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FROM THE EDITOR-IN-CHIEF

Dear Readers,

We appreciate your continued support of the Criminal Law Practitioner. We are the only student-run publication at the American University Washington College of Law that focuses exclusively on issues of criminal law. We hope that you find these published pieces useful and thought-provoking.

This publication is the culmination of the work of a dedicated staff and Executive Board. Without them, our work would not be possible. To our friends and colleagues on the staff and Executive Board who have graduated and moved to different chapters of their careers, I want to thank you. I especially want to thank my predecessor, Lisa Keshavarz for her leadership, support, and friendship. I take on the immense task of filling her shoes. I would also like to thank Henry F. Fradella, David Snyder, Michael S. Shafer, José B. Ashford, Joseph Diaz, and David Noble for their incredible pieces.

We are also excited to announce a special summer edition with pieces from the Institute for Innovation in Prosecution at John Jay College which will be published in August. David Noble's piece will introduce some of these articles.

We are incredibly thrilled and honored to share these pieces with you and we hope you enjoy reading them.

Sincerely,

Andrew Park, Editor-in-Chief
Volume XI, Criminal Law Practitioner

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Practitioners

A Study of Criminal Defendants Adjudicated Non-Restorable to Competency to Stand Trial in a Rural Southwestern County

Matthew M. Snyder
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Abstract

This study examines the demographic, clinical, and criminal characteristics of ninety-nine felony defendants in a primarily rural county in Arizona who were referred for clinical evaluation for competency to stand trial. Ninety-two of these people had their competency status adjudicated during the time period relevant to the study, sixty of whom were ultimately restored to competency and thirty-two of whom were determined to be non-restorable to competency. Of those in the latter group, most had serious mental illnesses or intellectual disabilities. Additionally, nineteen (59.4%) of the non-restorable defendants were referred for civil commitment proceedings, all but seven of whom were ultimately ordered into involuntary treatment. Only three (3) of the ninety-nine defendants in the study re-offended and were referred back into a restoration of competency program during a five-year period.

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I. Introduction

The U.S. system of criminal justice requires that one be competent or "fit" to stand trial before one's guilt or innocence is assessed at a criminal trial.[1] Accordingly, when the fitness of a particular criminal defendant to stand trial becomes an issue in a case, his or her competency to stand trial must be determined before a trial can proceed.[2] But that seemingly simple directive is quite deceiving because "evaluating the legal concept of competency ranks among the greatest challenges in criminal justice" and it "imposes numerous burdens on defendants and the courts."[3] An even more vexing issue for the criminal justice and public health systems is what to do with defendants who, after being adjudicated incompetent to stand trial, are subsequently determined to be non-restorable to competency ("NRC").

As explored in more detail in Part II of this Article, once a determination has been made that a defendant is NRC, states have limited options.[4] Although some people adjudicated NRC can be released without posing a substantial risk of danger to themselves or other people, other NRC defendants should not be released.[5] Thus, in order to ensure the safety of both the persons themselves and/or the public at large, states often must choose either to seek a guardianship for such persons, often attendant to court-ordered outpatient treatment,[6] or to seek the involuntary civil commitment of the person for in-patient treatment.[7] Compared to the rather sizable body of literature on competency determinations themselves, relatively

1 *See Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also infra* at Part II.

2 Fed. R. Crim. P. 12.2(a).

3 Marcia J. Weiss, *A Legal Evaluation of Criminal Competency Standards: Competency to Stand Trial, Competency to Plead Guilty, and Competency to Waive Counsel*, 13 J. Contemp. Crim. Just. 213, 213 (1997).

4 *See Jackson v. Indiana*, 406 U.S. 715, 729–31 (1972) (requiring either the release of NRC defendants or, alternatively, requiring the state to resort to civil proceedings to prevent dangerous persons from being released to harm themselves or others).

5 For a comparison on the types of danger that warrant involuntary confinement, see *infra* at Part III, Section A.

6 *See generally* Richard C. Boldt, *Emergency Detention and Involuntary Hospitalization: Assessing the Front End of the Civil Commitment Process*, 10 Drexel L. Rev. 1, 6 (2017) (exploring the roles of court-appointed guardians for persons deemed NRC); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 64–65 (2004) (comparing and contrasting guardianship and civil commitment proceedings for incapacitated adults).

7 *See infra* at Part III; *see generally* Alexis Lee Watts, Closing the "Gap" Between Competency and Commitment in Minnesota: Ideas from National Standards and Practices in Other States 8–11 (Robina Inst. of Crim. L. & Crim. Just. 2018) (summarizing select state's approaches to NRC determinations), https://www.hennepin.us/-/media/hennepinus/your-government/leadership/documents/cjcc-mar-2018-supplement.pdf.

little is known about which of these avenues jurisdictions typically opt and the circumstances under which such determinations are made.[8] The present study seeks to help fill this gap in the literature by comparing and contrasting what occurred to ninety-nine defendants who participated in a restoration to competency program in a primarily rural county in Arizona between fiscal years 2012 and 2016.

Part II of this Article explores the intricacies of the legal and psychological issues attendant to the competency to stand trial doctrine. Part III summarizes the legal and behavioral scientific research on the involuntary civil commitment of defendants who are adjudicated incompetent to stand trial and non-restorable to competency ("NRC"). Part IV explains the methods we used to analyze data on a sample of ninety-nine defendants determined to be NRC and Part V presents and discusses our primary findings. Finally, Part VI presents our conclusions and recommendations.

II. An Overview of Competency to Stand Trial[9]

A. Justifications for the Competency to Stand Trial Doctrine

The legal bar against trying incompetent defendants dates back to common law England, probably back to the time of Edward I in the 14th century.[10]

> Blackstone wrote that a defendant who becomes "mad" after the commission of an offense should not be arraigned "because he is not able to plead . . . with the advice and caution that he ought," and should not be tried, for "how can he make his defense?" The ban on trial of an incompetent defendant stems from the common law prohibition on trials in absentia, and from the difficulties the English courts encountered when defendants frustrated the ritual of the common law trial by remaining mute instead of pleading to charges. Without a plea, the trial could not go forward.[11]

At that point in the history of English common law, a person rarely had the right to counsel; in fact, counsel was prohibited in many cases.[12] A defendant, therefore, usually had to represent himself.[13] As a result, "the defendant stood alone before the court, and trial was merely a long argument between the pris-

[8] Indeed, we are aware of only one major study that examined the outcomes of cases after defendants were adjudicated NRC. *See* Gwen A. Levitt, Illa Vora, Kelly Tyler, Liliane Arenzon, David Drachman, & Gilbert Ramos, *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. Am. Acad. of Psychiatry & L. 349, 349 (2010).

[9] Portions of Part II are derived from Robert A. Schug & Henry F. Fradella, Mental Illness and Crime 433, 434–39, 443–48 (2014).

[10] Ronald Roesch & Stephen L. Golding, *Defining and Assessing Competency to Stand Trial*, *in* Handbook of Forensic Psychology 378 (Irving B. Weiner & Allen Hess eds., 1987); *cf.* Gary B. Melton Et Al., Psychological Evaluation for the Courts 123 (4th ed. 2018) (stating that the doctrine can be traced back "at least to the 17th century").

[11] Bruce J. Winick, *Criminal Law: Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. Crim. L. & Criminology 571, 574 (1995) (quoting, inter alia, William Blackstone, Commentaries *24 (9th ed. 1783); 1 Matthew Hale, The History of the Pleas of the Crown 34–35 (1736)); *see also* Melton et al., *supra* note 10, at 123.

[12] *See* Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 Wm. & Mary Q. 3, 5 (1954).

[13] *Faretta v. California*, 422 U.S. 806, 823 (1975).

oner and the counsel for the Crown".[14] Thus, it was imperative that defendants be competent because they were required to conduct their own defense."[15]

Today, however, the Sixth Amendment to the U.S. Constitution is interpreted to guarantee the right to the effective assistance of counsel to all felony defendants[16] and most misdemeanor defendants.[17] As a result, much of the common law's rationale underlying the doctrine of competency to stand trial is no longer applicable. But there are still important justifications for the doctrine in modern times, not the least of which that the U.S. Supreme Court has repeatedly reasoned that the U.S. Constitution's guarantee of due process in both the Fifth and Fourteenth Amendments prohibits the trying an incompetent defendant for several reasons.

> First, it increases the accuracy and reliability of the trial since an incompetent defendant cannot, for example, adequately testify on his behalf. The requirement also enhances fairness, since an incompetent defendant cannot make decisions regarding the course and nature of his defense. In addition, it maintains the "dignity" of the trial, in that an incompetent defendant may behave in an offensive or inappropriate manner. Finally, a competent defendant's comprehension of why he is being punished makes the punishment more just.[18]

In short, competency to stand trial is an essential part of due process because "the rights deemed essential to a fair trial—including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so"—depend, in large part, upon a defendant's ability to cooperate with counsel and participate in the criminal trial process.[19]

B. Competency Differentiated from Insanity

Competency to stand trial is often confused with insanity. Although the two legal doctrines are related insofar as they are both concerned with the mental status of a criminal defendant, they are quite different on a number of important dimensions.

First, timing is a critical distinction between the two doctrines. Competency to stand trial concerns itself with a criminal defendant's mental state *at the time of trial*.[20] In contrast, insanity is concerned with the defendant's state

[14] James F. Stephen, *A History of the Criminal Law of England*, 341 (1883)

[15] Winick, *supra* note 11, at 575.

[16] *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (guaranteeing right to counsel to all indigent persons in felony trials).

[17] *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending *Gideon* to all misdemeanor trials in which defendants face a potential jail sentence); *cf.* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that so long as an indigent defendant is not actually sentenced to imprisonment, then the state is not required to appoint counsel).

[18] Alaya B. Meyers, *Supreme Court Review: Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence*, 87 J. Crim. L. & Criminology 1016, 1017 (1997) (citing Wayne R. Lafave & Austin W. Scott, Jr., Substantive Criminal Law 4.4(a) (2d ed. 1986)); *see also* Melton et al., *supra* note 10, at 123.

[19] *Riggins v. Nevada*, 504 U.S. 127, 139–40 (1992); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975) (emphasizing that avoiding trial of incompetent defendants is "fundamental to an adversary system of justice").

[20] Stephanie M. Herseth, *Competency to Stand Trial*, 84 Geo. L.J. 1066-67, 1076 n.1418 (1996).

of mind *at the time the criminal offense* is alleged to have taken place.[21]

Second, insanity must generally be asserted by the defendant, usually through defense counsel, in a timely manner in order to be litigated as a criminal defense at trial.[22] If insanity is not pled at arraignment (or by whatever time specified in a jurisdiction's rules of criminal procedure), the defense is deemed waived.[23] Competency to stand trial, though, may be raised at any time in the criminal process, even after conviction.[24] Moreover, although the issue of competency to stand trial is usually raised by the defense,[25] the prosecution can raise the issue, as can the court on its own.[26] If, however, the question of competency to stand trial arises in a manner that renders defense counsel unaware of the fact that a competency evaluation is transpiring—such as prior to the time a defense attorney may be appointed for an indigent defendant—that might violate both the accused's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel at a critical stage of a criminal prosecution.[27]

Once the issue has been duly raised such that the evidence raises a "bona fide doubt" as to competence to stand trial, *Pate v. Robinson* guarantees defendants a constitutionally-based due process right to an adversarial hearing to determine their competency.[28] In contrast, the U.S. Supreme Court has never held there is a constitutional right to present an insanity defense. Indeed, several state high courts of last resort have held no such right exists.[29]

Third, there are significant differences in proving competency to stand trial and insanity. Modern formulations of the insanity defense in most U.S. jurisdictions require the defense to prove the defendant's insanity at trial by clear and convincing evidence, although a handful of jurisdictions require the defendant to prove his or her insanity by only a preponderance of the evidence.[30] In contrast, at a competency hearing, the prosecution typically bears the burden of persuasion to prove that the defendant is competent to proceed with the criminal trial,

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21 Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. Fla. J.L. & Pub. Pol'y 7, 17–18 (2007).

22 *E.g.*, Fed. R. Crim. P. 12.2(a):

If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

23 *Bakic v. United States*, 971 F. Supp. 697, 700 (N.D.N.Y. 1997) (denying petition to set aside conviction and sentence on alleged due process grounds due to insanity since insanity defense was not timely pled); *People v. Low*, 732 P.2d 622, 630 (Colo. 1987) (holding insanity defense not pled at arraignment as required by Colorado statute is deemed waived).

24 Winick, *supra* note 11, at 572.

25 Melton et al., *supra* note 10, at 128 (citing Bruce Winnick, *Incompetency to Stand Trial: Developments in the Law*, *in* Disordered Offenders: Perspectives from Law and Social Science 3 (John Monahan & Henry Steadman eds., 1983)). Note, however, that some commentators believe that "[d]efense attorneys, who are in the best position to notice clients' incompetence, may not raise the issue as often as it should be raised." Melton et al., *supra* note 10, at 130.

26 *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

27 *See*, *e.g.*, *Estelle v. Smith*, 451 U.S. 454, 470 (1980).

28 *Pate*, 383 U.S. at 378 ("the conviction of an accused person while he is legally incompetent violates due process").

29 *State v. Korell*, 690 P.2d 992, 997 (Mont. 1984); *State v. Searcy*, 798 P.2d 914, 917 (Idaho 1990); *State v. Bethel*, 66 P.3d 840, 844 (Kan. 2003); *State v. Herrera*, 895 P.2d 359, 363-64 (Utah 1995).

30 Fradella, *supra* note 21, at 25 (citing 18 U.S.C. § 17 (2007)).

usually by a preponderance of the evidence.[31] There are some jurisdictions that have shifted the burden of persuasion to the defense to prove the incompetency of the defendant by a preponderance of the evidence, a practice the U.S. Supreme Court approved in *Medina v. California.*[32] In *Cooper v. Oklahoma*, however, the Court invalidated statutory schemes that required the defendant to prove incompetence by clear and convincing evidence, finding such a requirement violated the guarantee of due process.[33]

C. When Is a Competency Hearing Required?

If there are no objective grounds for a judge to order a competency determination, it is highly unlikely that a judicial refusal to hold a competency hearing will have any outcome on a case. On the other hand, if there are reasons that call into question the defendant's competency and the trial court judge fails to order a competency evaluation, then serious constitutional concerns can be raised that could invalidate a conviction on appeal or via some post-conviction relief mechanism such as a habeas corpus proceeding.[34] Thus, most requests for a clinical determination of competency to stand trial go unopposed by opposing counsel and are routinely granted by judges.[35]

Judicial willingness to have criminal defendants evaluated for competency to stand trial is likely a function of clear appellate rulings on the consequences of neglecting to conduct such an inquiry: a failure to conduct an evidentiary hearing where evidence before a trial court raises a "bona fide doubt" about the defendant's competency to stand trial violates due process.[36] Although this may appear to be a concise rule, what constitutes a "bona fide doubt" often proves ambiguous, especially since reasonable people can offer differ with respect to whether such a doubt exists given the facts of any particular case. There are no "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed."[37] Rather, a wide range factors can give rise to the need for a formal inquiry into a defendant's competency.[38]

D. Psycho-Legal Focus of the Inquiry into Competency

As the outcome in the *Loyola-Dominguez* case illustrates, once a bona-fide issue regarding the defendant's competency has been raised, the court is constitutionally obliged to make a determination whether the defendant

[31] 18 U.S.C. § 4241(d); *see also United States v. Teague*, 956 F.2d 1427, 1431 n.10 (7th Cir. 1992); *United States v. Frank*, 956 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 506 U.S. 932 (1992); *see generally* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U.L. Rev. 207, 229 n.94 (2008) (comparing approaches taken in different U.S. jurisdictions).

[32] King, *supra* note 31, at 229 n.94; *see also Medina v. California*, 505 U.S. 437, 449–52 (1992) (finding no violation of due process where the state legislature had statutorily imposed on the defendant the burden to prove her own incompetency by a preponderance of the evidence).

[33] *Cooper v. Oklahoma*, 517 U.S. 348, 358–59 (1996) (holding due process is violated when a statute creates a presumption of competency and places the burden on the defendant to prove incompetency by clear and convincing evidence); *see also Medina*, 505 U.S. at 452.

[34] *Cooper*, 517 U.S. at 362–64; *Medina*, 505 U.S. at 452.

[35] Melton et al., *supra* note 10, at 129; Ronald Roesch, Patricia A. Zapf, Stephen L. Golding, & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, *in* the Handbook of Forensic Psychology 327, (Allen K. Hess & Irving B. Weiner eds., 1999).

[36] *Medina*, 505 U.S. at 452; *Pate*, 383 U.S. at 378 (1966).

[37] *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

[38] *See*, *e.g.*, *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997) (holding that a court's cursory in-court colloquy with a defendant was legally insufficient to address the bona-fide question of the defendant's competency when he had attempted to commit suicide the previous night after five months in solitary confinement).

is competent to stand trial. According to the Supreme Court's landmark decision in *Dusky v. United States*, competency to stand trial requires a defendant to possess (1) "a rational as well as factual understanding of the proceedings against him" and (2) "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[39] *Dusky*'s formulation of competency to stand trial was reaffirmed by the U.S. Supreme Court in *Medina v. California*,[40] although several states use slight variations in this language which can muddy the waters on the degree on rational understanding that is required.[41]

The first question under *Dusky*—can the defendant understand the proceedings against him or her—is not directed at whether a defendant understands the intricacies of the criminal process.[42] Rather, it is concerned with whether the defendant has a rudimentary understanding of the circumstances in which he or she finds himself or herself. Put differently, does the defendant appreciate that he or she has been charged with a crime and faces government-imposed punishment if convicted at a trial?[43]

Although not technically a requirement of the *Dusky* test for competency, mental health professionals often consider whether the defendant is oriented with respect to time, place, and situation as part of their inquiry in this phase of the competency evaluation.[44] In other words, does the defendant know who and where he or she is? Without such orientation, it is unlikely that a defendant understands, even in a basic way, the proceedings against him or her. Indeed, a meta-analysis of studies comparing defendants' psychiatric characteristics and competency status found that disorientation was the most common psychotic symptom correlated with a determination of incompetency (r = .43).[45] It should, therefore, come as no surprise that most criminal defendants determined to be incompetent to stand trial are diagnosed with severe mental disorders, such as schizophrenia, bipolar disorder, or schizoaffective disorder.[46]

[39] *Dusky v. United States*, 362 U.S. 402, 402 (1960).

[40] *Medina v. California*, 505 U.S. 437, 448-49 (1992).

[41] For a critique, see Alan R. Felthous, *Competence to Stand Trial Should Require Rational Understanding*, 39 J. Am. Acad. Psychiatry & L. 19 (2011).

[42] Melton et al., *supra* note 10, at 124 ("'Perfect' of complete understanding on the part of the defendant is not required") (citing Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 459 (1967)).

[43] Melton et al., *supra* note 10, at 125 ("[T]he defendant's understanding of criminal proceedings must be rational; just knowing general facts about legal proceedings is not enough.") (citing Fla. R. Crim. Pro. § 3.211(a)(1)–(3)); *see generally* Am. Bar Ass'n, ABA Criminal Justice Standards on Mental Health 7-4.1(b) (2016) [hereinafter "ABA Standards"], which provides:

> The test for determining the defendant's competence to proceed when the defendant is represented by counsel should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of *rational understanding* and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings.
>
> (Emphasis added).

[44] *See*, *e.g.*, Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments 95, (1986) ("Although psychopathological symptoms are by themselves not synonymous with legal incompetency, they are certainly relevant for pretrial competency determinations.").

[45] Robert A. Nicholson & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: a Quantitative Review of Comparative Research*, 109 Psychol. Bull. 355, 360 (1991).

[46] Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions about Competency*, 28 Law & Psychol. Rev. 109 (2004); Karen L. Hubbard, Patricia A. Zapf, & Kathleen A. Ronan, *Competency Restoration: An Examination of the Differences Between Defendants Predicted Restorable and Not Restorable to Competency*, 27 Law & Hum. Behav. 127 (2003); Richard Rogers, J. Roy Gillis, Shelley McMain, & Susan E. Dickens, *Fitness Evaluations: A Retrospective Study of Clinical, Criminal, and Sociodemographic Characteristics*, 20 Canadian J. Behav. Sci. 192 (1988).

The second line of inquiry under *Dusky* concerns whether the defendant is capable of assisting in his or her own defense. If the defendant cannot communicate with his or her attorney in a manner that permits the defense lawyer the ability to formulate a defense, there is little likelihood that the defendant will be found competent.[47]

The competency standard as applied in any particular case tends to be flexible; there is no set of fixed diagnostic criteria that, if satisfied, renders a person either competent of incompetent. In the 1961 case of *Wieter v. Settle*, a federal district court attempted to operationalize *Dusky* by setting forth a list of factors to guide judges in competency decisions.[48] The court stated a defendant would be competent to stand trial if he or she:

1. has the "mental capacity to appreciate his presence in relation to time, place and things";
2. has "elementary mental processes are such that he apprehends (i.e., seizes and grasps with what mind he has) that he is in a Court of Justice, charged with a criminal offense";
3. understands "there is a Judge on the Bench";
4. understands there is "a prosecutor present who will try to convict him of a criminal charge"
5. understands "he has a lawyer (self-employed or Court-appointed) who will undertake to defend him against that charge";
6. understands "he will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed";
7. understands "there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge"; and
8. has "memory sufficient to relate those things in his own personal manner."[49]

Although the factors specified in *Wieter v. Settle* have proven helpful over the years, the court has been criticized for using the term "understanding" without incorporating *Dusky*'s use of both the words "rational" and "factual" to modify the word "understanding" since the inclusion of both words indicates that competency "demands more than simple knowledge of facts and factors relevant to the proceedings, but also an ability to appreciate and consider those facts that is not significantly impaired by mental disorder."[50] Professor Richard Bonnie and the MacArthur Foundation Research Network on Mental Health and the Law developed a framework that distinguished basic, factual

[47] Grisso, *supra* note 44, at 95; Melton et al., *supra* note 10, at 124.

[48] *Wieter v. Setttle*,193 F. Supp. 318, 321–22 (W.D. Mo. 1961).

[49] *Id.*; *see also* Group for the Advancement of Psychiatry, Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial 896–97 (1974) (operationalizing the *Dusky* test for incompetency to stand trial using a list of 21 items that includes criteria such as to "comprehend instructions and advice," "follow testimony for contradictions or errors," "tolerate stress at the trial and while awaiting trial," and "refrain from irrational and unmanageable behavior during the trial").

[50] Randy K. Otto, *Competency to Stand Trial*, 2 App. Psychol. in Crim. Just. 82, 84 (2006); *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. Miami L. Rev. 539, 578 (1993) (criticizing the requirement of "basic understanding"—the ability to understand the nature and consequences of the decision—and instead arguing for a requirement of "basic rationality"—the ability to express plausible, rather than grossly irrational, reasons for the decision, but not necessarily "the ability to make a reasoned choice among alternatives"); Felthous, *supra* note 38, *passim*; Melton et al., *supra* note 10, at 125.

understanding from what Bonnie termed *decisional competence*.[51] Basic competency includes a cognitive understanding the charges, the nature of a criminal prosecution and defense, and a general ability to work with defense counsel.[52] Decisional competence, in contrast, is concerned with the quality of the defendant's understanding and reasoning processes.[53] Marcus and colleagues offered the following example to illustrate the difference between basic competency evidencing a mere factual understanding of the criminal trial process and rational competency:

> [A] defendant who shot a police officer believing him to be the devil could well understand that he is being tried for murder. If, however, he also suffers from companion delusions that as a special agent of God he will receive special consideration by the judge or jury, such delusions would indicate an irrational appraisal of the adjudicative process and of his actual legal jeopardy.[54]

To assist a court in determining whether a defendant possesses sufficient factual and rational understanding to be deemed competent to stand trial under *Dusky*, defendants should be clinically evaluated by qualified mental health experts. All criminal defendants have a Sixth Amendment right to consult with defense counsel before submitting to a court-ordered psychiatric examination.[55] There is no right, however, to have counsel present during the examination.[56]

E. Clinical Evaluation and Assessment Instruments

The assessment of a criminal defendant for competency to stand trial is one of the most important roles mental health professionals play in the criminal process. As a rule, a defendant's competency to stand trial should not be evaluated by his or her treating clinician, but rather by independent mental health professionals to prevent role conflicts, preserve the therapeutic relationship, and to avoid the exposure of "potentially damaging, incriminating, or embarrassing information" that might run afoul doctor-patient confidentiality if disclosed in court.[57]

Although defense attorneys might hire a psychologist, psychiatrist, or licensed clinical social worker to conduct a private assessment of competency to stand trial under conditions that will be protected by relevant privileges and work product protections,[58] most assessments of competency to stand trial are ordered by and delivered to a court.[59]

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[51] Bonnie, *supra* note 50, 554; *see also* Norman G. Poythress, Richard J. Bonnie. John T. Monahan, Randy K. Otto, & Steven K. Hoge, Adjudicative Competence: The MacArthur Studies (2002).

[52] Bonnie, *supra* note 50, 554–67.

[53] Bonnie, *supra* note 50, 567–81.

[54] David K. Marcus, Norman G. Poythress, John F. Edens, Scott O. Lilienfeld, *Adjudicative Competence: Evidence That Impairment in "Rational Understanding" Is Taxonic*, 22 Psychol. Assessment 716, 716–17 (2010).

[55] *Estelle v. Smith*, 451 U.S. 454, 470–71 (1980).

[56] *Buchanan v. Kentucky*, 483 U.S. 402, 421–24 (1987).

[57] Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. Am. Acad. Psychiatry & L. S3, S24 (2007); Harry H. Strasburger, Thomas G. Gutheil. & Archie Brodsky, *On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness*, 154 Am. J. Psychiatry 448 (1997); *see also* Am. Med. Ass'n Council on Ethical & Jud. Aff., Report 12-A-04, Medical Testimony (2004).

[58] Mossman et al., *supra* note 57, at S22 (citing *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Maryland v. Pratt*, 398 A.2d 421 (Md. 1979).

[59] Steven K. Hoge. *Competence to Stand Trial: An Overview*, 58 Indian J. Psychiatry S187 (2016).

> In these circumstances, the mental health professional should disclose to the defendant the nature of the evaluation, who has retained or appointed the evaluator, lack of ordinary doctor–patient confidentiality, possibility that the evaluator may be called on to testify about the evaluation, and right of the defendant not to answer questions.[60]

At one time, psychiatrists competence to stand trial evaluations in state mental hospitals to which defendants were committed for in-patient assessment for a period of one to three months.[61] Today, however, most forensic mental health services are offered outside of the limited space within psychiatric hospitals, typically by psychiatrists, psychologists, or social workers in private practice or by those employed by or contracted with pretrial services divisions within courts or local community mental health centers.[62] The type of clinician may play an important role in the potential outcome of evaluations. A 2008 study by Daniel C. Murray and colleagues reported that that social workers are "3.51 times more likely than psychologists to find a defendant incompetent" and that and psychologists were "2.04 times more likely than psychiatrists to make that same finding."[63]

Clinicians evaluating a defendant's competency to stand trial rely on medical histories, clinical interviews, observations and reports from collateral sources, and a combination of clinical and forensic assessment instruments.[64] Many clinicians rely heavily on traditional assessment instruments designed to measure intelligence and personality, such as the Wechsler Intelligence Scales (WASI, WAIS, WAIS-R, WAIS-III, WAIS-IV) and the Minnesota Multiphasic Personality Inventory (MMPI-2), as well as instruments designed to detect the presence of mental disorders—such as the Brief Psychiatric Rating Scale (BPRS) and the Psychopathy Checklist—Revised (PCL-R).[65] But most forensic mental health professionals also utilize specialized forensic assessment instruments that began to be developed in the mid-1960s to assist clinicians conducting competency to stand trial evaluations.[66] Since then, researchers have developed numerous specialized screening instruments, the most common of which include the Competency Screening Test (CST),[67] the Competency to Stand Trial Assess-

60 *Id.*; *see also* Mossman et al., *supra* note 57, at S26.

61 Melton et al., *supra* note 10, at 130.

62 Melton et al., *supra* note 10, at 130 (citing Thomas Grisso, Joseph J. Cocozza, Henry J. Steadman, William H. Fisher, & Alexander Greer, *The Organization of Pretrial Forensic Evaluations Services: A National Profile*, 18 Law & Hum. Behav. 377, 384–85 (1994)).

63 David Collins, *Re-Evaluating Competence to Stand Trial*, 82 Law & Contemp. Probs. 157 (2019 (citing Daniel C. Murrie, Marcus T. Boccaccini, Patricia A. Zapf, Janet I. Warren & Craig E. Henderson, *Clinician Variation in Findings of Competence to Stand Trial*, 14 Psychol. Pub. Pol'y & L. 177, 181–85 (2008)).

64 Marvin W. Acklin, *The Forensic Clinician's Toolbox I: a Review of Competency to Stand Trial (CST) Instruments*, 94 J. Personality Assessment 220 (2012); Otto, *supra* note 50, at 87–97; Gianni Pirelli, William H. Gottdiener, & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 Psychol., Pub. Pol'y, & L.1, (2011); Patricia A. Zapf, Ronald Roesch, & Gianni Pirelli, *Assessing Competency to Stand Trial*, *in* The Handbook of Forensic Psychology 281 (Irving B. Weiner & Randy K. Otto eds., 4th ed. 2013).

65 *See* Pirelli et al., *supra* note 64, at 4. For more information on the forensic uses of clinical assessment instruments like the MMPI-2, the PCL-R, the BPRS, and the various Weschler scales, see Robert P. Archer, Forensic Uses of Clinical Assessment Instruments (2006). For additional information on the Rorschach, which is less commonly used in competency evaluations, see The Handbook of Forensic Rorschach Assessment (Carl B. Gacono, F. Barton Evans, Nancy Kaser-Boyd, & Lynne A. Gacono eds., 2008).

66 *E.g.*, Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 Am. J. Psychiatry 616 (1965).

67 Paul D. Lipsitt, David Lelos, & A. Louis McGarry, *Competency for Trial: A Screening Instrument*, 128 Am. J.

ment Instrument (CAI),[68] the Computer-Assisted Determination of Competency to Proceed (CADCOMP),[69] the Georgia Court Competency Test (GCCT),[70] the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR),[71] the Evaluation for Competency to Stand Trial—Revised (ECST-R),[72] the Fitness Interview Test Revised (FIT-R),[73] the Interdisciplinary Fitness Interview Revised (IFI-R),[74] the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA),[75] the Metropolitan Toronto Forensic Service Fitness Questionnaire (MFQ),[76] the Mosley Forensic Competency Scale (MFCS),[77] and the Test of Malingered Incompetence (TOMI).[78] But as Justice of the High Court of New Zealand David Collins noted,

> The inherent weakness with any competency screening instrument is that there are no objective criteria against which to test its validity. This is because it is impossible to clinically assess how a defendant found incompetent would in fact perform in a trial setting. Thus, while some screening tools may be useful to differentiate between defendants who are competent to stand trial and those who are not, commentators acknowledge the variability and varying usefulness of competence screening instruments.[79]

Regardless of the assessment instruments that are used, most authorities rely on an

Psychiatry 105, (1971).

[68] Laboratory of Community Psychiatry, Harvard Medical School, Competency to Stand Trial and Mental Illness (1973).

[69] George W. Barnard, John W. Thompson, Jr., William C. Freeman, Lynn Robbins, & Dennis Gies, & Gary C. Hankins, *Competency to Stand Trial: Description and Initial Evaluation of a New Computer-Assisted Assessment Tool* (CADCOMP), 19 Bull. Am. Acad. Psychiatry & L. 367, 369 (1991).

[70] Robert A. Nicholson, Stephen R. Briggs, & Helen C. Robertson, *Instruments for Assessing Competence to Stand Trial: How Do They Work?*, 19 Prof'l Psychol.: Res. & Pract. 383, 384 (1988).

[71] Caroline T. Everington & Charles Dunn, *A Second Validation Study of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)*, 22 Crim. Just. & Behav. 44 (1995).

[72] Richard Rogers, Kenneth W. Sewell, Nicole R. Grandjean, & Michael J., *The Detection of Feigned Mental Disorders on Specific Competency Measures*, 14 Psychol. Assessment 177, (2002).

[73] Patricia A. Zapf, Ronald Roesch, & Jodi L. Viljoen, *Assessing Fitness to Stand Trial: The Utility of the Fitness Interview Test (Revised Version)*, 46 Canadian J. Psychiatry 426, 427 (2001).

[74] Stephen L. Golding, Ronald Roesch & Jan Schreiber, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the IFI*, 8 Law & Hum. Behav. 321 (1984).

[75] Randy K. Otto, Norman G. Poythress, Robert A. Nicholson, John F. Edens, John Monahan, Richard J. Bonnie, Steven K. Hoge, & Marlene Eisenberg, *Psychometric Properties of the MacArthur Competence Assessment Tool—Criminal Adjudication*, 10 Psychol. Assesment 435 (1998).

[76] David Nussbaum, Mini Mamak, Helene Tremblay, Percy Wright, & June Callaghan, *The METFORS Fitness Questionnaire (MFQ): A Self-Report Measure for Screening Competency to Stand Trial*, 16 Am. J. Forensic Psychol. 41(1998).

[77] Dan Mosley, Bruce A. Thyer, & Christopher Larrison, *Development and Preliminary Validation of the Mosley Forensic Competency Scale*, 4 J. Hum. Behav. in the Soc. Envt. 41, (2001).

[78] Kevin Colwell, Lori H., Perry, Ashlie T. Perry, David Wasieleski, & Tod Billings, *The Test of Malingered Incompetence (TOMI): A Forced-Choice Instrument for Assessing Cognitive Malingering in Competence to Stand Trial Evaluations*, 26 Am. J. Forensic Psychol. 17, (2008).

[79] Collins, *supra* note 63, at 178 (citing Patricia A. Zapf & Ronald Roesch, E*valuation of Competence to Stand Trial in Adults*, *in* Forensic Assessments in Criminal and Civil Law: A Handbook for Lawyers 17, 24 (Ronald Roesch & Patricia A. Zapf eds., 2013) ("[T]here can be no hard criterion against which to test the validity of competency evaluations because we do not have a test of how incompetent defendants would perform in the actual criterion situations."); Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments (2nd ed. 2006); Patricia A. Zapf & Jodi L. Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation and Competency to Stand Trial*, 21 Behav. Sci. & L. 351 (2003)).

estimate from the year 2000 that roughly 60,000 clinical assessments of competency to stand trial occur each year in the United States.[80] But because that figure represents a near doubling of high estimates from the early 1970s, the number has competency evaluations has undoubtedly risen substantially in two decades since the 60,000 estimate was published.[81] Consider that competency to stand trial evaluations "in Wisconsin increased 32.5% from 2010 through 2015 … while evaluations in Washington increased 76.3% from 2001 through 2012…. Colorado reported a 206% increase in the number of competence evaluations from 2005 to 2014 …, and Los Angeles county reported a 273% increase from 2010 to 2015."[82] This had led commentators to note that states are struggling to meet the demands for both competency evaluations and subsequent restoration services.[83]

The assessment of the defendant is normally conducted by clinicians appointed by the court who examine the defendant and then submit written reports to the court.[84] The court then decides the issue either based on the stipulation of the parties or after a competency hearing.

F. Competency Hearings

Although statutes or court rules require a formal, adversarial hearing in court to determine competency to stand trial per the mandate of *Pate v. Robinson*,[85] the parties often agree to waive a competency hearing and stipulate to the incompetency of a defendant based on the recommendation of the clinical evaluators.[86] When the prosecution and defense disagree on a defendant's competency to stand trial, though, *Pate* requires the trial court judge conduct an adversarial hearing at which clinical "examiners testify and are subject to cross-examination."[87] In such proceedings in most U.S. jurisdictions, the judge acts as both the arbiter of law and the trier-of-fact, meaning that the ultimate decision regarding a defendant's competency is a judicial one.

Although the determination of competency to stand trial is purely a legal determination—not a clinical one, the importance of the role of the evaluating clinician(s) cannot be overstated. First and foremost, most competency determinations are based on the clinical assessment of a single clinician.[88] Even when multiple clinicians evaluate a defendant's competency to stand trial, they agree unanimously in their initial competency assessments in

[80] Most sources that report this 60,000 figure cite Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* Youth on Trial: A Developmental Perspective on Juvenile Justice 73 (Thomas Grisso & Robert G. Schwartz eds., 2000). *E.g.*, Melton et al., *supra* note 10, at 136 (citing Bonnie & Grisso, *supra* note 79).

[81] For example, Mossman and colleagues noted the significant increase in competency inquiries from a 1973 estimate of 25,000 to 36,000 annual evaluations to the 60,000 that Bonnie and Grisso estimated in 2000. Mossman et al., *supra* note 54, at S3 (citing A. Louis McGarry, Competency to Stand Trial and Mental Illness Health (1973)).

[82] W. Neil Gowensmith, *Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis*, 25 Psychol. Pub. Pol'y & L. 1, 2 (2019) (internal citations omitted).

[83] *Id.* at 2; *see also* Hall Wortzel, Ingrid A. Binswanger, Richard Martinez, Christopher M. Filley, & C. Alan Anderson, *Crisis in the Treatment of Incompetence to Proceed to Trial: Harbiger of a Systematic Illness*, 35 J. Am. Acad. Psychiatry L. 357, 358 (2007).

[84] For a detailed discussion about the evaluation processes and the preparation of reports for submission to courts, see Mossman et al., *supra* note 54, at S31–S51.

[85] *Pate v. Robinson*, 383 U.S. 375, 376(1966).

[86] Melton et al., *supra* note 10, at 130.

[87] Winick, *supra* note 11, at 572.

[88] W. Neil Gowensmith, Daniel C. Murrie, & Marcus T. Boccaccini, *Field Reliability of Competence to Stand Trial Opinions: How Often Do Evaluators Agree, and What Do Judges Decide When Evaluators Disagree?*, 36 Law & Hum. Behav. 130 (2012); Ronald Roesch & Stephen L. Golding, Competency to Stand Trial (1980).

more than 70% of cases[89] and in 61% of subsequent evaluations.[90] Second, and arguably more importantly, judges routinely adopt the recommendation of clinical evaluators in more than 90% of cases.[91] One study even reported a judicial concurrence rate with clinical evaluators' recommendations as high a 99.6%.[92] In the comparatively rare cases in which three or more clinicians differ in their respective assessments of a defendant's competency to stand trial, judges defer to the majority evaluator opinion 64% of the time when two the majority feel the defendant is competent and 95.2% of the time of the majority of clinical evaluators opine the defendant is incompetent.[93]

Noted forensic psychologist Patricia A. Zapf interviewed judges to discern why they defer to clinical opinions so frequently. They reported that judges overwhelming feel that mental health professions are "more qualified" to determine competency that legal professionals are,[94] although other judicial officers argue that trial court judges—not forensic clinicians—should be "at the epicenter of the assessment of a defendant's competence to stand trial."[95]

G. Salient Factors in Competency Determinations

The threshold for finding a defendant to be competent to stand trial is quite low.[96] Thus, although the frequency of both referrals and ultimate decisions regarding competency vary across jurisdictions and situations,[97] between 20% to 30% of those referred for evaluation are found to be incompetent to stand trial whereas the remaining 70% to 80% are eventually ruled competent and face charges accordingly.[98]

Pirelli and colleagues conducted a meta-analysis of 68 studies published between 1967 and 2008 that compared competent and incompetent defendants on a number of demographic (e.g., sex, age, race, education level, employment history, marital status), criminological (e.g., prior arrest history, current charge of violent crime), and psychiatric variables (e.g., psychiatric diagnosis, psychiatric hospitalization history, competency evaluation history).[99] With exception of unemployment status, the most significant correlates among defendants

[89] *Id*, at 133.
[90] *Id.* at 134.
[91] *Id.* at 137 (reporting 92.5% judicial/clinical concurrence rate for initial assessments and 77.4% for subsequent competency evaluations); *see also* Keith R. Cruise & Richard Rogers, *An Analysis of Competency to Stand to Stand Trial: an Integration of Case Law and Clinical Knowledge*, 16 Behav. Sci. & L. 35 (1998); Ian Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand Trial*, 19 Int'l J.L. & Psychiatry 39 (1996); Stephen D. Hart & Robert D. Hare, *Predicting Fitness to Stand Trial: The Relative Power of Demographic, Criminal, and Clinical Variables*, 5 Forensic Rep. 53 (1992); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competence to Stand Trial*, 47 Clinical Psychiatry 29 (1986).
[92] Patricia A. Zapf, Karen L. Hubbard, Virginia G. Cooper, Melissa C. Wheeles, & Kathleen A. Ronan, *Have the Courts Abdicated Their Responsibility for Determinations of Competency to Stand Trial to Clinicians?*, 4 J. Forensic Psychol. Prac. 27 (2004).
[93] Gowensmith et al., *supra* note 88, at 134.
[94] Zapf et al., *supra* note 92, at 35.
[95] Collins, *supra* note 63, at 189 (arguing for adoption in the United States of the "effective participation test" that is embraced in most of the United Kingdom and by the European Court of Human Rights because "the assessment of a defendant's ability to effectively participate in her trial is quintessentially a judicial decision that is based upon a trial judge's knowledge of what the defendant needs to understand, evaluate, decide, and communicate in the context of her trial" *id.*).
[96] *Id.* at 167 (noting that there is a "high substantive bar to determining that a defendant is incompetent").
[97] Murrie et al., *supra* note 63, at 179 (noting that jurisdictions "differ in terms of referral patterns, the sophistication of the forensic mental health system, the availability of non-forensic mental health services, or other relevant factors").
[98] Gowensmith et al., *supra* note 88, at 133; Pirelli et al., *supra* note 64, at 13.
[99] Pirelli et al., *supra* note 64, at 7–12.

found incompetent to stand trial were not demographic or criminological characteristics, but rather were clinical ones: "Most incompetent defendants were diagnosed with a Psychotic Disorder (66.5%) and had a previous psychiatric hospitalization (53.4%)."[100]

1. Psychotic Symptoms and Incompetency

In their meta-analysis, Pirelli and colleagues reported that "defendants diagnosed with a Psychotic Disorder were nearly eight time more likely to be found incompetent than those without such a diagnosis."[101] These findings lend further support to prior research that found defendants determined to be incompetent to stand trial frequently performed poorly on tests specifically designed to assess legally relevant functional abilities; were diagnosed with psychotic disorders; and exhibited psychiatric symptoms indicating severe psychopathology.[102]

Nicholson and Kugler reported that the following symptoms associated with psychotic disorders were the most common ones found in defendants determined to be incompetent to stand trial: disorientation (78%), impaired judgment (69%), impaired thought and communication (68%), hallucinations (61%), delusions (58%), impaired memory (52%), disturbed behavior (51%), and affective disturbance (27%).[103] Several of these symptoms are likely obvious to legal actors in spite of their lack of training in mental health. "For instance, the commonly thought of psychotic who is attending to voices in his/her head rather than to the examiner is easy to identify as impaired. Thus, in one of the few studies comparing competency referred and non-referred clients, the most important predictor of referral was disorganized speech."[104]

The symptoms that suggest significant cognitive impairment are not easily connected to the question of competency because, unlike differential diagnosis of mental illnesses that hinge on the presence or absence of specific symptoms, competency to stand trial is functionally-based. Consider some of the other symptoms of thought disorder related to verbal communication that might manifest as poverty of speech, pressured speech, or poverty of content. The presence of any of these symptoms clearly would make communications between attorney and client challenging, but the relevant question is "*how* the symptom interferes or does not interfere with the interactive dialogue."[105] As psychologist Patricia Zapf argued in her doctoral dissertation, "what makes an individual competent is … *cognitive organization*."[106] Because such organization is often lacking in persons with psychotic symptoms, it is both intuitive and empirically predictable that such psychopathology is strongly associated with incompetency.[107] Nonetheless, it is important to keep in mind that cognitive difficulties,

[100] *Id.* at 15.
[101] *Id.* at 16.
[102] *See*, *e.g.*, Nicholson & Kugler, *supra* note 42, at 359–60; *see also* Jodi L. Viljoen & Patricia A. Zapf, *Fitness to Stand Trial Evaluations: A Comparison of Referred and Non-Referred Defendants*, 1 Int'l J. Forensic Mental Health 127 (2002).
[103] Nicholson & Kugler, *supra* note 45, at 361.
[104] David Freedman, *When Is a Capitally Charged Defendant Incompetent to Stand Trial?*, 32 Int'l J.L. & Psychiatry 127, 131 (2009) (citing Lisa M. Berman, & Yvonne H. Osborne, *Attorneys' Referrals for Competency to Stand Trial Evaluations: Comparisons of Referred and Nonreferred Clients*, 5 Behav. Sci. & L. 373 (1980).
[105] *Id.* at 132.
[106] Patricia A. Zapf, An Investigation of the Construct of Competence in a Criminal and Civil Context: A Comparison of the FIT, the MacCAT-CA, and the MacCAT-T 78 (July 1998) (unpublished Ph.D. dissertation, Simon Fraser University), https://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp03/NQ37773.pdf.
[107] *See*, *e.g.*, Nussbaum et al., *supra* note 73, at 59 ("Empirically, we have provided initial evidence that the legal

alone, are an insufficient basis for determining a defendant is not competent to stand trial. Rather, as explain below,[108] the clinicians conducting a competency assessment need to determine whether such deficiencies functionally impair a defendant's "psycholegal abilities" under *Dusky*.[109]

2. Intellectual Disability and Incompetency

Although the U.S. Supreme Court held in *Atkins v. Virginia* that the Eighth Amendment bars the execution of capital defendants with a diagnosis of intellectual disability (formerly mental retardation), it does not follow that the intellectually disabled are not competent to stand trial.[110] Fewer than 10% of adults found incompetent to stand trial have a diagnosis of intellectual disability.[111] And among those defendants with a diagnosis of intellectual disability, just over half (51%) were found incompetent to stand trial, while the other 49% were not.[112] This may be a function of the fact that "defendants with an IQ of 60 to 70 who fall in the mild mental retardation range are often able to meet minimal competency standards."[113]

3. Amnesia and Incompetency

As with psychoses and intellectual disability, the inability to remember events does not necessarily give rise to incompetency to stand trial.[114] "From a practical and theoretical standpoint, true inability to remember circumstances surrounding an alleged offense certainly impairs the defendant's ability to assist in his defense. For example, a defendant may be the only person who has knowledge of an alibi that could form the basis of an acquittal."[115] But courts are particularly dubious of claims of amnesia, especially when confined to the time period surround the alleged offense.[116] Melton and colleagues report that this distrust is well founded since empirical research demonstrates that upwards of a quarter of male forensic inpatients charged with serious crimes claimed either partial or total amnesia.[117]

Because amnesia can be faked, it is essential for clinicians not only to review a defendant's medical history, but also to administer psychological tests that include assessments for malingering.[118] If it appears to be genuine, the relating the amnesia to the functional requirements under *Dusky* is essential for a finding a incompetency.[119]

fitness concept appears grounded within a cognitive psychological foundation.").

[108] See *infra* at Part II, Section G.5.

[109] Pirelli et al., *supra* note 64, at 34.

[110] *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

[111] Otto, *supra* note 47, at 100.

[112] Nicholson & Kugler, *supra* note 42, at 361.

[113] *Id.* at 364 (citing Anasseril E. Daniel & Karl Menninger, *Mentally Retarded Defendants: Competency and Criminal Responsibility*, 4 Am. J. Forensic Psychiatry 145 (1983)).

[114] Mossman et al., *supra* note 54, at S16–S17, S49 (citing, *inter alia*, Steven K. Hoge, Norman Poythress, Richard J. Bonnie, John Monahan, Marlene Eisenberg, & Thomas Feucht-Haviar, *The MacArthur Adjudicative Competence Study: Diagnosis, Psychopathology, and Competence-Related Abilities*, 15 Behav. Sci. & L. 329, 329-45 (1997)); *see also* Melton et al., *supra* note 10, at 126–27.

[115] Mossman et al., *supra* note 57, at S44.

[116] Melton et al., *supra* note 10, at 126.

[117] *Id.* at 126 n.25 (citing Maaike Cima, H. L. I. Nijman, Harald Merckelbach, Kathleen Kremer, & S. Hollnack, *Claims of Crime-Related Amnesia in Forensic Patients*, 27 Int'l J.L. & Psychiatry 215, 218 (2004)); *see also* Dominique Bourget & Laurie Whitehurst, *Amnesia and Crime*, 35 J. Am. Acad. Psychiatry & L. 469, 477 (2007).

[118] Mossman et al., *supra* note 57, at S55.

[119] *Id.* at S16–S17; *see also Wilson v. United States*, 391 F.2d 460, 463-64 (D.C. Cir. 1968). The *Wilson* case instructed trial court judges to rule on an amnestic defendant's competency by examining how the amnesia "actually affected the fairness of the trial" using the following six factors:

the effect of the amnesia on the defendant's ability to

4. Other Mental Disorders and Incompetency

Mood disorders can negatively impact "attention, perception, concentration, and memory," thereby derailing "one or more of the stages of competence-relevant decision-making."[120] Nonetheless, courts have all but rejected the notion that depression and other mood disorders (other than bipolar disorders with psychotic features) are significant contributors to incompetence.[121] The same holds true for most anxiety disorders—including PTSD,[122] although such mental illnesses may be relevant to adjudicating criminal responsibility or for the purposes of mitigation at sentencing.[123]

5. Beyond the Diagnostic Threshold

As the previous sections should make clear, although a broad range of significant psychiatric diagnoses and attendant symptomology may impair both cognition and affect in ways that might run afoul the mandates of *Dusky*, the threshold for competency to stand trial is so low that only a narrow class of severe mental illnesses typically renders a defendant incompetent to stand trial. In short, a diagnosis of a either a psychotic disorder or a severe organic brain deficit, such as dementia or severe levels of intellectual disability, serves as a functional prerequisite for most courts to find defendants competent to stand trial. But such a diagnosis "is merely the first step in finding a defendant incompetent to stand trial."[124] The key to a determination is relating the impairments to the defendant's ability to functionally understand and perform *Dusky*'s trial-related abilities.

> Consider, for example, a defendant who has grandiose religious delusions and who therefore believes that no earthly court can punish him. This defendant may have an accurate factual understanding of the legal process as it applies to "ordinary" humans but

consult with and assist his lawyer; the effect of the amnesia on the defendant's ability to testify; how well the evidence could be extrinsically reconstructed, including evidence relating to the alleged offense and any plausible alibi; the extent to which the government assisted the defense in this reconstruction; the strength of the prosecution's case, including the possibility that the accused could, but for his amnesia, establish an alibi or other defense; and "[a]ny other facts and circumstances which would indicate whether or not the defendant had a fair trial."

Mossman et al., *supra* note 57, at S17 (quoting *Wilson*, 391 F.2d at 464); *see* also *United States v. Andrews*, 469 F.3d 1113, 1119 (7th Cir. 2006) (listing similar criteria); *United States v. Stubblefield*, 325 F. Supp. 485, 486 (D. Tenn. 1971) (emphasizing the prosecution's special obligations to cooperate with the defense to reconstruct events and possible defenses).

[120] Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 Am. Crim. L. Rev. 1375, 1410 (2006) (citing, inter alia, 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 1338–77 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000)).

[121] *Id.* at 1412 ("the academic literature and case law generally do not reflect any significant examination of the effects of depression, whether unipolar or bipolar, on adjudicative competence").

[122] *See*, *e.g.*, *United States v. Tracy*, 36 F.3d 187, 188–89 (1st Cir. 1994) (noting that a Vietnam veteran with PTSD was determined to be competent to stand trial); *Warren v. Schriro*, 162 Fed. Appx. 705, 707–09 (9th Cir. 2006) (upholding conviction and sentence for defendant with PTSD over objection that the diagnosis interfered with his competency to stand trial).

[123] *See*, *e.g.*, Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. Fla. J.L. & Pub. Pol'y 7, 11 (2007) (discussing how PTSD can be used to support insanity and diminished capacity defenses); *see also Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (holding that a failure to present mitigating evidence concerning a defendant's impaired mental health, which included PTSD, during the penalty phase of a capital trial constituted ineffective assistance of counsel).

[124] Roesch & Zapf, *supra* note 79, at 20; *see also* Patricia A. Zapf, Jennifer L. Skeem, & Stephen L. Golding, *Factor Structure and Validity of the MacArthur Competence Assessment Tool—Criminal Adjudication*, 17 Psychol. Assessment 433, 433 (2005) ("the presence of cognitive disability or mental disorder is merely a threshold issue that must be established to 'get one's foot in the competency door'").

> cannot recognize that he faces potential imprisonment if found guilty. In this situation, the … delusions affect the defendant's ability to participate rationally in the legal process.
>
> By contrast, a defendant may display indicia of mental illness (including signs or symptoms of a psychosis) that do not impair rational understanding of the trial process. For example, a defendant's persistent delusional belief that his ex-wife had an affair 10 years ago may cause no impairment in his ability to understand and proceed with adjudication on a burglary charge.[125]

Similarly, someone who is mentally ill might refuse to work with his or her attorney for reasons of voluntary/volitional noncooperation. Such reasons would not form the basis of an incompetency finding. But if a defendant refuses to assist his or her defense counsel for reasons directly related to psychopathology—such as irrational or paranoid thinking attendant to a psychotic disorder or extreme hopelessness attendant to major depression, then there may be grounds for a finding of incompetency.[126] For instance, a defendant "who refuses to speak with his attorney because he delusionally believes his attorney is an undercover FBI agent working for the prosecution provides an example of how a psychiatric symptom can impede collaboration with defense counsel."[127]

[125] Mossman et al., *supra* note 57, at S46.
[126] Melton et al., *supra* note 10, at 124.
[127] Mossman et al., *supra* note 57, at S46.

H. After a Competency Determination

After evaluation, if court determines that a criminal defendant is competent to stand trial, the case proceeds.[128] Such a determination of competency does not prevent the defendant from asserting the insanity defense for many of the reasons discussed above, the most important of which is the issue of timing since competency deals with the defendant's state of mind at the time of trial and insanity deals with the defendant's state of mind at the time of the alleged offense.[129]

The more difficult scenario is when a court adjudicates a defendant incompetent to stand trial. If an incompetent defendant is charged with only minor offenses, the American Bar Association urges that the charges either be dismissed or that the defendant be placed into a diversion program in which he or she will be given treatment.[130] This practice is common in jurisdictions that have enacted statutory provisions or case law in accordance with the ABA's recommendation.[131] If, however, one of these options does not occur, or if the defendant is charged with a more serious offense, the normal course of events would be for the court to "suspend the criminal proceedings and remand the defendant for treatment, typically on an in-patient basis. Treatment is not designed to cure the defendant, but to restore competency."[132] This is usually accomplished via "the administration of psychotropic medication, mental health treatment to alleviate symptoms of mental illness, and legal educa-

[128] Melton et al., *supra* note 10, at 131.
[129] *See* sources cited *infra* at notes 17–30 and accompanying text.
[130] ABA Standards, *supra* note 43, at 208.
[131] Melton et al., *supra* note 10, at 131 (citing Ariz. Rev. Stat. § 13-4504(a); Cal. Penal Code § 1370.2; Onwu v. State, 697 So. 2d 881 (Fla. 1997)).
[132] Winick, *supra* note 11, at 572; *see also* Melton et al., *supra* note 10, at 131.

tion … designed to familiarize patients with the justice system and trial process."[133]

1. In-Patient Restoration and Alternatives to It

Referrals for competency restoration have outpaced the ability of jurisdictions to provide such services, especially as the number of available state hospital beds has declined.[134] People adjudicated incompetent to stand trial "are routinely placed on lengthy wait-lists, biding their time in jail until a highly sought-after hospital bed opens up. This 'logjam' in jail can last for months, if not years."[135] To address these problems, some states have experimented with jail-based competency restoration services even though mental health professionals, disability rights advocates, and many legal commentators agree that jails are not proper venues to deliver mental health services.[136]

Other states are trying community-based restoration programs. At least thirty-five states have statutorily authorized such practices,[137] although only approximately sixteen states have implemented such programs.[138] Given some stark differences in the ways these states have designed and implemented such programs, it is difficult to compare their efficacy to each other and to more traditional in-patient restoration processes. It spite of such methodological difficulties, it appears they are somewhat effective in that most report that they successfully restored more than 60% of defendants to competency not only in less time than restoration takes in in-patient programs, but also for less money.[139] Still, these conclusions may be a function of selection bias since defendants admitted to community-based restoration programs often have less serious mental illnesses than those defendants whose mental disorders disqualify them for anything other than in-patient restoration services.[140]

2. Time Limits on Restoration

After a period of evaluation often set by statute (often between three and six months), if the mental health professionals providing res-

[133] Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act under* Olmstead V. L.C., 32 Geo. J. Legal Ethics 525, 540 (2019) (citing Kelly Goodness & Alan R. Felthous, *Treatment for Restoration of Competence to Stand Trial*, *in* Principles and Practices of Forensic Psychiatry 259 (Richard Rosner & Charles Scott eds., 3d ed. 2017)).

[134] *Id.* at 530–31; Wortzel et al., *supra* note 80, at 358; *see also* Doris A. Fuller, Elizabeth Sinclair, Jeffrey Geller, Cameron Quanbeck, & John Snook, Going, Going, Gone: Trends and Consequences of Eliminating State Psychiatric Beds, 2016 (2016), https://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf.

[135] Douglas, *supra* note 133, at 527.

[136] *Id.* at 550 (citing Craig Haney, *"Madness" and Penal Confinement: Some Observations on Mental Illness and Prison Pain*, 19 Punishment & Soc'y 3, 311, (2017); Reena Kapoor, *Commentary: Jail-Based Competency Restoration*, 39 J. Am. Acad. Psychiatry L. 311, 312 (2011); *Expanding Jail-Based Competency Restoration Takes Us Farther Off Course*, The Equitas Project (Feb. 12, 2018), https://www.equitasproject.org/2018/02/12/expanding-jail-based-competency-restoration-takes-us-farther-off-course/; Terry A. Kupers, *Mental Health Jails: A Foolhardy Solution for a Huge Problem*, Psychol. Today (Dec. 9, 2017), https://www.psychologytoday.com/us/blog/prisons-and-prisms/201712/mental-health-jails; H. Richard Lamb & Linda E. Weinberger, *The Shift of Psychiatric Inpatient Care From Hospitals to Jails and Prisons*, 33 J. Am. Acad. Psychiatry L. 529, 531–32 (2005)).

[137] Douglas, *supra* note 133, at 566; Amanda Wik, *Alternatives to Inpatient Competency Restoration Programs: Community-Based Competency Restoration Programs*, NRI. org (Oct. 31, 2018), http://www.nri-inc.org/our-work/nri-reports/alternatives-to-inpatient-competency-restoration-programs-community-based-competency-restoration-programs/.

[138] Wik, *supra* note 137, at 2; *see also* W. Neil Gowensmith, Lynda E. Frost, Danielle W. Speelman, & Danielle E. Therson, *Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration as a Promising Approach to Modern Challenges*, 22 Psychol., Pub. Pol'y, & L. 293, 300 (2016).

[139] Gowensmith et al., *supra* note 138, at 299–300; Wik, *supra* note 137, at 15.

[140] Gowensmith et al., *supra* note 138, at 302; Wik, *supra* note 134, at 15.

toration services believe that a defendant can be restored to competency, the defendant will remain for treatment and the government must report to the court on the defendant's progress at regularly. Assuming the original belief of the psychiatric staff was correct and the defendant is restored to competency, he or she will then face trial.

On the other hand, if the defendant's condition is fixed and the mental health professionals do not believe the defendant's condition will improve, the defendant may not be held indefinitely. This was not always the case, though. Until the U.S. Supreme Court's decision in *Jackson v. Indiana*,[141] defendants found incompetent to stand trial were routinely kept hospitalized indefinitely, often for a period of time that was in excess of the maximum sentence that could have been imposed had they been convicted, "with treatment being only a secondary objective."[142] And in some cases, such defendants were kept hospitalized for the remainder of their lives.[143] *Jackson* changed that state of affairs by holding, on both due process and equal protection grounds, that a defendant committed after a finding of incompetency to stand trial could not "be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[144] Notably, though, the "Court did not define what it meant by 'substantial probability'" or 'reasonable period of time.'"[145]

Since *Jackson*, a defendant found incompetent to stand trial can only be kept confined if the treatment he or she is receiving while committed is likely to restore capacity in the foreseeable future—not at some distant point in time. Most research suggests that six months is a sufficient period of time to restore between 75% and 85% of criminal defendants to competence if restoration appears possible (which may be the case for those with severe intellectual disabilities),[146] although many state laws provide up to one, three, five, or even ten years to restore competency.[147] That said,

> Thirty percent of the states set no time limit on the confinement of those found incompetent; 22% set the upper limit according to the offense with which the defendant was charged; 20% identify terms of between one and ten years; and 28% identify a period of one year or less. This variability smacks of the very arbitrariness and irrationality that the *Jackson* decision was meant to prevent.[148]

If the treatment being provided to the defendant either does not advance the defendant toward competency, or alternatively ad-

[141] *Jackson v. Indiana*, 406 U.S. 715, 729–31 (1972).
[142] Melton et al., *supra* note 10, at 131 (citing Ronald Roesch & Stephen Golding, *Treatment and Disposition of Defendants to Stand Trial: A Review and Proposal*, 2 Int'l J.L. & Psychiatry 349, 349–50 (1979)).
[143] James J. Gobert, *Competency to Stand Trial: A Pre-and-Post* Jackson *Analysis*, 40 Tenn. L. Rev. 659, 683 (1973).
[144] *Id.* at 660.
[145] Melton et al., *supra* note 10, at 132.
[146] Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 Behav. Sci. & L. 369, 379 (2003); Stephen G. Noffsinger, *Restoration to Competency Practice Guidelines*, 45 Int'l J. Offender Therapy & Comp. Criminology 356 (2001); Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 New Eng. J. on Crim. & Civ. Confinement 81 (2005); Patricia A. Zapf & Ronald Roesch, *Future Directions in Restoration of Competency to Stand Trial*, 20 Current Directions Psychol. Sci. 43 (2011).
[147] For a review, see Nicholas Rosinia, *How "Reasonable" Has Become Unreasonable: A Proposal for Rewriting the Lasting Legacy of* Jackson v. Indiana, 89 Wash. U.L. Rev. 673 (2012).
[148] Melton et al., *supra* note 10, at 132.

vances the defendant only marginally without a fair probability that competency will be restored within the foreseeable future, "then the state must either institute customary civil commitment proceedings to detain the defendant, or release the defendant."[149] To prevent such a person from being released, the state must show that a person poses a danger to himself or herself or to others.[150] Without proving such dangerousness by clear and convincing evidence, a person cannot be civilly committed lawfully and must therefore be released.[151]

I. The Quandary Presented by Synthetic Competency

The issue of competency has been greatly impacted by the advent of antipsychotic medications. Antipsychotic drugs are frequently used in an attempt to restore an incompetent defendant to competency.[152] The first generation of these drugs, sometimes called "typical" antipsychotics (e.g., Haldol, Mellaril, Moban, Navane, Perphenazine, Prolixin, Stelazine, and Thorazine) were introduced in the 1950s and 1960s.[153] These drugs caused significant adverse side effects, including extrapyramidal symptoms (involuntary movements), which can become irreversible in long-term use patients—a condition termed *tardive dyskinesia.*[154]

Clozapine, the first of the second generation of antipsychotic medications, often called atypical neuroleptics, was first developed in 1958, but was not reintroduced until 1989.[155] Through selective targeting of certain neurotransmitter receptors, Clozapine produced greater therapeutic effects in patients who respond poorly to treatment with typical antipsychotics while carrying a significantly lower risk of extrapyramidal side effects; however, it carried the risk of causing severe agranulocytosis—a potentially life-threatening condition in which a major class of infection-fighting white blood cells are reduced to the point that the immune system is unable to fight a wide range of infections.[156] In the 1990s, though, other atypical neuroleptics (e.g., risperidone and olanzapine) became available that carry an even "lower incidence of extrapyramidal symptoms/tardive dyskinesia and do not share clozapine's risk of agranulocytosis.[157] These drugs cause a variety of metabolic side effects ranging from weight gain to hypertension, coronary artery disease, and diabetes.[158]

[149] Winick, *supra* note 11, at 580.

[150] *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) ("…a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends").

[151] *See*, *e.g.*, *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves … however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others.").

[152] *See*, *e.g.*, David M. Siegel, Albert J. Grudzinskas, Jr., & Debra A. Pinals, *Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal Defendant*, 2001 Wis. L. Rev. 307, 312-13 (2001); *See also* Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of* Riggins v. Nevada, 10 N.Y.L. Sch. J. Hum. Rts. 637, 6430-46 (1993); *See also* Bruce J. Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 Am. B. Found. Res. J. 769, 770-71 (1977).

[153] *See generally* Chaitra T. Ramachandraiah, Narayana Subramaniam, & Manuel Tancer, *The Story of Antipsychotics: Past and Present*, 51 Indian J. Psychiatry 324 (2009); Winston W. Shen, *A History of Antipsychotic Drug Development*, 40 Comprehensive Psychiatry 407 (1999).

[154] *See generally* Daniel E. Adkins et al., *Genomewide Pharmacogenomic Study of Metabolic Side Effects to Antipsychotic Drugs*, 16 Molecular Psychiatry 321, (2011).

[155] Ramachandraiah et al., *supra* note 153, at 326.

[156] Adkins et al., *supra* note 154, at 321.

[157] *Id.* at 322.

[158] *Id.*

Both first- and second-generation antipsychotics alter brain chemistry by regulating neurotransmitters.[159] In doing so, these drugs can "enable the incompetent individual affected by psychosis to possibly think more clearly or control his emotions in such a way as to prevent them from interfering with his rational thinking process."[160] This process of using antipsychotics drugs to restore competency, which has been termed both *synthetic competency* and *artificial competency* by different commentators,[161] raises clinical and ethical issues that are beyond the scope of this Article.[162] Synthetically restoring competency also raises legal policy concerns of constitutional dimensions.[163]

1. Synthetic Competency as a Function of Controlling a Dangerous Inmate

In *Washington v. Harper*, the U.S. Supreme Court grappled with whether a correctional inmate may be forcibly medicated while imprisoned.[164] Given the adverse side effects the drugs can cause, the Court recognized that an individual possesses a significant, constitutionally-protected liberty interest in "avoiding the unwanted administration of antipsychotic drugs."[165] But this interest yields to the government's legitimate penological interests in protecting correctional staff, other inmates, and mentally-ill offenders themselves, provided that psychiatrists determine that inmates are "gravely disabled or represent a significant danger to themselves or others" due to mental illness.[166] Under such circumstances, the forced administration of antipsychotics is constitutionally permissible if "treatment is in the inmate's medical interest."[167]

2. Synthetic Competency Beyond Harper

Having recognized a constitutionally-protected liberty interest in "avoiding involuntary administration of antipsychotic drugs," the U.S. Supreme Court held in *Riggins v. Nevada* that due process prohibits the state from forcibly medicating a criminal defendant during an insanity defense trial without a judicial determination that there were no "less intrusive alternatives," that the antipsychotics were "medically appropriate," and that forced administration of the drug was "essential" for the sake of defendant's safety or the safety of others.[168] Although *Riggins* did not squarely address competency to stand trial, the decision intonated that forcibly medicating a criminal defendant to restore competency to stand trial would be constitutionally permissible under some circumstances.[169] The Supreme Court specifically held so in *Sell v. United States*, but set forth criteria designed to protect both interests of the state and the defendant.[170]

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[159] *Id.*

[160] Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 Ark. L. Rev. 361, 376 (1994).

[161] *See* Henry F. Fradella, *Competing Views on the Quagmire of Synthetically Restoring Competency to Be Executed*, 41 Crim. L. Bull. 447 (2005); *See also* Thomas G. Gutheil & Paul S. Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77, 77-78 (1983).

[162] *See*, *e.g.*, Gerald J. Schaefer, *Drug-Induced Alteration of Psychotic Behavior: Who Benefits?*, 9 J.L. & Health 43, 44-45 (1994/1995); David M. Siegel, *Involuntary Psychotropic Medication to Competence: No Longer an Easy* Sell, 12 Mich. St. U. J. Med. & L. 1, 3-4 (2008); Christopher Slobogin, Minding Justice (2006).

[163] *Id.* at 57.

[164] *Washington v. Harper*, 494 U.S. 210, 210 (1990).

[165] *Id.* at 221.

[166] *Id.* at 226.

[167] *Id.* at 227.

[168] *Riggins v. Nevada*, 504 U.S. 127, 133-35 (1992).

[169] For an analysis of this point, see Bruce J. Winick, *New Directions in the Right to Refuse Mental Health Treatment: the Implications of* Riggins v. Nevada, 2 Wm. & Mary Bill Rts. J. 205, 206-08 (1993).

[170] *Sell v. United States*, 539 U.S. 166, 179 (2003).

Under *Sell*, antipsychotic drugs can be forcibly administered to a criminal defendant to restore his or her competency to stand trial only if the trial court issues findings that four criteria are met.[171] First, there must be "important governmental interests . . .at stake".[172] The *Sell* Court recognized an "important" governmental interest in trying a defendant accused of "a serious crime against the person or a serious crime against property" in light of the criminal law's fundamental purpose of protecting "the basic human need for security."[173] The Court cautioned, however, that:

> [s]pecial circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime. . . . And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects but does not totally undermine the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed . . . Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.[174]

Second, involuntary medication must "significantly further" the government's concomitant interests insofar as being "substantially likely to render the defendant competent to stand trial" while simultaneously being "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair."[175]

Third, involuntary medication must be "*necessary* to further those interests."[176] Thus, trial courts must find that "any alternative, less intrusive treatments"—such as nondrug therapies—"are unlikely to achieve substantially the same results."[177] This criterion is likely to be satisfied only in cases in which the defendant presents with "one of three types of psychological conditions: (1) schizophrenia, schizoaffective disorder, and other psychotic disorders; (2) bipolar and other mood disorders; and (3) melancholic depression."[178]

Finally, administration of the antipsychotic drugs must be "medically appropriate" insofar as they are "in the patient's best medical interest" in light of his or her psychiatric condition.[179]

3. Applying Sell

Given the requirements of *Sell*, the Court noted that involuntary administration

[171] *Id*, at 167.
[172] *Id.* at 180.
[173] *Id.*
[174] *Id.*
[175] *Id.* at 181.
[176] *Id.* ~~(italics in original).~~
[177] *Id.*
[178] *Developments in the Law—the Law of Mental Illness: Sell v. United States: Forcibly Medicating the Mentally Ill to Stand Trial*, 121 Harv. L. Rev. 1121, 1122 (2008).
[179] *Sell*, 539 U.S. at 181.

of psychotropic medication to restore competency to stand trial may only be appropriate in "rare" instances.[180] But lower courts applying *Sell* have not interpreted the precedent narrowly, so it would be a mistake to read *Sell* as having created a strong right for those found incompetent to stand trial to refuse unwanted medication.[181]

Sell did not establish any standards of proof. At least two circuit courts of appeal have ruled, though, that the clear and convincing evidence standard applied in *Riggins* extends to *Sell*.[182] But problems with *Sell* go beyond the burden of persuasion. Perhaps as a function of balancing tests embedded in each of *Sell*'s criterion, lower courts applying *Sell* have ruled inconsistently on all four of *Sell*'s factors.[183] Consider the question of whether important governmental interests justify forcibly medicating a defendant.

In violent felony cases, the first *Sell* factor almost always tips in favor of forcibly medicating a defendant to restore competency. The designation as a felony, however, is not necessarily determinative, as some courts have held that select nonviolent felonies were not "serious crimes" under *Sell*'s first prong.[184] Moreover, even when select nonviolent felonies such as conspiracy, fraud, and identity theft are deemed to be "serious crimes" within the *Sell*'s first criterion, special circumstances may undermine the government's interest in prosecution.[185] Similarly, a misdemeanor designation does not necessarily determinative of *Sell*'s first factor in the converse direction. Although courts have ruled that misdemeanor offenses are not "serious crimes" and, therefore, the governmental interest at stake in trying an incompetent defendant is diminished,[186] other courts have decided that a misdemeanor offense for which a defendant could be sentenced to six months or more of imprisonment constitutes a "serious crime" in spite of its nonfelony designation.[187] "Given the conflicting interpretations across jurisdictions, mental health clinicians are in an uncomfortable, if not untenable, position."[188]

Even when the *Sell* factors balance clearly in favor of forcibly medicating a defendant to restore competency to stand trial, *Riggins v. Nevada* remains a concern.[189] *Riggins* involved a defendant who had been found mentally competent to stand trial after being treated with Mellaril (an antipsychotic) and Dilantin (an anticonvulsant).[190] But he did not want to be on any psychotropic medication during his trial during which he had asserted the insanity de-

[180] *Id.* at 180.

[181] Melton et al., *supra* note 10, at 134.

[182] *United States v. Gomes*, 387 F.3d. 157, 160 (2d Cir. 2004); *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1224 (10th Cir. 2007).

[183] *Developments in the Law*, *supra* note 173, at 1121–33.

Lower courts have not consistently applied the *Sell* standards, perhaps because the case asked lower courts to judge defendants according to standards that are ill-suited for application as bright-line rules. In both the importance and medical appropriateness prongs, courts have diverged from the *Sell* mandate, reading something that was not quite there into the case and overlooking what was—no doubt because *Sell* required judges to wrestle with difficult questions.

Id. at 1132–33; *see also* Lea Ann Preston-Baecht, *Federal Courts' Interpretations of* Sell v. U.S., 37 J. Psychiatry & L. 413, 413-15 (2009).

[184] *E.g.*, *United States v. Barajas-Torress*, 2004 WL 1598914 *1, *2 (W. D. Tex. 2004). For an in-depth analysis of several such cases, see Preston-Baecht, *supra* note 178, *passim*.

[185] *E.g.*, *United States v. White*, 620 F.3d 401, 402 (4th Cir. 2010).

[186] *E.g.*, *United States v. Kourey*, 276 F. Supp. 2d. 580, 585 (S.D. W.Va. 2003).

[187] *E.g.*, *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005) (*citing Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

[188] Preston-Baecht, *supra* note 178, at 429.

[189] *Riggins v. Nevada*, 504 U.S. 127, 128 (1992).

[190] *Id.* at 129.

fense because he wanted jurors to see his "true mental state."[191] In ruling for the defendant, the Court reasoned that the Mellaril could have prejudicially affected his attitude, appearance, and demeanor at trial.[192] Further, the drug's side effects may have gone beyond impacting his outward appearance by impairing "content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel,"[193] thereby creating an "unacceptable risk" that forced medication compromised his trial rights."[194]

Riggins made clear that Due Process could be satisfied if forced administration of antipsychotic medication was both "medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant's] own safety or the safety of others."[195] *Riggins* foreshadowed *Sell's* holding on synthetically restoring competency when medically appropriate. Specifically, if the government cannot obtain adjudication of a defendant's guilt or innocence by using "less intrusive means" than forced administration of antipsychotics. What "less intrusive means," though, might keep a person with a psychotic disorder competent to stand trial without running afoul the Due Process concerns raised in *Riggins*, is unclear. Reconciling *Riggins* and *Sell* would have been nearly impossible prior to the advent of today's second-generation antipsychotics. The comparably low risk of significant side effects of atypical neuroleptics like risperidone and olanzapine might permit harmonization of *Riggins* and *Sell* in some cases, but since they are not without significant health risks, such drugs are not a complete solution to the problem.

III. Non-Restorable Defendants and Civil Commitment

In comparison to determinations regarding competency to stand trial, little is known about defendants who are ultimately adjudicated NRC. A study in the 1980s revealed only few differences between those who were restored to competency and those found NRC.[196] More recent research, however, reports that NRC defendants either tend to have an ""irremediable cognitive disorder", such as a severe intellectual disability or chronic neurodegenerative disease, a "long-standing psychotic disorder" with a history of extended stays in psychiatric hospitals, and lower responsiveness to medications.[197]

What happens to NRC defendants after their release from a competency restoration program? *Jackson v. Indiana* did not specify what should happen to the charges a NRC defendant faces.[198] Some jurisdictions dismissed the charges for good; others dismiss them without prejudice, meaning they could be refiled in the future; others do not even dismiss

191 *Id.* at 130.
192 *Id.* at 137-38.
193 *Id.* at 137.
194 *Id.* at 138.
195 *Id.* at 127.

196 Paul Rodenhauser & Harry J. Khamis, *Relationships Between Legal and Clinical Factors Among Forensic Hospital Patients*, 16 Bull. Am. Acad. Psychiatry & Law 321, 330 (1988) (finding that large numbers of persons diagnosed with psychotic disorders were adjudicated competent with similar numbers were found to be incompetent).
197 Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. Am. Acad. Psychiatry & L. 34, 41 (2007); *see also* Lori H. Colwell & Julie Gianesini, *Demographic, Criminogenic, and Psychiatric Factors That Predict Competency Restoration*, 39 J. Am. Acad. Psychiatry & L. 297, 301 (2011); Douglas R. Morris & George F. Parker, Jackson's *Indiana: State Hospital Competence Restoration in Indiana*, 36 J. Am. Acad. of Psychiatry & L. 522, 522-23 (2008).
198 *Jackson v. Indiana*, 406 U.S. 715, 729–31 (1972).

the charges at all.[199] Massachusetts and South Carolina, for example, allow for the bench trial of incompetent defendants in the limited circumstances in which defense counsel believes they "can establish a defense of not guilty to the charges pending against the person" other than by an insanity defense.[200] Ohio does the same, but if a defendant is convicted, rather than being subjected to criminal punishment, then the disposition mirrors what would have been authorized had the defendant been adjudicated not guilty by reason of insanity.[201]

Beyond what happens to the relevant criminal charges, recall that *Jackson* mandated that NRC defendants are either supposed to be released or involuntarily civilly committed.[202] The first option—release—is self-explanatory. But releasing those who are so impaired that they were adjudicated NRC potentially subjects such people to situations where their mental status might further deteriorate if other people are unwilling or unable to act as guardians who helps to care for impaired persons; in turn, such people may pose a substantial danger to themselves or others. In such situations, civil commitment may be the wiser path.[203]

Civil commitment involves processes that vary among U.S. jurisdictions, although there are a few generalizations that can be made about the civil commitment process. First, all states require that those to be civilly committed suffer from a mental illness.[204] Second, all states require a showing that the person whose civil commitment is sought presents a danger to himself/herself or to others as a function of his or her mental illness.[205] And third, every state requires these criteria to be proven, at minimum, by clear and convincing evidence pursuant to the U.S. Supreme Court's decision in *Addington v. Texas*.[206]

Prior to the 1950s, most states only had loose protections for a person, others sought to have involuntarily hospitalized for psychiatric treatment. For example, some jurisdictions statutorily authorized civil commitment for "those persons defined as being a 'social menace' or 'a fit and proper candidate for institutionalization."[207] Others authorized the "confinement of insane persons 'manifestly suffering from want of proper care or treatment.'"[208] Indeed, this "in need of treatment" standard was adopted in roughly half the states between 1869 and the 1960s.[209] Under such amorphous standards, there was much discretion built into the system to confine people involuntarily, which, in turn, often resulted in arbitrary and unnecessary commitments.[210] Moreover, this broad authority was frequently used, as is illustrated by the

[199] Melton et al., *supra* note 10, at 132.
[200] *Id.* at 133 (citing Mass. Gen. Laws ch. 123, § 17; S.C. Code § 44-23-440).
[201] *Id.* at 133 (citing Ohio Rev. Code § 2945.39).
[202] *Jackson*, 406 U.S. at 729–31.
[203] *See generally*, *e.g.*, Virginia Tech Review Panel, Mass Shootings at Virginia Tech: Report of the Review Panel 52-60 (2007) (documenting the predicate failures to treat Seung-Hui Cho prior to the Virginia Tech shooting massacre), https://scholar.lib.vt.edu/prevail/docs/VTReviewPanelReport.pdf.
[204] Douglas Mossman, Allison H. Schwartz, & Elise R. Elam, *Risky Business Versus Overt Acts: What Relevance Do "Actuarial," Probabilistic Risk Assessments Have for Judicial Decisions on Involuntary Psychiatric Hospitalization?*, 11 Houston J. Health L. & Pol'y 365, 377–79 (2012).
[205] *Id.* at 380–82.
[206] *Id.* at 366 (citing *Addington v. Texas*, 441 U.S. 418, 431, 433 (1979) ("[T]he precise burden [must be] equal to or greater than the 'clear and convincing' standard . . . .").
[207] Bruce A. Arrigo, *Paternalism, Civil Commitment and Illness Politics: Assessing The Current Debate and Outlining a Future Direction*, 7 J.L. & Health 131, 136 (1992/1993).
[208] John Kip Cornwell, *Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After* Hendricks, 4 Psychol., Pub. Pol'y, & L. 377, 380-81 (1998).
[209] *Id.* at 380.
[210] *See*, *e.g.*, Gerald N. Grob, Mental Institutions in America: Social Policy to 1875 33 (1973); Bruce J. Winick, *Ther-*

statistic that more than a half a million people were civilly confined in 1955.[211]

The social movements of the 1960s brought reforms to many areas of social life, including the law. The area of civil commitment was one of the areas in desperate need of reform.[212] Conditions for those confined in mental hospitals were inhumane. In his classic text, *Asylums*, sociologist Erving Goffman detailed the squalid conditions in mental institutions, nearly all of which were dangerously understaffed.[213] The deinstitutionalization movement of the era brought many reforms.[214] Legal reforms that began to recognize the liberty interests of the mentally ill included "community-situated treatment, due process procedural protections, the right to treatment, medical and Constitutional minimal standards in treatment, and the right to refuse treatment."[215] By the mid-1970s, most states had tightened their civil commitment laws such that mental illness alone, even if serious, would not suffice. Rather, someone could only be involuntarily committed for treatment if a court found, by clear and convincing evidence, that the person represented a danger to himself or herself or to others.[216]

Involuntary civil commitment serves two goals: (1) the rehabilitation or care of people who are mentally ill, an aim stipulated by the state's *parens patriae* power, and (2) the protection of society from the potential harms such a person may cause, a purpose required under the state's police power.[217] But confining someone against his or her will raises serious due-process concerns. After all, civil commitment involves not only the "massive curtailment of liberty" attendant to involuntary hospitalization, but also significant restrictions on patients within the hospital.[218] In light of these significant infringements of a person's liberty interests, the U.S. Supreme Court held in *O'Connor v. Donaldson* that due process prohibits the involuntary hospitalization of any person who is not both mentally ill and dangerous.[219] In *Zinermon v. Burch* (1990), the Court reaffirmed the principle that the involuntary confinement of a mentally ill individual who does not pose a threat of harm and who can survive outside of a mental hospital is unconstitutional.[220] Although seemingly straightforward, many of the terms used in the cases setting the constitutional boundaries of civil commitment are quite nebulous. In fact, debates permeate both civil commitment case law and scholarship about who is mentally ill,

apeutic Jurisprudence and the Civil Commitment Hearing, 10 J. Contemp. Legal Issues 37, 38-39 (1999).

[211] Arrigo, *supra* note 207, at 136 (citing Howard H. Goldman et. al., *Deinstitutionalization: The Data Demythologized*, 34 Hosp. & Cmty. Psychiatry 129, 136 (1983).

[212] *See*, *e.g.*, Donald Stone, *Dangerous Minds: Myths and Realities Behind the Violent Behavior of the Mentally Ill, Public Perceptions, and the Judicial Response through Involuntary Civil Commitment*, 42 Law & Psychol. Rev. 59, 60–61 (2017-2018) (discussing the swing toward tighter civil commitment laws).

[213] Erving Goffman, Asylums: Essays on the Social Situation of Mental Health Patients and Other Inmates 47 (1961).

[214] Gerald N. Grob, *Historical Origins of Deinstitutionalization*, *in* Deinstitutionalization 121 (Leona L. Bachrach ed., 1983).

[215] Arrigo, *supra* note 202, at 139–40 (internal citations omitted); *see also* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974), *on reh'g*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976) (implementing, in a federal class action lawsuit, a series of substantive and procedural due process protections in civil commitment proceedings).

[216] Stone, *supra* note 212, at 60–61; *see also Addington v. Texas*, 441 U.S. 418, 426 (1979).

[217] Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, *in* Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment 23 (Kate Diesfeld & Ian Freckelton eds. 2018).

[218] *See*, *e.g.*, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

[219] *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

[220] *Washington*, 494 U.S. 113, 133–34 (1990) ("The involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless and can live safely outside an institution.").

what constitutes dangerousness, what procedural rights must be honored during litigation over these standards, and what protections apply after judicial determinations on civil commitment.

A. Mental Illness and Civil Commitment

The law often uses terms like "mental disease or defect" or a "mental abnormality" even though psychiatry and psychology prefer terms "mental illness" or "mental disorders."[221] Only a narrow range of serious mental illnesses, such as psychotic disorders, generally serves as a predicate for excusing criminal conduct.[222] By contrast, most statutes recognize a broader range of mental disorders as the basis for involuntary civil commitment, including not only psychotic disorders, but also mood disorders, dissociative disorders, anxiety disorders, adjustment disorders, eating disorders, impulse control disorders, sexual disorders, and that cause significant disability.[223] For example, Arizona law states, "'mental disorder' means a substantial disorder of the person's emotional processes, thought, cognition or memory."[224] However, like many states, Arizona specifically excludes some conditions that other states include:

(a) Conditions that are primarily those of drug abuse, alcoholism or intellectual disability, unless, in addition to one or more of these conditions, the person has a mental disorder.

(b) The declining mental abilities that directly accompany impending death.

(c) Character and personality disorders characterized by lifelong and deeply ingrained antisocial behavior patterns, including sexual behaviors that are abnormal and prohibited by statute unless the behavior results from a mental disorder.[225]

Yet, violence is often more of a problem associated with select personality disorders and substance abuse disorders than it is for people with psychotic disorders.[226] Moreover, because people with certain personality disorders, intellectual disabilities, dementia, or traumatic brain injuries are those who might most be in need of some alternative to simple release, the Arizona Supreme Court's Committee on Mental Health and Justice System criticized the above-quoted legislation for excluding these conditions from qualifying as mental disorders for civil commitment purposes.[227]

[221] Christopher Slobogin, *Rethinking Legally Relevant Mental Disorder*, 29 Ohio N.U. L. Rev. 497, 497-98 (2003).
[222] *Id.* at 504–07; *see also* Fradella, *supra* note 21, at 40–46.
[223] Bruce J. Cohen, Richard J. Bonnie, & John Monahan, *Understanding and Applying Virginia's New Statutory Civil Commitment Criteria*, 28 Dev. Mental Health L. 1, 2-4(2009); Slobogin, *supra* note 221, at 507–11; *see also Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (upholding the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence").
[224] Ariz. Rev. Stat. § 36-501(25) (2019).
[225] Ariz. Rev. Stat. § 36-501(25)(a)-(c); *see also* Kan. Stat. Ann. § 59-2946(f)(1) (2018) (excluding "[a]lcohol or chemical substance abuse; antisocial personality disorder; intellectual disability; organic personality syndrome; [and] an organic mental disorder"); *cf.* Wash. Rev. Code Ann. § 71.05.040 (2018) (excluding developmental disabilities, substance abuse disorders, and dementia "unless such condition causes a person to be gravely disabled or as a result of a mental disorder such condition exists that constitutes a likelihood of serious harm").
[226] Alec Buchanan & Morven Leese, *Detention of People with Dangerous Severe Personality Disorders: A Systematic Review*, 358 Lancet 1955, 1958 (2001); Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, 5 Psychiatry 34, 46 (2008); Schug & Fradella, *supra* note 8, at 116–60 (substance abuse disorders), 161–215 (psychotic disorders), 363–432 (personality disorders).
[227] Ariz. Sup. Ct. Comm. on Mental Health and the Just. Sys., Interim Report and Recommendations 2, 38 (2019), https://www.azcourts.gov/Portals/74/

> These defendants are typically in treatment for several months to attempt to restore their competency to stand trial. Upon initiation of civil treatment proceedings, the defendant may present as stable without any continuing dangerous behavior and consequently be found by the court not to need treatment at the time of [the civil commitment hearing].
>
> If the defendant is ordered to undergo involuntary treatment under a court order, there is no assurance that the defendant will be placed in a secure setting for treatment for any significant period of time due to a lack of resources in the civil system and an insufficient number of secure inpatient beds or secure community treatment facilities. After a short period of secure treatment, the defendant will be released back into the community where again, because of a lack of funding, there are insufficient services to assure that the defendant will remain compliant with treatment necessary to maintain control of his behavior.[228]

To prevent such persons from falling through the cracks in civil commitment laws, that committee recommended that the state's statute be amended to include such persons with such diagnoses, provided that the law were "narrowly drafted to target a limited subclass of dangerous persons."[229]

Arizona is not alone in excluding drug and alcohol abuse (without some other a co-occurring mental illness) from qualifying as a mental illnesses for the purposes of civil commitment, even though they are recognized disorders in the DSM.[230] However,

> chronic substance use, acute substance intoxication, and/or substance withdrawal all constitute important risk factors in assessing an individual's risk either of causing serious physical harm to himself or others or suffering serious harm due to a lack of capacity to protect himself from harm or provide for his basic human needs. . . . Substance abuse in its more severe forms can cause mood swings similar to those seen in major depressive disorder (including hopelessness and suicidal ideation), can cause psychotic symptoms (including voices telling one to kill himself), and can cause cognitive impairment as severe as that seen in other forms of dementia.[231]

MHJS/Resources/MHJSFINALInterimReport.pdf?ver=2019-09-12-154157-497.

[228] *Id.* at 38–39.

[229] *Id.* at 40.

[230] *E.g.*, Tex. Health & Safety Code § 571.003(14) (2019). *But see* Ind. Code § 12-7-2-130 (2015) ("Mental illness . . . includes intellectual disability, alcoholism, and addiction to narcotics or dangerous drugs."); Me. Rev. Stat. 34-B § 3801(5) (2010) ("'Mentally ill person' includes persons suffering effects from the use of drugs, narcotics, hallucinogens or intoxicants, including alcohol. A person with developmental disabilities or a person diagnosed as a sociopath is not for those reasons alone a mentally ill person."); Wis. Stat. Ann. § 51.15(1)(a) (including people who are "mentally ill, drug dependent, or developmentally disabled").

[231] Cohen et al., *supra* note 223, at 130.

Some states explicitly recognize this point by excluding substance-related disorders from qualifying as mental illnesses for civil commitment purposes unless they are severe enough to cause significant impairment along the lines of other qualifying mental illnesses.[232]

A number of states specifically exclude intellectual disabilities as serving as the basis for civil commitment[233]—an approach that appears well-suited in light of the Supreme Court's decision in *Olmstead v. L.C.*, which held that the Americans with Disabilities Act requires placement of persons with mental disabilities in the least restrictive setting (i.e., in the community over institution settings when possible).[234] Other states recognize intellectual disability as a qualifying mental illness for civil commitment purposes, but in keeping with the least restrictive setting mandate, these jurisdictions limit authority of the state over such persons to those who are not only unable to satisfy their basic needs for shelter, nourishment, or essential medical care, but also require proof that no one else is "willing and able" to assist them.[235]

B. Dangerousness

The traditional approach to determining dangerousness in support of a civil commitment uses one or more of three distinct criteria: the type of danger, the immediacy of the danger, and the likelihood of the danger.[236]

> The *type of danger* refers to the category of the harm. Examples include bodily harm, threat of bodily harm, and property damage. *Immediacy* accounts for when the danger will occur. Some statutes, for example, require "imminent" danger or danger in the "near future." As these forecasts project further into the future, uncertainty and the risk of error increase. The *likelihood of the danger* refers to the accuracy of the dangerousness prediction. Because studies have found that such predictions are more accurate when based on prior overt acts, some states require evidence of similar dangerous behavior in the respondent's recent past.[237]

Applying these three dimensions of dangerousness can be a confounding process that blends legal standards with the art and science of clinical evaluation, two perspectives that do not mesh well.

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[232] *E.g.*, S.C. Code § 44-52-10(2) (2019) (permitting the emergency commitment of a ' "chemically dependent person" who, "as a result of this condition, poses a substantial risk of physical harm to himself or others if not immediately provided with emergency care and treatment."); Wash. Rev. Code Ann. § 71.05.040 (2018) (recognizing that substance abuse disorders can cause someone to become "gravely disabled" or pose a "likelihood of serious harm").

[233] *E.g.*, 18 Vt. Stat. Ann. § 7101(14) (2019); Tex. Health & Safety Code § 571.003(14) (2019).

[234] *Olmstead v. L.C. ex rel.* Zimring, 527 U.S. 581, 599 (1999) (holding that states must place intellectually disabled persons in the least restrictive setting possible). In light of *Olmstead*'s mandate for community placements (as opposed to institutional ones) whenever possible, there is an irony in states excluding intellectual disabilities from qualifying as the basis for a civil commitment. Specifically, inclusion of such diagnoses presumably would translate into courts adjudicating more cases in which intellectual disabilities served as the basis for civil commitment. Yet, that would mean more individuals would be placed in the community where there is often inadequate support to help people in need.

[235] *E.g.*, N.J. Stat. § 30:4–27.2(h) (2019).

[236] Christine E. Ferris, Note, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 Vand. L. Rev. 959, 966–67 (2008)

[237] *Id.* at 966–67 (2008).

1. Type of Danger

Danger to self and others is typically interpreted within the context of active harm—violence directed at oneself (i.e., suicidal behavior and deliberate self-harm, such as mutilation) or towards other people.[238] Only a few states explicitly include harm or damage to property in their or civil commitment criteria.[239]

Although civil commitment processes in all U.S. jurisdictions continue to encompass the types of dangers attendant to violence danger,[240] approximately forty-two U.S. states also interpreted *O'Connor v. Donaldson*'s "danger to self" standard as encompassing various types of self-inflicted harm and, therefore, included so-called "passive dangerousness" provisions in their civil commitment statutes that allow for the involuntary hospitalization of people who are gravely disabled.[241]

> In 1983, the American Psychiatric Association issued guidelines for legislation concerning civil commitment which, defined a gravely disabled person as someone who is substantially unable to provide for some of his basic needs, such as food, clothing, shelter, health, or safety or [who] will, if not treated, suffer or continue to suffer severe mental and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of his previous ability to function on his own.[242]

Today, most gravely disabled provisions now include "need for treatment" provisions[243] reflecting "an understanding that people who are mentally ill are a danger to themselves if they are unable to provide for their basic needs or if they are likely to deteriorate without treatment."[244] For example, roughly one-third of U.S. states allow people to be involuntarily hospitalized to prevent deterioration of their mental state, such as "escalating loss of cognitive or volitional control."[245]

[238] Mossman et al., *supra* note 204, at 380–81 (citing Melvin G. Goldzband, *Dangerousness*, 1 Bull. Am. Acad. Psychiatry & L. 238, 238 (1973) (defining dangerousness as "the quality of an individual or a situation leading to the potential or actuation of harm to an individual, community or social order")). In a handful of states, a pregnant woman ingesting alcohol or drugs is specifically included in the concept of harm to others. Mossman et al., *supra* note 204, at 383–84.

[239] *Id.* at 383 (citing Alaska Stat. § 47.30.915(10)(A)-(B) (2010); Wash. Rev. Code Ann. § 71.05.020(23)(a)(iii)(West 2008).

[240] *E.g.*, N.J. Stat. § 30:4–27.2(h) (2019) ("'Dangerous to self' means that by reason of mental illness the person has threatened or attempted suicide or serious bodily harm….").

[241] Stone, *supra* note 212, at 61; *see also* Robert A. Brooks, *Psychiatrists' Opinions About Involuntary Civil Commitment: Results of a National Survey*, 35 J. Am. Acad. Psychiatry L. 219, 221 (2007). Even in the handful of states that did not use "gravely disabled" language in their statutes, courts interpreted "danger to self" to include those who were so gravely disabled. Mossman et al., *supra* note 232, at 382 n.72 (2012).

[242] American Psychiatric Association, *Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, 140 Am. J. Psychiatry 672, 673 (1983).

[243] Mossman et al., *supra* note 204, at 383, 411–46 (listing key provisions in state civil commitment statutes).

[244] Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. Mich. J.L. Reform 561, 569 (2012).

[245] Mossman et al., *supra* note 204, at 384; *see also* N.J. Stat. § 30:4–27.2(h) (2019) ("'Dangerous to self" means that by reason of mental illness the person … has behaved in such a manner as to indicate that the person is unable to satisfy his need for nourishment, essential medical care or shelter, so that it is probable that substantial bodily injury, serious physical harm or death will result within the reasonably foreseeable future….").

2. Immediacy of Danger

Until fairly recently, "'imminent dangerousness' was the gold standard for defining the criteria for civil commitment."[246] However, it is quite difficult, if not impossible, to predict dangerousness with any reasonable degree of scientific accuracy.[247] Indeed, the "voluminous literature as to the ability of psychiatrists (or other mental health professionals) to testify reliably as to an individual's dangerousness in the indeterminate future had been virtually unanimous."[248]

Moreover, a restrictive requirement of immediate danger can have disastrous consequences, such as when people with serious mental illness are not treated because they do not appear to pose some imminent danger, and yet may then go off to hurt or kill others.[249] As a result of high profile mass shootings in which the perpetrator had been determined not to present some imminent danger, nearly all states have abandoned the requirement of imminent danger and replace with the "language requiring 'a substantial likelihood' or 'significant risk' that the person will cause serious injury to himself or others 'in the near future.'"[250] Although such language provides judges with more flexibility when making civil commitment decisions, the statutory language in most states remains problematic from the perspective of mental health professionals because it still requires them to make a prediction about the likelihood of risk of danger in the future, even if not "immediate."

3. Likelihood of Danger

In 2003, Law Professor Alex Scherr reported that "no appellate court had ever ordered the exclusion of expert psychiatric testimony about danger in a civil commitment case."[251] This is somewhat remarkable because mental health professionals had readily admitted for many years that they were not able to predict a person's future dangerousness with anything approaching a reasonable degree of scientific certainty.[252] In fact, John Monahan, one of the leading experts in predictions of dangerous, reported in 1981 that "psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past (and thus had high base

[246] Klein, *supra* note 244, at 567.

[247] *See*, *e.g.*, Robert I. Simon, *The Myth of "Imminent" Violence in Psychiatry and the Law*, 75 U. Cin. L. Rev. 631, 636 (2006) ("No actuarial instrument can predict 'imminent' violence. No agreed upon definition of 'imminent' exists.").

[248] 1 Michael L. Perlin & Heather Ellis Cucolo, *Preface* to Mental Disability Law: Civil and Criminal Law: Civil and Criminal at iii (2d ed. Supp. 2007).

[249] Steven P. Segal, *Civil Commitment Law, Mental Health Services, and U.S. Homicide Rates*, 47 Soc. Psychiatry & Psychiatric Epidemiology 1449 (2012) (reporting that broader involuntary civil commitment criteria are associated with 1.42 less homicides per 100,000 people).

[250] Virginia Tech Review Panel, *supra* note 203, at 56; *see also* Mossman et al., *supra* note 232, at 411–46 (listing key provisions in state civil commitment statutes); Stone, *supra* note 207, at 61–62 (noting that mass shootings prompted a "tumultuous debate … about the dangerousness of people with mental illness when warning signs go unnoticed and when there is a lack of proactive intervention" which, in turn, led legislatures "to make it easier to commit people with mental illness who may be dangerous in the future). *But see* Ga. Code Ann. § 37-3-1(9.1)(A) (2010) (retaining imminent threat/harm requirement); Haw. Rev. Stat. Ann. § 334-60.2(2) (2019) (same); Mont. Code Ann. §53-21-126(1)(c) (2019) (same).

[251] Alexander Scherr, Daubert *& Danger: The "Fit" of Expert Predictions in Civil Commitments*, 55 Hastings L.J. 1, 2 (2003).

[252] Joseph J. Cocozza & Henry J. Steadman, *Prediction in Psychiatry: An Example of Misplaced Confidence in Experts*, 25 Soc. Probs. 265, 273 (1978); John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901, 903 (2000) (noting the low accuracy of various clinical approaches to predicting a risk of future dangerousness); Simon, *supra* note 247, at 636.

rates for it) and who were diagnosed as mentally ill."[253] Put differently, predictions of dangerousness were wrong two-thirds of the time—an error rate significantly worse than that predicted by chance.[254]

Starting in the 1990s, such prognostications began to improve with the development of actuarial risk assessment instruments.[255] Today, a substantial body of research claims that "mental health professionals can meaningfully rank potential for future violence over periods of hours, days, months, or years."[256] Still, there is great variability in the predictive validity of different risk assessment instruments.[257] Moreover, actuarial methods may or may not be accurate when applied to any particular person. The risk of improper prediction of high, moderate, or low risk is exacerbated when instruments are used to evaluate persons from outside the populations for which they were validated in terms of both offenses and offenders' demographic characteristics (e.g., age, sex, race, ethnicity).[258] This poses a particular challenge for several risk assessments that were validated against racially or ethnically homogenous groups, which, in turn, limits the overall generalizability of these assessments when they are used on individuals whose race or ethnicity falls outside of that comprising the majority of the validation groups.[259] And "[e]ven with a moderately accurate method of prediction, predicting low- or very-low-frequency events, such as serious violence . . . will inevitably result in a high false-positive error rate."[260] Thus, courts sometimes reject purely actuarial methods and evaluate them only when combined with clinical methods to support predictions concerning a particular person's dangerousness, especially in the civil commitment context.[261]

C. Due Process

Although some civil commitments begin when the families or friends of people with mental illnesses seek to have them involuntarily hospitalized, most civil commitments are instituted by the police, emergency room physicians, psychiatrists, psychologists, and sometimes even psychiatric nurses or licensed clinical social workers who make relatively quick and often inaccurate judgments based on how patients present at the time of an emergency.[262] All states permit, under appropriate circum-

[253] John Monahan, The Clinical Prediction of Violent Behavior 47–49 (1981).

[254] *Id.*; *see also* David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 Sci. 31, 32 (1988); Douglas Mossman, *Assessing Predictions of Violence: Being Accurate about Accuracy*, 62 J. Consulting & Clinical Psychol. 783, 783 (1994).

[255] Mossman et al., *supra* note 204, at 387.

[256] *Id.* at 389–90; *see also* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 Va. L. Rev. 391, 408–27 (2006); Min Yang, Stephen C. P. Wong, & Jeremy Coid, *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, 136 Psychol. Bull. 740, 755 (2010).

[257] Jay P. Singh, Martin Grann, & Seena Fazel, *A Comparative Study of Violence Risk Assessment Tools: A Systematic Review and Metaregression Analysis of 68 Studies Involving 25,980 Participants*, 31 Clinical Psychol. Rev. 499, 510 (2011).

[258] *Id.* at 500–01, 509.

[259] *Id.* at 509 ("One of the implications of the [demographic] findings is that caution is warranted when using these tools to predict offending in samples dissimilar to their validation samples."); *see also* David DeMatteo, Ashley B. Batastini, Elizabeth Foster, & Elizabeth Hunt, *Individualizing Risk Assessment: Balancing Idiographic and Nomothetic Data*, 10 J. Forensic Psychol. Prac. 360 (2010).

[260] Yang et al., *supra* note 250, at 741.

[261] Scherr, *supra* note 252, at 24–28, 37–48.

[262] *See* Alexander Tsesis, *Due Process in Civil Commitments*, 68 Wash. & Lee L. Rev. 253, 285 (2011); Benjamin K. P. Woo, Conrado C. Sevilla, & Gabriela V. Obrocea, *Factors Influencing the Stability of Psychiatric Diagnoses in the Emergency Setting*, 28 Gen. Hosp. Psychiatry 434, 435 (2006) ("Overall, our finding suggested that a sizable portion (38.7%) of psychiatric emergency patients were given a different diagnosis at time of discharge from the inpatient service.").

stances, the emergency hospitalization of an individual without any prior formal legal hearing "to stabilize patients, fine-tune their diagnoses and treatment plans, and arrange for outpatient treatment."[263]

In the emergency detention phase, although a handful of states, like Massachusetts, provide for emergency judicial review within twenty-four hours, excluding weekends and holidays,[264] most states do not provide any processes for a judicial determination about the propriety of the involuntary detention for psychiatric care until three to seven days after the emergency detention.[265] Rather, statutorily authorized decision-makers, usually either a peace officer and a qualified mental health clinical or two clinicians, simply need to have probable cause to believe the person is mentally ill and is a danger to self or to others.[266] Such minimal processes are rarely challenged because any more restrictive standards would be counterproductive in emergency situations, especially since a person subject to such an emergency detention still has due process rights to more formal adjudication proceedings, usually within a very short period of time, often only a few days.[267] For example, California and Colorado authorize emergency holds without judicial review for up to seventy-two hours, excluding weekends and holidays.[268] New Mexico requires a judicial hearing within seven days if the person is to be kept for involuntary treatment beyond that length of time.[269]

By contrast, formal civil commitment proceedings (which are required for anything more than short emergency holds lasting one to seven days, depending on the jurisdiction) require a range of due process protections. Recall that *Addington v. Texas* requires the state seeking an involuntary commitment to prove that a mentally ill person is either dangerous or gravely disabled by at least clear and convincing evidence;[270] a few states employ an even higher burden of persuasion—proof beyond a reasonable doubt.[271] Such evidentiary standards clearly presuppose a judicial proceeding at which evidence is presented.

Addington also made clear that, as with all adversarial hearings, due process requires that the notice of the commitment hearing be given in sufficient time to allow the respondent to prepare for the hearing. Beyond notice, the specific procedural rights guaranteed to those facing civil commitment vary by jurisdiction; however, the basic procedural due process protections to which respondents are generally entitled include "a hearing presided over by a fair and impartial judge, at which the respondent can be present, offer evidence, and cross-examine witnesses" and the right to privately retained counsel or, if the respondent is indigent,

[263] Boldt, *supra* note 6, at 4.
[264] Mass. Gen. Laws ch. 123, § 12(b) (2019).
[265] Boldt, *supra* note 6, at 15 (citing, as an example, N.M. Stat. Ann. §§ 43-1-10 to -12 (2017) (requiring hearing within seven days)); *id.* at 21 (citing N.Y. Mental Hyg. Law § 9.39(a)(2) (requiring hearing within five days)).
[266] *Id.* (quoting N.M. Stat. Ann.§ 43-1-10(E) ("an admitting physician or psychologist must conduct a prompt evaluation upon the person's arrival to determine 'whether reasonable grounds exist to detain the proposed client for evaluation and treatment'").
[267] *See*, *e.g.*, *N.M. Dep't of Health v. Compton*, 34 P.3d 593, 599–600 (N.M. 2001) (upholding the constitutionality of emergency detentions over a due process challenge because the state reasonably relies on law enforcement and mental health professionals to assess whether there are reasonable grounds for the involuntary detention); Tracz *ex rel. Tracz v. Charter Centennial Peaks Behav. Health Sys., Inc.*, 9 P.3d 1168, 1171–72 (Colo. Ct. App. 2000) (upholding emergency psychiatric holds for up to seventy-two hours without judicial review).
[268] *See* Cal. Welf. & Inst. Code § 5150(a) (2019); Colo. Rev. Stat. § 27-65-105(1)(a)(II) (2019).
[269] N.M. Stat. Ann. § 43-1-11(A).
[270] *Addington v. Texas*, 441 U.S. 418, 425-26 (1979).
[271] *See* Tsesis, *supra* note 263, at 272–75 (citing, inter alia, Ky. Rev. Stat. Ann. § 202A.076(2) (2009); *In re Andrews*, 870 N.E.2d 610, 616 (Mass. 2007).

appointed counsel.[272] Some states have also established the right to a court-appointed clinical evaluator.[273] And all states provide civilly committed persons with the right to a periodic judicial review of the commitment, often every three to six months.[274]

Even when sufficient proof of mental illness and dangerousness is adduced at a commitment hearing, the laws of most states do not allow a person to be involuntarily hospitalized unless doing so would be the least restrictive means of protecting the person from himself or herself or of protecting society from the person.[275] Because psychiatric hospitals offer the benefit of treatment in a "safe, secure, structured, and supervised environment while reducing stress on both patients and family members,"[276] some courts consider involuntary confinement to be less restrictive than involuntary medication.[277] For patients who are in active psychotic episodes, both hospitalization and forced administration of antipsychotic medications may be required to help the person.[278] Note, though, that courts in nearly all states have a middle-ground option of placing persons into assisted, outpatient treatment ("AOT"), which is known as involuntary outpatient commitment in some jurisdictions.[279]

> AOT typically includes mandatory mental health visits for monitoring of symptoms and case management, with recommendations and assistance for shelter and rehabilitation programs. AOT occasionally includes mandatory counseling. Although AOT laws do not allow forcible restraint and medication injection, they permit involuntary detention if patients deviate from their treatment plan, and the treatment plan will likely include antipsychotic medication.[280]

Empirical studies suggest that AOT not only reduces the arrest rate of people with mental illnesses, but also significantly decreases their use of alcohol and drugs, psychiatric rehospitalizations, homelessness, suicides, and violent behaviors.[281] Moreover, there is evidence

[272] Ferris, *supra* note 236, at 968 (citing Winick, *supra* note 205, at 40); Wright, *supra* note 5, at 64–65 (2004).
[273] Ferris, *supra* note 236, at 968 (citing Bruce J. Winick, Civil Commitment: A Therapeutic Jurisprudence Model 141 (2005)).
[274] *Id.* at 964 (citing Winick, supra note 267, at 4–5); *see also* Ralph Reisner, Christopher Slobogin, & Arti Rai, Law and the Mental Health System: Civil and Criminal Aspects (4th ed. 2009).
[275] Klein, *supra* note 244, at 570 n.37 (citing Ala. Code § 22-52-10.1(a) (2006); Ariz. Rev. Stat. § 36-540(B) (2003); Ga. Code Ann. § 37-3-161 (1995); Ill. Comp. Stat. Ann. 405 5/3-811 (2004); Minn. Stat. Ann. § 253B.09(1)(a) (2007); Wash. Rev. Code Ann. § 71.05.320(1) (2008)); *see also* Ilissa L. Watnik, Comment, *A Constitutional Analysis of Kendra's Law: New York's Solution for Treatment of the Chronically Mentally Ill*, 149 U. Pa. L. Rev. 1181, 1203 (2001) ("most states have incorporated the least restrictive alternative doctrine into their commitment laws").
[276] Marvin I. Herz & Stephen R. Marder, Schizophrenia: Comprehensive Treatment and Management 42 (2002).
[277] Klein, *supra* note 244, at 571.
[278] *Id.* at 572; *see also* Patrick W. Corrigan, Kim T. Mueser, Gary R. Bond, Robert E. Drake, & Phyllis Solomon, Principles and Practice of Psychiatric Rehabilitation: an Empirical Approach 160–72 (2008).
[279] Treatment Advocacy Center, *Promoting Assisted Outpatient Treatment* (2018), https://www.treatmentadvocacycenter.org/fixing-the-system/promoting-assisted-outpatient-treatment (last visited Nov. 21, 2019); Risdon N. Slate, *Seeking Alternatives to the Criminalization of Mental Illness*, 23(1) Am. Jails 20-22, 24, 26-28 (2009).
[280] Shawn S. Barnes & Nicolas Badre, *Is the Evidence Strong Enough to Warrant Long-Term Antipsychotic Use in Compulsory Outpatient Treatment?*, 67 Psychiatric Serv. 784, 784 (2016) (arguing that the evidence does not justify courts ordering compulsory long-term use of antipsychotic medications).
[281] Treatment Advocacy Center, *supra* note 273, at ¶ 2; *see also* Jo C. Phelan, Marilyn Sinkewicz, Dorothy M. Castille, Steven Huz, & Bruce G. Link, *Effectiveness and Outcomes of Assisted Outpatient Treatment in New York State*, 61 Psychiatric Serv. 137. 138 (2010)).

that several of these positive outcomes continue even after court supervision ends.[282]

Unless specifically guaranteed by the provisions of a particular state law, a number of procedural due process rights that exist in the criminal law context are notably absent from civil commitment proceedings; these range from a right to jury determination with regard to civil commitment criteria[283] to the protections of legal privileges, including the privilege against self-incrimination.[284] On the other hand, to protect the privacy rights of the person whose commitment is being sought, most states not only allow commitment proceedings to be closed to the public upon the request of the respondent but also require courts to keep medical records and reports pertaining to civil commitments confidential.[285]

D. Are NRC Defendants Treated Differently?

The requirements of civil commitment processes, including all of their attendant due process safeguards, are supposed to apply to all persons facing involuntary commitment. However, recent research suggests that the criminal charges defendants faced prior to their adjudication as NRC leads them to receive less than the full panoply of protections in their civil commitment proceedings.

In 2010, Levitt and colleagues reported on their observations of 293 NRC defendants in Maricopa County, Arizona, who had been referred for civil commitment proceedings.[286] They compared the characteristics of NRC defendants who were civilly committed to matched comparisons of civil commitments not involving persons who had been adjudicated NRC.[287] They concluded that NRC individuals were treated qualitatively differently during civil commitment proceedings than persons referred for civil commitment proceedings by family, friends, medical professionals, or other noncriminal justice system actors. Specifically, petitions for involuntary commitment were more likely to be granted for NRC defendants (84%) than petitions for those from the non-NRC group (69%).[288] The lengths of hospitalization were longer for the NRC defendants compared to people in the non-NRC group. This difference was magnified for people with "exceptionally long stays", as twice as many NRC defendants were hospitalized 50 or more days compared to the non-NRC group.[289] But perhaps most troublingly, "most" of the NRC group did not meet any of the criteria for hospitalization, whereas the non-NRC group met at least one and averaged nearly two inpatient admissions criteria, leading the researchers to opine that the NRC defendants "would never have been admitted to the hospital", but for

[282] Richard A. Van Dorn, Jeffrey W. Swanson, Marvin S. Swartz, Christine M. Wilder, Lorna L. Moser, Allison R. Gilbert, Andrew M. Cislo, & Pamela Clark Robbins *Continuing Medication and Hospitalization Outcomes After Assisted Outpatient Treatment in New York*, 61 Psychiatric Serv. 982, 983, 985 (2010).

[283] Wright, *supra* note 5, at 64-65 (citing *United States v. Sahhar*, 917 F.2d 1197, 1205-07 (9th Cir. 1990); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091–1103 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473, *judgment reentered*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on procedural grounds*, 421 U.S. 957 (1975), *judgment reentered*, 413 F. Supp. 1318 (E.D. Wis. 1976)).

[284] *Allen v. Illinois*, 478 U.S. 364, 375 (1986).

[285] Jane D. Hickey, Allyson K. Tysinger, & William C. Mims, *A New Era Begins: Mental Health Law Reform in Virginia*, 11 Rich. J.L. & Pub. Int. 101, 118 (2007/2008); Edward H. Stevens & Robert L. Pullen, *Access to Civil Commitment Proceedings and Records in Alabama: Balancing Privacy Rights and the Presumption of Openness*, 9 Jones L. Rev. 1, 9 (2005).

[286] Levitt et al., *supra* note 8, at 351.

[287] *Id.*

[288] *Id.* at 352.

[289] *Id.* at 353–54.

the fact that the County Attorney's office petitioned for" their involuntary commitment.[290]

E. The Current Study

Part V of this Article presents a descriptive analysis of data collected on ninety-nine felony criminal defendants in a primarily rural county in Arizona as a follow-up study to the one conducted by Levitt and colleagues.[291] We compare the clinical, legal, and demographic characteristics between defendants adjudicated incompetent and restored to competency with those deemed NRC. We also present follow-up data on NRC defendants' rates of civil commitment and reoffending.

IV. Methods

A. Data

Staff from the County Attorney's Office in the county in which we conducted this study provided anonymized data to the researchers in October 2016 for ninety-nine felony defendants who had participated in the county's restoration to competency program between fiscal years 2012 and 2016. Table 1 presents a summary of the demographic characteristics of these defendants. Table 2 summarizes the specific information on these defendants that the County Attorney's Office provided to the researchers.

Table 1. Defendant Characteristics

Sex	**n**	**%**
Male	82	83.7
Female	16	16.32
Unknown	1	0.01
Age	**Range**	**Mean**
	18 – 82	38
Race and Ethnicity	**n**	**%**
African-American/Black (Non-Hispanic)	12	12.4
Asian/Pacific Islander	0	0.0
Native American/Alaskan Native	6	6.1
Hispanic/Latino	42	41.9
White (Non-Hispanic)	37	37.1
Unknown	2	0.02

[290] *Id.* at 354.
[291] *Id.*, *passim*.

Table 2: Individual-Level Variables

Variable	*Description*
Originating Charges	The criminal offense(s) that precipitated the defendant being adjudicated NRC (crimes against persons, crimes against property, drug offenses, other)[292]
Primary Diagnosis for NRC Defendants	The clinical diagnosis that led to the NRC determination (serious mental illness; intellectual disability/ developmental disability; substance abuse disorder, traumatic brain injury; other)
Length of Competency Restoration Process	Calculated in days from the date of admission to and release from a competency restoration program
Disposition of Charges	Whether the originating charges were dismissed after the NRC determination (yes/no)
Civil Commitment Referral	Whether the NRC defendant was referred for involuntary civil commitment proceedings (yes/no)
Civil Commitment Basis	Basis for civil commitment (persistently, acutely disabled, danger to self, danger to others)
Guardianship	Whether the County Attorney sought a guardian for the defendant after the NRC determination (yes/no)
Reoffense	Whether the NRC reoffended after release from custody (yes/no)

B. Analytic Strategy

Descriptive statistics and chi-square analyses were used to compare demographic, legal, and clinical characteristics of defendants restored to competency and those adjudicated NRC.[293] Because age is a ratio-level variable, we ran a linear regression to determinate whether there was any significant relationship between age and restoration determinations.[294]

V. Results and Discussion

A. Restoration to Competency

Ninety-three of the ninety-nine defendants (93.9%) of the defendants had their competency status adjudicated during the time frame relevant to our study.[295] Of these ninety-two defendants, sixty (65.2%) were restored to competency and thirty-two (34.7%) were deemed NRC. Although the length of time it took courts to determinate a defendant was competent to stand trial varied significantly—from a minimum of twenty-seven days to a maximum of 758 days—the average length of time to a finding of competency took just under five months (mean = 147.93 days; standard

[292] Charging crimes were sorted into categories used by the Federal Bureau of Investigation ("FBI") in its Uniform Crime Reporting Program, including crimes against persons (criminal homicide, rape, robbery, and aggravated assault); crimes against property (burglary, motor vehicle theft, and arson), drug offenses, and "other" offenses (probation violation, disorderly conduct, etc.). *See*, e.g., FBI, 2018 Crime in the United States (2019), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018. Consistent with the FBI's so-called "hierarchy rule," if defendants were charged with multiple crimes, the most severe crime was coded. FBI, UCR: Uniform Crime Reporting Handbook 10, 11 (2004), https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf. For a critique, see Terry L. Penney, *Dark Figure of Crime (Problems of Estimation)*, *in* Encyclo. Criminology & Crim. Just. (Jay S. Albanese et al. eds., 2014), https://onlinelibrary.wiley.com/doi/10.1002/9781118517383.wbeccj248.

[293] Chi Square analyses are appropriate for testing the relationship between categorical variables such whether a defendant is adjudicated restorable or non-restorable to competency. *See Using Chi-Square Statistic in Research*, StatisticsSolutions, https://www.statisticssolutions.com/using-chi-square-statistic-in-research/ (last visited Oct. 27, 2019).

[294] *See generally* Pradeep Menon, *Data Science Simplified Part 4: Simple Linear Regression Models*, Towards Data Science (July 30, 2017), https://towardsdatascience.com/data-science-simplified-simple-linear-regression-models-3a97811a6a3d.

[295] Determinations as to the competency status of the other seven defendants were still pending at the end of the 2016 fiscal year.

deviation = 117.401 days). The length of time it took courts to determine a defendant was NRC also varied significantly—from a minimum of forty-two days to a maximum of 414 days; the average length of time to a finding of NRC took approximately six months (mean = 180.60 days; standard deviation = 117.401 days). These rates and times of competency restoration roughly aligns with that reported in some other studies.[296]

There were no statistically significant relationships between competency determination outcomes and sex (68% of males restored, 56.2% of females restored; $X^2_{(2, 91)} = .811$, $p > .368$, n.s.), or competency determination outcomes and age ($R^2 = -.006$, $F_{(1,19.9)} = .434$, $p > .512$, n.s.). These findings differ somewhat from those reported by other researchers who found that males and those younger in age at the time of admission to a competency restoration program were significantly related to restoration to competency.[297] But because many studies exclude females, the body of literature suggesting sex is a salient factor is limited.[298] Indeed, in their meta-analysis on competency restoration, Pirelli and colleagues concluded that "female defendants were essentially equally as likely as male defendants to be found incompetent."[299] Similarly, older age has been reported to be correlated with a NRC finding, presumably as function of the fact that younger people generally have a better response to antipsychotic medications than older people.[300] But in their meta-analysis of competency to stand trial outcomes, Pirelli and colleagues noted that the age differences are generally minor.[301]

Similarly, we found competency determination outcomes were unrelated to race/ethnicity. In order to meet the assumptions of the chi-square statistic, defendants' racial and ethnic status needed to be collapsed into White ($n = 34$, 37.4%) and non-White groups ($n = 57$, 62.6%), the latter of which included Hispanic/Latino defendants. There were no statistically significant relationships (64.7% of Whites restored, 66.6% of non-Whites restored; $X^2_{(2, 91)} = .036$, $p > .849$, n.s.). This finding aligns with other research that suggests although race/ethnicity may play some role in determining who gets admitting to forensic psychiatric facilities compared to other types of hospitals, race and ethnicity generally are not related to either

[296] *Compare* Mossman, *supra* note 196, at 38 (reporting overall competency restoration rate of 70.1%), *with* Morris & Parker, *supra* note 192, at 528 (reporting 72.3% competency restoration rate within six months and 83.9% competency restoration rate within one year, but noting that the overall rates were a function of better success at a forensic mental health facility compared to a lower competency restoration rate of 66.6% within six months and 77.6% within one year at other hospitals); *see also* Patricia A. Zapf & Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 Current Directions in Psychol. Sci. 43, 43 (2011) (reporting that the "vast majority—around 75%—of incompetent defendants are returned to court as competent within about [six] months") (internal citations omitted).

[297] Morris & Parker, *supra* note 192, at 529; Mossman, *supra* note 196, at 40.

[298] Pirelli et al., *supra* note 64, at 13 (remarking that is "noteworthy" that nearly half of all studies focus only on male defendants); *Id.* at 29 (noting that prior research establishing statistically significant relationships between restoration to competency and sex were generally weak or "small").

[299] *Id.* at 15.

[300] Morris & Parker, *supra* note 192, at 529; Mossman, *supra* note 192, at 40 (citing, inter alia, Anton J. M. Loonen, Jacques C. M. Loos, & Theodora H. Van Zonneveld, *Outcomes and Costs of Treatment with Risperidone in Adult and Elderly Patients: The Delta Patient Using Risperidone Study*, 26 Progress in Neuropsycho-pharmacology & Biological Psychiatry 1313 (2002); J. Scott Roberts, Frederic C. Blow, Laurel A. Copeland, Kristen Lawton Barry, & William Van Stone, *Age-Group Differences in Treatment Outcomes for Male Veterans with Severe Schizophrenia: A Three-Year Longitudinal Study*, 13 J. Geriatric Psychiatry & Neurology 78, 78 (2000).

[301] Pirelli et al., *supra* note 64, at 15 (noting that incompetent defendants were only "slightly older (35 years old vs. 31.8)" than their competent counterparts).

positive or negative outcomes for restoration to competency within six months.[302]

Forty-six (50%) defendants in the study were charged with crimes against persons, twelve (13%) defendants were accused of property crimes, sixteen (17.3%) defendants were charged with drug crimes, and eighteen (19.4%) defendants were accused of other crimes. Again, in order to meet the assumptions of the chi-square statistic, the original crimes were collapsed into two groups, crimes against persons (n = 46, 50.0%) and all other types of crimes (n = 46, 50.0%). Of the forty-six defendants charged with crimes against persons, twenty-six (56.5%) were restored to competency and twenty (43.4%) were not. Of the forty-six defendants charged with other crimes (i.e., not crimes against persons), thirty-four (73.9%) were restored to competency and twelve (26.1%) were not. There were no statistically significant relationships between competency determination outcomes and the class of crime charged ($X^2_{(2, 92)}$ = .3067, p > .08, n.s.). This aligns with Pirelli and colleagues' meta-analytic findings insofar as they reported that the relationship "between a finding of incompetency and nonviolent offense was virtually nonexistent across [twelve] studies (r = .01).

Collectively, the results of the present study finding no significant age, sex, racial/ethnic, and legal charge differences between felony defendants adjudicated competent to stand trial and those adjudicated NRC are unsurprising for two reasons. First, the sample size of the current study is small enough that such differences may not have been statistically detectable. Second, prior research identifying differences on these bases generally reports weak associations, if any. By contrast, a robust body of research supports the notion that certain types of mental illnesses (namely psychotic disorders and intellectual disability) are the much more salient factors in competency restoration outcomes than demographic characteristics are.[303]

B. Diagnoses of NRC Defendants

Unfortunately, the County Attorney's Office only maintained data on the clinical diagnoses of defendants who were NRC, but not on those who were successfully restored to competency. Neither chi-square analyses nor logistic regression analyses could, therefore, be calculated using psychiatric disorder as an independent variable. Although this missing information underpins a limitation of the current study, we can report that of the thirty-two NRC defendants, twenty-five (78.1%) were diagnosed with a serious mental illness, five (15.6%) had an intellectual or developmental disability, one (3.1%) had a substance abuse disorder, and one (3.1%) had been diagnosed with some other disorder. These findings are consistent with prior research.[304]

[302] Morris & Parker, *supra* note 192, at 529. Mossman, *supra* note 192, at 39 ("Among the felony defendants, … ethnicity … [was] not significantly associated with failure of restoration efforts."). Note, however, that Morris and Parker reported that White race becomes a salient predictor of being found incompetent after one year. Morris & Parker, *supra* note 192, at 529. *Cf.* Pirelli et al., *supra* note 64, at 15, 29 (reporting that although many studies report non-White defendants were 1.5 times more likely to be found incompetent than Whites, the significance of race/ethnicity decreases in meta-regression models that include more salient predictors). Zapf and Roesch, *supra* note 290, do not even mention race or ethnicity in their review of issues for future study on competency restoration.

[303] *See*, *e.g.*, Colwell & Gianesini, *supra* note 192, at 301; Morris & Parker, *supra* note 192, at 529; Nicholson & Kugler, *supra* note 42, at 359–61; Pirelli et al., *supra* note 64, at 7–12; Rodenhauser & Khamis, *supra* note 191, at 130; Zapf & Roesch, *supra* note 290, at 44.

[304] *See infra* notes 96 to 106 and accompanying text.

C. What Happens to NRC Defendants?

1. Civil Commitments and Guardianships

Nineteen of the thirty-two (59.3%) NRC defendants were petitioned for a court-ordered evaluation for civil commitment purposes. In all of these referrals, "persistently or acutely disabled," either as a function of serious mental illness (n = 18, 94.8%) or intellectual/developmental disability (n= 1, 5.2%), had been specified as the qualifying condition.[305]

Consistent with prior research findings, fifteen of the nineteen defendants (79%) referred for civil commitment evaluations had been charged with crimes against the person; only four (21%) were charged with other crimes. A Fisher's Exact Test was performed and found no significant association between charging crimes and referrals for court-ordered evaluations for civil commitments (p = .078).[306]

Twelve (63.1%) of the nineteen people referred for civil commitment evaluations were remanded into involuntary in-patient treatment programs. Four others (21.0%) were not civilly committed, but rather were released into the custody of family members who were court-appointed as new guardians for these persons. Notably, none of these four people were diagnosed with a mental illness; three were intellectually disabled and one had an unspecified "other" diagnosis, presumably indicating some form of dementia or organic brain injury. The remaining three persons referred for a civil commitment evaluation had a serious mental illness that had resulted in them having previously been placed under court-ordered guardianship prior to the commission of the alleged offenses which gave rise to the NRC determination. All three of those person were re-released to the care of their pre-existing guardians, two of whom were family members of one of whom was a public fiduciary.

2. Reoffending

Only three of the ninety-nine defendants (3%) in this study were charged with a new crime that led to them being readmitted to a restoration of competency program between Arizona's state fiscal years of 2012 and 2016. One defendant was charged with a crime against persons and was adjudicated to be restored to competency both on the rearrest charge and on the original charge. Another defendant was found NRC on the original charge of aggravated domestic violence, but restored to competency on the second charge of criminal trespassing. Finally, one defendant originally and subsequently charged with crimes against the person was found restorable at the original offense and NRC at the second offense. NRC defendants in our sample rarely reoffended during the five-year study period. Indeed, those adjudicated NRC reoffended at a dramatically lower rate than the roughly two-thirds of persons who the Bureau of Justice Statistics reports reoffend within three years after being released from prison.[307]

[305] In the state of Arizona someone meets the "persistently and acutely disabled" criteria for civil commitment if, as a function of a mental illness, a person "suffers mental, physical or emotional harm that significantly impairs judgment, reason, behavior or capacity to recognize reality" and does not have the capacity to make an informed decision regarding their care. Ariz. Rev. Stat. § 36-501(2018); Ariz. Rev. Stat. § 36-550 (2018).

[306] Fisher Exact Test is used to determine with the proportions of one variable are significantly different from those of another variable. The test is used when sample sizes are too small to meet the mathematic assumptions of the chi-square statistic. Only the p value is reported for this statistic. *See*, *e.g.*, *Fisher Exact Test*, Statistical Solutions, https://www.statisticssolutions.com/fisher-exact-test/ (last visited Oct. 27, 2019).

[307] Mariel Alper, Matthew R. Durose, & Joshua Markman, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period, 2005-2014 (2018), https://www.bjs.gov/content/pub/

D. Limitations

Like all studies, this present one is constrained by several limitations that should be noted. First, we relied on archival data in county attorney records. As Mossman characterized his use of data from hospital records, our archival data were "conscientiously assembled but unsystematic observations and conclusions about patients."[308] It would have been desirable to have systemically recorded diagnostic records prepared by clinicians with forensic training—especially if such data contained psychiatric diagnoses. Not only were diagnoses completely unavailable for defendants who were restored to competency in our study, but also the diagnoses provided for NRC defendants were only differentiated as mental illness, intellectual disability/developmental disability, substance abuse disorder, traumatic brain injury, or "other." Thus, we were unable to tease-out differences within the broad classification of mental illness that would have allowed us to report data on different categories, such a differential rates for those with psychotic, mood, anxiety, and co-occurring substance use disorders.

Second, the sample size of this study is relatively small. Thus, the power of statistical analyses is not particularly strong, which increases the chance of type two error. A larger sample size with attendant increases in statistical power might reveal significant associations between variables that were not found to be statistically significant in this study.

Third, the data for this study comes from a single geographic area. In contrast to the study by Levitt and colleagues that used data from Arizona's most populous and heavily urbanized county,[309] the data used in this study comes from a primarily rural county in Arizona, albeit with rapidly developing suburban communities, that makes up only 6% the of Arizona's population. Therefore, although the results of the present study shed light on how competency restoration determinations operate in one of the smaller, more rural counties of the state, the findings may not be broadly generalizable.

Finally, as Levitt and colleagues explained as a limitation of their research, the present study does not account for contacts with the criminal justice system prior to the time of admission to the competency restoration program in place during the five-year study period. Prior admissions to competency restoration programs could have influenced the lengths of clients' stays reported in Part V.

VI. Conclusion

With the exception of finding no statistically significant demographic differences between defendants restored to competency and those found to be NRC, the results of the present study mirror those reported in prior research.[310] But this study adds some new findings that have been overlooked in previous research.

First, contrary to what Levitt and colleagues reported based on their study in Maricopa County, Arizona,[311] the data we examine suggests that the county in our study routinely referred NRC defendants for guardianship and civil commitment proceedings by labeling these NRC defendants as "persistently or acutely disabled." In Arizona, this basis for civil

pdf/18upr9yfup0514.pdf (reporting released prisoner re-arrest rates of 38% within three years, 79% within six years, and 83% within nine years).

[308] Mossman, *supra* note 196, at 41

[309] Levitt et al., *supra* note 7, at 349.

[310] *See supra* notes 289–298 and accompanying text.

[311] Levitt et al., *supra* note 7, at 351.

commitment is appropriate if, as a function of a mental illness, a person "suffers mental, physical or emotional harm that significantly impairs judgment, reason, behavior or capacity to recognize reality" and does not have the capacity to make an informed decision regarding their care. By contrast, people who meet the "gravely disabled" designation for civil commitment have a mental illness that renders them incapable of meeting their basic needs and, as a result, is likely to cause themselves "serious physical harm or serious illness."[312] But because all of the NRC defendants in our study were petitioned for civil commitment on the basis of being "persistently or acutely disabled" rather than on the basis of being "gravely disabled," it appears that county officials believed all such defendants were capable of meeting their basic needs, but were impaired only to the extent that could not make competent decisions regarding their own care. Moreover, because none of the NRC defendants were petitioned for civil commitment on the basis of being dangerous, it also appears that county officials believed that these defendants did not pose a risk of violent danger to others. Such determinations may have been accurate but given that all of these people were deemed NRC, it seems possible, perhaps even probable, that county officials categorized people as "persistently or acutely disabled" and in need of treatment to avoid labeling them as "dangerous" to themselves or others. If that is actually what occurred, such practice should be remedied moving forward because knowing the proper bases for petitions would allow judges and mental health professionals to make better informed decisions in guardianship and civil commitment proceedings.[313]

However, if none of the MRC defendants in the research sample posed a substantial risk of danger to themselves or others, then perhaps the county should have considered diversion programs or other community-based alternatives to prosecution, especially since the length of time to complete the competency evaluations were often quite long. Rather than being held as in-patients, these defendants could have benefitted from community treatments available to those who are persistent and acutely disabled.

[312] Ariz. Rev. Stat. § 36-501(2018); Ariz. Rev. Stat. § 36-550 (2018).

[313] It should be noted that there are numerous tools available for making evidence-based prognostications about a person's future dangerous. Robert T. M. Phillips, *Predicting the Risk of Future Dangerousness*, 14 AMA J. Ethics 472 (2012). Although a review of risk assessment instruments is beyond the scope of this Article, readers should take care to note that although some of these risk assessment instruments show some promise in predicting violence in the immediate future (within hours or days), most cannot accurately make predictions beyond a few days and nearly all are flawed for a variety of reasons. For reviews, see Monahan, *supra* note 246, *passim*; Monahan, *supra* note 250, *passim*; John Monahan, *Violence Risk Assessment*, *in* Handbook of Psychology 541–555 (2d ed., Irving B. Weiner ed., 2013); Schug & Fradella, *supra* note 8, at 480–89; *cf.* Henry F. Fradella & Megan Verhagen, *Problems with Risk Assessment Based Bail Determinations*, *in* Punishing Poverty: How Bail and Pretrial Detention Fuel Inequality in the Criminal Justice System 77–128 (Christine S. Scott-Hayward & Henry F. Fradella 2019) (critiquing the use of risk assessments in pretrial proceedings).

Second and quite importantly, the defendants found NRC in our sample overwhelming did not reoffend. As a result, the data do not support the calls to establish a new program for allegedly dangerous defendants who are in a "revolving door" of offending, release, and re-offending.[314] Nonetheless, whether calls for such a program are truly unwarranted remains an open question until other studies establish if civil commitment and guardianship processes are similarly effective in preventing re-offenses in the way they appear to be in the Arizona county studied in this research project.

[314] Gary Grado, *Bill to Commit Criminal Defendants Deemed Incompetent Vetoed*, Ariz. Capitol Times (May 20, 2016), https://azcapitoltimes.com/news/2016/05/20/bill-to-commit-criminal-defendants-deemed-incompetent-vetoed/.

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How Courts Should Compel Third Parties to Undergo Invasive Procedures Believed to Reveal Material Evidence in Criminal Cases

Joseph Diaz

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I. Introduction

In 1999, Victoria Banks was serving out a criminal sentence in the Choctaw, Alabama county jail when she told the County Sheriff that she was pregnant.[1] Concerned that his impoverished county would have to pay for her expensive medical care and persuaded by the results of a brief medical examination, Sheriff Donald Lolley agreed to temporarily free Victoria Banks until after she delivered her baby.[2] Months later, after Victoria had failed to turn herself back in, Sheriff Lolley went searching for her.[3] She informed him that the baby had been delivered stillborn but Sheriff Lolley did not believe her.[4] Suspecting foul play, he brought Victoria in for questioning.[5] In her discussions with the police, Victoria "confirmed the sheriff's fears. She talked of the cool murder of an innocent baby boy, and she said she didn't act alone, that her sister and estranged husband, Medell Banks, also were involved."[6]

Almost immediately, the poor Alabama county was on the tip of journalists' tongues.[7] Nicknamed the "Choctaw Three,"[8] Victoria, her estranged husband Medell Banks, and her sister Dianne Tucker, were arrested and interrogated.[9] All three were poor, black, and mentally handicapped, and all three confessed to murdering Victoria's newborn baby.[10] Despite never finding a body,[11] District Attorney Robert Keahey believed that the confessions were legitimate and was convinced he had his killers.[12] The fact

1 Banks v. State, 845 So.2d 9, 13 (Ala. Crim. App. 2002); Hans Sherrer, The Tragedy of the Choctaw Three: Medell Banks Jrs.' Conviction for Killing A Non-Existent Child Is Thrown Out As A "Manifest Injustice," For Justice Denied Magazine (Jan. 10, 2003), http://www.justicedenied.org/choctawthree.htm [hereinafter Tragedy of the Choctaw Three]; Maurice Possley, National Registry of Exonerations https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3010; Body of Evidence (Transcript of Dateline NBC television broadcast Sept. 24, 2002).

2 Banks, 845 So.2d at 13; Body of Evidence, supra note 1.

3 Id.

4 The Tragedy of the Choctaw Three, supra note 1; Possley, supra note 1; Dave Reynolds, Where's The Baby? The Bizarre Case of The Banks Baby Murder, Inclusion Daily Express (Mar. 2, 2002), http://www.inclusiondaily.com/news/laws/banks.htm; Body of Evidence, supra note 1.

5 Body of Evidence, supra note 1.

6 Id.

7 Hans Sherrer, The Choctaw Three Sage Continues – Medell Banks Jr. Walks Free When The Murder Charge Against Him Is Dismissed, For Justice Denied Magazine (Feb. 12, 2003) [hereinafter The Choctaw Three Sage Continues].

8 Id.

9 Body of Evidence, supra note 1.

10 The Tragedy of the Choctaw Three, supra note 1.

11 Garry Mitchell, Baby Murder Charge Dropped, Gadsden Times (Jan. 11, 2003), https://www.gadsdentimes.com/article/DA/20030111/News/603219495/GT/, [hereinafter Baby Murder Charge Dropped].

12 Body of Evidence, supra note 1.

that no physical evidence had been discovered did not sway Keahey's resolve.[13] He relied heavily on a previous medical examination in which Doctor Katherine Hensleigh claimed she heard a fetal heartbeat and confidently determined that Victoria was indeed pregnant.[14]

Nor was Keahey swayed by the chilling details of the interrogations.[15] Detained without counsel, and subjected to hours of untruthful accusations, Medell's continuous denials were finally overcome by exhaustion.[16] Confused by the situation he found himself in and desperate to go home, Medell admitted that he might have heard a baby cry.[17] After hours of suggestive statements and repeated false statements that DNA evidence already pinned Medell as the killer, Medell reached his breaking point.[18] He agreed to show detectives where the body had been hidden.[19] However, the search proved fruitless.[20]

Had it not been for a media firestorm criticizing Choctaw County and District Attorney Keahey for acting solely on confessions which seemed to be the product of coercive interrogations, Keahey would have pursued the death penalty.[21] However, instead, feeling the mounting pressure of public scrutiny, Keahey sought a way out and offered Medell a deal.[22]

Charged with murder and facing the death penalty, all three suspects pleaded guilty to manslaughter and were serving fifteen-year terms when Medell Banks appealed his guilty plea.[23] His argument was unique: Victoria's baby was a phantom and had never actually existed.[24] Medell explained that in 1995, Victoria Banks had undergone tubal ligation, a surgical procedure in which a woman's fallopian tubes are sealed to prevent the possibility of pregnancy.[25] Therefore, Medell's attorney argued that Victoria could not have become pregnant and the baby never existed in the first place.[26]

Presented with a seemingly impervious defense, the prosecution threw a hail Mary. District Attorney Keahey, still unwilling to budge on Medell's guilt, argued that Victoria's tubal ligation had reversed itself.[27] He reasoned that in a little over one percent of cases, the fallopian tubes could reconnect themselves, making pregnancy possible again.[28]

To overcome the prosecution's counterattack, Medell's attorney asked Victoria to undergo testing to reveal if her tubal ligation was still intact.[29] However, Victoria was already serving time on unrelated charges and she did not seek to contest her plea.[30] The test that her estranged husband requested would be painful and invasive, so she refused. To solve this discrepancy, the Alabama Court of Criminal

13 Body of Evidence, supra note 1.
14 Garry Mitchell, 'Death' of Mystery Infant Lands Three in Prison, Los Angeles Times (Mar. 17, 2002), http://articles.latimes.com/2002/mar/17/news/mn-33269, [hereinafter 'Death' of Mystery Infant Lands Three in Prison].
15 Body of Evidence, supra note 1.
16 Rob Herbert, An Imaginary Homicide, N.Y. Times (Aug. 15, 2002), https://www.nytimes.com/2002/08/15/opinion/an-imaginary-homicide.html; The Choctaw Three Sage Continues, supra note 7; The Tragedy of the Choctaw Three, supra note 1; Possley, supra note 1.
17 The Choctaw Three Saga Continues, supra note 7.
18 Id.
19 Body of Evidence, supra note 1.
20 Id.
21 Id.
22 Id.
23 'Death' of Mystery Infant Lands Three in Prison, supra note 14; The Tragedy of the Choctaw Three, supra note 1; Possley, supra note 1.
24 Body of Evidence, supra note 1.
25 Herbert, supra note 16; see also Banks, 845 So.2d at 14 (explaining that before pleading guilty, Banks had already raised Victoria's previous tubal ligation and had presented expert medical testimony).
26 Body of Evidence, supra note 1.
27 Id.
28 'Death' of Mystery Infant Lands Three in Prison, supra note 14.
29 Body of Evidence, supra note 1.
30 Herbert, supra note 16.

Appeals was faced with a unique question.[31] Could a court compel a third party to undergo an invasive medical procedure[32] which it believed would reveal material evidence in a criminal trial?[33]

Victoria Banks eventually consented to the testing, and the court was able to escape the question altogether.[34] As it turned out, Medell's defense attorney was correct. Dr. Michael Steinkampf, director of Reproductive Endocrinology and Fertility at the University of Alabama, conducted a hysterosalpingogram (HSG) test "in which dye is forced into the tubes and scanned . . . . [H]e reported results that were 100% consistent with tubes that were severed and permanently closed."[35] The results of the HSG test conclusively determined that it would have been "impossible" for Victoria Banks to have been impregnated.[36]

Faced with the results of a conclusive medical examination given by an experienced and renowned doctor,[37] District Attorney Keahey decided to make another deal.[38] After serving forty-one months for a crime he could not have possibly committed, Medell Banks pleaded guilty to the misdemeanor of tampering with unspecified physical evidence and was released from state prison.[39] Victoria was still imprisoned on an unrelated charge and did not seek to change her plea.[40]

This Comment will explore the lingering question posed by Alabama's Court of Criminal Appeals in Banks v. State.[41] Can a court compel a third party to undergo an invasive medical procedure that it believes would reveal potentially exculpatory or incriminating evidence?[42] Although the court was able to avoid answering the difficult question, in a footnote, it explained its uncertainty because no precedent existed.[43] Instead, various tests have been used in both civil and criminal contexts to compel individuals to undergo invasive medical procedures.[44] The Constitution, through the Fourth, Fifth, and Fourteenth Amendments, seems to restrict but not completely forbid the idea that the state could compel the invasion of bodily integrity for the greater good.[45] This Comment will explore the tests that have been used in similar contexts, where the defendant himself is being

[31] Banks, 845 So. 2d at 25 n.16.

[32] 83A N.Y. Jur. 2d Physicians, Surgeons, and Other Healers § 125 (invasive procedure is defined as "any procedure in which human tissue is cut, altered, or otherwise infiltrated by mechanical or other means. Invasive procedure includes surgery, lasers, ionizing radiation, therapeutic ultrasound, or electroconvulsive therapy.").

[33] Banks, 845 So.2d at 25 n. 16.

[34] Body of Evidence, supra note 1.

[35] 'Death' of Mystery Infant Lands Three in Prison, supra note 14.

[36] The Tragedy of the Choctaw Three, supra note 1; Phillip Rawls, Sentence overturned in baby death case, Tuscaloosa News (Aug. 9, 2002), https://www.tuscaloosanews.com/article/DA/20020809/News/606113149/TL/.

[37] The Tragedy of the Choctaw Three, supra note 1.

[38] District Attorney Keahey did not originally seek a deal. In fact, Keahey appealed the Alabama Court of Appeals holding which allowed Banks to withdraw his guilty plea, stating, "we hold that a manifest injustice has occurred in this case." Banks, 845 So.2d at 30; see also Rawls, supra note 36.

[39] Baby Murder Charge Dropped, supra note 1; The Tragedy of the Choctaw Three, supra note 1.

[40] Baby Murder Charge Dropped, supra note 1; Possley, supra note 1.

[41] Banks, 845 So.2d at 25 n. 16.

[42] Id.

[43] Id. ("Several questions were asked at oral arguments before this Court on the issue of whether the trial court could have ordered Victoria to undergo the HSG without her consent. Although we are not called upon to answer that question, we think it appropriate to mention that, in this area, the law is unclear; there is no case on point. Without deciding that issue, we note that we question whether a trial court has the authority to order a woman to undergo what is obviously an invasive and potentially painful, if not deadly, procedure.").

[44] Infra Part II.

[45] See U.S. Const. amend. IV.; U.S. Const. amend. V.; U.S. Const. amend. XIV.

compelled,[46] and where mothers are compelled to undergo surgeries for the best interests of their fetuses.[47] It will then analyze both tests, applying them to our unique context where a third party is being forced to undergo a medical procedure against her will.[48] Eventually, this Comment will conclude by arguing that a new balancing test must be created to weigh the conflicting interests at play more adequately, and will give a recommendation of how future courts faced with similar issues should tackle the complicated question.[49]

Ultimately, this Comment will argue that in criminal cases, where either the prosecution or defense believes that performing an invasive medical procedure on a third party would reveal material evidence of either guilt or innocence and where the third party is unwilling to consent to such a procedure, courts should apply a case specific balancing test.[50] The new balancing test should weigh the interests of the prosecution or defense, the third party, and society as a whole.[51] This Comment argues that although current jurisprudence provides a starting point, existing legal tests are inadequate and incapable of being effectively applied to situations where someone other than the criminal defendant himself is compelled to undergo an invasive medical procedure. The balancing test this Comment proposes combines the Winston balancing test,[52] which has been used to resolve cases determining whether a criminal defendant himself should be compelled to undergo a procedure, and the balancing test used by many courts when considering whether to compel a mother to undergo a C-section. This recommendation, along with the other suggestions put forth in this Comment, will better address the novel issue presented by Banks v. State.[53]

II. Background

The right to bodily integrity dominates throughout the cases and tests whenever a compelled procedure is contemplated.[54] As a constitutional right, bodily integrity has received tremendous protection from the courts.[55] However, the right to bodily integrity is not an impregnable shield protecting individuals from court compulsion.[56] In the past, courts have often compelled invasive procedures on parties to a case, in both the criminal and civil contexts.[57]

[46] Infra Part II(a).
[47] Infra Part II(b).
[48] Infra Part III.
[49] Infra Part IV.
[50] Infra Part IV.
[51] Id.
[52] Winston v. Lee, 470 U.S. 753 (1985).

[53] Banks v. State, 845 So.2d 9, 25 n. 16 (Ala. Crim. App. 2002).
[54] See Winston, 470 U.S. at 74 (considering the right to bodily integrity as a factor to be weighed when determining to compel a surgery against one's will); In re Baby Boy Doe v. Mother Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (refusing to balance to balance the rights of a fetus against a mother, instead holding that a woman's bodily integrity is dominant); Andrews v. Love, 763 P.2d 714, 716 (Okla. Cr. App. 1988) (weighing the right to bodily integrity when determining if a compelled surgery should be ordered).
[55] See generally Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 835 (1992).
[56] Stewart-Graves v. Vaughn, 162 Wash. 2d 115, 135 (2007) ("[A] person's constitutional right to privacy and right to bodily integrity . . . is not absolute . . . but may be overcome by countervailing state interests, including: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) maintaining the ethical integrity of the medical profession.").
[57] See White v. Railroad Co., 21 N.W. Rep. 524, 526 (1884) ("[T]he ends of justice imperatively demanded that she submit to [the examination]. Such examinations are frequently ordered by courts in cases of divorce for impotency, and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so far as we are advised."); Andrews, 763 P.2d at 714 (court ordered the surgical removal of a bullet from a murder suspect's arm so that it could be used as evidence of his guilt); Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (court affirmed the trial court's order forcing a

It is well established that courts have the power to overcome the intense protection of bodily integrity to satisfy other societal interests. However, the tests the courts have used to determine when it is constitutional to do so have varied and are dependent on the surrounding circumstances of each case.[58] Generally, and for the purposes of this Comment, there are two main categories where various tests have been utilized, criminal cases and civil cases.

A. Criminal Cases

Typically, when courts consider compelling persons to undergo invasive medical procedures against their will it is because the prosecution or law enforcement is seeking to gather evidence of a crime.[59] When determining whether the court should grant the prosecution's request and order the defendant to undergo medical testing, courts have frequently turned to the Schmerber "Reasonableness Test" also known as the "Balancing Test."[60]

In Schmerber, the defendant was arrested at the hospital where he was being treated after a car accident.[61] The police suspected that he had been driving while intoxicated and ordered hospital staff to take a sample of Schmerber's blood, despite his refusals.[62] The Supreme Court set out to determine "whether the police were justified in requiring [the defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness."[63] The Court sought to balance the state's interests in gathering evidence to help determine whether the defendant was innocent or guilty, with the individual's protection from arbitrary invasions of privacy and bodily integrity under the Fourth Amendment.[64] The Court concluded that the nonconsensual blood test was "reasonable" because the taking of blood samples is an extremely effective method for determining one's level of intoxication, the level of blood necessary for testing is minimal, blood testing is a standard medical procedure which "involves virtually no risk, trauma, or pain,"[65] and the blood was drawn by a medical professional in a hospital and according to standard medical procedures.[66] However, the Supreme Court was unsure if more invasive intrusions could be justified; it cautioned that just because "the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions [it] in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."[67]

pregnant woman to submit herself to unwanted surgery in an effort to save her unborn child's life).

58 Infra Part II(a)–(b).

59 See generally Winston v. Lee, 470 U.S. 753 (1985) (prosecution sought the removal of a bullet for evidence); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (seeking the removal of a bullet from the criminal defendant as evidence of guilt); Andrews v. Love, 763 P.2d 714, 716–17 (Okla. Cr. App. 1988) (court ordered a surgery to remove a bullet for evidence of guilt).

60 Schmerber v. California, 384 U.S. 757 (1966). Courts also use the balancing test when deciding whether law enforcement's warrantless search of the defendant was constitutional, as was the case in Schmerber. Id.

61 Id. at 758.

62 Id.

63 Id. at 768.

64 Jay A. Gitles, Reasonableness of Surgical Intrusions – Fourth Amendment: Winston v. Lee, 105 S. Ct. 1611 (1985), 76 J. Crim. L. & Criminology 972, 972 (1986); Schmerber, 384 U.S. at 767 ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

65 Schmerber, 384 U.S. at 770–71. But see Birchfield v. North Dakota, 136 S.Ct. 2160 (2016) (determined that blood tests were no longer the most reasonable and unobtrusive manner of determining an individual's blood alcohol content).

66 Schmerber, 384 U.S. at 771.

67 Id. at 772.

Over a decade later, the D.C. Circuit Court of Appeals sought to expand the Schmerber Reasonableness Test to more invasive intrusions.[68] In United States v. Crowder, the court held that a court ordered surgery, performed under local anesthesia, to remove a bullet from Crowder's arm was a reasonable search, despite Crowder's objections.[69] The court concluded that if four factors are satisfied, the court should compel the procedure:

> (1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it; (2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal; (3) before the operation was performed the District Court held an adversary hearing at which the defendant appeared with counsel; (4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review by this court.[70]

The same year that the D.C. Circuit Court of Appeals was deciding Crowder, the Georgia Supreme Court was presented with a question extremely similar to the one this Comment poses: whether a criminal defendant could compel the victim of a crime to undergo a surgery to remove a bullet.[71] The court held that it was unconstitutional to compel a victim, against his will, to undergo a surgery to remove a bullet on the motion of a criminal defendant.[72] The defendant sought the motion because he believed that the bullet could be proven to have been fired from a different gun than the one the state had found on him.[73] Although the court realized that criminal defendants have a constitutional right to mount an effective defense, it determined that the "Fourth Amendment right of the victim to be secure against an unreasonable search must prevail over the right of the accused to obtain evidence for his defense."[74] The court also found it significant that even if it was proven that the bullet had been fired from a different gun, the evidence would not be exculpatory and would only add to his defense, although the court did not rely entirely on this factor.[75] Instead, the court relied on Schmerber and applied the Reasonableness Test.[76] Without much explanation, the court simply held that the surgical removal of the bullet could not be a reasonable search.[77] It also noted that the prosecution would have no right to order the removal of a bullet, regardless of the health risks.[78] However, this decision would not last very long. Within a decade, the Supreme Court departed from the logic in

[68] Michael B. Minton, Criminal Procedure – Surgical Removal of Evidence – United States v. Crowder, 43 Mo. L. Rev. 133 (1978).
[69] United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976).
[70] Crowder, 543 F.2d at 316.
[71] State v. Haynie, 242 S.E.2d 713 (Ga. 1978).
[72] Id. at 714 (holding that "it could not be a reasonable search . . . to require the victim of a crime to undergo surgery against his will to remove a bullet lodged an inch from his spine, even if medical testimony could be produced that the operation would not be dangerous to his health.").
[73] Id. at 713.
[74] Id. at 715.
[75] Id. at 715 (explaining that, because the defendant had turned the gun over to the police several days after the shooting, any evidence that the bullet was fired from a different gun would depend on a jury's determination of the defendant's credibility anyway).
[76] Id. at 714.
[77] Id.
[78] Id.

Haynie, holding that the surgical removal of a bullet could be reasonable so long as a new balancing test was satisfied.[79]

In Winston v. Lee, the Supreme Court refused to compel a surgical procedure to remove a bullet for evidence because of the procedure's risks to the suspect and because of the marginal additional evidence the potentially damaged bullet would bring.[80] Instead, it held that the case was "an example of the 'more substantial intrusion' cautioned against in Schmerber."[81] In the years following, Winston v. Lee has become the seminal case for courts deciding whether to compel an invasive procedure in a criminal case; changing the Schmerber reasonableness test into the Winston balancing test.

While under the visage of applying the Schmerber Reasonableness Test, the Supreme Court transformed the Test into a new balancing test, one which "weigh[ed] the extent to which the procedure may threaten the individual's safety or health, the extent of intrusion upon the individual's dignity interests in personal privacy and bodily integrity, and the community's interest in fairly and accurately determining guilt or innocence."[82] The case involved an armed robbery in which the victim returned fire and the assailant, Lee, was wounded.[83] The state of Virginia sought a court order to compel Lee to undergo surgery to remove the bullet which would be used as evidence of his guilt.[84] Initially, the order was granted because expert medical testimony had suggested that the surgery would be relatively minor and would only require local anesthesia, avoiding the dangers associated with general anesthesia.[85] However, additional pre-surgery examination revealed that the bullet was lodged deeper than previously thought and would indeed require general anesthesia.[86] Although the Supreme Court refused to order the surgery, the Court's initial decision showed its willingness to override the right to bodily integrity in favor of administering justice.[87] However, that willingness was not without its limitations; instead, the Court decided to weigh varying interests.[88]

In making its determination, the Winston Court applied three factors that it recovered from the Schmerber Reasonableness Test. First, the Court must determine "the extent to which the procedure may threaten the safety or health of the individual."[89] Second, the Court must consider "the extent of the intrusion upon the individual's dignitary interests in

[79] See Winston v. Lee, 470 U.S. 753 (1985); see also Haynie 242 S.E.2d at 715–16 (Hall, J., concurring) (explaining that the Fourth Amendment does not prohibit the defendant's motion, but rather, Schmerber does. The Schmerber Court was careful to limit its application, cautiously refusing to approve more intrusive searches. In Hall's view, there is a vast difference between a blood test and the surgical removal of a bullet. Additionally, Hall explained that "it is determinative that . . . this bullet, even if retrieved, will prove very little."). See also Haynie 242 S.E.2d at 717 (Hall, J., concurring) (arguing that "if it does not violate the accused's Fourth Amendment rights to perform involuntary surgery on him . . ., how does it violate the Fourth Amendment rights of the victim to perform surgery on him? I submit that there is no logical basis under the Fourth Amendment for treating the victim and the defendant differently.").

[80] Id.

[81] Id. at 755 (quoting Schmerber, 384 U.S. at 772).

[82] Andrews v. Love, 763 P.2d 714, 716 (Okla. Cr. App. 1988) (summarizing the balancing test laid out in Winston).

[83] Winston, 470 U.S. at 756.

[84] Id. at 757.

[85] Id.

[86] Id. at 757.

[87] Id.

[88] Id.

[89] Id. at 761 (in Schmerber this factor had been satisfied because a blood test "involves virtually no risk, trauma, or pain." Additionally, the blood test was conducted "by a physician in a hospital environment according to accepted medical practices.") (quoting Schmerber v. California, 384 U.S. 757, 770–71 (1966)).

personal privacy and bodily integrity."[90] Lastly, the Court must weigh the individual's interests against "the community's interests in fairly and accurately determining guilt or innocence."[91]

In discussing the risks associated with surgically removing the bullet, the Court noted that at least one surgeon testified that it would be difficult to determine the bullet's exact location and the resulting exploratory probing increased the risk of infection and could lead to permanent damage.[92] Multiple medical experts had purported wildly varying accounts on the duration, extent, and risks of an operation.[93] The Court noted that the medical uncertainty influenced its decision when weighing the first factor.[94] When weighing the second factor, the Court noted that the use of general anesthesia on an unwilling patient "involves virtually a total divestment of . . . ordinary control over surgical probing beneath his skin."[95] In balancing these factors with society's interest in obtaining the additional evidence, the Court found the government's needs unpersuasive. The Court believed that the bullet would provide little additional evidence.[96] There was some concern that the bullet would no longer be valuable because it might have corroded while in Lee's shoulder, thereby making it useless for comparison purposes.[97]

In the years following, the courts across the nation have followed the Supreme Court and D.C. Circuit's guidance, applying the factors laid out in Winston v. Lee and United States v. Crowder.[98] In Andrews v. Love, the Oklahoma Court of Criminal Appeals was faced with facts similar to Winston.[99] In his dying breath, the murder victim, surrounded by bullet casings, explained that he shot his attacker with his rifle.[100] Within the hour, the suspect was found with a chest wound and a bullet lodged in his arm.[101] The court was persuaded by expert medical testimony which explained that the bullet was located in a fleshy part of the suspect's arm, that there was a 99.9% chance that the surgery would be an uncomplicated minor procedure that posed no risk of long-term injury to the suspect, and that the bullet did not appear to be damaged.[102] The court was also influenced by the testimony from a ballistics expert who claimed that the murder victim's gun left identifiable marks after being fired.[103] In applying the Crowder factors, the court held that:

> It is clear that the evidence sought is relevant, can be obtained in no other way, and there is probable cause to believe that the oper-

[90] Id. at 761 (1985) (in Schmerber the Court noted that blood tests were so common and ordinary that society does not judge them as an extensive invasion of privacy) (referencing Schmerber, 384 U.S. at 771).

[91] Winston, 470 U.S. at 762 (noting that in Schmerber the Court had found blood tests to be highly effective at determining levels of intoxication, there was a high likelihood that evidence of drunkenness would be discovered by the testing, and that blood tests were extremely important for enforcing the state's drunk driving laws) (referencing Schmerber, 384 U.S. at 770). The third factor, the community's interest in fairly and accurately determining guilt or innocence has often been analyzed under a two-prong approach, considering the nature of the crime and the potential value of the evidence. See State v. Brown, 915 N.W.2d 896, 898 (Minn. Ct. App. 2018).

[92] Winston, 470 U.S. at 764.

[93] Id.

[94] Id.

[95] Id. at 765.

[96] See id. (explaining that "[t]he Commonwealth has available substantial additional evidence.").

[97] Id. at n. 10.

[98] Id. at 753–54; United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976).

[99] Andrews v. Love, 763 P.2d 714 (Okla. Crim. App. 1988).

[100] Id. at 715 (Bussey, J., concurring).

[101] Id.

[102] Id.

[103] Id.

> ation would produce it. The operation is minor and would be performed by a skilled surgeon under a local anesthetic. The risk of permanent injury is minimal, and further x-rays would be taken to ensure petitioner's safety. Finally, petitioner has been afforded both an adversary hearing and appellate review.[104]

In Johnson v. Nagle, the United States District Court for the Northern District of Alabama distinguished the facts surrounding the defendant's surgery from the facts in Winston v. Lee.[105] In following the trend, this case also involved the removal of a bullet from a murder suspect.[106] The defendant, Johnson, had attempted to rob a jewelry store when a gunfight ensued with the store owner.[107] As a result, the store owner died and the defendant was on the run with a bullet lodged in his back.[108] After the defendant was apprehended, the police received a warrant to remove the bullet as evidence.[109] It was determined that the bullet was of the same make and model as those that were fired from the victim's revolver on the night of the shootout.[110]

The court reviewed the defendant's objection to the bullet's removal under the Winston factors.[111] In doing so, the court determined that the facts could be distinguished from Winston.[112] For the first factor, the court reasoned that, unlike in Winston, "competent medical testimony . . . established that the bullet was lodged in fatty tissue, just beneath the skin, in the area of the shoulder blade; [the] surgery would be minor and would be performed with local anesthetic; and [there was] practically no danger to life or health" as a result of the surgery.[113] In addressing the third factor, the court stated that "the State's need for the evidence was extremely strong . . . the bullet was by far the most persuasive piece of evidence linking Johnson to the crime scene."[114] Notably, in applying the Winston factors, the court entirely ignored the second part of the test, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."[115]

Unlike the court in Johnson v. Nagle,[116] in State v. Brown, the Minnesota Court of Appeals addressed the second factor.[117] During a drug bust, police officers witnessed the defendant "shoving his hands down his pants" which indicated that he was attempting to conceal drugs.[118] After his arrest, the police officers continued to observe the defendant behave in a manner that indicated to them that he was "attempting to jam narcotics up his rectum."[119] Convinced that there was illegal activity afoot, the police conducted a strip search and detect-

[104] Id. at 716.
[105] Johnson v. Nagle, 58 F. Supp. 2d 1303 (N.D. Ala. 1999); Winston v. Lee, 470 U.S. 753 (1985).
[106] Johnson, 58 F. Supp. 2d at 1303.
[107] Id. at 1314–15.
[108] Id. at 1315.
[109] Id.
[110] Id. at 1316.
[111] See id. at 1377 ("The Winston Court enumerated three facts to be considered, including (1) the extent to which the procedure threatens the safety or health of the individual; (2) the extent to which the intrusion impinges upon the individual's 'dignitary interests in personal privacy and bodily integrity;' and (3) the extent to which prohibiting the intrusion would affect the 'community's interest in fairly and accurately determining guilt or innocence.'") (quoting Winston v. Lee, 470 U.S. 753, 761–63 (1985)).
[112] Johnson, 58 F. Supp. 2d at 1377.
[113] Id.
[114] Id.
[115] Id.; Winston, 470 U.S. at 761.
[116] See generally Johnson, 58 F. Supp. 2d at 1315.
[117] State v. Brown, 915 N.W.2d 896, 901 (Minn. Ct. App. 2018).
[118] Id. at 897–98.
[119] Id.

ed a plastic bag partially inside the defendant's anus.[120] The police received a warrant to remove the expected narcotics and transported the defendant to a hospital so that medical staff could perform the operation, an unconsented sedated anoscopy.[121]

In reviewing the reasonableness and constitutionality of the procedure, the court applied the Winston factors.[122] The court weighed the first factor in favor of the state because there was uncontested medical testimony presented by multiple doctors that the procedure was not complicated and posed only minimal health risks such as minor bleeding and tearing.[123] The factor addressing intrusion upon the individual's privacy and bodily integrity was weighed in favor of the defendant.[124] In agreeing with the district court, the court found it significant that "the anoscopy procedure was 'an extreme violation of Brown's dignitary interests in personal privacy and bodily integrity' because he was 'restrained, sedated, and forced to undergo the anoscopy."[125] In applying the final factor, the court found that it weighed in favor of the state.[126] The court determined that society has a strong interest in prosecuting drug trafficking, and, "unlike in Winston, the evidence sought here was the state's only direct evidence of crack-cocaine possession."[127] Despite the severity of the invasion of personal privacy and dignity, the court found that, taken together, the factors weighed in favor of the prosecution and the search was deemed reasonable.[128]

B. Civil Cases

Although there are numerous civil contexts where courts consider ordering invasive medical procedures,[129] this Comment will only discuss one that involves court ordered cesarean sections (C-section). In these cases, hospitals or doctors will seek a court order to compel

[120] Id.
[121] Id.
[122] Id. at 899–900.
[123] Id. at 900–01.
[124] Id. at 901.
[125] Id. ("The state concedes that, on balance, this factor favors Brown. We agree. The district court properly determined that 'the procedure was demeaning, humiliating, and an infringement on Brown's dignitary interests.'").
[126] Id.
[127] Id.
[128] Id. at 903.
[129] One of the most common civil tests used is provided in Federal Rule of Civil Procedure 35. Rule 35 is most commonly used in lawsuits where one party is attempting to verify the claims of another. It has also been used when a party is seeking to lower the value of damages based off of factors such as life expectancy. Rule 35 was justified by the belief that parties to an action have agreed to see justice done, which may require an invasion of their privacy. See generally Richmond & D. R. Co. v. Childress, 9 S.E. 602, 603 (1889) ("[W]hen a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done."). However, the Rule 35 analysis is unhelpful for the question considered by Banks v. State, 845 So.2d 9, 25 n. 16 (Ala. Crim. App. 2002), because it is strictly applied only to parties of the action. This is because these parties have voluntarily submitted themselves to the courts, and there is a strong interest in ascertaining the truth during litigation. However, at least one case has expanded the requirement that subjects of the procedure be parties to the action by allowing medical testing on a newborn baby. See Beach v. Beach, 114 F.2d 479, 482 (D.C. Cir. 1940) ("One who is not a party in form may be, for various purposes, a party in substance. The general rule that the interest of parties not before the court will not be bound by the decree is subject to the exception of the case, where a party, though not before the court in person, is so far represented by others that his interest receives actual and efficient protection."); Richard J. Barnet, Compulsory Medical Examinations under the Federal Rules, 41 Va. L. Rev. 1059, 1071 (1955) (explaining that in Beach, "since the mother and child had no conflicting interest in the outcome of the case, and, since the mother was conscientiously representing the infant, his interest was adequately protected.").

a pregnant woman to undergo a C-section for the safety of the unborn child.[130]

Sometimes, when women refuse to have a C-section despite their doctor's recommendations, the doctor will seek to have the surgery compelled through a court order.[131] In these rare cases, courts often use a balancing test to determine whether the C-section should be compelled. The balancing test seeks to weigh the rights of the mother against the interests of the fetus.[132] However, use of the balancing test is not consistent across America. Courts are split between use of the balancing test and a refusal to use the test in favor of an absolute right to bodily integrity.[133]

Many courts have used the balancing test to determine if a C-section should be ordered. In Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., the District Court for the Northern District of Florida reviewed a state court order requiring a woman, who was in labor and attempting a natural birth at her home, to submit to a C-section.[134] The hospital sought the court order out of a credible fear that the child would die during delivery if the mother continued with her natural birth.[135] After the child's healthy delivery, the mother sought damages, alleging that her constitutional right to bodily integrity had been violated.[136] During review, the court sought to balance her right to bodily integrity against the interests of the state in preserving the child's health and safety (this Comment will often refer to this interest as the fetus' interest rather than the state's).[137] The court concluded that,

> Recognizing these constitutional interests, however, is only the beginning, not the end, of the analysis. Ms. Pemberton was at full term and actively in labor. It was clear that one way or the other, a baby would be born (or stillborn) very soon, certainly within hours. Whatever the scope of Ms. Pemberton's personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.[138]

Several factors weighed heavily on the court's decision.[139] The court found it very significant that the birth of the child was imminent, with only a few hours to spare, and that the mother desired to avoid the C-section, not the birth itself.[140] Had the mother desired to

[130] See In re A.C., 573 A.2d 1235, 1237 (D.C. Cir. 1990) (en banc).

[131] See generally Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981) (per curiam); Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

[132] See Pemberton, 66 F. Supp. 2d at 1251 ("Whatever the scope of [defendant]'s personal constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.").

[133] Erin P. Davenport, Court Ordered Cesarean Sections: Why Courts Should Not Be Allowed to Use a Balancing Test, 18 Duke J. Gender L. & Pol'y 79, 85 (2010).

[134] Pemberton, 66 F. Supp. 2d at 1247, 1249.

[135] Id. at 1249 (in fact, enough doctors believed that a natural birth would be so dangerous, due to some of the plaintiff's existing health concerns, that the plaintiff was forced to attempt her natural birth at home because no doctor considered a vaginal delivery medically acceptable).

[136] Id. at 1250–51 ("She asserts a right to bodily integrity, a right to refuse unwanted medical treatment, and a right to make important personal and family decisions regarding the bearing of children without undue governmental interference.").

[137] Id.

[138] Id.

[139] Id.

[140] Id. ("The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby's birth was imminent, and more importantly, here the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether.

terminate her pregnancy, Roe v. Wade would have controlled, but due to the stage of pregnancy, the state still would have prevailed.[141] The court was also persuaded by medical testimony universally agreeing with the hospital's conclusion that the C-section was medically necessary to protect the child's life, as well as the mother's.[142] However, it is significant to note that the physicians placed the risk of medical complications of a natural birth between two and six percent and the child's death, should there be a complication at fifty percent.[143] Although these percentages may seem relatively low, the court was persuaded by the argument that if such percentages were attached to airplane crashes, no sane person would travel by air.[144] The court explained that "medicine is not an exact science," and the doctors behaved reasonably in their pursuit of a court order.[145] The mother's constitutional right to bodily integrity was outweighed.[146]

In Jefferson v. Griffin Spalding County Hospital Authority, the Georgia Supreme Court reviewed an order requiring a mother to undergo a C-section believed necessary to save her unborn child's life.[147] The mother refused to undergo the C-section on religious grounds.[148] In response, the court "weighed the right of the mother to practice her religion and to refuse surgery on herself, against her unborn child's right to live."[149] The court found that without the C-section there was over a "99% certainty" that the child would not survive; whereas there was nearly a "100% chance of preserving the life of the child" if the surgery was performed.[150] The court also found that the child was perfectly viable and capable of "sustaining life independent of the mother."[151] Similar to Pemberton,[152] the mother desired giving birth to her child, her resistance was on the procedure.[153] It was also relevant that the C-section posed no additional danger to the mother and in fact reduced her risk of dying from the pregnancy.[154] Furthermore, time was of the essence; the mother was due to begin labor at any moment.[155] Therefore, in weighing the child's interest in living with the mother's constitutional rights, the court decided that the compelled C-section was appropriate.[156]

However, many courts have rejected the balancing test and instead honor the woman's choice, regardless of its effects on innocent third parties.[157] The courts that refused to use the balancing tests have instead opted for the

Bearing an unwanted child is surely a greater intrusion on the mother's constitutional interests than undergoing a caesarean section to deliver a child that the mother affirmatively desires to deliver."); see also Davenport, supra note 133 at 85.

[141] Id.; see also Roe v. Wade, 410 U.S. 113 (1973).

[142] Pemberton, 66 F. Supp. 2d at 1253.

[143] Id. ("Prior to attempting to deliver vaginally at home, [plaintiff] was unable to locate a single physician willing to attend the birth; this shows just how widely held was the view that this could not be done safely.").

[144] Id.

[145] Id. at 1254.

[146] Id. ("Because of the very substantial risk that the course [plaintiff] was attempting to pursue would result in the death of her baby, requiring her to undergo an unconsented cesarean section did not violate her constitutional rights.").

[147] Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981) (per curiam).

[148] Id. at 458.

[149] Id. at 460.

[150] Id. at 458.

[151] Id.

[152] Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

[153] Jefferson, 274 S.E.2d. at 460.

[154] Id. at 459 ("There is a 50% chance that [the mother] herself will die if vaginal delivery is attempted. There is an almost 100% chance that [the mother] will survive if a delivery by cesarean section . . . .").

[155] Id.

[156] Id. at 460 (holding that the mother's rights were "outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.").

[157] See Davenport, supra note 133 at 85.

right to refuse based on bodily integrity. In In re A.C., the District of Columbia Court of Appeals reheard the depressing facts of a case where it had previously allowed a court order compelling a C-section.[158] The trial court had made the following findings of fact: (1) the mother would probably pass away within a day or two, (2) the fetus was viable and, if a C-section was performed immediately, had a fifty to sixty percent chance of living, (3) the state had a strong interest in preserving the viable fetus' life, (4) the operation greatly increased the odds that the mother would die, and (5) it was questionable whether the mother had consented to the procedure and whether she had the capability to do so.[159] After weighing the interests the trial court authorized the procedure and a child was delivered but died several hours later.[160] Sadly, the mother passed away two days after, as was expected.[161] Although there was much evidence suggesting the mother wanted her child delivered regardless of what would happen to her, there was an account that after the decision was made she muttered to her doctor, "I don't want it done, I don't it done."[162]

The appellate court held that the trial court "erred in subordinating [the mother's] right to bodily integrity in favor of the state's interest in potential life."[163] Instead it held that "in virtually all cases the question of what is to be done is to be decided by the patient – the pregnant woman – on behalf of herself and the fetus."[164] In justifying this decision, the court explained that at common law "courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health."[165] However, the court then stated that "the state's interest in preserving life must be truly compelling to justify overriding a competent person's right to refuse medical treatment."[166] Therefore, while holding that the trial court erred in using the balancing test, the court also refused to revoke the use of the test in all cases completely.[167]

In In re Baby Boy Doe v. Mother Doe, the Appellate Court of Illinois considered "whether an Illinois court can balance whatever rights a fetus may have against the rights of a competent woman to refuse medical advice to obtain a cesarean section for the supposed benefit of the fetus."[168] In this case, the fully viable fetus was receiving insufficient oxygen, and medical experts recommended an immediate C-section to save the child's life.[169] Similar to the mother in Jefferson, the mother here refused to undergo the C-section on religious grounds, opting instead for a natural delivery.[170] In at least one physician's uncontested opinion, the fetus' situation was worsening with each day, and at the

[158] In re A.C., 573 A.2d 1235, 1237 (D.C. Cir. 1990) (en banc) (the court had already heard the appeal but determined that there was not enough evidence to overturn the trial court's decision).
[159] Id. at 1240.
[160] Id. at 1238.
[161] Id.
[162] Id. at 1241, 1238 (the mother had agreed to a medical plan designed to extend her life by several weeks so that her child would have a better chance of surviving a C-section).
[163] Id. at 1238.
[164] Id. at 1237.
[165] Id. at 1243–44.
[166] Id. at 1246 (also stating that "In those rare cases in which a patient's right to decide her own course of treatment has been judicially overridden, courts have usually acted to vindicate the state's interest in protecting third parties, even if in fetal state.").
[167] Id. at 1252 ("We need not decide whether, or in what circumstances, the state's interests can ever prevail over the interests of a pregnant patient. We emphasize, nevertheless, that it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a caesarean section.").
[168] In re Baby Boy Doe v. Mother Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994).
[169] Id. at 327.
[170] Id.

time the trial court was considering an order, the odds of the baby's survival to a natural birth were near zero, whereas the chances of surviving a C-section were close to 100%.[171] In addition, the trial court determined that the mother's odds of dying as a result of the operation were almost zero, although it would be more painful than a natural birth.[172] Despite this, the trial court concluded that a mother has no "obligation or responsibility to provide medically for a fetus, or for another person for that matter," and therefore the use of any balancing test is unnecessary.[173]

The Appellate Court of Illinois affirmed, rejecting the balancing test and holding instead that a woman's right to bodily integrity "must be honored, even in circumstances where the choice may be harmful to her fetus."[174] In justifying this decision the court offered that "a woman's right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy . . . . [A] woman's rights can[not] be subordinated to fetal rights."[175] The court explained that courts in Illinois "have consistently refused to force one person to undergo medical procedures for the purpose of benefiting another person—even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be minimal and the benefit to the second person may be great."[176] Further, the court found that simply because Roe allows states to regulate abortions after viability, it does not mean that a state may intrude on a woman's bodily integrity and force an unwanted procedure.[177]

III. Analysis

As already shown, courts can compel individuals to undergo invasive, and sometimes dangerous, medical procedures when there are compelling state interests at risk.[178] In making their determinations, courts have used different tests based on the differing circumstances. Although both of the tests previously discussed have some advantages, neither of them is adequate for the situation discussed in Banks v. State.[179] The Alabama Court of Criminal Appeals explained, "in this area, the law is unclear; there is no case on point. Without deciding that issue, we question whether a trial court has the authority to order a woman to undergo what is obviously an ;invasive and potentially painful, if not deadly, procedure."[180] Faced with this uncertainty, this Comment will analyze each of the cases previously discussed to determine which parts are useful and which are not.[181] This Comment will then suggest that courts, faced with a request to order a third party to submit for an invasive procedure for the production of evidence, should adopt a new balancing test.[182] The new balancing test would weigh four critical interests: (1) the health and safety of the third party, (2) the third party's privacy and dignity interests, (3) the criminal

[171] Id. at 328 (finding that even if the child were to miraculously survive, he would be mentally handicapped).
[172] Id. (the chances of the mother dying as a result of the C-section were 1 in 10,000).
[173] Id. at 329.
[174] Id. at 330.
[175] Id. at 332.
[176] Id. at 333.
[177] Id. at 334; Roe v. Wade, 410 U.S. 113 (1973).
[178] See generally Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981) (per curiam); State v. Brown, 915 N.W.2d 896, 901 (Minn. Ct. App. 2018); Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999); Johnson v. Nagle, 58 F. Supp. 2d 1303 (N.D. Ala. 1999).
[179] See Banks v. State, 845 So.2d 9, 25 n. 16 (Ala. Crim. App. 2002).
[180] Id.
[181] Infra Part III (a)–(b).
[182] Infra Part IV.

defendant's rights, and (4) society's interests in determining guilt or innocence.

A. Winston Balancing Test

The Schmerber/Winston balancing test, as implemented today, has three major factors which courts must weigh.[183] Courts must balance (1) the extent to which the procedure may threaten the health or safety of the individual; (2) the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt or innocence.[184] The Winston balancing test is an extremely useful test. All three factors will play an essential role in any test that courts should use when analyzing an order to compel third parties.

There are many benefits to the Winston test. First, the test serves the same evidence gathering purpose. Under Winston, a defendant would be forced to undergo an invasive medical procedure for the exclusive purpose of gathering evidence. The factors used are extremely important and will serve an equally important purpose when a third party is involved. For example, courts have consistently done a suitable job weighing the extent to which the procedure may threaten the safety or health of the individual. In Winston v. Lee, this factor was perhaps the most influential in persuading the Court that the removal of the bullet was unnecessary.[185] The Supreme Court was heavily influenced by the medical uncertainty surrounding the surgery, finding that the testimony from several medical experts had described varying accounts on the duration, extent, and risks of an operation.[186] In Crowder, the D.C. Circuit Court ordered the removal of a bullet mainly because "the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal."[187] In Andrews, the Oklahoma Court of Criminal Appeals was heavily influenced by the "competent" medical testimony, which opined that there would be minimal health risks and a low chance for long term health effects on the defendant.[188] This emphasis on the patient's health is essential. The courts have appropriately weighed this factor the heaviest, and the individual's health must be even more heavily weighted when dealing with an innocent third party.

The courts have also done a good job balancing the third factor, the community's interest in fairly and accurately determining guilt or innocence.[189] This factor has often been broken down into two prongs: the nature of the crime, and the potential value of the evidence. In State v. Brown, the Minnesota Court of Appeals briefly touched on both parts of this factor, explaining that society has a strong interest in prosecuting drug trafficking, and, "unlike in Winston, the evidence sought here was the state's only direct evidence of crack-cocaine possession."[190] In other cases, the community's interest in preventing the crimes were obvious,

[183] Winston v. Lee, 470 U.S. 753, 756 (1985).
[184] Id.
[185] Id.
[186] Id.
[187] United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976).
[188] Andrews v. Love, 763 P.2d 714 (Okla. Cr. App. 1988) (Bussey, J., concurring) (finding that there was 99.9% chance that the surgery would be an uncomplicated minor procedure that posed no risk of long-term injury to the suspect).
[189] Winston, 470 U.S. at 756.
[190] State v. Brown, 915 N.W.2d 896, 898 (Minn. Ct. App. 2018).

since most involved homicides.[191] However, the nature of the value of the evidence sought has often been a decisive consideration. For example, in Winston, the Court was worried that the bullet may have corroded in the defendant's shoulder, which contributed to the Court's decision not to compel the procedure.[192] The situation was much different in Andrews, where there was a ballistics expert who testified that the bullet would still be very useful because the weapon which fired the bullet made very distinct marks.[193] Additionally, in Winston, the Supreme Court believed that the prosecution already had a strong case and the removal of the bullet would provide unnecessary additional evidence.[194] This differs from Johnson, where the District Court for the Northern District of Alabama stated that "the State's need for the evidence was extremely strong . . . the bullet was by far the most persuasive piece of evidence linking Johnson to the crime scene."[195] In Crowder, the court found that the evidence sought was relevant, could be obtained in no other way, and there was cause to believe that the surgery would reveal it.[196] The analysis for this factor is also very relevant for situations involving third parties. The courts have done an exceptional job at determining the relative value and necessity of potential evidence. As pointed out by the decisions in Winston and Johnson, additional evidence will not be sought as strongly as evidence that is essential to make or break the case.[197] Such an analysis is necessary for a test considering a surgery for third parties.

Unfortunately, courts have done a less than satisfactory job at weighing the second factor, the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity.[198] In Winston v. Lee, the Supreme Court did an adequate job when it noted that the use of general anesthesia on an unwilling patient "involves virtually a total divestment of . . . ordinary control over surgical probing beneath his skin."[199] Additionally, in State v. Brown, the court acknowledged that the procedure "was 'an extreme violation of Brown's dignitary interests in personal privacy and bodily integrity' because he was 'restrained, sedated, and forced to undergo the anoscopy.'"[200] However, many courts have paid little attention to the individual's dignitary interest.[201] This is unacceptable for situations involving third parties where much greater weight must be given to their privacy interests. Even in Brown, where the court did weigh the defendant's privacy interests, it still found that the other factors outweighed the defendant's bodily integrity.[202] This is difficult to compare with our situation because the defendant himself was committing a crime and therefore his interests were given less weight than one would expect if he were an innocent third party. Whereas a judge may be less motivated by the need to protect the privacy and dignity interests of an individual caught in the act of hiding evidence within his body, as was the case with Brown, judges must go to

[191] See Winston, 470 U.S. at 753; Crowder, 543 F.2d at 312; Andrews, 763 P.2d at 714.
[192] Winston, 470 U.S. at 765 n. 10.
[193] Andrews, 763 P.2d at 714 (Bussey, J., concurring).
[194] Winston, 470 U.S. at 753.
[195] Johnson v. Nagle, 58 F. Supp. 2d 1303, 1377 (N.D. Ala. 1999); see also Brown, 915 N.W.2d at 901 (the bag of narcotics was the state's only evidence of the crime).
[196] Crowder, 543 F.2d at 316.
[197] Winston, 470 U.S. at 753; Johnson, 58 F. Supp. 2d at 1377.
[198] Winston, 470 U.S. at 753.
[199] Id. at 765.
[200] State v. Brown, 915 N.W.2d 896, 901 (Minn. Ct. App. 2018).
[201] See Johnson, 58 F. Supp. 2d at 1377 (ignoring the individual's privacy interest).
[202] Brown, 915 N.W.2d at 903.

greater lengths to protect the privacy interests of innocent third parties.[203]

The Winston balancing test is limited to cases where the invasive medical procedure would be performed *on the defendant himself*. However, much of the Supreme Court's reasoning can be borrowed and applied to instances where the procedure would be conducted on a third party. When applied to our legal issue and Banks, it is clear that the existing balancing test does not weigh all of the interests at hand. This test is not sufficient when applied to third parties. An innocent third party should have heightened constitutional protections in their bodily integrity when compared to a criminal defendant,[204] especially a criminal defendant on appeal (like Medell Banks) who has reduced constitutional protections for having already been found guilty.[205] This Test serves as a starting point, but without more it is not sufficient.

B. Compelled C-Sections

Although the use of the balancing test is not unanimous, courts often balance the viable fetus's rights against the woman's rights when doctors believe a C-Section is in the unborn baby's (and often the mother's) best interests, yet the mother refuses to give consent.[206] There is no doubt that C-sections are "incredibly invasive for a woman. The doctor cuts through several layers of tissue and enters her body to remove the fetus."[207] Regardless, courts have sometimes determined that such an invasive procedure is necessary to save another's life.[208]

Unlike the Winston balancing test already discussed, the C-section balancing test introduces the critical aspect of a third party by determining whether compelling medical procedures for the benefit of a third party are justified. This test is important to analyze because it introduces a third party, which the Winston balancing test fails to contemplate. For example, in the C-section tests, the parties are: the state, the mother, and the fetus. The state is seeking to compel the mother for the benefit of another, the fetus. The government's interests are "the preservation of life, the protection of the interests of innocent third parties, . . . and the maintenance of ethical integrity of the medical profession."[209]

Analysis of the C-sections is useful for the criminal context because a court balancing the interests of the individual, the defense,

[203] State v. Brown, 915 N.W.2d 896, 903 (Minn. Ct. App. 2018); see also Banks v. State, 845 So.2d 9 (Ala. Crim. App. 2002). It is interesting to note that judges might not view Victoria as an innocent third party. Although she was not a party to the immediate case, she was either responsible for the murder of her newborn baby, or – as was eventually proven true, she had feigned her pregnancy so that she would be released from jail. Therefore, it is possible that a court might not have given significant weight to Victoria's privacy interests.

[204] But see State v. Haynie, 242 S.E.2d 713, 717 (Ga. 1978) (Hall, J., concurring) (arguing that "if it does not violate the accused's Fourth Amendment rights to perform involuntary surgery on him . . ., how does it violate the Fourth Amendment rights of the victim to perform surgery on him? I submit that there is no logical basis under the Fourth Amendment for treating the victim and the defendant differently.").

[205] See Sanchez v. Pereira-Castillo, 590 F.3d 31, 45 (1st Cir. 2009) (explaining that a search of an already convicted individual must be analyzed differently than in cases such as Winston where the search involved a "citizen-not yet convicted of a criminal offense.") (quoting Winston, 470 U.S. at 765).

[206] Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (balancing the right to bodily integrity against the interests of the state in preserving the child's health and safety).

[207] Davenport, supra note 133 at 93.

[208] See Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981) (per curiam); Pemberton, 66 F. Supp. 2d at 1247.

[209] Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 271 (1990).

and the prosecution, must also consider the legal doctrines that apply to all citizens, but especially innocent third parties. The extreme protection of the right to bodily integrity must be included and weighed in any balancing test applied to third parties. Bodily integrity claims are premised on "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[210] The courts' tendency to favor bodily integrity creates an even greater obstacle for the party seeking compulsion to overcome. C-section caselaw is useful to identify and properly weigh legal doctrines that criminal courts often glaze over.

The factors weighed in C-section cases have some similarities to the factors weighed under the Winston balancing test. As always, courts are very concerned that any procedure they order may imperil the life of the victim. In Pemberton, the court was persuaded by medical testimony universally agreeing with the hospital's conclusion that the C-section was medically necessary to protect both the child's and the mother's life and health.[211] The C-section posed no additional danger to the mother and in fact reduced her risk from dying from the pregnancy.[212]

However, use of the balancing test is split.[213] Whereas half of the courts have used the balancing test to determine if a C-section should be ordered,[214] half of the courts have rejected the balancing test and instead honor the woman's choice, regardless of its effects on innocent third parties.[215] The courts that refused to use the balancing test instead opted for the right to refuse based on bodily integrity, which poses a significant obstacle on any test requesting a court to potentially overcome the right to bodily integrity. The courts that refuse to use the balancing test have reasoned that "courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health."[216] However, in In re A.C., the court did not completely exclude the possibility that a court could overcome one's right to bodily integrity, stating that "the state's interest in preserving life must be truly compelling to justify overriding a competent person's right to refuse medical treatment."[217] In In re Baby Boy Doe, the court's reasoning seems to preclude any balancing test, in either the civil or criminal context, where a court order would compel an unwilling party to undergo an invasive procedure.[218] The court stated that courts "have consistently refused to force one person to undergo medical procedures for the purpose of benefiting another person—even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be minimal and the benefit to the second person may be great."[219]

Although the courts that have refused to implement the balancing test have relied on the constitutional right of bodily integri-

[210] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).
[211] Pemberton, 66 F. Supp. 2d at 1253; see also In re Baby Boy Doe v. Mother Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (the baby's survival to a natural birth were near zero, whereas the chances of surviving a C-section were close to 100%; mother's odds of dying as a result of the operation were almost zero, although it would be more painful than a natural birth).
[212] Pemberton, 66 F. Supp. 2d at 1253.
[213] Davenport, supra note 133 at 85.
[214] See Pemberton, 66 F. Supp. 2d at 1253; Jefferson, 274 S.E.2d at 458.
[215] See In re A.C., 573 A.2d 1235, 1243–44 (D.C. Cir. 1990) (en banc); In re Baby Boy Doe, 632 N.E.2d at 326.
[216] In re A.C., 573 A.2d at 1243–44.
[217] Id. at 1246.
[218] In re Baby Boy Doe, 632 N.E.2d at 334.
[219] Id.

ty and privacy, it is clear that that right is not invincible. It can, and has been, overcome, as this Comment has made clear in both civil and criminal cases.[220] Courts that refuse to implement the balancing test are distinguishable from those which do. Abortion cases such as Roe v. Wade and Casey v. Planned Parenthood have made it clear that a fetus does not receive equal protection under the law and therefore, less weight is given to the fetus' rights and protection.[221] However, in our context, the person who would benefit from the invasive procedure would be a fully developed human being with constitutional protections. Therefore, more weight must be given to the beneficiary's interests than the C-section cases provide to a fetus.

Although court orders compelling C-sections are civil cases, these decisions can be analogous with criminal cases involving third parties because the mother is refusing to submit to a clearly invasive and painful medical procedure, which would benefit a third party (her fetus). In the third-party-criminal context, non-defendants would be forced to undergo invasive medical procedures, not for their own benefit, but for either the defendant's or the prosecution's advantage. This test works to supplement and add to the Winston balancing test. This is similar to Banks where Victoria Banks, third party, was asked to undergo a procedure for the benefit of another, her estranged husband Medell Banks.[222] For this reason, an analysis of these cases is important. The third-party-criminal issue is somewhat similar to C-Sections because of the competing interests between an individual's right to privacy and bodily integrity, as well as the state's interests and the fetus's interests. The C-section balancing test introduces a possible way of dealing with a third party, where a medical procedure on the mother would not be for her benefit, but would be for another's.

IV. Recommendation: A New Balancing Test

The best test that courts should use in situations where an invasive medical procedure on a third party is believed to reveal material evidence would be a balancing test, similar but not identical to the Winston balancing test. The interests to be balanced would depend on the facts of the case and the party making the motion. When the defendant is making the motion the four interests weighed would be (1) the health and safety of the third party, (2) the third party's privacy and dignity interests, (3) the criminal defendant's rights, and (4) society's interests in determining guilt or innocence. When the State is bringing the motion, the third factor, the criminal defendant's rights, may not always apply.

The first, and most important, interest to be weighed is the third party's health and safety. This factor, which is borrowed from the Winston balancing test, would consider how risky the procedure is. Although most medical procedures are not an exact science, efforts should be made to determine what the risk for complications are, and what those complications might look like.[223] This would rebuke

[220] See generally Jefferson v. Griffin Spalding County Hospital Authority, 274 S.E.2d 457 (Ga. 1981) (per curiam); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976); Andrews v. Love, 763 P.2d 714 (Okla. Cr. App. 1988).

[221] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 835 (1992) ("Court's post-Roe decisions accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.").

[222] Banks v. State, 845 So.2d 9 at 7–9 (Ala. Crim. App. 2002).

[223] See Pemberton v. Tallahassee Memorial Regional Medical Center, Inc., 66 F. Supp. 2d 1247, 1254 (N.D. Fla.

Pemberton, which explained that "medicine is not an exact science."[224] There cannot be a bright line rule because each party is likely to present conflicting expert testimony. Instead, each case should be decided on its own facts, with a sliding scale. For example, the greater the likelihood the evidence is exculpatory, the more willingness there should be for it to be dangerous. Similarly, if a medical procedure is considered extremely safe, the value of the expected evidence would not need to be as high.

The second interest to be weighed is the third party's right to bodily integrity, privacy in your own person, and freedom from unwanted, painful, and potentially dangerous operations. The C-section cases, both those that have adopted a balancing test and those that have refused to, serve as guidance for how this interest should be weighed. Courts must go to great lengths to protect the privacy and dignity interests of innocent third parties. As In re A.C. explained," the state's interest . . . must be truly compelling to justify overriding a competent person's right to refuse . . . ."[225] Despite the tremendous amount of protection third parties must be afforded, there may be instances when the need for the evidence is so great that it justifies a compelled invasion of privacy. Such a compelling need has already been demonstrated by cases such as Pemberton and In re Baby Boy Doe, which ordered mothers to undergo C-sections against their will, believing that the survival of their children was compelling enough to override the mothers' right to bodily integrity.[226]

The third interest to be weighed is the criminal defendant's interests, which include freedom from physical restraint, the right to mount a defense, and an interest in preventing wrongful convictions. This factor will not always be necessary. In circumstances where the prosecution is seeking a court order to compel a surgery, the court may not have to weigh this factor in its entirety; although judges should always be mindful of the criminal defendant's rights as well as the state's and the third party's. However, when the criminal defendant is seeking the court order, judges must understand that criminal defendants have a constitutional right to mount an effective defense.[227] As part of their right to mount a defense, criminal defendants have been afforded the right to compel witnesses to testify on their behalf.[228] However, in some instances, the criminal defendant will be unable to mount an effective defense without the physical evidence recovered by a compelled procedure. Compelling the witness to undergo an invasive procedure may be viewed as a unique and very rare extension to the existing doctrine that allows criminal defendants to force witnesses to testify against their will.[229]

1999).

[224] Id.

[225] In re A.C., 573 A.2d 1235, 1246 (D.C. Cir. 1990) (en banc).

[226] Pemberton, 66 F. Supp. 2d at 1253; In re Baby Boy Doe, 632 N.E.2d at 326.

[227] See generally Katrice L. Bridges, The Forgotten Constitutional Right to Present a Defense and its Impact on the Acceptance of Responsibility Entrapment Debate, 103 Mich. L. Rev. 367, 395 (2004).

[228] See Peter Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 120–21 (1974) (explaining that "the Court has said and done enough to support the conclusion that it recognizes a comprehensive right of the accused to present a defense through witnesses . . . . [T]he right entitles a defendant to discover the existence of potential witnesses; to put them on the stand; to have their testimony believed; to have their testimony admitted into evidence; to compel witnesses to testify over claims of privilege; and to enjoy an overall fair balance of advantage with the prosecution with respect to the presentation of witnesses.").

[229] But see State v. Haynie, 242 S.E.2d 713, 715 (Ga. 1978) ("The Fourth Amendment right of the victim to be secure against an unreasonable search must prevail over the right of thee accused to obtain evidence for his defense.").

The weight given to this interest must be determined by several factors. Courts must consider how necessary the evidence is to the defendant.[230] Evidence which would be exculpatory, such as proving Victoria Banks' tubal ligation was still intact, should be given greater weight than evidence which merely adds to the defendant's defense.[231] Additionally, courts should consider the severity of the crime charged and the possible sentence that would result from a conviction. Greater weight should be given to death penalty and life imprisonment. However, courts should also heavily weigh any felony conviction, realizing the collateral consequences. This is a sliding scale. Whereas great weight must be given to a defendant defending himself from murder charges, less weight should be given to a defendant defending himself from robbery charges.

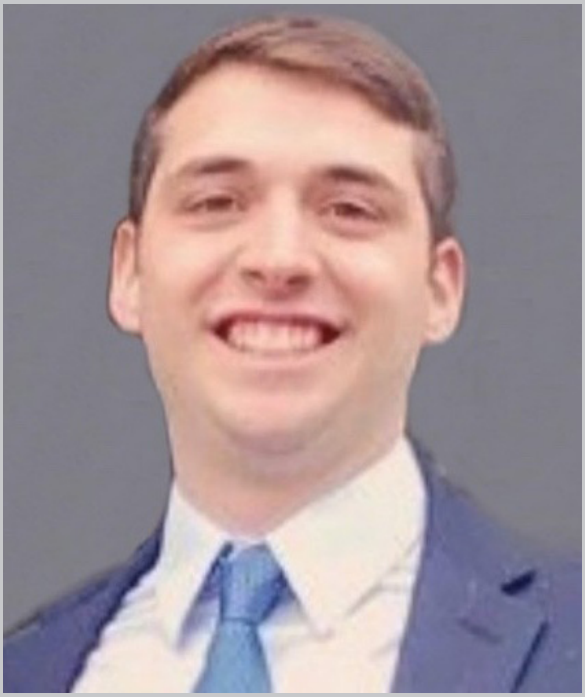
The last interest weighed under the new balancing test is society's interest in determining guilt or innocence. Bluntly, this forces courts to consider the societal interest in seeking justice and imprisoning only true criminals. In borrowing from the Winston balancing test, judges should consider how conclusive or pivotal the anticipated evidence would be.[232] In evaluating this factor, courts should give greater weight to evidence believed to be exculpatory, with incriminating evidence given less weight. In this sense, this interest is strengthened by the defendant's right to mount an effective defense. Additionally, as the Winston Court realized, merely additional evidence should be given the least weight.[233] In balancing the weight of a wrongful conviction with the weight of a temporary loss of privacy, courts should weigh the defendant's interests in instances, like Medell Banks', where the evidence believed to be revealed would be exculpatory.[234] Despite the longstanding societal belief that citizens should have no duty to rescue another from a dangerous situation which they did not create, courts should also consider the American legal maxims that it is better to have ten guilty men walk free, than to imprison one innocent man.

V. Conclusion

The question posed by the Alabama Court of Criminal Appeals in Banks v. State revealed a gap in current jurisprudence.[235] As the court noted, there are no current tests adequately equipped to handle situations where a court is considering the possibility of compelling a third party to undergo an invasive medical procedure in criminal cases.[236] After analyzing the existing tests used in civil cases, as well as the predominant test used in criminal cases, it is clear that no test is on point. As a result, the balancing test recommended in this Comment is needed to properly weigh the interests of the prosecution, defense, the third party, and society as a whole.

[230] See Winston v. Lee, 470 U.S. 763, 766 (1985) (finding that the possibly corroded bullet merely added to the prosecution's already strong case).
[231] Banks v. State, 845 So.2d 9 (Ala. Crim. App. 2002).
[232] Winston, 470 U.S. at 765 (weighing potential value of the evidence).
[233] Id. ("The Commonwealth has available substantial additional evidence.").
[234] Banks, 845 So.2d at 9.
[235] Id. at 25 n. 16.
[236] Id.

About the AUTHOR



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Executive Summary of the Institute for Innovation in Prosecution (IIP) Diversion Roundtable

By: David Noble

On December 3, 2018, the Institute for Innovation in Prosecution (IIP), with the support of Arnold Ventures, convened for a roundtable discussion on Prosecutor-Led Pretrial Diversion.[1] The daylong convention brought together an impressive and diverse group of practitioners, academics, and people directly impacted by the criminal justice system to begin building a knowledge base on an understudied area of prosecution. Diversion is generally understood as an "off-ramp" from the harmful effects of traditional criminal justice and can take many forms, such as drug court, mental health treatment, and restorative justice. With discretion in over charging, pretrial recommendations, and plea conditions, prosecutors make decisions that affect a defendant's[2] case at almost every stage of the criminal justice process. Yet, there are significant research and data gaps regarding prosecutorial decision-making, particularly the decision to divert.[3] Furthermore, various stakeholders in diversion programs—justice officials, service providers, and participants—all have their own definitions of success. Given these complexities, the Roundtable and the accompanying literature represent necessary first steps in assessing the role that diversion might play in the movement to transform criminal justice in the United States.

The current bipartisan consensus around the need for criminal justice reforms presents an ideal climate for an examination of diversion, and prosecutors are uniquely positioned to lead this effort. As Jeremy Travis, Executive Vice President of Criminal Justice at Arnold Ventures, said during the Roundtable, "because prosecutors are elected, they have to have a conversation with the electorate." In recent years, as evidenced by the successful elections of so-called progressive prosecutors in cities such as Chicago, Illinois; Houston, Texas; and Philadelphia, Pennsylvania, voters have made clear their desire for public safety strategies that promote healing and wellness over punishment and retribution. People directly impacted by the criminal justice system are making their voices heard as never before. Where does diversion figure in this discussion? In answering this question, the Roundtable's organizers and participants identified the following objectives:

- To assess the landscape of prosecutor-led pretrial diversion, including existing data and gaps in knowledge;
- To develop knowledge on diversion through scholarly research and informed debate;

[1] This monograph is part of a series on Prosecutor-Led Pretrial Diversion, prepared by the Institute for Innovation in Prosecution in Partnership with Arnold Ventures.

[2] Throughout this monograph, the word "defendant" is used to refer to the procedural posture of individuals in the position of defendant throughout a proceeding. One theme of discussion at the Roundtable, however, was the importance of the humanization of all people in contact with the criminal justice system. To that end, all criminal justice system actors are encouraged to refer to defendants by their names, an important step in restoring dignity to the system at large.

[3] While outside the scope of this paper, it should be noted that there are legitimate due process concerns with diversionary programs that must be taken seriously during design and implementation.

- To create a comprehensive "360-degree analysis" of diversion from the perspective of *all* stakeholders—including prosecutors, defense counsel, service providers, community advocates, victims, participants, and defendants who wanted to participate but instead received traditional sanctions;

- To develop a better understanding of how success can and should be measured, based on the perspectives and experiences of people who directly engage with or are excluded from diversion.

In preparation for the Roundtable, the IIP produced a preliminary landscape analysis of prosecutor-led pretrial diversion that featured a brief historical overview, a typology of diversion models, and a review of existing academic literature with an eye towards opportunities for future research. The IIP also administered a survey questionnaire to participants to capture the varying perspectives and approaches for understanding diversion and measuring its impacts. As expected, the survey responses reflected the diversity of participants' backgrounds and areas of expertise, which encompass prosecution, policing, reentry, community advocacy, public health, and restorative justice, among many others. (*Appendix A* contains detailed biographies of the participants.) Two themes emerged from the surveys. The first is the notion that community engagement is integral to the design, implementation, and ultimate success of diversion. The second is that the field needs to move beyond recidivism as a primary success metric. Both themes reappeared during the Roundtable discussion itself.

The Roundtable comprised a series of individual presentations paired with open conversation that moved back and forth between practical aspects of diversion, such as target populations and performance metrics, and bigger-picture theoretical concerns. Early on in the proceedings, one discussant asked the group to take a step back and consider the larger implications of their work. "What should the criminal justice system look like?" he asked. "How should prosecutors respond to offending?" From his perspective, to properly frame the potential of diversion, the objectives of the system as a whole need to be considered first. On a related note, several participants objected to the notion of diversion as an "alternative" to "normal" criminal justice processing. Instead, they envision a world in which what is now known as "diversion" is the first response to crime. For this shift to occur, system actors will have to cede space and power to community-based organizations, specifically those located in neighborhoods that have borne the brunt of mass incarceration. This report expands upon the ideas developed at the Roundtable and attempts to locate diversion along a continuum toward transformative change. Sections are summarized below:

Section I: Diversion in the Age of Mass Incarceration

Jurisdictions around the United States began institutionalizing diversion in the early 1970s, at the dawn of a period during which the country's prison and jail populations multiplied several times over. Early academic evaluations showed that diversion produced mixed results on criminal justice penetration and recidivism. Nevertheless, prosecutors and other officials, acknowledging the obvious failures of the wars on crime and drugs, developed innovations such as drug courts and community courts to deal with the explosion in the number of people under correctional control. Today, the majority of prosecutor's offices employ some

form of diversion. This section outlines three core values that ought to drive all diversionary efforts: accessibility, efficacy, and equality.

Section II: Culture Change—Inside and Outside the Prosecutor's Office

Following several decades dominated by "tough-on-crime" rhetoric and policies, district attorneys across the political spectrum have committed to reducing the footprint of criminal justice. Though these prosecutors may have the support of their most engaged constituents, achieving staff buy-in regarding diversion programs is no simple task. To this end, a DA can implement strategies such as rewriting their office's mission statement, creating performance metrics for line prosecutors that align with diversion goals, and bringing in outsiders to head diversion initiatives. Chief prosecutors should also aim to be thoughtful and strategic in their hiring and onboarding processes.

Section III: The Data Problem

Traditionally, prosecutors and other stakeholders have gauged the success or failure of diversion based on the rate of recidivism among participants. This is problematic, in part because it is extremely difficult to draw a causal link between a diversion model's offerings and whether or not a participant is rearrested. Further, recidivism cannot properly account for the progress an individual makes towards strengthening familial and communal ties, furthering their education, or improving their employment prospects. This section considers success metrics that more closely reflect the goals of diversion. It also explores existing evaluations of prosecutor-led diversion and steps that prosecutor's offices can take to improve their ability to measure the impacts of diversion.

Section IV: Looking Ahead

The lack of comprehensive research and data on prosecutor-led diversion should not deter practitioners from experimenting with established models. This is not to suggest that prosecutors should undertake initiatives without careful forethought and preparation. Rather, prosecutors and other stakeholders must recognize two important realities: First, criminal justice policies of the last 50 years have generated immense human and financial costs. Second, the evidence that will either confirm or invalidate diversion's usefulness will only materialize with broader implementation and evaluation. In the long term, criminal justice stakeholders should acknowledge that public safety issues related to poverty, mental illness, substance abuse, and other social concerns should be handled primarily within the community.

I. Diversion in the Age of Mass Incarceration

A. Mass incarceration and the role of prosecutors

The facts of mass incarceration in the United States are stark and well-known. More than 2.1 million people languish in prisons and jails around the country, a five hundred percent increase since the 1970s.[4] An additional 4.5 million people are on probation and parole.[5] Disparities abound in the criminal justice

[4] *Criminal Justice Facts*, The Sentencing Project, http://www.sentencingproject.org/criminal-justice-facts.

[5] Danielle Kaeble & Mary Cowhig, U.S. Dep't of Just., Correctional Populations in the United States, 2016 2

system, wherein African Americans are nearly six times as likely to be incarcerated as whites, and Hispanic Americans are more than three times as likely.[6] The collateral consequences of incarceration continue long after people leave prison, as they struggle to find housing, secure employment, exercise their voting rights, or otherwise reintegrate into society.[7]

In the face of these realities, diverse stakeholders—advocates, activists, people directly impacted by the system, law enforcement, politicians, voters—have confronted the excesses of punishment, policing, and surveillance. This work, coupled with plummeting crime rates around the country, has undergirded the halting shift from the "tough on crime" era to our current moment, in which appeals for more humane, evidence-based justice come from both sides of the political aisle. To quote public health scholar Ernest Drucker, "the emerging consensus that we simply cannot lock up so many people in prisons and jails stands to be one of the greatest victories for justice in America in our lifetimes."[8]

The consensus Drucker refers to has produced tangible positive results, though not enough to return the U.S. to anywhere near the incarceration levels of the mid-20th century. As the criminal justice reform movement has gained traction, the total number of people housed in prisons and jails or under correctional supervision has dropped steadily since 2008, according to the Department of Justice's Bureau of Justice Statistics.[9] As of 2016, "42 states had at least modestly downsized their prison populations from their peak levels."[10] Alaska, California, Connecticut, New Jersey, New York, and Vermont, whose prison populations peaked sometime between 1999 and 2007, have all achieved reductions of more than 25 percent.[11] Further, after reaching a historic high in 2011, the federal prison population has since declined by 13 percent,[12] thanks in large part to a 2014 change to sentencing guidelines for drug trafficking.[13] Yet even amidst all of this progress, the U.S. still incarcerates more people than any other country in the world. According to a 2018 report by the Sentencing Project, "at the pace of decline since 2009, it will take until 2093 to cut the U.S. prison population by 50%."[14]

In the most basic terms, reducing the number of people under correctional control entails releasing people who are currently imprisoned and sending fewer people to prison in the first place. The former can be achieved through sentencing reforms, among other strategies. The latter will require widespread policy and practice changes across the justice system but particularly within the prosecutor's office, where attorneys wield the power to file charges, decline to prosecute cases, or offer defendants a pathway to treatment and rehabilitation.

(Caitlin Scoville & Jill Thomas eds., 2018) [hereinafter Correctional Populations].

6 See generally The Sentencing Project, Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance (2018) (discussing in-depth the racial disparities in the U.S. criminal justice system) [hereinafter Sentencing Report].

7 See Catherine E. Forrest, *Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry*, NIJ Update, Jan./Feb. 2016, at 30-31.

8 Decarcerating America: From Mass Punishment to Public Health 2 (Ernest Drucker ed., 2018).

9 Correctional Populations, supra note 6.

10 *See generally* Nazgol Ghandnoosh, The Sentencing Project, Can We Wait 75 Years to Cut the Prison Population in Half? (2018), https://www.sentencingproject.org/publications/can-wait-75-years-cut-prison-population-half.

11 *Id.* at 2.

12 *Id.* at 2.

13 *Policy Shifts Reduce Federal Prison Population*, United States Courts (Apr. 25, 2017), https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population.

14 Ghandnoosh, *supra* note 11, at 2.

Within the decarceration movement, prosecutors have been cast as both scapegoats and potential saviors. While prosecutors were once able to operate under a shroud of secrecy, in recent years leading thinkers in the field have shone a harsh light on prosecutorial discretion and its potential for abuse. American University law professor Angela J. Davis argues that "because prosecutors play such a dominant and controlling role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound."[15] While acknowledging that race rarely figures consciously in prosecutors' decision-making, she maintains that they should make efforts to discover the racial impact of their practices and policies and work to institute effective reforms.[16]

Fordham University law professor John Pfaff, another vocal critic, primarily blames prosecutors for the rise in incarceration during the 1990s and early 2000s. According to Pfaff's analysis of filings from more than thirty state courts, the percentage of arrests that were filed as felonies rose by one-third during this time.[17] Not coincidentally, he writes, "the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped."[18] The policy solutions Pfaff offers—such as instituting stricter charging and plea bargaining guidelines—would rein in prosecutorial discretion. A district attorney could also respond to critiques regarding the influence of prosecutors on racial disparities and increased incarceration by utilizing the practice of diversion to shield defendants from collateral consequences, connect them to service providers and other helpful resources, and offer the community more meaningful involvement in public safety.

B. The early years of diversion

Diversion became a formal—as opposed to ad hoc—practice when "the diversion movement was launched during the 1960s within the context of the mounting political concern over poverty and racism, and over their correlates—crime, recidivism, overloaded courts and correctional institutions."[19] For years prior, police and judges neglected to arrest, prosecute, or convict individuals, particularly juveniles, they deemed deserving of leniency. Even if this ad hoc form of diversion decreased incarceration in some places, its implementation depended on the whims of individual actors and was not necessarily subject to external scrutiny. Moreover, it did not always include the provision of services.[20] This unchecked discretion opens the door to inconsistent justice and leaves further vulnerable defendants who tend to receive unequal treatment—the poor and minorities. Amidst the social and political upheavals of the '60s, marked by the beginnings of a crime spike that would not abate for several decades,[21] reformers sought

[15] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 16-17 (1998).

[16] *See id.* at 17-18.

[17] John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (July 12, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=1990508.

[18] Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, The Marshall Project (Feb. 9, 2017), https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong.

[19] Sally T. Hillsman, *Pretrial Diversion of Youthful Adults: A Decade of Reform and Research*, 7 Just. Sys. J. 361, 363 (1982).

[20] Id. at 362.

[21] Steven Pinker, *Decivilization in the 1960s*, Human Figurations (July 2013), https://quod.lib.umich.edu/h/humfig/11217607.0002.206?view=text;rgn=main.

to expand and refine diversion in order to remedy some of the justice system's failures.

As sociologist Sally T. Hillsman writes, pretrial diversion initiatives of this era focused on "young adult defendants, generally socially disadvantaged, who were being brought before the criminal courts in ever-increasing numbers."[22] Reformers asserted that the justice system was ill-suited to address behavioral issues related to substance abuse, mental illness, or poverty, and oftentimes made these problems worse. Further, they cast a wary eye towards the charging power of prosecutors, whose ballooning caseloads seemed to present a barrier to fair and consistent decision-making. As an alternative, reformers urged prosecutors to formalize processes for referring defendants to services such as drug and alcohol treatment, counseling, and job training. If defendants completed their treatment successfully, their charges would be dismissed; if not, their cases would be sent back to the court for criminal prosecution. For example, the Manhattan Court Employment Project, which inspired copycats around the country, offered participants group therapy and job counseling in lieu of trial.[23] The main objectives of such initiatives were to reduce recidivism and enhance rehabilitation by minimizing defendants' involvement in the justice system and steering them towards helpful community resources.

In a 1967 report titled "The Challenge of Crime in a Free Society," the President's Commission on Law Enforcement identified "early identification and diversion to other community resources of those offenders in need of treatment"[24] as a remedy for inefficiency in local justice systems. This recommendation spurred an influx of federal funding for diversion in the states. As a result, the number of formal diversion programs nationwide multiplied from four in 1970 to 148 in 1976.[25] Attempts to evaluate the efficacy of these programs soon followed. Because a sizeable portion of these initiatives were dedicated to juvenile defendants, much of the literature assessed the impacts on this population.

Theoretically, juveniles were an ideal target population for diversion because their offenses tended to be less serious than those of adults and they were less likely to have acquired lengthy rap sheets. Diversion allowed criminal justice actors and service providers to intervene before youthful indiscretion turned into a pattern of criminal offending. Acknowledging the benefits diversion offered young defendants, many observers warned of the potential for "net widening."[26] In other words, if programs swept up young people who previously would have eluded criminal supervision, then they were arguably guilty of "incorporating a whole new class of clients inside an expanding justice system."[27] Echoing this point, several studies concluded that the existence of diversion programs increased the number of wayward youths referred to the courts by caregivers, social service practitioners, and school administrators.

Evaluations of juvenile diversion also produced mixed results on measures of recidivism. Some programs demonstrated a positive impact while others showed a negligible

[22] Hillsman, *supra* note 20, at 362.

[23] *See generally* Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. Chi. L. Rev 224, 224-41 (1973).

[24] President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 134 (1967).

[25] Hillsman, *supra* note 20, at 366.

[26] Daniel P. Mears et al., *Juvenile Court and Contemporary Diversion: Helpful, Harmful, or Both*, Criminology & Pub. Pol'y 953, 954 (2016).

[27] Kenneth Polk, *Juvenile Diversion: A Look at the Record*, 4 Crime & Delinquency 648, 654 (1984).

or even negative impact. Studies that analyzed programs for adult offenders reached similarly murky conclusions about impacts on recidivism, educational or employment outcomes, and the potential for diversion to lead to judicial system overreach.[28] While the programs studied shielded a majority of participants from conviction, in many instances the courts probably would have treated these cases leniently and defendants would not have faced severe sanctions, including jail time. Though the results from early evaluations of diversion indicated that the practice was far from "an all-purpose solution to virtually every criminal justice problem,"[29] diversion continued to grow in popularity and evolve in form.

One method of diversion that proliferated in the late '80s and beyond was the drug court,[30] an attempt to "use the criminal justice system to address addiction through an integrated set of social and legal services instead of relying [on] incarceration or probation."[31] The first drug court opened in Miami, Florida, in 1989. Over the next 20 years, more than 1,600 other jurisdictions adopted the model.[32] The body of evidence on drug courts suggests that they reduce recidivism and for this reason save money for justice agencies. As with the first generation of diversion initiatives, however, research findings have not been positive across the board. Still, the development of drug court and other innovations, discussed below, evinced that prosecutors and other stakeholders were grappling with the system's failings, even as the tough-on-crime culture persisted.

C. The present and future of diversion

Today, "diversion" encompasses a broad range of initiatives aimed at leading people who have been arrested away from traditional criminal justice processing. According to a 2018 report on prosecutor-led diversion published by the National Institute of Justice (NIJ), in contrast to the reformers of the 1970s, modern-day practitioners aim first and foremost to produce cost and time savings and lessen the burden of conviction and collateral consequences.[33] A survey conducted by the Center for Court Innovation (CCI) revealed that prosecutor's offices also strive to hold participants accountable through the diversion process.[34] Included under the wide umbrella of diversion are models such as problem-solving courts, substance abuse and mental health treatment, educational classes, community service, and restorative justice.

Problem-solving courts address offenses related to individual "problems," such as drug addiction or mental illness; specific offense types, such as domestic violence or prostitution; and certain defendant populations, namely veterans. These courts include so-called community courts, which "combine punishment and help, requiring offenders to pay back the community by participating in restorative community service projects while also participating in individualized social service sanctions, such as drug treatment or mental health counseling."[35] With some similarities to community courts, restorative justice practices enhance community

[28] Hillsman, *supra* note 20, at 363-65.
[29] *Id.* at 366.
[30] Ryan S. King & Jill Pasquarella, The Sentencing Project, Drug Courts: A Review of the Evidence 1 (2009).
[31] *Id.* at 1.
[32] *Id.*
[33] Michael Rempel et al., Center for Court Innovation, NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness 1, 35 (2018).
[34] Michela Lowry & Ashmini Kerodal, Center for Court Innovation, Prosecutor-Led Diversion: A National Survey i, iv (2019).
[35] Julius Lang, Center for Court Innovation, What Is a Community Court? How the Model is Being Adapted Across the United States 1, 3 (2011).

participation in criminal justice by facilitating dialogue between crime survivors and perpetrators to repair harm and create accountability for defendants.[36] Compared to the traditional process, restorative justice focuses less on retribution than on the healing of victims, offenders, and the community. It is viewed as a particularly suitable intervention for juvenile defendants.[37] Restorative justice is generally not, however, considered an appropriate form of redress for serious violence such as rape or murder.[38] Prosecutors play a key role within all of the diversionary models.

The responsibilities of the prosecutor within diversion depend on the jurisdiction and the specific characteristics of the program. Programs differ in terms of when individuals are diverted (before or after charging), services offered, and eligibility requirements, such as offense type or criminal history. When diversion occurs prior to charging, prosecutors often determine the eligibility criteria and screen applicants. If diversion is contingent upon a guilty plea, a prosecutor may shape the nature of this plea and ultimately dismiss the charges once the defendant has fulfilled the terms of the agreement. If a participant fails to complete a program's requirements, prosecutors may be responsible for either filing charges or allowing the individual to reenter the program. In community courts, which are typically run by people who are not affiliated with a justice agency, prosecutors sometimes occupy administrative or supervisory roles. A prosecutor's office has the power to create and fund a program without overseeing its day-to-day operations. Whether a given program is led by a prosecutor's office or simply supported by one, diversion generally involves collaboration between justice agencies, service providers, community representatives, and, ideally, outside evaluators.

Before exploring the potential benefits, drawbacks, and challenges of implementing diversion, it is worthwhile to consider the values that can guide policy and practice for all collaborators.

In designing and implementing a diversion program, both to counteract the forces that built mass incarceration and to create a range of proportional responses to crime, prosecutors and their collaborators should strive to uphold three values—**accessibility, efficacy, and equality**. Diversion alone cannot solve an intricate, messy problem that is decades in the making. Through the lens of systems analysis, however, the points of arrest, charging, and sentencing are all potential leverage points, or "places within a complex system … where a small shift in one thing can produce big changes in everything."[39] Practitioners and academics have been trying for years to puzzle out exactly when and how to divert defendants in order to fix a range of issues in the justice system. If there is a place for diversion in a larger, system-wide transformation, the practice must align with loftier goals than time and cost savings or decreased recidivism. The first value—**accessibility**—furthers the idea that diversion should be an option available to prosecutors across ju-

[36] *Common Justice Model*, Common Justice, https://www.commonjustice.org/common_justice_model (last visited Dec.14, 2019).

[37] David B. Wilson et al., U.S. Dep't of Just., Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis 1, 4 (2017).

[38] Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. Times (Jan. 4, 2013), https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html.

[39] Donella Meadows, *Leverage Points: Places to Intervene in a System*, The Donella Meadows Project, http://donellameadows.org/archives/leverage-points-places-to-intervene-in-a-system (last visited Dec. 14, 2019).

risdictions for all cases in which it would be a measured and humane response to the offense.

As democratically elected officials, prosecutors have the means and mandate to elevate diversion as a normative response to crime rather than an "alternative." Accomplishing this requires, in part, an interrogation of prevailing attitudes towards punishment. The consensus among scholars is that, until the early 1970s, the main objective of criminal sanctions in the U.S., at least as professed by justice officials, was to rehabilitate offenders.[40] With the nationwide crime rise, "criminal justice policy became much more punitive, and the primary goal of prison moved from rehabilitation to retribution and crime control."[41] As this shift took hold, the number of offenses punishable by incarceration multiplied and sentence lengths shot up. These were developments that district attorneys not only welcomed but also actively pushed for.[42] In doing so, prosecutors reinforced the sentiment, widely held among both voters and justice officials, that the crime spike necessitated an equally strong law enforcement response. More specifically, the proliferation of mandatory minimums strengthened prosecutorial discretion because it allowed prosecutors to hang long sentences over the heads of defendants and force them to accept plea deals.[43] Now that crime rates are nearing historic lows and the country faces the wreckage of mass incarceration, prosecutors have an opportunity to emphasize the importance of proportionality in punishment, even for violent crimes.

Historically, diversion efforts have excluded violent offenders. Reformers of the 1960s and '70s believed that the criminal justice system swept up an inordinate number of people guilty of "crimes having no victims"[44] that would be better remedied through rehabilitative or educational efforts. Proponents of diversion did not seek to extend a similar leniency to violent offenders, and this tradition remains more or less intact today. From a prosecutor's perspective, diverting someone who was charged with a violent offense (or has a history of violent crime) poses a public safety risk, as well as a political one. No district attorney wants to have to explain to constituents why they referred a person charged with felony assault to substance abuse treatment rather than jail, only to have that person harm another community member. Properly examining the merits of incarceration as a response to violence would require a much more in-depth discussion. However, it should be noted that practitioners are experimenting with diversion for violent crimes, including in New York City.

New York's boroughs of Brooklyn and the Bronx are among the few jurisdictions in the country that apply an institutionalized restorative justice model to serious violent felonies (excluding rape and murder), through the organization called Common Justice. In an interview with The Marshall Project, Common Justice founder and director (and Roundtable participant) Danielle Sered described the impetus behind her organization's "survivor-centered" approach:

> Restorative justice has been demonstrated both to meet the

[40] Albert Altschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. Chi. L. Rev. 1, 6 (2003).
[41] National Research Council of the National Academies, *Principles to Guide Policies on Punishment* (2015).
[42] Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 Crime & Just. 395, 395-439 (2017).
[43] Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html.
[44] Hillsman, *supra* note 20, at 365.

> needs of victims and to reduce recidivism, which means we can deliver on healing and safety at the same time . . . . What's powerful about those kinds of processes is it forces somebody who has committed harm to come face-to-face with the human impact of what they've done . . . . One of the problems with prison is that there is never a time in the prisoner's incarceration where they are required to actually grapple with the impact their choices had on other people's lives.[45]

According to Sered, around 90 percent of survivors who have been given the choice between having their attacker incarcerated or participating in Common Justice have chosen the latter.[46] In a similar vein to Sered, a 2001 study looking at twenty years of research on restorative justice claims that "victims who seek and choose this kind of encounter and dialogue with an individual who brought unspeakable tragedy to their lives report feelings of relief, a greater sense of closure, and gratitude for not being forgotten and unheard."[47] They acknowledge that such work is time, and resource intensive, and staff must undergo special training to perform the work effectively.

For prosecutors skeptical of diverting violent offenders, expanding eligibility to people arrested for nonviolent felonies would be a step towards reversing the staggering increase in felony charges seen nationwide between 1980 and 2010.[48] (A Center for Court Innovation survey of 220 prosecutors' officers found that a little more than half of jurisdictions offered diversion for nonviolent felonies.[49]) On a related note, rather than only offering diversion for first-time offenses, jurisdictions could seek out people who cycle in and out of the justice system and could benefit most from personalized services and support.[50] Finding the right treatment for people whom the system has failed is a task that calls for rigorously tested, evidence-based practices. Thus, if prosecutors wish to use diversion to break the cycle of incarceration, they cannot lose sight of the second value—**efficacy**.

Like any public safety strategy, diversion is only worthwhile if it is effective. Mass incarceration has failed not only because of its exorbitant financial costs and the untold damage it has done to individuals, families, and communities, but also because it has not improved public safety. According to a report by the Vera Institute of Justice, "somewhere between 75 and 100 percent of the reduction in crime rates since the 1990s is explained by"[51] factors other than increased incarceration. This fact alone should encourage prosecutors to harness their discretion to implement novel responses to behaviors that cause harm and disturb the public order. However, before utilizing diversion,

[45] Danielle Sered, *Is Prison the Answer to Violence?*, The Marshall Project (Feb. 16, 2017), https://www.themarshallproject.org/2017/02/16/is-prison-the-answer-to-violence?ref=hp-1-111#.PL46MpFmf.
[46] *Id.*
[47] Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 Federal Probation 29, 33 (2001).
[48] Sarah K. S. Shannon et al., *The Growth Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010*, 54 Demography 1, 20-21 (2017).
[49] Lowry, *supra* note 35.
[50] The White House, Office of the Press Secretary, *Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration* (Jun. 30, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle.
[51] Dan Stemen, Vera Institute Evidence Brief, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (2017).

prosecutors should solicit input from all relevant stakeholders and should draw from evidence-based practice.

A lack of careful forethought and planning may lead to flaws in diversion program design. Participation in diversion should not be so burdensome that it prevents defendants from keeping a job, pursuing education, or attending to other important responsibilities. As the Roundtable participants noted, when the demands of diversion, such as a lengthy time commitment, are particularly onerous, defendants may instead elect to move forward with a plea or trial. Similarly, if practitioners do not account for the likelihood that participants will make missteps, they may establish rules that ultimately set defendants up for failure (and further system penetration). Stringent diversion requirements may appeal to stakeholders and observers with a more hardline stance regarding criminal sanctions, but they contradict the notion that the justice system too often asserts undue control over people's lives. These sorts of unwanted outcomes should be on the minds of prosecutors as they seek inspiration from the available research.

Admittedly, a challenge prosecutors face is, as the aforementioned NIJ report on prosecutor-led diversion states, the body of evidence in favor (or against) diversion is "limited."[52] While the report's authors refer specifically to the lack of comprehensive data regarding diversion's effects on reoffending and cost savings, the same could be said for measures of harm reduction, mental health outcomes, survivor perceptions of justice, community wellness, and the extent to which diversion decreases the amount of contact defendants have with the system. This lack of information limits the spread of potentially transformative practices and compromises public trust in diversion.

Practitioners have a responsibility to understand how diversion can address specific public safety issues and to communicate this information to their constituents, as well as other justice officials. To maintain public support and treat defendants with dignity and respect, prosecutors and other stakeholders should champion diversion as a fundamental part of their vision for public safety; consult experts on the various strategies and their potential impacts; bring in outside evaluators to measure the efficacy of initiatives; and make the results of this evaluation public. In a country still reckoning with the tough-on-crime era, and where public resources are in high demand, transparency and clarity around diversion would serve as a welcome counterpoint to the traditional "black box" of the criminal justice system.[53] Improved record keeping around prosecutorial decision-making would shed light on how prosecutors contribute to successes and failures of the justice system as a whole, including longstanding inequities. This point connects to the third value—**equality**—which refers primarily to the racial and economic disparities and disproportionalities in the justice system.

Criminal justice stakeholders must ensure that diversion initiatives do not reinforce existing inequalities in the system. In a 2013 study, Traci Schlesinger, Roundtable participant and associate professor in the sociology department at DePaul University, analyzed case data for men charged with felonies in 40 of the most populous U.S. counties, in the even years from 1990 to 2006. Schlesinger discovered that African-American and Latino defendants with no prior record were 43 and 34 percent less

[52] Rempel, *supra* note 34, at 2.

[53] *See generally* Samuel R. Wiseman, *The Criminal Justice Black Box, 78* Ohio St. L. J. 349, 349-401 (2017).

likely, respectively, to be offered pretrial diversion for nonviolent drug crimes than white defendants.[54] (Similar disparities were not found for violent felonies, primarily because prosecutors diverted a significantly smaller proportion of these defendants.[55]) Looking at U.S. justice systems more broadly, the Sentencing Project's 2018 report to the United Nations neatly summarizes how African Americans are discriminated against at every step of the justice process: "African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences."[56] Like African Americans, Hispanic Americans and Native Americans bear an undue burden of arrest and incarceration.[57] Seeing as these three minority groups experience poverty at higher rates than whites,[58] [59] the racial and economic disparities in the system are intertwined. Moreover, the results of a 2018 analysis published by the People's Policy Project suggest that economic status is a larger predictor of lifetime likelihood of imprisonment than race when comparing African Americans and white Americans.[60]

With an understanding of the overlapping racial and economic disparities in the justice system, prosecutors should limit fees for enrolling and participating in diversion that may ultimately exclude low-income people. Along with application fees, which can be as high as $250,[61] diversion participants often have to pay for counseling, drug tests, supervision, and other costs incurred by justice agencies. A 2016 *New York Times* investigation found that some prosecutor's offices reject applicants who cannot afford program fees.[62] Considering that arrest and incarceration exacerbate the effects of poverty, refusing to waive fees for indigent defendants is patently unjust. The *Times* also discovered that in certain programs, participants who are unable to pay restitution within a specific timeframe may have their cases reinstated.[63] In other jurisdictions, people who otherwise would not be eligible for diversion are allowed to pay their way into programs.[64] Such policies clearly advantage people of means.

Lastly, a focus on equality underscores the moral imperative behind diversion. Beyond the facts of mass incarceration lie the myriad of ways in which the criminal justice system dehumanizes those who pass through it. From police officers who ignore survivors of sexual assault to prosecutors who churn through plea deals, law enforcement personnel at every step

[54] Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies Processed in State Courts,* 3 *Race & Just.* 210, 210-38 (2013).

[55] *Id.*

[56] Sentencing Report, *supra* note 7.

[57] Jon Marcus, *Bringing Native American Stories to a National Audience*, Nieman Reports (Feb. 11, 2016), https://niemanreports.org/articles/bringing-native-american-stories-to-a-national-audience.

[58] Rakesh Kocchar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America's Racial and Ethnic Groups*, Pew Research Center (Jul. 12, 2018), https://www.pewresearch.org/fact-tank/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups.

[59] Jens M. Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, Pew Research Center (Jun. 13, 2014), https://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty.

[60] Nathaniel Lewis, *Mass Incarceration: New Jim Crow, Class War, or Both?*, People's Policy Project (Jan. 30, 2018), https://www.peoplespolicyproject.org/2018/01/30/mass-incarceration-new-jim-crow-class-war-or-both.

[61] Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. Times (Dec.12, 2016), https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html.

[62] *Id.*

[63] *Id.*

[64] *Id.*

of the process often fail to see the human costs of their actions. Implementing thoughtful and effective strategies to divert people away from conviction and incarceration is one way to honor their dignity and humanity. Furthermore, engaging community members in the creation of public safety practices and policy acknowledges the reality that harms stemming from crime have ripple effects throughout communities.

II. Culture Change—Inside and Outside the Prosecutor's Office

District attorneys have wide latitude to implement new diversion initiatives. To the extent that these initiatives depart from "received norms and practices,"[65] however, DAs may experience pushback from line prosecutors. After all, a prosecutor's office comprises of a group of individuals with varying levels of experience and seniority, as well as different understandings of their professional duties. Along with resistance from staff towards diversion, prosecutors may also encounter skepticism from community members, especially those directly affected by crime. Therefore, in elevating diversion as a normative response to crime, DAs must contend with the established cultures that exist both inside and outside their offices. This section outlines strategies chief prosecutors can use to respond to cultural attitudes in their communities towards criminal justice and challenge entrenched norms in their offices.

A. Culture change amongst constituents

District Attorneys should frame diversion as a direct response to the needs and desires of the communities they represent. The tough-on-crime aspects of prosecutorial culture, while still present in most offices, have receded from view as voters have become more aware of the damages of mass incarceration and opportunities for reform. In a 2016 Gallup poll, "45 percent [of respondents said] the justice system is 'not tough enough'—down from 65 percent in 2003 and even higher majorities before then."[66] While the results revealed differences in opinion based on race and political affiliation (more than half of whites and nearly two-thirds of Republicans said the system is "not tough enough"[67]), it is not uncommon to hear Republicans call for criminal justice reform by invoking "family values,"[68] Christian doctrine, and fiscal conservatism. This bipartisan agreement around the need for reforms helped pave the way for the elections of "progressive prosecutors" in places as politically disparate as Nueces County, Texas, and San Francisco, California. A number of these newly-elected prosecutors have accepted the mandate from voters and rolled out diversion programs aimed at reducing the system's reliance on incarceration. To solidify public support for diversion, however, district attorneys—newly elected or otherwise—must reckon with the fact that trust in law enforcement is wanting.

A commitment to diversion is one way to address the public's lack of faith in criminal justice actors. During the Roundtable, Adam Mansky, Director of Criminal Justice for CCI, noted that the justice system in the U.S. is currently experiencing a "crisis of legitimacy," especially

[65] Note, *The Paradox of "Progressive Prosecution"*, 132 Harv. L. Rev. 748, 762 (2018).

[66] Justin McCarthy, *Americans' Views Shift on Toughness of Justice System*, Gallup (Oct. 20, 2016), https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx.

[67] *Id.*

[68] Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, The Guardian (Aug. 5, 2018), https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform.

among communities that have been disproportionately impacted by the system. Prosecutors can help bridge this gap in trust by presenting diversion as one of several methods to right present and historical wrongs. For minority communities, African Americans in particular, the sources of mistrust and skepticism include mistreatment at the hands of law enforcement; a persistent feeling of being "overpoliced and underprotected"[69]; and highly publicized incidents of police violence for which the officers involved have very rarely been held accountable. According to a 2015 Gallup study, "blacks' confidence in police [over 2014-2015] averaged 30 percent, well below the national average of 53 percent."[70] This was a six-point drop from 2012-13.[71] Readers may remember 2014 as the year that police officers killed Eric Garner and Michael Brown Jr. and the Movement for Black Lives organized its first public protests.[72] Putting aside the difficult question of how DAs should deal with police violence,[73] prosecutors seeing this data may recognize an opportunity to make amends with the communities in their jurisdiction that have been most negatively impacted by the system and may wish to set a new agenda that involves diverting people who would be better served by treatment and support.

Some DAs, alongside other criminal justice leaders, have set an example for the field by making a direct, public apology to communities their offices have harmed through discriminatory and overly punitive practices.[74] Such an acknowledgment creates space for soliciting input from community members in the development of initiatives like diversion. In doing so, prosecutors will discover that people directly impacted by the justice system can be strong allies in their efforts to minimize the system's footprint. As Danielle Sered said during the Roundtable, "the hardest people to persuade that incarceration produces safety are people living in environments where incarceration is common."

Conversely, some community members will question the appropriateness or effectiveness of diversion. They will accuse prosecutors of caring more about defendants than victims of crime. In the face of such criticisms, DAs should acknowledge these constituents' concerns and explain why previous policies failed and how diversion will succeed. Once a diversion program has started, maintaining open lines of communication with both skeptics and supporters in the community will enhance trust.

B. Culture change among prosecutorial staff

The successful implementation of diversion programs requires effective leadership from district attorneys and buy-in from line prosecutors. Based on factors such as seniority, level of experience, and professional motiva-

[69] Amy Goodman, *"Overpoliced and Underprotected": In Michael Brown Killing, Neglect of Black Communities Laid Bare*, Truthout (Aug.19, 2014), https://truthout.org/video/overpoliced-and-underprotected-in-michael-brown-killing-neglect-of-black-communities-laid-bare.

[70] Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* Gallup, (Jun. 19, 2015), https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

[71] *Id.*

[72] Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof,* 18 Nev. L. J. 1091, 1099-1100 (2018).

[73] *See generally* Roy L. Austin et al., Institute for Innovation in Prosecution at John Jay College, Prosecutors and Officer-Involved Fatalities: A Forced Evolution From Tragedy to Advocacy (2019) (describing district attorneys' developing difficulty in handling police violence).

[74] Angela J. Davis, et al., Institute for Innovation in Prosecution at John Jay College, *Race and Prosecution* (2019).

tions, line prosecutors will embrace diversion to varying degrees. Keeping in mind that culture is a "phenomenon that shapes the organization and the mindset and actions of the people who make it up,"[75] DAs must be thoughtful and strategic in how they attempt to effect culture change. An important consideration at the outset of this process is whether the office's stated mission and values are in line with those of diversion.

An office's mission statement might include an intention to "defend public safety and do justice while upholding the values of fairness and accountability." Depending on one's interpretation, this office may or may not support diverting some arrestees suffering from mental illness. In the interest of clarity, DAs should consider inserting language in public-facing communications that outlines their vision and goals regarding diversion programs. The website of the Cook County State's Attorney's Office, for instance, states the following:

> State's Attorney Foxx is committed to creating safer, healthier communities by using prosecutorial resources strategically, appropriately, and supporting reforms that avoid needlessly bringing people into the justice system. As such, providing effective alternatives to traditional prosecution and incarceration of non-violent offenders is a priority.[76]

This clear, simple statement demonstrates to State's Attorney Kim Foxx's line prosecutors that she wants them to appreciate the burden incarceration places on people entering the system and to seek out alternatives whenever possible and appropriate. On this point, Roundtable participant David Sklansky, a professor at Stanford Law School, writes, "staff is more likely to push for what you care about if they know what you care about."[77] In making their priorities known, however, DAs should be aware of how this message may be received.

When it comes to resetting goals and priorities, DAs face unique challenges depending on how recently they took office and their relationships with the longest-tenured staff. Newly-elected prosecutors who push for immediate and drastic reforms are likely to encounter significant resistance. In a paper on culture change commissioned by the IIP following the Roundtable, Beth McCann, Denver County (CO) DA; Courtney Oliva, Executive Director at the Center on the Administration of Criminal Law at NYU Law School; and Ronald Wright, professor of criminal law at the Wake Forest School of Law, write, "newly-elected prosecutors who lead with a message of change can also unintentionally create office hostility by suggesting to long-time prosecutors that their 'old' way of approaching cases is harmful."[78] Even if this person is an office "insider" by virtue of having worked there for many years, the authors add, they "might be perceived as a traitor and provoke backlash among long-term colleagues."[79] To mitigate the possibility of such reactions, DAs should engage staff in dialogue about how diversion fits into the office's overall mission. Before this conversation happens, prosecu-

[75] Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 Loy. J. Pub. Int. L. 177, 200 (2008).
[76] Cook County State's Attorney, Diversion Programs (2020), https://www.cookcountystatesattorney.org/resources/diversion-programs.
[77] David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U. Cal. Davis L. Rev. 25, 28 (2017).
[78] Beth McCann et al., Institute for Innovation in Prosecution at John Jay College, *Prosecution Office Culture and Diversion Programs* (2020).
[79] *Id.*

tors can conduct a survey to gauge sentiment regarding diversion. The results of the survey can offer insights into whether proposed initiatives appear radical or commonsense to those who will actually be doing the work. Soliciting input from line prosecutors also shows that a DA is not trying to rule by fiat. During these internal discussions, chief prosecutors should aim to lay the foundation for new norms while acknowledging, and perhaps accommodating, staff concerns.

After determining how a diversion program advances the larger goals of the office, DAs and line prosecutors can begin negotiating its practical features. As a starting point, DAs can "encourage line prosecutors to evaluate *all* their cases for potential referrals to diversion."[80] As part of the Justice 2020 Initiative, Brooklyn (NY) DA Eric Gonzalez has encouraged staff to treat "incarceration and conviction [as] options of last resort."[81] By doing so, Gonzalez challenges conventional thinking and opens prosecutors' minds to other possibilities for their cases. However, taking incarceration off the table will not be enough to convince some prosecutors to embrace diversion. The reality is that culture change takes time and DAs may need to slow down the process for those who are "invested in the 'old way of doing things.'"[82] To appease resistant staff members, McCann, Oliva, and Wright suggest starting small, so to speak, by creating programs for first-time offenders or people arrested for nonviolent crimes, initiatives which may seem less risky than diverting people with significant criminal records. They also note that "programs that provide for visible accountability of the defendant to the victim and the community," such as restitution payments or community service, "tend to gain quicker acceptance among prosecutors."[83] Relatedly, the person the DA selects to oversee a diversion program is instrumental to the program's acceptance by staff—and its success.

As McCann, Oliva, and Wright explain in their paper, "choosing a well-respected prosecutor with depth and breadth of experience [to lead a diversion program] can show a commitment to the program's success."[84] The authority this seasoned prosecutor holds in the office lends legitimacy and credibility to the program. On the other hand, if the person in charge of diversion does not fully buy in to the practice, they may ultimately undermine the DA and create confusion for junior staff regarding whose lead to follow. Chief prosecutors also have the option of appointing someone from outside the office to lead a program. This can serve as a powerful signal to staff that achieving the program's goals necessitates direction from someone with a fresh perspective and perhaps a different area of expertise.[85] The Brooklyn DA's Office, for example, hired a social worker with experience in criminal justice to lead its youth diversion initiatives. Putting an "outsider" in a leadership role may "expand traditional notions of who should be eligible for diversion"[86] if this person's views on punishment and accountability differ from those of office veterans. If this person lacks familiarity with local justice officials, however, they may clash with police and judges who wish to keep certain cases in the system.[87] Prosecutors must of course weigh the benefits of an outsider's novel thinking against the challenges of navi-

[80] *Id.*
[81] Eric Gonzalez, Brooklyn District Attorney's Office, *Justice 2020: An Action Plan for Brooklyn*, (2019).
[82] Rapping, *supra* note 76, at 211.
[83] McCann et al., *supra* note 79.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

gating new relationships inside and outside the office.

Along with the question of leadership, DAs have to contemplate how much discretion staff will have in deciding whom to divert. Cultural resistance around diversion can manifest in individual prosecutors' decision-making. Again, when diversion initiatives are a major departure from previous policies and practices, they can run up against "inertia among line prosecutors who may not approach reform as zealously as their bosses."[88] One remedy to this issue is to give discretionary power to a small group of attorneys who actively support the practice. This is how diversion works in the San Francisco DA's Office, according to Roundtable participant Katy Miller, who serves as the office's Chief of Programs and Initiatives. With this arrangement in place, any lack of buy-in from staff who are not involved in diversion does not hamper the office's various initiatives, which are "more likely to operate in the way they were designed—whether the creators meant for the program to apply to a large or small pool of defendants."[89] Alternatively, DAs can tell staff to consider all cases for referral to diversion and allow the person leading the program—whether an attorney or an outsider—to make final decisions about enrollment.

No matter how a chief prosecutor allots responsibilities within a program, if they introduce diversion as a strategy that will succeed where others failed, they must communicate to staff how success (and failure) will be measured. While the next section of this paper focuses on data collection and evaluation, a few relevant ideas are worth mentioning here. Sklansky neatly summarizes the first: "The data you collect should depend, in part, on what you care about."[90] For example, if a DA wants to use diversion to reduce racial disparities in the system, they would keep track of the race of defendants who are offered diversion programs and share the results with staff and the public. Line prosecutors will be more likely to show enthusiasm for diversion when they can see the fruit of their labor. McCann, Oliva, and Wright believe that "the point of comparison for the success of a diversion program should be the known performance of criminal sentences imposed on defendants who are comparable to the program participants."[91] Pitting diversion outcomes against those of punitive sanctions may help win over staff who hold a more traditional view of prosecution.

Another way to bring staff members on board is to incentivize prosecutors to value proportionality over harshness in their decision-making. Even in the era of the so-called progressive prosecutor, career advancement in prosecutor's offices largely depends on successful criminal convictions. District attorneys can alter this incentive structure by emphasizing diversion in annual performance reviews. They might also use office newsletters or meetings to praise a line prosecutor who fought for a defendant's admission into a treatment program.[92] A less formal strategy employed in the Manhattan (NY) District Attorney's Office, involves having lead prosecutors call assistant prosecutors to congratulate them on successful diversion cases.[93] All of these tactics are aimed at securing buy-in and reinforcing behavior change among current staff.

[88] *The Paradox of Progressive Prosecution*, *supra* note 66, at 762.
[89] McCann et al., *supra* note 79.
[90] Sklansky, supra note 78, at 31.
[91] See McCann, et al., *supra* note 79.
[92] *Id.*
[93] Lucy Lang, Manhattan, New York District Attorney's Office's Informal Strategy, interview by David Noble , August 14, 2019.

As district attorneys attempt to shift culture, they should also be strategic in terms of hiring. Chief prosecutors can accelerate the pace of culture change by hiring attorneys who will champion their new vision for diversion and cultivating a diverse workforce. During the interview process, applicants should be asked about their views on the use of incarceration, the values a prosecutor should strive to uphold, and what they would change about the system's response to crime. For offices whose staff is less diverse than the constituent population, hiring more attorneys of color and female attorneys could have an effect on how the office does justice.[94] Drawing a parallel between prosecutor's offices and police departments, Sklansky argues that "the dramatic diversification of police forces in the 1970s and 1980s…helped to open up departments intellectually, making them more vibrant, more receptive to outside ideas, and far less dominated by any single, consensus set of understandings about [how] policing should be done."[95] One objective, then, in prioritizing diversity in hiring and promotion is to create space for viewpoints that stray from dogma. As the "progressive prosecution" movement demonstrates, the notion of what it means to be a prosecutor is evolving. District attorneys can take advantage of this momentum by visiting law schools to talk to students about ongoing reforms. They could even work with professors to create a course that serves as an introduction to prosecution. However, it is not enough to recruit and hire a diverse and enthusiastic group of attorneys. The training process should inform incoming staff of the values guiding diversion programs.

District attorneys can bolster cultural norms through the training they offer to new hires. During onboarding, giving people directly impacted by the system an opportunity to share their stories can make the reasoning behind diversion more tangible. In a series of interviews of current and former prosecutors conducted by Harvard Law School's Charles Hamilton Houston Institute for Race and Justice, respondents "recommended that all incoming prosecutors undergo training that included visiting prisons, speaking with incarcerated individuals, and understanding the full impact of incarceration and criminal control on an individual's life and on the life of his or her family."[96] Another component of this training could be a conversation with someone whose case the office diverted and who benefited from service offerings. Further, district attorneys can bring in academics to discuss findings on the diminishing returns of long sentences, collateral consequences, and other subjects that hammer home the importance of less punitive policies. This sort of programming would of course be enriching for experienced prosecutors as well. Line prosecutors with this education under their belts would, theoretically, be more eager to spot opportunities for diversion within their caseloads.

Once new staff begin to take on cases, it is crucial that the working atmosphere matches the lofty ideals the office uses to define itself. The chief prosecutor has a responsibility to set standards for language and behavior, particularly where defendants, victims, and others impacted by the system are concerned. A criminal justice system that routinely oppresses those who come into contact with it encourages prosecutors, police, and other actors to view defendants as deserving of callous treatment.

[94] *See* Sklansky, *supra* note 78, at 29.
[95] *See* Sklansky, *supra* note 78, at 41.
[96] Johanna Wald, *What's Inside the Prosecutorial Black Box?*, The Crime Report (Mar. 22, 2018), https://thecrimereport.org/2018/03/22/whats-inside-the-prosecutorial-black-box.

This premature judgment may reveal itself in the casual use of dehumanizing language. For district attorneys who want to promote dignity and equity in their office's practices, Sklansky offers this advice:

> Don't countenance racist or sexist language, coded or not. … Don't call defendants "mopes," don't call repeat offenders "three-time losers," don't call people with mental disabilities "wackos," and don't tolerate language like that from your staff. Make it clear, in every conversation you have with your staff, that you take seriously the ideals of equal justice and procedural fairness and expect your staff to take them seriously, too.[97]

Sklansky suggests that a prosecutor who does not see defendants as full people is unlikely to treat each case with the attention and care it deserves. Thus, she may not perceive the value of diverting an individual's case, especially if doing so would require more work. Similarly, prosecutors who are "from and of" communities that are overrepresented in the criminal justice population may be more attuned to policies and practices that contribute to disparities. Understanding that the language prosecutors use to describe defendants correlates with how an office treats them, chief prosecutors and other leadership should strive to serve as models for staff.

III. The Data Problem

A. What to measure

The Roundtable focused in large part on the question of data collection and evaluation: what jurisdictions typically measure with respect to diversion, what they do not, and what they *should*. Participants drew a connection between shortcomings in the metrics that diversion programs track and more overarching flaws in how prosecutor's offices approach data. At present, most "local prosecutors measure themselves by three core metrics: how many people are indicted on criminal charges, how many cases they try and how many convictions they secure."[98] These are measures that place a narrow focus on case processing rather than the larger goal of public safety. Of course, prosecutors historically had neither the means nor the incentive to capture data beyond measures of punishment and retribution, but that is changing. As prosecutor's offices look to act on the values underpinning diversion, they should strive to assess the impact of their work in the context of their overall mission and invest greater resources in data collection and evaluation that reflects that mission.

If not recidivism, then what?

Before creating a data system, prosecutors and other stakeholders must determine what they want to know about diversion. It bears repeating that "[t]he data you collect should depend, in part, on what you care about."[99] Over the last half-century, the primary metric prosecutors have cared about regarding diversion

[97] *See* Sklansky, *supra* note 78, at 39-40.

[98] Rachel Barkow et al., *How We Judge Prosecutors Has to Change*, N. Y. L. J., (Apr. 9, 2019), https://www.law.com/newyorklawjournal/2019/04/09/how-we-judge-prosecutors-has-to-change/?slreturn=20191114165559.

[99] *See* Sklansky, *supra* note 78, at 31.

is recidivism. Roundtable participants agreed, however, that the field needs to move beyond recidivism as a primary performance metric.[100] Specifically, the many variables that influence recidivism—race, class, geographic location, level of police presence, and prior criminal history, to name a few[101]—are complex and hard to disentangle from one another. And to quote Roundtable participant Kent Mendoza, who is a policy coordinator at the Anti-Recidivism Coalition and was incarcerated for five years as a teenager, "you can't expect a kid to change overnight—change is about relapses and further attempts." In other words, recidivism spotlights an individual's apparent failure at a specific moment in time while ignoring potential indices of progress and "system-level factors that fail to support desistance."[102]

In an opinion piece written for *The Marshall Project*, Roundtable participants Jeffrey Butts, Director of Research and Evaluation at John Jay College of Criminal Justice, and Vincent Schiraldi, Senior Research Scientist at the Columbia School of Social Work, define desistance as "the process by which people learn to become law-abiding."[103] They argue that "a desistance framework encourages justice agencies to promote and monitor positive outcomes,"[104] such as those related to harm reduction, rather than focusing on a single negative outcome, reoffending. The authors also suggest that decision-makers ask themselves the following questions when analyzing the effects of criminal sanctions:

> Are we really helping people convicted of crimes to form better relationships with their families and their law-abiding friends? Are we helping them to advance their educational goals? Are they more likely to develop the skills and abilities required for stable employment? Are we helping them to respect others and to participate positively in the civic and cultural life of their communities?[105]

Such an interrogation expands the notion of what prosecutors can accomplish with their discretion and integrates aspects of individual well-being—social connectivity, educational and professional attainment—that bolster public safety.

In a similar vein, Roy L. Austin Jr., former Deputy Assistant to President Obama for the Office of Urban Affairs, Justice and Opportunity, presented the Roundtable with a list of "things prosecutor's offices can actually count." An important caveat here is that performance metrics are only valuable to the extent that they connect to program goals, could reasonably be impacted by the program model, and do not overwhelm practitioners' capacity to capture the most important data. With that acknowledged, the "things" Austin cited include cost savings from removing cases from the system; reductions (or increases) in racial and socioeconomic disparities; and the percentage of defendants

[100] For a more thorough explanation of the limitations of using diversion to measure the effectiveness of criminal justice policies broadly, *see* Jeffrey A. Butts & Vincent Schiraldi, Harvard Kennedy School Program in Criminal Justice Policy and Management, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*, (2018).

[101] *Id.*

[102] David Noble, Institute for Innovation in Prosecution, *Prosecutor-Led Pretrial Diversion: A Review of the Professional Literature* 10 (2018).

[103] Jeffrey A. Butts & Vincent Schiraldi, *The Recidivism Trap*, The Marshall Project (Mar. 14, 2018), https://www.themarshallproject.org/2018/03/14/the-recidivism-trap.

[104] *Id.*

[105] *Id.*

suffering from mental illness and/or substance abuse who enroll in treatment and the number of hours they complete. Austin also proposed that jurisdictions attempt to track qualitative measures related to procedural justice and legitimacy. Potential areas of interest include participant, victim, and community sentiment regarding diversion, along with a program's impact on relations between community and law enforcement. The question of community-law enforcement relations points to the importance of measuring the effects of diversion not only on participants and the community, but also on the prosecutor's office itself.

Practitioners also draw inspiration from the following evaluations, which span a range of program designs and target populations and focus on metrics related to employment, housing, and mental health, among others. Some innovative approaches to measuring success include:

Drug Treatment Alternative-to-Prison (**DTAP**), New York, NY. Founded in 1990 at the height of the crack cocaine epidemic in Brooklyn, DTAP was envisioned as a treatment-based solution to an overwhelming influx of felony drug cases. The program accepted "adult defendants arrested for felony, undercover, 'buy-and-bust' drug offenses"[106] with a prior nonviolent felony conviction on their record. Participants were sent to a residential treatment program for 18 to 24 months. A 1995 analysis of DTAP in Brooklyn, along with replication programs in the four other New York City boroughs, discovered that DTAP retained participants at a rate more than one-and-a-half times greater than those of similar treatment programs.[107] A 2005 study found that the participant employment rate increased from 26 percent upon program entry to 92 percent at program completion. Researchers attributed this rise to "the prosocial living skills"[108] participants gained through attending classes and working jobs in the treatment facility.

Neighborhood Courts, San Francisco, CA. First implemented in 2012, the Neighborhood Courts handle nonviolent misdemeanors—vandalism, theft, soliciting prostitution—and certain nonviolent felonies. If a participant agrees to have their case heard in a Neighborhood Court, they meet with trained volunteers (known as "adjudicators") to discuss the offense and come up with ways to repair the harm caused. Speaking to the qualitative benefits of this model, Chief of Programs and Initiatives Katy Miller shared that "participants feel like they're treated with dignity," "victims feel seen and heard," and the adjudicators take pride in representing their community. The aforementioned NIJ multisite evaluation found that Neighborhood Court cases cost 82 percent less than cases prosecuted in the traditional manner.[109] The DA's Office has also been able to redirect participant restitution payments to its Neighborhood Justice Fund, which gives "grants to community-based organizations for projects that will enhance neighborhood safety, livability, and cohesion."

Jail Diversion for Persons with Serious Mental Illness, Union County, NJ. This program is geared towards individuals with a diagnosed mental illness who are arrested and charged with a nonviolent offense. According to the authors of a five-year longitudinal study of this program, "its unique feature was that the prosecutor's office itself coordinated the diversion

[106] Hung-En Sung & Steven Belenko, *From Diversion Experiment to Policy Movement: A Case of Prosecutorial Innovation*, 3 J. Contemporary Criminal Just. 225, 225 (2006).
[107] *Id.*
[108] *Id.* at 229.
[109] Michael Rempel et al., *supra* note 34.

effort, working with the court, defense counsel, and mental health providers."[110] The analysis showed that participants who completed the program spent significantly fewer days in jail in the 12 months following enrollment than in the year prior to enrollment. (Participants who did not complete the program also spent fewer days in jail but the difference was statistically insignificant.) On a measure of "community functioning and coping with symptomatology,"[111] those who stayed in the program for at least six months demonstrated "significantly increased community integration, better overall functioning, and management of symptoms."[112]

Law Enforcement Assisted Diversion (LEAD), King County, WA. In contrast to the other initiatives described here, LEAD relies on police officers' wielding discretion at the point of arrest. That said, LEAD's National Support Bureau believes that "recidivism and system utilization gains in Seattle/King County [are related] to the King County Prosecutor having dedicated deputy prosecutor(s) who track and manage LEAD participants' non-diverted cases."[113] Prosecutors are responsible for filing charges if a participant does not complete the program's intake process and withholding or dismissing charges when a participant demonstrates progress, among other duties. Most people that law enforcement divert through LEAD are low-level drug offenders. A 2017 study showed that enrolling in LEAD increased participants' likelihood of securing permanent housing by 89 percent.[114] The study also found that "participants were 46 percent more likely to be on the employment continuum"[115] following enrollment. Lastly, participants increased their likelihood of receiving legitimate income or government benefits by 33 percent when they enrolled in LEAD.[116]

In New York City's Drug Treatment Alternative-to-Prison (DTAP) program, the participant employment rate more than tripled from the time defendants entered DTAP to the time they completed it. Through restitution payments from defendants in San Francisco's Neighborhood Courts, the city has been able to fund grants for local organizations that share some of the same goals as the DA's office, namely enhancing community safety and wellness. Participants in the diversion program for people with serious mental illness in Union County, NJ, were better able to function in their communities and manage their symptoms. In King County, WA, low-level offenders who enrolled in Law Enforcement-Assisted Diversion (LEAD) increased their chances of finding permanent housing and a source of legitimate income.

These promising results notwithstanding, an urgent need exists for research and evaluation in the area of prosecutor-led diversion. Even though prosecutors have been diverting defendants since at least the 1960s, the field lacks robust data on this type of discretion. A 2013 report from the Center for Health and Justice states that "relatively little true evaluation exists in national or local literature about the effectiveness of [diversion] programs over-

[110] Kenneth J. Gill & Ann A. Murphy, BioMed Research International, *Jail Diversion for Persons With Serious Mental Illness Coordinated by a Prosecutor's Office* 2 (2017).
[111] *Id.* at 3.
[112] *Id.* at 5.
[113] Lead Nat'l Support Bureau, *Core Principles for Prosecutor Role* (2017).
[114] Seema L. Clifasefi et al., *Seattle's Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations With Recidivism*, 63 Crime & delinquency 429, 435 (2017).
[115] *See id*, at 440 (defining "employment continuum" as "participating in vocational training/internships, being employed, being retired from legitimate employment.").
[116] *See id.* at 435.

all, either in terms of cost savings or in reduced recidivism."[117] The potential explanations offered are inconsistencies in program design and inadequate resources for analysis.[118]

Announcing their intention "to improve upon the limited state of research knowledge,"[119] the authors of the 2018 NIJ study evaluated 16 prosecutor-led programs in 11 jurisdictions based on case outcomes, recidivism, and cost savings. Though the authors were unable to analyze each program along the same set of metrics, they come to the general conclusion that these programs help participants avoid conviction and incarceration, reduce recidivism, and produce cost savings for justice agencies.[120] The results of this study are encouraging because keeping defendants out of jail or prison shields them from the collateral consequences of incarceration, particularly if charges are dismissed in the process. Additionally, diversion programs that are less costly than normal processing—based on a comparison between the cost of diverting one individual and the work hours spent by court officials when a case goes to trial—allow jurisdictions to reallocate limited resources to the issues that most threaten public safety. More multisite evaluations like this one will greatly bolster the current body of research.

When DAs commit to expand the use of diversion, they should also adjust line prosecutors' performance metrics accordingly. Roundtable participants identified data that could show whether line staff are embracing diversionary policies and encourage behavior change. The simplest metric of this kind would be the number of times prosecutors referred cases for diversion. Digging deeper, one could compare diversion referrals to charges filed and analyze how offense type and prior criminal history, among other variables, influenced decision-making. If diversion is available for offenses that would potentially result in a jail sentence or probation, it may be possible to track instances in which prosecutors prevented defendants from either going to jail ("jail avoidance") or being placed under court supervision. For programs where prosecutors hold discretion over enrollment, breaking down acceptance rates according to race and ethnicity would be one way to ensure that diversion practices do not reinforce existing disparities. At a more qualitative level, Maggie Wolk, Director of Planning and Management at the Manhattan (NY) DA's Office, offered the idea of judging prosecutors on the frequency and nature of their contact with defendants and victims (communications with service providers could also be informative). Thinking beyond diversion, offices could track "declinations to prosecute arrests that are improper or lack sufficient evidence"[121] and "dismissals of low-level cases that are better left outside the criminal justice system."[122]

B. How to measure

Once prosecutors have homed in on what they want to know about diversion, they face a potentially daunting question: How does a prosecutor's office—particularly one with limited resources—go about collecting, evaluating, and sharing data?

To begin with, district attorneys can benefit greatly from revealing their office's in-

[117] Ctr. for Health and Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiative 1, 29 (2013).*
[118] *See id.* (noting why there is no standard evaluation regarding the effectiveness of diversion programs).
[119] Rempel et al., *supra* note 34, at 2-3.
[120] *See id.* at vii-viii.
[121] Barkow et al., *supra* note 99.
[122] *Id.*

ner workings to outside evaluators such as academic institutions and think thanks. The average prosecutor's office most likely lacks the capacity and resources to measure the effects of initiatives like diversion. Instead of relying on limited expertise, prosecutors can partner with researchers eager to open this so-called black box. A collaboration of this sort led to the creation of "A Prosecutor's Guide for Advancing Racial Equity," a 2014 report by the Vera Institute of Justice examining prosecutors' contributions to racial disparities in the justice systems of Mecklenburg County, NC; Milwaukee County, WI; and New York County, NY.[123] The report lays out the steps Vera's Prosecution and Racial Justice Program team took to engage each jurisdiction, capture and analyze data, and work with staff to come up with strategies for addressing any disparities. Acknowledging Vera's inability to implement this model with offices nationwide, the authors include a thorough checklist for prosecutors interested in embarking upon a similar project in their own unique contexts. Most pertinently, the report lays out the process by which data analysis can facilitate policy and practice change.[124]

In contrast to the offices in Vera's study, prosecutors largely do not document their decision-making internally, let alone make this information publicly available. John Pfaff, who places a fair bit of blame for mass incarceration on prosecutors, told The Marshall Project that "we don't know what [prosecutors are] doing, why they're doing it and what drives their decision process."[125] The responsibility falls to DAs to own this reality and take active steps to fix it. In Chicago, State's Attorney Kim Foxx is doing just that by following through on her campaign promise of greater transparency.

In 2017, Foxx's first year in office, she created and filled a new position—chief data officer—to help address "'big gaps' in knowledge in how the office is handling criminal cases."[126] While critics had charged that the office had been hiding data, she admitted that "the truth is we just don't have it." The following year, Foxx's office publicly released felony case data dating roughly from 2010 to 2016, as well as a report on 2017 data.[127] Uploaded to a government website, the dashboard displays the progress of every felony case in Cook County, from intake to sentencing. While the dashboard does not feature information on diversion (and may not be user-friendly to people unfamiliar with such tools), it can serve as a model for other jurisdictions as they develop methods for documenting and publicizing their diversion policies. In a letter introducing the report, Foxx writes, "our most important conversations around criminal justice—from bond reform to addressing gun violence—require us to make policy choices grounded in data."[128] Line prosecutors need to know *why* their bosses are telling them to divert certain cases, and what the expected results should be. Thus, consulting with data experts to design a diversion program will increase its legitimacy

[123] Vera Inst. Of Just., *A Prosecutor's Guide for Advancing Racial Equity* (2014).
[124] *See id.* at 6 (explaining how data analysis can improve organizational management that effectuates change).
[125] Tom Meagher, *13 Important Questions About Criminal Justice We Can't Answer*, The Marshall Project (May 15, 2016), https://www.themarshallproject.org/2016/05/15/13-important-questions-about-criminal-justice-we-can-t-answer.
[126] Steve Schmadeke, *Newly Elected Kim Foxx Details Plans to Reshape State's Attorney's Office,* Chi. trib. (Dec. 5, 2016), https://www.chicagotribune.com/news/breaking/ct-kimm-foxx-interview-met-20161205-story.html.
[127] *State's Attorney Foxx Announces Unprecedented Open Data Release*, Cook Cnty. State's Att'y (Mar. 2, 2018), https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-unprecedented-open-data-release.
[128] Kimberly M. Foxx, Cook Cnty. State's Att'y, *Cook County State's Attorney: 2017 Data Report 1* (2018).

among staff and hopefully improve the odds that the program will work as intended.

Opportunities also exist for data sharing across criminal justice agencies, public health offices, social service organizations, and other entities. Breaking down silos allows prosecutors to share responsibility for the success of diversion with "other stakeholders that have a vested interest in public safety and a critical role in creating it."[129] The exchange of data between prosecutors, police departments, probation offices, and other justice agencies (not to mention entities outside the system) has traditionally been limited. This phenomenon hampers prosecutors' ability to fully comprehend the upstream and downstream effects of their decisions and obscures the fact that there are social and individual problems that prosecutors cannot and should not try to solve alone. Integrating relevant data on individuals who frequently come into contact with the justice system and other government sectors such as healthcare and homeless services can lead to more effective policymaking. In Camden, NJ, for instance, criminal justice and public health officials worked with researchers to identify those individuals who were both the most frequent utilizers of hospitals and the most frequently jailed. A report examining this effort asserts that "the holistic view provided by integrated data will allow researchers, policymakers, and practitioners to design earlier interventions to prevent crime and the avoidable use of jails and emergency departments."[130]

Even with improved collaboration among stakeholders in the justice system and beyond, there are limits to what data can reveal about the effects of any program. As Jeffrey Butts writes, "human behavior … is enormously complex and not completely measurable."[131] He adds, "to say that a program is evidence-based" does not "guarantee that a program will work every time, for every person, and in every situation." Conversely, diversionary models that are unproven according to scientific evaluation should not be disregarded outright. This is of course not to suggest that data collection and evaluation is a futile endeavor. Rather, practitioners should allow room for ambiguity and experimentation. Prosecutors must be willing to reconsider the incentives they set for staff and their long-held objectives, such as reducing recidivism. Seeing as some forms of diversion may be a departure from established policies and practices, it could be necessary to conceive of novel success metrics. Seeking the input of outside experts will naturally bring new ideas into a prosecutor's office, as well as greater objectivity in evaluation. District attorneys can then share the insights they glean from all of these efforts with the community so that constituents gain a more thorough understanding of how effectively local prosecutors are providing justice.

IV. Looking Ahead

Questions about the efficacy of diversion puzzled evaluators in the 1970s and '80s and largely remain unanswered today. Because diversion can occur at several distinct points in the criminal justice process, can involve a

[129] John J. Choi et al., Inst. for innovation in prosecution, *Prosecutors and Frequent Utilizers: How Can Prosecutors Better Address the Needs of People Who Frequently Interact With the Criminal Justice and Other Social Systems?* 4 (2019).

[130] Anne Milgram et al., Harv. Kennedy Program Crim. Just. Pol'y & Mgmt., *Integrated Health Care and Criminal Justice Data — Viewing the Intersection of Public Safety, Public Health, and Public Policy Through a New Lens: Lessons from Camden, New Jersey* 2 (2018).

[131] Jeffrey A. Butts, John Jay C. of Crim. Just. Res. & Evaluation Center, *What's the Evidence for Evidence-Based Practice?* 1 (2012).

range of defendant populations, comprises dozens of unique program models, and is employed differently between jurisdictions, it is nearly impossible to define in a narrow sense. This complicates the task of figuring out which forms of diversion "work" and which do not. Moving forward, interested parties such as those assembled for the Roundtable must collaborate to build a body of research that assesses the impacts of various diversionary models on individual and community wellbeing, educational and employment attainment, justice involvement, and other important outcomes. Examining diversion broadly as well as at the local level will allow decision-makers to choose effectively as they ponder which programs to implement in their jurisdictions.

Although it will take years for a robust literature on prosecutor-led diversion to materialize, prosecutors and other stakeholders need not be discouraged. As Daniel P. Mears so eloquently puts it, "in the face of dramatic growth in America's criminal justice system and calls nationally for using evidence-based policies there stands an odd fact—precious little evidence exists to claim that the sanctions currently in use are effective."[132] While the phenomenon of mass incarceration solidified, those pushing for longer sentences and more invasive policing could not prove that these policies made communities safer. And until very recently, supporters of the tough-on-crime approach have not had to answer for the untold social and financial costs of "the highest rate of human caging of any society in the recorded history of the modern world."[133] For far too long, the imperative of harshness in late 20th century criminal justice policies—the amount of retribution exacted on defendants—largely obscured concerns about effectiveness, fairness, and dignity. The current reform movement, in contrast, rejects the premise that the main goal of criminal justice is to punish those who commit wrongs and instead centers the needs of survivors, the community, and defendants themselves. Within this paradigm change, diversion shows promise as a useful tool.

The philosophy of diversion presented here may fundamentally differ from how many experienced prosecutors understand their jobs. To begin with, it contradicts established beliefs about holding people accountable for crime and defending public safety. The idea that a prosecutor would view incarceration as a last resort also conflicts with an incentive structure that prizes convictions over all other outcomes. Acknowledging the power of this entrenched culture, district attorneys can invoke the moral imperative behind decarceration, along with more practical considerations. IIP Executive Director and career prosecutor Lucy Lang makes this point matter-of-factly: "What we're doing is wrong and where we're sending people is unconscionable." This "wrongness" encompasses the cruelty of imprisonment, its ineffectiveness in terms of both public safety and individual and communal rehabilitation, and its inordinate financial costs. After framing the conversation in these terms, DAs can utilize a number of strategies to encourage line prosecutors to consider the underlying issues that lead to an arrest and seek dispositions other than removing someone from the community. They can set performance metrics such as the number of cases referred for diversion or frequency of contact with service providers. They can hire attorneys and other staff who value a more nuanced, less punitive approach to prosecution.

[132] Daniel P. Mears & J.C. Barnes, *"Toward a Systematic Foundation for Identifying Evidence-Based Criminal Justice Sanctions and Their Relative Effectiveness,"* 38 J. Crim. Just., 702, 708-38 (2010).
[133] Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About 'Criminal Justice Reform'*, 84 Yale L. J. 128, 849-50 128 (2019).

They can partner with other justice officials and community members on problem-solving courts or restorative justice initiatives.

Given the many variables that affect a program's success, prosecutors must have an appetite for political risk. At some point, a person whose case was diverted will reoffend, perhaps even violently. When this occurs, chief prosecutors must be prepared to defend their office's policies from the potential blowback from political opponents and concerned voters. Depending on the nature of the offense, it could be valuable to apply the "desistance framework," which accepts that people will make mistakes as they eventually become law-abiding.

As prosecutors attempt to shift culture and elevate diversion as a normative response to crime, they must keep in mind that certain problems are best addressed outside the justice system. From a reformist perspective, diversion is perhaps a stopgap along a path towards transforming the system. Rather than diverting drug offenders with the understanding that completing treatment means avoiding conviction, some call for decriminalizing all drug use and increasing government investment in mental health and substance abuse services.[134] Realistically, such reforms would shrink the reach of criminal justice agencies as well as their budgets. In response to a questionnaire distributed prior to the Roundtable convening, one participant noted that when a pretrial diversion program is successful, cost savings may accrue to other justice agencies while the prosecutor's office foots the bill. How prosecutor's offices fund these programs is a valid concern, especially in jurisdictions with limited resources. However, if one believes that the benefits of initiatives like diversion should be felt across the system and the community at large, then this is not a zero-sum game.

Prosecutors amassed incredible power during the growth of mass incarceration; reducing the prison and jail populations and doing justice in a fairer, more humane manner will require that prosecutors give some of that power back. A common refrain from law enforcement leaders is that they aspire to one day "put themselves out of business." In other words, police chiefs and district attorneys want to do their jobs so well that there are no more people to arrest, prosecute, and lock up. This statement carries the assumption that law enforcement is most well-equipped to deal with what society has defined as crime. Diversion embodies the opposite assumption: that criminal justice is an ineffective remedy for issues related to poverty, racism, mental illness, and other social failures. Further, diversion can promote healing by providing opportunities for defendants to repair harms and receive services, such as mental health treatment and job training, that will help them thrive in their communities. Hopefully, in the not-so-distant future, people who today cycle through the system will receive the support they need long before they see the back of a squad car.

[134] John Washington, *"What Is Prison Abolition?"* The Nation, (Jul. 31, 2018), https://www.thenation.com/article/what-is-prison-abolition.

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