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MENTAL-HEALTH COURTS: EXPANDING THE MODEL IN AN ERA OF CRIMINAL JUSTICE REFORM

Courtney Black*

INTRODUCTION

In December 2018, federal criminal justice reform gained public attention when Congress passed the First Step Act.¹ The First Step Act was passed with bipartisan support, signaling that the United States has recognized the need for massive criminal justice reform.²

The necessity of criminal justice reform, at both the state and federal levels, is largely attributed to the current size of the prison population in the United States.³ Criminal-law changes, social changes, and economic changes have contributed to the current size of our prison population, which is over 1.5 million prisoners.⁴ The United States is said to be facing mass incarceration.⁵

The number of people with mental illnesses who are incarcerated has increased along with the total prison population.⁶ For example, the Department of Justice (DOJ), which publishes data on mental illness in prisons, has reported high levels of serious psychological distress, depression, and bipolar disorder among U.S. prisoners.⁷ Prison conditions

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1. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [https://perma.cc/BU3G-KGP4].

2. See *infra* Section I.A.

3. See J.F., *Why Does America Have Such a Big Prison Population?*, ECONOMIST (Aug. 2013), <https://www.economist.com/the-economist-explains/2013/08/14/why-does-america-have-such-a-big-prison-population> [https://perma.cc/3YYP-HXXH] (explaining prison sizes create financial incentives for reform because incarceration is expensive).

4. See *infra* Section I.B.

5. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland ed., 2001).

6. See *infra* Subsection I.C.2.

7. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, at 3 (2017) [hereinafter INDICATORS OF MENTAL HEALTH PROBLEMS].

and recidivism rates also indicate that the mental-health services currently offered in prisons are inadequate to help this segment of the prison population.⁸

Mental-health courts and early-release programs are two mechanisms of social reform created in response to these issues. Currently, mental-health courts function at state and municipal levels to divert eligible offenders from the criminal justice system to community treatment services.⁹ The mental-health courts function through a team of lawyers, judges, and case workers who emphasize rehabilitation.¹⁰ As currently designed, individuals charged with a crime may access the mental-health courts through referrals, but prisoners cannot.

On the other hand, early-release programs release eligible prisoners before the completion of their sentences.¹¹ While early-release programs were once being phased out by many states, they have reemerged because of large prison populations, long sentences, and high incarceration costs.¹² Academic studies on early-release programs have analyzed different state approaches to identify metrics that contribute to early-release program successes and failures.¹³

At the state level, Texas is a leader in criminal justice reform.¹⁴ It has both mental health-courts for defendants and an early-release program for mentally ill prisoners, which divert individuals to community treatment services.¹⁵ Other states also have mental-health courts, but they do not have early-release programs comparable to the Texas model.¹⁶ These states have

8. See *infra* Section I.D.

9. See *infra* Section I.E.

10. See *infra* Section I.E.

11. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 415 (2012).

12. *Id.* at 418–19.

13. See generally Klingele, *supra* note 11; Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

14. See Michelle Mark, *Texas Is Shedding Its Lock-'Em-Up Image Thanks to a 37-Year-Old Tattooed Lawyer and an Unlikely Political Alliance*, BUS. INSIDER (July 29, 2017, 3:03 PM), <https://www.businessinsider.com/texas-criminal-justice-reform-conservatives-liberals-bipartisan-alliance-2017-7> [<https://perma.cc/88BR-CHBS>] (providing a history of reform in Texas and describing how high incarceration costs have driven liberals and conservatives to support Texas's Smart on Crime Coalition).

15. See *infra* Subsections I.G.1, I.G.2.

16. See, e.g., MICHAEL ROMANO, STANFORD JUSTICE ADVOCACY PROJECT, *CONFRONTING CALIFORNIA'S CONTINUING PRISON CRISIS* 7 (2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf> [<https://perma.cc/9XK7-GVST>] (stating recent

thus missed the opportunity to further reduce prison populations by diverting prisoners away from inadequate correctional care.

This note proposes that state legislatures should expand access to mental-health courts so that mentally ill prisoners can (1) be referred for early-release consideration, (2) have the assistance of the mental-health court team to transition back into the community, and (3) receive community treatment services. Specifically, states should expand the authority of mental-health courts to hear current-prisoner cases, define the referral process for prisoner-participants, and define the mental-health court team for prisoner-participants. Additionally, this note identifies four structural decisions for state legislatures to address before implementing or expanding their mental-health court statutes. These decisions involve the funding of treatment services and defining eligibility. This note will use Texas's statutes to guide states through such statutory reform.

Part I of this note overviews mental illness in United States prisons, criminal justice reform, the prison population, and correctional mental-health services. It also introduces the mental-health court and early-release program models, and it provides Texas's statutes as examples. Part II analyzes the Texas statutes and makes proposals for states that do not have early-release programs for mentally ill prisoners.

I. HISTORY

A. Modern Criminal Justice Reform

In recent years, each branch of the federal government has come to play a necessary role in reforming the United States criminal justice system.¹⁷

early-release reform leaves mentally ill prisoners behind because criteria is based on in-prison behavior); *Early Release/Earned Compliance Credit*, MO. DEP'T CORR., <https://doc.mo.gov/divisions/probation-parole/early-discharge> [<https://perma.cc/9CFJ-ML6E>] (describing early-release programs in Missouri as solely based on time served or earned credit).

17. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 812–14 (2017) (explaining presidents retain “substantial influence” over the criminal justice system); see also Eugene Volokh, *12 Reasons to Worry About Our Criminal Justice System*, WASH. POST (July 14, 2015, 4:50 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/14/12-reasons-to-worry-about-our-criminal-justice-system-from-a-prominent-conservative-federal-judge/?noredirect=on&utm_term=.33fac0b868b2 [<https://perma.cc/D4XF-GNRB>] (explaining judicial influence on the criminal justice system); *Criminal Justice Reform Initiative*, U.S. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE: MINORITY SITE,

Such reform has garnered strong public support, irrespective of political or ideological background.¹⁸ The societal demand for criminal justice reform has been largely driven by the size of the United States prison population.¹⁹ In these reform discussions, mentally ill prisoners are one segment of the prison population capturing public attention.²⁰

B. Rising Prison Populations in the United States

Incarceration in the United States is unparalleled: the country comprises five percent of the world's total population, yet our prison population is nearly twenty-five percent of the world's prison population.²¹ Substantial growth of the U.S. prison population began in the 1970s and persisted through the 2000s, expanding from a population of 200,000 in 1973 to 2,000,000 in 2002.²² In January 2018, the DOJ released a study that found there are approximately 1,506,800 prisoners in state and federal prisons.²³ At the time of this report, state prisons held 1,317,565 prisoners, about eighty-seven percent of the total U.S. prison population.²⁴

This period of massive growth in prison size has been labeled the era of mass incarceration.²⁵ Scholars cite criminal-law changes, social changes,

<https://republicans-judiciary.house.gov/criminal-justice-reform-initiative/> [https://perma.cc/6AJL-96TF] (listing House Judiciary Committee work on sentencing, prison, and over-criminalization reform).

18. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017) [hereinafter *ACLU Polling*], <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [https://perma.cc/9LSW-NZXB] (explaining public opinion poll with consensus across political parties and demographics on the necessity of criminal justice reform). The recent passage of the First Step Act provides strong evidence that criminal justice reform is a bipartisan movement. See Fandos, *supra* note 1.

19. See J.F., *supra* note 3.

20. *ACLU Polling*, *supra* note 18 (summarizing public-opinion poll, which found that a majority of Americans believe mentally ill offenders should be sent to treatment instead of incarceration).

21. *Federal Sentencing Reform*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/federalsentencingreform/ [https://perma.cc/G2H6-VJ34].

22. Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 80-81 (2016).

23. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NCJ 251149, PRISONERS IN 2016, at 1 (2018) [hereinafter PRISONERS IN 2016].

24. *Id.* at 3.

25. GARLAND, *supra* note 5.

and economic incentives as the factors driving mass incarceration.²⁶ Relevant changes to the criminal law include the War on Drugs, mandatory minimum sentences for violent crimes and prior convictions, and elimination of parole and probation sentences.²⁷ Social changes in mass media, family structures, and American culture during the twentieth century resulted in the acceptance of a more punitive legal scheme.²⁸ Surpluses in capital, land, and labor made private prisons more economically attractive.²⁹ Interestingly, there is little data to indicate that crime reduction or public safety improvements occurred during this period of prison growth.³⁰

C. Mental Illness in the United States Prison Population

1. Defining Mental Illness in the Corrections Context

First, it is important to address how mental health has been defined in the corrections context. The DOJ recognizes at least two methods for finding a mental-health problem. The Kessler 6 test (K6) is used to identify current mental-health problems,³¹ while a diagnosis by a psychiatrist or psychologist is used to identify a history of mental-health problems.³²

Definitions in academia are more abstract. Many scholars have argued that the traditional definition of mental health—the absence of mental illness—is inadequate in the corrections context.³³ Instead, they argue that mental health is the presence of all human capacities necessary to succeed in the community after release from prison.³⁴ This definition of mental

26. Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 248–62 (2009).

27. *Id.* at 248–51.

28. *Id.* at 260–61.

29. *Id.* at 262.

30. *Id.* at 260.

31. INDICATORS OF MENTAL HEALTH PROBLEMS, *supra* note 7, at 1. The K6 is a tool used to screen for serious mental illness and is also used in the general U.S. population. Score ranges indicate the presence of anxiety disorder or serious psychological distress. *Id.* at 2.

32. *Id.* at 1. The DOJ recognizes diagnoses for a set of conditions: (1) manic depression, bipolar disorder, or mania; (2) depressive disorder; (3) schizophrenia or other psychotic disorder; (4) post-traumatic stress disorder; (5) other anxiety disorder; (6) personality disorder; and (7) other mental or emotional condition. *Id.*

33. *E.g.*, Terry A. Kupers, *A Community Mental Health Model in Corrections*, 26 STAN. L. & POL'Y REV. 119, 128–29 (2015).

34. *Id.* A non-exhaustive list of healthy human abilities includes: treating mental illness; pursuing basic efforts to care for oneself; being on time; being disciplined, reliable, and trustworthy;

health is more appropriate for the corrections context because it places a premium on successful reentry into the community.³⁵

2. *The Prevalence of Mental Illness in United States Prisons*

Although data on mental illness in U.S. prisons is generally limited, special reports from the DOJ provide guidance on its prevalence. When the K6 was employed in prisons from 2011–12, the DOJ concluded that fourteen percent of state and federal prisoners met the threshold for serious psychological distress (SPD) and therefore had a current mental-health problem.³⁶ Additionally, thirty-seven percent of state and federal prisoners self-reported a prior diagnosis by a mental-health professional.³⁷ The most common diagnoses were major depressive disorder and bipolar disorder.³⁸

The DOJ's K6 and diagnosis publication on K6 does not break down the data between federal and state prisoners. The most recent DOJ report to do so is a 2006 DOJ special report on mental-health diagnoses, treatments, and symptom presence.³⁹ In mid-2005, fifty-six percent of state prisoners reported having a mental-health problem.⁴⁰ Mania, major depression, and psychotic disorder symptoms were most common.⁴¹ Additionally, twenty-

controlling emotions; reality-testing irrational thoughts; settling disputes; and completing tasks. *Id.* at 129.

35. *Id.*

36. INDICATORS OF MENTAL HEALTH PROBLEMS, *supra* note 7, at 1. The percentage of the standardized general population meeting the SPD threshold was five percent. *Id.* During the K6, prisoners were asked how often in the past thirty days they had felt nervous, hopeless, restless or fidgety, worthless, or depressed and as if everything was an effort. *Id.* at 2. The answers ranged from none to all of the time. *Id.*

37. *Id.* at 1.

38. *Id.* at 3. Of those surveyed, 24.2% reported a major depressive disorder diagnosis, and 17.5% reported a bipolar disorder diagnosis. *Id.*

39. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006) [hereinafter MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES]. The report defined "mental health problems" using these three categories. *Id.* Symptoms must have met criteria in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *Id.*

40. *Id.*

41. *Id.* Using the DSM's criteria, forty-three percent of state prisoners reported symptoms of mania, twenty-three percent reported major depression, and fifteen percent reported psychotic disorder. *Id.*

five percent of state prisoners with a mental-health problem had served three or more prior incarcerations.⁴²

3. Sources of the Sizable Mentally Ill Prison Population

Deinstitutionalization, the War on Drugs, and changes to a psychiatric legal defense are commonly cited reasons for the large concentration of prisoners with mental illness.⁴³ Deinstitutionalization, the closing of public mental-health hospitals, began in the 1970s.⁴⁴ Deinstitutionalization sought to shift services to a community-care model, but insufficient funding resulted in a shortage of community treatment.⁴⁵ Once deinstitutionalization began, overlap between mental-health institution populations and prison populations occurred. For example, one cross-institutionalization study found the aggregate number of prisoners with prior mental hospitalization almost doubled between 1968 and 1978.⁴⁶ A second study found the mental hospitalization rate within a state had a statistically significant effect on that state's prison rates.⁴⁷

The War on Drugs also added to the sizable mentally ill prison population.⁴⁸ The War on Drugs was a period in U.S. political history where drug offenses became increasingly criminalized.⁴⁹ Some illegal-drug users also have mental illnesses.⁵⁰ Thus, a user's "mental illness [] becomes de facto criminalized" when drug use is criminalized.⁵¹ Studies from the early 2000s on drug-abuse and substance-abuse show there are still high rates of

42. *Id.*

43. Kupers, *supra* note 33, at 120.

44. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 205 (Jeremy Travis et al. eds., 2014) [hereinafter THE GROWTH OF INCARCERATION].

45. *Id.*

46. Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1778–80 (2006). The researchers concluded deinstitutionalization was not a significant factor in prison growth. *Id.* at 1779–80. The author, however, found it notable that the aggregate number of prisoners with prior mental hospitalizations was fifty percent higher than expected. *Id.* at 1779.

47. *Id.* at 1780. This study suggested that deinstitutionalization during the time period of interest resulted in 48,000 to 148,000 additional state prisoners. *Id.*

48. THE GROWTH OF INCARCERATION, *supra* note 44, at 119. Drug addiction as a mental illness will not be a primary focus of this note because drug courts are a separate model for these needs.

49. *Id.*

50. Kupers, *supra* note 33, at 121 (referring to the "dual diagnosis" of psychiatric disorder and substance abuse).

51. THE GROWTH OF INCARCERATION, *supra* note 44, at 205.

use disorders in the correctional context.⁵² And, because neuroscience research shows addiction is a brain disease,⁵³ mental illness related to drug use remains a relevant concern when discussing the modern prison population.⁵⁴

Changes in a psychiatric legal defense constitute the third prominent source of the mentally ill prison population. State legislatures amended their not-guilty-by-reason-of-insanity statutes to make it more difficult to be found not guilty.⁵⁵ The amended statutes create a higher standard by removing legal protections for defendants who lacked the control and ability to refrain from criminal acts due to mental illness.⁵⁶ As a result of this change, more defendants have gone to prison.⁵⁷

While some prisoners enter prison with a mental illness, all prisoners are subject to prison's psychosocial effects.⁵⁸ The psychological impact of prison conditions has increased over time with changes to the criminal justice system.⁵⁹ For example, overcrowding from drastic prison population growth threatens living conditions, safety, prison management, and access to meaningful programming.⁶⁰ In addition, the societal shift from rehabilitative to punitive correctional objectives increases the effects of isolation.⁶¹ Even if these factors do not cause clinical mental illness, the psychological impact has the potential to strain social networks,

52. *Id.* at 206 (comparing data on substance-use disorders in the general U.S. population to data in U.S. jails and prisons).

53. *Id.*

54. Time and resource constraints have prevented the movement of addiction cases from the criminal justice system to a mental-health system. *Id.* at 205.

55. Kupers, *supra* note 33, at 121.

56. *Id.*

57. *Id.*

58. Craig Haney, *The Psychological Impact of Incarceration 1* (U.S. Dep't of Health and Human Servs., Working Paper for the "From Prison to Home" Conference, 2001), <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf> [<https://perma.cc/7NLQ-Y7EX>]. Psychological changes include dependence on the institutional structure, hypervigilance, social withdrawal, and diminished self-worth. *Id.* at 5 n.6. Scholars have also argued that prison rules and discipline pose mental-health threats when imposed on mentally ill prisoners. See Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391 (2006).

59. Haney, *supra* note 58, at 2.

60. *Id.* at 2-3.

61. *Id.* at 3-4.

employment opportunities, and family relationships upon reentry.⁶² The structure of our criminal justice system thus has long-lasting effects on the mental health of those involved.

D. Mental-Health Services in United States Prisons

While data on correctional mental-health treatment is scarce, a study published in 2001 analyzed the prevalence of services among state prisons:⁶³

Mental Health Service	% of Facilities
Distribution of Psychotropic Medications	73%
Therapy or Counseling with a Mental Health Professional	71%
Intake Screening	70%
Assistance Accessing Treatment Upon Release	66%
Psychiatric Assessments	65%
Twenty-Four Hour Mental Health Care	51%

Despite these statistics, the researchers expressed concerns that facilities overestimate figures, and there is also substantial variation among states.⁶⁴ Further, the numbers alone do not provide insight into the quality of services offered.⁶⁵

Additional statistics support the conclusion that current services are inadequate.⁶⁶ First, scholars point to prisoners' Eighth Amendment claims as evidence of treatment inadequacy.⁶⁷ *Estelle v. Gamble* held that the Eighth Amendment guarantees prisoners a constitutional right to access

62. *Id.* at 15–16. Few prisoners develop clinical disorders while in prison, but even people who are skeptical of psychological harm developing in prison have conceded that imprisonment may lead to long-term psychological change. *Id.* at 5.

63. Daniel P. Mears, *Mental Health Needs and Services in the Criminal Justice System*, 4 HOUS. J. HEALTH L. & POL'Y 255, 275–76 (2004).

64. *Id.* at 276.

65. *Id.*

66. *Id.* at 277.

67. Desirae Hutchinson, *Inadequate Mental Health Services for Mentally Ill Inmates*, 38 WHITTIER L. REV. 161, 163–67 (2017). There have been few changes to services because of the cost of services, the negative stigma of mental illness, and the punitive objectives of incarceration. *Id.* at 161.

health care,⁶⁸ and most federal circuits have extended that right to include mental-health care.⁶⁹ However, Eighth Amendment claims for inadequate mental-health care persist.⁷⁰ High suicide rates in prisons also signal that current services are insufficient.⁷¹ Lastly, scholars cite high recidivism rates as an indicator of ineffective mental-health services in prisons.⁷²

Given the number of prisoners with mental illnesses and the inadequacy of prisons' mental-health services, improving outcomes for this segment of the prison population is a matter of public policy.⁷³ There are at least four justifications for policy measures that reform correctional mental-health services.⁷⁴ First, a humanistic concern for the well-being of others justifies improved service implementation.⁷⁵ Second, mental illness is more prevalent in the prison population than in the general population.⁷⁶ Third, improved correctional services are consistent with protecting society and maintaining a safe environment within prisons.⁷⁷ Lastly, existing legal mandates regarding a minimum level of services should be upheld.⁷⁸

E. The Creation of Mental-Health Courts

In response to the need for criminal justice reform for mentally ill prisoners, several states have enacted mental-health courts. The first mental-

68. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

69. *Hutchinson*, *supra* note 67, at 163.

70. A WestLaw search in December 2018 for Eighth Amendment mental-health cases in the prior twelve months produced 699 results. Search Results, WESTLAW, <https://lawschool.westlaw.com> (“‘Eighth Amendment’ and ‘mental health’” in search field; then filter cases by date for the last twelve months).

71. *See, e.g., Kupers*, *supra* note 33, at 135–38.

72. *See, e.g., id.* at 127 (stating outcomes were superior for community mental-health program participants over incarcerated individuals, measured by recidivism and parole violation rates).

73. *See, e.g., Mental Health Needs in the Criminal Justice System*, NAT'L CONF. ST. LEGISLATURES (May 1, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/mental-health-needs-of-criminal-justice.aspx> [<https://perma.cc/Z4K4-F4E9>] (claiming the treatment of mentally ill offenders is a matter of criminal justice and health policy).

74. James R. P. Ogloff, Ronald Roesch & Stephen D. Hart, *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy*, 18 *LAW & PSYCHOL. REV.* 109, 111–12 (1994).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

health court was created in 1997.⁷⁹ As of 2015, over three hundred mental-health courts operate in the United States.⁸⁰ Currently, all but seven states have at least one mental-health court for adults.⁸¹ These courts are predominately at the state and local levels.⁸²

Mental-health courts use the problem-solving court model, which is also used by drug and family courts.⁸³ The essence of a problem-solving court is to treat an underlying cause of crime by diverting offenders to specialized dockets and programs.⁸⁴ By utilizing the problem-solving court model, mental-health courts have developed three distinct features: (1) treatment, (2) incentives for program participation, and (3) judicial oversight and evaluation of defendants' progress in the program.⁸⁵

A defendant is diverted to a mental-health court by referral from the defense attorney, criminal justice official, or family member.⁸⁶ Once a defendant's case is placed on the mental-health court docket, the judge, prosecutor, defense attorney, and case manager collaboratively act as a team to establish a treatment program for the offender.⁸⁷ Specifically, the case manager's role is to connect the defendant to mental-health services in the local community.⁸⁸ During the program, the team may impose incentives and sanctions to encourage participation and completion.⁸⁹ The defendant's

79. Richard Williams, *Addressing Mental Health in the Justice System*, 23 NAT'L CONF. ST. LEGISLATURES LEGISBRIEF, no. 31, Aug. 2015, at 1, <http://www.ncsl.org/LinkClick.aspx?fileticket=PbspvKxqyoc%3d&tabid=29708&portalid=1> [<https://perma.cc/UU3S-LSZ8>].

80. *Id.*

81. *Adult Mental Health Treatment Court Locator*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults?field_gains_mhc_state_value=All [<https://perma.cc/R8AM-GHH7>] (keeping an up-to-date database of mental-health courts in the states and the District of Columbia).

82. *Id.*

83. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NCJ 249803, CENSUS OF PROBLEM-SOLVING COURTS, 2012 (2016) [hereinafter CENSUS OF PROBLEM-SOLVING COURTS].

84. *Id.* at 1–2.

85. John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 100, 113 (2007).

86. LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV'TS JUSTICE CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE, at vi (2009), https://www.bja.gov/Publications/CSG_MHC_Research.pdf [<https://perma.cc/D7SV-NE6C>].

87. *Id.* at 5, 14. It is important to note that mental-health courts do not operate or fund the mental-health services in the treatment program. *Id.* at 16.

88. *Id.* at 16.

89. *Id.* at 17 (listing fewer court appearances and certificates as examples of incentives and more court appearances, verbal warnings, and community service as examples of sanctions).

charge is dismissed, or sentence reduced, upon completion of the treatment program.⁹⁰

To establish a mental-health court, a state must first pass legislation authorizing the court's creation.⁹¹ This legislation establishes the programming, eligibility requirements, and best practices.⁹² Additionally, funding and administrative support are available through the DOJ Bureau of Justice Assistance.⁹³

All mental-health courts follow the same basic structure of operating a specialized docket for defendants with mental illness.⁹⁴ Further, the Council of State Governments Justice Center has published ten elements for making a mental-health court successful: (1) administrative stakeholders; (2) a defined target population; (3) timely participation; (4) specified terms of participation; (5) provision of information to make informed choices; (6) individualized treatment services; (7) a place of confidentiality; (8) a court team; (9) adherence to program monitoring; and (10) sustainability.⁹⁵

The leeway states have for establishing eligibility and programming has resulted in variously styled courts. For example, states can choose whether their mental-health court employs a pre-adjudication or post-adjudication model, dependent on whether accepting a plea bargain is a prerequisite to mental-health court access.⁹⁶ Further, the courts vary regarding eligibility requirements based on the type of mental illness and offense committed.⁹⁷ The most recent change to mental-health courts has been their expansion to hear violent-crimes cases.⁹⁸ This expansion often occurs once a mental-health court has become established and effective in a jurisdiction.⁹⁹

90. Arthur J. Lurigio, Amy Watson, Daniel J. Luchins & Patricia Hanrahan, *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184, 185 (2001).

91. Williams, *supra* note 79, at 2.

92. *Id.*

93. Bozza, *supra* note 85, at 105. In order for states to qualify for federal funding, they must meet certain application requirements, which include a long-term strategy plan, list of community initiatives who will assist in the proposal, and description of the program's evaluation process, among others. 34 U.S.C. § 10473 (2018).

94. ALMQUIST & DODD, *supra* note 86, at 5.

95. *Id.* at 31–32.

96. *Id.* at 12.

97. *Id.* at 7–10 (summarizing findings that while most mental-health courts accept people with diagnoses, mental-health courts vary on accepting defendants charged with misdemeanors, felonies, or both).

98. *Id.* at 8.

99. *Id.* at 9.

Although the mental-health court model is relatively new, there are some studies that have evaluated its effectiveness.¹⁰⁰ For example, a review of studies on mental-health courts analyzed the studies' findings on recidivism rates and the use of mental-health courts.¹⁰¹ The review discovered that a majority of such studies found a statistically significant positive relationship—meaning that participation in a mental-health court makes it less likely that an individual will commit another crime and return to prison.¹⁰² Studies that focus on recidivism metrics are especially important because reducing recidivism is a primary objective of the mental-health court model.¹⁰³ Moving forward, researchers will seek to understand what factors contribute to improved and worsened recidivist outcomes.¹⁰⁴

F. State-Level Early-Release Programs

To further address current prison levels, states have passed legislation allowing early release for certain prisoners.¹⁰⁵ Before the 1970s, early release was the norm for prisoners who had proven their rehabilitation.¹⁰⁶ However, state use of early-release programming declined in the 1970s due to concerns the model was unfair.¹⁰⁷ Some states continued to use early-release programming, but they only made it available to prisoners who had served certain percentages of their sentences.¹⁰⁸

100. See, e.g., *id.* at 4 (claiming too little research); Laura N. Honegger, *Does the Evidence Support the Case for Mental Health Courts? A Review of the Literature*, 39 *LAW & HUM. BEHAV.* 478, 479 (2015) (claiming research on the impact on psychiatric symptoms is “in its infancy”).

101. *Id.* at 483. This study defined recidivism as new arrests, incarcerations, or convictions following mental-health court participation. *Id.* at 478. The data on recidivism rates from fifteen articles were compiled and analyzed. *Id.* at 482–83. Only one article’s data had a statistically significant negative relationship. *Id.* at 483.

102. *Id.*

103. *Id.*

104. *Id.* at 484 (listing factors that, based on current research, the authors predict will lead to improved and worsened recidivist outcomes).

105. Klingele, *supra* note 11 (evaluating six states’ early-release programs that were adopted to address mass incarceration). Early-release programs also exist at the federal level and for other offenders, such as those on parole. This note’s focus, however, is on state-level criminal justice reform.

106. *Id.* at 417–18. The early-release model previously used was an indeterminate sentencing system, in which courts imposed maximum sentences and parole boards assessed prisoner rehabilitation to determine the actual durations to be served. *Id.*

107. *Id.* at 418.

108. *Id.*

Supporters of criminal justice reform have begun to advocate for the reemergence of early-release programs. Their advocacy has had some success: the First Step Act, passed in December 2018, includes provisions that expand early-release programs for federal prisoners.¹⁰⁹ The financial cost of mass incarceration has been a significant factor in this recent reconsideration of early-release programming.¹¹⁰

The academic literature on early release provides an abundance of studies identifying and evaluating state attempts to reintroduce early-release programs.¹¹¹ Such studies have reached conclusions regarding what factors contribute to early-release-program success and failure. For example, some scholars argue that early-release programs are more successful when eligibility targets prisoners “at the root of the mass incarceration problem”—including those with life sentences.¹¹² On the other hand, it has been argued that early-release programs are less successful when reducing prison overcrowding is the sole motive.¹¹³ The current system’s failure to adequately assist with transition services, including the search for community health care, further challenges the success of early-release programs.¹¹⁴

G. Mental-Health Courts and Early-Release Programs in Texas

To provide a visualization on how mental-health courts and early-release programs operate in practice, this section reviews Texas’s mental-health court and early-release statutes. Texas was selected because it is a leader among the states in criminal justice reform.¹¹⁵

109. See Fandos, *supra* note 1.

110. Klingele, *supra* note 11, at 419.

111. See, e.g., sources cited *supra* note 13.

112. Eaglin, *supra* note 13, at 213–14. The theory is that prisoners with life sentences should be considered for early release because they comprise a large portion of the prison population and because studies have shown they have lower recidivism rates among prisoners. *Id.*

113. *Id.* at 205–06 (describing failures in Illinois legislation where early release was granted to prisoners who had only served a few weeks as a means of managing an overcrowded prison population).

114. Patricia Leigh Brown, *They’re Out of Prison. Can They Stay Out of the Hospital?*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/ex-prisoners-health-california.html> [<https://perma.cc/2KV6-8ZAM>] (explaining that the formerly incarcerated face challenges with accessing healthcare, and the Transitions Clinic Network is an entity working to fill such systemic gaps).

115. See Mark, *supra* note 14; see also Kathryn Gisi, *Senate Passes Criminal Justice Reform Bill Modeled After Texas Efforts*, SPECTRUM NEWS AUSTIN (Dec. 18, 2018, 7:07 PM),

1. Texas's Mental-Health Court Statute

Chapter 125 of the Texas Government Code authorizes and governs the state's mental-health courts.¹¹⁶ Section 125.001 states that Texas's mental-health courts must have nine elements:

(1) the integration of mental illness treatment services . . . in . . . the judicial system; (2) the use of a nonadversarial approach . . . ; (3) early identification . . . of eligible participants . . . ; (4) access to . . . treatment services . . . ; (5) ongoing judicial interaction with program participants; (6) diversion . . . to needed services as an alternative to . . . the criminal justice system; (7) monitoring . . . of program goals and effectiveness; (8) continuing [] education . . . ; and (9) development of partnerships with public agencies and community organizations . . .¹¹⁷

Section 125.002 grants the authority to establish mental-health courts and provides the eligibility requirements.¹¹⁸ Defendants are eligible if they: (1) "are arrested for or charged with a misdemeanor or felony," and (2) "are suspected . . . of having a mental illness" by a law-enforcement agency or court.¹¹⁹

Section 125.003 provides guidelines and rules for program operations.¹²⁰ Subsection (a)(1) covers what issues a mental-health court may handle.¹²¹ Subsection (b) gives authority to magistrates to handle the legal issues.¹²² Section (a)(2) puts forth rules the court must follow.¹²³ These rules state the mental-health court must: (1) ensure that eligible defendants have legal counsel before volunteering to proceed in the program and during

<https://spectrumlocalnews.com/tx/austin/news/2018/12/19/criminal-justice-reform-bill-modeled-after-texas-efforts> [<https://perma.cc/AGA9-SV9G>] (stating the First Step Act is modeled after Texas programs that successfully reduced incarceration and crime rates).

116. TEX. GOV'T CODE ANN. §§ 125.001–.004 (West, Westlaw through 2019 Reg. Sess. of 86th Leg.). The provisions were originally enacted in 2003, but there were substantial amendments and additions in 2013 and 2019. *Id.*

117. GOV'T § 125.001.

118. GOV'T § 125.002.

119. *Id.*

120. GOV'T § 125.003.

121. *Id.*

122. *Id.*

123. *Id.*

program participation; (2) allow eligible defendants to decide to proceed through the mental-health court system or criminal justice system; (3) allow participants to withdraw from the program; (4) provide participants with individualized treatment plans; and (5) “ensure that the jurisdiction of the mental health court extends at least six months,” but not beyond the probationary period, for the offense charged.¹²⁴

Section 125.004 states that a program participant may be required to pay the costs of treatment and services while in the program, based on the participant’s ability to pay.¹²⁵

2. Texas’s Early-Release Statutes

Early-release programs in Texas are divided into three categories: mandatory supervision, discretionary mandatory supervision, and parole programs.¹²⁶ Mandatory supervision is the automatic early release from prison for categories of offenders with available good-time credits.¹²⁷ Discretionary mandatory supervision also gives early release for certain categories of offenders, but the Board of Pardons and Paroles (Board) makes release decisions.¹²⁸ Lastly, parole occurs when the Board approves the conditional release of an offender to serve the remaining sentence under community supervision.¹²⁹

In Texas, there is an early-release program specific to mentally ill prisoners. It is a parole program known as Medically Recommended Intensive Supervision (MRIS).¹³⁰ The program is limited to mentally ill prisoners who have committed certain offenses.¹³¹ A mentally ill prisoner can be referred by medical or mental-health staff, offenders, or external sources such as elected officials, family members, concerned citizens, and

124. *Id.*

125. GOV’T § 125.004.

126. *Parole Division—Types of Releases*, TEX. DEP’T CRIM. JUST. [hereinafter *Parole Division*], https://www.tdcj.state.tx.us/divisions/pd/release_types.html [https://perma.cc/8AUZ-PPMU].

127. *Id.*

128. *Id.*

129. *Definitions & Acronyms*, TEX. DEP’T CRIM. JUST., <https://www.tdcj.texas.gov/definitions/index.html#Parole> [https://perma.cc/5ARN-KX6E].

130. GOV’T § 508.146.

131. *Id.* Subsection (a)(1)(A) states the eligible offenses are listed in Article 42A.054, Code of Criminal Procedure. *Id.* These are non-violent offenders. *Parole Division, supra* note 126.

social-service agencies.¹³² Specific correctional bodies are involved in the decision to release, and, depending on the offense, the decision-makers may have to find that the prisoner has a mental illness and does not pose a threat to public safety.¹³³ Prior to release, a MRIS plan must be in place.¹³⁴ After release, the prisoner must remain under the care of a physician, and parole officials have discretion to impose conditions on medically suitable placements.¹³⁵ Correctional officers request proposals from public and private vendors to provide the necessary services under contract.¹³⁶

II. ANALYSIS AND PROPOSAL

This note proposes legislative amendments for states without early-release programs for mentally ill prisoners. Specifically, this note proposes that, as an alternative to the Texas model,¹³⁷ states should expand eligibility for their mental-health courts to include current state prisoners.¹³⁸ With this expansion, mentally ill state prisoners could use the mental-health court referral process. A team like the team for defendant-participants would review prisoner eligibility, establish a treatment plan, and monitor the prisoners' progress throughout the plan.

This note analyzes Texas's MRIS statute to identify positive characteristics of an early-release program that expanded mental-health courts should adopt. Because mental-health court statutes vary among the states, this note uses Texas's mental-health court statute as a guide to specify where and how to implement proposed amendments. Lastly, this proposal addresses the benefits of an expanded mental-health court over a separate early-release program like MRIS.

132. TEX. DEP'T OF CRIMINAL JUSTICE, PROGRAM GUIDELINES AND PROCESSES FOR MEDICALLY RECOMMENDED INTENSIVE SUPERVISION 2 (2010) [hereinafter MRIS PROGRAM GUIDELINES], https://www.tdcj.texas.gov/documents/rid/TCOOMMI_PGP_0104_MRIS.pdf [<https://perma.cc/NM6N-PQAZ>].

133. GOV'T § 508.146. The correctional bodies are the Texas Correctional Office on Offenders with Medical or Mental Impairments and Correctional Managed Health Care Committee. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. The "Texas model" refers to the combination of two programs: the mental-health court for mentally ill defendants and MRIS for mentally ill prisoners.

138. Under this proposal, states with mental-health courts should expand these preexisting courts. For the seven states that do not have mental-health courts, this proposal encourages those states to enact mental-health courts under the proposed, expanded model.

A. Proposal to Address the Growing United States Prison Population

Reducing mass incarceration is a primary focus for mental-health courts and early-release reforms. Under the Texas model, having a mental-health court statute and an early-release program diverts two categories of individuals from the criminal justice system: defendants and prisoners. Because other states lack specific early-release programs analogous to Texas's MRIS,¹³⁹ they are missing an opportunity to further reduce current prison population levels.

The first proposed amendment to expand the mental-health court model is to give mental-health courts the authority to hear prisoners' cases. Texas's mental-health court statute is a helpful guide for this proposal, with the exception of one component of § 125.001. This section describes essential elements of Texas's mental-health courts, including diversion to mental-health services as an alternative to the criminal justice system for defendants.¹⁴⁰ However, the statute should be amended to also permit diversion to mental-health services for prisoners.

Expanding mental-health courts' authority allows states to simultaneously address the size and growth of current and future prison populations. Because state prisoners comprise eighty-seven percent of the U.S. prison population,¹⁴¹ expanding state-level reform can significantly decrease the nation's total prison population.

B. Proposals to Address Mental Illness in United States Prisons

The first proposal—expanding access to mental-health courts—simultaneously addresses the total U.S. prison population and the concentration of mentally ill prisoners by diverting such prisoners from typical exposure to the criminal justice system. In states lacking specific early-release programs, the only possibility for early release is through general, non-mental-health-focused programs. Texas's MRIS, however, is a referral-based system and provides an avenue for early release specifically for mentally ill prisoners.¹⁴²

139. See sources cited *supra* note 16.

140. GOV'T § 125.001.

141. PRISONERS IN 2016, *supra* note 23.

142. MRIS PROGRAM GUIDELINES, *supra* note 132.

The second proposal expands the referral process to prisoner-participants. The mental-health court statute should also identify who can refer people for treatment. Although Texas's mental-health court statute is a useful guide, Chapter 125 currently does not state who may refer defendant-participants to the mental-health court. The Council of State Governments Justice Center's standard includes law enforcement, judges, defense attorneys, prosecutors, mental-health professionals, family members, and friends.¹⁴³ Chapter 125 should be amended to clarify the referral parties for both defendant and prisoner-participants. For defendant-participants, the Council of State Government Justice Center's standard is a good guide. For prisoner-participants, the referral process under Texas's MRIS program is a good guide.

Creating a multi-party, referral-based program acknowledges that individuals other than correctional officials may have a greater understanding of a mentally ill prisoners' needs. Further, a referral-based process eliminates potential concerns that correctional officials have external incentives that could hinder their decisions to initiate early-release consideration.¹⁴⁴ Lastly, this proposal addresses the issue of concentrated mental illness in United States prisons because a referral scheme involving more parties (as opposed to correctional officers' discretion) can potentially increase the number of mentally ill prisoners pursuing early release to community treatment services.

C. Proposal to Address Inadequate Mental-Health Services in United States Prisons

The abundance of Eighth Amendment claims, high prisoner suicide rates, and high recidivism rates signal that the current provision of correctional mental-health services is inadequate.¹⁴⁵ Current criminal justice reform, like that in Texas, endeavors to resolve this issue by diverting defendants away from correctional institutions before they are convicted.¹⁴⁶ In Texas, MRIS also diverts current prisoners to community treatment

143. ALMQUIST & DODD, *supra* note 86, at 5, 14.

144. Eisenberg, *supra* note 22, at 93 (stating private prison officials have an interest in prison expansion because it leads to profits, and public officials have an interest in prison expansion for job security).

145. See *supra* Section I.D.

146. See *supra* text accompanying note 84.

services.¹⁴⁷ However, because other states do not have early-release programs analogous to MRIS, there is a gap in mental-health services for current prisoners: they are neither diverted into community-based care nor provided robust services in prison.

Expanding the mental-health court to current prisoners gives current mentally ill prisoners the opportunity to access community treatment services immediately, instead of upon release. However, more than the ability to access these services is required for expanded mental-health courts to shift current prisoners from correctional to community treatment services. Prisoners need assistance to find available care. Thus, mental-health court legislation should also create a team of professionals that will assist the prisoner-participants. This note proposes that the appropriate team for a prisoner-participant should be composed of a judge, defense attorney, case manager, and correctional officer.

The primary difference between the proposed defendant-participant and prisoner-participant team compositions is the substitution of correctional officers for prosecutors when working on a prisoner-participant's case. This note proposes different teams to reflect the different stage prisoner-participants are in compared to defendant-participants. Including correctional officers as a prisoner-participant team member also allows the officers to retain authority in the early-release program because otherwise, their role in early-release decision-making would be eliminated.

1. Application of Early-Release Success Factors

The primary effect of making a team explicitly for prisoner-participants is to create a solution to inadequate correctional mental-health services. For example, because prisoner-participants work with case managers, prisoner-participants will have access to knowledge about available community services. Assistance from the case manager also establishes access to a broader range of care.¹⁴⁸

147. See *supra* Subsection I.G.2.

148. See *supra* text accompanying note 63 (showing screening, counseling, and psychotropic medicine are the primary correctional treatment services).

The expanded mental-health court model must also account for the different factors contributing to early-release success and failure.¹⁴⁹ Texas's MRIS focuses on reducing mental illness in the prison population (not just overcrowding), and it targets a substantial segment of the prison population. The MRIS supervisory plan also provides some transition assistance by requiring physician supervision. However, this note proposes that for prisoner-participants, the expanded mental-health court should use the mental-health court team and not defer to the MRIS supervisory plan to provide optimal transition assistance.

Expanding the mental-health court with the proposed prisoner-participant team could generate successful early-release outcomes. First, by targeting the treatment and recidivism issues that mentally ill prisoners face, the courts prioritize problem-solving over functioning exclusively as an overcrowding solution. Second, the expanded mental-health court focuses on the state level, which constitutes a large portion of the national prison population. Third, the role of the case manager as a connection to treatment services and the role of the judge as supervisor of program progression provide greater transition assistance than the MRIS supervision plan. Further, because preliminary mental-health court research shows a positive effect on recidivism rates,¹⁵⁰ states who faced recidivism issues in early-release programming may also see improved outcomes.

D. Additional Proposals Involving State Discretion

This note also proposes that there are four structural decisions that state legislatures should make before enacting the expanded mental-health court model. These decisions relate to eligibility requirements and financing community treatment services.

Providing states with discretion in these areas is consistent with the organization of mental-health courts nationally. For example, states currently retain discretion regarding offense eligibility, which provides the

149. A sole focus on overcrowding, exclusion of those “at the root of mass incarceration,” and lack of transition assistance have been identified as indicators that hinder early release program success. *See supra* text accompanying notes 111–113.

150. Honneger, *supra* note 100, at 483.

flexibility necessary to model the mental-health court in a manner appropriate for that state's communities.¹⁵¹

Defining mental-health court eligibility based on the offense committed is the first of these structural decisions required of state legislatures. In Texas, the eligible offenses are different for MRIS and mental-health court eligibility.¹⁵² Therefore, the Texas legislature would have to choose an eligibility scheme in light of these pre-existing standards.¹⁵³ States that do not have early-release programs like MRIS would have to decide if their current list of eligible offenses for defendant-participants should apply or differ for prisoner-participants.

The second structural decision required of state legislatures is defining eligibility based on prior mental-health court involvement. For example, there may be prisoners who had the opportunity to divert to the mental-health court as offenders but rejected the opportunity to do so. There may also be prisoners who are in prison as a sanction for conduct as a mental-health court participant. Eligibility issues could arise if participation is not explicitly defined by statute.

The third structural decision for state legislatures is deciding what percentage of sentences, if any, prisoners must serve to be eligible. By deciding if a minimum amount of time must be served, states avoid problems that prior early-release programs faced when overcrowding was the primary objective.¹⁵⁴

The final decision for state legislatures is whether treatment services will be paid by the participant or whether the corrections facilities will contract and pay for services. In Texas, the participant pays in the mental-health court model, but the correction facility pays in the MRIS model.¹⁵⁵ When deciding if contracting is feasible, the legislature will likely consider

151. Cf. ALMQUIST & DODD *supra* note 86, at 12–13 (describing the different ways mental-health courts function in different states).

152. Compare TEX. GOV'T CODE ANN. § 125.002 (West, Westlaw through 2019 Reg. Sess. of 86th Leg.), with *id.* § 508.146.

153. For example, defendant-participants could be subject to current mental-health court eligibility rules and prisoner-participants subject to current MRIS eligibility rules. Alternatively, both types of participants could be subject to the same eligibility rules, based on mental-health court, MRIS, or new standards.

154. Cf. Eaglin, *supra* note 13, at 205–06 (describing abuse of the early-release program in Illinois when prison officials did not honor the amount of time required to be served before release).

155. Compare GOV'T § 125.004 with *id.* § 508.146(d).

the potential increased participation that results from expanding the referral process to prisoners. The legislature should also consider whether an ability-to-pay model would hinder prisoner participation.

State legislators may express concerns about financing treatment services and increasing budgets related to an expanded mental-health court model. Such concerns can be overcome because both mental-health court and early-release programs have been pursued, in part, to combat high and unsustainable incarceration costs. For example, high incarceration costs significantly contributed to Texas's leadership in criminal justice reform and the reemergence of early-release programs.¹⁵⁶ Increased expenses thus must be weighed against the backdrop of these reforms operating as cost-saving mechanisms.

E. Proposal Feasibility

When analyzing these proposals, it is important to discuss the feasibility of enacting them. In light of the significant criminal justice reform at the federal level, the United States is politically and socially in a position where citizens recognize that the criminal justice system is unsustainable and ineffective.¹⁵⁷ Thus, the state-level proposals described above face a more politically favorable environment relative to the past.

Additionally, there are benefits to expanding mental-health court statutes instead of early-release statutes. From a resource position, it may be more practical to expand preexisting mental-health court services than create an entirely new early-release program. Further, expanding access to mental-health courts may prevent unfavorable political backlash that may otherwise result from expanding early-release programs, which some might equate to "letting prisoners off the hook."

CONCLUSION

By expanding access to mental-health courts, prisoner-participants would gain the assistance of the mental-health court team to transition and receive community treatment services. This is especially true for states that

156. See sources cited *supra* note 115; Klingele, *supra* note 11, at 419.

157. See *supra* Section I.A.

do not have early-release programs for mentally ill prisoners. Additionally, specific provisions of Texas's mental-health court statute should be amended as a guide for other states. Texas should expand the authority of the mental-health courts to hear current-prisoner cases, define the referral process for prisoner-participants, and define the mental-health court team for prisoner-participants.

Additionally, state legislatures should approve structural changes as they amend their mental-health court statutes. These decisions involve which offenses make prisoner-participants eligible, if prisoners must serve an amount of time before becoming eligible, and if funding for treatment services will come from the correctional facility or the prisoner-participant.

The Texas legislature has adopted one approach to reform by separating programs for mentally ill defendants (the mental-health court) and prisoners (MRIS).¹⁵⁸ While most states have enacted mental-health courts, not all have early-release programs for mentally ill prisoners.¹⁵⁹ To resolve this gap, mental-health courts and early-release programs should be tied together. This combined model focuses on carrying over to the mental-health court the positive characteristics of Texas's early-release program. Additionally, the proposal focuses on expanding mental-health courts, rather than creating an entirely new program. This is both efficient and politically beneficial.

Expanding the mental-health court model as proposed presents an opportunity for spreading the model's successful outcomes into the correctional context. First, the mental-health court's diversionary nature reduces the *current* prison population rather than only limiting future growth. Its focus on mentally ill prisoners targets the large mentally ill prisoner population and diverts prisoners from inadequate treatment in correctional facilities. Second, adopting the referral process that mental-health courts and Texas's MRIS program use ensures that people who know the prisoner's mental-health needs can be advocates. Third, adequate release assistance is achieved by creating mental-health court teams for prisoner-participants rather than adopting the MRIS supervisory plan. The proposed team provides prisoner-participants with a case worker to assist with

158. See *supra* Section I.G.

159. See sources cited *supra* note 16.

accessing treatment services and a judge to monitor their program progression.

A significant benefit of the mental-health court is that, as a problem-solving court, it targets the underlying source of crime to prevent future crime.¹⁶⁰ Preliminary research demonstrates that mental-health courts are also effective at reducing recidivism.¹⁶¹ Expanding mental-health courts therefore presents the opportunity to reduce recidivism among prisoners, which is especially important because recidivism is a significant concern for mentally ill prisoners.¹⁶²

Ultimately, the large U.S. prison population, sizable mentally ill prisoner population, and inadequate correctional treatment services indicate a serious need for criminal justice reform.¹⁶³ Because the national prison population is largely comprised of state prisoners, state reform has the potential to create the largest impact. Our country's political climate, which is more tolerant of criminal justice reform and helping mentally ill prisoners, further indicates that the present is an ideal time to pursue additional reform.

160. CENSUS OF PROBLEM-SOLVING COURTS, *supra* note 83.

161. Honegger, *supra* note 100, at 478–84.

162. See MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, *supra* note 39, at 8 (showing that 79.4% of state prisoners with mental-health problems were repeat offenders, 67.8% of federal prisoners with mental-health problems were repeat offenders, and 56.7% of local prisoners with mental-health problems were repeat offenders).

163. See *supra* Sections I.B, I.C, I.D.

