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TWO STANDARDS OF COMPETENCY ARE BETTER THAN ONE: WHY SOME DEFENDANTS WHO ARE NOT COMPETENT TO STAND TRIAL SHOULD BE PERMITTED TO PLEAD GUILTY

Jason R. Marshall*

This Note argues that the present uniform standard of competency, competence to stand trial, be abolished in favor of two standards: competence to stand trial and competence to plea bargain. Part I traces the history of the competency standard by exploring its common law origins, the Supreme Court rulings that frame the debate, an academic reformulation of the competency inquiry, and the interests protected by requiring that defendants be competent to proceed through the criminal process. Part II contrasts the cognitive abilities, capacity to communicate with counsel, and courtroom behavior of defendants standing trial with those qualities required of defendants pleading guilty. Part III explores specific mental illnesses and how the symptomology of each illness determines a defendant's competence to plead guilty or stand trial. Part IV examines the benefits and dangers of plea-bargaining to both defendants and society and proposes a separate test for competence to plea bargain that would allow some defendants to avoid civil commitment and its threat to liberty. Finally, this Note concludes by arguing that a multi-tiered system provides defendants with more due process protections.

INTRODUCTION

Rulings by our nation's courts do not directly address whether a defendant who has been found incompetent to stand trial can still participate in a plea bargain. Rather, these rulings employ a uniform standard of competency, called "competence to stand trial" [hereinafter "CST"], to determine a defendant's ability.

A uniform standard of competency provides a convenient formula that courts can apply to adjudicate the mental fitness of criminal defendants. Under the CST standard, when competence is a visible issue the adjudicative process is deferred until the defendant regains a rational and factual understanding of the proceedings and is able to assist counsel.[1] There is no separate

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1. *See* Dusky v. United States, 362 U.S. 402, 402 (1960).

assessment for defendants seeking to resolve the criminal charges pending against them through expeditious judgment by pleading guilty. Thus, under the present system, criminal defendants are not assessed according to the particular capacities needed to plead guilty, and these capacities are not juxtaposed with the defendant's specific mental state and functional abilities.

This uniform standard was designed to preserve due process by requiring that defendants not only be competent to enter a guilty plea, but also be competent to stand trial. However, the CST standard sets the due process bar too high. It fails to acknowledge that pleading guilty generally does not require the same degree of cognitive ability, communication with counsel, or behavioral control that defendants need to stand trial. Defendants proceeding to trial are faced with demands and complex decisions that often exceed the stresses and choices faced by defendants pleading guilty.

Medical advances in understanding mental health diagnoses illustrate exactly how mental illness can affect the courtroom behavior and cognitive and communicative abilities of defendants, the dispositive factors in assessing competency. Commentators recognize that forensic clinicians[2] have significantly increased their ability to tailor competency evaluations according to the tasks required of criminal defendants in a particular case.[3] A uniform standard of competency ignores and disregards these medical advances. It does not properly put the defendant's mental state in context and is too narrow to accommodate the varying stages of judicial proceeding.

In a criminal justice system that largely fails (or chooses not) to recognize the complexity of the competency issue, civil commitment exists as a default for judges who are required to make difficult competency determinations applying the uniform standard. This can produce harsh outcomes for both the criminal defendant and the rest of American society. Under this standard, a significant number of defendants are found incompetent and are subsequently committed. Although not convicted of a crime, these defendants are often placed in highly secure facilities without privileges enjoyed by "patients" who do not have pending criminal charges. This deprivation of liberty is appropriate where public safety would be threatened by a less restrictive confinement. However, the broad CST standard can potentially lead to severe

2. Mental health practitioners, often psychiatrists and psychologists, experienced in evaluating disorders of the mind.

3. *See* THE EVOLUTION OF MENTAL HEALTH LAW 312–13 (Lynda E. Frost & Richard J. Bonnie eds., 2001).

deprivations of liberty not justified by a criminal conviction, and therefore poses a threat to the due process rights of the very same defendants it was designed to protect.

Similarly, the present system militates against the potential benefits of plea bargaining. By avoiding the risks and expenses of trial, plea bargaining confers a number of important benefits both on defendants and on our society. It is a vehicle by which the defense and prosecution can quickly dispose of the criminal case to the satisfaction of both parties (particularly in cases where the defendant's act is not at issue). Trial courts likewise benefit from clearing crowded dockets. The uniform standard of competency is overinclusive, and postpones some criminal cases that could be swiftly resolved to the advantage of all parties—defendants, prosecutors, society, and the administration of justice.

A uniform competency standard also puts our society at risk. There are some circumstances in which criminal defendants are not competent to stand trial but also not civilly committable because they are a danger neither to themselves nor to others. Thus, rather than securing conviction through plea bargaining, the criminal case is deferred while an alleged criminal offender is free, perhaps subject only to conditions of bail.

This Note proposes that the uniform standard of competency be abolished in favor of two competency standards, CST and "competence to plea bargain" [hereinafter "CPB"]. While several academics have also suggested a more flexible competency standard, there has not been enough discussion about the relationship between plea bargaining and competency.[4] This is both surprising and troubling, considering the substantial number of criminal cases resolved through plea bargaining.[5] By arguing for a separate CPB standard, this Note expands on the work of scholars who have

4. *See, e.g.*, Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 591 (1995) ("The criminal justice system . . . should adopt a flexible standard of competency, requiring only that the defendant possess the abilities that are necessary in the particular case."); Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 294 (1992) ("[C]ompetence in the criminal process is best viewed as two related but separable constructs, not as an open-textured single construct. . . . I draw a distinction between a foundational concept of competence to assist counsel, and a contexualized concept of decisional competence.").

5. According to the most recent statistics provided by the U.S. Department of Justice, in 2000, 879,000 felony cases were resolved through guilty pleas in state courts and 68,156 felony cases were resolved through guilty pleas in federal courts. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 2002 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS § 5, *available at* http://www.albany.edu/sourcebook/pdf/section5.pdf (on file with the University of Michigan Journal of Law Reform).

defined circumstances in which decisions made by defendants pleading guilty to criminal charges are less taxing than those required at trial.[6]

Replacing the uniform standard with two separate competency tests also pays proper respect to individuals with mental illness by identifying how their specific symptoms affect the appropriateness of a formal adjudication. In other words, it better utilizes the skills of forensic clinicians by providing them with more guidance in their assessment of cognitive ability, communication with counsel, and courtroom behavior. Additionally, a separate test for CPB safeguards criminal defendants from the loss of liberty through civil commitment and helps to fulfill society's desire and the courts' mandate to resolve criminal matters expeditiously.

Part I of this Note traces the history of the competency standard; it looks at the common law origins of the incompetency doctrine, the Supreme Court rulings that frame the competency debate, an academic reformulation of the competency inquiry, and the interests protected by requiring that defendants be competent before proceeding through the criminal process. Part II contrasts the cognitive abilities, capacity to communicate with counsel, and courtroom behavior required of defendants proceeding to trial with those qualities required of defendants pleading guilty. Part III explores specific mental illnesses and how the symptomology of each illness determines a defendant's competence to plead guilty or stand trial. Finally, Part IV examines the benefits and dangers of plea bargaining to both defendants and society, and proposes a separate test for CPB that would allow some defendants to avoid civil commitment and its threat to liberty.

I. HISTORY AND PRESENT STANDARD

A. Due Process Inherited

English common law courts gave birth to the modern incompetency doctrine out of concern for legal formalism.[7] Beginning as

6. *See* Winick, *supra* note 4, at 590–92; Robert L. Denney & Timothy F. Wynkoop, *Clinical Neuropsychology in the Criminal Forensic Setting*, 15 J. HEAD TRAUMA REHABILITATION 804, 812 (2000) ("[P]leading guilty will require less cognitive skills than a lengthy trial. Before concluding a defendant's competency, one must have a sense of what demands will be placed on him or her through the particular legal proceedings.").

7. *See* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 39 (2002).

far back as the 14th century, defendants could be tried only after entering a plea of guilty or not guilty to the charges leveled against them.[8] When defendants "stood mute" rather than answering to the charges, the courts did not proceed to trial but rather undertook an investigation to determine if the defendant was "mute of malice" or "mute by visitation of God."[9]

A finding of "mute by visitation of God" referred to defendants who were deaf, mute, or insane.[10] These defendants were excused from trial on account of their physical or mental condition.[11] A finding of "mute of malice" consisted of defendants whom the courts believed were capable of understanding the charges but wanted to avoid trial and its potentially unpleasant outcome.[12] In medieval times, courts compelled these defendants to enter a plea by employing several unpleasant methods at their disposal. Most often, courts employed a technique known as *peine forte et dure*, which called for the placement of increasingly heavy weights on the defendant's chest until he entered a plea.[13] Other methods involved starvation or confinement in a small cell.[14]

Although it was initially conceived to conform to the requirements of entering a plea, the doctrine of incompetency to stand trial matured to resemble modern competency standards. Common law courts began to focus on the capability of a defendant to participate meaningfully in his defense, and to understand the pending criminal charges.[15] The depth and specificity with which 18th century courts inquired into the competence of defendants is remarkable. As the ABA Criminal Justice Mental Health Standards observed,

> Common law judges in the eighteenth century were, in retrospect, "surprisingly sophisticated" in the evidence they received

8. *Id. See also* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 120 (2d ed. 1997); PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 264 (Michael G. Fisher ed., 2d ed. 1991).

9. POYTHRESS, *supra* note 7, at 39; MELTON ET AL., *supra* note 8, at 121.

10. POYTHRESS, *supra* note 7, at 39; MELTON ET AL., *supra* note 8, at 121.

11. POYTHRESS, *supra* note 7, at 39; MELTON ET AL., *supra* note 8, at 121.

12. POYTHRESS, *supra* note 7, at 39; APPELBAUM & GUTHEIL, *supra* note 8, at 264.

13. *See* APPELBAUM & GUTHEIL, *supra* note 8, at 264; MELTON ET AL., *supra* note 8, at 120–21. *See also* ARTHUR MILLER, THE CRUCIBLE 125 (Penguin Books 1995) (1952) (referencing the pressing to death of Giles Corey during the 1692 Salem "Witch Trials").

14. *See* POYTHRESS, *supra* note 7, at 39.

15. *See* APPELBAUM & GUTHEIL, *supra* note 8, at 264; MELTON ET AL., *supra* note 8, at 121; AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 160–61 (1986) [hereinafter ABA STANDARDS].

> to adjudge the issues of incompetence: they considered many of the factors still used today to determine competence, including the defendant's medical history, military and social background, behavior and appearance at trial, and testimony from lay and professional witnesses who knew or had observed the defendant.[16]

In special competency hearings, twelve-man juries assessed the competence of defendants based on this evidence.[17] Defendants found incompetent were incarcerated until they became fit to proceed to trial while defendants found competent proceeded to trial.[18] Thus, while common law courts never advanced the term "due process" as the basis for establishing competency hearings, it is clear that they shared modern concerns about preserving the dignity of the criminal justice system.

Although judges rather than juries conduct competency hearings in the present-day United States, CST inquiries have come to dominate the criminal process. With an estimated 25,000 to 60,000 evaluations for CST performed annually in the United States, CST evaluations have been called "the single most significant mental health inquiry pursued in the criminal justice system . . . ."[19]

B. Setting the Bar: The Supreme Court's Competency Standard

1. Dusky, Pate, and *Drope*—The standard for evaluating CST has not changed significantly since 1960, when the United States Supreme Court articulated the definition of a competent defendant in *Dusky v. United States.*[20] According to *Dusky,* judges may not ascertain competency based only upon the finding that "the defendant [is] oriented to time and place and [has] some recollection of events."[21] Implicating due process, this landmark ruling held that "the test must be whether he has sufficient present

16. ABA STANDARDS, *supra* note 15, at 160–61.

17. *See* APPELBAUM & GUTHEIL, *supra* note 8, at 264.

18. *See id.*

19. Patricia A. Zapf & Jodi L. Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation of Competency to Stand Trial,* 21 BEHAV. SCI. & L. 351, 352 (2003); *see also* Richard Rogers et al., *Recent Interview-Based Measures of Competency to Stand Trial: A Critical Review Augmented with Research Data,* 19 BEHAV. SCI. & L. 503, 503 (2001); Paul G. Nestor et al., *Competence to Stand Trial: A Neurophsychological Inquiry,* 23 LAW & HUM. BEHAV. 397, 397 (1999).

20. 362 U.S. 402 (1960).

21. *Id.* at 402.

ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[22]

This opinion differs substantially from many of the momentous rulings handed down by the Court. First, the entire opinion is less than a half-page long. Second, it is a per curium opinion, thereby lacking the style, substance and analysis that is characteristic of an opinion authored by a specific justice. Last, this new competency test, which sets the constitutional bar for trying defendants, was not an invention of the Court. As the *Dusky* opinion reveals, this test was formulated by the Solicitor General and adopted word-for-word by the Court.[23]

When the Court revisited the issue of competency almost six years later, in *Pate v. Robinson*,[24] it implied that trying an incompetent defendant was a violation of due process. Justice Clark, authoring the majority opinion, wrote that "[t]he State concedes that the conviction of an accused person while he is incompetent violates due process . . . ."[25] *Pate* held that a criminal defendant's Sixth Amendment right to a fair trial requires that a competency hearing be held when there is "bona fide doubt" about a defendant's competency.[26] As Professor Stephen J. Morse noted, *Pate* "cement[ed] the constitutional status of the prohibition against trying an incompetent defendant."[27]

In *Drope v. Missouri*,[28] a unanimous Court clarified the *Dusky* test and the duty of trial judges to safeguard incompetent defendants from adjudication. Defendants are prohibited from proceeding to trial if they do not possess "the capacity to understand the nature and object of the proceedings against [them], to consult with counsel, and to assist in preparing [their] defense."[29] To this end, trial judges have an ongoing duty to observe the defendant for evidence suggesting incompetency.[30] Although there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," judges must monitor the

22. *Id. See infra* note 65 and accompanying text for Professor Richard J. Bonnie's interpretation of "rationality" after *Godinez v. Moran*, 509 U.S. 389 (1993).
23. *See Dusky*, 362 U.S. at 402.
24. 383 U.S. 375 (1966).
25. *Id.* at 378.
26. *Id.* at 385.
27. Stephen J. Morse, *Involuntary Competence*, 21 BEHAV. SCI. & L. 311, 313 (2003).
28. 420 U.S. 162 (1975).
29. *Id.* at 171.
30. *Id.* at 181.

behavior of defendants throughout the trial process and use their judgment to decide if an evaluation for competency is warranted.[31]

All jurisdictions in the United States adhere to the two-pronged competency test established by *Dusky* and refined in these subsequent decisions. A judge must evaluate: (1) the defendant's capacity to understand the charges and nature of the criminal proceedings; and (2) the defendant's ability to assist counsel in defending against the charges. The *Dusky* test is followed verbatim by a number of state statutes and courts, while others deviate from the exact wording but conform to its constitutional mandates.[32]

2. Godinez v. Moran—The Supreme Court granted certiorari in *Godinez v. Moran*[33] to resolve divisions among the federal circuit courts and state courts of last resort over the competency standard required for defendants to plead guilty or waive counsel.[34] The Ninth Circuit Court of Appeals held in *Godinez* that *Dusky* did not provide sufficient due process protection for some mentally challenged defendants.[35] Following the lead of courts that applied a heightened standard to defendants seeking to waive constitutional rights, the Ninth Circuit had held that defendants needed to possess the capacity for "reasoned choice" among the avenues available to resolve the pending charges.[36]

Reaffirming its uniform standard of competency, the Supreme Court held in *Godinez* that the level of competence required for defendants to plead guilty or waive their right to counsel is no greater than that required to stand trial.[37] Thus, the *Dusky* standard—rational and factual understanding of the proceedings and ability to assist counsel—satisfies due process when the defendant is seeking to waive any constitutional right. In analyzing the differences between pleading guilty and going to trial, the majority reasoned that "while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of trial."[38] The Court explicitly reminded states that, although due process is satisfied when a defendant has passed the

31. *Id.* at 180.

32. *See* MELTON ET AL., *supra* note 8, at 121; Winick, *supra* note 4, at 576–77; POYTHRESS ET AL., *supra* note 7, at 1. *See also* MO. REV. STAT. § 552.020 (2003); CAL. PENAL CODE § 1367 (West 2000); Mora v. State, 814 So. 2d 322, 327 (Fla. 2002); Com. v. Robbins, 727 N.E. 2d 1157, 1161 (Mass. 2000).

33. 509 U.S. 389 (1993).

34. *Id.* at 395–96.

35. *Id.* at 397.

36. *Id.*

37. *Id.* at 399.

38. *Id.* at 398.

Dusky test and been found fit to stand trial, states could enact more stringent requirements for assessing a defendant's competence to plead guilty or waive counsel.[39] Last, the Court avoided a precise dissection of the *Dusky* standard, but it expressly rejected the notion that competency evaluations need to be a context-based inquiry tailored to the specific decisions a defendant will be asked to make in adjudicating the criminal charges and the defendant's mental fitness.[40]

Justice Blackmun, in an impassioned dissent, rallied around the mental health practitioners on the front lines and perhaps laid the groundwork for a future modification of the competency standard, including this Note's proposal. Rejecting the majority's interpretation of *Dusky* as simplistic, Blackmun echoed the writings of progressive law professors and forensic clinicians who argued that competency was a context-based inquiry.[41] Observing that "[c]ompetency for one purpose does not necessarily translate to competency for another purpose," Blackmun rejected the majority's deviation from the Court's precedent that competency evaluations be tailored to the proceeding at hand.[42] Considering the degree to which questions about competency permeate the criminal justice system, it is not surprising that scholars have joined Blackmun over the last ten years in criticizing the majority's uniform standard of competency.[43]

Shortly after *Godinez*, at least one academic was reluctant to interpret the decision as establishing a unitary standard for all criminal competency inquiries. Professor Bruce J. Winick seemed to view *Godinez* as standing for the narrow proposition that due

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39. *Id.* at 402.

40. *See id.* ("While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence . . . the Due Process Clause does not impose these requirements."); *see also* David L. Shapiro, *Ethical Dilemmas for the Mental Health Professional: Issues Raised by Recent Supreme Court Decisions*, 34 CAL. W. L. REV. 177, 180–81 (1997) ("The *Godinez* decision was quite unusual in that the majority rejected the concept . . . that competence is tied to specific functions to be performed .... [T]he *Godinez* Court noted and rejected this in a rather 'cheap shot' at mental health professionals ....").

41. *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

42. *Id.*

43. *See* Michael L. Perlin, *Beyond Dusky and Godinez: Competency Before and After Trial*, 21 BEHAV. SCI. & L. 297, 299 (2003) (observing that *Godinez* may have clarified competency but was "misguided"); Shapiro, *supra* note 40, at 182 (1997) (*Godinez* deviates from the "accepted standard of care" charged to practitioners evaluating defendants for competency); *see also* Jennifer W. Corinis, Note, *A Reasoned Standard for Competency to Waive Counsel after Godinez v. Moran*, 80 B.U. L. REV. 265, 283–84 (2000); Michael L. Perlin, *"Dignity was the First to Leave": Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61 (1996) [hereinafter Perlin, *Dignity*].

process may not require a higher standard for CPB than CST.[44] Because the Court did not specifically address whether CPB could constitute a narrower standard than CST under some circumstances, Winick observed that *Godinez* left the door open for courts to undertake a contextual evaluation of competency.[45] This is a difficult argument to make given the majority's explicit rejection of tailored competency evaluations.[46]

3. Knowing and Voluntary—Godinez made clear that two inquiries are involved in evaluating the constitutionality of a guilty plea.[47] The first inquiry requires that defendants be evaluated for CST under the *Dusky* standard.[48] The second inquiry, informed by the Court's jurisprudence, calls for an analysis of whether the guilty plea is "knowing and voluntary."[49]

Given the many fundamental rights waived by defendants who plead guilty—the right to a jury trial, the privilege against self-incrimination, and the right to confront accusers, among others—the Court may have been concerned that its lengthy discussion about CST would cause some courts to blur "rational and factual understanding" with "knowing and voluntary." Accordingly, the Court articulated the purpose of requiring two inquiries:

> The focus of a competency inquiry is the defendant's mental capacity; the question whether he has the *ability* to understand the proceedings. The purpose of the "knowing and voluntary" inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.[50]

Godinez makes it more difficult for criminal defendants to waive constitutional rights because they need an *actual* understanding of the constitutional rights they are waiving—as opposed to just the *ability* to understand these rights.[51] This more stringent requirement

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44. Winick, *supra* note 4, at 590.

45. *Id.* at 590–91 ("To the extent that *Godinez* held that courts must apply the same standard of competency across the board, regardless of the particular issue or nature of the case, it is open to serious criticism.").

46. *See supra* note 40 and accompanying text.

47. *See Godinez*, 509 U.S. at 400–01.

48. *See id.* at 400.

49. *Id.* at 401 n.12; *see also* Santobello v. New York, 404 U.S. 257, 261 (1971) ("The plea must, of course, be voluntary and knowing . . . .").

50. *Godinez*, 509 U.S. at 401 n.12.

51. *See* Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1590 (2000) ("After *Godinez* . . . if the defendant waives any constitutional rights, he or she must not only have the

applies with equal force to defendants standing trial. Earlier in its opinion, the Court lists circumstances in which defendants who proceed to trial can relinquish these same constitutional rights by electing to take the witness stand and waive their privilege against self-incrimination, selecting a bench trial instead of a jury trial, or declining to cross-examine accusers.[52] Thus, all defendants who waive a constitutional guarantee, whether pleading guilty or not, may need to meet this higher threshold of understanding rights waived.

C. Professor Bonnie's Approach

In 1992, Professor Richard J. Bonnie proposed a novel theory for assessing competence that is frequently cited by academics and practitioners examining the issue of competency in the criminal process.[53] Bonnie argued that competence should be evaluated using two separate but related constructs: competence to assist counsel and decisional competence.[54]

Under Bonnie's reformulation, competence to assist counsel encompasses all of the requirements that a defendant, at minimum, must possess in order to proceed.[55] Due process is satisfied upon a showing that the defendant has the capacity to: (1) understand the charges, the purpose of the criminal process and the adversary system, especially the role of defense counsel; (2) appreciate his situation as a defendant in a criminal prosecution; and (3) recognize and relate pertinent information to counsel concerning the facts of the case.[56] According to Bonnie, and following *Dusky*

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capacity to understand, but must actually understand, the consequences of the waiver decision and arrive at the decision voluntarily.").

52. *See Godinez*, 509 U.S. at 398.

53. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992); *see, e.g.*, Morse, *supra* note 27, at 314; Denise L. Mumley et al., *Five Year Research Update (1996–2000): Evaluations for Competence to Stand Trial (Adjudicative Competence)*, 21 BEHAV. SCI. & L. 329, 330 (2003); Richard E. Redding & Lynda Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 359–60 (2000); Ian Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand Trial*, 19 INT'L J. L. & PSYCHIATRY 39, 49–50 (1996); Ronald Roesch et al., *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competency Model*, 2 PSYCHOL. PUB. POL'Y & L. 96, 103–04 (1996).

54. *See* Bonnie, *supra* note 4, at 294.

55. *See id.* at 297.

56. *See id.*

and ancient common law, adjudication is barred when defendants are unable to assist counsel in their defense.[57]

Decisional competence concerns the specific choices defendants must make throughout the adjudicative process.[58] Unlike many decisions made by attorneys, these are choices that only defendants can make: decisions such as whether to plead guilty, or whether to waive certain constitutional rights.[59] Accordingly, in some situations a defendant may be found competent to assist counsel but not competent to make these weighty decisions.[60] Lack of decisional competence, in contrast to inability to assist counsel, does not necessarily preclude adjudication.[61] This is because Bonnie views decisional competence as a context-dependent inquiry.[62] In other words, whether decisional competence is required depends on the decisions that a defendant is required to make at that particular stage of the criminal justice process. Thus, defendants who do not seek to waive any constitutional protections are not required to possess decisional competence.[63]

Bonnie revisited his theory after *Godinez* and observed that the Court rejected his two-tiered framework in favor of a single standard that absorbed the concept of decisional competence.[64] He interpreted the Court's jurisprudence as mandating the following requirements for a defendant to be decisionally competent:

(1) A capacity to understand information relevant to the specific decision at issue;

(2) A capacity to appreciate the significance of the decision as applied to one's own situation;

(3) A capacity to think (logically) about the alternative courses of action; and

(4) A capacity to express a choice among alternatives.

Perhaps trying to make sense of an opinion that has left many questions unanswered, Bonnie contended that collectively this list "operationalize[s] the 'rationality' requirement" that the Court addressed in *Godinez*.[65]

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57. *See* POYTHRESS, *supra* note 7, at 47.
58. *See* Bonnie, *supra* note 4, at 298.
59. *See infra* note 76.
60. *See* Bonnie, *supra* note 4, at 298.
61. *See id.* at 302.
62. *See id.* at 305–07.
63. *See id.* at 308–11.
64. *See* POYTHRESS, *supra* note 7, at 47–48.
65. *Id.* at 48.

Some commentators who adhere to Bonnie's contextual competency formulation have argued that adjudication can also hinge on the complexity of the case.[66] For example, while a defendant may be able to understand the proceedings and what facts to share with counsel in a misdemeanor or common felony case, the same defendant might be overwhelmed if charged with a more complicated crime such as conspiracy or fraud.[67] Under this theory, the cognitive ability of a criminal defendant is a variable that must be considered in any competency evaluation.[68]

D. Interests Protected by the Competency Requirement

With physical liberty at stake, both courts and individual criminal defendants have a strong interest in ensuring that only competent persons are allowed to proceed through the criminal justice system. This interest is also a fundamental right. The Sixth Amendment of the United States Constitution, applied to the states through the Due Process Clause of the Fourteenth Amendment, guarantees that defendants must receive a fair trial.[69] It violates due process to convict defendants whose mental impairments prevent them from communicating exculpatory or mitigating information to their attorneys.[70] Trying incompetent defendants or accepting guilty pleas from them could produce a significant number of erroneous convictions, something with which all individual defendants are obviously concerned.[71]

The defendant's liberty interest in not being tried while incompetent converges with society's concern for preserving the sanctity

66. *See* Freckelton, *supra* note 53, at 50; Redding & Frost, *supra* note 53, at 360–61.

67. *See* Freckelton, *supra* note 53, at 50; Redding & Frost, *supra* note 53, at 360–61.

68. *See* Freckelton, *supra* note 53, at 50.

69. U.S. CONST. amend. VI, XIV. *See* Massey v. Moore, 348 U.S. 105, 108 (1954) ("The requirement of the Fourteenth Amendment is for a fair trial . . . no trial can be fair that leaves the defense to a man who is insane . . . ."); *see also* Estes v. Texas, 381 U.S. 532, 540 (1965); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("No right ranks higher than the right of the accused to a fair trial.").

70. *See* Corinis, *supra* note 43, at 270; *see also* Bonnie, *supra* note 4, at 295 ("To proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his or her attorney and to the court would be unfair to the defendant and would undermine society's independent interest in the *reliability* of its criminal process."). The ABA Criminal Justice Mental Health Standards qualifies this statement by emphasizing that, to relate these facts, criminal defendants need an actual understanding, even if it is minimal one, of the proceedings, the critical nature of presenting defenses, and differences that would result from conviction or acquittal. ABA STANDARDS, *supra* note 15, at 170.

71. *See* Winick, *supra* note 4, at 575–76.

and fairness of the criminal process. First, both individual defendants and society have an interest in what Bonnie calls "client autonomy"—decisions that attorneys cannot make for the defendant, such as how to plead, whether the case should be tried before a jury or judge, and whether the defendant will take the stand.[72] Second, all persons subject to the criminal law have a stake in avoiding erroneous convictions. Arbitrary systems of justice leave everyone vulnerable to unjust sanctions. Indeed, the criminal justice system would splinter if public confidence in the reliability of the law were undermined.[73] Third, if an incompetent defendant were wrongly convicted, the perpetrator actually responsible for the crime would remain undetected and at liberty to commit additional offenses. Last, the conviction and sentencing of incompetent defendants who fail to appreciate that punishment is being imposed for their wrongdoing runs contrary to our tenets of justice.[74]

II. FACULTIES REQUIRED TO PROCEED: COMPETENCE TO PLEA BARGAIN (CPB) VS. COMPETENCE TO STAND TRIAL (CST)

Permitting defendants to plead guilty when they might not be competent to stand trial is justified by three major differences between the faculties and conduct of defendants pleading guilty and defendants proceeding to trial: (1) cognitive ability; (2) communication with counsel; and (3) courtroom behavior. While these differences are enumerated separately for ease of discussion, they are closely related and may overlap depending on a particular defendant's condition.[75]

A. Cognitive Ability

Defendants who choose to plead not guilty but subsequently waive constitutional rights at trial need to possess a more meaningful

72. *See* Bonnie, *supra* note 4, at 296.

73. Professors Bonnie and Winick refer to this as preserving the "dignity" of the criminal process. *See* Bonnie, *supra* note 4, at 295; Winick, *supra* note 4, at 576.

74. *See* Corinis, *supra* note 43, at 270.

75. *See, e.g.*, Karen E. Whittemore et al., *An Investigation of Competency to Participate in Legal Proceedings in Canada*, 42 CAN. J. PSYCHIATRY 869, 872–73 (in small sample of 76 patients, all individuals found unfit to stand trial were determined incompetent to plead guilty under Canadian legal standards).

understanding of the rights waived because they are called upon to make more complex decisions about their defense.[76] *Godinez* requires all defendants to have an actual understanding of the constitutional rights they waive and therefore due process is only satisfied when defendants are specifically evaluated for this understanding.[77] If a defendant standing trial waives his right to a jury in favor of a bench trial, for example, the trial court must ensure that the defendant understands why it is advantageous to discard trial by jury. This is not to say that every nuance of the defense needs to be understood.[78] Indeed, there are many strategic decisions that defendants can make in collaboration with their attorneys.[79] However, if autonomy is truly part of the due process calculation, defendants alone must decide to waive constitutional rights at trial. Surely the accompanying analysis of this process demands greater cognitive abilities.[80]

Defendants who plead guilty, on the other hand, should only be required to demonstrate a rudimentary understanding of the rights being waived. Of primary importance to defendants pleading guilty is the reduced sentence they will receive through plea bargaining and the maximum penalty they are subject to at trial. Thus, to borrow from the above example, there is no need for these defendants to grasp a significant understanding of the benefits of a bench trial as opposed to a jury trial because these defendants are competent to understand that the deal offered by the prosecution is more advantageous than *any* trial. Winick briefly addressed the futility of holding defendants who plead guilty to the same standard as defendants at trial:

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76. For example, a criminal defendant may choose to waive one or more of the following rights, among others: right to a trial by jury, right to remain silent and right to confront one's accusers.

77. *See* MELTON ET AL., *supra* note 8, at 163–64 (while the unitary standard does not require clinicians to "adjust" their evaluations depending on if the defendant will plead guilty or not, clinicians should "quiz" defendants about their understanding of rights waived by pleading guilty). It is unclear whether this inquiry into understanding of rights waived is embedded in plea colloquies conducted by judges when considering whether a guilty plea is rendered knowingly and voluntarily.

78. For instance, the author agrees with Bonnie's example that a defendant who waives a jury trial need not understand jury selection and peremptory challenges. *See* Bonnie, *supra* note 4, at 308.

79. *See Godinez*, 509 U.S. at 398.

80. In fact, a recent article in the *Journal of Head Trauma Rehabilitation* categorically stated that "pleading guilty will require less cognitive skills than a lengthy trial." Denney & Wynkoop, *supra* note 6, at 812. Unfortunately, this statement was not accompanied by any supporting empirical data.

> [A] complete understanding of the criminal prosecution is unnecessary in the overwhelming majority of cases that are resolved by a guilty plea. Defendants who plead guilty do not need a high level of understanding concerning the trial process, because they will not participate in it. . . . [I]n a substantial number of cases, mentally ill defendants, like defendants generally, are probably guilty and lack a credible defense. For these defendants, a guilty plea is almost always the best option.[81]

Godinez settled the issue that defendants pleading guilty need to have the ability to understand the constitutional rights waived and actually understand what these rights are meant to protect.[82] However, the minutiae of constitutional rights waived—for example, whether a bench trial would be advantageous given the complexity of charges and presence of scientific evidence, the calculated pros and cons of taking the stand in one's own defense, which prosecution witnesses should not be cross-examined—exceeds the scope of understanding required to satisfy due process for defendants pleading guilty.

The fact that understanding the constitutional rights waived plays a less significant role in plea bargained cases is illustrated by the typical interplay between judges and defendants proffering guilty pleas. When a defendant pleads guilty, a court's function as gatekeeper is to ensure that the defendant understands the ramifications of a guilty plea.[83] To this end, judges are generally required to question defendants who plead guilty.[84] The primary focus of this questioning, however, is not on a defendant's waiver of specific constitutional rights but on whether the defendant understands the causal relationship between pleading guilty and adjudication. In other words, defendants must understand that a guilty plea will result in a conviction, leaving them vulnerable to incarceration and collateral consequences such as criminal fines, deportation, and registration as a sex offender.[85]

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81. Winick, *supra* note 4, at 590.

82. *See* discussion *supra* Part I.B.3.

83. *See, e.g.*, Montana v. Garner, 36 P.3d 346, 355–56 (Mont. 2001).

84. *See infra* note 215 and accompanying text.

85. There are, of course, some cases in which a judge will suspend a guilty finding by the court conditioned on the defendant's completion of a particular course of action (e.g., staying out of trouble, attending drug and alcohol program, or making restitution).

B. Communication with Counsel

A defendant's capacity to interact with counsel and relate pertinent information can profoundly influence the outcome of both plea bargains and trials. For defendants pleading guilty, facts and descriptions of the alleged crime and any involvement in the offense help their attorneys assess the strength of the prosecution's case and can give them leverage in plea negotiations. Attorneys assisting defendants who stand trial will also rely on the information provided by their clients, constructing a defense around the facts and influencing their questioning of witnesses.

As Bonnie points out, the degree to which ability to communicate with counsel will affect adjudication depends on the nature of the individual case, with specific attention paid to the complexity of criminal charges and whether the defense attorney will actually need information from the defendant.[86] In general, however, there are two factors that distinguish the level of attorney-client interaction needed for defendants pleading guilty from that needed for defendants standing trial: (1) testimony at trial, and (2) amount of detail needed concerning the alleged criminal offense.

Testimony at trial refers both to statements made on the stand by the prosecution's witnesses and to statements made by defendants should they take the stand. Many defendants, likely on advice from their attorneys, decline their constitutional right to testify on their own behalf. Nevertheless, a number of defendants determine that it is in their best interest to take the stand. Because the prosecution will, in most cases, aggressively cross-examine these defendants, they need to possess a greater recollection of the events and understanding of the process than their counterparts pleading guilty. In addition, before taking the stand, defendants must have communicated more extensively with counsel to ensure that they anticipate questioning and formulate responses. With regard to the prosecution's witnesses, a defendant's ability to relate information that would allow counsel to discredit witnesses or identify false statements under oath is crucial to any effective trial defense. Thus, generally, more active participation is required of defendants who proceed to trial.

Similarly, attorneys preparing for trial typically need more intricate details of the crime, related events, and any defense, than do counsel for a defendant pleading guilty. When attorneys are

86. *See* Bonnie, *supra* note 4, at 302.

working in concert with their clients toward a plea bargain, facts are important if they weigh against what might be considered the proper sentence or if they can be used as bargaining chips to secure greater leniency. However, the nuts and bolts of the circumstances surrounding a criminal offense are not as essential because a plea bargain by definition avoids the open adversarial process, the forum through which opposing counsel dissects and packages the events with an eye toward undermining the other party's case.

Perhaps the best support for the claim that limited communication with counsel does not violate due process is that advanced by courts presented with defendants claiming amnesia. Amnesiac defendants are not *per se* incompetent to stand trial or plead guilty.[87] To determine competency in light of amnesia, courts will consider whether counsel is able to adequately retrieve evidence about the crime in substitution for the defendant's description of events.[88] Under some circumstances, the prosecution may even be required to fill in the gaps of defense counsel's knowledge about the crime by allowing unfettered access to its case files.[89] Courts will also weigh the strength of the prosecution's case and the importance of the defendant's own report to counsel in mounting a proper defense.[90] Thus, if defendants may be permitted to proceed through the criminal process even though they cannot relate any pertinent information to counsel due to amnesia, mentally ill defendants who are likewise unable to communicate any relevant facts or whose communication with counsel is severely limited should not be precluded from disposing of their criminal cases through plea bargaining.[91]

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87. *See, e.g.*, State v. Kleypas, 40 P.3d 139 (Kan. 2001); York v. Shulsen, 875 P.2d 590 (Utah Ct. App. 1994); State v. Wyn, 490 A.2d 605 (Del. Super. Ct. 1985); State v. McClendon, 437 P.2d 421 (Ariz. 1968); Bradley v. Preston, 263 F. Supp. 283 (D.D.C. 1967); *see generally* Jonathan M. Purver, Annotation, *Amnesia as Affecting Capacity to Commit Crime or Stand Trial*, 46 A.L.R. 3d 544 (1972).

88. *See, e.g.*, Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968).

89. *See* United States v. Stubblefield, 325 F. Supp 486, 486 (E.D. Tenn. 1971).

90. *See* Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968); Bonnie, *supra* note 4, at 302 ("Under the prevailing judicial practice, the legal significance of a (genuine) claim of amnesia is determined in light of the strength of the evidence in the particular case; adjudication is barred only if there is a significant possibility that the defendant would have been able to produce evidence raising a reasonable doubt about guilt."); THOMAS GRISSO, EVALUATING COMPETENCIES 76–77 (1986).

91. As a good illustration of how factors relating to competency overlap, a recent neuropsychological study suggested that the capacity to remember specific events is closely linked with cognitive ability. Nestor et al., *supra* note 19, at 399–400, 408.

C. Courtroom Behavior

The way in which defendants conduct themselves publicly is far more relevant to standing trial than to participating in a plea interrogation.[92] At trial, a mentally ill defendant's disruptive or distracting conduct could prejudice the factual determination of a jury or judge.[93] Similarly, a defendant who is not sufficiently in control of his speech or body movements will likely not be able to testify effectively on his own behalf, thereby affecting his right to receive a fair trial.[94]

These due process considerations are eliminated where defendants have accepted a plea bargain. A defendant who pleads guilty relieves the state of its obligation to prove guilt beyond a reasonable doubt. Thus, the trial judge sits not as a factfinder but as a gatekeeper to ensure that the defendant's plea has been offered knowingly and voluntarily.[95] The defendant's behavior cannot prejudice the determination of guilt or innocence, although it can influence the judge's decision as to whether the defendant is in fact competent to plead.[96] Likewise, the potential for depriving a defendant of the right to a fair trial when he cannot adequately take the stand in his own defense is obviated by the defendant's waiving the opportunity for exculpation.

There are additional characteristics unique to trial that also justify a higher standard of competency for defendants who do not adjudicate their charges through plea bargaining. One difference is the lapse of time between indictment and resolution of the criminal charge.[97] Depending on the length of trial, a mentally ill defendant might become disruptive under the stresses and

92. There is no clear consensus among commentators as to whether courtroom behavior should be part of the competency equation. Bonnie, for instance, contends that the issue of disruptive defendants is more appropriately thought of in terms of competency to be present. Bonnie, *supra* note 4, at 315–16. Other commentators squarely place courtroom behavior among the factors to consider in assessing CST. *See, e.g.*, MELTON ET AL., *supra* note 8, at 122–23; GRISSO, *supra* note 90, at 77.

93. *See* MELTON ET AL., *supra* note 8, at 123 ("[A] defendant who will disrupt and distract the factfinding process may prejudice the factfinder and make defense counsel's job difficult . . . .").

94. *Id.* ("[A] defendant who is incapable of testifying, even though able to talk to the attorney in private, may be deprived of a fair trial.").

95. *See infra* notes 214–15 and accompanying text.

96. Indeed, the Supreme Court held in *Pate v. Robinson*, 383 U.S. 375 (1966), that trial courts are required to order a competency hearing if suspicious that the defendant is not mentally fit. *See supra* note 26 and accompanying text.

97. *See* GRISSO, *supra* note 90, at 77 (including "probable length of trial" among list of variables relevant to competency to stand trial).

demands of trial. Similarly, a trial's emotionally charged atmosphere may trigger destructive behavior in the defendant.[98]

III. THE CPB STANDARD ILLUSTRATED: HOW MENTAL ILLNESS SYMPTOMS MAY PERMIT DEFENDANTS TO PLEA BARGAIN EVEN IF NOT COMPETENT TO STAND TRIAL

There exists a general and often emphatic consensus that mental illness should not be conflated with incompetency.[99] Although there is an undeniable link between individuals diagnosed with mental illness and legal incompetence,[100] competency is a case-specific inquiry in which the defendant's cognitive and communicative impairments should be juxtaposed with the requirements of the legal process at hand.[101]

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98. *See id.* (including "potential of trial to arouse emotion" on list of variables relevant to competency to stand trial). Because Grisso also includes a defendant's network of social support in this list, the author assumes that the presence of loved ones or capable practitioners can mitigate the effects that length of trial and emotion may have on a defendant's behavior.

99. *See, e.g.*, State of Missouri v. Elam, 89 S.W.3d 517,521 (Mo. Ct. App. 2002) ("The actual presence of some degree of mental illness ... does not necessarily indicate legal incompetence for purposes of trial. ... [A] defendant may be diagnosed with a mental disease and still be declared competent to stand trial."); Morse, *supra* note 27, at 316 ("Whether a defendant is incompetent to stand trial and whether a defendant suffers from mental disorder are distinct issues."); Jodi Viljoen et al., *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 LAW & HUM BEHAV. 481, 500 (2002) ("[D]uring formal evaluation, mental health professional should be careful not to equate mental illness with competency.");Robert A. Nicholson & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research*, 109 PSYCHOL. BULLETIN 355, 356 (1991) ("[N]either severe mental illness nor mental retardation, in and of itself, renders a person unfit for trial."); APPELBAUM & GUTHEIL, *supra* note 8, at 220 ("The mere presence of ... mental illness or disability is insufficient in itself to constitute incompetence.").

100. *See* Morse, *supra* note 27, at 316 (citing research confirming the link between persons suffering from mental illness and incompetence); Zapf, *supra* note 19, at 353 ("Certainly, the issue of an individual's mental status is inherently tied to competency status ...."); Robert E. Cochrane et al., *The Relationship Between Criminal Charges, Diagnoses, and Psychological Opinions Among Federal Pretrial Defendants*, 19 BEHAV. SCI. & L. 565, 567 (2001) (citing specific mental disorders and corresponding high rates of incompetence).

101. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii (4th ed. 1994) [hereinafter *DSM IV*] (additional information beyond clinical diagnosis needed to assess competency, possibly including the defendant's "functional impairments" and what is required of the defendant); Nicholson & Kugler, *supra* note 99, at 356 ("[T]he crucial issue is whether an existing disorder or deficiency impairs an individual's functional ability to understand his or her legal situation and assist an attorney."); GRISSO, *supra* note 90, at 76 (a determination of competency "should include a consideration of the attorney-client circumstances and probable trial demands in the instant case.").

In other words, competency assessments should be tailored to the mental health of the defendant, and to the minimum functional abilities needed to proceed through a specific phase of the adjudicative process. When applying this theory to a defendant pleading guilty, a forensic assessment would seek only to determine whether the defendant possesses a rudimentary understanding of the constitutional rights being waived and a limited ability to communicate with counsel.[102]

Forensic clinicians have the ability and tools at hand to tailor competency inquiries according to the adjudicative criminal forum, whether trial or plea bargain. Since the latter half of the twentieth century, many competency assessment instruments have been developed, with increasing sophistication, to assist clinicians.[103] In general, instruments reflect the shared desire among clinicians and academics for tailored competency assessments. Summing up the focus of competency instruments, one researcher noted that:

> In developing these instruments, considerable effort has been directed to deconstructing competence into relevant content-specific cognitive abilities that are quantifiable and measurable. These cognitive abilities have been broadly defined to include not only basic information processing capacities of encoding, retention, and retrieval of factual, court-related knowledge, but also abilities related to reasoning and comprehension that are presumably linked to the rational aspects of competence. . . . [P]erhaps the most challenging of these efforts has been directed toward deconstructing the social demands of competence that are often embodied in the capacity of the defendant to participate with legal counsel and to appreciate the general social context of the courtroom.[104]

By concentrating on the factors relevant to pleading guilty, cognitive ability and communication with counsel, the current competency assessment instruments lay the foundation for creating a separate evaluation of CPB.

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102. *See* discussion *supra* Part II.

103. *See* Zapf & Viljoen, *supra* note 19, at 353; Nestor et al., *supra* note 19, at 398; *see generally* Mumley et al., *supra* note 53; POYTHRESS, *supra* note 7; Richard Rogers et al., *Recent Interview-Based Measures of Competency to Stand Trial: A Critical Review Augmented with Research Data*, 19 BEHAV. SCI. & L. 503 (2001).

104. Nestor et al., *supra* note 19, at 398.

The following examination of three mental health disorders—schizophrenia, depression, and paranoid personality disorder—demonstrates the need for a separate competency assessment for plea bargaining, and illustrates how it might work. As stated above, the presence of mental illness is not dispositive in determining competency. Rather, findings of incompetency hinge on the clinical evaluation of the severity of the particular disease.[105] Accordingly, the following analysis of these mental illnesses predicts the way in which symptoms present in an individual would affect the competency assessment.

A. Schizophrenia

A number of studies have demonstrated that persons suffering from schizophrenia and other psychotic disorders have the highest rates of impaired ability to stand trial.[106] Even among defendants who have been diagnosed with other psychotic disorders, schizophrenics exhibit greater impairment.[107] The broad range of symptoms that are characteristic of schizophrenia shed some light on these findings.

The American Psychiatric Association, in its *Diagnostic and Statistical Manual of Mental Disorders* (*DSM IV*), classifies the symptoms that characterize schizophrenia as "positive" and "negative."[108] The positive symptoms—delusions, hallucinations, disorganized thinking and speech, grossly disorganized behavior and catatonic behavior—seem to encompass some of the popular perceptions about schizophrenia.[109] The *DSM IV* summarizes positive symptoms as "appear[ing] to reflect an excess or distortion of normal functions."[110] Conversely, negative symptoms are reported to "reflect a diminution or loss of normal functions."[111] As such, they may restrict the range and intensity of emotional expression, the fluency

105. To simplify the application of competency tests to a specific mental illness, the discussion of schizophrenia, depression, and paranoid personality disorder will work from the presumption that defendants present with only one mental health disorder. For example, although persons with schizophrenia have been found to suffer also from depression in some cases, for the purposes of this Note, individuals diagnosed with schizophrenia will not suffer from any other distinct mental illness.

106. *See, e.g.*, POYTHRESS, *supra* note 7, at 98; Viljoen et al., *supra* note 99, at 495; Cochrane et al., *supra* note 100, at 577; Nicholson & Kugler, *supra* note 99, at 364.

107. *See* Viljoen et al., *supra* note 99, at 497.

108. *DSM IV*, *supra* note 101, at 274.

109. *See id.* at 274–76.

110. *Id.* at 274.

111. *Id.*

and productivity of thought and speech, and the initiation of goal-directed behavior.[112]

Like other chronic illnesses, schizophrenia is characterized by periods of diminished infirmity and active symptoms.[113] The active phase is defined as a "relatively severe constellation of signs and symptoms" and typically includes psychotic disturbances such as delusions, hallucinations, and disorganized behavior.[114]

Schizophrenics who suffer from delusions misinterpret "perceptions or experiences."[115] Often, delusional schizophrenics believe they are being persecuted.[116] The persecutor may take the form of an F.B.I. agent or otherworldly being that has implanted a tracking device for some malicious reason.[117] Delusions may also be religious in nature.[118] For example, a criminal defendant may seek to plead guilty because he thinks he is an angel and that God will not allow him to be incarcerated.

Auditory hallucinations are more commonly reported by schizophrenics than are visual hallucinations.[119] The *DSM IV* notes that these hallucinations are "usually experienced as voices . . . familiar or unfamiliar . . . [and] are perceived as distinct from the person's own thoughts."[120] Another positive symptom, disorganized thinking and speech, has been strictly defined by the *DSM IV* as a symptom that "must be severe enough to substantially impair effective communication."[121] Disorganized thinking and speech may present in one or more of the following ways: a person switches without association from one topic to another; questions are answered with scarcely related or completely unrelated responses; or speech is so disorganized that it ceases to be understandable.[122]

Grossly disorganized behavior generally presents in a person's outward conduct and appearance. This symptom may manifest itself through unusual dress, such as when a person wears winter attire on a scorching summer day, inappropriate sexual behavior like public masturbation, or sudden unprovoked agitation typified

112. *See id.* at 275.

113. *See id.* at 278; SAMUEL JAN BRAKEL & ALEXANDER D. BROOKS, LAW AND PSYCHIATRY IN THE CRIMINAL JUSTICE SYSTEM 83 (2001).

114. *DSM IV*, *supra* note 101, at 277; *see also* BRAKEL & BROOKS, *supra* note 113, at 83.

115. *DSM IV*, *supra* note 101, at 275.

116. *See id.*

117. BRAKEL & BROOKS, *supra* note 113, at 84.

118. *DSM IV*, *supra* note 101, at 275.

119. *Id.*

120. *Id.*

121. *Id.* at 276.

122. *Id.*

by shouting or swearing.[123] Catatonic motor behaviors refer to a broad range of conduct that is both passive and active. Those exhibiting these behaviors may be unresponsive to their surroundings, may aggressively resist orders to move, or may have purposeless and unstimulated body movements.[124]

Negative symptoms refer to functional deficiencies. One common physical symptom is described as a combination of poor eye contact, reduced body language, and an expressionless face.[125] Another negative symptom, called "poverty of speech," is characterized by "brief, laconic, empty replies."[126] The *DSM IV* notes that poverty of speech, as a deficiency, is different from a conscious decision to provide shallow answers.[127]

Given the broad range of debilitating symptoms suffered by individuals with schizophrenia, the high correlation between the disorder and incompetency is not surprising. Even with the separate standard of legal competence proposed by this Note for defendants pleading guilty, a significant number of defendants found not competent to stand trial would also likely be found not competent to plead guilty.[128] However, because competency is a case-specific inquiry, forensic determinations depend on the severity of symptoms. Researchers examining the relationship between mental illness and competence listed "disorientation and impaired memory, poor judgment, thought and communication disturbances, hallucinations, delusions, and bizarre, unmanageable behavior" as the symptoms largely determinative of a defendant's fitness to stand trial.[129]

Defendants less impaired by schizophrenia, while incompetent to stand trial, could still meet the due process requirements of pleading guilty. First, forensic evaluations for CPB need not include judgments about the defendant's behavior. Whether a defendant exhibits "bizarre, unmanageable" behavior, or the range of conduct listed in the *DSM IV* under "grossly disorganized behavior" and "catatonic motor behaviors," is inconsequential when a defendant concedes guilt. These would be important considerations at trial, where the defendant's conduct and inability

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 277.
128. *See* Whittemore et al., *supra* note 75, at 872–73 (reporting small research sample showing that all individuals found not fit for trial were not competent to plead guilty under Canadian competency standards).
129. Nicholson & Kugler, *supra* note 99, at 364–65.

to testify effectively in his own defense could prejudice the factfinder.[130]

Second, symptoms of schizophrenia affecting communication—poverty of speech, reduced body language and expressions, disorganized thinking and speech—are less material to pleading guilty. Unlike their counterparts proceeding to trial, defendants who accept a plea bargain avoid many of the necessary interactions between attorney and client at trial, such as preparing for the defendant's testimony or disputing the credibility of the prosecution's witnesses.[131] Similarly, recollection of the alleged incident is less important because pleading guilty precludes the need for a defense strategy built around the facts of the case.[132] Thus, although a defendant with schizophrenia may have a reduced capacity to communicate with counsel, in many cases the defendant would have to be severely impaired for a clinician assessing CPB to find that this requirement is not met. For example, defendants choosing to plead guilty must be able to clearly communicate this preference to the trial court or may not be deemed to have knowingly and voluntarily waived their constitutional rights.

Lastly, defendants pleading guilty generally need only possess a surface level understanding of the constitutional rights being waived.[133] In some cases, this lower standard will permit adjudication through plea bargaining. Nevertheless, the high rate of cognitive impairment demonstrated by persons diagnosed with schizophrenia predicts a strong correlation between incompetence to stand trial and incompetence to plead guilty.[134]

Hallucinations and delusions could also play a factor in CPB assessments for schizophrenics. A guilty plea influenced by a voice inside the defendant's head commanding him to plead guilty would probably not constitute a knowing and voluntary waiver of rights. Likewise, with respect to delusions, a defendant who accepts a plea bargain because God has empowered him with the ability to liquefy and slip through prison cells would not meet the *Dusky* standard for rational understanding of the proceedings. Interestingly, however,

130. *See* discussion *infra* Part III.B.

131. *See* discussion *infra* Part III.B.

132. *See* discussion *infra* Part III.B.

133. *See* discussion *supra* Part III.A.

134. *See* Viljoen et al., *supra* note 99, at 497 ("In comparison to defendants with other types of psychotic disorders . . . defendants with schizophrenia demonstrated considerably more impairment on legal abilities. This finding is consistent with the high rates of cognitive and functional impairment in individuals with schizophrenia.").

delusions may be less likely to render a defendant incompetent to stand trial than hallucinations.[135]

B. Depression

Defendants diagnosed with mood disorders[136]—most commonly Major Depressive Disorder ("depression") and Bipolar Disorder—have low rates of incompetence to stand trial.[137] Although many studies examining the relationship between competency and mental illness utilize the umbrella term "mood disorders" rather than undertake a separate inquiry of depression and Bipolar Disorder, when considered independently, persons with depression were found to be far less legally impaired than those with Bipolar Disorder.[138]

According to the *DSM IV*, persons may be diagnosed with depression after experiencing at least one Major Depressive Episode absent the manic behavior that characterizes Bipolar Disorder.[139] Symptoms may include psychosis, although the *DSM IV* cautions that this may suggest an alternative diagnosis, such as Schizoaffective Disorder, to more accurately reflect the patient's condition.[140] About half of those who experience an isolated episode will experience a second episode.[141] For individuals who have experienced more than one episode, the recurrence of symptoms is case-specific, with some having "clusters of episodes" while others experience more frequent episodes or enjoy many years of dormant symptoms.[142]

The *DSM IV* defines an episode as five or more depressive symptoms persisting for at least two weeks.[143] There are nine characteristic symptoms of depression;[144] some are more relevant to

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135. *See id.* at 497–98 ("[E]xisting studies have generally found that impairment in the ability to stand trial is highly correlated with the psychotic symptoms of conceptual disorganization and hallucinations, whereas delusions appear to have a weaker and more isolated influence.").

136. Depression is labeled both as a mood disorder and an affective disorder. *See, e.g.*, *DSM IV*, *supra* note 101, at 317; Viljoen et al., *supra* note 99, at 498.

137. *See* Viljoen et al., *supra* note 99, at 498; Cochrane et al., *supra* note 100, at 575; Nicholson & Kugler, *supra* note 99, at 359–60.

138. *See* Viljoen et al., *supra* note 99, at 495, 498.

139. *See DSM IV*, *supra* note 101, at 339.

140. *See id.*; BRAKEL & BROOKS, *supra* note 113, at 88.

141. *See DSM IV*, *supra* note 101, at 341.

142. *Id.*

143. *Id.* at 320.

144. *Id.* at 327.

legal competency than others. The first two symptoms—frequently depressed mood, and diminished interest and pleasure in activities—are most important to those in the mental health field because the presence of at least one of these symptoms is necessary to diagnose depression.[145] However, the fifth and eighth symptoms—diminished ability to think or concentrate and psychomotor retardation—appear to play the most significant role in determining CPB for persons diagnosed with depression.[146]

The first symptom, depressed mood, is manifested in a variety of ways. Some individuals may verbally complain about feeling sad, hopeless, anxious, or even wholly devoid of any feelings at all.[147] Others may focus on body pains and aches, articulating these physical ailments instead of emotional suffering.[148] Depressed mood also presents itself in a number of persons as increased irritability.[149] As examples, the *DSM IV* notes that irritability might take forms such as "persistent anger, a tendency to respond to events with angry outbursts or blaming others, or an exaggerated sense of frustration over minor matters."[150]

Loss of interest is the second symptom. It may include losing pleasure in activities that used to be enjoyable, apathy, or social withdrawal.[151] Appetite changes and sleep disturbances are the third and fourth symptoms, respectively. Changes in appetite can take two extreme directions: an increase in appetite, which may lead to severe weight gain, or a decrease in appetite, which may cause the person to lose a substantial amount of weight.[152] Although persons with depression more frequently experience insomnia, some may suffer from hypersomnia or oversleep.[153]

The fifth symptom is listed as psychomotor agitation or retardation. Examples of agitation include "the inability to sit still, pacing, hand-wringing, pulling; or rubbing of the skin, clothing or other objects."[154] Retardation may manifest as "slowed speech, thinking, and body movements; increased pauses before answering;

145. *See id.*
146. *See id.*
147. *Id.* at 320.
148. *Id.* at 321.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

speech that is decreased in volume, inflection, amount, or variety of content, or muteness."[155]

Symptom six is fatigue or loss of energy. The *DSM IV* notes that "[a] person may report sustained fatigue without physical exertion. . . . The efficiency with which tasks are accomplished may be reduced."[156] Symptom seven—feelings of worthlessness or excessive or inappropriate guilt—causes individuals to overstate perceived faults and failings and blame themselves for events to which they are only tenuously connected or not connected at all.[157]

The eighth symptom is diminished ability to think, concentrate, or make decisions.[158] Persons presenting this symptom "may appear easily distracted or complain of memory difficulties."[159] The final symptom for depression involves recurring thoughts of death and contemplation of suicide.[160] In fact, as many of fifteen percent of those diagnosed with depression take their own lives.[161]

As with schizophrenia, those diagnosed with depression are not uniformly impaired in their ability to plea bargain or stand trial. Rather, legal competence depends on the severity of the depressive symptoms and how they present in a particular person.[162] In most cases, defendants diagnosed with depression are often not impaired to the degree necessary to justify a finding of incompetence to stand trial. Although the number of depressed defendants deemed incompetent to proceed to trial might be relatively low compared to defendants suffering from other mental health diagnoses, depressive symptoms still prevent a number of defendants from adjudicating the criminal charges pending against them at trial. Based on the symptoms that characterize depression, some of these "incompetent" defendants could benefit from a separate CPB standard.

One of the major differences between evaluations for CPB and CST is that a defendant's behavior is not relevant to pleading guilty. Consequently, a depressed defendant found incompetent to stand trial might be permitted to plea bargain if the competency finding was based in part on the forensic clinician's concern that angry outbursts or strange behavior could compromise the defendant's ability to take the stand.

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 322.
159. *Id.*
160. *Id.*
161. *See id.* at 340.
162. *See id.* at 322 ("The degree of impairment associated with a Major Depressive Episode varies . . . .").

The other primary factors determining whether a defendant found not competent to stand trial can plead guilty are the degree to which cognitive functions and the ability to communicate with counsel are impaired. Some depressed defendants are limited in their ability to think, deliberate about an issue, or make choices. There may also be a loss of short-term memory, or frequent distractions.[163] The degree to which diminished motivation affects these cognitive dysfunctions is unclear.[164] Nonetheless, a "widespread impairment of cognitive functions in . . . depressed patients" has been documented.[165] Furthermore, the severity of depression may not be indicative of the degree of cognitive impairment.[166]

In the legal context of pleading guilty, cognitive dysfunction could affect a defendant's ability to knowingly and voluntarily decide that it is in his best interest to accept a deal from the prosecution and forgo a trial and opportunity for exculpation. If depression clouds the decision-making process, it violates due process to allow a guilty plea. Although defense counsel may advise their clients that a plea bargain is more advantageous than going to trial, defendants must be able to weigh the benefits and risks of each adjudicative forum to plead guilty and make a truly independent waiver of constitutional rights. Therefore, when assessing CPB for a defendant diagnosed with depression, the forensic clinician needs to determine first if the particular defendant's illness manifests as cognitive dysfunction and, if so, whether the impairment is severe enough to prevent a rudimentary understanding of constitutional rights waived.

Some of these cognitive impairments may also erode a defendant's ability to communicate with counsel. Constant distractions and short-term memory loss can make it difficult for attorney and client to have a conversation.[167] A defendant's diminished capacity to focus on the attorney's pertinent questions could inhibit the attorney's ability to ascertain facts that could provide the defendant with increased leverage in plea bargaining. Similarly, psychomotor retardation—manifested through speech that is slowed, short in content, containing pauses before answers, or with varying tones—would likewise limit the effectiveness of attorney-client interactions.

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163. *See* Barbara Ravnkilde et al., *Cognitive Deficits in Major Depression*, 43 SCANDINAVIAN J. PSYCHOL. 239, 247–48 (2002).

164. *See id.* at 239.

165. *Id.* at 245.

166. *See id.* at 246.

167. *See id.* at 247.

As previously stated, communication with counsel should be given more weight in assessments for CST, and there may be alternative means by which the defense attorney can reconstruct the facts of the case. However, if the defendant's communication is so deficient that it precludes him from having a meaningful conversation with counsel about constitutional rights waived, he would not reach the competency threshold under CPB.

C. Paranoid Personality Disorder

The final mental illness included in this analysis, Paranoid Personality Disorder, was selected because it exemplifies diagnoses that generally bear no relationship with cognitive function. Perhaps this fact helps to explain findings that defendants with personality disorders have one of the lowest rates of incompetency to stand trial, even when compared with mood disorders.[168]

There are ten specific personality disorders listed in the *DSM IV.* Each disorder has its own diagnostic criteria, although some shared features justify their grouping. Most importantly, all personality disorders involve an "enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture."[169] Personality disorder can affect an individual's self-perception and how events and others are interpreted and perceived.[170] It can alter one's emotional responses, interpersonal functioning, and ability to control impulses. To receive a diagnosis of personality disorder, this enduring pattern must be "inflexible and maladaptive and cause significant functional impairment or subjective distress."[171]

Individuals with Paranoid Personality Disorder (PPD) suspect the worst in other people. According to the *DSM IV,* PPD is characterized by "pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent."[172] This lack of trust makes those with this disorder strive for self-sufficiency, autonomy, and control over people with whom they interact.[173] Individuals with PPD do not generally confide in other people or sustain close relationships, out of fear that their disclosure will somehow harm

168. *See* Cochrane et al., *supra* note 100, at 575.
169. *DSM IV, supra* note 101, at 630.
170. *See id.* at 630–31.
171. *Id.* at 630.
172. *Id.* at 634.
173. *See id.* at 635.

them in the future.[174] They feel that others are making plans to attack them without cause at an unpredictable time.[175] Those with PPD may misinterpret neutral or even objectively kind actions as personal attacks and may assume that others want to trick or exploit them.[176] Similarly, they will hold grudges against persons whom they feel have demeaned them.[177] Some people with PPD may also experience short psychotic episodes, especially when under stress.[178]

Because the symptoms for PPD listed in the *DSM IV* do not seem to affect cognitive ability, individuals with this disorder would likely benefit more than persons with many other mental illnesses from a separate standard of competency for pleading guilty. For defendants suffering from disorders like schizophrenia and depression, the primary obstacle to being found competent to proceed to trial, or even to plea bargain, is the potential impairment of cognitive functions needed for a rational understanding of the criminal charges and the constitutional rights waived. Based on the symptoms associated with PPD, however, defendants with this disorder would possess the surface level understanding that satisfies due process.

In the relatively small number of cases in which a defendant with PPD is deemed not competent to stand trial, therefore, the basis for this judgment is probably attributable to lack of capacity to communicate with counsel or to doubts about proper courtroom behavior. Stress from pending criminal charges could trigger brief periods of psychosis in an individual with PPD. This reaction, in turn, could lead to a finding of incompetency to stand trial because the defendant's behavior would potentially jeopardize the objectivity of the factfinding process. However, because psychosis is not a defining feature of PPD and because episodes last only a short time, findings of incompetence to stand trial are likely due to communicative deficiencies.

As previously stated, individuals with PPD do not trust other people and are constantly on guard against perceived attacks and slights. Consequently, they try to control people around them and prefer to be self-sufficient. These symptoms could spill over into questions of competency because they limit the capacity of a defendant with PPD to communicate with counsel. Defendants with

174. *See id.* at 634.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.* at 635.

PPD may genuinely feel that any information they share with their attorney will be used against them. They could perceive counsel not as an ally but as an adversary. For these reasons, a defendant with this disorder might not disclose facts relating to the alleged crime or may only provide guarded responses to direct questions posed by the attorney. Consistent with the desire for autonomy, defendants with PPD may also "choose" a course of non-disclosure with the misguided idea that they can resolve the pending charging largely without assistance from counsel.

The "choice" made by defendants with PPD to limit communication with counsel is distinguishable from similar decisions made by defendants without mental illness. Defendants without mental illness make a conscious choice not to communicate, unhampered by a psychological condition and all the time retaining the capacity to assist counsel in constructing a defense. On the other hand, a defendant whose ability to communicate is impaired by PPD or another disability lacks the capacity to interact sufficiently with his attorney. The underlying disease impedes defendants' judgment to the point that it is not truly their own. Analogizing to a physical ailment, persons with severe cerebral palsy would not be expected to run a marathon because the disease impairs control of their body movements. Likewise, defendants with a mental illness that impairs their ability to interact with people, like PPD, cannot be expected to use the same judgment as other defendants.

Under the CPB standard, some defendants with PPD found not competent to stand trial because of diminished communicative abilities would be permitted to resolve their criminal matters expeditiously by pleading guilty. Communication between attorney and client, while important in the plea bargain process, is not as important as it is at trial.

IV. WHY HAVE TWO STANDARDS?

A. The Benefits and Pitfalls of Plea Bargaining

The need for plea bargaining had been endorsed by the Supreme Court long before *Godinez* was assigned a docket number.[179]

179. *See* Santobello v. New York, 404 U.S. 257, 260–61 (1971) ("The disposition of criminal charges by agreement between prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . . Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.").

Plea bargaining is the process by which the prosecution and defense agree to a specific disposition of the criminal charges. Generally, the defendant enters a guilty plea in exchange for the prosecution's recommendation to the court that a lenient sentence be imposed.

In *Santobello v. New York*, a case cited repeatedly by courts praising the efficacy of plea bargaining, the Supreme Court explicitly encouraged the use of plea bargaining.[180] The majority opinion cited many benefits that plea bargaining produces: (1) the criminal case is resolved expeditiously; (2) defendants avoid the unproductive and negative effects of incarceration that may occur when bail is denied or is set too high; (3) society is protected from defendants who may commit crimes while released on bail; (4) handing down prison sentences soon after a defendant is charged with a crime increases the probability that the criminal will be rehabilitated; and (5) the resources that are saved by avoiding trial reduce the drain on state and federal judges and courthouses.[181]

This list of plea bargaining benefits, while impressive, cannot account for the fact that over 90% of all criminal cases are presently resolved through plea bargaining.[182] Perhaps the best explanation for the prevalence of plea bargaining in the criminal justice system is that it permits both the defense and the prosecution to avoid the risks and uncertainty of proceeding to trial.

The prosecutor benefits by ensuring conviction while conserving the limited resources available to punish and deter criminal acts.[183] Although the state must bargain away the maximum punishment available under the pending criminal charges, plea bargains guarantee that the public interest will be served by securing some penalty and acknowledgment of responsibility where trial may have produced neither.[184] This penalty can be tailored to the defendant's

180. *See id.* at 260.

181. *See id.* at 260–61.

182. *See* POYTHRESS, *supra* note 7, at 2; ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 173 (3d ed. 1996); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, 2002 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS § 5, *supra* note 5.

183. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) ("The prosecutor's objective in each case is to obtain the optimum level of punishment at the least cost, in order to free litigation resources for other prosecutions that can bring additional deterrence benefits. By tailoring each plea offer to the expected costs of trial, the likelihood of success, and the expected sentence, the prosecutor can maximize the deterrence obtainable from the finite resources at her disposal.").

184. *See* Ronald Wright & Marc Miller, 55 STAN. L. REV. 29, 38 (1992); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1914 (1992) (plea bargaining avoids the "risk of a costly trial followed by acquittal").

criminal history and the criminal act committed. Plea bargains save prosecutors considerable time, effort, and money by avoiding the cost of lengthy preparation and trial. Consequently, prosecutors can accept more new cases and use the resources diverted from plea bargaining to "get the greatest deterrent power out of limited resources."[185] Moreover, by granting prosecutors the flexibility to reduce charges and make concessions, plea bargains achieve other important ends. For example, inducing a defendant to cooperate with the state may lead to the arrest and conviction of other criminals who pose a greater threat to society.[186] Plea bargaining also shields victims from any additional trauma that might be caused by observing and possibly testifying at trial.[187]

The defendant benefits from a sentence that is preferable to the maximum sentence he might have received if found guilty by a judge or jury. Some defendants may be able to bargain felony charges down to a misdemeanor conviction, or avoid conviction of an offense such as sexual assault that might have caused significant hardship to the defendant in prison and upon release.[188] In addition, this swift resolution of the criminal charges limits the time defendants spend in pre-trial lock-up when unable to post bail.[189]

Another benefit that is commonly cited in support of plea bargaining is that it promotes autonomy. Because defendants run the risk of receiving the maximum sentence prescribed for the criminal offenses charged, they should be able to bargain their constitutional protections in exchange for a more lenient punishment.[190] In other words, the law should not foreclose defendants' ability to control their own fates.[191]

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185. Wright & Miller, *supra* note 184, at 38; *see also* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L. J. 1969, 1975 (1992) ("Compromise . . . benefits prosecutors and society at large. . . . [P]rosecutors buy that most valuable commodity, time. With time they can prosecute more criminals.")

186. *See* Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 515 (1999).

187. *See id.* at 518. Palmer also cautions that this justification for plea bargaining has been criticized by some on the grounds that the more lenient sentences resulting from plea bargaining can also injure victims because they have a personal interest in seeing that justice is done. *See id.*

188. *See id.* at 515 n.56 and accompanying text.

189. *See id.* at 515.

190. *See* Easterbrook, *supra* note 185, at 1975 ("Defendants have many procedural and substantive rights. By pleading guilty, they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered."); Scott & Stuntz, *supra* note 184, at 1914–15 ("[A] policy of contractual autonomy is the only way that parties can reduce the social losses that result from uncertainty and frustrated expectations.").

191. *See* Wright & Miller, *supra* note 184, at 91 (citing how some view plea bargaining in moral terms and believe that it "treats the defendant with the respect that an autonomous human being deserves, leaving more control over the defendant's fate in his own hands.").

Plea bargaining is not without its shortcomings. A number of commentators have criticized plea bargaining for undermining the accuracy of the criminal justice system and possibly leading to the conviction of innocent defendants.[192] Innocent defendants who are risk averse, for example, are more likely to accept the offer of an unjust sentence than risk the uncertainty of trial.[193] The possibility that an innocent defendant would plead guilty to receive a more lenient sentence rather than seek exoneration at trial is exacerbated by the coercion that characterizes the plea bargaining process.[194]

Many critics are uncomfortable with the large number of criminal cases resolved through plea bargaining because it undermines safeguards provided by the adversarial system and compels defendants to forgo many constitutional protections.[195] After all, a guilty plea is by definition a conviction.[196] By conceding guilt, the defendant waives the right to a jury trial, the right to confront his accusers, and the privilege against compulsory self-incrimination.[197] The state is relieved of its obligation to rebut the defendant's presumed innocence by persuading a factfinder of the defendant's guilt beyond a reasonable doubt. Similarly, unlike rules of evidence at trial, prosecutors can use hearsay statements, information and material obtained by the police in an unlawful search, and other evidence inadmissible at trial, to intimidate a defendant into accepting a plea bargain.[198]

Although prosecutors and defense attorneys are supposed to act in the interest of justice, incentives to deviate from this objective

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192. *See, e.g.*, Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1368–69 (2003) (Bibas concisely summarizes the observations by Albert Alschuler and Stephen Schulhofer, two of the leading scholars with respect to plea bargaining: "plea . . . bargaining undercuts accuracy, equal treatment, fairness, and perceptions of fairness by subverting proof beyond a reasonable doubt and other rights, thus putting innocent defendants at risk."); *see generally* Schulhofer, *supra* note 183, at 1981–87.

193. *See* Schulhofer, *supra* note 183, at 1982.

194. *See* Palmer, *supra* note 186, at 519 ("The problem of convicting an innocent person is further aggravated by the coercive elements involved in plea bargaining, such as pretrial confinement, overcharging, and differential in sentencing between pleas and trial."); *see also* Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.").

195. *See, e.g.*, Bibas, *supra* note 192, at 1368–69; Palmer, *supra* note 186, at 523.

196. *See Boykin*, 395 U.S. at 242 ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

197. *Id.* at 243.

198. *See* Palmer, *supra* note 186, at 524 n.108 and accompanying text.

may create conflicts of interest.[199] The prosecution's primary goals do not always align with the public interest. The chief prosecutor, or District Attorney, is a political office acquired by election or appointment. With political aspirations, the District Attorney's goal is to improve her public status and political standing.[200] Maintaining a high conviction rate, staying on good terms with defense attorneys, and avoiding high-profile trial losses are some of the ways to achieve this end.[201] These factors converge to create a powerful incentive for the District Attorney to encourage settlement through plea bargains.[202] Assistant District Attorneys, seeking to advance their careers while also conserving time, generally want to avoid trials because they are time-intensive and risky.[203] For career advancement, it may also be in their best interest to help the District Attorney get reelected or reappointed.[204]

Criminal defense attorneys, whether paid counsel or public defenders, have personal incentives to encourage their clients to accept plea offers. Most criminal defense attorneys are paid a flat fee to resolve the case.[205] By rejecting a plea offer, paid counsel must expend time and money preparing for trial at no additional charge and to the detriment of new, paying clients.[206] Also, some jurisdictions have fee arrangements that mandate higher compensation for pre-trial legal work.[207] Public defenders who are not paid on a case-by-case basis do not share these financial incentives. However, they do share a desire to reduce their heavy caseloads.[208] Similarly, public defenders and paid counsel working regularly with a county prosecutor's office might be more inclined to negotiate a plea bargain that is not in their client's best interest in order to improve their relationship with prosecutors and make their "working environment more tolerable."[209]

Another criticism of plea bargaining is that it marginalizes trial judges.[210] The prosecution and defense negotiate charges and

199. Some commentators refer to this conflict of interest as "agency cost problems." *See, e.g.*, Schulhofer, *supra* note 183, at 1987–90.

200. *See id.* at 1987.

201. *See id.*

202. *See id.*

203. *See id.* at 1988.

204. *See id.*

205. *See id.*

206. *See id.*

207. *See* Wright & Miller, *supra* note 184, at 92.

208. *See* Schulhofer, *supra* note 183, at 1989.

209. Wright & Miller, *supra* note 184, at 92.

210. *Id.* at 39 ("The clearest effect of plea bargains on trial judges is to marginalize them. Judges have little voice in traditional plea bargains.").

sentences that are then presented to the judge for acceptance.[211] Judges are inclined to acquiesce in sentencing for several reasons. First, the plea bargaining system, recognized as a crucial mainstay of the criminal justice system, would collapse if agreements negotiated by the parties were not honored. Second, judges should avoid disturbing agreements that are acceptable to both parties in an adversarial system.[212] Last, judges are often faced with a steady stream of cases that leave little time to undertake careful analysis of plea bargains that, by definition, satisfy the defense and prosecution.[213] Likewise, time constraints also pressure the judge to avoid trial.

These cumulative criticisms of plea bargaining shed light on the risk that criminal defendants will forgo their right to seek exoneration at trial, and agree to a plea offer that is not in their best interests. There are, however, a number of safeguards in place to mitigate the risks that plea bargaining will be abused. Perhaps the most significant protection stems from the due process clause: a guilty plea is valid only if made knowingly and voluntarily.[214] Trial courts typically engage defendants in plea colloquies to ensure that this requirement is met.[215] Thus, although there may be coercive elements at play in plea negotiations, the ultimate decision to plead guilty rests with the defendant and is usually checked by a judge. Also, additional measures beyond the minimum protections required by the due process clause may be enacted. For example,

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211. *Id.*

212. *Id.* ("[J]udges have every reason to listen to the recommendations of the parties and to follow the outlines of their agreement. In an adversary system, judges reason, the judge has limited justification to upset an agreement that satisfies both parties.").

213. *Id.*

214. *See* discussion *supra* Part I.B.3; *see, e.g.*, State v. Ross, 916 P.2d 405, 409 (Wash. 1996) ("The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.").

215. The United States Supreme Court advises trial courts to conduct an examination of the defendant upon a guilty plea to shield itself from charges by the defendant that he was not fit to plead. Boykin v. Alabama, 395 U.S. 238, 243–44, 244 n.7 (1968). Federal courts are required to inform defendants pleading guilty, in open court, of the constitutional rights they are waiving and determine that the defendants understands the consequences of this waiver. *See* FED. R. CRIM. P. 11(b). Many states explicitly require that trial courts engage in plea colloquies. *See generally* H.D. Warren, Annotation, *Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof*, 97 A.L.R. 2d 549 (1964). For a standard plea colloquy, see 2 F. LEE BAILEY & KENNETH J. FISHMAN, COMPLETE MANUAL OF CRIMINAL FORMS § 48.1 (3d ed. 2003).

in many jurisdictions, the trial court cannot accept the plea bargain before finding that there is a factual basis for the guilty plea.[216]

More active benches will also refuse to enforce plea bargains they believe are fundamentally unfair or run counter to public policy.[217] In *United States v. Perez*, the trial judge did not recognize the defendant's limited waiver of his right to appeal and of his right to bring a collateral challenge to his sentence.[218] Recognizing the "serious nature of the rights being waived in a plea,"[219] Judge Gertner held that:

> Despite the attraction of the idea of maximizing a defendant's power by allowing him to sell whatever he has, the market for plea bargains, like every other market, should not be so deregulated that the conditions essential to assuring basic fairness are undermined. . . . [A]ppeal waiver clauses . . . are contrary to public policy and void."[220]

In a different example, the United States Court of Appeals for the First Circuit held that unclear plea agreements would be construed to the benefit of criminal defendants.[221] Citing *Santobello*, the court placed the burden of clarity on the government in recognition of the rights waived by pleading guilty and the potentially coercive nature of plea bargaining.[222]

Despite the drawbacks of the plea bargaining system, defendants would not likely be better off in a legal system that imposed trials in all cases. Robert E. Scott and William J. Stuntz concede that "some defendants accept bad deals."[223] However, they argue that it is unfair to put all defendants at risk of longer post-trial sentences by abolishing plea bargaining because of "the misjudgments of a few."[224] Scott and Stuntz also advance a class-based argument in

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216. *See, e.g.*, FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); CAL. PENAL CODE § 1192.5 (West 2002) ("The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea."); IND. CODE ANN. § 35-35-1-3 (b) (West 1998) ("The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea.").

217. Under Rule 11(e)(2) of the Federal Rules of Criminal Procedure, federal judges have discretion to deviate from the sentence recommendation made by the prosecution.

218. United States v. Perez, 46 F. Supp. 2d 59, 60 (D. Mass. 1999).

219. *Id.* at 64.

220. *Id.* at 61.

221. *See* United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988).

222. *See id.* (citing Santobello v. New York, 404 U.S. 257 (1971)).

223. Scott & Stuntz, *supra* note 184, at 1928.

224. *See id.*

support of plea bargaining. Defendants that are poor and uneducated, they contend, are in the most need of competent lawyers but often end up with the least capable attorneys.[225] The lawyer's inability, coupled with the defendant's limitations, may produce an unfavorable offer and acceptance at the plea stage.[226] Scott and Stuntz contend that requiring adjudication at trial exacerbates this problem because trials demand greater attention and skill than plea bargaining, at higher stakes.[227]

Another advocate of plea bargaining, Judge Frank H. Easterbrook, accuses those opposing the present system of "commit[ting] the Nirvana Fallacy, comparing an imperfect reality to a perfection achievable only in imaginary systems."[228] Deception can take place at trial as well as in plea bargaining.[229] Trial rules, however, may exclude evidence that sheds light on a defendant's innocence that would be available to prosecutors at the bargaining stage.[230] In this manner, plea bargaining may be more conducive to protecting innocent defendants from conviction than would trials because prosecutors are more competent than the common jury pool and are in a better position to verify the information provided by law enforcement and the defense.[231]

Despite the criticisms of plea bargaining, there is no indication that it will be abolished at any point in the near future. The risk that defendants might plead guilty to a crime they did not commit is a danger inherent in the plea bargaining process. Society, however, values the benefits of plea bargaining over the possible conviction of innocent defendants. With safeguards in place to mitigate this risk, plea bargaining continues to play a crucial role in the administration of justice and provides defendants with the opportunity to secure a speedy and satisfactory adjudication of their criminal charges.

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225. *Id.*

226. *Id.*

227. *See id.* Judge Frank H. Easterbrook, in response to criticisms of the plea bargaining system, writes in part:

When a defendant's lawyer fails to make an important motion or omits an essential line of arguments, we treat the omission as a forfeiture. How bizarre for a legal system that routinely puts persons in jail for twenty years following their agents' oversight to deny them the right to compromise the same dispute, advertently, for half as much loss of liberty!

Easterbrook, *supra* note 185, at 1977.

228. Easterbrook, *supra* note 185, at 1976.

229. *Id.* at 1971.

230. *See id.* Some examples cited by Easterbrook are witnesses unwilling to testify because of fear and information supplied in confidence.

231. *See id.* at 1971–72.

B. The Importance of Expeditious Adjudication

A criminal justice system that incorporates a separate standard of competency to plead guilty would represent a much-needed alternative to the present adjudicative process. Under the current system, a finding of incompetence to stand trial triggers state civil commitment statutes or similar provisions that allow states to involuntarily detain individuals.[232] In most cases, the criminal adjudication is deferred pending the defendant's restoration of competence and the defendant is confined to a maximum-security hospital, perhaps for a long period of time.[233]

Furthermore, even within these maximum-security institutions, patients with pending criminal charges might be singled out for more restrictive confinement than other civilly committed persons, such as being segregated in a locked unit of the hospital and excluded from therapeutic outings sponsored by the hospital.[234] The highly restrictive nature of this confinement implicates the due process clause. Without ever having been convicted of committing a criminal act, the defendant is placed in a facility that more closely resembles a penal institution than the rehabilitative and therapeutic environment in which other patients are placed.

In *Jackson v. Indiana*, the Supreme Court limited the power of states to indefinitely commit an accused declared incompetent to stand trial.[235] The criminal defendant in *Jackson* was found not competent to stand trial and had been confined in a mental institution for three-and-one-half years.[236] An Indiana statute compelled

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232. *See, e.g.*, Mass. Gen. Laws ch. 123 § 16(c)(2002); Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 BEHAV. SCI. & L. 369, 372 (2003) (citing survey finding that most states had mechanisms in place to detain incompetent defendants against their will).

233. *See* Perlin, *Dignity*, *supra* note 43, at 63 ("[I]f it is unlikely that the defendant will regain his competency in the 'foreseeable future' (a category reserved for the most seriously mentally impaired), it is most likely that he will be committed to a secure forensic hospital for a lengthy stay (in many cases, a lifetime commitment)."); POYTHRESS, *supra* note 7, at 50 ("[D]efendants are committed for restoration of competence, usually to a forensic hospital . . . ."); Winick, *supra* note 4, at 580 ("Many of the hospitals in which defendants are confined are maximum security institutions that are poorly funded and staffed."); MELTON ET AL., *supra* note 8, at 131 (noting that in 1994 more than half the states did not require periodic judicial review of defendants found incompetent). The option of outpatient treatment for incompetent defendants is available under some circumstances. However, it is cautioned that this option is often overlooked or disregarded. *See* Slobogin & Mashburn, *supra* note 51, at 1624 n.198; Winick, *supra* note 4, at 580.

234. *See* MELTON ET AL., *supra* note 8, at 131 (defendants may be "confined in a secure 'forensic' facility and provided with fewer privileges").

235. 406 U.S. 715 (1971).

236. *See id.* at 718–19.

its state courts to civilly commit criminal defendants to psychiatric hospitals until deemed fit to proceed to trial.[237] Because medical evidence suggested that the criminal defendant in *Jackson* would never regain competency, the statute amounted to an indefinite criminal commitment without the procedural protections available in civil proceedings.[238]

The Court held that the due process clause of the Fourteenth Amendment made it unconstitutional to confine the accused based solely on incompetence to stand trial.[239] Rather, due process requires that the continued commitment of a criminal defendant can be justified only for a reasonable period of time of treatment and must be grounded by progress towards the goal of regaining competency.[240] Commitment at this pre-trial stage comports with due process because the defendant is shielded from criminal prosecution when he is not mentally fit to proceed to trial.[241] After this period has expired, however, a state must either release or civilly commit the individual.[242]

Even with the due process protections enumerated in *Jackson*, the danger of long-term commitment persists. A survey of state statutes published more than twenty-years after *Jackson* demonstrated that many states had disregarded the Court's directives.[243] A summary of the survey's findings stated that:

> Four states permitted commitment of incompetent defendants only under civil commitment laws, but 15 states imposed a lengthy treatment period, tied the maximum commitment to the sentences for the crimes charged, or created special classes of incompetent defendants with different commitment or release criteria. Statutes in another 14 states permitted indefinite commitment of permanently incompetent defendants.[244]

Furthermore, confinement under a state's civil commitment statutes may still lead to long-term detainment in a maximum-security hospital. A visit to one of the maximum-security "hospitals" that house defendants deemed not competent to stand trial makes

237. *See id.* at 720.
238. *See id.* at 725–26.
239. *See id.* at 731.
240. *See id.* at 738.
241. *See* People v. Zapotocky, 869 P.2d 1234, 1240 (Colo. 1994).
242. *See Jackson*, 406 U.S. at 738.
243. Miller, *supra* note 232, at 372.
244. *Id.*

clear that this commitment is civil in name only. The restrictive nature of detainment is punitive and analogous to the criminal confinement expressly forbidden in *Jackson.*

Civil commitment laws typically require that an individual be a danger to self or others before the state intervenes.[245] Many states have safeguards in place to prevent the unnecessary deprivation of liberty. After an individual is civilly committed, hospital staff is often required to periodically review the patient and submit recommendations for continued commitment. However, because individuals are committable as long as they are deemed a danger to themselves or others, they can be placed in a forensic hospital indefinitely. Consequently, patients with pending criminal charges may be at greater risk of having their civil commitment extended because their alleged criminal acts could make clinicians and judges more inclined to label them dangerous.[246]

Given the restrictive nature of civil commitment and potential for long-term detainment, prosecutors have been accused of abusing the competency inquiry by using it to detain defendants when guilt is difficult to prove.[247] For this reason, highly secure mental institutions have been called an "alternate place to do time."[248] In fact, some courts have sentenced defendants who had been placed in mental facilities for significant periods of time to "time served," perhaps in recognition of the punitive nature of the confinement.[249] Prolonged civil commitment is a particularly harsh consequence for those accused of misdemeanors because conviction of the offense would likely only have resulted in the payment of a small fine or probation.[250] Defense attorneys have also been accused of misusing the competency doctrine, asking the court to order an evaluation as pretext for designing a trial strategy of mental nonresponsibility or to assist them in plea negotiations or mitigation of sentence in case of conviction.[251]

Moreover, some studies have suggested that competency evaluations and the resultant civil commitment process are used as a "back door" to impose mental health treatment on individuals who

245. *See, e.g.*, CONN. GEN. STAT. § 17a-497 (2003); MONT. CODE ANN. § 53-21-126 (2003).

246. *See* MELTON ET AL., *supra* note 8, at 131.

247. *See* ABA STANDARDS, *supra* note 15, at 163–64; *see also* State ex rel. Haskins v. County Court of Dodge Cty, 62 Wis. 2d. 250, 258–59 (1974) (civil commitment of criminal defendant amounted to the "custodial warehousing of an individual who cannot be appropriately dealt with by the criminal law.")

248. HENRY STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 104 (1979).

249. *See id.*

250. Winick, *supra* note 4, at 580.

251. ABA STANDARDS, *supra* note 15, at 163; GRISSO, *supra* note 90, at 65.

would not otherwise meet the danger to self or others requirement.[252] In a related but less obvious theory about the consequences of misusing competency evaluations, Winick argued that findings of incompetence stigmatize criminal defendants.[253] Along with changing other people's perceptions of them, this stigma may cause "[i]ndividuals . . . to think that their difficulties cannot be helped . . . [and] can impede successful treatment."[254] These feelings could lead to symptoms that mirror depression.[255]

The hazards inherent in delaying the criminal process are tangible. A separate inquiry for CPB is needed to provide criminal defendants with more due process protections. A blanket policy that segregates patients with pending charges in the most secure areas of maximum-security hospitals is overinclusive.[256] Instituting a separate competency standard for pleading guilty would allow a number of criminal defendants to circumvent the civil commitment process. By pleading guilty, some defendants accused of committing minor or non-violent offenses could avoid the stigma and severe deprivation of liberty tied to findings of incompetency to stand trial.

Restrictive confinement in a maximum-security hospital would certainly be justified for offenders who are mentally ill and pose a heightened risk of violence. However, the punitive nature of this detainment mandates that efforts be made to secure a criminal conviction before imposing this severe deprivation of liberty. Individuals should be able to earn time during this period of confinement and a separate standard of competency to plead guilty helps to achieve this end. Under the present adjudicative system, some courts do consider time spent in maximum security hospitals during sentencing, but most statutes do not require that individuals be credited for the years spent languishing in hospitals while civilly committed.[257] When defendants plead guilty and are convicted of a serious offense, the state still reserves the power to

252. Mumley et al., *supra* note 53, at 330–31; GRISSO, *supra* note 90, at 65. The standard model for these studies consists of documenting the correlation between defendants charged with minor offenses such as disorderly conduct and referral for CST.

253. Winick, *supra* note 4, at 581–82.

254. *Id.* at 581.

255. *Id.* at 582.

256. *See id.* at 580.

257. *Id.* Some states require that criminal charges are automatically dismissed after a period of years, usually tied to the maximum sentence the defendant would have received if convicted of the most serious crime charged. *See, e.g.*, MASS GEN LAWS ch. 123, § 16(f) (2002). Even after the dismissal of charges, however, defendants may still be detained against their will under civil commitment statutes.

strictly confine these individuals and impose treatment if necessary. The significant distinction, however, is that states would not be allowed to do this at the expense of the defendant's due process rights.

One anticipated criticism of allowing defendants to plead guilty when they are incompetent to stand trial is that it would encourage plea bargaining and its inherent risks.[258] Fearing the uncertainty of civil commitment, some defendants may be more inclined to admit guilt and start serving their sentence. The risks of coerced plea bargaining, however, do not outweigh the benefits of a separate competency standard for plea bargaining. First, the vast majority of cases are adjudicated through plea bargains anyway: the inducement is already there. The possibility of civil commitment may provide the prosecution with more leverage during plea negotiations, but the significant benefits that states derive from avoiding trial gives the prosecution an incentive to offer a deal that is attractive enough to be accepted. Second, the fact that many defendants regain CST quickly mitigates the likelihood that plea bargains will be haphazardly accepted. In most cases, trial commences within six months of a finding of incompetency to stand trial.[259] There is no pressing need to accept a deal from the prosecution that deviates from the standard offer for comparable allegations if long-term civil commitment is unlikely. Last, there are a number of safeguards in place to protect against the coercion that is associated with plea bargaining.[260]

CONCLUSION

Ironically, in light of the objections to creating a separate standard for CPB, a multi-tiered system provides defendants with more due process. Defendants would avoid the severe deprivation of liberty triggered by civil commitment statutes and similar provisions, and some would be protected from "accepting" a plea offer when they are not competent to make this decision.

The present uniform standard is adverse to the moral dignity that the American justice system is supposed to embody. The criminal justice system is heavily biased towards plea bargaining, not trial, and therefore defense attorneys, prosecutors, and trial

258. *See supra* notes 192–213 and accompanying text.
259. POYTHRESS, *supra* note 7, at 51.
260. *See supra* notes 214–17 and accompanying text.

judges are more likely to accept proposed plea bargains rather than calibrate for competency. Concerns about the defendant's mental fitness are consequently ignored in favor of expediency.

CPB would supplement the antiquated CST standard, which sacrifices fairness and autonomy for convenience. It is time for the concept of legal competence to evolve and adapt to the changed landscape of the criminal process.