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Race, Mental Illness, and Restorative Justice: An Intersectional Approach to More Inclusive Practices

Sabah H. Muhammad* and J. Michael E. Gray**

I. INTRODUCTION

In the summer of 2019, a Black man faced trespassing charges in Georgia. The facts of the case were not entirely about the trespassing offense because the defendant had been “belligerent” with everyone who came near him from the moment of his first contact with police. The court assigned a public defender, and from her first meeting with her client, she knew why he committed the offense and why he had been “belligerent” with police, corrections officers, and nurses at the jail. Her client was shoeless, he had open wounds on his feet, and his eyes focused on something both distant and within himself. She knew those eyes, and she knew what they meant.

Law school had not prepared her for the systemic injustices that were to come, but her lived experiences had. The attorney’s brother is also a Black man with severe mental illness (SMI) who has faced serious criminal charges. She understood what other stakeholders in the criminal justice system did not—from the wounds on her client’s feet, to the seemingly inexplicable

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trespassing, his violent behavior post-arrest, his inability to give anyone his name (he sincerely did not know his name at the time of arrest), and his incorrect belief that he was in North Carolina and not Georgia—her client was too sick to help himself. He was too sick to access the tools to gain his own freedom and would simply stay in jail.

Her experience also told her that the compassion a law enforcement officer could have used to see, quite clearly, that the client was not a criminal, but rather that the client was unwell, is systematically withheld from Black individuals diagnosed with SMI during a mental health emergency. The arresting officer alone had the choice to take the man to a hospital; they chose jail instead. No matter the outcome of what was surely not the client's first or last criminal offense, she knew from the moment she saw him that she was about to play a part in a series of injustices. There would be no justice for the victim of the original offense, no justice for the community, and no justice for the defendant who could not even form the intent to commit the crime.

The systemic failures did not begin or end during pretrial detention. In court, the attorney had to try and find just solutions that did not exist. For clients that commit a crime because SMI controlled their mind at the time of the offense, the best place for them, once they are able to participate in their continuum of care, is at home. However, sending home a person accused of committing an offense¹ does not address the harm done to the victim and the community, nor does it address the harm done to the individual by years of inability to access psychiatric treatment. The client would almost certainly end up cycling through the criminal justice and mental health systems again.

Eventually, the attorney found the client's family and learned he had experienced a decades-long cycle of nontreatment and incarceration. The only legal option to address his mental state was to delay. She knew that this case would end with no long-term plan for treatment that could return him to

¹ Family support is often crucial for effective treatment of SMI, but it is also difficult on family members. See E. FULLER TORREY, M.D., *SURVIVING SCHIZOPHRENIA: A FAMILY MANUAL* 284–321 (7th ed. 2019).

the person he had been before SMI robbed him of his ability to make decisions. Even if he were temporarily stable, racial disparities in access to treatment would likely keep him from remaining stable. The client's status as a person with SMI, combined with his race, made it far more likely that he would end up cycling through jail numerous times before he ever received adequate mental health treatment. Likewise, nothing about this client's case would change the reality that the community and the victims had been harmed by his actions, and the court had no mechanism to remedy the interdependent obligations owed to the victim, the client, and the community.

This article argues for an application of restorative justice practices that would have benefitted the client and others who occupy the intersection of race and a diagnosis that are both marginalized in different but overlapping ways. Part I defines and explains restorative justice as it is currently implemented in the United States. We specifically focus on widespread shortcomings in the restorative justice movement in the form of overrepresentation of non-violent white individuals and the common requirement that they admit culpability to enter the process. Part II explains the unique problems that SMI presents in adjudicating criminal offenses and the compounded marginalization of Black people with SMI accused of committing crimes. Part III is an argument for an expansion of restorative justice practices to include some violent offenses involving people with SMI who are Black.

II. BACKGROUND: RESTORATIVE JUSTICE

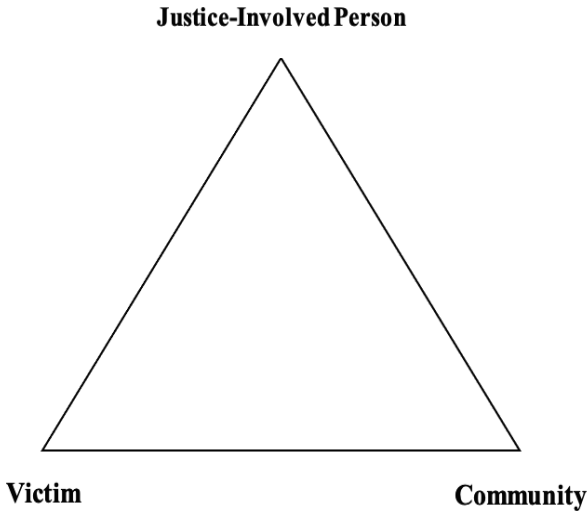
Restorative justice is a broad term encompassing many alternative approaches to criminal justice. In recent decades, it has come to mean any program or methodology used in place of or in addition to the existing system of criminal law enforcement that addresses interpersonal harm done by criminal activity to the victim and the justice-involved person, as well as

harm to the community and society.² All three participants—the victim, the justice-involved person, and the community—are necessary parts of a restorative justice model.³ For this reason, practitioners and scholars often describe restorative justice as a triangle.⁴ The three participants are at the angles of the triangle and the sides that connect the angles represent the interdependence among each individual entity and the other two.

² See Golan Luzon, *Challenges Shared by Restorative Justice and Strict Liability in the Absence of Mens Rea*, 19 NEW CRIM. L. REV. 577, 578 (2016); FANIA E. DAVIS, THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE 35 (2019); Thomas L. Hafemeister et al., *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, 191 (2012); Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 L. & CONTEMP. PROBS. 59, 68 (2004); Michael P. Seng, *Segregation, Violence, and Restorative Justice: Restoring Our Communities*, 50 J. MARSHALL L. REV. 487, 502–05 (2017) (describing restorative justice as a triangle: “On one side is the perpetrator; on the second side is the victim, often described as the survivor; and on the third side is the community”). Typical restorative justice approaches include circle sentencing, where everyone involved in the adjudication of the offense sits in a literal circle and discusses possible remedies, family group conferencing, involving the family of the justice-involved person, reparative boards, and “victim-offender mediation.” Gordon Bazemore & Mark Umbreit, *Conferences, Circles, Boards, and Mediations: Restorative Justice and Citizen Involvement in the Response to Youth Crime*, BALANCED & RESTORATIVE JUST. PROJECT 6 (1999). The latter approach, “victim-offender mediation,” is widespread in North America, particularly with low-level offenses, and is the principal type of restorative justice discussed in this article.

³ See Seng, *supra* note 2, at 502–05.

⁴ *Id.* at 502.



Applying the main purpose of restorative justice, “that involves . . . those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible,”⁵ is a practice that is prehistoric in origin and may be as old as the first human civilizations.⁶ Modern criminal justice procedures, however, are usually housed within the existing criminal justice system.⁷ They therefore require enormous bureaucracies, federal, state, and local funding

⁵ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE*, in *THE BIG BOOK OF RESTORATIVE JUSTICE* 50 (2015).

⁶ Hafemeister et al., *supra* note 2, at 191, citing JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 5 (2002) (“Restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world’s peoples”).

⁷ See Chelsea E. Bullard, *Mental Health Courts: A Theory-Driven Program Evaluation*, 52–55 (Dec. 2018) (Ph.D. dissertation, Oklahoma State University) (available at https://shareok.org/bitstream/11244/320943/1/Bullard_okstate_0664D_16015.pdf [<https://perma.cc/YVB3-NTRV>]).

streams, sprawling courthouse complexes, jails, and prisons of ever-increasing capacity. Discussing interpersonal harm and negotiating mutually beneficial methods to address that harm does not require such elaborate infrastructure and has been practiced by communities for millennia for both practical and philosophical reasons.⁸

Formal procedures for restorative justice housed within the modern criminal justice system date to roughly the 1970s and were a reaction to the mid-to-late twentieth century state of crime and punishment.⁹ The United States saw rising numbers in incarcerations and recidivism¹⁰ with the advent of mandatory sentencing guidelines,¹¹ a growing focus on prosecuting drug offenses,¹² and criminalization of brain diseases.¹³ Increased incarceration rates posed financial and pragmatic problems for federal and state agencies,

⁸ See DAVIS, *supra* note 2, at 17–29.

⁹ Hafemeister et al., *supra* note 2, at 191.

¹⁰ See Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1228 (2010). Zimring notes the “contrast between the four decades after 1930 and the three and a half decades after 1972 is stark.” *Id.* Incarceration rates in the former period were relatively flat but increased significantly each year in the latter period. *Id.*

¹¹ Congress authorized federal sentencing guidelines in 1984, 28 U.S.C. § 994 et. seq., and the Sentencing Commission promulgated the first *Guidelines Manual* in 1987, but state legislatures began enacting guidelines as early as 1980. See e.g., Minn. Stat. § 244.09; see Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROB. J. 28 (Sept. 2017), for a general discussion of the first four decades of state sentencing guidelines.

¹² The number of Americans incarcerated at any given time for drug offenses increased by 1,000% from 1980 to 2018. DRUG POL’Y ALL., THE DRUG WAR, MASS INCARCERATION AND RACE (2018), https://drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf [<https://perma.cc/9BFX-C2KM>].

¹³ “Criminalization” refers to the tendency of the criminal justice system to direct people with mental illness to jails and prisons. The term dates to at least 1972 when Dr. Marc F. Abramson was looking for terminology to describe potential consequences of the Lanterman Petris Short Act in California. See Marc F. Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side-Effects of a New Mental Health Law*, 23 HOSP. & COMM. PSYCHIATRY 101 (1972). Correctional facilities are the largest mental healthcare providers in the United States today. Matt Ford, *America’s Largest Mental Hospital is a Jail*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> [<https://perma.cc/M28W-UNQH>].

but also led to ethical questions about whether so many Americans should be incarcerated, especially for particular types of offenses. Restorative justice practices emerged as an alternative to more effectively address the harm done by an offense than the existing system of confining an individual to a prison after a lengthy adversarial process that serves the singular purpose of incapacitating them for the time they are incarcerated.

A. Lack of Focus on Violent Offenses

The greatest preclusion for participation in restorative justice programs is their tendency to focus on nonviolent offenses.¹⁴ Violent offenses are not entirely excluded, but non-violent justice-involved persons make up the majority of participants who benefit from these programs.¹⁵ Despite their ancient origins and noble goals,¹⁶ restorative justice programs largely function as one of the many diversionary tools for prosecutors, police, and

¹⁴ This is not to say that violent offenses are left entirely out of restorative justice theory and praxis. Regarding theory, *see e.g.*, ZEHR, *supra* note 5, at 19–20 (“[I]f the principles of restorative justice are taken seriously, the need for restorative approaches is especially clear in severe cases.”). Zehr’s assertion is at the crux of the argument contained in this article for broadening restorative justice to include populations currently being left out because of the nature of the offense and/or the presence of SMI clouding the legal elements of the crime. For the limitations that focusing on nonviolent offenses place on restorative justice approaches, *see e.g.*, M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123 (2016); Arlene Gaudreault, *The Limits of Restorative Justice*, Proceedings of the Symposium of the *Ecole Nationale de la Magistrature* 7 (2005), https://www.victimswweek.gc.ca/symp-colloque/past-passe/2009/presentation/pdfs/restorative_justice.pdf [<https://perma.cc/P3UZ-VALY>]. Some real-world exceptions to the restorative justice focus on nonviolent offenses exist and are showing preliminary positive results. *See* Billy Rankin, *A Second Chance for Some Violent Criminals in Fulton County*, ATLANTA J. CONST. (Nov. 23, 2018), <https://www.ajc.com/news/local/second-chance-for-some-violent-criminals-fulton-county/vIiIZJfJufLuWlyHoaYBzM/> [<https://perma.cc/XQH9-D92T>]. Fulton County’s community-based diversionary approach has elements of restorative justice but is still carceral in nature—participants face the threat of prison time if they do not comply with court-ordered plans. *Id.*

¹⁵ *See* Hanan, *supra* note 14, at 123.

¹⁶ *See generally* DAVIS, *supra* note 2.

courts.¹⁷ As with any diversionary program, the people in the system with the discretionary power to divert a defendant towards restorative justice programs are highly unlikely to divert violent individuals for a number of ethical, pragmatic, and political reasons.¹⁸ Contrary to the historic spirit of restorative justice—finding remedies for harm outside of a criminal justice system that itself exacerbates harm onto the triangle entities of justice-involved person, victim, and community—excluding cases of violent crime leaves the most injured parties in society on the outside of restorative justice looking in.¹⁹

The degree of trauma caused by an offense is subjective, as is any effective restorative justice remedy, but violent and interpersonal offenses will usually cause more obvious and devastating amounts of trauma to the parties involved than nonviolent property crimes. The restorative justice movement should apply its theories and praxis to all cases where there is an opportunity to address obligations and alleviate harm, not just the cases that are convenient for practitioners.

¹⁷ See Hanan, *supra* note 14, at 126–38.

¹⁸ See *infra* Section III.F (discussing political impracticalities to legislators adopting the *mens rea* variant to diminished capacity). Similar political and ethical obstacles prevent judges from diverting cases involving particularly violent sets of facts. Politically, most states select judges through popular election and anything short of incarceration for people convicted of violent offenses would risk disfavor with the electorate in many jurisdictions. From an ethical standpoint, judges have an obligation to follow legislative intent, and although they deviate from that obligation at times to follow legal precedence or their own consciences, the dilemma of having an egregiously harmed victim can sway jurists against non-traditional adjudication.

¹⁹ Most people incarcerated in state prisons are there for violent offenses. E. Ann Carson, *Prisoners in 2019*, DEPT. OF JUST. (2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/V3NF-L4LT>]. The breakdown for federal prisoners is similar but more semantically complicated. Most federal prisoners are incarcerated for drug or “public order” offenses, the latter including “immigration” and “weapons” charges. *Id.* at 22. It should be noted that there are far more state prisoners than federal, by a ratio of nearly eight-to-one. *Id.* at 20–22.

B. Racial Focus of Restorative Justice (or Lack Thereof)

Four decades into the modern incarnation of restorative justice, social justice advocates and anti-racist activists were troubled by the lack of racial equity in restorative justice programs.²⁰ They noticed and denounced “the lack of racial justice consciousness within the restorative justice community.”²¹ Most social movements in the history of the United States, unless they originate within communities of color, tend to be by white people and for white justice.²² Such movements tend to omit Black voices and other voices of color from their inception through early implementation. In addition to the lack of racially diverse voices within the restorative justice movement, there was a dearth of research into the racial implications of its practices.²³

The lack of both theory and practice regarding race in restorative justice was (and still is) especially alarming for two main reasons: the well-documented and highly controversial racial disparities in incarceration rates²⁴

²⁰ By the early 2010s, the only comprehensive study on multicultural aspects to restorative justice focused on mediators in two Scandinavian countries. See B. Albrecht, *Multicultural Challenges for Restorative Justice: Mediators' Experiences from Norway and Finland*, 11 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 3–24 (2010); and that is better than no research on the topic, but of limited relevance in the United States, which in 2010 had a population of 85.2 million people who were races other than white. Nearly 40 million of those people were Black. Karen R. Humes et al., *Overview of Race and Hispanic Origin*, 2010 U.S. Census Briefs 4 (2011).

²¹ DAVIS, *supra* note 2, at 36; ZEHR, *supra* note 5, at 11 (“Another concern is whether in articulating and practicing restorative justice, we are replicating patterns of racial and economic disparities that are prevalent in society.”).

²² See DAVIS, *supra* note 2, at 36. Some movements originally excluded Black people for reasons of overt individual racism, but anti-racists believe that any movement aiming at social justice that does not include non-white membership and some element of non-white leadership will inherently ignore or avoid just outcomes for non-white people because of systemic racism. *Id.* at 31–37.

²³ Theo Gavrielides, *Bringing Race Relations into the Restorative Justice Debate: An Alternative and Personalized Vision of “the Other,”* 45 J. BLACK STUD. 216, 217 (2014); see *supra* note 20 (citing the lack of research into multiethnic representation in restorative justice).

²⁴ See Gayrielides, *supra* note 23, at 218. The controversies surrounding race and incarceration rates are rooted in highly problematic debates regarding the reasons that

and the potential to compound long-standing distrust and disengagement by Black people towards the criminal justice system. At the time that advocates and scholars began noticing the troubling trend, the imprisonment rate for Black adults in the United States was over six times that for white adults.²⁵ Restorative justice will never achieve its potential and provide more fair and effective results than the existing criminal justice system unless it actively engages the people who are harmed the most by the current system. This realization led practitioners and advocates to begin new programs, conferences and scholarly research focused on bringing race to the fore of restorative justice.²⁶

In addition to the statistical equity of including racial consciousness in the restorative justice movement, there is another reason to do so that transcends case-by-case interpersonal healing: the potential for healing some aspects of inter-generational racial trauma. Inter-generational trauma, the negative

individuals commit criminal offenses. Generally, it is a discussion over the inherent disadvantages that result from structural and institutional racism, as opposed to racist beliefs that people of color are inherently more inclined towards antisocial behavior. For a treatment of the history and debate on race and imprisonment in the United States, *see generally* Delaney et al., *American History, Race, and Prison*, VERA INST. OF JUST. (Oct. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/FSD4-TUN9>].

²⁵ Carson, *supra* note 19, at 10. Carson defines “imprisonment rate” as “the number of prisoners sentenced to more than one year under state or federal jurisdiction per 100,000 U.S. residents” and presents data from 2009–2019. The imprisonment rate for white adults in 2013 was 292 and for Black adults it was 1,826, ergo 6.25 times higher. In 2019, the rate for Black adults had fallen to 5.5 times the rate for whites—1,446 and 263 respectively—but that is still a gross overrepresentation of Black people in correctional facilities.

²⁶ *See e.g.*, Gavrielides, *supra* note 23 (arguing that research into race and restorative justice was long overdue by 2014). The National Association of Community and Restorative Justice, which has held biennial conferences since 2013, focused its 2017 conference on racial aspects of restorative justice. 6TH NACRJ CONFERENCE PROGRAM, NAT’L ASSOC. OF CMTY. AND RESTORATIVE JUST. (June 16, 2017), https://nacRJ.org/images/NACRJ_Conferences/2017/6th_NACRJ_Schedule_Online_6-16-17.pdf [<https://perma.cc/8VMG-2JMM>].

effects of trauma passed down through multiple generations,²⁷ has manifested in Black people in the United States as often feeling distrust towards numerous government institutions.²⁸ The criminal justice system is no exception: centuries of structural racism playing out in law enforcement encounters, courtrooms, and carceral institutions have left Black people understandably jaded and distrustful that those same courtrooms will produce just results.²⁹

By historically eschewing racial consciousness in restorative justice procedures, some programs are missing an opportunity to confront issues of race and crime head-on. Furthermore, the very location of many restorative justice programs—within existing criminal justice infrastructure—risks both creating hesitancy in Black victims and individuals accused of crimes to take part as well as overreliance on components of the criminal justice system that have failed throughout the nation's history to bring just sentencing for Black justice-involved people. The willingness of victims and justice-involved persons to participate in a process and be open to empathy for all personal factors, including race, is so vital to the restorative justice process that ignoring the long-term context of race in the United States risks creating ineffective remedies.

²⁷ See Tori DeAngelis, *The Legacy of Trauma*, 50 MONITOR ON PSYCH. 36 (2019). Although most research and theories related to intergenerational trauma are related to Holocaust survivors and their descendants, a recent study indicates that racial discrimination against Black people is causing trauma symptoms. See generally Monnica T. Williams et al., *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, 8 PSYCH. VIOLENCE 735 (2018).

²⁸ James M. Avery, *The Sources and Consequences of Political Mistrust Among African Americans*, 34 AM. POL. RES. 653 (2006).

²⁹ For data showing greater distrust of state and local courts among Black Americans, see, e.g., DAVID B. ROTTMAN ET AL., NAT'L CTR. FOR ST. CTS., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 10–12 (2003); LAWRENCE W. SHERMAN, TRUST AND CONFIDENCE IN CRIMINAL JUSTICE 8–10 (July 2001), [https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-1.pdf?q=\[https://perma.cc/T872-CNQ5\]](https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-1.pdf?q=[https://perma.cc/T872-CNQ5]).

C. *Admitting Culpability*

Another requisite component of restorative justice, as it is commonly practiced, is the assumption of responsibility for the harm done by the person accused or convicted of committing an offense. Most restorative justice programs require a basic understanding by all parties that the justice-involved person committed the offense and that the commission thereof harmed the other two players in the process: the victim and the community.³⁰ The justice-involved person must therefore admit culpability to proceed with a program that will likely have a solution they find more agreeable than the remedies available under a traditional adjudication.³¹

This requirement of admitting culpability is intended to induce shame in the person accused of wrongdoing. Two seemingly indispensable aspects of restorative justice are that an individual must “express genuine shame and remorse for his/her actions, and [that the] victim forgives the [individual for the harm done].”³² Shame—meaning the justice-involved person feels humiliation and distress because of their harmful actions—is *sine qua non* (literally “without which, not”) to an equitable outcome in a restorative justice procedure. Admitting culpability is therefore also a *sine qua non* requirement for taking part in the restorative justice process.³³ This admission of guilt requirement is not just admitting legal guilt, as in an Alford plea, or allocution prior to sentencing; it goes much further and requires that they take responsibility for the harm done to both the victim and the community.³⁴

³⁰ See Luzon, *supra* note 2, at 580–83.

³¹ See *id.* The requisite admission of guilt, at least moral guilt if not also legal, can create an element of coercion in some cases. If an individual does not believe that they should admit responsibility for an offense but doing so is the best option to avoid incarceration, their limited options could entice them to feign responsibility.

³² Hafemeister et al., *supra* note 2, at 195.

³³ See Luzon, *supra* note 2, at 580.

³⁴ See *id.* at 581–83; Hafemeister et al., *supra* note 2, at 195.

III. THE MIND OF THE PERSON WHOSE ACTIONS CAUSE HARM

In the context of restorative justice, culpability is about responsibility. Responsibility for a criminal offense begins with the mind of a person facing criminal charges and answering the question—what was on that person’s mind at the time that the crime occurred? This section discusses the mental element of crimes in common law jurisdictions, exceptions to that rule, and the devastating way that mental illness affects a person’s ability to form intent. The section then takes an intersectional view of Black people impacted by SMI and concludes with a statutory approach that accounts for the impact of SMI on *mens rea*.

A. *Mens Rea*

The mental element of a crime, perhaps the most easily recalled Latin term of first-year law students, is *mens rea*. In common law criminal adjudications, “actus reus non facit reum nisi mens sit rea (“the act is not culpable unless the mind is guilty”).”³⁵ The act of the offense, the *actus reus*, is not enough to convict the defendant; the defendant must also have the statutorily requisite mindset at the time of the offense.³⁶ The presumption of innocence, a hallmark of common law jurisdictions,³⁷ demands a person only be convicted and punished if fully responsible for the crime. Accordingly, a two-prong approach—proving both the mental and physical aspects of an offense—provides more hurdles for the state and more protections for the accused. *Mens rea* is not merely an element of an offense but is an aspect on equal legal footing with *actus reus* as elements of the prosecution’s prima

³⁵ DAVID LANIUS, STRATEGIC INDETERMINACY IN THE LAW 113 (2019).

³⁶ The exceptions to this common law rule are strict liability offenses. For a discussion of these offenses and all their many problematic forms, see *infra* Section III.B.

³⁷ See, e.g., Coffin v. U.S., 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”); R. v. Whyte (1988) 2 S.C.R. 3 (Can.) (clarifying that the common law presumption of innocence extends not only to elements of an offense but also to excuses).

facie case.³⁸ *Mens rea* is, however, arguably the more ethically damning of the two elements because the *actus reus* either has or has not occurred and either has or has not caused harm, but the *mens rea* is what caused the individual to do the act that caused harm. To possess *mens rea* is to be responsible for harm caused by the *actus reus*.

The Model Penal Code (MPC) calls *mens rea* by its slightly less archaic name—culpability—and describes four different levels of culpability available for statutory construction. Except for strict liability offenses,³⁹ “a person is not guilty of an offense unless he acted purposefully, knowingly, recklessly or negligently . . . with respect to each material element of the offense.”⁴⁰

As a comprehensive approach to enumerate the true nature of the historic but vague concept of *mens rea*,⁴¹ the MPC assigns decreasing levels of guilt in a person’s mind to four states of culpability.⁴² A person acts with purpose if it is their “conscious object to engage in conduct [that causes the result]” or if they are “aware of the existence of [attendant circumstances] or hopes that [the circumstances] exist.”⁴³ An individual acts “knowingly” if “[they are] aware that it is practically certain that [their] conduct will cause [the

³⁸ MODEL PENAL CODE § 2.02 (AM. L. INST. 2021).

³⁹ See *infra* Section III.B.

⁴⁰ MODEL PENAL CODE § 2.02(1) (AM. L. INST. 2021).

⁴¹ The Court in *Morissette v. U.S.*, 342 U.S. 246 (1952) commented on the “variety, disparity and confusion of [various states’] definitions of the requisite but elusive mental element.” *Id.* at 252. They continued to point out the consistency with which states require a mental element to crimes but the inconsistency of language and meaning: “However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as ‘felonious intent,’ ‘criminal intent,’ ‘malice aforethought,’ ‘guilty knowledge,’ ‘fraudulent intent,’ ‘willfulness,’ ‘scienter,’ to denote guilty knowledge, or ‘mens rea,’ to signify an evil purpose or mental culpability.” *Id.*

⁴² MODEL PENAL CODE § 2.02(2)(a)–(d) (AM. L. INST. 2021). For a treatment of the historical and practical significance of the first MPC’s defining of culpability, see Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 952–53 (1999).

⁴³ MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 2021).

resulting offense]” or if “[they are] aware that [their] conduct is of that nature [to commit the offense] or that such [attendant] circumstances exist.”⁴⁴ Reckless culpability is conscious disregard of a “substantial and unjustifiable risk,” and that disregard must involve “a gross deviation from the standard of conduct that a law-abiding person would observe. . . .”⁴⁵ Last and least guilty of the mental states, negligent culpability is present when a person “should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.”⁴⁶ The negligent conduct also must, “considering the nature and purpose of [an individual’s] conduct and the circumstances known to [them], [involve] a gross deviation from the standard of care that a reasonable person would observe in the [individual’s] situation.”⁴⁷

The most significant result of the distinct levels created by the MPC for culpability is the implication of a hierarchy for the degrees of *mens rea*. The MPC itself points out that, “when the law provides that negligence suffices to establish an element of an offense, such element is also established if a person acts purposefully, knowingly or recklessly,”⁴⁸ and applies the same principle for each kind of culpability.⁴⁹ States that have incorporated the MPC into statute follow the culpability hierarchy to ensure that more harmful offenses and more severe punishments require a greater degree of guilt in the mind of the defendant. New Jersey, for example, has largely based its criminal code on the MPC, including the culpability requirements.⁵⁰ Accordingly, the New Jersey judiciary has found that each ascending level

⁴⁴ *Id.* at § 2.02(2)(b).

⁴⁵ *Id.* at § 2.02(2)(c).

⁴⁶ *Id.* at § 2.02(2)(d).

⁴⁷ *Id.* (Note that an individual with reckless culpability must deviate “from the standard of conduct that a *law-abiding person* would observe,” while a negligent individual only need deviate “from the standard of care that a *reasonable person* would observe,” creating an additional and subtle difference in the two types of culpability (emphasis added)).

⁴⁸ MODEL PENAL CODE § 2.02(5) (AM. L. INST. 2021).

⁴⁹ *Id.*

⁵⁰ *See* N.J. Stat. § 2C:2-2.

of *mens rea* requires a greater degree of awareness.⁵¹ Therefore, a defendant cannot be reckless unless they are also negligent, but the inverse is not true.

The *mens rea* requirement's historical, moral, and legal status as an inherent element to most⁵² offenses makes both legal scholars and lawmakers loathe to statutorily relax or eliminate it from criminal statutes. There is, despite the inherent justice of requiring intent before incarceration, one common category of statutes that purportedly contains no *mens rea* element at all—strict liability offenses.

B. Strict Liability: Exceptions to the Mens Rea Requirement

Strict criminal liability enables conviction without *mens rea*.⁵³ Unlike the degrees of culpability discussed in the previous section, strict liability creates convictable scenarios absent purpose, knowledge, recklessness, or even negligence in an individual's mind. This lack of culpability is a historical bane of retributivists because it seeks to punish a person who cannot be morally responsible.⁵⁴ Despite this well-reasoned objection to strict liability criminal statutes, they are pervasive throughout United States jurisdictions and come in many forms that produce varying levels of repercussions in sentencing. Legislatures justify infringement upon the *mens rea* requirement by including only low level offenses and correspondingly small sentences, at

⁵¹ *State v. Williams*, 919 A.2d 90, 95–96 (2007) (citing *State v. Simon*, 737 A.2d 1 (1999), *State v. Rose*, 548 A.2d 1058 (1988), and *State v. Sewell*, 603 A.2d 21 (1992)). Even jurisdictions like Kentucky, which have not technically adopted the MPC, still use a similar hierarchy of culpability. See KY. REV. STAT. ANN. § 501.030 (using the terms “intentionally, knowingly, wantonly [and] recklessly” to create a similar framework for statutory construction and judicial interpretation).

⁵² See discussion of strict liability offenses, *infra* Section III.B.

⁵³ See Kenneth W. Simons, *When is Strict Criminal Liability Just*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1079 (1997), citing, *inter alia*, Phillip E. Johnson, *Strict Liability: The Prevalent View*, in 4 ENCYCLOPEDIA OF CRIME & JUST. 1518 (Sanford Kadish, ed. 1983).

⁵⁴ See generally Christopher P. Taggart, *Retributivism, Agency, and the Voluntary Act Requirement*, 36 PACE L. REV. 645 (2016); Kenneth Simons, *Is Strict Criminal Liability in the Grading of Offenses Consistent with Retributive Desert?* 32 OXFORD J. LEGAL STUD. 445 (2012).

least in theory. In reality, strict liability offenses include a multitude of statutory crimes from the smallest offenses and sentences to the most violent crimes with the most severe punishments.⁵⁵ There are two layers necessary to understanding the latter categories of crimes—crimes of result versus crimes of circumstance and incriminating strict liability offenses versus escalating strict liability offenses.

First, strict liability offenses often omit *mens rea* because of either result of the crime or circumstance of the crime. The classic example of a result strict liability offense is felony murder.⁵⁶ The defendant causes a homicide in the course of committing a lower-level felony; they had the intent to commit the lower offense, and that intent plus the result of the victim's death equals a murder conviction. The classic example of a circumstance strict liability offense is a difficult topic, especially for survivors of sexual violence, but it makes up the lion's share of jurisprudence for this type of strict liability—statutory sexual assault.⁵⁷ In statutory sexual assault, the defendant intends to have sex with the victim, but it is the circumstance of the victim's age combined with the physical act that make the defendant convictable. Whether or not a defendant intended to have sex with an underage person is irrelevant.

Second, strict liability statutes also fall into categories of incriminating or escalating offenses. As Golan Luzan explains: "For incriminating strict liability, culpability is not required with regard to each essential element of the offense. For escalating strict liability, culpability is required with regard to at least one essential element but not for an additional element that creates a more severe offense."⁵⁸ Luzon demonstrates escalating strict liability with

⁵⁵ Luzon, *supra* note 2, at 584, 587.

⁵⁶ See Simons, *supra* note 53, at 1077.

⁵⁷ *Id.* at 1080.

⁵⁸ Compare Luzon, *supra* note 2, at 586–87, with Simons, *supra* note 53. Luzon attempts to improve the operative language that Simons uses to describe these layers and types of strict liability. Simons described three separate pieces: 1) result and circumstance, (discussed *infra* this section); 2) pure and impure (with "pure" meaning a textbook strict liability offense such as minor traffic violations where no *mens rea* is required and "impure" meaning an offense for which the law requires *mens rea* for at least one element

the example of petty theft and grand larceny, in which an individual accused of committing the offense only intended to commit petty theft, but the items stolen reach the grand larceny threshold.⁵⁹ In most jurisdictions, that individual could be convicted of grand larceny despite not having the mental state to commit that crime.⁶⁰ Incriminating strict liability includes more straightforward offenses, occurring when a statutory offense truly has no *mens rea* requirement, as in minor traffic violations. The prosecution does not have to prove that someone meant to exceed the speed limit, only that the violation occurred.

The result/circumstance and incriminating/escalating dynamics overlap significantly. Someone with no ability to form *mens rea* and who has no grasp of objective circumstances at a given moment therefore cannot intend to do anything that results from their behavior as it connects with reality. If that person does not know that the human being standing before them is a person or that the person is a police officer, can they then be held culpable for murder? Does that culpability extend to the elevated offense of murdering a police officer?⁶¹ A statutory scheme allowing a conviction in those

of the crime); and 3) criminalizing and grading strict liability. Simons, *supra* note 53, at 1079–82. The latter of the three is so similar to pure and impure strict liability that Luzon combined them into incriminating and escalating offenses. We use Luzon’s terminology because it is simpler to have fewer categories of differentiation among strict liability offenses so long as they lead to the same level of understanding the law. In this case, we can achieve that goal.

⁵⁹ Luzon, *supra* note 2, at 586–87.

⁶⁰ *Id.*

⁶¹ These are the facts of *Clark v. Arizona*, 548 U.S. 735 (2006). The Supreme Court upheld Clark’s conviction even though there was evidence that a severe mental illness, schizophrenia, led him to believe that extraterrestrial aliens were threatening his life and that the police officer he killed was an alien. The Court’s reasoning, related to limiting the admissibility of mental health evidence, is the source of much scholastic ire and an underpinning of the need for the *mens rea* variant discussed *infra* at Section III.F. For a critical analysis of the Court’s reasoning in *Clark*, see generally Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071 (2007).

circumstances⁶² would apply strict liability—the result of the dead police officer regardless of the person’s intent—and escalating strict liability—culpability needed to kill a police officer is irrelevant as long as there is culpability for some other part of the crime.

C. Severe Mental Illness

Although numerous medical conditions can impair one’s ability to form *mens rea*, this article focuses on severe mental illness (SMI) and its impact on a person’s actions. SMI is a narrow list of conditions that so substantially interfere with the brain’s ability to function that an untreated individual cannot, at times, take care of their basic needs, make rational decisions, or conduct other life activities that a person without SMI can do with little or no effort.⁶³ SMI diagnoses include schizophrenia, schizoaffective disorder, bipolar disorder, severe major depression, and other psychotic disorders.⁶⁴ Individuals experiencing a psychotic episode may not, by definition, be able to understand the objective reality of their surroundings.⁶⁵ They may not have control of their own actions and almost certainly cannot distinguish reality from an alternate set of circumstances existing in their mind as a symptom of SMI.⁶⁶ Delusions, hallucinations, and other mental manifestations can cause the person to act in ways that they would not act were they not experiencing psychosis.⁶⁷ In addition to those restrictions on mental and physical functioning, many people with SMI do not know that they are sick and are

⁶² See, e.g., ARIZ. REV. STAT. ANN. § 13-1105 (the statute under which the state of Arizona convicted Clark).

⁶³ 64 Fed. Reg. 33893; *Mental Illness*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness> [<https://perma.cc/PA78-XSHE>].

⁶⁴ *What is Mental Illness?*, AM. PSYCHIATRIC ASS’N (Aug. 2018), <https://www.psychiatry.org/patients-families/what-is-mental-illness> [<https://perma.cc/K6AB-9WT3>].

⁶⁵ TORREY, *supra* note 1, at 55–58.

⁶⁶ See *id.*

⁶⁷ See *id.*

either experiencing psychosis or have a high likelihood that they may experience psychosis soon.

Anosognosia is a condition when a patient has “no awareness of their own illness or need to take medication.”⁶⁸ Anosognosia presents “when specific areas of the brain are damaged, as also occurs in Alzheimer’s disease and some individuals with strokes. Individuals with serious mental illness who are unaware of their own illness usually do not take medication voluntarily and thus have a high relapse rate when living in the community.”⁶⁹ In other words, individuals with the anosognosia symptom of SMI truly do not know that they are ill. A doctor, family member, law enforcement officer, or friend can tell someone with anosognosia that they have SMI and are currently exhibiting symptoms of psychosis, but that individual will not believe it. It is not “denial”; it is a complete lack of insight into one’s own condition caused by the damage that SMI does to the brain.

Whether or not a person with SMI has insight into the existence of their own illness, psychosis can occur through no fault of the individual. In those moments, a person with SMI does not have the same control over their thought processes or actions that they may have when they are receiving effective treatment. A person with SMI experiencing psychosis certainly does not have the same control over motives and actions as a person without SMI.

⁶⁸ E. FULLER TORREY, AMERICAN PSYCHOSIS: HOW THE FEDERAL GOVERNMENT DESTROYED THE MENTAL ILLNESS TREATMENT SYSTEM 95 (2014).

⁶⁹ *Id.* Anosognosia is a controversial topic among mental illness policy experts, but its existence and impact on the brain and behavior of people with SMI is well documented. Treatment Advoc. Ctr., *Anosognosia 1 of 2*, YOUTUBE (July 7, 2010), https://www.youtube.com/watch?v=88kG8Qx2Xs8&feature=emb_logo [<https://perma.cc/9KLW-FX8K>]; DJ JAFFE, INSANE CONSEQUENCES: HOW THE MENTAL HEALTH INDUSTRY FAILS THE MENTALLY ILL 253–55 (2017). Some studies have even found physical indicators of anosognosia in patients’ brains through computerized tomography (CT) scans. See F. Laroi et al., *Unawareness of Illness in Chronic Schizophrenia and Its Relationship to Structural Brain Measures and Neuropsychological Tests*, 100 PSYCHIATRY RES: NEUROIMAGING 49–58 (Aug. 21, 2000).

1. An Analogy to Explain the Inability to Form *Mens Rea*

A bus driver is a twenty-year veteran of her city's transit authority who has never been late for work or run afoul of her supervisors. Most of the regular riders on her route consider her a dedicated public servant and a decent person. While driving her route one day, due to no fault of the bus driver's, she is incapacitated from behind by an unseen assailant who renders her unconscious and takes control of the bus. That person then weaponizes the bus and commits an atrocious crime—drives into a dense crowd of pedestrians, killing many and wounding many more. The bus driver survives the crash and when first responders arrive, the assailant has fled and is nowhere to be found. Upon regaining consciousness, the bus driver is astonished to learn that she will face criminal charges for all the harm caused by her assailant.

For the purposes of this analogy, the bus driver is a person with SMI, and the assailant is the SMI. The assailant stepped into the place of the bus driver and controlled the actions of the bus like a subrogative insurance company steps into the shoes of the plaintiff.⁷⁰ The bus driver was present, but she had neither the intent to commit the criminal act nor the ability to stop it. She likely was not even aware that it was happening. She neither had the guilty mindset to cause the tragedy nor did she actually cause it, but it was, in a sense, her bus. That is what SMI does to a person's *mens rea*.

D. Race, Mental Illness, and Compound Marginalization

Black people are disproportionately incarcerated in the United States, and correctional facilities are the nation's largest mental healthcare providers.⁷¹ Although jails and prisons provide the most mental healthcare, they are

⁷⁰ Subrogation is a contractual mechanism whereby an insurance company assumes the rights of its client, *i.e.*, "stepping into their shoes," to sue a tortfeasor who has harmed the client.

⁷¹ See Abramson, *supra* note 13.

among the worst places to receive those services.⁷² Therefore, Black incarcerated persons with SMI face a compounded discrimination resulting in subpar mental healthcare services. Incarceration rates for Black residents in the United States are several times that of white residents,⁷³ but Black incarcerated individuals are only somewhat less likely than white inmates to suffer from mental health conditions.⁷⁴ Thus, thousands more Black inmates need mental health services at any given time than white inmates, but are confined to receive the subpar medical treatment of the prison industrial complex. Black inmates with SMI are a marginalized group within a marginalized group: they are the overrepresented majority of the jail and prison population within a system not equipped to provide proper care.

Two additional and intersecting factors lead to overrepresentation of Black people with SMI in the criminal justice system: the barriers to healthcare faced by Black people and the higher likelihood of violent outcomes from police encounters for Black people suspected of crimes. First, barriers to Black people accessing mental healthcare include distrust of medical institutions,⁷⁵ lack of “culturally competent providers,” and a

⁷² See generally Jennifer M. Reingle Gonzalez & Nadine M. Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104 AM. J. PUB. HEALTH 2328 (2014) (finding, *inter alia*, that inmates with mental illness were likely to be under medicated in prison).

⁷³ See Gavrielides, *supra* note 23; Bronson & Berzofsky, *infra* note 74.

⁷⁴ Relative to incarceration rates, white inmates are actually more likely to have diagnosed mental illness, but the disproportionately high number of Black inmates means that there are many more Black inmates in need of mental health services than white inmates. As of 2012, white incarcerated persons were more likely to have a “mental health problem” than Black incarcerated persons by a margin of about 20%, however, white prison inmates were only slightly more likely than Black prison inmates to have experienced a “serious psychological distress” (17.3% to 12.5%). Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. 4 (2017). At the same time, Black incarceration rates were 1,383 per 100,000 Black U.S. residents compared to 236 per 100,000 white residents. Carson, *supra* note 19, at 10.

⁷⁵ See generally Bernice Roberts Kennedy et al., *African Americans and their Distrust of the Health Care System: Healthcare for Diverse Populations*, 14 J. CULTURAL DIVERSITY 56 (2007) (explaining Black distrust in healthcare research and researchers); Lindsay Wells

disproportionately high number of uninsured and underinsured individuals.⁷⁶ Second, inability to access mental healthcare when SMI symptoms first present exacerbates those symptoms and leads to a higher likelihood of criminal activity.⁷⁷ Once a person's symptoms bring them into contact with law enforcement, they face a higher likelihood of violent police encounters if they are Black.⁷⁸ The inability to form *mens rea*⁷⁹ puts people with SMI at risk of criminal justice involvement regardless of race. Black people are at a higher risk of harmful criminal justice experiences regardless of SMI status. The intersection of the two spaces—being Black and living with SMI—compounds the risk of unjust outcomes and intensifies the need for alternate approaches to adjudicating violent offenses committed by people occupying that intersection.

E. The Mens Rea Variant

The denial of the state's prima facie case due to the defendant's inability to form the *mens rea* element is what Professor Stephen Morse has dubbed

& Arjun Gowda, *A Legacy of Mistrust: African Americans and the US Healthcare System*, 24 PROC. UCLA HEALTH (2020) (commenting on Black patient mistrust of white clinicians).

⁷⁶ Division of Diversity and Health Equity, *Mental Health Disparities: African Americans*, AM. PSYCHIATRIC ASS'N 3 (2017).

⁷⁷ See generally Off. of Rsch. & Pub. Affs., *Anosognosia, Non-Treatment, and Violent Behavior*, TREATMENT ADVOC. CTR. (Sept. 2016), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/anosognosia-and-violent-behavior.pdf> [<https://perma.cc/LX6W-SLTF>].

⁷⁸ See Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-ethnicity, and Sex*, 116 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. OF AM. 16793, 16794 (Aug. 2018); MARK HOEKSTRA & CARLY WILL SLOAN, DOES RACE MATTER FOR POLICE USE OF FORCE? EVIDENCE FROM 911 CALLS 31 (Nat'l Bureau of Econ. Rsch. Working Paper No. 26774), https://www.nber.org/system/files/working_papers/w26774/w26774.pdf [<https://perma.cc/S4QR-D2TR>] (discussing the propensity of white police officers to use violence more often when responding to calls in minority neighborhoods).

⁷⁹ See *supra* section III.C.

the “*mens rea* variant” to diminished capacity.⁸⁰ This section discusses the *mens rea* variant concept, argues in favor of Morse’s assertion that every common law jurisdiction should adopt it, and explains the practical barriers to implementation of the *mens rea* variant.

Diminished capacity is the defense by which the defendant argues their mental capacities were too impaired for them to be culpable for the crime.⁸¹ The *mens rea* variant takes a different direction (i.e., it “varies”) from that logic by stating that a lack of *mens rea* means the defendant did not commit the crime.⁸² One cannot commit a crime of which the mental state is an element if one lacked the requisite mental state to commit the *actus reus*. In the above example of the defendant killing a police officer, he did not commit the crime under Arizona law because the offense contains a mental element.⁸³ The Supreme Court, however, disagreed that his mental state applied to the mental element of the law and decided that the state may “channel” evidence of mental illness for one type of defense, insanity, but not another,⁸⁴ thereby siloing the same relevant evidence and treating it differently for different defenses to the same crime caused by the same lack of mental faculties. In the bus driver analogy above,⁸⁵ the bus driver did not form the intent to commit the offense, and even if she did, she could not have committed the act. In both the literal and metaphorical examples, there is no mental element, but some courts proceed as if there is.

⁸⁰ Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984); Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 920–25 (2011).

⁸¹ *See State v. Shank*, 367 S.E.2d 639, 641 (1988) (ruling that the trial court erred by not allowing “defendant’s expert to testify that, in his opinion, defendant’s diminished mental capacity affected his ability to make and carry out [criminal] plans.”).

⁸² Morse, *Undiminished Confusion in Diminished Capacity*, *supra* note 80, at 5–7.

⁸³ *See e.g.*, ARIZ. REV. STAT. ANN. § 13-1105 (2009).

⁸⁴ Morse, *Mental Disorder and Criminal Law*, *supra* note 80, at 921–22 (commenting on Clark, 548 U.S. at 772, 774–78).

⁸⁵ *See supra* Section III.C.i.

Jurisdictions should adopt the *mens rea* variant and make it available as a defense, but jurisdictions should also keep other mental illness related defenses available and apply them all in a way that allows as much evidence as practical to prove that mental illness impacted the defendant's actions. A person whose SMI so severely impairs the ability to form intent cannot be culpable under any of the culpability hierarchy in the MPC. Morse makes the following argument regarding the insanity defense, but the same logic applies to the *mens rea* variant:

Reconsider the facts in Clark. If the defendant actually believed he was killing a space alien who was impersonating a police officer, then he is not guilty of purposeful, knowing, or reckless homicide. He would be convicted of involuntary manslaughter on a negligence theory, however, because his deluded mistake was unreasonable. But this defendant is not negligent in the ordinary sense. He cannot correct the error by being more careful. He is irrational and does not deserve to be punished at all. Conviction of involuntary manslaughter is morally and legally obtuse in such a case of gross lack of rational capacity.⁸⁶ (Internal citations omitted).

Before even reaching the language of “being more careful” in the definition of negligent culpability, the MPC requires that an individual's actions be within the bounds of “the circumstances known to him.”⁸⁷ The circumstances allegedly known to Clark were that aliens were trying to kill him.⁸⁸ If a person cannot be negligently culpable, then that person cannot be found culpable for acting reckless, knowingly, or purposefully. There is no culpability, in a non-strict liability offense, for a person with no *mens rea*.

Every jurisdiction should adopt and apply the *mens rea* variant.⁸⁹ However, three obstacles—one legal and two practical—will prevent

⁸⁶ Morse, *Mental Disorder and Criminal Law*, *supra* note 80, at 933–34.

⁸⁷ MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST., 2020).

⁸⁸ *Clark v. Arizona*, 548 U.S. 735, 743–47 (2006).

⁸⁹ Adoption of the *mens rea* variant should be done in way that does not preclude other defenses. Some jurisdictions have adopted elements of the *mens rea* variant, but at the expense of also denying defendants the insanity defense. *See e.g.*, KAN. STAT. ANN. §21-

adoption of the variant alone from creating just outcomes in all cases. First, some strict liability offenses contain no mental element, and those that do are convoluted and difficult to reconcile with the *mens rea* variant.⁹⁰ The second barrier is political reality. Legislatures are, and will continue to be, hesitant to enact criminal codes that could avoid any prison time for heinous offenses,

5209 (“It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. *Mental disease or defect is not otherwise a defense.*” (emphasis added)). When Kansas allowed what courts call the “*mens rea* approach,” they also abolished the affirmative insanity defense. The insanity defense is a Model Penal Code relaxation of the *M’Naughten* rule. The latter allowed acquittal if a defendant did not know the nature and quality of his actions or that the act was considered wrong and was the standard in common law jurisdictions for much of the twentieth century. *M’Naughten’s Case* (1843) 8 Eng. Rep. 718 (H.L.). The former absolves a defendant who “lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” MODEL PENAL CODE § 4.01(1) (AM. L. INST., 2020). The U.S. Supreme Court held in 2020 that Kansas’ abolition of the insanity defense was constitutional on the grounds that, *inter alia*, the statute did not deny due process. *Kahler v. Kansas*, 140 S. Ct. 1021, 1027–37 (2020). Kansas did not have to abolish the insanity defense when it enacted its approach to *mens rea*. The “*mens rea* approach,” as adopted in Kansas, could more accurately be called the “*mens rea only* approach.” The insanity defense has a controversial history, particularly since the attempted assassination of President Ronald Reagan by John Hinckley Jr. in 1981. Hinckley was found not guilty for reason of insanity, which brought public pressure to limit the insanity defense. For a discussion of that history and an argument for the preservation of the insanity defense, see Jacqueline S. Landess & Brian J. Holoyda, *Kahler v. Kansas and the Constitutionality of the Mens Rea Approach to Insanity*, 49 AM. ACAD. PSYCHIATRY & L. 1 (2021). For a discussion of the implications of *Kahler* and SMI generally on sentencing mitigation, see Michael Mullan, *Sentencing Alternative to an Insanity Defense*, 19 SEATTLE J. SOC. JUST. 441 (2021). Despite the public backlash to the insanity defense after the Hinckley affair, legal scholars are quick to point out that it is hardly ever used in cases other than the most severe crimes like murder, and even then, it is very rarely successful. See Marisa Tisbo, *Criminal Law and Mental Illness*, 24 PUB. INT. L. REP. 61, 66 (2018) (citing Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defence Reform is Long Overdue*, 26 USC INTERDISCIPLINARY L. J. 357 (2017)) (Tisbo notes that, “the insanity defense is raised in less than one percent of all criminal cases, and it has a less than thirty percent success rate within that small margin.”). It should remain in statute because it is a logical application of science to the law, but defense attorneys need additional tools like the *mens rea* variant at their disposal to fully allow for the impact of SMI on a defendant’s actions.

⁹⁰ See *supra* section III.F (discussing the *mens rea* variant); see *supra* section III.B (discussing the complex ways that legislatures incorporate strict liability offenses into crimes that carry severe sentences).

regardless of culpability. The authors of this article are experienced lobbyists who are skeptical that many state legislatures will pass legislation in the foreseeable future that theoretically allows for mental health treatment alone or even dismissal of large numbers of cases involving violent crimes. The public may perceive such legislation, though morally and technically rational, as soft on crime, making it a nonstarter with many legislators. The last obstacle is time; even if all jurisdictions adopt and apply the *mens rea* variant, they will not do so any time soon. Legislatures move slowly and judicial enforcement of code does as well.

Even if those obstacles did not exist, adoption of the *mens rea* variant is still not a panacea. It does not address the fact that harm has been done by an offense, even when the person's illness means no *mens rea* and no culpability. There was an *actus reus*, and because the *actus reus* harmed the victim, the justice-involved person, and the community, there should be an expansion of restorative justice practices.

IV. EXPAND RESTORATIVE JUSTICE

Restorative justice programs should expand to include certain cases involving violent acts committed by people with SMI because those individuals have a different degree of culpability than violent individuals without SMI and because there is evidence that Black people with SMI are being left out of the restorative justice process.⁹¹

Restorative justice is accurately portrayed in literature and training as a triangle with the angles being the victim/survivor, the person who committed the act, and the community.⁹² Each piece is interdependent on the other two for restorative justice to produce desirable and equitable outcomes. At least

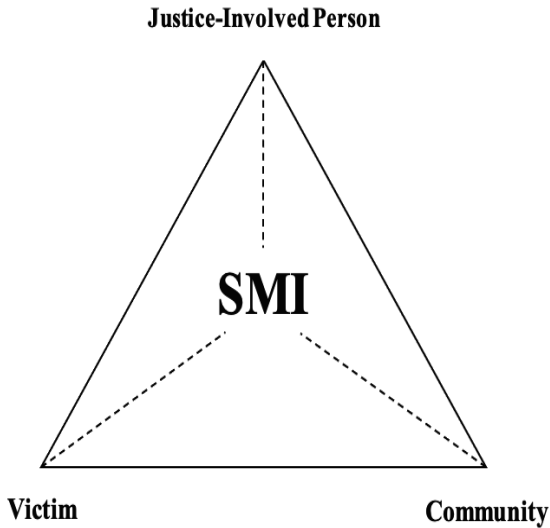
⁹¹ DAVIS, *supra* note 2.

⁹² See Seng, *supra* note 2, at 502–05; MICH. DEP'T OF EDUC., RESTORATIVE JUSTICE P3 PHILOSOPHY, PRINCIPLES, AND PRACTICES, https://www.michigan.gov/documents/mde/Segment_1-What_is_RJ_7-15_496905_7_554703_7.pdf [<https://perma.cc/YAN9-FMKL>].

two of the three angles in the triangle—the justice-involved person and the community—must admit some obligation stemming from the harm done by the crime.⁹³ The victim must be empathetic to the individual who committed the act to some degree in order to move forward with an alternative solution to incarceration that acknowledges and restores a three-way interdependence.

We propose a major addition to the triangle: incorporate the SMI that limited or negated traditional culpability of the person charged or convicted of an offense, caused the harm to the victim, and went untreated and unaddressed by the community. This is not the fourth corner of a square and it is not the metaphorical elephant in the room that merely looms over the process; SMI is the driving force behind the offense and the resulting harm. In this expanded form of restorative justice, an individual need not admit full responsibility for all the harm done by the *actus reus*, but merely admit that the *actus reus* occurred and it resulted in harm. On a case-specific basis, the individual must admit that they and their illness are a part of the circumstances that both the victim and the community want to address. Stated differently, the individual may admit a subjectively appropriate amount of culpability, but the SMI and the *mens rea* are inextricably intertwined.

⁹³ See *supra* section II.C (discussing the admission of culpability and the role of shame in addressing the harm); See ZEHR, *supra* note 5, at 29 (one of the principles of viewing justice through a “restorative lens” is to “[a]ddress the obligations that result from [harm],” including “obligations of the offenders, as well as the communities’ and society’s”).



The altered triangle does not create a new concept of the situation prior to the restorative justice process, but rather a better means to express reality. Whether or not those affected by any offense (i.e., one not involving SMI) choose to engage in restorative justice, the reality of the triangle and its interconnected parts already exists. Traditional restorative justice is just acknowledging that fact to arrive at a more just solution than conventional adjudication. Likewise, whether or not those affected by an offense involving SMI choose to engage in restorative justice, the impact of the mental disease is already the objective reality of the harm done by the offense. Our new addition to the triangle only describes those circumstances and provides a path towards better outcomes.

The context of race is a separate but often intersecting matter of relevance to the paradigm of the victim, the justice-involved person, and the community. Restorative justice programs should expand to include violent offenses when the person accused or convicted of the offense has an SMI diagnosis, should proceed with racial consciousness, and should also pay

careful attention to cases where the justice-involved individual is a person with SMI and one or more persons representing the angles of the triangle are Black. Stated differently, the SMI status of the person who committed the *actus reus*, the race of the people involved, and the intersection of those two circumstances are all three areas in which restorative justice practices should advance and expand.

This article is not the first to argue in favor of making room for the SMI population in restorative justice practices. For at least a decade, scholars and practitioners have pointed out the special circumstances of offenses involving SMI and the applicability of restorative justice to cases in which the three angles of the triangle are willing to discuss SMI.⁹⁴ Some argue for expansion of restorative justice programs to include people with mental illness but downplay the significant opportunity for persons accused or convicted of violent offenses once their SMI symptoms are managed by effective treatment.⁹⁵ Others argue for these types of restorative justice programs to be housed within mental health courts,⁹⁶ which is a somewhat practical idea, but would leave gaps in available programs in jurisdictions without mental health courts⁹⁷ and would not address the tendency of mental health courts to focus on nonviolent offenses and mental health disorders other than SMI. Yet

⁹⁴ See e.g., Hafemeister et al., *supra* note 2; Jessica Burns, *A Restorative Justice Model for Mental Health Courts*, 23 REV. L. & SOC. JUST. 427 (2014).

⁹⁵ Hafemeister et al., *supra* note 2. While this article is critical of others that opened the door to the idea of restorative justice for people with SMI without fully embracing the potential to address harm done by violent offenses, we do not mean to denigrate the work of Hafemeister et al. or others cited in this section. To the contrary, the place for cases involving SMI restorative justice practices is such a logical use of both those practices and certain methods of mental healthcare treatment that we are merely building on what Hafemeister and others have proposed.

⁹⁶ Burns, *supra* note 94.

⁹⁷ Mental health courts are also rooted in carceral systems, which is problematic for any program designed to avoid or reduce incarceration through restorative justice. Lauren Almquist & Elizabeth Dodd, *Mental Health Courts: A Guide to Research-Informed Policy and Practice*, COUNS. OF ST. GOV'TS JUST. CENTER 5 (2009) (defining mental health courts as integrated into the court system).

others make a similar argument regarding violent offenses, but with a narrow scope.⁹⁸

This article differs in that we seek to treat the brain disease and society's inability to address it at an earlier stage as not just the underlying appropriator of *mens rea*, but also as the overarching cause of the circumstances that allowed the offense to occur. With that perspective, state and local jurisdictions should expand restorative justice programs at varying points along the adjudication process to include opportunities for the victims, the community, and the justice-involved individuals with SMI, regardless of whether there is a violent component to the offense. What matters is the subjective willingness of the three entities constituting the angles of the triangle to accept the overarching nature of SMI. We also urge any expansion of restorative justice to be through the critical lens of criminalization and race, an approach that will further the goal of contemporary racial justice through restorative justice and ensure the maximum number of appropriate SMI-related cases receive consideration for expanded programs.

A. Community Obligation

Harm resulting from untreated or undertreated SMI is, at least in part, the fault of a mental healthcare system lacking in resources and legal mechanisms to intervene with appropriate treatment prior to the crisis point. Community organizations, healthcare systems, and state and local governments can reduce the likelihood of criminal activity through voluntary treatment or involuntary civil commitment.⁹⁹ Failure to do so is the

⁹⁸ Liesel J. Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 J. CONTEMP. HEALTH L. & POL'Y 69 (2007) (arguing that a specific piece of federal funding for restorative justice should include violent offenses).

⁹⁹ See Lisa Dailey et al., *Grading the States: An Analysis of U.S. Psychiatric Treatment Laws*, TREATMENT ADVOC. CTR. 9–13 (Sept. 2020), <https://www.treatmentadvocacycenter.org/storage/documents/grading-the-states.pdf> [<https://perma.cc/8WBH-ABQC>] (defining and discussing the aspects of involuntary civil commitment).

community's contribution to the situation that created the harm of a criminal offense. A restorative outcome in such cases should include various organizations admitting this failure and taking steps to prevent future harm.

The entities responsible for treating SMI should look back at the medical and criminal history of an individual and identify missed opportunities for earlier intervention. For example, if an individual stabbed two strangers on a public street while in a psychotic state,¹⁰⁰ the mental health providers and civil commitment programs in the jurisdiction should address the question of where along that individual's path from stability to crisis to violence they could have intervened and provided treatment before the offense occurred.¹⁰¹ Such a review of missed opportunities will help both the victim and person who committed the act understand the circumstances of the offense and help the mental healthcare system avoid future violent incidents.

In addition to missed opportunities to treat a specific individual with SMI prior to their justice involvement, state and local governments should examine their ability to effectively utilize involuntary civil commitment statutes. Involuntary civil commitment is a mechanism that allows courts to order a person with SMI into either inpatient or outpatient treatment if their symptoms prevent them from making rational decisions regarding their own psychiatric care or basic needs.¹⁰² These statutes are a way for legal and

¹⁰⁰ These are the alleged facts of a 2021 case in California. *Man Charged with Stabbing Two Asian women in San Francisco*, AP NEWS (May 6, 2021), <https://apnews.com/article/san-francisco-3d5caeb3bcf099a8261e34a793fc96c0> [<https://perma.cc/F6LY-BMXL>].

¹⁰¹ Outpatient civil commitment is legal in forty-seven states and D.C. For examples of statutes used on a consistent basis, *see, e.g.*, N.Y. MENTAL HYGIENE L. § 9.60; *see also, e.g.*, OHIO REV. CODE ANN. § 5122 et seq.

¹⁰² All fifty states and D.C. allow inpatient commitment. However, great discrepancies exist as to both the effectiveness of statutory language and utilization by local jurisdictions within the states. Existing data indicates that higher utilization of involuntary commitment statutes reduces the likelihood of future hospitalization and criminal justice involvement. *See* Swanson et al., *Involuntary Out-patient Commitment and Reduction of Violent Behavior in Persons with Severe Mental Illness*, 176 BRITISH J. OF PSYCHIATRY 324, 327–29 (2000); Phelan et al., *Effectiveness and Outcomes of Assisted Outpatient Treatment in New York State*, 61 PSYCHIATRIC SERV. 137 (2010). However, the use and even the

mental healthcare systems to access treatment for people with SMI before their symptoms reach the point of danger to themselves or others. To prevent tragic consequences, civil commitment laws should contain, at minimum, emergency evaluation periods of seventy-two hours or more,¹⁰³ access for any responsible adult to petition the court,¹⁰⁴ criteria for grave disability, and a psychiatric deterioration standard.¹⁰⁵ Grave disability and psychiatric

existence of these laws is controversial. As John Monahan points out, “[t]reating people with mental disorder without their consent always has been the defining human rights issue in mental health law.” John Monahan, *Mandated Community Treatment: Applying Leverage to Achieve Adherence*, 36 J. AM. ACAD. PSYCHIATRY L. 282 (2008). The controversy stems from fundamental disagreements about the meaning of an individual’s right to access psychiatric treatment. Advocates who abhor involuntary commitment believe it is a restriction on civil liberties, while advocates who support broader and more effective implementation of these laws point out that SMI can rob a person of their ability to make rational decisions regarding their own healthcare (see discussion of anosognosia *supra* at Section III.C.) and involuntary commitment is less restrictive on civil liberties than criminal justice involvement, which is often the result of non-treatment. See Swanson et al., *Can Involuntary Outpatient Commitment Reduce Arrests Among Persons with Severe Mental Illness?*, 28 CRIM. JUST. BEHAV. 156 (2001) (concluding that outpatient commitment can reduce criminal justice contacts).

¹⁰³ See e.g., WASH. REV. CODE § 71.05.153(1) (2021) (“[A person meeting the state’s dangerousness standard shall be] taken into emergency custody in an evaluation and treatment facility . . . for not more than seventy-two hours”). Washington’s emergency hold duration is increasing to 120 hours in 2026; OR. REV. STAT. § 426.232(2) (2019) (allowing emergency holds of up to five “judicial days”); N.M. STAT. ANN. § 43-1-11 (2009) (“right to hearing within seven days of admission”).

¹⁰⁴ See e.g., ARIZ. REV. STAT. §§ 36-520(A), 36-524(B), and 36-531(B) (2021) (allowing any responsible adult access to petition the court for an emergency evaluation of an individual in crisis, but disallowing public access to petition the court for inpatient commitment); MICH. COMP. LAWS § 330.1434 (2019) (“Any individual 18 years of age or over may file with the court a petition that asserts that an individual is a person requiring treatment.”); WASH. REV. CODE §§ 71.05.150(1), 71.05.153(1) (2021). Washington allows only first responders to file petitions for emergency detention, which is a problematic barrier to mental healthcare. Narrowly limiting who can petition the court means that family members who see their loved one’s deteriorating condition, healthcare providers who identify indicators that a patient may harm themselves, and others with firsthand knowledge of a dangerous situation are barred from filing petitions.

¹⁰⁵ Grave disability is the inability, caused by SMI, of a person to provide for their own basic needs. See e.g., ALASKA STAT. § 47.30.915(9) (2020) (“‘[G]ravely disabled’ means a condition in which a person as a result of mental illness . . . is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is

deterioration are the criteria by which a court can assess an individual's dangerousness to self or others, and they should not require that the threat of danger be imminent. Requiring imminence is one of the most common methods of delaying treatment until the point of emergency and violence, and some states have dropped imminence requirements from their laws to allow treatment before crisis.¹⁰⁶ The mental health treatment system in a given community or state cannot adequately intervene at the early stages of a crisis without civil commitment options to curtail escalation of a person's psychosis and deterioration of the person's mental health.

Some forms of civil commitment could also be used on the back end of crisis as part of a restorative justice approach to remedy the harm caused by the community's failure to treat an individual earlier. One evidence-based example of a civil commitment mechanism that could be used is assisted outpatient treatment (AOT). AOT is an involuntary commitment to a treatment plan administered to people diagnosed with SMI while living in the community instead of an inpatient facility.¹⁰⁷ AOT programs often include court monitoring of a thorough and individually-tailored plan to keep an

not taken.”). Psychiatric deterioration, also known as the “need for treatment” standard, is a condition in which a person will suffer harm if they do not receive psychiatric treatment. *See, e.g.*, VT. STAT. ANN. TIT. 18 § 7101(16) (2020) (“‘A person in need of treatment’ means a person who has a mental illness and, as a result of that mental illness, his or her capacity to exercise self-control, judgment, or discretion in the conduct of his or her affairs and social relations is so lessened that he or she poses a danger of harm to himself, to herself, or to others . . .”).

¹⁰⁶ *See, e.g.*, 16 DEL. C. §§ 5001(3), (4) (2021). For a general discussion of the imminence requirement and the gradual loosening of the standard, *see* SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. U.S. DEP’T OF HEALTH & HUM. SERVS. ET AL., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE 4, 8–9, 16 (2019), <https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf> [<https://perma.cc/88QZ-6N67>].

¹⁰⁷ *See* BRIAN STETTIN ET AL., TREATMENT ADVOC. CTR. & NE. OHIO MED. U., IMPLEMENTING ASSISTED OUTPATIENT TREATMENT: ESSENTIAL ELEMENTS, BUILDING BLOCKS AND TIPS FOR MAXIMIZING RESULTS 8 (2019), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/White_Paper_FINAL_1.pdf [<https://perma.cc/FMF7-BTXW>] (defining AOT).

individual who has been previously hospitalized from deteriorating to the point of needing inpatient psychiatric treatment again. Participants in these programs, although under court order, are not subject to contempt and incarceration if they do not adhere to the plan, but rather are subject to inpatient commitment until they are stable enough to reengage in outpatient treatment.¹⁰⁸ AOT is available as a civil remedy in forty-seven states and D.C. and has shown positive results in preventing tragic outcomes from SMI.¹⁰⁹ With the agreement of the victim and the assurance of the community mental health system to have psychiatric services in place, AOT should be considered as a part of a restorative justice approach for people with SMI who commit violent offenses. Just as in purely civil AOT proceedings, the person under a court order should not be held under threat of incarceration after failing to participate in the program, but rather inpatient commitment. With the goal of treating an individual's SMI so that the individual does not commit future criminal offenses, courts can utilize the metaphorical carrot of AOT and the stick of civil inpatient commitment rather than carceral threats like prison and probation.

B. Victim's Understanding of SMI

A working knowledge of SMI among all participants in the process is necessary for empathy to play its traditional and vital role in restorative justice for violent offenses involving mental illness. Victims will need to learn and understand objective medical facts about SMI—e.g., SMI's effect on the brain, the involuntary and indiscriminate occurrence of SMI in the general population, and anosognosia—as well as the consequences of nontreatment, the missing pieces in the mental health treatment system, and other contributing factors that led the person to commit the *actus reus*.

¹⁰⁸ See, e.g., IDAHO CODE § 66-329(12) (2021); see also, e.g., MINN. STAT. § 253B.097(5) (2020).

¹⁰⁹ See *supra* note 102 (discussing controversies around AOT and involuntary commitment generally).

Several organizations¹¹⁰ already have training available on SMI and the mental health system for people who have little or no prior knowledge of the issues. Those programs are usually geared towards either people living with SMI or their relatives and caregivers but could be modified to educate victims of offenses or at least as sources for training materials and approaches.¹¹¹ Engagement from the victim will require some understanding of the illness that caused the offense and how these types of cases differ from cases in which the perpetrator does not have SMI. In cases not involving SMI, conferencing often involves discussion of an individual's motives in order to move them towards understanding the harm they caused.¹¹² In offenses involving SMI, however, the illness itself can be the reason that a person committed the *actus reus* and harmed the victim and community. Victim education on these issues is therefore vital to address harm and meet the obligations created by it.¹¹³

C. Justice-Involved Person's Obligation

The approach proposed in this article differs significantly from traditional restorative justice with respect to the justice-involved person's admission of

¹¹⁰ See *infra* note 111.

¹¹¹ For an example of a comprehensive program designed to educate families and caregivers of people with SMI, see *NAMI Family to Family*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Support-Education/Mental-Health-Education/NAMI-Family-to-Family> [<https://perma.cc/X7NP-MM9H>].

¹¹² LORRAINE STUTZMAN AMSTUTZ, THE LITTLE BOOK OF VICTIM OFFENDER CONFERENCING: BRINGING VICTIMS AND OFFENDERS TOGETHER IN DIALOGUE, in THE BIG BOOK OF RESTORATIVE JUSTICE 121–23 (2015).

¹¹³ It is already difficult for victims to take part in restorative processes, particularly those involving violent crimes. Victim-offender conferencing in violent cases tend to be initiated by victims due to the heightened level of trauma and harm relative to other cases. See *id.* at 167. Expecting a victim to also learn enough about the condition of the person who committed a harmful act to have a productive and restorative process is a significant hurdle, but not an insurmountable one. Regardless of how they arrived at the point of applying restorative practices to violent cases, victims can still benefit from conferencing with people who caused them harm. See, e.g., *id.* (relaying an anecdotal positive outcome in such a case, but note that it does not involve SMI).

culpability. First, in a restorative justice plan involving an individual with SMI, it may not be necessary to determine how much culpability lies with the individual and how much was appropriated by the illness. Second, the shame factor in the individual¹¹⁴ may not be integral in these cases. It is only necessary that the victim and the community acknowledge that SMI played a role in the likely preventable offense and that the person with SMI physically performed the *actus reus*. The former point is necessary for the person with SMI to join the process, and the latter point will be the first requisite in a more just outcome for the victim and the community. By beginning with those admissions, all parties can proceed to understanding SMI and its relevance to the offense. If the victim, justice-involved person, and community are to understand each other's perspectives and foster the empathy necessary for a just outcome, then understanding every relevant piece of each other's experiences should be a goal of restorative justice.

D. Racial Consciousness and the Intersection of Race and SMI

People with SMI who have committed a violent offense and are also Black occupy an intersection of law, healthcare, and society that compounds multiple systemic shortcomings. Those shortcomings in turn fail intersectional individuals through over-policing, undertreating, and imposing harmful stereotypes from the earliest onset of SMI symptoms through the adjudication of crimes caused by SMI. Restorative justice programs should take these factors into account and address the ways that the intersection of race and SMI brought about the harm done by the offense.

We recommended in Part B of this Section that victims who have been harmed by the SMI symptoms of another should take part in training to understand SMI as part of a restorative process; likewise, both victims and community representatives should learn about systemic racism and implicit racial bias to understand the compound harms done to a Black person living

¹¹⁴ See *supra* Section III.C (discussing the shame factor in restorative justice).

with SMI prior to the violent act that led to their arrest. The overrepresentation of Black people in carceral institutions,¹¹⁵ combined with the subpar quality of mental healthcare for both the general public and incarcerated persons, are both contributing factors to the harm done by Black people living with SMI. Furthermore, a patient’s race is often a contributing factor to misdiagnosis and undertreatment of SMI, regardless of whether they are incarcerated.¹¹⁶ If the victim and community stakeholders understand that context, it will become possible to hold responsible the appropriate parts of the criminal justice system, healthcare systems, and other historically racist institutions that contributed to the harm.¹¹⁷ It is only through the lens of both SMI and race that restorative justice practices can adequately engage stakeholders in a process that addresses essential elements of the harm stemming from the awful intersection.

¹¹⁵ See Carson, *supra* note 19 (discussing the disproportionately high incarceration rate of Black people in the United States).

¹¹⁶ See Michael A. Gara et al., *A Naturalistic Study of Racial Disparities in Diagnoses at an Outpatient Behavioral Health Clinic*, 70 PSYCHIATRIC SERV. 130 (2019) (showing that Black men are more likely to be misdiagnosed with schizophrenia than white men); Derek H. Suite, *Beyond Misdiagnosis, Misunderstanding and Mistrust: Relevance of the Historical Perspective in the Medical and Mental Health Treatment of People of Color*, 99 J. NAT’L MED. ASS’N 879 (2007) (discussing historical “mistrust and underutilization of [mental health] services by people of color”).

¹¹⁷ See Fiscella et al., *Inequality in Quality: Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283 J. AM. MED. ASS’N 2579, 2580 (2000) (“Socioeconomic position and race/ethnicity is associated with potentially avoidable procedures . . . hospital readmissions, and untreated disease.”). For a discussion of implicit bias, *i.e.*, “unconscious racism” and its impact on healthcare, see DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTHCARE 33–54 (2015). It is also worth noting that the American healthcare system is not only dealing with unconscious racism, but also, like many parts of our society, is still feeling the impact of the 20th century’s blatant institutional racism. Hospitals in the Jim Crow south were largely segregated, with Black facilities providing predictably subpar care. It was not until the Social Security Amendments of 1965—Medicare and Medicaid’s enabling legislation—that the federal government leveraged the promise of guaranteed revenue streams to force integration. See David Barton Smith, *Civil Rights and Medicare: Historical Convergence and Continuing Legacy*, in COHEN ET AL., MEDICARE AND MEDICAID AT 50: AMERICA’S ENTITLEMENT PROGRAMS IN THE AGE OF AFFORDABLE CARE (2015).

V. CONCLUSION

Expanding restorative justice to include people living with SMI, even for violent offenses, will address community obligations currently underrepresented in criminal adjudications. It will also allow victims and justice-involved persons to reconcile the role that the intersection of SMI and the marginalization of Black people in American society play in criminal justice. Jurisdictions should also adopt the *mens rea* variant to diminished capacity without weakening or deleting existing statutory defenses. However, only expanding restorative justice in the ways described in this article will create a broad enough approach to encompass offenses caused by SMI while addressing the intersectional implications for Black justice-involved persons and victims.

