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## "Had to Be Held Down by Big Police": A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities

Michael L. Perlin

Alison J. Lynch

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**“HAD TO BE HELD DOWN BY BIG POLICE”: A  
THERAPEUTIC JURISPRUDENCE  
PERSPECTIVE ON INTERACTIONS BETWEEN  
POLICE AND PERSONS WITH MENTAL  
DISABILITIES**

*Michael L. Perlin, Esq.\* & Alison J. Lynch, Esq.\*\**

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**INTRODUCTION**

It is a truism that the nation’s largest urban jails are also the largest mental health facilities in the nation.<sup>1</sup> Most of the predictable

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\* Professor Emeritus of Law, Founding Director, International Mental Disability Law Reform Project, New York Law School; Co-founder, Mental Disability Law and Policy Associates.

\*\* Staff attorney, Disability Rights New York.

Our thanks to Katherine Davies for calling our attention to the New York City’s new initiatives on police training. Excerpts from this paper were presented at the Human Dignity & Humiliation Studies Network Conference in conjunction with the Morton Deutsch International Center for Cooperation and Conflict Resolution of Columbia University (December 3, 2015), the annual Inns of Courts banquet at Stetson University Law School (January 26, 2016), the Tri-State Forensic Psychiatry Fellowship program of Albert Einstein Medical School (March 2, 2016), and the Psychology Doctoral Program Workshop at John Jay College of Criminal Justice (March 2, 2016).

1. See, e.g., Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 978 (2006) (observing that, “in 1992, the Los Angeles County jail became the nation’s largest mental institution, with Cook County Jail, Illinois, and Riker’s Island, New York, as second and third

solutions that are offered to curb the influx of individuals with mental illness into jails, especially those that urge the loosening of civil commitment standards and the return to large psychiatric institutions,<sup>2</sup> are dreary at best, unconstitutional at heart, and mean-spirited at worst.<sup>3</sup> Deinstitutionalization is seen as the enemy,<sup>4</sup> and as the *raison d'être* for the current state of affairs.<sup>5</sup> One of the authors (MLP) has written about this previously, rejecting this argument, and endorsing instead the views of Professor Samuel Bagenstos:

To be sure, we could solve the problem of homelessness among people with psychiatric disabilities by simply institutionalizing them for the long term. But other policies could solve that problem just as well—notably supportive housing, in which individuals obtain tenancy in apartments linked with supportive services. And yet, as homelessness was increasing in the 1980s, the federal and state governments were cutting Supplemental Security Income (SSI) and housing assistance—the very programs that could pay for community-based housing for people with psychiatric disabilities.

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respectively.”). For a discussion of the overrepresentation of persons with mental illness in the justice system in general, see, for example, Sarah McCormick et al., *Mental Health and Justice System Involvement: A Conceptual Analysis of the Literature*, 21 PSYCHOL. PUB. POL’Y & L. 213 (2015); Linda A. Teplin, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, 84 AM. J. PUB. HEALTH 290 (1994).

2. See, e.g., E. Fuller Torrey, *Let’s Stop Being Nutty About the Mentally Ill*, MANHATTAN INST. CITY J. (Summer 1997), <http://www.city-journal.org/html/let-E2-80-99s-stop-being-nutty-about-mentally-ill-11913.html> [<https://perma.cc/ANX9-AQQW>].

3. See Michael L. Perlin, “*Their Promises of Paradise*”: *Will Olmstead v. L.C. Resuscitate the Constitutional “Least Restrictive Alternative Principle” in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1043 (2000) (critiquing the language of one of the most important proponents of this view, Dr. E. Fuller Torrey, as “florid and hyperbolic cant”); Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL’Y & L. 80, 118 (1995) (rejecting Torrey’s premise that patients’ rights lawyers impede the advancement of mental disability law).

4. A “psychiatric Titanic” in the words of Dr. Torrey. E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS* 11 (John Wiley & Sons, Inc. eds., 1997). For a discussion of how Torrey’s views have “had wide public currency,” see Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 57 n.52 (2004). See also *Olmstead v. L.C.*, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring) (quoting the “psychiatric Titanic” language).

5. But see Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 123 (1991) (arguing that those seeking expansion of the civil commitment power “inadequately consider[] the additional procedural and substantive due process dilemmas regarding the right to treatment, the right to refuse treatment, and rights of economic sovereignty that are raised by the possibility of a greatly expanded use of this commitment status”).

The indictment of deinstitutionalization, as opposed to the failure to invest in community-based services and supports, does not rest on an empirical determination of what happened in the world so much as on a normative premise that institutionalization is preferable to community-based housing and supports. Given the undoubted harms of long-term institutionalization for people with psychiatric disabilities, and the viability of evidence-based community services . . . there is no good reason to prefer institutionalization as the solution to the homelessness problem among people with psychiatric disabilities.<sup>6</sup>

However, we pay remarkably little attention to one of the primary causes of this reality: the *decision-making processes* “on the street” by police officers who choose to apprehend and arrest certain cohorts of persons with mental disabilities, often for what are characterized as “nuisance crimes,”<sup>7</sup> rather than working with them and seeking other, treatment-oriented alternatives. Such arrests fail to protect public safety when “mental illness at the root of a criminal act is exacerbated by a system designed for punishment, not treatment,”<sup>8</sup> and may

6. Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 3–12 (2012), *discussed in this context in* Michael L. Perlin, “*Wisdom Is Thrown into Jail*”: *Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, 17 MICH. ST. U. J. MED. & L. 343, 348–49 (2013).

7. See LeRoy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 258 (2004) (discussing arrests for “urinating in alleys, sleeping at airports, [or] harassing people in front of convenience stores”). This reality must be considered in the context of long-standing policies in New York City in which quotas for arrests and summonses were imposed on policemen on the beat. See, e.g., *Floyd v. City of New York*, 813 F. Supp. 2d 417, 426–27 (S.D.N.Y. 2011) (marshalling evidence of NYPD “quotas” including (1) testimony of various officers, (2) audio recordings of precinct commanders ordering “certain numbers of arrests, stops and frisks, and summonses during roll call,” (3) Patrolmen’s Benevolent Association labor grievance alleging transfer of six officers and one sergeant for failure to meet quotas, and (4) the labor arbitrator’s decision finding that the 75th precinct had imposed quotas), *as discussed in* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 318 n.181 (2014). *But see* William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES, Feb. 6, 2010, at A1 (reporting that precinct commanders and administrators manipulated statistical crime data to favorably impact crime rate statistics for their precinct), *as discussed in* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1194 n.133 (2011).

8. Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC L. REV. 143, 159 (2002); *see also* Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL’Y. & L. 107, 124 (“Arrest, [for people with untreated mental illnesses who have committed minor offenses], is inappropriate because the real problem is not criminality, but untreated mental illness.”).

“exacerbate or construct mental illness.”<sup>9</sup> Professor Amanda Geller and her colleagues make the latter point clearly: “[t]he criminal justice system has been recognized increasingly as a threat to physical and mental health.”<sup>10</sup>

Inappropriate arrests are caused by a variety of barriers to effective police response, including a lack of training and misconceptions of mental illness by the public and by police officers making the arrests.<sup>11</sup> In the vast majority of jurisdictions, police departments do not provide any clear guidelines for interacting with persons with mental illness; as a result of this, “the police officer is left to his or her own devices to resolve the situation.”<sup>12</sup> This becomes all the more important because of the substantial discretion police officers typically have in the handling of certain misdemeanor cases, such as failing to obey an officer or creating a public nuisance.<sup>13</sup> Dispositional decision-making often depends on such variables as the “publicness” of the behavior, whether the offender is a “known neighborhood character,” and whether the individual behaved problematically during the interaction.<sup>14</sup>

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9. Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1, 49 (2010).

10. Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 12 AM. J. PUB. HEALTH 2321, 2321 (2014); see *id.* at 2322–23 (demonstrating that research in New York City under its stop and frisk program showed elevated rates of symptoms of post-traumatic stress disorder among the young adults most often stopped and most intrusively police), as discussed in Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance and Race in the New Policing*, 43 FORDHAM URB. L.J. 539 (2016).

11. Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 176 (2005).

12. Peter C. Patch & Bruce A. Arrigo, *Police Officer Attitudes and Use of Discretion in Situations Involving the Mentally Ill*, 22 INT'L. J.L. & PSYCHIATRY 23, 28 (1999).

13. See, e.g., Fred Cohen, *Offenders with Mental Disorders in the Criminal Justice-Correctional Process*, in LAW, MENTAL HEALTH, AND MENTAL DISORDER 397 (Bruce Sales & Daniel Shuman eds., 1996). For a discussion of how discretion is not one decision (whether or not to arrest), but rather a series of decision points—“when to stop a suspect, how to approach the suspect, when to use force, and finally whether formal sanctions such as arrest are necessary,” see Melissa Schaefer Morabito, *Horizons of Context: Understanding the Police Decision to Arrest People with Mental Illness*, 58 PSYCHIATRIC SERVICES 1582, 1583 (2007).

14. Virginia G. Cooper et al., *Dispositional Decisions of the Mentally Ill: Police Perception and Characteristics*, 7 POLICE Q. 295, 298 (2004); see also Tom Tyler et al., *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, 12 J. EMPIRICAL LEGAL STUD. 602, 607 (2015) (“[T]he norms being enforced reflected the norms of the general community, which was bothered by ‘disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, and the mentally disturbed.’”).

There is robust, valid and reliable literature demonstrating that certain methods of training programs designed for police officers — the “Memphis model” of crisis intervention training (CIT) is the most well-known<sup>15</sup> — have resulted in dramatic reductions of arrests for such nuisance crimes and have avoided contributing to the over-incarceration of this population.<sup>16</sup> In the Memphis model, each shift, patrol area, or precinct is equipped with at least one officer who is a member of the crisis intervention team. Each member of the CIT unit undergoes extensive training in identifying symptoms of mental disturbances, utilizing non-violent interventions, de-escalation techniques, and utilizing all available community options.<sup>17</sup> Critical elements that lead to CIT program effectiveness generally include intensive training (standard training lasts forty hours), voluntary

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15. Amy Carter, *Fixing Florida’s Mental Health Courts: Addressing the Needs of the Mentally Ill by Moving Away from Criminalization to Investing in Community Mental Health*, 10 J.L. SOC’Y, 21–22 (2009). (“[The ‘Memphis model’] is a pre-arrest jail diversion program that trains police officers to be cognizant of mental health issues when responding to crisis calls.”).

16. See, e.g., Henry Steadman et al., *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 PSYCHIATRIC SERVICES 645, 649 (2000) (explaining that data “strongly suggest[s]” that intervention models such as the Memphis model “reduce the inappropriate use of U.S. jails to house persons with acute symptoms of mental illness”); Jennifer L.S. Teller et al., *Crisis Intervention Team Training for Police Officers Responding to Mental Disturbance Calls*, 57 PSYCHIATRIC SERVS. 232 (2006) (concluding that CIT partnership between police, mental health providers, families and consumers make it more likely that persons experiencing mental health crises will gain access to treatment and avoid improper arrests). The Memphis program is typically seen as a “progressive and documented change” in the way police departments interact with persons with mental illness. Hayden Smith, *Public Health and Criminal Justice*, 27 CRIM. JUST. STUD. 1, 3 (2014). In jurisdictions that have adopted a Memphis-type approach, the arrest rate is 7 in cases involving police encounters with persons with mental illness, see Steadman et al., *supra*, at 649, as compared to other jurisdictions in which the estimated arrest rate is nearly triple, at 20. Gordon Strauss et al., *Psychiatric Disposition of Patients Brought in by Crisis Intervention Team Police Officers*, 41 CMTY. MENTAL HEALTH J. 223, 224 (2005). But see Amy Watson et al., *Outcomes of Police Contacts with Persons with Mental Illness: The Impact of CIT*, 37 ADMIN. POL’Y MENTAL HEALTH 302, 313 (2010) (showing that CIT trained officers had higher likelihood of directing persons with mental illness toward the mental health system “but there is not a reduced likelihood of arrest”).

17. Rachel Hatfield, *Training Law Enforcement in Mental Health: A Broad-Based Model 1*, Marshall University: Theses, Dissertations and Capstones Paper No. 485 (2014) (citing Judith Adelman, *Study in Blue and Grey: Police Interventions with People with Mental Illness*, CAN. MENTAL HEALTH ASS’N (2003)). For a discussion of the amount of training typically received by police, see Judy Hails & Randy Borum, *Police Training and Specialized Approaches to Respond to People with Mental Illnesses*, 49 CRIME & DELINQ. 52 (2003) (“[Police departments] varied widely in the amount of training provided on mental-health-related topics, with a median of 6.5 hours for basic recruits and one hour for in-service training.”).

participation, involvement of police dispatchers in training, twenty-four hour a day availability of trained officers, and assignment of a lead officer with crisis intervention training on every team responding on all mental health calls.<sup>18</sup> A study by Jennifer Teller and her colleagues has concluded that such training “has led to increased transport of persons who are experiencing a mental illness crisis to emergency evaluation and treatment facilities, and transport is more likely to be on a voluntary basis compared with [that by] officers who have not participated in the training.”<sup>19</sup>

Of course, for such programs to be implemented successfully, police officers have to be “knowledgeable about the nature of mental illness, de-escalating crisis situations, and providing options for mental health treatment alternatives to incarceration that are available in the community.”<sup>20</sup> Yet, these approaches are far from widespread, so far appearing in only a handful of cities with any consistency,<sup>21</sup> and as a result, populations of persons with mental disabilities in urban jails like Rikers Island continue to skyrocket.<sup>22</sup>

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18. Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV'T L. REV. 405, 431 (2015) (citing JOEL B. PLANT & MICHAEL S. SCOTT, U.S. DEP'T OF JUSTICE, EFFECTIVE POLICING AND CRIME PREVENTION 13, 50 (2009), <http://www.popcenter.org/library/reading/pdfs/mayorsguide.pdf> [<https://perma.cc/VU3G-RMVU>], and Michael T. Compton et al., *Crisis Intervention Team Training: Changes in Knowledge, Attitudes, and Stigma Related to Schizophrenia*, 57 PSYCHIATRIC SERVS. 1199 (2006)); see also Abigail S. Tucker et al., *Crisis Intervention Team (CIT) Training in the Jail/Detention Setting: A Case Illustration*, 14 INT'L J. EMERGENCY MENTAL HEALTH 209, 210 (2012) (noting that in taking action against mentally ill persons, officers are motivated by their duty to protect and serve their communities and their power to involuntarily protect a person who has become a danger to themselves or others).

19. Teller et al., *supra* note 16, at 236. On the success of similar programs in other nations, see, for example, Victoria Herrington & Rodney Pope, *The Impact of Police Training in Mental Health: An Example from Australia*, 24 POLICING & SOC'Y 501 (2014) (concluding that using the Mental Health Intervention Team “led to increased confidence among police in dealing with mental health-related events, reduced police involvement in transportation of [persons with mental illness] and improved handover between police and mental health care services”).

20. Christina Canales, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1746 (2012).

21. There is significant confusion in the legal community as to the extent to which this model has been adopted. A witness in a federal damages lawsuit testified in 2011 that only nineteen cities had implemented such a program. See *Wilson v. City of Chicago*, No. 07 C 1682, 2011 WL 1003780, at \*2 (N.D. Ill. Mar. 15, 2011). On the other hand, a publication by NAMI (an advocacy group for persons with mental illness) claims that the program has been adopted in thirty-five states and is currently being implemented statewide in five states. See Carter, *supra* note 15, at 22 n.100 (citing NAMI, *Crisis Intervention Team Tool Kit* [hereinafter *CIT Tool Kit*], <http://www.nami.org/Template.cfm?Section=CIT&Template=/ContentManagement/ContentDisplay.cfm&ContentID=56149> [<https://perma.cc/SJQ7-5PFG>]). Further,

Unfortunately, courts have not been supportive of arguments that such programs are required. In one case, a district court in Montana ruled that a local police chief's failure to provide sufficient crisis intervention training, and to have procedures in place to ensure that an officer trained in crisis intervention techniques was present on the scene, did not result in police officers' alleged use of excessive force on the arrestee, nor did it deprive the arrestee of his right to medical treatment after arrest, based on a failure-to-train claim under 42 U.S.C. § 1983.<sup>23</sup> In another case, the Eighth Circuit ruled that an arrestee was not denied reasonable accommodations in violation of the Americans with Disabilities Act (ADA) by police failure to use their crisis intervention training after an incident in which officers received information that the arrestee had assaulted his mother and where they had observed his "aggressive and irrational behavior," and subsequently repeatedly used a stun gun against the arrestee, who went into cardiac arrest and died.<sup>24</sup>

Courts have also been reluctant to allow plaintiffs to rely on the Americans with Disabilities Act (ADA) in other civil litigation seeking damages for improper arrests of persons with mental disabilities.<sup>25</sup> However, recently, the Supreme Court dismissed, as

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there are significant operational differences in those cities in which they have been adopted. *See* Steadman et al., *supra* note 16, at 647–48 (showing a variance of specialized responses ranging from twenty-eight percent for Birmingham, forty percent for Knoxville, and ninety-five percent for Memphis).

22. It is estimated that nearly forty percent of Rikers inmates have some sort of mental illness. *See* Bandy X. Lee & Maya Prabhu, *A Reflection on the Madness in Prisons*, 26 STAN. L. & POL'Y REV. 253, 254 (2015). On the need for correctional officials to be trained in CIR methods *within* the jail/detention setting, see generally Tucker et al., *supra* note 18. As of October 15, 2015, 400 New York City officers have been trained, and Police Commissioner Bratton has promised that another 5,000 to 9,500 will be trained in the coming months. *See* COMMUNITIES FOR CRISIS INTERVENTION TEAMS IN NYC, <http://www.ccitnyc.org/> [<https://perma.cc/HFM6-QUZS>].

23. *Peschel v. City of Missoula*, 686 F. Supp. 2d 1092 (D. Mont. 2009).

24. *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892 (8th Cir. 2014); *see also* *Garczynski v. Bradshaw*, 573 F.3d 1158 (11th Cir. 2009) (holding that absent a constitutional violation, the court would not address an estate's claim that the failure of the sheriff's office to implement a crisis intervention training program violated the decedent's Fourth Amendment rights).

25. The case for allowing the ADA to make "systemic change" in the way police treat persons with mental disabilities in such situations is set out best in Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 160 (2005). *But see, e.g.*, *Lum v. County of San Joaquin*, 756 F. Supp. 2d 1243 (E.D. Cal. 2010) (holding that the ADA does not apply to arrests, nor does it apply to individual officers); *Estate of Awkward v. Willingboro Police Dep't*, No. 07-5083, 2010 U.S. Dist. LEXIS 104304 (D.N.J. Sept. 30, 2010) (granting defendant's

improvidently granted, a writ of certiorari on the question of whether the ADA required that law enforcement officers provide accommodations to a suspect with mental illness being brought into custody in a case in which public entity defendants conceded that the ADA may require officers to provide accommodations in such situations.<sup>26</sup> This decision, according to Professor Paul Appelbaum, “left open a window of opportunity during which the ADA can be leveraged to improve how police officers deal with persons with mental illness.”<sup>27</sup> Yet, it is far too early to draw any conclusions as to whether this will happen, or what the ultimate result of this decision will be on “on the ground” police/suspect encounters.

We also know that there is powerful, valid, and reliable research that calls into question the entire criminalization-as-a-result-of-deinstitutionalization hypothesis,<sup>28</sup> a hypothesis that has never been rigorously tested.<sup>29</sup> In their review of this literature, John Junginger and his colleagues clearly state:

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motion for summary judgment in a ADA claim which involved death by positional asphyxia from officers who were attempting to facilitate decedent’s involuntary commitment); *Hogan v. City of Easton*, No. 04-759, 2006 WL 2645158 (E.D. Pa. Sept. 12, 2006) (holding that the officer did not know about plaintiff’s mental health condition, and therefore was not liable for inadequate training claim); *James v. County of Benton*, 2006 U.S. Dist. LEXIS 14665 (E.D. Wash. Mar. 9, 2006) (denying plaintiff’s claim that officers were not trained adequately according to the ADA); *Sallenger v. City of Springfield*, 2005 U.S. Dist. LEXIS 18202 (C.D. Ill. Aug. 4, 2005) (granting defendants’ motion for summary judgment in part, and denying in part). *But see* *Buben v. City of Lone Tree*, No. 08-cv-00127-WYD-MEH, 2010 U.S. Dist. LEXIS 104853 (D. Colo. Sept. 30, 2010) (showing that a question of adequate training existed where officers beat and repeatedly tasered mentally ill plaintiff).

26. *See* *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773–74 (2015).

27. Paul S. Appelbaum, *Can the Americans with Disabilities Act Reduce the Death Toll from Police Encounters with Persons with Mental Illness?* 66 *PSYCHIATRIC SERVS.* 1012 (2015).

28. This hypothesis generally holds that individuals who have been deinstitutionalized end up becoming involved in illegal, criminal behavior. Criticism of deinstitutionalization as a major cause of homelessness has been prevalent for over three decades. *See, e.g.*, H. Richard Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, in *The Homeless Mentally Ill* 55, 56–60 (H. Richard Lamb ed. 1984) (suggesting that deinstitutionalization did not anticipate, but caused criminalization and homelessness among many). *But see*, Thomas M. Arvanites, *The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial*, 26 *CRIMINOLOGY* 307, 318 (1988) (claiming that there is no evidence that deinstitutionalization “has resulted in the wholesale criminalization of the mentally ill”). On how this hypothesis is a “crude explanation,” see Betsy Ginsberg, *Out with the New, In with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 *FORDHAM URB. L.J.* 713, 719 n.24 (2009).

29. *See* Arthur J. Lurigio, *Examining Prevailing Beliefs about People with Serious Mental Illness in the Criminal Justice System*, 75 *FED. PROB.* 11, 12 (2011).

Unless it can be shown that factors unique to serious mental illness are specifically associated with behavior leading to arrest and incarceration, the criminalization hypothesis should be reconsidered in favor of more powerful risk factors for crime than are inherent in social settings occupied by persons with severe mental illness—risk factors such as unemployment, poverty, homelessness, and substance abuse.<sup>30</sup>

In an earlier article, one of the co-authors (MLP) raised a full range of factors that are ignored in the political discourse over this issue, noting:

- “[W]hile the proportion of [persons with serious mental illness] in psychiatric institutions fell by 23 percent, the percentage of incarcerated [persons with serious mental illness] increased only 4 percent in the last half of the last century;”<sup>31</sup>
- “[M]any persons with mental illness are brought to jails rather than mental hospitals in the first place because of how much more time-consuming mental hospital “drop offs” are and for a variety of other reasons;”<sup>32</sup>
- “[T]he evidence is crystal-clear that ‘people with mental illness ‘engage in offending and other forms of deviant behavior not because they have a mental disorder but because they are poor,’ and that the strongest risk factors for violence ‘are shared by those with and without mental illness;”<sup>33</sup>
- “[W]e know little about the true prevalence of mental illness among offenders throughout all stages of the criminal justice system, or about the extent to which the needs of mentally ill offenders are going unmet;”<sup>34</sup>
- “[T]here is similarly substantial valid and reliable evidence that, if proper screening and placement procedures are

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30. John Junginger et al., *Effects of Serious Mental Illness and Substance Abuse on Criminal Offenses*, 57 *PSYCHIATRIC SERVS.* 879, 882 (2006).

31. Perlin, *supra* note 6, at 350 (quoting Lurigio, *supra* note 29, at 13).

32. *Id.* at 351 n.41 (“These reasons relate to the work conditions of the police officers involved and to what is perceived as the lack of ‘supportiveness’ of the relevant mental health facilities; and a lack of coordination between the police and mental health professionals, rather than to the acts or the clinical conditions of the apprehended individuals.”) (citing RISON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM* 87–89 (2008)).

33. *Id.* at 351 (quoting Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 *LAW & HUM. BEHAV.* 110, 116 (2011)).

34. *Id.* (quoting Daniel P. Mears, *Mental Health Needs and Services in the Criminal Justice System*, 4 *HOUS. J. HEALTH L. & POL’Y* 255, 257–58 (2004)).

employed, every resident of a large inpatient facility could be successfully placed in community settings;”<sup>35</sup>

- “[W]e have not even begun to do serious research into, by way of example, the specific issues that relate to the status of elderly persons with mental disabilities in the criminal justice system;”<sup>36</sup>
- There are “staggering fiscal costs [to] the current state of affairs,”<sup>37</sup> and most importantly of all;
- ““There is no evidence for the basic criminalization premise that decreased psychiatric services explain the disproportionate risk of incarceration for individuals with mental illness,’ that ‘there is little evidence that the risk of incarceration has uniquely increased for those with mental illness,’ and that ‘no research exists demonstrating that mental illness is a principal or proximate cause of criminal behavior for most offenders with mental illnesses.’”<sup>38</sup>

Of course, the empirical evidence that supports each of these assertions is utterly ignored in the media and in political debates. In most jurisdictions, police continue to over-arrest and over-jail persons with mental illness for nuisance crimes,<sup>39</sup> and the crisis that we address in this paper continues unabated. Again, Professor Geller and her colleagues underscore that “any benefits achieved by

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35. *Id.* (citing James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 476 n.351 (1985)).

36. *Id.* at 352 (citing Tina Maschi et al., *Aging, Mental Health, and the Criminal Justice System: A Content Analysis of the Literature*, 2 J. FORENSIC SOC. WORK 162 (2012)).

37. *Id.* (citing Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 221 n.343 (2012)).

38. *Id.* (quoting E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 565 (2012)) (citing Nancy Wolff, *Courting the Court: Courts as Agents for Treatment and Justice*, in COMMUNITY-BASED INTERVENTIONS FOR CRIMINAL OFFENDERS WITH SEVERE MENTAL ILLNESS 143, 155, 163 (William H. Fisher ed., 2003)).

39. *See, e.g.*, Bernstein & Seltzer, *supra* note 8, at 160 (“Public safety is not protected when people who have mental illnesses are needlessly arrested for nuisance crimes.”); Kondo, *supra* note 7, at 258; Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184, 187 (2001). This phenomenon is not limited to the United States. *See, e.g.*, MAGISTRATES COURT OF TASMANIA, MENTAL HEALTH PROCEDURAL MANUAL 3 (2010) (most prevalent offenses committed by persons with mental disabilities are minor offenses such as trespass, shoplifting, disorderly conduct).

aggressive proactive policing tactics may be offset by serious costs to individual and community health.”<sup>40</sup>

We believe that one possible solution is the adoption of policies that are consonant with the school of therapeutic jurisprudence. Therapeutic jurisprudence (TJ), as we discuss below, offers a fresh and creative way to approach these issues, and if embraced by policymakers, offers a potential solution to what has been an intractable problem for decades.

For nearly thirty years, lawyers, forensic psychologists, criminologists and scholars have turned to TJ as a new modality to solve a full range of seemingly-intractable social problems, ranging from mental disability law and corrections law to gay rights and domestic violence.<sup>41</sup> TJ teaches us that voice, validation and voluntariness—and embracing an “ethic of care”—are central to any efforts to remediate the sort of issues we discuss here.<sup>42</sup> But there has been virtually no attention paid to the potential use of TJ as a tool to remediate the most serious of problems.

In this paper, we urge that this tool be used. In Part I, we discuss the current state of affairs with regard to the over-arrests of persons with mental disabilities, and focus on some of the alternatives, such as CIT, that have proven to be successful in solving this issue. In Part II, we explain why embracing TJ would offer a bold new approach to the problems, and in Part III, we offer some suggestions for behavioral change to remediate the situation.<sup>43</sup>

Our title comes, in part, from Bob Dylan’s picaresque song, *When I Paint My Masterpiece*,<sup>44</sup> a song that depicts, in part, “a modern world [in] unaesthetic chaos,”<sup>45</sup> in which the narrator is “unable to

40. See Geller et al., *supra* note 10, at 2326.

41. See *infra* text accompanying notes 56–62.

42. See *infra* text accompanying notes 63–66.

43. Beyond the scope of this paper is a consideration of special mental health probation offices that have been developed in over one hundred jurisdictions, and are also widely seen as a promising means of reducing recidivism. See, e.g., Sarah Manchak et al., *High-Fidelity Specialty Mental Health Probation Improves Officer Practices Treatment Access and Rule Compliance*, 38 LAW & HUM. BEHAV. 450 (2014).

44. BOB DYLAN, *When I Paint My Masterpiece*, on BOB DYLAN’S GREATEST HITS VOL. II (Columbia Records 1971), <http://www.bobdylan.com/us/songs/when-i-paint-my-masterpiece> [<https://perma.cc/Y82G-N55H>].

45. Christopher Rollason, “*When I Paint My Masterpiece*”: Dylan, Europe and a Wild Goose Chase, EXPECTINGRAIN.COM, (Mar. 9, 1997), [http://www.expectingrain.com/dok/songs/When 20I 20Paint 20My 20Masterpiece](http://www.expectingrain.com/dok/songs/When%20I%20Paint%20My%20Masterpiece)’ — [<https://perma.cc/YM33-QC52>].

escape the shadow of his own personal history.”<sup>46</sup> In the verse from which this lyric comes, it is “*newspapermen*” (innocently “eating candy”) being “held down by big police.” To the critic Clinton Heylin, this reflects “how heavy [the] burden [of being the observer] had become.”<sup>47</sup> In the context of our paper, this “burden” is a heavy one for all society, but especially for those with mental illness who are treated in so many jurisdictions so inappropriately by police forces.<sup>48</sup> We hope, modestly, that this paper may lead to some changes in this set of circumstances.

### I. CURRENT STATE OF AFFAIRS

Crisis intervention training (CIT), while not a new concept to those entrenched in the representation of people with mental illness in the criminal justice system, remains in an uncertain position within police departments around the country. The cities that have chosen to implement the programs generally report positive results;<sup>49</sup> however, there are certain issues of implementation, such as the financial requirements<sup>50</sup> and the difficulty of training a rural police force,<sup>51</sup> that

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46. OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 676 (2004).

47. CLINTON HEYLIN, REVOLUTION IN THE AIR: THE SONGS OF BOB DYLAN 1957–1973, 417 (2009).

48. They are truly, quoting another Dylan song (*Chimes of Freedom*), “[the] ones whose wounds cannot be nursed . . . the countless confused, accused, misused, strung-out ones an’ worse.” One of the co-authors (MLP) has turned to this song on other occasions to reflect its expression of “affinity” for a “legion of the abused.” See, e.g., Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 197 (2000) (quoting, in part, ROBERT SHELTON, NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN 220 (1997)).

49. See Carter, *supra* note 15. The Memphis CIT Center keeps a record of existing CIT programs, and currently has a map showing over three thousand programs in forty-seven states. *CIT Map*, MEMPHIS.EDU, <http://cit.memphis.edu/citmap/> [<https://perma.cc/2JC7-L8PX>]. Success of CIT programs are measured either through learning outcomes, which look at officers’ attitudes, skills and knowledge, or behavioral outcomes, which examine injury reduction and jail diversion for mentally ill individuals. For comprehensive reviews of CIT success based on these measures, see Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. AM. ACAD. PSYCHIATRY & L. 47 (2008) and Kirk Heilbrun et al., *Community-Based Alternatives for Justice-Involved Individuals with Severe Mental Illness: Review of the Relevant Research*, 39 CRIM. JUST. & BEHAV. 351 (2012).

50. Suzanne Murphy et al., *Crisis Intervention for People with Severe Mental Illnesses*, 5 COCHRANE DATABASE OF SYSTEMATIC REVIEWS (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4204394/> [<https://perma.cc/PQ88-DQGY>] (showing that studies found crisis intervention programs to be more cost-effective than hospital care).

have kept CIT from becoming a more prevalent part of national police training schemes.

While there are various programs that are all referred to as crisis intervention training, the most well-known and frequently employed by police departments is the Memphis model of training.<sup>52</sup> This particular method of training was developed in 1988 by the Memphis Police Department, in partnership with the National Alliance for the Mentally Ill (NAMI), the University of Memphis, and the University of Tennessee.<sup>53</sup> The Memphis model utilizes a combination of lecture, role-playing exercises and interactions with individuals with mental illness over a forty hour training course to prepare an officer to handle what many police officers refer to as an EDP call, or a call for assistance with an “emotionally disturbed person.”<sup>54</sup> The CIT training program also supports partnerships between psychiatric emergency departments and police departments, which increase the likelihood that people in psychiatric crisis will be directed to an emergency room rather than a jail if an officer with crisis intervention training responds to the call.<sup>55</sup>

Today, there are more than 2800 CIT programs in operation in forty-seven states and in Washington, D.C. — Arkansas, Alabama, and West Virginia are the only states without at least one department engaged in CIT training.<sup>56</sup> While some states have implemented CIT along with improved community mental health services as part of a general plan to address the issues of mental illness in the criminal justice system, other states have been moved to implement crisis intervention training after particularly troubling interactions between individuals with mental illness and police officers.<sup>57</sup> For example, in Oregon, the death of James Chasse prompted Portland mayor Tom

51. The differences between ease of training in a large city versus a rural community have not been discussed in statistical review or scholarly articles beyond an acknowledgment that training programs must vary. A more detailed discussion of the issue is found *infra* text following note 62. See Martha Williams Deane et al., *Emerging Partnerships Between Mental Health and Law Enforcement*, 50 PSYCHIATRIC SERVS. 99 (1999).

52. Steadman et al., *supra* note 16, at 648.

53. *Id.* at 646–47.

54. *Id.* at 649.

55. Compton et al., *supra* note 18.

56. Laura Usher, *Crisis Intervention Teams: Lessons Learned on Working with Police*, THE ARC (Nov. 20, 2014), <http://www.thearc.org/document.doc?id=4925> [https://perma.cc/F2F7-XUA5].

57. See Ian Demsky, *Why Did James Chasse Jr. Die?*, WILLAMETTE WEEK (Oct. 31, 2006), [http://www.wweek.com/portland/article-6212-why\\_did\\_james\\_chasse\\_jr\\_die.html](http://www.wweek.com/portland/article-6212-why_did_james_chasse_jr_die.html) [https://perma.cc/J4QD-8F2S].

Potter to pledge \$500,000 to initiate a CIT program.<sup>58</sup> Officers reported that when they responded to a call about his behavior, he was “doing something suspicious or acting just, um, odd.”<sup>59</sup> Chasse was killed after he ran from officers who were approaching him. Chasse, who had schizophrenia, suffered broken ribs, a broken shoulder and sternum, and internal injuries during the struggle.<sup>60</sup> His death prompted an outcry from local media and advocates about the treatment of individuals with mental illness, eventually leading to the Portland CIT program.<sup>61</sup>

Most departments initially choose to train around twenty percent of their staff;<sup>62</sup> however, the area of training is one in which the disparities between urban and rural departments becomes clear. An urban department such as the New York Police Department has the resources to take some members of the police force off the streets to train them, while still having the necessary manpower for street patrols. However, a rural department with a limited number of officers will have much greater difficulty taking twenty percent of its force offline at one time to put them through training.

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58. *Id.*

59. *Id.*

60. *Id.*

61. Chasse’s family eventually settled with the city of Portland for \$1.6 million. See Henry Drummonds, *The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush*, 49 WILLAMETTE L. REV. 105, 113 n.18 (2012). For a comprehensive analysis of the Chasse case, see Joanna Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 873–74 (2012).

62. News articles from around the country generally show that departments initially attempt to train around twenty percent of staff. See, e.g., Press Release, City of New Orleans, NOPD recognizes first graduates of Crisis Intervention Team Training (Sept. 17, 2015), <http://www.nola.gov/nopd/press-releases/2015/20150917-nopd-recognizes-first-graduates-of-crisis/> [https://perma.cc/LM3K-QRR9]; Encarnacion Pyle, *Crisis Intervention Training: Role Playing Helps Police Learn How to Aid Mentally Ill*, THE POLICE POLICY STUDIES COUNCIL (Dec. 21, 2003), [http://www.theppsc.org/Archives/EDPs/crisis-intervention\\_training\\_\\_Ohio.htm](http://www.theppsc.org/Archives/EDPs/crisis-intervention_training__Ohio.htm) [https://perma.cc/T37M-WK72]; Danielle Waugh, *Push to Give Police More Mental Health Training*, WCSH6 (Feb. 12, 2015), <http://legacy.wcsh6.com/story/news/health/mental-health/2015/02/12/push-police-mental-health-training/23314641/> [https://perma.cc/TH96-F2PP].

This percentage appears to flow from the structure of the Memphis program. See Randolph Dupont et al., *Crisis Intervention Team Core Elements*, MEMPHIS.EDU (2007), <http://cit.memphis.edu/CoreElements.pdf> [https://perma.cc/WDV5-8BES] (“The number of trained CIT officers available to any shift should be adequate to meet the demand load of the local consumer community. Experience has shown that a successful CIT program will have trained 20–25 of the agency’s patrol division. There are differences that exist between large urban communities and small rural communities. Smaller agencies may need to train a higher percentage of officers. Ultimately, the goal is to have an adequate number of patrol officers trained in order to ensure that CIT-trained officers are available at all times.”).

The logistics of the current CIT programs all have some variations, but generally follow a set pattern. Most CIT initiatives also come with an increased awareness of and resources for community mental health services. For example, in New York City, officers trained in CIT will be taught that individuals with mental illness can be brought to a “diversion center” where that individual will not face charges for whatever nuisance crime he was picked up on, but instead will be able to meet with staff including social workers, counselors and nurses to assist in connecting that individual to mental health services.<sup>63</sup> However, as discussed below, there is not an attorney readily available for that individual,<sup>64</sup> and, as we discuss below, a therapeutic jurisprudence model could require or recommend that an individual brought to a diversion center speak with an attorney about any ongoing legal issues.<sup>65</sup> However, this possibility has not been addressed in the scholarly literature or in the training manuals of any currently operating center.

One of the other issues that cannot be ignored when examining the current state of crisis intervention training and implementation is the level of disdain many police officers have for mental health facilities and their “contempt” for the mental health system, which they perceive as “doing nothing,”<sup>66</sup> a contempt that is even more

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63. *Mayor’s Taskforce on Behavioral Health and the Criminal Justice System*, NYC.GOV (2014), <http://www1.nyc.gov/assets/criminaljustice/downloads/pdfs/annual-report-complete.pdf> [<https://perma.cc/9WM9-AXHJ>] [hereinafter *Mayor’s Taskforce*].

64. See *infra* text accompanying notes 116–120. We urge that counsel be made available for this population in these circumstances. See Alison J. Lynch & Michael L. Perlin, “*Life’s Hurried Tangled Road*”: *A Therapeutic Jurisprudence Analysis of Why Dedicated Counsel Must Be Assigned to Represent Persons with Mental Disabilities in Community Settings*, 35 BEHAV. SCI. & L. 353 (2017).

65. See *infra* text accompanying notes 116–120; *Mayor’s Taskforce*, *supra* note 63, at 9 (“The drop-off centers will be community-based, non-hospital settings that have the capacity to assess, provide linkage to care, and offer crisis beds for short-term stays.”). A subsequent release from Mayor Bill de Blasio’s office says this:

The City will also pilot a clinical drop-off center in Manhattan to provide an option for individuals who need neither to be held for arraignment on low-level charges nor emergency room services. This drop-off center will provide the police with a much needed alternative to jail for persons with mental health issues. A second drop-off center will open in another borough in early 2016.

*De Blasio Administration Launches \$130 Million Plan to Reduce Crime, Reduce Number of People with Behavioral and Mental Health Issues Behind Bars*, NYC.GOV (Dec. 2, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/537-14/de-blasio-administration-launches-130-million-plan-reduce-crime-reduce-number-people-with> [<https://perma.cc/KF8N-C5UQ>].

66. Cooper et al., *supra* note 14, at 306; see Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality and Why and How Mental Disability*

important because of the extra time it regularly takes (estimates are two and a half times) to process an individual in a hospital rather than a jail.<sup>67</sup> In response to a survey, multiple police officers commented, spontaneously: “[i]t is too much of a hassle to get someone involuntarily committed.”<sup>68</sup> Perhaps even more tellingly, a significant percentage of police officers that were questioned by researchers had no idea if there was a mental health liaison in their department.<sup>69</sup>

Most states have at least one department where at least some officers are trained in crisis intervention techniques. However, the news that continues to emerge about jails, such as Rikers Island, that remain some of the nation’s biggest mental health care providers tells us that it is not remotely enough.<sup>70</sup> More departments, both urban and rural, need to invest the time, money and manpower to adequately train officers to deal with individuals with mental illness. Models, such as the efforts currently taking place in New York City and the systems already in place in states like Oregon, should serve as a roadmap for other departments.<sup>71</sup> Research from these programs is positive for both the department and the community,<sup>72</sup> and, as discussed below, CIT offers a new way to integrate the field of therapeutic jurisprudence into law enforcement, thereby ensuring a

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*Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 15 (1999) (discussing how this contempt for the mental health system and mental health professionals is often mirrored in judicial statements and arguments by district attorneys); *see id.* at n.64 (listing examples).

67. Thomas M. Green, *Police as Frontline Mental Health Workers: The Decision to Arrest or Refer to Mental Health Agencies*, 20 INT’L J. L. & PSYCHIATRY 469 (1997).

68. Cooper et al., *supra* note 14, at 303.

69. *Id.* at 304 (“We have a mental health coordinator who is little or no help.”).

70. *See, e.g.*, Michael Winerip & Michael Shwartz, *For Mentally Ill Inmates at Rikers: A Cycle of Jails and Hospitals*, N.Y. TIMES (Apr. 10, 2015), [http://www.nytimes.com/2015/04/12/nyregion/for-mentally-ill-inmates-at-rikers-a-cycle-of-jail-and-hospitals.html?\\_r=0](http://www.nytimes.com/2015/04/12/nyregion/for-mentally-ill-inmates-at-rikers-a-cycle-of-jail-and-hospitals.html?_r=0) [<https://perma.cc/NK3Z-A82G>]; Michael Winerip & Michael Shwartz, *Rikers: Where Mental Health Meets Brutality in Jail*, N.Y. TIMES (July 14, 2014), <http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html> [<https://perma.cc/DM74-9QXU>].

71. *See supra* text accompanying note 63; *see also infra* text accompanying notes 97–98. These are exclusively CIT programs. Each state, of course, has the opportunity to build on the basic CIT model by training officers based on the Memphis curriculum, but can add other trainings or program elements thought to be helpful. Generally, self-generated reports on these programs do not elaborate, but merely characterize the program as a “CIT model” or a “Memphis model.” Of course, there are variations among programs. *See CIT in Oregon*, CIT EXCELLENCE, <http://citexcellence.com/cit-in-oregon/> [<https://perma.cc/P5G7-W4SU>].

72. Strauss et al., *supra* note 16, at 223 (explaining that officers trained in crisis intervention techniques are better prepared to determine whether an individual is in crisis and whether they need psychiatric evaluation).

partnership between disciplines that is sorely needed, if individuals with mental illnesses continue to be impacted by the actions of police officers.

## II. THERAPEUTIC JURISPRUDENCE

### A. What Is Therapeutic Jurisprudence?

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives”<sup>73</sup> and focuses on the law’s influence on emotional life and psychological well-being.<sup>74</sup> The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential “*while not subordinating due process principles.*”<sup>75</sup> There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: the law’s use of “mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns.”<sup>76</sup> Again, it is vital to keep in mind that “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>77</sup> In its aim to use the law to empower individuals, enhance rights, and

73. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535 (2009).

74. See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in DANIEL P. STOLLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000).

75. See Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005) [hereinafter *Best Friend*]; Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 510 n.139 (2008); see also Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585–86 (2008); Bernard P. Perlmutter, *George’s Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.112 (2005).

76. See David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); see also David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTATIVE PSYCHOL. 179 (1996).

77. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice, “Us” and “Them”*, 31 LOY. L. REV. 775, 782 (1998); see Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y. L. SCH. J. HUM. RTS. 623, 627 (1993) (“Consideration of therapeutic jurisprudence issues cannot be used as an excuse to return to the days of the 1950’s when courts were comfortable simply with a ‘hands off’ policy toward institutionalized persons.”).

promote well-being, TJ has been described as “a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism.”<sup>78</sup> That is, TJ supports an ethic of care.<sup>79</sup>

One of the central principles of TJ is a commitment to dignity.<sup>80</sup> Professor Amy Ronner describes the “three Vs” as voice, validation, and voluntariness,<sup>81</sup> arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>82</sup>

The question to be considered is this: to what extent can TJ be employed to remediate the current situation of unwarranted arrests

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78. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICE LAW AS A HEALING PROFESSION 34 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

79. See, e.g., Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); Brookbanks, *supra* note 78; David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Winick & Wexler, *supra* note 78, at 605–07.

80. See generally BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

81. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of “voice,” see Freckelton, *supra* note 75, at 588.

82. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

and a lack of available mental health services for so many of those who needlessly wind up in jails, and perhaps, eventually, in prisons? This is the issue we next address.

### B. Therapeutic Jurisprudence Implications of Police Decision-Making

Many scholars have argued that police are among the “players” in the legal system whose application of the law has TJ implications.<sup>83</sup> This takes on more immediacy when we realize that there is evidence that, in some jurisdictions, at least, “[p]olice [o]fficers’ stereotype[s] . . . included the idea that it is not possible to have a meaningful conversation with [persons with mental disabilities.]” and “officers hold on to the ideas that [mentally disabled] people are completely irrational and cannot be reasoned with.”<sup>84</sup> Such attitudes—beyond being demonstrably wrong<sup>85</sup>—are as antithetical to TJ precepts as imaginable. The problems are exacerbated even further when we acknowledge that police officers who can reliably

83. Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243, 244 (2008); see also Dennis Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 37 (1997).

84. Robert Panzarella & Justin O. Alecia, *Police Tactics in Incidents with Mentally Disturbed Persons*, 20 POLICING INT’L J. POLICE STRATEGIES & MGMT. 326, 335–36 (1997). This is not inconsistent with a range of police attitudes. Within a month of joining police forces, junior officers are socialized into an environment that registers high on both right-wing authoritarianism and social dominance scales; one of the greatest predictors of that socialization was whether there was agreement with this assertion: “[t]he only way our country can get through the coming crisis is to get back to our traditional values, put some tough leaders in power, and silence the troublemakers spreading negative ideas.” Juliette Gatto & Michael Dambrun, *Authoritarianism, Social Dominance, and Prejudice among Junior Police Officers: The Role of the Normative Context*, 43 SOC. PSYCHOL. 61 (2012).

85. One of the basic building blocks of mental disability law is the principle that incompetence cannot be presumed either because of mental illness or because of a past record or history of institutionalization. See, e.g., *In re LaBelle*, 728 P.2d 138, 146 (Wash. 1986). Studies done by the MacArthur Foundation’s Network on Mental Health and the Law dramatically conclude, on “any given measure of decisional abilities, the majority of patients with schizophrenia did not perform more poorly than other patients and non-patients.” Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study (III): Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 L. & HUM. BEHAV. 149, 169 (1995). We discuss the significance of these findings in Michael L. Perlin & Alison J. Lynch, “*Mr. Bad Example*”: *Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299 (2016).

understand the factors that relate to mental illness may be more apt to decide to access mental health treatment in lieu of arrest.<sup>86</sup>

We turn now to the question of the connection between TJ and the need for alternative models of policing, such as the Memphis model.

### III. THERAPEUTIC JURISPRUDENCE, POLICING, AND THE SIGNIFICANCE OF COUNSEL

One of the most important aspects of TJ is the insight that showing respect to all in the legal process results in enhanced psychological well-being and in more favorable outcomes.<sup>87</sup> Research on CIT programs has shown that when police interact with civilians with respect from the initial stages of the interaction and did not use an approach in which threats or force predominated, citizens were more likely to perceive that procedural justice<sup>88</sup> had occurred and were more likely to comply with police directives.<sup>89</sup> Importantly, the research has consistently shown that promoting police procedural justice has never been a “central concern of the law or the formal

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86. See, e.g., Amy C. Watson et al., *Improving Police Response to Persons with Mental Illness: A Multi-level Conceptualization of CIT*, 31 INT'L J.L. & PSYCHIATRY 359 (2008); William Wells & Joseph A. Schafer, *Officer Perceptions of Police Responses to Persons with a Mental Illness*, 29 POLICING INT'L J. POLICE STRATEGIES & MGMT. 578 (2006).

87. Ronner, *supra* note 82, at 93–94 (claiming that when criminal defendants believe that the legal system has treated them with fairness, dignity, and respect, they are more likely to cooperate with conditions of disposition and probation and less likely to recidivate). See generally, Jeffrey Fagan, *Dignity Is the New Legitimacy*, in NEW PERSPECTIVES ON CRIMES AND PUNISHMENT (Sharon Dolovich & Alexandra Natapoff eds., 2016).

88. On the close relationship between TJ and procedural justice, see MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW* (2013).

89. Testa, *supra* note 18, at 431 (citing Henry J. Steadman et al., *Comparing Outcomes of Major Models of Police Responses to Mental Health Emergencies*, 51 PSYCHIATRIC SERVS. 645, 648–49 (2000)). Contemporary research has demonstrated “the importance of police engaging with the public with procedural justice so as to reduce negative emotions and increase law-abiding behaviour.” Julie M. Barkworth & Kristina Murphy, *Procedural Justice Policing and Citizen Compliance Behaviour: The Importance of Emotion*, 21 PSYCHOL. CRIME & L. 254, 269 (2015). On the procedural justice implications of the impact of police forces generally respecting the bounds of their authority (a concept that extends beyond simply physical interaction between police and community members), see Aziz Huq, Jonathan Jackson & Rick Trickner, *Acts That Legitimate: Widening the Array of Predicate Policing Practices*, 13, U. CHI. L. SCH. PUB. L. & LEGAL THEORY, Paper No. 570, (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2740631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740631) [<https://perma.cc/5REB-ZXNC>] (finding “powerful affiliations” between procedural justice and “direct and unmediated experiences with police”).

systems of discretion control that populate police organizations.”<sup>90</sup> This becomes all the more problematic in light of evidence that prisoners who felt treated in a procedurally just manner during imprisonment were less likely to be reconvicted in the eighteen months after release,<sup>91</sup> and evidence that procedural justice shapes legitimacy in questions of policing, providing legal authorities with a “clear road map of strategies for creating and maintaining public trust.”<sup>92</sup>

Remarkably little has been written in the TJ literature about policing issues.<sup>93</sup> One of the co-authors (MLP) has considered how coercive police authority, by shaming and intruding on dignity, violates TJ.<sup>94</sup> There is also important scholarship on how TJ should inform what police officers do in responding to domestic violence calls<sup>95</sup> and in interviewing juvenile suspects.<sup>96</sup> Evan Seamone has

90. Stephen D. Mastrofski et al., *Predicting Procedural Justice in Police–Citizen Encounters*, 43 CRIM. JUST. & BEHAV. 119, 133 (2016).

91. Karin A. Beijersbergen et al., *Reoffending After Release: Does Procedural Justice During Imprisonment Matter?*, 43 CRIM. JUST. & BEHAV. 63 (2015).

92. Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCHOL. SCI. PUB. INT. 75 (2015).

93. On the related question of the potential impact of TJ on the way police might interview criminal suspects, see Ronald P. Fisher & R. Edward Geiselman, *The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence*, 33 INT’L J.L. & PSYCHIATRY 321 (2010), and Ulf Holmberg et al., *Interviewing Offenders: A Therapeutic Jurisprudential Approach*, in OFFENDERS’ MEMORIES OF VIOLENT CRIMES 355 (Sven Christianson ed. 2007).

94. Michael L. Perlin & Naomi Weinstein, *“Friend to the Martyr, a Friend to the Woman of Shame”: Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 28-29 (2014). This includes, but is not limited to, discriminatory stop-and-frisk policies and “order maintenance policing.” See, e.g., Jeffrey Fagan, *Indignities of Order Maintenance Policing*, at 3, [http://www.law.arizona.edu/Events/Soll\\_Lectures/Soll\\_lecture\\_2013.cfm](http://www.law.arizona.edu/Events/Soll_Lectures/Soll_lecture_2013.cfm). On the relationship between the police practices discussed here, shame and humiliation, see Michael L. Perlin & Alison J. Lynch, *“To Wander Off in Shame”: Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their Treatment of Persons with Mental Disabilities*, in POWER, HUMILIATION AND VIOLENCE (Prof. Daniel Rothbart ed. 2017) (forthcoming).

95. Dennis P. Saccuzzo, *How Should The Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765 (1999). “Through the effective use of therapeutic jurisprudence, the process of re-education of the batterer and the healing of the battered person can begin at the moment of police contact and continue through the entire judicial process.” *Id.*; see also, Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKCL. REV. 33 (2000).

96. Ronner, *supra* note 82, at 102–03, 113 (discussing police interview tactics designed to make a child feel powerless and vulnerable by confining the child in an isolated setting, away from friends and family).

noted how TJ-inspired implementation of diversionary programs at arrest, “have modified the criminal justice system to target the underlying psychiatric causes of the misconduct rather than the criminal symptoms of their mental illness.”<sup>97</sup> New York City Mayor Bill de Blasio has issued an expanded training plan for police officers that “will enable them to better recognize the behaviors and symptoms of mental illness and substance use; to learn techniques for engaging people in respectful, non-stigmatizing interactions that de-escalate crises; and to have tools for assessing what alternatives to jail or hospitalization are appropriate for the specific situation and symptoms presented.”<sup>98</sup> In the short term, this will be a stand-alone thirty-six-hour training, which will engage more than 5500 officers in two target areas.<sup>99</sup>

Perhaps the most relevant consideration of this issue is an article by Bruce Winick discussing the *transport* by police of persons with mental disabilities to hospitals as part of an involuntary commitment proceeding.<sup>100</sup> Patients felt less coerced when police understood their fearful or confused emotions and explained the commitment process to them.<sup>101</sup> In writing about Winick’s article, Thomas Barton noted: “[i]nvoluntary commitment proceedings thus are resolved with fewer adverse side effects where the police depart from their narrow role as implementers of a legal judgment or order and instead engage in the most rudimentary of dialogues intended to aid the problem holder’s adjustment to a difficult environment.”<sup>102</sup>

The literature on the positive impact of CIT programs is completely in line with Winick’s insights. Implementation of CIT teams has been shown to lead to fewer arrests of individuals with

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97. Evan Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 481 (2013). On the distinctions between *pre*-booking and *post*-booking diversion programs, see Testa, *supra* note 18, at 429–35; see generally, Terry A. Kupers, *A Community Mental Health Model in Corrections*, 26 STAN. L. & POL’Y REV. 119 (2015).

98. See *Mayor’s Taskforce*, *supra* note 63, at 8.

99. *Id.* The Report states that the new training, “informed by Los Angeles’ practices, will ultimately be integrated into the police academy curriculum, but in the short term, will be a stand-alone thirty-six-hour training, which will engage more than 5,500 officers in two target areas,” *id.*, but does not identify what those areas will be.

100. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 202 (1997).

101. *Id.*

102. Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POL’Y & L. 921, 939 (1999).

mental illness, improved access to psychiatric care, fewer injuries among mentally ill individuals who come into contact with police, and fewer jail suicides.<sup>103</sup> Other studies have concluded that after receiving CIT training, “officers reported improved attitudes regarding aggressiveness among individuals with schizophrenia, became more supportive of treatment programs for schizophrenia, evidenced greater knowledge about schizophrenia, and reported less social distance towards individuals with schizophrenia,” and that the study’s findings supported “the hypothesis that an educational program for law enforcement officers may reduce stigmatizing attitudes toward persons with schizophrenia.”<sup>104</sup> We have written elsewhere that TJ may be the best possible solution for dealing with such stigmatizing attitudes—that we call *sanism*<sup>105</sup>—exhibited by attorneys;<sup>106</sup> there is no reason to believe that it is any less of a valuable solution for dealing with these attitudes when exhibited by police officers.<sup>107</sup>

A substantial literature has developed around the idea of “boundary spanners,” a term, we believe, that was first used by Henry Steadman.<sup>108</sup> Steadman defines boundary spanners as individuals whose positions “link two or more systems whose goals and expectations are likely to be at least partially conflicting.”<sup>109</sup> At each organizational boundary there is a person whose role it is both to interact with the other people inside their own organization and to negotiate system interchanges with the other organization.<sup>110</sup> Such

103. Testa, *supra* note 18, at 432.

104. Compton et al, *supra* note 18, at 1199.

105. “[S]anism’ [is] an irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry.” Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 259 (2014). *See generally*, Perlin, *supra* note 66.

106. Perlin & Lynch, *supra* note 85, at 13.

107. On the need to address system bias, whether this bias is “motivated by fear or paternalism” in this context, see Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 122 (2011).

108. Henry J. Steadman, *Boundary Spanners: A Key Component for the Effective Interactions of the Justice and Mental Health Systems*, 16 LAW & HUM. BEHAV. 75, 76 (1992); *see also*, Joel A. Dvoskin & Henry J. Steadman, *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*, 45 HOSP. & CMTY. PSYCHIATRY 679, 684 (1994).

109. Steadman, *supra* note 108, at 75.

110. *Id.* at 77, *discussed in* Lois A. Weithorn, *Envisioning Second-Order Change in America’s Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1485 (2005).

individuals must “work beyond the boundaries of organizations to accomplish any goal.”<sup>111</sup> Critical is the need of such spanners to “connect and navigate systems in an attempt to meet the multifaceted needs of their clients.”<sup>112</sup>

Consider the explanation of boundary spanners offered by Professors Carrie A. Pettus and Margaret Severson: “[b]oundary spanners, those who attempt to understand human behavior in the context of the systemic structures, operations, and barriers that exist within and between communities and prisons, seek to bridge communication, understanding, and service gaps and translate the workings of one entity into the language of another.”<sup>113</sup> It should be clear that the deployment of such boundary spanners in this context – where their skills “may help promote better clinical outcomes, including greater access to psychiatric care and other community services”<sup>114</sup>—is entirely consonant with the aims of therapeutic jurisprudence.<sup>115</sup>

It is also essential that the population in question be afforded effective counsel.<sup>116</sup> Professor Amy Ronner and Judge Juan Ramirez have characterized the right to counsel as “the core of therapeutic jurisprudence,”<sup>117</sup> and we agree. One of the co-authors (MLP) has previously argued—in the contexts of right to refuse treatment litigation and the question of the incarceration of juveniles with mental disabilities—that “[t]he failure to assign adequate counsel bespeaks . . . a failure to consider the implications of therapeutic jurisprudence.”<sup>118</sup> To the best of our knowledge, none of the

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111. Jennifer Lerch et al., “Town Hall” Strategies for Organizational Change, 73 FED. PROB. 2, 5 (Dec. 2009).

112. Risdon N. Slate & Laura Usher, *Health Coverage for People in the Justice System: The Potential Impact of Obamacare*, 78 FED. PROB. 19, 20 (Sept. 2014).

113. Carrie A. Pettus & Margaret Severson, *Paving the Way for Effective Reentry Practice: The Critical Role and Function of the Boundary Spanner*, 86 PRISON J. 206, 208 (June 2006).

114. Manchak et al., *supra* note 43, at 451.

115. Thus, those who staff the drop off centers—*e.g.*, social workers, nurses, counselors—will both have their own professional expertise and will also be intimately familiar with the criminal justice issues that are of most significance in the cases offenders with mental illness. Therapeutic jurisprudence prides itself on its interdisciplinarity. See Ellen Waldman, *Therapeutic Jurisprudence: Growing Up and Looking Forward*, 30 T. JEFFERSON L. REV. 345, 346 (2008).

116. See Lynch & Perlin, *supra* note 64.

117. Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

118. Perlin, *Best Friend*, *supra* note 75, at 750; Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights and Therapeutic*

literature on CIT programs, the Memphis model or the disproportionate arrest rates of persons with mental disabilities addresses this question, although we do know that, in many jurisdictions, the quality of counsel afforded to this population is scandalous.<sup>119</sup> As we discuss above,<sup>120</sup> we know of no such program that makes any connection between the subjects of CIT intervention and lawyers.<sup>121</sup> For the promise of therapeutic jurisprudence to become a reality, it is essential that this issue be comprehensively addressed.

### CONCLUSION

As of June 2015, 124 individuals with mental illness have been shot and killed by police officers, accounting for a quarter of all individuals killed by police in the first six months of that year.<sup>122</sup> At least one

*Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH L. REV. 301, 337 (2013).

119. See Michael L. Perlin, “*I Might Need a Good Lawyer, Could Be Your Funeral, My Trial*”: *Global Clinical Legal Education and The Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J.L. & POL’Y 241 (2008) (“If there has been any constant in modern mental disability law in its thirty-five-year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective.”); Perlin, *supra* note 6, at 368–69 (“I have written often about the scandalous lack of effective counsel made available to persons with mental disabilities in the civil commitment and criminal justice processes.”).

120. See *supra* text accompanying note 64; Lynch & Perlin, *supra* note 64.

121. It would be prudent (as well as consonant with both therapeutic jurisprudence values and due process values) to make lawyers available at CIT drop off centers, so as to assist the population in question with criminal law issues, mental disability law issues, and the inevitable array of housing, domestic relations, immigration and government benefits issues often to be faced. See Lynch & Perlin, *supra* note 64. For a description of how such “wrap around” legal services are presented in a related context, see, for example, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003).

Not unimportantly, in many jurisdictions, Public Defenders are mandated to be appointed “within seventy-two hours of a defendant’s arrest,” see, e.g., Emily Rose, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279, 289 n.67 (2014); Britta Palmer Stamps, *The Wait for Counsel*, 67 ARK. L. REV. 1055, 1075 (2014); see generally, A.B.A., GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [https://perma.cc/VC8L-YUVF]. Persons taken to “drop off centers” under CIT programs would thus not qualify for legal assistance under the terms of such statutory or regulatory mandates.

122. See Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), <http://www.washingtonpost.com/sf/investigative/2015/06/30/>

study has found that people with psychiatric disabilities are four times more likely than members of the general population to die in encounters with the police.<sup>123</sup> Many of these individuals were in mental health crises, and police were responding to reports of odd or erratic behavior,<sup>124</sup> rather than any crime having been committed.<sup>125</sup> Crisis intervention training may be one of the police force's best options for curbing, and eventually eliminating, deaths and injuries of individuals with mental illness at the hands of police. The training provides practical advice for these crisis situations, and allows officers to practice their responses in realistic role-play scenarios.<sup>126</sup>

Additionally, crisis intervention training recognizes the fundamental principles of therapeutic jurisprudence—voice, validation and voluntariness—by providing options and opportunities for individuals in crisis that will empower them, rather than relegate them to the nation's largest mental health facilities—jails. If we are to

distraught-people-deadly-results/ [https://perma.cc/CD6H-2YV6]. It is certainly possible that others who were killed had undocumented mental illnesses. A review by a San Francisco television station claimed that, in fifty-eight percent of officer-involved shootings in that community between 2005 and 2013, the victim had a mental illness that was a contributing factor in the incident. See Alex Emslie & Rachael Bale, *More than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED NEWS (Sept. 30, 2014), <http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill> [https://perma.cc/B88W-JFN3]. A recent report found that more than one-third of persons killed by police officers in Los Angeles were mentally ill. See Kate Mather & James Queally, *More Than a Third of People Shot by L.A. Police Last Year Were Mentally Ill, LAPD Report Finds*, L.A. TIMES (Mar. 1, 2016), <http://www.latimes.com/local/lanow/la-me-ln-lapd-use-of-force-report-20160301-story.html> [https://perma.cc/AT72-ZA4R].

123. Susan Stefan, *What Is the Current State of the Law Regarding the Use of Police Force Against People with Psychiatric Disabilities?*, CTR. FOR PUB. REP., <http://www.centerforpublicrep.org/litigation-and-major-cases/damage-cases/41-litigation/damage-cases/68-use-of-police-force-against-people-with-psychiatric-disabilities> [https://perma.cc/552X-YK4G]. A more recent report estimates that people with mental illness are *sixteen times* more likely than others to be killed by police. See Liz Szabo, *People with Mental Illness 16 Times More Likely to be Killed by Police*, USA TODAY (Dec. 10, 2015, 4:26 PM), <http://www.usatoday.com/story/news/2015/12/10/people-mental-illness-16-times-more-likely-killed-police/77059710/> [https://perma.cc/TEC7-NLE8], *relying on* Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, TREATMENT ADVOC. CTR. (Dec. 2015), <http://www.tacreports.org/overlooked-undercounted> [https://perma.cc/T82M-W5C9].

124. For fatal and non-fatal police shooting cases involving the decedent's "odd but relatively trivial, non-criminal behavior," see *Federman v. Cty. of Kern*, 61 Fed. App'x 438, 440 (9th Cir. 2003), and *Mendez v. Cty. of Los Angeles*, No. CV 11-04771-MWF, 2013 WL 4202240, at \*26 (C.D. Cal. 2013) (quoting *Federman*).

125. Lowery et al., *supra* note 122.

126. See, e.g., James Fyfe, *Training to Reduce Police-Civilian Violence*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 165 (William Geller & Hans Toch eds., 1996).

turn to TJ as a means of “enhanc[ing] rights, and promot[ing] well-being,”<sup>127</sup> then the national adoption of CIT programs—in urban and rural police departments, in “red states” and “blue states”—will be one of the most valuable developments that we can imagine. And then, perhaps, persons with mental illness—in need of intervention by mental health professionals, not law enforcement officials—will no longer, in the words of our title, be unnecessarily “held down by big police.”<sup>128</sup>

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127. Perlin & Weinstein, *supra* note 94, at 10–11.

128. DYLAN, *supra* note 44.