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Insanity and Incompetency: Courts, Communities, and the Intersections of Mental Illness and Criminal Justice in the Wake of Kahler and Trueblood

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COMMENT

INSANITY AND INCOMPETENCY: COURTS, COMMUNITIES, AND THE INTERSECTIONS OF MENTAL ILLNESS AND CRIMINAL JUSTICE IN THE WAKE OF *KAHLER* AND *TRUEBLOOD*

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INTRODUCTION

Today, people with mental illnesses[1] in the United States are ten times more likely to be incarcerated than hospitalized.[2] About 20% of the United States population experiences some kind of mental illness each year, and about 3 to 5% of the population experiences a severe and persistent mental illness.[3] By contrast, more than 60% of jail inmates and at least 45% of prison inmates in the United States have a diagnosed mental illness.[4] Studies have found that anywhere from 25% to 71% of people with serious mental illness in a given community have a history of criminal justice involvement.[5] There are many reasons for these disparities, but the presence of a mental illness alone increases an individual's likelihood of being arrested or shot by police.[6] Inadequate access to mental health care, among other unmet needs, is considered to be a significant contributor to this overrepresentation.[7] People with mental illnesses who commit crimes and enter the criminal justice system might not have en-

[1] There are many approved and disapproved ways to refer to this group of people. *See Words Matter: Reporting on Mental Health Conditions*, AM. PSYCHIATRIC ASS'N: NEWSROOM, https://www.psychiatry.org/newsroom/reporting-on-mental-health-conditions (last visited Dec. 7, 2022); David Oaks, *Let's Find Language More Inclusive than the Phrase "Mentally Ill"!*, MINDFREEDOM INT'L, https://mindfreedom.org/kb/not-mentally-ill/ (Aug. 28, 2012). However, the most clear and common "person-centered" term this author has seen is "people with mental illnesses." Therefore, that term, or variations of it, will be used throughout. For the purposes of this Comment, it is necessary to group people together who share certain experiences related to psychiatry and incarceration. Deeper analysis of whom to consider part of this group and how to refer to them most appropriately is beyond the scope of this paper.

[2] *Criminalization of Mental Illness*, TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness (last visited Sept. 14, 2022); *e.g.,* German Lopez, *How America's Criminal Justice System Became the Country's Mental Health System,* VOX (Oct. 18, 2016), https://www.vox.com/2016/3/1/11134908/criminal-justice-mental-health.

[3] *Our Impact: By the Numbers*, TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/evidence-and-research/fast-facts (last visited Sept. 14, 2022).

[4] *See* Lorna Collier, AM. PSYCH. ASS'N, *Incarceration Nation*, 45 MONITOR ON PSYCH. 56 (2014), https://www.apa.org/monitor/2014/10/incarceration. Rates of civil commitment are difficult to calculate for many reasons and therefore difficult to compare with rates of incarceration of people with mental illnesses. *See* Gi Lee & David Cohen, *Incidences of Involuntary Psychiatric Detentions in 25 U.S. States*, 72 PSYCHIATRIC SERVS. 61 (2021), https://ps.psychiatryonline.org/doi/epdf/10.1176/appi.ps.201900477.

[5] Natalie Bonafine, et al., *Meeting the Needs of Justice-Involved People with Serious Mental Illness Within Community Behavioral Health Systems,* 71 PSYCHIATRIC SERVS., 355, 360 (2020), https://ps.psychiatryonline.org/doi/epdf/10.1176/appi.ps.201900453.

[6] Bonafine, et al, *supra*, note 5. Donna Hall, et al., *Major Mental Illness as a Risk Factor for Incarceration*, 70 PSYCHIATRIC SERVS. 1088, 1088 (2019), https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201800425; *People with Untreated Mental Illness 16 Times More Likely to Be Killed by Law Enforcement*, TREATMENT ADVOC. CTR.: RESEARCH WEEKLY (DEC. 9, 2015), https://www.treatmentadvocacycenter.org/component/content/article/168-research-weekly/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement-.

[7] Bonafine, et al, *supra*, note 5 (explaining that access to care is vital, resource-limited, and not enough on its own to address the criminogenic needs of populations with both existing mental

gaged in such behavior if they had been receiving adequate and appropriate mental health treatment instead.[8] Mental health care access in the United States has consistently failed to meet the demand.[9] The American Psychiatric Association has declared this phenomenon a "crisis."[10]

Kim Stringer was a teenager[11] living outside of Philadelphia with her parents when she first showed signs of mental illness.[12] Doctors diagnosed her with bipolar disorder and prescribed her medication.[13] However, like many people with a severe mental illness, Ms. Stringer was experiencing anosognosia, the clinical lack of awareness that she was ill.[14] As a result, when she turned eighteen, Ms. Stringer stopped taking her prescribed medications and stopped going to therapy.[15] Ms. Stringer's parents were worried for their daughter, but there was nothing they could do.[16] The law in most states requires adults to either voluntarily accept treatment or to become a danger to themselves or others

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illnesses and a history of criminal justice involvement). For more explanation of the criminogenic risk perspective, see *id.* at 356.

[8] Civil commitment law is a complex subject and an in-depth treatment of it is beyond the scope of this paper. *See generally* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., CIVIL COMMITMENT AND THE MENTAL HEALTH CARE CONTINUUM: HISTORICAL TRENDS AND PRINCIPLES FOR LAW AND PRACTICE (2019), https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care_041919_508.pdf [hereinafter SAMHSA CONTINUUM]. Seth J. Prins, Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review, 65 PSYCHIATRIC SERVS. 862, 862-72 (2014).

[9] *Study Reveals Lack of Access as Root Cause for Mental Health Crisis in America*, NAT'L COUNCIL FOR MENTAL WELLBEING, https://www.thenationalcouncil.org/news/lack-of-access-root-cause-mental-health-crisis-in-america/ (last visited Dec. 11, 2022). Bonafine, et al, *supra*, note 5, at 360 (explaining that the mental health system does the best it can with limited resources, and blaming the mental health system as the source of the problem is a facile generalization).

[10] *The Stepping Up Initiative: A National Initiative to Reduce the Number of People with Mental Illnesses in Jail*, APA FOUND., https://apafdn.org/Impact/Justice/The-Stepping-Up-Initiative (last visited Mar. 27, 2022).

[11] Popular myths and misconceptions conceal the fact that mental illness can happen to anyone. Harold S. Koplewicz, *7 Myths About Child Mental Health*, CHILD MIND INST. (Mar. 23, 2022), https://childmind.org/article/7-myths-about-child-mental-health/#.

[12] Jo Ciavaglia, *Lower Makefield Family Fights for Info, Treatment for Mentally Ill Daughter in Bucks Jail,* USA TODAY (June 19, 2020, 12:57 PM), https://www.usatoday.com/story/news/2020/06/19/lower-makefield-family-fights-for-info-treatment-for-mentally-ill-daughter-in-bucks-jail/111987716/ [hereinafter *Family Fights*].

[13] "Roughly half of all lifetime mental disorders in most studies start by the mid-teens." Ronald C. Kessler, et al., *Age of Onset of Mental Disorders: A Review of Recent Literature*, 20 CURRENT OPINION IN PSYCHIATRY 359, 359 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1925038/.

[14] "Anosognosia, also called 'lack of insight,' is a symptom of severe mental illness experienced by some that impairs a person's ability to understand and perceive his or her illness." *Anosognosia*, TREATMENT ADVOC. CTR. https://www.treatmentadvocacycenter.org/key-issues/anosognosia (last visited Mar. 23, 2022).

[15] *Id.*

[16] Transforming Health, *Mentally Ill and in Jail: A Mother Shares Her Daughter's Story*, YOUTUBE (Sept. 2, 2020), https://www.youtube.com/watch?v=UXq7JuWwvB4 [hereinafter *Mother Shares*].

before receiving any treatment.[17] Over time, Ms. Stringer began to deteriorate, developing symptoms similar to schizophrenia.[18] Her delusions, focused on a strong aversion to technology,[19] finally reached a fever pitch when she allegedly punched someone.[20] The police officer who responded had the legal ability to involuntarily commit Ms. Stringer to psychiatric treatment because in that moment, she posed a threat to herself or others.[21] However, the officer took Ms. Stringer to jail instead.[22] Why the police officer did not transport Ms. Stringer to the hospital is unclear, but it may have been because the officer was not trained to identify mental illnesses.[23]

Ms. Stringer was held in the local jail while her case was pending, a place ill-equipped to address her needs.[24] Ms. Stringer's parents were willing to post bond for Ms. Stringer, but due to the dangerous behavior she was exhibiting before her arrest, they would only post bond if Ms. Stringer could be transferred to a hospital.[25] Before Ms. Stringer's case could move forward, the county acknowledged, she needed psychiatric treatment.[26] However, the hospital would not admit her unless the jail initiated her transfer, and the jail would not initiate the transfer due to the onerous paperwork required.[27] Ms. Stringer was ultimately warehoused in the jail for two months without treatment and without a trial, while the jail assured the Stringers that their daughter was fine.[28] Ms. Stringer lost touch with reality while in jail and became unable to care for herself.[29] She was subjected to multiple "use of force" incidents, including being pepper-sprayed by jail staff.[30] The jail staff left her sitting in her own feces and urine, then may have withheld food from the twenty-eight-year-old for not cleaning herself up.[31] Ms. Stringer was put on suicide

[17] "Dangerousness" is often the easiest of a few available civil commitment standards to meet, and it had once been required. SAMHSA CONTINUUM, *supra* note 8, at 8-11.

[18] *Mother Shares*, *supra* note 16.; *Family Fights*, *supra*, note 12.

[19] *Family Fights*, *supra*, note 12.

[20] *Mother Shares*, *supra* note 16.

[21] *Id.*

[22] *Id.*

[23] *See Family Fights*, *supra*, note 12; RANDOLPH DUPONT ET AL., UNIV. MEMPHIS CIT CTR., CRISIS INTERVENTION TEAM: CORE ELEMENTS 14 (2007), http://cit.memphis.edu/CoreElements.pdf.

[24] Jo Ciavaglia, *Inside the Bucks County Jail: Investigative Report Details How Guards Used Force Against Mentally Ill Inmate,* COURIER TIMES (June 1, 2021, 10:02 AM), https://www.buckscountycouriertimes.com/story/news/2021/06/01/bucks-county-jail-use-of-force-corrections-doylestown-kim-stringer-falls-lower-makefield/7188188002/ [hereinafter *Guards Used Force*].

[25] *Family Fights*, *supra*, note 12.

[26] Ms. Stringer may have been awaiting competency restoration. *Id.*

[27] *Guards Used Force*, *supra* note 24.

[28] *Family Fights*, *supra*, note 12.

[29] *Mother Shares*, *supra* note 16.

[30] *Id.*; *Guards Used Force*, *supra* note 24.

[31] *Mother Shares*, *supra* note 16; *Family Fights*, *supra*, note 12.

watch after she attempted to harm herself.[32] While jail officials had repeatedly told her parents that Ms. Stringer was in good care and that they had nothing to worry about, Ms. Stringer's parents finally learned the truth when other inmates informed Ms. Stringer's parents about what was happening to their daughter.[33] Kim Stringer's mother, Martha Stringer, now advocates to end the overrepresentation of people with mental illnesses in jails.[34]

The criminal justice system is grappling with matters beyond its expertise and infrastructure.[35] The criminal justice system was designed with many–sometimes conflicting–purposes in mind, such as deterrence, retribution, incapacitation, and rehabilitation.[36] The criminal justice system was never designed to heal trauma, administer treatment,[37] or make people whole.[38] In reporting on the overrepresentation of people with mental illnesses in jails and prisons, many writers claim that the largest psychiatric facility in most states is a county jail,[39] yet the claim is usually only an illustrative metaphor.[40] Access to psychiatric services in jails and prisons, whether in the form of medication or therapy, is often grossly inadequate.[41] Incarcerated individuals with untreated mental illness pose a danger to themselves, employees, and fellow inmates.[42] Inmates with mental illnesses are over 60% more likely than inmates without mental illnesses to be physically victimized by other inmates or at their own hands.[43] Jail and prison staff are often underpaid, under-

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[32] *Family Fights*, *supra*, note 12.

[33] *Mother Shares*, *supra* note 16.

[34] *Id.*

[35] Dave Davies, *Psychiatrist: America's 'Extremely Punitive' Prisons Make Mental Illness Worse*, NPR HEALTH SHOTS (Jul. 16, 2020, 1:42 PM), https://www.npr.org/sections/health-shots/2020/07/16/891438605/psychiatrist-americas-extremely-punitive-prisons-make-mental-illness-worse.

[36] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 13-25 (8th ed. 2018).

[37] Though jails and prisons do provide treatment, it is often inadequate. *Health,* PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/health.html (last visited Mar. 28, 2022).

[38] In fact, the opposite occurs. Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE: BRIEFINGS (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/.

[39] *See, e.g.*, Eric Westervelt, *America's Mental Health Crisis Hidden Behind Bars*, NPR: MORNING EDITION (Feb. 25, 2020, 5:01 AM), https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars.

[40] Cook County Sheriff Tom Dart literally turned his jail into a psychiatric facility by shifting his budget around. Natalie Delgadillo, *Person of the Year 2017: Tom Dart, Sheriff*, GOVERNING, https://www.governing.com/poy/gov-tom-dart.html (last accessed Dec. 11, 2022).

[41] *See, e.g.*, Westervelt, *supra* note 39.

[42] *See generally,* Cynthia L. Blitz, et al., *Physical Victimization in Prison: The Role of Mental Illness*, 31 INT'L J.L. AND PSYCHIATRY 385 (2008); *and see* H. P. Smith, et al., "*A Call to Action" – Mental Illness & Self-Injurious Behavior Occurring in Jails & Prisons*." 41 J. HEALTH AND HUM. SERVS. ADMIN., 16 (2019).

[43] Blitz, et al., *supra* note 42 at 385. Smith, et al., *supra* note 42 at 16.

qualified, and under-resourced to handle inmates' mental health issues.[44] Staff are put at an unnecessarily high risk by managing overcrowded institutions populated by inmates with significant, unmet needs.[45] People with preexisting mental illnesses are also disproportionately held in solitary confinement,[46] which often exacerbates their conditions.[47] Despite the dangers and adverse consequences of housing individuals with mental illnesses in jails and prisons, people with mental illnesses continue to be vastly overrepresented in those institutions.[48] The criminal justice system was built as if incarcerating people with mental illnesses were the exception, but it is the norm.[49]

While people experiencing mental illnesses encounter every stage of the justice system, the two points at which criminal courts have historically grappled with mental illnesses are competency restoration and the insanity defense.[50] This Comment examines those two points from an historical perspective, tracing modern shifts in the two areas of law and the practical outcomes for justice-involved people with mental illnesses. Specifically, this Comment describes how competency restoration and the insanity defense both serve as pathways to court-ordered mental health treatment,[51] but how competency restoration has become so overused, state systems are no longer functioning.[52] By contrast, the insanity defense is being underused, has been held to no longer be constitutionally guaranteed, and is not preventing the inappropriate incarceration of people with mental illnesses.[53] This Comment ultimately argues that the

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[44] *See generally Family Fights*, *supra*, note 12; ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 119-25 (2018).

[45] *E.g., CBS4's Michelle Gillen Revisits the Forgotten Floor*, CBS MIAMI (July 18, 2013), https://www.cbsnews.com/miami/news/cbs4s-michelle-gillen-revisits-the-forgotten-floor/ (describing inmates housed three to a cell designed for one, drinking toilet water, sleeping on the floor, being sexually assaulted by one another, and dying in jail). *See also* ROTH, *supra* note 44, at 119-25.

[46] TREATMENT ADVOC. CTR., OFF. OF RESEARCH & PUB. AFFS., BACKGROUND PAPER: SERIOUS MENTAL ILLNESS (SMI) PREVALENCE IN JAILS AND PRISONS 2-3 (2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf [hereinafter SMI PREVALENCE]; ROTH, *supra* note 44, at 136-41.

[47] Prins, *supra* note 8, at 862-72.

[48] *Id.*

[49] Interview with Kenneth Minkoff, MD, Clinical Assistant Professor of Psychiatry, Harvard Med. Sch., et al. (May 27, 2021) (notes on file with Mental Health America of Colorado and the Equitas Project's Model Legal Processes for Emergency Psychiatric Intervention Working Group).

[50] ROTH, *supra* note 44, at 176. Technically, mental illness is considered at sentencing and other stages of trial, but only competency and insanity regularly attach some type of commitment to mental health treatment by default. *Cf.* AURELIE TABUTEAU MANGELS, AMERICAN BAR ASSOCIATION, DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 22-24 (2016), https://www.prisonpolicy.org/scans/aba/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

[51] See Part II below.

[52] Part II, A below.

[53] Part II, B below.

intersection of psychiatry and criminal law is increasingly a project for state governance; state courts and local communities must build responsive systems for the unique needs of the people in their states.[54] The competency system and the insanity defense too often fail to ensure that people with serious, unmet mental health needs will be able to access treatment and avoid unnecessary involvement with the criminal justice system.[55]

Part I of this Comment lays the contextual groundwork for a discussion of state competency restoration systems and of the insanity defense. Part II defines and differentiates competency and insanity, distinct areas of the law applied to distinct legal questions bearing on defendants with mental illnesses.[56] Part II, A describes the origins of competency restoration and its place in constitutional law, discusses some of the failures of the competency process, then reports on the effects of the 2017 United States Court of Appeals for the Ninth Circuit case *Trueblood v. Washington State Department of Social and Health Services* on state competency restoration systems.[57] Part II, B similarly begins with an historical perspective on the insanity defense, followed by a brief discussion of the 2020 United States Supreme Court case *Kahler v. Kansas*,[58] then a discussion of promising developments in the use of neuroscientific evidence in criminal cases.[59] After documenting the problems and shifts in the use of competency restoration,[60] as well as the effective loss of the affirmative insanity defense,[61] this Comment addresses existing gaps in state

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[54] Part III below.

[55] *Id.*

[56] *See* Emin Gharibian, *Not Guilty by Reason of Insanity vs. Incompetent to Stand Trial: What's the Difference Between Them?*, VERDUGO PSYCH. ASSOCS., https://verdugopsych.com/not-guilty-by-reason-of-insanity-vs-incompetent-to-stand-trial-whats-the-difference-between-them/ (last visited Dec. 9, 2022).

[57] Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037 (9th Cir. 2016); Courtney Hesla, *The Trueblood Lawsuit and Opportunities for Justice System Improvements*, POL'Y RSCH. ASSOCS., INC. (May 19, 2020), https://www.prainc.com/trueblood-justice-system-improvements/.

[58] Kahler v. Kansas, 140 S. Ct. 1021 (2020).

[59] *See* Deborah Denno, video beginning at 19:16, The Plummeting Use of the Insanity Defense Through the Decades, *2020 Presidential Summit and Sentencing Symposium: Mental Illness: Misperceptions and the Multiplier Effect*, NACDL (Oct. 22, 2020), https://www.nacdl.org/Media/MentalIllnessMisconceptionsandtheMultiplierEffect.

[60] COUNCIL OF STATE GOV'TS JUST. CTR., JUST AND WELL: RETHINKING HOW STATES APPROACH COMPETENCY TO STAND TRIAL at viii (2020), https://csgjusticecenter.org/wp-content/uploads/2020/10/Just-and-Well27OCT2020.pdf.

[61] *See* Ron Honberg, *Supreme Court Majority Effectively Eliminates 700 Years of Legal Thinking About Insanity Defense*, PETE EARLEY (Apr. 2, 2020), http://www.peteearley.com/2020/04/02/supreme-court-majority-effectively-eliminates-700-years-of-legal-thinking-about-insanity-defense/ [hereinafter *Eliminates Insanity*].

justice systems and recommends programming and investments states should consider making.

I. MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM

In the United States, every criminal defendant is constitutionally guaranteed a number of rights, including the right to due process of law under the Fifth Amendment,[62] the right to a speedy trial by a jury of his or her peers under the Sixth Amendment,[63] and the Eighth Amendment right not to be subjected to cruel and unusual punishment.[64] These rights have been incorporated to the states via the Fourteenth Amendment,[65] which also confers the right to equal protection of the laws.[66] Philosophically and practically, people with mental illnesses in the criminal justice system face unique challenges with respect to these rights, and the law continues to shift and change as it grapples with the culpability of criminal defendants with mental illnesses.[67] For example, the right to due process mandates that criminal defendants possess the mental capacity to meaningfully assist in their own defense,[68] but restoration to competency procedures have become problematic in many jurisdictions.[69] Criminal defendants with serious mental illnesses who face capital punishment may be denied equal protection of the laws because the U.S. Supreme Court has found execution of similarly situated groups with diminished culpability, such as children and people with intellectual disabilities, to be unconstitutional.[70] Some states have recognized this problem.[71] Finally, while the Supreme Court has applied a "competent to be executed"

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[62] U.S. CONST. amend. V.

[63] U.S. CONST. amend. VI.

[64] U.S. CONST. amend. VIII.

[65] *See e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Solem v. Helm, 463 U.S. 277 (1983); Furman v. Georgia, 408 U.S. 238 (1972); Timbs v. Indiana, 139 S. Ct. 682 (2019).

[66] U.S. CONST. amend. XIV.

[67] *See* Kahler v. Kansas, 140 S. Ct. 1021, 1022 (2020) (J. Kagan describing the "juncture of medical views of mental illness and moral and legal theories of criminal culpability" as "two areas of conflict and change"); *see also,* MANGELS, *supra* note 50, at 3, 7, 19, 24, 26.

[68] Drope v. Missouri, 420 U.S. 162, 171 (1975).

[69] *See* ROTH, *supra* note 44, at 187-88 (describing long wait times of months or years for competency restoration in Los Angeles, Pennsylvania, Washington State, Oregon, Arkansas, Utah, and elsewhere).

[70] Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 1, 4-11 (2000).

[71] *See* Annika Russel*, Ohio Passes Law Barring the Death Penalty for Defendants with Serious Mental Illness*, AM. BAR ASS'N: PROJECT BLOG (Feb. 24, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/ohio-bars-death-penalty-for-mental-illness/.

standard,[72] not all death row inmates who lacked a "rational understanding" of the reason for their executions have been spared.[73] These constitutional rights serve as an important "floor" to ensure minimal protection for people with mental illnesses.[74]

No legislation provides categorical protection to prevent jails and prisons from essentially serving as the social safety net of last resort for people with mental illnesses.[75] While jails and prisons are constitutionally required to provide inmates health care, including mental health care, access to care is often lacking.[76] For the purposes of this Comment, jails and prisons will be referred to interchangeably. However, there are many differences between jails and prisons,[77] and there are different rates of mental illnesses between jail and prison populations, on average.[78] Jails tend to house higher rates of people with mental illnesses than prisons do, and there tend to be more detainees with serious mental illnesses in jails.[79] Estimates also diverge due to regional variations, how inmates with mental illnesses are counted, jail turnover, and a lack of centralized data collection.[80] These trends may be attributed to the types of charges for which a person would be detained in a jail: low-level misdemeanors such as trespassing, petty theft, and other "crimes of survival," which may be more common among those who have serious

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[72] Under this standard, a State may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution," Panetti v. Quarterman, 551 U.S. 930, 958-59 (2007); Ford v. Wainwright, 477 U.S. 399 (1986). Texas petitioned to execute Scott Panetti in late 2022. Jolie McCullough, *Texas Tries Again to Prove that Scott Panetti is Just Sane Enough to be Executed*, TEX. TRIB. (Oct. 28, 2022), https://www.texastribune.org/2022/10/28/texas-execution-scott-panetti/.

[73] Ron Honberg, *The U.S. Is Set to Execute a Man with Schizophrenia and Alzheimer's. He Won't Even Know Why*, NEWSWEEK: OPINION (Jul. 16, 2020, 8:30 AM), https://www.newsweek.com/execution-federal-government-dementia-schizophrenia-alzeheimers-1515289; Jessica Schneider, *Wesley Purkey Executed After Supreme Court Cleared the Way for Second Federal Execution Since 2003*, CNN (July 16, 2020), https://www.cnn.com/2020/07/16/politics/federal-execution-wesley-purkey/index.html (showing that Purkey's claims were denied on procedural grounds).

[74] *See* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 NW. U. SCH. L. 365 (2008).

[75] Leah Wang, PRISON POL'Y INITIATIVE, CHRONIC PUNISHMENT: THE UNMET HEALTH NEEDS OF PEOPLE IN STATE PRISONS (2022), https://www.prisonpolicy.org/reports/chronicpunishment.html.

[76] *Id.*

[77] Jails typically detain people before they are charged with any crime, before trial, before sentencing, and for sentences lasting a year or less. Prisons hold inmates, typically for periods of more than a year, who have been convicted and sentenced to incarceration. For a problematic but illustrative explanation, see Infographics Show, *Jail vs Prison – What's Actually the Difference?*, YouTube (Jul. 9, 2019), https://youtu.be/Ck-vX7PxtEw.

[78] Collier, *supra* note 4.

[79] *Id.*

[80] *See* Westervelt, *supra* note 39.

mental illnesses.[81] According to one study, jail inmates who have been homeless were more likely to be currently incarcerated for a property crime, to have prior criminal justice involvement, and to have mental health and substance use problems.[82]

State and local governments manage budgets for both social safety net services and criminal justice systems, causing those governments to confront challenges at the intersection of mental illness and criminal justice.[83] These services include a wide spectrum of agencies and intercepts, from healthcare and social services, to housing and homeless services, policing, the court system, and beyond.[84] Although the federal government funds grants to support state and local programming,[85] state and local governments are ultimately responsible for finding the resources to deliver the continuum of services required.[86] Health care systems may be doing the best they can, but they are often underfunded.[87]

Varying by jurisdiction and defined by statute, a defendant's mental illness is the common denominator in a court's or jury's determinations of both competency to stand trial and the insanity defense.[88]

II. SHORTCOMINGS OF COMPETENCY RESTORATION AND THE INSANITY DEFENSE

"Competency" refers to a criminal defendant's presence of mind at trial, regardless of his mental state at the time of the crime.[89] The term "competency" arises most commonly[90] in criminal law as a threshold

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[81] *See* Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SERVS. 170, 170 (2008), https://ps.psychiatryonline.org/doi/epdf/10.1176/ps.2008.59.2.170.

[82] *Id.*

[83] *E.g.*, STEPPING UP INITIATIVE, SIX QUESTIONS: CASE STUDIES (Jan. 2017), https://www.naco.org/sites/default/files/documents/2018%20Stepping%20Up%206Q%20Case%20Studies_Q5_FINAL.pdf.

[84] POL'Y RSCH. ASSOCS., THE SEQUENTIAL INTERCEPT MODEL, https://www.prainc.com/wp-content/uploads/2018/06/PRA-SIM-Letter-Paper-2018.pdf (last visited Dec. 8, 2022).

[85] *See generally Substance Abuse and Mental Health Block Grants,* SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/grants/block-grants (last visited Dec. 11, 2022).

[86] Bonafine, et al, *supra*, note 5.

[87] *Id.*

[88] ROTH, *supra* note 44, at 176. .

[89] Dressler, *supra* note 36, at 319.

[90] The term also arises in the context of capital punishment. Constitutionally, defendants are guaranteed the right to be competent (i.e., rationally aware of why they are being executed) while being executed. *See* Alexander H. Updegrove & Michael S. Vaughn, *Evaluating Competency for Execution After* Madison v. Alabama, 48 J. AM. ACAD. PSYCHIATRY AND L. ONLINE 1, 1 (2020), https://jaapl.org/content/jaapl/early/2020/07/16/JAAPL.200003-20.full.pdf.

condition for subjecting a defendant to trial.[91] "Insanity" refers to a criminal defendant's state or presence of mind at the time the crime was committed, regardless of his capacity at trial.[92] One court compared the insanity defense to mental illness by stating that the defense exists "not to identify the mentally ill, but rather to determine who among the mentally ill should be held criminally responsible for their conduct."[93]Although both competency and insanity can apply to the same person and to a common mental state, the law keeps these legal statuses distinct.[94] A person who is incompetent to stand trial may have a history of mental illnesses that would bear on any crimes he commits.[95] A person who has legitimate grounds to claim the insanity defense at trial may well suffer from loss of touch with reality during trial sufficient to render him incompetent to participate in his own defense.[96] Outcomes at these stages have tremendous consequences for criminal defendants, leading to anything from incarceration or civil commitment to diversion or acquittal.[97] However, not every legally incompetent defendant can be found insane, not every defendant who was insane at the time of the crime will be incompetent to stand trial, and not every defendant with mental illnesses will meet either standard.[98]

Competency restoration is often regarded as a form of mental health treatment because it involves involuntary medication and procedures conducted in a psychiatric hospital, but the process offers little therapeutic value.[99] It is ultimately a thinly-veiled criminal justice procedure de-

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[91] Competence to stand trial goes by many names: fitness to proceed, adjudicative competence, etc. Barry W. Wall et al., *AAPL Practice Resource for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 46 (3 Supplement) J. AM. ACAD. PSYCHIATRY AND L. ONLINE S1, S4 (2018), https://doi.org/10.29158/JAAPL.003778-18. Thomas G. Guthiel, *A Confusion of Tongues: Competence, Insanity, Psychiatry, and the Law*, 50 PSYCHIATRIC SERVS. 767, 769 (1999), https://ps.psychiatryonline.org/doi/pdf/10.1176/ps.50.6.767. For the sake of clarity and consistency, the term "competency restoration," will be used throughout this Comment, and will refer to the process from evaluation through forensic civil commitment for competency purposes. *See* Lisa Callahan, *Competence to Stand Trial: Opportunities for Diversion,* POL'Y RSCH. ASSOCS. (Nov. 19, 2019), https://www.prainc.com/competence-stand-trial-opportunities-diversion/ [hereinafter *Competence Opportunities Diversion*].

[92] Guthiel, *supra*, note 91, at 767, 771.

[93] State v. Singleton, 211 N.J. 157, 173–74 (2012) (citing State v. Sikora, 44 N.J. 453, 470 (1965)).

[94] Guthiel, *supra*, note 91, at 767, 771.

[95] *E.g.,* Gharibian, *supra* note 56.

[96] *See Id.* 90% of defendants who are acquitted using the insanity defense have a previous mental illness diagnosis. Sarah Kuta, *What Life is Like for the Criminally Insane at a Maximum-Security Psychiatric Hospital,* A & E: TRUE CRIME BLOG: STORIES & NEWS, (July 19, 2021), https://www.aetv.com/real-crime/patient-experience-at-forensic-psychiatric-hospitals.

[97] ROTH, *supra* note 44, at 176.

[98] Gharibian, *supra* note 56.

[99] *See* CSG JUST AND WELL, *supra* note 60, at viii; *see generally* PETE EARLEY, CRAZY: A FATHER'S SEARCH THROUGH AMERICA'S MENTAL HEALTH MADNESS (2006).

signed to tee defendants up for conviction and sentencing with little prospect of longer-term care.[100] The insanity defense, by contrast, attaches access to treatment at the conclusion of trial, but the defense is almost never asserted and rarely successful.[101] Defendants whose crimes may have been attributable to an underlying mental illness are not sent to a state hospital after trial, but are instead incarcerated and sometimes executed.[102]

A. COMPETENCY RESTORATION: DELAYED, DETAINED, AND DETERIORATING

Competency to stand trial originated in English common law but was first held to be a due process right in 1960 in *Dusky v. United States*.[103] To present a defense, the accused not only must be physically present at trial, but also must be mentally present.[104] Defining the modern legal standard for competence to stand trial, the Court framed a two-part test: (1) whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"; and (2) "whether he has rational as well as factual understanding of the proceedings against him."[105] A "doubt"[106] as to the defendant's competency can be raised at any point, by the defense counsel, prosecution, or the judge in the process leading up to and in the course of a criminal trial.[107]

Even after *Dusky*, attempts to "restore" criminal defendants to competency, through short-term use of medications and other psychiatric interventions, were rare.[108] Rather, defendants were regularly sent to a

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[100] *See* ROTH, *supra* note 44, at 184-87; CSG JUST AND WELL, *supra* note 60, at viii.

[101] A comprehensive multistate study found that the defense was asserted in less than one percent of cases and resulted in acquittal and psychiatric commitment in only about a quarter of the those cases. *See* Michael L. Perlin, THE INSANITY DEFENSE: NINE MYTHS THAT WILL NOT GO AWAY n. 35 at 10 (Mark D. White, Ed., 2016 Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715577 (quoting Lisa Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight State Study*, 19 BULL. Am. Acad. Psychiatry & L. 331, note 15, at 336 (1991)).

[102] *See generally* Perlin, *supra* note 101. For more on the problems with subjecting people with mental illnesses to capital punishment, *see generally* MANGELS, *supra* note 50.

[103] Drope v. Missouri, 420 U.S. 162, 171 (1975) ("Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?'" (quoting 4 WILLIAM BLACKSTONE COMMENTARIES *21, *24.)).

[104] *Drope*, 420 U.S. at 171.

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

[106] *See* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 21:1 (3d ed. 2021).

[107] Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 911 (2011) [hereinafter *Mental Disorder and Crim*].

[108] ROTH, *supra* note 44, at 185.

hospital where they were held indefinitely.[109] In *Jackson v. Indiana* (1972) the Supreme Court ended the practice when it set a maximum length of time for detaining criminal defendants in a treatment facility when found incompetent to stand trial.[110] The *Jackson* court held that unless a defendant is found to be dangerous, he or she could only be committed due to incompetency to stand trial for a "*reasonable* period of time," or enough time to determine whether there was a substantial chance the defendant would become competent to stand trial in the foreseeable future.[111] This decision means that a criminal defendant's temporary forensic commitment for the purposes of restoration to competency cannot become an indefinite term of civil commitment, like "a 'life sentence,'" before the defendant is found guilty or innocent at trial.[112]

Involuntary civil commitment in the United States is a legal intervention by which a court may order a person with symptoms of mental illness, and meeting specified criteria, to be held in a psychiatric hospital or mandated to receive treatment in a community-based clinic for some period of time.[113] From the early 1800s until the 1950s, civil commitment to state hospitals, known as "asylums," was easy, requiring only the presence of mental illness and a recommendation for treatment.[114] However, state civil commitment systems were easily abused, patients were afforded no protection from unnecessary commitments, and asylums routinely used sedation, restraints, and experimental or ineffective treatments on their patients.[115] These practices were justified based on a societal view that asylum patients were incapable of making decisions and the fact that many were incurable with the treatments available at the time.[116] Throughout the 1970s, access to mental health treatment including civil commitment outside of the criminal justice system gradually became more difficult.[117]

Society's views transformed in response to growing awareness of civil commitment abuses, and states began to put legal protections in place, including taking decision-making power from psychiatrists and giving it to judges and magistrates.[118] Commitment laws were made much stricter, requiring a person to become "dangerous" to a legally rec-

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[109] Jackson v. Indiana, 406 U.S. 715, 733-43 (1972).

[110] COOK, *supra* note 106, § 21:1. *Jackson*, 406 U.S. at 738.

[111] *Jackson*, 406 U.S. at 738 (emphasis added).

[112] *Id.* at 716.

[113] SAMHSA CONTINUUM, *supra* note 8, at 1.

[114] Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 32 (2010).

[115] *Id.* at 31.

[116] *See Id.* at 32.

[117] *Id.* at 33.

[118] *Id.* at 32.

ognized level before involuntary commitment could be initiated.[119] The standard required for treatment became divorced from an individual's need for healthcare and from the state's *parens patriae*[120] power to act in the person's interest.[121] The "dangerousness" standard was thereafter inherently tied to a public safety standard instead of a standard related to an individual's "need for treatment."[122] Furthermore, when loved ones no longer had the power to bring individuals in need of treatment to hospitals, police officers were often left to handle these interventions and became accustomed to incarcerating individuals with mental illnesses because jail was the surest way to treatment, housing, and protection (albeit often through isolation).[123] These shifts, among others, produced a pipeline of people with mental illnesses whose only point of access to treatment was the criminal justice system.[124]

Since the 1970s, competency evaluation and restoration procedures have become increasingly common, to the extent that states across the country face significant backlogs in evaluating, treating, and returning defendants to a position from which they can stand trial.[125] Several state-level agencies have become the targets of lawsuits, often brought by consumer advocacy groups for unconstitutionally long pretrial delays and detentions.[126] These delays have been attributed to, among other factors, insufficient numbers of "forensic" hospital beds,[127] beds specifically set aside for criminal justice purposes.[128]

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[119] *Id.* at 33. SAMHSA CONTINUUM, *supra* note 8, at 4-7.

[120] Latin for "parent of the people," meaning that "persons deemed incompetent are within the special protection, and under the control of the state." *Parens Patriae*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/parens_patriae (last visited Mar. 23, 2022).

[121] Testa & West, *supra* note 114, at 31.

[122] *Id. at 35.*

[123] *See Id.* at 35; ROTH, *supra* note 44, at 136-41.

[124] An in-depth survey of civil commitment law is beyond the scope of this Comment. For more, *see generally*, SAMHSA CONTINUUM, *supra* note 8, at 8-11.

[125] CSG JUST AND WELL, *supra* note 60, at 3.

[126] *Id.* at 2, 4. People with mental illnesses sometimes refer to themselves as "consumers." "Consumer advocates," who may be consumers themselves, advocate on their behalf. *See generally*, E. F. Torrey, *Patients, Clients, Consumers, Survivors et al: what's in a name*? 37 SCHIZOPHRENIA BULL. 466, 466-67 (2011), https://doi.org/10.1093/schbul/sbq102. *Cf.* David Oaks, *Let's Find Language More Inclusive Than the Phrase "Mentally Ill"!*, MINDFREEDOM INT'L, https://mindfreedom.org/kb/not-mentally-ill/ (Aug. 28, 2012).

[127] *See* Trueblood v. Washington State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1041-42 (9th Cir. 2016) (describing multiple contributors to delay in completing evaluations, the first step in competency restoration). CSG JUST AND WELL, *supra* note 60, at 2-3. "Beds" is a metonymy frequently used to refer to the capacity of a state hospital where treatment is provided. *E.g.,* Drew Altman, *Why the U.S. Doesn't Have More Hospital Beds*, AXIOS (Mar. 30, 2020), https://www.axios.com/coronavrus-hospital-beds-shortage-63d0e1c3-de4b-4199-834c-477403cfaf06.html.

[128] "Forensic" mental health services are services provided by mental health professionals or agencies for use in court or otherwise in connection with a legal matter. NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS., FORENSIC MENTAL HEALTH SERVICES IN THE UNITED STATES:

1. Challenges and Shortcomings of Competency Restoration

The Council of State Governments (CSG), a non-partisan, non-profit organization composed of state and local government leaders and policy experts,[129] recently produced a report illustrating current problems with the competency restoration system.[130] The report included the following account from the father of a man awaiting competency restoration:

> He had an evaluation each time after he was declared incompetent, but there were always issues, [and] he would go back to the county jail. He never came home . . . [and was] never sent to the hospital for treatment. Just continually, court date set, declared incompetent, see a counselor or doctor, go back to court, he's still incompetent, and just repeatedly over and over, over a period of three years.[131]

Medical Director of California State Hospitals, Dr. Katherine Warburton, lamented that "the massive efforts to admit and restore patients are ultimately a waste of expensive clinical resources without improving the trajectory of a person's life."[132] After restoration and trial, these people were "most likely worse off: either released without resources to the same circumstances that precipitated arrest or incarcerated."[133]

Criminal defendants are typically held in jail before trial.[134] These defendants may either appear at hearings throughout the adversarial process or waive their appearances.[135] However, at all steps of the pre-trial criminal justice process, the defendant must be able to make informed decisions and assist in his defense.[136] A criminal defendant cannot do so if he is incompetent to stand trial, so the trial must be suspended while the defendant is "restored to competency."[137]

2014, at 2-3 (Oct. 3, 2014), https://www.nasmhpd.org/sites/default/files/Assessment%203%20-%20Updated%20Forensic%20Mental%20Health%20Services.pdf [hereinafter NASMHPD].

[129] *About Us*, COUNCIL OF STATE GOV'TS, https://www.csg.org/about-us/ (last visited Sept. 6, 2022).

[130] CSG JUST AND WELL, *supra* note 60.

[131] *Id.* at 2.

[132] *Id.* at viii.

[133] *Id.* at viii.

[134] That is, unless they are released on bail, a promise to return to court, or some other arrangement. *Pretrial Release: Detention*, NAT'L CONF. OF STATE LEGISLATORS (June 20, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx.

[135] Fed. R. Crim. P. §§ 10(b), 43.

[136] *See* Note, *Constitutional Waivers by States and Criminal Defendants*, 134 Harv. L. Rev. 2552 (2021). *See also* Richard R. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCIS. AND THE L., 291-316 (1992) (proposing a distinction between two types of competencies: competence to assist counsel and decisional competence).

[137] Model Penal Code § 4.06(2).

Any court actor can initiate a competency evaluation and restoration but defense attorneys most often do because they work most closely with defendants.[138] After the judge issues such an order for competency restoration, the judge may set a date for a hearing and appoint "competent disinterested physicians" to examine the defendant and later testify at the hearing to determine if a forensic commitment will be needed to restore competency.[139] This competency evaluation may be conducted at a state hospital, in a community healthcare setting, or in a jail.[140] Other evidence may be introduced to substantiate a determination of competency or incompetency at the competency hearing.[141] In preparation for his competency hearing, the defendant is either housed in a jail, in prison if the defendant is already serving a lengthier term of incarceration, or in the state hospital, then transferred back and forth as needed until competency is restored.[142] Some attempts at restoration cease when a defendant is found permanently unrestorable, but how and when this determination is made, and what it means, depends on the jurisdiction.[143]

When a court first finds that a defendant is "incompetent to stand trial," the assigned treatment is technically a short-term form of "forensic commitment."[144] Forensic commitment typically includes admission to a psychiatric hospital with features of criminal incarceration, including criminal court supervision, law enforcement escorts, and handcuffs.[145] Civil commitment is usually ordered by civil courts for the purposes of psychiatric-medical treatment, while criminal courts usually order competency restoration and other forensic commitments.[146]

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[138] *Mental Disorder and Crim*, *supra* note 107, at 911.

[139] Jackson v. Indiana, 406 U.S. 715, 717, n.1 (1972) (defining constitutional evaluation standards). Today, the standards for ordering competency evaluations and the number of evaluations vary widely by state. *See* NAT'L CTR. FOR STATE COURTS, LEADING REFORM: COMPETENCE TO STAND TRIAL 15 (Aug. 2021), https://www.ncsc.org/__data/assets/pdf_file/0019/66304/Leading_Reform-Competence_to_Stand_Trial.pdf.

[140] Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1040 (9th Cir. 2016) (citing Wash. Rev. Code § 10.77.060(1)). Some states, including Washington, permit evaluations to be conducted in either "a jail, a state hospital, or in the community." CSG JUST AND WELL, *supra* note 60, at 8.

[141] *Jackson*, 406 U.S. at 717, n.1.

[142] CSG JUST AND WELL, *supra* note 60, At 3.

[143] *See Competence Opportunities Diversion, supra* note 91.

[144] *E.g.*, *Forensic Commitments and Treatment*, CAL. DEPT. OF STATE HOSPS., https://www.dsh.ca.gov/Treatment/Forensic_Commitments.html (last visited Dec. 11, 2022).

[145] It is important to keep forensic commitment, incarceration, and civil commitment separate, though many prison abolitionists and social activists conflate them. *E.g.*, Kuta, *supra* note 96, at 145. The Supreme Court has, too. Karen Skolnick Moyer & Marina Nakic, *Forced Medication to Restore Competency*, 44 J. AM. ACAD. PSYCHIATRY L. 280, 282 (2016), https://jaapl.org/content/jaapl/44/2/280.full.pdf.

[146] This does sometimes get more complicated. Darmant Bhullar & Reena Kapoor, *Defendant's Rights Are Not Violated When Administrative Agencies Rather than Criminal Courts Author-*

Civil commitments[147] for those without criminal justice involvement are ordered in very limited circumstances,[148] but once ordered, these commitments are further circumscribed by the constitutionally required "least restrictive alternative" standard articulated by the United States Supreme Court in *Olmstead v. L.C*.[149] The "least restrictive alternative" standard dictates that a person can be treated in a hospital or other appropriately restrictive environment only until they reach a point at which they can be moved to a less restrictive environment.[150] This standard simultaneously protects the rights of consumers of mental health services and affords wide enough latitude to treating physicians to help patients recover and rehabilitate.[151] Mental health systems, at least those complying with *Olmstead*, are incentivized to assist patients until they achieve sufficient stability to "step down" to less intensive care, such as a community mental health facility.[152]

Competency restoration, by contrast, is far more cursory.[153] Even when it takes place at a hospital, competency restoration often includes just medication sufficient to achieve temporary psychiatric stability such that a defendant can retain information.[154] From there, defendants are given a cursory lesson about court proceedings and how the criminal

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ize Involuntary Medication to Restore Competence to Stand Trial, 50 J. AM. ACAD. PSYCHIATRY L. 152 (2022); *c*f. SAMHSA CONTINUUM, *supra* note 8, at 12-13 (each describing court-ordered commitments).

[147] *See generally* Testa & West, *supra* note 114.

[148] Most states require the person to pose a risk of harm to himself or others or to be gravely disabled (which can mean, for example, that the person is neglecting basic needs and at risk of substantial bodily harm as a result). Some states have expanded their civil commitment laws by slightly lowering the threshold risk of harm before intervening. SAMHSA CONTINUUM, *supra* note 8, at 8-11; *see* TREATMENT ADVOC. CTR., *State Standards for Civil Commitment*, (Sept. 2020), https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-civil-commitment.pdf.

[149] Olmstead v. L.C., 527 U.S. 581 (1999).

[150] *See Id.*; *Olmstead: Community Integration for Everyone*, ADA.GOV, https://www.ada.gov/olmstead/olmstead_about.htm (last visited Sept. 22, 2022).

[151] *See Olmstead* 527 U.S. at 587, 599 (1999).

[152] *See Olmstead: Community Integration for Everyone*, ADA.GOV, https://www.ada.gov/olmstead/olmstead_about.htm (last visited Sept. 22, 2022).

[153] Jackson v. Indiana, 406 U.S. 715, 733, 738 (1972) (explaining that the defendant may only be held for a reasonable time, during which his continued commitment must be justified by progress toward the goal of his attaining capacity to stand trial).

[154] COOK, *supra* note 106, § 21:1 at n.47 (3d ed. 2021). *See also* Sell v. United States, 539 U.S. 166 (2003) (creating standards guiding the administration of forced psychotropic medication to inmates found incompetent to stand trial); *Jackson*, 406 U.S. at 733, 738 (explaining that the defendant may only be held for a reasonable time, during which his continued commitment must be justified by progress toward the goal of his attaining capacity to stand trial); Kirk Heilbrun & Christopher King, *Forced Medication and Competency to Stand Trial: Clinical, Legal, and Ethical Issues* 34 PSYCHIATRIC TIMES (2017), https://www.psychiatrictimes.com/view/forced-medication-and-competency-stand-trial-clinical-legal-and-ethical-issues.

justice system functions.[155] For competency restoration to be considered successful, defendants need only be able to parrot back this basic information.[156] Once the defendant sufficiently comprehends the proceedings, he or she is then once again brought to trial as if no delay or interruption had occurred.[157]

The limited scope of treatment provided to those found incompetent to stand trial originated in *Jackson v. Indiana*.[158] Defendants who are committed for the purpose of regaining competency to be tried may be committed only so long as the commitment can "be justified by progress toward that goal."[159] In other words, the defendant's civil commitment serves no purpose related to promoting long-term recovery or stability, but only to eventually stand trial in criminal court.[160] While *Jackson* prevented excessive and indefinite terms of forensic commitment to a hospital for restoration, the standard opened the door to indefinite terms of *jail* detention whenever a bed is unavailable, and even jail-based competency restoration.[161]

Furthermore, should there be a delay in transferring a defendant from the hospital back to jail, or from jail to court, the risk that the defendant will once again decompensate increases.[162] Delays are common at every stage of the process.[163] Competency restorations regularly degenerate into cycles of restoration and decompensation, involving protracted terms of detention, sometimes lasting longer than the maximum sentence for which the defendant is charged.[164] The underlying mental illnesses of

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[155] ROTH, *supra* note 44, at 185; Nicole R. Johnson & Philip J. Candilis, *Outpatient Competence Restoration: A Model and Outcomes*, WORLD J. OF PSYCHIATRY (2015), http://dx.doi.org/10.5498/wjp.v5.i2.228 (both describing competency restoration instructors screening the film *My Cousin Vinny* as a strategy to teach forensic inpatients how the criminal justice system works). *See also*, TBS: Full Frontal, *Florida's Mental Health*, YOUTUBE (June 13, 2016), https://www.youtube.com/watch?v=OGHWghMfbEU.

[156] ROTH, *supra* note 44, at 185; Johnson & Candilis, *supra* note 155 (both describing competency restoration instructors screening the film *My Cousin Vinny* as a strategy to teach forensic inpatients how the criminal justice system works).

[157] *Jackson*, 406 U.S. at 717.

[158] *Id.*

[159] *Id.* at 738.

[160] *See Id.* at 738.

[161] *See* George Joseph & Simon Davis-Cohen, *Locked up for Three Decades Without a Trial: A New York City Man Has Been Shuffled Between Rikers Island and Mental Hospitals for 32 Years*, APPEAL (June 21, 2018), https://theappeal.org/locked-up-for-three-decades-without-a-trial/.

[162] ROTH, *supra* note 44, at 189 (describing how defendants risk "decompensating" during pretrial delays because jails are psychotogenic, or "psychosis-inducing," and defendants may lose access to mental health treatment while in jail). CSG JUST AND WELL, *supra* note 60, at 9.

[163] CSG JUST AND WELL, *supra* note 60, at 3.

[164] These cycles can last anywhere from six months to the maximum length of a person's sentence, and in some state statutes, there is no time limit. ROTH, *supra* note 44, at 187. *See* Joseph & Davis-Cohen, *supra* note 161.

individuals found incompetent to proceed may be made more severe by those compensation and decompensation cycles.[165] This combination of psychologically damaging practices, delays, and inefficiencies has resulted in compounding problems in competency restoration systems and for people caught inside them.[166]

2. *Challenges and Changes to Competency Systems in the Ninth Circuit and Beyond*

"Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated," remarked a prescient Court in *Jackson*.[167] As of 2022, defendants undergoing competency restoration occupied approximately one-ninth of all state psychiatric hospital beds in the United States.[168] The rates at which competency restorations have been ordered and the percentage of state psychiatric hospital beds dedicated to those restorations have recently been on the rise across the country.[169] A 2019 state government study observed that defaulting to inpatient competency restoration instead of outpatient or other treatment environments contributed to the backlog of competency evaluations and restorations in many states.[170] According to one survey, the number of people receiving competency restoration services in state hospitals rose an average of 76% between 1999 and 2014.[171] More than 91,000 competency evaluations

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[165] Controversial research shows that the more times an individual suffers a psychotic break, or a new bout with psychosis, the more likely that person is to suffer long-term brain damage and to fall into a state of psychosis again. Gerald Martone, *Is Psychosis Toxic to the Brain?*, 19 CURRENT PSYCHIATRY 12, 12 (2020), https://cdn.mdedge.com/files/s3fs-public/CP01904012.PDF; *cf.* Jeffrey A. Lieberman & Wayne S. Fenton, *Delayed Detection of Psychosis: Causes, Consequences, and Effect on Public Health*, 157 AM. J. PSYCHIATRY 1727, 1727 (2000), https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp.157.11.1727?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%20%200pubmed Psychosis is defined as: "an abnormal mental state involving significant problems with reality testing (essentially, the ability to perceive limitations between reality and fantasy, or self and non-self). *Psychosis*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/psychosis (last accessed Sept. 14, 2022).

[166] W. NEIL GOWENSMITH ET AL., GROUNDSWELL SERVS., INC., FORENSIC MENTAL HEALTH CONSULTANT REVIEW FINAL REPORT 16 (2014), https://www.dshs.wa.gov/sites/default/files/BHSIA/WSH/GroundswellReport6.30.14.pdf.

[167] Jackson v. Indiana, 406 U.S. 715, 737 (1972).

[168] Melanie A. Schneider, Competency Restoration Across the United States, at iii (Jan. 3, 2022) (Ph.D. dissertation, Fairleigh Dickinson University) (ProQuest).

[169] *See* ROTH, *supra* note 44, at 199; CSG JUST AND WELL, *supra* note 60, at 9.

[170] AGNEW BECK, FORENSIC PSYCHIATRIC HOSPITAL FEASIBILITY STUDY APPENDICES, PHASE II FINAL REPORT at B-8 (2019), https://dhss.alaska.gov/API/Documents/AdminChanges/ForensicPsychHospital_FeasibilityStudy_Phase2Report-Appendices_201907.pdf.

[171] AMANDA WIK ET AL., NAT'L ASS'N OF STATE MENTAL HEALTH DIRS. RSCH. INST., INC., FORENSIC PATIENTS IN STATE PSYCHIATRIC HOSPITALS: 1999–2016 at 40 (2017), https://www.nri-inc.org/our-work/nri-reports/forensic-patients-in-state-psychiatric-hospitals-1999-2016/.

were estimated to have been conducted in the United States in 2019.[172] As the demand for competency restorations increased, the increased litigation the *Jackson* court predicted in 1972 has materialized.[173]

In 2016, a class of individuals in Washington state sued the Washington State Department of Social and Health Services in the United States Court of Appeals for the Ninth Circuit for violating their due process rights by failing to timely perform competency evaluations.[174] In that case, the plaintiffs were pretrial detainees that were believed to be incompetent to stand trial, but they were left to languish in jail for weeks or months at a time without a competency evaluation.[175] *Trueblood* relied on *Oregon Advocacy Center v. Mink*,[176] another Ninth Circuit decision, both of which relied upon *Jackson* in holding that excessive pretrial detentions for competency evaluations violated due process.[177]

Trueblood was particularly influential because of the status of the individuals bringing the lawsuit, the legal theory underpinning the case, and the egregious facts presented to the court.[178] In *Trueblood*, the plaintiffs were being held in jail while their cases were pending and a doubt about their competency had been raised, even though they had not even been evaluated.[179] The United States District Court for the Western District of Washington heard the case on remand, holding that after fourteen days of detention without commitment to competency restoration, the state would no longer have a legitimate interest in holding the plaintiffs in violation of their due process rights.[180] Significant to the courts' decision was the "serious mental health consequences" many members of the

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[172] CSG JUST AND WELL, *supra* note 60, at 3 (citing LAUREN E. KOIS ET AL., "UPDATING THE 'MAGIC NUMBER': CONTEMPORARY COMPETENCE TO PROCEED METRICS REPORTED BY U.S. JUDICIARIES" (paper presented at the annual meeting of the American Psychology-Law Society, March 6, 2020)).

[173] *E.g.*, Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037 (9th Cir. 2016); Or. Advoc. Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003); Ctr. for Legal Advoc. v. Bicha, No. 11-cv-02285-NYW 2018 WL 6834597 (D. Colo. Dec. 28, 2018).

[174] *See Trueblood,* 822 F.3d 1037.

[175] Plaintiffs' Trial Brief at 1, Trueblood v. Wash. State Dep't of Soc. and Health Servs., No. 14-cv-01178-MJP (W.D. Wash. Mar. 4, 2015).

[176] Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1042. On remand, the United States District Court for the Western District of Washington found the maximum justifiable period for evaluations to be 14 days. Trueblood v. Wash. State Dep't of Soc. & Health Servs., No. C14-1178-MJP, 2016 WL 4268933, at *1 (W.D. Wash. Aug. 15, 2016). *Mink*, 322 F.3d 1101.

[177] Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1043 (9th Cir. 2016).

[178] *Id.* at 1044-45.

[179] *Id.* at 1044-45.

[180] Trueblood v. Wash. State Dep't of Soc. & Health Servs., No. C14-1178-MJP, 2016 WL 4268933, at *1 (W.D. Wash. Aug. 15, 2016).

class had suffered while held in prolonged detention.[181] The class members, often held in solitary confinement, had demonstrated suicidal behavior, engaged in self-harm, and refused to take medications.[182] The Ninth Circuit found that "[p]unitive settings and isolation for twenty-three hours each day exacerbate mental illness and increase the likelihood that the individual will never recover."[183] These harms impacted the plaintiffs' due process rights,[184] and the competency evaluation delays bore no relationship to the interests of the state.[185]

As a result, the Ninth Circuit and the district court together granted an injunction to require more expedient competency evaluations.[186] When the state failed to comply, they were fined,[187] ultimately paying over $100 million in fines by 2021.[188] Ultimately, the parties finalized a settlement agreement in which the state agreed to provide health care services sufficient to reduce the number of people with mental illnesses entering the criminal justice system as a whole.[189] As a result of the programming Washington state created, arrests of people previously found incompetent to stand trial initially decreased dramatically, charges decreased dramatically, numbers of new competency orders decreased, and connections to treatment *increased*.[190] While Washington state's efforts are still a work in progress,[191] Washington State Department of So-

[181] Trueblood v. Wash. State Dep't of Soc. & Health Servs., 822 F.3d 1037, 1042 (9th Cir. 2016).

[182] *Id.* at 1042.

[183] *Id.* at 1042.

[184] *Id.* at 1044.

[185] *Id.* at 1043.

[186] *Id.* at 1042.

[187] Hesla, *supra* note 57.

[188] WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., TRUEBLOOD ET AL V. WASHINGTON STATE DSHS, https://www.dshs.wa.gov/bha/trueblood-et-al-v-washington-state-dshs (last visited Dec. 9, 2022) [hereinafter DSHS RE: TRUEBLOOD].

[189] For more on the state's plan for complying with the settlement agreement, see WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., TRUEBLOOD FREQUENTLY ASKED QUESTIONS, https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2019Trueblood/19-0274BHA-TrueBloodFAQ.pdf (last visited Dec. 9, 2022). The state's Department of Social and Health Services tracks and reports its progress monthly, sending reports to both the Trueblood Court Monitor and posting publicly on its website. WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., MONTHLY PROGRESS REPORT FOR COURT MONITOR, https://www.dshs.wa.gov/bha/court-monitor-reports (last visited Dec. 9, 2022) [hereinafter PROGRESS REPORT]. DSHS RE: TRUEBLOOD, *supra* note 188.

[190] Hesla, *supra* note 57.

[191] Fiscal year 2022 is now showing a 37% uptick in number of in-jail evaluations ordered. DSHS RE: TRUEBLOOD, *supra* note 188. The state is still failing to comply with statutory wait time requirements. *Cf.* WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., *Trueblood v. Washington State Department of Social and Health Services* Monthly Report to the Court Appointed Monitor 7-8 (Sept. 30, 2022), https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2022Trueblood/Trueblood-Report-2022-09.pdf.

cial Services has since produced technical assistance guides to help other jurisdictions implement similar changes to their justice systems.[192]

Nearly all states report an inability to adequately handle demand for competency restoration services with their current resources.[193] Many states are also facing the kind of class-action litigation Washington has.[194] Pretrial inmates in at least seven other states[195] have sued their states to the tune of millions of dollars each.[196] Typically, significant portions of state mental health budgets fund competency restoration procedures.[197] In Louisiana, Maryland, Oregon, and Ohio, at least half of state mental health spending goes to forensic mental health care rather than treatment for those without criminal involvement.[198] Now, in some states where settlement agreements were reached, fines and fees assessed against those states are being used to fund community alternatives to competency restoration, including intensive mental health and diversion or "redirection" services.[199] How the fines are used varies by jurisdic-

[192] A number of state agencies collaborated with the state legislature to develop and implement phased reforms in accordance with the settlement agreement. WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., MILESTONES FROM THE FIRST YEAR OF TRUEBLOOD IMPLEMENTATION (June 26, 2020), https://www.dshs.wa.gov/sites/default/files/BHSIA/FMHS/Trueblood/2020Trueblood/Trueblood-year-one-milestones.pdf. *See* Hesla, *supra* note 57.

[193] Lisa Callahan & Debra A. Pinals, *Challenges to Reforming the Competence to Stand Trial and Competence Restoration System*, 71 PSYCHIATRIC SERVS. 691, 691 (2020), https://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.201900483.

[194] ROTH, *supra* note 44, at 188.

[195] Colorado, Nebraska, Pennsylvania, California, Utah, Oregon, and Arkansas. *E.g.,* Michael Kiefer, *This Program for Mentally Ill Defendants Mostly Focuses on Declaring Them Fit for Trial*, AZCENTRAL (Dec. 11, 2018 07:52 AM), www.azcentral.com/in-depth/news/local/arizona-investigations/2018/12/11/restoration-competency-jail-program-defendants-mental-illness-maricopa-county-superior-court/712133002/; *Pennsylvania's Wait Times for Competency Restoration May Be Longest in the Nation*, ACLU OF PA. (Oct. 22, 2015), https://www.aclupa.org/en/press-releases/lawsuit-alleges-many-defendants-mental-illness-jailed-well-over-year-awaiting-mental. *See* ROTH, *supra* note 44, at 188.

[196] *See, e.g.,* John Ferrugia, *A Broken System: Colorado Struggles to Uphold Laws Requiring Timely Mental Competency Services for Detainees, Despite Losing Lawsuits and Years of Failure,* ROCKY MOUNTAIN PBS (Apr. 3, 2020), https://www.rmpbs.org/blogs/news/a-broken-system-colorado-struggles-to-uphold-laws-requiring-timely-mental-competency-service-for-detainees-despite-losing-lawsuits-and-years-of-failure/.

[197] CSG JUST AND WELL, *supra* note 60, at 5.

[198] ROTH, *supra* note 44, at 200. "Forensic" mental health services are services provided by mental health professionals or agencies for use in court or otherwise in connection with a legal matter. NASMHPD, *supra* note 128, at 2-3.

[199] *E.g.,* Allison Sherry, *State Agrees to $10 Million in Fines, Overhaul of How It Handles Mentally Ill in Jail*, CPR NEWS (Mar. 16, 2019), https://www.cpr.org/2019/03/16/state-agrees-to-10-million-in-fines-overhaul-of-how-it-handles-mentally-ill-in-jail/; Andy Miller & Rebecca Grapevine, *Long Wait for Justice: People in Jail Face Delays for Mental Health Care Before They Can Stand Trial,* KAISER HEALTH NEWS (June 10, 2022), https://khn.org/news/article/incarcerated-people-mental-health-care-delays-trial-competency/ (describing similar delays in several states, and the Georgia state's efforts to create "nonhospital restoration alternatives"). *See* Leah Wang & Katie Rose Quandt, *Building Exits Off the Highway to Mass Incarceration: Diversion Programs Ex-*

tion.[200] In Washington, the settlement funds came from multiple state budget sources and are funding several grant programs, each of which is then distributed to programs designed to meet the goals stipulated in the consent decree.[201]

Washington State's court-ordered budget reallocations under *Trueblood* were supposed to fill gaps in services and free up resources for people who would otherwise add to competency restoration backlogs.[202] As of November 2022, Washington state's outcomes are no longer quite as impressive as they once seemed; rates of delay in initiating competency evaluations have more than doubled since *Trueblood* was decided.[203] However, the state continues to roll out its settlement implementation plan and report its progress to the court.[204] If Washington ultimately creates a successful and sustainable model, other states could assess the suitability of implementing similar programs, learning from some of the challenges Washington has faced in the process.[205]

A second nexus between criminal courts and forensic commitments is the insanity defense. As the competency restoration system has dramatically increased in use over time, use of the insanity defense has decreased over time and is even being eliminated in some states.[206]

B. THE DEMISE OF THE AFFIRMATIVE INSANITY DEFENSE

Modernly, any affirmative "excuse" defense[207] like insanity first requires the prosecutor to prove, beyond a reasonable doubt, that the defen-

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plained, PRISON POL'Y INITIATIVE BLOG (July 20, 2021), https://www.prisonpolicy.org/reports/diversion.html.

[200] Some state courts appoint "special masters" to distribute fines to existing managed care organizations charged with expanding access to existing mental health care programs, or to create new ones. In Colorado, the special masters worked with the plaintiffs to distribute funding from the Colorado settlement agreement. *See* Memorandum to Joint Budget Committee Members of the Colorado General Assembly 4-6 (Mar. 18, 2019), http://coga.prod.acquia-sites.com/sites/default/files/html-attachments/j_jbc_2019a_03182019_013123_pm_committee_summary/jbc%20staff%20cb%20packet%206-03-18-19.pdf.

[201] WASH. STATE DEP'T OF SOC. AND HEALTH SERVS., TRUEBLOOD DIVERSION GRANT PROGRAM AND TRUEBLOOD SETTLEMENT COMPARISON, https://www.spokanecounty.org/DocumentCenter/View/26987/03—-DSHS-BHA-Trueblood-Diversion-Grant (last visited Dec. 9, 2022) [hereinafter PROGRAM & SETTLEMENT COMPARISON].

[202] PROGRAM & SETTLEMENT COMPARISON, *supra* note 201.

[203] DSHS RE: TRUEBLOOD, *supra* note 188.

[204] PROGRESS REPORT, *supra* note 189; PROGRAM & SETTLEMENT COMPARISON, *supra* note 201.

[205] A handful of successful alternative systems are described in section III of this Comment, below.

[206] *Eliminates Insanity*, *supra* note 61.

[207] *Excuse,* LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/excuse (last visited Mar. 27, 2022).

dant committed every element of the charged crime.[208] If any element of the crime, such as the required mental state, or *mens rea*,[209] is not proven by the prosecutor, the subsequent acquittal would be based on a "failure-of-proof" defense.[210] After that, affirmative defenses serve the notion that, notwithstanding the defendant's guilt in fact, the defendant should still be excused from punishment under law.[211] To prove the affirmative defense of insanity, the defense attorney must offer evidence of the defendant's insanity at the time of the crime, to an evidentiary standard lower than "beyond a reasonable doubt," varying by jurisdiction.[212] Generally, if the state does not disprove the defendant's case, the defendant is acquitted not guilty "by reason of insanity" ("not guilty by reason of insanity," NGRI), automatically or optionally followed by an indefinite term of forensic commitment.[213]

The accessibility of the insanity defense has fluctuated over time.[214] The modern majority test for insanity today was first formulated in 1843, in *M'Naghten's Case*.[215] The insanity defense requires that, at the time of the defendant's act, the defendant was "laboring under such a defect of reason, arising from a disease of the mind," that: (1) the defendant did not know the nature and quality of his act; or (2) if he did know it, he did not know that what he was doing was wrong (i.e., the difference between right and wrong).[216] In the more than 100 years since *M'Naghten's Case* was decided, several other variations on the insanity defense have been tried and tested.[217] At least two are more favorable to defendants than the *M'Naghten* test.[218]

From the 1950s to the 1970s, legal experts and legislatures focused on expanding access to the insanity defense.[219] In 1972, the American

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[208] Dressler, *supra* note 36, at 321-22.

[209] *Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining mens rea as "guilty mind," or the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime).

[210] *See Failure-of-Proof Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[211] *See Affirmative Defense,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[212] Dressler, *supra* note 36, at 322.

[213] *See Id.* at 320-21, 333-35.

[214] *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html (last visited Sept. 14, 2022) [hereinafter *M'Naughten to Hinckley*].

[215] M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). Thirty-four states and the federal government use a variation of the M'Naghten test. Dressler, *supra* note 36, at 327.

[216] Dressler, *supra* note 36, at 327.

[217] *Id.* at 327-333.

[218] *See generally* Am. Acad. of Psychiatry and the L., *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 J. ACAD. PSYCHIATRY AND LAW S3 (2014) [hereinafter *AAPL Insanity Guideline*].

[219] *M'Naughten to Hinckley supra* note 214. One such test was the Durham rule, created by *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), abrogated by United States v. Brawner,

Legal Institute (ALI) developed a Model Penal Code insanity test which was readily adopted by 10 of the 11 federal circuit courts and a majority of the states.[220] The ALI's new standard was also a "significant softening" of *M'Naghten*.[221] The new standard eased the burden on defendants by requiring proof only that they lacked a "substantial capacity" to understand right and wrong rather than requiring defendants to have "no understanding whatsoever."[222] Furthermore, the standard had added a component regarding the ability to conform conduct to the requirements of the law, another basis upon which the defendant could be acquitted.[223] Until the 1980s, the prosecutor carried the burden of proof to show that the defendant was sane at the time of the crime.[224] The trend toward increased access to the insanity defense reversed in the early 1980s in response to John Hinckley, Jr.'s attempted assassination of President Ronald Reagan.[225]

In response, Congress enacted the Insanity Defense Reform Act, which was designed to limit the scope of insanity acquittals.[226] Even the American Medical Association at the time argued that the insanity defense should be abolished in its entirety.[227] The reforms included shifting the burden of proof from the prosecutor to the defense and barring a defense expert from opining on the ultimate issue[228] of the defendant's mental state.[229] Multiple states attempted to eliminate the defense altogether through legislation, but ultimately settled on allowing a *mens rea* approach.[230] At the same time, some jurisdictions worked to formulate a

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471 F.2d 969 (D.C. Cir. 1972). The "widely abused" *Durham* test allowed defendants to claim insanity for any act which was the "offspring and product of mental disease." *AAPL Insanity Guideline supra* note 218, at S3, S5.

[220] *M'Naughten to Hinckley supra* note 214.

[221] *See* Dressler, *supra* note 36, at 327-331; *M'Naughten to Hinckley supra* note 214.

[222] Dressler, *supra* note 36, at 331.

[223] *Id.*

[224] *Id.* at 322; *M'Naughten to Hinckley supra* note 214.

[225] *AAPL Insanity Guideline supra* note 218, at S7; H.R. 1280, 98th Congress (1983). "There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage, and then have the door opened for them to return to the society they victimized," said United States Attorney General William French Smith. Steven V. Roberts, *High US Officials Express Outrage, Asking for New Laws on Insanity Plea*, N.Y. TIMES, June 23, 1982, *as reprinted in* ROTH, *supra* note 44, at 179.

[226] *AAPL Insanity Guideline supra* note 218, at S7; H.R. 1280, 98th Congress (1983).

[227] *AAPL Insanity Guideline supra* note 218, at S6.

[228] Federal Evidence Code § 704 provides that court-qualified experts may opine on "ultimate issues." Fed. R. Evid. § 704(a). Until 1985, experts could also testify about a defendant's mental state or condition. H.R. 1280, 98th Congress (1983).

[229] *AAPL Insanity Guideline, supra* note 218, at S7-8.

[230] Discussed further below. Jacqueline S. Landess & Brian J. Holoyda, Kahler v. Kansas *and the Constitutionality of the* Mens Rea *Approach to Insanity*, 49 AM. ACAD. OF PSYCHIATRY AND LAW 1, 2-4 (2021), https://jaapl.org/content/jaapl/early/2021/03/31/JAAPL.200086-20.full.pdf.

new standard called "guilty but mentally ill," (GBMI), which some scholars have criticized as a "shortcut verdict," where "[t]he jury is left to its own devices to decide what constitutes a mental illness and which mental illnesses might merit special treatment."[231] Though some scholars celebrate the GBMI defense,[232] others have maintained that it is no substitute for the NGRI defense.[233] Defendants who are found GBMI may not necessarily receive any specialized treatment beyond what is offered to the general inmate population,[234] and may be worse off than if they had had no version of the insanity defense at all.[235]

Public perception has remained "fixated on the insanity defense as a symbol of all that is wrong with the criminal justice system and as a source of social and political anger."[236] Despite popular fear that the insanity defense is like an overused get-out-of-jail-free card,[237] NGRI defenses are used in only about 0.2-0.9% of cases, and they are seldom successful.[238] Salacious stories of egregious crimes have become coupled with the defense,[239] but one study found that prior to the reforms of the 1980s, as many as 86% of insanity pleas were asserted in nonviolent

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[231] John D. Melville & David Naimark, *Punishing the Insane: The Verdict of Guilty but Mentally Ill*, 30 J. AM. ACAD. PSYCHIATRY AND LAW 553, 553 (2002), http://jaapl.org/content/jaapl/30/4/553.full.pdf at 553.

[232] *See*, *e.g.*, Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 UNIV. CIN. L. REV. 943 (1987); *cf.* INST. ON MENTAL DISABILITY AND L. NAT'L CTR FOR STATE COURTS, THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY E-5 (1985), https://www.ojp.gov/pdffiles1/Digitization/98813NCJRS.pdf.

[233] Natalie Jacewicz, *"Guilty But Mentally Ill" Doesn't Protect Against Harsh Sentences*, NPR (Aug. 2, 2016, 1:22 PM), https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences; John D. Melville & David Naimark, *Punishing the Insane: The Verdict of Guilty but Mentally Ill*, 30 J. AM. ACAD. PSYCHIATRY AND LAW. 553, 554 (2002).

[234] "Treatment for GBMI offenders has not been assured beyond what is generally available to all other prisoners." Brian D. Shannon, *The Time is Right to Revise the Texas Insanity Defense: An Essay,* 39 TEX. TECH L. REV. 67, 76 (2006).

[235] Melville & Naimark, *supra* note 233, at 554.

[236] Perlin, *supra* note 101, at 3 (quoting Michael L. Perlin, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 224 (1990)).

[237] Other media representations of insanity, temporary insanity, intoxication, and other kinds of diminished capacity defenses likely contributed to fears and prejudices surrounding the insanity defense. *See* Robin L. Barton, *Dan White's "Twinkie defense" around 1978*, CRIME REP., https://thecrimereport.org/2017/10/04/understanding-the-so-called-twinkie-defense/ (last visited Sept. 21, 2022).

[238] Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. OF GENDER L. & POLICY 1, 11 n.86-87 (2003); Kenneth B. Chiacchia, *Insanity Defense: Insanity Defense Statistics, Problems with NGRI, Guilty but Mentally Ill*, JRANK: PSYCH., https://psychology.jrank.org/pages/336/Insanity-Defense.html#ixzz793J7oy99 (last visited Oct. 10, 2022).

[239] NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 20-21 (1983), *as reprinted in* Elizabeth Nevins-Saunders, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. Davis L. Rev. 1419, 1454 n.72 (2012). *E.g., Eliminates Insanity*, *supra* note 61.

felony cases and misdemeanor cases.[240] Over the past 40 years, mental health advocates concerned about the erosion of the insanity defense have been unable to turn the tide of public perceptions.[241] Ultimately, even the Supreme Court became convinced that the affirmative defense was no longer worth saving.[242]

1. The Constitutional Floor for Insanity Falls Six More Feet After Kahler v. Kansas

The insanity defense is no longer a constitutionally guaranteed affirmative defense since the 2020 decision in *Kahler v. Kansas*.[243] There is nothing stopping states from eliminating the defense[244] and five states have already done so.[245] Many have criticized the Court's decision in *Kahler* as having been a missed opportunity to preserve the rights of criminal defendants with mental illnesses and to uphold the Court's role in protecting people with mental illnesses.[246]

Defendant James Kahler claimed the insanity defense against multiple homicide charges brought by the state of Kansas but was instead found guilty and sentenced to death.[247] Under the Kansas insanity defense statute, the only defense available based on insanity is the "cognitive inability to form the needed *mens rea*."[248] In essence, the Kansas law removed the affirmative defense of insanity from a defendant's arse-

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[240] NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 20-21 (1983), *as reprinted in* ELIZABETH NEVINS-SAUNDERS, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1454 n.72 (2012).

[241] Stephen Morse, *Before and After Hinckley: Legal Insanity in the United States*, *U. Pa. L. Sch., Public Research Paper No. 21-08, in* THE INSANITY DEFENCE: INTERNATIONAL AND COMPARATIVE PERSPECTIVES at 9-13 (Ronnie Mackay & Warren Brookbanks eds., 2022 Forthcoming), https://ssrn.com/abstract=3784179.

[242] *See* Kahler v. Kansas, 140 S. Ct. 1021, 1022 (2020).

[243] *Id.*

[244] Paul S. Appelbaum, *Kahler v. Kansas: The Constitutionality of Abolishing the Insanity Defense*, 72 PSYCHIATRIC SERVS. 104, 106 (2020).

[245] *Id.* at 104.

[246] Morse, *supra* note 241, at 11-13. *See Eliminates Insanity*, *supra* note 61.

[247] James Kahler was accused of shooting to death his estranged wife, their two teenaged daughters, and his wife's grandmother, allowing his 9-year-old son to flee. The defendant had been diagnosed with multiple mental illnesses, and though he had been prescribed medications, he stopped taking them. An expert for the defense testified that Kahler had "completely lost control" due to his mental illness and had not made the rational choice to kill his family members. *Kahler*, 140 S. Ct. at 1026-27 (2020); *Kahler v. Kansas*, OYEZ, https://www.oyez.org/cases/2019/18-6135 (last accessed Sept. 15, 2022).

[248] "Failure of Proof – an individual's simplest defense in a criminal prosecution is to claim that the prosecution has not or cannot prove an element of the offense." *Criminal Law*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/criminal_law (last visited Sept. 15, 2022).

nal and now allows only a "failure of proof"[249] defense.[250] Thus, in Kansas, it is immaterial that a defendant's illness "prevented him from recognizing his criminal act as morally wrong."[251] The jury was unconvinced that mental illness should be a basis to lessen the defendant's sentence, let alone acquit him, so they imposed the death penalty.[252]

The defendant appealed his conviction to the U.S. Supreme Court, arguing that the U.S. Constitution's Due Process Clause under the Sixth and Fourteenth Amendments compelled Kansas to recognize the "moral incapacity" prong of the *M'Naghten* test: the inability to recognize right from wrong.[253] In eliminating that part of the *M'Naghten* test, Kansas had effectively eliminated the insanity defense as an affirmative, or standalone, defense.[254] However, the Court upheld the Kansas law, characterizing their ruling as declining to "constitutionalize a particular version of the insanity defense."[255]

The Court's decision had been strongly opposed by hundreds of legal scholars of psychiatry and law, who had warned the Court that it would be unconstitutional to remove the insanity defense as a safeguard for defendants who could not appreciate the wrongfulness of their actions.[256] Nonetheless, the Court declined to find that the affirmative insanity defense is protected under the Constitution, explaining that mentally ill defendants' criminal culpability "sits at the juncture of medical views of mental illness and moral and legal theories of criminal culpability—two areas of conflict and change."[257] Further, the states are the proper testing grounds for questions of mental illness and criminal culpability and, therefore, the insanity defense is a "project for state governance, not constitutional law."[258]

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[249] Kan. Stat. Ann. § 21-5209.

[250] *Kahler*, 140 S. Ct. at 1026 (2020).

[251] *Id.* at 1024.

[252] *Id.* at 1022.

[253] *Id.* at 1024-26.

[254] *Id.* at 1040-41 (emphasis added).

[255] *Id.* at 1022-23 (citing Leland v. Oregon, 343 U.S. 790 (1952), Powell v. State of Tex., 392 U.S. 514 (1968), and Clark v. Arizona, 548 U.S. 735 (2006)).

[256] Eric Williamson, *It's Unconstitutional Not to Allow Insanity Defense, Professor Tells Supreme Court*, U. Va. L. Sch. (Oct. 10, 2019), https://www.law.virginia.edu/news/201910/its-unconstitutional-not-allow-insanity-defense-professor-tells-supreme-court. *See also* Brief of Amicus Curiae 290 Crim. Law and Mental Health Law Professors in Support of Petitioner's Request for Reversal and Remand, Kahler v. State of Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) 2019 WL 2418946; Brief of American Psychiatric Ass'n, American Psychological Ass'n, American Acad. of Psychiatry and the Law, The Judge David L. Bazelon Ctr. for Mental Health Law, and Mental Health America as Amici Curiae in Support of Petitioner, Kahler v. State of Kansas, 140 S. Ct. 1021 (2020) (No. 18-6135) 2019 WL 2451207.

[257] *Kahler*, 140 S. Ct. 1022.

[258] *Id.* at 1037.

The Court additionally explained that Kansas still allowed Kahler the option to argue, during the penalty phase of trial, that his mental illnesses should mitigate his criminal liability and reduce the harshness of his sentence.[259] Kansas judges also have the option to replace a prison term with civil commitment at the penalty phase,[260] notably only as "a matter of judicial discretion, not of right."[261]

2. *The Aftermath of* Kahler *and Alternatives to Insanity*

Well before *Kahler*, a more "subjective approach to culpability" in criminal law had already been gradually supplanting the role of the insanity defense.[262] Acquittals based on insanity pleas are increasingly rare but defendants' mental illnesses remain relevant to courts, and courts have become more receptive to this kind of evidence over time.[263] This trend is in part attributable to reduced use of the insanity defense, advances in neuroscientific testing, and the increasing comfort of defense attorneys in using neuroscientific evidence.[264]

A recent national survey of thousands of criminal cases decided over the past 120 years revealed that the prevalence of insanity defense cases has sharply declined, even as the total number of criminal cases has risen significantly since the 1980s.[265] During the decade from 1970 to 1980, the insanity defense was at its highest rate of use, asserted in 64% of criminal cases.[266] The following decade from 1980 to 1990 saw the sharpest plummet in assertions of the defense, but the rate of use continued to decline after that.[267] In the years from 2010 to 2020, the insanity defense was asserted in only 11% of criminal cases.[268] While assertions of the insanity defense declined, the use of neuroscientific evidence rose.[269]

Following the Supreme Court's 1984 decision in *Strickland v. Washington*, which set the standard for ineffective assistance of counsel challenges, defense attorneys have increasingly sought to introduce neuroscientific evidence and evidence of other subjective characteristics

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[259] *Id.* at 1027, 1031.

[260] *Id.* at 1031.

[261] *Id.* at 1049 (Breyer, J., dissenting).

[262] Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1207 (2000) [hereinafter Slobogin re: *Insanity*].

[263] *Plummeting Use Insanity*, *supra* note 59.

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

of defendants.[270] Since 1984, successful appeals on the basis of ineffective assistance of counsel claims have most strongly correlated with counsel's failure to introduce neuroscientific evidence at trial.[271] This may be because illustrating a defendant's individual story is more persuasive than relying heavily on the defendant's psychiatric diagnosis alone, let alone a claim of insanity.[272] Further, defendants are less resistant to the use of neuroscientific evidence than they are to being called "insane."[273] The one-size-fits-all insanity defense has given way to tailored arguments for acquittal, mitigation, and diversion, and outcomes based on a defendant's unique neurological background and needs.[274]

III. A PROJECT FOR STATE GOVERNANCE

"Defining the precise relationship between criminal culpability and mental illness requires balancing complex considerations, among them the workings of the brain, the purposes of criminal law, and the ideas of free will and responsibility. This balance . . . is a project for state governance, not constitutional law."[275] This now infamous line from the majority opinion in *Kahler* has been interpreted to mean that the Constitution will not recognize the diminished criminal culpability of people whose illnesses have caused diminished capacities to perceive reality or control their actions.[276] What that line also stands for is a turn away from an outmoded tool fraught with problems.[277]

Of course, there is a clear need for mental health interventions, and it is not being met.[278] Studies have repeatedly reinforced the connection

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[270] Ineffective assistance of counsel challenges require defendants to show that "there is a 'reasonable probability' . . . sufficient to undermine confidence in the outcome [of a criminal case], that, but for counsel's unprofessional errors, result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). *Plummeting Use Insanity*, *supra* note 59.

[271] *Plummeting Use Insanity*, *supra* note 59.

[272] *Plummeting Use Insanity*, *supra* note 59. Akin Adepoju, video beginning at 33:50, Panel 2, *2020 Presidential Summit and Sentencing Symposium: Mental Illness: Misperceptions and the Multiplier Effect*, NACDL (Oct. 22, 2020), https://www.nacdl.org/Media/MentalIllnessMisconceptionsandtheMultiplierEffect.

[273] Adepoju, *supra* note 278.

[274] Slobogin re: *Insanity*, *supra* note 262, at 1200-01.

[275] Kahler v. Kansas 140 S. Ct. 1021 (2020).

[276] Morse, *supra* note 241, at 10-13.

[277] In addition to being underused, juries are reluctant to find defendants NGRI in part due to a bias against the presence of mental illness as an aggravating factor. Furthermore, the relationship between an NGRI acquittal and indefinite forensic commitment has been criticized. Finally, the defendants who most need an insanity acquittal may be reluctant to consent to such an argument due to their own anosognosia, or their lack of insight into their condition. *See Plummeting Use Insanity*, *supra* note 59; Adepoju, *supra* note 278. *See also supra* note 14.

[278] *See* Mark Moran, *Forensic Experts Propose New Commitment Process for Defendants with SMI*, APA: PSYCHIATRIC NEWS (Mar. 3, 2021), https://psychnews.psychiatryonline.org/doi/full/

between a lack of access to civil commitment and community mental health services and an increased use of competency restoration systems.[279] The intersection of mental illness and criminal justice is very complex, so state-based solutions in this area must be creative, bold, and research-based.[280] There are many such approaches which will be discussed below.

The first novel strategy states can adopt integrates therapeutic interventions designed to address the risk factors for criminal justice involvement via community mental health systems.[281] This strategy acknowledges that some people with mental illnesses, especially those with a history of homelessness or a prior criminal history, may share many of the same criminogenic risk factors as individuals without mental illnesses.[282] In this framework, individuals in the community could receive assessments and care tailored to several categories of needs, including social supports, mental health needs, criminogenic needs, and more.[283] These assessments and supports would be delivered by community mental health systems—part of what has been termed "Intercept 0."[284] Intercept 0 is the web of community-based services known to address the unmet needs driving people with mental illnesses into the criminal justice system.[285] Intercept 0 is envisioned as a prevention point before a vulnerable person contacts police, courts, corrections, reentry, parole, or probation.[286] Intercept 0 services are known to be the least expensive and most effective, so integrating therapeutic interventions specifically designed to address criminogenic risk factors into Intercept 0 systems could have a significant, positive effect.[287]

Another innovative proposal similarly acknowledges the ineffectiveness of existing interventions in the community for persons with both serious mental health needs and high criminogenic needs.[288] Experts in psychiatry and the law have proposed a formal pathway to civil commit-

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10.1176/appi.pn.2021.2.26; *see also* CSG JUST AND WELL, *supra* note 60, at 2-4; *see generally* Bonafine, et al, *supra*, note 5, at 355.

[279] CSG JUST AND WELL, *supra* note 60, at 7.

[280] *See* Moran, *supra* note 278.

[281] *See generally* Bonafine, et al, *supra*, note 5, at 355.

[282] *Id.* at 355-59.

[283] *See Id.* at 356-58.

[284] *See generally id.*

[285] *Intercept 0: Community Services*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/criminal-juvenile-justice/sim-overview/intercept-0 (last visited Dec. 11, 2022) [hereinafter *Intercept 0*].

[286] *See The Sequential Intercept Model (SIM)*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/criminal-juvenile-justice/sim-overview (last visited Dec. 11, 2022).

[287] *See Intercept 0, supra* note 285.

[288] *See* Bonafine, et al, *supra*, note 5, at 356-57.

ment, with the same due process protections governing civil commitment, but designed to begin during the initial stages of criminal justice involvement.[289] This proposal aims to target a subgroup of offenders with serious mental illness whose criminal behavior appears to be sufficiently related to their illness that they are likely to continue to offend in the absence of aggressive treatment interventions and social supports.[290] The coupled criminal behavior and presence of a mental illness would justify intensive intervention designed to prevent deterioration, prevent recidivism, and stabilize the individual.[291] The authors of this proposal believe approximately 40-60% of individuals with mental illnesses currently in the criminal justice system would be eligible.[292]

In addition to these aspirational ideas, many states are working to expand access to Assisted Outpatient Treatment (AOT), a community-based civil commitment model.[293] As a less restrictive, more holistic, and less expensive alternative to inpatient civil commitment, courts may order AOT as a form of commitment to receive treatment in the community.[294] In New York state, Kendra's Law made New York the 41st state to adopt AOT.[295] New York found that after enacting Kendra's Law, the duration and number of hospitalizations, incidences of homelessness, arrests, violence, and rates of victimization fell.[296] California has an equivalent law called Laura's Law.[297] Since implementing Laura's Law in 2002, California has seen dramatic reductions in homelessness, hospitalizations, violent behavior, and arrests, among other positive results when individuals with the greatest needs and highest rates of contact

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[289] Steven K. Hoge and Richard J. Bonnie, *A New Commitment Pathway for Offenders with Serious Mental Illness: Expedited Diversion to Court-Ordered Treatment*, 72 PSYCHIATRIC SERVS. 969, 969-70 (2020), https://ps.psychiatryonline.org/doi/epdf/10.1176/appi.ps.202000436.

[290] *Id*. at 970.

[291] *Id*. at 970.

[292] Moran, *supra* note 278.

[293] *See Assisted Outpatient Treatment*, MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/#assisted-outpatient-treatment (last visited Dec. 11, 2022).

[294] BRIAN STETTIN, ET AL., SMI ADVISER, IMPLEMENTING ASSISTED OUTPATIENT TREATMENT: ESSENTIAL ELEMENTS, BUILDING BLOCKS AND TIPS FOR MAXIMIZING RESULTS 4-5 (Oct. 2019), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/White_Paper_FINAL_1.pdf.

[295] N.Y. MENTAL HYG. LAW § 9.60. *See Kendra's Law Info. and Studies*, MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/kendraslaw.html#kendraslaw-analysissource (last visited Dec. 11, 2022).

[296] *Assisted Outpatient Treatment Research on Important Outcomes*, MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/aot/outpatient-commitment-research.html (last visited Dec. 11, 2022).

[297] CAL. WELF. & INST. CODE §§ 5345-5349.5.

with social safety net systems were enrolled.[298] Additionally, the Group for the Advancement of Psychiatry has created a guide for creating the Ideal Crisis Response System in communities to intervene at the onset of acute mental health crises, rather than a law enforcement and arrest intervention.[299]

Community-based treatment interventions are some of the most promising alternatives to existing practices.[300] However, courts have been and will continue to be integral to addressing the intersection of mental illness and the criminal justice system, especially due to their historic role in ordering treatment for those in need of supervised care.[301] Court civil commitment orders may even result in greater access to mental health services by requiring providers to treat those under court supervision who might otherwise be turned away.[302] Criminal courts also serve as key gatekeepers into and out of incarceration, and sometimes into mental health treatment via competency restoration and the insanity defense.[303] The insanity defense will remain a key assurance that those who are less culpable due to their mental state and the behavior it causes will have their right to claim insanity protected in 46 states and the federal jurisdiction.[304]

Courts will also continue to be involved in competency restoration, especially where the state's interest is important.[305] While competency restoration should continue to be available, states must also ask the question whether their investment in competency restoration is worth the expense in the half of cases in which competency doubts are raised and the accused is charged with a misdemeanor.[306] Mental health courts can additionally continue to meet the needs of populations who are justice-involved and mentally ill in a more therapeutic manner.[307] Finally, where

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[298] CAL. DEP'T OF HEALTH CARE SVCS., LAURA'S LAW: ASSISTED OUTPATIENT TREATMENT DEMONSTRATION PROJECT ACT OF 2002, 4-5 (May 2021), https://www.dhcs.ca.gov/formsandpubs/Documents/Legislative%20Reports/Lauras-LawLegRpt-July2018-June2019.pdf.

[299] *See generally* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, ROADMAP TO THE IDEAL CRISIS SYSTEM (Mar. 2021), https://www.thenationalcouncil.org/wp-content/uploads/2022/02/042721_GAP_CrisisReport.pdf.

[300] *See Intercept 0, supra* note 285.

[301] Testa & West, *supra* note 114, at 32.

[302] SAMHSA CONTINUUM, *supra* note 8, at 14.

[303] *See* ROTH, *supra* note 44, at 176.

[304] Morse, *supra* note 241, at 12.

[305] "Important" borrows the language from *Sell*. Sell v. U.S. 539 U.S. 166, 180 (2003). *Compare with* Or. Advoc. Ctr. V. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003) ("legitimate interests").

[306] CSG JUST AND WELL, *supra* note 60, at 5-6.

[307] *See generally*, KRISTEN DEVAIL, ET AL., NAT'L DRUG CT. RES. CTR., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON TREATMENT COURTS IN THE UNITED STATES (2022), https://ndcrc.org/wp-content/uploads/2022/08/PCP_2022_HighlightsInsights_DigitalRelease.pdf.

judges continue to be involved with this work, they should receive training in mental health issues and awareness.[308]

Courts and judges can also play a key role in upholding and creating policy.[309] The kind of litigation Washington state underwent may seem like a last-resort strategy to force states to increase their investments in mental health care due to the existing state-level mandate to provide competency restoration services.[310] However, using litigation to compel states to invest in mental health care services could backfire if it only produces more efficient competency restoration systems, more jail-based restoration services, or if those mental health services are only made available to people with criminal justice involvement.[311] The services being created in response to some pending competency lawsuits are needed, but people in need of mental health services should not need to risk criminal justice involvement to get support.[312]

Courts and judges hold significant power to guide progress toward reducing the numbers of people with mental illnesses in jails and prisons.[313] Judge Steve Leifman, for example, used his judicial position to spearhead innovative programs to redirect people who would otherwise be caught up in the competency restoration system into care and community reintegration.[314] Judge Leifman's Miami Model, which emphasizes community integration and redirection rather than competency restoration, has existed for over 20 years and is one of the most longitudinally successful and comprehensive models for redirecting from incarceration individuals better suited to treatment.[315] Due to Judge Leifman's efforts, Miami diverts anyone accused of a misdemeanor who might otherwise be eligible for competency restoration.[316] In addition, the Miami-Dade Forensic Alternative Center Program diverts people charged with mid-

[308] Katie O'Connor, *Judges, Psychiatrists Trained to Share Education About MH in Justice System*, APA: PSYCHIATRIC NEWS (Oct. 25, 2022), https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2022.11.11.10.

[309] *See Breaking the Cycle: Justice Reform for the Mentally Ill*, NAT'L ASS'N OF CNTYS. (Feb. 12, 2022), https://www.naco.org/articles/breaking-cycle-justice-reform-mentally-ill [hereinafter *Breaking Cycle*].

[310] *See* CSG JUST AND WELL, *supra* note 60, at 4.

[311] *See Id.*

[312] Hesla, *supra* note 57.

[313] *Breaking Cycle, supra* note 309.

[314] *Judge Steven Leifman*, NAT'L ASS'N OF CNTYS., https://www.naco.org/people/judge-steven-leifman (last visited Dec. 11, 2022).

[315] One of the most successful and famous alternative models is in Miami, Florida. A documentary on the program was released in 2020. THE DEFINITION OF INSANITY (PBS 2020), https://www.pbs.org/show/definition-insanity/. Aspects of the Miami model have been adopted in Cook County, Illinois and Aurora, Colorado, and elsewhere. The author has personally assisted in all of those efforts.

[316] CSG JUST AND WELL, *supra* note 60, at 16.

level felonies from the state competency restoration facility and into a local inpatient hospital with comprehensive services including crisis stabilization, community living skills training, and community reentry assistance.[317] Court monitoring continues for at least one year and charges are dropped upon completion of the program.[318] Individuals who are accepted into the Forensic Alternative Center Program spend about half as much time in jail, almost half as much time in hospitals, return to jail at about half the rate, at a cost of about half as much to treat compared to those who churn through the state's conventional competency restoration program.[319]

CONCLUSION

The needs of people with mental illnesses who become involved in the criminal justice system are complex. However, there is no question that our state and local systems need dedicated leaders, dedicated funding, and dedication to a vision of restoration over incarceration where incarceration would cause harm and increase recidivism. Until health systems are properly funded, and mental health services are adequate and available, courts will remain pipelines to incarceration for mentally ill defendants. If court systems wish to suffer fewer procedural delays, process fewer defendants with underlying mental health concerns, and reduce the rates of people with mental illnesses mentally deteriorating in state prisons and jails, courts and communities must collaborate to reduce the disproportionate representation of people with mental illnesses in the criminal justice system.

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[317] *Id.*

[318] *Id.*

[319] SANA QURESHI, ET AL., UNIV. OF MIAMI DEP'T OF PSYCHIATRY AND BEHAV. SCIS. & 11TH JUD. CIR. CT. OF FLA., OUTCOMES OF THE MIAMI-DADE COUNTY FORENSIC ALTERNATIVE CENTER: A DIVERSION PROGRAM FOR MENTALLY ILL OFFENDERS (Jan. 4, 2018) (on file with the author).