

4-20-2020

The Cycle of Failing Reform: How Mentally Ill Detainees Continue to Suffer Unconstitutional Wait Times in Colorado

Grace Gonzalez
University of Denver

Michael Campbell
University of Denver - Advisor

Follow this and additional works at: <https://digitalcommons.du.edu/duurj>



Part of the [Criminology Commons](#), and the [Social Control, Law, Crime, and Deviance Commons](#)

Recommended Citation

Gonzalez, Grace and Campbell, Michael (2020) "The Cycle of Failing Reform: How Mentally Ill Detainees Continue to Suffer Unconstitutional Wait Times in Colorado," *DU Undergraduate Research Journal Archive*: Vol. 1: Iss. 2, Article 9.

Available at: <https://digitalcommons.du.edu/duurj/vol1/iss2/9>

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in DU Undergraduate Research Journal Archive by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

The Cycle of Failing Reform: How Mentally Ill Detainees Continue to Suffer Unconstitutional Wait Times in Colorado

Abstract

This research examines the state of Colorado's failing criminal justice system, particularly as it pertains to mentally ill detainees. For several years, mentally ill detainees in Colorado have been forced to wait for extensive amounts of time to receive court-ordered evaluations to determine mental competency before trial. The state's continued failure to administer these evaluations in a timely manner has led to a series of complaints and lawsuits against the state. Unfortunately, these lawsuits have ultimately done little to create lasting reform. The state has managed to temporarily mitigate the problem as complaints of unconstitutional wait times arise, but it has historically disregarded the broader failures in the criminal justice system. Outpatient, community-based programs may be more beneficial to mentally ill detainees than a state forensic hospital.

Keywords

Detainees, Competency evaluation, Federal lawsuit, Colorado, Path dependency, Criminal justice

Publication Statement

Copyright held by the author. User is responsible for all copyright compliance.

The Cycle of Failing Reform: How Mentally Ill Detainees Continue to Suffer Unconstitutional Wait Times in Colorado

Grace Gonzalez¹ and Micheal Campbell²

¹Student Contributor, University of Denver

²Advisor, Department of Sociology and Criminology, University of Denver

Abstract

This research examines the state of Colorado's failing criminal justice system, particularly as it pertains to mentally ill detainees. For several years, mentally ill detainees in Colorado have been forced to wait for extensive amounts of time to receive court-ordered evaluations to determine mental competency before trial. The state's continued failure to administer these evaluations in a timely manner has led to a series of complaints and lawsuits against the state. Unfortunately, these lawsuits have ultimately done little to create lasting reform. The state has managed to temporarily mitigate the problem as complaints of unconstitutional wait times arise, but it has historically disregarded the broader failures in the criminal justice system. Outpatient, community-based programs may be more beneficial to mentally ill detainees than a state forensic hospital.

Keywords: Detainees, competency evaluation, federal lawsuit, Colorado, path dependency, criminal justice

1 INTRODUCTION

Over the past eight years, the state of Colorado has faced numerous lawsuits regarding the unconstitutional wait times for detainees in the criminal justice system who suffer from mental health issues. Individuals who have been accused of crimes but have not yet been charged wait as long as six months to receive a court-ordered evaluation to determine mental competency before trial¹. Those who are evaluated as mentally incompetent face even longer waiting periods to receive treatment at state forensic mental health hospitals. The excessive wait times are often longer than the wait times that detainees would need to serve if actually charged with the alleged crime¹. This injustice has led to many complaints by the accused and their families and it has sparked the advocacy group Disability Law Colorado (DLC) to sue the state in order to mandate reform.

This research aims to investigate the reasons why federal lawsuits were brought on by the DLC against the state of Colorado, the steps the state has taken since the filing of the lawsuits, and the reasons for a recent influx of people charged with crimes that require court ordered evaluations. Further, this paper examines the impact of the lawsuit on state litigation and thus mental institutions within the region. The state's ability to create effective and sustainable change for mentally ill detainees is hindered by continued use of methods

based on precedent rather than efficacy, a phenomenon known as path dependence. Path dependence increases the likelihood that prolonged wait times for mentally ill detainees will continue to go unsolved and instead repeat in the same cyclical pattern of failing reform.

A thorough examination of how Colorado's criminal justice system impacts mentally ill detainees through mental competency evaluations is a necessary addition to current criminology literature. By addressing specific aspects of the state of Colorado's system, this research can be applied to the broader context of the nation's criminal justice system. State comparisons have the capability to reveal approaches to reform or even demand reform on a larger scale. Such literature can move states and local governments away from path dependence, thus increasing the chances of significant and lasting reform.

2 METHODS

The research to generate this paper first explores a series of local news articles, ranging from sources like the Denver Post to online publications of the Colorado Public Radio. These articles were discovered from databases such as World Access News and the criminology and sociology database, using search terms such as "mentally ill detainees," "Colorado criminal justice reform,"

“federal lawsuit,” and “mental health in the criminal justice system.” Dates for these articles range from as early as the initial lawsuit filed in 2011, up to the fall of 2019. These news pieces emphasize an easily understandable outline of the basics of each lawsuit, the major actors involved, and the consequences of their actions in regards to the paper’s topic.

At the end of the news articles, there were often links to more materials and the actual lawsuits mentioned in the writing. With the use of these resources, extensive research was done to read and sort through the litigation in chronological order, gaining a better comprehension of how the state has reacted over the years and how various complaints have resulted in the amending of certain lawsuits. This resulted in findings about people involved, such as the head of the Colorado Department of Human Services, as well as major groups, like DLC. These sources comprise a thorough outline of the history of this issue over the past nine years and even before the initial lawsuit in 2011. They also yield a detailed analysis of who and what has contributed to the prolonged wait times of mentally ill detainees.

3 FINDINGS

Under both Colorado state law and federal law, an incompetent defendant cannot stand trial. However, the process to determine competency—a defendant’s ability to have rational understanding and consult with the lawyer to assist in one’s own defense—is long and complicated in and of itself¹. Questions of competency can be raised by the trial judge, prosecution, or defense, and the court can determine a preliminary finding of competency. This preliminary finding of competency will be the final decision unless another party objects within ten days¹. In the case that another party does object or that the court does not possess enough information to make a preliminary finding, the court orders that a competency evaluation be carried out for the defendant by the Colorado Department of Human Services (CDHS)². Once again, a party has ten days from when the evaluation report is received to request a hearing or second evaluation, and, if no case is made, then the court’s determination of competency to stand trial becomes final¹.

The trial court determines where these evaluations occur, and the defendants are often taken into custody by the CDHS until the evaluation takes place. The evaluations happen in one of three ways: in the psychiatric hospital at the Colorado Mental Health Institute at Pueblo (CMHIP), in the jail where the defendant is detained by a contract evaluator hired by CMHIP, or outside of jail for defendants released on bond¹. If it is decided that the defendant is not competent enough to proceed with trial, the court can release the defendant on bond to receive treatment services or, in the case

that the defendant is not eligible for bond, custody is granted to the CDHS to carry out restorative treatment¹. Not only can the process of determining competency take several weeks, but if the defendant is committed to the CDHS’s control, it can take up to several months to receive the necessary treatment due to backlogs at CMHIP caused by insufficient space and understaffing. Unfortunately, very little information is available as to what exactly comprises these competency exams, and there is not much information regarding the processes of restoration treatment at CMHIP either, except that services are carried out by professionals involved in “nursing, psychology, social work and medicine.”³ If this information is a matter of public record, further research should be done to understand the specifics of these competency evaluations and restoration treatments to better hint at the nuances of the state’s issues and why exactly the state is struggling to deliver evaluations and treatment in a timely manner.

CMHIP is a 455-bed hospital that administers inpatient behavioral health services for people involved in the criminal justice system³. According to their website, CMHIP “serves individuals with pending criminal charges who require evaluations of competency, individuals who have been found by a court to be too incompetent to proceed (restoration treatment), and individuals found to be not guilty by reason of insanity.”³ For having less than 500 beds, the treatment center has a lot of responsibility to aid a very diverse group of people involved in the criminal justice system. Much like parole and probation, there are far too many people involved in the carceral state who require mental health treatment compared to the small amounts of staff and trained professionals needed to administer these required resources; the ratio of staff to patient is much too large. Without individualized, or at least small group, treatment with trained staff, mentally ill detainees risk being lost in the system, rather than receiving the personal treatment they need in order to recover. Furthermore, at the time of the initial 2011 lawsuit, no Colorado jails could allocate treatment, and CMHIP was the only state forensic mental hospital equipped to provide court-ordered evaluations and accept custody of pretrial detainees for restorative treatment¹. Given the large number of individuals in need of these services, especially in more recent years, additional pressure has been placed on CMHIP to maintain effective staffing and resources for these people.

In 2011, the same year the first major lawsuit was filed against the state of Colorado, a waitlist existed of more than 50 people waiting for admittance into CMHIP for restorative treatment. Many of these detainees suffered from severe mental health issues, which remained untreated for up to six months and oftentimes getting much worse during that period¹. Furthermore, the detainees who were not eligible for bond had to spend

the time in local jails with a living environment that only exacerbated their mental health problems. While “a defendant may not be confined for restorative treatment for a period in excess of the maximum term of confinement that could be imposed for the offense with which the defendant is charged,” this has often been the reality for these detainees¹.

This backlog at CMHIP and the delays in administering competency evaluations also puts immense pressure on local sheriffs and their departments. Their jails are left to take care of these detainees, who are often much more difficult and expensive to jail than those who do not suffer from mental health issues¹. For example, the Arapahoe County Sheriff reported in 2010 that it took an average of 43 days for a competency evaluation to be carried out in jail after the initial court order. In 2011, the average increased to 51.6 days, with it once taking more than eight weeks—58 days, to be exact—for a detainee to receive the evaluation¹. The Arapahoe Sheriff also saw delays for admission to CMHIP after finding incompetency, with an average wait time of 26.25 days from the court order for commitment to actual admission to the institute in 2010, and an increase to 32.5 days in 2011¹. These detainees’ presence in local jails exhausts much of the jails’ resources meant for the other incarcerated individuals, like those serving short sentences or those awaiting trial who do not have mental health issues, and it costs significantly more money to jail those suffering from mental illness. The price to house one inmate for a day at the Arapahoe County Detention Facility is \$68.30, but, to house a mentally ill detainee, that price doubles¹. Local jails are having to incur these costs more often than they should due to the state’s failure in timely admittance of detainees for their evaluations and treatment.

Even though the primary lawsuits examined in this paper are between DLC and the state of Colorado, the persistent problems regarding mistreatment of detainees, prolonged wait times, and understaffing in treatment facilities manifested long before DLC’s original 2011 lawsuit. In 1999, for example, the first sign of systemic failure was revealed through the Neiberger federal lawsuit, in which patients at CMHIP filed complaints for negligence in the facility as well as violations of their due process⁴. This led to a 2002 settlement that resulted in the CDHS agreeing to fill vacant staff positions and maintain staffing ratios at CMHIP, as understaffing was found to be one of the main causes of mistreatment at the institute².

Further showing the history of incompetency by the state was the Zuniga case, which occurred just four years later. The CDHS had to answer a citation by a Denver District judge for failing to admit pretrial detainees for competency evaluations and restorative treatment in a timely manner². In fact, by the end of 2006, around 85 people were waiting to be transported to CMHIP for

treatment¹. The Department “blamed staffing shortages and increased numbers of court referrals as the cause for delays,” clearly showing that the settlement for the Neiberger case was ineffective in rectifying staffing issues². The state refused to change their ways, and instead they demonstrated path dependency by maintaining their traditional procedures. In 2009, the agreement reached by the Zuniga settlement expired with the opening of more than 200 additional beds on the CMHIP campus². However, as similarly demonstrated by mass incarceration, the creation of more beds often leads to the automatic filling of those beds to reduce backlog, rather than actually addressing the underlying factors creating the problem. When the new forensic institute was added to the CMHIP campus, it had the opposite effect of reducing backlog and instead created even longer delays to receive treatment at the facility. This was due to the fact that the institute was never properly staffed from its creation and not prepared to receive the high volume of court referrals². By January of 2010, pretrial detainees once again suffered the violation of constitutional rights when significant delays became the norm¹.

In 2011, DLC finally got involved to address the mounting backlogs by filing a lawsuit against the state of Colorado. DLC “protects and promotes the rights of people with disabilities and older people in Colorado through direct legal representation, advocacy, education and legislative analysis.”⁵ Because these unconstitutional wait times were greatly affecting people with mental health issues and even making their illnesses worse, DLC believed it was their responsibility to become a driving force of reform.

The group filed the original federal lawsuit on August 31, 2011, naming Reggie Bicha, the Executive Director of the CDHS, and Teresa Bernal, the Interim Superintendent of CMHIP, as the defendants¹. At the time, DLC went by the name “The Legal Center for People with Disabilities and Older People,” and as such the lawsuit’s title was abbreviated to Center for Legal Advocacy v. Bicha⁵. In the lawsuit, DLC argued that the pretrial detainees, “who have been charged with but not convicted of crimes, have constitutionally protected liberty interests in promptly receiving such evaluations and treatment while not being confined any longer than necessary.”¹ They cited that, in the most severe cases, some detainees have waited for treatment for as long as half a year¹. These excessive wait times violate the United States Constitution by depriving individuals of their due process rights and taking advantage of people who are often unable to protect themselves¹. Detainees are also guaranteed the right to a speedy trial under the Sixth Amendment, but the state of Colorado’s own speedy trial statute excludes the time that is spent to evaluate detainees’ competency, meaning they could be forced to wait for an indefinite amount of time for

evaluations or treatment without technically being in violation of the statute¹.

In addition to outlining the major issues and key actors, the lawsuit also included descriptions of many individual cases, emphasizing the exact wait times detainees suffered and demonstrating their breach in constitutional rights. For example, Client L.E., who at the time was represented by the Colorado Public Defender, was ordered to receive a competency evaluation by Judge D. Archuleta on December 30, 2010. It wasn't until almost a month later, on January 28, 2011, that the evaluation occurred at the Boulder County Jail. Another ten days passed before L.E.'s evaluation was filed with the court on February 7, 2011, and on February 14, the court finally determined L.E. was too incompetent to proceed with trial and required transportation to CMHIP for restoration. Client L.E. waited more than five months before finally being transported to CMHIP on July 15, 2011¹. L.E. is just one of countless examples, and many more instances of injustice were included as evidence in DLC's complaint against the state.

Center for Legal Advocacy v. Bicha ultimately resulted in a settlement agreement in 2012 between the CDHS and DLC. The main condition of the agreement required the CDHS to file monthly reports with DLC, demonstrating that they were fulfilling the agreed upon 28-day timeline to complete competency evaluations². DLC adopted a monitoring role to ensure the CDHS followed all procedures and remained in conjunction with their agreed upon provisions. For the first two years following the settlement, the state managed to timely admit pretrial detainees for their court-ordered evaluations². Additionally, the Office of Behavioral Health at the CDHS created a jail-based evaluation and restoration program in 2013, designed to "[provide] daily psychiatric care and competency restoration treatment through individual and group sessions; structured similarly to services provided at the Colorado Mental Health Institute at Pueblo (CMHIP)."⁶ The program is also designed to "routinely [assess] for goodness of fit and [transfer] [individuals] to a hospital setting if necessary."⁶

However, in 2015, the CDHS once again began facing issues concerning their treatment of mentally ill detainees. The admissions policy to CMHIP was changed by the CDHS without the knowledge of DLC, and these new policies limited the number of those admitted to the facility². This produced a waitlist and generated another backlog of approximately 100 detainees who were determined incompetent and awaiting treatment at the center. As was the case with the Zuniga lawsuit, the CDHS once again cited staffing shortages and a spike in the number of referrals as the main causes of the backlog². By using the same excuses, the state admitted to their lack of action and response to the previous lawsuits, further showing the effects of path

dependency. These actions were a breach of the settlement agreement, but rather than reaching out to DLC and explaining the situation, the CDHS tried to cover up their mistakes by submitting inaccurate reports to DLC². These falsified reports made it appear as though the CDHS was still following the 28-day admissions deadline when they were not. DLC discovered and began investigating the CDHS's actions "when it started receiving complaints from detainees' families and their attorneys who were being told by jail staff that it will be months before admission to CMHIP."²

In 2016, DLC reopened the 2011 lawsuit to once again address these backlogs. Both parties agreed to modify the settlement agreement by appointing "an independent administrator to supervise future compliance."⁷ The independent administrator's job, much like DLC did previously, was to monitor the CDHS's actions very closely over the next two and a half years to ensure it followed procedure⁷. The administrator would have access to the CDHS's operations as well as coordinate meetings each quarter to check the Department's progress². However, DLC tried to monitor the CDHS previously and the state was still able to falsify reports. To have an independent administrator do the same work would likely not have a more effective outcome.

In response to the outcry from DLC in 2016, state officials sought help from lawmakers to give them additional time frames beyond the previously-agreed upon 28-day deadline. The state asked for 45 days, starting from the moment a person is booked into jail, to execute mental competency evaluations, as well as 150 days to treat individuals who are found to be incompetent⁸. Both of these wait times are excessive, especially when many of the detainees face charges with jail times that are less than those deadlines. Reggie Bicha, the Executive Director of the CDHS who was named as a defendant in the original 2011 lawsuit, claimed "it's a matter of skyrocketing numbers of people who need mental health treatment in jail."⁸ Regardless, these requests showed the state's desire to change only the bare minimum in order to avoid penalties through litigation, rather than abandoning path dependency to seek the necessary broader reform.

Officials are also looking for alternative solutions that involve treating mental health detainees while they are in jail⁸. However, besides the jail-based restoration program created in 2013, which is located at the Arapahoe County Detention Facility, CMHIP is the only facility designed to provide treatment that restores incompetent detainees¹. Other jails do not have the capacity to treat inmates, and would end up using all their valuable resources on mentally ill detainees as opposed to the other inmates, who also need assistance. Not surprisingly, mental health advocates and public defenders such as DLC are not supportive of mentally ill people

receiving treatment in jail⁸. They argue that the most effective and beneficial form of treatment is in a community mental health care system, outside the adverse effects of the carceral state. Furthermore, advocates also oppose the state's proposition of a 150-day timeframe to administer treatment. They say the roughly five-month wait is "too long to sit in jail—and perhaps even be forcibly medicated—without being convicted of anything."⁸

There is no denying that the number of court-ordered mental evaluations has drastically increased over the past two decades. In 2001, 429 people were reported to receive mental health competency evaluations, compared to 2,277 evaluations in 2017⁸. While the data substantiates this fact, it is much harder to determine what has led to this increase in court orders. Although anyone in the court room can call into question a defendant's competency, it is the judge who holds the power to determine who does and does not require an evaluation. Robert Werthwein, the Director of the Office of Behavioral Health during the reopening of the lawsuit in 2016, believes part of the solution lies in judicial discretion. He proposes that judges should more carefully consider who does and does not require inpatient services based on the severity of offenders' mental illness⁸. If judges contemplate releasing more low-level offenders out of jail to receive outpatient treatment, this would allow more space within inpatient centers, like CMHIP, for the most severe cases. This is similar to Christopher Seeds' theoretical concept of bifurcation, where low-level offenders are treated differently from more serious offenders⁹. This method should also help clear some of the backlog in local jails and allow for better allocation of state resources. To help spread this message, Werthwein sent several letters a week to local judges to help sway their opinions. He mentioned that some took notice, but it would take a lot more support for the movement to foster significant change¹⁰.

On June 13, 2018, attorneys working for DLC once again moved to reopen the 2012 class-action settlement to address the unconstitutional wait times faced by detainees expecting competency evaluations⁷. This time, the complaint cited that "the wait times bear no relationship to the offenses these individuals have been charged with, which are often low-level and non-violent... The result of these lengthy, unconstitutional delays is a vicious cycle. The longer the state makes these individuals wait for evaluation and restorative services, the more exacerbated their mental illnesses become."¹¹ As officials stated, requests for competency evaluations have increased 524% since the year 2000, and in that time demands for mental health treatment by detainees have increased by 931%¹¹. Once again, the CDHS failed to enact change and faces the same issue of people waiting months in jail for competency evaluations or treatment, even though they have not yet been convicted of any

crimes. Reggie Bicha was again named in the lawsuit, and he proposed a bill to the state legislature that gives the state "permission to treat mentally ill people in jail, rather than move them to a mental hospital or other treatment setting."¹¹ However, the bill died on the last day of the legislative session, to DLC's relief.

In late 2018, DLC created a motion for the appointment of a Special Master to address their concerns. Special Masters are officials appointed by a judge to oversee that judicial orders are carried out and to provide evidence and recommendations to the judge for how to best deal with the matter¹². In the defendants' response to the motion, both Reggie Bicha and Jill Marshall, the Superintendent of CMHIP, agreed that a Special Master would be valuable "to assist the Department in implementing its plan to address compliance with the Settlement Agreement timeframes concerning inpatient competency restoration treatment and to assist the Court in addressing the complex and technical issues in this case."¹³ On December 29, 2018, Judge Nina Wang, a United States Magistrate Judge of the District of Colorado, ordered the appointment of Groundswell Services, Inc., a small management and consulting firm in Denver, to fulfill the Special Masters role. Bicha and Marshall requested that the Court's appointment of Special Master continue "until the Department has maintained compliance with the Settlement Agreement timeframes concerning inpatient competency restoration services for three months."¹³

For their first duty as Special Masters, Groundswell Services, Inc. filed a report on January 28, 2019, to outline their review of the CDHS document titled, "Comprehensive Plan for Compliance," which "describes the efforts of CDHS to improve timely performance of competency services, and thereby comply with the timelines delineated in the 2016 Settlement Agreement."¹³ In the Special Masters report, Groundswell Services, Inc. provides feedback on the CDHS's plan and recommends how they might change it to become more effective. They start by stating their belief that "most mental health services are best delivered in a broad system of care, beginning in the community, rather than solely in inpatient psychiatric hospitals."¹⁴ They argue that all members of the Settlement Agreement can agree that this would be the ideal solution.

The CDHS has been struggling with this same problem for many years, and despite DLC's involvement in reopening cases and continually suing the state, it has been to little avail. DLC and many other health and advocacy programs contest that the best way to support and treat mentally ill detainees is not by spending unnecessary time in jail awaiting treatment; instead, these individuals should receive services from community resources. With these services they can remain integrated into society and thus escape the inherently adverse effects of the carceral state.

One such community treatment program was started in November 2019 by the Mental Health Center of Denver, “one of the city’s biggest community behavioral health care providers.”¹⁵ The program, called Community Based Enhanced Restoration, is designed to allow patients to “live independently or with family members, and case managers will see them at least three times a week to help connect them and transport them to services from Mental Health Center of Denver and other providers, including benefits, employment, education, psychiatry and medication management.”¹⁵ The program is capped at 30 but, if it is successful, the supervisor of the program hopes to create similar programs elsewhere. While supportive of the outpatient treatment plan, DLC’s director of legal services, Alison Butler, says that the difficulty with getting these kinds of outpatient programs off the ground is having clients to generate funding, but in order to have clients, the program needs referrals from judges¹⁵. Judges will likely only refer to the program if it has proven to be successful in the past, so it becomes evident that this cycle poses a major hurdle to the success of these types of programs. As Robert Werthwein previously suggested, the solution likely lies in the discretion and decisions of judges.

Contrary to outpatient treatment programs, some people still advocate that the most obvious fix is to increase the number of beds available at CMHIP so that patients can be treated immediately, instead of waiting in jail for restoration. In fact, CDHS announced in September 2019 that a new unit is being constructed at CMHIP, which will add 24 beds and is projected to open by November 2020¹⁶. This construction is part of a larger plan to add a total of 128 beds by December 2021, including 18 beds at a new jail-based restoration services location at the Boulder County Jail, and 44 beds for restoration treatment at the Colorado Mental Health Institute at Fort Logan (CMHIFL), which is traditionally for civil patients¹⁶. However, as the Neiberger case showed previously, increasing the number of beds does nothing without also being prepared to increase staffing and resources to adequately house those beds, which the state failed to do after the 2002 lawsuit. Considering that the CDHS’s latest plan to increase beds does not mention anything about how this additional unit will be staffed, it can only be hoped that the proposed \$7 million budget includes a corresponding increase in staffing and resources to prevent the ongoing systemic failures seen in the past. As construction of these new units continues in the future, it will be interesting to see if they have the intended effect of reducing backlog, or if, yet again, the issue of additional beds without additional staffing persists.

Another proposed solution is to open bed space in civil mental health hospitals, which the state has already begun¹⁴. In other words, beds for non-criminally

involved patients at mental hospitals would be reserved specifically to address the backlog of detainees awaiting trial. In December 2018, the CDHS announced a freeze on civil admissions to CMHIFL, meaning patients not involved in the criminal justice system were not able to receive treatment¹⁷. DLC’s Alison Butler said she was “dismayed by the state’s proposal,” claiming that the plan meant, “essentially, in order to get... inpatient mental health services you have to commit a crime.”¹⁷ The state was attempting to solve one problem by creating another. Not surprisingly, this proposal was met with severe backlash, both because it inhibited patients who were not involved in the criminal justice system from seeking treatment and it appeared to award or incentivize criminal behavior. Only two months later in February 2019, the state agreed to remove the freeze and once again allow civil patients to be admitted for the treatment they need¹⁸.

Ultimately, a lasting solution to this problem is far more complicated than increasing the number of beds or appointing a Special Master to observe obedience. As Groundswell Services, Inc.’s January 2019 report noted, the CDHS’s plan to come “promptly into compliance with the Settlement Agreement is not the same as a comprehensive plan to improve Colorado’s civil and forensic mental health services.”¹³ For the state to finally fulfill consistent and reliable compliance, the broader healthcare system must be reformed. In March 2019, a consent decree was filed in federal court to close the most recent lawsuit between DLC and the CDHS and attempt to create a comprehensive plan to address the backlog of those waiting for competency evaluations once and for all¹⁹. The agreement “sets up a complex series of staggered timeframes for admission to state-run, inpatient treatment... [allowing] CDHS to prioritize the most acutely ill patients by requiring CDHS to admit them for restoration treatment more quickly.”¹⁹ If the state fails to meet any of these deadlines within a 12-month period, it faces a maximum of \$10 million in fines, which would be used to “enhance community mental health services.”¹⁹ Additionally, the agreement promises to “implement a coordinated wide-scale outpatient community restoration program,” create a team to manage data to make better informed decisions, and increase training and uniformity for competency evaluators and evaluations¹⁹.

While the agreement sounds hopeful on paper, especially with the mention of a comprehensive reform plan, the families of mental health patients suffering in the system know all too well that a huge gap exists between claims of action and finally delivering those promises. For years, these previous lawsuits have led to the state’s assurance that changes will be made to the system and, for years, mental health patients and their families have been let down by the state’s failures. Path dependency has resulted in the state doing the bare minimum to

meet terms of various agreements for short-term, immediate fixes after lawsuits and sanctions force the state's hand. Lasting reform, however, requires a much more extensive evaluation of how mental health patients receive treatment and how they are addressed within the criminal justice system. Hopefully, this newest plan can initiate lasting reform, but the last decade suggests that will not be the case.

4 CONCLUSION

A long history exists of the failed reforms and continual efforts of DLC to create lasting change in the way the state treats detainees who suffer from mental illness. As presented in the research, it is clear that the CDHS and CMHIP have, in the past, refused to change their methods and instead only try to escape impending penalties and lawsuits when they arise.

Ultimately, the situation in Colorado is not unique; it represents a broader failure of the criminal justice system, which remains rooted in old procedures and mindsets instead of welcoming the possibility of reform. Scholar Katherine Beckett refers to this path dependency as "the tendency for courses of political or social development to 'generate self-reinforcing processes' that frustrate efforts to change direction."²⁰ One of these self-reinforcing processes in Colorado's case is the state's automatic filling of additional hospital beds, without ever addressing the underlying problem producing the backlog. When they open more beds under the assumption that it will fix the issue, they neglect to consider the lack of staffing and other resources that are also necessary, which only contributes to the problem.

Another example of a positive feedback mechanism in Colorado is when the courts order excessive inpatient restoration in the first place. As the research outlines at the beginning of this paper, the process to determine competency is complicated, but it is also the method that has been used for years. If courts started to reconsider who really requires state mandated inpatient restorative treatment and instead examine who would benefit from outpatient treatment, the numbers of detainees waiting for admittance to CMHIP would decrease. However, the state has only ever reacted to mental health service in one way, and to change it comprehensively, as the Special Master and DLC suggest, would be very difficult. Too much history, money, and too many resources have been devoted to the system as it currently exists, and path dependence stands in the way of reform.

Furthermore, Colorado's situation exacerbates Beckett's concept of the carceral state²⁰. When these detainees are locked in jail for excessive amounts of time, they not only experience adverse effects on their mental health, but they are also cut off from society. The longer they wait in jail for evaluations or treatment, the

more detached they become from a normal, functioning, anti-crime life. Their involvement in the carceral state reduces their chances of success and reintegration into society after receiving the restoration treatment they need. This is why DLC advocates for more community-based treatment services, which would allow offenders to interact with their families and sometimes even keep their jobs, rather than the inpatient forensic mental health hospital at CMHIP. Unfortunately, creating these community services requires even more resources that the state does not possess. However, if the state developed a new mindset open to changing the traditional pathways to restoration, they could consider reallocating funds dedicated to building more units at CMHIP that are focused on new outpatient treatment programs instead.

There are a few negative feedback loops present in the case of Colorado, and, as Beckett explains these mechanisms, they might provide some hope for lasting reform²⁰. One of these negative feedback loops is discussed thoroughly in Hadar Aviram's book *Cheap on Crime*. The impending fiscal costs of a broken system, especially after the 2008 recession, have left many states forced to make reforms for the sole purpose of saving money²¹. For Colorado, the fiscal disadvantages are evident in local sheriff departments and county jails, where it costs substantially more to detain mental health patients than other detainees. Costs are also high to maintain CMHIP, which caused the understaffing that contributed to the backlogs in the first place. Furthermore, the state faces many sanctions for the various lawsuits and decrees that are designed to compel the state to fix the issues. Even with these negative feedback loops, however, costs have not deterred the state in the past, and path dependency suggests that costs will not incite reform in the future, either.

5 FURTHER DIRECTIONS

If Colorado hopes to create consistent and lasting reform, it must approach mental health and the criminal justice system in a broader way, addressing all aspects of the system rather than focusing on minor changes designed to mitigate consequences of past mistakes. The focus needs to be placed on revising mental health institutions as a whole, starting by creating more community-based programs, as opposed to just complying with the Settlement Agreement. This mirrors Christopher Seeds' discussion of recent criminal justice reforms and how they require a comprehensive plan⁹. This "comprehensive approach" to reform requires participation from all parties involved, bipartisan support in government, empirical evidence, and a mindset ready to finally abandon path dependency. This would include judges who, rather than sending all mentally ill detainees to CMHIP by default, would use

discretion to determine which low-level offenders could be directed towards outpatient treatment instead. This comprehensive approach would also involve funds being directed towards creating outpatient services rather than being funneled back into building more beds at CMHIP. Only then can Colorado—and the criminal justice system as a whole—hope to improve the lives of those involved in the carceral state and establish meaningful reform. Future research should not only address the most recent activity regarding the lawsuits against the state of Colorado, but it should also study the actions taken by lawmakers and other advocacy groups like DLC to initiate reform. It is important to ask which reforms, if any, have been successful and why. It is arguably more imperative to ask which reforms have failed, why they failed, and what actions can be taken differently in the future in order to be successful.

6 ACKNOWLEDGEMENTS

Thank you to Professor Michael Campbell, who helped formulate this research and guide me as I turned this idea into a paper, and thank you to Jacqueline O'Rourke, who edited my work at various stages of the process.

7 EDITOR'S NOTES

This article was peer reviewed.

REFERENCES

- [1] Lynch, J. M., Lock, M., & C. C. R. Center for Legal Advocacy v. Bicha (2011). URL <http://www.rplaw.com/>.
- [2] Disability Law Colorado. Disability Law Colorado Settles Suit to Protect Inmates with Mental Illness (2016). URL <https://www.prnewswire.com/>.
- [3] Department of Human Services. Colorado Mental Health Institute at Pueblo. URL <http://www.colorado.gov/>.
- [4] Browse cases. URL <http://www.casemine.com/>.
- [5] Beachy, E. Disability Law Colorado (2016). URL <https://disabilitylawco.org/>.
- [6] Program Profiles - Jail Based Restoration and Evaluation URL <https://drive.google.com/file/d/1Rhnsvs40o9wxpPLz3tZomWecFIXWieQN/view>.
- [7] Gilna, D. Colorado Accused of Failing to Comply with Settlement in Mental Health Care Suit | Prison Legal News. URL <https://www.prisonlegalnews.org/>.
- [8] Sherry, A. State Pushes For Longer Treatment Window For Mentally Ill Inmates (2019). URL <http://www.cpr.org/>.
- [9] Seeds, C. Bifurcation Nation: Strategy in Contemporary American Punishment.
- [10] Sherry, A. State Seeks Release, Mental Health Treatment For Certain Inmates (2019). URL <https://www.cpr.org/>.
- [11] Sherry, A. State Sued For Fourth Time For How They Treat Mentally Ill In Jail (2019). URL <https://www.cpr.org/>.
- [12] West's Encyclopedia of American Law. Special Master (2008). URL <https://legal-dictionary.thefreedictionary.com/SpecialMaster>.
- [13] Center for Legal Advocacy v. Reggie Bicha: Defendant's Response to Motion.
- [14] Gowensmith, N., & Murrie, D. Re: Civil Action No. 11-cv-02285-NYW (2019). URL <https://www.cpr.org/>.
- [15] Fleming, S. Program Will Help Divert Mentally Ill People From Jail. URL <https://www.westword.com/>.
- [16] of Human, D. & Services. Construction begins on Colorado Mental Health Institute at Pueblo expansion (2019). URL <https://www.colorado.gov/>.
- [17] KUSA. State freezes admission to psychiatric hospitals for patients who are not in the criminal justice system. URL <https://www.9news.com/>.
- [18] Sherry, A. Officials Agree To Remove Freeze On State Mental Hospital Beds For Non-Prisoners (2019).
- [19] Department & Services, o. H. Agreement aims to expand community behavioral health services and shorten wait times (2019). URL <https://www.colorado.gov/>.
- [20] Beckett, K. *Annual Review of Criminology* (2018).
- [21] Aviram, H. *Cheap on crime: Recession-era politics and the transformation of American punishment* (2015).