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Belli, Kelsey

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MENTAL ILLNESS AND CRIMINAL JUSTICE

By Kelsey Belli*

Abstract

This paper assesses some of the critical issues relevant to the connection between the mental health and criminal justice systems. Throughout the entirety of this paper there will be a comparison between the Unites States, France, and the Netherlands. This article will examine the current statutes, case law, and public policies in place in the criminal justice and mental health systems. It will offer a comparison between the balance of needs of individuals suffering from mental health issues and the maintenance of public safety. The first section will look at the historical background of how individuals were found to be mentally incompetent and how the criminal justice system has treated these individuals in the past. The second section will present the laws and statutes pertaining to this topic and the extent to which individuals found to be mentally incompetent can be held criminally liable for their actions. A third section will focus on what the process is like for mentally incompetent offenders from pretrial to post-conviction. Finally, the last section will present an analysis of the policies in place and the changes that should be considered for reformation.

* Santa Clara University School of Law, J.D., 2024.

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INTRODUCTION

Mentally ill offenders have a unique set of needs. However, often they go through the criminal justice system without the appropriate care to address their mental health problems leading to recidivism. More than half of incarcerated individuals in the United States have mental health needs, and they make up most of the U.S. correctional population.[1] These individuals often receive inadequate care, specifically in the US, where only one in three state prisoners and one in six jail inmates receive mental health treatment since admission.[2]

Despite the ever-growing problem of mental illness in the American criminal justice system, current efforts and policies are lacking in managing and treating mentally ill persons. Though the problem is recognized globally, there have only been a few programs and policies implemented to target mentally ill offenders. Thus, more needs to be done to understand the challenges for treating offenders with mental health disorders in the criminal justice system.

The criminal justice system and mental health treatment have been entwined for hundreds of years. Consequently, the way that countries treat and punish people with mental disorders has a long history. However, most justice systems are not built in a way that is cohesive to address individuals who have mental health disorders and have committed crimes. The goal of this paper is to present a discussion on how mentally ill offenders are processed in the criminal justice system in the United States, France, and the Netherlands by looking at the differences in practices, through statutes and policies to address these challenges. Further, this paper will present several remedies through criminal justice interventions and policies for mentally ill offenders.

I. HISTORICAL & LEGAL OVERVIEW OF THE PROBLEM

Every country around the world has their own criminal justice and psychiatry processes that address individuals who have mental disorders and commit crimes. With that, each country has their own history of how they handled these types of cases in the past. As a result, people diagnosed with mental disorders who have committed crimes are treated drastically different depending on what country they committed the crimes in. To understand the relationship between mental health treatment and the justice system, it is imperative that a historical summary be provided.

A. The United States

Around 100 years ago, *Abramson* introduced the idea of "criminalization" of the mentally ill in the United States.[3] People with serious mental illness (PSMIs) and their involvement in the criminal justice system can be traced back to a transformation in mental health policy known as deinstitutionalization.[4] Deinstitutionalization shifted the focus of care for PSMIs from psychiatric

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[1] KiDeuk Kim, et. al, Urban Institute, THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM, 47 (2015).
[2] *Id.*
[3] Arthur J. Lurigio & Andrew Harris, *The Mentally Ill in the Criminal Justice System: An Overview of Historical Causes and Suggested Remedies*, 2 PROF. ISSUES CRIM. JUST. 51 (2007).
[4] *Id.*

hospitals to community mental health facilities in the 1961.[5] This policy was the first major step that led to the mentally ill entering the criminal justice system. Deinstitutionalization led state mental hospitals to release thousands of psychiatric patients to community bases outpatient programs, which directly let to the increasing presence of PSMIs in the community.[6] The financial strain of the Vietnam War during the 1960s, the economic crisis of the 1970s, and cuts in federal funding for mental health services in the 1980s left fewer dollars for the community care of PSMIs.[7] As a result, many PSMIs became de facto charges of the criminal justice system as they were arrested for minor crimes and homelessness due to the lack of resources in the community.[8]

Ultimately, the social reform that deinstitutionalization was supposed to provide failed due to insufficient funding, limitations in evidence-based practices, and the lack of clear federal standards of care which have contributed to an extended period of neglect for the seriously mentally ill.[9] "Rather than replacing hospital care with extensive community-based facilities, states emptied their institutions without providing the requisite resources or infrastructure to meet the needs of the deinstitutionalized population."[10] PSMIs were left with few treatment options or services for essentials like food, clothing, shelter, and medical attention.[11] As a result of their economic hardships, the chronically mentally ill have become a stable part of the underclass.

Unlike earlier generations of mental patients, those PSMIs hospitalized since the 1970s were more likely to have criminal histories, misuse drugs and alcohol, and tax the capacities of families and friends to care for their needs, leading them to resemble those persons involved in the criminal justice system.[12] The transit of the mentally ill from the mental health system to the criminal justice system is usually referred to as the criminalization of the mentally ill.[13] The legacy of deinstitutionalization continues to effect today's mental health system. Formerly the prevailing model of long-term treatment for the chronically mentally ill, state psychiatric institutions today house populations of patients who are younger, more deeply disturbed, and far more likely to have histories of violence, substance use disorders, and previous criminal involvement compared with their predecessors.[14] Overall, the mental health system's capacity to confine, treat, and case manage PSMIs has diminished significantly, leaving the correctional system as the primary agent for monitoring and treating PSMIs.[15]

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[5] *Id.*
[6] *Id.*
[7] Robert D. Miller, Involuntary Civil Commitment of the Mentally Ill in the Post-reform Era 185 (1987).
[8] David H. Barlow & V. Mark Durand, Abnormal Psychology: An Integrative Approach 71 (2nd ed. 1999).
[9] Miller, *supra* note 190.
[10] Gerald N. Grob, From Asylum to Community: Mental Health Policy in Modern America 118 (1991).
[11] Alexandar R. Thomas, *Ronald Reagan and the Commitment of the Mentally Ill: Capital, Interest Groups, and the Eclipse of Social Policy*, 3 ELEC. J. SOCIOL. 117 (1998).
[12] Arthur J. Lurigio & John A. Swartz, *Changing the contours of the criminal justice system to meet the needs of persons with serious mental illness*, 3 CRIM. JUST. 45, 63 (2000).
[13] Richard J. Freeman & Ron Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 INT'L J.L. & PSYCHIATRY 105, 106 (1989).
[14]Lurigio & Harris, *supra* note 3, at 52.
[15] Lurigio & Harris, *supra* note 3, at 55.

B. France

Since the early 1800's, French law has addressed the treatment of individuals with mental disorders. The law first addressed them in the French Penal Code in 1810, and then addressed them in the "Insane Persons Act" of 1838. The French justice system was founded on the concept of criminal responsibility and did not favor mental health as a defense to any criminal actions. In the 1930s, many European countries created facilities dedicated to forensic psychiatry.[16] However, no facility for people diagnosed with mental health disorders who committed crimes was created in France.[17]

After World War II, organization of jails and prisons in France changed due to reformations that provided detainees with social services for rehabilitation purposes.[18] In 1927, the first psychiatric examination services were created in prisons, called Loos-lès-Lille.[19] The goal of these services was to establish psychiatric evaluations for people in prison under the supervision of a psychiatrist on behalf of the Ministry of Justice.[20] In 1958, the Penal Procedure Code, the Code de procédure pénale, introduced the option of placing incarcerated individuals whose "state of mental alienation is deemed incompatible with incarceration" in community psychiatric hospitals.[21]

In the 1960s and 1970s, anti-psychiatry movements arose in France with their criticisms cautioning against "rebuilding the asylum in prison."[22] The new problem arose for how psychiatrists would provide care to incarcerated people without participating in their legal supervision.[23] In 1985, the law changed to state that "psychiatric care in prisons had to be provided by mental-health workers employed by community psychiatric hospitals, under the authority of the Ministry of Health."[24] After this law passed, the French mental health and criminal justice systems stabilized.

Between the 1990s and 2000s, two major changes occurred that further integrated the relationship between the mental-health and justice systems. First, in 1994, French criminal law was changed to reflect the new concept of diminished criminal responsibility.[25] This new law blurred the lines for individuals charged with crimes by making it more challenging to determine the level of criminal responsibility. This new law allowed for a person to be sentenced to imprisonment even if they were diagnosed as mentally ill at the time of the offense.[26] This resulted in a decrease in the number of people declared "irresponsible," and an increase in the incarceration

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[16] Thomas Fovet et al., *Mental Health and the Criminal Justice System in France: A Narrative Review,* 1 FORENSIC SCI. INT'L MIND. L. 64 (2020).
[17] Caroline Protais, *Psychiatric care of social defense? The origins of a controversy over the responsibility of the mentally ill in French forensic psychiatry,* 37 INT'L J.L. & PSYCHIATRY 17-24 (2014).
[18] Fovet et al., *supra* note 16, at 1.
[19] Fovet et al., *supra* note 16, at 1.
[20] Fovet et al., *supra* note 16, at 2.
[21] Fovet et al., *supra* note 16, at 2.
[22] Fovet et al., *supra* note 16, at 2.
[23] Fovet et al., *supra* note 16, at 2.
[24] Fovet et al., *supra* note 16, at 2.
[25] Fovet et al., *supra* note 16, at 66.
[26] Protais, *supra* note 17, at 24.

of people whose responsibility is considered "diminished." [27] Then, in 1998, psychiatric care through probation became more prevalent with the creation of a new court-ordered treatment.[28] Initially limited to people convicted of sex offenses, this measure later extended more broadly to serious, non-sexual crimes and offenses in the 2000s.[29] The law sought to reduce the risk of recidivism through medical follow up and mainly consisted of psychiatric or psychological care after people have served their prison sentence.[30]

C. Netherlands

The history of the Dutch Criminal Code starts in 1810. At the time, the Kingdom of Holland was annexed to the French Empire, and the Penal Code for the Kingdom of Holland was replaced by the French Napoleonic Code Pénal.[31] After the restoration of independence in 1813 and the Kingdom of the Netherlands was established in 1815, the ideas of the classical school of criminal law, prevalent in the French Code Pénal, were gradually replaced by more modern ideas, which led to more humane sanctions and prisons.[32] The original Dutch prison system was harsh, with no differentiation in prisons according to age, term of prison sentence, or whether the prisoner was a first offender or recidivist.[33] Prisoners were not often housed in individual cells but in common quarters which led to detrimental effects on their mental health.[34]

In 1823, the Dutch Association for the Moral Improvement of Prisoners was established by a group of citizens with the aim of helping prisoners' mental health. The association ultimately led to the creation of the modern penal code in 1870.[35] Major criminal law reforms took place from 1886 to present day, which led to the addition of new laws and the modification of types of sentences that individuals could receive as punishment.[36] Later in the 1900's, Section 39 Criminal Code was added which allowed for an insanity defense.[37]

In recent years, the Dutch courts have increasingly imposed detention orders for the mentally ill, but the number of detained psychiatric patients being released has decreased.[38] Despite long-term treatment, these mentally disordered psychiatric patients continue to pose a high

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[27] Protais, *supra* note 17, at 24.
[28] J. Bernard et al., *Évaluation des pratiques de l' injonction de soins : étude sur 119 sujets* [*Evaluation of injunction to care practices : A student of 119 cases], 45* L'ENCEPHALE 297-303 (2019) (Fr.).
[29] M. Orsat et al., *Les Soins Pénalement Ordonnés : Analyse d' une Pratique Complexe à Travers une Revue de la Littérature [Court-ordered treatment: Analyzing a complex practice through a literature review]*, 41 L'ENCEPHALE 420 (2015) (Fr.).
[30] O. Halleguen & A. Baratta, *L' injonction de Soins. À Propos d' une Etude Réalisée Sur les Régions Alsace et Lorraine [Injunction to care : Results of a study carried out in the regions of Alsace and Lorraine]*, 40 L'ENCEPHALE 42-47 (2014) (Fr.).
[31] Peter J.P. Tak, THE DUTCH CRIMINAL JUSTICE SYSTEM 25 (Willem-Jan van der Wolf et al. 2008).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Tak, *supra* note 31, at 75.
[38] *Id.*

risk to society, and to address the issue of these persistently dangerous delinquent psychiatric patients, long-stay wings have been opened.[39] The number of inmates with mental health problems is increasing, which has caused serious problems in penitentiary establishments.[40] For inmates who need special psychiatric or psychological help, individual treatment wards are available in prisons.[41]

II. OVERVIEW OF THE LAWS IN PLACE

A. The United States

i. Pre-Conviction Treatment

Individuals with mental illness are overrepresented in the U.S. criminal justice system as the most recent report from the Bureau of Justice Statistics (BJS) on the mental health of prison and jail populations in the United States indicates that more than 700,000 inmates reported symptoms or a history of a mental health disorder.[42] During the past few decades, fundamental changes in mental health and law enforcement policies have led criminal justice partners and PSMIs into increasing contact.[43] The contact occurs at every stage of the criminal justice process, and the police interact with PSMIs often.[44] "For example, in New York City, police officers are dispatched every 6.5 minutes in response to service calls that involve PSMIs."[45] Police officers often arrest PSMIs because there are no other options readily available for treatment for them.[46] The three largest psychiatric facilities in the United States are the Los Angeles County Jail, Cook County Jail in Chicago, and Riker's Island Jail in New York City.[47]

Every state's statute stipulates procedures for processing individuals whose mental competency is in question. Because there is no federal standard, processing involves looking at an individual's state definition of mental competency, determining if there is criminal responsibility, and assessing a person's culpability considering those two factors. This sets the stage for how PSMIs are defined and recognized. States look at a variation of "one of three specific methods to determine the sanity of an individual at the time of the offense: the M'Naghten Rule, the Model Penal Code Rule, or the Durham Rule."[48] Under the M'Naghten Rule, an individual is presumed sane unless the defense proves that "at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Kim et al., *supra* note 1, at 47.
[43] Lurigio & Harris, *supra* note 2, at 54.
[44] Lurigio & Harris, *supra* note 2, at 54.
[45] Shelli B. Rossman et. al, Urban Institute, CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 186 (2012).
[46] *See* Linda A. Teplin, *The Criminalization of the Mentally Ill: Speculation in Search of Data*, 94 Psych. Bull. 54 (1983).
[47] E. F. Torrey, *Reinventing mental health care*, City J., 9, 4 (1999) https://www.city-journal.org/article/reinventing-mental-health-care.
[48] Kim et al., *supra* note 1, at 49.

quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong."[49]Additionally, the Model Penal Code Rule specifies that "a defendant suffering from a mental disease or defect is not responsible for criminal actions during which he or she lacked "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[50] Lastly, under the Durham Rule, the most liberal approach of all three, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[51]

All 50 states have their own definition for a mental health impairment in criminal proceedings, including mental illness, mental disease or defect, mental or psychiatric disorder, and mental or psychiatric disability. "The language used to describe these mental conditions varies greatly from state to state and often includes some degree of subjectivity, because most states craft a definition that functions for them procedurally, rather than focusing on clinical definitions."[52] Many states approach defining mental illness from a behavioral or symptomatic perspective, whereas others focus on specific abnormalities or treatment requirements. These definitions establish the basis for classifying and treating individuals whose mental competency is in question. Although there is a lot of inconsistency with these definitions, most states definitions share the theme of psychological impairment and inability to meet the demands of daily life.

The protocol for determining the criminal responsibility of mentally ill defendants also varies from state to state. The key question here is whether the mental state of an individual at the time of a crime dictates whether he or she should be held legally responsible for the offense. It is thus necessary for each state to assess the mental capacity at the time of the crime for individuals whose competency is in question. In determining the mental state of an individual at the time of offense, the majority of states appeal to a variant of either the M'Naghten Rule or the Model Penal Code Rule to test for insanity.[53] For states that follow the M'Naghten Rule, criminal responsibility of PSMIs will depend on whether they could determine the morality of their conduct. For states that follow the Model Penal Code Rule, criminal responsibility relies on their ability to appreciate the illicit nature of a criminal act or abide by the law.[54] Four states do not follow any of these rules: Idaho, Kansas, Montana, and Utah. These states do not allow for a verdict of not guilty by reason of insanity, and the mental condition of a defendant cannot be used as a direct defense to a criminal charge.

All 50 states use some sort of clinical assessment or test to assess the culpability of an individual. Such an assessment is either required by law or can be requested by a particular party in cases where the person's sanity is in question.[55] Nineteen states require clinical assessments for defendants whose mental state is in question. In the remaining 32 states, mental health evaluations are called for only by the request of a particular party.[56] Thirteen of these states perform clinical

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[49] M'Naghten's Case [1843] 8 Eng. Rep. 718 (appeal taken from Eng.).
[50] *Id.*
[51] *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).
[52] Kim et al., *supra* note 1, at 71.
[53] Kim et al., *supra* note 1, at 71.
[54] Kim et al., *supra* note 1, at 71.
[55] Kim et al., *supra* note 1, at 71.
[56] Kim et al., *supra* note 1, at 71.

assessments by request of the court, and 11 allow these evaluations at the request of any party and the remaining states perform such assessments at the request of the state, the defendant, or a detention facility.[57]

Every state corrections department has their own unique policies for how to classify prisoners with mental illness and maintains programs or facilities for prisoners with mental health needs. The state of New York, for example, has an elaborate diagnosis and treatment system for mentally ill inmates. New York classifies correctional facilities by the level of mental health service capacities and assigns prisoners to an appropriate facility based on their mental health needs ranging from level one to six depending on treatment needs. The California Department of Corrections and Rehabilitation Mental Health Services Delivery System also has similar protocols to classify inmates and define their mental health status.[58]

ii. Post-Conviction Treatment

As PSMIs move through the criminal justice process, American judges must decide how to respond to their needs with limited sentencing alternatives for PSMIs who are within categories of being guilty but mentally ill and outside that category. Then jail and prison administrators struggle to attend to the care of the mentally ill. Furthermore, probation and parole officers have to scramble to obtain the scarce community services available for PSMIs. When mentally ill persons are sentenced to or placed in community supervision, their disorders impede their ability to comply with conditions of release, leading to recidivism.[59] PSMIs "often cycle repeatedly through the criminal justice system, in part because of the court's failure to recognize psychiatric illness as a factor that contributes to their continued criminal involvement."[60] Interventions, ranging from mental health courts and pretrial diversion programs to discharge planning and in-prison and community-based treatment programs, are used to mitigate the social and economic costs associated with the recidivism of mentally ill offenders.

iii. Statutes and Relevant Regulations

The *Diagnostic and Statistical Manual of Mental Disorders*, *Fifth Edition* defines a mental illness as:

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily

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[57] Kim et al., *supra* note 1, at 71.
[58] Lurigio & Harris, *supra* note 3, at 59.
[59] Lurigio & Harris, *supra* note 3, at 59.
[60] *See* Jeffrey Draine et al., *Role of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons with Serious Mental Illness*, 53 PSYCH. SERV. 565 (2002).

> between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual (American Psychiatric Association 2013).

Throughout the history of mental health in the justice system, much of the disagreement has been on the classification of persons with mental disorders. Above is the most agreed upon definition used by the U.S, justice system.

The following is an example statute from the Model Penal Code Rule: "a defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity to: (1) appreciate the criminality of that conduct; or (2) conform that conduct to the requirements of law."[61] This is the most common acceptable classification as to culpability of PSMI's who have been charged with a crime.

Another commonly referred to statute, the M'Naghten Rule, defines an insanity defense as commonly used in the U.S. The following is the M'Naghten Rule: "person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence."[62]

B. France

i. Pre-Conviction Treatment

France has a non-adversarial procedure for psychiatric assessment in criminal law.[63] In court, the judge has discretion to ask for an independent expert, who acts as a technician assisting the judge in their area of expertise when ruling on cases involving PSMI.[64] Regardless of the charges, an expert psychiatrist must make an assessment of the person who is charged before the trial.[65] The expert who makes the assessment must provide proof of qualification and professional experience, but the law does not specify the criteria that deem them qualified as an expert.[66] For criminal cases "(Cour d'assises: "criminal court" with a popular jury board), the law requires written and oral expert reports."[67] "The assessment must include whether the committed offense was a direct result of a mental health disorder that abolished or altered the offender's discernment and/or ability to control his/her actions according to article 122-1 of the criminal law."[68] No mental health disorder is explicitly contained or omitted by the law. The French term "psychic or

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[61] *Id.*
[62] *Id.*
[63] *See* Nicolas Combalbert et. al, *Forensic mental health assessment in France: Recommendations for quality improvement*, 37 INT'L J.L. & PSYCH. 628 (2014).
[64] *See* J. Guivarch et. al, *Is the French criminal psychiatric assessment in crisis?,* 51 INT'L J.L. & PSYCH. 33 (2017).
[65] Fovet et al., *supra* note 16, at 3.
[66] Fovet et al., *supra* note 16, at 3.
[67] Fovet et al., *supra* note 16, at 3.
[68] Fovet et al., *supra* note 16, at 3.

neuropsychic disorder" allows for the psychiatrist to consider any mental health or neurological disorder while completing their assessment.[69]

The judge and the court are not required to follow the psychiatrist assessment's recommendations. If an expert determines a lack of criminal responsibility, the judge can declare the person not criminally responsible and thus not subject to a prison sentence.[70] A finding of a lack of criminal responsibility will be documented and registered in the person's criminal record.[71] In addition to a prison sentence, the judge can also impose conditions such as prohibited access to victims or family members, restrictions on place of residence or travel, and order an involuntary hospitalization in a community psychiatric hospital according to a specific law (article L3213-1 of "Public Health Code").[72]

In the cases where the courts find partial responsibility due to partial diminished mental capacity, the court can still send people to prison.[73] If the Court finds that there is a "diminished criminal responsibility," the court shall take this into account when determining the severity of the sentence.[74] "If the judge considers a prison sentence, they can reduce it by one-third or for a crime punishable by a sentence of life imprisonment reduce it to a 30-year maximum."[75] However, the court has discretion not to apply this sentence reduction.

ii. Post-Conviction Treatment

"At the end of a trial, if the judge declares the person not criminally responsible, he/she is referred to the psychiatric hospital in charge of him/her, according to residency and in most cases, the psychiatric expert suggests an involuntary hospitalization if the person requires psychiatric care and endangers the safety of others."[76] The psychiatrist in charge of the hospital has discretion to determine the type of treatment and the duration of stay.[77] Mental health care workers provide three levels of care inside correctional facilities: ambulatory care units; day treatment hospitals; and full-time hospitalization.[78] There are also maximum-security psychiatric wards located in community psychiatric hospitals where incarcerated individuals who pose a greater safety risk can be kept.[79]

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[69] Fovet et al., *supra* note 16, at 3.
[70] Fovet et al., *supra* note 16, at 3.
[71] Fovet et al., *supra* note 16, at 3.
[72] Stephanie Tamburini, *SDRE: Les soins sans consentement sur decision d'un representant de l'État [SDRE: Care without consent on the decision of a representative of the state],* MACSF (May 3, 2021) https://www.macsf.fr/responsabilite-professionnelle/Relation-au-patient-et-deontologie/soins-sur-decision-representant-etat.
[73] Fovet et al., *supra* note 16, at 3.
[74] *Fovet et al., supra note 16, at 3.*
[75] *Fovet et al., supra note 16, at 3.*
[76] Fovet et al., *supra* note 16, at 3.
[77] Fovet et al., *supra* note 16, at 3.
[78] *Fovet et al., supra note 16, at 3.*
[79] *See* S. Raymond et. al, *A descriptive and follow-up study of 40 parricidal patients hospitalized in a French secure unit over a 15-year period,* 41 INT'L J.L. & PSYCH. 43 (2015).

"Four 'national evaluation centres' are dedicated to a 6-week 'psycho-criminological' evaluation for people with long prison sentences in order to determine their 'potential dangerousness', the necessity of specific security measures, and to assign them to a correctional facility 'adapted to their personality.'"[80] Additionally, each "long-term correctional facility has established a sentence management program which aims to help people with long prison sentences manage their time in prison and eventually prepare their release under the supervision of a psychologist."[81] Finally, there is a security detention unit for people who have served their sentence but are at high risk of reoffending.[82]

Post release, people can be put on probation with probationary suspension, community service, residence ban, civic training, electronic monitoring, or judicial supervision.[83] Furthermore, court-ordered care, which consists of psychiatric or psychological care after people have served their prison sentence, exists for individuals who the Court deems to be at risk but that do not need to remain hospitalized.[84] Court-ordered care "is monitored by a sentencing judge, a social worker, [and] a psychiatrist chosen by the judge from a list of accredited psychiatrists."[85] "The medical coordinator is the connection between the treating psychiatrist, psychologist, and the judge: he/she has to report every year for the duration of probation about the relevance of the care program and the compliance of the offender."[86]

Since 2011, a "mandatory ambulatory care program" can also be set up at the end of a full-time involuntary psychiatric hospitalization.[87] This kind of program is not court ordered and may only be recommended by the treating psychiatrist.[88] "This mandatory ambulatory care program after discharge is usual and there is no minimum or maximum duration of mandatory ambulatory care after the person's discharge from the hospital."[89] A person may be readmitted to hospital if they don't comply with ambulatory care.[90] This type of program can also apply to people that the courts determined lacked criminal responsibility at the time of their discharge from involuntary hospitalization.[91]

iii. Statutes and Relevant Regulations

Determining culpability is a key factor in determining how to prosecute a PSMI in France, and the level of responsibility can determine the sanctions of people diagnosed with mental health disorders.[92] Three categories of criminal responsibility exist in French criminal law: (i) lack of

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[80] Fovet et al., *supra* note 16, at 4.
[81] Fovet et al., *supra* note 16, at 4.
[82] Fovet et al., *supra* note 16, at 4.
[83] Fovet et al., *supra* note 16, at 4.
[84] Fovet et al., *supra* note 16, at 4.
[85] Fovet et al., *supra* note 16, at 4.
[86] Fovet et al., *supra* note 16, at 5.
[87] *See* Denis Leguay & Patrice Boyer, *The organization of psychiatric care in France: Current aspects and future challenges,* 24 INT'L REV. PSYCH. 363 (2012).
[88] Fovet et al. *supra* note 16, at 5.
[89] Fovet et al. *supra* note 16, at 5.
[90] Fovet et al. *supra* note 16, at 5.
[91] Fovet et al. *supra* note 16, at 5.
[92] Fovet et al. *supra* note 16, at 2.

criminal responsibility ("A person who was suffering, at the time of the offense, from a psychic or neuropsychic disorder that abolished his/her ability to control his/ her actions"), (ii) diminished criminal responsibility ("A person who was suffering, at the time of the offense, from a psychic or neuropsychic disorder that impaired his/her ability to control his/her actions") and finally (iii) full criminal responsibility.[93]

However, the French legal system has no statutory powers to prescribe clinical intervention for the general population or for prison inmates.[94] There are two articles of the "Penal Proceeding Code (Code de Procédure Pénale CCP), article D 362 and D 398, which fix limits of psychiatric intervention in prison with the principle that there is no sense to a punishment which cannot be understood and lived through and that the prison is enough constraint by itself not to add treatment by force which would be a menace for human rights."[95]

The articles read:

> *Article D 362:* Except when he is found incapable of giving consent, the detainee must consent to any act of medical diagnosis or treatment.
>
> *Article D 398:* If the condition of a detained person falls under the provisions of article L 3213 of the Public Health Code (Code la Santé Publique), he cannot be remanded in detention and must be transferred to a civil psychiatric establishment, under the regulatory provisions for Compulsory Hospital Commitment.

Article D 362 allows for treatment not consented to nor motivated by an emergency, which has left psychiatrists in the position of being both prescribers of treatment and judges of a patient's ability to consent.[96] Psychiatrists treating prison inmates under this statute can refer inmates back to prison more easily by appealing to the self-same criteria.[97]

C. Netherlands

i. Pre-Conviction Treatment

The Netherlands Institute of Forensic Psychiatry (NIFP) conducts pretrial consultations on suspects and provides recommendations to judges on what type of forensic mental health report should be assigned.[98] Every prison in the Netherlands has a psycho-medical team which consists of a prison physician, nurse psychiatrist, and psychologist that monitors the mental state of

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[93] Fovet et al. *supra* note 16, at 5.
[94] Hans Joachim Salize et. al, Cent. Inst. of Mental Health, Ger., MENTALLY DISORDERED PERSONS IN EUROPEAN PRISON SYSTEMS - NEEDS, PROGRAMMES, AND OUTCOME (EUPRIS), 117 (2007).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See* Frans Koenraadt, *Pre-trial forensic mental health assessment in The Netherlands,* 3 TRANSNAT'L CRIMINOLOGY MANUAL 527 (2010).

detainees.[99] If a defendant is found unfit to stand trial due to a mental disorder, the criminal prosecution is stopped so that the person can be committed to a psychiatric hospital and treated until he can be considered fit.[100] The adjournment can last for an indefinite amount of time. This type of adjournment is not commonly invoked, in contrast to many other Western countries. Additionally, adjournment of the prosecution based on mental disorder is only applicable to a defendant who has mental problems after having committed a criminal act, meaning that there is no causal relationship between his mental state and the crime that has been committed.[101] If the defendant was already suffering from mental health problems at the time he committed the crime, the Dutch Code of Criminal Procedure allows the prosecution to continue and the defendant to be represented fully by his counsel. [102]

In contrast to most countries, Dutch law on involuntary outpatient treatment, such as administering drugs by direct coercion, is not legal except for under strict conditions usually relating to public safety.[103] Additionally, "it is possible to mandate community treatment orders…[and] if the patient does not comply with the conditions of the outpatient treatment order, involuntary admission can be immediately put into effect."[104]

ii. Post-Conviction Treatment

The Dutch handle criminals with mental illness very differently compared to many other countries. In the Dutch criminal justice system, a person can be found responsible for a crime on five gradations.[105] Dutch law has a sliding scale from full responsibility to total lack of responsibility, with three levels in between.[106] If found to have a mental health disorder, once in prison, a convict can be sent to several different places depending on an assessment and recommendation that is provided by a psychiatrist and psychologist.[107] "Those who have the most severe cases or those who refuse treatment can be sent to what's called a PPC – short for penitentiary psychiatric centre. PPCs are separate from the general prison population."[108] "In less severe cases, they can go to a place called the EZG (extra care facility). There are also several places in general mental health hospitals for those who agree to voluntary treatment."[109] Lastly,

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[99] *See* Hjalmar van Marle, *Forensic Psychiatric Services in the Netherlands*, 23 INT'L J.L. & PSYCH. 515 (2000).
[100] Koenraadt*, supra* note 98.
[101] Koenraadt*, supra* note 98.
[102] Koenraadt*, supra* note 98.
[103] Tilman Steinert et. al, *The use of coercive interventions in mental health care in Germany and the Netherlands. A comparison of the developments in two neighboring countries*, 2 Frontiers Pub. Health 1, 3 (2014), https://www.frontiersin.org/articles/10.3389/fpubh.2014.00141/full.
[104] *Id.*
[105] Melissa Hogenboom, *The unique way the Dutch treat mentally ill prisoners,* BBC FUTURE (Apr. 25, 2018), https://www.bbc.com/future/article/20180423-the-unique-way-the-dutch-treat-mentally-ill-prisoners.
[106] *See* Tim McInerny, *Dutch TBS forensic services: a personal view*, 10 CRIM. BEHAV. MENTAL HEALTH 213 (2006).
[107] Hogenboom, *supra* note 105.
[108] Hogenboom, *supra* note 105.
[109] Hogenboom, *supra* note 105.

the Dutch have crisis wards for individuals experiencing acute mental health symptoms and have processes in place for overriding patients' refusal to take medication.[110]

In general, the Netherlands prison population has drastically declined year after year, resulting in numerous prisons being shut down.[111] However, psychiatric patient's prison populations are growing, and this is true worldwide as well.[112] As of 2018, "there were roughly 8,000 prisoners in the Netherlands, according to the Ministry of Justice."[113] The average stay for prisoners entering PCC is about four months, and the PCC can be used as a holding place prior to them being sentenced or released.[114] Prisoners are more likely to receive psychiatric care inside than outside the PPCs due to the shortage of psychiatrists.[115] "Those who commit the most serious violent offences can be detained in a forensic institution called the TBS (terbeschikkingstelling), which means "at the disposal of the government". They can be held there until they are no longer deemed a risk to the public – something that is reviewed every one or two years."[116] "If the risk of reoffending is high, the inmate's stay can be extended for several years beyond their original prison sentence (both a prison and TBS sentence can be given). The average stay is between six and seven years [,] and the aim of TBS is twofold: to protect the public [,] as well as rehabilitate those who are there."[117]

iii. Statutes and Relevant Regulations

In the Netherlands, the statute in the criminal code that defines insanity is Section 39 Criminal Code:

> "Anyone who commits an offence for which he cannot be held responsible by reason of a mental defect disorder or mental disease is not criminally liable. No statutory standards or case law standards are set for determining insanity, but in practice a person is not held responsible for his criminal conduct if at the time of such conduct, as a result of a mental defect, disorder or disease, he lacks substantial capacity either to appreciate the wrongfulness of his conduct, or to bring his conduct into conformity with the requirements of law. In assessing whether the offender cannot be held responsible, the court makes use of reports by psychiatrists."[118]

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[110] Hogenboom, *supra* note 105.
[111] Lucy Ash, *The Dutch prison crisis: A shortage of prisoners,* BBC NEWS (Nov. 10, 2016), https://www.bbc.com/news/magazine-37904263.
[112] Vivienne de Vogel & Tonia L. Nicholls, *Gender Matters: An Introduction to the Special Issues on Women and Girls*, 15 INT'L J. FORENSIC MENT. HEALTH 1-25 (2016).
[113] Hogenboom, *supra* note 105.
[114] Hogenboom, *supra* note 105.
[115] *Geen Zorg vorr Bijna Helft Psychiatrische Patiënten* [*No Care for Almost Half of Psychiatric Patients*], BNNVARA (Jan. 16, 2017), https://www.bnnvara.nl/zembla/artikelen/geen-zorg-voor-bijna-helft-psychiatrische-patienten (Neth.).
[116] Hogenboom, *supra* note 105.
[117] Hogenboom, *supra* note 105.
[118] Tak, *supra* note 31, at 74.

Determining culpability and level of responsibility for a PSMI who commits a crime is a key element in deciding their punishment for that crime. The following is a statute that aids in defining culpability of PSMI. Psychiatric hospital order Section 37 Criminal Code states:

> "If a defendant cannot be held criminally liable for the crime of which he is accused by reason of a mental defect or disorder, the Court may not impose a penalty, but may order that the defendant be committed to a psychiatric hospital for up to one year, provided that the person is a danger to himself, to others, to the general public or to property in general. The Court shall only issue the order after submission of a reasoned, dated and signed opinion of at least two behavioral experts – one being a psychiatrist – who have examined the defendant, except in cases where the defendant is unwilling to cooperate in a psychiatric examination."[119]

III. ANALYSIS

The aim of this paper is to provide a comprehensive overview and comparison between the relationship of the mental health and criminal justice systems in the United States, France, and the Netherlands. Mental health care in each of these countries feature many similarities, but ultimately have more differences. Something that every country analyzed has in common is a lack of ability to manage the ever-growing problem that is mental health in the criminal justice system.

Beginning with observed similarities of the countries, all three countries have struggled to address the level of responsibility of the mentally ill when they commit a crime. Firstly, United States law provides two main perspectives when determining culpability. In determining the mental state of an individual at the time of offense, most states apply either the M'Naghten Rule (which emphasizes a defendant's ability to assess morality of their conduct at the time of the incident) or the Model Penal Code Rule (which emphasizes the defendant's ability to appreciate the nature of a criminal act) to test for insanity. Both rules outline completely different criteria for determining a defendant's mental state at the time of the offense, and defendants are processed and found responsible in inconsistent ways due to the variance of the rules from state to state. Further, every state requires some sort of assessment to assess the culpability of an individual where the person's sanity is in question. However, the process for requesting, obtaining, and conducting that assessment varies from state to state.

In contrast, though still similar, France has two levels of responsibility for PSMI's who commit crimes: lack of criminal responsibility and diminished criminal responsibility. Though there are two levels of culpability for PSMIs in France, the definition for determining the level of culpability is consistent throughout the entire country: "lack of criminal responsibility ("A person who was suffering, at the time of the offense, from a psychic or neuropsychic disorder that abolished his/her ability to control his/ her actions), diminished criminal responsibility ("A person who was suffering, at the time of the offense, from a psychic or neuropsychic disorder that impaired his/her ability to control his/her actions").[120] Though the definition is set in France, the application of the two levels of responsibility varies from court to court based on the particular psychiatrist who interprets the term "psychic or neuropsychic disorder." This term allows for the

[119] Tak, *supra* note 31, at 120.
[120] Fovet et al., *supra* note 16 at 2.

psychiatrist to consider any neurological disorder while completing their assessment, leaving the definition ultimately ambiguous. Similar to the United States, every court in France requires an assessment to determine the culpability of an individual whose sanity is in question. However, in contrast to the United States, an assessment is court ordered every time someone's sanity is in question, and there is no confusion as to who must produce the assessment.

Finally, the Netherlands is like both France and the United States in regards to the ambiguous culpability standard, but is vastly different in its use of levels of responsibility. The Dutch have the most classifications of culpability for an individual who commits a crime with a mental illness element. The Dutch system differs from most criminal law systems in that it allows for a spectrum of guilt rather than forcing someone to be found competent or incompetent. In the Netherlands, five common gradations for responsibility have come to be accepted: complete responsibility, slightly diminished responsibility, diminished responsibility, severely diminished responsibility, and complete non responsibility. Though there are more levels of culpability, the issue with ambiguity is still present. This is due to the language used to describe these mental conditions varying greatly depending on the psychiatrist who completes the assessment. The assessments will often include some level of subjectivity because most definitions are created to function procedurally rather than focusing on clinical definitions. Like the other two countries though, the Dutch do complete a clinical assessment of every individual for competency at the time of a question of sanity. In sum, though every country analyzed has vastly different definitions and levels of culpability, the same problem is present in that each country has left so much room for interpretation in responsibility that the treatment and outcome for every defendant is inconsistent and unsatisfactory.

Next to discuss the biggest differences among the three countries. Though the pretrial process for each of these countries is similar, the post-conviction treatment is drastically different among each of the countries. Beginning first with the United States, who upon reflection of this research has the worst facilities and treatment for PSMIs convicted of crimes. The problem has a long history, but issues with the treatment of PSMIs ultimately stems from the switch of state funding for mental health resources during the Reagan administration to federal funding. This financial switch has left the United States criminal justice system void of almost all substantial treatment options for individuals suffering from mental illness. Treatment options range from mental health courts and pretrial diversion programs, to discharge planning and in-prison and community-based treatment programs. However, due to the lack of funding and resources, prison staff are left with the responsibility of treating individuals who should ultimately be receiving hospital treatment or psychiatric help from trained professionals. Ultimately, the lack of proper clinical treatment leads to increased recidivism and growing numbers in the prisons.

France ranked second best out of the three countries and has significantly more resources for treating convicted individuals. This is because of the use of in-prison treatment professionals in every facility and using specialists in the more severe cases. Mental health care workers provide three levels of care inside correctional facilities: ambulatory care units; day treatment hospitals; and full-time hospitalization. Additionally, there are maximum-security psychiatric wards located in community psychiatric hospitals where incarcerated individuals who pose a greater safety risk can be kept indefinitely. This helps reduce the risk of recidivism because individuals are given professional treatment and care. However, the dark side of French mental health treatment is that

often it is used as a way of keeping societies 'unwanted' locked away for indefinite periods of time. There has been much controversy in France about whether the French justice system has simply criminalized and institutionalized its mentally ill so as not to have to deal with them in society.

Lastly, and the country which I would rank the highest among the three, is the Netherlands. The Dutch have created extensive treatment facilities inside and outside of prisons for individuals suffering from mental illness. They have treatment programs that begin from the moment a PSMI enters the legal system and continue past the time that the individual has served their punishment. There are also several places in general mental health hospitals for those who agree to voluntary treatment. As a direct result, the Netherlands prison population has continued to drastically decline over the years, with many prisons being shut down. Whether this is positive or negative, prisoners are actually more likely to receive psychiatric care inside of prison rather than outside due to the extensive prison mental health facilities. Overall, the TBS system of Netherlands can be seen as a model of how to properly care for PSMI who are in the criminal justice system.

CONCLUSION

Every country differs largely in their practice and policy of mental health treatment for criminals. Although both the legal and the mental health systems can be viewed as institutions with noble aims and benign intent, the institutions in place are insufficient to address and treat PSMI. Based on the analysis and comparison between the three countries, it is evident that there is no consensus on how to properly treat and address mental health in the justice system. There is, however, a growing urgency to improve the mental health of these offenders to prevent re-offenses through rehabilitation.

In every country, resources for treating individuals with mental health disorders are stretched to the limit, as they're tight on money and time. As a result, many have tried to find a faster, more efficient way to diagnose and treat PSMI, but with limited options and resources, many criminal justice practitioners are overwhelmed with the amount of work. Universally, there needs to be facilities designed for and dedicated to people with mental health disorders who commit crimes, and better training of mental health and justice partners to facilitate the treatment of these individuals. The justice system needs to adapt and implement the changes discussed to address the current mental health crisis.