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## Proactive Remedies to Prevent Permanent Solutions: Enacting Narrowly Crafted Legislative Reform to Reduce Jail Suicides

Kathryn E. Meloni

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# PROACTIVE REMEDIES TO PREVENT PERMANENT SOLUTIONS: ENACTING NARROWLY CRAFTED LEGISLATIVE REFORM TO REDUCE JAIL SUICIDES

*Kathryn E. Meloni*<sup>†</sup>

## ABSTRACT

This Note provides a critical examination of the practices jails currently utilize across the United States to prevent inmate suicides, ultimately concluding that current practices more closely mirror punishment rather than treatment. Although there is a form of legal redress for inmates and their families who have been wronged by current suicide prevention methods, many aggrieved individuals fail to obtain relief through the court system. This Note proposes that the solution instead lies in legislative reform. Using the Sandra Bland Act enacted by the Texas legislature as a model, this Note criticizes the Act's enactment, examining how other states may seek to adopt their own legislative reform to reduce jail suicides through proper allocation of resources. Ultimately, this Note concludes that legislatures should seek to protect and provide care for vulnerable inmates, reforming practices to better screen and operate jails so as to provide care for, rather than harm, inmates with suicidal ideologies.

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## INTRODUCTION

A suitable amount of pain is not a question of utility, of crime control, of what works. It is a question of standards based on values. It is a cultural question.<sup>1</sup>

Brendan Kiekisz died on December 30, 2018 while in custody at the Cuyahoga County Jail.<sup>2</sup> To this day, the jail remains silent as to the circumstances surrounding his death, except for the cause: suicide.<sup>3</sup> Kiekisz was taken into custody on Christmas Day, after he failed to appear in court regarding an outstanding probation violation and a misdemeanor ticket.<sup>4</sup> Kiekisz told officers that he had been struggling with mental illness and drug addiction, and that he had tried to kill himself just three days prior.<sup>5</sup> However, officers did not place him on suicide watch or administer medication.<sup>6</sup> The Kiekisz family still seeks

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1. NILS CHRISTIE, *CRIME CONTROL AS AN INDUSTRY: TOWARDS GULAGS, WESTERN STYLE* 201 (3rd ed. 2000).
  2. Adam Ferrise, *Mother of Man Who Died of Suicide in Cuyahoga County Jail: "They Failed Him"*, CLEVELAND.COM (Aug. 15, 2019), <https://www.cleveland.com/metro/2019/08/mother-of-man-who-died-of-suicide-in-cuyahoga-county-jail-they-failed-him.html> [https://perma.cc/SQ7D-X7BN].
  3. *Id.*
  4. *Id.*
  5. *Id.*
  6. *Id.*

answers; they hired a civil rights attorney with the hope of holding Cuyahoga County accountable for failing to prevent their son's highly preventable death.<sup>7</sup>

The Kiekisz family does not stand alone. Since the beginning of 2018, eight inmates have died while incarcerated at the Cuyahoga County Jail, four of whom committed suicide.<sup>8</sup> These deaths stand out among the nearly seventy attempted suicides at the same facility over a three-year time period.<sup>9</sup> Cuyahoga County provides merely one example of a county's struggle with rising rates of jail suicides. As local jail populations continue to increase, facilities struggle with managing the increased risk and frequency of inmate suicides.

The type of facility an inmate finds themselves in can mitigate or worsen an inmate's mental health and quality of life. An offender is incarcerated in either a prison or jail.<sup>10</sup> The two facilities fundamentally differ based on the inmate's typical length of stay.<sup>11</sup>

Prisons are operated by either state or federal governments and are typically reserved for convicted offenders serving longer sentences.<sup>12</sup> Compared to jails, prison inmates are often more satisfied with day-to-day life; longer stays mean an inmate's healthcare needs are known, their behaviors and daily routines are learned by staff and others, and

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7. *Id.*

8. Adam Ferrise, *Cuyahoga County Jail Inmate Put on Life Support After Attempted Suicide, Sources Say*, CLEVELAND.COM (July 7, 2019), <https://www.cleveland.com/metro/2019/07/cuyahoga-county-jail-inmate-put-on-life-support-after-attempted-suicide-sources-say.html> [https://perma.cc/T7KB-NX5Q].

9. Adam Ferrise, *Attempted Suicides at Cuyahoga County Jail Tripled Over Three-Year Span*, CLEVELAND.COM (Feb. 21, 2019), <https://www.cleveland.com/metro/2019/02/attempted-suicides-at-cuyahoga-county-jail-tripled-over-three-year-span.html> [https://perma.cc/WGX5-VHEC].

10. *See generally What is the Difference Between Jail and Prison?*, HG.ORG, <https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513> [https://perma.cc/UN6B-KNPP] (last visited Jan. 7, 2020); *see also* Nina Goepfert, *Beyond Deliberate Indifference: Improving Jail Health Care with False Claims Acts*, 25 VA. J. SOC. POL'Y & L. 123, 130 (2018) (quoting the Chief Medical Officer at MHM/Centurion who stated that jails and prisons are as different from one another as nursing homes and emergency rooms).

11. Scholars tend to conflate the two as being the same; distinguishing between the two types of facilities helps to inform how policies and measures must differ. *See generally* HG.ORG, *supra* note 10.

12. *What is the Difference Between Jail and Prison?*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-jail-prison/> (last visited Sept. 19, 2020) [https://perma.cc/DB62-P47W].

they can take part in programs better tailored to their specific needs.<sup>13</sup> According to United States Department of Justice statistics from 2006, an estimated ten percent of state prisoners reported symptoms matching criteria for a psychiatric disorder.<sup>14</sup> The Office of Research & Public Affairs at the Treatment Advocacy Center estimates that, today, this number likely reaches closer to fifteen percent.<sup>15</sup>

Jails are operated by cities, counties, or local jurisdictions.<sup>16</sup> Oftentimes, jails serve as short-term holding facilities where those who have been recently arrested, are awaiting trial, or are awaiting sentencing, may spend their time.<sup>17</sup> Although inmates are only in jail temporarily, many jails still provide inmates with programs and activities in hopes that the inmates improve themselves during their incarceration to avoid returning in the future.<sup>18</sup> Yet, given the short-term nature of many of the inmates' stays, inmates find daily functioning to be quite difficult.<sup>19</sup> As inmates are being moved in and out of the facility each day, other inmates must adjust to frequent interruptions in daily living, including sleep and exercise schedules.<sup>20</sup> In addition, societal woes are often exacerbated by incarceration; for example, the COVID-19 pandemic presented a massive challenge for jails due to close living quarters and potential new introductions of the virus into the community by staff and new inmates.<sup>21</sup>

Generally, the daily operations of jails create unique problems for both administrators and inmates, especially given that each year two

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13. HG.ORG, *supra* note 10.

14. *Serious Mental Illness Prevalence in Jails and Prisons*, TREATMENT ADVOC. CTR.: OFF. OF RES. & PUB. AFF., 2 (Sept. 2016), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf> [<https://perma.cc/4RX4-FD4J>] (citing James, D.J., Glaze, L.E., *Mental Health Problems of Prison and Jail Inmates*, BUREAU OF JUST. STAT. (2006)).

15. *Id.*

16. HG.ORG, *supra* note 10.

17. Those individuals charged with misdemeanor offenses carrying less than a year of jail time may serve the entirety of their sentence in jail. PRISON FELLOWSHIP, *supra* note 12. On occasion, inmates serving consecutive misdemeanor offenses may end up spending longer than a year incarcerated in jail. HG.ORG, *supra* note 10.

18. HG.ORG, *supra* note 10.

19. *Id.*

20. *Id.*

21. Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities – United States, February – April 2020*, 16 CTRS. FOR DISEASE CONTROL 587, 587 (2020).

million people suffering from mental illness are booked into jails.<sup>22</sup> The Office of Research & Public Affairs at the Treatment Advocacy Center estimates that twenty percent of inmates in jails suffer from serious mental illnesses including, but not limited to, schizophrenia, bipolar disorder, and major depression.<sup>23</sup> Of those booked, fifteen percent of men and thirty percent of women have a serious mental health problem.<sup>24</sup>

Large mentally ill populations have left jails particularly susceptible to frequent suicides.<sup>25</sup> In 2015, the Bureau of Justice Statistics published a report revealing that from 2000-2013, suicide was the leading cause of death inside of jails and was on the rise.<sup>26</sup> As of 2013, forty-six per one-hundred-thousand jail inmates committed suicide, as opposed to fifteen per one-hundred-thousand inmates in prisons.<sup>27</sup> Lori Rifkin, a

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22. *Jailing People with Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Advocacy/Policy-Priorities/Divert-from-Justice-Involvement/Jailing-People-with-Mental-Illness> (last visited Sept. 20, 2020) [<https://perma.cc/G9B2-ZBZZ>]. The COVID-19 pandemic created heightened risks for mentally ill inmates housed in jails and prisons due to the inherent limitations presented by mass outbreaks of illness within facilities. *See generally* AM. PSY. ASS'N: THE IMPACT OF COVID-19 ON INCARCERATED PERSONS WITH MENTAL ILLNESS (2020).
  23. TREATMENT ADVOC. CTR., *supra* note 14, at 1.
  24. For the purposes of this study, serious mental health problems included schizophrenia, schizoaffective disorder, bipolar disorder, major depression, and brief psychotic disorder. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERV. 761, 764 (2009).
  25. "It's a problem commonly blamed on the mere fact that more mentally ill people are landing behind bars, a trend that started after state psychiatric hospitals began closing in the 1970s and promised alternatives failed to emerge. More recently, jails have been overwhelmed with those addicted to opioids or meth, many of whom wrestle with depression and withdrawal." *Many US jails fail to stop inmate suicides, investigation reveals*, USA TODAY (June 18, 2019, 11:36 AM), <https://www.usatoday.com/story/news/2019/06/18/inmate-suicide-us-jails-fail-stop-deaths-investigation-reveals/1486534001/> [<https://perma.cc/27R3-H8M5>].
  26. MARGARET NOONAN ET AL., BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS 1 (2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf> [<https://perma.cc/8K8B-JJUT>] (Congress authorized the Bureau of Justice Statistics to conduct a statistical analysis of national and state-level data regarding local jail inmate and state prison death rates across the United States).
  27. *Id.* at 8 tbl.3, 21 tbl.18. *see also* Maurice Chammah & Tom Meagher, *Why Jails Have More Suicides Than Prisons*, THE MARSHALL PROJECT (Aug. 4, 2015), <https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons>. [<https://perma.cc/G78E-L9T8>].

California prisoner's rights attorney, asserts that a "vast majority" of jail suicides are "foreseeable and preventable."<sup>28</sup>

This Note will argue that the best way to prevent rising rates of jail suicides is through legislation. Section I examines the conditions in jails affecting the mentally ill and suicidal. First, it will explain the factors contributing to rising rates of jail suicides, including the widespread closure of mental health facilities<sup>29</sup> and associated challenges faced by jails.<sup>30</sup> It will then discuss known suicide risk factors and a study conducted by Lindsay M. Hayes examining how jails frequently fashion their suicide prevention programs.

Section II provides an overview of the jail-suicide litigation process, the most common form of recourse for individuals or family members who are dissatisfied with jail conditions for the mentally ill or suicidal. It will introduce a number of judicially—and statutorily—created barriers to recovery, and explain how these barriers interact to make recovery difficult. It will then discuss the recent turn toward structural reform litigation as a move in the right direction. It will end by ultimately concluding, however, that the court system alone cannot remedy the systematic and widespread problems within jails.

Section III introduces the Sandra Bland Act, a comprehensive piece of legislation out of Texas intended to remedy a number of issues within the Texas criminal justice and jail system, including monitoring and treating the mentally ill and suicidal. It will focus on three key provisions within the Act. It will then provide statistical data and commentary from the Texas Commission on Jail Standards and the Meadows Mental Health Policy Institute regarding the Act's provisions and how implementation has presented unique challenges for jails across Texas.

Section IV proposes that other states should use the Sandra Bland Act as a model for enacting their own criminal justice reform. It will argue that the Act's purpose should be limited to improving conditions *inside* of jails instead of attempting to create an overbroad and unfeasible piece of legislation states would be reluctant to adopt. It will suggest three amendments to the Act, all intended to improve conditions for the mentally ill inside of jail.

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28. USA TODAY, *supra* note 25.
  29. Steve Coll, *The Jail Health-Care Crisis*, THE NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [<https://perma.cc/H4VV-CCPN>].
  30. See Tim Brennan, *Implementing Organizational Change in Criminal Justice: Some Lessons from Jail Classification Systems*, NORTHPOINTE INST. FOR PUB. MGMT., INC. (1999), [http://www.northpointeinc.com/files/publications/1999CMQ\\_Implementation.pdf](http://www.northpointeinc.com/files/publications/1999CMQ_Implementation.pdf) [<https://perma.cc/W7UL-UU9F>].

I. CURRENT PRACTICES: UNDERSTANDING AND PREVENTING  
JAIL SUICIDE

The current state of care for the mentally ill and suicidal inside of jails is troublesome. Jails face a number of institutionalized barriers to their ability to care for and treat this special inmate population.<sup>31</sup> For many inmates, jail worsens their mental illness and suicide begins to feel like their only escape.<sup>32</sup> Because of the institutionalized barriers facing jails, jails often provide care for inmates that more closely mirrors punishment than treatment.<sup>33</sup>

A. *Societal Factors Contributing to Rising Rates of Jail-Suicide*

Jails across the United States struggle with how to manage growing populations of the mentally ill.<sup>34</sup> State mental health facilities continue closing,<sup>35</sup> and unless an individual can afford to pay for private care, mentally ill individuals are likely to end up either homeless or incarcerated.<sup>36</sup> Even sheriff's departments now recognize that they are the state's primary mental health care providers.<sup>37</sup> As a result, jails must navigate their role as caretakers for the mentally ill.

The influx of the mentally ill into jails has contributed directly to increased rates of jail suicides.<sup>38</sup> Because of overcrowding, jails are coping with security concerns and struggling to provide adequate

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31. See POLICE EXEC. RSCH. FORUM, MANAGING MENTAL ILLNESS IN JAILS: SHERIFFS ARE FINDING PROMISING NEW APPROACHES, 6 (2018), <https://www.policeforum.org/assets/mentalillnessinjails.pdf> [<https://perma.cc/X3AB-NKLP>].
32. *Jailing People with Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/learn-more/public-policy/jailing-people-with-mental-illness> (last visited Nov. 13, 2020). See also J. Richard Goss et al., *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, 53 PSYCHIATRIC SERV. 574 (2002).
33. Christine Herman, *Most Inmates with Mental Illness Still Wait for Decent Care*, NPR (Feb. 3, 2019, 7:00 AM), <https://www.npr.org/sections/health-shots/2019/02/03/690872394/most-inmates-with-mental-illness-still-wait-for-decent-care> [<https://perma.cc/4VTE-E6ZL>].
34. POLICE EXEC. RSCH. FORUM, *supra* note 31, at 5.
35. *Id.* ("As mental health treatment facilities have closed or been scaled back, county jails have become the *de facto* mental health care system for large numbers of individuals in many communities.").
36. Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to A Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [<https://perma.cc/TA37-KWDB>].
37. POLICE EXEC. RSCH. FORUM, *supra* note 31.
38. *Id.*



staffing and medical care.<sup>39</sup> Increases in inmate populations lead to an increased risk of violence within jails and an increased need for guards.<sup>40</sup> Jails then struggle to weigh facility concerns against inmate safety, as guards are often required to give more attention to mentally ill inmates due to their complex needs.<sup>41</sup>

*B. Known Suicide Risk Factors in Jails and Beyond*

In addition to weighing societal factors, jails must be wary of a number of suicide risk factors that often interact when an individual is first arrested and brought to jail.<sup>42</sup> By the time an inmate reaches prison, their mental illness or suicidal tendencies have had time to surface and the prison is made aware of the inmate's conditions.<sup>43</sup> On the other hand, jails are rarely made aware of an inmate's mental health or suicidal tendencies at intake unless the inmate self-reports.<sup>44</sup> For many inmates, the "shock of confinement" begins to set in, where first-time offenders are often shocked by the loss of their "job, housing, and basic sense of normalcy."<sup>45</sup> This shock of confinement largely contributes to jails' high suicide prevalence.<sup>46</sup> Some studies indicate that incarceration can strengthen suicidal ideations for those with other known risk factors.<sup>47</sup>

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39. Tim Brennan, *supra* note 30.
40. NAT'L INST. OF JUSTICE, CORRECTIONAL OFFICER SAFETY AND WELLNESS LITERATURE SYNTHESIS 2 (2017). *See also* POLICE EXEC. RSCH. FORUM, *supra* note 31, at 11–13.
41. NAT'L INST. OF JUSTICE, CORRECTIONAL OFFICER SAFETY AND WELLNESS LITERATURE SYNTHESIS 7 (2017).
42. *See generally* WORLD HEALTH ORG.: DEP'T OF MENTAL HEALTH AND SUBSTANCE ABUSE, PREVENTING SUICIDE IN JAILS AND PRISONS 3–4 (2007), [https://www.who.int/mental\\_health/prevention/suicide/resource\\_jails\\_prisons.pdf](https://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf) [<https://perma.cc/Z634-65KE>].
43. Chammah & Meagher, *supra* note 27.
44. *Id.*
45. *Id.*
46. When you combine preexisting risk factors with a sudden, jarring, terrifying transition, the results can be fatal . . . ” and as one researcher put it, “especially given . . . that ‘Research shows that suicidal behavior often emerges quickly with as little as five to ten minutes between the thought and the action.’” Jesse Singal, *Why Jails Pose Such a High Suicide Risk*, THE CUT (July 24, 2015), <https://www.thecut.com/2015/07/why-jails-pose-such-a-high-suicide-risk.html> [[perma.cc/343T-PZHN](https://perma.cc/343T-PZHN)].
47. *See, e.g.*, Karen E. Schaefer et al., *Suicidal Ideation in a United States Jail: Demographic and Psychiatric Correlates*, 27 J. OF FORENSIC PSYCHIATRY & PSYCH. 698 (2016) (“Additionally, isolation in the form of both segregation and disrupted interpersonal attachment can exacerbate the stress of the crisis of incarceration . . . While some inmates are able to adapt to this stressful environment, others experience an onset or

Risk factors for suicide are often “a combination of individual, relationship, community, and societal factors . . . ”<sup>48</sup> according to the Centers for Disease Control and Prevention (CDC).<sup>49</sup> Such risk factors may include, but are not limited to, “[p]revious suicide attempt[s] . . . [i]solation, a feeling of being cut off from other people . . . [l]oss . . . [f]eelings of hopelessness” and a “[h]istory of mental disorders, particularly clinical depression.”<sup>50</sup>

As one can imagine, many of these factors are worsened by incarceration. Recent literature compares characteristics found in those inmates who die by suicide as opposed to those who attempt suicide.<sup>51</sup> In one study drawing on a multistate sample, researchers found that inmates were more likely to die after an attempted suicide if they were “older, male, more educated, and married or separated/divorced; pretrial, committed for a violent crime, incarcerated in jail, housed in an inpatient mental health unit or protective custody setting, living in a single cell, not on suicide precautions, nor previously under close observation . . . .”<sup>52</sup> In another study, researchers examined documented risk factors for inmates who subsequently attempted or completed suicide.<sup>53</sup> The study revealed that those inmates with

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exacerbation of mental health problems, such as [suicidal ideations].”) *see also* Taanvi Ramesh, *Suicide in Prison: A New Study On Risk Factors in the Prison Environment*, PENAL REFORM INT’L (June 13, 2018), <https://www.penalreform.org/blog/suicide-in-prison-a-new-study-on-risk/> [<https://perma.cc/64X2-WTYW>] (comparing suicide trends amongst the general population to incarcerated individuals across developed nations).

48. CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/suicide/riskprotectivefactors.html> (last reviewed Sept. 3, 2019) [<https://perma.cc/6F4Q-98ZJ>].
49. *Id.*
50. *Id.*
51. These studies have largely assessed prison populations as opposed to jails. By distinguishing between those who attempt suicide and those who complete suicide, researchers hope to “inform assessment and delivery of proactive, appropriate interventions to prevent the most lethal of suicidal behavior.” Emily A. Boren et al., *The Suicidal Inmate: A Comparison of Inmates Who Attempt Versus Complete Suicide*, 48 SUICIDE AND LIFE-THREATENING BEHAV. 570, 571 (2018).
52. The study asked behavioral health professionals working at correctional facilities to complete a tracking sheet following an attempted or completed suicide. *Id.* at 570–72.
53. Researchers studied the following psychological risk factors:
  - [D]iagnostic factors (e.g., diagnosed mood disorder, substance use disorder), treatment factors (e.g., on mental health caseload, compliant with psychotropic medication), concurrent risk factors (e.g., documented depressive symptoms, alienation), proximal risk factors (e.g., documented self-injurious behavior, decline in physical health), and historical risk factors (e.g., documented

documented risk factors were more likely to attempt than die by suicide.<sup>54</sup> Researchers emphasized the importance of awareness, noting that when staff were aware of “inmates’ current and historical psychological state and social context,” fewer deaths occurred.<sup>55</sup>

*C. How are Jails Preventing Suicide?*

Awareness of and concerns over known suicide risk factors leads to programs intended to lessen the risk factors’ prevalence or impact.<sup>56</sup> Often, this results in suicide prevention programs.<sup>57</sup> An effective suicide prevention program requires:

[T]raining of all correctional, medical, and mental health staff on both an initial and annual basis; intake and on-going screening/assessment for suicide risk; procedures that encourage communication between outside entities and correctional facilities, as well as internally between and among facility staff and the suicidal inmate; suicide-resistant housing and restrictions . . . commensurate with risk level; procedures for emergency response to a suicide attempt . . .<sup>58</sup>

In reality, jails often use prevention measures that punish those with suicidal ideations as opposed to treating them.<sup>59</sup>

As the Project Director with the National Center on Institutes and Alternatives, Lindsay M. Hayes provides an overview of strategies most

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lifetime history of substance use problems, impulsivity, and trauma).

Johanna B. Folk et al., *Differences Between Inmates Who Attempt Suicide and Who Die by Suicide: Staff-Identified Psychological and Treatment-Related Risk Factors*, 15 PSYCHOL. SERV. 349, 350 (2018).

54. *Id.* at 353.

55. *Id.*

56. To formulate suicide prevention programs researchers are creating suicide profiles, examining those risk factors and circumstances most likely to make an inmate a suicide risk. *See generally* WORLD HEALTH ORG., *supra* note 42.

57. “Significant reductions in suicides and suicide attempts can be accomplished once comprehensive prevention programmes have been implemented.” *Id.* at 4.

58. Lindsey M. Hayes, *Suicide Prevention in Correctional Facilities: Reflections and Next Steps*, 36 INT’L J.L. & PSYCHIATRY 188, 193 (2013); *see also* Marty Drapkin, *Writing a Suicide Prevention Policy*, CORRECTIONSONE (Oct. 20, 2007), <https://www.correctionsone.com/corrections/articles/writing-a-suicide-prevention-policy-hyX58AbPA1wRygKN/> (breaking down key components to an ideal suicide prevention program) [<https://perma.cc/NK88-SSDF>].

59. Hayes, *supra* note 58, at 192.

commonly used by correctional facilities to prevent inmate suicide.<sup>60</sup> For example, a suicidal inmate may be placed in a suicide resistant cell.<sup>61</sup> Suicide resistant cells typically contain anti-tampering mechanisms, including folding hooks or reduced use of radiator vents, as both are often used as hooking mechanisms during suicide.<sup>62</sup> Jails often use safety smocks or blankets made of nylon fabric, a fabric that is both heavy and difficult to tear.<sup>63</sup> Suicidal inmates are commonly placed on suicide watch whereby the facility places a guard outside of their door twenty-four-hours a day, seven days a week.<sup>64</sup> Jails without enough staff to provide twenty-four-hour observation may use closed-circuit televisions (CCTV) to constantly monitor at-risk inmate blocks.<sup>65</sup>

Facilities should avoid suicide prevention measures that are punitive in nature. Hayes gives the extreme example of a county jail that placed suicidal inmates in small booking cages often referred to as “squirrel cages.”<sup>66</sup> Only three-by-three-foot in diameter and seven feet tall, it is not uncommon for an inmate to be placed in one of these “squirrel cages” for more than twenty-four-hours at a time.<sup>67</sup> Inmates placed in these cages lied to get out of them, saying they were no longer suicidal merely to avoid having to remain in such living conditions.<sup>68</sup> Hayes emphasizes that jails should permit suicidal inmates to “receive showers, access to telephone calls, legal and family visits, and other routine privileges [provided] to non-suicidal inmates . . . .”<sup>69</sup>

Although jails are aware of best practices for suicide prevention, they struggle to implement the required procedures.<sup>70</sup> When an inmate

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60. *See Id.* at 188.

61. *Id.* at 189; *see also* Jason Pohl & Ryan Gabrielson, *A Jail Increased Extreme Isolation to Stop Suicides. More People Killed Themselves*, PROPUBLICA (Nov. 5, 2019, 8:30 AM), <https://www.propublica.org/article/a-jail-increased-extreme-isolation-to-stop-suicides-more-people-killed-themselves> [<https://perma.cc/5EHZ-64R2>].

62. Hayes, *supra* note 58, at 189.

63. *Id.*

64. *See* Hayes, *supra* note 58, at 189.

65. *Id.* at 189.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See generally* NAT’L COMM’N ON CORR. HEALTH, SUICIDE PREVENTION RESOURCE GUIDE 6 (2020) (“There is no magic formula or definitive approach to suicide risk assessment, as understanding of this complex behavior among a complex patient population continues to evolve.”).

does commit suicide, the lingering question for many is, “what happened?” While a jail investigates an inmate’s death and the procedures that may have failed to prevent it, the jail is often sued over their failure to provide the necessary protections.<sup>71</sup>

## II. THE LEGAL STANDARD FOR INDIVIDUAL JAIL-SUICIDE LITIGATION

When an inmate or their family is dissatisfied with the jail suicide prevention or care jails are offering, they often sue jails.<sup>72</sup> Jail-suicide litigation appears in one of two forms: (1) Inmates may file a lawsuit while still incarcerated alleging that the conditions inside of the jail worsened, or that jailers failed to acknowledge suicidal ideation; or (2) an inmate’s family files suit to recover damages following their family member’s suicide.<sup>73</sup> To file a lawsuit, inmates or their families must overcome both statutory and judicially-created barriers to recovery.

### A. *The Eighth Amendment to the Constitution*

The Eighth Amendment to the Constitution recognizes an inmate’s right to be free from “cruel and unusual punishment.”<sup>74</sup> This right

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71. Lori Whitten, *Legal Liability Trends for Correctional Suicides*, NAT’L INST. OF CORR. (July 16, 2012, 12:23 PM), <https://community.nicic.gov/blogs/mentalhealth/archive/2012/07/16/legal-liability-trends-for-correctionalsuicides.aspx> [<https://perma.cc/8Y3C-T4P2>].
72. Whitten, *supra* note 71; *see also* Anasseril E. Daniel, *Suicide-Related Litigation in Jails and Prisons: Risk Management Strategies*, 15 J. OF CORR. HEALTH CARE 19 (2009) (providing healthcare providers and correctional officers with advice on the jail-suicide litigation process) [<https://perma.cc/TPG9->].
73. For a study comparing the efficacy of jail reform litigation and its process, *see* Wayne N. Welsh, *The Dynamics of Jail Reform Litigation: A Comparative Analysis of Litigation in California Counties*, 26 L. & SOC’Y REV. 591 (1992); *see also* Jack Denton, *Who’s Legally Responsible for Prison and Jail Suicides?*, PAC. STANDARD (May 14, 2019), <https://psmag.com/social-justice/whos-legally-responsible-for-prison-and-jail-suicides> [<https://perma.cc/LN5X-8THD>].
74. The Eighth Amendment states in full “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VII. Because jails house offenders at various stages of the criminal process (i.e. pre-trial, awaiting sentencing, convicted offenders), the Eighth Amendment does not always apply. For example, the Eighth Amendment does not apply to pre-trial detainees; claims brought by pre-trial detainees over unconstitutional conditions must arise under the Fourteenth Amendment Due Process Clause. *See* *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be ‘cruel and unusual’ under the Eighth Amendment.”).

applies to the length, type, and administration of criminal sentences.<sup>75</sup> The Supreme Court has ruled that “it is but just that the public be required to care for the prisoner who cannot by reason of the deprivation of his liberty, care for himself.”<sup>76</sup> The Eighth Amendment creates an affirmative duty to care for the incarcerated, as inmates are cut off from the outside world and are unable to seek care by their own free will.<sup>77</sup> Inmates are guaranteed certain protections and rights as a result, and must be cared for in a way that does not amount to cruel and unusual punishment.<sup>78</sup>

*B. Section 1983 of the Civil Rights Act*

While the Eighth Amendment provides a constitutionally-mandated standard of care, Section 1983 of the Civil Rights Act<sup>79</sup> provides jail-suicide litigants an avenue for redressing constitutional violations by state actors.<sup>80</sup> Section 1983 provides in part that “Every person who, under color of any statute . . . of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .”<sup>81</sup> In 1961, the Supreme Court held that Section 1983 provides plaintiffs with a federal remedy following a state actor’s misuse of power if the state actor violates a clearly established constitutional protection.<sup>82</sup>

*C. The Deliberate Indifference Standard*

In *Estelle v. Gamble*, the Supreme Court attached Section 1983 claims brought against correctional facilities and their personnel to

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75. For a discussion of the Eighth Amendment’s important application to the method of punishment, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884–86 (2009).
76. *Estelle v. Gamble*, 429 U.S. 165, 291 (1976).
77. “[T]he state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. The state therefore has an affirmative obligation to protect prisoners from serious physical and psychological harm.” Dolovich, *supra* note 75, at 881.
78. *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. Pa. L. Rev. 533, 560 (1978) [hereinafter *Actionability of Negligence*].
79. 42 U.S.C. § 1983 (2018).
80. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. OF EMPIRICAL LEGAL STUD. 4, 4 (2015).
81. 42 U.S.C. § 1983 (2018).
82. *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

Eighth Amendment medical treatment claims.<sup>83</sup> “Deliberate indifference” by correctional facility personnel to an inmate’s serious illness or injury now constitutes cruel and unusual punishment.<sup>84</sup> For an inmate to claim that they received inadequate medical care constituting cruel and unusual punishment, the inmate must “allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”<sup>85</sup> The *Estelle* Court did not define what deliberate indifference means, or whether or not “serious medical needs” include suicidal ideations or mental illness.<sup>86</sup>

The Supreme Court would not define deliberate indifference until 1994.<sup>87</sup> In *Farmer v. Brennan*, the Supreme Court held that an official cannot be held liable for deliberate indifference “unless the official knows of and disregards an excessive risk to inmate health or safety,” whereby “the official must both be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”<sup>88</sup>

Although a non-jail and non-suicide case, *Farmer v. Brennan* significantly altered jail-suicide litigation claims brought through Section 1983 under the Eighth Amendment.<sup>89</sup> First, the Court set the standard for deliberate indifference as criminal recklessness, requiring a conscious disregard for the heightened risk of harm to an inmate.<sup>90</sup> Second, the Court explicitly stated that a claimant does not have to prove that an “official acted or failed to act believing the harm would *actually* befall an inmate,” but rather that the official merely had “knowledge of a *substantial risk* of serious harm.”<sup>91</sup> Third, to prove such knowledge after *Farmer*, claimants could rely on a variety of

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83. *Estelle*, 429 U.S. at 291.

84. In 1991, the Supreme Court extended the “deliberate indifference” standard to all Eighth Amendment claims brought in response to conditions inside correctional facilities. See *Wilson v. Seiter*, 501 U.S. 294 (1991); see also Martin A. Schwartz, *Supreme Court Defines Deliberate Indifference*, N.Y. L. J. 159 (1994).

85. The inmate must show how the official’s actions could be considered “an unnecessary and wanton infliction of pain.” *Estelle*, 429 U.S. at 292.

86. Robert D. Hanser, *Inmate Suicide in Prisons: An Analysis of Legal Liability Under 42 USC Section 1983*, 82 THE PRISON J. 459, 460–61 (2002).

87. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

88. *Id.*

89. Michael Welch & Danielle Gunther, *Jail Suicide Under Legal Scrutiny: An Analysis of Litigation and its Implications to Policy*, 8 CRIM. JUST. POL’Y REV. 75, 87–9 (1997).

90. *Farmer*, 511 U.S. at 839–40.

91. *Id.* at 842 (emphasis added).

circumstantial evidence<sup>92</sup> including training manuals, records, and various medical or risk screening tools.<sup>93</sup> Lastly, a custodial official now “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he also must draw the inference.”<sup>94</sup>

In summation, under the *Farmer* standard, a claimant must prove that the state actor “knew and yet chose to engage in inadequate treatment, being consciously and intentionally indifferent to the consequences.”<sup>95</sup> Since *Farmer*, most of the case law arises from jail-suicide cases as opposed to prison-suicides.<sup>96</sup> By raising the burden of proof while also providing more avenues for proving mental state and inferences, the *Farmer* Court both helped and harmed jail-suicide claimants.<sup>97</sup> Federal judges sometimes find that correctional officers acted negligently; however, proving mere negligence is not enough for a claimant to satisfy the heightened criminal recklessness burden of proof.<sup>98</sup> As a result, it is almost impossible for plaintiffs to prove that the inmate presented an obvious suicide risk to the corrections officer, and district courts continue to grant defendants summary judgment.<sup>99</sup>

#### D. *The Doctrine of Qualified Immunity*

A claimant’s battle does not end with deliberate indifference. To make a Section 1983 claim, a claimant must also overcome the doctrine of qualified immunity.<sup>100</sup> Qualified immunity “allows government officials, including corrections officers, to avoid civil damages liability as long as the conduct in question did not violate a statutory or constitutional right that was clearly established at the time of the incident.”<sup>101</sup> Qualified immunity is a common barrier to recovery in jail-

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92. *Id.*

93. Hanser, *supra* note 86, at 463.

94. *Farmer*, 511 U.S. at 837.

95. Hanser, *supra* note 86, at 475.

96. *Id.* at 464.

97. *Id.*; see also Christine Tartaro, *Section 1983 Liability and Custodial Suicide: A Look at What Plaintiffs Face in Court*, 3 CALIFORNIAN J. OF HEALTH PROMOTION 115 (2005).

98. Hanser, *supra* note 86, at 463; see generally *Actionability of Negligence*, *supra* note 78.

99. Christine Tartaro, *What is Obvious? Federal Courts’ Interpretation of the Knowledge Requirement in Post-Farmer v. Brennan Custodial Suicide Cases*, 95 THE PRISON J. 23, 40 (2014).

100. Venus Chui, Note, *Correcting Correctional Suicide: Qualified Immunity and the Hurdles to Comprehensive Inmate Suicide Prevention*, 59 B.C. L. REV. 1397, 1403 (2018).

101. *Id.*



suicide litigation as it creates an elusive shield over government officials acting under the facility's direction.<sup>102</sup>

The doctrine of qualified immunity has a long-standing history in federal court.<sup>103</sup> The Supreme Court addressed the doctrine as recently as 2015 in *Taylor v. Barkes*, a case brought by an inmate's family after he committed suicide in a Delaware county jail.<sup>104</sup> The Court maintained its prior interpretation of the doctrine, holding that because corrections officers and the jail did not fail to follow any clearly established state law, they were shielded from liability under the doctrine of qualified immunity.<sup>105</sup>

The doctrine's critics fear that the doctrine has created a lack of accountability for jail officials who engage in misconduct.<sup>106</sup> In a Section 1983 case, once a defendant raises the affirmative defense of qualified immunity the burden shifts to the plaintiff to prove that the defendant's actions violated clearly established law.<sup>107</sup> Leaving a claimant responsible for showing a violation of clearly established law leaves claimants susceptible to failure; often, claimants lack the legal knowledge that would allow them to determine whether a clearly established law was violated in the first place. As one critic puts it, the doctrine of qualified immunity is an oxymoron, where facilities are given large budgets to train staff but are escaping liability when facilities fail to do so properly.<sup>108</sup> The legal justifications behind qualified immunity are often criticized, as they cannot justify the harm the doctrine has caused for jail-suicide litigants.<sup>109</sup>

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102. As privatization of correctional facilities has become more frequent, the doctrine has become more difficult to interpret. The doctrine remains prevalent in jail-suicide litigation, however, as privatization most often occurs in prisons. *See generally* Derek Gilna, *The "Qualified Immunity" Doctrine Needs to be Reexamined*, PRISON LEGAL NEWS (May 8, 2018), <https://www.prisonlegalnews.org/news/2018/may/8/qualified-immunity-doctrine-needs-be-reexamined/> [<https://perma.cc/24A5-ACP4>].

103. For a more detailed analysis of the qualified immunity doctrine, *see* Chui, *supra* note 100.

104. *Taylor v. Barkes*, 135 S.Ct. 2042, 2043 (2015).

105. *Id.* at 2045.

106. Gilna, *supra* note 102.

107. *Id.*

108. *Id.* (quoting jailhouse lawyer Derrick Hamilton).

109. The Supreme Court seems to have adopted three justifications for qualified immunity, including (1) the historical good-faith defense, (2) the two-wrongs-make-a-right theory, and (3) the lenity theory. However, as the doctrine of qualified immunity seems to maintain an omnipresence in the Court's jurisprudence, the doctrine may lack merit. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 51 (2018).

*E. The Prison Litigation Reform Act (PLRA)*

In 1996, Congress passed the Prison Litigation Reform Act (PLRA).<sup>110</sup> Intended to slow the rising instances of prisoner litigation, the PLRA placed a number of restrictions on inmates' ability to bring, settle, and win lawsuits.<sup>111</sup> Now, in order to file a lawsuit, an inmate must first exhaust administrative remedies by following grievance procedures inside the facility.<sup>112</sup> The PLRA has left the mentally ill vulnerable, as many are either unwilling to go to such lengths before seeking other alternatives or are unable to fully understand grievance procedures.<sup>113</sup>

*F. Creative Propositions for Reform Beyond Individual Jail-Suicide Litigation*

As individual litigants encounter these barriers to recovery, obtaining changes in jail conditions through individual jail-suicide litigation has proven difficult.<sup>114</sup> In recent years, inmates have turned to structural reform litigation, seeking court-ordered remedies as opposed to punitive damages or injunctive relief.<sup>115</sup> Those states with orders in place resulting from structural reform litigation, however,

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110. See 42 U.S.C. § 1983 (2018); see also *Know Your Rights: The Prison Litigation Reform Act*, ACLU (Nov. 2011), [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file79\\_25805.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf).

111. 42 U.S.C. § 1983 (2018); see also Margo Schangler, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, PRISON LEGAL NEWS (Sept. 28, 2015), <https://www.prisonlegalnews.org/news/2015/sep/28/trends-prisoner-litigation-plra-enters-adulthood/> [https://perma.cc/F58U-PCT7]; see also *Know Your Rights: The Prison Litigation Reform Act*, ACLU (Nov. 2011), [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file79\\_25805.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf) [https://perma.cc/SVM9-GCQJ].

112. Schangler, *supra* note 111.

113. Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, THE NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons> [https://perma.cc/A253-7YLM].

114. See, e.g., Kevin Bliss, *20 Years Sees No Improvement in California Prison's Mental Health Care; Suicide Results in \$1.5 Million Settlement*, PRISON LEGAL NEWS (Feb. 4, 2020), <https://www.prisonlegalnews.org/news/2020/feb/4/20-years-sees-no-improvement-california-prisons-mental-health-care-suicide-results-15-million-settlement/> [https://perma.cc/L7HU-MNE5] (“‘This is an acknowledgement that the system completely broke down when it came to providing the care she needed. . . . [They] had decades of notice that mental health treatment, especially at CIW, was below standard and they chose not to address it.’”).

115. See generally Goepfert, *supra* note 10, at 136–42.

struggle to meet the burdens imposed.<sup>116</sup> As a result, creative means must be considered in the future.

Commonly, structural reform litigation takes the form of class action lawsuits.<sup>117</sup> For example, inmates detained by the Illinois Department of Corrections (IDOC) filed a suit alleging that, rather than helping those inmates with mental illness, Illinois punishes them.<sup>118</sup> Although the lawsuit was settled in 2016, the IDOC's mental health care remains inadequate.<sup>119</sup> In California, overcrowding led prisons to place inmates in solitary confinement and deprive them of proper care.<sup>120</sup> The Supreme Court ordered the relocation and release of inmates after finding that conditions within the California Department of Corrections came dangerously close to cruel and unusual punishment.<sup>121</sup> However, these court orders are only effective if departments of correction have the resources available to make the required changes. Often, jurisdictions must raise taxes or reduce jail

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116. Goepfert, *supra* note 10, at 141–42 (“[C]ourt ordered reform [does] not solve the problem. Resolution is only possible where departments of correction have the resources to make improvements, which means either increased spending by taxpayers or decreases in prison or jail populations.”).
117. Such lawsuits are common today and often reflect widespread grievances related to public health issues. *See e.g.* James David Dickson, *Class-Action Suit Targets Wayne County, Sheriff for Jail Conditions*, THE DETROIT NEWS (May 5, 2020), <https://www.detroitnews.com/story/news/local/wayne-county/2020/05/05/class-action-suit-targets-wayne-county-sheriff-jail-conditions-during-covid-19outbreak/3083403001/> (describing recent class action lawsuit filed in Detroit following improper policies related to the COVID-19 pandemic) [<https://perma.cc/XNF5-DQQF>]; *see also Agreement Reached in Class Action Lawsuit Over Jail Conditions*, EDHAT: SANTA BARBARA (July 18, 2020), <https://www.edhat.com/news/agreement-reached-in-class-action-lawsuit-over-jail-conditions> (outlining the settlement agreement reached regarding conditions of confinement inside county jail) [<https://perma.cc/6KSR-4C8G>].
118. *See* Complaint at 14, *Rasho v. Walker*, No. 7-cv-01298-MMM-JAG (C.D. Ill. filed Nov. 7, 2007); *see also Rasho v. Jeffreys*, UPTOWN PEOPLE'S LAW CTR., <https://www.uplcchicago.org/what-we-do/prison/rasho-v-baldwin.html> (last visited Sept. 19, 2020) [<https://perma.cc/5755-UC7D>].
119. *See* Herman, *supra* note 33.
120. *Brown v. Plata*, 563 U.S. 493, 503-504 (2011). For a discussion of *Brown v. Plata* and its implications, *see* Christopher Horne & William J. Newman, *Updates Since Brown v. Plata: Alternative Solutions for Prison Overcrowding in California*, 43 J. AM. ACAD. PSYCHIATRY & L. 87 (2015).
121. *Brown v. Plata*, 563 U.S. 493, 550 (2011); Christopher Horne & William J. Newman, *Updates Since Brown v. Plata: Alternative Solutions for Prison Overcrowding in California*, 43 J. AM. ACAD. OF PSYCHIATRY LAW 87, 87 (2015).

populations to comply.<sup>122</sup> Because jails are typically operated by local sheriffs who have no opportunity to tax, court orders are helpful for “strong-arming” local governments into implementing higher taxes or reducing county jail populations.<sup>123</sup> Otherwise, court orders are more effective and more frequently used for prisons who can acquire the required state funding.<sup>124</sup>

Even with barriers and challenges, the number of individuals filing jail-suicide lawsuits remains high.<sup>125</sup> In 2019, various Associated Press staff members conducted an examination into reports and investigations from the last five years.<sup>126</sup> Four-hundred lawsuits were filed over the alleged mistreatment of inmates across the United States.<sup>127</sup> Nearly forty percent of the lawsuits filed involved suicide in local jails following thirty attempted suicides and 135 successful attempts.<sup>128</sup> The number of inmates whose families have recovered damages in these lawsuits, however, is unknown, as many lawsuits settle prior to trial.<sup>129</sup>

In recent years, academics have sought to remedy the jail health care crisis through creative means, looking beyond judicial remedies and toward policy.<sup>130</sup> Individual jail-suicide litigation through Section 1983 is a retroactive approach to change, holding jails accountable for individual deaths *after* they have occurred.<sup>131</sup> To slow the increasing frequency of jail suicides, *proactive* measures must be taken. Academics recommend amending current legislation to care for the mentally ill

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122. *See generally* Goepfert, *supra* note 10, at 142.

123. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 622–23 (2006).

124. *Id.* at 622–23.

125. *See generally* Whitten, *supra* note 71.

126. Sharon Cohen & Nora Eckert, *AP Investigation: Many US Jails Fail to Stop Inmate Suicides*, ASSOCIATED PRESS (June 18, 2019), <https://apnews.com/5a61d556a0a14251bafbeff1c26d5f15> [<https://perma.cc/9TAG-NCJB>].

127. *Id.*

128. *Id.*

129. *See* Kevin W. Bliss, *\$301,000 Awarded in Lawsuit Over Suicide at Illinois Jail*, PRISON LEGAL NEWS (May 3, 2019), <https://www.prisonlegalnews.org/news/2019/may/3/301000-awarded-lawsuit-over-suicide-illinois-jail/> [<https://perma.cc/E3XY-74VU>]; *See also* Matt Clarke, *\$2 Million Settlement in Lawsuit Over California Jail Prisoner’s Suicide*, PRISON LEGAL NEWS (Oct. 7, 2019), <https://www.prisonlegalnews.org/news/2019/oct/7/2-million-settlement-lawsuit-over-california-jail-prisoners-suicide/> [<https://perma.cc/UWM2-4VYM>].

130. *See generally* Goepfert, *supra* note 10, at 156 (suggesting legislatures use state false claims acts to improve jail health care).

131. *See generally* Cohen & Eckert, *supra* note 126.

housed in jails, and to prevent conditions inside jails from exacerbating inmates' mental health symptoms or suicidal ideologies.<sup>132</sup>

### III. TEXAS LEGISLATIVE DRAFTING: A CASE STUDY

The legislative process must seek to change conditions for the mentally ill and suicidal within jails. In 2017, the Texas state legislature passed The Sandra Bland Act,<sup>133</sup> named after Sandra Bland, a woman whose story drew national attention to Texas's county jail system.<sup>134</sup> The Act itself, as well as its implications, provides a unique case study on jail-suicide legislation and improving mental health conditions inside of jails.

In 2015, a Texas state trooper pulled Sandra Bland over for failing to signal a lane change.<sup>135</sup> The trooper took Bland's information and returned to his car to issue a citation.<sup>136</sup> When the trooper walked back to Bland's car with the ticket, the encounter escalated.<sup>137</sup> Bland was arrested, handcuffed, and brought to the Waller County Jail.<sup>138</sup> Three days after she was booked, Bland committed suicide in her cell.<sup>139</sup> Unbeknownst to the jail, Bland suffered from depression and other mental health problems.<sup>140</sup> The story quickly gained popularity.<sup>141</sup> Many

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132. Cohen & Eckert, *supra* note 126.

133. Sandra Bland Act, S.B. No. 1849, 85th Gen. Assemb., Reg. Sess. § 6.01 (Tex. 2017).

134. See David Montgomery, *The Death of Sandra Bland: Is There Anything Left to Investigate?*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/us/sandra-bland-texas-death.html> [<https://perma.cc/7H2Y-WUDE>]; Tierra Smith, *Five Years Later: The Death of Sandra Bland Continues to Demand Police Reform From Local and State Officials Across Texas*, CLICK2HOUSTON (July 13, 2020), <https://www.click2houston.com/news/local/2020/07/13/five-years-later-the-death-of-sandra-bland-continues-to-demand-police-reform-from-local-and-state-officials-across-texas/> [<https://perma.cc/U6FV-53JL>].

135. Adeel Hassan, *The Sandra Bland Video: What We Know*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/sandra-bland-brian-encinia.html> [<https://perma.cc/UB2Y-ZSB8>].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Bland was a civil rights activist, prompting social media users across the country to use the hashtag “#SandraBland” and “#SayHerName” in response to her death. *Id.*

viewed her death as a “turning point in the Black Lives Matter movement.”<sup>142</sup>

Like many others, Bland’s mother filed a wrongful-death lawsuit in federal court, alleging that Sandra Bland should have never been arrested and that she was not properly supervised by Waller County Jail officials.<sup>143</sup> The family settled with Waller County for \$1.9 million in 2016.<sup>144</sup> Settlement negotiations involved discussions over improving conditions for the mentally ill inside of jails to prevent such incidents from occurring again.<sup>145</sup> The Waller County Judge and region’s chief executive officer said this would include a “push for more funding to improve booking, training and other jail functions through legislation named for Ms. Bland.”<sup>146</sup>

A. *A Breakdown of Three Relevant Provisions Within the Act*

During the 85th legislative session, the Texas legislature passed the Sandra Bland Act to strengthen jail infrastructure and law enforcement practices.<sup>147</sup> The Senate Research Center described the Act’s purpose as multi-faceted: “bail reform, jail diversion, jail safety, officer training, racial profiling, data collection, officer discipline and behavioral health.”<sup>148</sup> The Act is comprehensive, protecting both the mentally ill and the intellectually disabled.<sup>149</sup> This Note will focus on the Act’s implications for the mentally ill, including three key provisions: (1) screening and assessing for suspicion of mental illness with magistrate referral; (2) use of telemedicine and camera technology to monitor at-

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142. *Id.*

143. Mitch Smith, *Sandra Bland’s Mother Files Wrongful-Death Lawsuit*, N.Y. TIMES (Aug. 4, 2015), <https://www.nytimes.com/2015/08/05/us/sandra-bland-family-lawsuit.html> [<https://perma.cc/MF97-F9XV>].

144. Christine Hauser, *Sandra Bland’s Family Settles \$1.9 Million Civil Suit, Lawyer Says*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/sandra-bland-family-settlement-19-million-lawsuit.html> [<https://perma.cc/66K2-9CDU>].

145. *Id.*

146. *Id.*

147. For a breakdown of the Act’s findings, see H.B. 2702, 85th Gen. Assemb., Reg. Sess. (Tex. 2017) (the unenacted version of the Act) [<https://perma.cc/24NE-B2V6>].

148. Julie Anderson, *Senate Bill 1849 Breaking Down the Sandra Bland Act – 85th Legislature*, TEX. COUNTY PROGRESS (Dec. 3, 2017), <https://countyprogress.com/senate-bill-1849-breaking-down-the-sandra-bland-act-85th-legislature/> [<https://perma.cc/5RAE-C9SP>]; *see also* SENATE RES. CTR., BILL ANALYSIS S.B. 1849 (2017), <https://capitol.texas.gov/tlodocs/85R/analysis/pdf/SB01849F.pdf> [<https://perma.cc/88VQ-ULLY>].

149. Sandra Bland Act, S.B. No. 1849, 85th Gen. Assemb., Reg. Sess. § 2.01 (Tex. 2017).

risk inmates; and (3) funding provisions, including the “The Prisoner Safety Fund and Grants for Establishment and Expansion of Community Collaboratives.”

1. Screening and Assessing for Suspicion of Mental Illness with Magistrate Referral

The Sandra Bland Act amended the Texas Code of Criminal Procedure Article 16.22 to include provisions changing the way jails manage, defer, and monitor inmates with mental illness.<sup>150</sup> Entitled “Early Identification of Defendant Suspected of Having Mental Illness or Intellectual Disability,” Article 16.22 requires that after a sheriff receives “credible information that may establish reasonable cause to believe that a defendant . . . has a mental illness . . .” the sheriff “shall provide written or electronic notice of the information to the magistrate.”<sup>151</sup> This section of the Act became effective on September 1, 2017.<sup>152</sup>

Such “credible information” can come from “observation of the defendant’s behavior immediately before, during, or after the defendant’s arrest and the results of any previous assessment of the defendant . . . .”<sup>153</sup> To collect such information, sheriffs must conduct two standardized procedures at intake: the Texas Commission on Jail Standards’ Screening Form for Suicide and Medical and Mental Impairments and a Continuity of Care Query.<sup>154</sup> Although both tools existed prior to the Act’s passage, the Act created a legislative mandate for the tools’ usage.<sup>155</sup>

The Screening Form for Suicide and Medical and Mental Impairments is brief, taking an estimated three minutes to complete, and contains sixteen questions that “have been tested nationally to have a high degree of predictive validity.”<sup>156</sup> The Form also informs

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150. Sandra Bland Act, S.B. No. 1849, 85th Gen. Assemb., Reg. Sess. § 2.01 (Tex. 2017).

151. *Id.*

152. Anderson, *supra* note 148.

153. S.B. No. 1849, § 2.01.

154. TEX. COMM’N ON LAW ENF’T, SUICIDE DETECTION AND PREVENTION IN JAILS: COURSE #3501 (Jan. 2018).

155. *See* TEX. COMM’N ON JAIL STANDARDS, TEXAS COUNTIES AND THE MENTALLY ILL – BRIDGING THE GAP (July 19, 2018) (explains that changes to Code of Criminal Procedure Article 16.22 did not require jails to change screening standards for detecting mental illness) [<https://perma.cc/WNT8-BPCM>].

156. TONY FABELO, THE MEADOWS MENTAL HEALTH POL’Y INST, THE CHALLENGE OF IDENTIFYING, DIVERTING, AND TREATING JUSTICE-INVOLVED PEOPLE WITH MENTAL ILLNESSES 10 (2018), <https://mmhpi.org/wp-content/uploads/2018/12/Justice->

sheriffs of whether and when they should notify supervisors, mental health professionals, or magistrates of an inmate's mental health status.<sup>157</sup>

In addition, sheriffs are required to conduct a Continuity of Care Query (CCQ) using the Texas Department Public Safety Texas Law Enforcement Telecommunications System.<sup>158</sup> Implemented in 2010, the system tracks whether an individual has received public mental health services through the Department of State Health Services.<sup>159</sup> The system shows the jail official whether the individual received services from a local mental health authority, but not what services were rendered or what diagnosis the individual received.<sup>160</sup>

After using these forms and receiving “credible information that may establish reasonable cause to believe that a defendant . . . has a mental illness . . .” the jail has twelve hours to then “provide written or electronic notice of the information to the magistrate.”<sup>161</sup> If the magistrate determines that there is “reasonable cause to believe” that the defendant is mentally ill, the magistrate can order a mental health agency to conduct a more detailed assessment.<sup>162</sup> A local mental health authority already responsible for the jail's mental health care may conduct the assessment.<sup>163</sup> If a local mental health authority is not available, magistrates may refer the inmate to a mental health authority clinically authorized to perform such assessments even if the

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Involved\_with\_Mental\_Illness\_Review\_and\_Recommendations\_TFab  
elo\_WEB\_12032018.pdf [<https://perma.cc/8J44-P98X>].

157. TEX. COMM'N ON LAW ENF'T, *supra* note 154.
158. FABELO, *supra* note 156, at 11.
159. *Texas Law Enforcement Telecommunications System*, TEX. DEP'T OF PUB. SAFETY, [https://www.dps.texas.gov/director\\_staff/information\\_management/tlets/tletsindex.htm](https://www.dps.texas.gov/director_staff/information_management/tlets/tletsindex.htm) (last visited Mar. 9, 2020) [<https://perma.cc/MH8S-LALM>].
160. FABELO, *supra* note 156, at 11.
161. The previous version of Article 16.22 required notice within 72 hours of receiving credible information. *See* Letter from Brandon Wood, Exec. Dir., Tex. Comm'n on Jail Standards, to Dennis D. Wilson & Kelly Rowe, Sheriffs (July 24, 2017) (on file with author) (explaining new protocol to sheriffs). To view the referral form booking officers use in Texas, *see* TEX. S., MENTAL ILLNESS ASSESSMENT MAGISTRATE WRITTEN NOTIFICATION FORM, 85TH SESS. (2017), [http://www.txcourts.gov/media/1438901/sb\\_1326-assessment-form.pdf](http://www.txcourts.gov/media/1438901/sb_1326-assessment-form.pdf) [<https://perma.cc/98KQ-T4BZ>].
162. Sandra Bland Act, S.B. No. 1849, 85th Gen. Assemb., Reg. Sess. § 2.01 (Tex. 2017).
163. *Id.*



authority is not under contract with the jail.<sup>164</sup> Currently, mental health professionals do not rely on a uniform assessment tool.<sup>165</sup>

Once the magistrate receives the assessment from the mental health care provider, the magistrate may divert the inmate suffering from a mental health crisis to a treatment center within the agency's jurisdiction.<sup>166</sup> This option is only available for those inmates accused of non-violent misdemeanor offenses and when there is an "available and appropriate treatment center" in the jurisdiction.<sup>167</sup> The flow-chart depicted on the following page outlines the magistrate notice requirement procedure and procedure for diverting inmates to outside treatment.<sup>168</sup>

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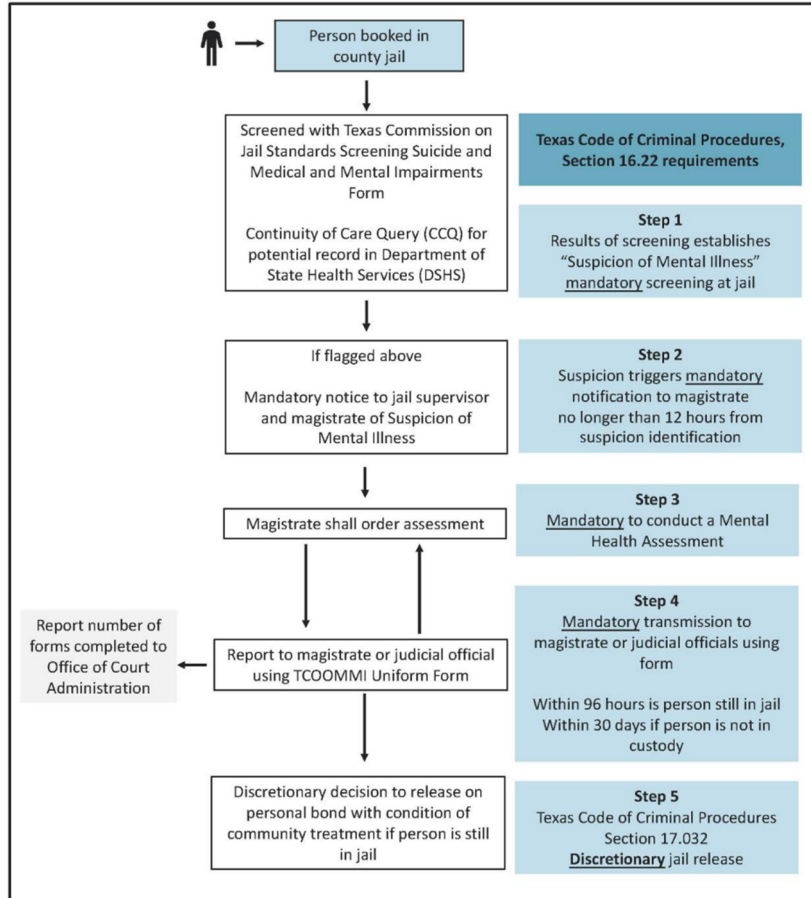
164. "There are protocols or forms that help structure these assessments, but there is no required 'assessment form' unless the [local mental health authority] conducts the assessment." FABELO, *supra* note 156, at 13.

165. *Id.*

166. The magistrate may choose to consider the mental health professional's recommendation in doing so. S.B. No. 1849, §§ 2.01-2.02.

167. *Id.* at § 2.02.

168. FABELO, *supra* note 156, at 20 fig. 1.



2. Use of Telemedicine and Camera Technology to Monitor Inmates

The Sandra Bland Act requires that jails install a number of technological programs intended to monitor and care for the mentally ill.<sup>169</sup> Inmates now have access to a mental health care professional twenty-four-hours a day, either through an on-site mental health professional or through the use of telemedicine.<sup>170</sup> If a qualified professional is not available on-site or through the telemedicine system, inmates must be transported to a facility to receive the required care.<sup>171</sup> Jails had until September 1, 2018 to comply with the twenty-four-hour access to care and transportation requirements.<sup>172</sup>

In addition, the Act requires that those inmates flagged as a suicide risk at intake are placed in at-risk cell groups.<sup>173</sup> Sheriffs must perform timely observations of inmates in at-risk cell groups.<sup>174</sup> If officers are unavailable to conduct this frequent observation, jails must install automated electronic sensors and cameras to monitor at-risk cell blocks.<sup>175</sup> County jails have until September 1, 2020, to comply with these technological advancements.<sup>176</sup>

3. Funding Provisions: The Prisoner Safety Fund and Grants for Establishment and Expansion of Community Collaboratives

The Sandra Bland Act amends the Government Code of Texas to include two methods for funding the Act's provisions, ensuring implementation of policies protecting inmates inside and outside of jails: The Prisoner Safety Fund<sup>177</sup> and the Grants for Establishment and Expansion of Community Collaboratives.<sup>178</sup>

The Prisoner Safety Fund is "a dedicated account in the general revenue fund."<sup>179</sup> The Commission must establish a grant program to assist those jails with fewer than ninety-six beds with implementing the

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169. S.B. No. 1849, § 3.05.

170. *Id.*

171. *Id.*

172. TEX. ASS'N OF COUNTIES, *S.B. 1849 "Sandra Bland Act" Implementation Timeline* (Nov. 2, 2018), <https://www.county.org/News/County-Issues/2018/November/SB-1849-Sandra-Bland-Act> [<https://perma.cc/EKE6-HZ28>].

173. S.B. No. 1849, § 3.05.

174. *Id.*

175. *Id.*

176. TEX. ASS'N OF COUNTIES, *supra* note 172.

177. S.B. No. 1849, § 3.07.

178. *Id.* at § 2.03.

179. *Id.* at § 3.07.

capital improvements required under the Act.<sup>180</sup> These capital improvements include the provision requiring twenty-four-hour access to mental healthcare in person or through a telepsychiatry service and new technology for monitoring at-risk inmate cells.<sup>181</sup> Any money left over in the Fund would then go toward assisting larger jails with implementing these improvements.<sup>182</sup>

The Grants for Establishment and Expansion of Community Collaboratives provision supports the Act’s goal of diverting mentally ill inmates to community mental health programs.<sup>183</sup> The legislature amended the Government Code, requiring “[t]o the extent funds are appropriated to the [Department of State Health Services] for that purpose, the department shall make grants to entities . . . to establish or expand community collaboratives that bring the public and private sectors together to provide services to persons experiencing . . . mental illness.”<sup>184</sup> The Grant redistributes resources allocated to the Department of State Health Services toward implementing and realizing the Act’s goals.<sup>185</sup>

*B. Known Problems with Implementing the Act’s Provisions*

The Act was passed and enacted in 2017 but will not be implemented in full until August 31, 2021.<sup>186</sup> The Meadows Mental Health Policy helped the Texas Commission on Jail Standards assess the Act’s early effects in jurisdictions across Texas.<sup>187</sup> Generally, these studies revealed that jurisdictions struggled with “effectively and efficiently aligning state and local resources with the intent of state policies.”<sup>188</sup>

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180. *Id.*

181. For a full description of capital improvements required under the Act, *see id.* at § 3.05.

182. *Id.* at § 3.07.

183. *Id.* at § 2.03.

184. *Id.*

185. *See id.* (referencing the Department of State Health Services).

186. For an implementation timeline, *see* TEX. ASS’N OF COUNTIES, *supra* note 172. *See also* Florian Martin, *Five Months After Sandra Bland Act Went Into Effect, What Has Changed?*, HOUS. PUB. MEDIA (Feb. 6, 2018, 5:57 PM), <https://www.houstonpublicmedia.org/articles/news/2018/02/06/266065/five-months-after-sandra-bland-act-went-into-effect-what-has-changed/> [<https://perma.cc/RA88-VVAX>] (explaining how the Act has been implemented across Texas).

187. TEX. COMM’N ON JAIL STANDARDS, SENATE BILL 1849 SURVEY: SUMMARY OF MAJOR FINDINGS 1 (2018) [<https://perma.cc/F8CD-8VJD>].

188. *See generally* FABELO, *supra* note 156.

1. Senate Bill 1849 Survey: Summary of Major Findings

In January 2018, the Texas Commission on Jail Standards and the Meadows Mental Health Policy Institute published *Senate Bill 1849 Survey: Summary of Major Findings*.<sup>189</sup> The survey's purpose was to collect information from county jails across Texas to assess jails' readiness to implement the procedures required under the Act.<sup>190</sup> Two hundred and thirty-three Texas jails responded to the survey between July 31, 2017 and the required response deadline, September 25, 2017.<sup>191</sup>

The Survey revealed that county jails struggled to meet the Act's requirements.<sup>192</sup> Notably, jails struggled to meet (1) the magistrate notice requirement; (2) diversion to outside treatment facilities; (3) the twenty-four-hour access to mental healthcare requirement; and (4) the installation of electronic sensors for monitoring at-risk inmates.<sup>193</sup>

Although ninety-six percent of jails reported that they *could* provide notice to magistrates within the twelve-hour time frame required by the Act, only sixty-two percent of jails had a formal plan in place for providing the necessary notice.<sup>194</sup> Out of those jails surveyed, sixty-eight percent said that there is no inpatient mental health facility within their jurisdiction where eligible inmates can be diverted.<sup>195</sup> The mental healthcare requirement is perhaps where jails struggled most: only eight percent of jails had a mental health professional on-site twenty-four-hours a day, while only thirty-nine percent of jails had available telepsychiatry resources.<sup>196</sup> Lastly, sixty-nine percent of jails had cameras in place for monitoring at-risk cell blocks, but only thirty-seven percent of jails provided a jail-check system in at-risk cell blocks.<sup>197</sup>

Notably, in a hearing held before the House County Affairs Committee shortly after the Act's passage, sheriffs and jail officials testified that the diversion and mental health care requirements were particularly difficult to meet as a result of "gaps in funding, training,

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189. TEX. COMM'N ON JAIL STANDARDS, *supra* note 187.

190. *Id.* at 1.

191. County jail officials self-reported their answers using either Survey Monkey or a portable document format (PDF). *Id.* at 1.

192. *See generally id.*

193. The Survey's findings were not limited to these four issues. *See generally id.* However, for the purposes of this Note, these four areas are most pertinent to the recommendations made in *infra* Section IV.

194. TEX. COMM'N ON JAIL STANDARDS, *supra* note 187, at 10.

195. In addition, 10% of jails were unaware of a facility within their jurisdiction. *Id.* at 12.

196. *Id.* at 6.

197. *Id.* at 5.

and the availability of mental health services.”<sup>198</sup> Rural jails struggled most with those issues discussed in *Senate Bill 1849 Survey: Summary of Major Findings*, noting a lack of funding and a shortage of mental health professionals within their communities as reason for their failure to comply with the Act’s provisions.<sup>199</sup>

2. Tony Fabelo, PhD’s Commentary on the Act and his  
Recommendations

Tony Fabelo, PhD, the Senior Fellow for Justice Policy with the Meadows Mental Health Policy Institute, analyzed and provided commentary on the survey’s data.<sup>200</sup> Fabelo found that jurisdictions lack the capacity to meet the Act’s demands and the number of mental health assessments that are actually conducted remains low and do not represent the numbers of inmates actually flagged at intake.<sup>201</sup> The number of inmates diverted to outside mental health treatment is even smaller “given the number of people who qualify for treatment, as well as the capacity of local mental health systems.”<sup>202</sup> In Dallas County, the assessment and diversion procedures only led the Dallas County jail to reduce their total bed count by twelve between April 2017 and April 2018.<sup>203</sup>

Texas’s problems with implementing the Act mirrors national issues with accomplishing criminal justice reform. Fabelo explains how in Texas, as well as elsewhere, there is a “‘conflict of perspectives’ between correctional and judicial officials and clinicians about the purposes and effectiveness of treatment.”<sup>204</sup> While correctional officials believe that treatment must be used to address specific behaviors that led to the crime committed or continuously are linked to criminal activity, mental health professionals wish to treat underlying conditions that impact the individual’s quality of life and well-being.<sup>205</sup> In light of these challenges, Fabelo recommends that Texas seek to “modernize the statute’s purposes . . . ” after considering “ . . . local resources that are available

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198. *Rural Jails Struggle to Meet Mental Health Standards of Sandra Bland Act*, HONEST AUSTIN (Sept. 28, 2018), <https://www.honestaustin.com/2018/09/28/rural-jails-struggle-to-meet-mental-health-standards-of-sandra-bland-act/> [<https://perma.cc/S3HB-8YV2>].

199. *Id.*

200. Researchers are addressing a statistical gap; local jurisdictions struggled to develop a systematic method for collecting data on “the number of screenings, assessments, and magistration hearings related to mental health for the purpose of pretrial release.” FABELO, *supra* note 156, at 21.

201. *Id.* at 35.

202. *Id.*

203. *Id.* at 29.

204. *Id.* at 19.

205. *Id.*

to implement the law.”<sup>206</sup> For Texas to continue complying with the Act’s current framework and goals, policymakers and mental health professionals must understand the proper next steps and consider the challenges presented thus far.

#### IV. AMENDING THE ACT FOR OTHER STATES: NARROWING THE ACT’S PROVISIONS

Outside of Texas, the Act provides valuable lessons, and serves as a model for states seeking to improve their own jail systems. State legislatures are bastions for experimentation.<sup>207</sup> Texas attempted to create an ideal system, responding to a large number of issues through one piece of legislation.<sup>208</sup> As one scholar stated:

Our ideal system would end our counterproductive addiction to mass incarceration, reducing the population of prisons and jails and utilizing more, alternative means of addressing addiction, poverty, and mental illness. It would address the unfair and disproportionate impact of the administration of criminal justice on the poor, on people of color, and on the mentally ill.<sup>209</sup>

In practice, the Act’s comprehensive nature buries the legislature’s goal in organizational and operational difficulties.<sup>210</sup> In the years following the Act’s implementation, researchers and public policy advocates continue to push for what may be the Act’s most important goal: “the priority on jail safety and health within detention settings—specifically, the goals of the Sandra Bland Act to prevent jail suicides, increase jail safety, and improve mental health services within Texas jails.”<sup>211</sup> Instead of attempting to legislate an ideal system into existence, however, criminal justice reform should focus on meeting specific goals and changing specific detrimental policies.

Unfortunately, Sandra Bland’s story does not stand alone. Jails across the United States face crises mirroring what happened in the Waller County Jail; other states can use these stories as ignition, creating acts with provisions designed specifically for screening and caring for the mentally ill. New legislation should focus on safeguarding

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206. *Id.* at 37.

207. For an analysis of adopting sentencing laws across state lines, see Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 34 (2018).

208. See *id.* at 42 (commenting how, inherently, “legislative politics are complex and sometimes even measures favored by a majority of voters fail to be adopted” and suggesting possible voter-based changes instead).

209. *Id.* at 34.

210. See generally TEX. COMM’N ON JAIL STANDARDS, *supra* note 187.

211. FABELO, *supra* note 156, at 37.

the mentally ill and suicidal *inside* of jails, rather than implementing procedures to keep the mentally ill out of jail.

After identifying the problems noted in Texas with the implementation of the Sandra Bland Act,<sup>212</sup> I propose that the Act's purpose must be narrowed before other state legislatures are convinced that adopting its protections would be beneficial to their own criminal justice systems. Legislatures seeking to use the Act as a model should consider: (1) eliminating the magistrate notice requirement and diversion to outside treatment; (2) changing the timeline for mental health screening and suicide risk screening measures; and (3) amending funding provisions to redirect money back into jails to put toward new safety measures.

*A. Eliminate the Magistrate Notice Requirement and Diversion to Outside Treatment*

The first recommendation is to eliminate the magistrate notice requirement from the Act and remove provisions requiring diversion of inmates. The notice requirement and diversion to outside treatment requirement creates a quasi-judicial procedure through comprehensive legislative action that mimics early resolution court and specialized court programs. Removing these procedures from the Act could make it more feasible for other states.

The magistrate notice and referral to outside treatment requirements combine two modern types of court reform into one provision: early resolution programs and specialized court programs. As the criminal justice system attempts to shift from a “tough-on-crime approach to a smart-on-crime approach,”<sup>213</sup> state courts try to resolve cases as quickly and as simply as possible.<sup>214</sup> To do so, states create diversion programs, intended to address overcrowding and cost difficulties.<sup>215</sup> Many states have created early resolution courts, intended

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212. The enacted version of the Sandra Bland Act has been called a “stripped-down” version of the original legislation. Police officers protested to proposed provisions regulating police policy, and legislatures have acknowledged that the enacted version of the Act is not perfect. See Chuck Lindell, *Senate Passes Stripped-Down Sandra Bland Act*, AUSTIN AMERICAN-STATESMAN (May 12, 2017, 12:01 AM, last updated Sept. 25, 2018, 9:03 AM), <https://www.statesman.com/NEWS/20170512/Senate-passes-stripped-down-Sandra-Bland-Act> [<https://perma.cc/NGY9-NEGC>].

213. Teresa L. Welch, *Early Case Resolution Court Programs: Evaluating the Good and Bad in Seeking Efficient Justice*, 51 CRIM. L. BULL. 1, 10 (2015).

214. See, e.g., Rob Butters et al., *Does Reducing Case Processing Time Reduce Recidivism? A Study of the Early Case Resolution Court*, 31 CRIM. JUST. POL'Y REV. 22 (assessing whether case processing time impacts recidivism rates).

215. See, e.g., Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should*



to keep eligible inmates out of jail by arranging early plea arrangements and agreements.<sup>216</sup> Early resolution courts are distinguishable from specialized court programs, which seek to address the underlying behavior leading to the criminal activity.<sup>217</sup>

Researchers studying the effectiveness of both types of courts emphasize the importance of aligning procedures with evidence-based practices.<sup>218</sup> Under the Act, the magistrate notice requirement and subsequent diversion strategies apparently are grounded in a desire to implement widespread public policy changes without attention to the possible implications. Both early resolution court programs and specialized court programs are most effective when enacted as their own separate initiatives, backed by extensive research to understand their implications for the court system at large.<sup>219</sup>

Statistics released about the Sandra Bland Act indicated how counties struggled to implement the notice requirement and diversion to outside treatment requirement.<sup>220</sup> For example, under the Act's current framework, screenings flag a large pool of inmates that are "suspect of mental illness" while gaps in data reveal uncertainty over how many of these inmates are actually referred to outside services by a magistrate.<sup>221</sup> In addition, policies regarding which screening results would warrant diversion or notice are inconsistent across Texas counties.<sup>222</sup> Instead, states should address diversion and treating

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*Embrace Them.*, ACLU: BLOG (Dec. 6, 2017, 12:45 AM), <https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors> [<https://perma.cc/ERF8-P43W>].

216. Welch, *supra* note 213, at 4. Erin B. Worwood et al., *Evaluation of Early Case Resolution (ECR): Final Report*, UTAH CRIM. JUST. CTR. 6 (Dec. 2014), [https://socialwork.utah.edu/\\_resources/documents/ucjc-reports/ecr\\_final-report\\_updated-oct2017.pdf](https://socialwork.utah.edu/_resources/documents/ucjc-reports/ecr_final-report_updated-oct2017.pdf) [<https://perma.cc/7XMK-2A8C>].
217. Examples of specialized court programs are drug courts, domestic violence courts, mental health courts, veteran courts, or homelessness courts. Kimberly A. Kaiser & Kirby Rhodes, *A Drug Court by Any Other Name? An Analysis of Problem-Solving Court Programs*, 43 L. HUM. BEHAV. 278, 278 (2019).
218. Welch, *supra* note 213, at 6–7.
219. See SPECIALIZED COURTS, SAGE PUBLICATIONS, INC. 363–365 (2020), [https://www.sagepub.com/sites/default/files/upm-binaries/98943\\_CHAPTER\\_14\\_Specialized\\_Courts\\_Hemmens\\_Criminal\\_Courts\\_4e.pdf](https://www.sagepub.com/sites/default/files/upm-binaries/98943_CHAPTER_14_Specialized_Courts_Hemmens_Criminal_Courts_4e.pdf) (focusing on the principles underlying problem-solving justice and how such policies are backed by restorative justice ideologies).
220. See *generally* TEX. COMM'N ON JAIL STANDARDS, *supra* note 187, at 8–12.
221. FABELO, *supra* note 156, at 35.
222. *Id.* at 36.

defendants outside of jail through separate legislation.<sup>223</sup> Because these diversion and treatment programs have widespread implications, states should seek to follow strict guidelines and conduct research before implementing them<sup>224</sup> rather than burying their provisions beneath comprehensive legislative reform.

*B. Changing the Timeline for Mental Health Screening and Suicide Screening Measures*

The second suggested amendment to the Act would change the current suicide and mental health screening protocol. Texas jails currently use the Commission's Screening Form for Suicide and Medical and Mental Impairments to screen inmates for suicide risk, mental illness, and intellectual disabilities.<sup>225</sup> Inmates then undergo a detailed mental health assessment only after a magistrate receives notice and orders an assessment to be conducted by a mental health professional.<sup>226</sup> The current screening protocols are intended to both screen inmates for eligibility for diversion services as well as assess what intervention strategies might initially benefit the inmate inside the jail.<sup>227</sup>

I propose changes to the procedure for screening inmates at intake and beyond. This would require: (1) the jail to utilize the suicide screening form with every inmate at intake; (2) after an inmate is arraigned<sup>228</sup> and only if they are to remain in jail before trial, they

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223. Recently, such legislation has taken the form of bail reform laws. Often used in response to overcrowding and mass incarceration, such laws seek to release certain defendants on bail by default. New York's bail reform law is merely one example, enacted in 2020. N.Y. CRIM. PROC. § 510.10 (2020). The new law has garnered a substantial amount of criticism in fear that it is too drastic. *See, e.g.*, Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/K4BM-FHZR>] (explaining the early implications of the bail reform policies); *see also* Mara Gay, *Give the Bail Reform Law Time to Work*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/15/opinion/bail-reformnyc.html> [<https://perma.cc/G4GX-7FE7>] (criticizing those who fail to see how the bail reform laws play out in real time).

224. *See* CTR. FOR PRISON REFORM, DIVERSION PROGRAMS IN AM.'S CRIM. JUST. SYS. 7 (2015) (setting forth recommendations for judges and agencies seeking to monitor inmates for diversion programs).

225. FABELO, *supra* note 156, at 10.

226. FABELO, *supra* note 156, at 12.

227. *Id.*

228. "Arraign" is defined as "to call (a defendant) before a court to answer to an indictment." *Arraign*, MERRIAM-WEBSTER, <https://www.merriamwebster.com/dictionary/arraign> (last visited Sept. 19, 2020) [<https://perma.cc/U4AU-KF7H>]. An inmate is normally arraigned within forty-eight to seventy-two hours of arrest. Stacy Barrett, *What's the Difference Between and Arraignment and*

undergo the same suicide screening assessment prior to their arraignment; (3) an inmate whose score on the second assessment indicates an ongoing suicide risk is subsequently evaluated by a mental health professional within twelve hours of the second screening tool; and (4) following the mental health professional's assessment, the suicide screening tool would be used on a discretionary basis. Such procedures exist under the assumption that the magistrate notice requirement would be eliminated from the proposed legislation.

First, states should create a narrowed suicide screening form for jails to use at intake. The ideal legislation would mandate collaboration between jail officials and mental health professionals to create the form. The form would include questions targeting key known suicide risk factors among correctional populations, including “substance use problems, impulsivity, suicide/self-injurious behavior, trauma, and participation in psychological treatment . . . .”<sup>229</sup> As a type of risk assessment, the suicide screening form would allow jail officials to determine what immediate steps must be taken to protect the inmate from harm.<sup>230</sup> However, the goal would be for these steps to involve treatment and monitoring of the suicidal inmate, rather than punishment.

Second, states should require jail officials to screen inmates after they are arraigned using the same suicide screening tool used at intake.<sup>231</sup> By requiring jail officials to use the same suicide screening tool a second time, jails can determine: (1) whether the initial “shock of confinement” has passed, whereby the inmate no longer is suicidal; (2) whether an inmate is now experiencing the “shock of confinement” after not posting bail and remaining in jail until trial; and (3) what procedures must be taken to protect the inmate's ongoing safety and security inside the jail.

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*a Trial?*, NOLO: CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/difference-between-arraignment-and-a-trial.htm> (last visited Oct. 3, 2020) [<https://perma.cc/RV2F-WQ4S>].

229. Folk et al., *supra* note 53, at 353.

230. “The risk assessment is intended to identify specific factors that may increase or decrease a patient's degree of risk, thereby suggesting specific interventions that may modify particular risk factors or address the safety of the patient or others.” AM. PSYCHIATRIC ASS'N, PRACTICE GUIDELINE FOR THE PSYCHIATRIC EVALUATION OF ADULTS 38 (2nd ed. 2006).

231. Even when a test or survey is administered to the same individual a second time, it is unlikely that scores will perfectly coincide. Such testing measures, however, indicate reliability, and provide insight into the survey's reliability. Craig S. Wells & James A. Wollack, *An Instructor's Guide to Understanding Test Reliability*, U. OF WIS. TESTING & EVALUATION SERV. (Nov. 2003), <https://testing.wisc.edu/Reliability.pdf> [<https://perma.cc/MH76-V4GE>] (providing information on measuring test reliability student exams).

Subsequent screenings would only be conducted with inmates remaining in jail before trial. The Act's current framework is unclear about whether a defendant would be subjected to its protections if they are released on bail.<sup>232</sup> The proposed act would clearly indicate that those inmates who are no longer incarcerated are not to be screened or assessed beyond intake. Although this may leave a number of defendants vulnerable to mental health concerns that were flagged at intake, the proposed act seeks to monitor and assist *only* those defendants remaining in the jail's care. This new provision would narrowly tailor the act's protections to that purpose.

Lastly, the proposed act would require that an inmate who scores high on the second suicide screening tool undergo an assessment by a mental health professional within twelve hours after the tool is administered.<sup>233</sup> This assessment would be standardized across the state. The act would mandate that mental health professionals and social workers develop the assessment together to ensure detail, validity, and diagnostic potential.<sup>234</sup> This initial assessment would allow jail officials to contemplate next steps for that inmate within the jail, such as proper housing or treatment options.

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232. In a memorandum, the Texas Commission on Jail Standards addressed the situation where an inmate turns themselves in, but arranges to post bond immediately. When the inmate is then screened during intake, they score high for suicide risk. In this situation, the jail must avoid delaying the release process. The jail can have the individual consult with a mental health evaluator, and if one is not available, provide the individual with a local mental health authority's information. The jail may also require the individual to sign a "No Harm" agreement prior to release. *See* Memorandum from Brandon Wood, Exec. Dir., Tex. Commission on Jail Standards, on Book In/Book Out of Inmate(s) with Mental Health Concerns to All Sheriffs & Jail Administrators (Jan. 20, 2017) (on file with author).

233. The results of the screening tools would be integrated into the mental health assessment, helping the mental health professional conducting the assessment to gather a holistic understanding of the individual. AM. PSYCHIATRIC ASS'N, *supra* note 230, at 36 ("The psychiatrist responsible for the patient's care reviews and integrates these assessments into the psychiatric evaluation of the patient and works with other members of the multidisciplinary team in developing and implementing a plan of care.").

234. A number of mental health agencies have compiled model assessment forms. *See, e.g., Resources*, CTR OF EXCELLENCE FOR INTEGRATED HEALTH SOL., <https://www.thenationalcouncil.org/integrated-health-coe/resources/> (last visited Sept. 13, 2020) [<https://perma.cc/2D64-TCZZ>]. BEHAV. HEALTH EVOLUTION, *Screening Tools*, [http://www.bhevolution.org/public/screening\\_tools.page](http://www.bhevolution.org/public/screening_tools.page) (last visited Mar. 15, 2020) [<https://perma.cc/34N2-NCM6>]; *Mental Health*, NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, <https://www.ncchc.org/mental-health-standards-1> (last visited Mar. 15, 2020) [<https://perma.cc/DXH3-MVD7>].

Screening measures catch some, but not all inmates, who intend to commit suicide.<sup>235</sup> A simple “No” to any question does not mean that the risk is over, which is perhaps where jails struggle to identify at-risk inmates the most.<sup>236</sup> Research suggests that these screening tools and assessments are vital; when correctional staff are aware of an inmate’s “current and historical psychological state . . . deaths by suicide are less likely to occur.”<sup>237</sup> Screening should not end with the mental health assessment; instead, best practice would include ongoing screening and assessment throughout the inmate’s incarceration.<sup>238</sup> By having strict screening procedures in place, jails may avoid subsequent lawsuits over failing to properly protect and monitor inmates.<sup>239</sup>

*C. Amending Funding Provisions to Redirect Money Back into Jails to Put Toward new Safety Measures*

My third amendment to the Sandra Bland Act would remove the Grants for Establishment and Expansion of Community Collaboratives provision, while allocating funding that would have gone to community programs into the Prisoner Safety Fund. Under the Act’s current structure, two provisions financially support the Act’s goals: The Prisoner Safety Fund<sup>240</sup> and the Grants for Establishment and

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235. See Johnathan Silver, *Revised Screening, Vigilance Lead to Drop in Texas Jail Suicides*, TEX. TRIB. (Dec. 4, 2016), <https://www.texastribune.org/2016/12/04/suicides-county-jails/> (explaining how jail suicide screening cannot serve as a catch-all but merely one piece of the puzzle for lowering jail suicide rates) [<https://perma.cc/EY7Y-6HDB>]; see also SUICIDE PREVENTION RESOURCE CENTER, WHAT CORRECTIONS PROFESSIONALS CAN DO TO PREVENT SUICIDE (last visited Aug. 21, 2020), <https://ubhc.rutgers.edu/documents/Education/TLC/Prevention/SPRC-Corrections-Professionals.pdf> (“However, intake screening is an imperfect tool. An inmate’s risk for suicide can fluctuate over the course of his or her incarceration. And while suicide resistant cells can prevent suicides, prisoners have shown an unfortunate ingenuity in using what is at hand to do themselves harm.”).

236. Martin Kaste, *The ‘Shock of Confinement’: The Grim Reality of Suicide in Jail*, NPR (July 17, 2015, 5:59 PM), <https://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail> [<https://perma.cc/5JVX-47EP>].

237. Folk et al., *supra* note 53, at 353.

238. “Additionally, the findings of the current study support the need for ongoing suicide risk screenings throughout incarceration, rather than relying on a one-time assessment of risk at the time of intake.” *Id.* at 355.

239. Texas saw a decline in their own jail-suicide rates in 2015, after assessment measures were modified following Sandra Bland’s death. See Silver, *supra* note 235.

240. Sandra Bland Act, S.B. No. 1849, 85th Gen. Assemb., Reg. Sess. § 3.07 (Tex. 2017).

Expansion of Community Collaboratives.<sup>241</sup> By centralizing funding efforts on the Prisoner Safety Fund as opposed to outside initiatives, jails will receive greater financial support for new technology intended to improve care and safety inside jails, including telepsychiatry and automated electronic sensors and cameras.<sup>242</sup> This new technology is essential to ensure the Act's purpose is fully realized and must be properly executed for states seeking to adopt the Act's protections and provisions.

Telemedicine is frequently used in correctional settings.<sup>243</sup> Texas uses telemedicine within its state prison system, saving the state an estimated \$780 million in healthcare costs over fourteen years.<sup>244</sup> Using telemedicine to care for inmates yields a number of benefits, including efficiency and improved treatment outcomes, particularly for those inmates in need of specialty services.<sup>245</sup> In addition, medical practitioners began using telemedicine outside of jails and prisons in response to the COVID-19 pandemic, a procedural shift that provides support for the use of telemedicine as an effective way to provide medical treatment.<sup>246</sup>

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241. *Id.* at § 2.03.

242. For a more detailed analysis of the Fund and its usages, *see* Section III(A)(3) of this Note.

243. Joel E. Barthelemy, *Controlling Prison Healthcare Costs with Telemedicine*, GLOBALMED (May 31, 2019), <https://www.globalmed.com/controlling-prison-healthcare-costs-with-telemedicine/> [<https://perma.cc/K4BM-FHZR>].

244. In Texas, these savings were largely the result of decreased transportation costs to outside healthcare agencies. California has seen similar results and continues to expand on their use of telemedicine services: from 2010 to 2018, California inmates experienced a one-hundred-and-eleven percent increase in telemedicine specialty encounters. *Id.*

245. *See* Michelle Andrews, *Telemedicine Opening Doors to Specialty Care for Inmates*, KAISER HEALTH NEWS (May 1, 2018), <https://khn.org/news/telemedicine-opening-doors-to-specialty-care-forinmates/> [<https://perma.cc/YPN6-EJCJ>] (explaining the use of telemedicine to provide specialty healthcare services including cancer treatment and cardiovascular care).

246. *See generally* Judd E. Hollander & Brendan G. Carr, *Virtually Perfect? Telemedicine for COVID-19*, 382 NEW ENG. J. MED. 1679 (2020) (highlighting the efficacy of telemedicine for treating patients during the COVID-19 pandemic); *See also* Dave Scott, *Telemedicine Breaks Out of Prisons to Widespread Use During Pandemic*, KAZEE INC. (June 8, 2020), <https://kazee.us/june-10th-2020-telemedicine-breaks-out-of-prisons-to-widespread-use-during-pandemic/> [<https://perma.cc/CV77-495F>] (explaining how the COVID-19 pandemic brought about a new need for remote access to medical care, a process often used in jails and prisons).

Psychiatry is one type of specialty service.<sup>247</sup> States seeking to adopt the Act's provisions would use telepsychiatry services in jails to provide remote mental health services.<sup>248</sup> The California Department of Corrections has used telepsychiatry extensively since 1997 and, as of 2019, thirty correctional facilities across the state utilized the service.<sup>249</sup> California's experiences with telepsychiatry provides insight into possible challenges, and solutions to those challenges that jails may encounter and resolve when implementing their own telepsychiatry services.

A common criticism of telemedicine is that it is operationally difficult.<sup>250</sup> However, researchers in California found that telepsychiatry actually helped resolve staffing shortages and recruitment challenges within correctional facilities.<sup>251</sup> In practice, telepsychiatry saved California facilities money.<sup>252</sup> Rather than requiring transport to outside practitioners or staffing a psychiatrist within the facility, prisons merely needed a small room to hold sessions in, or headphones when a room was not available.<sup>253</sup> Because the Act currently requires jails to provide twenty-four access to mental health care, providing such care through telemedicine services may resolve operational difficulties involved with providing such extensive services.<sup>254</sup>

Telepsychiatry may also create an alienation problem.<sup>255</sup> Researchers feared that inmates would view telepsychiatrists as outsiders by both inmates and correctional staff.<sup>256</sup> By practicing outside the correctional

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247. *See* Barthelemy, *supra* note 243.

248. "Telepsychiatry is the use of videoconferencing technologies to provide psychiatric services." Edward Kaftarian, *Lessons Learned in Prison and Jail-Based Telepsychiatry*, 21 CURRENT PSYCHIATRY REP. 15, 1 (2019).

249. *Id.*

250. *See id.* at 4. *See also* M. Mateo, R. Álvarez, C. Cobo, J.R. Pallas, A.M. López & L. Gaite, *Telemedicine: contributions, difficulties and key factors for implementation in the prison setting*, 21 REV. ESP. SANID PENIT 95, 98 (2019).

251. Generally speaking, there is a shortage of available psychiatrists across America. Psychiatrists also tend to believe that working in a correctional facility will compromise their safety. *Id.* at 2.

252. Stacie Ann Deslich, Timothy Thistlethwaite & Alberto Coustasse, *Telepsychiatry in Correctional Facilities: Using Technology to Improve Access and Decrease Costs of Mental Health Care in Underserved Populations*, 17 PERMANENTE J. 80, 82 (2013).

253. Kaftarian, *supra* note 248, at 5.

254. After finding that "[o]nly 18 out of the 231 jails that submitted responses to this question (about 8%) provide on-site, 24-hours-a-day mental health care." TEX. COMM'N ON JAIL STANDARDS, *supra* note 187, at 6.

255. Kaftarian, *supra* note 248, at 4.

256. *Id.*

institution, inmates and staff may struggle with trusting telepsychiatrists.<sup>257</sup> However, this “outsider” perspective can actually be quite beneficial for correctional facilities.<sup>258</sup> Inmates may feel as though telepsychiatrists are removed from the facilities’ authoritarian structure and are therefore less influenced by the prison environment.<sup>259</sup> Inmates may be more willing to share their thoughts and feelings while psychiatrists may be more willing to listen, as both can avoid fear of retaliation or danger to their physical safety.<sup>260</sup>

Telepsychiatry, however, requires full participation from “psychologists, nurses, social workers, administrators, and custody staff.”<sup>261</sup> Although jails use telepsychiatry to provide general mental health services, more research must be conducted on the use of telepsychiatry for suicidal patients and its possible implications and challenges.<sup>262</sup> The goal is for jails to one day use telepsychiatry to conduct remote suicide screening and assessment down the road. In the meantime, the newly expanded Prisoner Safety Fund would allow jails to provide valuable and cost-effective telepsychiatry services not otherwise available without such funding.

Additionally, increasing funding directly to jails would also assist with installing automated electronic sensors and cameras to provide additional monitoring for at-risk inmates. Those inmates housed in at-risk cell blocks are more likely to complete a suicide attempt.<sup>263</sup> Generally, researchers found that “[t]hose not on suicide precautions, recently discharged from close observation, or never under close observations were more likely to die by suicide than those on suicide precautions or under close observation.”<sup>264</sup> Using cameras in addition to or in lieu of direct observation will allow jails to provide close observation. Increasing the amount of money allocated to the Prison Safety Fund would provide funding for necessary equipment.

If the provision requiring the creation of Grants for Establishment and Expansion of Community Collaboratives is removed, legislative funding that is acquired can go directly into the Prisoner Safety Fund. Ideally, by redirecting funding, the act’s priority funding requirement for those jails with fewer than ninety-six beds would be realized in full,

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257. *Id.*

258. *Id.*

259. *Id.* at 3.

260. *Id.*

261. *Id.* at 6.

262. *See generally* David D. Luxton, Karen O’Brien, Larry D. Pruitt, Kristine Johnson & Gregory Kramer, *Suicide Risk Management During Clinical Telepractice*, 48 INT’L J. PSYCHIATRY MEDICINE 19 (2014).

263. Boren et al., *supra* note 51, at 573.

264. *Id.* at 577.



with plenty of resources remaining for those jails housing more than ninety-six inmates who are still in dire need of the required resources.

### CONCLUSION

Jails across the United States have become the primary mental health care providers for the mentally ill. Inmates are often dissatisfied with how jails are treating them and managing their care. As a result, more inmates seek permanent solutions to end their suffering – committing suicide in jail. Jails recognize suicide risk factors within their populations, but due to limited resources, struggle to fashion suicide prevention programs that follow best practices. Because individual litigants continue filing lawsuits, jurisdictions must use financial resources to resolve the lawsuits. As a result, jails cannot use these financial resources to improve conditions for the mentally ill and suicidal.

Texas adopted the Sandra Bland Act in 2017 seeking to address the criminal justice system's treatment of the mentally ill and intellectually disabled throughout Texas. Other states can reduce the frequency of individual jail-suicide litigation and focus on improving conditions for the mentally ill and suicidal inside of jails by following Texas's lead. The Sandra Bland Act serves as a well-thought-out starting point. In the upcoming years, Texas must amend the Act to closely align legislative goals with local resources. Other states seeking to improve conditions for the mentally ill and suicidal within their own jails should adopt the Act's provisions specifically tailored to that end, including those mandating telepsychiatry services and electronic monitoring of at-risk cell blocks. However, states must be wary of sweeping legislation that attempts to change multiple facets of the criminal justice system within one act.

Improving treatment and care for the mentally ill and suicidal should not end with one piece of legislation. Instead, policymakers and academics must research other ways to continue improving conditions for vulnerable populations. This may include mentoring programs or simplifying grievance procedures for inmates who are dissatisfied with their care. In the meantime, legislation modeled after the Sandra Bland Act is critical. Through proactive legislation, as opposed to retroactive measures like individual jail-suicide litigation, states are recognizing that inmates are human beings and must be treated as such.