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Prosecuting Prisoners:
Criminalization of Incarcerated People in an Era of Psychiatric Deinstitutionalization

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ABSTRACT

This study is the first to chart the national scope of the criminal prosecution of incarcerated people and to investigate the consequences of this social process. Using an interlocking set of data sources and methods, including interviews, ethnographic observations, and administrative records, I provide answers to some basic questions about the criminalization of imprisoned people in an era of psychiatric deinstitutionalization: how they are prosecuted, how frequently, and with what consequences. I also reveal that certain groups of incarcerated people—namely Black and Latinx people and those with mental illness—are disproportionately affected by these prosecutions. And I explore how extraordinarily harsh conditions, like solitary confinement, may actually play a role in producing the behavior that is subsequently criminalized in court. I argue that the criminal prosecution of imprisoned people helps to provide legitimacy for the punitive excesses of mass incarceration: for its extreme sentences, racial inequities, criminalization of people with mental illness, and harsh conditions of confinement. In effect, these prosecutions put already-criminalized and marginalized individuals on trial, instead of the institutions that help to produce the behavior in question. And the new convictions that result extend defendants' criminal sentences substantially, directly helping to maintain mass incarceration at its current levels.

In so doing, I engage with several core questions of sociological and law and society traditions: How is social inequality reproduced? How does deviance get classified alternatively as a "medical" or "criminal" problem? How and why do total institutions like prisons inevitably produce the very behaviors they ostensibly seek to control? In Chapter 2, I demonstrate how states and prisons go beyond administrative sanctions to use criminal law to manage incarcerated peoples' noncompliance, with significant social consequences. In Chapter 3, I reveal how the same social processes that leads to the criminalization of people with mental illness in the community play out in

the microcosm of the prison. And in Chapter 4, I describe how the criminal prosecution of incarcerated people subjected to long-term solitary confinement helps to legitimize those harsh administrative sanctions. In Chapter 5, I conclude with proposed changes to the criminal-legal system, prisons, and social policy that may help to interrupt this process of criminalization.

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CHAPTER 1

INTRODUCTION

Kendrick waited patiently for his virtual preliminary hearing to begin.[1] In the midst of the COVID-19 pandemic, he was calling into criminal court from inside a small room in the maximum-security prison in Wisconsin he was incarcerated in a few miles away. A Black man in his mid-twenties, he wore a blue hat, teal jumpsuit, and blue facemask, which was pulled down below his mouth. His case had been pending for over a year and he was eager resolve it.

When Kendrick was first incarcerated, he was set to serve just five years on felony theft and possession of a firearm charges. However, his time was not going smoothly. His prison records revealed that he was transferred several times to the state prison system's dedicated mental health facility. And a year before he would have been released to community supervision, Kendrick was charged with five new crimes: four counts of making "terroristic threats" and one count of "assault by a prisoner," for throwing bodily fluids on a correctional officer. Although none of these actions caused any substantial injury to another person, the charges were classified as felonies under the Wisconsin penal code and carried a maximum potential sentence of three and a half years in state prison. And because he already had a felony conviction, the prosecutor had added to each new charge a "repeater" modifier, which meant that each potential sentence could be increased by up to four years.

[1] Names and identifying details about all incarcerated and formerly incarcerated people in this study have been changed to protect their privacy.

The judge overseeing his case, a middle-aged White man, joined on Zoom from his courtroom, where he sat in full robes. Kendrick appeared on video without a lawyer. The judge asked him if he was planning on getting one.

"Well, I was planning on handling it myself," he replied. "I wrote the DA's office after last court date with a plea, but I never heard back anything from anybody," he added.

The judge responded, irritated, "Well I don't know anything about that, nor would I."

The prosecutor interjected, "Your honor, the defendant sent us a letter that actually predates his first appearance, that basically says he wants to plead to everything."

"Is that your wish?" the judge asked Kendrick.

"Yeah, yeah," he replied.

"If that's the case, we should set this for a separate plea time, where we can take care of the waiver of the preliminary hearing and go through the plea and everything else," the judge responded.

"Yeah, I was really hoping we could get this over today?" Kendrick asked.

"We're not going to get this done no matter what we do, there's a lot of steps we have to go through." The judge said, firmly.

As this exchange illustrates, Kendrick was exceedingly cooperative with the state in his handling of these new criminal charges. Prior to his very first hearing, and in every subsequent one I observed, he insisted that he wanted to plead guilty and did not want a defense attorney's assistance. Nevertheless, several months later, when the judge at last accepted his guilty plea, he sentenced Kendrick to five additional years in prison on all five of the charges, four of which were to be served consecutively. Kendrick will now spend the next twenty years of his life imprisoned. If he does not pick up any additional criminal charges, he will be released from parole in 2050.

Kendrick was not the only state prisoner facing new criminal charges in this small Wisconsin town. When I began observing his case proceedings, there were a dozen other men who had similar cases open in the same courthouse. And the majority of the other prisoner–defendants in that county, like Kendrick, were Black, Latinx, or Native American, had evidence of significant mental health issues, and were facing charges for conduct (e.g., bodily-fluid throwing, making threats, property damage) that did not cause serious injuries and that could be interpreted as symptomatic of a mental illness.[2] Moreover, there was little reason to believe that there were not similar hearings playing out in criminal courthouses throughout the country in counties housing maximum-security prisons.

At the time this research began, scholars had already penned decades worth of articles and books on mass incarceration and the criminalization of people with mental illness post-deinstitutionalization—twin social policy crises of the late 20th century. In addition to describing the contours of mass incarceration itself, the sociology of punishment literature has primarily sought to account for the explosive growth in the U.S. prison population in the late twentieth century (see, e.g., Alexander 2012; Hagan 2010; Lynch 2016; Schoenfeld 2012; Simon 2009; Wacquant 2009). Social scientists have also examined the myriad effects of psychiatric deinstitutionalization, including the overincarceration of people with mental illness in U.S. prisons and jails (see, e.g., Harcourt 2011; Kupers 1999; Mechanic and Rochefort 1990; Parsons 2018). And yet, almost nothing was known about this social phenomenon—the criminal prosecution of prisoners like Kendrick—that seemed to a consequence of this contemporary institutional (mis)alignment. Turning the scholarly gaze back to criminal court to observe the cases of prisoner–defendants, it would turn out, sheds fresh light on

[2] A more detailed summary of the cases observed and the approach to the case study as a whole is provided in the Methodological Appendix.

the punitive dynamics behind prison walls, where conduct like making threats can be transformed into criminal acts punishable with decades of additional imprisonment.

* * *

As it is now widely acknowledged, the present scale of mass imprisonment in the United States—although, at long last, starting to diminish (Phelps and Pager 2016:186)—is without historical precedent and beyond international comparison (Alexander 2012:56; Goffman 2014:1; Western 2006:12). Changes to substantive criminal law, including the emergence of determinate sentences and mandatory minimums, and to policing with the escalation of the War on Drugs in the 1980s, spurred an unprecedented rise in the number of people under carceral control, which reached its peak in the late 2000s (Alexander 2012; Lynch 2016; Simon 2009). The consequences of the monumental growth in state penal apparatuses have not been equally borne; Black Americans make up 40% of the over 2.3 million people incarcerated in the United States in 2020 despite only representing 13% of the U.S. population (Sawyer and Wagner 2020). Indeed, scholars have increasingly centered the fundamentally anti-Black nature of the criminal-legal system to explain its rise and characteristics (see Hinton and Cook 2021 for a helpful overview of this research). Moreover, scholars argue that in addition to confining dramatically more people in recent years, the rationales for and practices of incarceration have grown significantly more punitive (Feeley and Simon 1992; Lynch 2010; Wacquant 2009). Eschewing rehabilitative ideals and practices, in many states, then, the period of mass incarceration has also entailed the emergence of "supermax" prisons and a greatly expanded use of solitary confinement (Lynch 2010; Reiter 2016; Sakoda and Simes 2019; Shalev 2013, but see Phelps 2011).

Over the same time period, in the late 20th century, state provision of public aid—in the form of direct financial assistance, housing benefits, and educational programs—was withdrawn

from the poor nationwide as the criminal law enforcement and punitive sentencing was stepped up (Alexander 2012:56–57; Wacquant 2009:68). Indeed, sociologists and historians have increasingly demonstrated that we cannot understand the growth of the carceral system outside of the context of state welfare retrenchment (Beckett and Western 2001; Hinton 2016; Kohler-Hausmann 2015). Perhaps nowhere, however, has this institutional transformation from state provision of care to criminalization been more apparent than in the deinstutionalization of public mental healthcare and the concomitant increase in those with serious mental illness in the nation's jails and prisons (see, e.g., Erickson and Erickson 2008; Fellner 2006; Kupers 1999; Roth 2018). Today, a majority of state prisoners have a mental health problem of some kind (Kim, Becker-Cohen, and Serakos 2015), and it is estimated that there are ten times the number of people with serious mental illness incarcerated in the nation's prisons and jails than in state psychiatric hospitals (Treatment Advocacy Center 2016).

To better understand the social consequences of this new institutional arrangement—where prison populations of disproportionally Black and Latinx people have exploded, and where a greater share of people with serious mental health problems are criminally incarcerated in highly punitive, restrictive conditions—this study examines the cases of people who are charged with new crimes while imprisoned. These new criminal convictions have the potential to add years, or even decades, of imprisonment to defendants' sentences. And yet, despite the widespread alarm about both the scale and character of U.S. carceral practices, almost nothing is known about how, how frequently, and with what consequences, prisoners are prosecuted and convicted of new crimes. Using a mixed-methods approach, including an ethnographic case study, interviews with stakeholders, and quantitative analysis of administrative and survey data on prisoners with in-custody convictions, this study is the first to describe the national scope and sociological impact of the criminal prosecution

of prisoners in the United States and to assess whether prisoners with mental illness are at greater risk of these prosecutions.

Although previous socio-legal research has examined the growth and social consequences of prison systems' use of administrative sanctions—especially solitary confinement (see, e.g., Reiter 2016; Sakoda and Simes 2019)—to date, there has been no empirical research on the use of criminal law and process in the management of deviance inside prisons. This study fills this gap. In addition, although there is ample prior research on the criminalization of people with mental illness in the community (see, e.g., Teplin 1984), and the disproportionate administrative sanction of people with mental illness in prison (see, e.g., Adams 1986), this study is the first to address whether prisoners with mental illness may be at greater risk of criminal prosecution. Furthermore, this study contributes to the burgeoning literature on solitary confinement (see, e.g., Reiter and Blair 2015; Rhodes 2004; Shalev 2013) to show how the criminal prosecution of prisoners in long-term solitary provides additional layer of legitimacy for these punitive prison conditions.

In doing so, this study intervenes in a number of socio-legal literatures: on criminal law and the management of deviance, on the consequences of the transinstitutionalization of people with serious mental illness from public hospitals to prisons and jails, and of the productive failures of punitive total institutions like prisons. My results demonstrate the state's pervasive use of external criminal-legal regulation to manage prisoner populations in addition to their own internal expansive disciplinary regimes. This (re)criminalization of incarcerated people disproportionately affects Black and Latinx prisoners and prisoners with mental illness. Moreover, prisons' persistent recourse to criminal sanctions in response to prisoner noncompliance reveals the material and symbolic power of criminal law and process—to extend sentences, address dignitary harms, and legitimize harsh conditions inside.

WHY PRISONS?

This study looks at the criminalization of prisoners incarcerated in state and federal prisons, and leaves aside, for the time being, the prosecution of detainees in local jails and other types of facilities. Although there is little reason to believe that the criminal prosecution of prisoners, especially those with mental illness, is limited to those held in state or federal prison facilities, and despite the fact that the legal implications of criminalizing jail detainees, the majority of whom are imprisoned pretrial, are perhaps even more urgent, there are, nevertheless, several features of prisons made them more ideal as a starting place for this inquiry rather than jails. The first is the significantly shorter time that many jail detainees may spend incarcerated (for some, just a day or two) means that they are less vulnerable to the long-term psychological and social pressures that criminal incarceration may impose on those with in prison (Bureau of Justice Statistics 2018a). In this sense, they are a less ideal site for assessing the role that harsh prison conditions may themselves play in producing conduct that is subsequently criminalized.

In addition, state prisons—although extremely diverse institutions in many ways (e.g., state, security level, racial make-up and gender of prisoners)—are, on the whole, more homogenous than jails in terms of size and security procedures, in that a majority have an average daily population of over 400 inmates (Schlanger 2003:42). Moreover, whereas prisons are run by states, funded statewide, and share a common state administration team appointed by the governor, jails are run at the county level, mostly by elected sheriffs (Schlanger 2003:45–46). Thus, the management structure, political orientation, and resources of jails differ more greatly from county to county than the prisons in a given state. Therefore, findings about the criminal prosecution of prisoners in state prisons are more likely to be generalizable both beyond individual prisons and beyond individual states.

The third relevant feature is their geographic location. Whereas prisons tend to be located far outside major metropolitan centers, away from formal legal defense organizations and prisoners' families, jails are located in the hearts of major cities and towns—where prisoners have access to greater health, familial, and legal resources. These resources may insulate jail detainees from some of the pernicious, geographically bounded political dynamics that take place in the more rural counties where prisons are located (i.e., large influence of security staff unions, lack of public defense resources for prisoners, large racial disparities between court actors and correctional staff and the prison population). Furthermore, prisoners who receive new sentences while incarcerated are likely to serve these new sentences in the same county in which they were sentenced. Thus, the incentives for correctional officials to refer prisoners for new charges, and for prosecutors to pursue the cases and for judges and juries to ultimately convict—are all likely greater in counties home to prisons than in the metropolitan counties where most jail detainees are incarcerated. Together, these features combine to make prisons a suitable institutional site for the first study of the criminalization of prisoners, albeit a specific one.

METHODOLOGICAL APPROACH

The core research questions animating this study were *how*, *how frequently*, and *with what consequences* people are charged with new crimes while incarcerated. To assess both the quantitative scope of the phenomenon, as well as its qualitative, processual dimensions, I drew on a diverse set of data sources and sociological methods. A detailed description of each element of the research design and data collection procedures is located in the Methodological Appendix.

The first part of the research design was national in scope, focusing on the criminal prosecution of prisoners in diverse states across four regions (Northeast, South, West, and Midwest)

of the United States and the federal government. To investigate *how* and *with what consequences* prisoners are charged with new crimes, I conducted a qualitative analysis of state and federal prisoner-specific criminal legislation, prison administrative policies on criminal referral and disciplinary proceedings obtained via public records requests, and semi-structured interviews with 64 former prisoners, prisoners' advocates, prosecutors, and corrections professionals. To assess *how frequently* prisoners are charged with new crimes, I conducted a quantitative analysis of administrative data on prisoners with in-custody convictions obtained via public records requests from four states: California, Texas, New York, and Wisconsin. In addition, to assess whether prisoners with mental illness were at greater risk of prosecution, I analyzed nationally representative data from the Bureau of Justice Statistics' Survey of Inmates in State and Federal Corrections Facilities, as well administrative data from Wisconsin's Department of Corrections.

The second part of research design was more focused, adding depth to breadth. I conducted a case study of a county in Wisconsin that is home to a maximum-security prison to explore how and why prisoners, especially with mental illness, are being criminalized in these settings. I observed case proceedings and analyzed court records for all of the active "prison cases" in the county between February 2020-April 2021, including after those proceedings moved to virtual hearings in light of the COVID-19 pandemic. In addition, I interviewed a diverse set of informants, including prosecutors, defense attorneys, former prisoners, and correctional workers from Wisconsin. This case study illuminated the role that criminal process itself played in these prosecutions. Together with the state-level administrative data from Wisconsin on criminal referrals and those with in-custody convictions, these data reveal a more holistic picture of how incidents inside the state's prisons get classified as criminal, prosecuted, and ultimately, result in new convictions.

DEFINING MENTAL ILLNESS

I take seriously sociological scholarship that demonstrates that the boundaries between "madness" and "normality" are socially constructed and historically and culturally contingent (e.g., Foucault 1988; Goffman 1961). Nevertheless, I brought to this study a certain ontological perspective: I consider mental illnesses to be neurobiological and psychological afflictions, with social determinants like all other illnesses like cancer and the flu. Of course, even when operating under the assumption that mental illness is real and identifiable on some level leaves a lot of difficulty in operationalizing the concept for the purposes of social science research. For example, I do not believe it is useful to conceptualize or operationalize "mental illness" as a psychiatrically diagnosed disease listed in the DSM-5, for there is little evidence that prisons have the capacity or will to accurately screen, diagnose, and classify prisoners according to such standards. Indeed, data demonstrate that it is likely that a sizeable percentage of prisoners with serious mental illness do not receive the correct (or any) psychiatric diagnosis, much less sufficient treatment (Haney 2006:248–52).

Moreover, as a recent survey completed by the Association of State Correctional Authorities and the Liman Center for Public Interest Law at Yale Law School demonstrates, state correctional systems vary widely in their own institutional definitions of what counts as mental illness or "serious mental illness." Some states, like South Carolina, rely on the DSM-5 definition to define serious mental illness: "A Diagnosed Mental Health Disorder from the DSM-5 associated with serious behavioral impairment as evidenced by examples of acute decompensation or self-injurious behaviors affecting ability to function and requiring individualized treatment by a mental health professional" (The Association of State Correctional Administrators and The Liman Center for Public Interest Law at Yale Law School 2018:193). Other states, like Wyoming, make no mention of

the DSM-5, just listing "Major Depressive Disorder, Bipolar Disorder, Schizophrenia, or any type of long term Psychosis. Psychosis due to a medical or substance use condition that resolved is not included" as the definition of serious mental illness (The Association of State Correctional Administrators and The Liman Center for Public Interest Law at Yale Law School 2018:195).

This extreme institutional variation in definition and levels of diagnosis provides opportunities to think critically about what these decisions say about how the participants in this study think about what persons fit in the category of "mentally ill" or "seriously mentally ill" and the material consequences of these classifications. For example, in Chapter 4, I observe line-drawing among prosecutors, corrections staff, and mental health professionals alike among which prisoners are truly "ill" and which they perceive to be "malingering," or "sociopathic." In addition, in Chapter 3, where I analyze survey and administrative data from Wisconsin to assess how frequently prisoners with mental illness were charged with new crimes, I had the opportunity to operationalize "mental illness" on my own terms, which I discuss at length in the chapter and in the associated section of the Methodological Appendix. As a general strategy, when possible, I defined mental illness broadly and inclusively, meaning that the study recognized individuals with mental illness on multiple bases: reports of symptoms alone (rather than formal diagnosis), reports of formal diagnosis in the correctional setting, reports of current receipt of psychiatric treatment, and reports of past psychiatric history (e.g., hospitalizations, medications).

LANGUAGE AND THE CARCERAL STATE

Increasingly, advocates, journalists, and scholars have begun to think more purposefully about the language they use when writing about people incarcerated in prisons and jails and the carceral state itself. There is a growing consensus around the importance of using people-centered language, i.e., "incarcerated people," and avoiding dehumanizing terms like "offender" and "felon"

to describe people incarcerated by the criminal-legal system (Cox 2020; Solomon 2021). The turn towards people-first terminology initially grew out of the disability-rights movement, where it helped to avoid reducing people to a stigmatized status (Cox 2020:2). Now, outlets like *The Marshall Project* have adopted style guidelines prioritizing people-first language, with secondary use of the term "prisoner," in the interest of concision, which they found to be "considerably less fraught" than other disfavored terms like "inmate," because it "conveys a physical or mental state of being rather than an identity" (Solomon 2021).

In this study, like *The Marshall Project*, I use both people-first terminology and "prisoner" to describe people incarcerated in state prisons. In addition to being the term of choice of many prisoners' advocates, I also believe "prisoner" has an institutional specificity that is appropriate for the sociological analysis undertaken here. It helps to emphasize the fact that the incarcerated people's experiences I am studying are all confined in a specific total institution (state and federal prisons) rather than in other types of carceral facilities, which could include jails, secure treatment centers, or immigration detention facilities. Furthermore, my use of "prisoner" helps to emphasize the specific power-relationship at issue, without the euphemism that can accompany terms like "resident," and without adopting the stigmatizing language of the state like "offender" or "inmate."

For similar reasons, throughout, I use the term "prison" instead of "corrections facility"; I believe it more accurately describes these institutions, which often have little to offer in terms of rehabilitative programming. And finally, I use the term "criminal-legal system" as opposed to "criminal-justice system," because I also believe it more accurately describes the system of criminal law, adjudication, and enforcement in the United States, which often does not result in just outcomes.

CHAPTER OVERVIEW

In the pages that follow, I reveal how better understanding the scope and process of the criminalization of prisoners sheds new light on the nature of punishment in the United States. In Chapter 2, "Beyond Administrative Sanction: Criminal-Legal Regulation of Prisoners," I describe the role of criminal law in the regulation of prisoner conduct nationwide. I argue that this alternative form of regulation carries different consequences, both intended and unintended, for prisoners and corrections agencies than traditional administrative sanctions. I show that criminal prosecutions of prisoners are pervasive and that they differ from administrative sanctions in that they extend the sentences of prisoners with determinate release dates. These new convictions are experienced as everything from expected to shameful to devastating by prisoners, with especially crushing consequences for incarcerated juveniles charged with adult felonies that remain on their criminal record for life. And I find that these new convictions are not represented equally by prisoners of all racial groups; non-White prisoners, especially Black and Latinx prisoners, are overrepresented among those with in-custody convictions.

I also contend that these prosecutions bestow a range of symbolic and material benefits for security staff and corrections agencies, as well as local district attorneys, that go beyond what administrative sanctions offer. Criminal sanction, I argue, offers redress of dignitary harms that security staff endure and the promise of enhanced safety (through deterrence). In addition, these prosecutions provide a mechanism for locally elected district attorneys to defend the interests of the correctional-worker constituents. They also may, in some cases, allow correctional agencies to "cover up" incidents of excessive force. And finally, I find that an unintended consequence of the criminal regulation of prisoners is that it offers a rare public window, albeit very small, into the conditions inside these closed institutions.

I first review the existing socio-legal literature on the role of criminal law in the social management of deviance more generally, and the consider how examination of the use of criminal law in the management of prison populations specifically may trouble the received wisdom on the autonomy of correctional agencies. Next, drawing on a survey of state and federal prisoner-specific criminal legislation and administrative policies, I describe the changing role of criminal law in the regulation of prisoner conduct nationwide. I find evidence of several recent waves of criminal legislation targeting prisoners: the first in the 1970s and 1980s for assaults, and the second in the 1990s for bodily-fluid throwing. In addition, I find that public records reveal the near universality of correctional agencies' use of criminal referrals, although the process of these referrals varies substantially between jurisdictions and differs substantially from those put in place for the administration of internal disciplinary sanctions. Then, drawing on administrative data from California, Texas, New York, and Wisconsin obtained via public records requests, I present the first quantitative portrait of how many prisoners are currently in custody serving sentences that they obtained while incarcerated, and for what types of offenses, and what, if any, racial and gender disparities are present. I find that, depending on the jurisdiction, between 2% and 8% of state prisoners have convictions that they obtained while in custody, and that together these in-custody sentences affect over 10,000 individuals and amount to nearly 100,000 extra years of incarceration across these four states. Finally, drawing on interview data with 64 former prisoners, advocates, prosecutors, and corrections staff, I explain how the experience of criminal-legal regulation differs from the experience of disciplinary sanction for both prisoners and departments of corrections and district attorneys.

In Chapter 3, "Criminalization of Prisoners with Mental Illness," I examine an additional consequence of institutionalization of persons with mental illness in carceral settings that has so far

been overlooked in the literature: the criminalization of prisoners with mental illness. I present the first statistical evidence that prisoners with mental illness are overrepresented among those with in-custody convictions, and I explain why their symptomatic behavior may be classified as deviant and criminal in prisons. I argue that structural barriers to prisoners' compliance in prison, i.e., lack of sufficient mental health treatment resources, highly restrictive conditions, and cultural barriers to mental health professionals' power inside prisons, combine to make it more likely that noncompliance of prisoners—even those with severe psychiatric symptoms—is classified as a disciplinary or criminal issue, rather than a mental health issue. Moreover, once criminal referrals are made, I describe why the criminal-legal safeguards are not sufficient to prevent the prosecution of prisoners with serious mental illness.

I begin by reviewing the robust extant literature on the criminalization of people with mental illness in the community and consider its implications for prisoners with mental illness, who, like people in the community, may be subject to criminal sanction for behavior that is a manifestation of their mental health issues. In addition, I discuss how broader jurisdictional tensions between professionals in the medical field and criminal legal system over those with mental illness in the community that underlies criminalization may be even more heightened inside carceral systems. Next, I leverage the most recent wave of the nationally representative Bureau of Justice Statistics Survey of Inmates in State and Federal Correctional Facilities to assess whether those who received a new criminal sentence for their most recent disciplinary violation were more likely to have mental illness than their counterparts. I find that a substantially higher proportion of those prisoners who had received a new sentence had at least one indicator of mental illness (52.9%) than the overall population (42.8%). Then, drawing on an original administrative dataset from Wisconsin, I reveal the high rate of prisoners with in-custody criminal convictions (65.9%) who spent time in a

dedicated mental health prison treatment institution, nearly ten times the rate of the overall prison population. In the final section of the chapter, I draw on interviews with prisoners' advocates, former prisoners, prosecutors, and corrections mental health professionals to explain how and why prisoners with mental illness may struggle with compliance with prison rules and how this noncompliance is treated as a disciplinary or criminal-legal issue as opposed to a health or treatment matter. I conclude by considering what the phenomenon of criminalization tells us about the limits of therapeutic care provision in prison settings, and what that may suggest about the hazards of punitive care provision in carceral systems more generally.

In Chapter 4, "The Sickness of Solitary: Punitive Conditions and the Creation of Criminality," I examine the complex relationship between placement in solitary confinement and prisoners' criminal prosecution. I argue that these data demonstrate that not only are criminal prosecution and solitary confinement stacked sanctions (i.e., both may be simultaneously imposed in response to the same incident), but that placement in solitary can generate an increased risk for criminal prosecution by producing the very behavior subsequently criminalized—especially for prisoners with mental illness. Moreover, I argue that the legitimacy this criminalization provides for the maintenance of extremely restrictive conditions is perhaps even more powerful than the similar cycle of administrative tickets that has been previously observed in the literature, because it carries with it the imprimatur of a public criminal proceeding with ample due process including extensive psychological evaluations.

First, I review what recent psychological and sociological research on solitary confinement and supermax prisons has revealed about the relationship between long-term isolation and antisocial behaviors like self-mutilation and bodily fluid throwing, which place prisoners subjected to solitary confinement at an increased risk of further disciplinary sanction and criminal prosecution. Next, I

discuss how this process aligns with two prominent theoretical accounts of total institutions, those of Erving Goffman and Michel Foucault, whose studies of both mental institutions and prisons demonstrate how and why these institutions produce the very conduct they ostensibly serve to control or eliminate. In the following section, I leverage administrative data from Wisconsin on criminal referrals for prisoners' assault on staff to quantitatively assess the relationship between solitary confinement and criminal prosecution in one jurisdiction. I find that 65.2% of the staff assault incidents occurred while the individual was in "restricted housing," i.e., solitary confinement, and that criminal referrals were made in a majority of those incidents (59.4%). Finally, drawing on my interview data, I discuss how system actors understand placement in solitary confinement as both a consequence *and* cause of prisoner misconduct, and argue that the criminal prosecution of that misconduct occurring in solitary helps to legitimize the continued imposition of those extreme conditions. Finally, I discuss concerns raised about how new legal restrictions on the imposition of solitary confinement may have an unintended consequence—an increase in the use of criminal prosecution to regulate prisoner populations.

In Chapter 5, my concluding chapter, I argue that criminal cases brought against incarcerated people provide a particularly useful window to diagnose—and envision remediations to—the social policy failures of mass criminalization/incarceration, deinstitutionalization, and punitive penology. Drawing on interviews with my interview participants, I outline recommendations for changes to the system that align with those proposed by scholars of mass incarceration. First, I describe several reforms to the criminal-legal system, from changes to the substantive criminal law to new procedural protections for prisoners, that could reduce the number of prisoners who are prosecuted for new crimes. Second, I chart changes to prison conditions and routines, especially for those with mental illness, that could help prevent the noncompliant behavior that is subsequently criminalized inside

from arising in the first instance. Third, I discuss the large-scale social policy reforms that could address the structural inequalities undergirding these prosecutions, and in doing so, build a world where the cycles of criminalization these defendants face would not take place. Finally, I argue that the legal and social changes that could help to interrupt this process of (re)criminalization that happens inside America's prisons would likely have ripple effects far beyond this narrow subset of cases.

In sum, in this study, I argue that the criminal prosecution of prisoners helps to provide legitimacy for the punitive excesses of mass incarceration: for its extreme sentences, racial inequities, criminalization of people with mental illness, and harsh conditions of confinement. In effect, these prosecutions put already-criminalized and marginalized individuals on trial, instead of the institutions that help to produce the behavior in question. And the new convictions that result extend prisoners' criminal sentences substantially, directly helping to maintain mass incarceration at its current levels. Nevertheless, by bringing incarcerated defendants and episodes of their noncompliance into the public sphere, I contend that these prosecutions have the unintended potential to invite a sliver of public scrutiny into prisons' failures and the violence they inflict on those in their custody. That is, if we are willing to look.

CHAPTER 2

BEYOND ADMINISTRATIVE SANCTION: CRIMINAL-LEGAL REGULATION OF PRISONERS' CONDUCT

INTRODUCTION

Courtroom 4 was packed. On the benches sat an array of people—nearly all White—waiting for their cases to be called: men, women, and a young biracial man with a woman who looked to be his mother. I picked a seat in the back row, and shortly afterwards, three White male uniformed officers from the county's sheriff's office sat next to me. Jeremiah,[3] a young Black man in his early twenties, conspicuously sat in the jury box in a bright-orange jumpsuit. His arms were shackled, and two White officers stood on either side of him. His was one of the three cases I had come to the courthouse to observe that afternoon.

Jeremiah was incarcerated in the maximum-security prison located just on the edge of this small Wisconsin town. He was in Courtroom 4 for a preliminary hearing. Under Wisconsin's criminal statute prohibiting prisoners from throwing or expelling bodily substances (946.43(2m)(a)), Jeremiah faced two Class I felony charges for allegedly spitting at two correctional officers. Each of these charges carried with them a possible sentence of up to three and a half years, to be served consecutive to his original sentence, and up to a $10,000 fine. And because he had already been convicted of previous felony offenses, he faced a modification for "habitual criminality," which would allow a sentencing judge to increase each sentence by up to four years (939.62(1)(b)).[4]

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[3] Names and other identifying information of all people currently and formerly incarcerated included in this study have been changed to protect their privacy.

[4] All sentences to prison post-1999 in Wisconsin are bifurcated, meaning that the sentence must be split between imprisonment and a term of extended supervision outside. For this charge, each class I felony must not have a period of

The complaint in Jeremiah's case documented these two spitting incidents. In the first, dating from April 2018, Jeremiah was accused of spitting on a correctional officer's face, hat, and shirt, and remarking "this is bullshit" upon being told to face away from the cell door. In the second incident, nearly a year later, in April 2019, Jeremiah was accused of spitting at a correctional officer "on the left side of the forehead" and calling him a "bitch ass" after he refused to give him a shower. On that afternoon in March 2020, nearly a year after the second incident, Jeremiah was in court, asserting his right to represent himself, in his public, criminal proceeding which carried the possibility of substantially extending his confinement behind bars. Right before his hearing began, in front of a packed courtroom, he looked up to the ceiling, and took an audibly deep breath.

* * *

How, how frequently, and with what consequences does prisoners' conduct end up being regulated by the criminal-legal system, rather than just sanctioned administratively? Those are the central questions this chapter asks. After all, prisons' disciplinary rulebooks are vast. Incarcerated people can be ticketed for everything from having an extra t-shirt in their cell to borrowing someone else's eyeglasses. And prisons' expansive internal administrative sanctions to punish noncompliance are notorious. They are perhaps the most severe of any institution in the United States. As socio-legal scholars of punishment and society have widely noted, in the 1980s and 1990s, state and federal prison systems not only grew much bigger, they also got much harsher, particularly with the growth in solitary confinement (Garland 2001:9; Reiter 2016a:3–4; Sakoda and Simes 2019:2; Simon 1997:265). In her historical research on the Pelican Bay supermax prison, sociologist Keramet Reiter

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imprisonment of more than 1.5 years. See BIFURCATED SENTENCE OF IMPRISONMENT AND EXTENDED SUPERVISION W.S.A. 973.01 (1997).

explored how long-term solitary confinement has "produced a range of physical and psychological terrors" in prisoners subjected to it (Reiter 2016a:8,164). The imposition of long-term solitary confinement—prisons' most severe administrative sanction—Reiter shows, is often justified at an institutional level as necessary to ensure staff safety and security, to manage the "worst of the worst" (Reiter 2016a:5). But despite this rich scholarship on the severe administrative sanctions utilized by prisons and their disproportionate impact on racial minorities (Sakoda and Simes 2019), very little is known about the use of criminal prosecution to regulate prisoner conduct and manage prisoner populations.

This chapter describes the role of criminal law in the regulation of prisoner conduct nationwide. I argue that this alternative form of regulation carries with it different consequences, both intended and unintended, for prisoners and corrections agencies than traditional administrative sanctions. I show that criminal referrals and prosecutions of prisoners are pervasive and that they serve as a primary method to extend the sentences of prisoners with determinate release dates. I find that these new convictions are experienced as everything from expected to shameful to devastating by prisoners, with especially crushing consequences for incarcerated juveniles charged with adult felonies. And the new convictions are not equally by prisoners of all racial groups; non-White prisoners, especially Black and Latinx prisoners, are overrepresented among those with in-custody convictions. I also contend that these prosecutions bestow a range of symbolic and material benefits for security staff and corrections agencies, as well as local district attorneys. And finally, I find, that an unintended consequence of the criminal regulation of prisoners is that the criminal process offers a rare public window, albeit very small, into the conditions inside these closed institutions.

First, I review the existing socio-legal literature on the role of criminal law in the social management of deviance more generally, and the consider how examination of the use of criminal

law in the management of prison populations specifically may complicate the received wisdom on the autonomy of correctional agencies. Next, drawing on a survey of state and federal prisoner-specific criminal legislation and administrative policies, I describe the changing role of criminal law in the regulation of prisoner conduct nationwide. I find evidence of several recent waves of criminal legislation targeting prisoners: the first in the 1970s and 1980s for assaults, and the second in the 1990s for bodily-fluid throwing. In addition, public records requests for prison policy documents reveal the near universality of correctional agencies' use of criminal referrals, although the process of these referrals varies substantially between jurisdictions and differs substantially from those put in place for the administration of internal disciplinary sanctions. Then, drawing on administrative data from California, Texas, New York, and Wisconsin obtained via public records requests, I present the first quantitative portrait of how many prisoners are currently in custody serving sentences that they obtained while incarcerated, and for what types of offenses, and what, if any, racial and gender disparities are present. Finally, drawing on interview data with 64 former prisoners, advocates, prosecutors, and corrections staff, I explain how the experience of criminal-legal regulation differs from the experience of disciplinary sanction for both prisoners and departments of corrections.

CRIMINAL LAW IN THE SOCIAL MANAGEMENT OF DEVIANCE

Deviant, or abnormal social behavior, can be managed by societies in different ways. Deviance or abnormality may be "medicalized," for example, and taken under the jurisdiction of professional networks of physicians and psychiatry (Conrad 1992; Foucault 1988). Normalizing, or disciplining, social programs may be proactively imposed at both the institution and the population-level (Foucault 1995). Classical social theorists such as Emile Durkheim have long identified the criminal law as a central mechanism of sanctioning deviance, and in doing so, reinforcing community norms (Durkheim 1997 (1893):40, 47). The extent to which social deviance may be cast

as a medical versus a penal problem is a subject of overlapping concern for medical sociology and the sociology of law. State handling of drug and alcohol addicts, juveniles, and people with mental illness are arenas where tension and overlap between "treatment" and "punishment" orientations have been particularly acute and subject to considerable empirical research (Burns and Peyrot 2003; Nolan 2003; Platt 1977; Reiter 2016a; Simon 1998; Ward 2012).

Where Durkheim famously saw the productive aspect of criminalization (i.e., the promotion of social solidarity) (Garland 1991:122–23), with the massive growth of the U.S. criminal justice system, many more contemporary scholars have levied persuasive critiques of the use of criminal law to manage many forms of social deviance. As John Hagan has recognized, for example, "conceptions of deviance are relative to culture and circumstance" (Hagan 1977:8), and the marking of deviance as "criminal" can often differ depending on what social group is doing the deviating, especially when there is little moral consensus about the behavior in question (Hagan 1977:221). Similarly, Loïc Wacquant argues that the use of criminal law to manage certain populations has both a symbolic function and a material function, arguing that "penal institutions and policies . . . simultaneously act to enforce hierarchy and control contentious categories, at one level, and to communicate norms and shape collective representations and subjectivities, at another" (Wacquant 2009:xvi).

Today, socio-legal scholars and historians share grave concern with the present scale of mass criminalization and mass imprisonment in the United States (Alexander 2012; Goffman 2014; Hinton and Cook 2021; Miller 2021; Western 2006). As of a decade into the twenty-first century, over two million people were behind bars, and nearly six million were under some form of correctional supervision (Wacquant 2010:84). Adding to collective scholarly concern is that this growth of formal penal apparatuses since the early 1970s has been coupled with a massive

retrenchment in the welfare state—a double-burden imposed disproportionately on poor, Black families (Beckett and Western 2001:54–55; Goffman 2014:1–2; Wacquant 2000:384, 2010:74). In other words, the criminal sanctions are being imposed on a greater percentage of Americans, and the criminal justice system has grown to manage a substantially broader swath of the United States population. It has become a primary, if not *the* primary social institution for managing a wide array of social problems. Moreover, the expansion of the jurisdiction of the criminal law and its associated penal institutions over vulnerable populations like people with mental illness in the wake of deinstitutionalization has triggered significant scholarship across medicine, social sciences, criminology, and investigative journalism (see, e.g., Erickson and Erickson 2008; Kupers 1999; Roth 2018; Teplin 1984; Torrey 1996).

To date, however, very little is known about how correctional bureaucracies themselves use criminal law as a tool to manage deviance among prisoners. In the past, theorists like Michel Foucault and scholars like Jonathan Simon and Malcolm Feeley have often contrasted criminal and constitutional law with the bureaucratic excesses of prison administrations. For example, in his lectures, *The Punitive Society*, Foucault contrasts the discourses of "penal law" from the discourse of "the science of prisons," and notes how they have often been in opposition, because prisons grew out of a need to manage risk and dangerousness, to detain, not purely as a device of penal law to punish violations (Foucault 2015:66). Thus, he observes "the never ending attempt by the penitentiary system to escape penetration by the juridical and the law, and the judicial system's effort to control the penitentiary system, which is heterogenous to it…'the trouble is that the law does not penetrate the prison"' (Foucault 2015:66).

Feeley and Simon's influential conceptualization of "the new penology," which they argue is a "new strategic formation in the penal field," draws upon similar insights (Feeley and Simon 1992).

The new penology, they argue, is not aimed at punishing or rehabilitating individuals, but instead "about identifying and managing unruly groups," with a goal not of eliminating crime but managing it through selective incapacitation (Feeley and Simon 1992:455–58). In this reading, prisons pursue a social goal of incapacitation, which has become largely untethered to constitutional law or legal or political restraint of any kind (Simon 2014:43). And yet, by bringing to light prisons' use of criminal law—even just as a method to continue to pursue greater incapacitation—this chapter complicates and thickens the existing scholarly understanding of prison bureaucracies' relationship with the courts. I show that although prisons still largely evade legal regulation, by utilizing criminal courts as one method of disciplinary control, they invite a small bit of public scrutiny into conditions inside.

LEGAL ARCHITECTURE OF PRISONER PROSECUTION

How do prisoners end up in criminal court for their noncompliance behind bars? Certainly, some conduct that is criminalized in the free world also takes place inside prisons. For example, possession and trafficking of illicit drugs, assault, battery, and even murder, are all crimes inside and outside of prison walls that may be committed by both prisoners and staff alike. But some criminal statutes, like the one prohibiting bodily-fluid throwing by a prisoner that Jeremiah was charged with in Wisconsin, only apply to prisoners and were therefore passed with the intent to specifically regulate the conduct of prisoners using criminal law.[5] In addition, some sentencing statutes apply only to prisoners. For example, Minnesota has a statute that provides for "consecutive sentences for assaults committed by state prison inmates" and that "the inmate shall serve the sentence for the

[5] Indeed, many people might not typically consider spitting to be a criminal act in the United States, and associate its criminalization with authoritarian regimes like that of Singapore, where spitting in public is criminalized (Kamil 2020).

assault in a state correctional facility even if the assault conviction was for a misdemeanor or gross misdemeanor" (Minn. Stat. § 609.2232).

Moreover, having adequate state-level criminal law on the books to prosecute prisoners for their noncompliance is just the first step. In addition, other forms of law—institutional-level rules, procedures, and norms—also help to explain how prisoners' conduct is regulated by the criminal legal system. This section looks at both the hard and soft law that facilitates the criminal prosecution of prisoners. As a first step, I conducted what I believe to be the first systematic survey of prisoner-specific criminal legislation. Second, I analyze correctional agency policy documents obtained from public websites as well as through public records request that govern the criminal referral of prisoners.

Prisoner-Specific Criminal Statutes

I systematically examined prisoner-specific criminal law enacted in a national sample of twelve diverse states across four regions of the United States (Northeast, West, South, and Midwest) and the federal government using Westlaw's legislative database.[6] The results, summarized in Table 1 below, largely tracked my expectations, but also included a few surprises. I found that every jurisdiction had prisoner-specific criminal statutes on their books, and nearly every jurisdiction I studied (with the exception of the federal government and New Mexico) specifically criminalized the throwing of bodily fluids as assault against correctional employees. Some states, like California, have entire sections of their penal codes devoted specifically to "Offenses by Prisoners."[7] Although the existence of some prisoner-specific criminal statutes is unsurprising (e.g., escape), given the nature of

[6] State selection and search strategy details are described in-depth in the Methodological Appendix.

[7] California Penal Code §§ 4500-4504.

the crime, other provisions like prisoner-specific assault statutes present a more interesting case, as they provide for harsher sentencing of the same conduct when it occurs by a specific group of people (prisoners) or against a specific group of people (correctional staff) than in the community.

The timing of the passing of prisoner-specific criminal legislation across these jurisdictions was also intriguing. Although a number of jurisdictions, like Rhode Island and California, had prisoner-specific criminal legislation (e.g., prohibiting battery, assault, escape, contraband, etc.) dating from the 1950s or prior, I identified two more recent waves of legislation targeting prisoners. The first occurred in the late 1970s–early 1990s, where several states (e.g., Connecticut, Florida, Oklahoma, and Nevada) enacted new prisoner-specific legislation or provisions that prohibited violence or possession of deadly weapons. The second wave is more pronounced. I found that all the jurisdictions' bodily fluid provisions and statutes were all passed in a similar time period, from 1996–2006, with the majority in the year 1999.

Table 1. Summary of Prisoner-Specific Legislative Findings

Region	State	Example Prisoner-Specific Statute (Enactment Date)	Bodily Fluids Statute/Provision (Enactment Date)
Northeast	New York	McKinney's Penal Law § 240.06 Riot in the first degree (2005)	McKinney's Penal Law § 240.32 Aggravated harassment of an employee by an inmate (1996)
	Connecticut	C.G.S.A. § 53a-59b Assault of an employee of the Department of Correction in the first degree: Class B felony (1993)	C.G.S.A. § 53a-167c Assault of public safety, emergency medical, public transit or health care personnel: Class C felony (bodily fluids provision added—1999)
	Rhode Island	Gen. Laws 1956, § 11-25-2 Assault or escape by a custodial unit inmate (1896)	Gen. Laws 1956, § 11-5-15 Aggravated harassment of a deputy sheriff by an inmate (1999)
Midwest	Illinois	720 ILCS 5/31-6 Escape; failure to report to a penal institution or to report for periodic imprisonment (1961)	720 ILCS 5/12-3.05 Aggravated battery (bodily fluids/corrections provision added —1999)
	Missouri	V.A.M.S. 217.385 Violence or injury to others or property by offender, penalty (1982)	V.A.M.S. 575.155 Endangering a corrections employee--definitions—penalties (2005)
	Wisconsin	W.S.A. 946.43 Assaults by Prisoners (1955)	946.43. Assaults by prisoners (bodily fluids provision—1999)

South	Texas	V.T.C.A., Penal Code § 46.10 Deadly Weapon in a Penal Institution (1985)	V.T.C.A., Penal Code § 22.11 Harassment by Persons in Certain Facilities; Harassment of Public Servant (1999)
	Florida	West's F.S.A. § 775.0823 Violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges (1989)	West's F.S.A. § 784.078 Battery of facility employee by throwing, tossing, or expelling certain fluids or materials (2001)
	Oklahoma	21 Okl. St. Ann. § 649 Assault, battery or assault and battery upon police officer or other peace officer (corrections officer provision–1990)	21 Okl. St. Ann. § 650.9 Persons in custody—placing body wastes or fluids (1996)
West	California	West's Ann. Cal. Penal Code § 4501.5 Battery by prisoner on non-confined person; punishment (1959)	West's Ann. Cal. Penal Code § 4501.1 Aggravated battery by gassing; persons confined in state prisons; investigations; prosecution; reports (1997)
	Nevada	N.R.S. 212.185 Possession or control of dangerous weapon or facsimile by incarcerated person prohibited (1977)	N.R.S. 212.189 Unlawful acts related to human excrement or bodily fluid (1999)
	New Mexico	N. M. S. A. 1978, § 30-22-17 Assault by Prisoner (1953)	n/a (but caselaw on battery of a peace officer suggests it includes the throwing of bodily fluid: *State v. Jones*, 2000, 129 N.M. 165, 3 P.3d 14).
Federal	n/a	18 U.S.C.A. § 1791 Providing or possessing contraband in prison (1948)	n/a

Why was criminal law drawn on as a resource for state correctional systems in these periods? Although more research on the statute's legislative history is necessary, the first wave of legislation in the late 1970s through the early 1990s appears to correlate with the rise in mass incarceration (Alexander 2012; Western 2006), the "punitive turn" in corrections (Feeley and Simon 1992), and the massive prison-building boom of this period (Eason 2016). It also correlates with growing concern over prisoner rebellions and violence in prisons more generally (Reiter 2016a; Thompson 2016), and the adoption of determinate sentencing regimes and the abolishment of parole in a number of states (including several studied here: California, Connecticut, Illinois, and New Mexico) (Marvell and Moody 1996).

In the second wave, where bodily-fluid throwing was criminalized in nearly every jurisdiction in the late 1990s, there is evidence that concern over communicable diseases—namely HIV—was at its height. For example, in Florida, the 2001 legislation that criminalized the throwing of bodily

fluids at correctional employees and made it a third-degree felony (2001 Fla. Sess. Law Serv. Ch. 2001-244 (C.S.S.B. 1318)) also mandated an educational requirement for correctional inmates on HIV/AIDS. In California, the legislation that made "battery by gassing" a crime in 1997, also authorized the chief medical officer of the state prison in question to order the prisoner in question to be tested for hepatitis and tuberculosis (1997 Cal. Legis. Serv. Ch. 591 (A.B. 995)). This wave of bodily-fluid throwing legislation came at the same time that states were passing legislation criminalizing HIV transmission in the community as well, based on an "exaggerated perception of the risk of transmission of HIV" (Hoppe 2017:39). These broad findings suggest that there is evidence of the national diffusion and homogenization of state policy forms criminalizing violence within prisons, as scholars have observed in other areas of criminal law and punishment (see, e.g., Grattet, Jenness, and Curry 1998; Rubin 2015).

The New York legislature's memo accompanying its 1996 legislation criminalizing prisoner bodily-fluid throwing as "aggravated harassment of an employee by an inmate" pointed to several animating rationales for the legislation. Like in other states, the memo mentioned the fact that the conduct could constitute a "health risk" due to possible transmission of disease. But it went on to provided other rationales for drawing on criminal law to regulate this behavior. First, it noted the "vile and degrading nature of such conduct," emphasizing the dignitary harms to staff that such behaviors provoke. In addition, they acknowledged the availability of administrative disciplinary sanctions for such conduct, they said, "these remedies have not been effective in curbing this behavior."[8]

As the New York legislative memorandum helps to make explicit, all of these legislative changes from the 1970s to the early 2000s criminalizing prisoner conduct must be understood in the

[8] Legislative Memorandum for L.1996, c. 92.

context of criminal legal regulation being just one form of regulation at the state's disposal for managing prisoner conduct. Why might states have reached beyond their available administrative sanctions (which were growing all the more severe and extensive) to the criminal law in this period? The answers are most likely multiple, and include the public, symbolic value of criminal adjudication to address physical and dignitary harms that correctional workers were experiencing in this period of upheaval inside as well as the material benefits that the laws' enforcement confers. Indeed, prior studies of the passage and enforcement of criminal legislation have examined both the symbolic and instrumental dimensions of these acts (see, e.g., Grattet and Jenness 2008). Beyond its symbolic benefits, criminal-legal regulation of prisoner conduct offers additional consequences that may have been appealing to correctional agencies during this time. First, new criminal prosecutions and sentences of prisoners have the consequence of extending their underlying sentences. From a political-economy standpoint, for those with an interest in maintaining prison populations (including the staff who work in them), the ability to extend the stay of prisoners through new prosecutions (as well as through the loss of "good time" that may occur with administrative sanctions) is a potential benefit. As with other types of criminal legislation, the level of enforcement of these laws is likely to vary quite by both state and county, and depend to some extent on community context (Grattet and Jenness 2008). Below, I provide preliminary data from several states that sheds light on the enforcement patterns of prisoner-specific criminal legislation.

Moreover, the nature of conduct that is criminalized by some of these prisoner-specific statutes, namely the bodily fluids-throwing statutes—conduct like spitting and the throwing of urine or feces at correctional officers—likely places prisoners with severe mental illness at greater risk of criminal prosecution, even if that was not the original intent of legislators. Bodily-fluid throwing is a type of conduct that is rarely seen in the community; however, it's a fairly common antisocial

behavior seen among those with serious mental illness who are subjected to long-term solitary confinement (Kupers 1999:58). Therefore, it is plausible that post-deinstitutionalization, as prisons and jails began to incarcerate more and more people with serious mental illness, alongside the rapid growth of supermax prisons and long-term solitary confinement in the 1990s, these criminal laws were part of a response to this new institutional configuration. In effect, they also may have made prisoners with severe mental illness, especially those subjected to long-term isolation, more vulnerable to additional criminal prosecutions. This question as to whether incarcerated people with mental illness face a disproportionate risk of criminal sanction is taken up in Chapter 3, and the relationship between criminalization and solitary confinement is discussed in Chapter 4.

Institutional Policies Governing Criminal Referral

In order to complete the picture of the legal architecture of the criminal regulation of prisoners, I also analyzed the soft law, or institutional policy documents that govern disciplinary sanctions and criminal referrals within prisons. Prior work has shown that like criminal legislation, agency-level law enforcement policies are sites of both symbolic power and differential instrumental effects (Grattet and Jenness 2008). In most jurisdictions, the disciplinary rulebook was available publicly, and in some cases (e.g., New York and California), the policy governing criminal referrals of prisoners was also available online. However, for several jurisdictions, e.g., Illinois, Florida, and Oklahoma, I relied on public records requests to the department of corrections to obtain documents regarding criminal referral and disciplinary processes. The results are summarized below in Table 2.

Table 2. Prison Policies on Criminal Referrals & Mental Health Review

Region	State	Policy Documents Reviewed	Criminal Referral Policy	Disciplinary Mental Health Review
Northeast	New York	DIR# 6910 Criminal Prosecution of Inmates	yes, extensive	yes—review of competency and mental health status must be

		DIR# 4932 Chapter V, Standards Behavior and Allowances		considered in determining appropriate sanctions if found competent
	Connecticut	A.D. 9.5 Code of Penal Discipline A.D. 6.6 Reporting of Incidents	yes, includes requests made by an inmate, but by dept. vague	yes—face-to-face interviews encouraged, evaluation of responsibility, and evaluation of effect of disciplinary process
	Rhode Island	11.01-7 DOC Code of Inmate Discipline	yes, but vague	yes—for all facing disciplinary segregation and where mental illness may have contributed, and suicide attempts
Midwest	Illinois	Administrative Code Title 20 Chapter 1 Department of Corrections A.D. 01-12-120 Investigations of Unusual Incidents Notification of Prosecution DOC 0260 Illinois State Police/Illinois Department of Corrections Memorandum of Understanding	yes, includes records of pending prosecution in inmate's master file	yes—considers responsibility and effect of sanctions, but limited to inmates designated as "seriously mentally ill" and facing segregation
	Missouri	Offender Rulebook D1-8.4 Institutional Investigations IS19-1.6 Offender Accountability Program	yes, fairly extensive	yes—but only for sexual assault violations
	Wisconsin	DOC 303.01 Discipline DAI Policy 500.70.01 Psychological Input to Security Decisions (rev. 2015) DOC-3509A Psychology Input for Security Decisions	yes, fairly extensive	yes—psychological assessment of regarding mental status of "seriously mentally ill" inmates at time of behavior (major violation/self-harm) at review and disposition stage for mitigating factors and competency determination; no clear limits on sanctions
South	Texas	GR-106 Disciplinary Rules and Procedures for Offenders Office of the Inspector General Offender Warning to be Given Before Written Statement	yes, Office of Inspector General responsible for criminal investigation	yes—some special procedures referred to for developmentally disabled or psychiatric patients (incl. outpatients)

		AD–16.20 (rev. 3) Reporting Incidents/Crimes to the Office of the Inspector General		
	Florida	Chapter 33-601 Classification and Central Records Health Services Bulletin No. 15.05.13 33-404.108 Discipline of Inmates Diagnosed as Mentally Ill Procedure 108.003 Investigative Process	yes, Office of Inspector General responsible for investigation	yes—some discretionary psychological input for some inmates on responsibility and sanctions, required for those with more severe statuses; no solitary confinement for those on inpatient level of treatment
	Oklahoma	OP-060125 Inmate/Offender Disciplinary Procedures; Attachment A DOC 060125R Mental Health Recommendations Regarding Inmate Discipline	yes, but vague	yes—everything logged, review done for several classes (B, C1, C2, or D), recommendations mainly limited to competency but permits avoidance of sanctions
West	California	Department of Corrections and Rehabilitation Operations Manual Chapter 5—Adult Custody and Security	yes, fairly extensive including relationship between that disposition and disciplinary hearings	yes—extensive, for any inmate in certain classifications of care, or who displayed "bizarre behavior"
	Nevada	AR 708 Referral for Criminal Prosecution AR 707 Inmate Disciplinary Process	yes, extensive discussion of referral packet to be sent to prosecutor	yes—extensive, ban on solitary for "seriously mentally ill" inmates, any inmate can be referred for psychological evaluation prior to disciplinary hearing
	New Mexico	CD-090100 Inmate Discipline	yes, but vague—calls just made to law enforcement outside law enforcement automatically called for battery	yes—some responsibility review, only for those in special housing; unclear limits on sanctions
Federal	n/a	BP-A671.013 Referral of an Inmate Criminal Matter for Investigation P5270.09 Inmate Discipline Program	yes, extensive	yes—extensive mental health review for both competency and responsibility, for any inmate appearing "mentally ill" at any stage of the process

I found that every jurisdiction I studied had a criminal referral policy of some kind whereby suspected criminal activity by prisoners would be referred to the local state's attorney or to state police for investigation and/or prosecution. Some of these referral policies were far more detailed than others. At the extensive end is a state like New York, which has an entire administrative directive regarding "The Criminal Prosecution of Inmates," that details how "Facility and Central Office staff shall collaborate, when necessary, to ensure that the appropriate records and evidentiary materials on apparent serious criminal violations are carefully developed, collected, logged, and preserved." [9] Other jurisdictions in this category include California, the Federal Bureau of Prisons, Florida, Wisconsin, and Nevada. On the very vague/minimal end are states like New Mexico, whose rulebook simply states that "[w]hen an inmate allegedly commits an act covered by criminal law, the case shall be referred to the appropriate court or law enforcement officials for consideration for prosecution."[10] Upon follow-up, the department stated they had no further policy—that "[w]hen an incident is determined appropriate for referral for a criminal investigation, a call is placed to law enforcement."[11] Other states in this category include Oklahoma, Rhode Island, Connecticut, and Illinois. This variability in detail of jurisdiction-level policies suggests that in some jurisdictions, there are more centralized guidelines governing corrections' departments criminal referrals, and in others, significantly more discretion may adhere at the facility-level over how and what conduct gets referred.

Second, I found that there was considerable variation in both the scope and quality of disciplinary mental health review undertaken by the various correctional agencies for prisoners'

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[9] New York Department of Corrections and Community Supervision DIR# 6910: Criminal Prosecution of Inmates.

[10] CD-090100 Inmate Discipline.

[11] Email correspondence with author and Andrew Kuhlmann (Sept. 12, 2019).

disciplinary violations. For example, in Oklahoma, there are procedures for assessing prisoners' mental health status as part of the disciplinary process, but the mental health review is limited to whether the prisoner is competent, i.e., "capable of assisting with his/her defense."[12] In contrast, in Connecticut, for all prisoners with a mental health level score of "4 or 5," before any disciplinary report can be delivered, a mental health review must be undertaken wherein the professional assesses not only the prisoners' competency, but also their responsibility, i.e., whether their mental health disorder may have contributed to the disciplinary violation.[13] In other states, mental health review is limited to certain offenses, as in Missouri, for sexual assault,[14] or only utilized when prisoners faced certain sanctions, like solitary confinement, as in Illinois.[15] Importantly, however, is the fact that in *none* of the department policies I studied was there any indication of mental health review for *criminal referrals*. In other words, although most correctional agencies have in recent years taken steps to incorporate some form of mental health review for some disciplinary violations and/or groups of prisoners, there is no indication in either the criminal referral policies or the mental health review guidance that there are any meaningful checks on whether prisoners with mental illness may face criminal prosecution for noncompliance behind bars. As criminal sanctions have increased, there is no evidence of an increase in attendant protections for those with mental illness. The implications of this lack of mental health review for prisoners with mental illness facing criminal referrals is explored further in Chapter 3.

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[12] DOC 060125R Mental Health Recommendations Regarding Inmate Discipline.

[13] A.D. 9.5 Code of Penal Discipline.

[14] IS19-1.6 Offender Accountability Program.

[15] Administrative Code Title 20 Chapter 1 Department of Corrections Section 504.60: Investigation of Major Disciplinary Reports.

New Charges, New Convictions: Criminal Prosecution of Prisoners in Action

The question then arises: how does all this law-on-the-books with regard to criminal prosecution play out in action? In this section, I provide the first quantitative portrait by analyzing administrative data from four states—California, Texas, New York, and Wisconsin—to determine the number of people in custody with criminal convictions for in-custody offenses, the racial and gender breakdown of those with in-custody convictions, and the total accumulated extra time these new sentences represent. Next, I draw on interviews with prisoners' advocates, prosecutors, correctional workers, and former prisoners in these jurisdictions, to explain both the intended and unintended consequences of these criminal prosecutions. I show that these convictions can be devastating for prisoners: adding to the cumulative disadvantage minoritized people in prison experience, extending time and cutting off hope for release. But at the same time, these prosecutions provide a rare public window into the operation of prisons, the structural, emotional, and physical violence that prisoners experience behind bars, and the working conditions that security staff face inside.

The Scope of Criminal Prosecution of Prisoners: A Preliminary Quantitative Portrait

To obtain the first quantitative portrait of how frequently prisoners are prosecuted for new crimes while incarcerated, I requested administrative data from the largest prison systems in each of the four regions I studied (New York, Illinois, California, and Texas) as well as the Federal Bureau of Prisons and Wisconsin (the state home to my ethnographic case study).[16] California, Texas, New

[16] Using public records laws, I requested individual-level data on both criminal referrals and inmates currently serving sentences for offenses occurring post-admission. Although I requested mental health classification data, along with demographic data on individuals, unfortunately, none of the states were willing to provide mental health data (citing

York, and Wisconsin all provided data on all prisoners with in-custody offenses.[17] Together these data provide the first view—albeit partial—into how frequently prisoners are convicted of new sentences while incarcerated across the United States. These descriptive results are summarized in Table 3 and Table 4.

Overall, as shown in Table 3, I observed substantial variation between jurisdictions in the percentage of prisoners currently in custody who had been convicted of a new crime while incarcerated. In California, as of February 2020, there were 9,801 incarcerated people (7.8% of the total incarcerated population) who had received new sentences for 13,468 in-custody offenses. In Texas, as of January 2019, there were 3,378 incarcerated people (2.3% of the total incarcerated population) who had received new sentences for 4,522 in-custody offenses. In New York, as of April 2020, there were 1,166 incarcerated people (2.8% of the total incarcerated population) who had received 1,431 new sentences while imprisoned. And in Wisconsin, as of January 2020, there were 391 incarcerated people (1.7% of the total incarcerated population), who had received new sentences for 819 in-custody offenses.

Table 3. Prisoners with In-Custody Sentences

	California	Texas	New York	Wisconsin
Date of Administrative Data	February 29, 2020	January 31, 2019	April 27, 2020	January 31, 2020

HIPAA concerns and related exemptions), and some of the states were unwilling to provide demographic data. Several—including the New York Department of Corrections and Community Supervision, the Illinois Department of Corrections, and the Federal Bureau of Prisons, have yet to provide data. More detail on the various jurisdictions' FOIA-responsiveness (and lack thereof) is discussed in the Methodological Appendix.

[17] Wisconsin also provided data on all their staff assault data (including which offenses were referred for criminal prosecution). These data will be discussed in Chapter 3.

Total Adult Prison Population	125,054	145,402	42,123[18]	23,377
Individuals with In-Custody Sentences	9,801	3,378	1,166	391
% of Total Population	7.8%	2.3%	2.8%	1.7%
% Non-White	84.4%	77.2%	89.7%	56.2%[19]
% Male	95.0%[20]	98.8%	99.3%	96.7%
Mean Age	39.7 years	40.9 years	38.3 years	43.4 years
Mean Time-Served	13.8 years	16.5 years	12.2 years	16.2 years
Mean Number of In-Custody Sentences	1.4	1.3	1.2	2.1

On other measures, across jurisdictions, the populations of prisoners with in-custody convictions were similar on a variety of characteristics. In all jurisdictions, prisoners with new sentences for offenses committed in custody were overwhelmingly male and majority Black or Hispanic. The racial breakdown of the people with the new convictions was especially striking in Texas, where the vast majority—77.2%—of those with in-custody offenses were non-White (Black,

[18] This total population data information is from March 31, 2020, the closest date for which that information was made publicly available. I have a pending public records request for the information for April 27, 2020.

[19] The administrative data provided by Wisconsin did not include "Hispanic" as a separate racial category (they are often classified as African American or White), so this is almost certainly an undercount. Indeed, when I was conducting court observations, I noticed that a man classified as "White" in the administrative records spoke Spanish and had a Latino surname. To check how pervasive this classification problem might be, my research assistant cross-referenced every one of the 391 people in this dataset with their information available online via the Wisconsin Department of Corrections website, which reports racial classification data differently for individuals, as well as includes photographs and surname information. Albeit an imperfect method, we found using our classification system that if "Hispanic" people are categorized as a separate racial/ethnic group, the breakdown for those with in-custody convictions would be: 53.8% Black, 37.9% White, 5.9% Hispanic, .3% Asian/Pacific Islander, and 2% American Indian. This would mean that a greater share—62%—of the people in this sample could be classified as non-White.

[20] This is likely an underestimate. California did not provide data on gender, so this is estimated based on the individual's facility (three of which house women, including one that houses men and women—Folsom State Prison).

Hispanic, or other race), compared with 66.2% of the total population,21 and New York, were 89.7% of those people with in-custody convictions were non-White, versus only 76.5% of the total incarcerated population.22 In California, 84.4% of those with in-custody convictions were Black, Hispanic, or "Other," compared with 79.4% of the total incarcerated population. And in Wisconsin, too, the majority of individuals with in-custody offenses (53.7%) were non-White (Black, Asian or Pacific Islander, or American Indian), compared with 47.6% of the total population.23

The mean age of prisoners with in-custody convictions across jurisdictions was also similar (39.7, 40.9, 38.3, and 43.4 years in California, Texas, New York, and Wisconsin, respectively), and had served a similar amount of time—13.8, 16.5, 12.2, and 16.2 years. The mean number of in-custody sentences that each individual had was highest in Wisconsin (2.1) and about the same in California (1.4), Texas (1.3), and New York (1.2). Together, these similarities suggest that the different percentages of those with in-custody sentences across jurisdictions is not simply an artifact of the fact that they are on average older or have served longer time.

In contrast, as shown in Table 4, the characteristics of the sentences of those convicted of in-custody offenses differed substantially across jurisdictions. Indeterminate life sentences (e.g., 25 years-to-life) and other life and death sentences were much more frequent in California (n=881) than in Texas (n=90), which has a similar total prison population (although California had a much higher rate of incarcerated individuals with in-custody sentences). However, for those term-of-years

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[21] The population statistical data available publicly by the Texas Department of Criminal Justice is from August 31, 2018 (Texas Department of Criminal Justice 2019).

[22] The racial/ethnic breakdown data for the total population was also from March 31, 2020.

[23] The population statistical data from the Wisconsin Department of Corrections available publicly is from December 31, 2019 (Wisconsin Department of Corrections 2020).

sentences, they were substantially shorter on average in California (3.6 years), New York (2.6-4.3 years), and Wisconsin (4.6 years), than in Texas (12.3 years). When added together, the total additional years of incarceration those with term-of-years sentences were set to serve due to their in-custody prosecutions was substantial: 44,141 years in California, 41,622 years in Texas, 2,989 years in Wisconsin, and a range of 3,727 years –5,803 additional years of incarceration in New York.

The most frequent offenses in each jurisdiction also varied quite a bit—most striking was that while possession of contraband, i.e., cell phones, weapons, and/or drugs ranked among the most common charges in both California, Texas, and New York, in Wisconsin, they were nearly absent. Conversely, in Wisconsin, bodily-fluids throwing charges were among the top two most frequent charges (14.4%, n=117), after battery (33.6%, n=273), whereas escape ranked a distant third (6.2%, n=50). In California, the most frequent sentences were for possession or manufacture of a weapon (25.0%, n=3,361), possession of drugs (20.7%, n=2,790), and assault (20.5%, n=2,762); a very small fraction were for bodily-fluids throwing (1.8%, n=240). In Texas, the most frequent charges were also for possession of contraband, i.e., drugs or cell phone (34.1%, n=1,543), assault of staff (20.3%, n=920) , and possession of a weapon (15.4%, n=698); a slightly larger fraction (5.3%, n=239) were for bodily-fluids throwing. Similarly, in New York, the vast majority of in-custody sentences were for contraband (66.1%, n=946), and assault was second-highest (15%, n=215), and bodily-fluids throwing was third (3.6%, n=52). Notably, in all jurisdictions, a large fraction of the most common charges were for non-injurious criminal conduct, like contraband or drug possession or bodily-fluids throwing.

Table 4. Characteristics of In-Custody Sentences

	California	Texas	New York	Wisconsin
Total Count In-Custody Sentences	14,468	4,522	1,431	819

Total Count of In-Custody Life or Death Sentences	881[24]	90	68[25]	25[26]
Mean Term-of-Years In-Custody Sentence	3.6 years	12.3 years	2.6 years – 4.3 years[27]	4.6 years
Total Years Added (Term Sentences Only)	44,141 years	41,622 years	3,727 years – 5,803 years[28]	2,989 years
Top In-Custody Charges	1) Possession or Manufacture of Weapon (25.0%, n=3,361) 2) Possession of Drugs (20.7%, n=2,790) 3) Assault (20.5%, n=2,762)	1) Possession of Drugs or Phone (34.1%, n=1,543) 2) Assault on Staff (20.3%, n=920) 3) Possession of Weapon (15.4%, n=698)	1) Contraband (66.1%, n=946) 2) Assault (15.%, n=215) 3) Bodily-Fluids Throwing (3.6%, n=52)	1) Battery (33.6%, n=273) 2) Bodily-Fluids Throwing (14.4%, n=117) 3) Escape (6.2%, n=50)

Although a large percentage of the new convictions stem from behavior also criminalized in the free world (i.e., illicit drug possession and trafficking), there is also a substantial fraction of charges that are specific to prisoners (i.e., possession of a weapon, contraband, escape, etc.). Indeed, the fact that both California, Texas, and New York criminal codes specifically criminalize the

[24] The vast majority of these life sentences were indeterminate life sentences (n=808), i.e., included possibility of parole. Of the in-custody sentences, there were just 57 life without parole sentences and 19 death sentences.

[25] Like California, this includes indeterminate life sentences.

[26] This is the number of *individuals* with life sentences who did not have life sentences or missing sentence data upon admission. Unfortunately, the data provided do not permit a count of how many total life sentences were obtained in-custody. In other words, this count does not include those who may have obtained multiple life sentences while in-custody, if any.

[27] Each New York sentence had a minimum and a maximum range, so this range reflects the mean minimum sentence and the mean maximum sentence for in-custody convictions.

[28] Similarly, this is a range because each sentence had a minimum and maximum term.

possession of weapons, drugs, and cell phones *by prisoners*[29] may account for the higher number of prisoners with these in-custody convictions of these offenses in those states, compared with Wisconsin, which until March 2020 lacked criminal legislation specifically targeting prisoners for drug or weapons possession, even though it had universally applicable criminal drug possession and trafficking statutes.[30] Therefore, these data make clear that prisoner-specific criminal legislation does not simply exist on the books, but is actively drawn upon by corrections agencies and prosecutors to regulate conduct of those incarcerated. Prisoner-specific criminal legislation not only enables criminal regulation of prisoners in some cases (e.g., escape), but may in fact encourage the prosecution of prisoners when there is otherwise available general criminal legislation (e.g., general anti-drug possession laws in Wisconsin).

Together these preliminary data demonstrate that the criminal prosecution of prisoners appears to be a ubiquitous phenomenon across the United States, resulting in tens of thousands of additional criminal sentences and years of additional incarceration. These data also reveal concerning racial disparities among prisoners. Black and Latinx people are overrepresented in the nation's criminal legal system, and they are also overrepresented among those who obtain new convictions

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[29] *See*, *e.g.*, WEST'S ANN. CAL. PENAL CODE § 4502(a) Possession of Weapon by Prisoner; WEST'S ANN. CAL. PENAL CODE § 4502(b) Manufacture of Weapon in Penal Institution; WEST'S ANN. CAL. PENAL CODE § 4573 Bringing Drugs Into a California Jail or Prison; V.T.C.A. PENAL CODE § 46.10 Deadly Weapon in a Penal Institution; V.T.C.A. PENAL CODE § 38.11. Prohibited Substances and Items in Correctional or Civil Commitment Facility; N.Y. PENAL LAW § 205.25 Promoting Prison Contraband in the First Degree.

[30] This may soon change, as it appears a new Wisconsin criminal statute prohibiting contraband possession by prisoners was just passed in March 2020 (Bink 2020). Indeed, according to at least one prosecutor I spoke with for this study, it is beginning to change in some counties in Wisconsin, where prosecutors are increasingly charging prisoners with possession of contraband.

while incarcerated. And while these data do not speak directly to whether other groups of prisoners, namely those with mental illness, are at heightened risk of criminal sanction, that inquiry is the subject of Chapter 3. In the next section, using qualitative interview data, I explore the social consequences of the criminal prosecution of prisoners in greater depth.

"Free-World Cases" Behind Bars: Intended and Unintended Consequences

Although the cumulative number additional years of incarceration incurred by the prosecution of prisoners is staggering, the figures above provide only a limited understanding of social consequences the criminal legal regulation of prisoners creates for those prosecuted and for correctional agencies themselves. Drawing interviews with 64 former prisoners, advocates, prosecutors, and correctional workers in five states—California, Texas, New York, Illinois, and Wisconsin—I analyze what happens when prisons go beyond administrative sanctions and use criminal courts to punish conduct behind bars.[31]

In this section, I first discuss how these new criminal convictions lead to extended sentences, in some cases, decades-long, which can result in considerable loss of hope for prisoners and increasing disconnection from their families and communities. Indeed, I show how the status-enhancements that so many prisoners face for criminal conduct behind bars can lead to such extreme sentences that the pressure to accept a plea deal is overwhelming. For incarcerated juveniles convicted of new crimes in adult court, even if there is not lengthy incarceration that follows, these convictions can be especially life-altering, creating a felony record that can dramatically limit their future opportunities.

[31] A detailed discussion of my interview sample and protocol is provided in the Methodological Appendix.

Next, I discuss how participants pointed to the structural racism and anti-Black animus of U.S. prisons to help explain the racial inequities in criminal prosecution evident in the administrative data described above. These racial inequities mean that for Black, Indigenous, and Latinx prisoners, who are already overrepresented in the criminal legal system, the criminal prosecution of prisoners results in cumulative racial disadvantage.

Third, my interviews suggest that criminal prosecution of prisoners may carry both symbolic and material benefits for security staff inside and local district attorney offices. In the context of frontline corrections staff being poorly paid and facing pervasive threats of violence inside, interview participants suggested that criminal prosecutions may offer a sense of control and dignity-restoration. On the material side, interview participants suggested that criminal prosecutions can benefit corrections staff by deterring unsafe behaviors, keeping prisons full, and covering-up incidents of excessive force. For the local prosecutors charging these crimes, their sense of obligation to the correctional staff who are their constituents was cited as a reason to pursue these charges.

Finally, my interviews pointed to one unintended consequence of the criminal-legal regulation of prisoners: it provides a rare, albeit small, public window into a traditionally closed institution. Advocates described how they could use criminal proceedings to educate judges about conditions inside, including the severe administrative sanctions their clients had already faced for the conduct in question. In some cases, judges resisted this dynamic by actually moving criminal court inside prison walls or prison grounds, which threatened to close this public forum off, something former prisoners and advocates alike critique and in one case, successfully challenged legally. Moreover, the public nature and the higher burden of proofs and procedural protections present in criminal court, compared to administrative hearings held inside prisons, provided prisoners a chance

to fight their cases in a more equitable and transparent setting than the "kangaroo courts" they also experienced inside—even as the system remained systematically stacked against them.

I. *Extended Sentences; Broken Futures*

At the most basic level, new criminal convictions have at least one entirely predictable consequence: prisoners will spend an extended time imprisoned. New criminal prosecutions are not the only way nor most common way that imprisonment can get lengthened; administrative sanctions can lead to a loss of "good time" or reduced parole eligibility that extend prisoners' expected length of incarceration. But as one advocate from New York said,

> I know there's a lot of threats of criminal prosecution. Close to end time, they can throw on an additional charge. Because we have parole—you can take away good time in a disciplinary hearing, that's going to impact parole. But if you're going to max out, besides putting you in solitary won't have an effect—then it's about charges (INT175).

In other words, new criminal sentences are one of the only ways for a prisoner who has maxed out of their original sentence to be incarcerated by prison systems for a longer time.[32] Indeed, as one former prisoner from California remarked about the difference in experience of administrative sanctions versus criminal prosecution, it was the extra time that stood out to him:

> The only thing that make [criminal prosecutions] worse is the consequences. We are found guilty in the criminal court, you gone get extra years or whatever. That just means a life sentence, it could mean another ten years, paying more restitution, it can mean a lot of things. Administratively, it may mean, at the most severity, a year or so in solitary confinement, let's say, you might lose maybe a year max for the most extreme offense, it's the most that one can lose administratively is a year (INT197).

Importantly, although criminal regulation is an alternative to administrative sanction, in actual practice, criminal prosecution will always follow an internal disciplinary hearing. In this way,

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[32] Another mechanism is the legally dubious practice of holding some prisoners beyond their release date for lack of approved housing.

for those who are prosecuted criminally, prisoners will experience a double-sanction for the same conduct. Former prisoners described being sentenced administratively to time in solitary, in addition to facing criminal prosecution for the same incident, for example.

Because sentencing provisions in several states, including Texas and Illinois, require that convictions for in-custody offenses be served consecutive to prisoners' original sentences,33 and because many states, like California and Wisconsin, have status enhancements for "habitual offenders,"34 additional convictions can extend a prisoners' initial incarceration of several years into one much longer, and even a life sentence. These enhancements for "repeat and habitual felony offenders," can mean that even minor-seeming charges could result in serious extensions of imprisonment.35 This "stacked" sentence is precisely why one Texas prosecutor I spoke with felt that criminal prosecution had a "deterrent value" to incentive prisoners to "not commit further criminal acts" (INT021). Another Texas prosecutor explained how he felt the sentence-extension worked as a deterrent over-and-above the available administrative sanctions. He said, "a restriction of privileges, things like that, everybody sort of expects to get those and those sort of hit to the liberty inside of the prisons, but what they really care about is not having to be in prisons any longer" (INT160).

One Texas public defender described how an incarcerated client could face 2–20 additional years for possession of a cell phone and that the risk that they would go to prison for such a long time made defendants so afraid to go to trial that they would accept a plea deal (INT040). Another

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[33] *See*, *e.g.*, Vernon's Ann. Texas C.C.P. Art. 42.08.

[34] *See* W.S.A. § 939.62; *infra* note 36.

[35] *See*, *e.g.*, Penalties for Repeat and Habitual Felony Offenders on Trial for First, Second, or Third-Degree Felony, V.T.C.A. PENAL CODE § 12.42.

Texas advocate echoed this concern about how the stacked sentences plus enhancement issues create disproportionate sentences for violent behavior, too:

> The vast majority of the staff assaults were what I would call noninjurious. The definition of bodily injury is pain. All you need is a guard to say they were hurt and then it's a 3rd-degree felony. Don't need broken bone, could just be shoved and that could lead to life sentence—25 to 99 or life (INT029).

Perhaps nowhere is this threat of extreme sentences more severe than in California, with its three-strikes law.[36] The three-strikes law creates conditions whereby even nonviolent criminal conduct behind bars could result in a life sentence if the prisoner had two prior strikes for "serious" or "violent" felonies. Several former prisoners from California recalled fellow inmates who obtained life sentences for drug possession under the three-strikes law. One recalled:

> Yeah, you know, a lot of people get referred and at this time, this is 2001, and so 2001, this is when the three-strikes law was at its highest, especially in California, so the prisons were super-duper overcrowded at this time. We had people living in the gym, living in the tables, and stuff like that. There were a lot of people, and people were getting referrals for little drugs, for a little bit of weed. They would get referred and get struck out, it was crazy. Getting struck out and get a life sentence for weed at that time. So, the process was known; it was known and people knew that that was a risk (INT197).

Another California prisoner described the case of another inmate who was using drugs and ended up striking out. The prison suspected him so they put him on "potty-watch," a cruel practice that involves being bound and observed while using the bathroom for sometimes very extensive periods of time:

> Okay, he was on potty-watch for like, 40 something days, right? And well he held out because he had drugs on him and they knew that he had drugs on him and they couldn't get it out of him and he finally, I guess he couldn't take it anymore so he

[36] In addition to providing that defendants get a minimum prison term of 25 years to life for a third "violent or serious" felony, the law also doubles the prison sentence if they have any one prior violent or serious felony conviction. *See* California Penal Code § 667.

> ended up getting life in prison. He's still in prison to this day. This was in 1996, '96, I believe it was in 1996. So that's 24 years ago (INT060).

A Texas prosecutor explained that the sentence enhancements prisoners face is "impossible to overlook," which he said helps to explain why his office was so much more likely to charge prisoners than correctional officers (INT160). "So it's not only do they have mandatory minimums that are kicking in, it, they're just people who have already shown that they are prone to committing certain types of offenses and that honestly does enter into the types of offers that you make" (INT160).

For former prisoners and advocates that I spoke to, these sentence extensions are often experienced as everything from shameful to devastating. One Texas public defender explained of his clients, "[y]our sentence date, your end date is your hope; that is what you are living for and it is what you are looking for, that is everything to you" (INT026). Criminal prosecution, in extending sentences, "it's the end of hope, and it's a risk that they will be forever trapped in a perpetual cycle" (INT026). But for some prisoners who have already given up hope of ever being free, they describe being numb to the threat of additional time.

A former prisoner from Wisconsin recalled the shame of having to call his father and tell him he had picked up a new charge for battery while serving a first sentence in county jail:

> Damn, what fucking sucked was calling my dad on my birthday and tell him, I'm going back to prison…Like mine was, the first one was at the end of my sentence, so I was worried and it did affect me…they came and got me, they 94'd my release, and I was in [] jail the next fucking day, fucking up my life. I was like dude, this is bullshit. And after that, that's when I called my old man (INT114).

The psychological effects of the extended sentences were experienced as severe by others. One former prisoner from Illinois who was originally set to serve 3.5 years on a 7-year sentence, ended up picking up six additional cases while in solitary for a total of 21 additional years on charges of head-butting, destruction of state property, spitting, kicking, and throwing of fecal matter. None of

the charges caused any serious injury to officers, he felt rather that they "were just done out of retaliation to get back at me and punish me and to try to keep me in the system" (INT159). When he first went to court, he said, "It felt like my life was over" (INT159). He described these extra charges as contributing to his suicidal ideation:

> 'Cause like I said, you got aggravated battery, or something, in your background, you're screwed, you through. If they say it's extended time…you are in some serious trouble. And the bad part about it is you didn't even do nothing. Then it does nothing more than make you want to kill yourself or you just go crazy because, say you got a two-year offense and somebody says you threw something on them, now they turning your two years into a possible 14 years or something (INT159).

Another former prisoner from Illinois who was charged as an adult while imprisoned as a youth spoke in anger about the prosecution he experienced as unjust and saw other young people experience: "It's making me mad because this shit bogus, bro. That shit bogus what they doing, bro. They fucking up people's life for money bro, that shit ain't right, you fucking up other people!" (INT024).

In contrast to this mental anguish experienced by others, one former prisoner from California who identified as a gang member described feeling rather numb and accepting of the threat of additional DA referrals given his commitments to organized crime:

> I think the threat of death, of a life term was always something that we dealt with every day as gang members, organized criminal group that we, it was just something that would happen. We're gonna get a life term, and then eventually after the lifetime, we're gonna get a federal indictment…a lot of guys would say, "Man, I can't wait for my indictment to get out of the SHU and to get out of here and get transferred to a federal prison." So that was just the process, like a DA referral was just part of... like I said, it's something that you come to accept gradually and then eventually it's just a part of the collateral consequences of our lifestyle and what we chose to do and to believe in (INT060).

An advocate from California described a similar feeling of acceptance or numbness among her incarcerated clients who faced new criminal charges:

> When you're inside and you're facing more charges to sort of like, it doesn't garner the same sense of fight for your rights, fight for what is right, fight for who you are. It's just, everybody's very defeated, I feel like, and so in some ways the DA referrals, the criminal referral process, when you're already in prison, it's just an extension of the disciplinary system and everyone sees that as rigged anyway. So, people just, you know, it's just what they give you, it's what's done to you; there's a helplessness in the face of it, so people are so profoundly disempowered and treated like just these little objects. It's really, it's pretty foul (INT058).

Taken together, it is clear that the experience of facing new criminal charges and extended sentences varies by individual and by sentence. For some, it may be truly life-altering and devasting. For others, who had long given up hope of being free, or who remain committed to organized crime while imprisoned, however, it may be just be part of their expected course of incarceration.

Advocates and former prisoners also emphasized the long-term consequences of these new convictions on their clients and themselves, even for those who do eventually get out. One prisoners' advocate in California said that the new sentences trigger

> [j]ust more and more time, and so people get more and more institutionalized and sort of less able to function on the streets. It's really hard to go back to the streets for some people, particularly for people with mental illness or intellectual disabilities, and the longer you spend the worse it can be. It tends to just be this cycle. You get more and more time, you get dulled to it, you get institutionalized, and you get afraid to leave, so it's just very, very sad. It's sort of people who are thrown away (INT058).

Another advocate from California echoed this sentiment, she said, "especially for LGBTQ prisoners" who have a "very difficult time in prison" the extension of sentences can be very painful (INT188). "There is no way that any of our clients will be healed in prison—they need to be on the outside, and every conviction will delay that" (INT188).

For incarcerated juveniles, new criminal charges can be especially life-altering. Whereas their juvenile delinquency adjudication is confidential, adult criminal charges create a public record and can lead to incarceration in adult prisons. In both Illinois and Wisconsin, former prisoners and advocates described these charges taking place. One Wisconsin public defender recounted that over

the past nine years, she had represented 81 separate kids who were incarcerated, many who faced multiple charges. She said she's seen "some kids as young as 14 get charged as adults" for crimes such as battery and spitting on an officer (INT182)—a behavior that may be more common among youth. She described the especially egregious case of one client, a girl who was charged with assault for spitting on several guards while incarcerated. As her case was being processed, she actually was released and was out in the community doing "really, really well, in college, doing a job," when the judge sentenced her to adult prison (INT182).

A former prisoner from Illinois who was charged with felony staff assault while incarcerated in a youth prison, described his experience:

> "You got to go to court, you got a staff assault on you." I was like, what, 19? I think I was 18 going on 19, or I was 19 going on 20, I was supposed to went till my time was up, but they knew my time was gone be up so they was like, "Let's put a staff assault—he's over age, he 19, he finna be 20, so let's put a staff assault on him and make him as an adult." (INT024).

Ultimately, this young man was sentenced to three years in adult prison. He remarked of life-ruining aspects of his conviction: "I ain't even do nothing, I went to the joint and I just got a felony on my background, some shit I ain't even do, and they ain't even go back and look at, see if that shit fake, that shit bogus bro, that shit that fuckin' up a muh fucka's life" (INT024).

Another Wisconsin advocate said of these prosecutions, "the worst thing is they're going to be going into the adult prison system. An awful lot got some additional sentence" (INT154). But even for those who didn't, who took a plea deal and just obtained an adult conviction, it could be life-altering. As was the case for one client who took a plea deal:

> He avoided incarceration, but then, in a few months, was involved in another criminal act. He is such a smart kid and he was already not on a great path but seemed to have the capacity—if he had been given half the chance…I don't how much the adult conviction affected him, like whether he felt hopeless because he didn't have a clean slate. I can't say that it entered into his decision-making process, but it seems like for

> some kids that's going to be the case. You already have the adult record now, and now you don't have the chance to start over (INT154).

Another Wisconsin advocate also emphasized the stain of the adult criminal conviction for youth:

> Even more so than adult charges, these are juveniles whose records are supposed to be sealed. When they turn 18 and get out of juvenile system, they shouldn't have a record that is visible. But to give all these youth adult felony charges that will be on the record for the rest of their lives…I don't think it was their intention—but the obvious outcome was to make it more difficult for any of these youth to succeed in the future…It just always floored me that we'd allowed this system to produce felony convictions that didn't—the plea bargains that didn't extend time, it did not inflict extra punishment except to destroy their chance at rehabilitation. It's so contrary to what the juvenile justice system is about (INT107).

Indeed, one public defender put it succinctly on the threat to life-chances that an adult criminal conviction brings for juveniles: "I just don't know that a young person to succeed in life in any realm if they have a felony before they're 18…We're not rehabilitating them which is what the juvenile system was built for" (INT182).

In the case of the young man from Illinois who was convicted as an adult, his prison sentence was ultimately commuted by the Governor of Illinois, but the felony conviction has remained on his record, which he said has "Fucked up my life… 'Cause I can't get no real job bro like, I tryna get a good job…I swear to god, I get that felony off my background, I'm gonna be good" (INT024). Upon reflecting on his time in youth prison, when asked whether it helped him at all he said no, "It just, it's fucked up my life" (INT024).

II. *Cumulative Disadvantage for Black and Latinx Prisoners*

The administrative data discussed above reveals stark racial inequity in the population of prisoners with criminal convictions obtained while in custody. Interview participants across jurisdictions—including those where I was not able to obtain administrative data on race—emphasized these disparities.

A young Black former prisoner from Illinois who was charged as an adult for staff assault while incarcerated in a youth prison felt that the charges grew out of racism of the institution, where most of correctional officers were from majority-White counties in rural Illinois, and most of the youth incarcerated were Black or Latinx from Chicago:

> [The juvenile prison], they was hurting kids. I don't like that, bro, they were on some real live racist shit, I didn't like that, bro. I had long ass dreads, they cut, they try to pull out my hair, my hair was long, they pull out my hair—that's how I caught my staff assault (INT024).

He also recounted being called a racist slur prior to the incident that led to his charges. In telling his story, this interview participant walked a thin line between including lots of details about how tough and violent he was, and at times, dropping his guard would drop a bit and he would explain the fear he felt for his personal safety from both other inmates and guards. Later in the interview, he said, "I swear to god…they was on some evil, racist shit there, bro. And I told my mom on the phone, like, "Mom, I swear to god bro, they trying to kill me. I'm gonna kill them before they kill me." He added later, "they was out to kill any Black person coming in there" (INT024). When I asked whether any White kids got charged at this prison, he said, "Bro, they treat the White kids like they 5 feet up" (INT024).

A Latinx former prisoner from California said he felt that Latinx and African Americans were most likely to get charges for conduct inside:

> Well, I mean in my experience, just from my experience, I think that the people that got the most DA referrals and the most prosecutions were Latino or Mexican descent, because that was a majority of the people that were involved in the gang violence in prison. Secondly, I would say that African Americans were probably the greatest amount of DA referrals for staff assault, I would say they were the number one for staff assault (INT060).

Indeed, the administrative data from California bears his intuition out—among those incarcerated with in-custody convictions, 50.8% were classified as Hispanic, 27.9% were Black, and just 15.6%

were White. Other interview participants similarly raised the issue of racial disparities in our conversation. A White public defender in Wisconsin said she felt that it was difficult for her to gain the trust of her incarcerated clients because "most are some minority" and "I'm just another White person telling them what to do and what's going to happen" (INT182).

Interview participants linked these disparities to both structural and individual factors—including racial animus of staff. On the structural side, one Wisconsin advocate linked the criminal prosecution of prisoners to the state's overall "addiction to incarceration" and the overrepresentation of racial minorities in the system:

> Wisconsin law is addicted to incarceration. We have one of the highest racial disparities in incarcerated population. We have explosive growth like a lot of the country. Compared to neighboring states, we have a very high rate of incarceration overall. There's problem a default for a lot of people for people behaving in antisocial way is to keep them in prison longer (INT154).

An advocate for New York emphasized the role of racial animus he perceived in the criminal prosecutions: "You can't talk about any of this without talking about race—95% of staff are White and 75% of people in prison are people of color—there's a huge amount of racism. I absolutely believe about the racial component with prosecutions too (INT175). Similarly, another advocate from Wisconsin said of the high rate of prosecutions against imprisoned youth:

> Racism was a huge part of it. Because the guards were from Northern Wisconsin, which is racist territory to begin with, the majority of the youth were from urban parts of the state, Milwaukee, so majority of youth were of color. There was two percent staff of color working at [the prison]. There was an underlying inability to just communicate and empathize with youth and all those things that were a factor (INT107).

A Black former prisoner and advocate from California explained his views on both the historical and cultural motivations for the criminal prosecution of prisoners—a continuation of a punitive mindset with its roots in U.S. chattel slavery (INT048). Similarly, a mental health

corrections worker from California explained her view on the racial animus and psychology that motivated the criminal referrals she observed:

> I think that lots of people are motivated racially, I mean I don't want to say implicit bias because it's not implicit for a lot of people. Implicit and explicit bias, racism, just this willingness to be violent towards Black people and towards people who have obvious dependency needs…And then if you believe that punishing people as harshly as possible is gonna make other people not engage in that behavior, it's easier to get behind stuff like referring everything to the DA versus something else (INT118).

A Black former prisoner from Illinois noted how with criminal prosecutions, it was not just that most of the prisoners were Black and the staff was White, but everyone in the prosecuting county was White as well:

> And what the criminal prosecution is, none of that is properly examined and it's done in a prejudice, biased way because, and I'm not racist, but it's all White people that's making the decisions and it's the same people that's making the same decisions for everybody in that county because it's such a small county. So, in the relationships the county has with the prisons, people know each other, live next door to each other, etc. They—it's all in cahoots, it's all corrupt, there's no type of justice. You come to court and somebody brings three or four more officers in to say the same story and they had months to go over the story and have the story together, and you coming in with three other witnesses, that's gonna be convicted felons that's with you in the prison, it's—no one is considering that. It's no fair trial. (INT159).

This interview participant expressed this double-stigma that Black and other minoritized prisoners face when criminally prosecuted: their race, and their status as prisoners—by definition "felons." Their disadvantage of a lifetime of criminalization accumulates in this context of criminal courthouses located in rural, White, prison counties.

III. *Symbolic and Material Benefits of Criminal Prosecution for Corrections Personnel and Prosecutors*

The criminal prosecution of prisoners not only affects prisoners themselves, of course, it also carries consequences for the corrections agencies and the people who work there beyond simply lengthening the stay of people in custody, as well as for the agencies charged with prosecuting these offenses.

For example, one interview participant was a former frontline correctional worker in Texas. She described both the symbolic and material role that criminal prosecution of prisoners played for security staff like her. She described, for example, two behaviors towards staff that began to increasingly result in "free-world" charges: public masturbation that prisoners were engaging in towards female staff members, as well as bodily-fluids throwing at staff. While these two behaviors rarely cause physical injury for staff, she emphasized how they signal disrespect:

> There was a period of time where sexual misconduct cases were getting out of control, I mean literally out of control. And so, one period of time they were talking about actually prosecuting these offenders as sex offenders because they are constantly, I mean…these issues were always going on, and then kind of turned the other cheek, and through the years even as a female working on a male unit, you know, it's like, you can tell a difference when somebody is just trying to if you will take care of their business, and when somebody is downright being blatantly being disrespectful and perverted (INT033).

A California prosecutor I spoke with also mentioned how he would prosecute indecent exposure cases in prison because of how "traumatic" they were for staff (INT039). In addition to these more dignitary offenses, this interview participant also emphasized the material safety concerns that she and her colleagues experienced as security guards, in large part due to understaffing and lack of programming for prisoners (INT033). To the extent that criminal prosecution was aimed at regulating this type—both those that were dignitary or traumatic harms as well as substantial physical threats—if effective at deterring behavior, the prosecutions can garner significant symbolic and material benefits for security staff.

This is not to say that the bodily-fluids throwing was not perceived, especially in the 1980s and 1990s, as being a material threat to correctional officers' safety, even if now HIV transmission via spit, for example, has been thoroughly debunked. As one advocate from New York recalled about the 1990s:

> Criminally throwing—the bodily fluids statutes—were totally connected to HIV. In New York we had thousands who were HIV-infected…I can say the reaction was

> staff, so many people would get in discipline as throwers and spitters. They passed the legislation—I'd be very interested to know how many are prosecuted—because it was a threat and people were very fearful. It was such a—the staff was very paranoid, they wanted to make sure they could punish them. I think it was another manifestation of the "if we feel threatened, we want to punish" mindset (INT175).

The correctional officer in Texas also recalled a similar timeline, where bodily-fluids throwing at staff became not just a disciplinary offense but a criminal one, a "free-world case" for prisoners:

> When I first started, my first experience I got spit on by an offender and that, on the [] Unit actually, and that was, that person, he got disciplinary infraction, but he didn't get a free-world case. I think when things started happening, like with the AIDS and these certain situations, that's when the assault of spitting and bodily fluids started to become more of an assault case because of the threat of AIDS, that's when a lot of that started kicking up. Most definitely, when there's, it's not just having fluids, but now bodily fluids and maybe you have AIDS that can kill you down the road, yeah, that's when a lot of that started happening, so, I started seeing a change with that over time (INT033).

Multiple defense attorneys in Wisconsin echoed this sense that criminal prosecution was used primarily for more serious, egregious offenses. As one said, "a lot of the times I think, I think they really didn't care that much, unless it's very serious, like unless they beat the living shit out of someone" (INT172). And given that the administrative data from Wisconsin discussed above show the most common charge was for battery, that bears out. But even in states where this was not the case, like Texas and California, where the most common criminal convictions of prisoners were for drug and phone possession and possession of a weapon, some advocates seemed to perceive criminal regulation for prisoners mainly being justified as a recourse against violent actions. A Texas advocate said of criminal prosecution, "I think it persists for the worst of the worst cases, is why they still have it—people who severely hurt people, they feel like it can't go unpunished" (INT029). A California advocate also suggested the persistence of criminal prosecution was because "I mean I think people generally see it as a way to keep the most violent, the most feared, the most trouble making people in line. It's a threat" (INT058). A Texas prosecutor also endorsed this view, that

while violent assaults on staff weren't the most frequent offense they charged, it triggered the most "righteous indignation" in him:

> And then probably the highest of all those heightened senses of, I don't know, righteous indignation, is when a correctional officer gets violently assaulted by a violent inmate. Then, there's a real sense of, well, this person is in there, this correctional officer is in there trying to keep people safe, keep other inmates safe, trying to keep all the correctional officers safe, and they're, in a very real way, risking their lives on daily basis and now they've been harmed as a result. In those cases, if I'm being honest, a little bit of an extra flash of wanting to get in there and protect the victim (INT160).

Many interview informants opined that it was particularly assaults on staff, rather than prisoner-on-prisoner violence, that would increase the chances that conduct would be criminally referred and prosecuted. A New York advocate said he felt criminal prosecutions were an extension of general use of discipline used to protect staff from perceived and real threats from prisoners: "I think discipline is for the benefit of staff. And then somebody becomes the poster child if they push back. It's a way of saying: if you're really offensive, we'll go after every way you can" (INT175). A former prisoner from California suggested that in his experience, the California Department of Corrections and Rehabilitation might be more likely to refer a prisoner for criminal prosecution for resisting an officer than for killing another prisoner if it was gang-related:

> I really believe that if CDC wanted someone prosecuted, I believe that the captain of the investigative unit could call them. I believe that a lot of time they influenced whether or not someone was prosecuted. So, if it was just a routine gang stabbing, or even a killing, some of the times it wasn't prosecuted because, eh, "they're just animals, they're killing each other, it's okay." Or maybe you did something to them and you might have resisted while they were roughing you up, and then you're in court because they didn't like you. (INT060).

This former prisoner perceived that both DAs and the prison staff saw prisoners as less than human, as animals, and that it was primarily threats against staff that would result in prosecutions. The feeling of dehumanization by staff was echoed by another former prisoner from Illinois, who repeatedly described his treatment by staff in prison as if he were a "dog." Of solitary, he said "they

had us in cages like we dogs" (INT100). And this prisoner, who walks with a limp because of gunshot wounds in his back and foot, described the incident where he was accused of kicking a guard and causing them both to slip and fall because he had put handcuffs on him "real tight" and was repeatedly "jangling me like I'm a dog" while walking to get lab work done (INT100). That incident led to a new criminal conviction for aggravated battery that added an additional four years to his sentence as well as a year in solitary.

Other interview participants in this study—the majority of whom are prisoners' advocates and former prisoners—offered up a range of additional opinions as to what symbolic and material benefits the criminal regulation of prisoners bestowed on those who administer prisons and prosecute prisoners, beyond what correctional staff and prosecutors themselves might likely endorse. For example, one advocate in Texas speculated whether criminal prosecution was driven by the fact that "these guards are paid so little and have terrible working conditions." She elaborated, "[f]or some people, so much is out of their control, having that power over people. It would take some people" (INT127). A California advocate suggested that criminal prosecution of prisoners is a way to combat decarcerative reforms, "taking clientele away from prisons" and that prisons are "desperate" to stop that (INT188).

Other participants pointed to some of the additional symbolic benefits that criminal prosecution of prisoners may bring to corrections agencies. One Illinois prisoners' advocate speculated that criminal prosecution may have narrative or rationalizing benefits for prisons, he said, "it's a real nice story for them tell….You reinforce the narrative that people are in prison, they don't get better—they commit more crimes. Fits perfectly that the deserving are punished" (INT001). A former prisoner from California echoed this view: "so I think they do that to show the public just generally, to show the public that these people need to stay in prison because they're not

rehabilitating their selves, they're not reforming themselves, they just continuing on with criminal conduct and this is the truth" (INT197).

Many participants speculated that corrections officers, who were constituents of elected prosecutors—influenced the decision of district attorneys to bring criminal charges against prisoners, particularly for assaultive behavior against staff.[37] As one Illinois advocate suggested, whether the criminal prosecution of prisoners happens at all "depends on the prosecutor." She said, "[there are going to be particular prosecutors that are communities that have a lot of COs, where most people connected to prisons. The electorate are officers" (INT022). A New York advocate raised similar concerns, that "[i]n the smaller far-flung communities, there's a relationship between staff/DA/police, enforcement, they share a prevailing approach to all the things that happen in those facilities" (INT053). A California advocate also suggested that this political dynamic helped explain both the high levels of criminal prosecution of prisoners and the lack of criminal prosecution against correctional staff for abuse (INT058).

Several of the prosecutors I spoke with attested to this political dynamic. One Wisconsin prosecutor explained his view how the fact that the state prison system was a major employer in town, and how that influenced the value he placed on pursuing prisoner prosecutions:

> But every place, every county that has a corrections institution, that is one of if not the major employer in that area…My neighbors are corrections officers. We cannot pull a jury in [my county] where we have 25 people during jury selection where at least one of them has a first-order connection with corrections, whether it be they themselves are an officer or their parent, sibling, or child is a corrections officer. So, these are our

[37] There can certainly also be friction between DAs and prisons regarding the referrals. For example, one mental health expert I spoke to with experience working with the California Department of Corrections recalled: "I know in California it used to happen all the time. I go there, I go to a meeting and the local district attorney representative will be there complaining, 'You guys are giving us too much work. What the hell is wrong with you guys. Take care of your own problems'" (INT011).

> community members. They deserve to have protection, and they want to go to work in a safe place. And corrections is a dangerous business. So, we're doing what we can to protect them, doing a job that frankly we all really need. Corrections, I refer to it as the forgotten arm of law enforcement (INT008).

Similarly, a New York prosecutor explained how each of the prisons in his county had as big of a population—in terms of those incarcerated and who worked there—as most of the towns in his jurisdiction (INT051).

The tight relationship between local elected prosecutors and corrections staff in communities with prisons—and the influence that may have on criminal prosecution of prisoners—was absent in one of the jurisdictions studied: Texas. Texas, unlike the other states studied, has a centralized, statewide Special Prosecution Unit (SPU) that is responsible for prosecuting most crimes that occur in the state's many prisons, including those committed by staff.[38] According to one prisoners' advocate, this arrangement is good for prisoners on some level—it means that the SPU "doesn't care as much what TDC wants and might not take a case where the prison might want them to" (INT032). The downside, for prisoners, according to this advocate, is that "they also take stuff that would be better handled internally" (INT032), and according to another, it means that for the SPU, "prison crimes" are their "bread and butter" (INT026).

But, as one Texas public defender pointed out, the relative independence of the SPU from the electorate did not necessarily make juries or judges more defendant-friendly. For prisoners in criminal court, he said:

> All of the sort of perceptions about innocence kind of go out a window, but I think the even greater challenge was every place where the prisons were was almost without an exception, is a small rural community in which the prison is often the lifeblood of the community as twisted and as messed up as that sounds, which leads to a lot of really weird issues, including you've got staffing shortages. You've got people who are

[38] This prosecution arrangement is done by agreement with the local district attorneys and covers about 95-99% of the counties in Texas (INT021).

> not optimal on that staff who can maintain their employment despite lack of qualifications or unsuitability, so you've got a lot of festering problems on the units, and it's just, when you try a case in that county, guess who's on the jury? You've got a lot of people coming in there in their gray uniforms, and if you're not a guard, your family members are or your friends are. It's just not an environment that's conducive to trying cases (INT026).

And for correctional staff, the biases of juries could go the other way. A Texas prosecutor I spoke with said he'd tried to prosecute several guards for sexual assault and ended up with jury nullification because of rural community sentiment about the abuse people in prison deserved:

> Some of the uncivilized, I shouldn't say uncivilized, but some of the more rural areas, you know, that are more traditional thinking I guess, there are some that think that in this sort of gladiator mentality that "hey, that's what you get for being in prison." We faced a certain amount of jury nullification cases because they just, you know, it's kind of what you get for being in prison, so that's a particular skill to try and debunk that on the front end going into a case and changing community sentiment (INT021).

This concern about judges enjoying close relationships with staff of the local prison was shared by participants from other jurisdictions, too. For example, one former prisoner from Illinois explained that he ended up taking a plea deal because his lawyer pointed out how likely he was to lose given the judge's relationship with the administrator of the prison:

> There's a lot of freaky shit going on. The dude that run [the prison]…he played golf with the judge…they family in there, everybody's family, so this shit is just a game, they run it, bro. That shit ain't right bro, on me that shit ain't right…I want to take him to trial so bad, but it was just like, I would've took it to trial bro, I think they would have smoked me just because, they family's with the judge and using their cool, so I would've lost, it was gone be a lose-lose situation anyway, bro (INT024).

Another former prisoner from Illinois echoed the same grave concerns about his ability to get a fair trial in another county where his prison was located:

> It felt like, what can I do? I'm going to a county for embraces and everything that this prison does with justice without even properly examining the whole situation or giving you somebody that actually give you a defense and actually investigate everything they say, alleging you do it, you don't get none of that. It's like, going in there it's like you actually fighting for your life. That's how you feel when you go in. You feel depressed, you feel aggravated, you feel stressed that more, more evolved you feel like you fighting for your life now (INT159).

He similarly felt, like others, that this imbalance in court forced him to accept lengthy plea deals for his bodily-fluids throwing offenses (INT159).

Of all the additional sub rosa material benefits that the interview participants suggested the criminal prosecution of prisoners may bestow on prosecutors—one of the most common—and most serious was the suggestion that criminal charges against prisoners are used to "cover up" cases of correctional officers' excessive force. This allegation was most pronounced among advocates and former prisoners in California, but it also occurred among advocates in New York. One former prisoner in California recalled multiple first-hand experiences of this dynamic. In the first, he recalled that one of the ten DA referrals he obtained while incarcerated followed an incident where corrections staff actually shot a prisoner and then attempted to put the blame on others:

> I got a DA referral one time on the yard and they had gladiator fights—it's called the "gladiator fights,"—and we went out there and um, one of the guys got shot in the mouth with a block gun in the face, and they tried to charge us for that, right? They said that we punched him and that's why his nose was broken and his lips were busted, and I thought it was absurd. That was just one of the many that I received, and it's like, they created the damage and then they wanted to charge us. I mean, I was willing to accept responsibility for my actions and I am, still today, I'm willing to accept responsibility, but I didn't do that. You guys shot the guy in the face and then blamed it on us (INT060).

In another incident, he recalled how a friend who had physical disabilities got referred for criminal prosecution after staff assaulted him:

> Yeah, I mean every staff assault derives from, and I would say at least 95% of them are initiated by the officers on the inmates. Maybe there's a small percentage that might just walk up to an officer and punch him in the face or kick him or whatever, but I don't think that—if a person does that it's either because of mental health issues or maybe the guy did something to him, or the woman did something to him....So that's what happened to my friend, the one that I told you got slammed on his head and he was hearing impaired and speech impaired and...but they charged him with the write-up in order to cover up what they did, they wrote him up. So, I mean how many DA referrals—that was something that I wanted investigated while I was there at [a prison]—is how many people got convicted and maybe struck out and got a life term

> because of a staff assault and something else that they did that was unjustly pinned on them, you know? (INT060).

Another former prisoner from California also described a similar incident where force used against a prisoner with disabilities—this time someone with mental illness—was turned into a staff assault charge against a prisoner during a cell extraction:

> I have a buddy, you know my buddy, he's kind of bipolar, he was kind of bipolar, when you talk to him and stuff like that, you either need to, you need to bring him down from whatever height, emotional state he be in sometimes. He just get fired up and get to talking all wild and crazy sometimes. And then he had an issue one time with some, with a correctional officer, and I guess they were trying to tell him to lock it up or something like that, and he was trying to get something from a counselor or something before that happened, and so they had an argument or whatever and so they tell him to get down. He get down but, he complying with everything that they telling him to do, but he won't stop talking. He arguing with them, so they get more aggressive because of that. They get more aggressive, I wasn't there but my boy was right there, they was in the cell, they seen it, and they were like, they put they knee all in his back, all on his head and stuff like that, and so they had his arm all jacked up and they tried to move his arm, like, and the way they moved his arm, it kind of hit another CO, so they really pounced on him like, "he attacked a CO and all that," and so then they end up breaking his arm and he end up going to the hole and all that. They charged him for assault on a correctional officer, yeah they charged him with assault on a correctional officer (INT197).

And a former prisoner from Illinois described one case where he had been beaten up by a tactical team during a cell extraction—"a busted eye, swollen eye, busted lip, they basically hit me all over"—and he was charged with multiple counts of aggravated battery for which, in total, he was facing 90 years, so he took a plea deal that added three more years in exchange for dropping two of the charges (INT100).

Advocates from California, New York, and Texas raised these concerns as well. One Texas advocate said that every staff assault case he did involved a "major use of force," and subpoenaing those reports was often how he won his cases (INT174). A California advocate also emphasized the frequency by which some charged behavior is not really in fact "misconduct" on the prisoners' part, and how frequently *staff* misconduct goes unregulated:

> It's not always people's "misconduct" that they address through the criminal-legal system. They try to change their behavior or cover up their own behavior. It's so frequent to have staff use excessive force on someone and then they trial charges against them to cover it up, basically. So, it's not always misbehavior, it often is just simply being beaten up…I want to push on this a little harder, the degree to which people are living, locked up in the prisons, face criminal consequences for what are charged that the people working in the institutions, even when it's proven that there is excessive force as a general matter in a prison, they don't face criminal consequences. They don't get charged. So the criminal consequences are just for one category of people in the system, they're not for the others. So, there's that (INT058).

Similarly, a New York advocate suggested that if a prisoner is assault by a staff member, there is huge pressure to charge the prisoner, "to buffer[] against their own use of force" (INT175).

Further research is necessary to determine how accurate the speculation on the symbolic and material benefits of criminal prosecution for both corrections staff and prosecutors. But the experiences and perspectives of the interview participants discussed here point to some relevant lines for future inquiry: do frontline corrections staff see criminal prosecution primarily as a useful instrument to restore order, control, and respect? After all, they have a slate of other types of sanctions and tools at their disposal to control and punish prisoners. Furthermore, how much of a feature is the prosecution of prisoners in district attorney campaigns in counties where prisons are located? What proportion of staff assault criminal charges come in the context of use-of-force incidents? These are all empirical questions that would benefit from additional administrative data and qualitative data from correctional staff and prosecutors.

IV. *Public Windows into Total Institutions*

As discussed above, there are many consequences for all parties involved when prisons and prosecutors go beyond their available administrative sanctions to punish prisoners and utilize the criminal-legal system. Criminal wrongdoing may be punished, sentences of prisoners may be extended and (perceived or real) threats to staff safety may be mitigated. But there are also some

unintended consequences of bringing "free-world" cases against prisoners: namely, they bring regulation of prisoners conduct into more public view.

Perhaps the biggest difference between administrative disciplinary processes and the criminal courts is that criminal regulation requires a full panoply of constitutional protections to be provided for defendants. For example, whereas in administrative proceedings prisoners have no right to counsel; in criminal court, they enjoy a Sixth Amendment right to an attorney. In disciplinary hearings, unlike in criminal court, prisoners enjoy no Fifth Amendment right against self-incrimination, nor to trial by peers, nor the highest "beyond a reasonable doubt" standard of proof. Correctional staff administer disciplinary hearings behind prison walls, whereas in criminal court, there is a judge presiding over a public courtroom. Interview participants identified several ways in which the procedural protections of criminal court empowers prisoner–defendants and the public nature of criminal court offered a rare window into the punitive conditions inside prisons for court officials.

The former prisoners I spoke to expressed concerns about the fairness of the internal disciplinary process in prisons. One former prisoner and advocate from California highlighted the low burden of proof in administrative hearings and the power that corrections officials had in those settings:

> An administrative write up you cannot have witnesses, so it's literally your word against the officer's word, and if you were even to appeal it in the courts, it's not based on proof beyond a reasonable doubt, it's based on proof of preponderance of evidence, and the evidence weighs on the side of the officer (INT048).

A former correctional officer from Texas who had helped staff disciplinary hearings raised these same concerns about the deck being completely stacked against prisoners to the point where hearings were essentially "scripted":

> I think sometimes things happen to a point where they don't—they are so scripted, you know, if there is a literally a verbatim script that the disciplinary captain will say…When you're doing that, everything is already pre-done, it's predetermined…in my personal experience, have I had cases, that, yeah, literally was, that was wrong in so many ways that this person shouldn't have ever been found guilty and put in a situation where there were extenuating circumstances that should have been considered, yes, I have some of that and I don't want, I mean, that's—it's a joke, it really is (INT033).

Prisoners' advocates similarly raised significant concerns about administrative disciplinary processes. One Texas advocate, whose son had been incarcerated, said the tickets are "a game inside prison" and that case-quotas drive guards to write up false tickets (INT130). Another Texas advocate called disciplinary hearings "just a star chamber" (INT078).

In light of these problems with the administrative process, one former prisoner from California, for example, contrasted the fairness of criminal courts with the "kangaroo court" inside prison:

> Oh criminal court is way more fair. I mean, if you can reach righteous justice for criminal court, it's way more fair than kangaroo court because of the standard of proof and the procedures. That's all just based on the actual people that are keeping you in prison are the ones that's making this adjudication on your infraction. This is the supervisor of the person who wrote the infraction up, so it's like, you're already—the cards stacked against you. You might have some fair ones that will really look into all the facts and be like, "Nah, this is not consistent and I find you not guilty." So yeah, it's crazy, I think it's very important for prisoners to know their rights (INT197).

In this quotation, this participant emphasized several differences between the administrative and criminal process that were beneficial for prisoners—that criminal court has a higher standard of proof (beyond a reasonable doubt versus preponderance of the evidence), that there are more procedural protections, and that it is not judged by the "people who are keeping you in prison." Indeed, one advocate from California echoed this view, that criminal prosecution "allows a third party to observe the cases" (INT188).

But in addition to providing perhaps an ever-so-slightly more defendant-friendly forum for the adjudication of misconduct, moving the regulation of prisoners into criminal court has some other, perhaps more unexpected consequences. First, some defendants and attorneys are able to use the criminal process to educate judges about the punitive conditions that are typically hidden from public view. For example, one Texas public defender I spoke recounted a story where he worked at length to inform a judge he had several cases before about a private prison's use of solitary confinement. He had clients who were charged for possession of cell phones and marijuana, who were in general population but then placed in segregation upon being charged, which meant that he had one client who spent an entire year in solitary while waiting for his criminal case to be processed. He said, "he had spent his entire 22nd year of his life, in 8x5 cell for 23hr per day—for talking on a cell phone" (INT040). When he went to court on this case, he offered an article from the *New Yorker* about solitary confinement, *Hellhole*, to the judge as an exhibit to help him understand why he should reduce the sentence that his clients were willing to plead to. He describes the judge's reaction below:

> So, we go up there, and he was angry. He said that he's very conservative and he doesn't like to be put on the spot, he doesn't like to make fast decisions, but he's interested in what I showed him. And, he thought there might be something to it because the DA had said it was true, that [the defendants] have been held in solitary. So, he ordered the state to provide information about solitary and how it's used, and all of that, segregation, administrative segregation. How it's used, what it means, because he wanted to hear my argument, he didn't know what their position was…The next month, we came back… So, he said, which was nice, he said, "I learned a lot from this. I didn't know anything about this. What I want to do is give each of those men in this,"— that I've really complained about, not the ones that were in seg for four months, but the ones for more than like a year—"I want to reduce all their sentences by one year" (INT040).

Second, there is a way in which the many procedural protections of criminal court can allow prisoners to use the process itself as a way to get out of their cells and even see family. As one former prisoner from Wisconsin said of his experience in criminal court:

> Yo, it's sweet. I'm gonna tell you why. Because wherever you're at, they come and get you for the hearing, so you got many vacations. "I got a court date three months from now." So now you can set up visits for your, "Hey come through [my town], everyone come!" And you get to go back to your town, just driving through [town] sometimes is so healing, man. It's like, dude it sucks so much in the summertime, it's beautiful. You can drag them on for years, years! And that's just having fun with it (INT114).

A defense attorney in Wisconsin echoed this type of tactic that some prisoners take with their hearings, in asserting all of their rights, switching lawyers, insisting on self-representing, in his view, defendants are "buying time, fucking the system up, getting attention. Half the time they want to be moved, because they're stuck in the same goddamn cell, in segregation" (INT172).

Perhaps because the criminal process offers these unusual opportunities for prisoners to be in public and assert some control over their situation, participants in multiple states mentioned efforts of judges to move criminal court inside prisons to hear their cases—a legally questionable tactic that one defense attorney I spoke with in Texas successfully challenged. He recounted the story:

> The judge out in West Texas would come to the prison and have court inside the chapel of the prison, instead of having the inmates coming to the courthouse, because it's a small courthouse. And it violates the Constitution to have court in prison. It's not open to the public, and it sends a message that the warden is the one in charge, not the court, it's just—it's ugly and it was unconstitutional. So, I challenged it when I got assigned to that court…I wrote a letter to the judge saying all the reasons I thought it was unconstitutional and wrong, and he wrote back and said, "We're gonna do it my way" (INT040).

This lawyer ended up appealing the case and ultimately received a favorable appellate opinion, ruling that the judge was no longer to hold court in the prison chapel, a practice he had been doing for twenty years prior.

Former prisoners in both Illinois and California also raised concerns about judges holding criminal court inside prisons or on prison grounds. A former prisoner in Illinois described an especially grim scene, where his first criminal court appearance was held not only inside the prison

but in an old death row vising room. He said he "I was thinking I was going on my writ" but then "I was upset because I was like—the first time I went to court was inside the joint…She literally came to the joint. Set up in the old death row visiting room" (INT100). He said, "She did a bunch of cases that day, she basically opened up a criminal hearing inside the joint, which I told them that's against the law because...I couldn't be inside the institution holding court. Damn." (INT100). Another former prisoner from California raised this concern to me:

> I just want to tell you something that's peculiar...the courthouse at High Desert is on prison grounds…Like yeah, because I didn't know and one of my buddies told me that the courthouse is just right there. I'm like, "What!?" And there's like, yeah, there are so many DA referrals that they have the courthouse right there near the prison. I don't know how close, or if it's on state land, I couldn't tell you, but investigate that, look into that, because how close do you think the relationship was between prison staff and the court staff there? The judge, the DA, because there probably was only one because it's a rural county, what do they get, what kind of funding do they get based on the convictions that they get etc. etc…it's inappropriate because guess what, "Would you like a cup of coffee? Do you want a sandwich? Do you want a donut?" Then they become friends and, "Hey Bill, Let's go play golf. Let's go do this. Let's go hunting," because a lot of the, in the rural counties that's what they do. And not to knock that, I love hunting, I love the stuff being outdoors, but it creates an inappropriate relationship when the people that are keeping the inmate and the one that potentially could lengthen his stay or her stay, which is a judge—and I just think that judges need to be held accountable at a higher level and I just think in that sense it's a real danger when you have such a close relationship between a prison and courthouse (INT060).

In the view of these prisoners—moving a courthouse back inside a closed institution (or even immediately adjacent to it) sends a clear message to defendants: the court is not independent; it is under the control or influence of correctional staff. In other words, it becomes less distinguishable from a disciplinary hearing inside the walls of a prison. Indeed, when the court moved back outside prison to the courthouse, the Illinois former prisoner quoted above felt that it was better, "even though people were looking at us like I'm crazy, like I'm a crazy person, the way I walk in, we had to be shackled up like this" (INT100). Prisoner-defendants thus experience substantial stigma in public court, the threat of severe consequences and additional sentences, and the high likelihood that the

judge and jury have family and friends who work inside their correctional institution, but nevertheless may also experience the criminal *process* (even if not the sentence) as preferable to what takes place inside the total institution.

Conclusion

In this chapter, I have sought to demonstrate how the criminal law is used as one tool in the management of prisoner populations. Just as Black and Latinx people are disproportionately at risk of incarceration, it is clear from the preliminary administrative data presented here that incarcerated people of color make up a disproportionate number of those with in-custody convictions. Exploring these and other inequalities in the criminal legal regulation of prisoners, variation between jurisdictions and within them, as well as the consequences this regulation has on prisoners' lives and on correctional agencies and prosecutors' offices themselves, are all issues that remain ripe for future study.

To conclude, I'd like to return to Courtroom 4. As Jeremiah's preliminary hearing proceeded, he began to lay out his defense. He cross-examined one of the state's witnesses, a detective who had investigated the two spitting incidents. The detective testified that Jeremiah accused the correctional officer in question of denying him a shower because he was Black. Jeremiah then asked of the detective, "Would a person in their right state of mind say that about a shower? Did the correctional officer think I suffered from cognitive deficiencies?"' At that point, the commissioner overseeing the hearing interrupted Jeremiah and admonished him that his questions were not relevant. She said, "you're asking questions about your mental state…your capacity is not relevant, not an issue today. Do you have any questions other than about your mental capacity?"

As the hearing went on, Jeremiah's self-representation began to clearly irritate the commissioner more and more. The hearing became a spectacle, with Jeremiah at center-stage. He

used his cross-examination to raise issues of "wrongful deaths" in the prison. At one point he thanked the commissioner for "her facetiousness." She paused the hearing when he said he would like to call himself as a witness, requiring him to at least consult with an on-call public defender. When he returned to the courtroom, he said he no longer wanted to testify but maintained his desire to represent himself. He also asserted his intention to enter a plea of not guilty for reason of insanity and referenced an earlier case from a different county where he was found not guilty for reason of insanity. The case was set for an arraignment for a formal entry of his plea.

As the proceeding wrapped up, Jeremiah said he would like to make a statement. He requested a transfer to another prison given that his "victims" were officers at the prison he was housed and that he was worried they would harm him. The commissioner did not respond to this request, and as he was being led out of the courtroom in shackles, he asked if all of his statements were on the record. She said yes, and he responded dramatically: "if they attack me, I *will* respond in self-defense and they *will* be BEATEN TO A PULP in self-defense." And then he was led away. And the next case was called.

Exactly how many cases like Jeremiah's there are currently ongoing nationwide is unknown. But the data presented here demonstrates that although his hearing may have been exceptionally provocative, he is not alone in being a Black man, incarcerated, facing new criminal charges for behavior that did not cause a serious injury behind bars. Compared with the closed proceedings of correctional disciplinary sanctions, the public nature of his criminal proceedings offer defendants like Jeremiah some real benefits: the chance to flip the power dynamics and cross-examine law enforcement officers, the opportunity to bring some light to abuses occurring inside, to simply speak loudly and firmly and publicly. And yet, there was no doubt that Jeremiah, like other prisoners, faced a steep road to prevailing and avoiding a multi-year extended criminal sentence. His case is still

open, as are many of the questions it raises. In the next chapter, I will explore some particularly intriguing lines of inquiry that Jeremiah's case and many of the interview participants I spoke with raised—would someone in their "right mind" spit on an officer and face several years of additional incarceration? How frequently are prisoners with mental illness prosecuted for new crimes behind bars? Are they at greater risk of criminal prosecution than those without?

CHAPTER 3

CRIMINALIZATION OF PRISONERS WITH MENTAL ILLNESS

INTRODUCTION

"15 years, 7 months, and 12 days." Damien[39] knew the count precisely—the exact length of time he had spent imprisoned in the Illinois Department of Corrections. He was 19 when he was first incarcerated as an adult, on armed robbery and aggravated battery convictions. Originally sentenced to 7 years to be served at 50%, he anticipated coming back home after 3.5 years. But while confined to solitary confinement in a maximum-security prison in downstate Illinois, Damien was convicted of 6 new crimes—criminal destruction of property, possession of a weapon, and several charges of aggravated battery for spitting, throwing urine and feces at correctional officers, and head-butting a psychologist. He also accumulated over 25 years of segregation time.

Damien's life before incarceration was difficult. He grew up on the South Side of Chicago, primarily raised by his mother and grandmother. But as his parents and other family members began to have substance abuse problems, "things just started to spiral, I started to really just engaging in a lot of criminal activity; selling drugs to get by, and just doing whatever I had to do to come up, basically" (INT159). By age 7, he had joined a gang. He was arrested dozens of times as a juvenile and was incarcerated at several youth prisons. In his records, there's mention of his family discussing seeking treatment for his behavioral issues at a children's psychiatric hospital in Chicago, but they were afraid that the state would remove him from the home.

[39] Names and identifying information of all people currently and formerly incarcerated included in this study have been changed to protect their privacy.

Once in prison, Damien was designated as a security threat because of his gang membership and placed in administrative segregation. In solitary confinement, his mental health problems exploded. Damien started accumulating disciplinary tickets and new criminal cases, which he attributed to "me being unable to control myself." He explained, "a lot of my cases that I caught, I was going through a mental breakdown. I was in psychiatric wards, I was being sent, tested, I was diagnosed, I was severely mutilating myself, I was cutting my arteries, I was hanging myself, overdosing myself, swallowing stuff, putting foreign objects in me, all type of stuff, they don't consider none of that" (INT159).

Damien shared his lengthy medical records with me, and they confirm his account. Over the course of his incarceration, staff documented over 40 incidents of his self-mutilation and 10 suicide attempts. By the end of his incarceration, psychiatrists had diagnosed him with schizoaffective disorder, bipolar disorder, and major depression, and the prison system had designated him as "seriously mentally ill." He was considered so ill, in fact, that the state successfully petitioned to have him both involuntarily committed to a mental health facility and subjected to involuntary administration of psychotropic medication on numerous occasions. But during the course of his prosecutions for misconduct in prison, Damien was repeatedly diagnosed by prison and court-appointed evaluators as "malingering," faking his severe psychiatric symptoms with what they argued was an increasing level of "sophistication." As a result, he was consistently found competent to stand trial and sane at the time of his offenses.

When we spoke, Damien, now 36, was finally free but struggling to pick up the pieces of his life. He was discharged with just a two-week supply of his psychiatric medication. Reflecting on his experience imprisoned, he said: "I didn't even get a chance to get no schooling because all the segregation time that I had…I had no chance to get no education, no type of trade work, no type of

GED, no type of high school diploma, and I sure didn't get the mental health treatment that I needed and that was required under the Constitution. I didn't get none of that. Everything that I got when I left from there was scars and wounds and memories. I even hate to say memories, but I won't never forget what I went through there" (INT159).

* * *

In recent years, academics, lawyers, and journalists alike have recognized a significant American phenomenon: the shift in the primary social provision of institutional confinement of people with serious mental illness from hospitals to jails and prisons (see, e.g., Erickson and Erickson 2008; Fellner 2006; Kupers 1999; Roth 2018). The Treatment Advocacy Center conservatively estimates that in 2014, there were nearly 400,000 individuals like Damien with "severe psychiatric disease" in prisons and jails, or ten times the number remaining in the nations' state hospitals (Treatment Advocacy Center 2016). Normatively, many recognize this state of affairs as a social problem. After all, one need not be an expert to intuitively recognize that prisons and jails are not ideal places to treat people who are very sick, especially those who are sick with psychiatric illnesses. Prominent corrections officials agree.[40] They contend that their business is punishing criminals, not running psychiatric hospitals. Moreover, the presence of so many people with serious

[40] Cook County Sheriff Tom Dart is one such critic, arguing that "there is a fundamental mismatch between the legions of people with mental illness who inhabit jails and prisons and the services that those jails and prisons are able to provide" (Roth 2018:7). In a recent roundtable with President Donald Trump, leadership of the National Sheriffs' Association raised similar concerns: "One of the main concerns was not just my office as sheriff, but across the nation — the mentally ill in the jails, and the people that they're being really, for lack of a better term, warehoused in our jails across America because we don't have the facilities necessary to take care of them on the outside" (The White House 2017).

mental illness in carceral settings indicates, to many, a tragic failure of the deinstitutionalization movement of the 1960s and 1970s—a process often referred to as "transinstitutionalization" or "transcarceration" of people with mental illness (Erickson and Erickson 2008:37; Palermo, Smith, and Liska 1991). With the asylums shuttered, advocates for people with mental illness had hoped people would obtain quality treatment in community settings, not behind bars.

Despite the magnitude of this social problem, and the depth of its expertise on all matters "institutional"—including, importantly, foundational work on psychiatric hospitals and prisons (Goffman 1961)—sociology has yet to offer the public much in terms of empirical analysis of the consequences of the widespread criminal incarceration of people who have serious mental illness. In socio-legal scholarship, of course, there are notable exceptions. Keramet Reiter, with coauthor Tony Blair, as well as Mona Lynch with Craig Haney, for example, have examined how long-term solitary confinement affects prisoners with serious mental illness, exacerbating, and in some cases, even generating serious symptoms (Haney and Lynch 1997; Reiter 2016a; Reiter and Blair 2015). Jessica Simes, Bruce Western, and Angela Lee, utilizing a large state administrative dataset, have shown that prisoners with serious mental illness can expect to spend three to four times longer in solitary confinement than prisoners without mental illness (Simes, Western, and Lee 2020). To date, however, this and other research has exclusively focused on the relationship between prisoners' mental illnesses, their disciplinary misconduct, and their subjection to *administrative* sanctions—most prominently, solitary confinement (Adams 1986; Clark 2018; Daquin and Daigle 2018; Felson, Silver, and Remster 2012; Henry 2020; Jachimowski 2018; Semenza and Grosholz 2019; The Association of State Correctional Administrators and The Liman Center for Public Interest Law at Yale Law School 2018; Wachtler and Bagala 2013; Wood and Buttaro 2013).

In this chapter, I build on this prior work to examine an additional consequence of institutionalization of persons with mental illness in carceral settings that has so far been overlooked in the literature: *the criminalization of prisoners with mental illness*. By the criminalization of prisoners with mental illness, I mean the practice of prisons and jails referring prisoners with mental illness in their custody to local states attorneys to bring new criminal charges against them for misconduct behind bars, e.g., assault or possession of contraband, that can arguably be linked to symptoms of their mental illness. As demonstrated in Chapter 2, the criminal prosecution of prisoners often results in prisoners' conviction and the extension of their criminal sentences, and it disproportionately affects Black and Latinx prisoners. Here, I tackle a different series of questions: are prisoners with mental illness at risk of criminal prosecution? If so, why?

I begin by reviewing the robust extant literature on the criminalization of people with mental illness in the community and consider its implications for prisoners with mental illness, who, like people in the community, may be subject to criminal sanction for behavior that is a manifestation of their mental health issues. In addition, I discuss how broader jurisdictional tensions between professionals in the medical field and criminal legal system over those with mental illness in the community that underlies criminalization may be even more heightened inside carceral systems. Next, I leverage the most recent wave of the nationally representative Bureau of Justice Statistics Survey of Inmates in State and Federal Correctional Facilities to answer the first research question: whether those who received a new criminal sentence for their most recent disciplinary violation were more likely to have mental illness than their counterparts. Then, drawing on an original administrative dataset from Wisconsin, I reveal the high rate of prisoners with in-custody criminal convictions who spent time in a dedicated mental health prison treatment institution. In the final section of the chapter, I draw on interviews with 64 prisoners' advocates, former prisoners,

prosecutors, and corrections mental health professionals to explain how and why prisoners with mental illness may struggle with compliance with prison rules and how this noncompliance is treated as a disciplinary or criminal-legal issue as opposed to a health matter. I conclude by considering what the phenomenon of criminalization tells us about the limits of therapeutic care provision in prison settings, and what that may suggest about the hazards of punitive care provision in carceral systems more generally.

CRIMINALIZATION OF PEOPLE WITH MENTAL ILLNESS

Although there is little research to date on the criminalization of people with mental illness inside prisons, there is a substantial literature on the criminalization of people with mental illness in the community. In this section, I first review the literature on the consequences of deinstitutionalization for people with mental illness, focusing on empirical studies on the criminalization of people with mental illness in the community, and the resulting "transinstitutionalization" of people from mental hospitals to jails and prisons. Next, I discuss how this literature on criminalization of people with mental illness raises broader sociological questions about how social deviance can be managed by alternative social systems and professionals—medical or criminal–legal—depending on the historical and institutional context. In the final part, I consider what the existing literature on prisoners' mental illness and experience of administrative sanctions suggests about the enhanced likelihood of criminalization of mental illness in carceral settings.

Deinstitutionalization, Criminalization, and Transinstitutionalization

During the 1960s and 1970s, legal reforms swept across the United States that increased the procedural protections governing the involuntary commitment of people with mental illness to

psychiatric hospitals and dramatically reduced federal funding for long-term hospitalizations. Court-based reforms raised the legal standard for involuntary civil commitment from "in need of treatment" to "persons who were likely to be dangerous to themselves or others" in every state between 1964 and 1979 (Appelbaum 1997:136–37). Arguably the most important legal reforms, however, were the Community Mental Health Centers Act of 1963, passed by Congress and signed by President John F. Kennedy, which created a funding mechanism for community health centers, and the passage of Medicare and Medicaid programs in 1965, which provided federal incentives for states to transition patients from state psychiatric hospitals to nursing homes (Gronfein 1985).

These major legal and policy changes resulted in a sharp reduction in the number of people civilly committed to long-term institutional care for mental illness and intellectual disabilities—a historical phenomenon commonly referred to as "deinstitutionalization." Between 1955 and 1985, the number of psychiatric inpatients in U.S. public hospitals declined precipitously from 559,000 to 110,000 (Mechanic and Rochefort 1990), and by 1978, more than 500 federally funded community mental health centers were established (Rochefort 1984). Reformers hailed the shift towards a new model of community mental healthcare as "the third great revolution in psychiatry of this century," cheering its redress of the squalid conditions of state mental hospitals and stigma of those with mental illness (Rochefort 1984). Civil libertarians celebrated the move away from a "medical" model of civil commitment, where psychiatrists had broad authority to hospitalize patients indefinitely, to a "legal" model, where patients gained substantive and procedural safeguards (Durham and La Fond 1984:397).

But it was not long before deinstitutionalization came under widespread critique. Today, it is commonly understood as "one of the era's most stunning public policy failures" given the inadequate development of community mental health services that were initially intended to

accompany the discharge of patients from hospitals (Mechanic and Rochefort 1990:302). Critics cited rising numbers of untreated homeless people with mental illness and the "reinstitutionalization" of people with mental illness in facilities like nursing homes (Mechanic and Rochefort 1990; Rochefort 1984). Beginning in the early 1970s, mental health experts began to identify another alarming phenomenon which they linked to deinstitutionalization: people living with mental illness were being arrested for behaviors symptomatic of their mental illness and ending up incarcerated (Abramson 1972; Bonovitz and Guy 1979). A theory of criminalization of people with mental illness began to take shape, in which scholars argued that certain forms of deviant behavior previously regulated by a medical model of hospitalization and civil commitment began to be relabeled as criminal and regulated by the criminal legal system (Fisher, Silver, and Wolff 2006:546). Decades later, this thesis has been widely accepted, with scholarly pronouncements that whereas in the past the large state mental hospital characterized government response to care for the seriously and chronically mental ill, "the current state era is characterized by the criminalization of the mentally ill" (Bloom 2010:728).

Embedded in the criminalization hypothesis is at least one historical claim: that a subpopulation of those with serious mental illness who would have been previously hospitalized were now incarcerated in prisons and jails (Steury 1991:335); a phenomenon is commonly referred to as "transinstitutionalization" (Prins 2011). Reports of high rates of numbers of people with serious mental illness in U.S. jails and prisons have bolstered this claim. A widely cited 1998 review of the literature found that 6-15% of jail inmates and 10-15% of state prisoners had serious mental illness (Lamb and Weinberger 1998). More recent prevalence estimates suggest that 14.5% of men and 31% of women booked into jails have serious mental illness, and that figure is similar among state prison populations (Prins 2011:717), and an estimated 64% of jail inmates and 56% of state

prisoners have a mental health problem of some kind (Kim, Becker-Cohen, and Serakos 2015). A diverse array of stakeholders—everyone from human rights activists to journalists to county sheriff's associations—have raised alarm bells about the high rates of people with mental illness in prisons and jails and the poor institutional fit of this arrangement (Fellner 2006; Roth 2018; The White House 2017).

Also bolstering the criminalization and transinstitutionalization hypotheses are historical data showing that just as patient populations in state hospitals began to reduce after 1968, there was a nearly equivalent increase in the number of state prison inmates. Between 1968 to 1978, the state mental hospital population fell from 399,000 to 147,000 (a 64% reduction), and the state prison population grew from 168,000 to 277,000 (a 65% increase) (Steadman et al. 1984). These data, at least on first blush, appear to confirm a theory from early in the 20th century that that criminal justice and mental health systems are "functionally interdependent;" if the population of one system goes up, the other is likely to come down (Steadman et al. 1984). Indeed, Bernard Harcourt has shown that when mental hospitalization rates and criminal incarceration rates are aggregated into a single rate of institutionalization, the dramatic curve of the "incarceration revolution of the late twentieth century" oft-cited in the literature is blunted—the level of aggregated institutionalization that the United States experienced in the 1950s was nearly as high as in 2000 at the height of mass incarceration (Harcourt 2005:1754).

Unfortunately, a direct test of whether deinstitutionalization *caused* the high rates of criminal incarceration of people with mental illness is not possible due to lack of data on the rate of mental illness among prison and jail populations prior to deinstitutionalization (Steadman et al. 1984:477). Nevertheless, scholars have tried to test this hypothesis, and their findings have cast doubt on a simple causal story of transinstitutionalization. For example, in a study of six states' prison and

mental hospital admissions between 1968-1978, Steadman et al. found only a modest overall increase in the percentage of prisoners with a history of psychiatric hospitalization, but did observe a larger increase in the percentage of mental hospital patients with arrest histories (Steadman et al. 1984). In other words, the study found limited evidence that discharged psychiatric patients themselves were accounting for increased state prison incarceration rates, but that there was a growth in criminalization, and that, for example, high arrest rates for drug offenses may have swept up people with mental illness (Prins 2011). The authors also suggested that local jails may be the "buffer" institution between state prisons and mental hospitals that help account for an indirect relationship between mental hospital populations and state prison populations (Steadman et al. 1984).

In a similar study of New York also casting doubt on a direct causal relationship between deinstitutionalization and high rates of people with mental illness in prisons and jails, Banks et al. found that among adults who had been hospitalized for psychiatric services, they were less likely to be incarcerated in the year they were not hospitalized than when they were—in other words, not being hospitalized did not make it more likely that these patients would be incarcerated (Banks et al. 2000). Moreover, Bernard Harcourt has shown that the demographic make-up of the mental hospital population in 1968 was quite different than the prison population in 1978—the former being far more female, White, and older—which strongly suggests that a different patient population are now being criminally incarcerated than were psychiatrically hospitalized in the past (Harcourt 2005:1781–83).

Other scholars, however, continue to provide evidence supporting a more structural account of the criminalization and transinstitutionalization hypotheses, arguing that the lack of availability of inpatient psychiatric treatment is a structural factor that leads to both more arrests for people with mental illness and harsher sanctions once in criminal court. Indeed, the evidence may be stronger for

deinstitutionalization playing an indirect causal role in the criminalization of people with mental illness in the community. For example, citing their research showing that a subset of people with severe mental illness cannot be effectively managed in the community, Lamb and Weinberger argue that decreased availability of psychiatric hospitalization post-deinstitutionalization, especially for those who are treatment-resistant or who display assaultive behavior, has led to criminalization of those who in the past could have been treated in long-term inpatient psychiatric facilities (Lamb and Weinberger 2005).

Moreover, in an early empirical study testing a possible mechanism of criminalization, Linda Teplin found that the presence of "mentally disordered behaviors" increases the probability of arrest, all other factors being equal (Teplin 1984). She proposed several possible explanations for this finding: first, that mental disorder itself may provoke a punitive response by police officers, and second, that because of lack of funding for community health services, and the difficulty in obtaining involuntary hospitalization post-deinstitutionalization, that "the criminal justice process may have become the default option for disposition of persons who are not able to be treated within the mental health system" (Teplin 1984:799–800). Observing that police officers commonly obtained a signed criminal complaint even when the person was thought to require psychiatric hospitalization in case the hospital rejects them, Teplin finds more support for the second explanation—that higher arrest rates reflect the fact that "arrest is often the only disposition available to the officer in situations where persons are not sufficiently disturbed to be hospitalized, yet are too public in their deviance to be ignored" (Teplin 1984:800).

Another study conducted in Milwaukee found that courts imposed more severe criminal sanctions—custody, cash bail, detention for more than two weeks, and imprisonment—on misdemeanor defendants with a psychiatric history than those without, even when controlling for

the seriousness of the offense (except for those charged with battery) (Steury 1991:346). Moreover, only a minority of defendants with psychiatric histories were treated as "patients" by the courts, e.g., ordered to undergo evaluation or undergo treatment, and thus receive more lenient treatment (Steury 1991:352). Together, this research provides evidence for two mechanisms—albeit indirect—to explain the criminalization and transinstitutionalization of people with mental illness post-deinstitutionalization: that the lack of inpatient psychiatric treatment options may enhance both the likelihood of arrest of people with mental illness in the community and the severity of punishment once entangled in the criminal legal system because they are less likely to be read as "patients" by the courts.

Therefore, although there is little empirical support for a simple causal narrative of transinstitutionalization—that the same type of people who would have been hospitalized for psychiatric conditions in the prior era are criminally incarcerated post-deinstitutionalization—there is strong support that deinstitutionalization, coupled with the build-up of mass incarceration, has fundamentally changed the landscape of mental health treatment in America, and that these social processes were linked. There is historical evidence, for example, that the closure of state mental hospitals directly helped facilitate a build-up in state infrastructure and capacity for mass incarceration, especially in the Midwest and Northeast regions of the United States, where old hospitals and their support staff were physically transitioned into prisons and correctional workers (Parsons 2018). Today, people with severe mental illness are unquestionably overrepresented in U.S. jails and prisons (Kim et al. 2015); large urban jails in Los Angeles, Chicago, and New York, are frequently cited as the largest government providers of psychiatric care (Treatment Advocacy Center 2016). And despite some positive changes to mental health insurance parity brought about by expansions in coverage and benefit regulation following the passage of the Affordable Care Act in

2010, there remains significant unmet need for mental health care in the community, especially for minoritized people and people with criminal-legal system involvement (Baumgartner, Aboulafia, and McIntosh 2020:10; Howell, Wang, and Winkelman 2019; Novak, Williams-Parry, and Chen 2017).

The Changing Institutional Context for the Social Control of Deviance

Often left unanswered in these inquiries, however, is a larger, latent sociological question: "has the criminal justice system caught in its wider net the type of people at the margin of society—the class of deviants from predominant social norms—who used to be caught in the asylum and mental hospital?" (Harcourt 2005:1780–81). Bernard Harcourt argues that analysts must apply the same constructivist approach to "criminality" as was done to the label "insane," which allows assessment of whether the "category of the present-day criminal does the same work that used to be done by the category of insane" (Harcourt 2005:1781). In other words, even if the exact people criminalized now are dissimilar to those medicalized in a previous era, the social categories of "insane" and "criminal" may serve to categorize and incapacitate marginal people in a way that serves similar macro social functions (e.g., control of violence or maintenance of an underclass). Harcourt's observation thus suggests that any study of the criminalization of mental illness should be attentive to how deviance can be alternatively medicalized or criminalized, depending on the historical and institutional context.

And over the twentieth century, as discussed above, the institutional context for provision of medical and social services, especially mental healthcare, changed considerably in the United States. Alongside deinstitutionalization, state provision of healthcare and social services more broadly—in the form of direct financial assistance, housing benefits, and educational programs—was withdrawn from the poor nationwide just as the criminal law enforcement and punitive sentencing was stepped up (Alexander 2012:56–57; Wacquant 2009:68). In this way, for the poor, access to medical and

mental healthcare, especially drug treatment resources, has increasingly become bound up with the criminal justice system (Parsons 2018:125; Tiger 2013:4). Indeed, historian Anne Parsons, in her book, *From Asylum to Prison*: *Deinstitutionalization and the Rise of Mass Incarceration*, argues that the overincarceration of people with mental illness in jails and prison has stemmed in large part from a broader shift in governance towards racist law-and-order politics, marked chiefly by the rapid growth in the criminal legal system itself—not just the closure of state hospitals (Parsons 2018:5–7). Whether in drug courts (Burns and Peyrot 2003; Nolan 2003; Tiger 2013), halfway homes (Haney 2010), or in prison (Haney 2006), medical and penal institutions have increasingly come together at various institutional sites to provide "punitive care" to populations.

This move to systems of punitive care provision has brought increasing numbers of healthcare professionals into carceral settings. It is worth recalling the status quo of the U.S. healthcare system: the only people with a legally enforceable right to healthcare are prisoners, even after the expansion in access to health insurance brought about by the Affordable Care Act of 2010. The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment, which has been interpreted by federal courts to prohibit prisons and jails from acting with deliberate indifference towards prisoners' medical needs.[41] Despite the Eighth Amendment's guarantee, however, prisoners have long fought for states to live up to their constitutional duty to provide adequate medical and mental healthcare. Jonathan Simon's book, *Mass Incarceration on Trial*, describes and celebrates recent right-to-health litigation undertaken by prisoners and their advocates in California (Simon 2014). One question that Simon's work raises is whether, when prisons get an influx of new mental health and medical care personnel in the wake of impact litigation, these new professionals undermine existing security-based incapacitative and retributive logics at work in

[41] See *Estelle v. Gamble*, 429 US 97 (1976).

contemporary prisons, or whether they end up fundamentally adopting the "warehouse" logic of the new penology (Feeley and Simon 1992). Put another way: for prisoners with mental illness receiving treatment behind bars, who takes jurisdiction over their noncompliance or deviance, security officers or mental health professionals?

And to answer the question about professional battles over who has jurisdiction over social problems, it is helpful to look to the sociology of medicine literature, which has a rich tradition of studies exploring how medical professionals—especially doctors—came to assert their "sovereignty" over healthcare issues, and gain cultural legitimacy over other healthcare workers and professions (see, e.g., Starr 1982; Whooley 2010). These insights as to how certain groups of medical professionals obtain jurisdiction over health issues and assert their professional authority, might shed important light on the contestation around what strategies may be used in handling mental illness in correctional settings, where treatment professionals work alongside security staff. As Carol Heimer's work on how legal institutions compete for influence among medical and family institutions in caring for critically ill neonates demonstrates—close attention to the organizational setting of this institutional competition, in this case, prisons—is critical (Heimer 1999; Heimer and Staffen 1998).

Deviance Inside Prisons

People incarcerated in jails and prisons, like drug-treatment patients supervised by drug courts or in halfway homes, their deviance or noncompliance may be even more likely to be criminalized in these punitive settings than in the community. It is no great stretch to hypothesize that for prisoners with diagnosed mental health issues—"patients" being simultaneously punished

and treated inside one of the most punitive institutions of our time—deviance may be even more likely to be criminalized than in the free world.

Indeed, extant scholarship on the relationship between mental illness and the disciplinary sanction of prisoners suggests that correctional systems are likely to invoke a punitive response to prisoners with mental illness displaying noncompliant behavior. In an early study of disciplinary sanctions in two New York state prisons, Adams (1986) found that prisoners who were referred to the mental health units had a higher rate of disciplinary infractions, even after controlling for differences in known correlates (age, race, drug use, prior prison experience). Prisoners with mental illness were found to be overrepresented among those with certain categories of infractions—refusing to leave one's cell, setting fire to one's cell, injuring oneself, and destroying property—that can be classified as symptomatic behavior (Adams 1986:312). In addition, he found that "treatment-oriented" dispositions were not frequently utilized by disciplinary adjudication committees, and even when prisoners were referred to the mental health units for rules violations, these referrals were often combined with punishments (e.g., loss of privileges, cell confinement, segregation) (Adams 1986:309–10).

More recent studies have bolstered these early findings and extended them to other jurisdictions. Studies of nationally representative survey data have found that prisoners with mental illness are more likely to have faced disciplinary charges for breaking facility rules since admission, and were more likely to have been charged physical or verbal assault on a staff members and other inmates (Felson et al. 2012; Henry 2020; James and Glaze 2006; Wood and Buttaro 2013). Research has also shown that prisoners with mental illness make up a disproportionate share of those in solitary confinement (Reiter et al. 2020; The Association of State Correctional Administrators and The Liman Center for Public Interest Law at Yale Law School 2018) and that those with mental

illness are more likely to be sentenced to solitary confinement, even when controlling for other factors (Clark 2018; Simes et al. 2020).

Scholars and advocates have provided a number of potential explanations for these findings. Prisoners with mental illness may experience symptoms like paranoia, depression, mania, and psychosis, that inhibit their ability to regulate their own behavior and comply with strict prison rules (Felson et al. 2012). Correctional staff may perceive prisoners with mental illness as especially unmanageable, or dangerous to themselves or others, warranting the use of harsh sanctions like solitary confinement (Clark 2018:1377; Reiter and Blair 2015:188). Advocates point out that prison disciplinary processes often do not offer a treatment-oriented responses to deviance among those with mental illness and that prison officials—who have enormous discretion over administrative sanctions—are loathe to permit mental disorder to function as an "excuse" for misconduct (Abramsky and Fellner 2003:62–63). And finally, scholars point to the overwhelmingly punitive culture of prisons, where security and control outweigh rehabilitative and treatment goals; even when prisoners have diagnosed mental illness, they are "treated first as criminals and second as patients," authorizing harsh administrative sanctions inside (Reiter and Blair 2015:192).

As this prior work demonstrates, prisoners with mental illness have already, by definition, been criminalized, and they face severe quasi-criminal disciplinary sanctions administered by correctional agencies once in custody. Many of the same structural and cultural mechanisms that operate to place people with mental illness at risk of criminalization in the community, and at risk of disciplinary sanction inside prison, may bear on the use of the criminal-legal sanction of prisoners as well. In this chapter, I use both quantitative and qualitative methods to empirically examine how, how frequently, why, and with what consequences prisoners' symptoms of mental illness become treated not only as disciplinary problems but as criminal offenses, as opposed to health or medical

problems. In doing so, I extend the literature on the criminalization of people with mental illness from the community to prison—with an eye towards how jurisdictional struggles between health and correctional personnel working in the same carceral setting affect the availability of treatment alternatives to symptomatic behaviors.

CRIMINAL SANCTION OF PRISONERS WITH MENTAL ILLNESS

How often are prisoners with mental illness sanctioned criminally for behavior that may be considered symptomatic of their mental health issues? As discussed in Chapter 2, there is very little known to date on how frequently prisoners are prosecuted for conduct inside prison in general; there is even less known about how such use of the criminal legal system may disproportionately impact prisoners with mental health issues. In this section, I provide a first window into the question of how many prisoners with in-custody convictions have a history of mental illness using two different datasets: the Bureau of Justice Statistics Survey of Inmates in state and federal correctional facilities (2004), a nationally representative survey of prisoners, and an original dataset of prisoners with in-custody convictions in Wisconsin, my case-study county. Although the datasets have considerable limitations, both analyses reveal that prisoners with mental illness are overrepresented among those reporting in-custody convictions.

Bureau of Justice Statistics Survey of Inmates

Since 1974, the Bureau of Justice Statistics (BJS) has conducted a nationally representative, interview-based survey of inmates in state and federal correctional facilities approximately every five years. Surveys of state prison inmates were conducted approximately every five years from 1974-2004, and federal prison inmates were interviewed in the 1991, 1997, and 2004 surveys. These

extensive surveys include over 3,000 questions about prisoners' current offense and sentence, criminal history, demographic information, and participation in prison programming. All surveys used a two-stage sampling strategy: facilities were selected from the "facility universe" and selection ensured adequate gender and regional representation and then inmates sampled randomly in the second stage. Most importantly for this study, the three most recent waves of the survey include multiple items relating to both prisoners' mental health treatment history and psychiatric symptomatology, and prisoners' disciplinary conduct and sanctions behind bars, including whether a prisoner "received a new sentence" as a consequence of their most recent disciplinary infraction.[42] The most recent survey, collected between October 2003–2004, was made publicly available on ICPSR in 2007 (Bureau of Justice Statistics 2018).[43] In the time since its release, scholars have published a number of articles analyzing these data, including quite a few studies specifically looking at the relationship between prisoner mental illness and disciplinary misconduct (Clark 2018; Felson et al. 2012; Semenza and Grosholz 2019). However, to my knowledge, no study has yet specifically analyzed the data on prisoners' experience of in-custody criminal convictions. In this section, I use this nationally representative survey to assess how many state and federal prisoners in custody in 2004 experienced criminalization behind bars for their most recent disciplinary incident, and whether prisoners with mental illness are overrepresented in this group. A full description of the variables used in this analysis is provided in the Methodological Appendix.

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[42] I confirmed with the BJS that this item, "received a new sentence" referred to a new criminal sentence (email correspondence with Tracy L. Snell, Bureau of Justice Statistics Statistician, Aug. 7, 2018).

[43] In addition, I applied for and received the restricted ICPSR database for 2004, which includes some potentially identifying individual information (e.g., country of citizenship). In this analysis, I do not rely on the restricted data.

I. *Results*

For this analysis, I combined the data for state (14,499) and federal prisoners (3,686), for a total of 18,185 observations. The characteristics of the total population of survey respondents and the subset of those who received a new sentence are summarized below in Table 1.

Table 1. Population Characteristics, Prisoners in U.S. State & Federal Correctional Facilities, BJS Survey (2004)

	Total Population (n=18,185)	**Received New Sentence** (n=68)
Race/Ethnicity		
White	35.0% (n=6,362)	32.4% (n=22)
Black	39.8% (n=7,240)	35.3% (n=24)
Hispanic	18.9% (n=3,438)	27.9% (n=19)
American Indian	1.9% (n=346)	1.5% (n=1)
Asian, Pacific Islander, Native Hawaiian	1.1% (n=200)	1.5% (n=1)
Multiple Races (non-Hispanic)	3.1% (n=571)	1.5% (n=1)
Gender		
Male	78.6% (n=14,297)	88.2% (n=60)
Female	21.4% (n=3,888)	11.8% (n=8)
Age		
18–25 years	18.9% (n=3,444)	23.5% (n=16)
26–34 years	29.6% (n=5,390)	26.5% (n=18)
35–49 years	40.8% (n=7,416)	44.1% (n=30)
50+ years	10.5% (n=1,905)	5.9% (n=4)
Mean Years Education Prior to Incarceration	11.0 (SD: 2.5)	10.0 (SD: 2.4)
Percent Employed Prior to Incarceration	64.2% (n=11,679)	55.9% (n=38)
Mean Number of Prior Incarcerations	1.7 (SD: 4.4)	2.8 (SD: 3.6)
Mean Sentence Length (years)	68.8 (SD: 210.6)	139.9 (SD: 293.4)
Mean Time Served (years)	4.5 (SD: 5.2)	9.5 (SD: 9.1)
Admissions Offense Type		
Violent offense	39.9% (n=7,250)	54.4% (n=37)
Property offense	18.5% (n=3,365)	14.7% (n=10)
Drug offense	25.1% (n=4,569)	16.2% (n=11)
Public-order offense	14.4% (n=2,623)	13.2% (n=9)
Other offense	00.7% (n=127)	0.00% (n=0)
Percent Spent in Cell 22-24hr in Last Day	11.0% (n=2,002)	29.4% (n=48)
Mental Health		
Symptoms	16.5% (n=3,005)	23.5% (n=16)
Diagnosis	26.9% (n=4,771)	26.5% (n=18)
Treatment History	32.3% (n=5,753)	38.2% (n=26)
Suicide Attempt	13.7% (n=2,496)	22.1% (n=15)
Any Mental Illness	42.8% (n=7,782)	52.9% (n=36)

Of the total number of prisoners in this dataset, less than half (45.6%) reported ever receiving any charge of disciplinary misconduct, and only 68 people (.4% of the total population of survey respondents) reported receiving a new criminal sentence for their most recent disciplinary violation. Thus, while these data provide evidence that criminal prosecution for disciplinary misconduct does occur, the number of prisoners who experienced criminal sanction for misconduct is dwarfed by the numbers who experienced administrative sanctions, especially loss of privileges (16.1%, n=2,933), sentences to disciplinary segregation (i.e., solitary confinement) (14.2%, n=2,578), and loss of good time (8.2%, n=1,482). It is important to emphasize that this is a very conservative estimate of the frequency that prisoners are criminally prosecuted for conduct behind bars overall, as this total only reflects those who received a new sentence for their *most recent* disciplinary violation, which may have been more minor than one they've incurred in the past. Nevertheless, these data do provide a useful avenue to compare the relative frequency of criminal versus administrative sanctions.

The disciplinary violation that resulted in a new sentence was missing for 29 respondents. The most frequent violations were for physical assault on another inmate (n=8), physical assault on a staff member (n=6) and escape or attempted escape (n=6), and drug offenses (n=5). Minor violations like disobeying orders (n=2), other contraband (n=2), verbal assault on an inmate (n=1), verbal assault on a staff member (n=2) also resulted in a new criminal sentence in a small number of cases.

The share of non-White prisoners who had received a new sentence for their last disciplinary incident (67.6%) was comparable to the percentage of non-White prisoners overall (65.0%). Men, however, were overrepresented, making up 88.2% of those who had received a new sentence, compared to 78.6% of the total population. Older prisoners made up a smaller share of those who

had received a new sentence (5.9%) compared with the overall population (10.5%). Although prisoners who had received a new sentence had similar overall rates of educational attainment prior to incarceration (10.0 years) compared with the total population (11.0 years), a much smaller share (55.9%) reported receiving an income from a job prior to incarceration than the total population (64.2%).

Prisoners who had received a new sentence had a higher mean number of prior incarcerations (2.8) versus the total population (1.7), and they had substantially longer average sentences (139.9 years) versus the total population (68.8 years). They had also, on average, served more time by the interview date (9.5 years), compared with the total population (4.5 years). In addition, a greater share—over half (54.4%)—of those who had received a new sentence were incarcerated initially for a violent offense than the overall population (39.9%).

A much larger percentage of those who had received a new sentence for their most recent offense reported being confined to their cell for 22-24 hours in the last day (29.4%) compared with the overall population (11.0%). This finding may be explained by the fact that in response to the same serious disciplinary violation that resulted in a new sentence, 42.7% (n=29) of those with a new sentence reported also being sentenced to segregation, 17.7% (n=12) reported also being sentenced to cell confinement, 19.1% (n=13) also reported being moved to a higher custody level, and 17.7% (n=12) reported also being transferred to a new prison; in other words, the same incident likely may have triggered both the new criminal sentence and the move to solitary. However, it is also possible that being in a form of solitary confinement itself was related to the behavior that triggered the new criminal sentence, especially for those with mental illness, like Damien's story, which is recounted above, suggests. This complex relationship between solitary confinement and the criminal prosecution of prisoners is explored in far greater depth in Chapter 4.

With regard to mental illness—the central characteristic under study here—a substantially higher proportion of those who had received a new sentence had at least one indicator of mental illness (52.9%) than the overall population (42.8%).[44] A greater share of those who had received new sentences reported serious symptoms of mental illness (23.5% versus 16.5%), treatment history (38.2% versus 32.3%), and a past suicide attempt (22.1% versus 13.7%), than the total population. The percentage of those who had a psychiatric diagnosis in the two groups was comparable: 26.5% of those who had received a new sentence versus 26.9% of the overall population. In other words, these data provide some evidence that prisoners with mental illness are overrepresented among those with in-custody convictions; however, the chi-squared test of association between any mental illness and receipt of a new sentence was not significant.

II. *Limitations*

Although it is the best available nationally representative survey of prisoners that contains data on criminal prosecution, there are a number of significant limitations of the BJS survey for answering my research questions. The central limitation, as discussed above, is that of my key dependent variable—whether a prisoner had "received a new sentence"—because it was asked only in reference to the most recent disciplinary violation, rather than whether they had received this sanction at any point in their incarceration. This resulted in very low count of prisoners (n=68) reporting this disciplinary outcome, which seriously limits the ability to assess how other

[44] If history of suicide attempt is omitted from the "any mental illness" construct, because in some cases suicide may be related to brief, acute experiences of grief or trauma unrelated to chronic mental illness, prisoners with any mental illness are still overrepresented among those with new sentences when compared to the general population (47.1% of those with new sentences versus 41.0% of the general population).

characteristics of prisoners', especially their report of mental illness, may bear on the likelihood of in-custody criminal convictions.

In addition, although the 2004 survey is the most recent of this series, these data are quite dated now, and that severely limits their ability to speak to contemporary patterns of criminal prosecution. Furthermore, there is also the fundamental issue that the survey is based on self-report, so there may be significant uncertainty in both respondents' ability to recall at all these specific details of their experience or do so with accuracy. Especially those who have psychological or cognitive impairments, there may be a real question about the reliability of their responses. Despite these very serious limitations, however, this dataset provides a first—albeit limited—window into the scope of the criminalization of prisoners of prisoners with mental illness nationwide.

Case Study of Wisconsin

To address some of the limitations of the BJS survey data described above, analysis of administrative data on all of those in custody with, and without, a new criminal conviction is necessary for a more complete understanding of how frequently people with mental illness receive criminal convictions for behavior behind bars. Unfortunately, none of the states I received administrative data from and discuss in Chapter 2 were willing to provide corresponding individual mental health classification data with data on in-custody criminal convictions, citing health privacy exclusions as the data on convictions are publicly identifiable. Fortunately, I was able to identify a proxy for mental illness that could be linked to the administrative dataset I obtained from one state, Wisconsin: prisoners' transfer to the Wisconsin Resource Center.[45]

[45] I have redacted my procedures here to protect the individuals' private health information.

The Wisconsin Resource Center is a secure correctional facility operated jointly by the Wisconsin Department of Corrections (WDOC) and Department of Health Services, that "is a leader in the development of innovative treatment methods for state prison inmates in need of specialized mental health services" (Wisconsin Department of Health Services 2020) and 87% of the WRC population had a mental health diagnosis. According to the DOC referral policy for transfer of "inmate patients" to the Wisconsin Resource Center (WRC), staff are directed to prioritize:

A. Inmate patients who exhibit significant symptoms of serious mental illness, such as psychosis or serious mood disturbance.
B. Inmate patients who exhibit significant suicide risk or engage in serious self-harm behaviors.
C. Inmate patients with developmental disabilities, cognitive problems, or social skill deficits that lead to impaired functioning or vulnerability within a correctional environment.
D. Inmate patients with a history of serious mental illness who continue to have residual functional impairments that may be responsive to further treatment.
E. Inmate patients with both Axis I and II disorders that result in impaired ability to function within a correctional environment.
F. Inmate patients whose treatment needs would benefit from specialized programs and treatment interventions available at WRC.[46]

Given these referral criteria prioritize for transfer those prisoners who are exhibiting serious mental health or cognitive concerns, it may be used as an imperfect proxy for mental illness—albeit a conservative one in that many prisoners with mental health issues are not assessed as having severe enough symptoms to warrant transfer to the WRC. Indeed, a public records request to WDOC revealed that as of January 31, 2020, although 41.6% (n=9,719) of the WDOC population was classified as having mental illness, and 8.7% (n=2,033) of these people are classified as having a serious mental illness, a much smaller fraction—just 6.7% (n=1,571)—of those in custody had ever been transferred to the WRC over the course of their incarceration.

[46] Wisconsin Department of Corrections DAI Policy #500.70.08, Wisconsin Resource Center Transfers (03/16/15).

I. *Results*

Of the 390 individuals whose records were able to be linked,[47] we found that 65.9% (n=257) of those with in-custody convictions had been transferred to the WRC at least once during their incarceration, nearly 10 times more than the overall rate of those with transfers to WRC for those in WDOC custody. Thus, I am able to conclude with confidence that prisoners with serious mental health issues are substantially overrepresented among those with in-custody convictions in the WDOC.

Among those with in-custody convictions in Wisconsin, there were some intriguing differences that emerged between those with WRC transfers and those without. The results from this analysis are summarized below in Table 2.

Table 2. Characteristics of Prisoners with In-Custody Convictions in Wisconsin, by WRC Transfer

	WRC Transfer	**No WRC Transfer**
Percent of Prisoners with In-Custody Sentences	65.9% (n=257)	34.1% (n=133)
Total Number of In-Custody Sentences	605	205
Percent Non-White	58.0% (n=149)	70.0% (n=93)
Percent Male	95.7% (n=246)	98.5% (n=131)
Percent with Life Sentence	24.1% (n=62)	18.8% (n=25)
Percent Multiple In-Custody Sentences	75.4% (n=456)	52.7% (n=108)
Mean Number of In-Custody Sentences	6.3 (min=1, max=27)	3.0 (min=1, max=14)
Mean In-Custody Sentence Length	4.6 years (min=0, max=50)	4.5 years (min=0, max=50)
Mean Individual Cumulative In-Custody Sentence Length	11.3 years (min=0, max=358)	7.3 years (min=0, max=205)
Top In-Custody Charges	1. Battery (31.1%, n=188) 2. Bodily-Fluids Throwing (17.4%, n=105) 3. Escape (6.1% n=37) & Sexual Offenses (6.1%, n=37)	1. Battery (41.5%, n=85) 2. Disorderly Conduct (10.2%, n=21) 3. Bodily-Fluids Throwing (5.9%, n=12) & Escape (5.9%, n=12)

[47] To check this coding, I double-coded a random 10% sample of the individuals present in the dataset, and my research assistant and I had 97% correspondence on all fields collected, and 100% correspondence on whether the individual was ever transferred to the WRC. Our only discrepancies related to counting how many times they were transferred in/out and those discrepancies were limited to those with 20 or more transfers between WRC and other prisons. One person's records were not able to be linked.

These data reveal that White prisoners with in-custody convictions were more likely to be transferred to the WRC than non-White prisoners; only 58.0% of those who had a WRC transfer were non-White compared to 70.0% without a transfer. Those with a WRC transfer were also slightly more likely to be serving a life sentence (24.1%) than those without (18.8%). In addition, those with a WRC transfer were substantially more likely to have more than one in-custody sentence (75.4%) than those without (18.8%); their mean number of in-custody convictions were 6.6 compared with 3.0. But it appears that they were not sentenced, on average, to more or less time per conviction—both groups had nearly identical mean in-custody sentence lengths: 4.6 and 4.5 years. This suggests that although those prisoners with significant mental health issues have more in-custody criminal convictions, courts were not granting those with a significant history of mental illness leniency—there's no evidence of any consistent "discount" in terms of sentence lengths. Moreover, because those with WRC transfers had, on average, more in-custody sentences, their mean individual added time due to in-custody convictions was higher (11.3 years) than for those without a WRC transfer (7.3 years). Overall, these findings reveal that those prisoners with a WRC transfer are not only overrepresented among those with in-custody convictions but are also more likely to have more in-custody sentences and thus have their time in prison extended even longer than those without serious mental health and behavioral issues.

Perhaps most interesting is the differences in charges between the two groups. Although battery charges were the most common charge in both groups, they made up a higher percentage of charges among those without a WRC transfer (41.5%, n=85) than those with (31.1%, n=188). Because battery charges can be brought against prisoners for both assaults on staff as well as assaults on other prisoners, these may be charges that are less likely overall to correspond to symptoms of

mental illness, and instead reflect organized crime activity in prison. In contrast, among those prisoners with an in-custody conviction and with a WRC transfer, bodily-fluids throwing charges made up a substantially higher percentage of all charges (17.4%, n=105) than those without (5.9%, n=12), which is consistent with the assumption that this anti-social behavior is highly correlated with those with symptoms of severe mental illness. Among those with a WRC transfer, escape and sexual offense charges (6.1%, n=37) each, were also common, which is also consistent with the assumption that public masturbation in prison is another antisocial behavior that is often correlated with mental illness among those in solitary confinement. I discuss at greater length this link between solitary confinement and the production of anti-social behaviors (i.e., bodily-fluid throwing, self-mutilation, and public masturbation) that may be subsequently disciplined and criminalized, in Chapter 4.

II. *Limitations*

The limitations of these data too, however, leave open a lot of questions. It is not possible to precisely discern what percentage of the in-custody charges correspond to behavior that is arguably symptomatic of mental illness, although the charge categories give some clues. There is also a question about the validity of WRC transfer-as-proxy for significant mental illness, given that not all stays at WRC were long (it appears that some people in the sample were just transferred for a matter of days for an evaluation), and the overall average length-of-stay at WRC for WDOC prisoners has been over 100 days since its opening.[48] Although we collected data on the number of transfers to and from WRC (mean=12.2, min=0, max=106), we did not collect data on the cumulative length of stay. There is also a concern that non-White prisoners may not be as likely to be seen as needing

[48] These data were also provided by WDOC in response to a public records request and contain annual length of stay at WRC data from 1983–2019.

intensive mental health treatment, given that a much higher percentage of those with in-custody convictions in the non-transfer category (70.0%) were non-White versus those with a transfer (58.0%). This may result in an underestimation of the prevalence of mental illness among those with in-custody convictions. But overall, these first data do provide a useful window into how overrepresented those with serious mental illness are among those with in-custody convictions likely are, and which types of charges they are most susceptible to.

CLASSIFYING MENTAL DISORDER AS CRIMINAL BEHIND BARS

As the national BJS survey data and the Wisconsin case study data presented above reveal—there is good reason to believe that prisoners with mental illness are at times criminalized for their conduct, which raises additional questions: How may symptoms of mental disorder become classified as criminal? Why might prisoners with mental illness be at heightened risk of criminal sanction? What consequences does this have for their lives? In this section, I draw on interviews with 64 prisoners' advocates, former prisoners, prosecutors, and corrections mental health professionals to answer these questions and explain how and why prisoners with mental illness may struggle with compliance with prison rules and how and why the administrative disciplinary procedures for those with mental illness and the competency and sanity standards in criminal court are often not sufficient to protect this population from further criminalization. Ultimately, these accounts provide evidence of the overriding punitive culture of prisons in defining instances of prisoner noncompliance as disciplinary-criminal problems as opposed to health problems, even for those prisoners with severe presentation of psychiatric symptoms and extensive diagnosis and treatment histories.

Pervasive Criminal Referrals of Prisoners with Mental Illness

Consistent with the quantitative data presented above, in the 64 interviews that I've conducted across the country, nearly all participants recalled experiences with prisoners with serious mental illness being charged with new crimes. In part, this stems from the observation of many advocates that "most people in prison have mental health issues" (INT156), a consequence that many attributed to deinstitutionalization and the War on Drugs. As one New York advocate recalled about the late 1990s:

> The prisons [were] just swollen with people, and you had the factor of deinstitutionalization, which was the psychiatric hospitals were…emptying out, not completely of course, but there was a lack of community supports put in place. So there was very much mixed in a population of people with mental illness who weren't able to be stable in the community, not through a great fault of their own. Some were mixed up with the drug laws and so forth. So you had a high proportion of this swollen prison population had mental illness (INT179).

Other advocates attributed the high percentage of prisoners with mental illness in prison to the carceral environment itself. As one Illinois advocate said, "I mean, I think that the mere fact of being in prison automatically causes some amount of mental distress. So I would say probably every client I've represented has suffered from some mental health issues because the nature of incarceration inflicts that on everybody it touches, including the families (INT022). Another Illinois advocate echoed this same sentiment:

> I mean are there mentally ill people in prison? Seriously mentally ill people in prison? Absolutely. But there are prisons in and of themselves seriously, like mentally unhealthy places, yes. So, it's hard to gauge what is a healthy, what is a normal adaptation to a hideously abnormal situation? I don't know (INT104).

Whatever the attributed cause, interview participants widely recognized that people with serious mental health concerns were overrepresented in the prisons they worked or lived in. A mental health professional who worked in the California Department of Corrections and Rehabilitation (CDCR) explained how she was drawn to her job in part because she "really wanted

more experience working with people who were diagnosed with serious mental illnesses" and "[i]n California, they're all in prison." CDCR, she said, is "one of the biggest sites of psychiatric treatment in the state" (INT118). Similarly, an Illinois attorney specializing in the protection of people with disabilities said she her organization had invested in prison work because "we can't ignore the thousands of people who have disabilities who are incarcerated" (INT057).

In addition, defense attorneys focused squarely on those prisoners who have been charged with new crimes reported a significant share of their prisoner caseload struggled with mental illness. For example, one defense attorney in Texas, whose practice was previously devoted full-time to representing Texas Department of Criminal Justice (TDCJ) prisoners charged with new criminal offenses, estimated that overall, 50% of her clients had mental illness (INT148). Another Texas public defender echoed this same sentiment, "I represented many people there with severe mental disease, including schizophrenia, bipolar, all sorts of different issues, and in many cases the—what happened in the case was clearly related to it. I mean there were clients that had no concept of reality" (INT026).

One Wisconsin public defender estimated that among her incarcerated clients, she estimated that "90%, at least" had mental health issues (INT182). Another Wisconsin public defender noted that one challenge she had in representing her clients who were imprisoned in a local maximum-security facility was that so many had "severe mental health issues" that they were being transferred back and forth to the dedicated mental health facility—the Wisconsin Resource Center—while their case was in process (INT156). And even one prosecutor I spoke with in Wisconsin joked that his "boss must hate me" because he kept getting assigned all of their "prison cases." He said prosecuting prisoners was "a different world" because the defendants have "lots have mental health issues that the prison isn't dealing with." He recalled that when he was growing up, "there were state

hospitals," but now people were in prisons and jails and "all we can do is react, criminalize" (FN200226).

Several mental health providers working with prisoners in California felt that their clients were referred to DAs "pretty routinely" even if their prosecutions were not always pursued (INT069). Another mental health provider recalled one case that stood out to her in particular because the patient was "so clearly psychotic" at the time of his original offense and "was still very, very sick in prison and then I think the case that got referred to the DA added on another ten years to his life sentence." She remembered:

> I just had this image of him, I remember, I don't even know if I ever actually saw his entire face because he was always looking down. He has this kind of stringy hair, like his self-care was really terrible, and like his face was just his head, just hung on his neck, kind of. I just remember thinking, who, what, how can this person even participate in their own defense of anything? He was just so incredibly ill, it was hard to understand how anyone, even just looking at him visually, couldn't see how ill he was . . . I unfortunately don't remember what the case was. It was probably for fighting and probably the fighting was self-defense or something. I don't know, that's usually what people got DA referrals for, but he wasn't selling drugs in prison or anything like what, which is another popular one. It was just so, I just remember thinking like, how can people look at this and think that this is okay?... How is anybody in prison looking at this person and thinking that this is a matter of an intentional being making a decision to forgo societal norms and do something problematic (INT118).

As these providers make clear, even for clients on their mental health caseloads, or who are exhibiting clear symptoms like psychosis, may still experience criminal prosecution.

A former prisoner in California who had been received multiple criminal referrals during his incarceration explained how prisoners with mental illness could be at risk of prosecution. He said that after prisoners of Latino or Mexican descent who often were charged for gang-related violence, and African Americans who were charged for staff assaults, be believed that the third group of prisoners most at risk of DA referrals were "the mentally ill." He said that prisoners with mental illness often would get charged for defending themselves to staff use of force or cell extractions, for example, kicking, scratching, clawing, or biting during a cell extraction, because they "didn't really

understand what they were doing." In his experience, refusal to go into their cell was the number one "ignitor or initiator for a DA referral" for those with mental health problems (INT060). For example, he recalled that during one coordinated action he and other prisoners on his tier had taken in response to staff beatings, they purposefully flooded their cells and refused to lock up. Afterwards, the guards systematically did cell extractions of everyone on the tier, regardless of their involvement in the resistance, and he recalled one man with mental illness getting charged. "I think he bit one of the officers," he remembered, "I don't think he really understood what was going on" (INT060).

A prisoners' advocate from New York who works mainly with people with mental illness, said his clients had incurred new criminal charges for behaviors "like throwing things at an officer, spitting on an officer, that kind of thing. I mean, assault-on-staff stuff is usually what leads to additional charges" (INT053). A prisoners' advocate working in Illinois noticed similar patterns, that new charges imposed on clients with mental illness were "mostly spitting and urine, and the weapons are items that people craft in order to get attention or to self-harm," and that while she's "a couple of incidents of physical aggression…those are few and far between" (INT142). A prisoners' rights advocate in Wisconsin who had been incarcerated for many years himself also said that in his memory, "outside charges" were brought against individuals with mental illness who were not able to "control themselves," for behaviors like hitting and spitting at staff members (INT122). In Texas, a public defender discussed a client who was "floridly psychotic" who had smeared his own feces on his cell walls while in solitary confinement and had carved a Star of David into his body. When he was indicted, she remembered thinking, "I can't believe judge was going to go forward with his client looking 'crazier than a bedbug'" (INT029).

Other advocates recalled other types of offenses that clients with mental illness were charged with—which ranged in seriousness from threats to public officials to murder—all of which they linked to their clients' mental illness. In Illinois, a prisoners' advocate working with those with mental illness raised the concern that while bodily-fluids charges had seemed to begin to die down, she was hearing about an uptick of charges against people in segregation for "exposing themselves or masturbating at their cell front" (INT057). A California prisoners' rights attorney described a client who was psychotic and made "threats against, I believe, the President," and received a DA referral (INT058). Similarly, a New York advocate remembered a "most awful horrible case" where a client with mental illness was charged repeatedly for "threatening public officials and judges" despite the fact that he was in a maximum-security prison and "couldn't control himself nor effectuate his threats" (INT170).

One CDCR mental health provider shared a story of a "pretty mentally ill" client who was charged with possession of drugs, but later was determined to have been "basically being taken advantage of because he was so ill" (INT061). Another provider recalled a patient who escaped during a "drug-induced psychosis" and who injured himself badly but was also then charged criminally and convicted (INT069). A public defender in Texas described a client with a similar story: he had schizophrenia and had a paranoid delusion that a fellow inmate was from the IRS and simply walked away while on a work detail. He was found the next morning by a guard, sleeping on the side of the highway near the prison grounds, and was charged with escape. Ultimately the case was dropped by the prosecutor after he was found incompetent, but while awaiting trial, he spent the entire time in solitary confinement, where he decompensated (INT148).

Other interview participants mentioned very serious crimes, committed by prisoners with mental illness, including murder of fellow inmates. One New York advocate recalled a case of a

client with serious mental illness murdering his cellmate—something she felt could have been prevented, arguing, "he wouldn't have killed someone if he'd been in a single cell. Right? I'm sure it was pressure and paranoia" (INT047). And another recalled a widely reported case of a young man who was severely ill and hospitalized for many years by the New York prison system, nevertheless getting criminally prosecuted for setting fire to his cell. She said, "as he was about to get out this happened, and they prosecuted him again. It's pretty horrific" (INT054). As these examples begin to make clear, bodily-fluids throwing is not the only charge whereby prisoners with mental illness have ended up having their conduct referred for prosecution. More general assault and battery charges, possession of a weapon, escape, and even possession of drugs may be linked to a prisoners' psychiatric and intellectual disabilities.

In addition, interview participants drew attention to some of social consequences that new criminal charges and convictions can raise for prisoners with mental illness, over and above those consequences that may attend to criminal prosecution of prisoners more generally, as discussed in Chapter 2. For example, on New York advocate discussed how an unexpectedly lengthened sentences can be especially devastating for prisoners with mental illness who face major obstacles to successful community orientation (INT173). A mental health provider from California echoed this same concern about how prisoners' release-planning being thrown off completely by a prosecution, "[w]hen we think about inmates with mental illness, many of whom are homeless when they came in, it really put their release plans and transitional care, all of that, in a further state of limbo that I think can be really destabilizing, frankly" (INT069).

This mental health provider also raised the concern that criminal prosecution can be psychologically destabilizing for her clients, in part because criminal proceedings often result in a prisoner being transferred to administrative segregation or a new facility—often disrupting ongoing

access to mental healthcare. For example, she said one patient with an adjustment disorder was erroneously written up for indecent exposure, and in response "started to feel much more depressed and anxious and uncomfortable and just struggled a lot more. He says he was initially sent to their ad seg unit and then was isolated. It was just a horrifying experience for him. The whole write-up and the shame and the stigma…" (INT069). She also mentioned how another client with serious mental illness, who was charged with escape, had his treatment disrupted as he was facing charges in a county six hours away, which she felt could have serious psychological consequences:

> He was stable, he was on meds, he wasn't as agitated or angry. Then he goes up to court on this case, his treatment is essentially suspended, and he comes back and he will not re-engage in treatment. So, there are collateral consequences to, when we are sending people out to court, which is really disruption in continuity of care for these patients. In his case, there could be really severe consequences (INT069).

An Illinois prisoners' rights advocate also described how new criminal prosecutions can create a negative psychological cycle for prisoners with mental health issues—where they start to internalize their behavior rather than being given tools to address the root causes of it (INT022). A prisoners' rights advocate from California raised similar concerns about criminal prosecutions generating a pernicious cycle for clients with mental illness, as they lead to

> [j]ust more and more time, and so people get more and more institutionalized and sort of less able to function on the streets. It's really hard to go back to the streets for some people, particularly for people with mental illness or intellectual disabilities, and the longer you spend the worse it can be. It tends to just be this cycle. You get more and more time, you get dulled to it, you get institutionalized, and you get afraid to leave, so it's just very, very sad. It's sort of people who are thrown away (INT058).

In sum, the cases that the interview participants shared, across a range of jurisdictions, largely correspond with the survey and administrative data on prisoners with in-custody convictions presented in the section above. While not all prisoners charged with new crimes have mental illness—a majority do—some of whom exhibit severe psychiatric symptoms, and for these prisoner-patients, the consequences can be severe. In addition, as the Wisconsin data reveal, common charges

for this group include battery, bodily-fluids throwing, sexual offenses, and escape—many of the same types of offenses that were discussed by my interview informants. Moreover, the Wisconsin data show that prisoners who had serious mental illness had a higher mean number of in-custody sentences. One interview participant, an advocate for Illinois, observed this pattern as well. She opined that while not all prisoners charged with new crimes had mental illness, she felt nearly all of those who were *repeatedly* prosecuted suffered from some kind of mental illness, "because the people who are not mentally ill got prosecuted once and were like, 'no, thank you to that additional six years'" (INT142)—in other words, she suggested that any deterrent effect of an experience criminal prosecution was mainly limited to prisoners without mental illness. An advocate from New York echoed this same view: "fact is, once they criminalized throwing bodily fluids in New York, then the people without mental health issues stopped doing it" (INT047).

Together, these data support the conclusion that the criminalization of prisoners with mental illness is a phenomenon taking place in every jurisdiction studied: from New York to California, from Wisconsin to Texas. In the following sections, I explore the reasons that my interview participants gave to explain how and why prisoner with mental illness's behavior is criminalized, in other words, how symptoms may become classified as criminal rather than as something to be treated.

Mental Illness and the Structural Barriers to Compliance in Prison

How and why do prisoners with mental illness end up with experiencing criminal prosecution? At baseline, many interview participants described the struggles that prisoners with mental illness face in comporting with the rigid disciplinary rules they encounter in correctional facilities. As one Illinois prisoners' advocate said, running afoul of both the prisons' formal and informal social codes can cause prisoners with mental illness's behavior to be sanctioned:

> [P]eople with mental illness in prison tend to get in trouble for violating rules. They have a hard time conforming their behaviors to all the strict formal and informal policies and practices that are required in how to conduct yourself in prison. The prison is its own very special world and culture, and you have to be able to conform your conduct according to the rules of the road, both of other prisoners and of the system, and so people with mental illness tend to get into trouble more often, I think, in prisons (INT057).

A prisoners' advocate from New York, who also focused her practice on clients with serious mental illness, echoed these general sentiments—emphasizing how the prison experience can trigger behavior in prisoners with mental illness that can be classified as a disciplinary violation:

> For people with mental illness, and serious mental illness in particular, you know that emotional regulation is a difficult thing. It's something that requires treatment, that is not provided to the same extent, or to really any extent, that it should be… it's my impression that a lot of the discipline is, if you took a close look at it, it's tied to someone's ability to manage. I mean, the prison system causes maladaptive behavior. You have to be on watch all the time. You have to be paranoid. You have to be on your guard. And things aren't given to you unless you scream for them, even when you're in mental health crisis and you're asking for services. So I have had clients who say like, "I tell the staff I'm going to cut up, or I'm going to do this or that," and they're not taken seriously. So then the next step is to escalate that behavior, to start banging on the walls to like, I don't know, cause a disturbance. And then you get ticketed for that. And it's like, is that closely tied to your ... It's a response to not getting what you need, and what you need is tied back to your mental health need (INT173).

Similarly, a prisoners' advocate from California emphasized the global challenges that prisoners with intellectual disability and mental illness face in comporting with the expectations of the prison environment, and how noncompliance can be read as a disciplinary problem as opposed to symptomatic:

> So, I work directly with people with intellectual disabilities…I mean the challenges are extraordinary. Part of it is from largely untrained correctional staff dealing with people whose behavior is often, can be seen as frightening or incomprehensible or defiant, when in fact it's a result of the mental illness or the disability. And they have done some, there has been some training; CDCR is better than it once was, but it's still incredibly difficult for these corrections officers to be dealing day in and day out with people who they don't fully understand, and there's a lot of fear…(INT058).

A mental health provider from California said that while traditionally the focus has been on how "psychosis, paranoia, voices, delusions" impact prisoners' noncompliance, "I think that there are times where it's kind of missed that sometimes people can be really heavily influenced by things like severe, or not severe, but significant anxiety, for example, or depression or stress" as well (INT061). As another clinician noted, patients with severe depression may manifest anger, to the point where "they're barking back or talking back to a staff member, when they would normally comply or sort of be able to shrug off the indignities, the everyday indignities of the prison system, they might make a smart comment back and then get a write up for obstructing peace officer and performance of duties" (INT069). Even patients with non-psychiatric mental health issues, like traumatic brain injuries, may exhibit symptoms that can lead to disciplinary problems, for example, this provider mentioned a client with serious brain injury that had been misdiagnosed as psychosis, who "would take items out of the garbage every day in the day room and stack them up, who's violating rules all the time just around following directions. He wouldn't come out of his cell when instructed, he was really struggling" (INT069).

While breaking even seemingly minor rules (e.g., not coming out of cell when instructed) can lead to disciplinary tickets and administrative sanctions, more serious acts of noncompliance, like \ assault on staff members, can lead to criminal charges. One former prisoner from Illinois with serious mental illness explained that when unmedicated, his paranoia that staff were trying to kill him led him to act out in assaultive ways—spitting, head-butting, throwing urine—that were subsequently criminalized:

> They placed me in elevated security because they were saying that I was a threat and safety to the security and the staff and inmates because of my methods of assault, my behaviors I displayed. I was suffering from my illnesses and I was—I wasn't medicated properly. I wasn't receiving a proper treatment, so in not receiving those treatment, my symptoms, I was feeling like they were trying to kill me so I would like, I would

> act out, you know what I'm saying? Like defend myself. I was being provoked as well (INT159).

A Texas public defender shared a similar story about a client charged with staff assault, who had stopped taking his first-generation antipsychotic medications because of their side effects, and ended up "spinning out, losing touch with reality, and there's an allegation of staff assault. I mean, I really didn't have a lot of sympathy for a system that failed to address the basic needs of the patient and you know… they could have prevented this whole thing" (INT026). Another former prisoner who was designated as seriously mentally ill from Illinois echoed these sentiments, arguing that his assault cases were instances of self-defense, triggered by both his mental state and staff provocation, "I feel I caught the case like, yeah mental health issues because, for one I was stressed out, two I was in depression, a state of depression due to me losing my father… I don't like fighting. I don't like fighting unless I have to, and when it comes to police,[49] I don't like police at all…they push me to the point where I had to fight, I fight" (INT100).

Indeed, a prisoners' advocate and former prisoner from California also recalled observing how misunderstandings—and lack of training—of security staff could result in prisoners with mental illness being charged with staff assault:

> A lot of the officers don't have patience at all, which means, it's immediate, I'm not sure if it's training, or what it is, but the immediate thing is like, get over here and if you don't get over what they're asking you to do, "get against the wall," and the next thing you know the person, or, "I don't understand what's going on," which creates staff assault (INT134).

Another advocate and former prisoner from California raised very similar concerns; observing that prisoners with mental health issues react badly to routine searches or orders, and felt that security staff needed to be more understanding:

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[49] This participant and other former prisoners interviewed often would refer to correctional officers as "police."

> [T]hose who have mental health issues and they respond or react in ways that are not appropriate, when asked to be searched and things of that nature. So again, a lot of it goes to training, but it also goes to culture. If I'm an officer and I know I've aggravated this guy and he throws his lunch down, maybe he doesn't want to eat his lunch, I don't care, but I shouldn't take the next step and say I'm gonna charge you for trying to hit me with that lunch when I know you didn't do it (INT048).

A public defender in Texas also felt that often cases of staff assault would come from guards not only not understanding mental illness," but also from their provocation, arguing that guards "poked at them" (INT032).

In addition, however, many of the advocates, former prisoners, and mental health professionals I spoke with emphasized the structural factors that contribute to prisoners' symptoms being exacerbated in correctional settings, which are often woefully ill-equipped to meet the needs of their population with mental health needs. For example, one prisoners' advocate from Texas explained how this lack of treatment bed space can lead to criminalization:

> Individuals with mental health issues have a real problem. There's a number of issues. First off, there's not enough bed space for the psychiatric patients, mental health patients in TDC, so what they wind up doing is, they cycle them through. Somebody acts out, after he catches, usually it's after he catches a couple of disciplinary cases, then they finally say, "We got to send him to Skyview"…They then put them in there and they get him stabilized and most of them, but because of the shortage of bed spaces, then they return them to the same environment to which they decompensated. So, it's a vicious cycle in many cases, and as I said, they not only pick up disciplines, but many of them wind up picking up criminal cases (INT174).

A New York Prisoners' advocate raised similar concerns about the Department of Corrections and Community Supervision (DOCCS)—namely, that dedicated treatment slots for people with serious mental illness were lacking (INT054). Another New York prisoners' advocate connected this lack of treatment bed space to increasing the risk of disciplinary sanction of those with serious mental illness who must remain in the general population (INT175).

Advocates thus felt this dearth of specialized "treatment bed" space acutely across jurisdictions. In Texas, the standard was so high, that one lawyer explained you had to be "floridly

psychotic" to get a bed, and even then, once stabilized, he had clients who would be transferred out, only to commit suicide (INT126). In Wisconsin, one public defender felt that because "a fairly small number of beds" were reserved for juveniles with serious mental illness at the dedicated youth treatment center, most of her clients were only transferred *after* they had committed a battery and were criminally prosecuted, rather than at intake (INT182). For adults, too, another public defender in Wisconsin connected the lack of treatment beds in the adult treatment facility—the WRC—to the use of criminalization. Criminal prosecution, she said, is "a way to say you can't do this—you have to face more time now. That's the only sort of thing. What's the other option? There's no treatment places. They'll still be there" (INT156). The interview participants' identification of the lack of specialized mental health services inside the prison systems for those who were the most ill as a factor contributing to criminalization is consistent with the larger scholarly literature on the criminalization of people with mental illness in the community literature—which, as discussed above, has long attributed criminalization of people with mental illness, at least in part, to the lack of psychiatric hospitalization options post-deinstitutionalization.

Beyond just the lack of specialized psychiatric inpatient-level services for prisoners, interview participants also pointed to other inadequacies of the mental health treatment available, all of which meant that symptoms are often under-treated and under-identified. One California mental health provider felt that general treatment resources for prisoners varied widely across the state—whereas in some facilities prisoners may get "8 hours of yoga a day" and "really intensive restorative-justice victim-centered DBT groups," in other facilities, "people have these giant caseloads, they don't really have spaces to meet with anyone, they don't necessarily have a treatment team" and as a result "there's probably people still rotting in their cells not getting a very simple medication" (INT118). One Illinois prisoners' advocate raised the concern that the privatization of state prison medical

services played a role in the inadequacy of treatment options—incentivizing psychotropic treatment and group therapy over individualized therapy:

> Some [prison health services] are not privatized, but many are, and the privatization is a huge problem because again, it incentivizes—it's much cheaper to throw a formulary pill at somebody than it is to pay sufficient numbers of healthcare staff and mental health staff to provide therapy and actually work to provide treatment and come up with individualized plans that take into account a particular person's mental health issues and how they are interacting with their environment and all of those things (INT022).

Another prisoners' advocate from Illinois recalled a former client who was very seriously ill, but the prison "essentially withheld psychiatric treatment until they were suicidal" (INT001). Former prisoners in Illinois explained that even procedures for suicidal prisoners who were placed on suicide-watch were often inadequate, and punitive, where tactical teams would "strip you naked and put you in the suicide room" leaving you "maced up" and not allowed to shower (INT100). Another former prisoner emphasized the staffing failures that failed to prevent serious self-harm and suicide:

> They supposed to do 30-minute walks and stuff like that, they don't do none of that. If you look at the cameras there, you would see an officer walk every hour, hour and a half. They supposed to be on continuous watch, sitting in front of the door watching somebody and they're at the door asleep. The person in the cell is able to cut his artery and hurt himself and almost bleed out, but you sitting right there, so how come you couldn't call somebody before the person start engaging the cutting? How can a person on suicide watch get a paper clip, a staple, how can he get pills? All this come because they don't watch, they leave you there to do. The thing is, "If you gone do it you gone do it, we gone let you do it." You gone get tired of doing it, or you gone die (INT159).

New York advocates also raised serious concerns about the adequacy of the suicide-watch observation units in the state prison systems in comparison to what would be available in a state psychiatric hospital. As one attorney said, there were often not enough to meet the need, which meant that some suicidal patients were essentially just held in solitary confinement (INT173).

Together, these accounts paint a picture of a prison mental health environment where, too often, there are not enough specialized treatment services provided to meet the needs of even those

identified with serious mental illness, which can leave prisoners vulnerable to disciplinary and criminal sanction. But in addition, the interview participants I spoke to raised concerns that even more fundamentally, there were barriers to prisoners even being adequately identified as having an illness and were thus excluded from treatment and disciplinary protections entirely. For example, a California provider said the problem with under-identification is real, and had multiple causes, including lack of insight, interest in services, or lack of screening:

> I treat everything from adjustment disorders, anxiety, depression, PTSD, of course also all the way up to schizophrenia, there's lots of personality disorders that we also are managing, lots and lots of dual diagnosis...The one thing that I just want to point out that I think is really interesting when we talk about treating mental illness in prisons and jails, that some of the—and I hate to use the term inmates—but some of the sickest people in custody who I've encountered are GP [in general population]. They're not enrolled in a mental health program because either they lack the insight, the willingness to receive services, or somehow they have flown under the radar until they don't anymore. Until they're either referred by a staff member or there might be some other reason than they come to the attention of the mental health department, but it's just one thing that I think is important to be aware of is some inmates with the most severe mental illness are not even in the treatment program itself, which is, just want to point that out (INT069).

A New York advocate attributed problems with identification in part to lack of adequate staffing resources in rural reception centers (INT179).

Other participants felt that in some cases, prisoners rationally sought to avoid the label of "mentally ill," which could lead to risk of civil commitment post-incarceration and reduced programming opportunities. One California mental health clinician shared an example of a client who had feared being identified because of the threat of subsequent civil commitment (INT118). Another California provider shared a story about how prisoners who were members of gangs were also disincentivized from obtaining mental health treatment because of the stigma inside (INT069).

In addition to the general shortage of mental healthcare resources in many prison settings, and the failure to adequately identify those prisoners with mental illness, the other main structural

factor that repeatedly came out in the interviews as a cause of some of the conduct that could be criminalized was solitary confinement. One mental health expert who had previously served as a monitor of correctional systems in a number of jurisdictions explained the harmful cycle that solitary causes in prisoners with mental illness:

> So, what happens is, it's pretty commonsensical, but the literature now is very clear and supports it, that placing people in long-term segregated housing makes your mental illness worse, and also creates a de novo mental illness. I've heard it called "SHU Syndrome," "Security Housing Unit, or Solitary Confinement Syndrome." So, it results in certain behavior…throwing feces at guards, assaulting, masturbating, exposing yourself to female guards, stuff that would be a punishable offense in prison if it were perpetrated by a non-mentally ill person….So if you save up feces and throw it at a guard and hit the guard with it, that's assault. It's just like if you slipped your cuffs and took a swing at somebody. But with the mentally ill who do that, it's a product of their mental illness. So then, in the old days, you do something like that, you get more seg time. That makes it worse. You act out again because you're in seg, and then you get more seg time, and then you get worse; that's how it goes. So, and it's the same thing we saw in every prison system I've been in (INT011).

Indeed, this view that placement in solitary confinement itself imposed a significant risk of decompensation, leading to antisocial behaviors that could be subsequently criminalized, was so widespread among my informants that it is taken up as a separate matter in Chapter 4.

Thus, for many of the informants I spoke with, it was impossible to separate the "noncompliance" observed in prisoners with mental illness from the structural constraints of the prison itself. When prisoner-specific criminal legislation is mobilized within this structural context, there was the pervasive sense that it created a risk that some of the nation's most vulnerable prisoners would be subjected to further criminal sanctions. In the next section, I turn to cultural factors—namely the punitive, security-oriented culture of prisons and security staff that overwhelmed the rehabilitative, treatment-oriented culture of mental healthcare professionals—that participants felt also help to explain how and why prisoners with serious mental illness may experience criminal prosecution for noncompliant behavior.

Across jurisdictions, interview participants often explained the discipline and criminal sanction of prisoners with mental illness with reference to a global punitive culture within prisons—where logics of control, security, and punishment dominated security staff interactions with prisoners with mental illness and severely curtailed the reach and power of alternative treatment-oriented logics of mental healthcare providers to intervene in a disciplinary context. Several advocates felt that the rise of mass incarceration and the severe prison overcrowding that accompanied it shaped the punitive culture still dominant today. As one New York advocate opined:

> So to me, the notion was, we cannot control the population because we are over-capacity, and so the only way we can control, this is a kind of correctional lore: the only way you control is by power. Care, custody and control; it's control that is 90% of what they do, and if we can't control them by dealing with them in any humane and sort of effective way, it's got to be force, and force has two components. It's discipline, and it's also criminal prosecution. It's saying: "We're gonna keep you in longer." So, I see them as very much mirrored of the same philosophy of control, control is done by punishment, and we have to use whatever mechanisms we have to do that (INT175).

Although several participants noted a movement away from this punitive culture and towards rehabilitation in the wake of decades of prisoners' rights litigation and legislative reform, many felt that there was a long way to go to transform prisons into institutions capable of rehabilitation and reintegration (INT118; INT053). As one New York advocate, put it, although legal reforms had started to reduce the prisoner population, they did not yet have appreciable effects on the culture inside:

> You know, I will say that quantitatively, the numbers are dropping in New York. A lot of different reasons for that. Certainly, we've had significant law reforms…That said, I haven't seen demonstrable changes in the way that prison staff interacts with incarcerated people. I haven't seen demonstrable changes in the provision of mental health and medical care. I haven't seen any demonstrable changes in practices of sex abuse and sex assault. I haven't seen any of that, the stuff that we've been challenging for decades []. I haven't seen really demonstrable changes in those areas. We're in an interesting place, where a lot of the Department's policies are catching up with the

> Constitution and catching up with...they're where they should be in many respects, but there's a policy practice dichotomy that is extremely difficult to challenge. Definitely on the mental health front, that's a big issue. Definitely on the disability rights front, that's a big issue. Now it's like: how do you change culture beyond just policy? (INT053).

Many interview participants felt that this persistently punitive orientation of security staff helped to explain why the noncompliance of prisoners with mental illness was treated as a disciplinary or criminal issue, even when it could arguably be linked to symptoms. One New York advocate suggested that some corrections officers were deeply violent and abusive, and that explained the punitive orientation: "I watched the video of George Floyd…The guy. I mean it was the face of a corrections officer. It was chilling, just chilling, and there have been some extremely, nasty, brutal deaths in the New York prisons that don't get enough investigations (INT179). An Illinois prisoners' rights advocate explained that a punitive disciplinary response was in part because correctional staff were not adequately integrated into the treatment team for prisoners with mental illness:

> I have seen just a really overwhelming amount of clients who have any sort of mental health issue. It could be something as not blasé but something as common as a mild anxiety disorder. And then we've had clients who have severe schizophrenia that results in severe behavioral disruptions. But I think what we've seen in all of those clients is that the mental health program that they are participating in, which we know really isn't like an actual program or a real individualized plan, but that's totally separated from the rest of that person's life in custody. And the correctional officer who walks that gallery or who supervises yard or who overseas when that person is working isn't at all connected to the mental health treatment. And so their response, their training, their culture is if you do anything that I don't like that I see as noncompliant, I can discipline you (INT022).

Frequently, however, participants also pointed to security officers lack of training and knowledge in alternative, more treatment-oriented modes of interacting with prisoners with mental illness. A retired Texas correctional worker explained this dynamic:

> [F]irst of all they don't know how to deal with that type of situation, or they know ahead of time that this person may be mental and the other person doesn't deal well

> with being told what to do. So they have no idea how to deal with them than through violence rather than through talk, so we don't know that at the time, so there's a lot of things I think that tend to get overlooked, but they do try, they do try (INT033).

Mental health providers echoed this concern—that security staff were not adequately prepared to interact positively with people with mental illness, and that this lack of knowledge could lead to conflict, violence, and punitive responses that might otherwise be avoided. For example, an Illinois prisoners' advocate explained:

> I think that security staff have a hard time seeing another way. This is the way that our system has worked for a very long time, and when that's all your used to as a control technique, is segregation, then they don't really understand what the alternatives are. They also don't really understand, because they haven't seen, how it can be different. And so I think they're scared of change (INT057).

As this advocate implied, obtaining compliance with rules and regulations might actually be fostered more effectively by treating underlying mental health issues—but such approaches were not embraced in this jurisdiction, or in any of the other jurisdictions studied.

In addition, participants noted how particularly challenging seriously ill prisoners can leave "staff just feeling exasperated, like shocked and overwhelmed, and really having a range of reactions" which can include "getting involved in excessive use of force and really acting out and retaliating against the inmates" (INT059). In addition to exasperation and frustration, interview participants also raised the concern that security staff, who have their own mental health challenges, could become resentful of prisoners receiving mental health treatment and accommodations, as one mental health provider said:

> Sometimes they're like, "Why should I care about inmate mental health when nobody cares about me? I just watched somebody get stabbed and you're worried about how they feel? What about how I feel?" And they never articulate that with words, but with their behaviors. So when we really value and center the mental health of the staff, then they feel secure enough to value the mental health of the inmates (INT059).

Another California mental health provider explained that as security levels go up, she found that staff hostility towards mental health treatment staff also increased, in part because of their own fears

of violence and also because they felt maximum-security prisoners were afforded too generous of privileges:

> So, the interaction [with security staff] is very different at this level than it is at higher levels. At a higher-level institution it, there's significantly more stress, and so that usually results in much more tense interactions, because at a higher-level institution, mental health is considered—it's looked very negatively on by custody staff. I would say probably most custody staff do not believe in mental health. They do not believe that the men should have access to treatment, and so there's a lot of tension. But at a lower level institution, there's much less tension…and so what I think is extremely common at the higher-level institutions is that obviously there's a lot more violence, there's a lot of danger, and that coming from the inmates themselves. They have a lot of, the gang politics at a Level IV are at their max, virtually everybody is required to participate in that, so there's a lot of activity around that, and that really put the inmates at risk, but it also put the staff at risk, and because the officers have the most interaction with the inmates, it really put them on edge (INT061).

Although interview participants coming from security backgrounds were unfortunately quite limited in this sample, these responses provide a window into how at least other actors in the system—prisoners' advocates, mental health providers, and former prisoners—perceive security staff's orientation to those struggling with mental illness.

Perhaps most surprising, however, in these interviews, was the pervasive sense from these informants that the punitive culture of security staff was able to, in many cases, overpower the treatment-orientation of mental health professionals working inside prisons. A prisoners' advocate from Illinois felt that the attitude of correctional staff "infects the medical staff and mental staff," and as a result, "they take this adversarial position where the best thing that you could say about an inmate, to use their words, is that they are 'compliant.' And what does that say about a person where you think most highly of the person, because you consider them to be compliant to your demands?" (INT022).

Participants frequently explained the power of security staff over mental health professionals in terms of dependence. Mental health staff can't meet with patients without security transporting them, and they rely on their protection in the case of violence. As one New York advocate said,

> From my observation, [the Office of Mental Health] functions like they're in DOCCS' house. What I've come to feel is they are so reliant on DOCCS for everything, for transport of appointment, for letting them on the unit to see inmates, for their own safety and security, that they sometimes identify too closely with DOCCS. And as an advocate, I found it really hard to break that jam. A lot of time you'd get from executive level of OMH, would say we're complying with DOCCS policy. That's why it was so hard to fix these systems. You would hope the clinical folks would be an advocate. Things like putting people in restricted dockets. They seem to acquiesce to DOCCS. Every now and then you find a really good therapist who would really get in there—but it wasn't the norm. And there's such a DOCCS presence, even mental health units are guarded by security (INT170).

Unlike in a psychiatric hospital setting, where medical authority is often supreme, in the prison, interview participants frequently echoed this view that mental health providers were "guests" of the correctional center and didn't have authority to intervene or prevent the administration of severe disciplinary sanctions against their patients like solitary confinement (INT179). A mental health expert who had monitored prison conditions in Illinois and California assessed the situation starkly:

> The clinicians are basically at the mercy of the custody staff. I don't care what they say, I've seen it and they've even admitted it to me in private. So if you get a reputation, like soft on crime, kind of, then you're screwed. Custody staff won't be there when you need them…They can be in danger, and some real passive aggressive stuff that you see. And not just in danger, the clinical staff relies so heavily on custody staff in order to get their work done. They've got to move guys out to go to group, they got to move guys out to do individual therapy, they've got to move guys out...they say, "Oh, we're too busy, we can't do it." So, it's not just, it is the danger part, but in addition, it's just that other passive aggressive stuff that they do to punish you (INT011).

The security staff/mental health staff power imbalance may help to explain why so many seriously ill patients are classified by mental health professionals as "malingering," even when engaging in self-harm or suicide attempts. According to a New York prisoners' advocate:

> I think the reality today is very much what the reality was in the mid-2000s…where manifestations of mental illness are still viewed as disciplinary issues. That's just the dichotomy in prisons. I've learned that through reviewing disciplinary records for clients… I've also just seen this in the suicide area and in the self-harm area, where virtually every cry for help is considered to be "malingering," considered to be agenda-driven to avoid certain prison conditions. I mean, that's a phrase that the Department and the Office of Mental Health use all the time in these records. I've seen and I've worked with clients who've cried out for help for years and have eventually completed suicide, because all of those cries for help were ignored (INT053).

Similarly, a correctional mental health expert explained how prosecutors, security staff, and even mental health professionals frequently failed to see prisoners' noncompliance as symptomatic, even when they were designated as seriously mentally ill:

> Prosecutors don't believe they're mentally ill. Or if they're mentally ill, it had nothing to do with the crime. So, that's the attitude that carries over into the prison system. These guys may be mentally ill, but this has nothing to do with the fact that they spit at a guard or they masturbated in front of a female staff. That's my take on this. That they just don't... and this is just pure speculation on my part, is that if they believe these guys are mentally ill, they don't want to, they can't be seen as being sympathetic (INT011).

The former prisoners I spoke with who had been diagnosed with serious mental illness and charged with new crimes while incarcerated also observed the lack of authority of mental health professionals inside. One Illinois former prisoner experienced mental health providers beholden to security, even for treatment decisions:

> Everything that goes on with the mental health staff, it's not really even mental health that provides the services. It's like security dictates the page to tell mental health what to do. They tell them how long to keep you on [suicide] watch, they tell them if they think you should get a shot to sedate you, they think you need to be in four-point restraints, they think you need to see a doctor. Sometimes the judgment can be used to somebody that can't actually say what's going on with them, they need help, but it's like it's only certain ones they do that for, and they only do that because they don't want to be held liable if the person is about to die in the cell or something (INT159).

Another Illinois former prisoner shared his positive experience with his therapist while in youth prison, but felt that it was ultimately constrained and that she did not have the power to protect him from the threats he perceived from security staff:

> She was like a skinny white lady, she was young though. She was cool as hell….Every time I get mad, they'd call her every time I do something, like going crazy, they'd call her. She'd come to my door, and she would just look at me, and I would see her eyes, her eyes, she got some blue eyes, bro. Like that little thing right there, she got some blue eyes, and her eyes would just give worry, and I just see a tear drop and I can't even look at her like that, I'm like "Damn shorty." That shit make me so crazy, because I'm like, "Damn."...Yeah bro, I couldn't even look, because she know they was doing wrong. She know they was doing some bogus shit, but she couldn't do about it…so she like, "I want to help you, but I can't. I'm trying to help you, but I can't. I'm trying to do whatever I could, but I can't." (INT024).

Mental health providers also perceived this power-imbalance. For example, one California provider said that "when we're all pulling in the same direction, we're certainly capable of working cooperatively, but many times of course our professional mandates diverge from theirs" (INT069). As one example, she said that "we all know as mental health staff, we're supposed to at all costs avoid" recommending their patients single-celled "for their stabilization, or their safety, or others' safety from a mental health perspective," because "it really pisses custody off":

> They have less bed space, they have to scramble to accommodate that person, it makes it more challenging for them, and so, you know, the person is more difficult to house, and so that's just one tiny example of where, when I make the determination or the recommendation for a single cell, it's never just considering what's best for the patient, it's also considering the "safety and security needs" of the institution. That's just one tiny example, but there are so many others…(INT069).

Another clinician reported feeling like "a fly on the wall" when she attended a patient's classification hearing, where they decide on his security level and visiting privileges, saying she "didn't have any juice in that situation" (INT118). Her presence was appreciated by her client, but she felt her authority was quite constrained. Given that mental health professionals working in prisons often have significantly higher levels of education and professional training than security staff (who are often promoted to management positions within the prisons), this lack of authority is somewhat surprising. It demonstrates how in certain institutional environments, medical expertise and authority is severely circumscribed.

Advocates expressed the view that increasing the involvement and power of mental health professionals in disciplinary contexts would help address prisoners' noncompliance in a less punitive, more equitable way. For example, one Illinois attorney said:

> I think every time there's a behavioral incident, what we would want to have is the treatment team looking at that, being like "hey, what's going on," and let this incident happen, and maybe really doing that approach and looking at what is happening with their mental health treatment that can maybe be more preventative. If somebody is starting to act out with behaviors that are a result of symptoms of their mental illness or difficulty coping with the very harsh environments that they live in, then there may be things that can be done to try to prevent further deterioration, like more mental health treatment and just more out of cell time and stimulation. It's not all that everybody needs their medications amped up, or that they need psychotherapy around the clock. They could oftentimes use some psychotherapy or some real individualized counseling, which is really rare in our prisons, but also just having something to do when we recognize that we don't have enough staff and we don't have enough resources for programs, what are we gonna do because we put these people in boxes where we know they're gonna suffer (INT057).

In addition, a New York advocate felt that hearing officers were not proactive enough at understanding the mental health condition or history of prisoners charged with disciplinary offenses, even when "conduct screamed out" that the person had serious mental illness (INT047).

Interview participants explained how they felt that involving treatment professionals in response to incidents could help get to the root cause of problematic behavior. A California mental health provider felt that, for actions like bodily-fluids throwing, which she acknowledged was "really horrible," that providers could better see "that the person was angry and so then to look more underneath, like the underlying problem and to think about, to think more about addressing that" (INT152). A New York mental health provider said that although security staff would often consult her about in-house disciplinary charges, "it was not written into policy, although it probably should have been." She mentioned a situation where a prisoner threw a pillow at a deputy in the mental health ward, was charged with assault "for a frickin' pillow" (INT059)—a situation she felt she could have helped to deescalate.

Taken together, interview participants largely described a cultural landscape in prisons where mental health professionals did not have enough power to offer meaningful nonpunitive alternative responses to prisoner noncompliance. In the next and final section, I will discuss how criminal-legal safeguards for prisoners with mental illness are also insufficient to overcome the already-constrained power of mental health providers.

Lack of Criminal-Legal Safeguards

As described above, the advocates, former prisoners, and mental health providers interviewed all offered accounts of the informal power dynamics between security staff—and the punitive institutional culture of prisons more generally—and mental health staff, which reduced their influence in the handling of incidents of noncompliance involving their patients. But what about formal safeguards for prisoners with mental illness to prevent punishment for symptomatic behavior? In recent decades, class-action litigation brought by advocates in a number of jurisdictions under study here, including California, New York, Illinois, and Wisconsin, placed formal limits on the ability of correctional agencies to subject prisoners with serious mental illness to their most extreme disciplinary sanction—solitary confinement—without at least some type of mental health review in the disciplinary process.[50] The perceived (in)adequacy of these disciplinary mental health reviews are discussed at length in Chapter 4. But as discussed in Chapter 2, no jurisdictions appear to have analogous administrative mental health review procedures for criminal referrals even on the books. The criminal-legal system itself, and the substantive legal protections guaranteed to criminal defendants that require competency for proceeding and the invocation of the not guilty by reason of

[50] See *Madrid v. Gomez* (N.D. Cal. 1995); *Jones'el v. Berge* (W.D. Wis. 2001); *United States v. Dole* (E.D. Wisc. 2008); *DAI v. New York State Office of Mental Health* (S.D.N.Y. 2007); *Rasho v. Walker* (C.D. Ill. 2015).

insanity (NGI) defense, are the main formal safeguard for prisoners with mental health issues. Participants frequently explained why these criminal-legal safeguards are not sufficient to prevent the prosecution and conviction of prisoners with serious mental illness.

One mental health provider explained that in California, while for certain disciplinary rule violations, a mental health assessment would be done for her patients, those assessments aren't used to determine whether criminal referrals proceed because referrals are just based off offense-type: "if everybody who's charged with attempted murder is gonna be a DA referral, everybody who's charged with distribution or attempted distribution of narcotics is gonna be a DA referral…it's just across the board that certain rule violations are gonna be referred" (INT061). Many of the prosecutors I spoke said that they do not receive any official mental health information on the defendants from prisons upon referral (INT050; INT051; INT039). As several prosecutors explained, typically the only way they learn that it may be a concern is if the prisoners' defense attorney raises competency or insanity as an issue in the case and asks for an evaluation:

> In which case we say, "okay, let's do the psych evaluation." And then it either comes back that they're competent or they're not, and apart from that, there's all kinds of things that could technically constitute mental illness. Maybe they're receiving medication or something, but it's just, we're just gonna listen to a professional about whether or not those mental illnesses are significant enough to relieve the person of criminal culpability. So, apart from that, unless it rises to that level we just don't find out that much about their mental illness. Sometimes, it presents itself on its own in the report, for me this happens. I know I'm speaking for a lot of my colleagues when I say this. Sometimes, we read an offense report and before we even hear from the defense attorney, we'll say, "This just sounds like this person has a severe mental illness," and we'll look at their mental history, and see something that makes us think they need to get evaluated, and we do get them evaluated. But apart from that, we don't find out anything usually until the plea bargain. Or until we start pulling their records to get ready for trial (INT160).

Another prosecutor in Texas I spoke with also said that it was not uncommon for him to be referred cases where the defendant had mental illness, and in some cases, those defendants may be found to be incompetent and avoid prosecution. In addition, he said his office may agree to dismiss the case

if the charge was minor, but for violent cases, there would be little to deter the prosecution from proceeding:

> Yeah, obviously there's a lot of mentally ill people in prison. I mean that's—I think that goes without saying. We do get those cases and we do treat them just like you would in the free world…there's a lot of times where we just won't, if a person, we just won't take a case. If it's clear the person is mentally ill and it's a small amount of prohibited substance, that's one thing, so it's case-by-case. If it's a violent case, we'll take a good hard look at it, and first decide whether this person committed this offense because they were insane at the time...and I mean it, sometimes just getting someone to court is a hard, a hard task because TDCJ is not going to transport them from a unit to a courtroom if they're having any sort of mental health episode, and so sometimes these cases just sit around forever while we, till you get to a point where that person is capable of going to court (INT021).

By this prosecutors' account, and according to others I spoke with, prosecutors may set a fairly high bar to decline to pursue charges on the basis of mental health issues—to the point of proceeding even when the defendant is in a dedicated mental health unit on suicide watch or when it's impossible to transport a prisoner to court due to a mental health crisis if they perceive the conduct to be egregious enough. As prosecutors enjoy considerable discretion on those decisions, it's highly likely that this practice would vary between individual prosecutors as well as between jurisdictions. As one Texas public defender said, her clients with mental illness would most often face charges for possession of a weapon (a razor blade) or for "dashing," throwing urine on a guard. In 90% of these cases, she estimated, there was no injury to anyone, and although she would frequently request a competency evaluation, there was no formal process to get the court to dismiss charges against prisoners with mental illness (INT148). But in contrast, one Illinois prosecutor I spoke with said that bodily-fluid throwing was alleged criminal behavior that on its own might send a strong enough signal that there are serious mental health issues in play to avoid prosecution:

> We have bright-line test, and it's terrible that we joke about this stuff, but [I'm] just giving you the inner workings. Whenever you hear or see people talk about eating feces and urine, that pretty much tells me that they're crazy, for lack of a clinical term. And

> you start playing with bodily fluids like that, it raises a red herring, especially if they're consuming them. Which happens all the time out of mental health (INT004).

Once the criminal referral is made, defense attorneys described the steps they would take to help their clients with mental illness avoid criminal liability for their conduct. One criminal-legal safeguard for defendants with mental illness or intellectual disability is competency determinations—which hinge on whether the defendant is competent to stand trial and participate in their own defense. If a psychologist finds they are not competent, it does not result in charges being dismissed, but instead the state may make an effort to "restore" the person to competency via treatment or forced medication, at which point proceedings may resume. In Texas, both prosecutors and defense attorney interview participants alike said this was something that the state would undertake "especially on a more serious case of throwing urine" (INT040). Unfortunately, I do not have data on how many or what percentage of prisoners are referred for competency restoration.

Of course, many prisoners with mental illness are competent to participate in their own proceedings—they understand the courtroom actors and their role in their own defense—but allege that at the time of the offense in question they were not legally sane. In this case, prisoners and their attorneys may invoke an NGI defense. However, those legal standards are extremely high, typically they require that the person not understand that their conduct was wrong. As one California mental health provider explained:

> Yeah, I remember not understanding that. How is it possible that prisons are full of people with mental illness? There's an NGI thing... and the thing is, you can totally still be ill and think you're doing... you can know that you're doing something wrong, but it can be in the name of whatever your illness is. What was that famous case of that woman that drowned her kids? She knows, she knew that killing children was wrong, but when the delusion is telling you that if you kill them it will save them from eternal fire, then wrong kind of takes on a different hue. Yeah, it was always striking to me that the law doesn't actually take into account the symptoms of mental illness (INT118).

Similarly, another Illinois advocate shared her frustration with legal standard for competency and the NGI defense, which she felt helped explain why so many people with serious mental illness were incarcerated:

> I have to say, one of the last cases I did, or that pushed me over the edge at the appellate defender, was it was a guy who had, I mean, a documented history of just absolutely florid schizophrenia from a young age on, in and out of hospitals, anyway, this guy had killed his mother, no... he killed his sister because he believed that his sister was taking the neighbor's dog, a Labrador named Blueberry, over to rape his mother nightly, and there was a vast conspiracy, so he killed his sister. They allowed, 1) they found this guy competent to stand trial, 2) they allowed him to waive counsel and represent himself and it was a fucking farce. I mean, just a basic notion of what due process and of what a fair trial, I mean you read this transcript and you're like, this is, I cannot believe, and I lost that fucking appeal. So, it was, and the appellate court said, "You know what, he said on the record he understood he was waiving counsel, and so we're gonna uphold this." This was a totally, this was an inequitable, unfair process, and it was at one of those points I was like, I don't want anything to fucking do with you people. I'm out (INT104).

Both competency determinations and the strength of an NGI defense depend on psychological evaluations which are court-appointed for indigent defendants, so much turns on the quality and independence of the examining psychologist, which one former prisoner from Illinois questioned in the context of his criminal prosecutions:

> Yeah, I had psychiatric diagnosis, I was really ill at the time. I had a psych eval examination done on me. The court still pursued with it. The [] county used the same, the same psychiatric doctor to do all their examinations, so it's the same result; they all work in cahoots (INT159).

Advocates from other jurisdictions also found that some very ill clients were found competent by the evaluator. One Texas defense attorney described a client who ultimately received an 8-year sentence for throwing bodily fluid despite being very ill:

> I had a fella who was always throwing, he was always shooting really nasty poopy water out of a shampoo bottle and he was in segregation. So, he was alone in his cell and he was, he didn't like people of a different race than him and he would always shoot the people, like if Hispanic people that came by, or if they were Black and they came by delivering things for the prison, like food, or cleaning up, he would try to hit them, and he was found competent. He was serving time for murder, which definitely was

> brought about by him not being right mentally….So, after he was found guilty he was facing, I think 2-20, we went to the judge for punishment instead of letting the jury choose, and the judge sentenced him to 8 years, so they added 8 years onto his 6-year sentence (INT040).

Moreover, there may be some reason to believe that not every person who has a legitimate chance of succeeding with an NGI defense makes use of it. A Wisconsin public defender said that in her experience, "9 times out of 10" her clients with mental illness are "very resistant" to plead NGI because doing so would increase the chances that they would be transferred to the Wisconsin Resource Center, because in their perspective, "it's where the crazy people go" and it can prevent prisoners from being eligible for other programming (INT156). Post-conviction, there is also little room for advocacy, even to restore good time that was reduced via administrative sanction. As one Illinois prisoners' rights attorney said:

> Once you're stuck in prison, there's no way out in fact. Thanks to criminalization of mental illness, you can be quite stuck for a very long time, and unless you have a [post-conviction claim] that gets past a certain stage, you just don't have any right to an attorney, at all (INT142).

And finally, there are limited defenses to liability for prisoners with mental illness other than NGI pleas. One Illinois advocate noted, although there are prisoner-specific criminal statutes (see Chapter 2), there is no special defenses available for those that are in custody when the crime occurs, despite the highly coercive environment (INT142). Thus, taken together, there was a widespread sense among the interview participants that the criminal-legal safeguards that do exist to shield the prosecution of people lacking mental capacity to understand the criminal proceedings or to form the requisite state of culpability from criminal liability are ultimately not sufficient to protect most prisoner–defendants with serious mental illness from new criminal convictions and extended sentences.

CONCLUSION

This chapter has sought to demonstrate that for multi-faceted structural and cultural reasons, prisoners with mental illness continue to be subject to criminalization while incarcerated across the country. In carceral settings with too few treatment beds and where mental health expert authority is circumscribed by a culture of control and security, prisoner noncompliance is disciplined, and in a subset of cases, subsequently criminalized. And once taken to criminal court, the criminal-legal competency and sanity requirements are not sufficient to shield defendants with even quite serious mental illness from liability. The interview data reveal that as with criminalization of people with mental illness in the community, the criminalization of prisoners with mental illness also occurs in the structural context of a prison "community" with a chronic shortage of psychiatric hospital beds and lack of investment in treatment resources. Moreover, the data show that in the highly punitive culture of prison settings, the jurisdiction of mental health providers over the response to their patients' behavioral issues is severely constrained, with security staff firmly governing the disciplinary space, even for those classified as seriously mentally ill.

Furthermore, the data presented here point to the fundamental limits of provision of punitive care in carceral settings. For prisoners on the mental health caseload not assigned to inpatient-level treatment, they experience care in an environment that is structurally deficient—where myriad disciplinary rules become impossible for some to navigate, at some points exacerbating systems, and where noncompliance is treated predominantly as a disciplinary or criminal-legal problem. Moreover, their clinicians, despite being endowed with more education and professional credentials, lack the institutional and cultural power to intervene on their behalf in moments when perhaps they need them the most.

The data presented here are limited, undoubtedly. Future research on the scope, causes, and consequences of the criminalization of prisoners with mental illness in the United States would benefit from better administrative data from additional jurisdictions, and interviews and observations with a broader array of system actors—more frontline correctional workers, correctional administrators, and mental healthcare providers, prisoners, and prosecutors. Nevertheless, these data do provide a first glimpse of this social phenomenon, aiding in some initial understanding of the share of prisoners with in-custody offenses who have mental illness, as well as some of the social mechanisms underlying it.

In Chapter 4, I take up a line of inquiry ever-so-slightly opened up here: what is the relationship between prisoners' placement in solitary confinement and their criminal prosecution? The BJS survey data showed that a significantly higher percentage of prisoners reporting in-custody convictions were in cell confinement than the overall population of survey respondents. Interview participants time and again offered their perception that a large percentage of prisoners with in-custody offenses were in segregation at the time of the criminal proceedings, and that prisoners with mental illness often decompensated in response to isolation conditions. How are new criminal sentences "stacked" on top of solitary confinement? And how might administrative sanctions like solitary be responsible for *producing* noncompliant behavior in prisoners with mental illness that is subsequently criminalized? These are the questions I turn to next.

CHAPTER 4

THE SICKNESS OF SOLITARY: PUNITIVE CONDITIONS AND THE CREATION OF CRIMINALITY

INTRODUCTION

A line of television cameramen stood at the ready along the back windows of a Chicago plaintiff's law firm's slick high-rise meeting room. In a few minutes, Illinois State Representative LaShawn Ford would announce a new bill: the Anthony Gay Isolated Confinement Restriction Act. The proposed legislation would dramatically curtail the state's ability to use long-term solitary confinement to punish prisoners to just 10 days in a 180-day period. The lawyers for a former Illinois prisoner, Anthony Gay, who the proposed Act was named in honor of, had convened the morning press conference to bring attention to both the new bill and to Mr. Gay's civil lawsuit against the state.[51]

Since Mr. Gay's 2018 release from prison, his experience of solitary confinement, psychological decompensation, and repeated criminal prosecution while incarcerated had garnered substantial publicity in Illinois, including several articles in the *Chicago Tribune* (S. S. Clair 2020; Coen and Clair 2019; Pawlaczyk and Hundsdorfer 2018). As these newspaper articles and his lawsuit explain, Mr. Gay, an African American man from Rock Island, Illinois, was originally sentenced to 7 years in prison for stealing a hat and dollar bill of a fellow teen; he expected to serve just 3.5 years. But a fight landed him in solitary confinement, where his mental health spiraled. Mr. Gay suffers

[51] Complaint, *Anthony Gay v. State of Illinois*, No. 1:18-cv-07196 (C.D. Ill. filed Oct. 28, 2018) (alleging that Illinois's deliberate indifference to his mental health needs violated the Eighth Amendment's prohibition on cruel and unusual punishment and the Americans with Disabilities and Rehabilitation Act).

from borderline personality disorder, and while in solitary, engaged in gruesome self-mutilation, some of which resulted in his permanent disfigurement. In addition, his assaultive behavior against correctional officers resulted in disciplinary tickets extending his time in solitary confinement over 150 years and 21 new felony indictments, many of which were for acts like throwing of feces and "yanking back on chains." He was ultimately convicted of 18 new crimes, and each of his additional sentences ranged from 3–8 additional years, which together extended his sentence to 99 years (Illinois Department of Corrections 2018; Pawlaczyk and Hundsdorfer 2018). Seven years had become a life sentence.

At the press conference, after his lawyers introduced his case, Mr. Gay himself took the podium and began to tell his story. He explained to the journalists, news cameras, and supporters in the room how he felt solitary confinement drove him to engage in both extreme self-harm and acts against correctional staff that were subsequently criminally prosecuted:

> I spent 22 years in solitary confinement in Illinois prisons. It was psychologically darker than the inside of a cow. I was trapped in a cell, smaller than the size of a parking space, 24 hours a day, seven days a week. It was torture. The only way I received social stimulation and human contact was when I cut my neck, legs, arms and private parts. How could this be? *When the conditions of confinement were psychologically eating me inside out, instead of being removed from solitary confinement and offered adequate psychological counseling, I was prosecuted, given a hundred years, and buried deeper in solitary confinement for symptoms of mental illness that solitary created.* In fact, I was scheduled to die in solitary confinement.[52]

[52] Anthony Gay Statement, Romanucci & Blandin, LLCPress Conference (March 10, 2020) (on file with author) (emphasis added).

Speaking as a free man in downtown Chicago, Mr. Gay had defied the odds to win release.[53] Now, there was even a bill in his name that offered the hope of significantly restricting solitary confinement in Illinois. He ended his statement with a call to action: "to every prisoner I know, who are in solitary confinement suffering, who thought I would get out and forget about you, I didn't. I did my part. Now it's up to our moving and compelling representatives and senators to make limitations on solitary confinement a reality."

* * *

Anthony Gay's public advocacy against solitary confinement has made his the most well-known story of criminal prosecution of prisoners with mental illness in Illinois, and perhaps the country. But, as Damien's[54] experience of solitary confinement, psychological decompensation, and criminal prosecution, recounted in Chapter 3 helps to make apparent, what happened to Mr. Gay was not a singular event. Together, their experiences open up a larger question motivating this chapter: what is the relationship between solitary confinement and criminal prosecution of prisoners, in Illinois and beyond?

Survivors, advocates, scholars, and policymakers alike have raised serious concerns about the widespread use of solitary confinement in U.S. prisons, jails, and immigration detention centers. Solitary confinement is the correctional practice of isolating a prisoner in a cell for 22–24 hours per day from social and environmental stimulation, for periods of time ranging from hours to decades

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[53] His attorneys were able to negotiate with the local state's attorney to revise an initial sentencing error and have his new sentences obtained while incarcerated run concurrent with one another, although consecutive with his original sentence.

[54] Name changed to protect participant confidentiality.

(Kiebala and Rodriguez 2018). Prisons and jails use solitary confinement as a means of maintaining order, to punish those who break prison rules and to segregate those who are deemed a threat to general prison security (Smith 2006:442). Solitary, writes sociologists Ashley Rubin and Keramet Reiter, "is a perennial practice of last resort for those seeking control within prison walls," that persists despite centuries of criticism of and resistance to the practice in the United States (Rubin and Reiter 2018:1605). Prisoners placed in solitary confinement cells—commonly referred to as "segregated housing units" or "administrative detention" or "disciplinary segregation"—often spend both their sleeping and waking hours in their cells where they eat meals, some of which are windowless and some of which can be sealed with solid doors (Abramsky and Fellner 2003:146). Supermax prisons, which began to be opened in the 1980s, are entire institutions designed to keep prisoners in solitary confinement (Rubin and Reiter 2018:1623).

Decades of scientific evidence demonstrates that the prolonged isolation of prisoners in conditions of solitary confinement can cause significant psychological and physical harms (Cloud et al. 2015; Grassian 1983, 2006; Haney 2003, 2018b; Smith 2006; but see Morgan et al. 2016; O'Keefe et al. 2013). Moreover, among prisoners with pre-existing mental illnesses—who make up a disproportionate number of prisoners in isolation (Abramsky and Fellner 2003:147) and spend a longer period of time in solitary than those without (Simes et al. 2020)—psychological research has shown that solitary confinement imposes even greater risk of serious harm (Abramsky and Fellner 2003:151; Haney 2018a:286). Studies of prisoners subjected to solitary confinement have documented a wide range of psychological reactions, including anxiety, depression, insomnia, panic, withdrawal, paranoia, hypersensitivity, cognitive disfunction, hallucinations, hopelessness, self-mutilation, and suicidal ideation and behavior (Haney 2003:130–31). Together, these symptoms

combine to form a "specific psychiatric syndrome associated with solitary confinement" that "has the characteristics of an acute organic brain syndrome" (Grassian 2006:333, 337).

Placement in solitary confinement can be both life-threatening and lead to additional disciplinary consequences. Correctional systems frequently report the highest rates of self-injury in their segregation or other "lockdown" units (Appelbaum et al. 2011:287; Kaba et al. 2014). Studies reveal that suicide rates are also disproportionally high among prisoners in solitary confinement (Kupers 2017:107; Metzner and Fellner 2013:316). Other forms of self-mutilation, like amputation and cutting, while not fatal, can be permanently disfiguring (Abramsky and Fellner 2003:174–78). Although it is becoming less common, in the past, many states considered self-mutilation to be a disciplinary offense—which meant that self-harm itself could extend a prisoner's stay in solitary (Appelbaum et al. 2011:287; Kupers 1999:38, 53). Studies have also shown that solitary confinement can also trigger symptoms of anger, aggression, and loss of impulse control, which can lead to both self-injury and violence towards staff, like the throwing of waste (Grassian 1983:1453; Kupers 1999:58–59). This is one reason why "supermax" prisons, which were architecturally designed to be the most restrictive and most isolating facilities, have generally not been found to reduce prison violence or increase staff safety system-wide (Shalev 2013:209, 214–16; Smith 2006:443). And indeed, prisoners who engage in assaultive behavior toward staff are at risk of further disciplinary sanction and criminal prosecution (Kupers 2017:115–17).

In recognition of the grave psychological effects this isolation can produce, the American Psychiatric Association, the National Commission on Correctional Health Care, and the National Alliance on Mental Illness, have opposed the use of solitary for individuals with serious mental

illness.[55] Numerous federal courts have either outlawed or significantly curtailed the practice of putting prisoners with mental illness in solitary confinement in recent years.[56] In 2011, the U.N. Special Rapporteur on torture declared prolonged solitary confinement a form of torture (United Nations 2011), and in 2015, the U.N. General Assembly passed rules prohibiting indefinite solitary confinement, solitary confinement in excess of 15 days, and the imposition of solitary confinement of any length on women, children, and persons with mental or physical disabilities.[57] A growing array of states—including as Washington, North Dakota, and Colorado, California, and New York—have taken steps in recent years to dramatically limit the use of solitary confinement in their correctional systems (Kiebala and Rodriguez 2018).[58]

Nevertheless, despite these reforms, as of July 15, 2019, it is estimated that between 55,000 (3.8%) and 62,500 (4.4%) of state and federal prisoners were held in "restricted housing," i.e., in-cell for twenty-two hours or more per day on average for fifteen days or more (The Correctional

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[55] American Psychiatric Association, Position Statement on Segregation of Prisoners with Mental Illness (Nov. 2012), https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-prisoners-segregation.pdf; National Commission on Correctional Health Care, Solitary Confinement (Isolation) (April 10, 2016), https://www.ncchc.org/solitary-confinement; National Alliance on Mental Illness, Policy Platform: Legal Issues, https://www.nami.org/About-NAMI/Policy-Platform/9-Legal-Issues (2018).

[56] See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); *see also* Abramsky and Fellner 2003:165–67 (citing *Jones 'El v. Berge*, Judgment in a Civil Case, Case No. 00-C-0421-C (W.D. Wisconsin, June 24, 2002) (unpublished); *Austin v. Wilkinson*, Case No. 4:01-CV-71 (N.D. Ohio, November 21, 2001); *Ruiz v. Johnson*, 37 F. Supp. 855 (S.D. Texas, 1999)).

[57] United Nations Economic and Social Council, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) 16-17 (2016), https://undocs.org/A/RES/70/175.

[58] Most recently, on April 1, 2021, New York's Governor Cuomo signed the Humane Alternatives to Long-Term Solitary Confinement (HALT) Act, which limits solitary confinement for all incarcerated people to 15 days, among other measures.

Leaders Association & The Arthur Liman Center for Public Interest Law 2020:5–8). And these estimates do not include those held in solitary in jails and immigration detention facilities across the United States, where the practice is also widespread (Franco, Patler, and Reiter 2020; The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law 2020). And although there has been a recent rise in socio-legal research examining the growth in solitary confinement across the United States and its disproportionate impact on marginalized groups (Franco et al. 2020; Reiter 2016a; Rubin and Reiter 2018; Sakoda and Simes 2019; Simes et al. 2020), to date, there has not been any study investigating the relationship between prisoners' placement in solitary confinement and their criminal prosecution.

In this chapter, I draw on two main sources of data to examine the complex relationship between placement in solitary confinement and prisoners' criminal prosecution: administrative data on referrals for criminal prosecution from my case study state, Wisconsin, and interview data from 64 prisoners' advocates, prosecutors, former prisoners, and corrections staff from Wisconsin, New York, Illinois, Texas, and California.[59] Together, I argue that these data demonstrate that not only are criminal prosecution and solitary confinement stacked sanctions (i.e., both may be simultaneously imposed in response to the same incident), but that placement in solitary can generate an increased risk for criminal prosecution by producing the very behavior subsequently criminalized—especially for prisoners with mental illness. Furthermore, I explain how the criminal prosecution of prisoners for conduct occurring in solitary follows from and helps to support a particular narrative about the disruptive behaviors (e.g., bodily-fluid throwing) that prisoners in long-term solitary engage in, wherein they are neither "ill" nor engaging in rational reactions to extremely

[59] Please see the Methodological Appendix for a more detailed breakdown of interview participants and more information about the interview protocols.

punitive conditions, but rather "immutably bad." I argue that the rationalization this criminalization provides for the maintenance of extremely restrictive conditions is perhaps even more powerful than the similar cycle of administrative tickets that has been previously observed in the literature, because it carries with it the imprimatur of a public criminal proceeding with ample due process including extensive psychological evaluations.

First, I review what recent psychological and sociological research on solitary confinement and supermax prisons has revealed about the relationship between long-term isolation and antisocial behaviors like self-mutilation and bodily-fluid throwing, which place prisoners subjected to solitary confinement at an increased risk of further disciplinary sanction and criminal prosecution. Next, I discuss how this process aligns with two prominent theoretical accounts of total institutions, those of Erving Goffman and Michel Foucault, whose studies of both mental institutions and prisons demonstrate how and why these institutions produce of the very conduct they ostensibly serve to control or eliminate. In the following section, I leverage administrative data from Wisconsin on criminal referrals of prisoners for assaults on staff to quantitatively assess the relationship between solitary confinement and criminal prosecution in one jurisdiction. Next, drawing on my interview data, I discuss how system actors understand placement in solitary confinement as both a consequence *and* cause of prisoner misconduct, and argue that the criminal prosecution of that misconduct occurring in solitary helps to legitimize the continued imposition of those extreme conditions. Finally, I discuss concerns raised about how the imposition of solitary confinement may have an unintended consequence—an increase in the use of criminal prosecution to regulate prisoner populations.

TOTAL INSTITUTIONS AND THE PRODUCTION OF MISCONDUCT

Prisons are the paradigmatic total institution in contemporary U.S. society. In an era of mass incarceration, they are a place of residence and work where a staggeringly large number of individuals are "cut off from the wider society for an appreciable period of time" (Goffman 1961:xii). In this section, I first review the existing scholarship on the cycles of violence that solitary confinement produces, before turning to how these findings resonate with more general studies of the "failures" of total institutions.

Solitary Confinement and Cycles of Violence

The widespread expansion of long-term solitary confinement, coupled with the emergence of the "supermax" prison, is one of the most alarming features of contemporary punitive prison conditions (Reiter 2016b:485, 2016a:3–4; Rubin and Reiter 2018:1624; Sakoda and Simes 2019:2; Shalev 2013:2, 5). Between 1995 and 2000, as prison populations across the United States grew by 28%, the use of solitary confinement increased at an even higher rate, by 40% (Shalev 2013:1991). Widespread prison overcrowding in the late 1970s and early 1980s is commonly thought to have led to the internal strife and rebellions in prisons that ultimately led to the expansive growth in solitary confinement (Kupers 2017:7). Supermax prisons, which, between 1980 and 2005 were constructed in as many as 44 states, do not account for the overall increase in solitary confinement alone; almost all prisons and jails in the United States have "restricted housing" units dedicated to high-security custody (Sakoda and Simes 2019:3).

Today, an individual's placement in solitary confinement is fundamentally an administrative decision; it is not imposed by judges as part of a criminal sentence, and courts have placed only limited procedural and substantive restrictions on it (Shapiro 2019). Corrections officials may order a

prisoner to solitary confinement as a result of an adjudication of a disciplinary rule violation, or as a result of classification of a prisoner as a security threat (e.g., because of alleged gang membership), or as a form of "protective custody" (e.g., if the prisoner has a disability or has been labeled a "snitch") (Shalev 2013:2). At the macro-level too, socio-historical research has demonstrated how corrections administrators, rather than legislators, largely drove the creation of supermax prisons themselves in the 1980s (Reiter 2016b). The broad discretion that corrections officials have to assign prisoners to solitary—especially through administrative classification—has led to some prisoners spending an indeterminate amount of time in long-term segregation, in some cases, for decades (Sakoda and Simes 2019:4, 15).

The imposition of long-term solitary confinement—prisons' most severe administrative sanction—is often justified at an institutional level as necessary to ensure staff safety and security, to manage the "worst of the worst" (Reiter 2016a:5; Rhodes 2004:24; Shalev 2013:45). Solitary units serve as prisons within prisons, where social exclusion becomes nearly absolute (Kupers 2017:57–58; Rhodes 2004:7; Shalev 2013:4). The legacy of George Jackson and prisoners' political mobilization of the 1960s and 1970s which resulted in several prominent rebellions in particular animates justifications for the continuing need for supermax prisons, despite the fact that murder rates in maximum-security prisons are vanishingly low now (Reiter 2016a:35–36). And although solitary units and supermax prisons are commonly discussed in terms of housing the most dangerous and violent prisoners, scholars have frequently found that in fact they house a combination of prisoners with violent disciplinary histories, as well as "mentally ill prisoners, confirmed and alleged gang members, and death row prisoners" (Rhodes 2004:59; Shalev 2013:69). Indeed, research has shown that, at least in some jurisdictions, both prisoners classified with serious mental illness and racial minorities are overrepresented in solitary confinement generally and supermax prisons in particular

(Kupers 2017:72–73, 102–3; Sakoda and Simes 2019:25–27; Shalev 2013:69–70; The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law 2020:5, 48–50).

As discussed above, research on long-term solitary confinement and supermax prisons has explored how it imposes "a range of physical and psychological terrors" upon prisoners subjected to it, and how supermaxes are themselves a method of managing people incarcerated with mental illness (Reiter 2016a:8, 164). Prisoners with mental illness are not only more likely to be selected for solitary, but long-term solitary confinement may itself *induce* mental illness in previously healthy individuals, and exacerbate it in already those already ill (Kupers 2017:102–3, 108; Reiter and Blair 2015:181–82). Depression, anxiety, and hallucinations are all common effects of long-term isolation (Kupers 2017:88–93; Reiter 2016a:26, 181). In segregation units, and the prison context more generally, the ability of mental health profession to provide meaningful therapy is severely circumscribed (Reiter and Blair 2015:185). Aberrant behavior like self-harm among prisoners is frequently met either with punishment (e.g., continued segregation), or with punitive practices that are cloaked in therapeutic language (e.g., cages may be referred to as "therapeutic treatment modules") (Reiter and Blair 2015:189). As mental illness goes largely untreated, suicides are common (Reiter 2016a:136).

For those many prisoners subjected to incarceration in a small cell for up to twenty-three hours a day, seven days a week, for years (if not decades) on end without meaningful human contact—the conditions amount to nothing short of torture (see Reiter 2016a:62). Psychiatrists studying prisons have long found that harsh punishments tend to lead to defiance and resistance, rather than constructive behavior change (Kupers 2017:53). And because human contact for prisoners in solitary is often limited to receiving a food tray from staff through a slot in the door, or being shackled and transferred to the shower or solitary yard for an hour at a time—scholars have

observed that prisoner resistance to the conditions of solitary may often be limited to refusing to return a food tray, "gassing" guards, i.e., throwing their own bodily fluid at them, or directing their rage and resistance against themselves in the form of extreme self-harm (Kupers 2017:55; Rhodes 2004:23, 35, 41–43; Shalev 2013:164).[60]

Indeed, in their research on U.S. supermax units and prisons, both sociologist Sharon Shalev and anthropologist Lorna Rhodes found that bodily-fluid throwing and feces-smearing, were among the most common forms of "acting out" in these facilities (Rhodes 2004:43–44; Shalev 2013:165). The emergence of behaviors like gassing, Shalev argues, is not random but indeed built into the "design and regime of supermax units," wherein "bodily substances are one of the few things that prisoners have some control of" (Shalev 2013:164). Rhodes describes "shit throwing" as a "particularly satisfying form of resistance" for prisoners in control units, as it is an act that is "capable of reversing—at least momentarily—the usual trajectory of contempt" (Rhodes 2004:44–45). This pattern of violence is so predictable that supermax units and prisons routinely make use of plastic cell shields or "special cells" with slippery walls, to counter the anticipated bodily-fluid throwing and smearing issues (Kupers 2017:55–56).

Rather than view behaviors like throwing either as a manifestation of isolated prisoners' severe emotional distress or mental illness, or as a predictable response to the extreme conditions of long-term isolation however, prison officials often see it "as demonstrative of the savage nature of supermax prisoners," a form of dehumanization which is used to justify the extreme conditions imposed on them (Shalev 2013:181, 198). Similarly, sociologist Keramet Reiter and psychiatrist

[60] An important and powerful form of prisoner resistance to solitary has also been through organized hunger strikes, perhaps the most prominent led by prisoners incarcerated at Pelican Bay State Prison, a supermax prison, in California in 2011 and 2013 (Kupers 2017:61; Reiter 2016a:7).

Thomas Blair argue that the "cycles of infractions and confinement" brought on by solitary and the acts it provokes, serve "as a justification for continued use of solitary confinement—particularly with mentally ill prisoners" (Reiter and Blair 2015:179). Indeed, they contend, "[a]s prisoners in isolation continually violate rules, they reaffirm prison officials' assessments that they are dangerous and unmanageable" (Reiter and Blair 2015:182), and in this way, solitary confinement has been an important mechanism in legitimizing the transinstitutionalization of people with mental illness from psychiatric hospitals to prisons and jails post-deinstitutionalization (Reiter and Blair 2015:182–83).[61]

For guards, experiencing throwing is often humiliating, and may provoke both fear (over the threat of communicable diseases) as well as rage (Rhodes 2004:45–46). And even when such acts of resistance or distress like refusing to return a tray or gassing does not cause injury to others, scholars have observed that they may nevertheless be treated as serious security threats which could be met with staff violence, including use of chemical agents and restraints to extract prisoners from their cells (Reiter 2016a:135; Reiter and Blair 2015:189; Rhodes 2004:50–52; Shalev 2013:165–66).[62] In this way, Shalev writes, "rather than controlling violence, as they officially aim to do, such highly controlled environments may breed it" (Shalev 2013:168). Indeed, she goes on to write, long-term isolation units create an "ecology of cruelty," whereby "violence is not a by-product, but an inherent part of their *modus operandi*, reinforced through the rules and regulations that govern these prisons, their architectural design, and the daily routines and interactions in them" (Shalev 2013:175). Similarly, it is through this mechanism of ever-increasing control that Rhodes observes, "the prison tends to secrete the very things it most tries to eliminate" (Rhodes 2004:29).

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[61] For more discussion of deinstitutionalization and transinstitutionalization, see Chapter 3.

[62] In several particularly horrific cases, guards have scalded and permanently disfigured and killed prisoners with mental illness while "bathing" prisoners who have smeared feces on themselves (Reiter 2016a:21–22, 246–47).

The "Failures" of Total Institutions

In the decades before the U.S. prison and supermax booms, two foundational social theorists Erving Goffman and Michel Foucault, engaged in focused study of total institutions—asylums and prisons (Foucault 1988, 1995; Goffman 1961). Interestingly, both scholars identified similarities between psychiatric asylums and prisons, and they also shared a key insight about total institutions: that despite these institutions' stated purpose of reducing and controlling social deviance and abnormality, they, in fact, cannot help but produce it.[63] In *Discipline and Punish*, for example, Foucault notes that very early on in the history of prisons, they were "denounced at once as the great failure of penal justice" for they "cannot fail to produce delinquents" (Foucault 1995:264). For Foucault, this "failure" is in fact intrinsic to the function of the prison—for it serves not to eliminate criminal offenses, but distinguish them, distribute them, and use them (Foucault 1995:271).

Goffman also identifies a similar phenomenon—that although total institutions often "present themselves to the public as rational organizations designed consciously," they "typically fall short of their official aims" (Goffman 1961:74, 84). His discussion of "looping" may help explain how the delinquency, or failure, that both he and Foucault observe is produced at the organizational level. In his essay, *Characteristics of Total Institutions*, Goffman outlines the "mortification" process that is imposed on all inmates of total institutions. One indirect form of this mortification he observes is a process he calls "looping"—which produces "a disruption of the usual relationship between the

[63] Social institutions' production of failure or delinquency is hardly limited to total institutions. Indeed, scholars such as John Hagan and Bill McCarthy have demonstrated empirically that parental abuse and criminal sanctions interact to "amplify rather than deter trajectories of criminal behavior" among youth involved in street crime (Hagan and McCarthy 1997:179, 187).

individual actor and his acts" (Goffman 1961:35–36). Through "looping" an inmate's conduct, which may itself be a reaction to the conditions of his or her confinement, is thrown back upon the inmate in another context, as a check on that behavior (Goffman 1961:37). In other words: "[a]n agency that creates a defensive response on the part of the inmate takes this very response as the target of its next attack" (Goffman 1961:36).

For the psychiatric patients in Goffman's study of the asylum, he observed a "vicious-circle process at work" for those lodged in the restrictive, "bad" wards, that is eerily similar to what is described by scholars of long-term solitary confinement above (Goffman 1961:307). In these wards, he writes:

> Acts of hostility against the institution have to rely on limited, ill-designed devices… When a patient finds himself in seclusion, naked and without visible means of expression, he may have to rely on tearing up his mattress, if he can, or writing with feces on the wall—actions management takes to be in keeping with the kind of person who warrants seclusion (Goffman 1961:307).

Not only are the behaviors that Goffman describe of psychiatric patients in seclusion overlapping with what others have observed among prisoners in solitary confinement (i.e., feces smearing), but his account also points to a similar rationalizing function that the behaviors have for staff.

Therefore, across these accounts, one can infer a dual function of total institutions' production of delinquency or misconduct. The first is material. Total institutions need a constant supply of inmates to politically and economically justify their continued existence. Creating the very behavior that they ostensibly aim to intervene upon is a useful strategy to stay in business, so to speak. The second function is a legitimizing one. For the "staff world," (to borrow Goffman's term), who may be forced to treat inmates inhumanely as a matter of course, they may interpret this production of misconduct as a way of self-justifying or rationalizing their role in the power-hierarchy of total institutions. As Goffman writes:

> The interpretative scheme of the total institution automatically begins to operate as soon as the inmate enters, the staff having the notion that entrance is *prima facie* evidence that one must be the kind of person the institution was set up to handle…Having to control inmates and defend the institution in the name of its avowed aims, the staff resort to the kind of all-embracing identification of the inmates that will make this possible. The staff problem here is to find a crime that will fit the punishment (Goffman 1961:84–85).

In this account, correctional staff will work to see all prisoners as criminals, deserving of their confinement. For correctional staff managing the most restrictive solitary units, the rationalization for prisoners' subjection to what many consider are conditions of torture, the need to find a "crime" to fit the punishment is even more intense and may help explain how even symptomatic behavior is understood as a disciplinary problem or criminal act in these settings.

In this way, although there is good reason to believe that Goffman may not have even been able to fully imagine the extent to which solitary confinement would expand in the decades after *Asylums* was published,[64] and although Foucault may not have imagined that the delinquency that prisons produced would be criminalized while prisoners were still imprisoned, these studies help to explain how and why the criminal prosecution of prisoners also subjected to solitary confinement may take place. In this chapter, I seek to contribute to this existing literature by examining the role of the conditions of the total institution—in this case, the contemporary maximum-security prison—in producing the very behavior the state then seeks to criminalize. In the next sections, I rely on administrative and interview data to explore the complex relationship between solitary

[64] In his writing, Goffman seemed to suspect that solitary confinement was on the cusp of being abandoned as a practice, it was so inhumane: "Currently the prison punishment of solitary confinement is being seriously re-examined, the belief becoming more widespread that our natures are such that isolation is contrary to them and ought not to be inflicted" (Goffman 1961:195).

confinement and criminal prosecution of prisoners, and in doing so, gain insight into the utility of such actions in providing macro- and micro-level justifications for the conditions that prisoners are subjected to inside.

PROSECUTING PRISONERS IN SOLITARY

In my interviews with 64 prisoners' advocates, prosecutors, former prisoners, and correctional staff across five jurisdictions—California, Texas, New York, Illinois, and Wisconsin—about their experiences with and views on the criminal prosecution of prisoners, issues around solitary confinement nearly always bubbled up. At times, the most offhand comment was the most intriguing. For example, one public defender from Wisconsin mentioned that she only rarely meets with an incarcerated client who is *not* in the segregation unit (INT156). Public defenders and prisoners' advocates in other states like Texas and New York who exclusively represented prisoners echoed the same observation: that their clients who got criminal referrals were almost always in solitary (INT029, INT170). What could account for this pattern?

There are a few possible explanations, which are not mutually exclusive. The first and perhaps most simple explanation is that if a prisoner commits an act that results in a criminal referral (and thus ends up on a public defender's caseload), that client is likely to be administratively moved to solitary while under investigation and/or subsequently sentenced to it after a parallel disciplinary hearing. For these prisoners, the process is very much the punishment, akin to holding criminal defendants in the community in jail pre-adjudication (Feeley 1979). This was a pattern of practice mentioned by a number of prisoners' advocates and prosecutors I spoke with in Texas, Wisconsin, and California (INT139; INT032; INT160; INT026; INT134).

A second possible explanation would be that placement in solitary itself can cause the conduct that is subsequently criminalized. The typical proposed pathway is that solitary conditions lead to psychological decompensation (in both mentally ill and even previously healthy individuals) that results in violent reactions like bodily-fluid throwing that is subsequently criminalized. This explanation is supported by the literature on solitary confinement and its psychological effects discussed above, and as I detail below, was broadly endorsed by interview participants in my study.

A third possible explanation is that the same prior tendencies towards violent behavior or other forms of misconduct that resulted in a prisoner's placement in solitary is what accounts for any of his or her subsequent criminal conduct. In this explanation, solitary conditions might change the modes a given individual has of acting out (e.g., by restricting access to certain materials or people), but doesn't serve as a causal force in its own right. The persistence of a prisoners' misconduct in solitary, under this framework, might indicate the ineffectiveness of restrictive housing conditions at preventing violence or misconduct, but would not suggest that the conditions themselves have an independent causal relationship with subsequent behavior in general. While this view was not explicitly endorsed by many interview participants in this study, it was referenced by several, as I discuss below.

In this section, I leverage both administrative and interview data to begin to distinguish between these possible explanations and assess more broadly the work that criminal prosecution of people in solitary does in rationalizing the punitive conditions prisoners are exposed to. First, to help ascertain whether the strong relationship between prisoners' restrictive housing status and pending criminal prosecution that attorneys I spoke with observed is wholly explained by post-incident transfer—in other words, between explanation one and the other two—I first draw on criminal referral data from one jurisdiction, my case study state of Wisconsin. These data include the housing

status of a prisoner (e.g., restricted or general population) at the time of the criminal *referral* rather than at the time of prosecution or conviction, for a subset of types of cases: prisoner assaults on staff, i.e., staff assaults. These data allow me to evaluate how frequently, at the time of an incident that is subsequently criminalized, the individual was already in solitary confinement.

Next, I detail two competing narratives that came out of my interviews regarding the relationship between solitary conditions and criminal prosecution. The first—the majority view of those participating in my study—describes how solitary conditions cause predictable reactions in individuals, and how a subset of prisoners suffering from that decompensation engage in assaultive acts and other misconduct that is subsequently criminalized. The second—the minority view of those participating in my study—suggests that assaultive behavior of prisoners in solitary is not fundamentally a result of the conditions but is evidence of the immutably antisocial nature of some prisoners. While my data do not permit me to adjudicate between these two views definitively, and again, they may not be mutually exclusive in any case, in the final part of this section, I explain how the criminal prosecution of prisoners for conduct occurring in solitary follows from and helps to support the second "immutably bad" narrative. I argue that the rationalization this criminalization provides for the maintenance of extremely restrictive conditions is perhaps even more powerful than the similar cycle of administrative tickets that has been previously observed in the literature, because it carries with it the imprimatur of a public criminal proceeding with ample due process including extensive psychological evaluations. Finally, I consider one possible additional function of criminal prosecution of prisoners as it relates to solitary confinement: an alternative form of punishment that can be utilized in the case that solitary confinement is restricted in a jurisdiction.

Criminal Referrals from Restrictive Housing: Staff Assaults in Wisconsin

Since 2012, the Wisconsin Department of Corrections has regularly tracked and publicly reported its "staff assault" data, i.e., prisoner assaults on staff members, occurring in its facilities in annual reports (see, e.g., Wisconsin Department of Corrections 2019). To assess how many and what types of "staff assaults" originated while prisoners were already in "restrictive housing," i.e., solitary confinement conditions, I made a public records request for the individual-level data underlying these reports, which includes information about the location of the incident, the type of assault, whether it caused a serious injury, race and gender of the prisoner, and whether law enforcement was contacted as a result of the incident.[65] The data provided cover all alleged staff assault incidents occurring in the Division of Adult Institutions between 2013 to 2019, recorded by the Wisconsin Department of Corrections. The results are summarized in Table 1 below.

Table 1. Staff Assault Incidents in Wisconsin Department of Corrections (2013-2019)	
Total Incidents	2,167
Total Prisoners	1,090
Race of Prisoner	
American Indian/Alaskan Native	3.8% (n=41)
Asian or Pacific Islander	0.4% (n=4)
Black	58.9% (n=642)
White	37.0% (n=403)
Percent Male	95.1% (n=1,036)
Mean Incidents/Prisoner	5.3 (SD 6.0, min=1, max=53)
Security Level of Prison	
Maximum	75.6% (n=1,638)
Medium	23.3% (n=504)
Minimum	0.8% (n=17)
Other	0.4% (n=8)
Percent Restricted Housing	65.2% (n=1,412)
Percent Serious Injury	3.3% (n=72)

[65] I requested corresponding individual mental health classification information as well, which the public reports provide in summary form, but they denied that request, citing confidentiality concerns.

Incident Type Flags	
Battery	35.1% (n=761)
Throwing	31.1% (n=673)
Spitting	21.2% (n=460)
Physical Injury	22.0% (n=476)
Sexual	2.0% (n=43)
Percent Criminal Referral	61.1% (n=1,324)

These data show that there were 1,090 individuals that were written up for 2,167 staff assault incidents in Wisconsin prisons between 2013-2019. The overwhelming majority of individuals reported for a staff assault incident were male (95.1%), and the majority were Black (58.9%). The number of incidents per individual ranged widely, from 1 to 30 in one case, with a mean of 5.3 staff assault incidents per individual.

The majority of incidents, 75.59% (n=1,638), occurred in maximum-security facilities, about a quarter, 23.3% occurred in medium-security facilities, and almost none (0.8%, n=17) occurred in minimum-security facilities. Perhaps most importantly for our purposes here—65.16% (n=1,412) of the staff assault incidents occurred while the individual was in "restricted housing," i.e., solitary confinement. Of the 150 staff assault incidents occurring at Wisconsin's supermax prison, the Wisconsin Secure Program Facility, 72.7% (n=109) were referred to law enforcement.66 Of all those incidents occurring in restricted housing, criminal referrals were made in a majority (59.4%, n=839).

Very few, only 3.3% (n=72) staff assaults resulted in serious injuries to staff. Nevertheless, overall, law enforcement was contacted in the majority of incidents system-wide 61.1% (n=1,324). Of the type of incidents, 35.1% (n=761) were flagged as batteries, 31.1% (n=673) were flagged as

[66] This facility did not, however, have the highest rate of law enforcement referrals. Several Wisconsin facilities with very low numbers of overall incidents (i.e., n=1) had 100% criminal referral rates, and two maximum-security prisons, Waupun Correctional Facility and Dodge Correctional Facility had higher rates of referrals (90.4% and 73.6%, respectively) of more total incidents (n=280 and n=288).

bodily-fluids throwing, 21.2% (n=460) were flagged as spitting, and 2.0% (n=43) were flagged as sexual.67 An overwhelming majority of the bodily fluids incidents (81.3%, n=547) and spitting incidents (78.0% (n=359) occurred in solitary units, whereas about half of battery (53.0%) and physical injury (51.7%) incidents occurred in solitary units, and only 39.5% of sexual incidents occurred in solitary units.

Although over 200 staff assault incidents occurred at the Wisconsin Resource Center,68 the state's dedicated prison mental health facility, criminal referrals were only made in 23.7% of the incidents (n=56), the lowest referral rate of all the institutions. This low referral rate was followed closely by the women's prison, the Taycheedah Correctional Institution (34.5%), and the Racine Youthful Offender Correctional Facility (34.7%). These data suggest that there is likely a great deal of facility-level discretion in criminal referrals, and that correctional administrators may adjust this discretion in light of the prisoner population of a given facility and perceived culpability and/or dangerousness—i.e., based on mental health status, gender, or age.

Together, these data provide, to my knowledge, the first quantitative evidence that, at least for a subset of types of prison misconduct—in this case, staff assaults—criminal referrals are made routinely against prisoners already in solitary confinement at the time of the incident, and where very few incidents resulted in serious injury to staff. This provides strong evidence that post-incident

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67 Please note these flags are not mutually exclusive, and likely should be interpreted with caution. There were 24 incidents, for example, that were flagged as both "spitting" and "bodily fluid throwing." Similarly, there were 83 incidents that were flagged as both "battery" and "physical injury." Furthermore, a majority (46 incidents) of incidents that were recorded as resulting in a "serious injury" were not flagged as "physical injury."

68 In the Wisconsin Department of Corrections administrative data, the Wisconsin Resource Center is coded as the "Supervised Living Facility." Please see Chapter 3 for more detail on how this facility was identified.

transfer to solitary (which indeed, as mentioned above, may be routine in many facilities) does not fully account for the connection between restrictive conditions and assaultive conduct that may be subsequently criminalized. Furthermore, these data align remarkably closely with the ethnographic data provided in Shalev and Rhodes' accounts of solitary units and supermax prisons discussed above (Rhodes 2004; Shalev 2013)—in that bodily fluid throwing appears to be the assault-type most common in restrictive housing units.

Given the highly restrictive conditions of solitary confinement, and the limited access it provides for interactions with other prisoners or contact with the outside world, staff assaults are an offense-type that is possible for prisoners to commit while in solitary. In other words, we would expect to see more staff assaults among prisoners in solitary than offenses like drug possession or battery of other prisoners. That said, because of prisoners in solitary's highly restricted freedom-of-movement, compared with that of prisoners in the general population, this offense-type may still present a good case to compare relative rates of incidents in these separate housing conditions. After all, those with more out-of-cell time are likely to have increased opportunity to assault staff. These administrative data are not able to distinguish, however, between the second and third possible explanation for the relationship between solitary confinement and criminal prosecution. Do we see more staff assaults in restrictive housing because more violent prisoners who have previously committed staff assaults outside are placed there and just continue to commit additional offenses? Or do we see more staff assaults in restrictive housing because the conditions themselves help to produce this form of conduct?

In the next section, I draw on interview data to explain how advocates and former prisoners I spoke with discussed their views on how solitary confinement does not just incidentally precede incidents leading to criminal referrals but is in fact a causal force in creating the conduct that is

subsequently criminally prosecuted. These proposed pathways, however, are in some tension with an alternative view offered by other interview participants—namely some prosecutors and correctional staff—that the assaultive or disruptive acts of prisoners in long-term solitary confinement as evidence of their immutable antisocial nature rather than a form of treatable mental illness that could be remedied by a change in conditions or greater mental health treatment.

Solitary as a Causal Force of Misconduct

How does solitary cause prisoner misconduct? The main pathway that interview participants—primarily prisoners' advocates and former prisoners—articulated was that solitary confinement triggers psychological decompensation that then leads to predictable forms of misconduct. In addition, however, others emphasized the ways in which assaultive conduct among those in solitary was not necessarily due to mainly to psychological decompensation, but instead could be viewed as a form of rational resistance to the extremely punitive conditions they are subjected to.

I. *Vicious Cycles of Despair, Decompensation, and Discipline*

In the opinion of many of the interview participants I spoke with, there was, quite simply, nothing coincidental about the frequency in which they observed prisoners in solitary criminally prosecuted for new crimes. The criminal prosecution of assaultive or other conduct occurring in solitary, most commonly acts involving bodily-fluid throwing, in their view, flowed from the same pattern of psychological decompensation, misconduct, and further discipline, that scholars and survivors have observed among people in long-term solitary (e.g., Reiter and Blair 2015; Woodfox 2019). This pattern held regardless of whether prisoners experienced symptoms of mental illness prior to being placed in solitary, or if they developed them subsequently.

Prisoners' advocates and corrections mental health professionals I spoke with in all five jurisdictions—New York, Illinois, California, Texas, and Wisconsin—who have been involved in civil rights litigation around solitary confinement, all expressed concern that, despite major litigation wins that limited the formal ability for corrections departments to place prisoners with serious mental illness in solitary,69 there were still many people with preexisting mental illness who ended up in segregation units. In New York, for example, advocates expressed concerns that even those individuals who were eligible to be diverted from the Special Housing Units because of known pre-

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[69] See *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (holding conditions of confinement in the Security Housing Unit of California's Pelican Bay supermax prison imposed cruel and unusual punishment on prisoners with mental illness); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (holding that the California Department of Corrections and Rehabilitation had been deliberately indifferent to systematic deficiencies in inmates' mental healthcare, including improper housing of prisoners with mental illness in administrative segregation); Order, *Rasho v. Walker*, No. 1:07-cv-01298-MMM (C.D. Ill October 30, 2018) (holding that the Illinois Department of Corrections had been deliberately indifferent to the mental healthcare needs of inmates, including those with serious mental illness in segregation); Private Settlement Agreement, *DAI v. New York State Office of Mental Health*, No. 1:02-cv-04002-GEL (S.D.N.Y April 25, 2007) (requiring multiple reviews of disciplinary sentences for prisoners with mental illness to remove prisoners with serious mental illness form solitary confinement and other changes to mental health treatment provision in the New York Department of Corrections and Community Supervision); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Texas 1999) (finding that the Texas Department of Criminal Justice's administrative segregation units constitute cruel and unusual punishment in violation of the Eighth Amendment for prisoners with mental illness); Order, *Jones'el v. Berge*, No. 00-C-0421-C (W.D. Wisconsin, June 24, 2002) (approving settlement agreement wherein no prisoners with serious mental illness are to be permitted to be incarcerated at Wisconsin Department of Corrections' supermax prison); Joint Entry for Motion of Conditional Dismissal, *USA v. Doyle*, No. 2:08−cv−00753 (E.D. Wis. Sept. 4, 2008) (approving settlement agreement between the U.S. Department of Justice and the Wisconsin Department of Corrections to overhaul mental healthcare provision for incarcerated women, including enhanced mental health review for disciplinary proceedings).

existing mental health issues remained in solitary conditions either because they were deemed ineligible for mental health programming because they posed too great a security risk, the treatment received was so minimal that they essentially remained in their cells all day, or they were held in "keeplock," a cell-restriction status that is almost indistinguishable (INT179, INT173, INT054, INT053). Others also suggested that after the exclusion law was passed, that prisoners appeared to be systematically re-diagnosed to less serious mental illnesses (INT175, INT179). In Wisconsin and Illinois, despite legal victories that required the state corrections departments to review whether mental illness was a factor in disciplinary incidents before a sanction of solitary could be imposed, found that in practice, these reviews were more of a rubber-stamp, and not able to protect people with mental illness from being sentenced to solitary (INT154).

Beyond failures to identify and meaningfully divert prisoners with mental illness from solitary in the first place, many former prisoners and advocates I spoke with also described, in painful detail, the devastating psychological effects of solitary had on even previously healthy individuals.[70] A former prisoner from Wisconsin I spoke with put his experience in "the hole" starkly: "I think there was a couple of times, man, where it was like I was ready to hang it up, like damn, what is—I just remembered every morning I'd wake up, like, it's a perfect day to hang myself. That's the mentality you have" (INT114). Although his time in solitary was relatively short, he observed others with even more severe symptoms of psychological decompensation: "I've known guys that were in the hole for so long, they're fucking not right anymore in the mind. Like they're not, we lost him, it's just remnants of a man" (INT114). A former prisoner from California I spoke

[70] In New York, even one prosecutor I spoke with cheered the limits on solitary confinement in the state, saying "solitary confinement can do more damage than it can bring help…from an administrative standpoint" (INT015), given its psychological effects.

with who spent over a decade in solitary confinement at the supermax prison, Pelican Bay, and at another prison's Special Housing Unit, said, that of experience in solitary:

> Still to this day, [it] is something that I suffer from and I deal with on a daily basis. Spending that much time in the SHU, people normally don't come out with their head intact, but I mean by the grace of God, I exited with my mind intact. I suffer from anxiety and I can't be in a hot place, in any hot room, if there's too many people in there I got to get out (INT060).

A former prisoner from Illinois I spoke with described the beginning of his own decompensation in solitary poignantly, "like once you're in seg it's like you're just gone" (INT159). He explained how this hopelessness and isolation drove him "mad" and led to his own and others' conduct—bodily-fluid throwing and head-butting—that ultimately resulted in additional tickets and new criminal sentences:

> You have some people who do stuff for attention, but a lot of stuff that's going on there is not attention, it's being sick. It's being sick and losing hope and losing everything you got. A lot of, a lot of things that people got in the world, being able to watch TV every day, being able to shower when you want to shower, being able to eat when you want to eat, and certain things that you like to eat, listening to music, your sexual partner, being able to talk, being able to go outside, being able to touch grass and rocks and throw stuff and to move around—picture yourself losing that, all of that, and being around those who you love and waking up to them every day, or seeing them, or doing something you like to do every day. Picture not being able to do that for ten, twelve, twenty something years to go on straight. And then while you in the process of doing it, you lose the, all the support you have or that you had, it drives you mad because the only thing you think about is, "I don't have nothing else to live for" (INT159).

From this point, he explained, that his "mental state started to deteriorate" (INT150). In response to "them not giving me proper treatment that I needed" and the security staff "doing things to aggravate me and to provoke me," at times "I would act out, you know?" (INT159). Looking back on the episodes of self-harm and assaultive behavior he engaged in, he now can barely recognize himself in his past actions: "That's how I did sometimes when I look at certain papers or I look at a certain mark on my arm, or you know, why did I do that? What was I thinking? I wasn't in my right

state of mind" (INT159). For these acts, he received over 25 years of additional segregation time, and also 6 new criminal charges. With the cycle of decompensation, "you get buried in seg," he said (INT159).[71]

This pattern—of prisoners' psychological decompensation, followed by loss of impulse control and assaultive behavior like throwing bodily fluids, which the prison then punishes with more segregation time, and in some cases, criminal prosecution—was described by many interview participants as "a vicious cycle" (INT001), a "cycle of misery" (INT053). An Illinois advocate put it succinctly: "they punish mental illness with solitary confinement, and then punish the obvious and predictable result of isolation on a mentally ill person with even more solitary confinement" (INT001). Another Illinois advocate echoed a very similar view, wherein "[the prison system is] creating a problem, they're making a problem worse, and then they're punishing people for that problem" (INT057). In other words, these former prisoners and advocates saw solitary as creating the very criminal conduct that prisoners were subsequently punished for, extending their stay in segregation and in prison more generally.

Taken together, then, for these attorneys and former prisoners, solitary conditions themselves were a causal force in creating the impulsive and reactive conduct like spitting or throwing urine or feces on guards that some prisoners engaged in. And among most of the prosecutors I spoke with working in New York, Wisconsin, California, and Texas, these bodily-fluid throwing cases were among the most common type of prison cases they prosecuted (INT160, INT005, INT008, INT039, INT050, INT051). Like the addition of new tickets and extended segregation time, the criminalization of such conduct, which often extends prisoners' sentences, is in

[71] A more extensive description of this participant's experience in solitary is recounted at the beginning of Chapter 3.

this view, evidence of the predictable failures and inherent violence of these extremely restrictive conditions.

II. *Rational Resistance*

In a related but slightly different view of the relationship between solitary conditions and prisoners' misconduct, other prisoners' advocates I spoke with described the acts of bodily-fluid throwing and other assaultive behavior less as a symptoms of mental illness triggered or exacerbated by solitary, and more as rational responses to their extremely restrictive conditions—human reactions to the prison environment that Ashley Rubin would likely classify as "friction" but others might consider a form of resistance (Ashley T Rubin 2015). For example, one Illinois advocate said solitary creates a "weird Kafkaesque universe" wherein:

> You've created conditions where it is utterly and completely foreseeable that human beings, *not crazy human beings, just human beings*, will respond in certain ways through violence or through throwing urine, throwing feces, whatever, but then you come back and you say, even though we've created these conditions, you are responsible for what we knew you would do as a human being, as a coping mechanism, or a decompensation in this environment that we control (INT104) (emphasis added).

In the above quotation, this attorney took care to emphasize how, in her view, one didn't need to be "crazy" to respond violently to solitary conditions; one need only be human. She spoke similarly about self-mutilation, calling into question more explicitly whether such behaviors in solitary are necessarily symptomatic of mental illness:

> People generally do things for a reason, to meet a need, even if it's not a good way, or maybe the best way of getting a need met, but for instance this self-harm that people routinely exhibit in long-term solitary, that's okay, it's characterized on the one hand as a manifestation of—it's pathologized and it's mental illness, and I suppose that's true….But leaving that aside, it's actually a completely, in that prison economy, in solitary's economy, it is a rational form of communication. Because saying "Help me, I need this," no longer works, so what do you have? You express yourself and you write yourself through your own body. That's essentially what's left to you, and that is

> what is demanded in that environment to get someone to respond to you. So, is that mental illness? I don't know. I don't know if it is (INT104).

Quite similarly, another attorney from New York who had also spent a long career advocating for prisoners' rights, spoke about how, in his view, one could view acts like throwing, which may ultimately get prosecuted as new crimes, as a form of rational resistance—an assertion of "humaneness" in an extremely restrictive environment where there are few other options:

> When you take away power to people, sometimes their only power they have left is what I call the "no-power." That means, "I'm not gonna come out," "I'm not gonna do it," "I'm gonna resist you even if it's counterproductive for my well-being." That is the only way in prison I can exercise power. I can't do things affirmatively if they don't let me do that, but I can do things negatively as a manifestation of my humanness or—particularly for men—my manhood. So, I am going to, if you do something, I am going to fight back, it's because you've taken away all their options… it's the environment where you've created no alternatives to assert your own personal authority other than being resistant, and some people maybe are smart enough to do it in a non-violent way, or something, but most people inside don't have that as their mechanism so they're doing it the only way they can manifest that, which is often violent. And that can lead to criminal prosecutions. So, it's the "no-power" that I talk about, of your sense of humanness (INT175).

And even once prosecuted, as another attorney, a public defender from Wisconsin, pointed out, defendants who are in solitary confinement may have rational reasons for strategically using courtroom procedures, like insisting on hearings, firing attorneys, or representing themselves, in an effort to get out of their cells—even if it causes them disfavor in court. He said of some prisoner-defendants:

> They're buying time, they're fucking the system up because they like causing trouble, and they get the attention too. They get the attention. And half the time they want to be moved. Why wouldn't you? You're stuck in the same goddamn cell all the time because you're in segregation. So you're going to scream, "I have the right to appear." And you do. You do have the right to appear in court, and you can't take that away. So that's all the time they do it, and that's where they said, "I'm not appearing by phone. I need to be there in person." They'll also fire attorneys because that's the best way for them to buy more time, because if they keep the same attorney, the judge will say, "You know what? We're done. Except for trial. We're ready to go" (INT172).

Of course, as the historic hunger strikes among prisoners in solitary in Pelican Bay and in other prisons make clear—throwing bodily fluids and self-mutilation is certainly not the *only* form of resistance available to those in solitary to protest their conditions of confinement. Engaging in violent behavior that can be punished with more solitary time and possibly new criminal sentences is certainly not the most *strategic* method of hastening release, either. And while it may be understandable for prisoners in solitary who are subsequently prosecuted use court process to increase their in-person hearings and jam the system up, or run "a playbook" as one Wisconsin prosecutor put it (INT008)—it carries a high risk of annoying the judge presiding or the prosecuting attorney, which could lead to a less generous plea offer or harsher sentence.

In these ways, even if the violent acts in solitary (whether self- or other-directed) are viewed as rational, on some level, by advocates, they are not necessarily inconsistent with mental illness. After all, as the New York attorney's quotation hints at above, utilizing such non-strategic modes of response could itself be interpreted as a symptom of mental illness in that they may be incapable of impulse control or formulating different response. Indeed, many prisoners' advocates expressed a sort of hybrid view, that recognized the mental health issues of their clients as well as how such reactions to conditions were understandable or rational given human nature. For example, one New York prisoners' advocate reflected:

> People in segregation get awful damn frustrated and don't have any resources at their disposal. You know, I mean, I think the difference is if you're someone without mental illness engaging in that kind of behavior versus if you are—if you're in a psychotic state or if you're screaming for help and no one's helping you, I could see resorting to that kind of behavior (INT170).

Thus, both the "vicious cycle" of psychological decompensation pathway and the "rational response" pathway articulated by interview participants can be understood together as two related causal pathways that help to explain the relationship between solitary confinement and the criminal

conduct like bodily-fluid throwing that it produces: mental illness and psychological decompensation may lead to misconduct, but that conduct is still on some level a "rational" response to the need for human interaction in the context of extreme social isolation.

Alternative Explanation: Immutably Mad and Bad

In contrast, there was an alternative view of the relationship between solitary confinement and misconduct that was put forth by other interview participants—namely prosecutors, but some corrections staff as well—that the violent behavior that prisoners engaged in was not brought about by the extreme conditions of solitary or prison more generally, but was instead due to their immutably violent, antisocial nature. For example, one Wisconsin prosecutor whose county is home to several prisons said plainly:

> Well, we're not deniers of not guilty by reason of mental disease or defect, as many in the field sometimes are…Mental health is real. Okay?... But there's a difference between somebody who has a treatable mental illness like schizophrenia or depression and someone who has antisocial or borderline personality disorder, is a psychopath, shows evidence of psychopathy. There's a difference between that. People that have psychopathy and those kinds of antisocial type personality disorders, that's not treatable. That is who they are, and they present a risk to the public, and it oftentimes makes them much more dangerous. And there really isn't a solution that has been provided other than hard prosecution for these and some sort of hard control, whether it be incarceration or strict supervision (INT008).

In this view, as articulated by this prosecutor, "hard prosecution" and "hard control" is the only appropriate response for those prisoners who are immutably antisocial—and those, he said, are found in the "long-term segregation" unit of a maximum-security prison. He explained:

> These are obviously individuals that already have a disciplinary problem within the institution, and they get moved from all over the state, okay, to that location. So, they are really pretty much the most dangerous offenders, dangerous within the prison, not necessarily dangerous to the community but dangerous to the prison community. They've assaulted inmates and engaged in repeated assaults on guards. That's very common…So, that creates just a higher level of work (INT008).

In other words, this prosecutor took the repeatedly assaultive behavior of prisoners assigned to long-term segregation in his county as evidence not of any causal link between solitary and such behavior, but instead as evidence of the fundamentally dangerous nature of those prisoners.

Notably, not all prosecutors I spoke with, even those who did repeatedly engage in prosecuting prisoners with mental health diagnoses and who were in solitary confinement, endorsed the strong formulation of this view. Some saw their prosecutions more as the lesser of two evils, a necessary step to protect public safety in the context of a less-than-ideal carceral system (INT010, INT051). Nevertheless, others working in the field felt this view was widespread—not just among prosecutors but among corrections officials. One psychiatrist I spoke with, a mental health corrections expert who had evaluated prison systems in a number of jurisdictions, including Illinois and California, recalled the pushback he had received upon telling corrections officials that the "untoward behavior" that they consistently saw among people placed in solitary confinement (i.e., "throwing feces at guards, assaulting, masturbating, exposing oneself to female guards") was a result of worsening mental illness brought on long-term segregation:

> This is such a major issue and every prison system that I've ever had any contact with, and I tell people, "You guys, you're causing this. If you would do better treatment, this would stop. If you would do the appropriate amount of out-of-cell time this would stop." And they say, "Oh no, they're just a bunch of assholes. They're anti-socials," and all that sort of stuff like that that even the clinicians fell prey to (INT011).

In this psychiatrist's experience, even some mental health professionals working in corrections come to reject the view that there is a causal link between solitary conditions and violent behavior for some prisoners.

This perspective emerged in some of my interviews with some mental health corrections staff members as well: an acknowledgement that while there were some prisoners who were "truly" mentally ill, typically with Axis I psychiatric diagnoses like schizophrenia or bipolar disorder, there

were others who were had Axis II personality disorders, like anti-social personality disorder, whose misconduct was "behavioral." For example, one psychologist working in an Illinois maximum-security prison where the majority of inmates were in segregation, echoed this mentally ill/behavioral distinction:

> Mental illness in the community works differently than some of the mental illness in prison. And I think that that is related to... Yes, we have people who are really very ill based on a psychotic or a mood disorder. And then we have people who are ill because of their personality disorder, and that is much, much...that presents itself much differently. But then there's also people who may struggle emotionally as it is, and then they come into the system. And they almost develop more behavior based on what they've learned from other people… Yeah, they definitely learn additional tools to use to help achieve their goals. Let's put it like that (INT035).

In this view, for those prisoners whose actions are more calculated, manipulative, "behavioral," criminal prosecution could be more easily justified. As this psychologist said, "most of the cases of sexual misconduct, and especially the ones that are getting picked up for prosecution, are people who it is predictable, and it's more related to that personality disorder than out of any psychosis or mania" (INT035). Another prosecutor I spoke with in Wisconsin echoed this view in how he approached discerning which cases to pursue among prisoners with known mental health issues:

> A lot of the time the charges don't get pressed because, well, they're mentally ill. We understand that that's who they are. So then nothing happens to them and we see it as some of them are definitely mentally ill. Some of them, it's definitely a behavioral situation. So you have to be able to wade through that funkiness to see what is what (INT064).

How do prosecutors and courts "wade through" and discern which prisoner–defendants are "definitely mentally ill" and therefore culpable of criminal behavior and liable for punishment? In the next section, I turn to the various methods (both informal and formal) that prosecutors and courts use in deciding whether to sustain criminal charges against prisoners with diagnoses and/or conduct (like throwing) that could serve as indicators of mental illness. If charges are sustained

despite these criminal procedural protections, such prosecutions, I argue, have the ability to further legitimize the extreme conditions of solitary confinement in prison systems across the country.

Criminal Prosecution and the Legitimacy of Punitive Conditions

As discussed above, scholars of total institutions have repeatedly observed that the predictable disciplinary infractions that extreme conditions like solitary trigger—especially among prisoners with mental illness—serve to legitimize and justify the conditions themselves (Goffman 1961; Reiter and Blair 2015; Shalev 2013). This is true, too, of criminal prosecution for conduct occurring inside prisons, especially that in solitary units. Indeed, because of the procedural protections guaranteed to criminal defendants alleging severe mental health issues, this legitimation function may be even more powerful than administrative processes alone.

For example, the hard-charging prosecutor I spoke with in Wisconsin explained the role that mental health evaluations, which prisoners can request "legally," and, in his experience, most do, play in his decision-making in whether to sustain charges against a prisoner:

> One of the things that's good about the fact that they want all their process is that we do get mental health assessments on almost all the inmates... in some fashion during the process. And what those mental health assessments usually reveal is the antisocial personality disorder or straight-up malingering, where they have no mental health issues and they are just simply faking it. And some of these guys are really, really good at that, but malingering is a very significant problem in the criminal justice system as a whole. It is a very significant problem beyond that in the institutions. People malinger, because they had the idea that it would be better to be at the mental health institution than be at the prison. "Well, I can get additional privileges," and some of them do by malingering and using that as a status to get them something. But we usually can detect most of that, because we are engaging—we have a stable of very good forensic psychologists and psychiatrists that we work with regularly (INT008).

The standard for not guilty by reason of insanity is so high, as discussed more in Chapter 3, that even though most of the prisoners this prosecutor charges have "mental health statuses"—such that they're not even eligible to transferred to Wisconsin's supermax prison—they nevertheless are

hardly ever are found to be mentally ill enough (e.g., an antisocial personality disorder diagnosis or diagnosis of malingering) by the state's "stable of good forensic psychologists and psychiatrists" to not qualify for the court's protection.

In addition to using formal court processes like psychiatric evaluations to discern which defendants are truly or seriously "mentally ill," prosecutors I spoke with also relied on informal methods. But in these cases, too, the standards for finding defendants sick enough to not pursue charges appeared to be almost impossibly high. For example, one New York prosecutor I spoke with discussed how his "administrative assistant" is able to use her relationships with the civilian psychiatric hospital where prisoners are sometimes transferred to assess which defendants—among those who are hospitalized—are truly sick and those may just have been moved there to provide the prison with "respite care" (INT051). These high standards for finding that a given defendant is truly mentally ill permit this prosecutor to charge, with some frequency, bodily-throwing cases involving prisoners designated as seriously mentally ill. This group of prisoners include those who are housed on what he termed a prison's "smock units," where prisoners were held in segregation and not permitted to even wear normal clothing because they posed such high suicide-risks.

Another prosecutor in Wisconsin described routinely talking with mental health staff at prison facilities while investigating cases to assess whether the prisoner was "even capable of acting appropriately" (INT050). But, he explained, sometimes, his office would decide to move forward with prosecution even if there were questions about the prisoners' mental health: "We had some people who just serially attacked people, frequently employees, sometimes not employees, but those were the types of cases where even if we had some doubts about whether our intervention was going to do any good, we just didn't really see an alternative" (INT050).

Indeed, there was broad consensus among interview participants about the futility of criminal prosecutions in effecting behavior change, especially for those with mental illness and in restrictive conditions, even among correctional staff. As a psychologist working in an Illinois prison said:

> I mean, I think staff feel somewhat validated when those additional terms come along. Like, "Oh my gosh. I was seriously injured by this person." Okay. Well, here are some consequences. And it helps them to feel a little more validated. On the other hand, like I said, I think it doesn't necessarily stop any further behavior from happening with those offenders….Deterrents are not working. They're not working. They may make staff feel better because they feel like, "Okay. Well, now there's certain just consequences in place." But they don't actually... My perception of it is that they don't actually change the behavior (INT035).

A security staff member in Wisconsin echoed this view, noting that while he would be angry if "if I saw one of my coworkers was violently assaulted and the institution decided not to press charges," it nevertheless would be worth thinking about the effectiveness of the prosecution:

> Again, you need to look at the situation, like, what is the inmates time? Is he a life inmate? Is he going to be there for life anyways? Now what more can you do to a guy with that situation? So there's a lot of variables that play into that. And those of us that have been around a long enough will see that and understand. Some of the younger ones may not, people that just started. So you've got to take all that information into effect before you make a decision personally about it. If that makes sense? (INT064).

As I discuss in greater depth in the next concluding chapter of the dissertation, these and many other interview participants I spoke with offered an impressive array of alternative options for how violence in prisons could be productively addressed without the imposition of severe disciplinary sanctions like solitary and criminal prosecution. For many I spoke with, the relationship between punitive conditions like solitary and the conduct prosecuted itself was so clear that any solutions to violence would require a rollback or abolition of those very conditions.

But in the shorter term, it is clear that even the most reform-oriented prosecutors working in prison counties I spoke with felt constrained and compelled to pursue charges against prisoners with

mental illness—including those diagnosed serious mental illness in long-term segregation units in Wisconsin or on suicide watch in New York. And with an ostensibly independent, court-ordered psychological evaluation in hand certifying that the defendant in question—despite even their institutional classification of serious mental illness—was not so ill as to avoid criminal culpability, these prosecutions served to not only reinforce a narrative of the "immutably dangerous prisoner," but also justify the extreme restrictions they are subjected to.

Solitary Reform Backlash

Beyond the legitimation function that criminal prosecution of prisoners in solitary may play for the maintenance of these restrictive conditions, interview participants also raised the possibility that criminal prosecution in fact might also function as an alternative, more stable, form of punishment that could persist in the case that solitary use is restricted. As solitary reforms continue to sweep the nation and restrict prisons' ability to impose the sanction on prisoners, several prisoners' advocates I spoke with raised the possibility that increased criminal prosecution may follow.

Many interview participants raised this as a plausible speculation, but one they did not have data yet to support. For example, one New York prisoners' rights advocate said that after "some changes around how they use solitary in the city," she had heard that the district attorney was under pressure to prosecute more incidents occurring in New York City jails, with people saying, "people are getting away with these things and so they need to be prosecute" (INT054). Another New York prisoners' advocate expressed similar concerns about the state correctional system. He suggested there had been a possible increase use in criminal prosecution after the state's solitary reform

legislation limited the department's ability to impose long-term segregation on prisoners with severe mental illness:

> I think at one point…when there became a little more accountability, I'm wondering if people [were] looking for other mechanisms. I have a feeling that the number of criminal prosecutions went up because there was a little more accountability on the disciplinary side, so then it then says "if this is serious, and this person we can't throw away the key for 20 years inside of solitary, we better criminally prosecute them." And so I think there is a push-pull as you get the disciplinary system a little more accountable, in the extreme cases—and I think it is only the extreme cases—you're maybe looking at: "we better do criminal prosecution" (INT175).

This advocate explicitly said he would be interested in assessing data from New York and other jurisdictions to evaluate whether there is evidence for such solitary-reform backlash: "I'd be very interested seeing other states as they reduced or created much more accountability for this system that didn't have much accountability on administrative or disciplinary segregation, has there been this pressure to kind of increase the criminal side?" (INT175).

And these concerns were raised by advocates working outside in other jurisdictions as well. For example, one California attorney expressed a similar sense that there had been an "uptick" in criminal prosecutions of prisoners in the state subsequent to both solitary confinement reform, and prison reform more generally:

> Because I think that prison reform and criminal justice reform is taking the clientele away from prisons. And I think that they are desperate to make sure that their beds are full and their jobs caging people feel purposeful and meaningful. That sounds pretty crap, but I really think that if there is an uptick, which is what it feels like to me, my feeling is that because I have experienced it in direct correlation to prison reform and criminal justice reform. And then it is a response to making sure that people remain in prison (INT188).

A California prosecutor I spoke with lent some credence to this attorney's speculation. He spoke forcefully about the important role he saw for prosecutors of prisoners in the context of the state's decarceration efforts in the wake of COVID-19 and other reforms:

> There have been a lot of significant changes to the prisons. What's very unfortunate is that with the legislature and the governor, they're doing everything they can to unload the prisons. They're using COVID-19 as an excuse. What's problematic is, what's really happened here, is that the tenor of the legislature and the governor—and I know this sounds crass—but they do not care about victims anymore. In their eyes, the victim is the inmate. I can't stress to you how important victims are. This is why I do my job. This is why I exist is to help victims find justice, and they are just letting everybody out. It's astonishing (INT007).

In addition to his views about the state-level decarceration efforts, he also expressed concerns about the limits on solitary confinement that had occurred in the state's supermax prison, Pelican Bay—and how he viewed the violence occurring in the prison in his county that he was prosecuting as directly related to those reforms. He said:

> Basically, these inmates filed a lawsuit that being incarcerated in a high-security prison in Pelican Bay in segregation was unconstitutional. So, basically, they won that suit, so basically the California Department of Corrections and Rehabilitation—CDCR for short, that's the prison system—they unleashed the worst of the worst and spread them around all these prisons in California. Again, they're being sent to level-three, level-four prisons. They're not sending them to the lower-level prisons, but they spread these people around. They're doing the same thing with San Quentin inmates. What these inmates have done now, and I've gotten this information from correctional officers at these other prisons, is they become, oftentimes, shock collars at these prisons, and they've ordered all sorts of stuff. Hits, you name it. So, to answer your question, the level of violence has increased in the lower-level prisons, because these people are knocking around (INT007).

Based on these accounts, it is possible that prosecutors in California and New York have felt an increased pressure to charge prisoners in the wake of reforms that they feel are causing incarcerated people to be less likely to be sanctioned to long-term solitary confinement and more likely to be released. But more data is needed.

In Illinois, there was at least one well-documented case of solitary reform in the state's youth prison system leading to a staff backlash and an increase in adult criminal prosecutions of youth for

bodily-fluid throwing and other assaultive behavior at one facility.[72] One Illinois attorney I spoke with recounted this episode:

> That situation was…the perfect storm of, because of *RJ* [an ACLU lawsuit] they had to eliminate solitary. The COs felt, rightly or not rightly, whatever, that "our ability to control these kids has been removed." And then, basically, using the court system as a form of protest with these kids as collateral damage of going and bringing individual claims against them for stuff like spitting, right? (INT104).

A Wisconsin correctional officer expressed similar concerns emanating from security staff working in their adult prisons. He said that with new restrictions on solitary, correctional staff have grown increasingly concerned about their safety:

> There's a lot of changes that have come down and a lot of staff members would say not for the best for staff because they've really lightened the way that they handled these inmates with kid gloves. Some say too light, that there's no incentive for them to behave because they don't receive any kind of…It's like a spoiled child. If you don't deal with them, they just keep getting worse (INT064).

Whereas in the past, he said, common infractions could lead to a 360-day sentence in solitary, "now it seems like they can do something pretty serious as getting into a fight with another inmate and by the next two days, they're both back out on the units again, without any kind of consequence" (INT064). Whether such attitudes among staff in Wisconsin could trigger a similar response as Illinois saw remains to be seen, but it is something that both advocates and researchers may do well to consider as a possible unintended consequence of solitary confinement reform nationwide.

CONCLUSION

In this chapter, I explored the bidirectional, symbiotic relationship between solitary confinement and criminal prosecution in contemporary U.S. prisons. Drawing on administrative

[72] For more detail about these prosecutions of youth at IYC-Harrisburg, please see my report published by the Children and Family Justice Center, a legal clinic at Northwestern Pritzker School of Law (Tolman 2020:8–9).

staff assault data from Wisconsin, I have shown how solitary confinement is not only imposed as a post-infraction consequence in response to prisoner misconduct, but that criminal referrals often emanate from incidents that occur within restrictive housing units. In addition, using interviews with a diverse range of prison-system actors from across the country (prisoners' advocates, former prisoners, prosecutors, and correctional staff), I traced the multiple, and at times, conflicting, narratives participants used to explain the relationship between solitary conditions and prisoner misconduct. I argued that the criminal prosecution of prisoners in solitary—most frequently for behavior like the throwing of bodily fluids—helps to reinforce a narrative that prisoners in solitary are immutably antisocial, rather than mentally ill, and in doing so, helps to justify the punitive conditions they are subjected to. In so doing, I built on a robust legacy of social science scholarship examining the "failures" of total institutions, their production of misconduct, and the legitimation of extreme forms of confinement.

By highlighting the relationship between segregation and criminalization of prisoners with mental illness, this chapter complicates the simple the "beyond administrative sanction" conceptualization of criminalization of prisoners introduced in Chapter 2, by demonstrating how in fact the two are interrelated empirically both at the individual and institutional level. For individuals, new criminal sentences are "stacked" on top of administrative sanctions and may follow from them. For institutions, outside criminal prosecution helps to authorize the extreme conditions of solitary that so many prisoners in the United States are exposed to—by using criminal courts to certify prisoner-defendants' behavior as criminal as opposed to a predictable, even rational reaction, to torture. Taken together, this chapter has shown that these multiple systems for regulating prisoners and prison populations—administrative and criminal-legal—interact in complex ways. In different cases, jurisdictions, and time periods, they may be additive, adjunctive, independent, or

complementary. Future research would do well to not view either as an isolated system, for changes in one raise the possibility of changes in the other in ways that could bring relief or new harms to people incarcerated and correctional staff.

In the next, concluding chapter, I summarize my findings and reflect on what these cases can teach us about the punitive excesses of contemporary mass incarceration and the breakdown in community mental health care and social welfare provision in the United States. I argue that the criminal prosecution of prisoners provides a useful lens to diagnose and envision remediations to these twin social policy failures. I draw on my interviews to discuss the creative law and social reform solutions participants raised that might help break the cycle of criminalization behind bars—and beyond.

CHAPTER 5

CONCLUSION

> *[T]he criminal punishment system, not abolition, depends on a superficial view of violence, a facile view of good and evil based on the victim-perpetrator binary. Simple stories of the perfect victim and the monstrous perpetrator bend reality to fit the pretexts for state violence, helping us to pretend that the physical, emotional, social, and civic injuries of prison are somehow justice.*
>
> — Naomi Murakawa, "Foreword," *We Do This 'Til We Free Us* (2021)

INTRODUCTION

After spending over two decades imprisoned in California, Malik was free.[73] When we spoke, he had just enrolled in classes at a local community college and had secured a good job working for his city's public transportation system. He was enjoying staying "tight knit" with his family and friends. In the years ahead, he planned to transfer his credits to a four-year university. His bright future, however, was hard fought.

Malik grew up in a large family marked by poverty and drug abuse. As a child, he was in and out of youth prisons for petty crimes. He picked up his first "strike" under California's Three Strikes Law as a young teenager, when he was convicted of a robbery. At 21, he got his second strike, for another armed robbery, he was sentenced to over thirty years in the California Department of Corrections and Rehabilitation. A few years into his sentence, while incarcerated, he faced a new criminal charge after a fight with several other prisoners. The assault charge would be his third strike if convicted—which meant that he could spend the rest of his life in prison. In our interview, he described how the threat weighed on him:

> It was one of those "woah" moments. I heard about a lot of people fighting smaller infractions end up getting struck out and getting that life sentence on top of their sentence that they're serving at that time, and that was a reality check for me when I

[73] Names and other identifying information have been changed to protect participants' confidentiality.

> received that. It was like, "dang, I could really spend the rest of my life in here." But at that time, I was thinking, too—there was a double conversation going on in my head—like "man, I could get this life sentence on top of this 36 years that I have." Which, at this time, I had 28 years left to serve. And so, I'm looking at 28 years, and I was like, "well shit, fuck it, I ain't probably gone get out anyway." So, it was like, those type of thoughts going on in my head, the back and forth like, "do I still have value enough to believe I'm gonna make it out and still be a productive person?" Or should I just say, "the hell with it, this is my life, and I'm gonna live it as is"…I was numb, I started numbing up to my time (INT197).

When the district attorney decided not to pursue the charges against him, Malik got another chance at life.

* * *

For Malik, as for all the other former prisoners whose stories were recounted in the pages above, the in-custody criminal charge he faced was far from the start of his entanglement in the nation's criminal-legal system. But the prosecution did represent a critical juncture. In his case, as a "habitual" offender, a new conviction for a charge that might otherwise have led to a few additional years meant a possible life sentence. For other prisoner-defendants, as described in the preceding chapters, new in-prison convictions led to a loss of hope, disconnection from family and community, punishment for untreated mental health symptoms, and the accumulation of a lifetime of racial, ethnic, and class disadvantage. And for states, these extra criminal sentences amount to tens of thousands of extra years of incarceration at a cost of billions of taxpayer dollars.[74]

Indeed, in this study as a whole, in answering the questions of how, how frequently, and with what consequences incarcerated people in the United States experience criminal prosecution,

[74] As noted in Chapter 2, determinate in-prison sentences added a total of 44,141 years of extra time for those in the California Department of Corrections and Rehabilitation alone, which at a cost of $81,203/prisoner/year (Legislative Analyst's Office 2019), will cost the state an estimated total of $3,584,381,623.

some troubling patterns of inequality and structural violence emerged. In Chapter 2, a survey of prisoner-specific criminal legislation, administrative data, and interviews with stakeholders from across the country revealed how pervasive these prosecutions are, and how in an era of determinate sentencing, just how much time is added by virtue of these criminal-legal sanctions. It also showed how Black and Latinx prisoners are disproportionately affected by these prosecutions. In Chapter 3, drawing on national survey and administrative data from Wisconsin, and interviews, I observed the overrepresentation of prisoners with mental illness among those with in-custody convictions, and explored the social process by which symptoms of mental illness can be turned into disciplinary and criminal-legal offenses inside prisons. And in Chapter 4, I analyzed the multi-faceted role that solitary confinement plays in the criminal prosecution of prisoners—including helping to produce the very behaviors that are subsequently criminalized inside. Together, these chapters paint the picture of a broken criminal-legal system, where the criminal law is turned once again to manage a trio of social policy failures in the United States: mass criminalization/incarceration, deinstitutionalization, and harsh punitive penal logics.

At its core, this study has identified a widespread phenomenon of criminal-legal responses to incidents of prisoner noncompliance. In each of the chapters, I have argued how the criminalization of these acts help to provide legitimacy for the punitive excesses of mass incarceration: for its extreme sentences, racial inequities, criminalization of people with mental illness, and harsh conditions (Travis and Western 2021). In effect, these prosecutions put already-criminalized and marginalized individuals on trial, instead of the institutions that help to produce the behavior in question. And the new convictions they produce, by extending criminal sentences, fundamentally help maintain mass incarceration at its current levels. In sum, therefore, I contend that it is not

possible to understand the drivers of mass incarceration without attention to the criminal prosecution of those already imprisoned.

But, as others have argued, the ultimate consequences of incidents of prisoner noncompliance depend on the interpreting audience (Rubin 2017). Prisoners' acts of noncompliance—whether friction, violence, or resistance—can serve a functional purpose within prisons, or, in the eyes of critics, can illuminate failures of the prison system. In other words, noncompliance provides "evidence of the prison's (il)legitimacy" depending on the viewing audience and how much the activity resonates with pre-existing narratives (Rubin 2017:154). On the one hand, the social process of prisoner criminalization I've identified here helps provide legitimacy for the existing, punitive, penal order because a wide swath of the type of conduct criminalized, even when it does not cause serious injury, "fits well into narratives of prisoners' dangerous character, and bolsters support for stricter, more control-oriented prison policies and lengthier prison sentences" (Rubin 2017:158–59). On the other hand, however, from the perspective of a growing consensus of scholars, advocates, and activists critical of mass incarceration, these prosecutions tell a different story. By bringing incarcerated defendants into the public sphere, these cases—and this study itself—invites a sliver of scrutiny to these otherwise closed institutions' failures (to rehabilitate and to reduce crime), and inflictions of violence (in the form of excessive force, failure to protect, and tortuous conditions).

In this concluding chapter, drawing on my interviews with 64 prisoners' advocates, former prisoners, prosecutors, and correctional staff, I argue that criminal cases brought against incarcerated people provide a particularly useful window to diagnose—and envision remediations to—the social

policy failures of mass criminalization/incarceration, deinstitutionalization, and punitive penology.[75] As some of the people with the closest proximity to these cases, albeit from different perspectives, their views on how the system could be improved are particularly valuable. First, I describe several reforms to the criminal-legal system, from changes to the substantive criminal law to new procedural protections for prisoners, that could reduce the number of prisoners who are prosecuted for new crimes. Second, I chart changes to prison conditions and routines, especially for those with mental illness, that could help prevent the noncompliant behavior that is subsequently criminalized inside from arising in the first instance. Third, I discuss the large-scale social policy reforms that could address the structural inequalities undergirding these prosecutions, and in doing so, build a world where the cycles of criminalization these defendants face would not take place. Finally, I argue that the legal and social changes that could help to interrupt this process of (re)criminalization that

[75] As I discuss in my methods appendix, my interview guide differed for each participant type depending on their background. But one question I asked in almost every conversation, regardless of participant type, what they would change, if they could, about how prisoner misconduct is handled by prisons or in the courts. With just a few exceptions, nearly everyone I spoke with had some suggestions for how the system could be improved in order to reduce the number of prisoners subject to prosecution while incarcerated. This is not to say that interview participants did not recognize any material and symbolic benefits that the criminal prosecution of prisoners brought to bear for various groups. For example, in Chapter 2, I discussed how these prosecutions can help corrections staff feel more secure, that physical and dignitary harms are redressed, and thus in turn, how the cases enable local elected district attorneys to be responsive to a core constituency's concerns. In Chapter 4, I discussed how the criminal prosecution of prisoners in solitary confinement helps to legitimize those harsh punitive conditions. But nevertheless, overall, almost all of the 64 interview participants, including 7 of the 11 prosecutors I spoke with, had some suggestions as to how to prisoner noncompliance might be handled better.

happens inside America's prisons would likely have ripple effects far beyond this narrow subset of cases.

CRIMINAL-LEGAL REFORMS TO REDUCE PRISONER CRIMINALIZATION

There are several changes to the criminal-legal system itself that might help to reduce and reform the criminal prosecution of prisoners. In this section, I first discuss changes to substantive criminal law—specifically laws that subject prisoners to longer sentences by virtue of their status as prisoners as well as their status as "habitual" offenders more generally—that could help reduce the number of prisoners charged and convicted of new crimes. Second, I describe how strengthening public defense of prisoners would help prisoner-defendants fight unwarranted charges and provide prosecutors with better information about prisoners' mental health status that could increase rates of dismissals. And third, I discuss constitutional challenges to the use of solitary confinement as an adjunct to criminal prosecution which, if successful, could benefit prisoners' ability to defend themselves against new criminal charges.

Prisoner "Status" and Extreme Sentences

As discussed in Chapter 2, most states and the federal government have criminal legislation that specifically targets prisoners. In some cases, these statutes make what would otherwise be misdemeanor-level violent conduct in the free world a felony (e.g., bodily-fluid throwing on correctional staff). In other cases, the conduct itself that's criminalized is only considered criminal by virtue of the defendants' status as a prisoner (e.g., possession of a cell phone as "contraband"). In addition to the way that prisoner status is criminalized, sentences are also made considerably harsher for those who are incarcerated by statutes which require that sentences be "stacked" or served consecutive to the prisoners' initial sentence and by statutes which "habitualize" the defendant, like California's Three Strikes Law. When combined, this legislation means that prisoners can face

extreme sentences, decades or even life, for acts that might be considered noncriminal or quite minor criminal offenses in the community.

Several prisoners' advocates named changing these substantive criminal laws as their primary hope to reform the system. One Illinois advocate felt that the laws needed to change such that only violent conduct causing "serious bodily harm" should be able to be prosecuted in prison (INT142). Another suggested the need to create a new defense available to incarcerated criminal defendants that would allow a crime committed by a person with serious mental illness in solitary confinement to be justified on the basis of necessity (i.e., they acted in a way due to conditions completely outside their control) (INT104).

Other advocates felt that the harsh sentencing statutes prisoner–defendants were subject to should be the main target for legal reform. As one Texas public defender said:

> If I could change anything about it? I think the biggest problem for me were the sentencing ranges…No one should face getting decades for punching someone. I don't care if they're a prison guard, or a police officer. I don't care why they're in prison. The sentencing ranges and the fact that it was mandatory stacked sentences could create some really disproportionate sentences (INT029).

Rolling back habitual offender criminal legislation would take away the threat of these extreme sentences, and in doing so, reduce the ability for prosecutors to obtain plea agreements (a likely reason why this particular reform was *not* endorsed by any of the prosecutors I spoke with). When defendants face 25-year sentence minimums due to their habitual status, to be served consecutively, the charging decision is everything, and the law, in the words of another Texas public defender, effectively takes the sentencing power away from the judge and jury (INT040). This law, he said, "gives too much power to the prosecutor…they have really weak cases but people will plea because they're afraid to do otherwise" (INT040).

In her book, *Hard Bargains: The Coercive Power of Drug Laws in Federal Court*, socio-legal scholar Mona Lynch observes this same dynamic but in a different context—federal drug prosecution—where extreme sentencing ranges and mandatory minimums drive widespread plea agreements, because "the costs of asserting one's rights in criminal court [] so high few people dare take the risk" (Lynch 2016). Her study demonstrates how substantive criminal law interact creates an "extreme power imbalance" between the prosecution and defense that help to account for the rise in mass incarceration (Lynch 2016). This study, too, provides evidence for the critical role of substantive criminal law in shaping the conditions by which the prosecution of prisoners is facilitated. As Lynch writes, for the United States to "retrench from the[] punitive excesses" of the past several decades, "the substantive law must be tamed so that it no longer overwhelms the procedural rights of defendants by authorizing outrageously high sentences" (Lynch 2016). Thus, for those who wish to interrupt the cycles of criminalization for this population of defendants, like others—changing the criminal law itself is a clear place to start.

Public Defense of Prisoners

The indigency of state prisoners in the United States is well-documented. While incarcerated, prisoners receive very meager wages (if any at all) for their work (Sawyer 2017), and data reveal that incarcerated people had a pre-prison median income of less than $20,000 annually (Rabuy and Kopf 2015). Therefore, while facing new criminal charges while incarcerated, prisoners almost-universally qualify for public defenders and therefore, prisoner defense is a public defense problem. In general, then, strengthening public defense organizations by providing them access to sufficient resources would benefit this subgroup of defendants.

But, in addition, attorneys representing prisoners raised some additional challenges in mounting an effective defense, beyond the severe sentences their clients faced. For example,

although their clients' imprisonment ensured they could be located (not always true of defendants in the community), meetings with incarcerated clients were hampered by the strict rules on visitation, which often prevented attorneys from bringing laptops inside or being able to show their client video or photographic evidence that would be used against them (INT156). When prisons as a whole are on lockdown (as in the case of a major security breach), or the client is in solitary, these challenges to meaningful, in-person meetings, were heightened (INT156). Moreover, once charged with a new crime, prisons have discretion to transfer defendants in their custody to other facilities, which might be hours drives away from the county where they are facing the new prosecution, hampering their ability to meet with their attorney (INT156). Other challenges that attorneys I spoke with raised included the fact that whereas with some other defendants, they could minimize any prejudicial effect of a prior conviction, in the case of incarcerated defendants, the fact of their incarceration was often an element of their charge and disclosure could not be avoided (INT029).

Above all, however, prisoners' advocates and former prisoners alike who I interviewed spoke most frequently and forcefully about the need for rapid, independent investigation of crimes alleged to have occurred inside prisons. In Texas, for example, the prison system's Office of the Inspector General would be responsible for initially investigating alleged crimes and then referring cases to the state's Special Prosecution Unit.[76] Sometimes these reports would take years and by the time the

[76] Texas has an unusual structure for both the criminal prosecution and defense of incarcerated people: a statewide Special Prosecution Unit (SPU) that prosecutes prisoners (and correctional staff) across the state in agreement with local district attorneys, and a statewide public defense unit for prisoners, the State Counsel for Offenders, housed *within* the correctional agency, the Texas Department of Criminal Justice (TDCJ). The fact that the public defenders charged with representing prisoners were employees of the prison itself had some benefits (ID badges, for example, which allowed them easy access to the prisons to meet with their clients), but interview participants I spoke with who worked in the office raised a number of concerns about the arrangement. These concerns included the fact that the prison controlled

indictments came, witnesses (i.e., other prisoners), would have long been transferred (INT032; INT029). A Texas attorney explained about prison cases, "[t]hese are particularly troublesome cases in terms of, these are crimes alleged to have occurred in prison, so these are largely a black box as it is. In order to figure out what was, what really happened in the case, I think you need early investigation" (INT049).

A former prisoner from California also strongly endorsed a more independent investigative process for alleged crimes occurring inside prisons, he said:

> I would change the way DA referrals are given. In other words, I would want an independent investigator to do all those and make that determination. I would say, even, a team, because a lot of these DA referrals should be investigated the way a crime is investigated out here. Not by CDCR's police, but by independent, I would say independent—I would want you on there, a lawyer, I would want someone from a social and psychological background that has the understanding of these inmates that have mental health issues. I would want someone from the clinical side and someone from the law side and then maybe an actual officer that's retired. I think they should be taken a lot more seriously whether someone should be prosecuted, and I know that they'll be like, "that's a little too far-fetched," but someone's freedom is at stake and as an American you should value freedom, even a prisoner's freedom. They are citizens of this country, or even if they're not citizens of this country, if they came as immigrants, they still deserve the protections of the Constitution (INT060).

A former prisoner in Illinois echoed the same concerns: "why isn't any outside investigators being brung to the facility to do the investigation regarding the incident to make a decision? (INT159). Incarcerated people charged with crimes are likely to see the "same people that's investigating" are

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their budget (and thus ability to hire experts), the significant pay disparity compared to the SPU, lack of funds to travel to meet clients across the state (INT032; INT127; INT174; INT049). This institutional arrangement has come under some public critique (see, e.g., Barajas 2018) following the publication of a 2017 investigative report published by the State Bar of Texas's Committee on Legal Services to the Poor in Criminal Matters, but to date, there have been no successful legislative efforts to reform the office.

the "same people…who used to work in the cell houses" (INT159), calling into question immediately the legitimacy of the charges.

Increasing defense resources to enable more robust independent investigation of the evidence against incarcerated people might help to ensure that more equitable determinations of whether alleged misconduct should be classified as "criminal" across the board. But as the formerly incarcerated participant from California alluded to above, more defense-side investigative resources might also help to specifically reduce the number of prisoners with mental illness who are subjected to these charges and convictions. As discussed in Chapter 3, several prosecutors I spoke emphasized this as well; they explained how health privacy laws often prevent them from obtaining protected health information on prisoners' mental health status prior to indictment, and how this lack of information makes it more difficult for them to assess whether the behavior in question was symptomatic of mental illness at the time of charging (INT050; INT051; INT039). If public defenders representing prisoners had greater resources (and lower caseloads), they might be in a better position to get this information to receptive prosecutors' offices as soon as possible post-indictment. Moreover, greater defense resources might aid in obtaining psychological evaluations for defendants that would assist in findings of non-competency or with a NGI defense.

In a recent article for *The Nation,* sociologist Matthew Clair notes the critical role that public defenders play for defendants in criminal courts more generally: "For many poor defendants of color caught up in this system, public defenders are the last line of defense," he writes. "Appointed by the state to represent those who cannot afford an attorney, public defenders can serve as a check on the power of a police department and a prosecutor's office that are often institutionally aligned" (Clair 2020). For prisoners subjected to criminal prosecution, where their alleged crimes are primarily investigated by officers of the prison itself, and many of whom are struggling with serious

mental illness, this need for an independent check of well-funded, robust public defense offices is made all the more stark.

Criminal Procedure and Solitary Confinement

A final set of criminal-legal reform suggestions raised by participants targeted the imposition of solitary confinement as an adjunct to the criminal prosecution of prisoners. As discussed in Chapter 4, prisons commonly move a prisoner–defendant to solitary confinement after an allegedly criminal incident takes place while criminal prosecution is pending, and in addition, may place prisoners in solitary a disciplinary sanction for the same incident. Interview participants took issue with both of these practices.

One advocate argued, for example, that moving a prisoner to solitary confinement while a charge is pending is akin to a free-world *arrest*, triggering defendants' Fifth and Sixth Amendment criminal procedure rights against self-incrimination and to a speedy trial. He described a case he worked on where this practice raised a Sixth Amendment right-to-a-speedy-trial issue, which ultimately, the U.S. Supreme Court declined to take up (INT001). In a separate case, the same attorney also identified a Fifth Amendment issue related to the imposition of solitary confinement in the course of a criminal prosecution: that the duress solitary causes is so severe that a defendant cannot knowingly waive his Miranda rights against self-incrimination in the context of a police interrogation (INT001). In this attorney's view, prisoners subject to criminal prosecution should not be able to be "arrested" (i.e., moved to solitary confinement) without all the attendant procedural protections that criminal defendants in the community have under the Constitution.

In addition, other advocates raised concerns that the practice of placing prisoners subject to criminal prosecution in solitary raised an additional Fifth Amendment issue: the prohibition on double-jeopardy. For example, as one California prisoners' advocate (also a former prisoner) said:

> First of all, when someone messes up, they go to solitary confinement and they're gone, they go to the hole, and then they get transferred after that, when the court is over. So basically, I remember, if you have the DA, district attorney picked up your case, you're in solitary confinement, for the most part you're fighting it while in solitary confinement. So there's two punishments that happened…it's almost like double jeopardy—if the DA picks it up and that would be added to your time. Not necessarily your physical condition, but like the length of your time (INT134).

This double-punishment concern was raised by advocates and former prisoners frequently. In fact, one Illinois former prisoner emphasized how, between the imposition of solitary, the extension of a sentence of criminal prosecution, and the loss of "good time" credits on one's original sentence—the same conduct could be punished *three* times:

> It's not just a one-way lose. When you catch a ticket and a ticket amounts to good conduct credit being took, and then prosecution, you lose a three-way round circle because you getting seg time, which gone be probably 3 months, 6 months, a year, or indeterminate seg. Then, you losing the good time that's going along to whatever you got, and they not working a program to where they getting good time back in a timely manner, or a way to make you see light sooner. Programs is not good, and then third, you got to worry about how much time you gone get for the case! If you gone be a habitual criminal, if you get extended terms. All of that is what you have on the plate if something happens (INT159).

A public defender in Texas discussed how he worked to leverage his clients' simultaneous sanction to solitary as a way reduce their criminal sentences: "if the person was found guilty or maybe during plea negotiation, I'd bring up like, 'Hey, he lost this much of his good time,' or 'he was put into solitary or ad seg or whatever for this many weeks because of this,' to show that they'd already been punished a little bit for it" (INT032). The other public defenders I spoke with did not raise this strategy, even though they readily characterized solitary and criminal prosecution as a "double

punishment" (INT026), so it is not clear how common of a tactic this is—but it's one that more public defenders representing prisoners might do well to consider.

The current state of the constitutional law, which does not recognize solitary as a criminal punishment (subject to double-jeopardy prohibitions) or as an arrest (subject to speedy-trial and self-incrimination protections), means that these concerns raised by interview participants are currently without remedy in the courts. But there is some possibility that this is an area of law that, with more research and advocacy, could develop in the future, and if it did, might possibly reduce the conviction-rate of prisoners subject to criminal prosecution. In the next section, I describe the even more radical restrictions on solitary confinement and other prison conditions reforms that many interview participants viewed as important for interrupting cycles of criminalization inside.

FROM "VICIOUS" TO "VIRTUOUS" CYCLES: INSTITUTIONAL REFORMS TO PRISONS

The second main set of changes to the process of prisoner criminalization that my research would support are to prisons themselves. In my interviews, participants generated a slew of suggestions as to how the system for handling prisoner misconduct could be improved, from instituting more robust screening procedures to tamp down on contraband (INT004) and installing more cameras (INT159; INT015), to improving grievance procedures (INT122), permitting attorneys for disciplinary hearings (INT032; INT188; INT173), and better addressing correctional officer misconduct (INT100). But far-and-away, three responses to this question were most common: first, improved mental health services, second, the need to radically reduce if not abolish solitary confinement, and third, to transition to a disciplinary system that is incentive- rather than punishment-based. I discuss those each in turn below.

Mental Health Treatment Resources and Disciplinary Input

In Chapter 3, I explored, in depth, the issues that other scholars and interview participants raised around the lack of availability and poor quality of mental health treatment resources for prisoners—both in the community, post-deinstitutionalization, as well as in prison. Many of the advocates, former prisoners, and mental health clinicians I spoke with connected this dearth of treatment to the behavioral problems, and subsequent criminalization, that prisoners with mental illness may face. Unsurprisingly, then, when asked what they would like to change about how prisoner misconduct is handled, interview participants of all types cited improved mental healthcare. For example, one clinician working in the California Department of Corrections and Rehabilitation emphasized the need for significantly more treatment resources so that prisoners beyond just those with the most serious mental illness would have access to supportive therapy (INT025). An advocate from New York listed a whole bevvy of improvements she saw as necessary to provide adequate mental health services to prisoners: better screening and assessment upon admission, providing treatment proactively (rather than in response to disciplinary incidents), and increasing the number of treatment beds (INT170). These views align with a growing scholarly and public consensus around the inadequacy of U.S. prisons and jails to provide public mental healthcare post-deinstitutionalization (Kupers 1999; Montross 2020; Roth 2018).

Many interview participants also cited the need to enhance disciplinary procedures and screening mechanisms to prevent those with serious mental illness from being placed in solitary confinement (INT025; INT059) and referred to district attorneys for prosecution (INT154). A former prisoner from Illinois raised concern that mental health professionals are often not even notified when a prisoner "catches a ticket that requires mental health to be involved" (INT159), much less engaged in a rigorous evaluation to help inform the adjudication. As one Illinois advocate

said, the input of mental health providers into the disciplinary process would need to be substantial for it to be meaningful (INT022). The greater involvement of mental health professionals in administrative disciplinary processes could also assist in their criminal defense, said a Wisconsin public defender, by providing defendants with "speedy access to mental health assistance" or an "evaluation" in the wake of a charge (INT139). No area of the disciplinary process is mental health input more critical, though, than the decision on whether to impose solitary confinement.

Abolishing Solitary Confinement

As discussed at length in Chapter 4, interview participants of all types identified the central role that solitary confinement and other punitive conditions played in producing the "criminal" behavior subsequently prosecuted, and therefore, they viewed prison-conditions reforms as having the potential to not only reduce the number of prisoners subject to prosecution, but also reduce violence and other disruptive behavior in the first instance. As one Illinois advocate said, "I mean obviously solitary is a huge driver, right? I think you have to—you have to get rid of solitary" (INT142). Similarly, a New York attorney said: "The first thing I would change about prison conditions generally is I would eliminate the use of solitary confinement completely, because solitary confinement is another intervention that is completely counterproductive. It deepens all the problems it purports to solve. The fact that we still do that, it's shocking to me" (INT053).

And it was not just former prisoners and their advocates that shared this perspective about the harms of solitary. Prosecutors in Illinois and New York acknowledged the considerable mental health toll that solitary takes on prisoners subjected to it (INT015; INT004). Even the Wisconsin security officer I spoke with felt that while in general there was not enough use of solitary

confinement, felt that prisoners should not be subjected to it for offenses related to their mental illness (INT064).

For many advocates I spoke with, solitary confinement was the single "biggest problem" in prisons, because "it's too detrimental to [prisoners'] mental health and their physical health" (INT047). A Texas public defender put her views on solitary succinctly:

> There's just too much of it. They do it too often and it lasts too long, and they do it primarily for the safety of the staff, and I understand that. I know and love some prison guards and I want them to be safe, too, but in the end, it's just too high of a cost on the prisoner's psyche (INT148).

Indeed, there was widespread agreement among interview participants about the detrimental effects of solitary confinement, especially for those people with preexisting mental health issues, that resonated with many of the scholarly critiques of the practice described at length in Chapter 4 (see, e.g., Grassian 1983; Haney 2018; Haney and Lynch 1997). And yet, there remained for many an open question: how do you ensure prison staff safety and security in a world without solitary? Advocates and mental health staff alike raised this question (INT086; INT059). In the next section, I discuss the innovative proposals that interview participants raised for wholesale changes in how prisons might be better able to respond to prisoner noncompliance, and in doing so, prevent cycles of criminalization.

Incentivizing Behavior Change

Many of the advocates I spoke with who endorsed major changes to the disciplinary system of prisons, like abolishing solitary confinement, recognized the difficulty in convincing prisons themselves to embrace the reforms or courts to order them without some kind of replacement mechanism for social control in prisons. In response, the advocates I spoke with evinced a

consistent refrain: incentive-based disciplinary models are not only less damaging, but far more effective at reducing violence.

For example, a prisoners' advocate with expertise litigating against solitary confinement, referenced "the best practices literature" which suggests that "an incentive structure is not only far more humane [than solitary], but also far more effective" at producing "excellent behavior" (INT001). A prisoners' advocate from California also emphasized the benefits of an incentive-based behavior-change system in prisons rather than a punitive one:

> So, punishment doesn't work. It can incapacitate people, but it doesn't make people make good choices. Not in an effective way, an effective lasting way. What does work is incentives, and so if you want people to act a certain way, then you provide the incentives to get them to do that. So, if you want people to do programs in prison and not be violent, then you give them really good jobs that they want, that pay them something and that can give them good skills and that keep them busy. That's deeply effective, so, what I would do is rethink the whole thing from the ground up using the social science data that we know about what is effective for behavior change (INT058).

Many other interview participants echoed this view that the best-run and least-violent prisons were those where incarcerated people were given more programs, more freedom—not less. A New York advocate described one such environment:

> Literally, people would end up getting keys to their rooms, keys to their own rooms, and there was no—you'd get tickets, you'd get tickets because you didn't get to class in time, but you wouldn't be put in isolation, but you were expected to be responsible, get there on time and do stuff, and it was a totally different environment (INT175).

Similarly, a former prisoner from California and current advocate directly observed this relationship, between programming and misconduct: "the more programs we put inside the less disciplines we would have" (INT048).

A Texas advocate explained what he felt underlay this relationship between rehabilitative programming and positive behavior-change—giving people "something to lose." He said:

> I think that, for example, the places where people are allowed to work, and they get money from that, and they learn skills that are actually useful in the real world, and

> they get money over a pittance, those kind of places—they give people something to lose, right? Where you've got to come up, you've got to wake up at the right time yourself—they're not gonna do it for you, you've got real income coming in and these are competitive jobs that people want in the unit. That's a much better model to me…I'm just so sick of prison being this kind of self-perpetuating cycle… rather than a thing of punishment, how about rewarding good behavior, and just making it easier (INT026).

A prosecutor I spoke with from Wisconsin echoed these same views while describing his experience visiting a more rehabilitative federal prison in the state:

> One of the things that was striking to me right away was just how much it felt like a campus and not so much a prison and how much freedom and opportunity and... People had a lot to lose. If people are locked up in cells all day long and get an hour out, they don't have that much to lose. Where when people have all of these opportunities, they have all of these things that they can do and take advantage of, you're able to get compliance in different ways because you have something to threaten them with. For people who are in that position, and some people are just irrational and then the threats just don't matter—but having things...when you've given people things or freedoms that you can take away, that is a powerful motivator (INT050).

Having "something to lose" is another way of having "something to live for"—and for many who are incarcerated, that means not just a well-paying job in prison, or great educational opportunities, but also the chance to live again in the free world. A corrections mental health provider from California described the power of hope that the possibility of future freedom had for inducing positive-behavior change. After a law changed to permit the possible parole of a number of people sentenced to life, she observed:

> It was such a simple but revealing thing, that there was this kind of virtuous cycle that got going on the institutions—that when people started seeing that it was tactical for them to get out, they had an incentive to actually behave differently, and then once they started behaving differently, more people got out and so people started to see that there was actually a connection between what they did and whether or not they got out, whereas before the law in politics had completely severed that. So, I think that kind of thing is, that's good for everybody in the institution (INT118).

In this way, substantive legal reforms, like those that permit release of those formerly sentenced to life, may also create conditions inside prisons that promote "virtuous cycles" of behavior rather than "vicious cycles" of misconduct–discipline–misconduct that were described in Chapter 4.

Of course, even in the case of a much more rehabilitative prison model, where incarcerated people are provided with ample opportunities for employment, mental healthcare, educational programming, recreation, family visitation, and hope for future release—sometimes violent acts would occur. And in those cases, too, advocates suggested different models to intervene than punitive isolation. As one corrections mental health expert said, in her view, the ideal response to such incidents is to take a public-health approach to isolation, where separation from the general population is paired with the provision of high-intensity treatment resources that address the root cause of the violence. In the face of violence, she suggested the *length of time* a prisoner spent in isolation from the general population (a primary target of legislative reforms to solitary confinement), was far less important than what happened to them while separated:

> I mean, there's a lot of reasons why people are suddenly violent, but taking all of those reasons and putting them into a box for 15 days, 22 hours a day, with no plan how to understand the reason they're in that box and address a way to get them out and back into community safely—it means the 15 days is too many. But if you actually put somebody in isolation to keep everybody safe, and to throw resources at them so they are actually in isolation, meaning not in the company of other residents, but they actually had enhanced access to multiple hours a day of crisis counseling, of behavioral health modification, of understanding, therapeutic intervention, drug treatment intervention, gang recidivism, reasons to really understand what they needed and to create a treatment plan, it could be that they need five days to get to the problem of this...And in fact, if we were to see that kind of approach, a treatment-oriented approach to isolation, it wouldn't actually be isolation. It would be isolation from other residents, but people would be spending an enormous amount of time in the company of treatment providers and healthcare providers (INT199).

This treatment-oriented approach to violence and isolation holds the promise of providing security-oriented prisons with an effective alternative to harsh administrative sanctions like solitary

confinement and criminal prosecution—one that centers the health and safety concerns of both correctional staff and prisoners.

Perhaps more than any others, though, an incentive-based model to social control in prisons is a type of reform that seeks to harness the inherent power that total institutions have to shape selves. Goffman, in his essay, "On the Characteristics of Total Institutions," identified the "privilege system" as an important corollary to the "mortification system" characteristic of total institutions (Goffman 1961:49). Total institutions like prisons, he argued, use mortifications to break down the inmates' sense of self to assert authority, and privileges, he argues, provide a "framework for personal reorganization" in light of these mortifications (Goffman 1961:50). Punishments and privileges, he writes, are a system of organization that are "peculiar to total institutions" (Goffman 1961:52). In other words, an incentive-based behavioral model of prisons may really be a change more in emphasis than in fundamental organization. And perhaps for that reason, among others, as I discuss in the next section, ultimately, there is no reform to prisons that would be sufficient to "fix" them and interrupt cycles of structural violence and criminalization—only prison abolition and the fundamental social structuring that requires is likely to have that effect.

PRISON ABOLITION AND THE REIMAGINING OF SOCIETY

Not all interview participants felt that changes to the criminal-legal system or to prison conditions would be sufficient to end the cycles of racialized violence and inequality that the criminal prosecution of prisoners often entail. In fact, several advocates and former prisoners explicitly endorsed a prison abolitionist perspective. A Texas advocate prefaced his response by explaining that he believed "that prisons should be closed" (INT086); an Illinois attorney, when asked if would change anything about the system, said "I'd abolish prisons" (INT022); a New York advocate said that if he could change anything, that "most of my clients wouldn't be incarcerated.

Really, all of them. The abolition is for all of them…There is a 0% likelihood that my clients could be served in carceral environments, zero" (INT053). A former prisoner from Illinois who was charged with new crimes while incarcerated as a youth put it plainly. When asked what he would change, he said, "I just feel like [that prison] needs to be shut down, that's how I feel. I feel like this shit, shit ain't right. Shit'll never be right in [that prison]" (INT024).

In recent years, both popular and scholarly writings on prison and policing abolition have multiplied (see, e.g., Kaba 2021; Roberts 2019). Leading abolitionist organizer Mariame Kaba, defines prison-industrial complex abolition more broadly than just the narrow goals of the end of prisons and policing. Abolition, she writes, is "a political vision, a structural analysis of oppression, and a practical organizing strategy…a vision of a restructured society in a world where we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundational to our personal and community safety" (Kaba 2021:2). Beyond those interview participants who identified as abolitionist, several other interview participants, while not explicitly abolitionist, endorsed societal-level interventions into the process of prisoner criminalization that seem largely consistent with this definition.

For example, even several prosecutors engaged in some societal-level reimagining when asked what they would change about how prisoner misconduct is handled. A Wisconsin prosecutor I spoke with (elected long before the contemporary wave of "progressive prosecutors") decried the single-minded focus on criminal punishment in the United States he said: "right now, by and large, in the United States, we take a one-stop approach to solving this, which is police arrest, prosecute, incarcerate. Besides the fact that it's just stupid, it's not working" (INT010). He said that fixing the issues presented by these prosecutions would require a rethinking of our entire healthcare system:

> Of course, when somebody is in the mental health hospital, the taxpayers are paying about $1,100 a day for the person to be there. So the criminal prosecution and all of

> that process looks pretty cheap by comparison but yeah, it's an ongoing problem that really... that's one of those things that the criminal justice system in the U.S. has to get better about. We don't like to talk about free health care for anybody, even if they have mental health issues or anything else but we will pay $1,100 a day on the back end. So we really have to do a lot of soul searching here as a country about how we want to deal with this (INT010).

Similarly, a prosecutor in California described how in a "utopian world with just no limits to resources in the world," where it would be possible to spend "a hundred billion dollars on each inmate," *if* it was necessary to separate people with mental illness from society, he hoped that they would be confined not in prison, but housed instead in a place "that's humane and safe for those who need to work with them" (INT039).

Advocates similarly engaged in big-picture thinking. A Wisconsin prisoners' advocate, when asked what he would change, if he could, about systems for handling prisoner misconduct, diagnosed the entire system of mass incarceration as the problem. He said:

> It's so obvious that what we're doing isn't doing any good, and is there a way to say, "Look, we recognize, we're starting to recognize that we don't want to bring people into this system in the first place because it doesn't produce the outcomes we want. All it does is cost society a lot of money to make people even less likely to be able to survive on the outside when they get on the outside in a way that's productive, so why put them there in the first place?" And then for those who are in, can we get to the point where we can say about them, "Look, this obviously isn't working for them either, so why do something that's just gonna extend their stay in this useless institution?" Most people on in the inside of that system don't think about it that way, but that, I think, that's the kind of thinking that it's gonna take to have a meaningful impact probably, so it's again, changing hearts and minds—not just tweaking, using a form or changing a level of, the level of authorization. Those are things that maybe will have some marginal effect, but to *really* change it you need to rethink the whole underlying system (INT154).

In other words, this attorney was arguing that to truly interrupt cycles of prisoner criminalization, the entire social system would need to be reimagined, such that criminal law and incarceration is no longer seen as the answer to our problems. A New York advocate likewise decried how "community-based systems [for mental healthcare] are just so horribly lacking. People have such few

options and so little treatment. The cycle will continue forever until we deal with this in communities" (INT170).

A mental health care provider from California spoke similarly broadly about what interrupting the cycles of prisoner criminalization would entail. She said:

> I would not only change this probably for people who are incarcerated, but probably just in general how they deal with things…maybe for the system to look more at the underlying, like not just disciplining behaviors, but understanding what the behavior is coming from… So, or when people gas, which I can't say that I wouldn't want that to be disciplined if that ever happened to me because that would be really horrible, but that the person was angry and so then to look more underneath, like the underlying problem and to think about, to think more about addressing that. And you could probably bring the scope of that out a bit into the greater society about how the legal system prosecutes problems that we, you know, I think it kind of like, "you're being bad and we're gonna punish you and we're gonna give you so many days in jail or if you're in jail"…if you look at the underlying social and psychological problems that are going on—that would be helpful (INT152).

For her, the same root-cause analysis of "social and psychological problems" that should inform a non-punitive response to behaviors like bodily fluid throwing in prison, should be applied to how society in general "prosecutes problems."

One concrete strategy for abolitionist organizing that Kaba proposes is "participatory defense campaigns," where people organize to secure the freedom of criminalized people. These campaigns, she writes, not only help to reduce the number of people incarcerated, but also can galvanize public opinion against the broader prison-industrial complex. She writes, "defense campaigns are most effective as abolitionist strategies when they are framed in a way that speaks to the need to abolish prisons in general…individual cases should be framed as emblematic of the conditions faced by thousands or millions who should also be free" (Kaba 2021:111). In doing so, these campaigns hold the promise to "connect people in a heartfelt, direct way that teaches specific lessons about the brutality of prisons" (Kaba 2021:111). As I believe is shown above, criminal cases against prisoners cannot help but expose major social policy failures in desperate need of

remediation in the United States: the mass criminalization and grossly disproportionate incarceration of Black and Latinx people, extremely long and harsh sentences to prison that may involve torture, and the retrenchment of social welfare and lack of public guarantees of healthcare, including quality mental health treatment in the community. For these reasons, abolitionist activist attention to the cases of prisoner–defendants might not only help to provide critical resources for individuals affected by this social process, but also might help move the public toward a radical re-imagination of society, where we have all we need.

CONCLUSION

This study is the first to chart the national scope of the criminal prosecution of prisoners and to investigate the consequences of this social process. Using an interlocking set of data sources and methods (surveys, interviews, ethnographic observations, administrative records), I provided preliminary answers to some basic questions about the criminalization of prisoners: how they are prosecuted, how frequently, and with what consequences. I also revealed certain groups of prisoners—namely Black and Latinx prisoners and those with mental illness—are disproportionately affected by these prosecutions. And I explored how extraordinarily harsh conditions, like solitary confinement, may actually play a role in producing the behavior that is subsequently criminalized in court. And in this final chapter, I explore some proposed changes to the criminal-legal system, prisons, and social policy that may help to interrupt this process of criminalization.

In so doing, I engaged with several core questions to sociological and law and society traditions: How is social inequality reproduced? How does deviance get classified alternatively as a "medical" or "criminal" problem? How and why do total institutions like prisons inevitably produce the very behaviors they ostensibly seek to control? And in answering these questions, I brought new

evidence to bear on some lively issues in the punishment and society scholarship. In Chapter 2, I demonstrated how states and prisons go beyond administrative sanctions to use criminal law and courts to manage prisoner misconduct with significant social consequences. In Chapter 3, I revealed how the same social processes that leads to the criminalization of people with mental illness in the community play out in the microcosm of the prison. And in Chapter 4, I described how the criminal prosecution of prisoners in long-term solitary confinement helps to legitimize those harsh administrative sanctions.

There are many questions, however, that remain unanswered. Future research would do well to explore how state and county-level variations in criminal legislation, facility types, and prosecution and defense structures affects rates of prisoner prosecutions. It may also be productive to compare how criminal-legal regulation is used to manage civilly committed psychiatric facility patients and people incarcerated in jails with how it's used in state prisons. Methodologically, future studies would benefit from a more representative interview sample, with more even participation among prosecutors and correctional staff, and perhaps most importantly: people currently incarcerated serving sentences they obtained while in custody. The stories of those who remain incarcerated—who experienced arguably the most extreme consequence as a result of their in-prison prosecutions—remain untold.

METHODOLOGICAL APPENDIX

INTRODUCTION

Josh glanced at my Illinois license plates and suggested that he take the wheel instead. I hesitated for a half second before slipping into his passenger seat.[77] The morning had been marked by a big surprise, and I did not want to let the opportunity pass. Josh—my gregarious AirBnB host—revealed to me as I was packing up my things to head back to Chicago, that he had spent several years incarcerated in Wisconsin's state prison system and that he had picked up a new criminal conviction while inside. When I booked the room in his house, which was just steps from the county courthouse where I was conducting observations, I never could have imagined that my host would have firsthand experience of the exact phenomenon I had come to study. And even more, Josh was excited by my research project. He eagerly offered to participate in a formal research interview about his experience. But, he said, he wanted to do it in a more private place, outside of the home he shared with his girlfriend.

We set off together to a nearby McDonalds. On our way there, I asked about the local prison, and Josh agreed to take a detour and drive by the maximum-security facility on the edge of town. The walls of the prison were visible from the highway, and we zoomed by them quickly. The red brick watchtowers were imposing, but distant, their power attenuated as we looked out at them through the car windows of this sunshine-filled, chilly, February day. As we drove, Josh spoke at a rapid pace, recounting his experience incarcerated there—where his old classmates were his prison guards—and in other facilities throughout the state. We exited the highway and sped through some open fields a mile or so past the prison, where he said he used to hang out with friends in high

[77] Name and other identifying details have been changed to protect the confidentiality of this research participant.

school. We cut back through town, and drove past his childhood home, a modest apartment complex located in the shadows of the county jail. He explained how his life got off track as a teenager, when he first ended up in prison, while also talking excitedly about his future that lay ahead. After about an hour of driving, Josh's impromptu, personal tour of town concluded. We pulled into the McDonalds parking lot, I ordered us coffees and some breakfast sandwiches, and we found a table at the back. After we went over the consent documents, I switched the recorder on.

* * *

That serendipitous morning drive with Josh would be the closest I would ever come to a maximum-security prison over the course of my research for this project.[78] That physical distance—between me and the institution that's the focus of this study—was a function of both my research design as well as the social relations of the contemporary U.S. prison. Aware of the relative impenetrability of prisons to the public and qualitative social science researchers, as well as the ethical challenges of conducting research inside (Reiter 2014), I designed this study with the prison itself at arms-length. In this Appendix, I will describe the multi-methods approach I took to gain access to information about how, how frequently, and why prisons use criminal process in the management of their populations. And I will also try to explain how navigating the complicated relationship between the prison and the public became central to both my methodological approach and my substantive research findings.

[78] Thankfully, through my work as a law student and as an educator in the Northwestern Prison Education Program, I have gained access to maximum-security prisons in Illinois. Those experiences working with incarcerated clients and students, helped to inspire this work, guide my methodological approach, and contextualize my findings.

At the time I conceived of this project, there was virtually no existing research in the scholarly or grey literature on the criminal prosecution of prisoners outside of anecdotal reports. How frequently did this happen? How did it happen? With what consequences did it occur? Were there any patterns of what types of prisoners were more likely to be charged criminally for conduct inside? I felt that any rigorous empirical study of this widespread phenomenon would be a welcome and important contribution to the socio-legal literature—whether quantitative or qualitative, national in scope or limited to a single facility. Nevertheless, I believed it would be a missed opportunity to fail to use this valuable research time to attempt to generate some sense of the national scope of the phenomenon (both quantitatively and qualitatively). Similarly, given how highly localized criminal prosecution is, I felt it would be a missed opportunity to fail to capture in greater depth some of the particular state and local dynamics that may influence how criminal cases against prisoners emerge, are prosecuted, and processed by courts. These two descriptive threads—generating a national baseline scope of criminalization as well as an in-depth ethnographic interview-based account of the process—motivated the overall approach of the project.

To answer my research questions on the how, how frequently, and with what consequence, prisoners in the United States are prosecuted criminally for noncompliance behind bars, I gathered several different data sources with enlarging geographic scope: 1) field observations, court records, and interviews with attorneys working in one case-study county courthouse in Wisconsin, 2) interviews with former prisoners, their advocates, prosecutors, and corrections officials from five states—four of the nation's largest incarcerators (California, Texas, Illinois, and New York)—as well as Wisconsin; 3) administrative data on all prisoners with in-custody criminal convictions from the same states (excluding Illinois which did not provide it); 4) criminal legislation and administrative policy documents on criminal prosecution of prisoners from twelve states, including all of the

above, plus several others from the four regions of the United States and the federal government; and 5) national survey data from the Bureau of Justice Statistics. In the sections that follow, I detail my use of each of these data sources—the sample selection, collection procedures, and methods of analysis—in turn. I conclude with some reflections on how the "public" figured into my ability or inability to access data on prisons and the benefits and limitations of my methodological approach.

CASE STUDY

The anchor of my dissertation research was a mixed-methods case study of a single county in Wisconsin that was home to a maximum-security prison. Given the vast unknowns about the criminal prosecution of prisoners in the United States, I believed that focusing on a single site would provide a manageable route to obtaining a "360-view" of the phenomenon, albeit one that was preliminary and tied to single locale. It would also permit me to conduct in-person observations of court cases. The case-study component of my overall data collection was most affected by the COVID-19 pandemic, which eliminated the opportunity for in-person travel and research just as I gained access to my fieldsite in February 2020. Nevertheless, as I discuss below, I still was able to acquire the richest data from Wisconsin—in terms of administrative records, courtroom observations, and interviews—and inclusion of that county and state in my analysis has proved extremely generative. And, thankfully, my methodological approach was designed to be somewhat redundant in anticipation of access issues that might arise.

State Selection

State selection for the case study was, to some extent, arbitrary. During my preliminary research, I spoke with prisoners' advocates about the criminal prosecution of prisoners. Outside of

one state (Connecticut) where I was told there may have been robust enough mental health care provision and oversight to avoid the criminalization of prisoners with mental illness, I got the sense that the prosecution of prisoners was a phenomenon that was ubiquitous nationwide. And yet, as we know from the existing socio-legal scholarship on prisons, not only do state prison systems vary widely with regard to population size and demographic characteristics, they also vary considerably in a host of other factors: physical plant, provision of medical, mental health, and other programmatic resources, levels of federal court supervision, whether they utilize private prisons, and their use of segregation, among many other variables.

Given my desire to conduct ethnographic fieldwork as part of the case study, I identified three states that were feasible as research sites but differed on some important variables: Illinois, Michigan, and Wisconsin. All three states are readily accessible from Chicago, and as discussed in the Introduction, anecdotal data from each suggests that the systems do refer prisoners for criminal prosecution, including those who have severe mental illness. To my knowledge, none of the three state correctional systems has been the subject of book-length sociological study in the past several decades. All three are below the national average in terms of overall incarceration rate (471 per 100,000 people), but all three are above the average (5.4 black/white disparity per 100,000 people) in terms of black/white disparity in incarceration rates (The Sentencing Project 2016).

Table 1. Case-Study State Selection

	Illinois	**Michigan**	**Wisconsin**
State prison incarceration rate[79]	341 per 100,000	414 per 100,000	383 per 100,000
Number of prisons	25	21	37
Number of maximum-security prisons	3 (plus 2 mixed-security)	2 (plus 2 mixed-security)	6
State prison population	43,657 people	41,122 people	22,144 people

[79] These rates and figures are based on 2016 Bureau of Justice data compiled by the Sentencing Project (The Sentencing Project 2016).

Corrections expenditures in 2016 (in millions)	1,093	2,168	1,221
White imprisonment rate	174 per 100,000	253 per 100,000	221 per 100,000
Black imprisonment rate	1,533 per 100,000	1,682 per 100,000	2,542 per 100,000
Trend in incarceration rate	Declining after steep growth in 1990s	Declining after steep growth in 1990s	More modest growth in late 1990s, still increasing
Mental health caseload[80]	13,170 (~30% of population)	~8,000 (20% of population)	~9,500 (37% men and 84% women)
Prisoners with Serious Mental Illness[81]	2,034	unknown	2,068
Mental health prison litigation?	yes	yes	yes – appears limited to one facility (Taycheedah)
Under current federal oversight for mental health care?	yes	no – ended in 2015	no – ended in 2012

Ultimately, in consultation with my committee, I ended up selecting Wisconsin on the basis of several factors: first, it was the state department of corrections with the most readily accessible data on inmate assaults on staff, including on the breakdown of cases referred for criminal prosecution and those committed by prisoners with mental illness. What they have made available publicly makes me almost certain they could readily generate data on all cases referred for criminal prosecution and the mental health status of those prisoners. Second, like Michigan, Wisconsin did not appear to be under current federal court oversight (although it made reforms in the past due to a settlement agreement). And finally, the number of maximum-security prisons in Wisconsin relative to Illinois and Michigan meant that it would be more possible to maintain the anonymity of the prison and its county that I selected for study. The downside of selecting Wisconsin was that I had the fewest connections to the legal community there, and fewer homes-away-from-home.

[80] These figures come from the states' most recent publicly available data.

[81] These figures were taken from a recent survey on restrictive housing (The Association of State Correctional Administrators and The Liman Center for Public Interest Law at Yale Law School 2018).

County Selection

After choosing my case-study state, the next step was selecting a single prison county to focus my research on. Based on prior research (Rhodes 2004; Roth 2018; Shalev 2013), I hypothesized that prisoners with mental illness and in restricted housing (i.e., solitary) would be at heightened risk of criminal prosecution, and given this was a key research question, I decided to select a county housing a maximum-security prison, with the understanding that it was likely to have restricted-housing units. However, based on the anecdotal reports of cases of prisoner prosecution in Illinois (Pawlaczyk and Hundsdorfer 2018), I had a sense that the rate of criminal referrals and prosecutions arising out of maximum-security prisons in the same state might still vary quite a bit by county. In an effort to select a county with a "regular" number of criminal prosecutions (i.e., not very few and not extremely high) to assess the general dynamics at work, I made use of a statewide administrative dataset on staff assaults.

I. *Wisconsin Staff Assault Criminal Referral Data*

Early in my research, I made a public records request for the administrative data underlying the annual reports that Wisconsin Department of Corrections publishes on "staff assault" incidents, i.e., when an incarcerated person is disciplined for assaulting a correctional officer (see, e.g., State of Wisconsin Department of Corrections 2016; Wisconsin Department of Corrections 2019). On October 24, 2019 I received the data which covered all staff assault incidents from 2013 to the present recorded by the Wisconsin Department of Corrections, 2,167 records in all. They included incident-level data with the following variables: Individual Identifier; Incident Date; Site; Security

Level; Status (Attempted, Completed, Injuries)[82]; Restrictive Housing (i.e., solitary); Serious Injury[83]; Law Enforcement Contacted; Fiscal Year; Battery Flag[84]; Throwing Flag[85] (i.e., bodily fluids); Spitting Flag[86]; Physical Injury Flag[87]; Sexual Flag[88]; Race; Gender. While the Department did not provide all the information I requested—namely, individuals' mental health classification—and didn't cover all disciplinary incidents (only staff assault), or the final disciplinary sanction, the data

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[82] Attempt – An offender is guilty of attempt if either of the following is true: the offender planned to do something which would have been a rule violation if actually committed, or the offender did acts which showed a plan to violate the rule when the acts occurred. Completed – An offender is guilty of a completed assault if the offender committed the act of the full offense of an assault. Injury – An injury of any nature which is caused by the event, includes but not limited to mental damage or physical injury resulting in bodily harm, and is not a serious injury.

[83] An injury that requires urgent and immediate medical treatment and restricts the staff's usual activity. Medical treatment should be more extensive than basic first aid, such as the application of bandages to wounds: it includes great bodily harm, stitches, setting of broken bones, treatment of a concussion, etc.

[84] Battery by a prisoner- As defined in Wisconsin Statutes s. 940.20, any prisoner who intentionally causes bodily harm or a soft tissue injury, as defined in s. 946.41 (2) (c), to an officer, employee, visitor, or another offender, without his or her consent.

[85] Throwing Assault- As defined in Wisconsin Statutes s. 946.43(2M), any prisoner who throws or expels the blood, semen, vomit, saliva, urine, feces or other bodily substance with the intent that it come into contact with the officer, employee, visitor, or other offender.

[86] Spitting – As defined in Wisconsin Statutes s. 946.43(2M), any prisoner who forcibly ejects saliva or other substances from the mouth.

[87] Physical Injury by Contact – Injury to a staff member, caused by an offender that may or may not result in off-site medical care.

[88] Sexual Assault – As defined in Wisconsin Statutes s. 940.225, any prisoner who has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

were still extremely helpful in selecting a county to study in-depth, as well as for analysis of the role that solitary may play in the criminal prosecution of prisoners (as discussed at length in Chapter 4).

After conducting a preliminary analysis of these data in Stata (summarized below in Table 2), I found that the prisons in Wisconsin varied quite a bit in the number of total staff assault incidents they reported during this period (they ranged from 1 to 344). The number of law enforcement contacts (criminal referrals)/prison also varied quite a bit, from 1 to 253. There were 7 prisons in the state that had over 100 staff assault incidents and 5 with over 100 criminal referrals in this period. Because I wanted to select a county where there was a clear pattern of criminal prosecution of inmates, and thus where I have the best chance of observing some case proceedings, I ultimately selected among those at the "top-tier" in terms of absolute numbers of referrals. In this way, I was selecting a fieldsite on my dependent variable, and it was not meant to be representative of all prisons in the state. The top-tier criminal referral prisons also were, as expected, the state's maximum-security units. Across all prisons in Wisconsin, the mean referral rate (law enforcement contact/"staff assault" incident) was 61.1%, which put 2 of the 5 "top-tier" prisons (in terms of absolute numbers of referrals) closest to the "average" facility in Wisconsin as far as the *rate* of criminal referrals for staff assault incidents.

Table 2. Case Study Prison/County Selection

Security Level	Current Facility Population	Number of Incidents Total	Number of Law Enforcement Contacts Total	% Total Law Enforcement Contacts/Incident	Distance from Chicago
Maximum	479	150	109	72.67%	4.25hr
Maximum	1,625	288	212	73.61%	3hr
Maximum	1,257	280	253	90.36%	3hr
Maximum	809	285	185	64.91%	3hr
Maximum	1,083	344	210	61.05%	3.5hr

II. *Obtaining Access—to Court*

From the administrative staff assault data I obtained from the Wisconsin Department of Corrections, I already knew a little bit about the criminal referrals emanating from the maximum-security prison I selected to pursue, but I knew little about how those referrals were handled by the county's district attorney. I feared the administration of the prison in question would be, if not hostile to research requests, then at least make the approval process quite time-consuming.[89] Therefore, before attempting to obtain research access to the prison itself (in the form of interviews with correctional workers[90]), I opted instead to begin obtaining access to information about the criminal prosecution of prisons through the doors of an ostensibly public portal: the criminal courthouse. Adult criminal court proceedings are constitutionally protected as open to members of the public. If there was a prisoner being tried for crimes committed inside the local prison, I would be able to attend the hearing in person as a member of the public. But of course, on any given day there might be dozens if not hundreds of criminal cases called in this courthouse, and identifying which, if any, defendant was currently incarcerated in the local maximum-security prison, would be a difficult (if not impossible) task if it meant sitting through all the proceedings.

In the hope of obtaining some guidance on when I might be able to observe this subset of criminal cases, in February 2020, I called the clerk of the court. When I asked about whether there were any upcoming criminal cases involving prisoners, she said indeed there were, but that the

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[89] Rubin has recently called into question the received wisdom among social scientists about the inaccessibility of prisons to researchers, documenting that over the past several decades, the absolute number of doctoral dissertations drawing on original, in-prison data have increased markedly (Rubin 2021).

[90] Interviewing currently incarcerated prisoners was not on the table, for reasons discussed *infra* page 126 on research ethics and IRB approval.

Victim's Advocate in the prosecutor's office would be able to tell me when those would be heard. She did not have a way of identifying which defendants were in state prison custody from the state court system's database.[91] The District Attorney's office did not disappoint: that same day, after speaking over the phone and putting a request in writing, the Victim's Advocate sent me a list of all their active cases involving the local maximum-security prison—15 in total, 13 of which involved prisoner-defendants, and 2 which involved correctional officers.[92] Five cases with prisoner-defendants were scheduled for hearings the following week. I jumped at the opportunity to begin to observe these proceedings and began my fieldwork.

COVID and the Criminal Court: Case Observations

Before the COVID-19 pandemic halted all research travel for the remainder of my doctoral program, I was able to make just two trips to my fieldsite and observe hearings involving six prisoner-defendants over the course of three days. I also obtained court records (e.g., complaint, discovery, letters from defendants to the judge) from the clerk for those six cases. But, armed with the prosecutor's case list, and a very helpful state court website (with detailed case records), I was able to continue to follow the cases as the Wisconsin state court system made a transition to broadcasting Zoom hearings via livestream on Youtube. The characteristics of the thirteen cases I have been tracking from my fieldsite for now over a year are summarized below.

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[91] This also prevented the clerk from being able to pull, en masse, any longitudinal data on cases involving prisoners in the county.

[92] In one case, a correctional officer was charged with official misconduct, but that case resulted in a deferred prosecution agreement. In the other, a prisoner filed a "John Doe" petition with the prosecutor's office to investigate a correctional officer for criminal conduct, but the office declined to file charges.

Of the 13 cases, 6 involved charges of violence (battery by prisoners and assault by prisoners), 4 involved charges of bodily-fluid throwing, and 1 each involved weapon possession, threats, and property damage. Overwhelmingly, the defendants were non-White—9 defendants were Black, 1 was Hispanic, 1 was Native American, just two were White. The majority were under 30 years old. Strikingly, many of these cases had been in process for years. The referral dates to the prosecutors' office was in some cases already several years past at the time my research began (February 2020), and at the time of this writing (March 2021), only 3 had concluded. The sentences that resulted were staggering. In one case, which I describe at the opening of Chapter 1, a defendant pled guilty to four counts of making "terroristic threats," and one count of throwing bodily-fluids and —the judge sentenced him to over 5 years for each count, most running consecutive to one another. Notably, he, like the majority of these defendants, had spent time at the Wisconsin Resource Center (WRC), which is the state prison system's dedicated mental health facility.[93] Indeed, 2 of the defendants were currently imprisoned at the WRC while facing criminal charges in my case study county (they had been transferred there subsequent to being charged), and for at least 4, competency and sanity were at issue in the case (with at least 2 pleading not guilty for reasons of insanity).

[93] In order to protect these individuals' private health information, I have redacted my procedures for how I obtained data on the defendants' history of transfer to the WRC.

Table 3. Fieldsite Case Characteristics

Referral Date	Summary Charge Description	Observations	Obtained Complaint	Race/Ethnicity of Defendant[94]	Birth Year	Status (as of 3/11/21)	WRC[95]
October 2019	Battery by Prisoners	initial appearance observed	yes	African American	1981	OPEN	yes
May 2018	Assault by Prisoners - Bodily Substances	preliminary hearing observed	yes	African American	1998	OPEN	yes
June 2016	Battery by Prisoners	preliminary hearing observed	yes	African American/Hispanic	1995	OPEN	yes
December 2019	Assault by Prisoners	initial appearance observed	yes	African American	1989	OPEN	no
February 2019	Assault by Prisoners - Bodily Substances	competency hearing observed Zoom	yes	African American	1970	OPEN	yes
June 2018	Battery by Prisoners	return observed Zoom; preliminary hearing observed Zoom	yes	African American	1993	OPEN	no
June 2019	Assault by Prisoners - Bodily Substances	initial appearance observed	yes	African American	1991	CLOSED – convicted and sentenced to 4 years	no
November 2019	Carrying a Concealed Knife	initial appearance observed; return observed Zoom	yes	Caucasian	1987	OPEN	no
August 2018	Assault by Prisoners - Bodily Substances	none	no	White/Native American	1995	OPEN	yes
April 2017	Battery by Prisoners	preliminary hearing partially observed	no	African American	1993	OPEN	no
November 2019	Terrorist Threats - Public Panic or Fear	return hearing observed Zoom	no	African American	1993	CLOSED – pled guilty to five counts, sentenced to 5.5 years on each count	yes

[94] The "race" of defendant is pulled from the court record; and the "ethnicity" is pulled from the prison system's database.

[95] For reasons discussed in the text accompanying note 45, I believe transfer to the WRC is a valid proxy for serious mental illness.

July 2019	Felony Criminal Damage to property	none	no	Caucasian	1990	OPEN	yes
June 2015	Battery by Prisoners	none	no	Caucasian/Hispanic	1975	CLOSED – convicted after jury trial, sentenced to 12 years	yes

Although my in-person fieldwork was, quite unfortunately, cut short by the pandemic, those first few visits were incredibly generative. I took extensive fieldnotes on my experience inside and outside of the courtroom—of the clerks, judges, sheriffs, prosecutors, defense attorneys inside—as well as how those in the local community I interacted with talked about the prison (e.g., a conversation with a waitress who was a former journalist who covered incidents occurring there). The few hearings I was able to observe were remarkably revealing, like that of Jeremiah, whose hearing I describe at length in Chapter 1. Being in-person allowed me to observe the gallery's reaction to cases, engage in informal conversations with court personnel, and collect court documents that are only available as paper copies rather than electronically. Unfortunately, any early insights into how the local political economy may have figured into the criminalization of prisoners inside remained just that, not able to be fully developed at this time.

In the transition to "Zoom court," I also continued to take extensive fieldnotes on the hearings I observed; indeed, one benefit was the ability to replay the video, which allowed me to transcribe conversations word-for-word. In these hearings, the "public" was worlds away for defendants and for the court personnel, not able to be seen or heard. Participation in court proceedings meant that defendants were still in chains and under the close watch of correctional officers, who were just offscreen. There was no trip to the courthouse. The physical separation between administrative hearings and criminal proceedings had all but collapsed for these defendants. Everything could take place within the prison walls. But again, any comparative insights I might

have been able to develop on the differences between in-person hearings and those that were done via video conferencing, remain extremely preliminary.

Case Study Interviews

In addition to the informal conversations I had with court personnel and members of the community in my two trips to my fieldsite, I conducted 5 formal interviews with people connected to the county: 1 prosecutor, 3 public defenders, and 1 former prisoner. In addition, I conducted 8 formal interviews with additional participants from Wisconsin: 3 prosecutors, 1 public defender, 3 prisoners' rights advocates (including one former prisoner), and 1 correctional officer. These interviews were conducted using the same protocol used for the other national interviews described below, with the exception that non-lay participants from Wisconsin were eligible for a $50 gift card for their participation.[96]

State Law, Policy, and Data

To provide additional state-level context for my case study beyond the staff assault administrative data, I also collected data on Wisconsin criminal legislation targeting prisoners, department of corrections policy on criminal referrals, and on the total population of prisoners with criminal convictions obtained while in custody. These data were collected and analyzed using the same procedures described below for the other jurisdictions included in the analysis.

[96] Several prisoners' advocates and the correctional officer accepted this incentive. I did not offer the incentive to the prosecutors I recruited.

NATIONAL INTERVIEWS

The most extensive part of the data collection for this project were 64 qualitative interviews conducted with a range of participants from across the country in a position to speak about their views on how, how frequently, why, and with what consequences prisoners are charged with new crimes while incarcerated. In the sections below, I describe the interview sample, procedures used, methods of analysis, and reflections on my positionality as a White, female, researcher and prisoners' advocate.

Interview Sample

Interview participants were drawn from five states in each of the four regions (Northeast, Midwest, South, and West) designated by the FBI for its comparative crime-reporting purposes, as well as from the federal system. Recent socio-legal scholarship on prison conditions and mass incarceration has emphasized the importance of both local and regional variation in criminal justice policies and practices (see, e.g., Lynch 2010). Thus, drawing interview subjects from each of the four regions in the United States ensures some level of geographic representation of the nation as a whole, and permits observation of variations as to the cultural, political, and historical differences in state correctional systems.

One jurisdiction in each region was selected to capture high prison populations (New York, Illinois, Texas, and California, are all among the top first or second incarcerators of each region in absolute numbers)[97]—as well as on the basis of access to interview participants. Wisconsin was

[97] New York, Texas, and California are all the largest state prison systems in their region, Illinois has the second-largest in its region (Ohio ranks first).

selected as the case study site for other reasons described above (proximity to Chicago, multiple maximum-security prison counties to preserve anonymity, and absence of a recent federal mental health consent decree). Table 1 below lists the target jurisdictions and key population information about their correctional systems.

Table 4. Jurisdictions for Interview Participants

Region	Target State	Prison Population (2017)[98]	Incarceration Rate (per 100,000 people)[99]
Northeast	New York	50,402	443
Midwest	Illinois	41,427	564
	Wisconsin	23,952	676
South	Texas	162,523	891
West	California	131,398	581

The national interview component of the study recruited five types of participants across the five jurisdictions (New York, Illinois, California, Texas, and Wisconsin). The five main groups of interview subjects were made up of people in a position to speak to the criminal legal regulation of prisoners, including those with mental illness: 1) prisoners' advocates, 2) corrections mental health professionals, 3) corrections security officials, 4) former prisoners, and 5) prosecutors. Over the

[98] These absolute numbers reflect the state prison population, not local jail populations (Hinds, Kang-Brown, and Lu 2018).

[99] This incarceration rate reflects the jurisdiction's total confined population, including both prison and jail populations, as well as youth confinement, and involuntary civil committees, as of December 2016 (Wagner and Sawyer 2018).

course of the study, out of 118 recruitment letters sent and phone calls made, 64 people agreed to participate in the study.[100]

Table 5. Interview Sample						
	Prisoners' Advocates	**Corrections: Mental Health**	**Corrections: Security**	**Former Prisoners**	**Prosecutors**	**Total**
New York	7	2	0	0	2	11
Illinois	6	2	0	3	1	12
Texas	12	0	1	0	2	15
California	4	5	0	2	2	13
Wisconsin	7	0	1	1	4	13
Total	36	9	2	6	11	64

Prisoners' advocates made up the largest portion of the interview sample (n=36). This group included attorneys representing prisoners full- or part-time in post-conviction, appellate defense, or civil rights litigation (n=17); defense attorneys representing prisoners facing new criminal charges (public or private) (n=12); and non-lawyer staff members of organizations working on behalf of prisoners, including public-interest law firms and community organizations (n=7). Several of the nonlawyer prisoners' advocates I spoke with (n=3) had been previously incarcerated, so these interviews included their reflections on their own experiences as prisoners as well as community advocates. Prisoners advocates were recruited via snowball-sampling methods over email.

Prosecutors made up the second-largest group of the interview sample (n=11). Prosecutor recruitment differed in that it was largely done via cold-call. Prosecutors' offices were targeted for recruitment based on whether administrative data from the state's department of corrections revealed them to be "top-tier" for the absolute numbers of prisoners convicted of new crimes (California, Wisconsin), whether they had a maximum-security prison in their county (New York,

[100] Four potential participants refused participation, six were deemed ineligible, and forty-four did not respond.

Illinois), and via snowball sample (Texas). Interviews were conducted with both head prosecutors as well as assistant prosecutors.

Corrections mental health experts made up the third-largest group of the interview sample (n=9), the majority of whom had experience working in the California Department of Corrections and Rehabilitation. These experts included both current or former employees of state or federal correctional agencies holding an advanced degree in psychological sciences or social work, as well as current or former court-appointed monitors or mental health experts witness specializing in mental health care provision in correctional settings, holding an advanced degree in psychology or psychiatry, who were able to speak about the role of mental illness in disciplinary proceedings in one or more jurisdictions.

Former prisoner participants (n=6) included adults who were previously incarcerated in a prison, had been charged with a new crime while in prison (although not necessarily prosecuted or convicted), were currently living in the community, were able to speak English, did not have cognitive impairments rendering them unable to consent, and did not have any pending (unadjudicated) criminal or civil cases against the correctional system that they were located in. Although this group of participants was small, their inclusion was extremely informative. Because three jurisdictions were represented (Illinois, California, and Wisconsin), these interviews did permit some identification of similarities in experience of prosecution across jurisdictions as well as important differences.

One important group of potential interview participants was unfortunately left mostly unrepresented in the sample: correctional officers. One interview was conducted with a former frontline correctional officer in Texas, and another interview was conducted with a current frontline corrections officer in Wisconsin. Recruitment of correctional officers was mainly conducted through

correctional officer unions but did not prove fruitful (with the exception of Wisconsin). While these interviews were illuminating, the relatively low number I conducted represents an important limitation of these interview data, given the prominent role that corrections officers play in incidents that lead to criminal referrals and as witnesses in criminal proceedings against prisoners. Other potential interview subjects—judges and police officers—who play a significant role in the criminal prosecution were not recruited as part of this study, mainly due to time limitations.

Interview Procedures

Interviews took place in person, over the telephone, and via video-conference between October 2019 and November 2020. In-person interviews were preferred where possible and took place in a quiet, private location of the participant's choosing (i.e., their office or home). Each interview lasted for approximately one hour, and that was the duration of most participants' involvement. The procedures were reviewed and approved by the Institutional Review Board of the American Bar Foundation.

All interviews were audio-recorded with the permission of the participants (just two interview participants did not consent to audio-recording) and transcribed professionally, and extensive notes were taken during and after each interview. Semi-structured interview guides were used, and they differed depending on participant type. In general, professional participants (prisoners' advocates, prosecutors, and corrections personnel) were asked to describe their position, their work history, the process and circumstances by which prisoners may be charged with new crimes, to describe recent cases of this type that they can recall, and to provide their opinion on what types of prisoners may be at more risk for criminal referral and prosecution. Former prisoners were asked to describe their personal background, their history of incarceration, their mental health

history, and the circumstances of their case while a prisoner, and the outcomes they experienced. Expert participants were not offered any financial compensation for participation in the study, consistent with professional norms.[101] Lay participants were offered a $50 gift card (Amazon or Visa) for their participation in the study.

The consent process also differed by participant type. Professional participants (prosecutors, corrections professionals, and prisoners' advocates) were provided with a consent statement over email. At the outset of each interview, I confirmed that they had read it, asked if they had any questions about it, and asked if they agreed to participate and be audio-recorded. Lay participants (former prisoners) were provided with a written consent form (or verbal consent statement if conducted over the telephone or if reading comprehension was in question), with language suitable for lower reading levels. This consent form detailed the risks and benefits of participation. In addition, the consent form included the notification that the interviews will be kept confidential, that participants may ask for the recording to stop at any time, and they can skip any questions during the interview. Moreover, the statement indicated that the interview would only be audio-recorded with the respondent's permission and that compensation would be provided regardless of the interview's termination. Participants' confidentiality was additionally protected in that there will be no verbal consent recorded or written signatures linking them to the study. A copy of the consent document was provided to participants upon request. If after undergoing the consent process, the participant did not demonstrate comprehension of the study's or interview's purpose, I terminated the interview.[102] Approximately ten minutes was devoted to the consent process for lay participants to ensure understanding.

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[101] With the exception of several Wisconsin participants, as discussed *supra* in the text accompanying note 96.

[102] I ultimately terminated two interviews with former prisoners for this reason.

After the interview, in some cases, prisoners' advocates were asked to share information about the study with clients who they believed might be willing to participate in this study, rather than provide me with names or contact information, which would constitute a breach of attorney–client confidentiality. In some cases, former prisoners were asked if they were willing to share additional documents regarding their case—namely, legal records relating to their criminal prosecution while incarcerated.[103] They also were asked to share study information with other former prisoners charged with new crimes while incarcerated who they know who they believe may be willing to participate in the study.

The study involved the participation of former prisoners, some of whom suffered from mental illness, and some who were vulnerable to coercion or undue influence on the basis of their continued supervision in the community. No one currently imprisoned was recruited to participate in this study given my inability to ensure confidentiality, voluntariness, or participant safety of incarcerated participants. In addition, however, several layers of safeguards were employed to protect previously incarcerated people who elected to participate. First, the recruitment process was done through snowball sample (including through lawyer referrals), to minimize unwanted cold-contact and protect lawyer–client confidentiality. Second, eligibility of former prisoners was limited to those who had experienced criminal prosecution while incarcerated but who were currently a) without a pending criminal case or civil case relating to their criminal prosecution, b) had capacity to

[103] I obtained court records for all three former prisoners from Illinois and conducted one follow-up interview with a former prisoner from Illinois where he also shared his medical records. I obtained incarceration history records for the former prisoner in Wisconsin. I was not able to locate additional records for the two former prisoners from California who I interviewed. The records I obtained were quite useful in that they permitted triangulation of those participants' accounts.

consent, and c) had ability to speak English. Eligibility was determined before an interview was scheduled and again at the start of the interview.[104] Third, the consent process included a consent statement written for the understanding of someone without more than an elementary school education. Fourth, the interview would be terminated if the former prisoner appeared to be in a) significant emotional distress, b) or wishes for any reason to stop answering questions. They would still be compensated for their time. Fifth, if the former prisoner begins sharing any potentially incriminating information (not previously adjudicated), I would stop recording and taking notes on the interview for that portion of the conversation. Sixth, the names and other identifying information of the interview participants were never shared or made public to protect their confidentiality. Only first names of former prisoners were recorded in interview tracking files, which was stored in a password-protected file on a password-protected computer.[105]

Interview Analysis

I used a grounded-theory approach to analyzing my qualitative data, wherein I pursued simultaneous data collection and analysis and theoretical sampling, and systematic coding of data (Emerson 2001:291–95). For example, towards the end of my data collection period, I wanted to test some of my initial hypotheses about how prosecutors made sense of the prisoners they prosecuted (e.g., the line-drawing they engaged in regarding those with "real" mental illness), and therefore made a renewed effort to include more of their accounts. I did not seek out "statistical

[104] Five former prisoners who expressed interest in participating were deemed not eligible to participate in the study, ultimately.

[105] The names of all participants (professional and lay) were removed from audio-files and transcripts and pseudonyms were used in this document.

representativeness" of my interview sample, but rather included participants based on theoretical relevance (Emerson 2001:292). Furthermore, I inductively coded the interview transcripts and notes, developing increasingly abstract analytical codes, and then returning again to the interviews to pursue more focused coding (Charmaz 2001:341–46). In practical terms, this meant that I read through each interview and transcript several times over the course of drafting each chapter, adjusting my argument (and thus the relevant codes), iteratively.

Positionality

My social position—a White, female, social scientist, with a background in prisoners' rights legal advocacy—undoubtedly, and unevenly, shaped my access to and interactions with the interview participants in this study. The fact that prisoners' advocates make up the largest group of my interview sample is no coincidence. I drew on my preexisting connections to this community in Illinois and beyond at the outset of my data collection. For example, a law professor and former prisoners' advocate was my key to research access in Texas. Not only did I share a professional and educational identity with this group of participants, I also often shared a racial, gender, and political identity, which put both me and these participants, I feel, at ease. Rapport was often less difficult to establish with them.

Indeed, it was largely through these advocates that I was able to connect with and gain the trust of the former prisoners whom I spoke with. Several former prisoners in Illinois agreed to speak with me on the basis of me having done legal work as a law student for a community advocate. In another case, a prisoners' rights advocate helped facilitate the interview by paying for the transportation of the former prisoner of the study. And these contacts were important: with the exception of the former prisoner from Wisconsin who was White, all of the former prisoners in this study were Black or Hispanic and male. The racism, classism, and ableism that the former prisoners

in my study experienced throughout their lives and incarceration is profoundly part of their story, experiences that I do not relate to and will likely never fully understand. Without the credibility that I obtained by doing past legal work, I'm not certain that I would have been able to secure interviews with any of my formerly incarcerated participants. I have sought to do their experiences justice and to center their experiences, in all their complexity, as much as I can throughout this project.

In contrast, I found that at least some prosecutors approached me with more suspicion, despite sharing educational and racial identities with them. One, from New York, called me after receiving my recruitment email to question me on my views of prosecutors and criminal justice reform (he mentioned having looked up my background online and recognizing that I was a "prisoners' rights person" that he was trying to understand if I had an "agenda"—he also admonished me for taking notes on our conversation). As much as I worked to assure this prosecutor that I was approaching this project as a politically neutral social scientist and would do my best to capture his perspective fairly, I understand his concern. It is valid. No social scientist is able to shed all political ideology or personal experience when they approach a research project; obtaining a sort of scientific or "mechanical objectivity" is impossible. In my case, I did approach this project from the standpoint of a researcher, yes, but also as a prisoners' advocate too—one who hopes the research has a positive impact on public policy. Nevertheless, I feel that I have a duty to all my interview participants to try to set aside my political biases and assumptions and present their accounts of their experiences as faithfully as possible. Doing so, I believe, requires an acknowledgment of my standpoint and of taking special care in presenting narratives of those participants of different racial and socioeconomic backgrounds (i.e., former prisoners), as well as those with whom I may differ in political and professional views (i.e., prosecutors), accurately.

ADMINISTRATIVE DATA ON PRISONERS WITH IN-CUSTODY CONVICTIONS

As Keramet Reiter stated in her article, "Making Windows in Walls: Strategies for Prison Research," "[p]rison administrators not only resist public accountability by keeping civilians out, they also resist public accountability by keeping information in" (Reiter 2014:421). Although prisons are public institutions, she writes, they remain, in many ways, a "a social 'black site,'" resistant to academic investigation due to their "institutional inaccessibility, bureaucratic idiosyncrasies, and insufficient public accountability" (Reiter 2014:417, 420). In many cases, data on solitary confinement, gang classification, and rates of violent assault in prisons, have only been made available through "persistent Freedom of Information Act" requests, as well as discovery requests made through litigation (Reiter 2014:421). Although many state prison systems do make individual-level population data available publicly online, these data do not include information on the key variables that were of interest to me in my study: namely, how frequently disciplinary incidents (e.g., assault on staff, possession of contraband) resulted in criminal referral, and how frequently those incidents resulted in new criminal sentences, as well as demographic and mental health information about those individuals. In this section, I describe my use of state public records laws to obtain administrative data on prisoners with criminal convictions for in-custody offenses that I write about in Chapters 2 and 3 from four jurisdictions—California, Texas, New York, and Wisconsin—as well as my less successful attempts, before describing my analysis of these data.

FOIA for Social Scientists

One of my central research questions was about the frequency of the criminal prosecution of prisoners, followed closely by the question of whether there were certain groups of prisoners, namely, those with mental illness, who were at greater risk of prosecution. Key to answering both of

these questions would be obtaining quantitative data from correctional agencies. These data were not routinely made available to the public, but technically could qualify as public records which could be obtained via freedom of information requests. Although all fifty states, as well as the federal government, have freedom of information act laws of some kind, and although investigative journalists increasingly use administrative data in their reporting, scholars have noted that these laws remain under-utilized among sociologists (Greenberg 2016; Keen 1992). I pursued these records with the guidance of investigative journalists. I attended the Chicago Headline Club's annual FOIAFest conference three years running in 2019, 2020, and 2021, which was incredibly helpful in learning techniques for formulating, tracking, and appealing (if necessary) public records requests.

As a first step, I sought to obtain public records on how correctional agencies handled criminal referrals, investigations, and mental health concerns in disciplinary proceedings—information that would help me formulate my subsequent data request. These policy documents were data in their own right and I discuss them below in the following section. But in addition, they provided information on the terminology that agencies used in how they categorized criminal referrals, and the relevant offices who may be involved in their documentation. For example, an administrative directive from New York's Department of Corrections and Community Supervision outlined in great detail the process their investigators used to collect evidence on suspected criminal conduct of prisoners and how they transmitted that evidence to local prosecutors. Some of this information was available publicly on the departments' websites (as in, for example, the case of New York and California), and some of it was only available upon request (as in the case of Illinois).

As a second step, I made a round of requests for my ideal dataset: de-identified, individual-level information on all disciplinary infractions over the past three years, the results of those administrative adjudications, whether the incident was referred for criminal prosecution, the result of

the criminal prosecution, and demographic (including mental health status) and criminal history information for each individual. I enjoyed little success on this front, beyond the Wisconsin Department of Corrections, which, as detailed above, provided me with a limited criminal referral data for a subset of cases (prisoner assaults on staff). My request to the federal Bureau of Prisons for disciplinary and criminal referral data is still pending after a year. Several agencies' policy documents suggested that they did not track criminal referral data centrally at all (e.g., Texas and Illinois), others refused to provide it, saying that I would need to go through their research office to obtain disciplinary and/or referral records (e.g., New York and California). Wisconsin also refused to provide mental health status information on individuals, citing HIPAA concerns, despite anonymizing the data.

In light of these refusals, I made a final round of simplified data requests that would not provide me with all the information I wanted but would permit analysis of some sense of the national quantitative scope of criminal prosecution of prisoners: data on all prisoners currently in custody who had criminal sentences they obtained while in custody. At last, I was successful, and the data started to come in over the next year. Ultimately, I received data from the Texas Department of Criminal Justice, the California Department of Corrections and Rehabilitation, the Wisconsin Department of Corrections, and nearly a year later, from the New York Department of Corrections and Community Supervision. California charged me several hundred dollars to write a computer program to produce the dataset, but all the other states provided it to me free of charge. Illinois, unfortunately, has continued to refuse my data request, providing several different reasons (the most common being that they do not record data on in-custody convictions). I reached out to a law firm in Chicago with experienced FOIA attorneys about possibly litigating the matter, and I am in the process of collecting additional information that might aid in that effort in the future.

Responses and Omissions

Obtaining these administrative data from multiple jurisdictions across the country, including two of nation's biggest incarcerators (California and Texas), allowed me to investigate not only the quantitative scope of criminal prosecutions for prisoners in absolute terms, but also variations between jurisdictions, and between counties within states. All of the states included in their responses the following data on each individual with an in-custody conviction: identifier (in all cases, their prison "number"), gender classification, age or birthdate, admission date, in-custody conviction charge, and in-custody conviction sentence, and current prison facility. Several states (i.e., California, New York, and Wisconsin) provided additional information about prisoners' admission offenses, as well as the county of their in-custody conviction.

Most states provided the requested race/ethnicity classification information for each individual—critical information that permitted analysis of whether criminalization of prisoners disproportionately affected Black and Hispanic prisoners (which required comparisons to the total prison populations in each state). Initially, California was the only state to refuse to provide this information, citing "privacy" concerns and statutory authorization to refuse disclosure. I received a tip several months later from my sister who is an attorney in California, that there had been a recent state court decision forcing the department to disclose race/ethnicity information in a data request on parole decisions.[106] I wrote back renewing my request, and citing the court decision, and to my surprise, they agreed and provided the updated dataset to me.

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[106] One case, *Voss v. California Department of Corrections and Rehabilitation* (July 16, 2020), was brought by the Electronic Frontier Foundation. In the companion case's opinion, *Brodheim v. California Department of Corrections and Rehabilitation*, the court found that the "weighty public interest" in disclosure of the race data to "shed light on whether the parole process is infected by racial or ethnic bias" outweighed any minimal individual privacy interest.

Unsurprisingly, given the fact that no agency deidentified the data (even though I requested that they do so), none of the departments of corrections provided individual mental health classification information, citing privacy exemptions. However, as I describe in Chapter 3, for the Wisconsin dataset, I was able to use the public identifiers to link the in-custody conviction data with each prisoners' movement records. This permitted me, at least for this one jurisdiction, to develop a workaround and analyze whether prisoners with a history of serious mental health issues (as defined by transfer to the dedicated state mental health prison), were disproportionately among those with in-custody convictions, when compared to the general population.

Analysis

I used StataSE (16.0) for all administrative data cleaning and analysis. In the case of New York, it took considerable effort (and the help of an outside consultant) to even transform the PDF document that contained thousands of lines of data into an Excel file that could be imported into Stata. Overall, the most challenging part of the descriptive analysis was handling the charge and sentence variables. For each dataset, I relied on statute numbers and offense descriptions to group the different charges into broader categories (e.g., 2nd and 3rd degree battery might be grouped together with 2nd and 3rd degree assault charges in a broader category of "assault"; possession of marijuana and intent to deliver heroin would be grouped together as "drug" charges). These broader groupings allowed me to make some inter-state comparisons about the most common types of crimes that prisoners were convicted of. In some cases, however, the criminal codes differ for some types of offenses such that strict comparisons are impossible. For example, in Texas, possession of contraband is a single offense category that can include possession of drugs or a cell phone; in California, possession of drugs is a separate offense. The sentencing information format also varied

quite a bit between jurisdictions. For example, in California, there were a high number of "indeterminate life" sentences (e.g., 25 to Life). In New York, all sentences were given as a range, with a minimum and maximum term. In Wisconsin, non-life sentences had a determinate "in-prison" portion, and a determinate extended community supervision term. Therefore, in calculating the mean sentence for in-custody convictions, I had to exclude life and death sentences and indeterminate sentences, as well as account for the fact that in the case of New York, the mean minimum and maximum sentences had to be reported separately. These state-level differences in criminal codes and sentence types (while interesting data in its own right), make perfect comparisons between states impossible.

STATE LAW AND POLICY ON PRISONER PROSECUTION

To ascertain how, exactly, prisoners are prosecuted with new crimes, I also sought to collect nationwide data on state prisoner-specific criminal legislation and department of corrections policy on criminal referrals. In this section, I first describe the sample of thirteen jurisdictions I studied, as well as the methods I used to collect and analyze the state law and policy data presented in Chapter 2.

Jurisdiction Selection

I selected twelve diverse states across four regions of the United States (Northeast, West, South, and Midwest) and the federal government.[107] Jurisdictions within in each region were selected

[107] Ideally, I would have completed a full fifty state and federal government survey of prisoner-specific criminal legislation and state prisoner criminal referral policies. But, given time constraints, I opted instead to study a sample of jurisdictions.

to maximize variation—high incarceration rates and low incarceration rates, high prison populations and low prison populations. Table 1 below describes these thirteen jurisdictions.

Table 6. Target Jurisdictions for Legislative & Policy Research

Region	Target State	Prison Population (2017)[108]	Incarceration Rate (per 100,000 people)[109]
Northeast	New York	50,402	443
	Connecticut	13,830	468
	Rhode Island	2,871	361
Midwest	Illinois	41,427	564
	Missouri	32,225	859
	Wisconsin	23,952	676
South	Texas	162,523	891
	Florida	98,504	833
	Oklahoma	26,991	1,079
West	California	131,398	581
	Nevada	13,281	763
	New Mexico	7,053	829
Federal	n/a	183,261	n/a

Legislative Survey

Using Westlaw's legislative database, I first conducted state-specific searches within each jurisdiction's criminal or penal code of following search terms: "inmate," OR "prisoner." After going through these results, I then reviewed the entire code, where applicable, governing "corrections." And finally, I did a search for "urine" OR "feces" in the criminal and/or penal code to ensure I captured any fluid-throwing statutes like that utilized in the Wisconsin case above. I used Westlaw's legislative history function to determine when statutes were passed or amended to add

[108] These absolute numbers reflect the state prison population, not local jail populations (Hinds et al. 2018).

[109] This incarceration rate reflects the jurisdiction's total confined population, including both prison and jail populations, as well as youth confinement, and involuntary civil committees, as of December 2016 (Wagner and Sawyer 2018).

prisoner-specific provisions. I downloaded and filed all the statutes and history documents to enable double-coding of the documents in the future.

Corrections Agency Policies for Discipline and Criminal Referrals

To obtain policy documents on state correctional systems' disciplinary procedures (including how prisoner mental health status is handled in the administrative process), as well as their criminal referral policies, I first did a search of their websites for publicly available information. As described above in my discussion of freedom of information act requests, some jurisdictions had detailed disciplinary procedures and criminal review policies that were already publicly available (e.g., California and the federal government). But in most cases, some or all of these documents were not online. Therefore, I submitted public records requests to eleven jurisdictions for policy documents: Connecticut, Florida, Illinois, Missouri, Nevada, New Mexico, New York, Oklahoma, Rhode Island, Texas, and Wisconsin. After several rounds of follow-up, I ultimately received responses from all of them (even if just to confirm that there were no responsive records).

BUREAU OF JUSTICE STATISTICS NATIONAL SURVEY OF INMATES

And finally, I utilized the nationally representative Bureau of Justice Statistics (BJS) survey of inmates in state and federal correctional facilities to assess whether and how prisoner mental illness was related to the prisoners' new convictions. In this section, I describe the three sets of key variables I used in my analysis in Chapter 3.

Key Variables

There are three sets of key variables in the 2004 BJS survey I use in my analysis. The first are those relating to mental illness of people incarcerated. The second are those related to disciplinary misconduct. The third are control variables.

a. *Mental Illness*

The BJS survey asks prisoners about mental illness in several different ways. It includes questions about whether participants have ever been treated for a mental condition, including hospitalization history, both before or during incarceration; whether they have ever been diagnosed with a psychiatric illness, both before or during incarceration; about current experience of psychiatric symptoms; and about history of suicidal ideation and attempts. Given this wide array of constructs that could be used for mental illness, it is perhaps unsurprising that there is no obvious consensus in the literature about what is the best measure or measures to use. For example, some scholars analyzing the BJS survey have just used diagnosis with psychiatric illness as the measure for mental illness (Clark 2018; Semenza and Grosholz 2019), whereas others have examined psychiatric symptoms (Edgemon and Clay-Warner 2019; Felson et al. 2012) and treatment history (Daquin and Daigle 2018; Severson 2019) as well.

In this analysis, I measure mental illness using a broad range of variables, to enable identification of those prisoners who may not have received a formal diagnosis or treatment but nevertheless have experienced serious psychiatric symptoms, to guard against potential under-identification of those with mental illness in the community post-deinstitutionalization and in correctional settings. I created a dichotomous composite variables for the following measures of mental illness: *diagnosis* (i.e., whether the participant reported ever being diagnosed with depression, schizophrenia, PTSD, anxiety, personality disorder, or other mental disorder); *treatment history* (i.e.,

whether the participant reported ever receiving medications, counseling, or other treatment for a mental health condition; or being hospitalized for a mental health condition); *symptoms* (i.e., whether the participant reported experiencing symptoms of severe depression, delusions, hallucinations, or paranoia during the last year);[110] *suicidal behavior* (i.e., whether the participant reported ever attempting suicide). In addition, I created a dichotomous umbrella variable, any mental illness, for respondents who reported one or more of the following: psychological diagnosis, treatment history, symptoms, or suicidal behavior.[111]

b. *Disciplinary Infractions*

The BJS survey contains several questions relating to disciplinary misconduct, although they have significant limitations. Importantly, the survey asks a general question as to whether the prisoner has "ever been written up or found guilty of breaking prison rules?" and then probes what

[110] These symptom categories are based off of those used by other scholars working with this BJS survey data (Daquin and Daigle 2018). To measure depression, I constructed a variable based on the four-item depression scale listed in (Edgemon and Clay-Warner 2019), but required the acknowledge of all four symptoms over the past year: 1) difficulty feeling close to friends or family?, 2) given up hope for your life or your future? 3) periods where you feel no one cares about you? 4) periods when you felt numb or empty inside? Whereas nearly half of all survey respondents noted the presence of at least one of these four depression symptoms (49.9%), a much smaller percentage (3.7%) reported the presence of all four depression symptoms—which was more comparable with percentage of participants reporting the presence of other types of serious psychiatric symptoms, i.e., delusions (6.7%), hallucinations (7.7%), or paranoia (7.2%). To ensure I had a conservative estimate of symptoms of severe psychiatric symptoms, I required the presence of all four depression symptoms, but just one of the other psychiatric symptoms.

[111] Including symptoms appears to be important to construct a comprehensive measure of mental illness because nearly half (44.7%, n=1,309) of those reporting serious symptoms within the past year did not have a formal psychiatric diagnosis and over a third of those with serious symptoms did not report any history of receiving mental health treatment (39.1%, n=1,164).

type of violation (e.g., possession of a controlled substance, weapon, stolen property, contraband, verbal assault on staff member/other inmate, physical assault on staff member/other inmate, disobeying orders, etc.) as well as how many times for each.

The next set of questions ask what the *most recent violation* was and whether any disciplinary action was taken. The prisoner then is asked if disciplinary action was taken, what the action was. The types of disciplinary action asked about include: 1) solitary confinement/segregation, 2) confinement to one's own cell, 3) higher custody level, 4) transferred to another facility, 5) loss of good time, 6) received a new sentence, 7) extra work, 8) loss/change of work assignment, 9) loss of privileges, 10) other, 11) formal reprimand, 12) no punishment/suspended punishment. Much of my analysis focused on question number six—whether a participant reported receiving a *new sentence* as a consequence of their most recent disciplinary infraction. Nevertheless, it's important to emphasize that those who report a new sentence in this survey represents just a fraction of those who may have received a new sentence at some point in their incarceration.

c. *Demographic Variables*

In addition, the survey data includes a wide range of useful demographic and control variables that may bear on the likelihood that prisoners would be criminalized for conduct inside: *race*, *gender*, *education*, *admission offense*, *sentence length*, *time served*, *number of prior incarcerations*, and *cell confinement status* (i.e., whether in the past 24 hours the respondent had spent 22-24 hours in the same place as they slept).[112]

[112] Confinement to a cell for 22-24 hours/day is a commonly used definition of solitary confinement by advocates and scholars, which encompasses more than simply disciplinary segregation, including, as well, solitary confinement due to protective status, administrative classification of dangerousness, and de facto solitary confinement conditions due to prison-wide lockdowns, or an inmates' refusal to participate in work, programming, or recreation, for example.

CONCLUSION

This study relied on a wide range of data sources—from case observations in a single county in Wisconsin to the secondary analysis of a nationally representative survey—to answer several basic research questions about the criminal prosecution of prisoners. This multi-pronged approach was necessary to answer my research questions regarding the quantitative scope (how frequently?) process (how?) and with what consequences (who is most at risk? what are the symbolic and material effects of these prosecutions?). For example, the administrative data on people with in-custody convictions allowed me to understand the scope of the prosecutions, what charges were more common in different states, the cumulative effect of the additional sentences, and the racial inequities that they represented. Because they lacked mental health data, though, I relied on the Bureau of Justice Statistics Survey and an original dataset from Wisconsin to take a first, albeit imperfect, attempt, at assessing those with mental illness may be at greater risk of criminal prosecution than their counterparts. My interview data was critical in helping me understand the administrative and legal processes behind these prosecutions, as well as their social consequences.

Drawing on a diversity of data-sources also allowed me to triangulate accounts of this social phenomenon. For example, when an interview participant shared their perception of what racial groups were more at risk of prosecution, or the relationship between solitary confinement and criminal referrals, I was able to compare that against the administrative data I had obtained from their state. Similarly, I was able to understand the frequency in which certain offenses types of

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Unfortunately, the BJS survey does not ask specifically what the respondents' solitary confinement status is, so it's impossible to disaggregate the different reasons that someone may have reported spending the past 22-24 hours in their cell.

offenses, like contraband, were prosecuted in a given jurisdiction by talking to prosecutors there. And they allowed me to withstand the world-historical interruption that COVID-19 presented for social scientists, and qualitative researchers, in particular. Together, these data allow me to describe one aspect of the contemporary functioning of U.S. prisons that has until now remained almost entirely invisible. In doing so, it helps to bring the "blurry, pixelated image of the 21st century U.S. prisons into sharper focus" (Reiter 2014:417).

My approach, however, is certainly not without its limitations. By keeping the people imprisoned and working inside prisons at arms-length, and instead focusing my investigation at the courthouse, and in conversation with prosecutors, formerly incarcerated people currently living in the community, and their advocates, there is much that remains unknown about how incidents—from cell phone possession and spit to fights in the yard—inside prison walls gets categorized and pursued as criminal matters. Had I not internalized the fears about bureaucratic hurdles in obtaining permission to conduct interviews of correctional staff (Rubin 2021:31), and had the pandemic not struck right as my access to my fieldsite was taking off, I may have gained significantly greater depth of understanding of the role criminal regulation of prisoners plays in the contemporary management of U.S. prisons. Future research would do well to prioritize the accounts of correctional workers. Nevertheless, by pursuing a study of prisons from the outside—from the criminal courtroom and through freedom of information act requests—I learned quite a bit both about the limits of public accountability of prisons as well as the importance of maintaining these small, but powerful, public windows into what is happening inside our nation's most punitive total institutions.

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