

Even though mental health is more openly discussed and accepted today than in the past there is still an ongoing concern regarding issues of violence and the common misperception that people with mental illness are far more dangerous than others in society. With this misperception and all its associations, persons with mental illness are at risk for being over-incarcerated, over-institutionalized, and marginalized in society. The stigma surrounding mental illness creates disparities including a lack of parity for health insurance coverage, differential and lesser rates of reimbursement for behavioral health providers compared to other health care specialists, and social ostracism and isolation of individuals suffering from mental illnesses when social connectedness is needed to help foster healing and recovery.

Judges across court systems are often faced with decisions about public safety, whether in tenancy proceedings, child custody determinations, or identifying settings for civil and forensic commitments, and incarceration. Bail determinations are designed to examine risk of failure to appear and at times risk of violence, but assessments of these risks are not the same as those conducted in clinical settings. In making judicial determinations, constitutional principles typically require the least amount of impingement on personal liberties as necessary to further government interests. But when there are competing priorities at stake such as individual liberties and public safety interests, weighing decisions with limited information, or statutory schemes that do not incorporate modern understanding, can be fraught with problems and inequities.

This *Mental Health Facts in Brief* will provide an overview of the all too often over-emphasized relationship between mental illness and violence that can result in liberty restrictions and further stigmatize a population of people who may be better served in a treatment setting. Strategies for judges faced with decisions in particular cases are offered for consideration to improve outcomes without compromising public safety.

## **BRIEF HISTORY**

The notion that mental illness is typically associated with violence is not new, as this overblown association has been in existence for centuries and beyond. Media portrayals typically recount stories of individuals with mental illness that have engaged in violence more commonly than they portray stories of the countless numbers of people who daily live with mental illness and work, pay taxes, have families, or survive and thrive in our communities. In fact, studies show that the general public still believes that persons with mental illness are far more dangerous than others, especially when they have little personal experience with someone with mental illness.

In addition to general perceptions, across America there have been examples of egregious violence against citizens and more heinous examples against our nation's school children. When mass violence occurs, there is generally a hue and cry for increased mental health programs, which is always good, but

may also point blame to mental illness to explain this mass violence, when mental illness has been shown repeatedly to not drive most of these mass shooting events. This complex interplay has led experts to review and provide thoughtful guidance about the need to be much more nuanced in approaches to address societal mass violence, and to look at firearms related violence as a public health issue rather than as an issue focused solely on people with mental illness.

Some discourse also focuses on legislative strategies to utilize incarceration or civil commitment including Assisted Outpatient Treatment to address more problems than they were designed to solve, and many believe that courts can be the single tool for reducing violence across populations. Options to reduce acute violence potential may be limited in the court, and options available must take into account the specific facts and circumstances of the particular individual and the case, as well as the nature of the legal issue before the court. Nevertheless,

## BRIEF HISTORY (cont.)

courts serve an important gatekeeping function and judges are servants of public trust, balancing weighty issues for countless individuals that rely on courts for justice and the best outcomes. To achieve these best outcomes, judges need accurate information to inform their decisions.

## COMMUNITY POLICIES AND PRACTICES

Not all crime is violent, and not all violence is criminalized. The criminal justice system relies heavily on the risk-need-responsivity model that helps identify an individual's risks, such as risk of criminal recidivism, re-arrest, re-incarceration, and sometimes violence. Programs often use standardized assessment to examine criminogenic factors. Mental illness is not a leading criminogenic risk factor. Rather, although substance use is a high correlate and a criminogenic risk factor, mental illness is considered a responsivity factor, that is, a condition that must be promptly addressed for interventions to be most effective and for the individual to have the best chance of recovery.

Utilizing evidence-based tools is important, but criminogenic risk assessment tools differ in approach from clinical risk assessments. Policies and practices should underscore what the Council of State Governments established in their expert panel report on the "Over-Valuation of Risk for People with Mental Illness" that recognized the utility of empirically developed, validated assessment tools that examine past behavior and other predictive factors, but caution that care should be taken to ensure that the presence of a serious mental illness is not used to justify more severe sanctions when the mental illness itself is not clearly linked to crime and violence. Moreover, there may be structural issues in some tools that further marginalize specific populations and create silting of disadvantaged populations with intersecting mental health issues into the criminal system.

Protocols to assist with risk mitigation increasingly examine strengths in addition to risks to help make correctional supervision models more well-rounded and effective. Treatment courts often have established relationships with clinicians who can provide a clinical review of potential risk, that would look at issues differently from traditional court reviews of risk by

legal professionals. Models are developing that promote positive outcomes for those people with behavioral health and justice involvement to help reduce recidivism and decrease symptoms. Policy and practices should strive to incorporate models that take a trauma-informed, strength-based perspective on assessing individual's needs and strengths for supervision and treatment purposes.

## SUPPORTING EVIDENCE

Of all violence in society, at most 3-5% can be attributed to mental illness. Some of the most rigorous research shows that violent behavior by people with serious mental illness discharged from psychiatric hospitals was generally not significantly different when compared to a general community sample, unless there was co-occurring substance use.

Studies repeatedly reflect that substance use is a driver of violence risk both in the population of people with mental illness and those without mental illness, and that for a variety of reasons persons with mental illness are at heightened risk for having a substance use disorder. However, it has also been shown that persons with mental illness are more likely to be victims of violence than perpetrators, yet this is often overlooked in formulas for where "public safety" would be maximized. Still, on an individual level, the presence of mental illness symptoms can contribute to a violent or criminal act, and as such assessments must be individualized. Evidence points out that persons with mental illness appear at disproportionate rates in the criminal justice system, and that individuals in the public behavioral health system have disproportionate rates of criminal histories compared to the general population, but this speaks more to the complexity of intersecting issues, including social determinants of health and mental health, structural disparities, and trauma exposure and community response. In fact, one study showed that of offenders with mental illness, symptoms of mental illness such as psychosis that directly appeared to drive the criminal conduct were only seen in 4% of the cases. Thus, the evidence shows that but for a very small percentage of individuals, violence and crime is driven by factors other than mental illness for all populations including those with and without serious mental illness.

Firearm related violence, and even mass violence by firearm, has its own unique elements, and most firearm-related violence toward others has much more to do with

access to assault weapons, personality styles, and recent events that can lead to dysregulation and frustration and social disconnectedness than mental illness or developmental disabilities, which only have weak associations to firearm related violence. However, firearm related suicides remain a major risk factor in society for individuals with and without mental illness.

Current research supports a more public health framework toward overall violence prevention and intervention.

And it further illuminates that mental illness should not be identified as a single causative factor for violence in judicial decisions, unless there is clear and ample evidence for that link separate from other factors, including substance use. And in those limited cases where there is a direct nexus, careful clinical assessment for appropriate treatment interventions is needed, which may or may not include the need for a court order to intervene.

## JUDICIAL CONSIDERATIONS

People with mental illness who come before the courts have a right to be treated fairly. Overvaluing the risk of violence without looking at clinical and criminogenic assessments and relevant facts and circumstances runs the risk of placing undue liberty restrictions or limiting access to basic freedoms without the gains of protecting the public from harm. At the same time, public interests in living in safe communities must be taken into consideration. With that in mind, judges may find the following considerations useful as individual case determinations arise in their courtrooms:

- *Formalized clinical risk assessments will yield information from a different vantage point from legal tools such as those used for pretrial risk assessments or criminogenic risk and need assessments.*
- *Validated risk-need-responsivity, trauma screenings and other tools are available and should be used when indicated; in addition, general treatment-related violence risk assessments may also be useful.*
- *Judges should be cautious and not override risk assessment findings that indicate an individual with mental illness is at low risk of violence, unless there is clear evidence for supporting a higher risk determination. Judges should also incorporate dynamic (changeable) risk factor mitigation as well as a strengths-based approach to helping an individual at risk navigate recovery safely.*
- *Persons with mental illness and youth with serious emotional disturbances are at heightened risk of being victims of violence and abuse. Thus, in settings where there may be high levels of violence directed at them, there may be other factors related to individuals for judges to balance in rendering their decisions.*
- *Services should be delivered that match the level of criminogenic risk and needs, but medical necessity and risk of failure to appear are not equivalent, and judges should work with behavioral health specialists to understand how medical necessity determinations for levels of clinical care are made to achieve the best possible outcomes for persons with mental illness and substance use disorders.*
- *Psychiatric considerations of risk may be distinct from those of justice stakeholders (e.g., judges, defense, prosecution, etc.). Thus, partnerships between justice system, behavioral health, and child welfare system personnel, among others, are critical as judicial decisions are best made when informed by various perspectives to achieve the best possible outcomes.*

## SUMMARY

Violence in society has increasingly been recognized as a public health issue, and judges are often required to make decisions to help protect public safety while balancing treatment needs and liberty interests related to the party before them. Because persons with mental illness are often before the court, it is critical that court personnel understand the risks of over-identifying mental illness with violence and that they understand the literature that points out that mental illness alone accounts for only a small percentage of violence in society. Working with a range of risk assessment approaches that encompass strengths and dynamic factors and building partnerships with behavioral health professionals are strategies courts can utilize to best examine risk and develop risk management strategies from complementary vantage points to achieve better outcomes for all.

## RESOURCES

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