TOO LITTLE, TOO LATE? EXECUTIVE ORDERS & THE DISAPPEARANCE OF PSYCHIATRIC HOSPITALS

JOANMARIE ILARIA DAVOLI[†]

[†] Associate Professor of Law, Barry University, Dwayne O. Andreas School of Law. B.A., University of Virginia; J.D., Georgetown University Law Center. The author would like to thank Priscilla Norwood Harris, Leandra Lederman, Jason Murray, Shanara Ramirez Osorio, Louis M. Rosen, and the Barry Law faculty for their feedback and support during the works-in-progress series. The author is particularly grateful to Dean Leticia Diaz and Barry Law for providing the funding for this research.

ABSTRACT

Deinstitutionalization of psychiatric hospitals was a complete success, if success is demonstrated by shutting down facilities and preventing the mentally ill from receiving desperately needed psychiatric treatment. However, in terms of successfully treating individuals suffering from a serious mental illness, Deinstitutionalization was a complete failure. When the psychiatric hospitals closed, individuals needing inpatient psychiatric care did not disappear. Instead, the luckiest patients often languish in emergency rooms for weeks awaiting transfer to the dwindling number of psychiatric beds, while the unlucky ones are either warehoused in the criminal justice system or abandoned to the streets.

The academic debate about involuntary psychiatric treatment versus individual liberty masks the reality that inpatient psychiatric hospitals are a rare and disappearing option. Significantly, almost no inpatient psychiatric treatment options are available, whether or not the patient voluntarily requests assistance. Since the 1960s, the vast majority of psychiatric hospitals have been closed.

The most significant factor in the closing of state psychiatric hospitals was the "Institutions for Mental Disease" (IMD) Exclusion of the 1965 Medicaid Act. By excluding psychiatric care in a hospital from Medicaid reimbursement, yet permitting payment for "treatment" received elsewhere, the federal government's policies have resulted in failure to provide the mentally ill with any care at all.

After almost sixty years of federal enforcement of the policy that incentivized the closure of psychiatric hospitals, both scholars and government officials are finally reevaluating the IMD Exclusion. Recent executive orders have promulgated policy waivers, allowing states to receive federal reimbursement for inpatient psychiatric care.

However, even if the IMD Exclusion is not enforced, and even if it were revoked, that will not bring back the shuttered psychiatric hospitals. There are no plans or financial support to rebuild them. This article examines whether the federal government has waited too long to reevaluate the IMD Exclusion policy, and what would need to happen for states to reopen or build new psychiatric hospitals.

I. INTRODUCTION

Before he took office, United States Senator John Fetterman was a controversial and polarizing candidate: he was famous for wearing

hoodies and gym shorts,[1] he once chased down an innocent jogger and held the man at gunpoint until police arrived,[2] and he suffered a stroke during his campaign in May of 2022 that left his speech impaired.[3] After his stroke, Senator Fetterman received great support for his cognitive struggles from his political allies,[4] but he received intense criticism from opponents who questioned his ability to perform his senatorial duties while suffering from such a serious medical condition.[5] The medical impact of his stroke was widely debated,[6] and his mental abilities were questioned.[7]

In contrast, when Senator Fetterman checked himself into a hospital in February 2023 for treatment of clinical depression, the public reaction was much different.[8] Instead of questioning his abilities because of his psychiatric illness, the Senator was offered widespread support and compassion across political divisions.[9]

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1. Katie Glueck, *How 'Just a Dude' in Shorts Became a Senate Front-Runner,* N.Y. TIMES (May 14, 2022), www.nytimes.com/2022/05/14/us/politics/fetterman-pennsylvania-democratic-primary.html [perma.cc/8LXX-TRD5] ("His fashion choices are also a point of controversy. As she stood in a Whole Foods parking lot not far from Mr. Lamb's suburban Pittsburgh hometown, Darlene Jicomelli said she liked Mr. Fetterman, but worried that his informal look could turn off some voters. She said she was undecided on whom to vote for.").

2. Marc Caputo, *Fetterman's Gun Incident Rattles Black Democrats in Pa. Senate Race*, NBC NEWS (Apr. 25, 2022, 4:31 AM), https://www.nbcnews.com/politics/2022-election/fettermans-gun-incident-rattles-black-democrats-pa-senate-race-rcna25649 [https://perma.cc/VST9-DDLB].

3. Michael Brendan Dougherty, *The Fetterman Scandal,* NAT'L REV. (Oct. 25, 2022, 10:55 PM), https://www.nationalreview.com/corner/the fetterman [https://perma.cc/B2FH-4GY5].

4. Katie Glueck, Blake Hounshell & Gina Kolata, *Fetterman Says Stroke Problems Have Not Slowed Down A "Normal" Campaign,* N.Y TIMES (2022), https://www.nytimes.com/2022/09/15/us/politics/fetterman-stroke-health.html (last visited Jul 16, 2023) [https://perma.cc/98AY-XYGE].

5. Shane Goldmacher, *Fetterman, Showing Stroke Effects, Battles Oz in Hostile Senate Debate*, N.Y TIMES (Oct. 22, 2022), https://www.nytimes.com/2022/10/25/us/politics/fetterman-oz-debate-senate-pa.html [https://perma.cc/H7ZB-94SA].

6. *Id*.

7. *Id.*

8. Niels Lesniewski & Sandhya Raman, *Fetterman Hospitalized for Treatment of Depression,* ROLL CALL (Feb. 16, 2023, 3:28 PM), https://rollcall.com/2023/02/16/fetterman-hospitalized-for-treatment-of-depression/ [https://perma.cc/E55M-8UZV] ("Fetterman was admitted to Walter Reed National Military Medical Center in Bethesda, Md., on a voluntary basis, following the advice of Capitol Attending Physician Brian Monahan.").

9. Scott Detrow & Barbara, *John Fetterman Wants to 'Pay It Forward' by Speaking Openly About His Depression,* NPR (Apr. 20, 2023), https://www.npr.org/2023/04/20/1171052245/john-fetterman-wants-to-pay-it-forward-by-speaking-openly-about-his-depression [https://perma.cc/A7TV-8JZH] ("[Fetterman] added that some Senate colleagues visited him while he was receiving treatment at Walter Reed National Military

> On Thursday, Sen. Ted Cruz (R-Texas) joined the chorus wishing Fetterman well: "Heidi & I are lifting John up in prayer. Mental illness is real & serious, and I hope that he gets the care he needs. Regardless of which side of the political aisle you're on, please respect his family's request for privacy . . . ."[10]

Notably absent from the wide-ranging press coverage was any discussion of stigmatizing Senator Fetterman for his psychiatric diagnosis of having a serious mental illness.[11]

Significantly, Senator Fetterman was able to access inpatient psychiatric treatment without any concerns about length of stay or status of the hospital.[12] During his six weeks of voluntary inpatient hospitalization, Senator Fetterman received psychiatric medications for his medical diagnosis of major depression.[13] "Medication therapies were administered to help Fetterman manage his depression. His mood and motivation steadily improved and his sleep and appetite were restored, ultimately leading Williamson to declare the senator's depression in

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Medical Center: Democratic Sens. Tina Smith of Minnesota and Bob Casey of Pennsylvania, as well as Republican Sen. Katie Britt of Alabama.").

10. Katherine Tully-McManus, *Fetterman is Far from Alone,* POLITCO (Feb. 17, 2023, 7:40 AM), https://www.politico.com/newsletters/huddle/2023/02/17/fetterman-is-far-from-alone-00083408 [https://perma.cc/257B-5XNG].

11. Lesniewski & Raman, *supra* note 8 ("Reporting mental health problems was once an automatic deal-breaker for politicians: In 1972, Democrat Sen. Thomas Eagleton's disclosure that he had been treated for depression ultimately spurred him to withdraw from seeking the vice presidency. But as stigma has decreased, lawmakers have felt increasingly comfortable speaking out.").

12. *See* ADA S. CORNELL, CONG. RSCH. SERV., HEALTH BENEFITS FOR MEMBERS OF CONGRESS AND DESIGNATED CONGRESSIONAL STAFF: IN BRIEF 6 (Jan. 13, 2017) ("Current Members are also authorized to receive medical and emergency dental care at military treatment facilities. There is no charge for outpatient care if it is provided in the National Capital Region. For inpatient care, Members are billed at full reimbursement based on rates set by the Department of Defense."). See IDA A. BRUDNICK, CONG. RSCH. SERV., CONGRESSIONAL SALARIES AND ALLOWANCES: IN BRIEF 3–4 (Sept. 19, 2023) ("In addition, the Office of the Attending Physician provides emergency medical assistance for Members of Congress, Justices of the Supreme Court, staff, and visitors. Additional services are offered to Members who choose to enroll for an annual fee ($650.00 in 2023). The office is led by a medical officer from the U.S. Navy, a tradition begun in 1928.")

13. Marina Alfaro, *Fetterman Discharged from Hospital, will Return to Senate on April 17,* WASH. POST, (Mar. 31, 2023, 6:28 PM), https://www.washingtonpost.com/politics/2023/03/31/fetterman-hospital-release/ [https://perma.cc/8SHG-L8H4] ("'It's like . . . you just won the biggest, you know, race in, in the country,' Fetterman told Pauley. 'And . . . the whole thing about depression is, is that objectively, you may have won. But depression can absolutely convince you that you actually lost. And that's exactly what happened.'").

remission."[14] Senator Fetterman returned to the Senate shortly after his discharge, demonstrating that he clearly benefitted from receiving appropriate, comprehensive, inpatient psychiatric treatment[15] – the type of treatment denied to almost everyone else in the United States.[16]

Compare the inpatient psychiatric treatment afforded Senator Fetterman with that available to another patient seeking voluntary, inpatient psychiatric care in a facility located merely twenty-nine miles away:

> Zach Chafos languished for a total of 76 days in a Maryland ER waiting for a psychiatric bed . . . [c]onfused and frustrated, Zach lashed out at his nurses and doctors repeatedly. They tied down his arms and legs with restraints and injected him with a sedative called haloperidol, according to his medical records. The drug reduced his aggression but made his whole body shake so violently that he couldn't hold a cup of water still enough to drink from it." They were afraid to walk into his room, afraid to take his vitals," said his father Tim, who sympathized with the hospital's plight.[17]

The horrific experience of Zach Chafos, who died in 2021, ten short days after finally being moved from the emergency room to a bed in a psychiatric hospital for the second time,[18] demonstrates the fallacy of widely accepted but inaccurately explained barriers to psychiatric treatment that result from a lack of funding, stigma and discrimination by health insurance companies.[19] Such narratives claim that if only there was

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14. Lindsey McPherson, *Fetterman Discharged from Walter Reed, Depression in Remission,* ROLL CALL (Mar. 31, 2023, 6:29 PM), https://rollcall.com/2023/03/31/fetterman-discharged-from-walter-reed-depression-in-remission/ [https://perma.cc/5J3K-AA3G].

15. *See* Nicky Robertson, *Fetterman Returns to the Senate Following Treatment for Clinical Depression*, CNN (Apr.17, 2023), https://www.cnn.com/2023/04/17/politics/fetterman-return-senate/index.html [https://perma.cc/QN4Y-CTYT].

16. *See infra* Part III and IV.

17. William Wan, *An Autistic Teen Needed Mental Health Help. He Spent Weeks in an ER Instead.*, WASH. POST (Oct. 20, 2022, 7:00 AM), https://www.washingtonpost.com/dc-md-va/2022/10/20/er-mental-health-teens-psychiatric-beds/ [https://perma.cc/533G-6JPY] ("An autistic teen needed mental health help. He spent weeks in an ER instead. Zach Chafos languished for a total of 76 days in a Maryland ER waiting for a psychiatric bed — part of a growing mental health treatment crisis for teens across the country.").

18. *Id*.

19. *See generally* Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987 (2002) [hereinafter *The Cuckoo's Nest*]. *See* Joanmarie Ilaria Davoli, *No Room at the Inn:*

more money and less shaming, then there would be better treatment for psychiatric illnesses.[20] Yet Zach wasn't tied down[21] to a hospital bed while awaiting psychiatric treatment in a backwoods town, unable to afford medical care and dependent upon charity. Instead, Zach's inability to access appropriate medical care occurred in one of the wealthiest counties in the United States.[22] His middle class, veteran's family[23] was both insured and able to afford medical treatment.[24] Stigma did not interfere with Zach's treatment, as Zach was surrounded by a loving family and community, [25] none of whom were worried about any stigma resulting from correct diagnosis and treatment.[26] Zach was tied to a bed in the hospital emergency room because no bed was available in a psychiatric

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How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill, 29 AM. J.L. & MED. 159 (2003) [hereinafter *No Room at the Inn*].

20. *See* Sarah Sloat, *Mental Health Care Should Be Available for All, Not a Luxury*, SCI. AM. (June 1, 2022) https://www.scientificamerican.com/article/mental-health-care-should-be-available-for-all-not-a-luxury/ [https://perma.cc/KG2M-8BLV] ("In addition to cost, another factor that might prevent people from seeking care is stigma around mental illness. By confronting and dismantling negative stereotypes about mental health, organizations such as the AMHC and another group, called Rural Minds, aim to expand access to care in their communities."). *See also Let's Face It, No One Wants to Talk About Mental Health*, MASS. GEN. BRIGHAM MCLEAN, https://www.mcleanhospital.org/essential/lets-face-it-no-one-wants-talk-about-mental-health [https://perma.cc/TU2W-7GM5] (last visited Nov. 21, 2023).

21. Jordan Engler, *Boarding Mental Health Patients in Minnesota Emergency Department- the Unintended Consequences of an Inadequate Mental Health System*, 48 MITCHELL HAMLINE L. REV. 893, 893 (2022) ("Mental health patients who 'spend prolonged time' in the emergency department are also at a 'greater risk for requiring chemical and physical restraints.'"); *See* Chun-Chi Hsu & Hung-Yu Chan, *Factors Associated with Prolonged Length of Stay in the Psychiatric Emergency Service*, PLOS ONE (2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0202569#:~:text=In%20that%20study%2C%20prolonged%20LOS,three%20or%20more%20Axis%20I.

22. *Howard County is the Sixth Richest County in the Country by U.S. New & World Report,* CBS (July 15, 2022, 11:12 AM), https://www.cbsnews.com/baltimore/news/howard-county-md-ranked-sixth-richest-county-in-the-nation-by-u-s-news-world-report/ [https://perma.cc/KNU5-C3PW] ("Howard County is the sixth richest county in the country, according to a new ranking by U.S. News & World Report.").

23. Wan, *supra* note 17.

24. Wan, *supra* note 17. *See, e.g., Timothy Chafos in Clarksville, MD (Maryland)*, FASTPEOPLESEARCH, https://www.fastpeoplesearch.com/timothy-chafos_id_G6489959783903886084 [https://perma.cc/8QYD-BVFG] (last visited Nov. 21, 2023).

25. Zachary Chafos, *To Infinity and Beyond,* FACEBOOK (Feb. 10, 2023), https://www.facebook.com/groups/565580614885985/ [https://perma.cc/5R2M-NNJH].

26. *See, e.g.,* Wan, *supra* note 17.

hospital.[27] In Minnesota, there aren't many psychiatric hospitals still in existence,[28] and they were all full.[29]

Zach's situation is not unusual. In Minnesota, "People in mental health crises frequently go to local emergency departments, desperately seeking help, only to find themselves languishing in emergency rooms for days, even weeks, waiting for an inpatient psychiatric bed to open."[30] "Boarding" psychiatric patients in emergency rooms because inpatient psychiatric patient beds are unavailable has become common.[31] The problem of Boarding exists across the United States.[32] In 2023, North Carolina's emergency rooms contained Boarders awaiting psychiatric inpatient beds every single day.[33] "On any given day this January, an average of 350 North Carolinians waited in emergency rooms even after they needed a hospital bed, state data shows. They boarded in ERs because no psychiatric beds were available — either in a state hospital or a nonprofit or for-profit hospital . . . ."[34] Tragically, no inpatient psychiatric hospital beds were available for Zach or similarly situated patients because there are almost no psychiatric hospitals anymore.[35] The psychiatric hospitals have been closed down.[36]

Despite their disappearance, psychiatric hospitals remain a necessary component[37] of the overall treatment for individuals suffering from a serious mental illness.[38] This article follows the medical definition of

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27. Wan, *supra* note 17.

28. Engler, *supra* note 21, at 907–11.

29. Wan, *supra* note 17.

30. Engler, *supra* note 21, at 894.

31. *Definition of Boarded Patient*, AM. COLL. EMERGENCY PHYSICIANS (Sept. 2018), https://www.acep.org/globalassets/new-pdfs/policy-statements/definition-of-boarded patient.pdf [https://perma.cc/89BE-M4LR] (defining "boarding" as "the practice of holding patients in the emergency department after they have been admitted to the hospital, because no inpatient ot observation beds are available.").

32. Engler, *supra* note 21, at 898.

33. Dana Miller Ervin, *The Mental Health Crisis in North Carolina's Emergency Rooms,* PBS (May 16, 2023), https://www.pbs.org/wgbh/frontline/article/mental-health-crisis-north-carolina-emergency-rooms/ [https://perma.cc/5RW6-J2JL].

34. *Id*.

35. Engler, *supra* note 21, at 907–11.

36. *Id*.

37. Lisa Davis et al., *Deinstitutionalization? Where Have All the People Gone?* 14 CURRENT PSYCHIATRY REPS. 259, 266 (2012) ("While access to mental health care and the well-being of individuals with mental illness continues to improve overall, the shift from long-term psychiatric care in large and isolated state hospitals to a more diversified short-term outpatient care model may primarily benefit those with less severe mental health conditions.").

38. Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led To A Mental Health Crisis*, NPR (Nov. 30 2017), https://www.npr.org/2017/11/30/567477160/how-

serious mental illness [SMI] which is a disease of the brain. "Serious mental illness (SMI) is defined as a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."[39] Such illnesses include schizophrenia,[40] bipolar disorder, depression, panic disorder, and clinical depression with psychosis.[41] Individuals suffering from SMI are the ones most harmed by the inability to access a psychiatric hospital.[42]

This article first details the federal government's role in Deinstitutionalization and the resulting impact of closing psychiatric hospitals.[43] Additionally, recent policy changes are analyzed, including Presidential Executive Orders allowing states to use federal money for some inpatient psychiatric services.[44] The article demonstrates the futility of granting such waivers without any attempt to fund and build psychiatric hospitals.[45] Finally, this article examines whether the federal government has waited too long to reevaluate funding policies, and what would need to happen for states to reopen or build new psychiatric hospitals.[46]

II. THE IMPACT OF THE IMD EXCLUSION ON STATE PSYCHIATRIC HOSPITALS

> John Haasjes was having a bad Christmas. It was 2020, and he thought his downstairs neighbor was spying on him. They exchanged words, and she called the cops. He was arrested on suspicion of making a verbal threat and booked into a Kern County jail. . . . In March 2021, Haasjes was declared "incompetent to stand trial."

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the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis [https://perma.cc/NJS7-EN7E].

39. *Mental Health,* NAT'L INST. OF MENTAL HEALTH (Mar. 2023) https://www.nimh.nih.gov/health/statistics/mentalillness#:~:text=Serious%20mental%20illness%20(SMI)%20is,or%20more%20major%20life%20activities [https://perma.cc/3G9Z-DYVZ].

40. *Schizophrenia,* NAT'L INST. OF MENTAL HEALTH (2021), https://www.nimh.nih.gov/health/publications/schizophrenia#:~:text=Schizophrenia%20is%20a%20serious%20mental,for%20their%20family%20and%20friends (last visited Oct. 1, 2023) [https://perma.cc/QX9V-QUR6].

41. Evans TS, et al., *Disparities Within Serious Mental Illness (Technical Briefs, No. 25.),* ROCKVILLE (MD): AGENCY FOR HEALTHCARE RSCH. & QUALITY (US) (2016), https://www.ncbi.nlm.nih.gov/books/NBK368430/ [https://perma.cc/XFT2-96RC].

42. *Id*.

43. *See infra* Part II.

44. *Id*.

45. *See infra* Part III.

46. *See infra* Part IV.

> The legal designation meant Haasjes could not understand the court process for determining his guilt or innocence. It meant he was entitled to mental health treatment before he could stand trial. It also should have meant his prompt transfer to a state hospital or treatment program to receive care — but it did not.
>
> Like thousands of other mentally ill detainees incarcerated across California in recent years, Haasjes instead languished in jail, where he was denied trial or proper treatment from the Department of State Hospitals for more than a year. [47]

Similar to Zach's days in the emergency room, Haasjes waited in jail for a year because there was no state psychiatric hospital in which he could receive treatment.[48] Despite the fact that both Zach and Haasjes were requesting admission and wanted psychiatric treatment, there was nowhere for them to go because there are almost no more psychiatric hospitals left.[49] While Zach was coming from an emergency room[50] and Haasjes was being court-ordered to treatment from the jail,[51] they both ended up waiting in inappropriate institutional settings lacking appropriate psychiatric care.

The large-scale elimination of the long-term, state-run, residential facilities for the mentally ill, known as Deinstitutionalization, initially began as a natural result of medical research that developed improved medical treatment for psychiatric patients.[52] Medications were discovered that removed the symptoms of serious mental illnesses such as hallucinations and delusions, enabling doctors to medically discharge

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47. Kevin Rector, *'You can't get out': Mentally Ill Languish in California Jails Without Trial or Treatment*, LA TIMES (Sept. 14, 2022), https://www.latimes.com/california/story/2022-09-14/you-cant-get-out-mentally-ill-languish-in-california-jails-without-trials-or-proper-care [https://perma.cc/5F58-YL2Y]; *See also* Justin Jouvenal, *Man Accused of Stealing Snacks Died in Jail as He Waited for Space at Mental* Hospital, WASH. POST (Sept. 29, 2015), https://www.washingtonpost.com/local/crime/man-accused-of-stealing-5-in-snacks-died-in-jail-as-he-waited-for-space-at-mental-hospital/2015/09/29/7ceac8a2-5aff-11e5-9757-e49273f05f65_story.html [https://perma.cc/CP52-YHG7].

48. *Id*.

49. Engler, *supra* note 21, at 907–11; Wan, *supra* note 17; Rector, *supra* note 47.

50. Wan, *supra* note 17.

51. Rector, *supra* note 47.

52. E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS, (1997); *See* DJ Jaffe, *Trump Takes a Stand for the Mentally Ill*, WALL ST. J. (Feb. 19, 2020), https://manhattan.institute/article/trump-takes-a-stand-for-the-mentally-ill [https://perma.cc/ETA4-N65F] ("Many mistakenly believed that newly developed antipsychotic drugs and community mental-health centers would obviate the need for institutions.").

patients whose symptoms responded to the new treatments.[53] This organic, medically appropriate discharging of patients moved slowly, and the first wave of Deinstitutionalization appropriately stemmed from medical and therapeutic decisions: the new medicines enabled certain patients to either recover fully or recover enough to return to their former homes and lives.[54] Such medications were optimistically believed to be the long-awaited permanent cure that would restore individuals to their lives by eradicating their illnesses,[55] much the way the discovery of insulin in 1921 was the savior of those afflicted with life-threatening diabetes.[56]

However, Deinstitutionalization soon became a political and legal movement that essentially abandoned considerations of appropriate medical care. As a result, "between 1955 and 1965, the number of patients in public mental hospitals declined by only 15%, while a substantially greater decline of 65% occurred between 1965 and 1985."[57] The change in discharge decisions from medically-based ones in 1955 resulted partially from the establishment of the federal Medicaid program in 1965, which limited funds for inpatient psychiatric treatment.[58] In 1965, Deinstitutionalization accelerated, and the movement expanded to include civil liberties,[59] anti-establishment ideology,[60] suspicion about the

53. Mark Olfson et al., *The Psychiatric Bed Crisis in the US: Historic and Contemporary Uses of Psychiatric Beds*, AM. PSYCHIATRIC ASS'N 12 (May 2022), https://www.psychiatry.org/getmedia/95ee291e-b0c8-4d5c-819a-fc51588000b3/APA-Psychiatric-Bed-Crisis-Report-Section-1.pdf [https://perma.cc/8YP4-45JP].

54. Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences Journal of Ethics,* AM. MED. ASS'N (Oct. 2013), https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10 [https://perma.cc/VP8J-3PXJ].

55. *See No Room at the Inn, supra* note 19, at 161 (citing RAEL JEAN ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS 48 (1990)).

56. *The History of a Wonderful Thing We Call Insulin,* AM. DIABETES ASS'N (July 1, 2019), https://diabetes.org/blog/history-wonderful-thing-we-call insulin#:~:text=For%20many%20people%2C%20surviving%20life,doctors%20could%20do%20for%20them [https://perma.cc/N9CS-69R6].

57. Olfson et al., *supra* note 53, at 12.

58. *Id*.

59. *Id*.

60. David Oshinsky, *It's Time to Bring Back Asylums*, WALL ST. J. (July 21, 2023), https://www.wsj.com/articles/its-time-to-bring-back-the-asylum-ec01fb2 [https://perma.cc/JX7W-4ETY] ("The promise of Thorazine coincided with a dramatic assault upon traditional psychiatry led by radical critics such as Michel Foucault and Thomas Szasz. Asylums existed to enslave those who ignored society's norms, they believed. Who could say with assurance that the people locked away in these places were any more or less insane than the authorities who put them there? It seemed a perfect fit for the 1960s, appealing to emerging rights groups and a counterculture scornful of elites. 'If you talk to God, you are praying,' Szasz declared. 'If God talks to you, you are schizophrenic.'").

legitimacy of psychiatric diagnoses,[61] and overly optimistic certainties that treatment in the community could permanently replace the need for psychiatric hospitals for the seriously mentally ill.[62]

Thus, what began in 1955 as medical progress in the therapeutic treatment of notoriously difficult-to-treat psychiatric illnesses, in 1965 turned into a race to empty the psychiatric hospitals in order to save money.[63] The difference between these two time periods stems from the fact that medical professionals were releasing patients based on therapeutic decisions between 1955 and 1965. After 1965, the policies of Medicaid interfered with patient treatment and incentivized states to shut down psychiatric hospitals,[64] explaining the Deinstitutionalization rate of 65% in the twenty years following its passage.[65]

Since 1965, the closing of psychiatric hospitals continues to accelerate, currently reaching crisis levels.[66] A 2016 report revealed that there were a total of 37,679 staff beds left in state hospitals, resulting in a "96.5% drop from peak hospital numbers in the 1950s. 11.7 beds remain per 100,000 people. This means there are fewer state hospital beds per capita than at any time since . . . the 1850s."[67] The federal government's Institutions for Mental Disease (IMD) Exclusion incentivized state governments to empty the psychiatric hospitals with no concern for the

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61. *The Cuckoo's Nest, supra* note 19, at 989.

62. Chris Larson, *Why One State is Pushing Back Against Medicaid's IMD Exclusion,* BEHAV. HEALTH BUS. (Jan. 8, 2023) https://bhbusiness.com/2023/01/20/why-one-state-is-pushing-back-against-medicaids-imd-exclusion/ [https://perma.cc/35JV-4H9Y] (noting that the IMD exclusion "was also part of a political and regulatory retreat from treating behavioral health issues in large hospital-like settings, with champions of that movement including President John F. Kennedy."); Briony Marie DuBose & Eileen K. Fry-Bowers, *Achieving Access Parity for Inpatient Psychiatric Care Requires Repealing the Medicaid Institutions for Mental Disease Exclusion Rule*, 22 POL'Y, POL., & NURSING PRAC. 63 (2021) ("The deinstitutionalization movement began with the passage of the federal Community Mental Health Centers Act of 1963. Signed into law by President John F. Kennedy, the intent was to improve the quality of care of individuals with mental health conditions by shifting their care into the communities. With this act, there were plans to create 1500 centers for treatment to optimize and provide appropriate care.").

63. Jaffe, *supra* note 52 ("But states soon realized that if they kicked patients out of hospitals, Medicaid would kick in and pay half the cost of care.").

64. *Id*.

65. *Tracking the History of State Psychiatric Hospital from 1997 to 2015,* NOMORA RSCH. INST. (July 2015), https://www.nri-inc.org/media/1111/2015-tracking-the-history-of-state-psychiatric-hospital-closures-lutterman.pdf [https://perma.cc/KJ2S-WTK3]. *See also* Doris A. Fuller et. al., *Going Going, Gone: Trends and Consequences of Eliminating State Psychiatric Beds,* TREATMENT ADVOC. CTR. 1 (2016) https://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf [https://perma.cc/7FGM-E6DZ].

66. *See infra* Part III.A.

67. *See* Fuller et al., *supra* note 65; *See also infra* Appendix C.

individuals upon whom these policies experimented, and for whom Deinstitutionalization has profoundly failed.

A. Institutions for Mental Disease (IMD) Exclusion

When Medicaid was passed in 1965, most States in the union offered inpatient psychiatric care at state-run psychiatric hospitals.[68] Because such hospitals existed, psychiatric care was seen as a state responsibility.[69] As a result, Congress specifically exempted such treatment from Medicaid payments.

The Medicaid IMD exclusion prohibits the use of federal Medicaid financing for care provided to patients aged 21–64 years old in inpatient mental health and substance use disorder treatment facilities with greater than 16 beds.[70] A facility is designated as an IMD if it is licensed or accredited as a psychiatric facility, is under the jurisdiction of the state's mental health authority, specializes in providing mental healthcare, or more than 50% of its patients require admission due to a mental health condition.[71]

The exclusion set specific guidelines for defining whether or not an institution qualified as an Institutions for Mental Disease (IMD) and was thus ineligible for funding.[72] Despite passing Medicaid with the intent to provide federal funding for medical care to low-income patients,[73] Congress denied payments for inpatient psychiatric treatment without considering any possible negative impact on the treatment of patients with a psychiatric illness.[74] Instead, swept up in the popular claims that

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68. *No Room at the Inn*, *supra* note 19, at 168.

69. *Id*.

70. CONG. BUDGET OFF., BUDGETARY EFFECTS OF POLICIES TO MODIFY OR ELIMINATE MEDICAID'S INSTITUTIONS FOR MENTAL DISEASES EXCLUSION 3 (2023), https://www.cbo.gov/system/files/2023-04/58962-Medicaid-IMD-Exclusion.pdf.

71. Robert Trestman et al., *Definitions of Psychiatric Beds: Financing of Psychiatric Beds*, AM. PSYCHIATRIC ASS'N 22, 19 (May 2022) https://www.psychiatry.org/getmedia/5576f016-a9fd-4e46-b803-05052846f14f/APA-Psychiatric-Bed-Crisis-Report-Section-3.pdf [https://perma.cc/T69E-H4AA].

72. John O'Brien, *The IMD Exclusion—What is it? Why is it important?,* SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (last visited July 8, 2023), https://nasadad.org/wp-content/uploads/2011/06/The-IMD-ExclusionNASADAD-Obrien.pdf [https://perma.cc/ZP9E-J3U9].

73. *Policy Basics, Introduction to Medicaid,* CTR. ON BUDGET & POL'Y PRIORITIES (Last visited July 8, 2023), https://www.cbpp.org/research/health/introduction-to medicaid#:~:text=Created%20in%201965%2C%20Medicaid%20is,federal%20government%20and%20the%20stats [https://perma.cc/X4EL-VXHY].

74. See Legislative History to the Community Mental Health Centers Act of 1963, Pub. L. No. 88-164, 77 Stat. 282, 290–94 (1963), *published in* H.R. REP. NO. 88-694 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1054, 1064–66.

institutions were unnecessary and often evil, Congress prioritized treatment in the community.[75]

1. Financial Incentives

Because Medicaid alleviated the financial burden on state governments for medical treatment of the economically disadvantaged, states were incentivized to have as many medical costs as possible covered under the rules of Medicaid.

> Medicaid does not provide healthcare directly to patients, but instead provides matching (and even exceeding) funds to encourage the states to make healthcare available for the very poor: "The federal government shares the cost of each state's program, based on a formula determined by the state's relative wealth. The federal share ranges from 50% to 78% . . . ." Thus, states already providing identical services to those covered by Medicaid stood to gain significant amounts of money by applying for the federal funding.[76]

As a result of shifting as much of the cost of psychiatric treatment as possible to the federal government, "Medicaid and Medicare are the major sources of public funding for inpatient psychiatric care."[77] Whether or not this was the intent at the time, states quickly seized on the financial opportunities by discharging psychiatric patients.[78]

As a result of the IMD Exclusion, many patients discharged from psychiatric hospitals were placed in unsuitable locations, chosen only because of the availability of Medicaid funds: "With the expansion in nursing home capacity accompanying Medicaid and Medicare legislation, roughly one-half of older patients discharged from mental hospitals went directly into nursing homes."[79] Despite claiming that Deinstitutionalization would restore patients to their loving homes and welcoming communities, many patients were simply trans-institutionalized:[80] moved from one institution, the psychiatric hospital, to

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75. *See id*.

76. *See No Room at the Inn*, *supra* note 19, at 163 (citing Kenneth R. Wing, *The Impact of Reagan-Era Politics on the Federal Medicaid Program*, 33 CATH. U. L. REV. 1, 7 (1983).

77. Trestman, *supra* note 71, at 24.

78. *See No Room at the Inn*, *supra* note 19, at 169–70.

79. Olfson et al., *supra* note 53, at 12.

80. Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates,* 40 STAN. L. REV. 773, 805 (1988) ("The term 'transinstitutionalization' refers to the transfer of a population from one institutional system

another institution, albeit one offering less treatment and less care, such as nursing homes or halfway houses.[81]

Additionally, the IMD Exclusion narrowed options for the mentally ill by excluding any facility that provided psychiatric care, by broadly interpreting the term "Institutions for Mental Disease."

> Since Medicaid was established in 1965, the federal statute has largely prohibited payments to IMDs. This designation, which is exclusive to the Medicaid program, is broadly defined in the Social Security Act as a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases.[82]

Thus, the more helpful and appropriate the institution in offering medically necessary care and treatment for the mentally ill, the less likely such an institution was to receive any federal funding.[83]

Moreover, the federal government vigorously enforced the IMD exclusion policy, investigating facilities and disallowing Medicaid payments to any that were in fact providing inpatient psychiatric care.[84] Medicaid's IMD "guidelines are brutally paradoxical: treatment centers must strip away essential services for the mentally ill in order to receive funding to treat the mentally ill."[85] As a result of the decision to exclude coverage of treatment received in psychiatric hospitals from Medicaid, 91% of hospital beds for psychiatric patients have been eliminated since the 1950s.[86] The IMD Exclusion has achieved its goal: placing patients anywhere except in a psychiatric hospital.

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to another as an inadvertent consequence of policies intended to deinstitutionalize the target population.").

81. *Id*. at 779.

82. *Report to Congress on Oversight of Institutions for Mental Diseases,* MEDICAID & CHIP PAYMENT AND ACCESS COMM'N (Dec. 2019), https://www.macpac.gov/wp-content/uploads/2020/01/Report-to-Congress-on-Oversight-of-Institutions-for-Mental-Diseases-December-2019.pdf [https://perma.cc/2S3V-AKQA] [hereinafter *Report to Congress*].

83. Heather Carroll, *The Medicaid IMD Exclusion and Mental Illness Discrimination,* TREATMENT ADVOC. CTR. (Aug. 2016), https://www.treatmentadvocacycenter.org/component/content/article/220-learn-more-about/3952-the-medicaid-imd-exclusion-and-mental-illness-discrimination- [https://perma.cc/8FVH-KBJ5].

84. O'Brien, *supra*, note 72, at 13.

85. Michael E. Onah, *The Patient-to-Prisoner Pipeline: The Imd Exclusion's Adverse Impact on Mass Incarceration in United States*, 44 AM. J.L. & MED. 119, 129 (2018).

86. *Tracking the History of State Psychiatric Hospital from 1997 to 2015, supra* note 65; *See also* Jaffe, *supra* note 52 ("The country has lost more than 450,000 mental-hospital beds since the 1950s, 12,000 of them since 2005.").

2. Discrimination Based on Diagnosis

In 1973, the United States Supreme Court summarily affirmed[87] a decision of the United States District Court, Southern District of New York upholding the constitutionality of the IMD exclusion.[88] The District Court applied the rational basis test and found that the IMD exclusion did not violate the Equal Protection Clause of the Fourteenth Amendment.[89] While recognizing the plight of the patients, the court determined that the IMD classifications were constitutional.[90] The court concluded:

> It is the thrust of plaintiffs' contention that the restrictions contained in both the Medicare and Medicaid legislation result in arbitrary and invidious discrimination against public mental institution patients. These patients represent the poorer and sicker of America's hospitalized mentally ill, and because of the alleged discrimination they continue to receive inadequate care in that the state mental institutions receive no federal funds to supplement inadequate state appropriations.[91]

The District Court found that at "the time of the passage of Medicare and Medicaid, Congress had determined that advances made in treating mental patients were sufficient to indicate that many would soon be treated in facilities where more remedial benefits were available."[92] Combined with the belief that states had the responsibility to fund their own psychiatric hospitals, the District Court found that the IMD exclusion furthers a legitimate state interest and is rationally related to legitimate government goals.[93]

Scholars suggest that as psychiatric hospitalization changes,[94] and the IMD exclusion impacts only those suffering from serious mental

87. Legion v. Weinberger, 414 U.S. 1058 (1973).

88. Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).

89. *Id*. at 459 ("Where a statutory classification is not conceived on peculiarly suspect grounds such as wealth or race, all that is constitutionally required is that the challenged classification or restriction bear a reasonable relationship with the objectives sought to be fulfilled by the legislation.").

90. *Id*.

91. *Id*. at 458.

92. *Id*. at 459.

93. *Id*. at 459–60; Schweiker v. Wilson, 450 U.S. 221 (1981) (reinforcing the holding in Legion v. Richardson concerning SSI payments and the IMD exclusion). *See also* Susan M. Jennen, *The IMD Exclusion: A Discriminatory Denial of Medicaid Funding for Non-Elderly Adults in Institutions for Mental Diseases*, 17 WM. MITCHELL L. REV. 339 (1991).

94. In 1991, Susan M. Jennen suggested that as the assignment of a hospitals expanded the impact of the IMD exclusion that the court should recognize the patients impacted as a

illnesses,[95] additional arguments can be made that the IMD exclusion violates the Equal Protection Clause. Significantly, it is abundantly clear that psychiatric illnesses are not treated the same as physical diseases under the law.[96] Particularly startling, the "IMD exclusion is the only section of federal Medicaid law that prohibits federal payment for medically necessary care because of the type of illness being treated."[97] Thus, Medicaid intentionally discriminates against patients based on diagnosis. In fact, "[f]ederal medical assistance payments are denied even when [s]ervices are medically necessary . . . ."[98] Such discrimination further discourages facilities from offering inpatient psychiatric care by penalizing them financially.[99]

Imagine a similar scenario for any other illness and the inequity becomes grotesquely clear, for example: leprosy. While leprosy has been almost entirely eradicated, it still existed in 1965[100] and does today.[101] If Medicaid had prohibited payment for medically necessary care because a patient was diagnosed with leprosy instead of psoriasis,[102] then patients would receive substandard or no care at all for a treatable disease, and would instead risk paralysis and crippling of hands and feet, shortening of toes and fingers due to reabsorption, nose disfigurement, chronic non-

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suspect class. "In summary, the constitutionality of the current IMD exclusion is unresolved. Although the Supreme Court upheld the classification under the rational basis test, the Schweiker Court did not examine the exclusion in its current context. Instead, the holding focused on the IMD exclusion as it relates to public/state mental hospitals and nominal SSI benefits. The Supreme Court has not addressed the constitutionality of the IMD exclusion in its current context as it affects the residents of many private long-term care facilities." Jennen, *supra* note 92, 358–59.

95. J. Michael E. Gray & Madeline Easdale, *Blatant Discrimination Within Federal Law: A 14th Amendment Analysis of Medicaid's IMD Exclusion*, 18 UNIV. MASS. L. REV. 165, 180 (2022) ("This article argues that people with SMI, who are discriminated against by the IMD exclusion, constitute a quasisuspect class and should thus be afforded the protection of intermediate scrutiny, and that the federal judiciary should render the IMD exclusion invalid under the Equal Protection Clause.").

96. *Id*. at 181–86.

97. Trestman, *supra* note 71, at 24.

98. O'Brien, *supra* note 72, at 12 (alteration in original).

99. DuBose & Fry-Bowers, *supra* note 62, at 69.

100. Hajime Sato & Janet E Frantz, *Termination of the Leprosy Isolation Policy in the US and Japan : Science, Policy Changes, and the Garbage Can Model*, 5 BMC INT'L HEALTH & HUM. RTS. 1 (2005).

101. Lugi Santacroce et al., *Mycobacterium Leprae: A Historical study on the Origins of Leprosy and Its Social Stigma*, 29 INFEZIONI IN MEDICINA (2021).

102. Rita V. Vora et al, *Leprosy Mimicking Psoriasis*, J. CLINICAL & DIAGNOSTIC RSCH. (Sept. 2015), https://pubmed.ncbi.nlm.nih.gov/26500993/ [https://perma.cc/AQ7Z-MPHH] (demonstrating that the symptoms for the two diseases are quite similar).

healing ulcers on the bottoms of the feet and even blindness.[103] Suffering untreated, individuals might conceivably lose their jobs or become homeless. Such a restriction would be seen as medically absurd, irrationally callous and inherently cruel. Yet, such restrictions placed on the mentally ill by Medicaid are accepted daily by those averting their eyes from human suffering.[104]

3. Discrimination Based on Location

The IMD Exclusion is not only discriminatory, but also illogical. Unlike other Medicaid restrictions, psychiatric care is covered by Medicaid as long as it is offered anywhere *except* in a psychiatric hospital.[105] "The IMD exclusion is one of the few instances in Medicaid where federal funding is not available for covered services based on the setting in which they are provided."[106] Yet, the most appropriate location to treat a psychiatric patient may well be in a psychiatric hospital, rather than leaving Boarders to languish in an unsuitable emergency room for days or weeks.

At the time it was written, support for the IMD exclusion included those who wanted to save the federal government money, as well as those who wanted to close down the large psychiatric hospitals because of their overcrowded and inhumane conditions.[107] Instead of directing funding to improve substandard hospitals and provide for adequate hospital resources, Congress simply decided not to fund inpatient treatment for psychiatric patients.[108] At no point did anyone involved in Deinstitutionalization ever conduct a medical study to determine if location of treatment for the mentally ill might negatively impact therapeutic outcomes.[109] Instead, inpatient treatment was simply rejected.

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103. SIGNS AND SYMPTOMS, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 6, 2017) https://www.cdc.gov/leprosy/symptoms/index.html#:~:text=If%20left%20untreated%2C%20the%20signs,the%20bottoms%20of%20the%20feet [https://perma.cc/Z7EN-D2PA].

104. *Medicaid Handbook: Interface with Behavioral Health Services*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., https://www.store.samhsa.gov/sites/default/files/d7/priv/sma13-4773_mod3.pdf [https://perma.cc/S4VC-RRRJ] (last visited July 16, 2023).

105. O'Brien, *supra* note 72.

106. *Report to Congress, supra* note 82.

107. Onah, *supra* note 85, at 123–24.

108. *See supra* Part II.A.

109. Davis et al., *supra* note 37, at 266 (explaining that more recently, "some researchers have wondered whether it is also the case that subgroups within the SMI spectrum may require greater levels of structure, supervision, and institutionalized care regardless of other available treatment options.").

Once again, imagine a similar scenario for any other illness in which payment would be refused based on location, and the inequity becomes shockingly clear, for example: renal disease. A patient with renal disease needs dialysis,[110] sometimes daily.[111] Well-respected dialysis clinics offer the best, most up-to-date equipment and are staffed with experts in the field.[112] Restricting the patient's necessary, life-saving treatment of dialysis to any location except a specialty clinic dedicated to dialysis would be absurd. Similar to allowing the brains of the mentally ill to remain awash in psychosis,[113] such a system would leave the bodies of those afflicted with renal disease to become awash in toxins that can result in fatality.[114] The absurdity and cruelty of treating renal disease in such a manner would be obvious. Yet leaving the mentally ill to suffer without appropriate psychiatric hospitals is the accepted norm.[115]

Thus, by establishing Medicaid with the IMD Exclusion, the federal government intentionally refused payment for care in a psychiatric hospital. In response to the IMD Exclusion, state governments sought to provide psychiatric treatment anywhere except a psychiatric hospital.[116] Moving patients out of state-run psychiatric hospitals saved the states

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110. *Dialysis: Types, how it works, Procedure & Side effects,* CLEVELAND CLINIC, https://my.clevelandclinic.org/health/treatments/14618-dialysis (last visited July 8, 2023) [https://perma.cc/4AHU-Q8M9] ("Dialysis is a treatment for people whose kidneys are failing. When you have kidney failure, your kidneys don't filter blood the way they should. As a result, wastes and toxins build up in your bloodstream. Dialysis does the work of your kidneys, removing waste products and excess fluid from the blood.").

111. Kelli Miller, *When Do I Need Dialysis?*, WEBMD (2023), https://www.webmd.com/a-to-z-guides/kidney-dialysis [https://perma.cc/M5ZQ-VQLG] ("You can have hemodialysis at home, also. Home hemodialysis allows you to have dialysis for a longer period or more frequently—usually three to seven times a week.").

112. *Nephrology and Hypertension*, MAYO CLINIC (June 30, 2023), https://www.mayoclinic.org/departments-centers/dialysis-programs/overview/ovc-20464948 [https://perma.cc/UUG7-W9H5].

113. *Schizophrenia, supra* note 40.

114. *Chronic Kidney Disease Basics*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 28, 2022), https://www.cdc.gov/kidneydisease/basics.html#:~:text=If%20left%20untreated%2C%20CKD%20can,Learn%20more%20about%20ESRD [https://perma.cc/EVP3-ARYL] ("CKD has varying levels of seriousness. It usually gets worse over time though treatment has been shown to slow progression. If left untreated, CKD can progress to kidney failure and early cardiovascular disease. When the kidneys stop working, dialysis or kidney transplant is needed for survival. Kidney failure treated with dialysis or kidney transplant is called end-stage renal disease (ESRD).").

115. Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30 (Oct. 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/ [https://perma.cc/BW8N-FBX4].

116. Carroll, *supra* note 83; Yohanna, *supra* note 54, at 888.

enormous amounts of money.[117] The IMD Exclusion irrationally and unfairly treats psychiatric hospitals differently from other hospitals and also treats serious mental illnesses differently from all other illnesses. The results of these policy decisions are the tragic abandonment of individuals suffering from mental illness to the streets,[118] to imprisonment,[119] and often to early death.[120]

B. Involuntary Psychiatric Treatment

Popular culture continues to depict psychiatric hospitals as places wherein innocent yet sane victims are held against their will, cut off from the outside world, subjected to neglect or gruesome experiments, controlled by drugs and unable to escape from the sadistic nurses and corrupt, maniacal doctors.[121] This impression of psychiatric hospitals encouraged public for Deinstitutionalization, as psychiatric hospitals were seen as places of abuse[122] that produced mental illness.[123] No person, whether healthy or ill, would want to be held in such facilities.

Additionally, psychiatric treatment became synonymous with involuntary psychiatric commitment, as if the only patients treated in psychiatric hospitals were held against their will. In the 1960s, shortly after medication had been developed that could reduce or eliminate psychosis, there was a civil liberties movement attacking the grounds for holding patients inside psychiatric hospitals.[124] Much political, legal and popular culture[125] attention focused on the issue of involuntary psychiatric

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117. *See No Room at the Inn*, *supra*, note 19, at 170–71.

118. *See No Room at the Inn* , *supra*, note 19, at 174–75; *see also* Yohanna, *supra* note 54.

119. PETE EARLEY, CRAZY: A FATHER'S SEARCH THROUGH AMERICA'S MENTAL HEALTH MADNESS (2007).

120. R Musgrove et al., *Suicide And Death By Other Causes Among Patients With A Severe Mental Illness: Cohort Study Comparing Risks Among Patients Discharged From Inpatient Care V. Those Treated In The Community,* 31 EPIDEMIOLOGY & PSYCHIATRIC SCI. 1 (May 6, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7612694/ [https://perma.cc/44GP-6GPT].

121. Laura Berger, *Trailer Watch: Claire Foy is Stuck in a Psychiatric Hospital in "Unsane*,*"* WOMEN & HOLLYWOOD (Jan. 30, 2018), https://womenandhollywood.com/trailer-watch-claire-foy-is-stuck-in-a-psychiatric-hospital-in-unsane-43f858571778/ [https://perma.cc/79NP-AF59]; *See also* LIV CONSTANTINE, THE LAST MRS. PARRISH (2021); *See also* RATCHED (Netflix 2020).

122. Onah, *supra* note 85, at 125.

123. Judy Ann Clausen & Joanmarie Davoli, *No-One Receives Psychiatric Treatment in A Squad Car*, 54 TEX. TECH L. REV. 645, 655 (2022); *See also* Tuten v. Fariborzian, 84 So. 3d 1063, 1067 (Fla. Dist. Ct. App. 2012).

124. Davis et al., *supra* note 37, at 260.

125. ONE FLEW OVER THE CUCKOO'S NEST (Fantasy Films Nov. 19, 1975).

treatment: when an individual is court-ordered into psychiatric treatment over that individual's objection.[126]

Typically referred to as "civil commitment,"[127] involuntary psychiatric treatment occurs when there is concern that an individual diagnosed with a mental illness needs psychiatric care but refuses treatment as a result of the psychiatric illness.[128] A court hearing follows in which "evidence of mental illness is presented to a judge or jury, along with the reason treatment is requested, despite the objections of the afflicted individual. The court then determines whether or not an individual should be ordered to receive psychiatric medication and treatment . . ." over objection.[129] Historically, states had allowed for involuntary treatment based on family or doctor referrals.[130] Lawsuits successfully demanded that patients receive due process before their liberty was restricted by being forced into psychiatric hospitals.[131]

Thus, courts intervened and transformed involuntary psychiatric care. Illness-induced treatment refusals that cause the individual to be dangerous or interfere with the individuals' ability to care for self became the only standards for involuntary psychiatric care.[132] Eventually, the inability to care for self standard became so narrowly interpreted that homeless individuals, refusing food and money because of psychosis, were considered to be taking care of themselves adequately and could not be involuntarily committed.[133] While medical professionals continued to study medication and treatment for mental illness, civil liberties lawsuits demanded that liberty – not health – be the primary consideration for psychiatric treatment.[134]

After a series of rulings, the Supreme Court narrowly defined liberty to being outside.[135] More precisely, as the Court defined liberty as being anywhere except inside a psychiatric hospital.[136] As long as a person was not forced to be inside for psychiatric treatment, courts held that liberty

126. Davis et al., *supra* note 37, at 260.

127. FLA. STAT. ANN. § 394.451 (West, Westlaw through July 4, 2023); *See also* CAL. WELF. & INST. CODE § 5000 (West, Westlaw through Ch. 163 of 2023 Reg.Sess.); *See also* N.Y. MENTAL HYG. LAW § 9.01 (McKinney, Westlaw through L.2023, chapters 1 to 364).

128. *The Cuckoo's Nest*, *supra* note 19, at 992.

129. *Id*.

130. Testa & West, *supra* note 115, at 32–33.

131. *The Cuckoo's Nest*, *supra* note 19, at 1033.

132. *Id*. at 1048.

133. Testa & West, *supra* note 115, at 36–37.

134. *Id*.

135. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."); *See also The Cuckoo's Nest*, *supra* note 19, at 1006.

136. *See generally O'Connor,* 422 U.S. 563.

was protected. "Dicta in these decisions is devoted to the stereotype that long-term confinement in a psychiatric hospital is never necessary except to protect society from dangerous people, that it is extremely unpleasant, and perhaps is even worse than imprisonment."[137] In the 1999 case of *Olmstead v. LC*,[138] the Supreme Court held that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[139] This stereotyped depiction of psychiatric hospitals runs throughout Supreme Court decisions.[140] The *Olmstead* Court ordered states to place persons with mental disabilities in community settings rather than in institutions

> when the State's treatment professionals have determined that community placement is appropriate, [that] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated [by] taking into account the resources available to the State and the needs of others with mental disabilities.[141]

Courts, medical facilities, and activists consistently interpret *Olmstead* to require that civilly committed patients be treated in the "least restrictive alternative"[142] in order to protect the patients' liberty.

Relying upon *Olmstead*, activists practically insist[143] that patients are better off even if they end up in ill-equipped nursing homes, homeless, incarcerated, or in the morgue.[144] Such an attitude reflects over sixty years of hysteria resulting from the stereotype that psychiatric hospitals offer

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137. *The Cuckoo's Nest*, *supra* note 19, at 992.

138. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 601 (1999).

139. *Id.*

140. *The Cuckoo's Nest*, *supra* note 19, at 992; *See also* Davis et al., *supra* note 37, at 266 ("If an individual with SMI lives within the community and is socially isolated, physically ill, and impoverished, does this represent successful deinstitutionalization?").

141. *The Cuckoo's Nest*, *supra* note 19, at 1050 n.30 (citing *Olmstead*, 527 U.S. at 601).

142. *Id.*

143. *See Mayor Adams' Plan Will Not Help New Yorkers With Mental Disabilities*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, https://www.bazelon.org/wp-content/uploads/2022/12/BC-NYC-Statement-12-2-22.pdf [https://perma.cc/P3JQ-NYC8] (Claiming that "virtually all homeless and housing insecure New Yorkers with disabilities do not need to be hospitalized, but can be served in their own homes and communities if they are engaged in appropriate and voluntary services and supports.").

144. Onah, *supra* note 85, at 137 ("[F]or the mentally ill persons who are shut out from the public health system because of the obstructions created by the IMD Exclusion, if they are not arrested or killed, they usually remain helpless and without adequate access to healthcare.").

nothing except intentional evil abuse.[145] But to believe that being outside is somehow more therapeutic than receiving appropriate care and treatment for a medical condition in a psychiatric hospital makes the activists themselves irrational.[146]

Limiting the definition of liberty to "being outside" is truly absurd, and projects rationality onto disordered behavior. In fact, "people with severe mental illnesses often are not expressing anything that looks like free choice because it doesn't look like choice at all: Nobody has the power to choose to be confused, disoriented, or hallucinating."[147] The Supreme Court's focus on liberty takes no account of the medical realities of serious mental illnesses.

> In addition, by interpreting all involuntary treatment as a "massive curtailment of liberty," the Court's decisions and lower courts' interpretations of those decisions result in a situation whereby the non-criminal mentally ill are "free" or "at liberty" to be dominated by their untreated brain disease, which prevents them from understanding that they are even ill. They are free to wander around in a psychosis, reacting to auditory and visual hallucinations that prevent them from experiencing any of the freedoms inherent in the concept of liberty.[148]

Supreme Court cases have made involuntary psychiatric treatment cases more difficult to prove, as "the only people sick enough to receive forced treatment-and thus lose their liberty are-those who are already incarcerated or subject to prosecution."[149] Deinstitutionalization has made it more difficult to find a hospital in which involuntary psychiatric patients can be treated.[150] And the only patients likely to spend many years in

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145. *See infra* Part II.B.

146. Mayor Koch explained his reaction to activists preventing a mentally ill person from receiving psychiatric care. ''I said, 'Isn't she a candidate for institutionalization in some form.' No, they said. I am thinking to myself, you are loony yourself.' Josh Barbanel, *Mentally Ill Homeless Taken Off New York Streets*, N.Y. TIMES (Oct. 29, 1987), https://www.nytimes.com/1985/11/14/nyregion/homeless-in-city-facing-koch-edict.html [https://perma.cc/6C4W-QCUA].

147. Amanda Pustilnik, *Calling Mental Illness "Myth" Leads to State Coercion*, CATO UNBOUND (Aug. 13, 2012), https://www.cato-unbound.org/2012/08/13/amanda-pustilnik/calling-mental-illness-myth-leads-state-coercion/ [https://perma.cc/6SWL-E6LT].

148. *See The Cuckoo's Nest*, *supra*, note 19, at 1018.

149. *Id*.

150. *See id.* at 1050 n.71.

psychiatric hospitals are either those found incompetent to stand trial,[151] or those civilly committed after a verdict of Not Guilty by Reason of Insanity.[152]

In contrast, very little attention has been paid to the issue of voluntary treatment: a patient's ability to access inpatient psychiatric care. Left out of the conversation remain patients such as Zach, who was tied to a bed in the emergency room waiting for a psychiatric hospital bed to become available. Patients are asking for help, but there's nowhere for them to access treatment. This article highlights the lack of psychiatric hospital availability for those requesting care.

C. Patients Requesting Psychiatric Care

> Far from forcing people into treatment, psychiatrists face hard choices every day about who to force out of treatment: People who need and want help must be discharged due to lack of hospital space. People with major mental illnesses like psychosis and schizophrenia seek help at hospitals but are routinely turned away because the few available beds must be reserved for the handful who are truly dangerous. Getting out of psychiatric hospitals is occasionally hard for some people. Getting into them is hard for everyone.[153]

The elimination of psychiatric hospitals did not stem from their uselessness.[154] Serious mental illnesses were not eradicated. Inpatient treatment did not become obsolete because of developing therapy or medications. Instead, psychiatric hospitals closed because state governments wanted access to federal government funding. And the Federal Government's Medicaid program, specifically the Institutions for

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151. United States v. Weston, 194 F.3d 145 (D.C. Cir. 1999) (resulting in Weston remaining incompetent to stand trial for his 1998 charges for the murder of Capital Hill police officers).

152. Many states provide that a defendant found not guilty by reason of insanity is automatically committed to a psychiatric hospital for an indefinite period of time. *See, e.g.*, VA. CODE ANN. § 19.2-182.2 (Michie 2002).

153. Pustilnik, *supra* note 147 (emphasis omitted).

154. Evidence demonstrates that "those with more severe and chronic mental illnesses, with the greatest need [of inpatient hospitalization], often fare the worst. Overall, evidence suggests that a high prevalence of functional impairment, unemployment, poverty, and isolation characterizes present-day life for most individuals with chronic and severe mental illness." Davis et al., *supra* note 37, at 266–67.

Mental Disease (IMD) Exclusion, meant that patients could not receive funding for treatment in a psychiatric hospital.[155]

> As a result of the IMD exclusion, patients covered by Medicaid who experience acute psychiatric crises often end up in unsafe or ineffective settings including emergency rooms, jails, prisons, homelessness services, and forensic psychiatry beds. This results in worse medical outcomes for individuals with mental illness and higher costs to county, state, and federal governments.[156]

The medical outcomes are worse for several reasons. First, for those suffering from serious mental illnesses, psychiatric hospitals may provide the best possible treatment.[157] Second, each episode of psychosis hurts the brain.[158] Every episode makes the patient worse.[159] The sooner the patient receives appropriate care, the faster the recovery, and the less likely that future psychotic episodes will occur.[160] Third, patients are destabilized as result of lack of continuity of care.[161]

Individuals suffering from a serious mental illness may need a bed in a psychiatric hospital. "[A]n inpatient psychiatric hospital bed is defined here as a bed where individuals with mental illness receive 24/7 psychiatrically supervised care primarily for symptoms of psychiatric illness with ancillary supports for co-occurring medical conditions."[162] Far from being the punitive warehousing offered by incarceration, psychiatric hospitals are staffed with experts in psychiatry and offer myriad medical and therapeutic options. Individuals in well-run, properly funded

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155. *No Room at the Inn*, *supra* note 19, at 159–60 ("Because of financial incentives from the federal government, every state continues to close state-run psychiatric hospitals, leaving those who are poor and severally mentally ill with no treatment or care."); *See also* Anita Everett et al, *The Psychiatric Bed Crisis in the US*, AM. PSYCHIATRIC ASS'N (May 2022), https://www.psychiatry.org/getmedia/81f685f1-036e-4311-8dfc-e13ac425380f/APA-Psychiatric-Bed-Crisis-Report-Full.pdf [https://perma.cc/T5RX-BCRR] (Demonstrating the APA's acknowledgment that "Due to federal policy changes, the development of antipsychotic drugs, and the rise of managed care, among other factors, that trend turned downward, and between 1970 and 2014, the resident population in state psychiatric hospitals declined from about 370,000 to 40,000 and stays grew shorter.").

156. *Id.* at 23–24.

157. Kwame J McKenzie, *How Does Untreated Psychosis Lead to Neurological Damage?*, 59 CAN. J. PSYCHIATRY 511–512 (2014).

158. *Id*.

159. *Id*.

160. Everett, *supra* note 155, at 55.

161. *Id*. at 92.

162. *Id*. at 37.

psychiatric hospitals receive organic, whole-person care, allowing for stabilization and improvement.[163]

The specific care received, and the time needed for treatment varies from patient to patient. Although Supreme Court decisions and civil commitment laws conflate the two and practically pretend that psychiatric hospitals are another word for prison, such hospitals are necessary and are not simply holding cells by another name. As one author explained:

> [O]ur son is currently receiving the best treatment that he has received since he first became sick in 2008, in a state hospital. (One of only 2 remaining state hospitals here in Iowa – where we only have 64 beds for adults and 32 for children . . .). Our son has a full schedule every day and has made himself an excel spreadsheet that he marks off as he accomplishes things. He is meeting with a psychologist on a regular basis and has made progress in his ability to recognize that some things make his delusions worse, and other things help him to be grounded more in reality.[164]

The above author contrasted treatment received by her son in the psychiatric hospital, where the goal was to appropriately treat his illness, with that offered outside the psychiatric hospital by the "least restrictive alternatives," where the goal is to restore the patient to his "liberty" as quickly as possible.

> In the past, [our son] has been issued meds and hurried out into residential care facilities before he was well enough to actually participate in his own recovery. What if he had been allowed to stay in treatment longer back then? I keep dreaming, 'What if this had been available to him so much sooner, and all the other young people unfortunate enough to have a serious brain illness?'[165]

Deinstitutionalization's impact has been severe. For individuals suffering from a serious mental illness who want to voluntarily seek inpatient hospital services, there is likely no available bed.[166] If the

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163. DuBose & Fry-Bowers, *supra* note 62.

164. Pete Earley, *Mother Says Son Finally Is Getting Help He Needs: Iowa State Hospital is Not A "Horrifying Place*", PETEEARLEY.COM (2021), https://www.peteearley.com/2021/10/13/mother-says-son-finally-is-getting-help-he-needs-iowa-state-hospital-is-not-a-horrifying-place/ [https://perma.cc/P2HE-RCN7].

165. *Id*.

166. Everett *supra* note 155, at 8. In fact, psychiatric patients wait in the back of the line for a hospital bed under all circumstances, including during the pandemic. *Id.* "Early in the

individual's income status falls under Medicaid guidelines, there is likely nowhere for that patient to be treated.

> Because states received matching federal funds through Medicaid, the Medicaid program created incentives for states to develop small units in local hospitals that could bill Medicaid and discouraged state investments in state psychiatric hospitals. An additional critical policy lever that encouraged shorter stays was the Medicare lifetime cap on the total number of days of inpatient psychiatric treatment.[167]

By effectively encouraging states to close specialty psychiatric hospitals as well as hold the line at sixteen psychiatric beds per general hospital, the likelihood of a bed being available for any patient, much less one paying with Medicaid, is quite small.[168]

The lack of available beds for psychiatric patients has become critical, despite the huge funds spent on mental health care. "While overall spending on mental health treatment has steadily increased, the percentage of mental health care spending on inpatient care shifted from 42% in 1986 to 27% in 2014."[169] Yet the need for impatient services did not decrease.

States have creatively tried to maintain inpatient psychiatric hospitals as well as federal Medicaid funding. Minnesota circumvented the IMD Exclusion by building smaller, 16-bed facilities in the community:

> These sixteen-bed psychiatric facilities have several benefits, including being smaller and providing a less institutionalized feel. CBHHs [Community Behavioral Health Hospitals, founded in 2005] are also sized to qualify for federal money under Medicaid, which is generally unavailable for larger mental institutions. Additionally, these smaller facilities were designed to save money while also serving the mentally ill population closer to home.[170]

Yet, smaller facilities do not have the capacity to handle the patients who most need their services. Additionally, the Medicaid IMD Exclusion includes a list of other restrictions.

COVID-19 era some inpatient psychiatric wards were used for COVID-19 patients thus further reducing the available capacity for psychiatric beds." *Id*.

167. *Id*. at 12.

168. Onah, *supra* note 85, at 130–31.

169. Everett, *supra* note 155, at 4.

170. Engler, *supra* note 21, at 911–12.

> Furthermore, the facilities that do manage to meet the 16-bed limit must also roll back or completely eliminate other essential services for mental health treatment—the number of qualified psychiatric professionals, the kinds of medical treatment and prescriptions they're allowed to give mentally ill individuals, and a litany of other tools that frustrate the possibility of affordable, comprehensive, treatment for psychiatric and substance abuse disorders. The inability of these Medicaid funding-eligible facilities to meet the growing and evolving needs of mentally ill individuals forces many individuals, who are often low-income and lack housing, to take to the streets.[171]

The static aspect of the IMD Exclusion is irrational and reflects a misunderstanding of both medicine and science. Medical research continues to examine the causes, treatment and prognosis of serious mental illness.[172] One day, inpatient psychiatric treatment may in fact no longer be necessary. That day has still not yet arrived.

Additionally, the touted replacement for psychiatric hospitals, care in the community, has not produced the expected outcomes. Community health centers have their own limitations and are often unable to handle patients suffering from a psychotic episode. As one author notes:

> Unfortunately, CBHHs have shown to be problematic in their own way. For example, these facilities lack their own security forces and, therefore, must rely on local police departments "when aggressive patients become violent." The system is ill-equipped to handle the most severely mentally ill patients, especially those who are aggressive, violent, and unstable. These severely mentally ill patients pose a danger to themselves and their communities. Consequently, this often results in psychiatric patients boarding in hospital emergency departments or ending up in local jails.[173]

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171. Onah, *supra* note 85, at 129.

172. E. FULLER TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL FOR FAMILIES, CONSUMERS, AND PROVIDERS (2006) (Evolving knowledge in every field of scientific enquiry, requires new theories to arise to explain the observations. At the same time, the older theories that no longer fit the facts are set aside and eventually discarded. All areas of science have dusty shelves full of discarded theories and schizophrenia research is no exception. Dr. Torrey then lists the discarded theories for the cause of schizophrenia, including masturbation, bad mothers, bad families, and bad cultures.).

173. Engler, *supra* note 21, at 912.

These patients have become aggravated and unstable as a direct result of the symptomology of their diagnosis of serious mental illness.[174] Incarceration should not be the best chance for a suffering individual to receive psychiatric care.

Senator Fetterman's experience demonstrates the absurdity and cruelty of the IMD Exclusion. Medicaid's restrictive funding of facilities with less than sixteen beds is an irrational, arbitrary rule not relevant to good medicine. Indeed Fetterman was treated at Walter Reed National Military Medical Center, a facility that certainly has more than sixteen beds available for psychiatric treatment,[175] including an Adult Acute Psychiatric Unit and an Adult

Neuropsychiatric Unit.[176] As for Congress's distrust of inpatient psychiatric care as demonstrated by the IMD Exclusion, Senator Fetterman was treated in a psychiatric hospital. Finally, despite the choice being either outpatient treatment or nothing, Senator Fetterman's experience demonstrates the importance of continuity of care in which hospitalization might be necessary at one point, followed by outpatient treatment. Walter Reed offers medically based psychiatric treatment that includes extensive inpatient, partial hospitalization, outpatient, and continuity of care options for those suffering from mental illness.[177]

As Senator Fetterman's experience demonstrates, individuals suffering from serious mental illnesses may need inpatient psychiatric care, some for longer periods of time than others. Denying people appropriate care based on unreasonable and discriminatory governmental policies, outdated stereotypes, and irrational fears of inpatient treatment is as harmful as it is cruel. It has produced chaos and mistreated some of the most vulnerable among us. Congress should stop denying everyone else the option of inpatient psychiatric treatment they make available for themselves.

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174. Marie E Rueve & Randon S. Welton, *Violence and Mental Illness*, 5 PSYCHIATRY 5 (2008).

175. *Internal Medicine & Psychiatry Program,* CAP. PSYCHIATRY, https://www.capitalpsych.org/medpsych [https://perma.cc/ZRG5-6X5C] ("Program Overview: We are located at Walter Reed National Military Medical Center in Bethesda, Maryland. Our facilities include 296 patient rooms, 50 ICU beds, 40 inpatient acute psychiatric beds, 27 ED beds, and a 7-story outpatient building where we are able to treat and provide care to active duty.").

176. *Mental Health,* WALTER REED NAT'L MED. CTR., https://walterreed.tricare.mil/Health-Services/Mental-Health [https://perma.cc/ZC28-BUFW].

177. *Id*.

III. TOO LITTLE?

> Cheryl Chandler was browsing the Internet last Wednesday when she saw a video of an incoherent woman in a thin patient gown, stumbling outside of a Baltimore hospital. Her heart stopped, Chandler said, when she realized it was her mentally ill daughter Rebecca, whom she had reported missing more than a week before.[178]

On January 9, 2018, University of Maryland Medical Center employees abandoned a nearly naked Rebecca at a downtown Baltimore bus stop in freezing temperatures.[179] The hospital employees calmly strolled away, pushing an empty wheelchair, leaving Rebecca behind them, disorientated, unable to communicate, and clearly experiencing a psychiatric crisis.[180] Despite Rebecca's status as an adult suffering from a serious mental illness, no one contacted Rebecca's family to inform them of her discharge or even of her short hospitalization.[181]

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178. Andrea K. McDaniels & Meredith Cohn, *Family of Woman Found Outside Baltimore Hospital in Just a Gown Speaks Out*, BALT. SUN (Jan. 18, 2018), https://www.baltimoresun.com/health/bs-hs-patient-dumping-press-conference-20180118-story.html [https://perma.cc/EC8A-XXEA].

179. David McFadden, *Mother: Care Denied Daughter Left in Cold in Hospital Gown*, TAIWAN NEWS (Jan. 19, 2018), https://www.taiwannews.com.tw/en/news/3344831 [https://perma.cc/Q6DC-NY4S] ("Chandler's daughter, Rebecca, was escorted out of the hospital by uniformed security personnel with her street clothes stuffed in plastic bags, and she was left at an open-air bus stop with outdoor temperatures in the 30s. She had a gash on her forehead and was visibly disoriented, stumbling in her hospital gown and unable to formulate any words on the cold night.").

180. Associated Press, *Woman Discharged from Hospital, Left Out In Cold,* YOUTUBE (Jan. 12, 2018), https://www.youtube.com/watch?v=X4buCVc2afw [https://perma.cc/W8RX-QVHD] (reporting that a Baltimore hospital discharged an apparently disoriented woman in her gown, leaving her at a cold bus stop on Tuesday night. The hospital's president and CEO says the facility "failed." This video includes images some may find disturbing).

181. *Id.* (noting that no one would know about this if it weren't for a stranger's shock and disgust at watching the hospital literally dump a patient.).

Similar to Zach, Rebecca had both medical insurance[182] and a loving family.[183] Yet she lacked the ability to share this information with authorities because of her serious mental illness. And unlike Senator Fetterman, she was not a high-level government official with access to Walter Reed.

American society itself seems to be hallucinating that ignoring mentally ill individuals is normal.[184] Examples of untreated mental illness currently abound in the United States,[185] despite the discovery of antipsychotic medication. Walking past individuals clearly suffering from delusion occurs daily in most major cities.[186] Filling the jails with

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182. *See* Andrea K. McDaniels & Meredith Cohn, *Family of Woman Found Outside Baltimore Hospital in Just a Gown Speaks Out*, BALTIMORE SUN (Jan. 18, 2018, 5:00 PM), https://www.baltimoresun.com/health/bs-hs-patient-dumping-press-conference-20180118-story.html [https://perma.cc/A64B-JZYK]. While beyond the scope of this article, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) further complicates the ability of family members to be notified of psychiatric crisis when the individual is an adult. *See What Options Do Family Members of an Adult Patient with Mental Illness Have If They Are Concerned About the Patient's Mental Health and the Patient Refuses to Agree to Let a Health Care Provider Share Information with the Family?*, U.S. DEP'T OF HEALTH & HUM. SERV. (Sept. 12, 2017), https://www.hhs.gov/hipaa/for-professionals/faq/2095/what-options-do-family-members-adult-patient-mental-illness-have-if-they-are-concerned-about.html [https://perma.cc/B7VY-E6Z70].

183. McFadden, *supra* note 179 ("Chandler spoke about her daughter during a sometimes emotional news conference at Gordon's law offices in downtown Baltimore. . . . [She and her other children] wanted to correct depictions of Rebecca as homeless and uninsured. Chandler said she has insurance and a loving family.").

184. E. Fuller Torrey, *250,000 Mentally Ill are Homeless. 140,000 Seriously Mentally Ill are Homeless,* MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/consequences/homeless-mentally-ill.html [https://perma.cc/54JW-RTXC] ("In many cities such as New York, homeless people with severe mental illnesses are now an accepted part of the urban landscape and make up a significant percentage of the homeless who ride subways all night, sleep on sidewalks, or hang out in the parks. These ill individuals drift into the train and bus stations, and even the airports.").

185. Erin Allday, *The Streets' Sickest, Costliest: The Mentally Ill,* S.F. CHRON. (June 29, 2016), https://projects.sfchronicle.com/sf-homeless/mental-health/ [https://perma.cc/23C5-EGLZ] ("Everyone has seen them. They are the men and women walking barefoot down Market Street, talking to themselves or yelling obscenities at no one in particular. Or sitting quietly in dim doorways, rocking back and forth, or sprawling on nests of dirty blankets in BART corridors.").

186. Andy Newman & Joseph Goldstein, *Can New York's Plan for Mentally Ill Homeless People Make a Difference*?, N.Y TIMES (Dec. 15, 2022), https://www.nytimes.com/article/nyc-homeless-mental-health-plan.html [https://perma.cc/YS27-BR4V]. *See also* Jamie Parfitt*, At the Intersection of Homelessness, Mental Illness and Addiction in Portland Lies Psychosis*, KGW8 (May 9, 2023), https://www.kgw.com/article/news/local/the-story/psychosis-addiction-homeless-portland-seattle/283-be1d2dda-9298-4fbd-9831-2ccbe2514e2d [https://perma.cc/W3CP-X39Z]; Clara Harter & Steve Scauzillo, *LA*

individuals suffering from psychosis, ignoring the victimization of those with serious mental illness, and arguing endlessly about what constitutes liberty ignores realty. Individuals suffering from psychosis aren't receiving competent medical care. Instead, such patients are being ignored, boarded, or dumped. There is no shortage of money, and stigma is no longer a barrier to treatment. Instead, there is a shortage of rational public policies, and the only stigma seems to be admitting that psychiatric hospitals are necessary.

A. Boarding, Dumping, & Squandered Resources

There is plenty of federal and state funding spent on psychiatric care.[187] That money is simply wasted. As a result of funding priorities designed to ensure that the general population feels happy,[188] there is not enough money left over to care for those suffering from serious mental illness. "Overall expenditure on mental health has steadily increased in recent decades from $32 billion in 1986 to $186 billion in 2014. The percentage of mental healthcare dollars spent on inpatient care, however, decreased from 42% in 1986 to 27% in 2014."[189] The money is not funding treatment for individuals with serious mental illness, and as a result, the seriously mentally ill are left to languish, and even die, untreated.[190]

1. Squandered Resources

Every time a homeless, mentally ill person dies of exposure, there is a cry for more funding.[191] Every time a mentally ill individual commits an

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Is Losing the Battle Against Mental Illness Among Its Homeless, L.A. DAILY NEWS (Jan. 28, 2023), https://www.dailynews.com/2023/01/28/los-angeles-is-losing-the-battle-against-mental-illness-among-its-homeless/ [https://perma.cc/MG8M-8E4W].

187. *See e.g*., Stephen Eide & Carolyn D. Gorman, *Medicaid's IMD exclusion: The case for repeal*, MANHATTAN INST. (Feb. 2021), https://media4.manhattan-institute.org/sites/default/files/medicaids-imd-exclusion-case-repeal-SE.pdf [https://perma.cc/T7KK-6N6C]. ("Spending on such shelters, which numbered 28 as of the end of FY 2018, has grown every year since FY 2014 and currently stands at about $150 million. There are more beds in mental health shelters in New York City than the combined total of adult beds in state psychiatric centers and psychiatric beds in NYC Health + Hospitals facilities.").

188. Olfson et al., *supra* note 53.

189. *Id*. at 24.

190. *Id*.

191. Melinda Henneberger, '*We' Let Blind, Mentally Ill Homeless Mark Rippee Die in Vacaville. But Let's Name Names.*, SACRAMENTO BEE, (Dec. 1, 2022), https://www.sacbee.com/opinion/article269419817.html [https://perma.cc/9EZK-WKQU]

atrocious crime, there is a cry for more funding.[192] Every time a mentally ill defendant dies in police custody, there is a cry for more funding.[193] In truth, none of these failures to provide appropriate, compassionate medical and psychiatric care stem from a lack of funding. Mental health initiatives are practically drowning in cash. The United States spends a fortune on "mental health" and "behavioral health." According to the Biden administration, "The Federal Government covers some of the costs of treating mental health disorders. Around $280 billion were spent on mental health services in 2020..."[194] State governments also spend a considerable amount on psychiatric treatment, especially with large numbers of incarcerated mentally ill individuals.[195] Yet, despite shockingly huge expenditures, the priority for funding is never given to care for the seriously mentally ill.

Instead of targeting the four or five percent of the population suffering from a serious mental illness[196] who make up large percentages of the homeless and incarcerated mentally ill, federal government funds are spent to improve the lives of the vast majority of individuals who are feeling

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(reporting that James Mark Rippee was blind, mentally ill, and homeless on the streets on Vacaville. How could California let this unhoused man die?).

192. Beth Haroules & Simon McCormack, *We Can't Police Our Way out of Homelessness And Mental Health Crises*, NYCLU (Mar. 24, 2022), https://www.nyclu.org/en/news/we-cant-police-our-way-out-homelessness-and-mental-health-crises [https://perma.cc/285R-HJYQ]. ("Martial Simon, the man accused of pushing Go had a long history of struggling with mental illness and homelessness and he regularly complained he could not get the treatment he needed").

193. Kate Lisa, *Taser-Involved Death Prompts Calls for New Mental Health Response Rules For Police*, SPECTRUM NEWS (Juy 18, 2023), https://spectrumlocalnews.com/nys/central-ny/politics/2023/07/18/taser-involved-death-prompts-calls-for-clearer-mental-health-response-rules-for-police [https://perma.cc/KLZ4-KJBF] ("Legislation proposed this session known as Daniel's Law, named after Daniel Prude who died in Rochester Police custody in 2020, would require mental health workers respond with law enforcement. It did not pass this session, but funding was included in the latest state budget to create a 10-person panel to address these issues.").

194. *Reducing the Economic Burden of Unmet Mental Health Needs,* WHITE HOUSE (May 31, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/31/reducing-the-economic-burden-of-unmet-mental-health-needs/ [https://perma.cc/XS4N-MJTE]. *See also* DJ Jaffe*,* INSANE CONSEQUENCES: HOW THE MENTAL HEALTH INDUSTRY FAILS THE MENTALLY ILL, (2017) ("The Office of Management and Budget (OMB) reported actual federal mental health spending for treatment and income support in 2012 totaled $130 billion, with $147 billion budgeted for 2014.").

195.Joseph Vanable, *The Cost of Criminalizing Serious Mental Illness,* NAMI (Mar. 24, 2021), https://www.nami.org/Blogs/NAMI-Blog/March-2021/The-Cost-of-Criminalizing-Serious-Mental-Illness [https://perma.cc/2MGA-RRAN].

196. *Mental Health,* supra note 39 ("In 2021, there were an estimated 14.1 million adults aged 18 or older in the United States with SMI. This number represented 5.5% of all U.S. adults.").

fine.[197] Resources are squandered on bloated agencies and useless initiatives[198] that do nothing to fund medically appropriate treatment for individuals suffering from serious mental illnesses.

One of the most bloated agencies spending federal money is the Substance Abuse and Mental Health Services Administration (SAMHSA), which describes itself "as the primary Federal agency responsible for leading public health and service delivery efforts that promote mental health, prevent substance misuse, and provide treatments and supports to foster recovery while ensuring equitable access and better outcomes."[199]

If the opioid and fentanyl crises[200] don't demonstrate SAMHSA's abject failure in fulfilling its responsibilities, its lack of promotion of "mental health" certainly does.

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197. Onah, *supra* note 85, at 134.

198. *Study of Peru Brothel gets "Fleece" Award*, N.Y TIMES (Apr. 19, 1978), https://www.nytimes.com/1978/04/19/archives/study-of-peru-brothel-gets-fleece-award.html [https://perma.cc/SS6H-JUZF] (Squandering of funds granted to the NIMH and other federal agencies is nothing new. In 1978, "a federally financed study of a Peruvian brothel was the winner of Senator William Proxmire's monthly Golden Fleece Award. Senator Proxmire, Democrat of Wisconsin, described the National Institute for Mental Health grant of $97,000 as a 'ridiculous waste of the taxpayers' money.'"). *See also Real Clear Policy: #wasteoftheday Week 68*, OPEN THE BOOKS (June 3, 2022), https://www.openthebooks.com/real-clear-policy-wasteoftheday-week-68/ [https://perma.cc/KF3Y-Q3TD] (Showing additional details about this study are even more disturbing: 'The study consisted of a researcher and his associate spending 18 months in Peru. Proxmire said that the researchers kept going back to the brothel in the interests of accuracy. As part of their research, they interviewed 21 prostitutes, as well as brothel staff members, both formally and informally. They also observed prostitutes outside the brothel and visited the brothel at random times throughout the day to 'obtain a good idea of its everyday functioning.' The researcher also studied ethnicity and social structures in Peru during his trip. The researcher that obtained this funding published a book just before this excursion titled 'Academic Gamesmanship,' which taught researchers how to obtain government funding for projects, and some parts of the book suggest he was teaching readers how to game the system, Proxmire said. For example, he writes, 'In addition to paying part of your basic salary, grants will typically also give you an extra two months of summer salary. You can finance numerous jaunts to domestic and international conferences out of your research money without having to . . . justify your trip by reading a paper.' He even encourages his readers to look into tax exemptions for extended research. Aside from this project being unnecessary for the government to fund, it is sad that the NIMH wasted money on this project, when it could have gone to substantial mental health research that could have helped Americans battling mental illness.").

199. *Department of Health and Human Services*, SAMHSA, https://www.samhsa.gov/sites/default/files/samhsa-fy-2024-cj.pdf [https://perma.cc/J3RG-RWFB].

200. *Drug Overdose Death Rates*, NAT'L INST. OF HEALTH (2023), https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates [https://perma.cc/JBE7-7J7E].

Despite controlling an annual budget of $10.8 billion,[201] SAMHSA admits its own incompetence: "Too often, people with mental health . . . treatment needs cannot access the care they need when they need and want it, or they get lost in transition across a highly fragmented and inadequately funded system."[202] The system is definitely fragmented—if it is even possible to refer to the abandonment of the seriously mentally ill as a system—but it's simply impossible to concede that a system that spends $10.8 billion a year for one agency with a total federal expenditure of $280 billion a year for "mental health" is inadequately funded. In fact, the enormous amount of money spent on mental health is simply squandered.

Funds are frequently misdirected to useless initiatives by sloppily defining "mental health" to include both serious mental illnesses together with practically any issue pertaining to emotional wellbeing. "Mental health disorders cover a broad range of diagnoses, including but not limited to developmental disorders such as Attention Deficit Hyperactivity Disorder (ADHD), substance use disorders such as alcohol dependence, depressive and anxiety disorders, and schizophrenia and other psychotic disorders."[203] While a broad focus makes sense for some policy decisions, defining almost everyone as suffering from a mental illness trivializes the impact and severity of serious mental illness[204] and diverts much needed funding away from medical treatment.[205]

The focus of the government's mental health policies should be to help the most vulnerable: the seriously mentally ill. Feel-good initiatives designed to make life happier for the general population are uniformly useless to the seriously mentally ill.[206] Additionally, funding training for

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201. *Department of Health and Human Services, supra* note 199 ("The FY 2024 President's Budget includes a total of $10.8 billion.").

202. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SAMSHA 25 (Apr. 2023), https://www.samhsa.gov/sites/default/files/draft-strategic-plan-2023.pdf [https://
perma.cc/NT9Y-8WAU].

203. *Mental Health*, *supra* note 176.

204. *See No Room at the Inn, supra* note 19.

205. Pete Earley, *Congress Hears About SAMHSA's Failings: Pushing an Anti-Psychiatry Agenda, Wasting $$$,* PETEEARLEY.COM (2013), https://www.peteearley.com/2013/05/23/congress-hears-about-samhsas-failings-pushing-an-anti-psychiatry-agenda-wasting/ [https://perma.cc/X4G3-3LD9] ("Murphy also chastised SAMHSA for its funding priorities. He specifically attacked a yearly "alternatives conference" that SAMHSA funds, which included a workshop called 'Unleash the Beast' that promised to help attendees learn about mental illness by studying animal movements").

206. *Linking Actions for Unmet Needs in Children's Health Grant Program*, SAMHSA, https://www.samhsa.gov/grants/grant-announcements/sm-19-007 [https://perma.cc/MPX9-HZP4] (Offering grants of up to $800,000 each, the "Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Mental Health Services (CMHS), is accepting applications for fiscal year (FY) 2019 Linking Actions for Unmet Needs in

the general public to recognize if someone has a serious mental illness is money not spent on providing treatment to the mentally ill.

Since the majority of the $280 billion spent annually on "health care" does nothing to help the seriously mentally ill, it would be impossible to fully audit[207] the expenditures within the limitations of this article. Nonetheless, almost all of that money is wasted and misspent because almost none of it is directed to the seriously mentally ill. In the interest of space, this article will focus on two representative examples of squandered resources: Mental Health First Aid (MHFA) and early intervention initiatives to prevent mental illness.

a. Mental Health First Aid

> Mental Health First Aid (MHFA) is a commercially available training program created in Australia and now . . . [offered by] non-profits in the United States. The training program teaches people to identify the symptoms of mental illness in others and connect them to help. It also licenses others to be trainers for a fee.[208]

MHFA receives enormous amounts of federal funds and devotes a portion of its website to instruct how others can receive federal grants in order to . . . give it to MHFA!

Children's Health Grant Program (Short Title: Project LAUNCH). The purpose of this program is to promote the wellness of young children, from birth to 8 years of age, by addressing the social, emotional, cognitive, physical and behavioral aspects of their development. It is expected that this program will provide local communities or tribes the opportunity to disseminate effective and innovative early childhood mental health practices and services, ultimately leading to better outcomes for young children and their families.The overall goal of Project LAUNCH is to foster the healthy development and wellness of all young children (birth through age 8), preparing them to thrive in school and beyond. Project LAUNCH grants are designed to build the capacities of adult caregivers of young children to promote healthy social and emotional development; to prevent mental, emotional and behavioral disorders; and to identify and address behavioral concerns before they develop into serious emotional disturbances (SED).") *See* also *Community Conversations About Mental Health*, SAMHSA (2013), https://store.samhsa.gov/sites/default/files/d7/priv/sma13-4763.pdf [https://perma.cc/23YB-DTC2].

207. *Department of Health and Human Services, supra* note 199. See *infra* Appendix B (showing the "mental health training funding" in proposed Budget Fiscal Year 2024 for SAMHSA).

208. *The Evidence: Trainers and Trained Like Mental Health First Aid*, MENTAL ILLNESS POL'Y ORG. (Apr. 18, 2012), https://mentalillnesspolicy.org/samhsa/mental-health-first-aid-fails.html [https://perma.cc/WR5F-A2JU].

For 2023, the MHFA website provides information on how to receive federal grants, including offers to help with grant-writing. According to the MHFA website:

> The Substance Abuse and Mental Health Services Administration (SAMHSA) has recently announced several funding opportunities, totaling almost $50 million, with fast-approaching deadlines. These opportunities will help eligible organizations expand Mental Health First Aid (MHFA) to more schools, first responders, veterans and other communities, ensuring that more people have the tools they need to offer support when someone is experiencing a mental health or substance use challenge.[209]

Thus, MHFA is funded by the federal government, paid by groups hiring MHFA's services, and to help these groups receive funding, the MHFA trains the groups on writing grants to get that money from the federal government. Developers of Ponzi schemes should be jealous of this vacuous money grab.

Individuals, insurance companies such as Aetna,[210] organizations, and schools pay for MHFA training. Sometimes these organizations receive federal grant money that they can then use to pay MHFA. Most grant money comes from SAMHSA, part of the United States Department of Health and Human Services (HHS). For several years, Congress directly authorized payments to MHFA.

There might possibly be some value in the MHFA training program, but no independent studies support that claim.[211] The studies focus on the impact on the trainees and not the impact on those needing psychiatric treatment. The federal government continues to spend millions on MHFA without evidence that anyone needing mental illness treatment receives any benefit whatsoever.

With an impressive website, a credentialed list of "research advisors," and a well-funded sales campaign slickly promoting its accolades, MHFA boasts that people trained in their program:

- Increase their knowledge of signs, symptoms and risk factors of mental health and substance use challenges.

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209. *Funding Opportunities,* MENTAL HEALTH FIRST AID, https://www.mentalhealthfirstaid.org/funding-opportunities/ (last visited Dec. 19, 2023) [https://perma.cc/C2FT-4RVS].

210. Clark Leonard, *Aetna supports Mental Health First Aid*, UNI. OF N. GA., https://ung.edu/news/articles/2023/05/aetna-supports-mental-health-first-aid-training.php [https://perma.cc/GS7E-247S].

211. Amy K. Maslowski et al, *Effectiveness of Mental Health First Aid: A Meta-Analysis*, 24 MENTAL HEALTH REV. J. 245 (2019). *See also* Eunice C. Wong, et al., *Reviewing the Evidence Base for Mental Health First Aid*, 5 RAND HEALTH Q. 1 (2015).

- Can identify multiple types of professional and self-help resources for individuals with a mental health or substance use challenge.
- Show reduced stigma and increased empathy toward individuals with mental health challenges.
- Increase their confidence and likelihood to help an individual in distress.
- Use the skills and information they learn in MHFA to manage their own mental wellbeing.[212]

First, the "they" in these accomplishments does not refer to patients or individuals suffering from a mental illness. Instead, "they" refers to the people trained by MHFA. Thus, none of these accomplishments, paid for by funds meant to help those with mental illnesses, actually benefit the mentally ill. At best, these accomplishments seem to duplicate already-funded public programs such as community mental health services.

At worst, these accomplishments appear to be swindling the public, especially when the website goes on to offer a summary to help people who purchase their training learn how to:

- Market your MHFA courses to potential participants.
- Pitch the program's importance to your organization or the organizations you work with.
- Support grant applications to secure funding.
- Showcase the evidence behind MHFA programs to your local, state and federal policymakers.[213]

Thus, the federally-funded MHFA can help others market their services in order to collect additional government funds.

MHFA not only does nothing for individuals suffering from a serious mental illness, but there is also evidence demonstrating the ineffectiveness of the training it does provide. Research "studies demonstrate little support for MHFA's effectiveness with respect to potential aid recipients. Specifically, [a study] found no significant differences between students at schools where staff were trained as MHFAiders versus students at waitlist control schools on any of the outcomes. . . ."[214] Worst of all, there

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212. *Research and Evidence Base*, MENTAL HEALTH FIRST AID, https://www.mentalhealthfirstaid.org/about/research/ (last visited Dec. 19, 2023) [https://perma.cc/NA9V-28CY].

213. *Id*.

214. Maslowski, *supra* note 211, at 245–61 ("Few studies examined the effects for those who received aid from a MHFA trainee. Preliminary quantitative evidence appeared lacking (Hedges' g=−0.04 to 0.12); furthermore, a qualitative review found limited positive effects. Research limitations/implications: MHFA trainees appear to benefit from MHFA; however, objective behavioral changes are in need of greater emphasis. Additionally, considerably greater attention and effort in testing effects on distressed recipients is needed with future empirical investigations. Originality/value: This is the first known review that

is absolutely no evidence that MHFA trainees provide any assistance whatsoever to those suffering from a psychiatric illness.[215]

Perhaps it seems harsh to attack this one program. Yet, while people are paying MHFA[216] (which is receiving federal grants) to learn about nonexistent stigma, individuals suffering from serious mental illnesses are languishing in emergency rooms because there is no funding for beds in psychiatric hospitals or are dumped at a bus stop in the middle of the night to fend for themselves. Funds spent on MHFA while there is no funding for the seriously mentally ill is simply a travesty.

b. Early Diagnosis or Preventive Care

Other federal funds that are spent for "mental" or "behavioral" health that do nothing to help the seriously mentally ill include programs developed to assist with "early diagnosis." Early diagnosis is a particularly useless standard for serious mental illness, as such illnesses cannot be prevented except by preventing pregnant mothers from using marijuana[217]

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includes preliminary findings on the effects of MHFA on the distressed recipients of the aid. It is anticipated that this will prompt further investigation into the impact of MHFA.") *See also* Cristina Mei & Patrick D. McGorry*, Mental Health First Aid: Strengthening its Impact for Aid Recipients,* 23 EVIDENCE BASED MENTAL HEALTH 133–134 (2020).

215. Maslowski, *supra* note 211, at 245–46 ("While its effect on those trained in MHFA has been promising, recent meta-analyses have failed to detect any significant benefit to individuals who receive support from an MHFA trainee.").

216. Meaghan Hardy-Lavoie, *Anna Maria College Awarded Federal Funding for Mental Health First Aid Training*, ANNA MARIA COLL. (Mar. 25, 2022), https://annamaria.edu/anna-maria-college-awarded-federal-funding-for-mental-health-first-aid-training/ [https://perma.cc/CF4J-JYML] ("Anna Maria College was awarded $1,075,000 to increase the number of instructors in Mental Health First Aid across all public safety sectors. United States Senator Edward Markey included Anna Maria's federal funding application as part of his Congressionally Directed Spending requests submitted to the Senate Appropriations Committee. The federal funds were supported and secured by Senators Edward Markey and Elizabeth Warren.").

217. *See Schizophrenia,* MAYO CLINIC (Jan. 7, 2020), https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443 [https://perma.cc/PM7M-DABX] ("There's no sure way to prevent schizophrenia, but sticking with the treatment plan can help prevent relapses or worsening of symptoms. In addition, researchers hope that learning more about risk factors for schizophrenia may lead to earlier diagnosis and treatment."). *Young Men at Highest Risk of Schizophrenia Linked with Cannabis Use Disorder*, NAT'L INST. OF HEALTH (May 4, 2023), https://www.nih.gov/news-events/news-releases/young-men-highest-risk-schizophrenia-linked-cannabis-use-disorder [https://perma.cc/47VJ-5KKJ] (linking marijuana use and schizophrenia); *U.S. Surgeon General's Advisory: Marijuana Use and the Developing Brain*, U.S. DEP'T OF HEALTH & HUM. SERV. (Aug. 29, 2019), https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html [https://perma.cc/LXX6-4AZZ] (linking marijuana use and the impact on developing baby).

and the onset of serious mental illness typically begins between the ages of nineteen to twenty-nine.[218] Nonetheless, the federal government broadly defines "mental disorders" to include the normal stress of everyday life, and it treats the onset of serious mental illnesses with the same level of concern as how to get good grades in elementary school.

For example, "interest in social and emotional learning (SEL) has increased because strong SEL skills in childhood are associated with positive academic, social, and mental health outcomes. If schools can help children master these non-academic skills, then perhaps they can prevent future mental health problems in adults."[219] While improved social and emotional learning may be generally helpful, such initiatives are completely useless in preventing the development of serious mental illnesses, which can rarely be prevented.[220]

SAMSHA's budget for Fiscal Year 2024 continues this focus on early intervention, which is simply unrelated to addressing serious mental illnesses. The funds include:

> Investments to. . . :Provide America's youth and families with accessible, affordable, and appropriate mental health . . . prevention, intervention, treatment, and recovery services in communities and schools through expanding programs like the Infant and Early Childhood Mental Health program, the Children's Mental Health Initiative the Project Advancing Wellness and Resiliency in Education (Project AWARE), and the

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218. *See Schizophrenia, supra* note 217 ("In men, schizophrenia symptoms typically start in the early to mid-20s. In women, symptoms typically begin in the late 20s. It's uncommon for children to be diagnosed with schizophrenia and rare for those older than age 45."). *See also Schizophrenia*, NIMH, https://www.nimh.nih.gov/health/topics/schizophrenia (last visited Dec. 19, 2023) [https://perma.cc/ZYM4-7ZVM] ("People with schizophrenia are usually diagnosed between the ages of 16 and 30, after the first episode of psychosis."); *Bipolar Disorder,* NIMH*,* https://www.nimh.nih.gov/health/topics/bipolar-disorder (last visited Dec. 19, 2023) [https://perma.Cc/YPY7-8CNL] ("Bipolar disorder is often diagnosed during late adolescence (teen years) or early adulthood").

219. *Mental Health*, *supra* note 176 ("This report also claims "Because one-half of all lifetime cases of mental disorders are estimated to start before age 14, school-based mental health programming is one promising strategy for increasing early detection of mental health disorders while also improving access to treatment.").

220. *See Schizophrenia*, *supra* note 217. *See also* Carsten Hjorthøj et al., *Association Between Cannabis Use Disorder and Schizophrenia Stronger in Young Males than in Females*, PSYCH. MED. (2023), ("Outside the scope of this article is new research linking the heavy use of cannabis with the onset of schizophrenia. However, the federal government has done nothing to promote this new information. Association between cannabis use disorder and schizophrenia stronger in young males than in females.").

Resiliency in Communities After Stress and Trauma (ReCAST) program.[221]

Not one penny of the $64 million spent funding such initiatives will benefit an individual suffering from a serious mental illness.[222]

Once "mental disorders" are defined to mean anything,[223] funds get diverted.[224] The focus on mental health often disregards the fact that "mental illness is a biologically based no-fault medical problem that resides in the brain's chemistry or neuroanatomy. Untreated, it can lead to irrational thinking, and therefore irrational behavior. There are virtually

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221. *See* DEP'T OF HEALTH & HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES FISCAL YEAR 2024, 3–4 (2023) https://www.samhsa.Gov/sites/default/files/samhsa-fy-2024-cj.pdf [https://perma.cc/D5DF-TF6A].

222. *Id*. at 42 ("Established in 2018, the purpose of the Mental Health Awareness Training (MHAT) program is to (1) train individuals (e.g., school personnel and emergency services personnel including fire department and law enforcement personnel, veterans, armed services members and their families, etc.) to recognize the signs and symptoms of mental disorders and how to safely de-escalate crisis situations involving individuals with a mental illness and (2) provide education on resources available in the community for individuals with a mental illness and other relevant resources, including how to establish linkages with school and/or community-based mental health agencies. The MHAT program uses several evidence-based activities and programs to ultimately increase the number of individuals prepared and trained on how to respond to individuals appropriately and safely with mental disorders, particularly individuals with serious mental illness (SMI) and/or serious emotional disturbance (SED). These programs include but are not limited to: Mental Health First Aid and its associated specialty curriculums, Question, Persuade, Refer; Applied Suicide Intervention Skills Training; and Crisis Intervention Training. With the MHAT program, SAMHSA aims to increase the number of individuals prepared and trained on how to respond to individuals with mental disorders appropriately and safely. . . . The FY 2024 President's Budget request is $64.0 million, an increase of $36.0 million from the FY 2023 Enacted funding level for this program will support 197 continuation grants and 277 new grants. The budget will enable populations to be trained, including college students, veterans and armed services personnel and their family members, and to broaden applicable settings for trainings to include noneducational, non-health care settings. With this funding, it is estimated the number of individuals referred to mental health and related services will near 325,000 and the number of individuals trained to recognize the signs and symptoms of mental illness will be approximately 600,000.").

223. *See No Room at the Inn*, *supra* note 19.

224. *Mental Health Advocates Versus Mental Illness Advocates*, MENTAL ILLNESS POL'Y ORG. (Nov. 17, 2014), http://mentalillnesspolicyorg.blogspot.com/2014/11/mental-health-advocates-versus-mental.html [https://perma.cc/CS7P-E48G] ("Mental 'health' advocates argue mental illness is associated with bad grades, poverty, single parent households, and their latest cause, bullying and cyberbullying so we should divert funds meant to help the seriously ill to improve grades, end poverty, improve marriages and address cyberbullying. Those are worthy social services issues but are not mental illnesses. Spending mental health funds on those diverts attention from mental illness.").

no programs left for this group."[225] Directing resources to help develop the social and emotional learning skills of healthy children, or to train individuals to show reduced stigma diverts money away from treating the seriously mentally ill, often with tragic results.[226]

2. Boarding

> Due to the current IMD exclusion, many Medicaid enrollees with acute psychiatric and addiction treatment needs are referred to hospital emergency departments and general acute care inpatient units. These general acute care hospitals do not often maintain the resources and expertise to provide needed specialized care to these individuals, nor are they cost-effective for the services these individuals need.[227]

Emergency rooms have essentially become inpatient psychiatric institutions for days, weeks, or months at a time, as psychiatric hospital bed space has become scarce. "What's happened in the last five years, the growth of this problem is not a linear growth. It's exponential. . . . There are days when fully 90-95% of our ER beds are occupied by boarding patients."[228] Patients admitted for psychiatric treatment simply wait—in a bed or on a stretcher[229] in the hallway—for transfer to a psychiatric facility.[230] While patients may need to wait in an emergency room bed for

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225. DJ Jaffe, *Mental Health Kills the Mentally Ill,* HUFFPOST (Jan. 20, 2011), https://www.huffpost.com/entry/mental-health-kills-the-m_b_426672 [https://perma.cc/2BCC-RQT7].

226. Jen Smith, *Memphis Surgeon Shooting Suspect Larry Pickens Told Cops He Was Schizophrenic and 'Off His Meds' in April 2022 – And Previously Threatened a Barbershop Because He Was Unhappy with His Haircut*, DAILY MAIL (July 13, 2023), https://www.dailymail.co.uk/news/article-12296323/Memphis-surgeon-shooting-suspect-Larry-Pickens-told-cops-schizophrenic-meds.html [https://perma.cc/X959-LVCN]. *See also* Colleen Slevin, *Colorado Supermarket Shooting Suspect Has Schizophrenia,* AP NEWS (Feb. 27 2023), https://apnews.com/article/boulder-schizophrenia-ahmad-al-aliwi-alissa-colorado-health-db44d8b60d120a088220786a7025bace [https://perma.cc/3XD2-EX2E].

227. *National Medicaid & Chip Program Information*, MEDICAID, https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/index.html [https://perma.cc/DZV5-V3D4].

228. Ervin, *supra* note 33.

229. Larson, *supra* note 62 ("Boarding is undesirable for both the providers and the patients as many of these patients wait for services, sometimes in isolation rooms or in the corridors, for extensive periods of time contributing to extended lengths of stay.").

230. Stephen Eide & Carolyn D. Gorman, *The Continuum of Care: A Vision for Mental Health Reform*, MANHATTAN INST. (Sept. 2022), https://media4.manhattan-institute.org/sites/default/files/the-continuum-of-care-vision-for-mental-health-reform.pdf [https://perma.cc/DNU9-LYTT] ("Boarding occurs when patients with psychiatric

many serious conditions, waiting times for placement of psychiatric patients is three times longer.[231]

Emergency rooms are high-stress environments,[232] with ambulances arriving, patients going into cardiac arrest or other frightening medical crises, and medical personal performing triage or sometimes even prepping patients for surgery or other procedures.[233] Emergency rooms are often loud, brightly-lit, energy-filled places filled with bustle and managed chaos.[234] Emergency rooms are for emergencies.[235] Emergency rooms are terrible locations for individuals with serious mental illnesses suffering from psychosis.

> Patients "awaiting inpatient psychiatric care are unlikely to be receiving optimal treatment for their mental health conditions while in the [emergency department]." Emergency departments simply "do not have the physical and staffing resources and specialty expertise to provide definitive psychiatric care." Furthermore, even if patients are able to receive some psychiatric care while boarding in the emergency department, these mental health patients "frequently decompensate" because the chaotic environment "worsens their underlying disease process." Emergency departments rarely provide pleasant experiences for patients, and long-term exposure to such a tumultuous atmosphere is hardly conducive to positive health outcomes for anyone, but especially those suffering from mental health crises.[236]

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symptoms have been assessed and admitted to a hospital but left in the emergency room (or some other equally unsuitable location, such as a hallway) for lack of a bed that is available and suited to their needs.").

231. Eide & Gorman, *supra* note 186.

232. Ervin, *supra* note 33 ("The ER is a bright, loud, noisy, sometimes very chaotic, always changing environment that's on 24/7, 365. And just imagine yourself being in that setting for, you know, one week, one, month, six months. . . .").

233. Larson, *supra* note 62, at 63–72 ("Diverting patients with mental health conditions to Eds negatively impacts patients, providers, and health care organizations.").

234. *Id*. ("This boarding can exacerbate symptoms due to the chaotic environment of an ED as well the lack of psychiatric care during the boarding period.").

235. *Id*. ("And there seems to be no interest in researching the impact of prolonged stays in the emergency room are having on those suffering from a serious mental illness. Literature regarding mental health care in the ED focuses on cost, provider impact, and financial consequences with little attention given to patient experience and outcomes. This poor understanding of the impact of poor delivery of care demands further research as systems, structures, and policies are in place without knowledge of their impact on these vulnerable patients.").

236. Engler, *supra* note 21.

Similar to some of the worst accusations against abusive psychiatric hospitals, emergency room care sometimes focuses on sedation rather than treatment in order to ensure patient safety.[237] Thus, emergency rooms are unsuitable locations for psychiatric patients. Yet, many psychiatric patients are "boarded" in the emergency room awaiting transfer to the very few existing psychiatric beds. "Boarding" of psychiatric patients in emergency rooms is a nationwide problem. "A survey of 328 emergency department directors . . . published in 2008 (since which year the number of public psychiatric beds has declined) found that 79% of those directors boarded psychiatric patients."[238] These patients have nowhere to because there is an acute shortage of psychiatric beds as a direct result of the IMD exclusion.[239]

3. Dumping

After the University of Maryland Medical Center (UMMC) "discharged" Rebecca one freezing cold night to a bus stop, her attorney injected reality into such abuse by explaining, "It's not a misdiagnosis, it's a dump."[240] The attorney further alleged that financing dictated the callous actions of the hospital staff. "Rebecca's condition was going to require a considerable hospital stay to stabilize her. UMMC, believing that she did not have insurance, determined it was better to return her to the street untreated and face whatever consequences arose from that decision rather than to absorb the cost."[241] Because so many patients suffering from a psychiatric illness lack insurance coverage, and because Medicaid will not pay for their care, psychiatric patients are increasingly dumped onto the streets.

The IMD Exclusion produced the practice of dumping psychiatric patients because shutting down the psychiatric hospitals means there is nowhere for patients who are ready for medical discharge but who need psychiatric treatment. "Patient dumping occurs when a hospital denies emergency medical care or inappropriately discharges a current patient."[242] What happened to Rebecca is not an unusual problem.

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237. Larson, *supra* note 62, at 63–72 ("Many providers in Eds do not get training and education on therapeutic treatment of this patient population beyond sedative medications. Moreover, many Eds focus only on the safe keeping of these patients to prevent self-harm while in the ED.").

238. Eide & Gorman, *supra* note 187.

239. Onah, *supra* note 84, at 125.

240. McFadden, *supra* note 179.

241. *Id*.

242. Deborah Becker, *After Woman's Death, Report Raises Alarm Over "Patient Dumping" from Psychiatric Hospitals*, WBUR (June 10, 2021), https://www.wbur.org/

Countless others have also suffered from the lack of access to state run psychiatric hospitals.

> When CaSonya King was admitted to her third psychiatric hospital in a year in 2018, her family thought she was going to get the help she needed. But after spending 19 days at the now-closed High Point Hospital in Middleborough, King was still disoriented and severely ill. Yet, she was discharged from the private psychiatric hospital and taken to Boston, where it appears she was expected to go to a homeless shelter. She never checked in. Thirty hours later, 44-year-old King was dead.[243]

Despite King's need for psychiatric treatment, when personal insurance is exhausted, the government will not offer any financial assistance. Hospitals were further incentivized to dump patients by lawsuits following the Supreme Court's decision in *Olmstead v. L.C.* requiring treatment in the least restrictive alternative setting.[244] Over the past sixty years, countless numbers of individuals have been discharged from psychiatric hospitals and dumped into inappropriate settings, including homeless shelters and sometimes directly into the streets.

Contrast the treatment of the mentally ill who need inpatient psychiatric treatment with the governmental response to the crisis of the 2020 Covid pandemic. The government immediately spent huge amounts of money to treat patients suffering from Covid in hospitals so that stricken

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news/2021/06/10/casonya-king-boston-mental-health-facility-death [https://perma.cc/L8KB-3MYR].

243. *Id*. (appalling is the condition from which the patient was suffering at the time of discharge: "Yet, the hospital determined that King could be discharged. Medical Records from the DLC report say that although hospital staff described King as "disheveled" and 'yelling and self-dialoguing,' her doctor informed the treatment team that King "no longer requires inpatient level of care.").

244. *Position Statement 25: Community Inclusion after Olmstead*, MENTAL HEALTH AM., https://mhanational.org/sites/default/files/Position-Statements/Position-Statement-25.pdf [https://perma.cc/Z6QE-A43Z]. ("In 1999, the U.S. Supreme Court issued its landmark decision in Olmstead v. L.C. (Olmstead), ruling that unjustified segregation of people with mental disabilities constitutes unlawful discrimination under the Americans with Disabilities Act (ADA). MHA strongly supports the enforcement of the principle of community inclusion articulated in the Olmstead decision. Deinstitutionalization is not enough, and de-facto segregation on the streets and in single room occupancy flophouses – often referred to as 'dumping' – is not a solution. Robust community based treatment resources, peer support, and a continuum of crisis care options to resolve danger to self or others without coercion must be understood as bedrock requirements of community inclusion.").

patients received inpatient care.[245] Care was provided regardless of cost or patients' ability to pay. The governmental discrimination against the mentally ill becomes undeniable. "It is difficult to imagine withholding medically necessary care from a patient experiencing any other health crisis event. While it may be easy to postulate what impact withholding medical treatment would have, it is more difficult with psychiatric care."[246] Withholding necessary medical treatment should be unimaginable, but instead it is a daily reality for the seriously mentally ill.

B. Hospitals are not Jails or Prisons

> The coercive giant that straddles our country and that feeds its maw with people who have serious mental illnesses is not state psychiatry. It is our vast prison system, which coercively confines hundreds of thousands of nonviolent, severely mentally ill people who have wound up there for want of adequate treatment.[247]

Inpatient psychiatric treatment is not incarceration. Warehousing the mentally ill in jails and prisons[248] combines the most extreme abuses of the worst psychiatric hospitals of the past with the neglect imposed by civil liberties cases that restrict involuntary treatment for the mentally ill.[249] Deinstitutionalization produced "the discharges from hospitals, coupled with the difficulties posed by the IMD Exclusion in terms of accessing community-based healthcare, exposed patients to a very different, more hostile relationship with the state in the form of law enforcement."[250] In fact, family after family is told that the fastest or only way for their loved one to receive psychiatric treatment is to have the person arrested.[251] As

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245. Heather Hollingsworth & Ricardo Alonso-Zaldivar, *Federal Funds for Uninsured COVID Patients Dry Up As Hospital Costs Rise*, PBS (May 5, 2022), https://www.pbs.org/newshour/nation/federal-funds-for-uninsured-covid-patients-dry-up-as-hospital-costs-rise [https://perma.cc/T6LX-SLRG].

246. Onah, *supra* note 85, at 63–72.

247. Pustilnik, *supra* note 147.

248. Onah, *supra* note 85, at 63–72.

249. Patricia D'Antonio, *History of Psychiatric Hospitals, Nursing, History, and Health Care*, PENN NURSING, https://www.nursing.upenn.edu/nhhc/nurses-institutions-caring/history-of-psychiatric-hospitals/ [https://perma.cc/4EUG-P2S7].

250. Onah, *supra* note 85, at 119.

251. Jenna Bao, *Prisons: The New Asylums*, HARV. POL. R. (Mar. 9, 2020), https://harvardpolitics.com/prisons-the-new-asylums/ [https://perma.cc/BUT3-6SLK] ("Realizing that he needed help and believing that his best shot at treatment was as a parolee, the judge sentenced him to prison. Francisco never even made it to the prison's mental health department, as the judge intended — instead, he hung himself in his cell on October 22, 2014.").

the psychiatric hospitals were dismantled and countless mentally ill individuals were taken to jail, there has been public and legal confusion about the respective roles, treatment options, and outcomes between incarceration and hospitalization.

Historically, psychiatric hospitals were a reaction to the mistreatment of the mentally ill. During the colonial period, some states built the first psychiatric hospitals.[252] However, the vast majority of individuals suffering serious mental illnesses were treated in a variety of degrading ways. For example,

> The custom most shocking to modern thought, undoubtedly, was that of placing the poor on the auction block like so many chattel slaves—the only difference being that they were sold to the lowest, instead of the highest, bidder. However barbaric it may appear in our eyes, the system was at that time generally accepted with quite the same complacency that the average Southerner then showed toward the institution of slavery. As a matter of record, the custom of bidding off the poor persisted over a wide area throughout the 19th century ....The guiding principle underlying this practice was to get rid of public charges at the lowest possible cost and the least amount of trouble to the community. The custom seems to have originated in the northeastern states, since it was popularly known as the "New England System."[253]

Also horrifying, was the pastime of callously mocking the mentally ill by turning their odd behavior produced by their psychosis into a roadside attraction.

> One particularly unpleasant custom was that of "exhibiting the insane patients to the gaze of curious sightseers for a set admission fee." At first, people came to view the mentally ill without official sanction. "It was customary ... for idlers and thrill-seekers to gather about the cell windows of the insane ... and to take turns at 'teasing the crazy people,' with the aim of rousing them into raving fury." As an attempt to dissuade the locals from coming to view the mentally ill, the hospital officials began to charge a fee for admission. This did not, however, stop the practice from

252. *Diseases of the Mind: Highlights of American Psychiatry Through 1900 – Early Psychiatric Hospitals and Asylums,* U.S. NAT'L LIBR. OF MED. (2017), https://www.nlm.nih.gov/hmd/diseases/early.html [https://perma.cc/7S9Q-865Q].

253. ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES (2014).

> continuing throughout the 18th century. "It was quite the thing for inhabitants to entertain their out-of-town guests by bringing them to observe, or to participate in, the sport of baiting the madmen.[254]

Overall, there was nowhere to treat or house the mentally ill . . . except a system tragically echoed by the indifference exhibited toward the seriously mentally ill today: jails and prisons.

Beginning in the 1840s, social activists began to expose the incarceration of individuals who were suffering from mental illness. Because there was no available treatment, inmates were simply warehoused in prisons and jailed. In 1841, one activist described seeing "the presence of insane persons locked up in cells . . . in a place intended not to cure or even for care, but for punishment. . . ."[255] Such activists drew wide public attention to these conditions, and state psychiatric hospitals were built with the goal of improving treatment and care for serious mental illnesses within the best understanding of the symptoms and treatment options of the time.

> The Kirkbride Plan was introduced in the mid-19th century. . . .A more humane approach to mental health, the plan focused on care and treatment in psychiatric institutions rather than mere containment. Open buildings and rehabilitative programs involving art, farming, and therapy improved the lives of the individuals with mental illness who lived at one of the rash of new hospitals that opened in the late 1800s.[256]

The building and funding of state psychiatric hospitals allowed individuals suffering from psychosis to be treated as patients instead of criminals.[257] "By 1880 the dreams of early American psychiatric activists...had been realized. At that time there were almost 140 public and private mental hospitals caring for nearly 41,000 patients."[258] Significantly, these activists were particularly concerned with the seriously mentally ill and advocated for improved treatment of those suffering from psychosis.

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254. *See No Room at the Inn*, *supra* note 19.

255. DEUTSCH, *supra* note 253.

256. Molly McBride Jacobson, *18 Abandoned Psychiatric Hospitals, and Why They Were Left Behind*, ATLAS OBSCURA (2017), https://www.atlasobscura.com/lists/abandoned-psychiatric-hospitals [https://perma.cc/YS9N-N7G6].

257. Oshinsky, *supra* note 60 ("Asylums were created for humane ends. The very term implies refuge for those in distress. The idea was to separate the insane, who were innocently afflicted, from the criminals and prostitutes. . . .").

258. GERALD GROB, MENTAL ILLNESS AND AMERICAN SOCIETY, 1875–1940 (2019).

During the twentieth century, overcrowding and lack of funding contributed to the negative and sometimes even abusive environment of psychiatric hospitals.[259] Yet, some of the horrors seen inside the hospital resulted from the fact that untreated[260] symptoms of psychosis are horrible.[261] In 2023, examples of untreated psychiatric illnesses was visible throughout Virginia as

> hospital emergency rooms are filling up with people in mental health crises, often handcuffed to gurneys and attended by law enforcement officers. People in these situations can't walk around, save to go to the bathroom, and they can't see their families. They may be calm or exhibiting aggressive behaviors; they might be hearing voices or may not have eaten in days because they believe their food is poisoned.[262]

Prior to the 1950s, no medication existed that could treat psychosis.[263] Thus, tying patients to beds or placing them in empty rooms with padded

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259. Jacobson, *supra* note 256. *See also Kirkbride Buildings – Historic Insane Asylum History*, KIRKBRIDE BUILDINGS HISTORY, https://www.kirkbridebuildings.com/about/history.html [https://perma.cc/Y65H-AN9H].

260. Indeed, psychiatric treatment had not changed much from the late 1800s when "The psychiatrist was expected to do little more than deliver a prognosis of the melancholy course of the disease and then supervise the housing, feeding and restraining of the patient." John Chynoweth Burnham, *Psychiatry, Psychology and the Progressive Movement*, 12 AM. Q. 457, 459 (1960) (citing A. I. Noble, *The Curability of Insanity*, 69 AM. J. OF INSANITY 4, 715–17 (1913)).

261. Andy East et al., *Mentally Ill in Jail 'Very Challenging,'* REPUBLIC NEWS (Jul. 10, 2022), https://www.therepublic.com/2022/07/10/mentally-ill-in-jail-very-challenging/ [https://perma.cc/XCG2-32C4]. (Suffering from untreated mental illness has been found in countless reports of the behavior of jail inmates. "McLemore would spill and throw his food on the floor and walls and would tear up trays, paper bags and cups that food and drinks were served in, according to the Jackson County prosecutor's report. He also would frequently urinate on the floor of his cell. At least at one point, McLemore was placed in a device similar to a straitjacket "due to his erratic and self-harming behavior" as "was left in it for several hours and monitored.") *See also* Tami Abdollah, *A Man with Mental Illness Died After 20 Days in Solitary Confinement. Did the Jail System Fail Him*?, USA TODAY (Apr. 12, 2023), https://www.usatoday.com/story/news/nation/2023/04/12/jail-reform-mentally-ill-man-dies-after-solitary-confinement/11566175002/ [https://perma.cc/EAJ9-H4MD].

262. Jo DeVoe, *Shortage of Mental Health Beds Pushes Arlington Toward Community-Based Care*, ARLNOW (Jan. 25, 2023), https://www.arlnow.com/2023/01/25/shortage-of-mental-health-beds-pushes-arlington-toward-community-based-care/ [https://perma.cc/H725-TNR5].

263. "By the time Asylums came out in 1961, the phenothiazines had revolutionized hospital treatment nationwide. In May 1954 Thorzine appeared on the market and within eight months had been administered to over two million patients. In 1955 . . . New York became the first state to adopt a complete program of treatment with neuroleptic drugs in

walls may seem extreme and cruel to modern sensibilities,[264] but such measures prevented psychiatric patients from ripping out their own eyeballs,[265] slitting their own throats,[266] or attacking the medical personal.[267]

1. Confusing civil commitment with criminal prosecution

As psychiatric hospitals became overcrowded warehouses, their filthy, often violent conditions horrified observers.[268] News reports exposed abuses, and popular culture depicted psychiatric hospitals as much worse than prison.[269] Legal activists challenged the right of the state to keep patients who wanted to leave, arguing that civil commitment violated their liberty interests.

In response, Supreme Court cases[270] analogized civil commitment proceedings to criminal holds, without any regard for medical reality. State

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all its hospitals." RAEL JEAN ISAAC & VIRGINIA C. ARMAT, MADNESS IN THE STREETS 48 (1990).

264. *See* DeVoe, *supra* note 262. ("Except that it's happening now, but not in psychiatric hospitals: 'In Arlington and across the state. . . '").

265. Hannah Muniz Castro et al., *A Case of Attempted Bilateral Self-Enucleation in a Patient with Bipolar Disorder*, 9 MENTAL ILLNESS 1, 1 (2017). ("Attempted and completed self-enucleation, or removal of one's own eyes, is a rare but devastating form of self-mutilation behavior. It is often associated with psychiatric disorders, particularly schizophrenia, substance induced psychosis, and bipolar disorder.") *See also* Sam T Levin, *US Prisoner Gouged Out Eyes After Jail Denied Mental Health Care, Lawsuit Says*, THE GUARDIAN (Dec. 8, 2017), https://www.theguardian.com/us-news/2017/dec/08/prisoner-gouges-out-eyes-colorado-boulder-mental-health-lawsuit [https://perma.cc/5ADJ-NPND]; Natasha Lennard, *A Schizophrenic Who Gouged Out His Eyes Is On Texas Death Row,* SALON (Feb. 25, 2013), https://www.salon.com/2013/02/25/a_schizophrenic_who_gouged_out_his_eyes_is_on_texas_death_row/ [https://perma.cc/UU44-FYYN].

266. Suprakash Chaudhury et al., *Suicidal Behavior in Schizophrenia: A Case Series*, 30 INDUS. PSYCHIATRY J. 230 (2021).

267. Ailsa Chang, *"Insane": America's 3 Largest Psychiatric Facilities Are Jails,* NPR (Apr. 25 2018), https://www.npr.org/sections/health-shots/2018/04/25/605666107/insane-americas-3-largest-psychiatric-facilities-are-jails [https://perma.cc/A2JM-T2AB] ("Indeed, jails and prisons contain many untreated mentally ill persons. "One time when I was [at the Los Angeles County jail], corrections officers came out with a man who had been strapped into a wheelchair and was bleeding from his arm because he had scratched out a piece of his own flesh." Another day she accompanied officers as they tried to get inmates to come out for recreation time or for a shower. "And they opened the little door in the cell where you hand food trays through, and there was this almost overpowering smell of feces," Roth says, "because this man had smeared the walls of his cell.").

268. Onah, *supra* note 85, at 124.

269. Walid Fakhoury & Stefan Priebe, *Deinstitutionalization and Reinstitutionalization: Major Changes in the Provision of Mental Healthcare*, 6 PSYCHIATRY 313 (2007).

270. O'Connor v. Donaldson, 422 U.S. 563, 563 (1975). *See also* Addington v. Texas, 441 U.S. 418, 419 (1979); Jackson v. Indiana, 406 U.S. 715, 717 (1972).

laws were written to restrict the amount of time a person could be held without judicial review. Thus, civil commitment laws imposed strict time limits which imitated criminal procedure rules of due process. Individuals could only be held for up to forty-eight hours until a judicial hearing about their need for psychiatric care, similar to the probable cause hearing required for a criminal defendant arrested without a warrant.[271] Patients held involuntarily could "volunteer" for a shorter period of psychiatric treatment to avoid the longer time period of hospitalization,[272] similar to pleading guilty to a criminal charge in exchange for a lesser sentence of incarceration.[273]

Such procedures linked psychiatric treatment to irrelevant time limits instead of to medical reality and therapeutic goals. The revolving door exists because patients cannot be stabilized within the strict time limitations imposed by the statutory schemes.[274] Additionally, the illness itself produces a lack of insight as patients suffer from the symptom of anosognosia[275] in which the mental illness tricks the patient's brain into disbelieving it has a psychiatric diagnosis. As a result of anosognosia, many patients with serious mental illness have an inability to believe that they are sick. Thus, such patients have illness-induced symptoms that result in treatment refusals.[276]

As a result, fewer individuals are civilly committed to psychiatric treatment, whether inpatient or outpatient. Yet, those individuals are no less in need of psychiatric treatment. Thus, an individual manifesting psychosis in public often gets arrested, similar to the status of the mentally

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271. *When Does a 'First Appearance' Take Place in Your State*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 20, 2023), https://www.ncsl.org/civil-and-criminal-justice/when-does-a-first-appearance-take-place-in-your-state.

272. *See, e.g.,* VA. CODE ANN. § 37.2-814(B) (2023).

273. *See, e.g., Plea Bargaining*, JUSTICE.GOV, https://www.justice.gov/usao/justice-101/pleabargaining (last visited Nov. 21) [https://perma.cc/FGS5-GX6X]

274. Clausen & Davoli, *supra* note 122, at 677 ("Short-term "stabilization" of an individual suffering from a psychotic event, the "least restrictive care necessary," simply perpetrates a seventy-two-hour revolving door imposed by current commitment laws that require doctors to heed the illness-induced treatment refusals of people in crisis, even when those people desperately need care.").

275. ANINDA B. ACHARYA & JUAN CARLOS SANCHEZ-MANSO, ANOSOGNOSIA (2023) ("Anosognosia is a neurological condition in which the patient is unaware of their neurological deficit or psychiatric condition. It is associated with mental illness, dementia, and structural brain lesion, as is seen in right hemisphere stroke patients. It can affect the patient's conscious awareness of deficits involving judgment, emotions, memory, executive function, language skills, and motor ability." Additionally, "Because of a lesion in the brain or dysfunction due to illness, the patient cannot incorporate new information regarding their deficits into their self-image. Therefore, they deny their illness or deficit or downplay its significance.").

276. *Id.*

ill in 1830. Five states have even authorized the use of jail cells to hold individuals awaiting civil commitment, essentially criminalizing mental illness.[277] Tragically, individuals with untreated psychiatric illnesses often end up in the criminal justice system, which is unfair to them and further depletes therapeutic access to psychiatric hospitals.

There are two categories of individuals who are involuntarily hospitalized. First, there are those who go through the civil commitment process: a hearing is held, and a judge makes the decision that the individual meets the civil commitment standard. The second group comes from the criminal system. These are individuals who have been arrested for a crime and are sent to a psychiatric hospital pretrial (for either a competency or an insanity evaluation), or post-trial after a verdict of not guilty by reason of insanity. These two categories are hospitalized together, which adds to the confusion between being confined for law enforcement purposes versus being confined for therapeutic purposes.[278]

Adding to the confusion even more, those ordered by criminal court judges currently constitute a large percentage of the psychiatric patients. "Nationally, 46% of beds within state and county psychiatric hospitals are occupied by forensic patients."[279] Forensic patients are those being restored to competency, being evaluated for competency, or those who have been found not guilty by reason of insanity. Such patients may even completely fill the beds, leaving individuals who are voluntarily seeking psychiatric care with nowhere to go: "The proportion of state beds used for court-mandated assessments and admissions has increased tremendously such that some state hospitals are virtually only court-ordered admissions."[280] In Minnesota, civilly committed jail inmates have priority over other patients: "Jail inmates are being admitted to state psychiatric facilities before hospital patients, "regardless of clinical need

277. Patrick Anderson & Lisa Kaezke, *Jailed for Being Mentally Ill: South Dakota Looks for an Alternative*, ARGUS LEADER (Feb. 10, 2019), https://www.argusleader.com/story/news/2019/02/07/south-dakota-mental-health-jail-system/2701616002/ [https://perma.cc/M73Z-PM5K] ("Sioux Falls and other South Dakota communities rely on jail cells as part of their mental health system, even though national advocacy groups are critical of the practice and local jail officials say their facilities aren't designed for mental health treatment. South Dakota is one of five states [Texas, Wyoming, New Mexico, North Dakota, and South Dakota] where this procedure, putting people in jail on what's known as an involuntary mental health hold, is an option provided in statute.").

278. *See* Anne Schindler, *Court: State Must Send Mentally Incompetent Defendants to Psychiatric Hospitals, Not Just Leave Them in Jail*, FIRST COAST NEWS (Aug. 23, 2021, 3:14 PM) https://www.firstcoastnews.com/article/news/crime/court-state-must-send-mentally-incompetent-defendants-to-psychiatric-hospitals-not-just-leave-them-in-jail/77-02484142-93b7-4ff2-98d4-9a72028ab5ec [https://perma.cc/4B3M-YB9B].

279. *See* Olfson et al., *supra* note 53.

280. *Id*. at 52.

or cost."[281] Thus, while the IMD exclusion prevents payments for individuals requesting care, states prioritize psychiatric treatment to restore a criminal defendant to competency in order to be prosecuted or even executed.[282]

North Carolina is an example of both the typical shortage of psychiatric hospitals as well as the allocation of resources.

> Those with the most complicated mental health problems might need to be in a state psychiatric hospital. But it's hard to get one of those beds. Staffing shortages mean that only 600 of the state's 900 state beds are operating. And many of those are filled with people who won't be leaving any time soon.
>
> One-third are filled with inmates who need care just to be able to stand trial. Four in ten of the remaining beds are filled with patients who are ready for discharge, NCDHHS data shows. It can take months before they're discharged because there's no place for them to go. There's a shortage of community care for those with mental health needs.[283]

Tragically, separating the mentally ill from the criminals was one of the original goals of building psychiatric hospitals – to decriminalize serious mental illness. Today, civil liberty groups fight to keep the mentally ill out of psychiatric hospitals, which has resulted in a "system" in which family members press charges against a loved one in the hopes of securing psychiatric care.[284] Unbelievably, the current situation for the mentally ill is now as bad as or worse than when the activists of the 1840's began championing for humane treatment.[285]

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281. Engler, *supra* note 21, at 913.

282. *Id*. *See also* Oshinsky, *supra* note 60 ("The majority of the current patients are there 'involuntarily'—people who have been judged a danger to themselves or to others, who have been found not guilty of a crime by reason of insanity, or who are being evaluated for their competency to stand trial. Because so many psychiatric beds have disappeared, the waiting period for admission can take months, which means that inmates languish in jail without having been convicted of a crime.").

283. Ervin, *supra* note 33.

284. Andy Steiner, *Can Better Online Information for Mental Health Crisis Care Help People Avoid 911, ERs?*, MINN. POST (June 26, 2023), https://www.minnpost.com/mental-health-addiction/2023/06/can-better-online-information-for-mental-health-crisis-care-help-people-avoid-911-ers/ [https://perma.cc/4YV8-3LJL]. Rebecca Sitzes, *Family Speaks out Against Lack of Mental Health Resources in Cleveland County*, SHELBY STAR (June 9, 2023), https://www.shelbystar.com/story/news/2023/06/09/family-struggles-to-get-mental-health-care/70302188007/ [https://perma.cc/6A49-BSBT].

285. *See, e.g., No Room at the Inn supra* note 19, at 178–179.

2. The mentally ill remain institutionalized

> It's so hard to get treatment in a psychiatric hospital because nearly all of the funds that used to support them have been diverted into state prison systems. Which leads to the second conclusion from the incarceration numbers: Coercion of the mentally ill without psychiatry is an enormous problem.
>
> The United States uses its prison system as a warehouse for adults and children with severe mental illnesses.[286]

Patients released from psychiatric hospitals had to go somewhere. "Evidence reviewed here corroborates the notion that shifting individuals from a centralized institutional locus of care (i.e., the state hospital) to multiple and differentiated institutions and care facilities (e.g., nursing homes and prisons) does not represent a process of deinstitutionalization, but rather trans-institutionalization."[287] Instead of hospitals, the mentally ill are now institutionalized within the criminal justice system.

Shut out from psychiatric hospitals, suffering from illness-induced treatment refusals, hallucinating, delusional, psychotic and confused, individuals suffering from untreated serious mental illnesses are often arrested. "Without effective treatment, it is unrealistic to expect improvement [in the patient's psychiatric health], perpetuating a cycle of arrest and incarceration."[288] In 2023 in the United States of America, jails and prisons typically serve as the primary and perhaps only option for individuals suffering from serious mental illnesses.

Every year since 1965, more and more mentally ill individuals are arrested. In 2009,

> the prevalence of mental illness in prisons and jails was three to six times that of the general population. This overrepresentation reveals a clear relationship between serious mental illness and incarceration, indicating a pseudo-criminalization of illness. . . . Correctional facilities have become our de facto mental health hospitals. Thus, while prison reform is often considered a criminal justice issue, the data indicate an unresolved public health problem as well.[289]

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286. Pustilnik, *supra* note 147.
287. Davis et al., *supra* note 37.
288. Bao, *supra* note 251.
289. *Id*.

Nobody seriously advocates that more people should be locked up in jail instead of being placed in therapeutic hospitals for treatment. Instead, phrases such as "community care" and "least restrictive alternatives" are endlessly parroted, as if such alternatives to hospitalization would magically heal psychiatric illnesses. In reality, such lofty, aspirational solutions have "rescued" the mentally ill out of hospitals and into incarceration.

Incarceration is a common result of not having sufficient inpatient psychiatric hospitals.

> Another significant factor in the supply and demand of inpatient psychiatric beds has been the increasing interface of individuals with mental illness with the criminal justice system which results in far too many individuals being arrested and incarcerated rather than treated or admitted to a hospital. In the U.S., a staggering 28% to 52% of people with a serious mental illness have been arrested at least once.[290]

The jails didn't replace the need for hospital beds. Rather, the lack of hospital options led to the increasing incarceration of individuals with mental illness.[291] Incarceration does not result in better treatment for the mentally ill. Individuals in jails and prisons receive mediocre psychiatric care—if any at all—as "correctional institutions are not designed for treatment . . . . "[292] Jails are designed for short-term holding of individuals pretrial or for serving sentences that are typically less than a year. Unlike prisons, jails offer few diversions or educational opportunities for the inmates, and thus offer even less for those inmates suffering from a psychiatric illness. "Instead of psychiatric experts, untrained and under-equipped law enforcement officers poorly manage a vast majority of the low-income, mentally ill populace."[293] Reminiscent of the worst abuses in

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290. *See* Olfson, et al., *supra* note 53, at 7. *See also* Seena Fazel & Katharina Seewald, *Severe Mental Illness in 33,588 Prisoners Worldwide: Systematic Review and Meta-Regression Analysis*, 200 BRIT. J. PSYCHIATRY 364–373 (2012); *The Psychiatric Bed Crisis in the US: Understanding the Problem and Moving Toward Solutions*, AM. PSYCHIATRIC ASSOC. (May 2022), https://www.psychiatry.org/getmedia/95ee291e-b0c8-4d5c-819a-fc51588000b3/APA-Psychiatric-Bed-Crisis-Report-Section-1.pdf [https://perma.cc/7FVG-C7U5]("[A]dults with major psychiatric and substance use disorders remain disproportionately common in jails and homeless shelters, underscoring serious challenges in meeting basic social and housing needs of adults with major mental illnesses.") (internal citations omitted).

291. Joanmarie Ilaria Davoli, *Diverting the Mentally Ill Out of the Virginia Criminal Justice System*, 11 GEO. MASON U. C.R. L.J 109, 119–20 (2000).

292. *See* Bao, *supra* note 251, at 1.

293. *See* Onah, *supra* note 85, at 106.

the overcrowded psychiatric hospitals of the early twentieth century, "treatment" of a psychiatric illness in jail typically consists of restraints—either physical or chemical.[294]

Additionally, an individual is not "discharged" from jail; the person is simply released if charges are dropped or after the sentence has been served. Discharge from a hospital includes medical directives about continuity of medical care. Release from jail is more akin to patient dumping. The inmate is often released in whatever clothes worn at the time of the arrest. Sometimes discharge occurs in the middle of the night, and no money is provided to the released inmate. "Another barrier to effective treatment within the criminal justice system is the difficulty of providing continuity of care. The timing of one's arrival and release from a jail system is highly unpredictable."[295] There is no support system or medical follow-up for the mentally ill individual who has been released from jail.

Inmates sentenced to prison are marginally more likely to receive at least decent psychiatric care,[296] especially since psychiatric prisons have been built in response to the fact that Deinstitutionalization "saved" the psychiatric patients from hospitals. As a direct result of their symptoms of mental illness—particularly anosognosia,[297] in which the mental illness tricks the brain into disbelieving the diagnosis—many individuals suffering from a mental illness refuse medication or treatment and subsequently commit crimes while psychotic, many of which are horrific.[298]

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294. *See* Earley, *supra* note 119.

295. *See* Bao, *supra* note 251, at 1.

296. *See Federal Prisons: Information on Inmates with Serious Mental Illness and Strategies to Reduce Recidivism,* U.S. GOV'T ACCOUNTABILITY OFF. (Feb. 2018), https://www.gao.gov/assets/gao-18-182.pdf [https://perma.cc/M7LH-YJJS] (stating that "[a]cutely ill inmates in need of psychiatric hospitalization, such as inmates suffering from schizophrenia or bipolar disorder, may receive these services at one of BOP's five medical referral centers, which provide inpatient psychiatric services as part of their mission."); *see also* Aimee Feinberg*, Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr..,* 54 STANFORD L. REV. 769 (2002).

297. Aninda B. Acharya & Juan Carlos Sanchez-Manso, *Anosognosia*, STATPEARLS (2023), https://www.ncbi.nlm.nih.gov/books/NBK513361/ [https://perma.cc/4799-EQ9Q].

298. *See, e.g.,* Oshinsky, *supra* note 60 ("The ongoing saga of the severely mentally ill in America is stirring attention again in a sadly familiar way. In Los Angeles in early 2022, a 70-year-old nurse was murdered while waiting for a bus, and two days later a young graduate student was stabbed to death in an upscale furniture store where she worked. That same week in New York City, a 40-year-old financial analyst was pushed onto the subway tracks as a train was arriving, killing her instantly. All three assaults, random and unprovoked, were committed by unsheltered homeless men with violent pasts and long histories of mental illness. In New York, the perpetrator had warned a psychiatrist during one of his many hospitalizations of his intention to commit that very crime.")

Warehousing the mentally ill in the prison system was cruel in the early 1800s, but it is indefensibly cruel today as modern medicine offers effective and safe treatment options. Policy experts argue for reform to reduce the high amount of incarceration endured by individuals with mental illness. "Regarding the seriously mentally ill, it is becoming increasingly clear to experts, policymakers, and even the public that the systems in place are costly and ineffective, hindering both social and individual progress."[299] Yet, such commentary seems breathlessly naïve. Since the 1880's, there always had been a place for treatment—psychiatric hospitals are not a new idea. But the IMD Exclusion helped shut them down.

C. Psychiatric Hospitals are Necessary

Deinstitutionalization only deinstitutionalized the psychiatric hospitals themselves, but not the patients. The patients remain institutionalized, albeit in less appropriate settings. "The number of mentally ill people in jails, prisons, shelters and hospitals in the 1950s was roughly the same as it is today. But the majority were in hospitals in the 1950s."[300] Today, the luckiest patients often languish in emergency rooms for weeks awaiting transfer to the dwindling number of psychiatric beds, while the unlucky ones are either warehoused in the criminal justice system or abandoned to the streets. If psychiatric treatment was bad in the 1950s,[301] the fate of the mentally ill today is far worse.

Despite nearly sixty years of hostility towards them, there is an emerging consensus that inpatient psychiatric hospitals remain a necessary component of an effective medical system and humane society.[302] "Access to inpatient psychiatric beds undergirds local mental health systems, providing essential services to help treat adults or young people who are experiencing mental illness, just like inpatient medical hospitalization serves the most acutely ill."[303] One-hundred years ago,

299. *See* Bao, *supra* note 251, at 1.

300. *See* Jaffe, *supra* note 52, at 1.

301. *See generally* Onah, *supra* note 85, at 124.

302. *See generally* Jalyn Radziminiski et al., *Organizations, Individuals from Across the County Oppose Mayor Eric Adams' Plan to Increase Involuntary Commitment of New Yorkers with Mental Disabilities,* BAZELON (Dec. 12, 2022), https://www.bazelon.org/wp-content/uploads/2022/12/media-release-for-NYC-statement-final-12-12-22.pdf [https://perma.cc/2V8J-7LNC] ("We cannot hospitalize ourselves out of the problems faced by the mentally ill, nor can we force more people into the same services that have already repeatedly failed them. Instead, our leaders must triple our investments in the outreach, peer support, housing first, and rehabilitation programs that are in the process of being rolled out by the City and State.").

303. *See* Everett, *supra* note 166, at 3.

psychiatric hospitals may have been the only option for treating psychiatric illness, as there were no psychotropic medications and outpatient treatment did not meet the needs of individuals with mental illness. However, today's system in which inpatient psychiatric treatment is essentially unavailable is even worse.[304]

According to a 2022 report by the American Psychiatric Association, "Today, psychiatric inpatient care is complex and encompasses many factors that reflect a struggle to provide compassionate care with diminishing resources and within time frames that are often too short to evaluate treatment response or facilitate meaningful recovery."[305] In examining the lack of available beds to treat individuals with psychiatric illness, the report begins by inadvertently revealing the source of the problem: "Mental health systems optimally include a care continuum to meet people's needs in the most accessible, least restrictive environment."[306] Yet, the "least restrictive environment" requirement for optimum care stems not from medical best practices or medical necessity, but from the civil liberties lawsuits that have distorted the options for psychiatric treatment. Civil liberties advocates ignore the etiology of serious mental illness when they inject legal—rather than medical—standards into treatment options.[307]

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304. *See* Engler, *supra* note 21, at 900–901 (And the problem goes beyond inpatient. Patients also need a transition from inpatient to the community, and not having appropriate options means the "system" remains in constant chaos. "An additional contributing factor to this glaring problem of boarding mental health patients in emergency departments and the overall deficit of inpatient psychiatric beds is the lack of appropriate 'step-down' services. 'Step-down' mental health services could accept patients who are ready to leave hospital-level care, but not yet ready to return home. The absence of such essential treatment programs creates a vicious cycle because it delays patient discharges from inpatient psychiatric units. In turn, these delays result in fewer inpatient beds available for new patients in mental health crises, thus, further contributing to the problem of bed shortages and boarding in emergency departments. 'Each person who is 'stuck' in the wrong level of care creates a further cascade of individuals who cannot transition to the next stage of their treatment and recovery.'") (citing Governor's Task Force, *Reforming Mental Health in Minnesota*, MINN. DEP'T HUM. SERVS. (July 2016), https://mn.gov/dhs/assets/Overview-Mental-Health-Presentation-ppt_tcm1053-250266.pdf [https://perma.cc/5VQ8-BF4L]).

305. *See* Everett, *supra* note 166, at 3.

306. *Id.*

307. *See, e.g.,* Oshinsky, *supra* note 60 ("Put simply, civil libertarians and disability rights advocates have largely replaced psychiatrists as the arbiters of care for the severely mentally ill. And a fair number of them, with the best of intentions, seem to view the choices of those they represent as an alternative lifestyle rather than the expression of a sickness requiring aggressive medical care.").

The legal intrusion into psychiatric care has produced an absurd system in which medical considerations are not merely secondary, but are actually almost irrelevant, to the treatment plan and location.

> Deinstitutionalization was based on the principle that severe mental illness should be treated in the least restrictive setting. As further defined by President Jimmy Carter's Commission on Mental Health, this ideology rested on "the objective of maintaining the greatest degree of freedom, self-determination, autonomy, dignity, and integrity of body, mind, and spirit for the individual while he or she participates in treatment or receives services."
>
> For a substantial minority, however, deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of "dignity" or "integrity of body, mind, and spirit." "Self-determination" often means merely that the person has a choice of soup kitchens. The "least restrictive setting" frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.[308]

Neither when Medicaid was passed nor when the court upheld the right to the least restrictive alternatives was there any medical analyses or research done regarding whether inpatient or outpatient psychiatric care was appropriate.[309] Instead, the assumption was that whatever care was provided in a psychiatric hospital could be better achieved elsewhere.[310] The medical community did little to address that question.

The medical establishment has accepted these legal restrictions without even bothering to study the efficacy of inpatient psychiatric treatment. "Unfortunately, research on the effectiveness of adult or child psychiatric inpatient care has been nearly absent."[311] Instead, the IMD Exclusion, combined with United States Supreme Court decisions, as well

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308. Torrey, *supra* note 172.

309. *See* John Fergus Edwards, *The Outdated Institution for Mental Diseases Exclusion: A Call to Re-examine and Repeal the Medicaid IMD Exclusion*, (May 1997), https://mentalillnesspolicy.org/wp-content/uploads/imd-legal-analysis.pdf [https://perma.cc/S3PS-JSGG] (demonstrating how, instead, Congress relied upon an unrelated study to support their conclusion about the uselessness of inpatient hospitals: "The Committee on Interstate and Foreign Commerce for the House of Representatives, in the above cited Congressional report, discounted the need for long-term institutional psychiatric care by citing a research study which indicated that seven out of ten schizophrenic patients were able to be discharged within a year.").

310. *See generally* Onah, *supra* note 85, at 124–25.

311. Everett, *supra* note 166, at 13.

as spending on less serious mental health issues, have produced a system in which the goal is to have the patient treated anywhere except in a psychiatric hospital—regardless of the medical appropriateness of such an option.

Closing psychiatric hospitals has serious negative consequences for the patients and also for society as a whole. A 2014 research study found that the incidents of violent behavior by an individual suffering from schizophrenia increased in direct proportion to the decrease in time spent in an inpatient psychiatric hospital. The study specifically found that "fewer annual inpatient nights were associated with more violence perpetrated by those with schizophrenia and related disorders."[312] Research studies have consistently found that untreated psychosis often results in violent behavior which likely would have been avoided if the individuals received proper treatment in a psychiatric hospital.[313]

For no other medical condition would there be a constant demand that patients be treated in the community[314] instead of in an appropriate hospital setting. Imagine if similar laws controlled the monitoring of newly transplanted organ recipients to ensure the organ is not rejected. Imagine that instead of allowing such monitoring in the hospital, the law required that recent organ transplant recipients be released. The patient would need to be transported daily, at great inconvenience, pain, and medical risk, to a local clinic for blood tests, perhaps while experiencing spiking fevers or chills, body aches, nausea, cough, and shortness of breath. Nobody would advocate such risky behavior as a better system than remaining in the hospital to have the new transplant monitored as long as medically necessary.

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312. Seena Fazel et al., *Violent Crime, Suicide, and Premature Mortality in Patients with Schizophrenia and Related Disorders: A 38-Year Total Population Study in Sweden*, 1 LANCET PSYCHIATRY 44, 50 (2014).

313. *See* HJ Steadman et al., *Violence by People Discharged From Acute [psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES OF GEN. PSYCHIATRY 393, 400 (1998) (concluding that "the highest rate of reported violence did not occur during the follow-up year at all, but rather during the 10 weeks prior to the hospitalization . . . .).

314. Paul Duncan, *Long Beach Homeless Column: This is a Typical Day at the Long Beach Multi-Service Center*, INSIDELB (Sept. 26, 2022), https://www.longbeach.gov/insidelb/blogs/long-beach-homeless-column-homelessness-this-is-a-typical-day-at-the-long-beach-multi-service-center/ [https://perma.cc/JY8Y-KZC8] ("For an example of how mentally ill individuals are "treated in the community" see a day in the life of a homeless shelter: "About a third of clients have significant mental health issues, for which many have not been receiving support. These range from learning difficulties and traumatic brain injuries to people who are actively experiencing auditory hallucinations and have difficulty organizing their thoughts.").

In fact, the emphasis on the least restrictive alternative being the most appropriate actually interferes with proper medical care for individuals with serious mental illness. "Utilization review criteria that limit inpatient length of stay to the minimum 'medically necessary' can lead to premature discharge and adverse outcomes including relapse and hospital readmission, homelessness, violent behavior, criminal justice involvement, and all-cause mortality including suicide."[315] Focusing on getting the patient out of the hospital instead of providing the best possible care harms the patient's health and wellbeing. "These risks are especially concerning given the high rates of failed transitions from inpatient to outpatient mental health care: 42%-51% of adults and 31%-45% of youth do not receive any outpatient mental health treatment for their disorder within 30 days of inpatient discharge."[316] The closing of the psychiatric hospitals thus interfered with a system that had provided continuity of care.

For individuals suffering from the often-crippling symptoms of psychosis, there are multiple benefits of being in an inpatient psychiatric hospital.

> Within psychiatric hospitals, patients can receive more aggressive pharmacotherapy, psychotherapy, and other procedures such as complex diagnostic assessments and electroconvulsive therapy that are difficult to provide and often unavailable in other settings. An additional value in inpatient treatment includes being out of the environment the person came from for several days and within a clean, orderly, caring hospital environment with regular meals. The hope for relief from an undesirable environment adds to the demand for inpatient settings.[317]

Instead of protecting civil liberties,[318] the lack of inpatient treatment options typically results in worse short-term and long-term outcomes for patients. "For a lot of families, the lack of inpatient facilities is pretty

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315. Everett, *supra* note 166, at 31.

316. *Id.*

317. *Id.* at 13.

318. April Dembosky et al., *When Homelessness and Mental Illness Overlap, is Forced Treatment Compassionate?*, NPR (Mar. 31, 2023), https://www.npr.org/sections/health-shots/2023/03/31/1164281917/when-homelessness-and-mental-illness-overlap-is-compulsory-treatment-compassiona [https://perma.cc/ZD25-WDB]. Although outside the scope of this article, there is growing consensus between opposing political views that civil commitment standards have become too lax, and that leaving people to die instead of treating their psychiatric disorder is not as compassionate as it once was considered. *See also* Radziminiski, *supra* note 302.

stifling. That has societal woes. They start missing work, then lose their job and then lose their housing."[319] Many of the untreated mentally ill subsequently become homeless, and a large percentage of them are arrested.[320]

Whether the patient voluntarily requests inpatient psychiatric treatment, or whether the patient objects and is civilly committed, the lack of psychiatric hospitals produces the same result: substandard or nonexistent treatment. Tragically, the United States has the resources and the ability to offer excellent, effective inpatient treatment for the seriously mentally ill. Everyone who needs inpatient psychiatric treatment should have the same treatment options as Senator Fetterman.

IV. TOO LATE?

> One of the deaths now under investigation by Michigan Protection and Advocacy involves Alissa Negus, a 25-year-old from Hanover. For Negus, short hospital stays had become a part of her life. Her years-long struggle with depression led to drug abuse, bouts of homelessness and alienation from her family. On multiple occasions, she tried to take her life. But repeatedly, Alissa sought help from psychiatric hospitals throughout the state. Most of her stays, said her family, lasted just a couple of days. "She needed to be somewhere for months," said her mother Jill. "Two or three days is not long enough for someone with mental illness."[321]

For the patients denied care and the lives lost as a result of closing psychiatric hospitals, it really is too late. Nothing can bring back Alissa, or CaSonya or Zach. Yet, something should be done for all the others who continue to suffer despite living in a country with the skill and means to

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319. Garrett Moore, *Beds for Psychiatric Patients Are a Must for Northwest Arkansas, River Valley, leaders say,* NW. ARK. ONLINE (Apr. 16, 2023), https://www.nwaonline.com/news/2023/apr/16/beds-for-psychiatric-patients-are-a-must-for/ [https://perma.cc/2ASX-AZQG].

320. Jeffrey Lynne & Samuel Winikoff, *New Report Analyzes Trespass Arrests of Homeless and Mentally Ill in County Hospitals*, AM. HEALTH LAW ASS'N (Jun. 26, 2019), https://www.americanhealthlaw.org/content-library/publications/alerts/9473654b-50e0-4dbd-a940-9a76aeb92f8d/new-report-analyzes-trespass-arrests-of-homeless-a [https://perma.cc/R65G-JRSH]. *See also* J. R. Belcher, *Are Jails Replacing the Mental Health System for the Homeless Mentally Ill?*, 24 CMTY. MENTAL HEALTH J. 185 (1998).

321. *See* Ross Jones, *Deaths in the Dark: When Psychiatric Patients Suddenly Died, State Didn't Ask Why,* WXYZ DETROIT (Mar. 5, 2020 8:44 PM), https://www.wxyz.com/news/local-news/investigations/deaths-in-the-dark-when-psychiatric-patients-suddenly-died-state-didnt-ask-why [https://perma.cc/ARS9-VAEV].

offer them the same quality psychiatric care that Senator Fetterman received.

A. Waivers

Medicaid's IMD Exclusion prevents funding for both psychiatric as well as substance abuse treatment received in psychiatric hospitals. However, the Medicaid 1115 waiver process allows States to apply for waivers of Medicaid rules, including rules that restrict funding of inpatient psychiatric hospitalizations.[322] There has been bipartisan support for issuing substance abuse waivers. In 2015, the ongoing opioid crisis prompted the Obama administration to authorize a Medicaid 1115 in order to allow federal funding of inpatient treatment for substance abuse disorders (SUD).[323] This allowed for inpatient substance abuse treatment. In 2017, the Trump Administration similarly issued a waiver for opioid use disorder (OUD) and SUDs.[324]

In 2019, the Trump administration issued an additional 1115 waiver that allowed inpatient treatment for serious mental illnesses.[325] The city of Washington, D.C. received the first waiver.[326] Other states followed, with

322. *Medicaid's Institutions for Mental Disease (IMD) Exclusion*, CRS REPORTS (July 30, 2019), https://crsreports.congress.gov/product/pdf/if/if10222 [https://perma.cc/K3L9-R55X] (granting Medicaid 1115 waivers prior to 2007. "Between 1993 and 2009, nine states had approved Section 1115 waivers allowing the states to receive federal Medicaid funds for behavioral health services in IMDs. All except one of these waivers were phased out.").

323. DEP'T OF HEALTH & HUM. SRVCS., RE: NEW SERVICE DELIVERY OPPORTUNITIES FOR INDIVIDUALS WITH A SUBSTANCE USE DISORDER (July 27, 2015), https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/SMD15003.pdf.

324. *Trump Administration Approves Two New State Medicaid Demonstrations to Treat Substance use Disorders and Combat National Opioid epidemic*, CMS.GOV (Jun. 28, 2019), https://www.cms.gov/newsroom/press-releases/trump-administration-approves-two-new-state-medicaid-demonstrations-treat-substance-use-disorders [https://perma.cc/WYE8-2BD7].

325. Larson, *supra* note 62 (requesting Medicaid waivers for New York state in January 2023. "10 states have an exemption for mental health treatment" under the Medicaid waivers.").

326. *See District of Columbia Section 1115 Medicaid Behavioral Health Transformation Demonstration*, DEP'T OF HEATH CARE FIN., https://dhcf.dc.gov/1115-waiver-initiative [https://perma.cc/XH7U-YGVG] (last visited Nov. 19, 2023) ("On November 6, 2019, the Centers for Medicare and Medicaid Services (CMS) approved the District's Behavioral Health Transformation demonstration with an effective date of January 1, 2020.").

approximately 48 states receiving waivers by 2023.[327] However, the waiver process is not simple.[328] Once granted, there are stringent reporting requirements that necessitate extensive paperwork.[329] Additionally, "waivers must be renewed, and they are subject to changing stipulations from one administration to another, or even during a single administration."[330] For some states, the costs of requesting the waivers might exceed any benefit.[331] Such waivers are typically only granted for specific diagnosis and for a limited period of time.[332]

By their very nature, Medicaid 1115 waivers cannot solve the psychiatric bed crisis. The waivers do not support long-term planning or solutions. "Most waivers are set to expire after several years; states may apply to renew the waiver but approval in these cases is not guaranteed."[333] Reliable, long-term, sustainable funding must exist in order to rebuild psychiatric hospitals. For example, in 2012 Massachusetts spent $300 million to open Worcester Recovery Center in Massachusetts, a facility for 320 long-term patients with private rooms and "a recovery-inspired residential design" on the grounds of a former psychiatric hospital.[334] Without ongoing access to funding sources, such development is impossible.

Equally challenging, the federal government "requires states to apply separately for waivers exempting IMD substance abuse services and waivers exempting IMD mental health services."[335] Such a distinction is arbitrary and not medically based. Substance abuse treatment and psychiatric treatment are often needed by the same patient at the same

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327. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers*, KFF (Sept. 26, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/ [https://perma.cc/G22C-K4DM].

328. *See* Eide, *supra* note 186, at 12 ("As for Section 1115 waivers, state officials report that the process is cumbersome, the terms can change between administrations and even during the same administration, and budget neutrality requirements focus only on cost savings within the Medicaid program itself.").

329. *See* CRS REPORTS, *supra* note 322, at 2 ("Also, as a condition of the state plan option, states are required to ensure that a continuum of services is available by (1) notifying the Secretary of Health and Human Services of how individuals receive evidence-based clinical screening before receiving services in an eligible IMD; (2) providing coverage of certain outpatient, inpatient, and residential services; and (3) ensuring appropriate transition from an eligible IMD to receiving care at a lower level of clinical intensity.").

330. *See* Eide, *supra* note 187, at 9.

331. *See generally Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers*, *supra* note 324.

332. *Id.*

333. Onah, *supra* note 85, at 140.

334. Oshinsky, *supra* note 60.

335. Onah, *supra* note 85, at 140.

time. Separating the funding for such treatments does nothing to enhance patient care or outcomes.

Finally, waivers are dependent upon their continued acceptance by the current political powers.[336] While there have been recent Executive Orders authorizing Medicaid waivers, the waiver process is cumbersome and time consuming and there is no guarantee that such waivers will be granted over the long term. Waivers should not be necessary. Instead of forcing administrators to devote time and energy to filing waiver requests, Congress should simply repeal the IMD Exclusion.

B. Repeal the IMD Exclusion

> Removing the Exclusion from the Medicaid Act would almost instantly expand mental health coverage by allowing larger treatment facilities to receive federal funding and accept patients regardless of their insurance status. Additionally, repealing HHS "IMD factors" rules would allow facilities to offer a higher quality of mental healthcare to patients by allowing them to prescribe psychiatric medicine, hire licensed mental health professionals, and work closely with the corresponding state mental health authorities.[337]

A growing consensus endorses the repeal. "The American Hospital Association, National Association of State Mental Health Program Directors, the Interdepartmental Serious Mental Illness Coordinating Committee, National Alliance on Mental Illness, and the Treatment Advocacy Center identify the Rule as 'discriminatory,' 'outdated,' and 'counter-productive' and recommend reform or full repeal."[338] The American Psychiatric Association (APA) fully endorses eliminating the IMD Exclusion in order to provide better treatment for those suffering from serious mental illnesses.[339] These organizations and others have

336. *See* DuBose & Fry-Bowers, *supra* note 62, at 68 ("Waivers are a temporary solution to this longstanding inequality resulting from the IMD Rule, as waivers are generally only valid for 5 years, and they are not impervious to administrations' changing priorities.").

337. Onah, *supra* note 85, at 138.

338. DuBose & Fry-Bowers, *supra* note 62, at 68.

339. *See* Everett, *supra* note 166, at 82 (developing a model of the APA report to determine how a community should plan the number of psychiatric beds it should offer: "This is an emerging model in the process of development, including participation by communities working with model developers to input the specific population and services variables. The APA together with model developers anticipate an effective tool that can be used by planning regions across the U.S. to provide a benchmark for services demand against available community services resources including inpatient psychiatric beds."); *see also* Emily Kubera, *Open Letter To President Biden Regarding The Appointment Of An*

extensively studied the situation. "Revisiting the IMD Rule may be the most impactful policy option for increasing the availability of inpatient psychiatric treatment. Not only antiquated in its name, the Rule does not protect those with mental health conditions and is detrimental to both patients and providers."[340] Modern medical care simply bears no relation to the conditions in 1965 that prompted Congress to impose such restrictions.

These organizations recognize the absurdity that outdated stereotypes of psychiatric hospitals control modern policies. "Eliminating the IMD Exclusion wouldn't bring back the 'snake pit' hospitals of the 20th century. Those conditions were the result of underfunding. Adding Medicaid funds to the mix would allow psychiatric hospitals to deliver care that is truly therapeutic."[341] The needs of the patients should control the funding of the facilities. These needs will change over time, and thus Congress should allow federal funding to be used to treat the seriously mentally ill without arbitrarily limiting the location of the treatment.

In 1890, the only way to successfully treat an individual experiencing violent delusions and command hallucinations was likely restraining the individual to prevent harm to self and isolating that individual to prevent harm to others. Yet, when treatment options changed, it became possible for many individuals to leave the hospital and receive medical treatment in the community. The flaw in the IMD exclusion was to believe that *no on*e should ever be hospitalized and that *everyone* should be treated in the

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Assistant Secretary Of Health And Human Services For Mental Health And Substance Use, TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/fixing-the-system/features-and-news/4366-open-letter-to-president-biden-regarding-the-appointment-of-an-assistant-secretary-of-health-and-human-services-for-mental-health-and-substance-use%20Accessed%20March%202021 [https://perma.cc/5EF6-ZFR4] (receiving widespread support for the APA's proposal: The Treatment Adovocay Center wrote an open letter to President Biden in which they referenced this widespread report "we respectfully call on you to appoint an Assistant Secretary of SAMHSA who is committed to "[j]oining the entire mental health industry in supporting the elimination of the Medicaid Institutions for Mental Disease (IMD) exclusion, an outdated, discriminatory federal rule that imposes significant barriers to treatment for adults with severe mental illness. Under this rule, Medicaid payments to states are prohibited for non-geriatric adults receiving psychiatric care in a treatment facility with more than 16 beds. This categorically discriminatory rule is a leading cause of our national psychiatric hospital bed shortage and directly contributes to a host of negative consequences for those with the most severe mental illnesses." As well as [j]oining the entire mental health industry in calling for the elimination of the offensive 190-day Medicare lifetime limit, which caps payment for necessary and lifesaving hospitalization for psychiatric care at an arbitrary 190 days over the lifetime of an individual. To paraphrase our friend and ally, former Rep. Patrick J. Kennedy, 'our health system must be compelled to treat the brain as part of the body.'").

340. DuBose & Fry-Bowers, *supra* note 62, at 67.

341. *See* Jaffe, *supra* note 52, at 1.

community. Yet "many patients who are discharged from state hospitals are denied proper access to mental healthcare. Community health centers fill up their mentally ill quotas quickly, and many centers end up closing, leaving patients with no viable treatment options."[342] The dream of replacing psychiatric hospitals with community care options proved unrealistic,[343] "notwithstanding a nearly 1,500 percent increase in spending on community mental health services between 1981 to 2015."[344] Even where such centers exist, they have not replaced the need for psychiatric hospitals.

Additionally, even if the community care options had been properly established, there remains a population of individuals suffering from mental illness who need longer term psychiatric treatment. "Ultimately, community treatment centers lack the institutional capacity to accommodate the mentally ill, leaving millions of anguished people to fend for themselves."[345] Thus, psychiatric hospitals were necessary in 1965 and they remain necessary in 2023. Congress should not develop funding restrictions based on location of treatment. The funding should be provided to the patient in the appropriate setting.

Nor should hospitals become the only funded options. Medical advances and new treatments are developing and will continue to evolve. Funding should ensure that patients receive the most appropriate treatment in the most appropriate setting—which may change over time. Policies such as the IMD exclusion reflect an outdated and inefficient mode of thought: that legislatures instead of medical professionals should set medical policies.

There have been proposals in the past. During the Trump administration, "[d]espite th[e] bipartisan support, the proposal . . . stalled in Congress because of opposition from civil libertarians and mental-health advocates who continue to argue, despite the evidence, that

342. *See* Onah, *supra* note 85, at 133.

343. *Id.* at 134. ("Notably, despite the increasing number of homeless mentally ill, the number of community mental health centers increased greatly from the end of the 20th century into the early 21st century, from approximately 210,000 to 800,000. 89 These statistics pose an interesting juxtaposition: why are so many people suffering from mental disease homeless when there are so many more community centers today? It's worth remembering here that these community centers cannot provide permanent housing and, in many cases, because of the IMD Exclusion, they cannot provide long-term mental healthcare.").

344. Carolyn D. Gorman, *The Federal Government Can—and Should—Help the Mentally Ill*, THE HILL (Apr. 21, 2023 7:30 AM), https://thehill.com/opinion/healthcare/3960841-the-federal-government-can-and-should-help-the-mentally-ill/ [https://perma.cc/8TB4-KG65].

345. *See* Onah, *supra* note 85, at 142.

institutions aren't needed because everyone with mental illness recovers with proper support and wellness initiatives."[346] After sixty years of legislative delusions, it is past time to provide treatment for the seriously mentally ill without regard to artificial limitations based on location of services.

C. Funding Sources

Repealing the IMD exclusion will allow Medicaid funding for psychiatric hospitals, but the lack of current hospital beds remains a barrier to treatment.[347] Conservative estimates are that the United States needs an additional 123,300 psychiatric beds.[348] The federal government issued a new study detailing the cost of fully revoked Medicaid's IMD exclusion.

In April 2023, the federal Government Accounting Office (GAO) released a report estimating the costs of repeal. Titled the *Budgetary Effects of Policies to Modify or Eliminate Medicaid's Institutions for Mental Diseases Exclusion,* the report analyzes two options, one offering short-term payments and the other a complete repeal of the IMD exclusion.[349] While short-term payment options offer temptingly lower costs, Congress should instead accept the costs of the full repeal.

A complete repeal of the IMD exclusion would include lifting the restrictions for both substance abuse as well as psychiatric illnesses. For the years 2023 to 2031, "[e]liminating the exclusion for stays for [Substance Use Disorders] SUDs would increase those expenditures by $7.7 billion . . . eliminating the exclusion for stays for mental health disorders would increase those expenditures by $33.5 billion . . . and eliminating it for both types of stays would increase those expenditures by $38.4 billion . . . ."[350] Thus, over the course of ten years, the federal budget might need to be increased $38.4 billion in order to provide care for seriously ill individuals.

Of course, the $38.4 billion only represents an increase if the federal government continues to fund all current programs, including the useless ones. The GAO report only focuses on increases. Completely absent from the GAO's suggestions is to reallocate funding from ineffective or unnecessary expenditures to ones that would effectively treat serious

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346. *See* Jaffe, *supra* note 52, at 1.

347. *See infra* Appendix B (showing number of beds lost up to 2016).

348. DuBose & Fry-Bowers, *supra* note 62, at 69.

349. CONG. BUDGET OFF., BUDGETARY EFFECTS OF POLICIES TO MODIFY OR ELIMINATE MEDICAID'S INSTITUTIONS FOR MENTAL DISEASES EXCLUSION, (Apr. 2023), https://www.cbo.gov/system/files/2023-04/58962-Medicaid-IMD-Exclusion.pdf [https://perma.cc/L9XC-QMAZ].

350. *Id.* at 1.

mental illnesses. The good news is that any money shortage could be solved by redirecting some of the federal government's current $280 billion expenditures on "Mental Health."[351]

Additionally, the $38.4 billion increase fails to account for significant savings elsewhere. Despite the fact that huge amounts of federal money are spent on incarceration of the mentally ill, the cost savings of less incarceration is not considered in the GAO report. "Under all of the options that CBO examined, outlays would increase because of greater federal spending for inpatient and long-term care services. Those costs would be partially offset by slightly less spending for emergency department visits."[352] While the IMD Exclusion might be seen as a cost savings for Medicaid, it has vastly increased societal costs, including additional costs for prisons, jails, and in countless human lives:

> While [repealing the IMD exclusion] will have high initial costs, the return on investment due to better management of mental health conditions makes it a worthy endeavor. This could be done by allocating funds that are currently used for the criminal justice system for more appropriate treatment options.[353]

The idea that the IMD Exclusion keeps down the federal costs for mental illness is overemphasized. "The cost savings from the IMD Rule is merely an illusion as the financial cost of treatment in general hospitals, jails and the impact of homelessness is far greater."[354] Thus, Medicaid funds could be redirected away from unsuitable locations and back into psychiatric hospitals.[355]

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351. *See* THE WHITE HOUSE, *supra* note 193.

352. *See Budgetary Effects of Policies to Modify or Eliminate Medicaid's*, *supra* note 349, at 1.

353. DuBose, *supra* note 62, at 69.

354. *Id. See also* Steve Leifman & Norm Ornstein, *Locking People Up Is No Way To Treat Mental Illness,* THE ATLANTIC (May 30, 2022), https://www.theatlantic.com/ideas/archive/2022/05/mental-illness-treatment-funding-incarceration/643115/ [https://perma.cc/NUZ8-GMZV] ("For example, Miami-Dade County currently spends $636,000 a day or $232 million a year to warehouse approximately 2,400 people with mental illnesses in its jail. In shocking contrast, the entire state of Florida spends only $47.3 million annually to provide mental-health services to about 34,000 people in Miami-Dade and Monroe Counties. And this expenditure leaves almost 70,000 people in those counties with no access whatsoever to mental-health services.").

355. *See* Gorman, *supra* note 230 (explaining that the GAO estimate "does not comprehensively incorporate the cost savings undoubtedly to be had in other systems put under strain by continued deinstitutionalization, such as criminal justice and homeless services.").

Not only the Medicaid funds, but also a portion of the $280 billion spent on "Mental Health Care" or "Behavioral Health" by the federal government should focus on developing a system to provide continuing, comprehensive care for the 4 percent of the population suffering from serious mental illness. That ten-year cost of $38 Billion[356] would only cost a fraction of what is spent on "Mental Health" yearly. In fact, "the full estimated increase in outlays for repeal would represent less than 0.5 percent of projected federal Medicaid spending in the year 2033."[357] The GAO's report conclusively demonstrates that the only impact repealing the IMD Exclusion would have would be to vastly improve the lives of people who need inpatient psychiatric treatment. True, less people would be trained in Mental Health First Aid, but none of that money was helping the seriously mentally ill anyway.

V. CONCLUSION

> I've always been frustrated by the never-ending argument about which is better: community care or longer term care in state hospitals before discharge. What we need are accessible services that are appropriate to each individual's need, whether that be in a community setting or more intensive hospital care.[358]

Any debate concerning the location where a patient is treated is irrelevant. Waiting for an opportunity to incarcerate the mentally ill instead of treating systems of psychosis is cruel. And prohibiting treatment in the most effective and appropriate location is discriminatory. Yet such a system has prevailed in the United States since 1965.[359]

The medical needs of the patient suffering from a serious mental illness should be the focus whether that patient needs to be treated in an inpatient psychiatric facility with twenty-four hour care or at home surrounded by a loving and supportive family.

Waivers of the IMD Exclusion are not enough. Congress should abolish both the IMD Exclusion and the 190-day lifetime limit on inpatient psychiatric care. Neither limitation is linked to the medical needs of

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356. *See* CONG. BUDGET OFFICE, *supra* note 349, at 1; *see also infra* Appendix A.

357. *See* Gorman, *supra* note 230.

358. *See* Earley, *supra* note 164.

359. *See* Gray, *supra* note 95, at 199 ("Enough time has passed that every possible rationale for the initial implementation of the IMD exclusion has played out and proven false, fruitless, or based on incorrect assumptions . . . untold numbers of lives have been lost as a result of the damage to treatment access which the IMD exclusion has wrought over the years of its existence.").

patients, the government's ability to financially support the patient, or any rational need. Both limitations are discriminatory and counter-productive.

Whether the treatment is sought by the patient, or the patient is subjected to civil commitment, the treatment provided should result from the individual's medical needs. The symptoms of the disease should be treated, consistent with the quality of care currently offered for physical diseases. Priority should be given to continuity of care, so that patients avoid future onset of the painful and cruel symptoms of psychosis.

Finally, while nobody knows the future, psychiatric hospitals should be rebuilt because they are currently still needed.[360] Funding options should not be restricted to specific, static locations. In the future, psychiatric hospitals may no longer be needed as medical research continues to search for ever-improving treatment. Thus, medical necessity should dictate where a patient is treated, what treatments are available, and how long the patient should undergo treatment.

The building of psychiatric hospitals in the 1800s reflected the best in humanity and medicine: scientific progress and hope that individuals suffering from a mental illness could be treated with dignity, respect, and compassion.[361] Hope for a healthier future was offered alongside the best

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360. *See generally* Capi Lynn, *When Adults with Mental Illnesses Don't Want Help, What Are Their Parents To Do?*, STATESMAN J. (Sept. 9, 2019), https://www.statesmanjournal.com/story/news/2019/09/09/parents-adult-children-refuse-mental-illness-treatment-suicide/1549104001/ [https://perma.cc/FZN7-RX9] ("During the last mental health conference Bandfield attended, a doctor said during a presentation that 20 percent of individuals with schizophrenia don't respond to medication. She's heard other reports where that number is as high as 25 percent. The psychiatrist these parents are working with has told them he believes their son would do well on the right mood stabilizers. But even with the right medication, such disorders often require long-term care. 'Sometimes it takes a year for a person to recover from a psychotic episode,' Wolf said. 'We don't have places for people to get treatment for a year.'").

361. *See generally* Dorothea Dix. *"I Tell What I have Seen" – The Reports of Asylum Reformer Dorothea Dix*, 96 AM. J. PUB. HEALTH 588, 588–91 (demonstrating how, in 1843, advocate Dorothea Dix persuaded the Massachusetts legislature to fund hospitals for the mentally ill by appealing to their humanity: "I proceed, Gentlemen, briefly to call your attention to the present state of Insane Persons confined within this Commonwealth, in cages, closets, cellars, stalls, pens! Chained, naked, beaten with rods, and lashed into obedience! . . . Men of Massachusetts, I beg, I implore, I demand, pity and protection, for these of my suffering, outraged sex!—Fathers, Husbands, Brothers, I would supplicate you for this boon—but what do I say? I dishonor you, divest you at once of Christianity and humanity—does this appeal imply distrust. If it comes burthened with a doubt of your righteousness in this Legislation, then blot it out; while I declare confidence in your honor, not less than your humanity. Here you will put away the cold, calculating spirit of selfishness and self-seeking; lay off the armor of local strife and political opposition; here and now, for once, forgetful of the earthly and perishable, come up to these halls and consecrate them with one heart and one mind to works of righteousness and just guardians of the solemn rights you hold in trust. Raise up the fallen; succor the desolate; restore the

psychiatric treatment available at the time. Today, individuals suffering from a serious mental illness receive the worst humanity has to offer: discrimination in treatment options, legal barriers to treatment, callous dumping, inhumane boarding, squandered resources, incarceration and neglect.

Congress should stop denying the most vulnerable members of society from accessing the necessary inpatient psychiatric care afforded to one of their own. As advocate Dorothea Dix stated in 1843: "I repeat it, it is defective legislation which perpetuates and multiplies these abuses."[362]

APPENDIX A:

Government Accounting Office (GAO) Report: Costs of Elimination of IMD Exclusion.

Total Estimate for costs over next ten (10) years: $38 billion.[363]

Year for Inpatient Treatment	**Estimated Cost**
2024	4,375 million
2025	4,240 million
2026	4,155 million
2027	4,060 million
2028	3,940 million
2029	3,820 million
2030	3,680 million
2031	3,535 million
2032	3.375 million
2033	3,225 million

APPENDIX B:

Substance Abuse and Mental Health Services Administration (SAMHSA) 2024 Budget[364]

Authorizing Legislation .....Sections 520J of the Public Health Service Act FY 2024

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outcast; defend the helpless; and for your eternal and great reward, receive the benediction . . . 'Well done, good and faithful servants, become rulers over many things!'").

362. *Id*. at 599.

363. CONG. BUDGET OFFICE, *supra* note 349.

364. *Substance Abuse and Mental Health Services Administration (SAMHSA) Fiscal Year 2024 Justification of Estimates for Appropriations Committees*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.samhsa.gov/sites/default/files/samhsa-fy-2024-cj.pdf [https://perma.cc/T7KL-GEPC].

Authorization $24,963,000
Allocation Method ..... Competitive Grants/Contracts
Eligible Entities……State and Territories, Political Sub-divisions of States; Tribes or Tribal Organizations; and Non-Profit Entities

The MHAT program uses several evidence-based activities and programs to ultimately increase the number of individuals prepared and trained on how to respond to individuals appropriately and safely with mental disorders, particularly individuals with serious mental illness (SMI) and/or serious emotional disturbance (SED). These programs include but are not limited to: Mental Health First Aid and its associated specialty curriculums... With the MHAT program, SAMHSA aims to increase the number of individuals prepared and trained on how to respond to individuals with mental disorders appropriately and safely. Budget Request The FY 2024 President's Budget request is $64.0 million, an increase of $36.0 million from the FY 2023. The budget will enable populations to be trained, including college students, veterans and armed services personnel and their family members, and to broaden applicable settings for trainings to include noneducational, non-health care settings. With this funding, it is estimated the number of individuals referred to mental health and related services will near 325,000 and the number of individuals trained to recognize the signs and symptoms of mental illness will be approximately 600,000.

APPENDIX C:

State Hospital Beds Remaining in 2016[365]

State	2016 total state hospital beds	2010 total state hospital beds	Number of beds lost or gained	2016 beds per 100,000 population	Relation to target beds per capita
Alabama	383	1,119	-736	7.9	15.8%
Alaska	80	52	28	10.8	21.7%
Arizona	302	260	42	4.4	8.8%
Arkansas	222	203	19	7.5	14.9%
California	5,905	5,283	622	15.1	30.2%
Colorado	543	520	23	10.0	19.9%
Connecticut	615	741	-126	17.1	34.3%
Delaware	122	209	-87	12.9	25.8%

365. Fuller et al., *supra* note 65, at 1.

District of Columbia	282	*	*	42.0	84.0%
Florida	2,648	3,321	-673	13.1	26.1%
Georgia	954	1,187	-233	9.3	18.7%
Hawaii	202	182	20	14.1	28.2%
Idaho	174	155	19	10.5	21.0%
Illinois	1,341	1,429	-88	9.3	18.7%
Indiana	818	908	-90	12.4	24.7%
Iowa	64	149	-85	2.0	4.1%
Kansas	451	705	-254	15.5	31.0%
Kentucky	499	446	53	11.3	22.6%
Louisiana	616	903	-287	13.2	26.4%
Maine	144	137	7	10.8	21.7%
Maryland	950	1,058	-108	15.8	31.6%
Massachusetts	608	696	-88	8.9	17.9%
Michigan	725	530	195	7.3	14.6%
Minnesota	194	206	-12	3.5	7.0%
Mississippi	486	1,156	-670	16.2	32.5%
Missouri	874	1,332	-458	14.4	28.8%
Montana	174	194	-20	16.8	33.7%
Nebraska	289	337	-48	15.2	30.5%
Nevada	296	302	-6	10.2	20.5%
New Hampshire	158	189	-31	11.9	23.7%
New Jersey	1,543	1,922	-379	17.2	34.4%
New Mexico	229	171	58	11.0	22.0%
New York	3,217	4,958	-1,741	16.3	32.5%
North Carolina	892	761	131	8.9	17.8%
North Dakota	140	150	-10	18.5	37.0%
Ohio	1,121	1,058	63	9.7	19.3%
Oklahoma	431	401	30	11.0	22.0%
Oregon	653	700	-47	16.2	32.4%
Pennsylvania	1,334	1,850	-516	10.4	20.8%
Rhode Island	130	108	22	12.3	24.6%
South Carolina	493	426	+67	10.1	20.2%
South Dakota	128	238	-110	14.9	29.8%
Tennessee	562	616	-54	8.5	17.0%
Texas	2,236	2,129	107	8.1	16.3%
Utah	252	310	-58	8.4	16.8%
Vermont	25	52	-27	4.0	8.0%
Virginia	1,526	1,407	119	18.2	36.4%

Washington	729	1,220	-491	10.2	20.3%
West Virgina	260	259	1	14.1	28.2%
Wisconsin	458	558	-100	7.9	15.9%
Wyoming	201	115	86	34.3	68.6%
TOTALS	37,679	43,318	-5,639	11.7	23.4%