

## NOTES

**COMPETENCY, COUNSEL, AND CRIMINAL DEFENDANTS' INABILITY TO PARTICIPATE**SARA R. FABER<sup>†</sup>

## ABSTRACT

*Built into the foundation of the U.S. criminal justice system is the idea that defendants must be able to participate in the trials against them. The right not to stand trial unless competent is premised on the idea that it is fundamentally unfair for defendants to stand trial unless they are able to participate in their trial in at least some capacity. Likewise, the right to counsel is based on a conception of defendants controlling at least some decisions in their case. These rights express an ideal that is foundational to our criminal system: defendant participation must be protected.*

*Ultimately, though, the criminal system does not do a sufficient job of protecting that ideal throughout the criminal process. Instead, the criminal system is punctuated with procedural rules and constitutional standards that actually erode defendants' ability to participate in the trials that affect their lives. In accordance with the ideal evident in the competency standard and the right to counsel, we should build a criminal justice system that allows for defendants to participate in meaningful and impactful ways.*

*This Note first seeks out the doctrines that reveal the underlying ideal of defendant participation, and then examines the procedural rules and constitutional standards that prevent the actualization of that ideal. Ultimately, it concludes that these rules and standards must be changed to preserve the ideal of defendant participation throughout the criminal process.*

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*It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.<sup>1</sup>*

*The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the assistance of counsel, and an assistant, however expert, is still an assistant.<sup>2</sup>*

## INTRODUCTION

The conviction that criminal defendants should be active participants in the trials against them is built into the fabric of the American criminal justice system. This concern is evident in the competency standard, the result of a longstanding prohibition against allowing incompetent defendants to stand trial. The competency standard is premised on the idea that criminal defendants must be capable of at least some level of involvement in the trial against them. If a defendant is incapable of making certain decisions and assisting in his defense, making him stand trial is considered fundamentally unfair and, in our modern system, a violation of his right to due process.

Though the competency standard requires only minimal involvement, the prohibition against allowing an incompetent defendant to stand trial demonstrates the underlying belief that defendant participation is important and must be protected. Ultimately, though, the criminal system does not sufficiently protect that ideal throughout the criminal process. Instead, the criminal system is riddled with rules and standards that erode defendants' ability to participate in the trials that affect their lives.

This Note seeks out the places in the criminal justice system where the ideal of defendant participation is most pronounced, then looks to the rules and standards inhibiting that participation. The Note ultimately concludes that some procedural rules could be changed to better preserve the ideal of defendant participation throughout the criminal process. Part I focuses on the doctrines that reveal this fundamental belief in the importance of defendant participation and the ways that the standard for ineffective assistance of counsel has evolved to undermine or inhibit defendant participation. Part I.A

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1. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

2. *Faretta v. California*, 422 U.S. 806, 819–20 (1975).

addresses the competency standard, exploring its common law origins to illuminate the concern for defendant participation at its heart. It then discusses how the modern competency standard asks for only minimal defendant participation, relying on defense counsel to help their clients through the trial. Part I.B links the competency standard's reliance on defense counsel to the Sixth Amendment right to counsel, demonstrating that though the right to counsel is premised on the idea of defense counsel as assistant to the defendant, decisionmaking authority is increasingly allocated to defense counsel instead of to defendants. Moreover, the extremely high bar for claims for ineffective assistance of counsel often leaves defendants with no recourse when their defense counsel makes a decision that they oppose.

Parts II and III propose procedural changes that could allow or incentivize greater defendant participation. Part II contends that the transfer of decisionmaking authority from defendants to defense counsel undermines the ideal underlying the competency standard and the right to counsel. Given the critical lack of resources for indigent defense, most defense counsel do not have the time or resources to adequately guide defendants through the decisions that they must make. Relying on defense counsel to protect formally competent, but actually low-functioning defendants' right to a fair trial is thus an inadequate measure, and reforms must be instituted to ensure more effective representation or increased defendant participation in the trial process. Because it is unlikely that the standard for proving ineffective assistance of counsel will be lowered, Part III turns to a solution that might be more easily enacted—removing the procedural bars to defendant speech throughout the criminal process and thereby allowing for increased defendant participation. Part III explains why defendant speech is so significant, enumerates the procedural rules that discourage defendants from speaking at their trials, and argues that those procedural bars should be lifted or lessened.

#### I. THE PRIMACY AND EROSION OF DEFENDANT PARTICIPATION

The competency standard and, to a lesser extent, the Sixth Amendment right to counsel demonstrate the American criminal justice system's longstanding commitment to ensuring that criminal defendants who stand trial are capable of participating in those trials. Given the foundational nature of the right not to stand trial if judged incompetent and the right to counsel—the former derived from the common law and the latter enumerated in the Bill of Rights—the ideal

of defendant participation underlying both can itself be described as foundational to our criminal justice system. Despite that, the constitutional standard for effective assistance of counsel and the rules of criminal procedure do not always reinforce or support defendant participation.

This Part explores these two doctrines in the American criminal justice system that make apparent the longstanding concern for defendant participation, and the ways in which rules and standards have eroded defendants' ability to participate. It addresses the competency standard, the right to counsel, and the standard for ineffective assistance of counsel.

### A. *The Competency Standard*

1. *History.* It is a primary tenet of the American justice system that criminal defendants who are incompetent cannot be made to stand trial,<sup>3</sup> and the system goes to great lengths to protect the right of incompetent defendants not to be tried. Courts must follow procedures that assure defendants' competence. Failure to do so amounts to a due process violation<sup>4</sup> and results in reversal of a conviction.<sup>5</sup> The question of competency is so significant that it can be raised by the defense, the

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3. See *Drope*, 420 U.S. at 171–72 (finding that the failure to evaluate the defendant's competency denied him due process); see also *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (“It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment.”); *United States v. Chisolm*, 149 F. 284, 286–87 (S.D. Ala. 1906) (explaining that a person who is insane cannot be tried).

4. *Pate v. Robinson*, 383 U.S. 375, 385 (1966); see also *Drope*, 420 U.S. at 172 (“In *Pate v. Robinson*, we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” (citation omitted)); *Youtsey*, 97 F. at 941 (“It is not ‘due process of law’ to subject an insane person to trial upon an indictment involving liberty or life.”).

5. See, e.g., *Pate*, 383 U.S. at 386 (directing that, because the defendant's due process rights were violated, he must be discharged or retried “within a reasonable time”). It has been argued in several cases that defendants whose right not to be tried while incompetent was violated should be reevaluated for competency *at the time of the original trial*; if a defendant was then found competent at the time of the original trial, the conviction would stand. E.g., *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 386–87. The Court has repeatedly rejected this argument because of the difficulties inherent in such a backward-looking hearing. E.g., *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 386–87. As the Court explained in *Pate*, “we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record.” *Pate*, 383 U.S. at 387 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

prosecution, or the court,<sup>6</sup> and once raised, the issue cannot be waived by the defendant.<sup>7</sup> As the Supreme Court itself has noted, “the prohibition [against incompetent defendants standing trial] is fundamental to an adversary system of justice.”<sup>8</sup>

The prohibition against trying incompetent defendants has its roots in the common law, which disallowed the arraignment, trial, or sentencing of incompetent persons.<sup>9</sup> Two primary concerns motivated this prohibition: the accuracy of the trial and the defendant’s ability to make rational decisions regarding her defense.<sup>10</sup> Because the defendant has the most information about her involvement (or lack thereof) in the commission of the crime, her inability either to recollect the events at issue or to effectively communicate her recollection to the jury jeopardizes the accuracy of the trial.<sup>11</sup> The prohibition also reflects

6. HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 436–42 (1954).

7. See *Pate*, 383 U.S. at 384 (“[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” (citing *Taylor v. United States*, 282 F.2d 16, 23 (8th Cir. 1960))).

8. *Drope*, 420 U.S. at 171–72.

9. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*24 (explaining that “[i]n criminal cases therefore idiots and lunatics are not chargeable for their own acts”); see also *Drope*, 420 U.S. at 171 (quoting 4 BLACKSTONE, *supra*, at \*24); *Youtsey*, 97 F. at 937 (adapting the common law bar on trying incompetent defendants for American courts); Note, *Incompetency To Stand Trial*, 81 HARV. L. REV. 454, 454, (1967) [hereinafter *Incompetency To Stand Trial*] (“[C]urrently operating law relating to incompetency to stand trial derives its substance and much of its form from the common law rule . . .”).

10. See 4 BLACKSTONE, *supra* note 9, at \*24. As Blackstone writes:

[I]f a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; *because he is not able to plead to it with that advice and caution that he ought*. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; *for how can he make his defense?* If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, *had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution*.

*Id.* (emphasis added); see also *Incompetency To Stand Trial*, *supra* note 9, at 457 (asserting that the functions of the competency test are “to safeguard the accuracy of adjudication” and to ensure that the defendant can exercise enough control over his defense as to make the proceeding seem fair).

11. See *United States v. Chisolm*, 149 F. 284, 287 (S.D. Ala. 1906). The court stated:

The reason why an insane person, or one who though not insane, is laboring under such mental infirmity as to prevent his rationally aiding in his defense, should not be put to trial, is . . . because there may be circumstances lying in his private knowledge which would prove him innocent or his legal irresponsibility, of which he can have no advantage, because they are not known to persons who undertake his defense.

*Id.*; see also *Jordan v. State*, 135 S.W. 327, 328 (Tenn. 1911) (“There may be circumstances in . . . which the defendant alone has knowledge, which would prove his innocence, the advantage of which, if insane to such an extent that he did not appreciate the value of such facts, or the propriety of communicating them to his counsel, he would be deprived.”).

a concern with defendants' capacity to make informed decisions. To ensure that defendants are capable of decisionmaking, courts have historically looked to whether the defendant is "capable of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense rationally."<sup>12</sup>

Both of these concerns—accuracy and rational decisionmaking—are ultimately related to the amount that a criminal defendant must be able to participate in her trial. The common law ensured that a defendant had the capacity to give testimony, consult with her lawyer, help formulate the defense, and make sound decisions about the disposition of her case<sup>13</sup>—measurements of competency that are fairly minimal. The common law did not ensure that defendants had full understandings of the mechanics of trial; to the contrary, the common law, as applied by early American courts, only required that defendants be sufficiently competent to fulfill their responsibilities at trial.<sup>14</sup> As the Supreme Court of Tennessee explained, "[i]t is not, however, every case of insanity that will incapacitate one from properly making his defense and prevent him from being placed upon trial. He may be insane upon some subjects, yet perfectly sane in regard to all other matters, and capable of properly advising his counsel."<sup>15</sup> Still, the underlying concern for defendant participation illustrates baseline ideals about the defendant's role in the trial against her; without some level of defendant participation—or at least the capacity for that level of participation—the trial procedure is deemed inadequate and violative of the defendant's right to a fair trial.

American courts have long followed the common law prohibition against trying incompetent defendants, but it was not until 1956 that

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12. *Jordan*, 135 S.W. at 329.

13. *See, e.g., Chisolm*, 149 F. at 287 (listing functions that a criminal defendant must be able to perform); *see also* *United States v. Harriman*, 4 F. Supp. 186, 186 (S.D.N.Y. 1933) (inquiring "whether or not the defendant is in present mental condition to comprehend the charges, to give testimony, and to assist in the conduct of his defense").

14. *See, e.g., Chisolm*, 149 F. at 287. The court stated:

[A] person, though not entirely sane, may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings, and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the criminating evidence, and has such poise of his faculties as will enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction.

*Id.*

15. *Jordan*, 135 S.W. at 328–29.

the Supreme Court first announced the test for determining competency to stand trial in *Dusky v. United States*.<sup>16</sup> In a per curiam opinion, the Court stated that the “test must be whether [the defendant] has sufficient present 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.”<sup>17</sup> Twenty years later, the Court expounded on the test, writing that a person may not stand trial if “he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.”<sup>18</sup> In accordance with the *Dusky* test, courts examine whether the defendant is able to consult with her lawyer and whether she has a rational understanding of the proceedings, but—in accordance with common law precedent—the defendant’s ability to understand and contribute need only be minimal for her to be deemed competent.<sup>19</sup>

2. *Implementation.* The competency standard detailed in *Dusky* is nearly identical to the common law competency standard—both basically require a defendant be capable of understanding and participating in the trial at a minimal level. The way that the *Dusky* standard is implemented, however, requires even less of defendant. The test, as implemented, “reflects a court’s assessment of the most minimal role a defendant can play consistent with notions of due process,”<sup>20</sup> particularly because there seems to be a belief that defendants with low capacity have defense counsel to protect their right to a fair trial. In reality, though, courts rely on counsel to do more than simply protect defendants’ due process rights; instead, defense counsel are—at least sometimes—asked to make decisions for clients who are incapable of making those decisions themselves.

*State v. Beaudoin*<sup>21</sup> exemplifies both the minimal participation and comprehension required of defendants and the way that the low competency standard necessitates heavy reliance on defense counsel.

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16. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

17. *Id.*

18. *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

19. See Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1220 (2006) (describing various situations in which defendants can be declared competent, including defendants with amnesia, mentally handicapped defendants, and defendants on various medication that might impair their ability to participate in the trial).

20. *Id.*

21. *State v. Beaudoin*, 970 A.2d 39 (Vt. 2008).

In *Beaudoin*, the Supreme Court of Vermont affirmed a trial court's competency determination because the defendant, Ronald Beaudoin, was able to understand the most basic explanations of the trial process.<sup>22</sup> Beaudoin could state the charges against him, he correctly identified his lawyer and her role as his counsel, and he understood the difference between being found guilty or not guilty.<sup>23</sup> But as the court's forensic psychiatrist—who declared Beaudoin competent—said of him, Beaudoin's "failure to understand certain points made during the course of a trial 'suggests a need for accommodation.'"<sup>24</sup> The psychiatrist recommended that the court accommodate Beaudoin's shortcomings by "using simple vocabulary and grammar, explaining technical legal terms, allowing time for defendant's attorney to ascertain at frequent intervals that defendant comprehended what transpired, or appointing a facilitator to ensure that defendant understood the proceedings."<sup>25</sup> Beaudoin was found competent in spite of numerous deficiencies in his ability to comprehend the proceedings; though his lawyer would be required to check his comprehension "at frequent intervals,"<sup>26</sup> the court determined—and the state supreme court affirmed—that this defendant was able to understand the proceedings well enough to make informed decisions.<sup>27</sup>

Not only did the court psychiatrist rely on Beaudoin's defense counsel to explain the trial to Beaudoin, the court itself relied on Beaudoin's counsel to make decisions on his behalf. When his counsel told the court that Beaudoin was unable to understand a decision that needed to be made about the acceptability of a jury instruction, "[t]he court asked [the] defendant 'Is that paragraph okay with you if it's okay with your lawyer, Mr. Beaudoin?' Defendant responded affirmatively."<sup>28</sup> As the Supreme Court of Vermont stated while

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22. *Id.* at 43.

23. *Id.*

24. *Id.* at 42. Although the court's forensic psychiatrist ultimately judged Beaudoin competent, his own expert clinical psychologist came to the opposite conclusion. *Id.* Beaudoin's expert "concluded that 'because of his mental retardation and severe problems with language problem solving . . . he would be incompetent because he would not have rational understanding.'" *Id.* (alterations in original).

25. *Id.*

26. *Id.*

27. *Id.* at 43, 47.

28. *Id.* at 46. The entire interaction, which took place after the defendant had already been deemed competent, proceeded as follows:

After the close of evidence, the parties discussed jury instructions. The court requested that defense counsel discuss a paragraph in the instructions making specific reference to defendant not testifying. Defense counsel reported that she showed the instruction



affirming the trial court’s decision not to conduct a competency hearing at that point, “[t]here is nothing in this interaction that would trigger the court to make a second competency determination.”<sup>29</sup> Though Beaudoin was unable to comprehend the meaning of the decision he was asked to make, the court did not need to assess his competency because he had counsel present, and her decisions could stand in for his own. As the next Section discusses, defense counsel can make some decisions for their clients, but we should not allow a lawyer’s decisionmaking capabilities to stand in for those of her client. The competency standard is meant to ensure that defendants who stand trial have the capacity to understand and make important decisions, and we should not allow the presence of counsel to obscure that goal.

The First Circuit’s decision in *Brown v. O’Brien*<sup>30</sup> is also demonstrative of the minimal understanding necessary to demonstrate competency and the reliance on counsel necessitated by the competency standard. In *Brown*, the First Circuit upheld the trial court’s determination of a defendant’s competency on habeas review, despite testimony from multiple psychiatrists that the defendant, Eric Brown, was incompetent to stand trial.<sup>31</sup> In upholding the trial court’s determination, the First Circuit noted that, although the defendant “was surely impaired, . . . all experts agreed that he possessed at least *some* understanding of the situation and some ability to reason about it and discuss issues with counsel.”<sup>32</sup> The court continued:

No one knows just how to measure precisely that “sufficient present ability” to consult and understand of which the Supreme Court spoke in *Dusky*. . . . A raving lunatic may not be tried, however patently guilty and however hopeless his defense. But Brown is in a gray area,

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to defendant but he couldn’t understand what it meant. She reiterated her objection to defendant’s competency. The court asked defendant “Is that paragraph okay with you if it’s okay with your lawyer, Mr. Beaudoin?” Defendant responded affirmatively.

*Id.*

29. *Id.*

30. *Brown v. O’Brien*, 666 F.3d 818 (1st Cir. 2012).

31. *Id.* at 825. One of the psychiatrists testified that the defendant “was suffering from chronic paranoid schizophrenia, was delusional, believed he was the Anti-Christ, and heard voices . . . [he] appeared to have deteriorated significantly since his last evaluation, was inattentive, and would have serious difficulties following the proceedings and preparing a defense.” *Id.* Ultimately, the district court based its competency determination on testimony from a forensic psychiatrist for the government who judged the defendant competent after two evaluations. *Id.* at 826. On habeas review at the First Circuit, the circuit court concluded that “the state court finding was contestable, but it was not ‘unreasonable’ under the deferential habeas standard.” *Id.* at 827.

32. *Id.* at 826 (emphasis in original).

somewhat impaired; and although “prejudice” is not part of the equation, it is hard to see what more Brown could have contributed to the thorough “all fronts” defense he received.<sup>33</sup>

Though the First Circuit seemed skeptical about the defendant’s ability to understand and participate in the trial, it affirmed the trial court’s finding. The First Circuit noted that it affirmed, at least in part, because of the deferential standard of review and because of the trial court’s firsthand knowledge of the defendant’s demeanor,<sup>34</sup> but it ultimately allowed a conviction to stand where the defendant’s capacity to understand and participate was admittedly dubious.

*Brown* also shows how the competency standard necessitates reliance on defense counsel. The First Circuit noted that “it is hard to see what more Brown could have contributed to the thorough ‘all fronts’ defense he received,”<sup>35</sup> but the primary defense presented at trial was an affirmative defense of insanity,<sup>36</sup> for which Brown’s help was not necessary. To prove that Brown was insane at the time of his crime, his defense counsel called four psychiatrists, who testified about Brown’s mental illness, as well as a number of Brown’s friends, family members, and former coworkers, who testified to Brown’s deteriorating mental state during the months leading up to the crime.<sup>37</sup> Brown himself did not testify at trial, and given the psychiatrists’

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33. *Id.* at 826–27.

34. *See id.* at 826. The First Circuit noted:

Habeas challenges to state competency findings fail with remarkable regularity, partly because habeas review is deferential and partly because the trial judge has seen the witnesses and the defendant. The ability to understand the proceedings and assist counsel is both a matter of degree and one in which trial judges, as well as health professionals, have pertinent expertise.

*Id.* (citations omitted) (citing *Competency To Stand Trial*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 459, 468 n.1432 (2011); then citing *United States v. Figueroa-Gonzalez*, 621 F.3d 44, 48 (1st Cir. 2010); and then citing *United States v. Ahrendt*, 560 F.3d 69, 75 (1st Cir. 2009)). The standard of review for competency hearings is usually low: in Georgia, it is abuse of discretion, *see Wadley v. State*, 672 S.E.2d 504, 505–06 (Ga. Ct. App. 2009) (“The question on appeal, therefore, is whether the trial court abused its discretion in finding no reasonable doubt as to Wadley’s competency and therefore no need to conduct further proceedings.”); in Massachusetts, “[a] judge’s determination of competency is entitled to substantial deference ‘because the judge had the opportunity to view the witnesses in open court and to evaluate the defendant personally,’” *Commonwealth v. Brown*, 872 N.E.2d 711, 722 (Mass. 2007); in Vermont, appellate courts “will not overturn a trial court’s competency determination if it is supported by the court’s findings, and if the findings in turn are supported by credible evidence and are not clearly erroneous,” *State v. Tribble*, 892 A.2d 232, 237 (Vt. 2005).

35. *Brown*, 666 F.3d at 826.

36. *Brown*, 872 N.E.2d at 718.

37. Brief of Petitioner-Appellant Eric Brown at 15–26, *Brown*, 666 F.3d 818 (No. 11-1037).

analysis of his mental state, it is unclear how much help he could have been to his lawyers in formulating the defense.<sup>38</sup> The First Circuit noted that Brown could not have contributed much to his defense, but the competency standard is meant to ensure a minimum of defendant participation, not to encourage clever lawyering in the absence of help from the defendant. The point of the competency standard is undermined when defendants can be tried because their defense counsel has utilized strategies for which the defendant's input is not strictly necessary.

The history of the competency standard underscores that a defendant's participation is fundamental to our criminal justice system. The American criminal justice system adopted the concern for defendant participation from the common law, so the concern for defendant participation has always been present in the American legal system. As the next Section describes, our criminal system has increasingly allowed defense counsel to make decisions for their clients and prevented defendants from participating in their trials in the most meaningful and impactful ways.

*B. Overreliance on Defense Counsel Is Compounded by the Increasing Power They Are Given over Their Clients' Cases*

As mentioned in the last Section, the low bar for defendant competency arises in part from the courts' reliance on lawyers to protect their clients' right to a fair trial. But the ideals behind the competency standard demonstrate an interest in defendant participation that would require a more robust partnership between defendants and their counsel than the system currently supports.

The history of the Sixth Amendment right to counsel reveals an idea of the defendant as the leader of their trial, with defense counsel assisting rather than supplanting the defendant.<sup>39</sup> Undermining this

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38. Even the state's psychiatrist, who deemed Brown competent to stand trial, described a person of low capacity: the psychiatrist testified "that while Brown did hear voices, they were not overly distracting, and that during the evaluation, Brown was able to concentrate and focus, had a good short-term memory, and showed no gross impairment in judgment." *Brown*, 666 F.3d at 826.

39. See Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right To Control the Case*, 90 B.U. L. REV. 1147, 1163-69 (2010) (reviewing the "common law practices in England, in the Colonies prior to the ratification of the Constitution, and in the states at the time the Bill of Rights took hold" to determine the meaning of the Sixth Amendment right to counsel); Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 366-67 (2003) ("[T]he counsel

ideal, however, are two intersecting lines of Supreme Court cases, one of which assigns certain decisions solely to defendants<sup>40</sup> and the second of which—the cases enumerating and applying the standard for ineffective assistance of counsel—increasingly allows defense counsel to encroach on defendants’ decisionmaking authority, even for those decisions that are supposed to be left to defendants alone.<sup>41</sup> Rather than creating doctrine that incentivizes or encourages increased defendant participation, the Supreme Court has crafted a doctrine of ineffective assistance that allows defense counsel to make unilateral decisions for their clients, sometimes even over their objections.<sup>42</sup>

This Section describes the history of the Sixth Amendment right to counsel and its implications for the relationship between defendants and their counsel, and then discusses the ways that certain doctrines have allowed defense counsel to infringe on defendant decisionmaking.

1. *Sixth Amendment Right to Counsel.* Our current criminal justice system regards defense counsel as directors of their clients’ cases,<sup>43</sup> but the text and history of the Sixth Amendment right to “Assistance of Counsel” reveals that defense counsel were originally conceived of as “[a]ssistan[ts],” not directors.<sup>44</sup> At the time the Sixth Amendment was written, the presence of any defense counsel was a relatively new

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clause guarantees not only that a defendant will have the right to counsel, but also that in exercising that right, the defendant will maintain autonomy over his own defense.”).

40. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case . . .”). For more on *Jones*, see *infra* notes 55–58.

41. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (setting the standard for proving ineffective assistance of counsel claims). For more on the *Strickland* standard, see *infra* notes 64–99 and accompanying text.

42. For more on how the *Strickland* standard has allowed defense counsel to usurp their clients’ decisionmaking authority, see *infra* Part I.B.2.

43. For a description of how the competency standard relies on defense counsel to guard their clients’ rights, see *supra* Part I.A.2. For a description of how the courts have shifted decisionmaking authority from defendants to defense counsel, see *infra* Part II.B.

44. U.S. CONST. amend. VI; see also Hashimoto, *supra* note 39, at 1168 (“[A]t the time the Sixth Amendment was debated and ratified, counsel truly was an assistant rather than a master.”); Zelnick, *supra* note 39, at 366 (asserting that defense counsel are described in the Constitution “not as the protector or even the defender of the accused, but rather as the defendant’s ‘Assistan[t]’ (alterations in original)).

phenomenon.<sup>45</sup> Self-representation was the norm,<sup>46</sup> and when defense counsel were present, they usually “played a relatively limited role, primarily cross-examining witnesses and arguing legal questions.”<sup>47</sup> “[T]he entire history upon which the Framers drafted the Sixth Amendment featured the defendant as the primary decision-maker and advocate in the case.”<sup>48</sup>

The text of the Amendment corresponds with that history: it creates a right “to have the *Assistance* of Counsel.”<sup>49</sup> The Supreme Court has recognized that the text leaves to the defendant the work of and responsibility for mounting a defense, writing that “[t]he Sixth Amendment . . . grants to the accused personally the right to make his defense. . . . The counsel provision supplements this design. It speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.”<sup>50</sup>

The text and history of the Sixth Amendment right to counsel thus demonstrate that the role of defense counsel was never meant to be a stand-in for defendants, nor was the right to counsel meant to supplant the defendant’s other constitutional rights. “The right to counsel, far from being seen as a means for undermining defendant autonomy, instead was intended, like the other trial guarantees in the Constitution, to provide defendants themselves with a necessary tool

45. See generally WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955) (reviewing the historical availability of defense counsel in pre-Revolutionary England and pre- and post-Revolutionary America); see also Hashimoto, *supra* note 39, at 1166–67 (reviewing the emergence of the presence of defense counsel in England and the American colonies around the time of the American Revolution).

46. Hashimoto, *supra* note 39, at 1166 (“As late as 1800 it seems probable that only in New Jersey, by statute, and in Connecticut, by practice, did the accused enjoy a full right to retain counsel, and to have counsel appointed if he were unable to afford it himself.” (citing BEANEY, *supra* note 45, at 21 (1955))).

47. *Id.* at 1168.

48. *Id.*

49. U.S. CONST. amend. VI (emphasis added).

50. *Faretta v. California*, 422 U.S. 806, 819–20 (1975). In *Faretta*, the Court recognized that criminal defendants have a right to self-representation, disallowing states from imposing counsel on defendants without their consent. *Id.* at 807, 818. But the Supreme Court noted that, so long as the defendant did consent to having counsel represent him, counsel had the ability to direct the case:

It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant’s consent, at the outset, to accept counsel as his representative.

*Id.* at 820–21 (citing *Henry v. Mississippi*, 379 U.S. 443, 451 (1965); then citing *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966); and then citing *Fay v. Noia*, 372 U.S. 391, 439 (1963)).

for making and acting upon the most well-informed decisions.”<sup>51</sup> Counsel were intended to help guide defendants through the trial, putting the defendant “in the best position to choose for himself the course most advantageous from his own perspective.”<sup>52</sup> In light of this historical and textual understanding, the Sixth Amendment seems to call for a partnership between a defendant and her counsel rather than a usurpation by counsel of defendant’s decisionmaking capability.<sup>53</sup>

2. *Defendant Decisionmaking and Ineffective Assistance of Counsel.* Allocating decisionmaking authority between defendants and their counsel proves difficult,<sup>54</sup> but the Supreme Court has held that there are a few “fundamental decisions regarding the case” that are left to the exclusive purview of the defendant.<sup>55</sup> Other than those key decisions, defense counsel are empowered to make all decisions regarding day-to-day case management and, significantly, overall case strategy. The latter is important because the Supreme Court’s standard for ineffective assistance of counsel includes a presumption that counsel’s decisions are part of the trial strategy, and thus correctly within counsel’s purview.<sup>56</sup> This standard puts the bar for proving ineffective assistance of counsel so high that it is nearly impossible for defendants to succeed on those claims, even when their counsel has encroached on the few “fundamental decisions regarding the case” that are supposed to be left to the defendant alone.<sup>57</sup>

In *Jones v. Barnes*,<sup>58</sup> the Supreme Court held that “the accused has the ultimate authority” to decide “whether to plead guilty, waive a jury,

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51. Hashimoto, *supra* note 39, at 1169.

52. *Id.*

53. This argument should not be misconstrued to mean that this Note advocates for criminal defendants to do most, or even half of their own defense work. Rather, the historical understanding of the Sixth Amendment right to counsel is intended to bolster the argument that we should be building a criminal justice system that better affords criminal defendants the opportunity to participate in the trials against them. Counsel’s role should be to help bolster the defendant’s ability and choice whether to participate.

54. For an overview of the arguments and evidence on both sides of the longstanding debate on how to allocate decisionmaking power between defendants and their counsel, see Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 18 (1998).

55. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

56. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

57. *Jones*, 463 U.S. at 751.

58. *Jones v. Barnes*, 463 U.S. 745 (1983).

testify in his or her own behalf, or take an appeal.”<sup>59</sup> Aside from those exceptions, defense counsel is empowered “to manage the case and to make all tactical decisions . . . [and] to present the client’s case in accord with counsel’s best professional judgment, regardless of the client’s wishes.”<sup>60</sup> Defense counsel also has the ability to make all decisions regarding the “day-to-day conduct of the defense,”<sup>61</sup> including decisions “to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.”<sup>62</sup> As the Court has mentioned, “[t]he adversary process could not function effectively if every tactical decision required client approval.”<sup>63</sup>

Since the Court enunciated the standard for ineffective assistance of counsel in *Strickland v. Washington*,<sup>64</sup> however, courts have increasingly allowed lawyers to encroach on even those “fundamental decisions” that are supposed to be left to the defendant. In *Strickland*, the Court held that, in order to succeed on an ineffective assistance of counsel claim, defendants must first show that their lawyer’s performance was deficient, and then must show “that the deficient performance prejudiced the defense . . . [so] as to deprive the defendant of a fair trial.”<sup>65</sup> In other words, a defendant making an ineffective assistance of counsel claim must not only show that their counsel’s performance was insufficient, but also demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”<sup>66</sup>

The *Strickland* standard is explicitly deferential to lawyers’ decisionmaking. The Court refused to spell out any guidelines for what qualifies as deficient performance,<sup>67</sup> instead opting for a standard of

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59. *Id.* at 751.

60. Uphoff & Wood, *supra* note 54, at 18.

61. *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring); *see also Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988) (“Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.” (footnote omitted)) (citing *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966); then citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984); and then citing *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963)).

62. *Taylor*, 484 U.S. at 418.

63. *Id.*

64. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

65. *Id.*

66. *Id.* at 694.

67. As the Court explained:

review in which courts determine “whether counsel’s assistance was *reasonable considering all the circumstances*.”<sup>68</sup> Further, the Court mandated that the standard for reviewing counsel’s performance should be reasonableness at the time of trial; courts should make “every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”<sup>69</sup> Ultimately, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>70</sup>

This extremely deferential standard has allowed defense lawyers to infringe upon their clients’ decisionmaking authority without reproach and without recourse for those clients. In *Jones*, the Supreme Court mandated that only defendants can decide “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,”<sup>71</sup> but the Court has failed to recognize ineffective assistance in cases in which counsel have neglected to inform their client about the right to appeal,<sup>72</sup> effectively barred their client from testifying,<sup>73</sup> and conceded

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No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

*Id.* at 688–89.

68. *Id.* at 688 (emphasis added).

69. *Id.* at 689.

70. *Id.* The Court in *Strickland* even explicitly stated that “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Id.* Human rights lawyer and professor Steven Bright criticized the low *Strickland* standard thusly:

Much less than mediocre assistance passes muster under the *Strickland* standard. Errors in judgment and other mistakes may readily be characterized as ‘strategy’ or ‘tactics’ and thus are beyond review. Indeed, courts employ a lesser standard for judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects.

Steven Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858 (1994).

71. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

72. For a further discussion of the Court’s analysis in cases where counsel failed to inform their client about their right to appeal, see *infra* notes 77–81 and accompanying text.

73. For example, in *Nix v. Whiteside*, 475 U.S. 157 (1986), the defendant argued that he had been denied effective assistance of counsel because his lawyer threatened to report him to the court for perjury if he testified in a manner that his lawyer thought was perjurious. *Id.* at 161–62. The Court held that, because there is no right to testify falsely, counsel’s assistance was not prejudicial. *Id.* at 173, 175. According to the Court, the lawyer “can in no sense be said to have



to guilt of a lesser offense in the opening statements of a trial.<sup>74</sup> White collar defense attorney Kimberly Helene Zelnick argues that it is the *Strickland* standard that prevents defendants from effectively exercising the right to make those decisions.<sup>75</sup> “The power of the attorney to override his client’s wishes is virtually absolute whenever the decisions can reasonably be classified as ‘trial strategy.’ Moreover, courts do not hesitate in labeling a decision as trial strategy even when the decision is plainly linked to fundamental rights.”<sup>76</sup>

In *Roe v. Flores-Ortega*,<sup>77</sup> for example, the Court followed *Strickland* in “[d]eclining to adopt a bright-line rule” about whether the failure to consult with one’s client about filing an appeal was per se ineffective assistance of counsel.<sup>78</sup> Instead, the Court ruled that it was only per se unreasonable for defense counsel to fail to consult with their client about an appeal when a rational defendant would want an appeal or when a particular defendant had “reasonably demonstrated to counsel that he was interested in appealing.”<sup>79</sup> In so ruling, the Court essentially allowed defense counsel—in certain circumstances—to decide not to consult with their client about an appeal and then to decide single-handedly not to file one, even as the Court noted that the decision on whether to file an appeal is solely within the defendant’s

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forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely.” *Id.* at 173. Zelnick argues that this framing of the case allowed the Court to dodge the more important question of whether an attorney could abrogate his client’s right to testify. Zelnick, *supra* note 39, at 385–86.

74. For a further discussion of the effect of counsel conceding to their client’s guilt, see *infra* notes 87–91 and accompanying text.

75. Zelnick argues that *Strickland* is operating to curtail defendants’ rights, Zelnick, *supra* note 39, at 381–99, but Professor Erica Hashimoto argues that it is the right to counsel itself that has limited the defendant’s “autonomy interest.” Hashimoto, *supra* note 39, at 1149. As Hashimoto states, “[b]eginning in the late 1960s, after the Court’s decision in *Gideon v. Wainwright*, however, courts began to shift, in subtle ways, decisional control over cases from clients to counsel.” *Id.*

76. Zelnick, *supra* note 39, at 388.

77. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

78. Zelnick, *supra* note 39, at 386. The Court made explicit that it was declining to set a bright-line rule because of *Strickland*’s warning against specific guidelines with which to measure effective counsel: “We cannot say, as a *constitutional* matter, that in every case counsel’s failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense.” *Flores-Ortega*, 528 U.S. at 479.

79. *Flores-Ortega*, 528 U.S. at 480. The Court further followed *Strickland* in holding that a defendant making an ineffective assistance claim based on a counselor’s failure to file an appeal must prove that the decisions prejudiced the defendant, meaning that, if not for counsel’s failure to file, the defendant would have filed an appeal. *Id.* at 484.

purview.<sup>80</sup> But if the authority to decide whether to file an appeal rests solely with the defendant, defense counsel should never be able to decide unilaterally not to file one. It is not enough that defense counsel are required to ask defendants who have a reasonable shot at an appeal whether they want to file one because a defendant's right to appeal is not contingent on how strong a defendant's case is. Instead, as Justice Souter argued in his dissent, if defendants alone can make that decision, then defense counsel that do not ask their client whether they want to file an appeal and do not file one have effectively taken that decision from the defendant and rendered ineffective assistance.<sup>81</sup>

Courts have also allowed defense counsel to concede guilt at certain parts of trial or to lesser offenses, which infringes on defendants' exclusive right to decide to plead guilty. In *Florida v. Nixon*,<sup>82</sup> the Supreme Court held that defense counsel had the authority to concede his client's guilt at the guilt/innocence phase of a capital trial because that is a strategic trial decision.<sup>83</sup> As the Court wrote, "if counsel's strategy, *given the evidence bearing on the defendant's guilt*, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain."<sup>84</sup> In other words, if the evidence against a capital defendant is great enough, it is reasonable for a lawyer to decide to concede his client's guilt to a capital crime—without his client's explicit consent<sup>85</sup>—even though the decision to plead guilty is supposed to be left exclusively to the defendant and even though the decision requires more than "tacit acquiescence."<sup>86</sup> Similarly, in *Haynes v. Cain*,<sup>87</sup> an en banc panel of the Fifth Circuit held that defense counsel's decision to concede their

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80. *See id.* at 479 ("[T]he decision to appeal rests with the defendant.").

81. *Id.* at 488–93 (Souter, J., concurring in part, dissenting in part).

82. *Florida v. Nixon*, 543 U.S. 175 (2004).

83. *Id.* at 191–93.

84. *Id.* at 192 (emphasis added).

85. In *Nixon*, the question was specifically whether defense counsel could decide to concede a client's guilt without *any* input from the client on the decision; despite defense counsel's repeated attempt to explain his strategy to the defendant in *Nixon*, the defendant was "generally unresponsive during their discussions" and "never verbally approved or protested [the] proposed strategy." *Id.* at 181. The separate, but related question of whether defense counsel can permissibly decide to concede their client's guilt *over their client's express objection* is currently before the Court in *McCoy v. Louisiana*, 138 S. Ct. 53 (2018). The court heard oral arguments on January 17, 2018, but there was no decision at the time of publication.

86. *Id.* at 188–89.

87. *Haynes v. Cain* (*Haynes II*), 298 F.3d 375 (5th Cir. 2002) (en banc). At the time that the Fifth Circuit decided *Haynes II*, the question had not been decided by the Supreme Court, but the decision in *Haynes II* could be superseded by the Court's upcoming decision in *McCoy*.

client's guilt to second-degree murder during the trial's opening statements<sup>88</sup>—despite the defendant's fervent statements that he wished to plead not guilty to all counts charged<sup>89</sup>—was a reasonable trial strategy “[g]iven the overwhelming evidence defense counsel faced.”<sup>90</sup> Moreover, the en banc Fifth Circuit noted that, even if defense counsel's failure to get their client's consent to concede to lower charges amounted to deficient performance under *Strickland*, an ineffective assistance claim would still fail on the prejudice prong of the *Strickland* test. “Based on the prosecution's nearly conclusive evidence that Haynes [the defendant] committed the offense in question,” the defendant could not have established “that without the concession strategy, he would have been acquitted of first degree murder.”<sup>91</sup> In effect, the stringency of the *Strickland* ineffective assistance standard piles on top of the defense counsel's usurpation of their client's decisionmaking authority, making it even more difficult for defendants to assert their decisionmaking rights or to receive relief when those rights have been violated.

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88. The defendant had been charged with first-degree murder, and the defense counsel decided that the evidence of defendant's guilt was so overwhelming that the best they could do was to argue for a conviction for second-degree murder instead, thus avoiding the death penalty. *Id.* at 377–78. In accordance with this strategy, during opening statements the defense counsel conceded that the defendant had abducted, raped, and possibly robbed the victim, and that she had died during the commission of these crimes. *Haynes v. Cain (Haynes I)*, 272 F.3d 757, 759 (5th Cir. 2001). But, the defense argued, her death had not been intentional. *Id.*

89. *Haynes II*, 298 F.3d at 379. After defense counsel's opening statement, the defendant told the court:

I don't agree with what these lawyers are doing, talking about I'm guilty of second degree murder. I'm not guilty of second degree or first degree. . . .

. . . .

. . . I specifically asked my lawyers not to do what they—they said they were going to do this second degree junk. I don't like that. I mean, I'm not guilty. I don't feel I'm guilty of second degree or first degree and I don't agree with them.

*Haynes I*, 272 F.3d at 759–60.

90. *Haynes II*, 298 F.3d at 382 (majority opinion).

91. *Id.* at 383. In another particularly perverse application of the prejudice part of the *Strickland* test, a defendant's ineffective assistance claim was denied after his attorney incorrectly understood the meaning of felony murder and had told the jury multiple times that, although her client was guilty of armed robbery, he was not guilty of the murder that accompanied the robbery. *Cave v. Singletary*, 971 F.2d 1513, 1517–18 (11th Cir. 1992). Though the Eleventh Circuit noted that it was “disturbed by Steger's [counsel's] representation of Alphonso Cave [defendant]” and was “convinced that Steger completely misunderstood the law of felony murder, which is a concept that . . . should be within the grasp of lawyers, especially those defending a client charged with a capital offense,” it also believed that the evidence against the defendant was so great “that even a highly competent lawyer could not have won Cave an acquittal.” *Id.* at 1518. Thus, the defendant's claim failed on the prejudice portion of the *Strickland* test. *Id.*

In both *Nixon* and *Haynes*, the Supreme Court and the Fifth Circuit made sure to note that the decisions did not interfere with the defendant's exclusive ability to decide whether to plead guilty.<sup>92</sup> In *Nixon*, the Court emphasized that defense counsel's decision to concede the defendant's guilt did not do away with the trial altogether; although a guilty plea "is a 'stipulation that no proof by the prosecution need be advanced,'"<sup>93</sup> in this trial "[t]he State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged."<sup>94</sup> The Court noted that the defendant retained the right to cross-examine witnesses and "could endeavor . . . to exclude prejudicial evidence."<sup>95</sup> Likewise, in *Haynes*, the Fifth Circuit concluded that "defense counsel did not *entirely* fail to subject the prosecution's case to meaningful adversarial testing."<sup>96</sup> Though counsel admitted that their client committed second-degree murder, counsel "remained active at trial, probing weaknesses in the prosecution's case on the issue of intent" and cross-examining the state's witnesses, intending to "focus the jury's attention on the one area where the prosecution's case was not exceedingly strong."<sup>97</sup>

These analyses seem to suggest that there is a meaningful difference between pleading guilty and conceding guilt while still testing parts of the government's case at trial, but the difference is probably null to defendants who wish to plead not guilty. As Professor Erica Hashimoto points out, defendants have an interest in overseeing the decisions made by their defense counsel because it is their liberty at stake.<sup>98</sup> "[B]ecause the defendant is the only person who can prioritize the various competing interests at stake—including the risks of going to trial, the sentencing exposure, and other possible consequences of a guilty plea—the defendant has a significant autonomy interest in controlling the key decisions in the case."<sup>99</sup> If the ability to plead guilty is reserved exclusively to the defendant whose

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92. *Florida v. Nixon*, 543 U.S. 175, 188–89 (2004); *Haynes II*, 298 F.3d at 381–82.

93. *Nixon*, 543 U.S. at 188 (citing *Boykin v. Alabama*, 395 U.S. 238, 242–43 n.4 (1969)).

94. *Id.*

95. *Id.*

96. *Haynes II*, 298 F.3d at 381.

97. *Id.* at 382.

98. See Hashimoto, *supra* note 39, at 1149 (arguing that "there is a strong jurisprudential argument that the Constitution should protect the interest of a criminal defendant in exercising control over his case" because a conviction results in the loss of the defendant's autonomy).

99. *Id.* at 1178–79.

liberty is at stake, counsel should not be allowed to commandeer that right merely because the procedural safeguards of the trial remain.

Ultimately, the ideals of the competency standard and the foundation of the right to counsel are at odds with both the reliance on counsel inherent in the competency standard and the encroachment on defendants' decisionmaking authority. The *Jones/Strickland* line of cases simultaneously allocates certain decisions to defendants' exclusive purview and allows defense counsel to trespass on defendants' decisionmaking authority. Furthermore, *Strickland* sets the standard for proving ineffective assistance of counsel so high that it is nearly impossible for defendants to receive any recourse for decisions made by counsel, even when those decisions should by right be made by the defendant. And although the competency standard seeks to ensure a minimum level of defendant participation, the competency standard is justified by increasing reliance on lawyers to protect their clients' rights when their clients may be unable to do so for themselves. Thus, "while the Court has blessed pathetic attorney performances with one hand, it has celebrated the wisdom of counsel with the other, widening the scope of attorney discretion and the appointed attorney's power over his hapless client."<sup>100</sup> These various doctrines—the competency standard and the *Jones/Strickland* lines of cases—give increasing authority to defense counsel, ignoring the ideal of defendant participation fundamental to the competency standard. As the next two Parts argue, the U.S. criminal justice system should respect the underlying ideal of defendant participation by incentivizing increased partnership between defendants and their defense counsel and by instituting procedures that allow defendants to make more meaningful choices about their level of participation in the trials affecting them.

## II. INDIGENT DEFENSE AND RAISING THE *STRICKLAND* STANDARD

As was explained in Part I, the competency standard and the *Strickland* standard interact to allow defense counsel to make a number of decisions for their clients. The competency standard, in particular, depends on defense counsel to protect their clients' right to a fair trial. But the reality of the criminal justice system is that public defenders, who take on the bulk of criminal defense work,<sup>101</sup> are

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100. Zelnick, *supra* note 39, at 376.

101. See MAREA BEEMAN, A.B.A., USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 2 (2012), <http://www.americanbar.org/content/dam/aba/administrative/>

extraordinarily overworked and underresourced.<sup>102</sup> So long as the criminal system relies on defense counsel to help their clients—who may be formally competent but require assistance—we must lower the standard for proving ineffective assistance of counsel. Should, however, this standard not be lowered—as it likely will not be—we should be even more focused on enacting rules of criminal procedure that allow for a truer partnership between defense counsel and their clients. This Part explores the first of two potential solutions to the lack of defendant participation: lowering the *Strickland* standard. Part III then focuses on the second possible solution of changing the rules of criminal procedure to allow for increased defendant participation through speech.<sup>103</sup>

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legal\_aid\_indigent\_defendants/ls\_sclaid\_def\_sustaining\_and\_improving\_public\_defense.authcheckdam.pdf [https://perma.cc/72NF-VS2C] (“[R]esearchers estimate that 60 to 90 percent of all criminal cases involve indigent defendants.”); CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> [https://perma.cc/G3CU-8FGD] (“[A]pproximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel.”); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIMINAL JUSTICE (A.B.A.), Fall 2009, at 1, [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_24\\_3\\_primus.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.authcheckdam.pdf) [https://perma.cc/RD8P-A3NN] (“With public defenders representing 80 percent of criminal defendants nationwide, the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.”).

102. See A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 8 tbl.1 (2004) [hereinafter *GIDEON’S BROKEN PROMISE*], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [https://perma.cc/F3VU-7XSV] (describing percentages of indigent defense expenditures attributable to either state or counties in 2002).

103. It is worth mentioning that this Note does not explore the possibility of raising the competency standard. Defendants who are found incompetent are usually civilly committed until they are competent to stand trial or the charges against them are dropped. See, e.g., 18 U.S.C. § 4241(d) (2018) (mandating that defendants who are judged incompetent be hospitalized for treatment until they are competent to stand trial or the charges against them are dropped); ALASKA STAT. ANN. § 12.47.110 (2008) (mandating that courts commit incompetent defendants charged with felonies and allowing courts to decide whether to commit incompetent defendants charged with “any other crime” for no longer than ninety days); FLA. STAT. § 916.13 (2016) (“Every defendant who is charged with a felony and who is adjudicated incompetent to proceed may be involuntarily committed.”). Although some jurisdictions forbid indefinitely committing incompetent defendants, other jurisdictions do not impose a maximum time limit that an incompetent defendant can remain in civil commitment. See ALASKA STAT. ANN. § 12.47.110 (mandating ninety-day limit on civil commitment of incompetent defendants); TEX. CODE CRIM. PROC. ANN. art. 46B.0095(a) (2017) (“A defendant may not . . . be committed to a mental hospital or other inpatient or residential facility . . . , ordered to participate in an outpatient . . . treatment program, or subjected to any combination of inpatient treatment [and] outpatient . . . treatment . . . for a cumulative period that exceeds the maximum term provided by law for the

The competency standard necessitates heavy dependence on defense counsel to protect their clients' right to a fair trial, and even to make decisions on their clients' behalf. In doing so, it also incorporates the *Strickland* standard to ensure that defense counsel provide competent representation to their clients. But as discussed in Part I, *Strickland* set the bar for proving or receiving relief for ineffective assistance so high that the *Strickland* standard can be said to effectively remove defendants' decisionmaking authority and grant it instead to their lawyers. This has obvious negative implications for defendants' ability to participate in trials, and those implications become even more dire because of the state of indigent defense. Most criminal defendants in the American criminal justice system are represented by public or assigned counsel,<sup>104</sup> yet public defense in the United States is notoriously underresourced.<sup>105</sup> Given that reality, we should be skeptical of rules or standards that transfer so much authority to defense counsel and preclude defendants from having the opportunity to be full participants in the trials against them.

Indigent defense services are responsible for the vast majority of criminal defense, but public defense offices are notoriously underfunded and overworked. In 2000, the U.S. Department of Justice's Bureau of Justice Statistics found that 66 percent of federal felony defendants and 82 percent of felony defendants "in large State courts were represented by public defenders or assigned counsel."<sup>106</sup> But the lack of funding for public defense makes that large burden incredibly difficult to meet, especially for indigent defense at the state level,<sup>107</sup> where about 90 percent of all criminal prosecutions take

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offense for which the defendant was to be tried."); VA. CODE ANN. § 19.2-169.3 (2017) (allowing for the civil commitment "without limitation[]" of incompetent defendants who have been charged with capital murder, so long as a trial court reviews the defendant's competency every six months); see also Brian T. Lawler, Comment, *Out of Sight, Out of Mind: Indefinite Confinement and the Unconstitutional Treatment of North Carolinians with Mental Retardation*, 35 CAMPBELL L. REV. 257, 257 (2013) (recounting the story of Floyd Brown, who was civilly committed in North Carolina for fourteen years after being judged incapable of proceeding to trial). Regardless of the existence of a limitation on the length of civil commitment, raising the competency standard would inevitably result in the civil commitment of more defendants, an outcome for which this Note does not advocate.

104. See Primus, *supra* note 101, at 1 (highlighting that public defenders represent 80 percent of the nation's criminal defendants).

105. See *GIDEON'S BROKEN PROMISE*, *supra* note 102 (chronicling the lack of funding for American public defense and the problems it creates).

106. HARLOW, *supra* note 101, at 1.

107. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2153 (2013) ("[M]ost states, counties, and

place.<sup>108</sup> States fund indigent defense services in a variety of ways—some states use state money for public defense, some require that counties provide money individually, and others use a combination of state and local funding.<sup>109</sup> Regardless of how funding is secured, however, it is generally insufficient to meet the needs of indigent defense services.<sup>110</sup> This lack of resources for public defense is especially galling when compared to the funding afforded prosecutors. In 2007, public defender offices in forty-nine states and the District of Columbia received a total \$2.3 billion in funding.<sup>111</sup> In the same year, prosecutors’ offices nationwide received \$5.8 billion,<sup>112</sup> more than double the funding allotted to public defense.

As a result of the lack of resources, public defenders are underpaid, which results in “meet ‘em and plead ‘em”-style lawyering.<sup>113</sup> “Hourly rates for public defenders and panel attorneys can run as low as \$40 per hour and in some cases have averaged out to \$4 per hour.”<sup>114</sup> In localities that contract with private attorneys to provide indigent defense, the compensation paid those attorneys varies

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municipalities . . . have refused to provide funding necessary for counsel and equal justice.”); Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 L. & CONTEMP. PROBS. 83, 93 n.83 (2017) (“[P]ublic defense in the federal criminal justice system—largely because of the requirements of the 1964 Criminal Justice Act—functions in a way widely regarded as effective.”).

108. Griffin, *supra* note 107, at 93.

109. See *GIDEON’S BROKEN PROMISE*, *supra* note 102, at 8 tbl.1 (describing percentages of indigent defense expenditures attributable to states and counties in 2002).

110. See *id.* at 7–9 (describing the lack of state funding for indigent defense services). One witness to the American Bar Association’s hearings described a Mississippi county that was “nearly bankrupted by the expense of providing services in a death penalty case and was compelled to file a lawsuit in 1999 in an effort to force the state to establish and fund a statewide public defender system.” *Id.* at 9.

111. LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES 5 tbl.1 (2009), <http://bjs.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/Z9J2-E3KX>]. Maine did not have any public defender offices in 2007 and was thus not included in the report. *Id.*

112. STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 4 tbl.2 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/6KRP-99KB>].

113. The term “meet ‘em and plead ‘em” appears to be quite ubiquitous. See *GIDEON’S BROKEN PROMISE*, *supra* note 102, at 16 (using the term “meet ‘em and plead ‘em”); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1462–63 (2005) (same); Griffin, *supra* note 107, at 94 (same).

114. Griffin, *supra* note 107, at 94.



widely from state to state.<sup>115</sup> Some states cap compensation for noncapital felony defense at \$1000,<sup>116</sup> while others will compensate contracted lawyers up to \$12,000.<sup>117</sup>

The low compensation for defense counsel generally results in difficulty recruiting and retaining experienced lawyers.<sup>118</sup> When contracted defense counsel are paid a flat fee for their work,<sup>119</sup> regardless of the hours required to provide effective assistance, the compensation structure perversely incentivizes those lawyers to do a minimal amount of work.<sup>120</sup> Even for salaried public defenders, budget constraints mean that they must take on massive caseloads, lessening the amount of time they can spend with any individual defendant. The American Bar Association recommends that public defenders take on, per year, no more than “150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.”<sup>121</sup> But as the American Bar Association reported in 2004, “oftentimes caseloads far exceed national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases.”<sup>122</sup> Public

115. See Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 912 (2010) (“States vary widely with regard to funding levels, funding structures, and stability for indigent defense.”).

116. THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW app. 5. Mississippi has an unwaivable cap of \$1000 plus overhead expenses per noncapital felony case. *Id.*

117. *Id.* at app. 6. Nevada will pay a maximum of \$12,000 per case for felonies for which the defendant is facing the possibility of life without parole, but if the defendant is facing less than life without parole, Nevada caps out at \$2500. *Id.*

118. See *GIDEON’S BROKEN PROMISE*, *supra* note 102, at 9 (“Inadequate compensation for indigent defense attorneys is a national problem, which makes the recruitment and retention of experienced attorneys extraordinarily difficult.”).

119. See Griffin, *supra* note 107, at 94 (“Many jurisdictions impose per-case caps regardless of the seriousness or complexity of the case. For example, a defense attorney might earn \$600–\$1200 for handling an entire felony trial.”).

120. Though there are not many empirical studies to prove this claim, a recent doctoral dissertation does study the change in attorney’s reported hours when South Carolina switched its payment method for contracted indigent defense lawyers from an hourly payment system to a flat-fee system. Benjamin Schwall, *A Study of How Different Incentive Systems Can Impact Criminal Defense* (May 2017) (unpublished Ph.D. dissertation, Clemson University), [https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=2946&context=all\\_dissertations](https://tigerprints.clemson.edu/cgi/viewcontent.cgi?article=2946&context=all_dissertations) [<https://perma.cc/5TXT-2JFH>]. The author found that the data “supports the idea that attorneys work less when paid a flat fee.” *Id.* at 12.

121. A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [<https://perma.cc/C9AP-64GY>].

122. *GIDEON’S BROKEN PROMISE*, *supra* note 102, at 18.

defenders in New Orleans, for example, handled an average of 19,000 cases per attorney in 2009, “which translated into seven minutes per case.”<sup>123</sup> These excessive caseloads result in less time spent with defendants, less time investigating cases, less time preparing for trial,<sup>124</sup> and less time for continued legal training.<sup>125</sup>

Given the reality of public defense, we should require more of counsel and be skeptical of standards that rely on defense counsel to stand in for defendants in decisionmaking. The current standard for ineffective assistance of counsel leaves no room for any discussion of attorneys’ resources:

[i]f the attorney’s performance is ultimately found objectively unreasonable, the level of resources made available to that lawyer is irrelevant. Likewise, if the attorney’s performance is found constitutionally sufficient in any given case, it is of no consequence that her office is severely underfunded or that other cases on her docket may have suffered as a result.<sup>126</sup>

Moreover, the *Strickland* standard of “reasonableness under prevailing professional norms”<sup>127</sup> is problematic because “the norm may itself be anemic,”<sup>128</sup> in that it may have internalized the existing lack of resources for most defense counsel into what counts as “reasonable” defense work. Additionally, as Professor Sanjay Chhablani argues, the low standard set by *Strickland* is in part to blame for the underfunding of indigent defense:

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123. THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CENTER FOR JUSTICE, GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 4 (2013), [https://www.brennancenter.org/sites/default/files/publications/Gideon\\_Report\\_040913.pdf](https://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf) [<https://perma.cc/83LZ-RNX4>]. The New Orleans caseloads do not seem far from normal: in 2008, public defenders in Miami handled an average of 500 felony cases per attorney, and in 2010, “Minnesota defenders reported devoting an average of 12 minutes per case, not including court time . . . .” *Id.*

124. See *GIDEON’S BROKEN PROMISE*, *supra* note 102, at 16–19 (reporting on the deficiencies that result from overburdened defense attorneys).

125. See *id.* at 11 (reporting that several states lack “formal, systematic training of indigent defense attorneys”); Tina Peng, *I’m a Public Defender. It’s Impossible for Me To Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.8c355e4b505c](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.8c355e4b505c) [<https://perma.cc/5CRL-BMBA>] (“Because we don’t have enough lawyers on staff, the week I passed the bar in 2013, I began representing people facing mandatory life sentences on felony charges.”).

126. Lauren Sudeall Lucas, *Reclaiming Equality To Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1205–06 (2013).

127. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

128. Lucas, *supra* note 126, at 1208–09.

[T]he absence of *ex ante*, meaningful guidance about the specific obligations of counsel combined with the powerful presumptions of competence and reasonableness have allowed jurisdictions to severely under-fund defense systems. Had *Strickland* imposed more robust obligations on counsel, jurisdictions would have been compelled to provide more adequate funding or face the prospect of appellate courts reversing convictions.<sup>129</sup>

Of course, judicial mandates do not come with funding, but an increased standard for effective assistance could apply legislative pressure to allocate more funds to indigent defense. As Chhablani points out, a higher standard of review would likely mean more convictions overturned by appellate courts,<sup>130</sup> increasing the value of effective defense to legislators.<sup>131</sup> In other words, if more convictions were overturned for ineffective assistance of counsel brought about by the lack of funding for indigent defense, legislators might see fit to allocate more budgetary dollars to ensure fewer overturned convictions.

Raising the standard for ineffective assistance of counsel is not only imperative to improve the quality of indigent defense, but also to ensure that the competency standard functions properly. As implemented, the competency standard relies heavily on defense counsel to help defendants who cannot immediately or easily comprehend the trial process and even positions counsel to make decisions for those defendants who are judged competent but are ill equipped to make decisions at their trials.<sup>132</sup> Because the consequences for defendants judged incompetent are so poor—incompetent defendants are typically civilly committed until they are competent to stand trial or the charges against them are dropped<sup>133</sup>—the ideal

129. Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 393–94 (2009); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 21 (1997) (citations omitted) (“[N]othing in the law of criminal procedure regulates how much states must spend on lawyers for defendants. This too is a consequence of ineffective assistance doctrine.”).

130. Chhablani, *supra* note 129, at 393–94.

131. This idea is borrowed from Professor Lisa Kern Griffin, who argues:

[A higher] baseline for constitutional competence . . . might induce some systemic change . . . . Because of the sheer volume of cases in which the market for plea bargaining and the market for publicly funded counsel intersect, even this slight pressure on the regulatory lever could increase the incentive for state investment in indigent defense.

Griffin, *supra* note 107, at 105.

132. For a discussion of the competency standard, see *supra* Part I.

133. For a discussion of the civil commitment of incompetent defendants, see *supra* note 103.

solution is not simply to raise the competency standard but to ensure that the system adequately protects defendants who are judged competent by ensuring them a robust defense. Lowering the standard for proving ineffective assistance of counsel would protect defendants' right to a fair trial by requiring defendants have defense counsel who can sufficiently assist them, as well as with recourse should their counsel make a decision adverse to their interests or goals.

Unfortunately, the likelihood that the standard for proving ineffective assistance of counsel will be lowered is not promising. In the case that the standard is not lowered, enacting the procedural changes proposed in the next Part of this Note is even more imperative: the assistance of defense counsel justifies the minimal systemic concern with defendants' personal participation, yet defense counsel is held to a low standard of effectiveness, and funding for indigent defense is so inadequate that even highly skilled lawyers have insufficient funding to challenge the prosecution. These shortfalls seem likely to continue, meaning that defendants' own involvement is increasingly critical. The reforms proposed in the next Part could remove significant barriers to defendants' participation and make them more effective partners in their defense.

### III. THE PROCEDURAL RULES BARRING DEFENDANT PARTICIPATION THROUGH SPEECH

Despite the competency standard and the right to counsel's ideal of defendant participation, the rules of criminal procedure do not uniformly promote the concept. Instead, various procedural rules discourage defendants from making one of the most meaningful and effective contributions to the adjudications that effect their lives: speaking at their trials and sentencing hearings. This Part first outlines the importance of defendant speech, and then identifies the procedural rules that effectively prevent defendants from speaking.

#### A. *The Importance of Defendant Speech*

Speech is one of the most important ways defendants can participate in their own trials. Criminal trials affect the liberty interest of the defendants alone, and yet “[c]riminal defendants rarely speak.”<sup>134</sup> Only about half of criminal defendants testify at their own

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134. Natapoff, *supra* note 113, at 1449.

trials.<sup>135</sup> For the more than 90 percent of criminal defendants who plead guilty<sup>136</sup> and waive the right to testify,<sup>137</sup> the only opportunities for speech are at the plea hearing, during which the plea colloquy often yields one-word responses,<sup>138</sup> and at sentencing,<sup>139</sup> at which allocution is constrained.<sup>140</sup>

Though the silence of criminal defendants is often lauded as a protective measure,<sup>141</sup> the lack of defendant speech throughout the

135. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision To Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1373 tbl.2 (2009) (summarizing a finding that 49 percent of all defendants in the study of 382 cases testified); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329–30 (1991) (“In a sample of Philadelphia felony defendants tried in the 1980s, forty-nine percent chose not to testify at trial . . . . In a sample of misdemeanor defendants, fifty-seven percent chose not to testify at trial . . . .”); see also Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 397 (2018) [hereinafter Bellin, *Silence Penalty*] (“[O]nly about half of criminal defendants take the witness stand.”).

136. Ninety-one percent of all federal criminal defendants accused of a felony pled guilty in 2014. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2013–2014 1, 26 tbl.14 (2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf> [<https://perma.cc/GC38-HBVC>]. Ninety-four percent of felony offenders charged in state courts pled guilty in 2006. SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1, 25 tbl.4.1 (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/RGM8-DFPM>].

137. See FED. R. CRIM. P. 11(b)(1)(E)–(F) (dictating that the trial judge must determine that the defendant pleading guilty or nolo contendere understands that by doing so he is waiving his right to testify).

138. See Natapoff, *supra* note 113, at 1463 (describing the plea colloquy as “consist[ing] of highly scripted questions and the defendant’s monosyllabic ‘yes’ or ‘no’ answers”).

139. See *id.*, at 1458. As Natapoff notes, “[t]his description assumes representation by counsel.” *Id.* at 1458 n.28.

140. For a description of the constraints for defendant allocution, see *infra* Part III.B.

141. The common wisdom about the Fifth Amendment right not to testify at one’s own trial is that it protects defendants. See Natapoff, *supra* note 113, at 1450 (“Courts and scholars typically treat this silencing as a victory for defendants.”). Professor Jeffrey Bellin explains:

The right to remain silent in the face of accusation has been widely celebrated in American law, representing in the words of the Supreme Court “an important advance in the development of our liberty” and “one of the great landmarks in man’s struggle to make himself civilized.” As famously stated, the right, among other things, protects the guilty defendant from “the cruel trilemma of self-accusation, perjury or contempt,” by allowing the guilty to sit silently while “requiring the government . . . to shoulder the entire load” of a criminal prosecution. The Court has emphasized that the values protected by the right not to testify are so important that they easily overcome the fact that it may on occasion “save a guilty man from his just [deserts].”

Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules that Encourage Defendants To Testify*, 76 U. CIN. L. REV. 851, 862–63 (2008) (citations omitted) [hereinafter Bellin, *Improving Reliability*]. Rather than arguing that this understanding of the right not to testify is incorrect, this Note asserts that defendant testimony has benefits to the defendant and the criminal system that should also be recognized and protected.

criminal justice system has costs to the defendant and to the system. For defendants, the inability to speak can have grave implications for case outcomes. Courts and scholars have long recognized that “a defendant who does not take the stand will probably fatally prejudice his chances of acquittal.”<sup>142</sup> Jurors expect defendants to testify,<sup>143</sup> and though jurors are told not to use a defendant’s silence at trial against him, “the empirical evidence . . . demonstrates that remaining silent comes at a price.”<sup>144</sup> In a February 2002 poll, about half of the 900 respondents surveyed said that a defendant who does not testify “‘is probably guilty’ or ‘has something to hide.’”<sup>145</sup> Jurors likely use the same logic; studies have shown that mock jurors more readily convict defendants who do not testify.<sup>146</sup> Professor Jeffrey Bellin calls this the “silence penalty” because the higher rate of conviction for defendants who do not testify is so consistent that it can be described as a punishment.<sup>147</sup>

The inability to speak also has damaging implications for the defendant personally, as “silent defendants are denied many of the cognitive and participatory benefits of expressive engagement in their own cases.”<sup>148</sup> For example, “[d]efendants who remain silent throughout the legal process are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legitimacy of the outcomes, feel remorse, or change as a result of the experience.”<sup>149</sup> Defendants who do not speak miss out on the humanizing aspects of speech, both to the factfinder, who primarily sees the defendant as the accused,<sup>150</sup> and to the defendant himself, who

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142. *United States v. Grayson*, 438 U.S. 41, 58 n.5 (1978) (Stewart, J., dissenting) (quoting Note, *The Influence of the Defendant’s Plea on Judicial Determination of Sentence*, 66 *YALE L.J.* 204, 212 n.36 (1956)); see also *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978) (noting that the adverse assumption based on defendant’s failure to testify “may be inevitable”).

143. Michael E. Antonio & Nicole E. Arone, *Damned If They Do, Damned If They Don’t: Jurors’ Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 *JUDICATURE* 60, 62 (2005) (analyzing the results of the Capital Jury Project’s survey of decisionmaking by capital jurors to mean “that jurors wanted or expected the defendant to testify on his or her own behalf”).

144. Bellin, *Silence Penalty*, *supra* note 135, at 407.

145. *Id.* at 407 (citing Fox News Poll conducted by Opinion Dynamics (Feb. 2002)).

146. See *id.* at 408 (citing David R. Shaffer, *The Defendant’s Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 124 (Saul M. Kassim & Lawrence S. Wrightsman eds., 1985)).

147. See generally *id.* (coining the term).

148. Natapoff, *supra* note 113, at 1451.

149. *Id.*

150. See Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 *WM. & MARY L. REV.* 1, 5–6 (1993) (“It is almost impossible to see the defendant as a deserving person unless he testifies,

endures an otherwise “dehumaniz[ing]” process.<sup>151</sup> Testifying in court is an important opportunity to portray the defendant to the jury as a full human, worthy of sympathy as well as censure. As Professor Barbara Babcock describes it:

It is almost impossible to see the defendant as a deserving person unless he testifies, partly because the natural order of the trial dehumanizes him. For hours, days, even months, the jury has heard the government’s witnesses—the victims and the professionals: experts and police. Again and again, [the jury has] seen the moving finger point to the sullen, or perhaps sad, but always silent, accused. Then, finally, he takes the stand and is suddenly revealed: with a family or not, educated thus, worked in these ways . . . . As a practical matter, the only real chance the defendant has to speak to the jury is by taking the stand . . . .<sup>152</sup>

It is unclear how exactly this moment of humanization affects juries, but based on the higher conviction rates for defendants who do not testify, it seems crucial to show the defendant to the jury as a full person.

Defendant silence also has negative implications for the accuracy of the criminal justice system. Defendants who do not speak during the trial can withhold important factual information from the factfinder, putting the accuracy of the trial at risk.<sup>153</sup> Defendant speech during allocution at sentencing can also have a bearing on how the judge evaluates the deserved sentence, but defendant speech may be even more significant at the trial itself.<sup>154</sup>

The lack of defendant speech can also damage external perceptions of the criminal justice system. As Professor Alexandra Natapoff points out, “speech is the constitutionally celebrated vehicle by which defendants have their ‘day in court,’ enforce or waive their constitutional rights, tell their stories to the jury, persuade the judge of

partly because the natural order of the trial dehumanizes him.”); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2644 (2007) (“Another persistent rationale for allocution—and for sentencing hearings in general—is individualization or humanization of the defendant.”).

151. Babcock, *supra* note 150, at 6.

152. *Id.* at 5–6 (footnotes omitted) (citations omitted).

153. See Bellin, *Improving Reliability*, *supra* note 141, at 854 (“When the defendant, ‘who above all others may be in a position to meet the prosecution’s case,’ is silent, the jury is deprived of critical factual information.” (quoting *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961))).

154. See generally Thomas, *supra* note 150, at 2655–57 (explaining the mitigation theory of allocution). Allocution is the point in a plea hearing at which the defendant is permitted to speak. For further discussion of the power of speech at allocution, see *infra* Part III.C.

proper punishment, and communicate with their constitutionally guaranteed counsel.”<sup>155</sup> Losing out on these “democratic speech functions” can constrain the public’s trust in the system.<sup>156</sup> This loss of trust is exacerbated by the demographics of criminal defendants, because “[t]he silencing of defendants serves to disproportionately quiet the voices of the poor and people of color within the court system.”<sup>157</sup> So not only are criminal defendants often “silenced by their typical status as impoverished, young, undereducated people of color,” they are additionally silenced by the criminal justice system itself, in which they are more likely to be embroiled precisely because of their status as “impoverished, young, undereducated people of color.”<sup>158</sup> Defendant speech is thus vital because “being heard within the legal process can be an important part of a larger power struggle over social meaning.”<sup>159</sup>

Lastly, of course, defendant silence flies in the face of one of the primary interests of the competency standard—ensuring that a defendant can assist in preparing her defense.<sup>160</sup> Given how impactful defendant speech can be to the judge and the jury, speaking affords defendants their best opportunity to assist in their own defense.<sup>161</sup> If we take the ideal of defendant participation seriously, we should work to protect defendants’ ability to help their defense in the most meaningful way possible, by zealously guarding defendants’ ability to speak.

### *B. Strengthen the Right To Testify*

Because defendant testimony (or lack thereof) so often influences trial outcomes, providing this testimony is one of the most important ways the accused can act in her own defense. Defendants do not have the legal knowledge to make objections or argue legal minutiae, and they lack the experience necessary to cross-examine witnesses

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155. Natapoff, *supra* note 113, at 1452.

156. *Id.*

157. Thomas, *supra* note 150, at 2643. As Natapoff explains, “[d]efendant silence . . . is part of a larger phenomenon of expressive disempowerment of those disadvantaged groups who tend to become defendants: racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems.” Natapoff, *supra* note 113, at 1452.

158. Natapoff, *supra* note 113, at 1453.

159. *Id.*

160. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (describing traditional refusals to make incompetent defendants unable to defend themselves stand trial).

161. For more on the effectiveness of defendant testimony, see *supra* note 147 and accompanying text.



successfully. What defendants can contribute to their defense—what will make the biggest impact on the jury<sup>162</sup>—is their testimony. If the criminal system cares at all about defendant participation, this is the facet of defendant participation to protect. But several procedural rules—particularly the sentence enhancement for perjury and the impeachment rules—create significant risks for defendants who choose to testify, making the choice to testify an unbalanced one. These rules may not formally prevent defendants from taking the stand, but they make the consequences of testifying so great that many defendants are in effect prevented from speaking at their trials. These procedural rules keeping defendants from testifying should thus be changed to give more defendants a meaningful choice about whether to participate in their trials in this key way.<sup>163</sup> This Section first discusses the sentence enhancement for perjury and then examines the various impeachment rules that make the choice to testify a very difficult one for many defendants.

1. *Perjury Rules.* The threat of perjury operates to silence criminal defendants. The risk of a perjury prosecution must give some defendants pause, but the greater danger is the near-certain possibility of a sentence enhancement.<sup>164</sup> The Federal Sentencing Guidelines contain a two-level sentence enhancement for defendants who are found to have “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction,”<sup>165</sup> which includes “committing, suborning, or attempting to suborn perjury . . . .”<sup>166</sup> Many state sentencing guidelines contain similar provisions.<sup>167</sup>

The sentencing enhancement essentially punishes defendants for asserting their innocence and being disbelieved by the judge. “The only reason for a defendant to testify is to offer exculpatory testimony,

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162. For more on juries’ expectation of defendant testimony, see *supra* notes 143–47 and accompanying text.

163. For various reasons, certain defendants and their lawyers may decide that it is in the defendants’ best interests not to testify, but this Note advocates for a criminal justice system in which more defendants have a meaningful choice.

164. Bellin, *Improving Reliability*, *supra* note 141, at 878 (describing the risk of the sentencing enhancement as “a more realistic and immediate punishment”).

165. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM’N 2016).

166. *Id.* at cmt. 4(B).

167. Natapoff, *supra* note 113, at 1459 n.31.

which will almost always contradict the government's evidence, thereby inviting" accusations of perjury and the associated sentencing enhancement if the defendant is ultimately convicted.<sup>168</sup> And because the sentencing enhancement, unlike a conviction for perjury, is determined by only a preponderance of the evidence<sup>169</sup> and is accomplished without expending prosecutorial resources,<sup>170</sup> the enhancement is more of a certainty and thus a bigger danger. "[I]t cannot be lost on defendants—even innocent ones—that if they sit silently though the presentation of evidence, relying on counsel to speak for them, they are amenable to no increased penalty."<sup>171</sup>

As Babcock has asked, "Why should there be such a price for taking the stand unsuccessfully?"<sup>172</sup> The sentencing enhancement serves either to limit defendant testimony "to a denial of the charges"<sup>173</sup> or to prevent defendants from testifying, all for fear of a longer sentence. "In effect, trial silence, if contrasted with an unsuccessful effort at claiming innocence through testimony, can be predicted to result in an effective two-level *decrease* under the sentencing guidelines."<sup>174</sup> Moreover, the enhancement undermines the ideal of defendant participation. The competency standard demonstrates that our legal system values defendant participation, yet the sentencing enhancement creates a perverse incentive not to participate.

2. *Impeachment.* When witnesses testify at trial, they can be discredited with evidence that would otherwise be inadmissible, including evidence of prior convictions.<sup>175</sup> When a defendant takes the witness stand, he is not exempt from the impeachment rules, which

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168. *Id.* at 1460. Indeed, nearly 98 percent of federal defendants who went to trial between October 1, 2015 and September 30, 2016 received the enhancement for obstruction of justice. U.S. SENTENCING COMM'N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2016).

169. *See* United States v. Booker, 543 U.S. 220, 228–29 (2005) (noting that the sentencing judge had found by a preponderance of evidence that sentencing enhancements applied); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986) (holding that a state statute subjecting defendants to a sentencing enhancement found by preponderance of the evidence does not violate due process).

170. As Jeffrey Bellin explains, "[t]he practical barriers to such a prosecution in the form of a necessary expenditure of prosecution resources in a separate trial for an offense generally viewed as difficult to prove, make this an unlikely occurrence for any trial witness, including the defendant." Bellin, *Improving Reliability*, *supra* note 141, at 877–78.

171. *Id.* at 879.

172. Babcock, *supra* note 150, at 7.

173. *Id.*

174. Bellin, *Improving Reliability*, *supra* note 141, at 879–80.

175. *See* FED. R. EVID. 609(a) (allowing evidence of past convictions to impeach witnesses).

allow the opposing party to use otherwise inadmissible evidence to attack a witness's truthfulness, though they might be more damaging to him than to other witnesses.<sup>176</sup> Furthermore, defendants who testify can be impeached with evidence that is normally not admissible because it was collected in violation of the defendant's constitutional rights.<sup>177</sup> This impeachment evidence should be excluded to better allow defendants to participate in their trials in the most meaningful way possible.

*a. By Evidence of Prior Convictions.* Taking the witness stand makes criminal defendants vulnerable to impeachment with evidence of prior convictions.<sup>178</sup> Prosecutors are generally unable to admit evidence of a defendant's prior bad acts as evidence of the defendant's bad character,<sup>179</sup> but the Federal Rules of Evidence contain a host of workarounds that allow evidence of the defendant's prior bad acts to be admitted as evidence of something else.<sup>180</sup> Rule 609 is one such workaround; it allows parties to introduce evidence of a witness's previous conviction for any felony or for any crimes involving dishonesty to impeach the witness, including a defendant.<sup>181</sup> The evidence of prior convictions is admitted to show only that the witness's truthfulness cannot be trusted, and jurors are instructed not to use the evidence as proof of the defendant's guilt, moral desert, or propensity for crime.<sup>182</sup>

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176. See Bellin, *Improving Reliability*, *supra* note 153, at 867 n.53 (collecting cases recognizing that impeachment by conviction is especially dangerous to defendants).

177. For more on impeachment with evidence collected in violation of constitutional rights, see *infra* Part III.B.2.b.

178. See FED. R. EVID. 609(a) (allowing evidence of a witness's prior conviction "for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year" and "for any crime regardless of punishment" that requires proving "a dishonest act or false statement" for conviction).

179. See FED. R. EVID. 404 (prohibiting use of character evidence or evidence of prior bad acts to demonstrate character).

180. See FED. R. EVID. 404(b)(2) (permitting evidence of prior bad acts as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

181. FED. R. EVID. 609(a)(2).

182. See Bellin, *Silence Penalty*, *supra* note 135, at 401–02 ("As the evidence is admissible only with respect to the 'witness's character for truthfulness,' judges must instruct juries that the testifying defendant's 'prior convictions should only be used to judge [the defendant's] credibility rather than his propensity to commit crimes.'" (quoting FED. R. EVID. 609; then quoting *United States v. Stanley*, 94 F. App'x 984, 986 (4th Cir. 2004) (alteration in original))); see also Kathryn Stanchi & Deirdre Bowen, *This is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 WASH. L. REV. 901, 908 (2014) ("Rule 609 allows the admission of prior

Jurors, however, seem unable to observe the distinction between impeachment for credibility and propensity for crime. “Most studies show that admission of a defendant’s prior conviction leads to more guilty verdicts in criminal trials, regardless of whether the jurors receive a limiting instruction.”<sup>183</sup> Moreover, the evidence shows that jurors convict more readily when the conviction is for a similar crime than when the conviction involves dishonesty,<sup>184</sup> exposing the fact that jurors are using evidence of prior convictions, intended strictly to impeach for honesty, as evidence of propensity or even guilt. As Bellin explains:

If jurors used prior convictions as the law intends, past crimes that undermined the defendant’s truthful character, such as perjury, would be the most damaging to defendants’ chances of acquittal. Yet empirical research has shown that even when properly instructed, mock jurors convict most readily when presented with prior crimes that are similar to the charged crime, not, as the operating legal theory would predict, when presented with crimes related to dishonesty.<sup>185</sup>

Bellin’s own study confirmed the existing evidence.<sup>186</sup> Mock jurors were presented with one of four scenarios, each one presenting different versions of the same trial, in which the defendant was accused of “breaking into a store and stealing jewelry.”<sup>187</sup> What varied in each scenario was whether the defendant testified and whether she was impeached with evidence of a prior conviction.<sup>188</sup> The mock jurors were then asked whether they would find the defendant guilty or not guilty.<sup>189</sup> The mock jurors most readily convicted the defendant who had testified and had been impeached with evidence of a prior conviction for robbery.<sup>190</sup> Eighty-two percent of the mock jurors presented with that scenario responded that they would find the defendant guilty, compared to 73 percent of mock jurors who

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conviction evidence only for the narrow purpose of impeaching the credibility of the witness. The evidence is not meant to show that the witness is simply a bad person, more likely to have committed other crimes, or somehow less deserving of justice or damages.”).

183. Stanchi & Bowen, *supra* note 182, at 911.

184. *See id.* (“The negative impact is, not surprisingly, more profound when the prior conviction is for a similar crime as the one with which the defendant is charged.”).

185. Bellin, *Silence Penalty*, *supra* note 135, at 403 (citing Shaffer, *supra* note 146, at 131).

186. *Id.* at 413.

187. *Id.* at 410, 412.

188. *Id.* at 412.

189. *Id.* at 413

190. *Id.*

responded that they would convict a defendant who had testified and been impeached with evidence of a criminal conviction for fraud.<sup>191</sup>

This impeachment rule is harsh on defendants, widely used, and not supported by social science. A 1966 study found that evidence of defendants' prior convictions was revealed in 72 percent of cases in which the defendant testified.<sup>192</sup> But as many scholars have argued, "character evidence"—including that of prior convictions—"often fails the test of logical relevance" because the character evidence allowed in courts is not "valuable either in establishing character or in making an accurate prediction of the individual's behavior on a specific occasion."<sup>193</sup> Rather than admitting useful evidence into trial, "Rule 609 and its counterparts create and reinforce a false view of human nature,"<sup>194</sup> one that is all the more damaging because it is not strictly necessary at trials. Juries are not blind to the fact that defendants have a significant interest in the outcome of the trial,<sup>195</sup> and are thus already skeptical of defendant testimony at trial.<sup>196</sup>

When that preexisting skepticism is combined with the fact that juries are not using evidence of prior convictions for proof of veracity, the value of this evidence begins to wane. Add to that the way impeachment evidence undermines the ideal of defendant participation, and it becomes unclear why this evidence is admissible against criminal defendants. It is not serving its intended purpose and is weakening one of the foundational beliefs of our justice system—that defendants should be able to participate.

*b. Through Loopholes to Constitutional Protections.* When defendants take the witness stand on their own behalf, they can be impeached with evidence that would be otherwise excluded for

191. *Id.* This finding is of statistical significance in this survey. *Id.* at 414 n.98. For more information on Bellin's calculations, see *id.*

192. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 147 tbl.44 (1966).

193. David P. Leonard, *The Use of Character To Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26, 30 (1986); see also Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 779–89 (1975) (summarizing social science to reach the conclusion that "the probative worth of character evidence is very low"); Stanchi & Bowden, *supra* note 182, at 909 (offering a list of legal commentators making this point).

194. Stanchi & Bowden, *supra* note 182, at 909.

195. See *United States v. Gaines*, 457 F.3d 238, 248 (2d Cir. 2006) ("Nothing could be more obvious, and less in need of mention to a jury, than the defendant's profound interest in the verdict.").

196. See Bellin, *Improving Reliability*, *supra* note 141, at 885 (arguing that juries are already skeptical of defendant testimony).

violating the defendant's constitutionally protected rights. This evidence includes statements taken in violation of defendants' Fifth Amendment rights under *Miranda v. Arizona*,<sup>197</sup> statements obtained without presence of counsel, in violation of the Sixth Amendment,<sup>198</sup> physical evidence found and taken in violation of the defendant's Fourth Amendment rights,<sup>199</sup> and defendants' testimony from a previous suppression hearing.<sup>200</sup> This evidence is normally excluded from trials to deter violations of constitutional rights,<sup>201</sup> but the Court has ruled that "some marginal deterrence of constitutional violations must be sacrificed to avoid 'impairment of the integrity of the factfinding goals of the criminal trial.'"<sup>202</sup>

The allowance of evidence obtained in defiance of constitutionally protected rights for impeachment purposes makes testifying riskier for defendants. Though this evidence is admitted only for impeachment purposes, juries are notoriously bad at properly differentiating between evidence for impeachment and evidence for guilt.<sup>203</sup> Ultimately, the inclusion of this evidence "function[s] to deter

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197. *Miranda v. Arizona*, 384 U.S. 436 (1966); see *Oregon v. Hass*, 420 U.S. 714, 723–24 (1975) (holding that an officer's testimony based on questioning of defendant that occurred absent *Miranda* warnings were admissible for the purposes of the defendant's impeachment); *Harris v. New York*, 401 U.S. 222, 224 (1971) ("It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.").

198. See *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (holding that statements taken without counsel that are inadmissible in the prosecution's case in chief are admissible to impeach the defendant); see also Bellin, *Improving Reliability*, *supra* note 141, at 869 n.61 (explaining the Supreme Court's holdings).

199. See *Walder v. United States*, 347 U.S. 62, 65 (1954) (permitting the inclusion of illegally obtained heroin to impeach defendant's testimony that he had never possessed narcotics).

200. See *United States v. Quesada-Rosal*, 685 F.2d 1281, 1283 (11th Cir. 1982) (holding that the district court did not abuse its discretion in allowing testimony from the suppression hearing to be used as impeachment evidence). Bellin argues that "[t]he Court has not determined whether such testimony may be used to impeach a testifying defendant, but this result logically follows from the Court's other decisions, as a number of courts have recognized." Bellin, *Improving Reliability*, *supra* note 141, at 870 n.66.

201. See Bellin, *Improving Reliability*, *supra* note 141, at 869 (explaining that these rules "are intended to safeguard the citizenry's constitutional rights by deterring constitutional violations. . ."); see also *Terry v. Ohio*, 392 U.S. 1, 12 (1968) ("Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. . . . [W]ithout it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" (citations omitted)).

202. Bellin, *Improving Reliability*, *supra* note 141, at 869–70 (quoting *United States v. Havens*, 446 U.S. 620, 627 (1980)).

203. For more on how jurors misuse impeachment evidence, see *supra* notes 183–91 and accompanying text.

defendants from taking the witness stand by increasing the tactical disadvantages to doing so and decreasing the ultimate weight of any testimony a defendant offers.”<sup>204</sup>

When allowing this evidence in for impeachment, the Court has often mentioned the importance of factfinding during trials.<sup>205</sup> But promulgating rules that keep defendants off the witness stand hinders the factfinding function of a trial by silencing one of the primary actors in the alleged crime, potentially keeping whatever facts she alone knows from the factfinder. Moreover, this conception of factfinding is in opposition to the reasoning behind the competency standard. The competency standard is intended to protect defendant participation by enabling better factfinding and increased accuracy.<sup>206</sup> These impeachment rules, however, reduce defendant participation in the name of factfinding. Because the belief in defendant participation is so fundamental to our criminal justice system, the rules of evidence should exclude illegally obtained evidence to encourage defendants to testify more frequently.

### C. *Sentencing Allocution*

In addition to defendant testimony at trial, the other primary place for defendant speech during the criminal process is during allocution at the sentencing hearing. Allocution comes from a longstanding tradition of allowing defendants to speak on their own behalf at sentencing,<sup>207</sup> and was originally restricted to presenting affirmative defenses.<sup>208</sup> In today’s criminal system, in which over 90 percent of criminal defendants forego trials and plead guilty, and only half of those that do go to trial actually testify, many defendants will never speak until allocution at the sentencing hearing.<sup>209</sup> It is still often thought of as the sanctioned point in the sentencing hearing for

204. Bellin, *Improving Reliability*, *supra* note 141, at 871.

205. *See, e.g.*, James v. Illinois, 493 U.S. 307, 311 (1990) (“This Court has carved out exceptions to the exclusionary rule, however, where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial. . .”).

206. For more on how the common law’s concern for accuracy motivated the prohibition on trying incompetent defendants, *see supra* note 11 and accompanying text.

207. *See* Thomas, *supra* note 150, at 2645 (explaining that, at common law, allocution was afforded to people convicted of capital felonies).

208. *Id.* at 2645–46. At common law, when defendants were unrepresented by counsel and prevented from testifying during the trial, allocution was the one place for defendants to speak. *Id.* at 2645. It was the sanctioned place for the defendant to put forth affirmative defenses. *Id.*

209. *See id.* at 2643 (“Most [defendants]—however remorseful, justified, or angry—will not have a chance to speak until the sentencing hearing.”).

defendants to present mitigating evidence to the judge,<sup>210</sup> but defendants are not formally constrained to presenting only mitigating evidence at allocution.<sup>211</sup> Still, defendants are informally restricted by the Sentencing Guidelines to making certain types of statements because the Guidelines contain a sentence decrease for a defendant who “clearly demonstrates acceptance of responsibility for his offense.”<sup>212</sup> Professor Kimberly Thomas points out that this downward departure serves to discourage or prevent defendants from making statements that deviate from favored narratives like mitigating evidence, acceptance of responsibility, and penitence.<sup>213</sup>

The telling of defendants’ stories, even disfavored stories, is beneficial to the defendant and the system, and should not be discouraged. The ability to speak during allocution has an important humanizing effect on the defendant, who has been dehumanized routinely throughout the trial process.<sup>214</sup> And because the criminal justice system disproportionately ensnares members of disenfranchised minority communities, who are so silenced by the criminal system,<sup>215</sup> these personal allocution stories allow defendants an opportunity to be heard, to be realized as individual humans uniquely affected by the criminal process. Affording defendants that opportunity is one small way to afford them autonomy in the process, while disallowing it can be yet another way that defendants—and the minority communities from which they disproportionately come—lose faith in the criminal system.

By discouraging defendant speech throughout the criminal justice system, the system also loses out on opportunities to understand the experience of defendants. Stories apart from mitigation, “stories that might offer alternative accounts of the case or the offender, including stories of racism in the criminal justice system, economic oppression of the defendant, or other counter-hegemonic themes,” allow the system

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210. See *id.* at 2655 (“Mitigation is a commonly cited purpose of allocution.”).

211. See FED R. CRIM. P. 32(i)(4) (mandating simply that the court give the defendant the “opportunity to speak”); see also *Allocution*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “allocution” as a “[a] trial judge’s formal address to a convicted defendant, asking whether the defendant wishes to make a statement or to present information in mitigation of the sentence to be imposed.”).

212. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2016).

213. Thomas, *supra* note 150, at 2664–65.

214. Babcock, *supra* note 150, at 5–6 (mentioning that “the natural order of the trial dehumanizes” defendants).

215. For more on how the criminal justice system disproportionately affects and silences minorities, see *supra* notes 157–59 and accompanying text.



as a whole to understand and account for the defendant's perspective.<sup>216</sup> As Bellin explains, “[b]y encouraging defendants to remain silent throughout the process, the system suffers an ‘institutional loss of information about defendant perceptions and experiences’ that decreases any potential recognition of what works, what does not work, and what should be changed.”<sup>217</sup> Allowing defendants to allocute in whatever way they want opens the door to insight about defendants’ experience of the criminal justice system that it might otherwise never get, especially because so many criminal defendants do not go to trial or do not speak at trial.

Furthermore, allowing defendants the full breadth of possible statements at allocution is another point at which the criminal system can abide by its ideal of defendant participation. Blackstone noted that the importance of presenting mitigating evidence at sentencing was one of the reasons for the prohibition on sentencing incompetent defendants,<sup>218</sup> and we should expand the view of the utility of allocution past mitigating evidence alone. There are important functions to allocution statements that do not present mitigating circumstances, and we should protect defendants’ ability to participate in their sentencing by giving those statements as well.

## CONCLUSION

As demonstrated by the competency standard and the right to counsel, our criminal justice system has a longstanding commitment to ensuring that criminal defendants are able to participate—at least to some degree—in the trials and adjudications that affect their lives.

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216. Thomas, *supra* note 150, at 2666. Thomas asserts that these nonhegemonic stories are “*necessary*.” *Id.* at 2665 (emphasis in original). She recounts Nelson Mandela’s allocution at his sentencing hearing:

Before being sentenced to life imprisonment, Nelson Mandela stood, dignified, before his sentencing court and elegantly stated that he did the acts for which he was convicted and was proud to have done them. Mandela did not seek to mitigate his punishment or apologize for his conduct. He also suggested an alternative vision of justice in the face of what he believed to be an unjust system. His words flew in the face of the sentencing court and questioned the legitimacy of his prosecution.

*Id.* at 2665–66. Of course Nelson Mandel is not the run-of-the-mill defendant, but the episode illustrates what the criminal justice system misses out on by constraining defendant speech at allocution: instances of defendant speech that can dignify and humanize defendants and that can expose the court to the experience of being a criminal defendant.

217. Bellin, *Improving Reliability*, *supra* note 141, at 858.

218. 4 BLACKSTONE, *supra* note 9, at \*24 (“If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced . . . had the prisoner been of sound memory, he might have alleged something in stay of judgment. . .”).

Despite the fundamental nature of that commitment, the U.S. criminal justice system does not ensure or protect defendant participation at every stage of the criminal process. Instead, the system is riddled with constitutional standards and procedural rules that discourage or prevent participation.

The rules that prevent defendants from testifying at trial are particularly damaging because they prevent defendants from meeting one of the mandates of the competency standard—assisting in their defense—in one of the most impactful ways possible. In light of the criminal system’s underlying ideal of defendant participation, these procedural rules should be changed in order to build a criminal system that allows defendants to receive the full benefit of that ideal.

The standard for ineffective assistance of counsel also works to hinder defendant participation at trial, by creating a regime in which defense counsel can make decisions for their clients and face no reproach if those decisions are adverse to their client’s wishes or interests. Lowering the standard for proving ineffective assistance would not just impose higher requirements on defense counsel, it would also force defense counsel to be more deferential to their clients’ wishes, affording defendants more control over their cases.

Ultimately, changing these constitutional standards and procedural rules would likely give defendants more chances to participate in their trials, or at least more meaningful choices about how much they want to participate. Some defendants may always choose not to testify at trial or allocute at sentencing, but our current system distorts the benefits and drawbacks of that choice, making it unnecessarily damaging to many defendants. In light of the foundational ideal of defendant participation evident in the competency standard and the right to counsel, the criminal justice system should seek to afford defendants the opportunity to participate rather than putting procedural hurdles in the way of that participation.