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A Therapeutic Jurisprudence Analysis of Competency Evaluation Requests:

The Defense Attorney's Dilemma

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In recent mental health law articles, commentators attribute the rejuvenation of the discipline's scholarship to new challenges to attitudinal doctrine predicated upon the use of empirical data, rather that the re-examination of increasingly stale or attenuated constitutional theories.[1] Therapeutic jurisprudence offers scholars and practitioners a new spin on mental health law by forcing us to consider and investigate the role of law as a therapeutic agent. To do so, we must consider the "holistic"[2] effects of legal procedure as well as the intended and unintended outcome of the legal process upon courtroom participants, most notably, for purposes of this article, criminal defendants. Nowhere is there as great a need for such research as in the murky intersection of criminal procedure and mental health law.

Although a few commentators have made preliminary analyses of types of cases or offenders utilizing the tenets of therapeutic jurisprudence,[3] I am not

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[1]David Wexler, *Putting Mental Health in Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992); David Wexler & Bruce Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENT & PHYS. DIS. L. RPTR. 225 (1992); John Petrila, *Redefining Mental Health Law: Thoughts on a New Agenda*, 16 LAW & HUM. BEHAV. 89 (1992); *see also*, Michael L. Perlin and Deborah Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L._____ (1993) (in press).

[2]Holistic is used in the sense of affecting the "spirit" of the proceedings, in that the dynamics between the legal process and its participants necessarily adjusts to the entirety of the circumstances; hence, each case has its own individuality, which transcends its purely procedural components. *See also*, Margaret Severson, *Redefining the Boundaries of Mental Health Services: A Holistic Approach to Inmate Mental Health*, 56 FED PROB 57 (1992).

[3]Most notably, Professors Wexler and Winick, *supra* note 1 (treatment for defendants found incompetent

aware that any scholars have pursued this line of inquiry into specific courtroom procedures or the decision whether to request a competency evaluation for the accused.

The arraignment process occasions the first meeting between the judge, the defense attorney, and the prosecutor. It is the first time that the accused meets with the defense attorney, learns the formal charges against him or her, enters a formal plea to the charges, engages in plea-bargaining, and may have the case disposed of by plea and sentence. Arraignment is a critical stage fraught with great emotional and physical stress,[4] where most decisions have far-reaching consequences and repercussions.[5] Thus, this is a juncture ripe for critical discussion.

In this article, I will briefly discuss the concept of therapeutic jurisprudence and how it relates to law reform in the context of criminal-mental health law. Next, I will discuss practical and procedural details as well as the judicial underpinnings shaping the arraignment process. The third section speaks generally about requesting a competency examination, and Part IV will explore the ethical quandary a defense counsel faces when representing a potentially incompetent client. In Part V, I outline the potential therapeutic and anti-therapeutic consequences of the decision selected by defense counsel.

Part I: Therapeutic Jurisprudence

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent.[6] In other words, this perspective explores the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or anti-therapeutic consequences.[7] To fully learn from this perspective, mental health law practitioners and scholars must become more familiar with behavioral science methodology, and willingly integrate a more interdisciplinary approach to both research and substantive practice. In this way, the empirical data that results can be used to influence policy determinations and law reform in the criminal-mental health area.

Professors David Wexler and Bruce Winick, generally acknowledged as the creators of therapeutic jurisprudence, urge attorneys to consider that principles of justice and the knowledge, theories, and insights from mental health disci-

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to stand trial, sex offenders, and the plea process) and Wexler, *supra* note 1 (suggesting that therapeutic jurisprudence may be applied to *Tarasoff* issues, as well as various other treatment and release issues). *See also*, Amiram Elwork, *Psycholegal Treatment and Intervention: The Next Challenge*, 16 LAW & HUM. BEHAV. 175 (1992).

[4]Criminal defendants routinely lack sleep, food, bathing facilities, and communication with family members. *The Arrest to Arraignment Process*, 45 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 172, 179 (March 1990) hereinafter *Arrest to Arraignment*. *See generally*, Paul Lees-Haley, *Litigation Response Syndrome: How Stress Confuses the Issues*, 56 DEF. COUNS. J. 110 (1989).

[5]As a criminal defense attorney for the Legal Aid Society in Manhattan, and in my subsequent private criminal practice as well as the years I represented institutionalized psychiatric patients for the Mental Hygiene Legal Service, it was my experience that criminal defendants become more likely to plea-bargain the longer they remain incarcerated. *See also, Arrest To Arraignment, supra* note 4, at 173.

[6]Wexler, *supra* note 1, at 32.

[7]Wexler and Winick, *supra* note 1, at 225.

plines can help shape the development of law without trumping[8] other considerations.[9] Therapeutic jurisprudence does not endorse psychiatric paternalism, and does not call for increased coercion of mentally ill defendants or greater state intervention.[10] Rather, therapeutic jurisprudence may be seen as the process of relating relevant psychological evidence to legal procedure and exploring their interface to develop a superior base of integrated knowledge.[11]

Part II: The Arraignment Process

The arraignment process, also known in some jurisdictions as the "first appearance" or the "initial presentment,"[12] is the process by which the accused goes from his or her arrest to an initial appearance in front of the judge. This process may last from several hours[13] to several days.[14] During this period, at least in New York City (and I suspect in every other large urban area as well), the defendant is frequently transported from the place of arrest to the booking precinct, to another holding cell, to a courthouse feeder pen,[15] and ultimately in front of a judge who may or may not take much substantive action on the case.

If the arraignment involves a lesser misdemeanor offense and is triable by the presiding judge, the judge proceeds with the matter in much the same way as a felony arraignment proceeds: by ruling on the sufficiency of the charges, plea-bargaining the case, and entering an initial plea that often allows the defendant to be sentenced on the spot (or after the receipt of a probation report).

The arraignment process in New York City, as well as in other large urban jurisdictions, is not a brief formality, but is a mechanism that:

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[8]I use the word "trump" to "denote the supremacy of one right or duty over another right or duty." Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 113 n.28 (1991), citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331, 1347 (9th Cir. 1990) (Kozinski, J., dissenting in part):

> The fact is, the Constitution protects a variety of rights and liberties and reasonable minds might differ as to the relative importance of each. When we relegate certain of these to collateral status by refusing to give them the full measure of constitutional protection, we undermine the integrity of the constitutional structure and hand a potent weapon to those who may not share our vision as to which rights trump which.

and Ronald M. Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 13 n.11 (1987) ("a utilitarian political morality could not recognize a general right to liberty as a trump over utilitarian calculations of overall social advantage").

[9]Wexler, *supra* note 1 at 32.

[10]Wexler, *supra* note 1 at 32.

[11]*Id.*

[12]WAYNE R. LA FAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE, §1.4(h) (2d ed. 1992).

[13]*Id.*

[14]*Arrest to Arraignment, supra* note 4. *See also* Corey Steinberg, *"Justice Delayed is Justice Denied," The Abuse of Pre-arraignment Delay*, 9 N.Y.L. SCH. J. HUM. RTS. 403, 404 (1992), citing to Williams v. Ward, 845 F.2d 374, 376 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

[15]Steinberg, *supra* note 14, at 407 n.42, citing *Williams*, 845 F.2d at 378, "[A] feeder pen is the area pen is the area behind the courthouse where arrestees are held until they can be seen by a judge."

> insures that the defendant is [promptly] advised of the charges against him, and of his right to counsel, to seek bail, to communicate with counsel, family and friends and to advise [him] as to his whereabouts, to undertake prompt investigation of the charges, and to do all that can be done to meet the challenge of the arrest. The arraignment is a crucial stage in the proceedings . . .[16]

Central to the Second Circuit court's determination that the arraignment is a "crucial stage in the proceedings"[17] is the practice that all criminal defendants are represented by counsel at arraignment.[18] Unfortunately, even competent representation at arraignment cannot adequately compensate for the emotional degradation suffered by defendants during a prolonged period of incarceration prior to the time the defendant first meets his or her lawyer.

The adverse impact on defendants held for prolonged periods of pre-arraignment incarceration was recently litigated in the New York federal and state forums. The federal district court in *Williams v. Ward*[19] originally ruled that the probable cause determination—made at an arraignment hearing where the defendant is represented by counsel, the sufficiency of the complaint is determined, and bail is fixed—must be made within 24 hours of a warrantless arrest. The Second Circuit reversed,[20] holding that the procedural benefits to arrestees under New York's arraignment system justify detention up to 72 hours. This appears to be in accord with the Supreme Court's decision in *Gerstein v. Pugh*[21] and *County of Riverside v. McLaughlin*.[22] However, many jurisdictions continue to attempt to reduce the processing time[23] because of the devastating consequences of prolonged pre-arraignment detention.[24] After the federal court decision,[25] the New York Court of Appeals upheld a decision of

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[16]*Id.* at 404, citing People v. Davis, 118 Misd. 2d 122, 124 (Just. Ct. Westchester Cty. 1983).

[17]*Id.*

[18]Indigent defendants are assigned Legal Aid lawyers, or in some cases, "18-B" lawyers. 18-B refers to the county law that authorizes the assignment of criminal panel attorneys to indigent defendants. N. Y. COUNTY LAW §722 (McKinney 1977).

[19]671 F. Supp 225 (S.D.N.Y. 1987).

[20]Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

[21]420 U.S. 103 (1975).

[22]500 U.S. 44 (1991), 111 S. Ct. 1661 (1991).

[23]The "Bronx Arrest-to-Arraignment" program was initiated by the Office of the Deputy Mayor for Public Safety two years ago in an effort to reduce the arrest-to-arraignment time to under 24 hours. 1 ASSIGNED NEWSLETTER, NYC Office of the Deputy Mayor for Public Safety 1 (Summer 1992).

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> The consequences of prolonged prearraignment detention are often more serious than the disposition ultimately made in the case. Extended confinement may threaten an arrestee's job, source of income and family relationships, and increases the possibility that he/she will suffer physical or mental abuse by other arrestees in detention. Long prearraignment detention times frequently result in coerced plea agreements.

Arrest to Arraignment, supra note 4 at 173.

[25]It should be noted that the U.S. Supreme Court only sets the federal constitutional minimum standards, and the state supreme court or the state legislature is always free to grant greater rights than those mandated by the U.S. Supreme Court. Rivers v. Katz, 504 N.Y.S. 2d 74 (1986), 2 M.L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 10 (1989).

the state Appellate Division stating that delays exceeding 24 hours in arraignment of persons arrested without a warrant are presumptively unnecessary.[26]

It stands to reason that New York City's detailed arraignment procedure, where each defendant is represented by counsel and accorded at least the potential opportunity of a full-blown hearing with the defense counsel, prosecuting attorney, and presiding judge, is routinely the first judicial setting where the issue of requesting a competency examination may be raised. Thus, the New York City arraignment scheme serves as a useful paradigm upon which to frame concerns raised through the lens of therapeutic jurisprudence.

Part III. Competency Evaluations

The Supreme Court has articulated a two-part test for determining competency to stand trial: (1) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "whether he has a rational as well as factual understanding of the proceedings against him."[27] Procedurally, the competency determination proceeds in three stages: the granting of a request for a competency evaluation; a psychiatric examination of the defendant;[28] and the competency hearing, during which the results of the examination are used as evidence.[29] The federal circuit courts disagree on amount of discretion accorded to trial courts in determining whether to grant a motion for a psychiatric examination.[30] State courts also differ on this issue.[31]

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[26]People of New York *ex rel.* Maxian v. Brown, 164 A.D.2d 56 (N.Y. 1990), *aff'd*, 568 N.Y.S.2d 575 (1991) (case began as a series of writs brought by the Legal Aid Society in state court pursuant to rights asserted under state court statutes and the state constitution).

[27]Dusky v. United States, 362 U.S. 402, 402–03 (1960).

[28]*Cf.*, Commonwealth v. Funk, 379 S.E.2d 371 (Va. App. 1989) (indigent defendant in rape case was not denied due process right to fair trial where his sanity was assessed by a psychologist rather than a psychiatrist).

[29]Competency issues are frequently resolved without a full hearing on the merits, with the judge relying on written reports submitted by court-appointed psychiatrists. A New York study concluded that confirmation hearings, where the prosecution and defense presented no live evidence and did not seek to controvert the findings of the assigned psychiatrists, took an average of about four minutes. Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO WASH. L. REV. 375, 396 (1985).

[30]*Twentieth Annual Review of Criminal Procedure*, 79 GEO. L. J. 902 (1991), *and see id.* at n.1388 for a review of conflicting circuit holdings on this issue.

[31]Affirming a judge's denial of a motion for a psychiatric examination: People v. Scott, 594 N.E.2d 217 (Ill. 1992) (defendant suffering from mental defect is competent to stand trial when his lack of cooperation with counsel is due to his unwillingness rather than his inability to do so); Hudson v. State, 801 S.W. 278 (Ark. 1991) (statement by defense attorney that defendant did not appreciate the seriousness of the charges due to his third-grade education and unspecific medical problem were not sufficient to believe that defendant's mental disease or defect would become an issue); McArthur v. State, 591 So.2d 135 (Ala. Ct. Appl. 1991) (defendant's testimony in his own defense showed he understood the facts and evidence involved in his case); Hall v. State, 808 S.W.2d 282 (Tex. App. 1991) (defendant's testimony showed he knew what the proceedings were about, he knew who the judge and district attorney were and their functions, indicating defendant had a rational and factual understanding of criminal proceedings); State v. Messenheimer, 817 S.W.2d 273 (Mo. App. 1991) (record reflected defendant was able to understand the proceedings against him and assist in his defense, despite his abnormal behavior); State v. Sharkey, 821 S.W.2d 544 (Mo. App. 1991) (trial court is vested with broad discretion with regard to ordering the examination of defendant to

The Supreme Court has held that due process is violated if a competency hearing is not held when a certain level of doubt arises regarding a defendant's competency.[32] The Court has not articulated the nature and amount of evidence necessary to establish such doubt[33] and has noted that the states may prescribe their own standards.[34] Scholars, and certainly practitioners, radically differ in interpreting this issue.[35]

State courts may set standards regarding procedure and proof in competency hearings.[36] However, most states[37] conform to the *Dusky*[38] criteria, along with the addition of a third test[39] developed in *Drope v. Missouri*.[40] The *Drope* test

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determine his competence to stand trial); State v. Amaya-Ruiz, 800 P.2d 1260 (Ariz. 1990) (denial supported where defendant was able to understand the nature of the proceedings and aid in his defense); People v. Hall, 168 A.D.2d 310 (N.Y. 1990) (defendant's attempted suicide did not, by itself, require a hearing to determine defendant's competency).

But see contra, cases affirming a decision granting a motion for a psychiatric examination: State v. Hatfield, 413 S.E.2d 162 (W. Va. 1991) (defendant's genuine attempt at suicide is sufficient evidence of irrational behavior to order a psychiatric examination); Boggs v. State, 575 So.2d 1274 (Fla. 1991) (Psychiatrist's opinion that defendant was not competent to stand trial constituted a reasonable ground to believe he was not competent to stand trial and thus, court was required to have defendant clinically examined and hold a hearing to determine his mental condition) and People v. Byron, 175 A.D.2d 728, 573 N.Y.S.2d 179 (1st Dept. 1991) (upon initial conclusion that competency evaluation was warranted, it was error for trial court to abort that process before it was terminated). *Cf.* Bruce J. Winick, "The Supreme Court's New Due Process Methodology in Criminal Cases: *Medina v. California* and the Burden of Proof in Incompetency to Stand Trial" (1992) (unpublished manuscript, on file with author), manuscript at 49.

[32]Drope v. Missouri, 420 U.S. 162, 180 (1975); Pate v. Robinson, 383 U.S. 375, 385 (1966).

[33]*Drope*, 420 U.S. at 180.

[34]*Id.* at 172–3; *Pate*, 383 U.S. at 385.

[35]When I was a staff attorney for the Legal Aid Society, Criminal Defense Division, my practice was to determine the "holistic" value of bringing the issue of potential incompetency to the court. The vast majority of times I chose not to raise the issue of competency because I determined that it was not in my client's best interest, and my client did not wish me to do so.

A study done by a group from the Institute of Law, Psychiatry & Public Policy at the University of Virginia showed that out of 202 felony cases, defense attorneys had significant doubts regarding the competency of their clients in 15% of the cases, but only referred 8% of those clients for evaluation. Evidence showed that the greater the seriousness of the offense, the more likely the attorneys were to refer for clinical evaluation. INSTITUTE OF LAW, PSYCHIATRY & PUBLIC POLICY (Report of Activities 1991) at 16. When researching this issue I was relieved to find theoretical, if not a great deal of case support for my position. *See, supra*, text accompanying footnotes 84–105; *also*, Enriquez v. Procunier, 752 F.2d 111 (5th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985).

[36]The Supreme Court recently held in Medina v. California, 112 S.Ct. 2572 (1992), that the state of California may constitutionally place the burden of proving incompetency upon the party so asserting (here the presumably incompetent defendant), even when the government has the burden of proving the defendant's competency to stand trial by a preponderance of the evidence. *See* U.S. *ex rel* SEC v. Billingsley, 766 F.2d 1015, 1023–24 (7th Cir. 1985); Brown v. Warden, 682 F.2d 348, 353–54 (2d Cir.), *cert. denied*, 459 U.S. 991 (1982).

[37]Matter of W.A.F., 573 A.2d 1284, 1265 (D.C. App. 1990); State v. Hewett, 538 A.2d 268, 269 (Sup. Jud. Ct. Me. 1988); People v. Kinder, 126 A.D.2d 60, 64, 512 N.Y.S.2d 597, 599 (4th Dept. 1987); State v. Schwartz, 519 A.2d 270, 271 (N.H. 1986); State v. Bock, 502 N.E.2d 1016, 1020 (Ohio 1986); State v. Guatney, 299 N.W.2d 538, 543 (Neb. 1980).

[38]*Dusky*, 362 U.S. at 402. See *supra*, text accompanying note 27, for a discussion of the *Dusky* criteria.

[39]Matter of W.A.F., 573 A.2d 1264, 1265 (D.C. App. 1990); People v. Schwab, 502 N.E.2d 815, 818 (Ill. App. 2 Dist. 1986); State v. Bock, 502 N.E.2d 1016, 1020 (Ohio 1988); State v. Guatney, 299 N.W.2d 539, 543 (Neb. 1980).

[40]Drope v. Missouri, 420 U.S. 162 (1972).

requires the defendant to be able to "assist in preparing his defense."[41] Dissatisfied with the imprecise tests set out by the Supreme Court, both legal and medical practitioners and scholars have attempted to quantify competency formulations. Lists of factors to be considered, such as those developed by the American Law Institute (ALI),[42] have been adopted in several jurisdictions.[43] Medical researchers have compiled evaluative criteria of functional performance or medical diagnoses to determine incompetency.[44] Finally in 1984, the American Bar Association (ABA) adopted the ABA Criminal Justice Mental Health Standards[45] (ABA Standards) in an attempt to clarify the legal and ethical quagmires faced by practitioners representing criminal defendants who may be incompetent to stand trial.

The request for a competency evaluation may be made by the defense attorney, the prosecutor, or the court. Indeed, the Supreme Court has held that the judge, in order to ensure the validity of the proceedings, has the duty to raise and resolve the issue of competency whenever there is a good faith or "bona fide" doubt about the defendant's competency.[46] A breach of this duty is considered unfair and a violation of due process. The ABA Standards support this contention by specifying that the judge has the ultimate responsibility for raising and determining the competency issue whether or not it was affirmatively raised by either party.[47]

Although some commentators have argued against the viability of allowing

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[41]*Id.* at 171.

[42]In the ALI test the court must determine:

1. That the defendant has the mental capacity to appreciate his presence in relation to time, place and things; and
2. That his elementary mental processes are such that he comprehends:

(a) that he is in a court of justice charged with a criminal offense;
(b) that there is a judge on the bench;
(c) that there is a prosecutor present who will try to convict him of a criminal charge;
(d) that he has a lawyer who will undertake to defend him against that charge;
(e) that he will be expected to tell to the best of his mental ability the facts surrounding him at the time and place where the alleged violation was committed if he chooses to testify and understands the right not to testify;
(f) that there is or may be a jury present to pass upon evidence adduced as to guilt or innocence of such charge or, that if he should choose to enter into plea negotiations or to plead guilty, that he comprehend the consequences of a guilty plea and that he be able to knowingly, intelligently, and voluntarily waive those rights which are waived upon such entry of a guilty plea; and
(g) that he has the ability to participate in an adequate presentation of his defense.

Bennett, *supra* note 29, at 377 n.11 (1985).

[43]N.J. REV. STAT. §2C:4-4 (1981); 18 U.S.C. § 4244-47; State v. Guatney, 299 N.W.2d 538, 545 (Neb. 1980) (*per curiam*) (Krivosha, C.J., *concurring*); Weiter v. Settle, 193 F. Supp. 318, 321-22 (W.D. Mo. 1961) (using similar criteria).

[44]Michael Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, (1993) (in press) (manuscript at 50-52); Winick, *supra* note 51 at 933.

[45]ABA STANDING COMM. ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984). [Hereinafter ABA STANDARDS]. Sections 7-4.1 to 7-4.15 address issues facing an attorney representing someone who may potentially be incompetent to stand trial.

[46]*Pate*, 383 U.S. at 385; *Drope*, 420 U.S. at 181.

[47]Bennett, *supra* note 29, at 388 (citing to ABA STANDARDS 7-4.2(a), 7-4.4(a)).

the prosecution to raise the issue of competency,[48] it is not proscribed by any legal normative standards. Concerns of prosecutorial abuse of such power are premised upon the recognition that raising the issue can trigger consequences potentially adverse to the defendant. Those concerns include: extended institutionalization,[49] continued incarceration while waiting for the psychiatric examination,[50] which often far exceeds the amount of time the defendant would be sentenced to on the pending charges,[51] loss of dignity,[52] a disadvantageous delay to the proceedings,[53] providing the prosecution with an opportunity to confront the defendant[54] and thus, possibly compromising the defendant's privilege against self-incrimination.[55]

The ABA Standards set forth the prosecutor's right and obligation to bring the issue of potential incompetence to the court's attention.[56] While recognizing the potential for prosecutorial abuse, the drafters of the ABA Standards rank procedural validity over potential misuse, believing that abuses can be confronted directly and resolved by addressing the abuser, rather than restricting an otherwise proper procedure.[57] The import of these concerns should not be taken lightly. However, when balanced with the therapeutic or anti-therapeutic effects of a prosecutorial request rather than a defense-initiated competency request, the weight given to the previously mentioned concerns may significantly shift.

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[48]*Id.* at 387–89; ABA STANDARDS 7-4.2(b).

[49]Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 101; Thomas M. Arvanites, *The Differential Impact of Deinstitutionalization on White and Nonwhite Defendants Found Incompetent to Stand Trial*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 311, 312–13 (1989).

In addition, there is an increased risk of the client contracting AIDS or other life-threatening diseases in the prisons and psychiatric facilities. One study reveals that one in seventeen New York City patients institutionalized in psychiatric centers many be infected with the AIDS virus. Prisons also house a disproportionate number of persons with AIDS. Michael L. Perlin and Joel A. Dvoskin, *AIDS-Related Dementia and Competency to Stand Trial: A Potential Abuse of the Forensic Mental Health System?*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 349, 350 (1990).

[50]At least one state, Virginia, has amended its laws so that forensic competency determinations are to be done on an outpatient basis if possible. Janet I. Warren, et al. *Criminal Offense, Psychiatric Diagnoses, and Psycholegal Opinion: An Analysis of 894 Pretrial Referrals*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 63, 64 (1991). *See also*, Bennett, *supra* note 29, at 392 (ABA Standards find that pre-trial commitment "is generally unnecessary to achieve a valid examination").

[51]Uphoff, *supra* note 49, at 101; Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 942 (1985).

[52]Winick, *supra* note 51, at 931, 944.

[53]Bennett, *supra* note 29 at 407–8; Winick, *supra* note 31 at 50.

[54]Uphoff, *supra* note 49, at 101.

[55]Bennett, *supra* note 29, at 399–407; Buchanan v. Kentucky, 483 U.S. 402, 423–4 (1987), *reh'g denied*, 483 U.S. 1044 (1987).

[56]Because the trial of an incompetent defendant is deemed invalid, the prosecutor has a heightened obligation of seeking justice. The prosecutor then must also disclose to defense counsel—and to the court—any information bearing on possible incompetence that does not rise to the level of doubt, but may influence the competency determination. Bennett, *supra* note 29, at 389. *See also*, ABA STANDARDS 7-4.2(b).

[57]Bennett, *supra* note 29, at 389.

Part IV. Ethical Considerations for Defense Attorneys

The chimerical nature of criminal defense litigation attracts attorneys who are comfortable making instantaneous decisions when the unexpected happens during trial, despite diligent preparation on a case. In doing so, defense attorneys must constantly weigh the balance between affirming their obligations to represent their client zealously[58] and respecting their duties as an officer of the court. There is no simple reformulation of this duality.[59] When confronted with the even murkier decision of whether to ask for a competency hearing,[60] defense attorneys are at risk when making a visceral response. Residual or even active symptoms of mental illness alone do not provide a basis for a defense attorney to determine that a client is incompetent to stand trial.[61] Lawyers seeking guidance in these matters may turn to the Model Code of Professional Responsibility, the Model Rules of Professional Conduct,[62] or the American Bar Association Criminal Justice Mental Health Standards, but they will not find a bright line upon which to base their course of action.

The Model Code of Professional Responsibility (Model Code) asserts that a lawyer's responsibilities may vary according to the intelligence or mental condition of the client.[63] The lawyer must consider all circumstances, and obtain all possible advice from the client to safeguard and advance the client's interests.[64] Where the impaired client has not been appointed a guardian, the Code says that an attorney may make decisions on the client's behalf.[65] However, there is no further clarification regarding which decisions the practitioner may ethically undertake.

The Model Rules of Professional Conduct (Model Rules) directs the attorney to maintain a "normal client-attorney relationship" with the impaired client.[66] This directive, according to the commentary, means that the attorney must allow the client as much autonomy as possible,[67] while recognizing that the attorney may take "protective . . . action . . . when the lawyer reasonably be-

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[58]MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) (hereinafter MODEL CODE).

[59]Uphoff, *supra* note 49, at 66 n.3, *citing* Commonwealth v. Stenhach, 514 A.2d 114, 125. "Attorneys face a distressing paucity of dispositive precedent to guide them in balancing their duty of zealous representation against their duty as officers of the court."

[60]Michael L. Perlin, *Fatal Assumption; A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 43, 49 (1992); Winick, *supra* note 51, at 941; Lisa M. Berman & Yvonne Hardaway Osbourne, *Attorney's Referrals for Competency to Stand Trial Evaluations: Comparisons of Referred and Nonreferred Clients*, 5 BEHAV. SCI. & L. 375 (1987).

[61]3 M. L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989), § 14.04, at 218–19; Uphoff, *supra* note 49, at 70; Bennett, *supra* note 29, at 378; Winick, *supra* note 51, at 924–32; ABA STANDARDS 7-175. *See also*, People v. Kurbegovic, 138 Cal. App. 3d 731, 758, 188 Cal. Rptr. 268, 283 (1982) (psychotic and delusional defendant claiming to be Captain of Aliens of America and the Messiah found competent to stand trial).

[62]MODEL RULES OF PROFESSIONAL CONDUCT (1983) hereinafter MODEL RULE(s).

[63]MODEL CODE EC 7-11.

[64]MODEL CODE EC 7-12.

[65]*Id.*

[66]MODEL RULE 1.14.

[67]MODEL RULE 1.14 commentary.

lieves that the client cannot adequately act in the client's own interest."[68] The Model Code and the Model Rules simply do not adequately respond to the defense attorney's dilemma in ascertaining ethical boundaries with regard to respecting a client's wish to forgo a competency evaluation or declining to make such a request if it is contrary to the client's best interests.

In the context of criminal representation, the criminal defendant has the right to make fundamental case decisions,[69] including what plea to enter, whether to waive a jury trial, to testify, and to appeal.[70] It would seem that the right to initiate, acquiesce, or reject the raising of the competency issue is also a fundamental case decision. The ABA Standards, however, do not support the defendant's autonomy in making this decision. Rather, Standard 7-4.2 requires that the defense counsel raises the competency issue *whenever* the attorney has a good faith doubt about a client's competency. Although the commentary recognizes that counsel's duty to represent the client's best interest effectively may be on a collision course with the obligation to inform the court of possible incompetency,[71] the ABA Standards resolve this dilemma in favor of informing the court.

Many practitioners[72] and some commentators find fault with the ABA Standards' position, regarding it as an unfair intrusion into the disabled defendant's right to zealous representation. Two distinguished scholars have resolved the ethical tension surrounding this controversy in similar, but subtly different ways.

Professor Uphoff believes that defense counsel should be permitted to make case-by-case determinations as to *raising* the competency issue.[73] In a thoughtful piece that compares the Model Code, the Model Rules, and the ABA Standards, as well as Wisconsin Supreme Court's decision in *State v. Johnson*,[74] he persuasively argues against the thrust of the ABA Standards which, he maintains, "support converting defense counsel into a friend to the court."[75] Professor Uphoff suggests that in any case where the defense attorney doubts the client's competency, the attorney must make a decision to respect the client's decision; assume a more paternalistic role; or raise the competency issue to the court. The decision should be based upon a careful analysis of the degree to which the perceived impairment impacts on the defendant's ability to understand the proceedings and assist counsel, the importance of the decision

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[68]Uphoff, *supra* note 49, at 75, citing to MODEL RULE 1.14 commentary.

[69]Uphoff, *supra* note 49, at 69.

[70]Jones v. Barnes, 463 U.S. 745, 751 (1983); MODEL RULE 1.2; ABA STANDARD 4-5.2 and commentary.

[71]ABA STANDARDS at 7-179; Uphoff, *supra* note 49, at 77.

[72]Personal communication with Robynn Abrams, a 10-year veteran of the New York City criminal defense bar (August 14, 1992). *See also*, *supra* note 45.

[73]Uphoff, *supra* note 49, at 98-99.

[74]133 Wis. 2d 207, 395 N.W.2d 176 (1986), *reversing* State v. Johnson, 126 Wis. 2d 8, 374 N.W.2d 637 (Ct. App. 1985) (rejecting the defense attorney's decision to forgo requesting an incompetency examination and finding his representation to be deficient).

[75]Uphoff, *supra* note 49, at 89.

being considered, the type of case, and the costs and benefits to the client in alternative courses of action.[76]

Professor Winick favors the explicit *waiver* of a competency determination over defense counsel's omission of raising the issue with the court.[77] This resolution allows the defendant (with defense counsel's concurrence) or the defense attorney (with the defendant's consent) to waive the defendant's right to a competency determination. Winick suggests that since competency is not static, but may be viewed as a continuum, the point at which the courts determine legal competence to stand trial should mark where the defendant can express a choice. That minimal degree of autonomy should be respected, especially when defense counsel concurs with the result and decision.[78] Professor Winick theorizes that counsel's concurrence eliminates detrimental decisions made by the client on the basis of delusional beliefs or irrational reasoning.

There are sound therapeutic reasons for believing that *making the request* is disadvantageous to the client-attorney relationship,[79] just as there are sound reasons for believing that the *granting of the request* is not in the client's best interests, even when the attorney believes that the client may be incompetent to stand trial or to take a plea.[80] Once the request is granted, the client is committed to a psychiatric facility until the evaluation is performed.[81] Defendants frequently do not return from competency evaluations until some 30 to 90 days have passed,[82] often resulting in a greater length of incarceration than could be served for the original charges.[83] During that period the client may lose his or her job,[84] be subjected to psychotropic drugs in order to render him or her

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[76]*Id.* at 99.

[77]Winick, *supra* note 51, at 959.

[78]*Id.* at 979.

[79]*See infra*, text accompanying notes 112–124.

[80]For the purposes of this article, I will not discuss whether the standard for competency to stand trial and competency to plead guilty should differ. Not all jurisdictions believe the standards to be identical. Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992), *cert. granted*, 113 S.Ct. 810 (1992). *Compare*, Delaware v. Shields, 580 A.2d 655 (Del. Super. Ct. 1990) (court found defendant met low trial competency threshold despite his multiple disabilities), with Blehm v. Colorado, 817 P.2d 988 (Col. Sup. Ct. 1991) (defendant's insanity adjudication did not invalidate his later plea on other charges, even though sanity had never formally been restored), and Minnesota v. Weisberg, 473 N.W.2d 381 (Minn. Ct. App. 1991) (jury verdict of Not Guilty By Reason on Mental Deficiency for sports bookmaking charge was not grounds to invalidate prior plea to the same type of charge).

However, I believe that the therapeutic jurisprudential reasons for deciding to request a competency exam remain the same, whether motivated by the knowledge that the prosecutor's case is weak, that a plea-bargain will result in substantially less incarceration time, or by the defendant's inability to acknowledge impairment.

[81]*Compare*, ABA STANDARDS 7-4.3 and commentary which suggest a preference for competency evaluations performed on an outpatient basis whenever possible. Bennett, *supra* note 29, at 383, 391; Warren et al., *supra* note 50, at 64 (in 1982 the Commonwealth of Virginia amended its laws to require judges to order forensic evaluations performed on an outpatient basis by special trained forensic clinicians, if possible).

[82]Winick, *supra* note 51, at 931 (30–60 days); Bennett, *supra* note 29, at 392 (15 to 60 days).

[83]*Compare*, Jones v. United States, 463 U.S. 354 (1983) (finding of not guilty by reason on insanity is sufficiently probative of mental illness to justify commitment to a forensic psychiatric facility for an indefinite period until the acquittee regains sanity or is no longer dangerous, even if that period of time exceeds the maximum term of incarceration possible for the crime alleged).

[84]Winick, *supra* note 51, at 947.

competent[85] or to insure facility security,[86] case investigation may cease,[87] pretrial motions that could expose the weakness of the case against the defendant cannot continue,[88] the defendant may suffer unwarranted stigmatization,[89] and be unjustly deprived of liberty even after returning from the competency examination.[90] Furthermore, if a competency hearing is eventually held,[91] it may force the attorney to testify as to confidential conversations with the client.[92] Most disturbingly, statistical research has borne out the fact that an overwhelmingly high percentage of clients sent for competency examinations are found competent to stand trial.[93] This seems to indicate that courts continue to engage in inappropriately "sanist"[94] behavior with regard to defendants suspected of having mental disabilities.

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[85]United States v. Charters, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990), *vacated* 829 F.2d 479 (4th Cir. 1987).

[86]Washington v. Harper, 494 U.S. 210 (1990) (limiting the right to refuse treatment in cases involving convicted prisoners).

[87]Winick, *supra* note 51, at 941 "Defense counsel, particularly overworked public defenders (who frequently represent incompetent defendants), too often neglect their incompetent clients once they have been committed."

[88]The New York State Law Revision Commission, along with the Criminal Justice Committee of the Association of the Bar of the City of New York Committee on Legal Problems of the Mentally Ill are presently studying this issue, and have submitted proposed amendments to the New York State Criminal Procedure Law.

[89]Warren et al., *supra* note 50, at 67; Winick, *supra* note 51, at 943-44; Uphoff, *supra* note 49, at 72; Winick, *supra* note 31 at 58.

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> [R]aising the competency question routinely deters the setting of bail, or results in the revocation of bail if bail has already been granted. Prosecutors . . . may invoke the competency process to obtain pretrial detention without bail of a defendant who might otherwise be released pending trial.

Winick, *supra* note 51, at 946.

[91]*See, supra* note 29 (judges often decide competency issues without live testimony).

[92]Darrow v. Gunn, 594 F.2d 767 (9th Cir. 1979), *cert. denied*, 444 U.S. 849 (1979); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); Clanton v. United States, 488 F.2d 1069 (5th Cir. 1974); United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964).

[93]Winick, *supra* note 51, at 932 (75%-96% of defendants referred for competency examinations are found competent); Bennett, *supra* note 29, at 391 (in virtually all jurisdictions studied, most defendants committed as incompetent are competent to stand trial).

[94]Sanism refers to

> the irrational prejudices that cause and are reflected in prevailing social attitudes toward mentally disabled persons and those so perceived. It infects our jurisprudence, our lawyering practices, and our forensic practices. It is largely invisible and largely socially acceptable. It is based upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our false use of ordinary common sense (OCS) and heuristic reasoning in our unconscious response to events in everyday life and the legal process.

Michael L. Perlin, *Therapeutic Jurisprudence: A Multi-Professional Perspective* (paper presented at the 18th International Congress on Law and Mental Health, Simon Fraser University, Vancouver, BC, Canada (June 23, 1992)), citing Perlin, *"On Sanism,"* 46 SMU L. REV. 373 (1992); Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990); Perlin and Dorfman, *supra* note 1.

To study the therapeutic impact of a competency request empirically, a multidimensional analysis of variables is necessary including: (1) the environment: courtroom, holding pens, and duration of the arraignment process; (2) the players: the defense attorney, prosecuting attorney, judge, court officers, and correctional officers; and (3) the procedure: a probable cause determination, arraignment on charges, and the potential disposition of the case. With regard to the criminal defendant, the analysis must consider the functional abilities, behaviors, or capacities to which the client must conform in order to be legally competent to stand trial. In other words, researchers must assert specific dispositional goals.[95] Given the increasing sophistication of forensic researchers in defining, ascertaining, and treating individuals to attain trial competency, I expect the significant numbers of defendants returned as competent to continue.

Part V. The Application of Therapeutic Jurisprudence

What insights can therapeutic jurisprudence give us to better assess the effect of requesting a competency examination? Consider the following: "Tee" has been involved in an incident that drew police officers to intervene and arrest the suspect.[96] "Tee" is brought to the precinct, then to central booking, and then to the holding pens behind the arraignment part.[97] This process takes at least 24 hours and probably more.[98] During this time, "Tee" generally does not receive any medical care, is isolated from friends, and is not informed of the charges upon which he or she is being held.

The cells behind the arraignment part routinely contain 10 or 15 similarly tired, disheveled men. If "Tee" is a female, youth, or transvestite, he or she is most often seated on a bench in the courtroom.[99] While seated in an interview

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[95]Elwork, *supra* note 3, at 177.

[96]Another critical junction ripe for analysis under the therapeutic jurisprudence, but beyond the scope of this article is the determination by the arresting officer whether to arrest the "suspect" or to bring the "ill person" to the hospital. Even the narrative description has therapeutic implications. *See generally*, DOROTHY HOLLAND & NAOMI QUINN, CULTURAL MODELS IN LANGUAGE & THOUGHT (1987).

For an interesting discussion of how judicial narrative determines a court's analysis of representational inaction cases, *see*, Lawrence A. Steckman & Peter Daily, *Attorney Inaction as Trial Strategy: A Study of the Effects of Judicial Use of Non-Action Neutral Language on the Analysis and Adjudication of Claims of Ineffective Assistance of Counsel Under the Sixth Amendment*, 6 J. SUFF. ACAD. L. 89 (1989).

[97]This scenario is based in large part on my own experience of being a staff attorney for the Legal Aid Society in Manhattan and my later representation of institutionalized psychiatric patients as a senior attorney for the Mental Hygiene Legal Service, also in Manhattan. However, my subsequent research in this area has shown that my experiences and recollections are similar to those in other large urban jurisdictions. *See generally, Arrest To Arraignment, supra*, note 4.

[98]*See, supra* text accompanying notes 18–26.

[99]Until fairly recently, women, youths, and transvestites arraigned in New York County were routinely seated on the benches in the courtroom so that they remained marginally segregated from the adult male arrestees. When so situated, they, unlike the men in the holding cells, were not even afforded the privacy of consultations held at the side of the pen; at least in the pens you can sometimes prevail upon other inmates to move away and give the illusion of privacy, whereas on the benches it was impossible to maintain such a facade.

About two years ago, the primary arraignment part for New York County was moved to a newly renovated courtroom equipped with a glass interview booth for clients sitting on the benches and a series of interview

booth or standing at the edge of the pen to discuss the case, the assigned attorney has only a few minutes to interview "Tee" prior to the arraignment. The decision to request a competency evaluation for "Tee" is made within that brief period.[100]

Counsel's decision whether to request a competency evaluation has a therapeutic impact on the defendant, creating expressed and unexpressed consequences. The initial consideration must be the defendant's role in the decision-making process and to what extent the attorney discusses competency concerns with the client. Most lawyering skills training materials teach attorneys to involve clients in critical decision making as a form of client empowerment.[101] Competing with this directive is the defense attorney's presumed right and duty as an officer of the court to state concerns over competency to the court, even over the defendant's objection.[102] However, making such a decision without input from the client, or at the very least informing the client of the unilateral decision, derogates the attorney-client relationship.[103] Even the decision to rank professional duty to the court over obligations to represent the client zealously surely impacts on the formation of a meaningful attorney-client relationship.[104]

Any defense attorney meeting a client for the first time is not a *tabula rasa*, but a complex individual who brings preconceived notions regarding the roles and posture of attorney and client to the interview. Therefore, inquiries into pretextual[105] motivators must be explored to facilitate empirical study. Once there is a body of empirical evidence, suggestions may be made for assessing that behavior[106] and conforming the law to reach the desired outcome. In this case, a balance granting the disabled defendant an acceptable modicum of autonomy without dismissing justice concerns is sought.

Pursuant to what pretext[107] does the defense attorney make the motion to

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booths adjoining the pens behind the courtroom.

For an interesting discussion of the lack of treatment programs for incompetent women defendants, and the constitutional implications that flow from such lack, *see* Henry J. Steadman, *Mental Health Law and the Criminal Offender: Research Directions for the 1990's*, 39 RUTGERS L. REV. 323, 335 (1987).

[100]Typically, New York City arraignments take between five and ten minutes. Williams v. Ward, 845 F.2d 374, 380 (2d Cir. 1988).

[101]DAVID A. BINDER, PAUL BERGMAN AND SUSAN PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991); ROBERT M. BASTRESS AND JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION-SKILLS FOR EFFECTIVE REPRESENTATION (1990).

However, there has been criticism leveled against the methodology used with potentially disabled clients. Anthony v. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7 (1990).

[102]ABA STANDARDS 7-4.2.

[103]Uphoff, *supra* note 49, at 72.

[104]*Id.* at 88-89.

[105]Pretextual in the sense that courts are willing to accept, either implicitly or explicitly, the testimonial dishonesty of court "players"—defense attorneys, prosecuting attorneys, court officers or correctional officers—because that testimony comports with their own "self-referential concepts of 'morality'" even if such stated ends do not meet the legal criteria needed. Perlin, *supra*, note 44; *see also*, Michael Perlin, *Morality & Pretextuality, Psychiatry & Law: Of "Ordinary Common Sense," Heuristic Reasoning and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991).

[106]Elwork, *supra* note 3, at 177.

[107]I use pretext to refer to the individual biases, unarticulated agendas or unexplained reasons why the defense attorney makes the request for a competency determination.

adjourn for psychiatric evaluation? The ABA Standards tell us that such a motion should be used exclusively to determine the defendant's competency, not for other tactical defense goals.[108] However, research in this area reveals the opposite result.[109] One study found that a majority of the 111 defense attorneys studied requested competency determinations as a tactical stall or for related strategic reasons.[110] Another study found that judges routinely grant such motions even when they believe the defendant to be competent, and that the request for an examination is a pretext for, at best, more time to investigate the case and, at worst, a means by which to substantially delay a difficult or unpleasant case.[111] The latter point is a painful one to make, but one that needs to be acknowledged. Many defense attorneys are overworked, underpaid, or simply not interested in a client whose needs consume an extraordinary amount of time.[112] Granting a motion for competency examination generally means an adjournment for another 30 to 90 days.[113] For overworked attorneys, a lengthy adjournment may be seen as a blessing.

Likewise, it is vital to identify the biases an attorney may rely upon in deciding whether to request a competency examination. The attorney may hold the belief that hospitalization is what a client "needs," irrespective of the client's view of hospitalization or medication.[114] The attorney may believe that the defendant will benefit from being sent to a hospital without consideration of the defendant's competency to proceed.[115]

Upon what indicia should defense counsel base a determination of client competency? Can the defense attorney distinguish between incompetency and mental illness?[116] Does the defense attorney harbor, to borrow from Professor Perlin, "sanist" beliefs about the mentally disabled? Does the defense attorney see communication difficulties as a barrier to formulating a competent defense?[117] In an effort to engage attorneys in the process of evaluating the

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[108]ABA STANDARDS 7-4.2(e).

[109]Winick, *supra* note 31, at 49.

[110]Berman & Osbourne, *supra* note 60, at 374, *citing* RONALD ROESCH & STEPHEN GOLDING, COMPETENCY TO STAND TRIAL (1980).

[111]Warren et al., *supra* note 50, at 68.

[112]Richard Bonnie, *The Competency of Criminal Defendants With Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 423 (1990).

On the prevalence of inadequate counsel representing the mentally disabled generally, *see*, Perlin, *supra* note 60.

[113]*See supra*, note 91.

[114]Warren et al., *supra* note 50, at 68 (defense attorney may believe that the best way to insure attention is given to even a competent client's mental, emotional, or substance abuse problems is to request a competency evaluation). *See also*, Norman Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 LAW & HUM. BEHAV. 1 (1978).

[115]Criminal defense attorneys are rarely aware of the forensic procedures that occur after the request for a competency examination is granted. *See supra* note 85.

[116]Berman & Osbourne, *supra* note 60, at 378. For an excellent discussion of functional determinacy for competency to refuse psychotropic medication, *see* Rivers v. Katz, 495 N.E. 2d 337 (N.Y. 1986).

[117]Berman & Osbourne, *supra* note 60, at 278. (Attorney certainty of client incompetency is significantly correlated to speech disorganization, whereas no other behavioral descriptors correlated with certainty of incompetence).

But see, Warren et al., *supra* note 50, at 65–66, finding that psychiatrists' opinions regarding incompetence

decision-making process in this area, a number of attitudinal variables must be investigated, including the attorneys' experience working with disabled persons, sensitivity to disability issues, anticipation of adjournment times, and knowledge of services rendered during the evaluation process. The implementation of therapeutic jurisprudential methodology will enable scholars to study these variables and their practical application.

Whatever the attorney's personal agenda is in requesting the competency evaluation, equally important issues include how the defendant interprets the competency request and, finally, in what way does the client's idiosyncratic interpretation affect his or her psychological response to the legal process?

Based upon my own experiences[118] and my research, I envision four general therapeutic reactions that may be triggered when a criminal defendant is consulted by defense counsel regarding a request for a competency evaluation. These categories of "competency request-reactive behavior"[119] are not mutually exclusive, and a defendant may react in any or all of these ways. The defendant's individual behavior patterns may be based on a number of variables, including the prior relationship between the individual defendant and the attorney, the extent and manner in which the attorney discussed the request with the defendant, the defendant's past encounters with the criminal justice system as well as the mental health system, and his or her idiosyncratic symptoms of mental disability.

The psycholegal categories of competency request-reactive behavior include the following:

The defendant may see the request for a competency examination as a betrayal on the part of the defense attorney, thereby disrupting the formation of a trusting, productive attorney-client relationship. This may jeopardize how the client responds to the psychiatric evaluation and any subsequent therapeutic intervention.[120] At best, the defendant may feel the attorney deceived him or her and so may refuse to cooperate fully with the attorney, or to disregard the attorney's counsel. It is likely that the client who reacts in this way will be resistant to any therapy unless he or she wants to "disrespect"[121] the attorney by convincing the doctors that the attorney was incorrect in his or her assessment of the defendant's competency.

The defendant may interpret the request by the attorney as a sympathetic response, demonstrating that the attorney cares about the client and wants to "help." However, this outcome may encourage the client to perceive him or herself as "sick" and in need of long-term care, creating a psychological resis-

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to stand trial was significantly related to the seriousness of the charge. For example, only 8% of those defendants charged with homicide were opined incompetent to stand trial, as opposed to 48% of those defendants held on public order and trespassing charges.

[118] *See supra* notes 5 and 97.

[119] This terminology has evolved from similar psycholegal terms used by social scientists. Lees-Haley, *supra* note 4 (investigating litigation response syndrome).

[120] *Compare, Medina*, 112 S.Ct. at 2582 (O'Connor, J., concurring) (expressing concern that defendants will feign incompetency in order to benefit from legal procedures).

[121] This terminology is drawn from new American slang; to "diss" someone, meaning to show disrespect by embarrassing someone in the eyes of his or her colleagues. FAB 5 FREDDY, FRESH, FLY, FLAVOR: WORDS AND PHRASES OF THE HIP HOP GENERATION at 19 (1992).

tance to therapeutic efforts to return to court as competent. If the defense attorney has assumed a traditional paternalistic position of power in the professional relationship, then the client may accept the pronouncement of incompetency.

The attorney may have framed the discussion of requesting a competency evaluation as a means to postpone a procedurally adverse disposition. Despite the ABA Standards' admonition against doing so,[122] in this instance, the client may view the attorney as a partner, or at least a co-conspirator, in manipulating the system. If so perceived, then the request for a competency examination may be internalized as an act to empower the client.

The dispositional outcome of the competency examination should reflect the client's sense of empowerment. It could be that the client's confirmatory sense of "beating the system" heightens the possibility of an inaccurate finding of incompetency. In most cases, I am confident that the forensic psychiatrists who evaluate criminal defendants are sophisticated enough to identify a malingerer. In any case, malingering merely leads to excessive institutionalization, something most "able-minded" persons would not endure very long, even to avoid prison.[123]

In the alternative, the request for a competency exam could, to the client, reflect the defense attorney's insignificant status. The defendant may believe the attorney to be incapable of "calling the shots," instead relying on the decision of unknown doctors. Under such circumstances, the client may lose all faith in the attorney and probably in the legal system, which is viewed merely as a pawn of the mental health system.[124] How such a view may ultimately affect the defendant's therapeutic response could be played either way; the client believing the doctors have control could find it advantageous to comply or, seeing the doctors as "part of the system," a client could choose to rebuke efforts to regain competency.

Conclusion

The arraignment process is clearly a critical junction of criminal law and mental health law. Decisions made during this initial period impact on future case disposition and profoundly affect the defendant's psychiatric health. By examining the arraignment process under the theory of therapeutic jurisprudence, practitioners and scholars can begin to formulate law reform strategies that reflect an interdisciplinary approach.

Defense attorneys facing the decision whether to request a competency evaluation, or to oppose a prosecution motion or a *sua sponte* order by the court granting the same, are standing on ethical quicksand. The attorney must in-

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[122]ABA STANDARDS 7-4.2(e).

[123]ONE FLEW OVER THE CUCKOO'S NEST by Ken Kesey comes to mind. Historically, the forensic psychiatric hospitals have been abysmal places. Keri A. Gould, *"Madness in the Street" Rides the Wave of Sanism* (book review) 9 N.Y.L. SCH. J. HUM. RTS. 567, 572 n.21 (1992) citing Scott v. Plante, 641 F.2d 117 (3d Cir. 1981) (discussing the conditions in the Vroom Building of Trenton State Hospital, which houses forensic psychiatric patients).

[124]This belief is further supported by the realization that the judges rely primarily on psychiatric reports to determine legal competency to stand trial. Arvanites, *supra* note 49, at 312.

volve the client in discussing contingency options and resolving the competency issue, despite the obstacles it may create.[125] Counseling the defendant in this manner will force defense attorneys to rethink their assessment of competency, question their motives in requesting a competency evaluation, and consider the holistic effect of the selected decision on the defendant.

[125]One commentator believes that such a decision should not be made until after the initial appearance, when there is more time to investigate the case or to talk to friends and family. Uphoff, *supra* note 49 at 107-08.

Unfortunately, practitioners do not always have the luxury of waiting as the judge or the prosecuting attorney may preempt them by asking for the competency evaluation. I think a better course of action is to discuss the issue with your client and map out a plan with foreseeable contingencies if you suspect that your client may be incompetent to stand trial.