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Editor Introduction

Despite the tumultuous spring of 2020, the Law Journal for Social Justice continued working toward its mission of fostering important conversations about social justice issues. Although the Journal had to cancel events, like its social justice symposium, editors and journal leaders continued to strive for ways to discuss social justice issues important to our community, even in these extremely difficult times. Editors continued writing online blogs to provide relevant legal analyses, like a blog by Associate Editor Kathy Johnson titled, “Rights in the Time of Coronavirus.” In the blog, Kathy analyzes legal issues in China’s quarantine of its citizens. The Law Journal for Social Justice continued to find ways to spark important conversations, especially those pertinent to our unique times. Volume thirteen continues in this mission.

Volume thirteen begins with two articles closely connected to our local Arizona community. First, in *A Case for Broadening Arizona’s Approach to Compassionate Release*, Dr. Sarah Cooper critically examines Arizona’s compassionate release procedures in prisons. With Arizona grappling with extremely high incarceration rates, Dr. Cooper provides a critical analysis of current procedures in the state and potential alternatives. Dr. Cooper concludes by advocating and providing for broader compassionate release legislative reform in Arizona.

Second, in *Violating the Inviolate*, Mikel Steinfeld, dissects the constitutionality of the Arizona Legislature authorizing trial judges to decide the existence of prior convictions, taking the decision away from juries. Steinfeld explores the history of Arizona’s recidivism scheme and analyzes the Arizona Constitution to argue the court’s error of approving judicial fact-finding of prior convictions. Steinfeld concludes by advocating for the court to revisit the issue to hold the Arizona Constitution protects a defendant’s right for a jury to find for prior convictions, invalidating current Arizona law.

Next, Lauren K. Garretson, in *Giving Immigrants the Cold Shoulder: Potential Legal Challenges and Policy Considerations for Trump’s Inadmissibility on Public Charge Grounds Rule*, discusses the legal challenges to the Trump Administration’s new Inadmissibility on Public Charge Grounds rule. Garretson analyzes the evolution of the Public Charge Doctrine in the United States. Garretson then explores the Trump Administration’s new version of the rule and discusses the detrimental effects the rule will have on lawfully present non-citizens, American employers of immigrants, and immigrant communities.

Last, Michael L. Perlin, Esq., in “Deceived Me into Thinking/I Had Something to Protect:” *A Therapeutic Jurisprudence Analysis of When Multiple Experts are Necessary in Cases in which Fact-Finders Rely on Heuristic Reasoning and “Ordinary Common Sense,”* explores the disconnect between the “ordinary common sense” of fact-finders and the scientific evidence that can inform decisions in cases. Perlin argues by providing two experts in situations where common-sense is flawed, legal systems can correct this erroneous behavior to create a fairer and just system.
The Law Journal for Social Justice would like to thank the authors in this volume. Their work is important, and we appreciate the opportunity to publish and share it. Additionally, we’d like to thank all who contributed in putting this volume together. We hope you enjoy the Law Journal for Social Justice’s thirteenth volume.

Ashley E. Fitzgibbons
Editor-in-Chief
2019-2020
A CASE FOR BROADENING ARIZONA’S APPROACH TO COMPASSIONATE RELEASE

By: Dr. Sarah L. Cooper*

INTRODUCTION

The growth in U.S. incarceration rates over the past forty years is “historically unprecedented and internationally unique.”[1] Imprisoning approximately 2.3 million adults,[2] America presently has the highest incarceration rate in the world.[3] This situation has drawn attention to the interplay between incarceration and health(care),[4] with prisoners tending to suffer higher rates of disease than the general population,[5] and correctional facilities often being “ill-equipped treatment providers.”[6] States are constitutionally required to provide adequate healthcare for prisoners,[7] but delivery can be challenging, especially in large prison systems. Recent

*Reader in Law at Birmingham City University, United Kingdom. This article was informed by a research project undertaken with the support of the Leverhulme Trust and British Academy Small Research Grant. Many thanks, in particular, to Katie Puauskas, Joey Dormandy, Professor Lissa Griffin, and my colleagues at Birmingham City University’s School of Law for their time and efforts in discussing this topic with me. Special thanks to panelists and participants who attended Compassionate Release of Prisoners with Health Problems Across the United States — an event held at Arizona State University in November 2018 to discuss the funded project — for their feedback and observations. Cory Bernard, Thomas Nicklin, and Luca Prisciandaro have provided excellent research assistance.

[3] NRC, supra note 1, at 68.
[4] Id. at 203.
[6] Id.
litigation highlights that Arizona — a state with incarceration rates that “stand out internationally” — is grappling with such challenges.

Compassionate release procedures typically allow prisoners to seek early release due to serious terminal, non-terminal, and/or age-related health issues. As such, they are one possible pressure release valve for America’s challenging incarceration situation. In addition to a federal procedure, nearly every U.S. state has at least one compassionate release procedure. Arizona has two. Compassionate Leave, an administrative procedure overseen by corrections, authorizes temporary and escorted release to receive “specialized health care for [a] verified terminal illness.” By

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8 See Parsons v. Ryan, 912 F.3d 486 (9th Cir. 2018) (“Inmates in the custody of the Arizona Department of Corrections (ADC) and disability law center brought putative class action against senior ADC officials, alleging systemic Eighth Amendment violations in Arizona's prison system. The parties signed a settlement agreement, by which defendants agreed to comply with more than 100 performance measures designed to improve the ADC health care system and reduce the harmful effects of prisoner isolation.”); see also Am. Civil Liberties Union, Parsons v. Ryan (June 22, 2018), https://www.aclu.org/cases/parsons-v-ryan (The compliance process is ongoing).


10 18 U.S.C. § 3582(c)(1)(A)(i)(ii) (2018) (stating federal prisoners may apply for compassionate release, also referred to as a ‘reduction in sentence,’ in two instances. First, if they have “extraordinary or compelling reasons,” which can relate to medical condition(s), age, family circumstances, or other reasons. Second, if they are aged seventy or above, have served thirty years in prison, and the Director of the Bureau of Prisons (“BOP”) determines s/he is not a danger to others. Following a process involving federal corrections and the BOP, the prisoner’s federal sentencing court (directed by U.S. Sentencing Commission guidelines) makes a final decision. See also, U.S. DEP’T OF JUSTICE FED. BUREAU OF PRISON, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(g) (Jan. 17, 2019) https://www.bop.gov/policy/progstat/5050_050_EN.pdf.


contrast, Commutation of Sentence due to an Imminent Danger of Death (IDD) allows prisoners to apply to the Arizona Board of Executive Clemency (BOEC). Prisoners must produce medical evidence that “there is reasonable medical certainty that [their] medical condition will result in death within four (4) months.”13 The BOEC then votes on whether to recommend release to the Governor. Between January 2015 and March 2018, four Arizona prisoners were released via IDD.14

Compassionate release has been the subject of considerable research. This includes studies focused on identifying and deconstructing existing procedures;15 efforts that have allowed researchers to offer evidence-informed recommendations for reform. This paper proposes that Arizona should reform its current approach, specifically through replacing its IDD procedure with a broader Medical Parole procedure. Part I outlines the interplay between incarceration, health(care), and compassion in the United States, including specific challenges faced in Arizona. Part II summarizes existing research findings and recommendations about compassionate release, using them as a steer for how Arizona could shape a broader Medical Parole procedure. It concludes that, in the light of other state approaches, evidence of a national and local political will to broaden compassionate release, and due to the potential for a broader procedure to include a family member with a life-threatening illness or injury or preventing emotional instability when the need is justified. Escorted only.”.

15 See Price, supra note 11; Marjorie P. Russell, Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse Than the Disease?, 3 Widener J. Pub. L. 799, (1994); Nancy R. Gartner & Rolando V. Del Carmen, Releasing the Ailing and Aging: A Comprehensive Analysis of Medical Parole Legislation in the United States, 52 No. 6 Crim. Law Bulletin ART 2 (Winter, 2016); and Sarah L. Cooper, State Compassionate Release Approaches in the USA: A Blueprint for Discussion, (unpublished, on file with author). (Reporting a provisional analysis of a 2017-2018 study undertaken by researchers at Stakeholder Institution, Birmingham City University and funded by a Leverhulme Trust/ British Academy Small Research Grant, to identify and unpack compassionate release procedures across United States. It aimed to learn from, and build on, the methodological approaches, findings, and recommendations of existing literature, and particularly the studies undertaken by FAMM, Russell, and Gartner and del Carmen).
offer resource-saving benefits, Arizona should be particularly motivated to consider reform.

I. INCARCERATION, HEALTH(CARE), AND COMPASSION

In 2014, the National Academy of Sciences (NAS) reported, “The growth in incarceration rates in the United States over the past forty years is historically unprecedented and internationally unique.”\(^{16}\) From 1973 to 2009, state and federal prison populations grew from about 200,000 to 1.5 million.\(^{17}\) The NAS concluded this situation was caused by an “increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.”\(^{18}\) This political and social cocktail informed “a series of policy choices—across all branches and levels of government—that significantly increased sentence lengths, required prison time for minor offenses, and intensified punishment for drug crimes.”\(^{19}\) Despite evidence indicating a slight decline in numbers in state and federal prisons through 2012,\(^ {20} \) and initiatives aimed at reducing prison populations,\(^ {21} \) America presently has the highest incarceration rate in the world,\(^ {22} \) imprisoning approximately 2.3 million adults.\(^ {23} \) These people represent around 25% of the world’s known prisoners.\(^ {24} \) In America, “nearly 1 of every 100 adults”\(^ {25} \) is in prison or jail. Arizona follows this national trend, with both its prison incarceration rate and prison population increasing over the last forty years.\(^ {26} \) Arizona incarcerates approximately 62,000 people across various facilities.\(^ {27} \) Prison Policy Initiative describes Arizona as having incarceration rates that “stand out internationally.”\(^ {28} \)

High incarceration rates have various implications. In particular, they have “drawn greater attention . . . to the relationships between incarceration

\(^{16}\) NRC, supra note 1, at 2.
\(^{17}\) Id.
\(^{18}\) NRC, supra note 1, at 4.
\(^{19}\) Id.
\(^{20}\) Id. at 13.
\(^{22}\) NRC, supra note 1, at 68.
\(^{23}\) Sawyer & Wagner, supra note 2.
\(^{24}\) NRC, supra note 1, at 2.
\(^{25}\) Id.
\(^{27}\) Arizona Profile, supra note 9.
\(^{28}\) Id.
and health.” Following Estelle v. Gamble, the state has an “obligation to provide [adequate] medical care for those whom it is punishing by incarceration.” A “deliberate indifference” to a prisoner’s serious illness or injury violates the Eighth Amendment’s prohibition of cruel and unusual punishment, although inadvertent and/or negligent failures to provide adequate care will not. The protections afforded by Estelle have been the subject of litigation in Arizona. In a class action Parsons v. Ryan Arizona prisoners have alleged systemic Eighth Amendment violations in Arizona’s prison system; arguing that policies and practices of the Arizona Department of Corrections (ADC) exposed them to a “substantial risk of serious harm,” to which there was a deliberate indifference. Ultimately, the parties entered into a settlement agreement (Stipulation). As part of the Stipulation compliance process, the defendants “agreed to comply with over 100 performance measures…designed to improve the ADC health care system and reduce the harmful effects of prisoner isolation.” Subsequently, the defendants have been subject to allegations of non-compliance, resulting in fines of $1.4 million in 2018.

The implementation of legal frameworks, like Estelle, that aim to safeguard prisoner health(care) is important. One particular reason for this is that evidence shows prisoners have “dramatically higher rates of disease than the general population.” This “high burden of disease” includes problems associated with mental health, substance abuse, infectious diseases, chronic conditions, and health issues associated with specific cohorts, such as elderly, female, LGBTQ+, and juvenile prisoners. Prisoners can come from “some of the most disadvantaged segments of

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29 NRC, supra note 1, at 203.
30 Estelle, 429 U.S. at 103.
31 Id. at 104.
32 Id. at 105-6.
33 Parsons, 912 F.3d at 493.
34 Id.
35 Id.
38 CLOUD, supra note 5.
39 NRC, supra note 1, at 202.
40 See id. at 202–230.
society”\textsuperscript{41}, and, therefore, may enter prison with compromised physical and mental health. Their health status can then be worsened by general prison conditions, and even further exacerbated if they are subject to high incarceration rates. High incarceration rates have been accompanied by overcrowding, a reduction in rehabilitative programs, and an increased burden on medical and mental health services.\textsuperscript{42} This has led to a “range of poor consequences for health and behavior and an increased risk of suicide”\textsuperscript{43} amongst prisoners. Through providing opportunities for routine screening, prevention, diagnosis, and treatment (inside and outside of prison),\textsuperscript{44} correctional institutions play an important role in safeguarding prisoner health. However, these institutions “too often serve as ill-equipped treatment providers of last resort for medically underserved, marginalized people.”\textsuperscript{45}

This situation poses significant challenges for agents in the criminal justice system, including prisoners and their families, corrections institutions and staff, healthcare professionals, courts, legal representatives, parole boards, and policy and law-makers. One of these challenges relates to the exercise of compassion by the state. The pervasion of poor and/or declining health in a heavily populated prison system, which has limited healthcare resources, urges stakeholders to consider: what circumstances, if any, justify early release on the grounds of poor or declining health? These are complex questions that come with, as Greifinger puts it, “many distractions”\textsuperscript{46} due to the person in need of compassion being a prisoner. Noting, however, the urgent need to address such questions emerging at the intersection of incarceration and health(care), the National Academies has called for researchers to “expand the number of systematic evaluations of prison-based programs.”\textsuperscript{47} As Part II explains, this call has, in the context of compassionate release, been quite heartily answered.

\begin{flushleft}
\textsuperscript{41} \textit{Id.} at 5.
\textsuperscript{42} \textit{Id.} at 6.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 204.
\textsuperscript{45} CLOUD, \textit{supra} note 5.
\textsuperscript{47} NRC, \textit{supra} note 1, at 11.
\end{flushleft}
II. COMPASSIONATE RELEASE: RESEARCH AND RECOMMENDATIONS

There is much scholarship evaluating issues associated with compassionate release. This includes discussions around the broader relationships between incarceration and health(care);\textsuperscript{48} the intersection of compassion with politics and the purposes of punishment;\textsuperscript{49} international law standards for prisoners;\textsuperscript{50} health issues for specific populations (e.g., the elderly);\textsuperscript{51} terminal illness in the prison context;\textsuperscript{52} and the roles and competencies of corrections, healthcare professionals, and parole boards.\textsuperscript{53} Next to this, a number of studies have focused on identifying and deconstructing existing compassionate release procedures.\textsuperscript{54} These studies demonstrate that compassionate release procedures are commonplace in the American justice system. In addition to a federal procedure,\textsuperscript{55} there are approximately eighty-eight compassionate release procedures across the fifty states and DC.\textsuperscript{56} Iowa is seemingly the only state absent a clearly

\textsuperscript{48} See NRC, \textit{supra} note 1; see also Cloud, \textit{supra} note 5; NATIONAL RESEARCH COUNCIL \& AMY SMITH, \textit{HEALTH AND INCARCERATION: A WORKSHOP SUMMARY} (Wash., DC: National Academies Press 2013) [hereinafter \textit{HEALTH AND INCARCERATION}].


\textsuperscript{54} See Price, \textit{supra} note 11; Russell, \textit{supra} note 15; Gartner \& Del Carmen, \textit{supra} note 15; and Cooper, \textit{supra} note 15.


\textsuperscript{56} See Price, \textit{supra} note 11; Cooper, \textit{supra} note 15 (As part of the \textit{The Blueprint Study} a cross-check of the procedures identified by the Families Against Mandatory Minimums study against those identified by the \textit{Blueprint Study} was undertaken, totaling 88).
identifiable procedure.57 These studies have resulted in researchers being able to make recommendations for achieving more functional compassionate release procedures. This section summarizes existing research findings and recommendations about compassionate release, using them as a steer for suggesting how Arizona could implement reform.

A. Method & Labelling

Compassionate release methods include parole,58 executive clemency and commutation,59 reprieves,60 sentence modifications,61 extended confinement with supervision,62 respite programs,63 and furloughs.64

57 See Families Against Mandatory Minimums, Iowa State Memo 2 (2018), https://famm.org/wp-content/uploads/Iowa_Final.pdf. Note, however, as the memo indicates, the media reports there has been a compassionate release case in Iowa, but there are no identifiable procedures.
60 See Ga. Const. art. IV, § II, para. II(e) (granting Georgia’s parole board power “to issue a medical reprieve to an entirely incapacitated person”); 37 Tex. Admin. Code § 143.34 (2019) (granting the Texas parole board to consider applications for “medical emergency reprieve.”)
Approximately fifty different labels exist, with ‘Medical Parole’ being the most common. This reflects that parole—in its general form or in a specific form—is the most common method of compassionate release. It is recommended that methods employed should clearly state the releasing authority, and harness decision-maker expertise. For example, physicians should only be required to make medical decisions; and parole authorities (or other such releasing authorities) should not be required to make medical prognostications. This is about achieving functionality through harnessing specific expertise. As Russell remarks about parole authorities, “These panels deal with release determinations on a daily basis. They are accustomed to reviewing evidence, evaluating cases, balancing equities, and drawing conclusions. They are also well prepared to determine what conditions should be imposed in any given situation.” Another example is the good experience corrections staff have with continuity of support on discharge (e.g., through parole, community corrections, and drug treatment programs), which could be harnessed when making decisions around the continuity of medical care for prisoners.

Also evident is that many of the labels used across compassionate release procedures are not an obvious shorthand of the procedure they describe, particularly for lay persons. For example, “extensions of the limits of confinement”, “recall of sentence” and “supervised community

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65 Cooper, supra note 15, (unpublished report at 20).
66 Id. at 21 (terms such as “medical/medically”; “extraordinary”; “special”; “geriatric/age”; and “compassionate” feature multiple times too).
68 See Id. at 16 (“It is important that each statute clearly indicate the employer and licensing status of the physician(s) who make the diagnosis.”); CAL. PENAL CODE § 1170 (West 2022) (requiring a physician employed by the department of corrections to determine whether a prisoner has six months or less to live); Russell, supra note 15, at 834 (“The physician should not be required to make a finding about the prisoner's capacity to commit criminal acts or to determine whether he poses a threat to society”)
69 Russell, supra note 15, at 836.
70 Greifinger, supra note 46, at 236 (“Correctional systems have good experience with continuity on discharge through other programs, such as parole programs, work releases, community corrections, and linkages to drug treatment programs. This experience should help them with a broader agenda that includes continuity of medical care.”)
confinement” could be considered unclear. Clarity and lay-accessibility is particularly important as research shows there tends to be a lack of legal representation for prisoners navigating compassionate release procedures, with one study commenting, “Given the complexity of rules and criteria, we were surprised to see how few systems allow for or provide counsel for prisoners, including prisoners who must go before a parole board.” A review of cases involving appeals in the context of compassionate release also highlights a prevalence of prisoners acting pro se.

Like many states, Arizona could adopt a Medical Parole procedure, which would make use of a lay-friendly label that clearly captures the procedure’s function (i.e., a parole process related to medical issues), and which integrates compassionate release into Arizona’s established parole infrastructure. This approach would provide for a clear method (parole), and a singular releasing authority, namely the Arizona Board of Executive Clemency, as parole decisions do not require executive involvement (unlike commutation does). Placing release authority solely in the discretion of the BOEC could allow for a fuller harnessing of BOEC members’ expertise. For example, members will be experienced in release-related decision-making; receiving reports from third parties (like healthcare professionals); and coordinating with other agents, such as corrections and prisoners’ families.

B. Exclusions

Prisoners can be excluded from compassionate release procedures even if they meet the ill-health related eligibility criteria. Exclusions are relatively common, with grounds for exclusion including categories of

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74 Price, supra note 11, at 18.

offenders; parole eligibility; minimum sentencing requirements; age requirements; and more nuanced reasons. Researchers have suggested exclusions be clearly explained and primarily based on a prisoner’s present medical condition(s). Specifically, one study recommended that it be guaranteed that “all eligible prisoners are considered for compassionate release, notwithstanding their crime, sentence, or amount of time left to serve.”

Fashioning a compassionate release procedure that is sensitive to concerns about public safety, the broader aims of punishment, the diversity of sentences and offences applied in the United States, and that accounts meaningfully for compassion is difficult. A starting point for Arizona, however, could be to shape a procedure that expressly states eligibility is not—save for those serving capital and life sentences—dictated by a prisoner’s conviction, sentence, date of sentence or crime, amount of time-served, or parole eligibility. Such an exclusion practice is clear and narrow. It is also rational in that the excluded cohorts are subject to sentences that

77 See, e.g., CAL. PENAL CODE § 3055 (2018) (excluding inmates sentenced to life without the possibility of parole); KAN. STAT. ANN. §§ 22-3728 (2014) (excluding inmates sentenced to death or life without the possibility of parole).
78 See, e.g., COLO. REV. STAT. ANN. § 17-2-201 (2019) (setting Five Year limits on eligibility for inmates convicted of Class 1 and Class 2 felonies); N.Y. EXEC. LAW § 259-r (McKinney 2015) (requiring inmates convicted of certain violent crimes to complete one-half of the sentence to become eligible for medical parole).
80 See, e.g., ALA. CODE § 14-14-3 (2019) (requiring inmates to qualify for Medicare or Medicaid).
81 Gartner & del Carmen, supra note 15, at 15 (“It is equally important for statutes to state the reasons why an inmate is disqualified from consideration. The disqualification should be clear in the statute and references to disqualifying statutes, if any, should be included.”). See Id. at 16 tbl.9 (“Core Provisions of Suggested Medical Parole Statute Inclusions.” Listing reasons for which inmates are exempt from consideration).
82 Russell, supra note 15 at 833 (“All terminally ill prisoners should be eligible for compassionate release. Once we are dealing with someone suffering from a terminal illness, penologic considerations are secondary. In light of current societal values addressing death with dignity, considerations of punishment, deterrence, and rehabilitation should no longer come into play. The seriousness of the crime is not deprecated if we permit the terminally ill to die outside the hostile confines of prison. This is certainly true when a predicate to release is a finding that the prisoner no longer poses a threat to society. Thus, no crimes or sentences should serve as a basis for exclusion, nor should minimum time served requirements be imposed.”).
83 Price, supra note 11, at 21.
follow conviction for the most serious crimes, and that death in prison is an inherent consequence of such sentences. It would also remove unduly restrictive and arbitrary limitations currently placed on eligibility by various Arizona sentencing statutes. 84

C. Eligibility

Eligibility for compassionate release generally relates to serious terminal, non-terminal, and/or age-related health issues. Non-terminal conditions are described varyingly, but typically require prisoners be subject to serious medical conditions/disabilities that significantly incapacitate them. Mental health is occasionally included. Age is referenced in various ways. Tens of procedures expressly reference ‘terminal’ within eligibility criteria, with many including a temporal reference. These references range from that death must be “imminent,” to that it must occur within twenty-four months. It has been posited that eligibility criteria not be unduly strict and/or vague, but rather underpinned by “medical, end-of-life, and geriatric criteria,” which is

84 See ABOEC Policy #114, 114.1–114.3, https://boec.az.gov/sites/default/files/documents/files/114-Commutation%20of%20Sentence%20Rev%202018.pdf. An Arizona prisoner can only apply for commutation of sentence if they are “statutorily eligible” or if their “sentence does not require a minimum amount of time to be served.” The Board will only consider those prisoners who have served two years from their sentence begin date and are not within one year of their release date for sentences more than three years. “The Board will not consider inmates with less than three years sentence.” The Board’s “imminent danger of death” procedure provides an exception to the time requirements only, but not eligibility requirements. An Arizona prisoner can only seek commutation based on imminent danger of death if they are within four months of death and, as stated above, only if their sentence allows release eligibility. Arizona’s “imminent danger of death” procedure does not apply beyond such health issues or to those serving flat day-for-day sentences.

85 See Cooper, supra note 15, at 27 (including chronic, debilitating, extraordinary, incapacitation, disabled, severe, permanent, and grave).


87 Cooper, supra note 15, at 31–32 (1. procedures that are for the exclusive use of elderly prisoners, and which determine eligibility by reference to a specific age; 2. procedures that include elderly prisoners—as a specifically eligible cohort—within a broader procedure that is available to other prisoners; and 3. procedures that consider age generally as part of the decision-making process).


89 Id.

90 Price, supra note 11, at 13–14, 21.

91 Id. at 21.
based “on evidence and best practices, with input from medical experts.” 92 Other factors such as risk to public safety, prisoner well-being, and cost, can also inform decision-making about eligibility. 93 These factors should be carefully constructed. For example, assessments of risk to public safety should be nuanced, requiring decision-makers to determine if there are material concerns about public safety. It is considered good practice for procedures to “assess whether continued incarceration defeats the purposes of punishment . . . .” 94

Arizona could shape eligibility criteria that takes account of the above. Arizona’s current IDD commutation procedure bases a prisoner’s medical eligibility on their being terminally ill and [to a reasonable degree of medical certainty] within four months of death. 95 A first step, therefore, would be to broaden the categories of prisoners—in terms of medical issues—eligible to apply. Categories could continue to include terminal illness but make use of a longer life-expectancy period (e.g., death within twenty-four months). Or, indeed, express temporal references could be removed. Non-terminal illness could be shaped to cover a breadth of medical issues, for example, a physical, mental, and/or cognitive condition, disease or syndrome that debilitates, and/or incapacitates. In addition, deteriorating health due to advancing age could be included as a specific category. Criteria and interpretative guidelines could be developed in collaboration with medical experts. The second step would be to integrate medical experts within the procedure to undertake decision-making about whether a prisoner falls within any particular category. In short, licensed physicians would be required to harness their expertise and certify that a prisoner falls within an eligible category. Arizona already coordinates a similar approach. 96 The third step of the procedure would harness the expertise of BOEC members, who would weigh the criminal justice policy dimensions of eligibility. For instance, whether, in light of the certified medical issue, the prisoner’s release poses a substantial risk to public safety; is appropriate in terms of state resources and medical care; is in the interests of the prisoner’s well-being and dignity; and whether there is a comprehensive release plan prepared by corrections.

92 Id.
93 Cooper, supra note 15, at 32–34.
94 Price, supra note 11, at 17 (“We were also impressed with the handful of states that assess whether continued incarceration defeats the purposes of punishment, in the context of their state’s compassionate release program.”).
95 ABOEC POLICY #114, at 114.3.
96 Id.
D. Process

Compassionate release processes vary. It is generally recommended that processes should be streamlined,\(^97\) and include time-limits that reflect the need for expedited review.\(^98\) The proactive identification of eligible prisoners is also encouraged,\(^99\) along with taking a broad approach to who can be a petitioner and initiate proceedings (e.g., any interested party, including correctional staff, family, and lawyers).\(^100\) Processes should make use of competent decision-makers, specifying who they are and what their competence is within the process.\(^101\) As part of this, the reporting of reasons for decision-making is encouraged.\(^102\) Supporting evidence requirements should be clearly itemized,\(^103\) focusing on medical evidence. The integration of an appeals process is also recommended.\(^104\)

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97 Russell, supra note 15, at 832–33 ("Because of the exigent nature of terminal illness, any compassionate release program should be constructed so that cases can be expeditiously processed . . . . The more complex the system, the less likely that it will be efficient in accomplishing its goal . . . .")

98 See Gartner & del Carmen, supra note 15, at 17 ("For the process description to be even more useful, jurisdictions should state specific time limits for the consideration process and the length of the decision period from time of application to the final release decision."); Price, supra note 11, at 21 ("Establish time frames within which document-gathering, assessment, and decision-making must occur that are realistic, provide sufficient time to develop informed decisions, and are sensitive to the need for expedited review in the case of terminal illness.")

99 See Price, supra note 11, at 21 ("Teach staff how to identify eligible prisoners and make it their duty to do so.")

100 Id. ("Involve families in identifying eligible prisoners and providing support, such as in coordinating release planning.")

101 See Price, supra note 11, at 14 ("We found a number of states providing little if any policy guidance or procedures that prison staff, corrections officials, or final decision-makers could use to implement compassionate release.")

102 See id. at 21 ("Require all agencies involved in compassionate release to provide annual data—including demographic information—on applications, approvals, denials, and revocations, including reasons for denials and revocations."); Gartner & del Carmen, supra note 15, at 18 ("The final items that should be included in a well-constructed medical parole statute are . . . the reporting requirements for the releasing authority.")

103 Gartner & del Carmen, supra note 15, at 16 tbl.9 ("Core Provisions of Suggested Medical Parole Statute Inclusions - List and define necessary documentation for consideration.") Id. at 17 ("The statute must also describe how these documents should be delivered—full report, separately as they are completed, etc.—and to whom the documents must be delivered.")

104 Price, supra note 11, at 21 ("Provide the right to appeal denials or the right to reapply following a denial.")
the process should be publicly available and signposted to prisoners, including guidance about terminology employed.

Arizona’s existing IDD commutation procedure already adopts some relevant qualities. The ADC and BOEC provide—separately—publicly available information about the IDD process. This information includes, for example, some express time limits. For instance, ADC policy states “[w]ithin one workday from receipt of the application,” the Time Computation Unit will determine whether the prisoner is statutorily eligible to apply. Moreover, the BOEC’s policy describes that the “Executive Director will make every effort to accommodate priority scheduling for imminent danger of death commutation hearings.” Both policies also make some clear references to decision-makers (e.g., Time Computation, Human and Health Services, the BOEC, and the Governor); harness expertise (e.g., a medical specialist must complete a written prognosis); and have some focus on medical evidence requirements (e.g., the need for a clinical summary and prognosis). Arizona can build on these foundations in designing a new Medical Parole procedure. For example, by adding more express time-limits throughout the process to “keep applications moving;” requiring decision-makers to provide reasons for their decision-making; itemizing and making clearly available all evidence requirements and documentation; and integrating an appeals process based on typical appeals principles, such as the showing of new information [about eligibility, for example], error, or inequity.

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105 Id. at 7 (“Compassionate release rules should be easy to understand. . . Help should be available to prisoners and their loved ones, if needed, to apply for compassionate release. . . Finally, compassionate release in every state should be transparent to the fullest extent possible.”). See also Price, supra note 11, at 21 (“Provide information about compassionate release options to each entering prisoner; ensure prison handbooks include a section that clearly explains eligibility and application.”).

106 Gartner & del Carmen, supra note 15, at 16 tbl.9 (“Core Provisions of Suggested Medical Parole Statute Inclusions.” “Indicate terminology used for the release program.”) Gartner & del Carmen, supra note 15, at 18 (“The final items that should be included in a well-constructed medical parole statute are a statement of the appropriate terminology for the release program. . .”).


108 See ABOEC POLICY #114, supra note 13, at 114.3, 3.2.3.

109 See generally ADC ORDER, supra note 107; ABOEC POLICY #114, supra note 13 (discussing roles of these decision-makers within release procedure).

110 See ABOEC POLICY #114, supra note 13, at 114.3, 3.2.

111 See ADC ORDER, supra note 108, at 1.113.2.3.

112 Price, supra note 11, at 21 (“Establish Deadlines to Keep Applications Moving”).
E. Release Requirements

Release conditions are typical but vary, ranging from agreeing to the public release of medical records and placements and being subject to periodic medical evaluations, to intensive supervision and fee payments. Release revocation based on a change in circumstances is also typical. Release requirements should be tailored to individual circumstances, clear in both terms and consequences, and there should be

113 See, e.g., ALASKA ADMIN. CODE tit. 22, § 20.605(c) (2019), http://www.akleg.gov/basis/aac.asp#22.20.605 (“An applicant for special medical parole must provide the board and the department with full access to all medical records, and must sign a release assuring that access by the department and the board for the full duration of the period of parole.”).
114 See, e.g., CONN. GEN. STAT. ANN § 54-131d(a) (2013) (“The Board of Pardons and Paroles shall require as a condition of release on medical parole that the parolee agree to placement and that he or she is able to be placed for a definite or indefinite period of time in a hospital or hospice or other housing accommodation suitable to his or her medical condition, including his or her family's home, as specified by the Board of Pardons and Paroles.”).
115 See, e.g., N.H. REV. STAT. ANN. § 651-A:10-a(IV) (2015) (“The Adult Parole Board may request, as a condition of medical parole, that such inmate submit to periodic medical examinations while on medical parole . . . .”).
116 See, e.g., NEV. REV. STAT. ANN. § 213.380(2)(c) (2019) (“Require intensive supervision of the offender, including unannounced visits to his or her residence or other locations where the offender is expected to be in order to determine whether the offender is complying with the terms and conditions of his or her confinement.”).
118 See, e.g., Ark. Code Ann. § 12-29-404(e) (2012) (“The board may revoke a person’s parole supervision granted under this section if the person’s medical condition improves to the point that he or she would initially not have been eligible for parole supervision under this section.”).
119 Gartner & del Carmen, supra note 15 (“A medical parole statute should list and explain any general and/or medically specific conditions of release that are required of a medical parolee....A vital piece of a medical release statute is the discussion of the possible sanctions for the violation of parole conditions and the method through which those sanctions may be imposed — reprimands, graduated sanctions, revocation, etc. The statute should include, in clear terms, the number and/or nature of violations that will be grounds for revocation. The statute should also be clear regarding whether improvement in the parolee's medical condition is grounds for revocation, and if so, the definition of improvement and how the determination of improvement will be made. The process whereby a medical parolee is found to have violated the conditions of parole and the reasons supporting revocation should be adequately detailed in the statute. These details should indicate whether individuals must be notified that they are in possible violation of their parole conditions, whether a hearing in front of a judge is necessary for formal
support available for pre and post-release planning, including identifying welfare support.\textsuperscript{120} It is considered good practice to involve families in release planning (as well as the broader application process).\textsuperscript{121}

Arizona’s existing IDD commutation procedure includes a reference to prisoners agreeing to their medical records becoming public,\textsuperscript{122} and ADC policy describes support for medical-based release planning, including health insurance and federal benefits.\textsuperscript{123} In considering a new Medical Parole procedure, Arizona could build on this footing. Enhancements could include sealing prisoners’ medical records, which would allow decision-makers to consider all relevant information, but limit public discussion of sensitive content that is very likely to be unrelated to a prisoner’s offence. As an additional motivation for undertaking comprehensive release planning, a check on completion could be integrated into the BOEC’s eligibility-related decision-making. To support the BOEC to resolve concerns about release, the procedure could expressly allow the BOEC to — as is typical for parole practices — attach specific release conditions.

F. Reporting

Generally, compassionate release procedures lack comprehensive reporting and tracking systems, including systems that record applications, decisions, reasons for decision-making, and follow-up systems for those granted release.\textsuperscript{124} Procedures should include mandatory reporting and violation or revocation, and whether an individual is eligible for medical parole after an earlier parole revocation.”).

\textsuperscript{120} Price, supra note 11, at 21 ("Assign dedicated staff to assist ill and elderly prisoners with pre-and post-release planning, including applying for public assistance, veterans’ benefits, housing and medical facility placements, Medicaid and/or Medicare, and other supports.").

\textsuperscript{121} Id. ("Involve families in identifying eligible prisoners and providing support, such as in coordinating release planning.”).

\textsuperscript{122} See ABOEC POLICY #114, supra note 13 114.3(3.2.4) ("Inmates will be notified on the Commutation of Sentence Application that their medical records may become public record and discussed in public forum during the commutation hearing. They shall acknowledge this notice by their signature on the application form.”).


\textsuperscript{124} Price, supra note 11, at 19. ("More than half of the states do not track or collect any data on how many people apply for and receive compassionate release. We believe that if lawmakers were aware of how few people are granted compassionate release they might be moved to examine why and act to improve the programs. Knowing who asks for compassionate release, who is denied, and why and how those requests are decided is essential to improving outcomes so that, for example, more eligible prisoners are released and terminally ill prisoners get expedited reviews.”).
tracking requirements, which are subject to regular review and evaluation. Establishing data collection systems is important, but “a delicate balance” must be struck so as not to impose unduly costly and intrusive requirements.

There is some published information about IDD commutation decisions in Arizona. In shaping a new procedure, Arizona could establish more detailed tracking procedures, particularly across the two main agencies proposed to be involved in decision-making: the BOEC and ADC. This could include, for example, corrections being required to regularly report on the number and nature of applications, release planning support, and the recidivism of prisoners released. Similarly, the BOEC could be required to regularly report on the number and nature of Medical Parole hearings, outcomes, and appeals. Both agencies could be required to report on compliance with relevant procedural time-limits. The aim of such an approach would be to enhance transparency and accountability, and establish an evidence-base for regular review and evaluation.

G. Cross-cultural Competencies

Compassionate release procedures can involve various agents, including prisoners and their families, lawyers, corrections personnel, healthcare professionals, parole authorities, courts, and executives. Arizona’s current IDD commutation procedure reflects this. The development of cross-cultural competencies i.e., common understandings between these agents — who obviously have their own specific roles and training — is encouraged. Developing such understanding is largely about signposting, creating, and delivering education opportunities. Suggestions include publicizing compassionate release procedures and policies across stakeholder institutions, including the proactive signposting of procedure information to prisoners and families; education programs (led by

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125 Id. at 21. (“Require all agencies involved in compassionate release to provide annual data—including demographic information—on applications, approvals, denials, and revocations, including reasons for denials and revocations.”)
126 Russell, supra note 15, at 835.
127 Id.
128 Id.
130 Price, supra note 11, at 7 (“Compassionate release rules should be easy to understand. . . [h]elp should be available to prisoners and their loved ones, if needed, to apply for compassionate release. . . [f]inally, compassionate release in every state should be transparent to the fullest extent possible.”); see also id. at 21 (“Provide information about
healthcare professionals) for criminal justice system stakeholders (such as corrections personnel and BOEC members) about prisoner health(care) needs and the meaning of compassionate release eligibility criteria,\textsuperscript{131} and training for healthcare professionals (led by criminal justice system professionals) about the conditions of incarceration and the pressures faced by criminal justice institutions and actors.\textsuperscript{132} Fostering such cross-agency collaboration is of “practical importance”\textsuperscript{133} so as to limit conflicts. Without it, “you’re just spinning your wheels.”\textsuperscript{134}

**CONCLUSIONS**

There are calls for compassionate release reform across the United States. Arguably, Arizona should feel particularly motivated to hear such calls and broaden its approach. As a start, research suggests, when compared against other state procedures, Arizona takes a particularly narrow approach to compassionate release. Both of its procedures are seemingly for the exclusive use of terminally ill prisoners, with Compassionate Leave providing only temporary release, and the IDD commutation procedure catering only for terminal prisoners certified to be within four months of death (and statutorily eligible). Compared to other state procedures using a temporal reference to dictate eligibility for terminally ill prisoners, Arizona ranks as one of the narrowest.\textsuperscript{135}

With this in mind, there is evidence of both a local and national political will to broaden compassionate release, with members of the Arizona state legislature and Arizona representatives in the US Congress supporting relevant bipartisan policies. The latter is shown by support for the First Step Act, which, *inter alia*, allows for compassionate release applications by federal prisoners in a relatively wide set of circumstances.\textsuperscript{136} The First Step
Act passed the House of Representatives (358–36) and the Senate (87–12) by a landslide, enjoying the bipartisan support of a majority of Arizona’s federal representatives in Congress. There have been sustained efforts to legislate for a broader compassionate release procedure in Arizona too. Between 1991 and 2015, eight bills seeking to establish a Medical Parole procedure were introduced in the Arizona House of Representatives. Half of them had bipartisan sponsorship. These bills—in short—aimed to allow prisoners with an “incapacitating physical condition, disease or syndrome” to apply to the BOEC for release if within one year of release, parole eligibility, or (if neither of the latter two applied) death. Political will is critical to achieving relevant reform, particularly in the context of prison policy, as relevant strategies require “determined political leadership.”

Political will is shaped by various factors, including by the availability of resources and the need to problem-solve systemic challenges. With regards to resource, significant expenses are associated with “[h]ousing, accommodating, and providing medical care for aging prisoners, prisoners who are ill or suffering from a significant and limiting disability, and prisoners nearing the end of their lives.” Moreover, inefficiencies inherent to prison systems, such as insufficient medical monitoring procedures, minimal handicap accessibility, and inadequate staff training on specialized medical issues contribute to increased costs. Medical care

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139 See “First Step Act of 2018: Roll Call No. 448.” supra note 137; see also “First Step Act of 2018: Roll Call No. 271.” (Senator Flake and Representatives McSally, O’Halloran, Grijalva, Schweikert, Gallego, and Lesko voted “Yea.” Senator Kyl and Representatives Gosar and Biggs voted “Nay.” Representative Sinema did not vote.)
141 See legislative bills cited supra note 140.
142 See legislative bills cited supra note 140.
143 NRC, supra note 1, at 343.
144 Price, supra note 11, at 8, 9.
consumes a significant portion of state prison expenditures.\textsuperscript{146} In 2018, ADC housed prisoners at a cost of $71.13 per prisoner per day.\textsuperscript{147} Comprising a significant portion of that expense is healthcare, as the state’s new contract for healthcare services with Centurion of Arizona, LLC will cost $16.60 per prisoner per day.\textsuperscript{148} Broadening compassionate release could possibly contribute to reducing these costs. It could also contribute to problem-solving systemic issues that complicate the delivery of adequate healthcare in prisons. Large prison populations are one such issue, and, as shown in California through federal court orders associated with the \textit{Plata} litigation, broadening compassionate release is one remedial strategy.\textsuperscript{149} Texas has also utilized compassionate release to reduce its prison population.\textsuperscript{150}

Using research findings and recommendations as a steer, this paper suggests a direction for a new compassionate release procedure in Arizona. In sum, it suggests that Arizona considers replacing its current IDD commutation procedure with a Medical Parole procedure. This procedure would place releasing authority solely in the discretion of the BOEC and continue to harness professional decision-making expertise across the BOEC, corrections, and healthcare professionals. Sensitive to existing state practices and infrastructures, it would include broader eligibility categories, narrower and clearer exclusions, expedited and inclusive processes, nuanced release requirements, and useful reporting and tracking systems.

\textsuperscript{146} Price, \textit{supra} note 11, at 9 (noting “[m]edical care alone consumed one fifth of state prison expenditures . . . ”).
\textsuperscript{149} In 2014 a federal court ordered California to expand its medical parole program as part of the effort to reduce prison crowding. See Cal. Dep’t of Corr. & Rehab., \textit{Medical Parole Hearings, Bd. of Parole Hearings} (last visited October 28, 2019) https://www.cdc.ca.gov/bph/mpf-overview/.
VIOLATING THE INVOLATE

By: Mikel Steinfeld*

For more than a century, Arizona juries were responsible for determining whether a defendant had prior convictions. This requirement, dating back to Arizona’s territorial days, reflected the common-law requirement that any fact that might increase a defendant’s penalty needed to be alleged in the indictment and proved to a jury beyond a reasonable doubt.

But in 1996, the Arizona Legislature changed this requirement. Arizona’s Legislature authorized trial court judges to decide the existence of prior convictions, abandoning the long-held requirement for juries to decide that question. Two years later, the Supreme Court of the United States signed off on this practice in Almendarez-Torres v. United States insofar as the federal constitution is concerned.¹ In State v. Quinonez, decided in 1999, the Arizona Court of Appeals approved of the 1996 statutory change.² Six years later, in Newkirk v. Nothwehr, the Arizona Court of Appeals again approved of judicial fact-finding of prior convictions.³

Quinonez and Newkirk are incorrect.

Article 2, section 23 of the Arizona Constitution guarantees: “The right of trial by jury shall remain inviolate.”⁴ This has been interpreted as guaranteeing the right to a jury trial as it was understood when Arizona approved its constitution. When given its proper weight, section 23 guarantees the right to a jury trial for prior convictions.

To understand the intersection between Arizona’s constitutional guarantee of jury trials and factual findings of prior convictions, this article will first look at Quinonez and Newkirk to frame our subsequent discussions. In Part II we’ll turn to the history of recidivism schemes and the common-law practices which developed for pleading and for proving allegations of prior convictions. In Part III, we’ll talk about Arizona’s history. This will include a discussion of Arizona’s territorial history, first implementation of a recidivism scheme, constitutional convention, and subsequent implementations of the general recidivism scheme. In Parts IV

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⁴ ARIZ. CONST. art. II, § 23.
and V we’ll look to how Arizona and Washington have interpreted section 23. We’ll revisit Quinonez and Newkirk in Part VI. And in Part VII we’ll consider some broader implications of our discussion. With a full view of Arizona’s background—considering territorial, constitutional convention, and post-statehood times, as well as common-law and statutory foundations—the error in Quinonez and Newkirk becomes clear.

I. QUINONEZ AND NEWKIRK

Quinonez was decided in 1999.5 There, the state charged the defendant with manslaughter and aggravated assault as a result of a car accident in which the defendant was intoxicated.6 Before trial, the state alleged the defendant had prior convictions that could be used to subject the defendant to an enhanced sentencing range.7 As we will discuss in more depth in Part II, from 1887 to 1995, statutes required prior convictions be proved to a jury.8 However, the legislature changed the statute regarding proof of prior convictions in 1996.9 This change required the trial court to make the factual determination, not the jury.10 Despite the change, the defendant in Quinonez asked that the prior convictions be proved to a jury.11 The trial court denied this request and the prior convictions were tried by the court.12 On appeal, the defendant argued the trial court violated his right to a jury trial under article 2, section 24 of the Arizona Constitution.13

The Arizona Court of Appeals noted the defendant did “have tradition on his side here.”14 The court recognized that “[f]rom at least 1887 until the 1996 amendment to section 13-604(P), Arizona granted criminal defendants the right to a jury trial on an allegation of prior conviction.”15 The court referenced the 1887 Territorial Penal Code as an example.16

However, cases decided shortly before Quinonez suggested the Arizona Constitution did not mandate jury findings of prior convictions.17 For example, in State ex rel. Neely v. Sherrill, the Arizona Supreme Court said

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5 Quinonez, 976 P.2d 267.
6 Id. at 268.
7 Id.
8 See infra Part II.
9 See Quinonez, 976 P.2d at 268.
10 See id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id. at 268–69.
“use of a jury to determine a prior conviction is not constitutionally mandated, but is required only by statute in Arizona.”\textsuperscript{18} And in \textit{State v. Hurley}, the Arizona Supreme Court said its research “did not reveal any constitutional basis for this requirement in Arizona.”\textsuperscript{19}

The distinction came down to labels. As the \textit{Quinonez} court framed it, “the question was whether the legislature ‘created a separate offense in which release status is not merely a sentencing factor but is a constituent element of the crime.’”\textsuperscript{20} The court of appeals thus concluded allegations of prior convictions were sentencing factors, not elements.\textsuperscript{21} As a result, it was proper for the trial court to determine prior convictions.\textsuperscript{22} “Although, prior to 1996, the Arizona Legislature traditionally granted criminal defendants the right to a jury trial on an allegation of historical prior felony conviction, that right is not guaranteed by the constitution, and its revocation does not offend the constitution.”\textsuperscript{23}

Six years later, in 2005, the Arizona Supreme Court considered whether the Arizona Constitution guaranteed a jury trial for the misdemeanor charge of drag racing in \textit{Derendal v. Griffith}.\textsuperscript{24} The supreme court observed Arizona’s two constitutional guarantees of the right to a jury trial—found in article 2, sections 23 and 24—had been interpreted as “preserving, rather than creating, the right to jury trial as it existed in Arizona prior to statehood.”\textsuperscript{25} In assessing section 23 specifically, the court looks to “whether a modern crime has a common law antecedent.”\textsuperscript{26} Where there is no common-law antecedent, the protection stems out of section 24.\textsuperscript{27} Under that section, the supreme court clarified the length of punishment is the “most significant” determining factor.\textsuperscript{28} Where an offense is punishable by more than six months, a jury trial is guaranteed; where an offense is punishable by less than six months, a jury trial is not guaranteed unless there are additional consequences beyond incarceration that would warrant a jury trial.\textsuperscript{29} Because drag racing did not have a common-law antecedent and the

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\textsuperscript{18} Id. at 269 (quoting \textit{State ex rel. Neely v. Sherrill}, 815 P.2d 396, 399 n.2 (Ariz. 1991)).

\textsuperscript{19} Id. (quoting \textit{State v. Hurley}, 741 P.2d 257, 260 (Ariz. 1987)).

\textsuperscript{20} Id. (quoting \textit{Hurley}, 741 P.2d at 262).

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Derendal v. Griffith, 104 P.3d 147 (Ariz. 2005).

\textsuperscript{25} Id. at 150.

\textsuperscript{26} Id.

\textsuperscript{27} Id. at 151.

\textsuperscript{28} Id. at 153.

\textsuperscript{29} Id.
penalty was not sufficiently substantial, the court concluded there was no jury trial right.30

Six months after Derendal, the issue of whether a defendant was entitled to a jury finding on prior convictions again came before the Arizona Court of Appeals in Newkirk v. Nothwehr.31 Like in Quinonez, the state charged the defendant with an offense (driving under the influence) and alleged a prior conviction.32 With the benefit of Derendal, however, the defendant argued section 23 guaranteed the right to a jury trial on prior convictions because jury trials were provided when the constitution was enacted.33

The court rejected this argument.34 After discussing Quinonez and Derendal, the Court turned to its analysis of the issue.35 The court concluded that “[a] prior conviction . . . is not a common-law offense but rather a sentencing enhancement.”36 Thus, the court found the defendant’s “attempt to liken an allegation of a prior conviction to a common-law offense that retains the right to a jury trial under Derendal” unpersuasive.37 The court further held that “the right to a jury trial on an allegation of prior conviction was statutory under both the territorial penal code and Arizona Revised Statutes until 1996.”38 This statutory provision was important because jury determinations of prior convictions therefore had “no common-law antecedent that would require a jury under Derendal.”39 Thus, the Court ruled there was no right to a jury trial.40

Quinonez and Newkirk rested upon two conclusions. First, the right to a jury trial on allegations of prior convictions was a statutory right, not a right based in the common law. Second, the court of appeals concluded in each case that prior convictions are different from what section 23 was designed to protect. In Quinonez, the court distinguished between a sentencing factor and an element.41 In Newkirk, the distinction changed to one between a sentencing enhancement and an offense.42 In light of these claimed differences, the court decided section 23 did not protect the right to a jury trial.

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30 Id. at 157.
32 Id. at 1265.
33 Id. at 1266–67.
34 Id. at 1267.
35 Id. at 1266–67.
36 Id. at 1267.
37 Id.
38 Id.
39 Id.
40 Id.
42 Newkirk, 115 P.3d at 1267.
These two conclusions are flawed. To understand how, we will now turn to the history of recidivism schemes and how the common law developed to address such schemes.

II. RECIDIVISM UNDER THE COMMON LAW

Recidivism statutes are not new. The first forms of recidivism statutes were specific in nature—the repeated commission of a specific offense was treated more harshly. One example is Virginia’s hog stealing statute, enacted in 1645. Upon conviction, the offender had to pay both the owner of the pig and the informant 1,000 pounds of tobacco or work one year for each. In 1679, Virginia created a recidivism scheme for hog stealing. On a second or third offense of hog stealing, the penalty grew stiffer:

[I]f any person haveing beene once convict of hoggstealing, shall a second tyme be convict thereof, then for such his default he shall stand in the pillory two howres, and have both his eares nailed thereto, and at the expiration of the said two howres, have his eares cut loose from the nailes, which penalty and punishment shalbe adjudged and inflicted against and upon the offender by any county court in Virginia, any law to the contrary notwithstanding. And whoever shalbe taken a third tyme stealing hoggs, that then he be truye by the lawes of England as in case of ffelony.

The penalty for a felony was death. General recidivism schemes—schemes that generally authorized harsher punishment of a person with a prior conviction—followed. In 1797, New York passed the first general recidivism scheme in the United

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48 Id. at 641.
49 Id. at 641–42.
That scheme required “that individuals convicted of their second felony be sentenced to prison ‘at hard labor or in solitude, or both, for life.’”

Other states followed suit: Massachusetts passed a general recidivism scheme in 1817.

To address these recidivism schemes, courts, through the common law, developed a process for alleging and finding prior convictions. The rule was simple: “any prior conviction that would boost the sentence had to be alleged in the indictment and proven to a jury beyond a reasonable doubt.”

This was the process used in Virginia in 1843 in Brooks v. Commonwealth. There, the defendant had been convicted of grand larceny and sentenced to two years in prison. The prison superintendent subsequently reported the defendant was convicted previously and had been sentenced to prison under a different name. The prosecuting attorney filed an information against the defendant alleging the prior conviction. A jury was impaneled to determine if the defendant was the same person who had been previously convicted, and the jury found the defendant was the same person. The defendant was thus sentenced as a repeat offender.

The Supreme Court of Georgia squarely confronted the issue in 1859 in Hines v. State. There, the state charged the defendant with “selling liquor to a slave” and alleged it as a second offense. The trial court ruled it was not necessary to submit the question of the prior offense to the jury.
Rather, after the jury returned a guilty verdict, the trial court found the defendant had previously been convicted of the same offense. The Supreme Court of Georgia rejected this approach. “In every such question, identity is involved, and that, beyond a doubt, is a matter for the jury.”

Joel Prentiss Bishop echoed the same rationale in the fifth edition of his Commentaries on the Criminal Law, published in 1872: “Plainly the fact of the previous conviction, depending chiefly upon record evidence, is to be established without much resort to oral testimony; yet, as the question involves that of identity, it ought doubtless to be passed upon by the jury.” Bishop further recited the common-law requirement that the allegation be included in the indictment: “But if it is the second or third, and it is sought to make the sentence heavier by reason of its being so, the fact thus relied on must be averred in the indictment; because the rules of criminal procedure require the indictment, in all cases, to contain an averment of every fact essential to the punishment sought to be inflicted.” Bishop reiterated these principles in subsequent editions. Notably, the Territorial Supreme Court of Arizona repeatedly relied upon Bishop’s Commentaries on the Criminal Law when evaluating the common law.

Under the common law, there were two procedural requirements for such schemes. First, the prosecutor needed to allege the prior conviction in a charging document. Second, the prosecutor needed to prove the prior conviction to a jury beyond a reasonable doubt.

In context, these requirements make sense. Whether a defendant had a prior conviction was a question of fact, which the jury was generally responsible for finding. The importance of a jury finding was amplified because the fact of a prior conviction exposed the defendant to an increased penalty. While carving out prior convictions, the Supreme Court observed these principles in a footnote in Jones v. United States, decided in 1999: “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged

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63 Id.
64 Id. at 616.
65 Id.
66 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 963 (5th ed. 1872).
67 Id. at § 961.
68 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 963 (7th ed. 1882); 1 Joel Prentiss Bishop, New Commentaries on the Criminal Law § 963.3 (8th ed. 1892).
69 E.g., Williams v. Territory, 108 P. 243, 244 (Ariz. 1910); Booth v. Territory, 80 P. 354, 355 (Ariz. 1905); Hinds v. Territory, 76 P. 469, 470 (Ariz. 1904); McLane v. Territory, 71 P. 938, 940 (Ariz. 1903); Halderman v. Territory, 60 P. 876, 877 (Ariz. 1900).
in an indictment, submitted to a jury, and proven beyond a reasonable
doubt.”70 The next year, the Supreme Court made this footnote explicit in
Apprendi v. New Jersey.71
In Apprendi, Justice Stevens clarified the confusion between
“elements” and “sentencing factors.”72 Justice Stevens wrote: “Despite
what appears to us the clear ‘elemental’ nature of the factor here, the
relevant inquiry is one not of form, but of effect—does the required finding
expose the defendant to a greater punishment than that authorized by the
jury’s guilty verdict?”73 Because the factor in Apprendi exposed the
defendant to a greater punishment, the factor operated as an element, not a
sentencing factor.74 A “sentencing factor,” on the other hand, “describes a
circumstance . . . that supports a specific sentence within the range
authorized by the jury’s finding that the defendant is guilty of a particular
offense.”75
Justice Thomas went further in his concurrence.76 Although Apprendi
concerned an intent-based aggravator, Justice Thomas revisited the question
of whether prior convictions were elements.77 He concluded they were.78
After noting that early cases treated recidivism like any other fact that would
increase punishment, Thomas observed, “[b]y the same reasoning that the
courts employed in . . . cases discussed above, the fact of a prior conviction
was an element, together with the facts constituting the core crime of which
the defendant was charged, of a new, aggravated crime.”79 However,
because Apprendi didn’t concern prior convictions, the Supreme Court
didn’t explicitly address the issue.80 We will discuss the Jones and Apprendi
line of cases in more depth in Part VII.

As we will see in the next section, Arizona’s early recidivism schemes
reflected the expectations established by the common law.

III. ARIZONA’S HISTORY

Arizona’s territorial and constitutional history can help us
understand how to interpret article 2, section 23 as it relates to recidivism

70 Jones v. United States, 526 U.S. 227, 243 n.6 (1999).
72 Id. at 494.
73 Id.
74 Id. at 494–95.
75 Id. at 494 n.19.
76 See id. at 506–09 (Thomas, J., concurring).
77 Id.
78 Id.
79 Id. at 507.
80 Id. at 489–90 (majority opinion).
schemes. First, we will look at Arizona’s time as a territory. In doing so, we will see that Arizona operated under a code of laws for the vast majority of this time. Second, we will look specifically to Arizona’s implementation of a recidivism scheme under its territorial code. Third, we will look more closely at the drafting and passage of Arizona’s Constitution, with an eye toward the Declaration of Rights and article 2, section 23. Finally, we will consider recidivism schemes in Arizona after statehood.

A. Arizona’s territorial days

In 1846, the United States Congress, pushing West to Manifest Destiny, declared war on Mexico. In August of 1846, General Stephen Kearny captured Santa Fe. Just a month later, by September 22, 1846, General Kearny signed and published a Bill of Rights, a letter to the Adjutant General, appointments of civil officers, and a code of laws for the Government of the Territory of New Mexico, commonly known as the Kearny Code. The code was derived from the laws of Mexico, Missouri, Texas, Coahuila, and the Livingston Code.

The Mexican-American War resolved in 1848 when the United States and Mexico signed the Treaty of Guadalupe Hidalgo. In this treaty, Mexico ceded the part of Arizona north of the Gila River (as well as California, Nevada, Utah, and portions of New Mexico, Colorado, and Wyoming) in exchange for fifteen million dollars.

Once ceded, the land that would later become Arizona was added to the previously created New Mexico Territory. As such, Arizona’s first involvement in the United States came under a code of laws—the Kearny Code.

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83 Peplow, supra note 82, at 283–84; Mead, supra note 82, at 420; Nicholas M. Sydow, A Well-Tread, Disfavored Shortcut: A History of Summary Judgment in New Mexico, 42 N.M. L. Rev. 471, 473 (2012).
84 Mead, supra note 82, at 420 n.18; Sydow, supra note 83, at 474.
85 McClory, supra note 81, at 14; Peplow, supra note 82, at 290–91; Leshy, supra note 85, at 3–4.
86 See sources cited supra note 85.
87 McClory, supra note 81, at 14–15; Leshy, supra note 85, at 4.
The southern portion of Arizona (including Tucson and Yuma) was added through the Gadsden Purchase in 1854.\textsuperscript{89} The newly acquired land was again incorporated into the New Mexico Territory, and thus operated under the Kearny Code.

“While many residents of the Gadsden Purchase land welcomed U.S. control, they soon became unhappy with the territorial arrangement.”\textsuperscript{90} The capital, Santa Fe, was hundreds of miles away.\textsuperscript{91} There were also no local courts or lawmen.\textsuperscript{92} As a result, Arizona’s early days in the New Mexico Territory were defined by vigilante justice.\textsuperscript{93}

Starting in 1856, residents in the southern Arizona area began petitioning Congress for an independent Arizona Territory.\textsuperscript{94} Three years later, President Buchanan joined in the request for a separate Arizona Territory.\textsuperscript{95} Yet Congress did not act.\textsuperscript{96}

In 1860, Arizona residents attempted to form their own government.\textsuperscript{97} The Civil War broke out shortly after and this new government applied for admission into the Confederacy.\textsuperscript{98} “Confederate troops entered Tucson in 1861,” and the Confederacy accepted Arizona as a part of the Confederacy on February 14, 1862.\textsuperscript{99} The experiment, however, was short-lived; by June of 1862, Union forces reclaimed the southern portion of Arizona.\textsuperscript{100}

Inspired by the fear that Arizona might again align with the Confederacy, Congress took action on Arizona’s desire to become a separate territory.\textsuperscript{101} The Arizona Territory came into existence on February 24, 1863, when President Abraham Lincoln signed the Organic Act.\textsuperscript{102} Immediately, Arizona went to work establishing a code of laws.\textsuperscript{103}

\textsuperscript{89} McClory, \textit{supra} note 81, at 15–16; Peplow, \textit{supra} note 82, at 323–25; Leshy, \textit{supra} note 85, at 4; Murdock, \textit{supra} note 81, at 10.
\textsuperscript{90} McClory, \textit{supra} note 81, at 16.
\textsuperscript{91} Id.
\textsuperscript{92} Id.

\textsuperscript{93} See \textit{id.; see also} Rebecca White Berch, \textit{A History of the Arizona Courts}, 3 Phx. L. Rev. 11, 13–14 (2010).
\textsuperscript{94} Peplow, \textit{supra} note 82, at 348; McClory, \textit{supra} note 81, at 16.
\textsuperscript{95} McClory, \textit{supra} note 81, at 16.
\textsuperscript{96} Id.

\textsuperscript{97} Peplow, \textit{supra} note 82, at 361; McClory, \textit{supra} note 81, at 16.
\textsuperscript{98} Peplow, \textit{supra} note 82, at 361–63, 372–73; McClory, \textit{supra} note 81, at 16.
\textsuperscript{99} McClory, \textit{supra} note 81, at 16. \textit{See also} Peplow, \textit{supra} note 82, at 372–73; Berch, \textit{supra} note 93, at 12.
\textsuperscript{100} McClory, \textit{supra} note 81, at 16–17; Berch, \textit{supra} note 93, at 12.
\textsuperscript{101} McClory, \textit{supra} note 81, at 17; Berch, \textit{supra} note 93, at 12.
\textsuperscript{102} McClory, \textit{supra} note 81, at 17. \textit{See Berch, \textit{supra} note 93, at 12.}

William Howell, an Associate Justice of the Arizona Supreme Court, was tasked with creating the first set of laws. He modeled the code after New York and California. While the code he produced has been criticized as incomplete, it was adopted in 1864 and officially named the Howell Code. The code was subsequently revised in 1871, by Secretary Coles Bashford; in 1877, by Governor John Philo Hoyt; and again in 1887 and 1901. We will take a closer look at the development of Arizona’s territorial codes in the next section.

Over the years, there were several attempts at statehood. A constitutional convention took place in Phoenix in 1891. The convention produced a proposed constitution and forwarded it to Congress. Congress, however, did not approve. Another convention was held in 1893, but Congress again did not take action. In 1904, Congress proposed joint statehood with New Mexico. Congress eventually passed a bill in 1906 that would have admitted the new joint state. The state would be named Arizona, but the capital would be in Santa Fe. The two territories voted on the proposal in November of 1906. While New Mexico favored the proposal, Arizonans overwhelmingly rejected it.

104 PEPLOW, supra note 82, at 600; 3 FARISH, supra note 103, at 117; MYLES E. HILL & JOHN S. GOFF, ARIZONA: PAST AND PRESENT 162 (1970).
105 PEPLOW, supra note 82, at 600.
110 HILL & GOFF, supra note 104, at 162.
112 Id.
113 Id. at 2.
114 Id.
115 Id.
116 See id.
117 Id.
118 Id.
119 See id. (Arizonans voted against joint statehood 16,265 to 3,141.).
Three years later, President William Howard Taft visited Arizona and was sympathetic to the desire to become a state. The next year, Congress passed the Enabling Act, which created a pathway for statehood. President Taft signed the bill and Arizona was on its way.

Through this entire period, the Territorial Code survived, in one variation or another. Thus, when considering what our framers understood and intended in the constitutional guarantees, there is an important takeaway: almost all of Arizona’s history as part of the United States fell under statutory schemes. When Arizona first became part of the United States, it entered into a New Mexico Territory that already had a code of laws. And when Arizona became a separate territory, it enacted a code of laws the following year. In 64 years as a territory, Arizona lacked a code of laws for less than two years. We will thus turn to the statutory schemes in place in Arizona’s territorial days.

B. Recidivism during Arizona’s territorial days

As noted above, when Arizona first joined the Union, it was incorporated into the New Mexico Territory, and therefore the Kearny Code governed. The fifth provision of the Bill of Rights as declared by Kearny was: “That the right of trial by jury shall remain inviolate.” The Kearny Code reflected the guarantee of a jury trial. The code separated the criminal code and the criminal practice code. Under the criminal practice code, a jury was responsible for both finding all facts and announcing the punishment: “All issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict, and the court shall render a judgment accordingly.” There was not a recidivism scheme.

Arizona’s first territorial code—the Howell Code—also contained no recidivism scheme. Subsequent revisions in 1871 and 1877 still did not include a general recidivism scheme.

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120 Id.
121 Id.; Berch, supra note 93, at 15.
122 RICHARDS, supra note 111, at 2.
123 N.M. TERR. LAWS Bill of Rights as Declared by Brigadier General Stephen W. Kearny (1846) (Westlaw current through November 6, 2018).
124 N.M. TERR. LAWS KEARNY CODE CRIM. PRAC. § 22 (1846) (Westlaw current through November 6, 2018).
125 See generally N.M. TERR. LAWS KEARNY CODE CRIM. AND PUN. (1846).
126 See generally ARIZ. TERR. LAWS THE HOWELL CODE (1865).
As noted in Part II above, other jurisdictions had already implemented recidivism schemes that allowed for enhanced punishment when a defendant had a prior felony conviction. Under the common law, there were two procedural requirements for such schemes: (1) the prosecutor needed to allege the prior conviction in a charging document and (2) the prosecutor needed to prove the prior conviction to a jury.

The Arizona Legislature enacted Arizona’s first recidivism scheme with the 1887 Code. As a starting point, the Code provided for enhanced punishments when a person had prior convictions. For example, section 1045 set forth the enhanced penalty scheme:

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Every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the territorial prison, commits any crime after such conviction, is punishable as follows:
1. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the territorial prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life.
2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the territorial prison for any term less than for life, such person is punishable by imprisonment in such prison for the longest term prescribed, upon a conviction for such first offense.
3. If the subsequent conviction is for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the territorial prison, then such person is punishable by imprisonment in such prison not exceeding five years.
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Section 1046 allowed for prior convictions in other jurisdictions to be considered prior convictions for Arizona purposes:

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128 REV. STAT. OF ARIZ. PENAL CODE § 1045 (1887).
129 Id.
130 Id. See also REV. STAT. OF ARIZ. PENAL CODE § 1044 (1887) (provided for enhanced sentencing when a person had previously “been convicted of any offense punishable by imprisonment in the territorial prison” and “commits any crime after such conviction.”).
Every person who has been convicted in any other territory, state, government, or country, of an offense which, if committed within this territory would be punishable by the laws of this territory by imprisonment in the territorial prison, is punishable for any subsequent crime committed within this territory in the manner prescribed in the last two sections, and to the same extent as if such first conviction had taken place in a court of this territory.  

With these two factors, the government could allege and prove a prior conviction to obtain a heightened penalty.  

The Code also set forth the process for alleging and proving prior convictions; a process that reflected the common-law principles noted above. First, the Code required the prosecutor to allege the fact of a previous conviction in the indictment. Second, the prior conviction had to be proved to a jury.

This was succinctly noted in the General Provisions: “In the cases specified in sections 1045 and 1046 the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment or information and found by the jury.”

Beyond this, the scheme set forth the process for both charging the prior offense and having the jury consider it:  

Regarding charging, the code set forth what constituted a sufficient charge:

In an indictment or information charging the fact of a previous conviction of a felony, or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petit larceny, it is sufficient to state, “That the defendant, before the commission of the offense charged in this indictment or information, was, in (giving the title of the court in which the conviction was had) convicted of a felony (or attempt, etc., or of petit larceny).” If more than one previous conviction be charged in the indictment or information, the date of the judgment upon each conviction

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133 Id.  
134 Id.
shall be stated and not more than two previous convictions shall be charged in any one indictment or information.\(^{135}\)

The scheme also set forth the process for the jury when a prior conviction had been alleged:

Whenever the fact of a previous conviction of another offense is charged in an indictment, the jury, if they find a verdict of guilty of the offense with which he is charged, must also unless the answer of the defendant admits the charge find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: “We find the charge of the previous conviction true,” or, “We find the charge of previous conviction not true,” as they find that the defendant has or has not suffered such conviction.\(^{136}\)

The requirement for a jury trial on the prior conviction was so fundamental that it even applied when the defendant entered a guilty plea on the charged offense, but did not admit the prior conviction.\(^{137}\)

The subsequent 1901 Code had nearly identical provisions.\(^{138}\) A harsher sentence was still authorized for subsequent convictions;\(^{139}\) foreign priors could still be used;\(^{140}\) the state was still expected to allege the prior conviction in the charging document;\(^{141}\) and a jury was still required to


\(^{137}\) Rev. Stat. of Ariz. Penal Code § 1556 (1887) (“When a defendant, who is charged in the indictment or information with having suffered a previous conviction, pleads either guilty or not guilty of the offense with which he is charged, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answers shall be entered by the clerk in the minutes of the court, and shall, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answer that he has not, his answer shall be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction shall be tried by the jury which tries the issue upon the plea of “not guilty,” or in case of a plea of “guilty,” by a jury impaneled for that purpose.”).


decide if the prior existed. In fact, only minor grammatical changes distinguished the pertinent sections of the 1887 and 1901 codes.

This 1901 Code “served the territory until after statehood was attained in 1912.”

C. Arizona’s Constitutional Convention

i. General background

In 1910, the U.S. Congress passed the Enabling Act, which set forth requirements for the Arizona Territory to become a state. One of those requirements was the drafting of a state constitution. Arizonaans elected 52 men—14 of whom were attorneys—to convene a constitutional convention and draft Arizona’s proposed constitution. Of the 52 delegates, 41 were Democrats and 11 were Republicans, and the majority of the Democrats were considered “Progressive” Democrats.

On December 9, 1910, after working for approximately two months, the members approved the proposed constitution by a vote of 40 to 12, largely along party lines. The result was a constitution that reflected the progressive movement. As John D. Leshy describes, “[t]he most constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral process.” The framers also appreciated the need to protect the individual against the power of the government. Thus, the framers included a Declaration of Rights, even over some opposition. We will look at the Declaration of Rights—particularly article 2, section 23—in more depth below.

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144 Hill & Goff, supra note 104, at 162.
145 Id.
146 Berch, supra note 93, at 15.
147 Mcclorey, supra note 81, at 25; Leshy, supra note 85, at 9; Murdock, supra note 81, at 33, 36; Berch, supra note 93, at 15.
148 Mcclorey, supra note 81, at 25; Leshy, supra note 85, at 8–9; Murdock, supra note 81, at 36; Berch, supra note 93, at 15.
149 Mcclorey, supra note 81, at 28; Leshy, supra note 85, at 22; Murdock, supra note 81, at 42. See also Richards, supra note 111, at 26–27.
150 Mcclorey, supra note 81, at 28; Leshy, supra note 85, at 14.
151 Leshy, supra note 85, at 14.
152 See id. at 18.
153 Id. at 18-19.
Arizonans voted to approve the proposed constitution by a three-to-one margin shortly after. The Enabling Act, however, required two more steps: congressional and presidential approval. Congress approved Arizona’s proposed constitution and forwarded it to President Taft. President Taft vetoed the constitution on August 22, 1911. Taft’s concern had nothing to do with the right to a jury trial, but focused on a provision that allowed the citizens to recall judges.

In the wake of President Taft’s veto, the Arizona Territory held a special election. On December 12, 1911, a strong majority of voters chose to change the judicial recall provision. The new constitution was submitted again, this time garnering Taft’s approval, and Arizona became a state on February 14, 1912. Notably, Arizonans voted to amend the Constitution and reinstate the judicial recall provision in the next election in 1912. They also overwhelmingly voted against Taft in his bid for reelection.

**ii. Arizona’s Declaration of Rights and protection of the right to a jury trial**

Most notable for our discussion is Arizona’s Declaration of Rights, which is article 2 of the Arizona Constitution. The Declaration of Rights provides for the right to a jury trial in two locations: section 23 and section 24. As we’ll see below, these provisions were taken from the Washington Constitution.

William F. Cooper of Pima County, an attorney and former editor of the Florence Tribune, introduced Proposition 94 to the Constitutional Convention on October 25, 1910. Proposition 94 regarded the declaration of rights and would eventually become article 2 of the approved constitution. The proposition was read for the second time three days after

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154 LESHY, supra note 85, at 22.; RICHARDS, supra note 111, at 34.
156 MCCLOY, supra note 81, at 31.
157 Id.
158 MCCLOY, supra note 81, at 31–33; LESHY, supra note 85, at 22.
159 MCCLOY, supra note 81, at 33; LESHY, supra note 85, at 22.
160 MCCLOY, supra note 81, at 33; LESHY, supra note 85, at 22.
161 MCCLOY, supra note 81, at 33; LESHY, supra note 85, at 22.
162 MCCLOY, supra note 81, at 34.
163 MCCLOY, supra note 81, at 34; LESHY, supra note 85, at 22–23.
165 RECORDS at 77, 1374.
later, and referred to the Committee on Legislative Department.166 On November 1, 1910, the Committee on Legislative Department recommended the proposition be referred to the Committee on Preamble and Declaration of Rights.167 With no objection, the referral was made.168

Three weeks later, the Committee on Preamble and Declaration of Rights submitted a substituted version of Proposition 94 and requested it be adopted.169 The substituted proposition was referred to the printing committee.170

Regarding article 2, section 23, there was no substantive change.171 There was, however, an important change to the general guarantee of rights in criminal cases provided in article 2, section 24. Where the pertinent language in the original did not refer to a jury trial, the substituted version did. Proposition 94 originally read, “[i]n criminal prosecutions, the accused shall have the right . . . to have a speedy public trial in the county in which the offense is alleged to have been committed, and the right to appeal in all cases.”172 In the substituted version, the language read, “[i]n criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases.”173

The proposed Declaration of Rights was discussed and debated November 25, 1910.174 Rev. James E. Crutchfield of Maricopa County explained the original proposition “was taken entirely from the Constitution of the State of Washington,” with just small omissions.175 The committee reviewed the Washington Constitution and decided to recommend the entire bill of rights from that document, along with a couple of amendments and added sections.176 Albert F. Parsons, an attorney from Douglas, moved to consider the proposition by each individual section, which the convention did.177 For our purposes, two provisions of the substituted proposition are relevant: sections 22 and 23, which in their current forms are article 2, sections 23 and 24 respectively.

166 Id. at 102.
167 Id. at 137.
168 Id.
169 Id. at 507.
170 Id.
171 Compare id. at 1235 (language of section 21 in original proposition), with id. at 1240 (language of section 22 in substituted proposition).
172 Id. at 1235.
173 Id. at 1240 (emphasis added).
174 Id. at 658–82.
175 HILL & GOFF, supra note 104, at 203–04; RECORDS, supra note 164, at 658. RECORDS, supra note 164, at 658-59.
176 HILL & GOFF, supra note 104, at 202; RECORDS, supra note 164, at 659.
Section 22 was debated on the basis that it allowed for conviction in criminal cases if nine of twelve jurors agreed.\textsuperscript{178} Donnell L. Cunningham, a Tombstone attorney, moved to strike the reference to criminal cases, thereby ensuring jury unanimity in criminal cases.\textsuperscript{179} Rev. Crutchfield argued conviction by a less-than-unanimous jury should be retained in light of a letter from a California Judge.\textsuperscript{180} However, Cunningham’s motion passed over Crutchfield’s objection and jury unanimity was required.\textsuperscript{181} After a small wording change was made, the convention approved of section 22.\textsuperscript{182}

Section 23 (the current article 2, section 24) was subject to brief debate on the timing of orders for payment, but the motion failed.\textsuperscript{183} The convention approved section 23.\textsuperscript{184} After the remainder of Proposition 94 was discussed, the convention forwarded it to be engrossed and read a third time.\textsuperscript{185}

The third reading occurred November 29, 1910.\textsuperscript{186} At this time, delegates spoke on the importance of a separate Declaration of Rights. For example, Fred Ingraham, a Yuma lawyer, disputed claims that the Bill of Rights in the U.S. Constitution was sufficient:

\begin{quote}
Gentlemen may say these principles are all in the Constitution of the United States, and therefore are absolutely unnecessary here now. That is a mistake; that is not the law, and I want to state it so mainly that the mistake will not occur again, that the first ten amendments to the United States Constitution, which is the Bill of Rights, have no application to the state law; they are not restrictions upon the states, and they are not aimed to affect state affairs.\textsuperscript{187}
\end{quote}

After a discussion regarding some of the specific provisions not at issue in this article, the convention voted to adopt Proposition 94.\textsuperscript{188}

While the Declaration of Rights was largely considered as a whole and minimally debated, there are two important takeaways. First, the framers

\textsuperscript{178} \textit{RECORDS}, \textit{supra} note 164, at 670–71.
\textsuperscript{179} \textit{HILL & GOFF}, \textit{supra} note 104, at 201–02; \textit{RECORDS}, \textit{supra} note 164, at 670.
\textsuperscript{180} \textit{RECORDS}, \textit{supra} note 164, at 670–71.
\textsuperscript{181} \textit{Id.} at 671.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 681–82.
\textsuperscript{186} \textit{Id.} at 758.
\textsuperscript{187} \textit{HILL & GOFF}, \textit{supra} note 104, at 204; \textit{RECORDS}, \textit{supra} note 164, at 759-60.
\textsuperscript{188} \textit{RECORDS}, \textit{supra} note 164, at 760–63.
saw the Arizona Constitution as a separate guarantee of rights. Ingraham’s comments make that clear. Second, the guarantee of a jury trial was important to the framers, particularly for criminal trials. Without placing such value on jury trials, the framers would have acquiesced to conviction by non-unanimous jury in section 23 and would not have inserted the right to an impartial jury in section 24.

D. Recidivism after statehood

The first code passed after the Arizona Constitution—the 1913 Penal Code—contained the same recidivism scheme from the Territorial Code, complete with the requirement for an allegation in the charging document and jury finding of the fact.\(^{189}\)

The scheme established in 1887 and extended through the 1913 code had staying power. In 1977, the Arizona Revised Statutes still required the state to allege prior convictions in the indictment and prove them to the jury: “The punishments prescribed by this section shall be substituted for those prescribed for a first offense if the previous conviction is charged in the indictment or information and admitted or found by the jury.”\(^{190}\)

When the Arizona Legislature amended the Arizona Revised Statutes in 1978, the wording slightly changed: “The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction or the dangerous nature of the felony is charged in the indictment or information and admitted or found by the trier of fact.”\(^{191}\)

While the wording changed to “trier of fact,” the expectation did not change. In State v. Parker, the Arizona Supreme Court evaluated whether the dangerousness allegation in the same statute had to be submitted to a jury.\(^{192}\) The court held “A.R.S. § 13-604(K) requires a specific finding by the trier of fact that the dangerous nature of the felony has been proved. The finding of the dangerous nature of the felony must be submitted to the jury for a separate finding unless” dangerousness is inherent in the charge.\(^{193}\) Two years later in State v. Hunter, the Arizona Court of Appeals held, “before a sentence may be enhanced pursuant to A.R.S. § 13-604 by a prior

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190 ARIZ. REV. STAT. § 13-1649(B) (1977); see also ARIZ. R. CRIM. P. 19.1(b) (1973) (requiring trial courts to proceed initially “as though the offense charged were a first offense” and then proceed to the question of the prior conviction).
193 Id. at 296.
conviction, the prior conviction must either be admitted by the defendant or found to be true by the trier of fact." \(^{(194)}\)

The Arizona Supreme Court again addressed jury findings related to prior convictions in *State v. Johnson*, decided in 1987. \(^{(195)}\) There, the jury convicted the defendant of the offense but hung on the prior convictions. \(^{(196)}\) The trial court declared a hung jury and granted a motion to dismiss the prior convictions. \(^{(197)}\) On appeal, the Arizona Supreme Court agreed the scheme generally required the allegation of prior convictions be tried by the same jury, but noted the unique scenario of a jury hung on the question of priors. \(^{(198)}\) In that situation, the court held the trial court should have empaneled a new jury to address the question. \(^{(199)}\)

Four years later, this rationale was extended further in *State ex rel. Neely v. Sherrill In and For County of Pima*. \(^{(200)}\) The case dealt with two defendants, each of whom were tried in absentia. \(^{(201)}\) In each, the prosecution asked to prove the priors to a subsequent jury, arguing the defendant’s presence was needed to best prove identity. \(^{(202)}\) The trial courts granted the requests. \(^{(203)}\) The Arizona Supreme Court approved both decisions. \(^{(204)}\) Because the state was not to blame for the defendants’ absence, the government “should not be deprived of the best evidence for proving the prior conviction.” \(^{(205)}\)

Each case shows Arizona law guaranteed jury trials on the question of prior convictions. This was an important right that protected the interests of defendants and prosecutors alike. When a prior conviction was alleged, a defendant received a jury. If the first jury couldn’t decide whether a defendant had prior convictions, a new jury was empaneled. When a defendant was tried in absentia, the state could wait until the defendant was apprehended before presenting their case on prior convictions. When prior convictions were at issue, Arizona courts consistently protected the right to a jury determination.

This changed in 1996.

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\(^{(196)}\) *Id.* at 84.
\(^{(197)}\) *Id.*
\(^{(198)}\) *Id.* at 84–85.
\(^{(199)}\) *Id.* at 85.
\(^{(201)}\) *Id.* at 397–98.
\(^{(202)}\) *Id.*
\(^{(203)}\) *Id.* at 398.
\(^{(204)}\) *Id.* at 399–400.
\(^{(205)}\) *Id.* at 400.
In 1995, the provision read the same as it had previously: “The penalties prescribed by this section shall be substituted for the penalties otherwise allowed by law if the previous conviction . . . is charged in the indictment or information and admitted or found by the trier of fact.”

The next year, courts were responsible for making the finding: “The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction . . . is charged in the indictment or information and admitted or found by the court.” Since then, Arizona trial courts have conducted the fact-finding for prior convictions (except for in death penalty cases).

For more than 80 years after the passage of the Arizona Constitution—and for more than a century overall—Arizona required juries to determine the existence of prior convictions. This scheme reflected the common law. Under the common law, prosecutors who wanted to use a prior conviction for enhancement purposes were required to allege that prior conviction in the charging document and prove the prior conviction to a jury.

To understand how this history impacts our decision, we will next turn to consider how courts have interpreted section 23 of the Arizona Constitution.

IV. HOW ARIZONA COURTS HAVE INTERPRETED ARTICLE 2, SECTION 23

Having considered Arizona’s history, including the passage of the Declaration of Rights, we will turn to how Arizona’s appellate courts have interpreted article 2, section 23. Fortunately, the Arizona Supreme Court didn’t wait long to interpret section 23’s guarantee that “[t]he right of trial by jury shall remain inviolate.” The court considered the section in Brown v. Greer in 1914, just two years after the Arizona Constitution was approved.

In Brown, the Arizona Supreme Court observed for the first time that section 23 “does not give the right to a trial by jury, but its purpose is to guarantee the preservation of the right. In other words, it does not create or extend the right, but by its declaration there is guaranteed the preservation of such right as it existed when the Constitution was adopted.” The court then defined its role as “determin[ing] if there is a statutory provision in Arizona giving the appellant such a right,” and looked to the 1901 code in

209 Brown v. Greer, 141 P. 841 (Ariz. 1914).
210 Id.
effect when the Constitution was approved.\textsuperscript{211} Applying the 1901 statutes, the court found the right to a jury trial for the desired claim.\textsuperscript{212}

Ten years later in \textit{Bowden v. Nugent}, the Arizona Supreme Court considered section 23 in the context of a criminal case.\textsuperscript{213} In \textit{Bowden}, the defendant had been charged with operating a poker house in violation of a city ordinance.\textsuperscript{214} The defendant was convicted in a court without the benefit of a jury.\textsuperscript{215} He subsequently filed a petition for a writ of habeas corpus with the superior court, arguing he was denied his right to a jury trial.\textsuperscript{216} The superior court granted the writ and the chief of police appealed.\textsuperscript{217}

The Arizona Supreme Court analyzed the statutes in effect when the constitution was enacted.\textsuperscript{218} Of particular importance to the court was a statute, passed in 1909, that provided: “In the trial of offenses for the violation of the ordinances of cities or towns of such nature as by the common law were not triable before a jury, no jury trial shall be granted.”\textsuperscript{219} From this, the court held that the Arizona Constitution protected the right to a jury trial as it existed in the common law.\textsuperscript{220} The court’s language is notable:

Provisions somewhat similar to sections 23 and 24 . . . are found in most of the state Constitutions. The courts are in accord that their purpose is to preserve, not create, rights; to assure, after the Constitution is in effect, that persons accused of crimes may demand and have a jury trial in those cases as to character or grade, in which they could demand and have a jury trial before the Constitution was adopted, and that it is not a general guaranty that all accused persons shall have the right to a jury trial regardless of the grade or character of the offense laid against them or the forum of trial.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{211} \textit{Id.}
\item \textsuperscript{212} \textit{Id.} at 842–43.
\item \textsuperscript{213} \textit{Bowden v. Nugent}, 226 P. 549 (Ariz. 1924).
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.} at 550.
\item \textsuperscript{219} \textit{Id.} (quoting Laws of 1909, § 8, c. 25).
\item \textsuperscript{220} \textit{Id.} at 551.
\item \textsuperscript{221} \textit{Id.} at 549.
\end{itemize}
In support of this proposition, the court cited Brown. The court then concluded that the charged offense was akin to operating a gambling house, which required a jury trial under the common law. Because the 1909 statute effectively created a jury trial right for offenses which required a jury trial under the common law, and the offense charged received a jury trial under the common law, the Arizona Supreme Court ruled a jury trial should have been given.

Just one month later, the Arizona Supreme Court changed course in Donahue v. Babbitt. There, the appellant argued that because their civil claim warranted a jury under the 1901 code, the Arizona Constitution preserved that right to a jury trial. The supreme court disagreed, holding that “[t]he constitutional guaranty concerned a plain, permanent right made almost sacred by years of recognition and usage.” Because the provision at issue “did not bear these qualities,” there was no right to a jury trial.

Instead, the court concluded “that a constitutional guaranty that ‘the right of trial by jury shall remain inviolate’ is a guaranty of trial by jury as it was known at common law.”

Subsequent cases continued the trend toward considering the common law. In State v. Cousins, decided in 1964, the Arizona Supreme Court held that the right guaranteed by section 23 “is applicable only in those matters in which it existed anciently under the common law.” Yet the supreme court still cited Brown with approval for the proposition that section 23 “does not give the right to a trial by jury, but its purpose is to guarantee the preservation of the right.”

Two years later, the same thing happened in Rothweiler v. Superior Court of Pima County. Again, the court cited Brown with approval: “In Brown v. Greer... we stated that the right of a jury trial as declared by our Constitution applied to such right as ‘existed when the Constitution was adopted.’” Notably, this quoted language came immediately before the Brown court considered the statutory provisions in effect in 1901.

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222 Id. at 550.
223 Id.
224 Id. at 551.
226 Id. at 996.
227 Id. at 996–97.
228 Id. at 997.
229 Id.
231 Id.
233 Id. at 482.
234 See Brown v. Greer, 141 P. 841, 842 (Ariz. 1914).
Rothweiler court then discussed common-law issues as noted in Cousins and went on to create a three-pronged test for assessing whether a petty crime required a jury trial under Arizona’s Constitution: “In determining whether a crime is a petty offense that constitutionally may be tried without a jury the severity of the penalty inflicttable, as well as the moral quality of the act and its relation to common law crimes, must be considered.”

Two years later, in 1968, the Arizona Supreme Court addressed the right to a jury trial for prior convictions in State v. Armstrong. In Armstrong, the defendant was charged with robbery with a prior conviction. “At his arraignment, [the defendant] denied the prior conviction, pleading not guilty to the charge.” The denial changed during trial when the defendant took the stand. On direct examination, the defendant’s attorney sought to draw the sting of the prior conviction and asked the defendant if he’d “ever been convicted of a felony” before. The defendant said he had, and testified to the date, location, and charge. Further information was given on cross-examination. The trial court, relying on the admission of the prior conviction, did not submit the question of the prior to the jury and sentenced the defendant as a repeat offender.

On appeal, the defendant argued he should have been entitled to a jury determination of the prior despite his admission on direct and cross-examination. The court rejected the argument, concluding “an admission on cross-examination is surely the strongest evidence available to prove a prior conviction.” Moreover, because defendant’s admissions at arraignments were treated as binding, admission during testimony could also bind a defendant.

The court briefly addressed the Washington Supreme Court’s decision in State v. Furth, which will be discussed in more depth in the next section. The Arizona Supreme Court agreed with Furth’s holding that section 23 required a jury trial for priors, but found the admission in Armstrong distinguishable: “We agree with the Washington Court in its

235 Rothweiler, 410 P.2d at 482–83.
237 Id. at 412.
238 Id. at 413.
239 Id.
240 Id.
241 Id.
242 Id.
243 Id.
244 Id.
245 Id.
246 Id.
247 Id. at 414.
conclusion that the state constitution’s provision guaranteeing the right of trial by jury was violated, but we do not think that is authority against the effect of the judicial admission in this case.”

Justice Bernstein dissented on this basis in Armstrong. Justice Bernstein was frustrated with “the cavalier manner in which [the majority] dispose[d] of the right to trial by jury.” Bernstein traced the origins of the statute to the Penal Code of California. Then, relying on Brown v. Greer, Bernstein argued the majority should not have ignored the fact that the rules at issue existed under the 1901 Code “and are therefore inviolately preserved and guaranteed under art. 2, § 23.”

As noted in Part I, the most recent in-depth discussion came in 2005 with Derendal v. Griffith. In Derendal, the Arizona Supreme Court abandoned the moral quality prong announced in Rothweiler. Nonetheless, the court still construed the “shall remain inviolate” language as a preservation of “the right to jury trial as it existed at the time Arizona adopted its constitution.”

With an understanding of how Arizona’s courts have interpreted section 23, we’ll next turn to consider how Washington has interpreted the provision.

V. WASHINGTON’S MIXED AND DISPUTED HOLDINGS ON THE QUESTION

Rev. Crutchfield explained during discussions in the constitutional convention that the Arizona Declaration of Rights was largely taken from Washington. As a result, Arizona courts have often looked to Washington for guidance when considering how to address claims raised under the Arizona Declaration of Rights. Like Arizona’s Constitution, Washington’s Constitution guarantees “[t]he right of trial by jury shall remain inviolate.” Thus, Washington’s analysis of this issue can prove valuable. But a trilogy of cases—State v. Furth, State v. Manussier, and State v. Smith—shows Washington has struggled with the question of

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248 Id.
249 Id. (Bernstein, J., dissenting).
250 Id.
251 Id. at 416.
252 Id. at 417.
254 Id. at 150.
255 RECORDS, supra note 164, at 658.
257 WASH. CONST. art. 1, § 21.
whether their own constitution guarantees the right to jury findings on prior convictions.258

A. *State v. Furth*

The Washington Supreme Court interpreted this provision in the context of a habitual criminal offender scheme in 1940 in *State v. Furth.*259 There, the prosecution charged the defendant with larceny and secured a conviction.260 Upon learning of the defendant’s criminal history, the prosecutor filed a supplemental information alleging three prior convictions.261 The defendant denied the allegation and asked for a jury trial.262 The trial court, however, denied the request, concluding the prior convictions went solely to punishment.263 The judge heard testimony of a fingerprint expert, found the prior convictions, and sentenced the defendant as a habitual offender.264

The Washington Supreme Court reversed.265 The court noted two issues of fact arise when a defendant denies prior convictions: “(1) Were there previous convictions? (2) Was appellant the man who was the subject of those convictions?”266 And “such convictions must be proved beyond a reasonable doubt, since the fact of the prior conviction is to be taken as an essential element of the offense charged, at least to the extent of aggravating it and authorizing an increased punishment.”267 The court further noted that the American Law Review listed several authorities “in support of the editor’s statement that on a charge of a second or subsequent offense the question of a prior conviction is an essential element of the offense charged and is an issue of fact to be determined by the jury.”268

After reviewing several of the cases discussed in the A.L.R., the court moved to the constitutional provision at issue (section 21 in Washington).269 Applying this provision, the court concluded, “[i]t is the function of the jury—not the court—to settle disputed issues of fact.”270 Thus, “[o]n a

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259 Furth, 104 P.2d. at 925.
260 Id. at 926.
261 Id. at 926–27.
262 Id. at 927.
263 Id.
264 Id. at 927–28.
265 Id. at 934.
266 Id. at 930.
267 Id. (citing People v. Reese, 179 N.E. 305 (N.Y. 1932)).
268 Id.
269 Id. at 930–33.
270 Id. at 933.
charge of a second or subsequent offense, the question of a prior conviction is an issue of fact to be determined by the jury.”  

B.  **State v. Manussier**

*Furth* stood for more than 50 years. But in 1996, the Washington Supreme Court moved away from *Furth* in *State v. Manussier.*  

There, the defendant was convicted of robbery and sentenced to a mandatory life sentence under the newer three strikes law.  

The defendant argued he was entitled to a jury trial on the prior convictions.  

The trial court rejected this argument and the defendant subsequently entered a guilty plea.  

At sentencing, the prosecution presented evidence of the prior convictions to the trial court.  

The court found the defendant had two prior convictions, declared the defendant a “persistent offender,” and sentenced the defendant to life.  

Regarding the right to a jury trial, the Washington Supreme Court concluded the defendant had “waived his right to a jury trial.”  

The court further noted that the law at issue did not provide for a jury trial on the question of prior convictions.  

The majority also found comfort in the fact that the Supreme Court of the United States had concluded there was “no constitutional right to a jury trial on questions of fact relating to sentencing.”  

However, the majority never addressed the Washington Constitution’s guarantee that the right to a jury trial shall remain inviolate.  

In her dissent, Justice Madsen did. Justice Madsen pointed to *Furth* in the first sentence of her dissent.  

She concluded that Washington’s first recidivism statute provided for a jury trial on the prior convictions, “consistent with the common law practice.”  

According to Justice Madsen, *Furth* therefore properly considered this history and concluded Washington’s constitution guaranteed the right to a jury on allegations of prior convictions.  

Madsen further criticized the majority’s attempt to distinguish the scheme at issue on a statutory basis because *Furth* rested “on

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271 Id.
272 State v. Manussier, 921 P.2d at 473.
273 Id. at 476–77.
274 Id. at 477.
275 Id.
276 Id.
277 Id. at 487.
278 Id. at 488 (citing Parke v. Raley, 506 U.S. 20, 32–34 (1992)).
279 Id. at 489 (Madsen, J., dissenting).
280 Id. at 491 (citing *Furth*, 104 P.2d 925).
281 Id. at 491–92 (citing *Furth*, 104 P.2d 925).
state constitutional law, not on statutory language.”284 And Madsen expressly noted this practice was important because section 21 “preserves the right [to a jury trial] as it existed at common law in the territory at the time of its adoption.”285

C. State v. Smith

Seven years later, the issue came to the Washington Supreme Court again in State v. Smith.286 In Smith, the defendant was convicted of burglary and trespass.287 The defendant requested “a jury trial on the issue of whether he was a persistent offender.”288 The trial court denied the motion, found the defendant had four prior convictions, determined the defendant was a persistent offender, and sentenced the defendant to life in prison.289 On appeal, the defendant argued he had a constitutional right to a jury determination.290 A 5-4 majority rejected the defendant’s argument.291

The majority confronted Furth this time.292 The majority found Furth unpersuasive on the grounds that Furth did not support its conclusion with “historical evidence indicating that the drafters meant to include a right to a jury trial on the issue of prior offenses in the constitution.”293 Further, the majority reasoned the framers would not have meant to require jury findings of all facts because judges often determine issues of fact when deciding motions and making factual assessments for sentencing.294

When deciding whether the Washington Constitution provides greater protection than the United States Constitution, the Washington Supreme Court evaluates six factors: “(1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern.”295 The Smith majority looked at these six factors to determine whether section 21 should be construed more broadly than the United States Constitution.296

284 Id. at 492 (citing Furth, 104 P.2d 925).
285 Id. at 494 (citing Pasco v. Mace, 653 P.2d 618, 623 (Wash. 1982)).
287 Id. at 935.
288 Id.
289 Id.
290 Id.
291 See id. at 934, 943 (Bridge, J., with Alexander, C.J., Ireland, Owens, & Fairhurst, JJ., concurring in the majority); see id. at 943–44 (Chambers, J., dissenting, joined by Sanders, Johnson, & Madsen, JJ.).
292 Id. at 937–38.
293 Id. at 938.
294 Id.
295 Id. at 940 (citing State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986)).
296 Id. at 939–43.
Regarding the textual language, the majority concluded that while the “inviolate” language “indicates a strong protection of the jury trial right, . . . that right only applies to trials for offenses, not to sentencing proceedings.” 297 This was based on jurisprudence concluding “a jury determination of the degree of murder and the punishment were not constitutionally required when the defendant pleaded guilty to second degree murder and was sentenced accordingly . . . .” 298

Addressing the differences in the texts, the majority agreed the two protections of the jury trial right in the Washington Constitution “indicate[d] the general importance of the right,” but found no guidance because “the extent of the right must be determined from the law and practice that existed in Washington at the time of our constitution’s adoption in 1889.” 299 This amplified the importance of the third and fourth factors regarding Washington’s history.

The court next moved to structural differences, the fifth factor, but again concluded the factor didn’t help resolve the issue. 300

For the sixth factor, state interests and local concern, the court agreed “providing jury trials for adult defendants is a matter of particular local concern.” 301

The majority recognized these “four factors indicate some support for interpreting Washington’s right to a jury trial more broadly than the federal right.” 302 The third and fourth factors—regarding Washington’s constitutional history and preexisting state law—are where the majority truly reached its decision. 303

The majority found two points particularly persuasive. First, territorial laws required “the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted.” 304 Second, Washington did not pass a recidivism scheme until 1903, fourteen years after the passage of the state constitution. 305 Based upon these differences, the majority concluded section 21 should not be construed more broadly than the U.S. Constitution. 306

297 Id. at 940.
298 Id. (citing Brandon v. Webb, 160 P.2d 529, 161 (Wash. 2003)
299 Id. at 940–41. (citing Pasco v. Mace, 653 P.2d 618, (Wash. 1982)).
300 Id. at 941.
301 Id.
302 Id.
303 Id.
305 Id.
306 Id. at 934
Justice Chambers, joined by three more Justices, began his dissent by incorporating Justice Madsen’s dissent in *Manussier*. From there, Justice Chambers cut quick to the problem he identified in the majority’s analysis: “The proper question is not whether a judge or a jury would have determined a criminal sentence in 1889. The proper question is whether a judge or a jury would have determined the fact of prior convictions in 1889.” This clarification went straight to the heart of the majority’s reliance upon the judicial announcement of sentences. Because *Furth* already answered the question, Chambers and the other dissenters would have sided with the defendant.

D. Assessments of Washington jurisprudence

Considering Washington’s cases, there are two reasons Arizona courts should reach a different decision. First, the ultimate conclusion in *Smith* was incorrect. But second, to the extent the *Smith* majority is construed as correct, Arizona’s unique history requires we reach a different conclusion.

Foremost, Justice Chambers’ criticism of the *Smith* majority was spot on. The question is not who announces a sentence. The question is who makes the pertinent factual findings. Cases like *Apprendi* and *Jones*, discussed in Part II above, prove this point. Nothing in *Apprendi* or *Jones* called into doubt the trial court’s role in considering facts and announcing a sentence. But both concluded that a trial court could not be the fact-finder when an aggravating factor (other than prior convictions) would expose a defendant to a higher sentence.

Indeed, Washington’s history also illustrates the problem. One issue that drove the majority’s conclusion in *Manussier* was that “[t]he United States Supreme Court has held that a criminal defendant has no constitutional right to a jury trial on questions of fact relating to sentencing.” But this decision was only possible because *Manussier* was decided in 1996—three years before *Jones* and four years before *Apprendi*.

Who decides and announces the sentence has no bearing on who makes the finding of fact on prior convictions? Such an assertion is akin to arguing that because the trial court is responsible for formally entering the order finding the defendant guilty, a trial court can dispense with the need for a jury during the guilt determination.

Second, Arizona’s history is also sufficiently distinct from Washington such that a different conclusion is warranted. The *Smith* majority leaned

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307 *Id.* (Chambers, J., dissenting).
308 *Id.* at 943–44.
309 *Id.* at 944.
heavily on the fact that Washington did not have a recidivism scheme when the Washington Constitution was adopted. Thus, there would have been no opportunity to apply a statutory or common-law procedure for having a jury decide prior convictions. The majority was therefore able to find two factors which weighed against applying section 21 to findings of prior conviction: Washington constitutional and common-law history and preexisting state law.

Arizona’s experience was the inverse. Arizona passed its first recidivism scheme in 1887—twenty-three years before its constitutional convention. This recidivism scheme required that a jury find prior convictions. Arizona’s constitutional history, as informed by Arizona’s implementation of the common law, thus weighs in favor of protecting the right to jury trials on allegations of prior convictions. And Arizona’s preexisting state law—which codified the common law—further supports interpreting the Arizona Constitution to protect jury findings of prior convictions. To consider this in more depth, we’ll next take another look at Quinonez and Newkirk.

VI. Quinonez and Newkirk Revisited

Quinonez and Newkirk turned on two conclusions. First, the Arizona Court of Appeals concluded the right to jury trial on prior convictions was provided by statute, not common law. Second, both cases concluded there was a difference between enhancements and offenses or elements. Because the existence of prior convictions is an enhancement, not an element or separate offense, both courts concluded there was no constitutional protection. The common law thus informs both conclusions. And neither justification is consistent with Arizona’s history.

A. The Arizona Territorial Legislature merely codified the common-law requirement for jury findings of prior convictions.

At a facial level, the court’s conclusion that the right to a jury trial was provided by statute seems reasonable—the territorial code that established

312 Id. at 941-942.
313 REV. STAT. OF ARIZ. PENAL CODE § 1045 (1887).
314 REV. STAT. OF ARIZ. PENAL CODE § 1032 (1887).
316 Newkirk, 115 P.3d at 1266; Quinonez, 976 P.2d at 269.
317 Newkirk, 115 P.3d at 1266; Quinonez, 976 P.2d at 269.
the recidivism scheme also provided for a jury finding. That does not mean, however, that an analysis can stop at that point.

In Donahue, the Arizona Supreme Court noted that section 23 “concerned a plain, permanent right made almost sacred by years of recognition and usage.” As discussed in Part II above, the right to jury findings for prior convictions was so commonly recognized and used that it warrants protection.

Recidivism laws had been enacted in several jurisdictions before Arizona’s Territorial Legislature passed our first recidivism scheme in 1887. Specific recidivism schemes predated Arizona’s enactment by more than two centuries and general recidivism schemes predated Arizona’s by 90 years. As a result, courts and commentators had already established the common-law requirements for such schemes: allegation made in the indictment and proof to a jury. This was the process used in Virginia in Brooks v. Commonwealth, decided three years before the United States declared war on Mexico. And twenty-eight years before Arizona passed its first recidivism scheme (and before Arizona was a separate territory), the Supreme Court of Georgia required prior convictions to be submitted to the jury in Hines v. State. The practice was so well established in the common law that Joel Prentiss Bishop announced, “as the question involves that of identity, it ought doubtless to be passed upon by the jury” in 1872—fifteen years before Arizona’s recidivism scheme was passed.

As this history makes clear, Arizona’s enactment of a jury trial right was not something the territorial legislature invented out of the blue. Rather, the legislature codified the common-law right to a jury finding on prior convictions.

This history also establishes the error in some cases discussed in Quinonez and Newkirk. For example, both cases discussed State ex rel. Neely v. Sherrill, in which our Supreme Court said, “[w]e note that the use of a jury to determine a prior conviction allegation is not constitutionally mandated, but is required only by statute in Arizona.” However, the issue in Neely was whether the prior conviction had to be tried to the same jury.

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319 See supra Part II.
320 See supra Part II.
323 1 BISHOP, supra note 66, at 565.
that found guilt when the defendant absconded.\textsuperscript{325} Context of the quoted language is important. The next line reads: “In other jurisdictions, the judge may determine this issue.”\textsuperscript{326} To support this statement, the court cited \textit{Spencer v. Texas}, a U.S. Supreme Court decision.\textsuperscript{327}

This demonstrates the court was focused on what the U.S. Constitution required, not the Arizona Constitution. Article 2, section 23 of the Arizona Constitution provides a unique protection for jury trial rights as they existed under the common law when the Arizona Constitution was passed. \textit{Spencer} supports the conclusion the common law required the prior conviction to be proved to a jury: “The common-law procedure for applying recidivist statutes, used by Texas in the cases before us, which requires allegations and proof of past convictions in the current trial, is, of course, the simplest and best known procedure.”\textsuperscript{328} \textit{Spencer} thus supports what has been established above: under the common law, the state had to prove the fact of prior convictions to a jury. While such a process may not be constitutionally required under the U.S. Constitution, it is required under Arizona’s guarantee that the right to trial remain inviolate.

\textit{Quinonez} and \textit{Newkirk} also discussed \textit{State v. Hurley}, wherein the Arizona Supreme Court stated, “[o]ur research did not reveal any constitutional basis for this requirement [proving priors to juries] in Arizona; apparently the procedure was commonly accepted by many states, some believing that it was constitutionally mandated.”\textsuperscript{329} However, context makes clear the Arizona Supreme Court was focused on the United States Constitution, not the Arizona Constitution. In a footnote that followed the sentence, the \textit{Hurley} court cited two United States Supreme Court cases and a number of various state cases.\textsuperscript{330} But like the citation to \textit{Spencer in Neely}, the \textit{Hurley} court’s decision to cite a host of cases describing or requiring jury findings of prior convictions illustrates the common law required such findings.

While the cases cited in \textit{Quinonez} and \textit{Newkirk} may have addressed whether there was a basis under the United States Constitution for jury trials on prior convictions, the cases did not address whether the Arizona

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\item \textit{Sherrill}, 815 P.2d at 398–99.
\item \textit{Id.} at 400 n.2.
\item \textit{Id.} (citing \textit{Spencer v. Texas}, 385 U.S. 554, 560, 566–69 (1967)).
\item \textit{Spencer}, 385 U.S. at 566.
\end{enumerate}
\end{footnotesize}
Constitution separately guaranteed the right to a jury determination of prior convictions. To the contrary, because the cases repeatedly reiterated the common-law requirement for a jury determination of prior convictions, the cases cited in Neely and Hurley actually support the conclusion that the Arizona Constitution guarantees the right to a jury finding of prior convictions through article 2, section 23.

The Arizona Court of Appeals thus erred in its first conclusion. While the right to a jury was provided in statute, the right originated in the common law, well before Arizona passed its first recidivism scheme. To classify the right as statutory misses the mark.

B. The distinction between elements or offenses and enhancements is a false one.

The court’s second conclusion has been inconsistent. In Quinonez, the court focused on whether the prior conviction was an element. Indeed, Newkirk recognized that Quinonez held that “a sentencing allegation is not a ‘constituent element’ of a crime.” However, with Apprendi decided in the interim—and factors that increased the maximum punishment thus defined as elements—the court reframed the issue in Newkirk. Where Quinonez had focused on elements, Newkirk shifted the focus to offenses. Because “[a] prior conviction . . . is not a common-law offense but rather a sentencing enhancement,” the court concluded no jury finding was warranted.

The enhancement, offense, or element distinction is one of labels. But the label is not the important question. As Justice Stevens clarified in Apprendi, “the relevant inquiry is not one of form, but of effect . . . .” How Arizona courts have labeled the factor is irrelevant; how the factor operates is not. The important question, from a common-law perspective, is whether the fact of prior convictions increases the maximum possible penalty. If it does, it is an element. Thus, where a factor allows the judge to impose a higher sentence within an already authorized range, it operates as a sentencing factor and need not be proved to a jury. But,

331 Quinonez, 976 P.2d at 267.
332 Newkirk, 115 P.3d at 1266.
333 See id. at 1266–67.
334 Id.
335 Id. at 1267.
337 Id. at 500–01 (Thomas, J., concurring).
338 Id.
339 Id. at 494 n.19 (majority opinion).
where a factor exposes the defendant to greater punishment, it operates as an element and must be proved to a jury.340

The history discussed above therefore illustrates the error in the court’s second conclusion—that there is a difference between a sentencing enhancement and an element or offense. As discussed above, courts that addressed the issue under the common law were not concerned with any such distinction.341 In Brooks, the trial court used this process.342 And in Hines, the Supreme Court of Georgia required a jury finding.343 Neither court concerned itself with whether the fact of prior convictions was an enhancement, offense, or element. This makes sense for two reasons. First, the fact of prior convictions inherently involves the factual question of identity.344 Second, the finding operates to increase the maximum penalty; it operates as an element.345

While Arizona’s courts have largely been concerned with the question of whether certain offenses are deserving of a jury trial, the purpose of section 23 was broader: to preserve “the right to jury trial as it existed at the time Arizona adopted its constitution.”346 This protection should not depend upon labels created and imposed nearly a century later. When Arizona adopted its constitution, the state provided for a jury finding on prior convictions, consistent with the well-established common law. It should be interpreted to guarantee that same right now.

VII. Further Implications in the Supreme Court of the United States

While we have focused on the Arizona Constitution’s guarantee that the right to a jury trial shall remain inviolate, much of our discussion is also pertinent to how and why this issue should be brought back to the attention of the Supreme Court of the United States.

As noted at the beginning of this article, the U.S. Supreme Court decided this issue in 1998 in Almendarez-Torres v. United States.347 There, the defendant argued that any factor that significantly increased the statutory maximum of a sentence should be treated as an element of the offense.348 The Court rejected this proposal, finding it would be “anomalous in light of

340 See id. at 494–95.
341 See supra Part II.
344 See 1 BISHOP, supra, note 66.
345 See Apprendi, 530 U.S. at 494.
348 Id. at 247.
existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty . . . .” 349 The Court cited three cases to support this assertion: Walton v. Arizona, Hildwin v. Florida, and Spaziano v. Florida. 350

Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg, dissented. 351 Justice Scalia observed, “[a]t common law, the fact of prior convictions had to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime.” 352 All but eight states retained this process through at least 1965. 353 Because of this common-law background, the dissenting justices believed “there [was] no rational basis for making recidivism an exception” to the rule requiring enhancing elements be proved to a jury beyond a reasonable doubt. 354

The next year, in Jones v. United States, the Supreme Court somewhat reversed course in a case regarding the federal carjacking statute. 355 Justice Souter, writing for the majority, set forth a standard that would become familiar the next year: “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 356 The judicial split is important. The four dissenting justices in Almendarez-Torres made up four of the five of the majority votes in Jones. 357 They were joined by Justice Thomas, who had been in the majority in Almendarez-Torres. 358

One year later, in Apprendi v. New Jersey, the standard was more formally recognized: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 359 The same five justices in the Jones majority—Justices Stevens (the author), Scalia, Souter, Thomas, and Ginsburg—comprised the Apprendi majority. 360 This majority was cognizant of the fact that its holding

349 Id.
351 Almendarez-Torres, 523 U.S. at 248 (Scalia, J., dissenting).
352 Id. at 261.
353 Id.
354 Id. at 258.
356 Id. at 243 n.6.
357 Compare Almendarez-Torres, 523 U.S. at 226, with Jones, 526 U.S. at 229.
358 Almendarez-Torres, 523 U.S. at 226.
359 Apprendi, 530 U.S. at 490.
360 Compare Jones, 526 U.S. at 229, with Apprendi, 530 U.S. at 468.
undermined *Almendarez-Torres*. The Court did not, however, address the question of recidivism because the defendant “[did] not contest [*Almendarez-Torres*’s] validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.”

Thus, *Almendarez-Torres* was framed as “an exceptional departure from the historic practice” of requiring jury findings for any fact that would increase punishment.

Justice Thomas went further in a concurring opinion. Where Justice Thomas had previously been in the *Almendarez-Torres* majority, he changed his view and agreed with Justice Scalia’s dissenting opinion from *Almendarez-Torres*. Justice Thomas traced the common-law traditions even further than Justice Scalia had, looking to antebellum cases that treated recidivism as an element, as well as Joel Prentiss Bishop’s treatise on criminal procedure. From this discussion, Justice Thomas recognized he made an error and concluded, “[w]hen one considers the question from this perspective [a fact that increases punishment is an element], it is evident why the fact of a prior conviction is an element under a recidivism statute.”

*Apprendi* also set the foundation for the collapse of the capital cases the *Almendarez-Torres* majority relied upon. In 2002, just two years after *Apprendi*, six justices (the *Apprendi* five and Justice Kennedy) applied *Apprendi* to death penalty cases in *Ring v. Arizona*. There, the Court concluded *Walton v. Arizona*, which authorized judicial determinations of facts which make a defendant death-eligible, was “irreconcilable” with *Apprendi*. The Court extended *Apprendi* and concluded that defendants facing the death penalty “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”

Three years later, in 2005, Justice Thomas again made his view on *Almendarez-Torres* clear in a concurring opinion in *Shepard v. United States*. Justice Thomas pointed out that “*Almendarez-Torres* . . . has been

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362 Id. at 490.
363 Id. at 487.
364 See id. at 506–07 (Thomas, J., concurring).
365 Id. at 507–09 (discussing Plumbly v. Commonwealth, 43 Mass. 413 (1841); Tuttle v. Commonwealth, 68 Mass. 505 (1854)); id. at 510 (citing 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872)).
366 Id. at 521.
368 Id.
369 Id. at 589.
eroded by [the] Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”371 While the parties didn’t request the issue be considered, Justice Thomas encouraged the Court to reconsider *Almendarez-Torres* in an appropriate case.372

In *Alleyne v. United States*, decided in 2013, Justice Thomas noted, this time in the majority opinion, that *Almendarez-Torres* “recognized a narrow exception to [the] general rule for the fact of a prior conviction.”373 However, because the parties again did not challenge *Almendarez-Torres*, the Court did not revisit the question.374

Three days later, in *Descamps v. United States*, Justice Thomas said in a concurring opinion that the only reason the issue was before the Court was “because [the] Court ha[d] not yet reconsidered *Almendarez-Torres*, which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant’s prior convictions.”375

Justice Thomas made similar comments in *Mathis v. United States* and *Sessions v. Dimaya*.376 In *Dimaya*, decided in 2018, Justice Thomas argued in his dissent, “[t]he exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. In my view, if the Government wants to enhance a defendant’s sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.”377

Justice Thomas has been calling upon litigants to look closely at *Almendarez-Torres* for nearly two decades. The basis for his request also drives the analysis under the Arizona Constitution—the common law. Thus, the discussion provided in this article is not only relevant to how we interpret and understand the Arizona Constitution, it is also pertinent to how we interpret and understand the United States Constitution.

**CONCLUSION**

For more than a century, Arizona required prior convictions to be proved to a jury. While the territorial code set forth this requirement, the

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371 *Id.* at 27.
372 *Id.* at 28.
374 *Id.*
375 *Descamps v. United States*, 570 U.S. 254, 281 (2013) (Thomas, J., concurring) (internal citation omitted) (quoting Shepard, 544 U.S. at 27 (Thomas, J., concurring)).
377 *Id.* (internal citations omitted).
provision was predicated upon the common-law requirement for a jury finding on the fact of prior convictions.

Article 2, section 23 guarantees that the right to a jury trial shall be protected to the extent it was protected when the Arizona Constitution was passed. At that time, the common law and penal code both required a jury finding on prior convictions. The Arizona Constitution should therefore be interpreted to protect a defendant’s right to a jury trial for prior convictions.

While the Arizona Court of Appeals has twice rejected this argument, the justifications for that rejection are incorrect. Where the court of appeals has concluded the origin of the right was statutory, the court has ignored the common-law tradition that predated Arizona’s enactment of a recidivism scheme. And where the court of appeals has attempted to distinguish between offenses and enhancements, they have missed the point. Any fact that increases the maximum possible penalty is an element, and elements must be proved to a jury.

In light of these errors, Arizona’s courts should revisit the issue and hold that the Arizona Constitution guarantees a jury finding for prior convictions. Failing to do so means that every day, Arizona trial courts continue to violate what was meant to be inviolate.
GIVING IMMIGRANTS THE COLD SHOULDER: POTENTIAL LEGAL CHALLENGES AND POLICY CONSIDERATIONS FOR
TRUMP’S INADMISSIBILITY ON PUBLIC CHARGE GROUNDS RULE

By: Lauren K. Garretson*

INTRODUCTION

Since the late 1800s, federal immigration law has provided that individuals who are likely to become, or are, a public charge are inadmissible to the United States.¹ Late last year, the Trump Administration promulgated a notice of proposed rulemaking—titled “Inadmissibility on Public Charge Grounds”—that would drastically change the regulatory scheme for determining inadmissibility to the United States on a public charge basis.² The Department of Homeland Security (DHS) recently published the final rule on August 14, 2019, which was originally set to take effect on October 15, 2019.³

The public charge doctrine has been used in the United States for over a century to exclude would-be immigrants based on the likelihood that they would become dependent on the government for assistance.⁴ The public charge doctrine is already a significant hurdle to granting immigrant and nonimmigrant visas to the United States.⁵ For instance, in 1916 approximately one million non-citizens lawfully attempted to enter the United States, and 10,263 of those individuals were denied admission because they were likely to become a public charge, although only approximately 1,000 were deported on the same grounds.⁶ These numbers

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are likely to increase greatly once the Trump Administration’s Inadmissibility on Public Charge Grounds rule goes into effect.

The new rule would drastically expand the umbrella under which an individual is deemed a public charge. For instance, the new rule states that the receipt of non-emergency Medicaid should deem an individual to be a public charge, while the receipt of such benefits has not previously been a determinative factor. The new rule sparked outrage from many critics who see it as a means of punishing legal immigrants who rely in some capacity on government assistance. As one commentator puts it: “Never in our nation’s history have we said that you have to be comfortably middle class to become an American.”

This Note identifies the potential legal challenges to the new Inadmissibility on Public Charge Grounds rule, and argues that even if the rule survives judicial review, it is not a sensible piece of immigration policy. To do so, the Note examines the significant distinctions between the current regulatory framework for enforcing the public charge doctrine and the Trump Administration’s new public charge rule. Part I explains the development of the public charge doctrine from the 1800s through the present day, focusing significantly on the current status of the public charge doctrine as a result of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and the 1999 interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. Part II details the significant changes between the current regulatory framework of public charge and the new rule, as well as the administration’s policy justifications for the rule. In Part III, the Note identifies and evaluates different kinds of potential legal challenges to the

7 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51159.
8 See, e.g., Hester et al., supra note 6.
I. EVOLUTION OF THE PUBLIC CHARGE DOCTRINE

Generally, “public charge” refers to an alien who currently is, or is likely to become, “primarily dependent” on government-provided benefits. Under the Immigration and Nationality Act (INA) of 1965, if an alien is determined to be a public charge “at the time of application for admission or adjustment of status,” then that individual is inadmissible to the United States. Currently, DHS is primarily responsible for enforcing the rules for public charge determinations. But the determination itself is based on either the relevant consular officer or the Attorney General’s opinion as to the future likelihood that an alien will become a public charge. The INA does not precisely define public charge. It mandates only that, at a minimum, immigration officials consider general factors such as the alien’s age and health to determine admissibility. This section details the history of public charge determinations and the evolution of the public charge doctrine over time.

A. A Brief History of the Public Charge Doctrine

Since the late 1800s, United States immigration law has barred by statute individuals who are likely to become a public charge from entering the United States. Yet the definition of public charge over the years has changed dramatically. In the late 1800s, a lack of cash did not necessarily mean an alien was a public charge and thus inadmissible, so long as the alien was able and willing to work.
In the early 1900s, Congress passed another immigration statute that permitted the deportation of immigrants who were public charges. During the twentieth century, courts continued to develop the contours of the public charge doctrine. For instance, in *Ex parte Mitchell*, the United States District Court for the Northern District of New York held that mere "remote and conjectural" events do not necessarily mean that an alien is "likely" to become a public charge for purposes of the controlling statute, and thus the alien is still admissible. No quantitative or highly particularized standards were developed as of yet. However, courts did generally agree that a public charge referred to an immigrant who was likely to be, or already was, "supported at the public expense." As the century progressed, immigration courts and the Board of Immigration Appeals began to refine the definition of public charge for inadmissibility purposes. In *Matter of Harutunian*, the Board held that if an alien is incapable of earning a living, does not possess sufficient funds within the United States for self-support, and has no sponsor in the United States willing and able to support the alien financially, that alien is excludable or inadmissible on public charge grounds. Aliens who could not establish that they had an annual income above the published poverty guidelines were also inadmissible.

While the precise definition of public charge evolved over the years, the reasoning underlying the doctrine did not. The public charge doctrine continued to represent the American government’s belief that most immigrants to the United States should be self-supporting. As explained below, this notion of immigrant self-support and self-sufficiency is the

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who had only 50 cents in cash but was a skilled cabinet-maker was not inadmissible on public charge grounds because he would be able to work to support himself).

22 256 F. 229 (N.D.N.Y. 1919).
23 *Id.* at 231.
24 *Id.* at 234; see also United States v. Williams, 175 F. 274, 275 (S.D.N.Y. 1910) (holding that immigrant with criminal tendencies was likely to become a public charge because, whether or not he would be imprisoned for a crime, “he would live at the expense of any community in which he remained”).
26 The analysis for determining excludability and inadmissibility on public charge grounds is largely the same. *Id.* at 589.
28 See, e.g., *id.* at 132. (“The elements constituting likelihood of an alien becoming a public charge . . . are not defined by statute, but rather are determined administratively upon consideration of all the factors bearing on the alien’s ability or potential ability to be self-supporting.”); *Williams*, 175 F. at 275 (“I believe that the statute should be reasonably construed as including . . . those persons who through misfortune cannot be self-supporting.”).
continuous thread between the origins of the public charge doctrine and the policy considerations underlying the Trump Administration’s Inadmissibility on Public Charge Grounds rule.

B. Current Status of the Public Charge Doctrine

The 1990s gave way to the regulatory and statutory framework that currently structures the implementation of the public charge doctrine today. The INA of 1965 provides the statutory authority for the Attorney General and consular officers to determine an immigrant’s admissibility on public charge grounds.29 The application of the public charge doctrine in determining alien admissibility is largely effected through the combination of PRWORA, IIRIRA, and the 1999 interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. This section sketches the provisions of PRWORA, IIRIRA, and the 1999 Field Guidance as they relate to the public charge doctrine and immigrants’ ability to gain access to government benefits.

i. Personal Responsibility and Work Opportunity Reconciliation Act

PRWORA was a 1996 effort to reform the welfare system in the United States. Part of the Act explicitly aimed to restrict the provision of public benefits for immigrants.30 PRWORA did so in order to directly address American citizens’ concerns that immigrants were using too many social services and receiving excessive unemployment benefits.31 Just as the public charge doctrine and American immigration statutes had always focused on immigrant self-sufficiency, so too did PRWORA.32 While the Act does not directly mention public charge, it did have a drastic effect on immigrants’ ability to obtain government-provided benefits.33

For instance, prior to the passage of PRWORA, legal immigrants could become eligible for Supplemental Security Income (“SSI”) after residing in the United States for five years.34 After the passage of the Act, legal immigrants could not receive SSI until after they became citizens.35 But certain benefits, such as housing programs administered by the Secretary of

33 Polen, supra note 5, at 1456.
34 Id.
35 Id. (citing PRWORA, 8 U.S.C. § 1612(a) (Supp. III 1997)).
Housing and Urban Development, were still available to many immigrants who were receiving such benefits at the time of PRWORA’s enactment.\footnote{36 \textit{Act of Aug. 22, 1996} § 400.}

For the first time, federal legislation had created a distinction between citizens and non-citizens for the purposes of receipt of SSI, Medicaid, Temporary Assistance for Needy Families (TANF), and Supplemental Nutrition Assistance Program (SNAP) benefits.\footnote{37 \textit{Hammond, supra} note 4, at 509.} But PROWRA still permitted several categories of foreign-born individuals to receive federal assistance, including legal permanent residents, refugees, and asylees.\footnote{38 \textit{Id.} at 509–10.} These individuals are “qualified” immigrants under PROWRA, while those ineligible for most federal assistance programs are “nonqualified” immigrants.\footnote{39 \textit{Id.} (noting that nonqualified immigrants may still receive limited federal assistance, namely emergency Medicaid, immunizations, and student access to school meal programs).}

Overall, PRWORA marked a shift in immigration law and policy as the United States moved towards an even more restrictive view of what government benefits should be offered to immigrants.\footnote{40 See Claire R. Thomas & Ernie Collette, \textit{Unaccompanied and Excluded from Food Security: A Call for the Inclusion of Immigrant Youth Twenty Years After Welfare Reform}, 31 \textit{Geo. Immigr. L.J.} 197, 214 (2017) (“[I]mmigrants continually face legally restrictive laws, such as Title IV of PRWORA, which result from economic and public pressure.”).} The legislation did not directly address public charge determinations. But, in effect, PROWRA made it more difficult for noncitizens currently present in the United States to become public charges because it greatly restricted what government assistance is accessible to noncitizens in the first place.

\textit{\textbf{ii. Illegal Immigration Reform and Immigrant Responsibility Act}}

PRWORA, IIRIRA gave “new force to state efforts to restrict immigrant use of social services.”

iii. 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds

The 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (Field Guidance) currently outlines the framework for determining immigrant inadmissibility on public charge grounds pursuant to the INA. Initially, the guidance policies were issued as part of a notice of a proposed rule, which would have officially established these same policies. But the final rule was never published.

The Field Guidance is significant in two respects. First, despite being titled as an “interim” guidance, both U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS) have continuously relied on this public charge guidance for nearly two decades. The reliance on this guidance is particularly interesting since it is not a legally binding regulation. Second, while guidance documents are not legally binding in the way that agency regulations and rules are, USCIS has substantially relied on the Field Guidance in its own adjudications of various alien applications and petitions, and in the wake of the Field Guidance DOS updated its own Foreign Affairs Manual to incorporate the public charge determination procedures in the Field Guidance for DOS visa adjudications.

The original goal of the Field Guidance was to “establish clear standards governing a determination that an alien is inadmissible or ineligible to adjust status, or has become deportable, on public charge grounds.” It emphasizes that determinations for inadmissibility on public charge grounds depend on a “totality of the circumstances test” pursuant to section 212(a)(4) of the INA rather than on any individually determinative

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44 Hammond, supra note 4, at 514 (quoting Gregory A. Huber & Thomas J. Espenshade, Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants, 31 INT’L MIGRATION REV. 1031, 1045 (1997)).
45 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28689.
47 Id.
51 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28689.
The Field Guidance clarified that, under the totality of the circumstances test, current receipt of special-purpose cash benefits and non-cash benefits that are for purposes other than income maintenance are not to be considered in determining that an alien is likely to become a public charge. Additionally, the Field Guidance also states that, unless the family relies on benefits as their sole means of support, an alien’s application for admission, extension of stay, or change of status should not be denied on public charge grounds if a member of the alien’s family receives government benefits.

Furthermore, the Field Guidance enumerates which benefits may currently be considered for determining whether an individual is likely to become, or currently is, a public charge. It states that receipt of: (1) SSI; (2) TANF; (3) “General Assistance” programs from states or localities that aid in income maintenance; and (4) programs supporting long-term care (namely placement in mental health institutions or nursing homes) should be considered in determining that someone is a public charge for purposes of admissibility and adjustment of status. It definitively excluded the consideration of non-cash assistance (aside from long-term institutionalization) benefits. The Field Guidance notes that Medicaid, the Children’s Health Insurance Program (CHIP), many nutrition programs, and housing benefits are not to be considered for public charge purposes.

Not all aliens are subject to admissibility determinations based on public charge grounds. Certain classes of aliens are statutorily excluded from public charge determinations, such as self-petitioners under the Violence Against Women Act (VAWA). Asylees and refugees are also excluded from public charge determinations for admissibility. Additionally, the majority of legal permanent residents (LPRs) who leave the United States for a period of less than 180 days are not considered “applicants for admission” upon their return and are therefore also exempt from public charge determinations upon re-entry.

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52 Id. at 28690.
53 Id.
54 Id. at 28692.
55 Id.
56 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28692.
57 Id.
59 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28689.
60 Id.
II. THE NEW INADMISSIBILITY ON PUBLIC CHARGE GROUNDS RULE

A. Significant Changes in the New Rule

The Trump Administration’s Inadmissibility on Public Charge Grounds rule is significantly different from the 1999 Field Guidance and the current state of the public charge doctrine. One of the more dramatic provisions effectively would prevent DHS from admitting an individual to the United States if that individual is likely at any time in the future to receive virtually any government assistance.61 Disqualifying assistance includes federal rental assistance, Low Income Subsidy (LIS) for Medicare Part D (for prescription drug coverage), Medicaid, SNAP, SSI, cash aid under TANF, and perhaps CHIP.62 While SSI and TANF had previously been considered in public charge determinations under the 1999 Field Guidance, the Field Guidance had explicitly excluded even the mere consideration of CHIP, Medicaid, and nutrition and housing assistance programs such as SNAP and federal rental assistance.63 Conversely, there is currently no single program that could be dispositive in determining that an immigrant is a public charge.

Not only is DHS purporting to lengthen the list of government benefits that may be used to deny admissibility on public charge grounds, it also seeks to completely disregard the 1999 Field Guidance’s instructions that only aliens who already are or are likely to become “primarily dependent”64 on government assistance should be inadmissible. Consequently, DHS seeks to drastically expand its authority by making it far easier to determine

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61 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51157 (“DHS is proposing to define a public charge as an alien who receives one or more public benefits, as defined in 8 CFR 212.21(b).”). See also Anderson, supra note 9; Shawn Fremstad, Trump’s ‘Public Charge’ Rule Would Radically Change Legal Immigration, CTR. FOR AM. PROGRESS (Nov. 27, 2018), https://www.americanprogress.org/issues/poverty/reports/2018/11/27/461461/trumps-public-charge-rule-radically-change-legal-immigration/ (explaining that, under the new public charge rule, government officials would need to consider not only whether an individual has ever received these benefits, but also if they have ever applied for or been approved for such benefits).

62 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51160 (explaining that the proposed rule sought comments on the inclusion of CHIP on this list of disqualifying benefits).

63 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28689.

64 Id.
that an individual is, or is likely to become, a public charge, and therefore deny their visa, change of status, and other related applications.\textsuperscript{65} DHS also proposes to include a number of “heavily weighed factors”\textsuperscript{66} for officers to consider when making a public charge determination of an alien seeking admission or a change of status. These factors are either negative or positive depending on whether they weigh in favor of admissibility, and certain factors are identified as “heavily weighed” in comparison to other considerations. The heavily weighed negative factors are (1) lack of current, past, or likely prospective employment (except for full-time students and those aliens unauthorized to work in the United States); (2) current receipt of at least one of the rule’s enumerated public benefits; (3) receipt of public benefits within the thirty-six months preceding the filing of an application or petition; (4) lack of private health insurance or other equivalent financial resources to pay for medical expenses; and (5) whether the alien has previously been found to be either inadmissible or deportable on public charge grounds.\textsuperscript{67} The heavily weighed positive factors consist of only: (1) the alien possesses financial assets and resources that total at least 250 percent of the Federal Poverty Guidelines (FPG), based on their household size; and (2) the alien is authorized to work in the United States and is employed with an annual income of at least 250 percent of the FPG.\textsuperscript{68} Another significant DHS proposal is to establish additional threshold values for various indicators that would determine whether a fact about an alien could be considered in a public charge determination. For instance, one proposal would allow for the consideration of monetary public benefits that cumulatively exceed fifteen percent of the FPG per alien within any one-year period as a negative factor in determining admissibility.\textsuperscript{69} Another proposal is to consider an alien’s annual income or financial assets, if they are at or above 250 percent of the FPG, as a highly positive factor in determining that an alien is admissible.\textsuperscript{70} This latter proposal implies that

\textsuperscript{65} See Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51119 (noting that DHS expects that the number of denials for adjustment of status applicants based on public charge grounds will increase should the proposed rule go into effect).

\textsuperscript{66} Id. at 51198.

\textsuperscript{67} Id. at 51198–204.

\textsuperscript{68} Id. at 51292.

\textsuperscript{69} Id. at 51164.

\textsuperscript{70} Id. at 51204 (explaining that the threshold income amount for 250 percent of the current FPG for all states, excluding Alaska and Hawaii, is approximately $64,375 annually for a family of four based on the Poverty Guidelines for 2018 published by the Department of Health and Human Services). See Notice of Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018); compare Kayla Fontenot et al., U.S. Bureau of the Census, Income and Poverty in the United States: 2017 (2018) (the average median income across all populations in the United States in 2017 was $61,372).
aliens whose annual income or financial assets do not exceed 250 percent of the FPG would be at risk of being deemed inadmissible under the new public charge standards. DHS does note that other positive factors of the alien may mitigate the impact of this threshold consideration when “considered in the totality of the circumstances.”

If DHS successfully promulgates this new public charge rule, the effects on immigrants and children of foreign-born parents could be devastating. And it might completely alter the ways in which the United States government provides public benefits to immigrants and citizen children of immigrants.

B. The Trump Administration’s Justifications for the New Rule

The new rule’s underlying policy focuses on the theme, as the public charge doctrine has for over 100 years, of immigrant self-sufficiency. In the eyes of the Trump Administration, the rule would “better align U.S. immigration policy with federal law.” USCIS cites to PRWORA’s provision that immigrant self-sufficiency “has been a basic principle of United States immigration law since this country’s earliest immigration statutes” as legislative support for the proposed rule. It seems that the Trump Administration views its public charge rule as a natural extension of immigration law. At the very least, it is using this justification to attempt to justify a sweeping expansion of public charge doctrine as it currently stands.

Several congressional policy statements are provided in the proposed rule as informing DHS’s decision to expand the list of benefits that may determine whether an immigrant already is, or is likely to become, a public charge. The notice of proposed rulemaking argues that immigrants in the United States should not depend on publicly provided aid to meet their own needs. Additionally, the proposed rule cites the Administration’s belief

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72 Hammond, supra note 4, at 529.
that offering public benefits should not constitute an incentive for immigrants to come to the United States.\textsuperscript{77}

These justifications, in and of themselves, are certainly not unfamiliar to American immigration law and policy. Courts have long recognized that public charge determinations are guided by the principle that immigrants coming to, and residing in, the United States should be self-sufficient.\textsuperscript{78} Adjudicators continue to make administrative decisions based on the idea that immigrants to the United States should be able to provide for themselves.\textsuperscript{79} As PRWORA states, self-sufficiency has long existed as a “basic principle” of American immigration law.\textsuperscript{80}

Additionally, DHS estimates a cost savings of $35.78 per petitioner\textsuperscript{81} because the proposed rule would eliminate the need for petitioners to file Form I-864W.\textsuperscript{82} DHS did not calculate annual accrued cost savings of this change.\textsuperscript{83} This is the only substantive quantitative benefit that the Administration explicitly identifies in the notice of proposed rulemaking.

DHS also estimates in the notice that the proposed public charge rule would reduce annual transfer payments (those payments made to provide public benefits) from the federal government to those individuals likely to disenroll from public benefits programs by $1.51 to $4.53 billion.\textsuperscript{84} While a reduction in these transfer payments would result in the federal government paying out less to immigrant populations for public benefits, it would not “save money” for the wider society. Transfer payments are those payments made from one group or entity to another that do not directly affect the total financial resources available to the society as a whole.\textsuperscript{85}

\textsuperscript{77} Id. at 51163–64.
\textsuperscript{78} See, e.g., United States v. Williams, 175 F. 274, 275 (S.D.N.Y. 1910).
\textsuperscript{79} Matter of Harutunian, 14 I. & N. Dec. 583, 590 (B.I.A.) (holding that elderly alien who lacked a means of supporting herself and had previously relied on a state-funded “old age assistance” was likely to become a public charge and thus excludable). \textit{Contra} Matter of Kohama, 17 I. & N. Dec. 257, 259 (B.I.A. 1978) (holding that although applicants for permanent residency were unable to demonstrate they could support themselves, they had satisfactorily demonstrated through affidavits that they would be adequately supported).
\textsuperscript{81} Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51118.
\textsuperscript{82} Id. at 51117 (stating that form I-864W is the Request for Exemption for Intending Immigrant’s Affidavit of Support, and the proposed rule would eliminate the need for Form I-864W by allowing aliens to indicate that they are exempt from the affidavit of support requirement on Form I-485, Application to Register Permanent Residence or Adjust Status).
\textsuperscript{83} Id. at 51229.
\textsuperscript{84} Id. at 51267.
\textsuperscript{85} \textit{Id.}
DHS concedes that the calculation of the reduction in transfer payments leans towards overestimation.86

The other generally purported benefits of the proposed rule identified by the Administration include: decreased chance that noncitizens will use public benefits; a more efficient review process for USCIS when determining inadmissibility on public charge grounds; and, again, assurance that aliens admitted to the United States, or immigrants applying for adjustment of status within the United States, are “self-sufficient” and unlikely to use public benefits.87 The self-sufficiency policy goal is reflected in DHS’s estimate of a large-scale reduction in transfer payments to the noncitizen population in the United States.88

C. Evaluation of the Administration’s Policy Justifications

The Trump Administration argues that the proposed rule promotes immigrant self-sufficiency.89 Yet commentators and research suggest that the proposed rule may not accomplish that goal.90 Studies have demonstrated that immigrants who initially use public benefits when they arrive to the United States decrease their reliance on public benefits over time.91 This suggests that the use of public benefits actually promotes immigrant self-sufficiency, rather than simply showing a lack thereof.92

The proposal to disregard the “primarily dependent” standard in particular rests on DHS’s belief that the INA does not necessarily mean to state aliens are public charges only if they rely on government assistance for at least 50 percent their income.93 But as the proposed rule notes, non-cash public benefits are generally considered “supplementary” support, unlike cash assistance and long-term institutionalization.94 Given these

86 Id. at 51264.
87 Id. at 51118–22.
88 Id. at 51118.
89 Id. at 51122–23.
92 Id.
94 Id. at 51163–64; see also Matter of Harutunian, 14 I. & N. Dec. 583, 589 (B.I.A. 1974) (noting that there is a difference between supplementary assistance and individualized public assistance); Fremstad, supra note 61 (explaining that supplementary benefits are considered to be those “benefits that one cannot subsist on in the absence of other income,
considerations, the changes to public charge policy in the proposed rule may not only fail to promote the purported goal of immigrant self-sufficiency, but also actively undermine it. The economic and human costs of implementing the proposed rule as it currently stands would far outweigh any savings the federal government would accrue as a result of implementing the proposed changes.\textsuperscript{95}

III. POSSIBLE LEGAL CHALLENGES TO THE NEW PUBLIC CHARGE RULE

The Trump Administration has so far attempted to dramatically alter the landscape of immigration policy in the United States through various executive actions, which have been met with several challenges. The infamous “Muslim ban” or “travel ban,” for example, effected by an executive order, originally barred the entry of Iraqi, Iranian, Libyan, Sudanese, Syrian, and Yemeni nationals\textsuperscript{96} and the admission of refugees to the United States.\textsuperscript{97} Several lawsuits ensued challenging the original executive order.\textsuperscript{98}

Should the Trump Administration successfully promulgate the proposed public charge rule, or a similar public charge rule in the future, it may well face challenges just as the Administration’s prior executive actions did. As state lawsuits against the rule begin to accrue,\textsuperscript{99} an evaluation of the types of legal challenges that may or may not succeed against the now-published rule is timely.

\textsuperscript{95} See Anderson, supra note 9 (noting that Doug Rand estimates that compliance costs could exceed 1.3 billion dollars over the coming decade if the proposed rule goes into effect); see also Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51118 (stating that DHS estimates a cost savings of only $35.78 per petitioner by eliminating the need for a single form).


Legal challenges to executive agency rules typically fall under three categories: (1) claims that the agency improperly promulgated the rule by failing to conform to the procedural requirements of the Administrative Procedure Act (APA) and other applicable law;\(^{100}\) (2) the rule or regulation exceeds the scope of the agency’s legislatively delegated authority or fails arbitrary and capricious review;\(^{101}\) and (3) the rule or regulation violates a constitutional or statutory right.\(^{102}\) The APA also permits interested parties to petition government agencies to amend, issue, or repeal a final rule or regulation.\(^{103}\)

This section evaluates three types of potential legal challenges to the proposed public charge rule. First, it briefly explains why a challenge on procedural grounds is not only weak, but also fails to address the root of the rule’s myriad problems. Second, it analyzes a potential challenge to the proposed rule on the grounds that it exceeds DHS’s statutory authority. Third, it examines a challenge based on the rule being arbitrary and capricious, and argues that this type of legal challenge is most likely to succeed.

### A. Conforming to Procedural Requirements

Parties affected by the final rule could file suit against the Trump Administration if they believe the promulgation of the rule suffered from a procedural defect. Section 706 of the APA governs reviewability of agency action.\(^{104}\) The Act mandates that reviewing courts should “hold unlawful and set aside” any agency action, conclusions, or findings that are “without observance of procedure required by law.”\(^{105}\)

It appears that DHS has followed the requisite procedures for the proposed public charge rule. This rule is undergoing informal rulemaking, and as such, is only subject to the notice and comment procedural requirements of the APA.\(^{106}\) It is quite unlikely, therefore, that a procedural challenge against the rule would succeed. Beyond that, even if a procedural challenge did succeed, DHS could simply promulgate the rule by following the correct procedures. This would fail to correct the inherent substantive defects of the proposed rule.

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\(^{101}\) Id. at § 706(2)(A), (C).
\(^{102}\) Id. at § 706(2)(B).
\(^{103}\) Id. at § 553(e).
\(^{104}\) Id. at § 706.
\(^{105}\) Id. at § 706(2)(D).
B. The Scope of DHS’s Authority

Another possible challenge that could be made against the new rule is that it exceeds the scope of DHS’s statutorily granted legal authority. The new public charge rule contradicts the relevant legislative history, and in effect DHS has taken on a legislative rather than an administrative role.\textsuperscript{107} While the meaning of “primarily dependent” as it applies to public charge determinations has evolved somewhat over time,\textsuperscript{108} the understanding that someone who is a public charge is “primarily dependent”\textsuperscript{109} on government assistance has been well-established for many years,\textsuperscript{110} even if by a different name or under different terms.\textsuperscript{111} By completely redefining the meaning of public charge from “primarily dependent” on government assistance to cover nearly any noncitizen who “receives” government assistance, DHS has effectively attempted to amend the INA through administrative regulations.

Multiple immigrant nonprofit organizations have already raised this sentiment in their lawsuits challenging the new public charge rule. For example, in one suit out of California, the plaintiffs claimed that the “[r]egulation uses the public charge ground of inadmissibility to penalize the receipt of or likely use of certain public benefits even though Congress has repeatedly rejected efforts to do precisely that.”\textsuperscript{112} As an agency, DHS is not permitted to enter Congress’s territory in this manner.


\textsuperscript{108} Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28689 (noting that the 1999 Field Guidance first specified the exact phrase “primarily dependent” as the public charge standard).

\textsuperscript{109} Anderson, supra note 9 (quoting Doug Rand).

\textsuperscript{110} See Anderson, supra note 9 (Doug Rand claims that “DHS wants to turn more than a century of precedent on its head.”).

\textsuperscript{111} Matter of Harutunian, 14 I. & N. Dec. 583, 589 (B.I.A. 1974) (“Everything in the statutes, the legislative comments and the decisions points to one conclusion, that Congress intends that an applicant for a visa be excluded who is without sufficient funds to support himself, who has no one under any obligation to support him and who, being older, has an increasing chance of becoming dependent, disabled and sick.” This is clearly an example of an individual who is likely to become primarily dependent on government assistance, even though this administrative decision predates the 1999 Field Guidance by several years.) (emphasis added).

To this end, a bill has been recently introduced in Congress that speaks to the notion that Congress does not permit DHS’s proposed changes under the INA.\footnote{H.R. 7052, 115th Cong. (2018).} The bill proposes that no federal funding should be used to carry out DHS’s proposed Inadmissibility on Public Charge Grounds rule.\footnote{Id. § 3.} It declares that DHS’s proposed rule ignores a century of law and policy precedent “in a manner not authorized or contemplated by Congress”\footnote{Id. § 2(6).} when it passed the INA. But we should not rely on bills to curtail the detrimental effects of the proposed rule. As discussed below, the most powerful potential legal challenge to the proposed public charge rule is to argue that it fails arbitrary and capricious review under the APA.

C. Arbitrary and Capricious Review

The legal challenge most likely to succeed against the proposed public charge rule is that it fails “arbitrary and capricious”\footnote{5 U.S.C. § 706(2)(A) (2012).} review under the APA. An agency rule is “arbitrary” or “capricious” if it does not “articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’”\footnote{Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156 (1962)).} The standard under the APA is a relatively low bar. So long as the rule is (1) lawful under the authorizing statute, (2) is supported by “good” reasons, and (3) the promulgating agency believes the rule is an improvement upon the previous policy, the rule passes arbitrary and capricious review.\footnote{Fed. Commc’n Comm’n v. Fox Television Stations, Inc., 556 U.S. 502, 511 (2009).} The Supreme Court has cautioned, however, that when an agency seeks to promulgate new policy based upon findings of fact that significantly differ from those supporting the previous policy, or when there are “serious reliance interests” at stake in eliminating the old policy in favor of the new, the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”\footnote{Id.}

In this instance, noncitizens have serious reliance interests at stake in the complete reformulation of public charge determinations. Many immigrant parents, who came to the United States to give themselves, and their children, opportunities and security unavailable to them in their home countries, may now find themselves unable to provide food for their families if they wish to remain in the country.\footnote{Sarah Bowen et al., A Heartbreaking Choice for Moms: Food or a Family’s Future,} “By refusing legal status
to those who can’t afford food or health care and seek help, the rule will further drive immigrant families into the shadows, forcing them to sacrifice their health and security to maintain even a chance of receiving permanent legal status down the road.”

Asking noncitizens to choose between seeking medical treatment for themselves or their children, or risking becoming inadmissible, creates an impossible decision.

Despite the serious, widespread potential consequences for noncitizen populations, DHS has failed to articulate the requisite detailed justifications for implementing the policy changes. When DHS identifies the negative health outcomes that would result from the promulgation of the proposed rule, it does not attempt to justify why those negative outcomes are balanced by some other interest.

DHS goes on to state a meager list of benefits, including that the proposed process will be clearer to applicants, but the addition of numerous factors in public charge determinations, some of which are heavily weighed and some of which are not, do not support this assertion. Because there are serious reliance interests at stake in overhauling the public charge determination process and redefining public charge, and because DHS did not provide adequate explanation for these changes, DHS’s proposed rule is arbitrary and capricious.

DHS also did not follow a “logical and rational” decision making “process” as it should have. The Supreme Court has previously set aside regulations that are unsupported by the agency’s offered reasoning. Some commentators support this argument, contending that DHS has not given sufficient evidence-based reasoning for dramatically redefining what it means to be a “public charge.” Here, DHS has failed entirely to offer


121 Id.


124 Id.

125 See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (holding that a regulation that was issued without a reasoned explanation even though serious reliance interests were at stake could not receive Chevron deference, despite agency’s belief that new interpretation of the controlling statutory authority was more consistent and reasonable); Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Services, 545 U.S. 967, 981 (2005) (finding that an inadequately explained inconsistency in a change in agency practice can be a reason for holding an agency’s interpretation of a controlling statute to be arbitrary and capricious).


127 Id. (collecting cases).

128 See, e.g., DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds from Jeanne
evidence that issues in the adjudication of admissibility on public charge grounds, or similar issues, warranted this dramatic overhaul of the policy. Furthermore, despite the numerous, significant negative outcomes identified by DHS in the proposed rule, DHS fails to explain how those results are offset by the benefits. Setting aside the Trump Administration’s proposed public charge rule would fall in line with Supreme Court precedent.

Arguing that the proposed public charge rule fails to pass arbitrary and capricious review under the APA is the strongest of the potential legal challenges outlined here. It aims at the root of the problems—that DHS’s offered justifications do not sufficiently rationalize the proposed complete overhaul of public charge policy.

IV. POLICY CONSIDERATIONS AND CONSEQUENCES

Should the Trump Administration successfully promulgate the rule, there will likely be significant consequences for immigrant communities, noncitizen workers, and their employers. This section assesses two major policy issue groups raised by the proposed rule: (1) the “chilling effect” on immigrants who will no longer seek public benefits for fear of becoming a public charge and related consequences; and (2) the detriment to noncitizen workers and their American employers.

A. The “Chilling Effect” and Public Benefits

One of the probable consequences of the proposed rule would be widespread disenrollment from public assistance and healthcare programs among noncitizens, particularly those who seek LPR status. Various studies of previous changes to immigration law and policy surrounding public benefits demonstrate that these shifts in policy appear to have a “chilling effect” on immigrants currently residing in the United States. The “chilling effect” is a phenomenon where even immigrants who are


129 Id. at 3.


eligible for public benefits choose to not seek them or to disenroll from these programs.\textsuperscript{132} The decision of immigrants to avoid seeking benefits for which they are still legally eligible may result from stigma from associated legislation (like PROWRA) and regulation,\textsuperscript{133} or from fear of public charge determinations that could render them inadmissible.\textsuperscript{134} After the passage of PRWORA, one study found a significant increase in the proportion of children of foreign-born mothers who had no health insurance, while rates of uninsured children of U.S.-born mothers remained relatively stable.\textsuperscript{135} According to the authors of the study, these statistics were “an indication that PRWORA may have engendered fear among immigrants and dampened their enrollment in safety net programs.”\textsuperscript{136}

Additionally, 2.5 percent of immigrants and their citizen family members who would are otherwise eligible for Medicaid subsidies are projected to disenroll or forego participation in the program.\textsuperscript{137} DHS calculates the 2.5 percent number based on the proportion of the foreign-born, noncitizen population currently residing in the United States who are likely to disenroll from or forego using public benefit programs because they do not want to compromise their chances of successfully applying to adjust their status by being labeled a “public charge.”\textsuperscript{138}

The overwhelming majority of noncitizens who were originally admitted to the United States without LPR status possess, at a minimum, one factor that DHS could weigh negatively in a public charge determination under the proposed rule.\textsuperscript{139} Approximately 42 percent of this same category of noncitizens possess at least one \textit{heavily weighed} negative factor.\textsuperscript{140} These noncitizens would consequently be ineligible to adjust their status to become legal permanent residents, unless they disenroll or forego participation in public benefits programs that they otherwise would be using to help cover healthcare, housing, or nutrition costs. This is particularly

\begin{itemize}
\item \textsuperscript{132} Neeraj Kaushal & Robert Kaestner, \textit{Welfare Reform and Health Insurance of Immigrants}, 40 \textit{Health Services Res.} 697, 698 (2005).
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Park, supra note 131, at 1169.
\item \textsuperscript{135} Kaushal & Kaestner, supra note 131, at 718.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} See Parmet & Ryan, supra note 90; Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51266.
\item \textsuperscript{138} Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51266.
\item \textsuperscript{139} Artiga et al., supra note 130 (estimating this figure at a staggering 94 percent of noncitizens who enter the United States without LPR status. This group of noncitizens often live in households with three or more individuals, have no private health coverage, and nearly half (40 percent) do not possess high school diplomas. All of these characteristics are considered “negative” factors by DHS that may be considered in making a public charge determination.).
\item \textsuperscript{140} Artiga et al., supra note 130.
\end{itemize}
concerning given that the proposed rule could affect not only immigrants themselves, but also their American-born children.

Additionally, such a chilling effect could cause negative community health outcomes. DHS acknowledges several of the risks in its notice of proposed rulemaking. Commentators have noted that the chilling effect would lead to several poor health outcomes that would be magnified by reduced enrollment in benefits programs, such as nutrition programs. For example, DHS admits that the use of emergency care as a substitute for primary care is likely to increase if the Trump Administration implements the proposed rule. DHS’s conclusion on this point is logical, given that the agency does not propose to include the receipt of “emergency” Medicaid in public charge determinations. The proposed rule would give lawful noncitizens without private health insurance an incentive to avoid seeking treatment until their health problems turn from treatable to emergencies. The results could be deadly, as past experiences with reform of public benefits for immigrants demonstrate. In one tragic instance following the passage of PROWRA, an immigrant woman who had badly burned herself in bathwater refused to seek emergency care, even though she and her entire family were documented immigrants. She feared that seeking medical assistance would result in trouble with immigration authorities, and her scalding became so infected over the course of the next month that by the time she sought help, her wounds were untreatable and she died.

Finally, increased housing support has been shown to result in positive community health outcomes by improving access to programs that improve overall health. Adults may self-report better overall health with housing assistance. One study found that women and children see reductions in

141 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51270 (listing the following as potential consequences for healthcare in the United States following promulgation of the proposed rule: increases in uncompensated care, i.e., care that is never paid for by an insurance provider or patient; increased spread of communicable diseases among unvaccinated noncitizen and citizen populations; higher rates of poverty; increases in the use of emergency care providers as primary health care; lower rates of employee productivity and educational achievement; and other general worsening of health outcomes, such as increases in obesity and malnutrition).
142 See Artiga et al., supra note 130; Parmet & Ryan, supra note 90.
143 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51270.
144 Id. at 51159.
145 Parmet & Ryan, supra note 90.
146 Park, supra note 131, at 1172.
147 Id.
148 Parmet & Ryan, supra note 90.
149 David E. Jacobs et al., Health and Housing Outcomes from Green Renovation of Low-Income Housing in Washington, DC, 7 J. ENVTL. HEALTH 76 (2014).
obesity and rates of diabetes when they receive needed housing benefits.\textsuperscript{150} The chilling effect of the proposed public charge rule would significantly alter access to healthcare for many immigrants.

\textbf{B. Effects on Nonimmigrant Workers and their American Employers}

The effects of the Trump Administration’s propose rule would not only affect immigrants. The proposed public charge rule would also impact employers who hire noncitizens, especially those employers petitioning on behalf on nonimmigrant workers seeking an extension of stay or change of status. For example, it is likely that the proposed rule would result in unpredictability and confusion for employers seeking to hire highly skilled nonimmigrant workers on H-1B visas,\textsuperscript{151} or who intend to hire students finishing their studies who want to switch from a student visa to an H-1B visa.\textsuperscript{152} As stated previously, the proposed public charge rule contains a suggestion that if an alien’s annual income or other financial resources amount to at least 250 percent of FPG, this fact should be “a heavily weighed positive factor” in determining admissibility on public charge grounds.\textsuperscript{153} While a total annual income of less than 250 percent of FPG would not automatically make an alien seeking to work in the United States inadmissible,\textsuperscript{154} this could be confusing to employers and noncitizen employees alike. Therefore, it is possible that if an employer is not paying, or offering to pay, a nonimmigrant more than the threshold annual income in the notice of the proposed rulemaking, that workers on H-1B visas may not be able to renew their visas and continue to work in the United States.\textsuperscript{155} DHS estimates that every year 336,335 employers file on behalf of nonimmigrant workers seeking an extension of stay or a change of status using Form I-129.\textsuperscript{156}

\begin{thebibliography}{99}
\bibitem{150} Jens Ludwig et al., \emph{Neighborhoods, Obesity and Diabetes: A Randomized Social Experiment}, 16 N. ENG. J. MED. 365 (2011).
\bibitem{151} DHS 60-Day Notice and Request for Comments; inadmissibility on Public Charge Grounds from the American Immigration Lawyers Association & the American Immigration Council to Department of Homeland Security (Dec. 10, 2018).
\bibitem{153} Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 5114, 51204, 51292.
\bibitem{154} Id.
\bibitem{155} Anderson, \emph{supra} note 9.
\bibitem{156} Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51251.
\end{thebibliography}
The new rule could create confusion for these employers and interfere with their ability to hire the employees they feel are best suited for the positions offered. Employers may find that an employee who was previously admissible, upon application for an extension of stay or change of status under the new public charge rule, would suddenly be ineligible to work in the United States. Employers may face increased labor turnover costs if they find themselves having to replace employees they expected would be able to continue to work in the United States. And some nonimmigrant workers who had hoped to eventually seek LPR status through their employers may have to overcome large hurdles to demonstrate that they are admissible on public charge grounds.

**CONCLUSION**

The Trump Administration’s new Inadmissibility on Public Charge Grounds rule marks a dramatic expansion of the public charge doctrine for the purposes of denying immigrant visa, adjustment of status, and extension of stay applications in the United States. While the new rule is in some ways a continuation of the notion that immigrants to the United States should be self-sufficient, it is an extreme view of what it means to be “self-sufficient” that is unprecedented in American immigration law. Over a dozen states have already filed suit against the new public charge rule. The new rule is arbitrary and capricious because it fails to adequately account for the complete overhaul of the prior public charge determination process, despite the various serious reliance issues that it raises.

Whether or not the changes to the public charge doctrine survive judicial review, it is ultimately not a sensible or just piece of public policy. It will likely encourage immigrants in the United States disenroll from, or not seek out, public benefits for fear of their applications for adjustment of status or extension of stay being denied. The new rule will also burden American employers of immigrants. They will have greater difficulty determining, with any predictability, the likelihood of extending the stay of skilled employees on work visas, or of successfully recruiting immigrants on student visas. The potential detriments of the new rule to noncitizen and citizen populations alike demonstrate that the Trump Administration’s latest attempt to restrict the opportunities for legal immigrants is more than merely misguided. It is a senseless attempt to restrict legal immigration and

157 Id. at 51275.

158 Evich, supra note 74 (fearing the effects of the rule on excludability and admissibility had already begun encouraging immigrant families to refuse government assistance when the proposed rule was first announced).

159 Anderson, supra note 9.
punish middle-class and poor immigrants. The costs to immigrant communities and the wider public will far outweigh any supposed benefits.
“DECEIVED ME INTO THINKING/I HAD SOMETHING TO PROTECT”: A THERAPEUTIC JURISPRUDENCE ANALYSIS OF WHEN MULTIPLE EXPERTS ARE NECESSARY IN CASES IN WHICH FACT-FINDERS RELY ON HEURISTIC REASONING AND “ORDINARY COMMON SENSE”

By: Michael L. Perlin, Esq.*

INTRODUCTION

There is a stunning disconnect between the false “ordinary common sense” of fact-finders (both jurors and judges) and the valid and reliable scientific evidence that should inform decisions on the full range of questions that are raised in cases involving the forensic mental health systems – including but not limited to, predictions of future dangerousness, competency and insanity determinations, sentencing mitigation in death penalty cases, and sexually violent predator commitments. Abetted by the misuse of heuristic reasoning (the vividness effect, confirmatory bias, and more), decision-makers in such case frequently “get it wrong” in ways that poison the criminal justice system. If we were to adopt this proposal – to provide two experts in cases in which such inaccuracy is likely, one to explain to the fact-finders why their “common sense” is fatally flawed, and one to provide an evaluation of the defendant in the context of the specific question before the court – then, and only then, would therapeutic jurisprudence principles be vindicated.

I. THE HEART OF THE PROBLEM

A. The basic errors

The public – and for the purposes of this paper, this includes judges as well as jurors along with those whose knowledge base flows from TV news and Internet websites – is dead wrong about everything it thinks it knows about the full range of topics that matter so much in the criminal justice system. These include:

- the accuracy of predictions of future dangerousness,
- the salient issues in competency and insanity determinations,
- the disposition of cases involving defendants who plead insanity (both those who are successful and those who are not),
• the potentially mitigating factors that are frequently raised in
sentencing phase of death penalty cases and the meaning of
“intellectual disability” in such cases, and
• the accuracy of predictions involving those who are subject to
sexually violent predator commitments.¹

These “dead wrong” views flow from the unthinking use of heuristic
thinking devices (including, but certainly not limited to, the vividness effect
and confirmatory bias) and the similarly unthinking use of false “ordinary
common sense.”² The effect of all of these is the same – judicial
decisionmakers, “knowing” they are right, fall prey to a full range of biases
that cause them to believe everything that is false and disbelieve everything

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me.

¹ I have written about these frequently in the past, and I continue to do so. See, e.g.,
[hereinafter PERLIN, HIDDEN PREJUDICE]; MICHAEL L. PERLIN, THE JURISPRUDENCE OF
THE INSANITY DEFENSE (1994) [hereinafter PERLIN, INSANITY DEFENSE]; MICHAEL L.
PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES
(2013); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION:

² See, e.g., Michael L. Perlin, Morality and Pretextuality, Psychiatry and Law: Of
Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance, 19 BULL. AM.
ACAD. PSYCHIATRY & L. 131 (1991) [hereinafter Perlin, Morality]; Michael L Perlin,
Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic
Reasoning, 69 NEB. L. REV. 3 (1990) [hereinafter Perlin, Psychodynamics]; Michael L.
Perlin, Talia Roitberg Harmon & Sarah Chatt, “A World of Steel-Eyed Death”: An
Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate
Counsel to Defendants with Mental Disabilities Facing the Death Penalty, 53 U. MICH.
J. L. REFORM. 261 (2020) (discussing the impact of these factors on death penalty cases
involving defendants with serious mental disabilities).
that is true. In this paper, I suggest an approach to remediate these gross cognitive errors.

B. An example: on predicting dangerousness

Those of us who do the research, who read the research, and who study the research know that our assumptions are wrong, and we have known this for years. Consider the example of the Supreme Court’s 1983 decision in *Barefoot v. Estelle*, 3 countenancing testimony on future dangerousness in a death penalty case in which the witness had never personally examined or evaluated the defendant. 4 One of the lynch-pins of the *Barefoot* decision was Justice White’s conclusion that, as a result of vigorous cross-examination, “the jury will ... be able to separate the wheat from the chaff.” 5

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4 *Barefoot*, 463 U.S. at 896. Compare *id.* at 926 (Blackmun, J., dissenting) (cautioning that the “major danger of scientific evidence is its potential to mislead the jury” and that “an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny”), as discussed in Michael L. Perlin, “Your Corrupt Ways Had Finally Made You Blind”: Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities, 65 AM. U. L. REV. 1437, 1452 n. 30 (1985).

There is a deeper issue here that requires far more attention than it has received: the validity and reliability of the assumptions embedded in the Texas statute in question in *Barefoot*, see TEXAS C.C.P. Art. 37.071 (a statute similar to those adopted by other states as well, see, e.g., IDAHO CODE § 19-2515(9)(h); VA. CODE ANN. § 19.2-264.2(1); WYO. STAT. ANN. § 6-2-102(h)(xi)): that future dangerousness (a topic that, per state law, can be testified about knowledgeably by forensic mental health professionals) can be and should be equated to death-worthiness. See, e.g., Phyllis Crocker, Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases, 66 FORDHAM L. REV. 75 n.305 (1997) (“future dangerousness, while independent of the crime, still does not fully address the defendant's deathworthiness.”). There has been significant attention paid to the question of the capacity of such forensic witnesses to accurately predict dangerousness. See, e.g., for the most recent research, Jaymes Fairfax-Columbo & David DeMatteo, Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing, 25 WM. & MARY BILL RTS. J. 1047, 1050 (2017) (“psychologists and psychiatrists are simply poor at predicting future dangerousness, at least in capital contexts”); *id.* at 1058 (“the empirical evidence base suggesting that clinicians can accurately predict future dangerousness in capital cases is quite thin”).

5 *Barefoot*, 463 U.S. at 899 n. 7. But see *id.* at 926 (Blackmun, J., dissenting) (“The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific
The *Barefoot* decision led three researchers to write, some six years later, “[W]e have yet to find a single word of praise for, or in defense of *Barefoot*, in the literature of either science or law.”\(^6\) Thirty years after that article was written, such a single word can still not be found.\(^7\) And *Barefoot* continues to be perceived as good law, and continues to be regularly cited in published, appellate cases.\(^8\)

But again, it is not just matters involving predictions of dangerousness that we get dead wrong. Our “ordinary common sense” is flawed—deeply, fatally flawed—as it relates to all of the issues that I noted above, and, if we continue to litigate these cases as we currently do, I see no reason to expect any significant “improvement” (meaning that, in an alternative universe I wish for, fact-finders would take seriously the valid and reliable evidence that has been developed for decades, and would acknowledge that their embrace of the vividness and availability heuristics taints all their judgments).\(^9\) Certainly, there is no question that, when valid research is dissonant with jurors’ (and judges’) “ordinary common sense” on these positions, then that “ordinary common sense” prevails—an “ordinary common sense” that is often wrong—and the research is ignored.\(^10\)

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\(^9\) See *infra* text accompanying notes 68 & 71.

of the leading casebooks on evidence tells us, “What the witness sees or hears is fitted into and made sense of by means of pre-existing ideas.”

C. On “folk psychology”

In this context, we also need to think about what is regularly called “folk psychology”—“the prescientific, commonsense conceptual framework that all normally socialized humans deploy in order to comprehend, predict, explain, and manipulate the behavior of humans.”

There has been extensive scholarship about this phenomenon in related areas, much of it focusing on the rules of evidence. By way of example, “excited utterances” are commonly viewed as exceptions to the hearsay rules, an exception that relies on folk psychology to tell us that “a person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event.”

Or, in the words of Professor Melissa Hamilton, “Drawing on a `folk psychology of evidence,’ this naive belief that people are wholly incapable of spontaneously lying under emotional distress is farcical.” As Professors Robert Beatty and


13 For an overview, see Stephen J. Morse, Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience, 9 Minn. J.L. Sci. & Tech. 1, 4 (2008) (criminal law is based on “folk psychology” which views humans as rational beings).


Mark Fondacaro have noted, in a context close to what I am discussing here, “a folk psychology [referring to “ordinary common sense”] approach to something like mens rea is guaranteed to be wrong some of the time and costly much of the time.”

In this paper, I suggest that our current “take” on a full range of issues relevant to forensic cases is similarly “farcical,” and wrong most of the time, and suggest a new approach. In cases involving forensic testimony of this sort – testimony that is especially difficult for jurors to process because it flies in the face of “what they know,” and is contrary to the media’s incessant mischaracterizations of the issues in question – the defendant should be entitled to two experts: one who has done an evaluation and testifies as to whether the defendant in question is, variously, likely to be dangerous in the future, likely to reoffend sexually, not responsible for the underlying actus reus, etc., and one (a different one) who explains to the jury (and not insignificantly, the judge) why fact-finders regularly make these fatal errors in such cases.

II. SUPREME COURT CASELAW

A. The Ake baseline

Supreme Court caselaw is of marginal help. While Ake v. Oklahoma, a case in which an indigent defendant sought funding for an expert witness,


17 See, e.g., PERLIN, INSANITY DEFENSE, supra note 1, at 172 (“Media depictions rely on stereotypes and distort images of mental illness ....”); see also, Heather Ellis Cucolo & Michael L. Perlin, “They’re Planting Stories in the Press”: The Impact of Media Distortions on Sex Offender Law and Policy, 3 U. DENV. CRIM. L. REV. 185 (2013).

18 In some jurisdictions, there are rights to multiple experts to evaluate competency, but these experts are statutorily tasked with answering the same question: whether the defendant in the case in question is competent to stand trial. See, e.g., State v. Israel, 577 P.2d 631 (Wash. Ct. App. 1978).

19 470 U.S. 68 (1985). Ake had been charged with two counts of murder and two counts of shooting with intent to kill. Id. at 70-71. Prior to trial, he was institutionalized to determine his competency to stand trial, in accord with a recommendation rendered by a court-appointed psychiatrist who characterized Ake as “frankly delusional” and a “probable paranoid schizophrenic.” Id. at 71. That Ake had serious mental problems cannot be seriously disputed: in a remarkable colloquy with the judge, trial counsel had characterized the defendant as “goofier than hell.” See Brief of Petitioner, Ake v. Oklahoma, 470 U.S. 68 (1985), at 10, quoting J.A. 27. Before trial, defense counsel had notified the court that he would raise the insanity defense, and asked the trial judge to
concluded that a “criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense,”20 a more recent case on the right to expert assistance made clear that “Ake does not give the defense the right to interview potential experts, to seek out an expert who offers a favorable preliminary diagnosis, or to hire more than

either arrange for a psychiatric examination of the defendant so as to evaluate his responsibility at the time of the offense, or to make funds available (in light of the defendant’s indigency) to allow him to arrange for his own evaluation. Id. at 5, quoting J.A. 20 This request was denied. Ake, 470 U.S. at 72.

20 Id. at 77. On the need for such assistance to be independent, see Alexandra Marimucci, Achieving Ake: Defendants Deserve the Constitutional Right to Independent Mental Health Professionals, 79 U. PITT. L. REV. 729 (2018). By statute in at least one state, if an expert has been appointed to assist the defense, the defense may produce other expert evidence on the same matters, but any additional experts must be paid by the defense. See CAL. EVID. CODE § 733. It is clear that the “overwhelming” majority of criminal defendants are indigent, see Dean A. Strang, Beyond Guilt or Innocence: Larger Issues That Making a Murderer Invites Us To Consider, 49 TEX. TECH L. REV. 891, 893 (2017); it has been estimated that, in some Arizona counties, 95% of all defendants are indigent, see Lisa R. Pruitt & Beth A. Colgan, Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense, 52 ARIZ. L. REV. 219, 222 n. 14 (2010).
This is in line with earlier state court decisions that have held that the “defendant had no right to the appointment of multiple experts.”

I believe that this unthinking line of cases is, in large part, responsible for the current state of affairs in which credible expert evidence is often ignored, succumbing to heuristic reasoning and false “ordinary common

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21 McWilliams v. Dunn, 137 S. Ct. 1790, 1803 (2017). While awaiting sentence on a conviction for capital murder, McWilliams’ counsel asked for neurological and neuropsychological testing. *Id.* at 1795-96. The court agreed, and McWilliams was examined by a doctor who filed a report two days before the judicial sentencing hearing. *Id.* at 1796. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some “genuine” neuropsychological problems. *Id.* Just prior to the hearing, counsel also received updated records from the commission’s evaluation, as well as previously-subpoenaed mental health records from the Alabama Department of Corrections. *Id.* At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and also asked for the assistance of someone with expertise in psychological matters to review the findings. *Id.* at 1796-97. The trial court denied defense counsel’s requests. At the conclusion of the hearing, the court sentenced McWilliams to death. *Id.* at 1797–98.

See also, *e.g.*, Glass v. Blackburn, 791 F.2d 1165, 1168–69 (5th Cir.1986) (suggesting that *Ake* does not require that more than one expert be provided). Other post-*Ake* cases have considered aspects of this question in a variety of ways. See *e.g.*, Schiro v. Clark, 754 F. Supp. 646, 658 (N.D. Ind. 1990), aff’d, 963 F.2d 962 (7th Cir. 1992) (*Ake* satisfied by appointment of two experts who evaluated defendant on questions of competency and sanity); Rychtarik v. State, 334 Ark. 492, 499, 976 S.W.2d 374, 378 (Ark. 1998) (defendant not entitled to additional psychiatric evaluation to determine his competency to waive rights); Castro v. Ward, 138 F.3d 810 (10th Cir.), cert. denied, 525 U.S. 971 (1998) (denial of funds for additional mental health expert did not violate due process); State v. Arter, 2016 Ariz. App. Unpub. LEXIS 1583 (Dec. 20, 2016) (trial court did not abuse its discretion by denying the motion for additional funds for a second mental evaluation); Lewis v. Commonwealth, 42 S.W.3d 605 (Ky. 2001) (no prejudice from court's failure to appoint additional experts when person appointed was expert on syndrome which was defendant's defense). See generally, PERLIN & CUCOLO, *supra* note 3, § 15-4.3, at 15-70 n. 559 (collecting cases).

22 *E.g.*, State v. Seaberry, 388 S.E.2d 184 (N.C. Ct. App. 1990). On the other hand, there are pre-*Ake* state cases finding the right to experts to flow from the state constitutional right to effective counsel, a right that *might* extend to multiple experts, although not for the reasons urged in this paper. See, *e.g.*, Coronevsky v. Superior Court, 204 Cal.Rptr. 165, 167 (Cal. 1984) (right to an expert when necessary to respond to the prosecution's expert witnesses or to establish an affirmative defense, as an aspect of “ancillary defense services”), as construed in People v. Stuckey, 96 Cal.Rptr.3d 477, 491 (Cal. Ct. App. 2009). On how *Ake* can be read to insure *more* than simply a testifying expert, see Danica Bird, *Indigent Defendants Are Entitled to a Defense Team Mental Health Expert*, 22 J. GENDER, RACE & JUST. 351, 374 (2019).
sense” in ways that are infused with sanism and pretextuality.  

I hope that this paper will encourage fact-finders to rethink the current state of affairs.

B. On sex offenders

We know that the public is wrong – dead wrong – about what it believes about sex offender cases. It believes, by way of example, that the recidivism rate is nearly 100%. And on this issue, the Supreme Court is no better. In the case of *McKune v. Lile*, relying on one prior source – a source based on a non-peer reviewed study of one therapy group (led by the source’s author) – the Court cited an 80% rate of re-offense for untreated offenders as a basis underlying the justification to restrict the rights and liberties of individuals convicted of sexual offense, an “unsupported assertion of someone without research expertise who made his living selling such

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24 For an earlier article suggesting additional expert testimony in the confessions context to inform judges and juries about police interrogations, false confessions, and personal and situational risk factors, see Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. in Pub. Interest 33, 58 (2004) (referenced in Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles after Roper v. Simmons*, 65 Wash. & Lee L. Rev. 385, 446 n. 238 (2008)). This has been noted by at least one state Supreme Court justice. See State v. Lawrence, 920 A.2d 236, 274 (Conn. 2007) (Katz, J., dissenting) (“These studies [referring to that of Kassin and Gudjonsson, among others] demonstrate that jurors are unable to detect false confessions because of the commonsense expectation of self-serving behavior in others and the accompanying disinclination to believe that a person would falsely confess.”).

Similarly, Professor Kassin and another colleague have argued that special experts – to testify about memory and perception – may be needed in cases involving eyewitness testimony. See Saul M. Kassin & Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* 84-86 (1988), a topic about which courts have differed significantly. Compare id. with State v. Henderson, 27 A.3d 872 (N.J. 2011) (allowing for the introduction into evidence of expert testimony on eyewitness identification testimony in general), with United States v. Thevis, 665 F.2d 626, 641 (5th Cir. 1982), cert. den., 459 U.S. 825 (1982) (the jury can adequately weigh questions involving witness’s perceptions and memory “through common-sense evaluation”), and Commonwealth v. Alicia, 92 A.3d 753 (Pa. 2014) (expert testimony on the phenomenon of false confessions would impermissibly invade the jury's exclusive role as the arbiter of credibility).


counseling programs to prisons.” As I have written with my frequent co-author-colleague Professor Heather Ellis Cucolo:

Lawyers must be trained to identify and then reject the sanist and pretextual myths that lead fact finders to make gross misassumptions about persons who are subject to the SVPA process (e.g., that “no treatment works”; that “they all recidivate”; that the stranger-in-the-parking-lot scenario is the most common fact pattern), in the ways that heuristic reasoning dominates fact-finders’ thought process (including, not limited to, the vividness heuristic), and in the ways that fact-finders’ false “ordinary common sense” leads them to make fatally erroneous assumptions as a result of pre-reflective thinking, and observations based disproportionately on visual cues and clues (“he looks creepy”).

C. On the insanity defense

Similarly, the public is equally dead wrong about what it believes about the use of the insanity defense: that it is a plea without risk, often used, almost always successful, and that it leads to a minimal stay in a “Club Fed” type facility. Consider some of the myths – myths that have been

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disproved unequivocally by all the valid and reliable evidence — to which jurors adhere:

Myth #1: The insanity defense is overused.

Myth #2: The use of the insanity defense is limited to murder cases.

Myth #3: There is no risk to the defendant who pleads insanity.

Myth #4: NGRI acquittees are quickly released from custody.

Myth #5: NGRI acquittees spend much less time in custody than do defendants convicted of the same offenses.

Myth #6: Criminal defendants who plead insanity are usually faking.

Again, we know that each of these are demonstrably wrong, and that we have known that they are wrong for decades. These myths are “firmly rooted in our cultural subconscious,” and despite decades of scholarly articles refuting them, they remain so rooted. We were cautioned about

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31 Id.

32 See Perlin, Insanity Defense, supra note 1, at 229-62 (citing valid and reliable evidence disproving each of these myths).


this over 180 years ago, when Isaac Ray wrote, in the context of insanity defense cases, “the jury is seldom a proper tribunal for distinguishing the true from the false, and fixing on each its rightful value.”

Yet, we continue to adhere to them, and prosecutors continue to regularly perpetuate these myths in jury closings with no sanctions forthcoming.

D. On intellectual disability and the death penalty

Another example to consider: Since the Supreme Court decided Atkins v. Virginia in 2002, it has returned on the merits on four occasions to the question presented there – the executability of one with intellectual disabilities. In Hall v. Florida, it rejected the use of a “bright line” IQ score of seventy as a cut-off point for intellectual disability for the purposes of determining whether one is eligible to be executed. But, notwithstanding the Hall decision, the State of Texas, by way of example, continued to adhere to its utterly-discredited decision of Ex parte Briseño, which created a standard – based on the fictional character of Lenny, in John Steinbeck’s novel Of Mice and Men – for determining whether a particular defendant possesses significant adaptive deficits, a standard criticized by a

35 Catherine Struve, Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation, 72 FORDHAM L. REV. 943, 959 (2004) (citing ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 59 (1838)).

36 Compare State v. Dalton, 794 S.E. 2d 485 (N.C. 2016) (prosecutor’s statements during closing argument, exaggerating the likelihood of defendant’s release if found guilty by reason of insanity, constituted prejudicial error), with State v. Moody, 94 P. 3d 1119 (Ariz. 2004) (prosecutor’s improper closing argument appealing to jurors’ fears that verdict of not guilty by reason of insanity would result in defendant’s release did not require reversal of capital murder conviction).

37 536 U.S. 304, 319 (2002) (finding that execution of a person with mental retardation [as it was then characterized] is cruel and unusual punishment).


39 Hall, 134 S. Ct. at 2001. Soon after its decision in Hall, the Court returned to this issue in Brumfield, holding that a state postconviction court’s determination that prisoner’s IQ score of 75 demonstrated that he could not possess subaverage intelligence reflected an unreasonable determination of the facts. 135 S. Ct. at 2281. Brumfield also held that a defendant needs “only to raise a ‘reasonable doubt’ as to his intellectual disability to be entitled to an evidentiary hearing.” Id.


41 Id. at 6 (“Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt”) (citing JOHN STEINBECK, OF MICE AND MEN (1937)). See, for a provocative discussion of this issue, Mia-Carré B. Long, Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the Briseño Factors, 26 GEO. J. LEGAL ETHICS 859 (2013).
commentator, accurately, creating “an unconstitutional risk of executing mentally deficient persons” notwithstanding the Hall decision. 42

Three years after Hall, 43 in its first Moore decision, the Supreme Court struck down Texas’s schemata for determining if a defendant were sufficiently intellectually disabled so that execution would violate the Eighth Amendment, 44 sending the case back to state court for further review utilizing a test based on more current medical standards. 45 But, notwithstanding this decision, and notwithstanding the fact that the prosecutor in the Moore case requested the defendant’s sentence be changed to life in prison, the Texas Court of Criminal Appeals again rejected this plea, ruling that Moore was not intellectually disabled under either standard. 46 The Supreme Court granted certiorari again, and once more held that the Texas court was in error in determining that Moore was not intellectually disabled. 47

This area of the law is further contaminated by the corrupt use, by some prosecutors, of retaining witnesses who use “ethnic adjustments” in death penalty cases—artificially adding points to the IQ scores of minority death penalty defendants—so as to make such defendants, who would otherwise have been protected by the Atkins line of cases, subject to capital

43 Prior to Moore, the Supreme Court also held in Brumfield that a state postconviction court’s determination that prisoner’s IQ score of 75 demonstrated that he could not possess sub average intelligence reflected an unreasonable determination of the facts. Brumfield, 135 S. Ct. at 2281.
45 Moore, 137 S. Ct. at 1052-53.
46 Id. at 1042.
punishment. To be able to rebut this, an additional expert will inevitably be needed. Although at least one psychologist who has testified in this manner has been sanctioned by a state licensing board, it is clear that many others have testified in the same corrupt way.

In writing about this specific issue previously, I called on defense counsel to “call their own witnesses ... to expose the testimony's fraudulence to the court and its jurors.” Here, I drew on the example of the Colorado death penalty case of Frank Orona, in which Drs. Paul Appelbaum and Henry Steadman testified on behalf of the defendant and concluded that the testimony of Dr. James Grigson was “unethical,” and that there was “no empirical evidence” to support his conclusions, resulting in a hung jury at the penalty phase. This, though, will be impossible if, per Ake, counsel representing indigent defendants is limited to one expert.


49 See Sanger, supra note 48, at 123 (noting there are no peer reviewed studies supporting these adjustments).


52 Perlin, supra note 4, at 1458-59.

53 Drs. Appelbaum and Steadman are two of the most eminent experts in the world on these issues. (Paul S. Appelbaum, MD, COLUMBIA UNIVERSITY DEPARTMENT OF PSYCHIATRY, https://www.columbiapsychiatry.org/profile/paul-s-appelbaum-md (last visited Jan. 8, 2020); PRA Founder and President, Dr. Henry J. Steadman, Retires After an Illustrious Career, POLICY RESEARCH ASSOCIATES, prainc.com/steadman-retirement/ (last visited Jan. 8, 2020).

54 See Perlin, supra note 4, at 1440 (discussing “the scandalous story of Dr. James Grigson-known morbidly as “Dr. Death”-who regularly testified fraudulently on behalf of the state at the penalty phase of death penalty cases, even after he lost his license to practice psychiatry, using, in virtually every case, “junk science” as the basis of his opinions”). Dr. Grigson was the state’s expert witness in the Barefoot case. See supra text accompanying notes 3-8.

55 See, e.g., Matt C. Zaitchik, Burying Dr. Death, BOS. PHOENIX, Dec. 21, 1990, §1, at 3; Perlin, supra note 4, at 1448 n. 56. There is no mention of Dr. Grigson’s testimony, nor of Drs. Steadman’s nor Appelbaum’s testimony, in the reported decision in the Orona case. See People v. Orona, 907 P.2d 659 (Colo. Ct. App. 1995), disapproved of on other
III. JURISPRUDENTIAL FILTERS

In considering this array of cases and myths – spanning sex offender law, insanity defense law, and death penalty law (some, but not all, of the categories that trouble me)\textsuperscript{56} – it is necessary to also consider those jurisprudential filters that have “poisoned and corrupted” all of mental disability law,\textsuperscript{57} and have “malignantly distort[ed] both the legislative and judicial processes.”\textsuperscript{58} I will define them each briefly.\textsuperscript{59}

A. Sanism

“Sanism dominates the entire representational process” in cases involving individuals with mental disabilities,\textsuperscript{60} and it reflects what civil rights lawyer Florynce Kennedy has characterized as the “pathology of oppression.”\textsuperscript{61} It is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) racism, sexism, homophobia, and ethnic bigotry.

Sanism “infects both our jurisprudence and our lawyering practices” and “is largely invisible and largely socially acceptable,” “based predominantly upon stereotype, myth, superstition, and 

grounds, in People v. Harlan, 8 P.3d 448 (Colo 2000), overruled, on other grounds, by People v. Miller, 113 P.3d 743 (Colo. 2006).
\textsuperscript{56} Consider also matters related to incompetency to stand trial. One trial judge responding to a National Center for State Courts survey indicated that defendants who were incompetent to stand trial could have understood and communicated with counsel and the court “if they had only wanted.” \textit{E.g.}, Perlin, \textit{supra} note 7, at 671 (citing to Ingo Keilitz & J. Rudy Martin, \textit{Criminal Defendants with Trial Disabilities: The Theory and Practice of Competency Assistance} 90 (unpublished manuscript, on file with the author)); Michael L. Perlin & Keri K. Gould, \textit{Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines}, 22 AM. J. CRIM. L. 431, 454 (1995) (quoting Keri A. Gould et al., \textit{Criminal Defendants With Trial Disabilities: The Theory and Practice of Competency Assistance} 90 (1993) (unpublished manuscript)).
\textsuperscript{57} See Michael L. Perlin & Meredith R. Schriver, ‘‘You Might Have Drugs at Your Command’’: Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality, 8 ALBANY GOV’T L. REV. 381, 395 (2015).
\textsuperscript{59} The following section is partially adapted from Perlin, Harmon & Chatt, \textit{supra} note 2, at 278-82.
\textsuperscript{60} Michael L. Perlin & Alison J. Lynch, \textit{"Mr. Bad Example"}: Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities, 16 WYO. L. REV. 299, 300 (2016).
\textsuperscript{61} Morton Birnbaum, \textit{The Right to Treatment: Some Comments on its Development}, M\textit{EDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE} 97, 107 (Frank Ayd ed., 1974) (quoting Kennedy).
deindividualization,” “in unconscious response to events both in everyday life and in the legal process.” “Sanism is especially pernicious in institutional settings, and its power in jails and prisons is particularly vicious.” Its “corrosive effects have warped all aspects of the criminal process.”

B. Pretextuality

Pretextuality describes the ways in which courts accept testimonial dishonesty—especially by expert witnesses—and engage similarly in dishonest (and frequently meretricious) decision-making, a phenomenon that is especially poisonous where courts accept witness testimony that shows a “high propensity to purposely distort their testimony in order to achieve desired ends.” It “breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and at times, perjurious and/or corrupt testifying.”

C. Heuristics

Heuristics refers to a cognitive psychology construct that describes the implicit thinking devices that individuals use to simplify complex, information-processing tasks. The use of such heuristics frequently leads to distorted and systematically erroneous decisions, and it leads decision-makers to ignore or misuse items of rationally useful information. By example, the vividness heuristic teaches us that “one single vivid, memorable case overwhelms mountains of abstract, colorless data upon

64 Perlin, God Said, supra note 34, at 510.
65 Perlin & Schriver, supra note 57, at 384.
66 Perlin, Supra note 2, at 133; Perlin & Cucolo, supra note 63, at 452.
68 See, e.g., Cucolo & Perlin, supra note 17, at 212. On how judges are particularly vulnerable to the use of heuristics; Harold J. Bursztajn et al., Kumho for Clinicians in the Courtroom, 24 MED. MALPRACTICE L. & STRATEGY, No. 2 (Nov. 2006), at 1, 6 (author of this paper is a co-author of the Bursztajn paper).
which rational choices should be made.”69 Similarly, “confirmation bias” informs us that “we focus on information that confirms our preconceptions,”70 the “hindsight bias” causes people “to hold decisionmakers legally liable for outcomes that they could not have predicted,”71 and the “availability heuristic” leads us to judge the probability or frequency of an event based upon the ease with which we recall it.72 The “meretricious allure of simplifying cognitive devices”73 “blinds us to ‘gray areas’ of human behavior.”74 Importantly, it is supported by “our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.”75

Consider how jurors perceive insanity defendants. Whether or not a defendant “drools” has acquired totemic significance in these sorts of cases. In the trial of Andrew Goldstein for the murder of Kendra Webdale (after whom New York's outpatient commitment statute, “Kendra's Law,” was named), jurors, who initially rejected Goldstein's insanity defense, “reported crediting testimony that Goldstein did not froth at the mouth or drool, and considered his lack of drooling significant to their responsibility determination.”76 The fact that most persons with severe mental illness do

69 Perlin, Borderline, supra note 34, at 1417.
72 Cucolo & Perlin, supra note 17, at 211 (citing to, inter alia, Jeffrey Rachlinski, Selling Heuristics, 64 ALA. L. REV. 389, 399-400 (2012)).
73 Perlin & Gould, supra note 56, at 446.
74 Perlin, Neonaticide, supra note 34, at 6; see also Perlin & Cucolo, supra note 63, at 452.
not comport with popular culture's depictions of “crazy people” increases the likelihood of teleological decision-making via the use of false OCS.

Again, I believe it is impossible to understand the textures of what I am discussing here without a consideration of these poisoning and corrupting factors. The “vividness” heuristic – a TV “action news” story that a juror saw about a defendant with a mental disability (a story that may or may not be true) – blocks the juror’s mind to actually listening to what the expert has to say. The juror’s non-reflective and false “ordinary common sense” (“this isn’t what a truly crazy person would do”) stops him from taking the expert seriously. And these cognitive errors are abetted by the sanist and pretextual stereotypes that are used regularly in our treatment of persons with mental disabilities, especially in the criminal trial process.

IV. The need for an additional expert

A second expert, though, could best address these stereotypes, these cognitive errors, these biases. S/he could explain the roots of this disordered thought (on the part of the fact-finders), demonstrate to jurors how sanist pretexts dominate their thought processes, and illuminate why reliance on heuristics and false “ordinary common sense” is inappropriate in these cases, as they “distort our abilities to rationally consider

77 Perlin, Unpacking the Myths, supra note 34, at 724: “To the lay person (the juror or the judge), the temporarily delirious patient ‘leaping over chairs and taking the broomstick to hallucinatory monsters’ [still] looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic” (citing Walter Bromberg & Harvey Cleckley, The Medico-Legal Dilemma: A Suggested Solution, 42 J. CRIM. L. & CRIMINOLOGY 729, 738 (1952)).

78 “When the defendant fails to exhibit any stereotypical behaviors (such as drooling, giggling, smiling with a vacant appearance, rocking), jury members may think that the mental retardation defense is untrue or unwarranted.” Michael L. Perlin, “Life Is in Mirrors, Death Disappears”: Giving Life to Atkins, 33 N. M. L. REV. 315, 335 (2003) (citing Denis Keyes et al., Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998)).

79 See, e.g., Perlin, Neonaticide, supra note 34, at 9 (discussing the stereotype of persons with mental illness as evil).

80 Dr. David Shapiro has speculated that this might, in itself, be a new area of forensic specialization. See E-mail from Dr. Shapiro to author, Wed., (May 8, 2019) (on file with author). Indeed, the American Psychology Association’s Specialty Guidelines for Forensic Psychology, section 2.05, states: “Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.” As I conceive of the role of the “second expert,” such individuals would do precisely this.
information.”81 This is especially important, given findings that, when an expert’s message is “difficult to comprehend or is complex, individuals rely on cognitive shortcuts or heuristics to evaluate the value of the communication.”82 This is especially important in cases where fact-finders rely on pre-existing (yet false) beliefs.83 Given the reality that “doctors do not always `strictly adhere to diagnostic criteria’ leaving their clinical


Cultural competency is critical in criminal forensic evaluations. Cultural competency eschews reliance on stereotypes, precluding the mistake of assuming that cultural dictates apply with equal force to all who share a cultural background, thus allowing the forensic examiner to provide a comprehensive picture of the defendant to the fact-finder.

On the interpretation of cultural issues in psychiatry in general, see ARTHUR KLEINMAN, PATIENTS AND HEALERS IN THE CONTEXT OF CULTURE (1980) (examining methods of healing throughout various cultures).
judgment ... affected by heuristics and biases," this becomes even more important.\(^{85}\)

Also, as we begin to learn more about the ambiguities inherent in what is called the “G2i [group-to-individual] problem” (the dilemma of applying group data to individual instances) in the context of expert psychiatric testimony,\(^{86}\) such testimony becomes even more essential.\(^{87}\) In an important G2i paper, Professors David Faigman, John Monahan, and Christopher Slobogin focus on four considerations that must be considered in the making of admissibility decisions about scientific evidence: (1) Relevance

\(^{84}\)Katie Manworren, The FAA’s Mental Health Standards: Are They Reasonable? 83 J. AIR L. & COM. 391, 409 (2018) (quoting, in part, Eva Charlotte Merten et al., Overdiagnosis of Mental Disorders in Children and Adolescents (in Developed Countries), CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 1, 2 (Jan. 17, 2017), accessible at https://capmh.biomedcentral.com/articles/10.1186/s13034-016-0140-5 [perma.cc/U4WZ-GB8B] (emphasis added)). We have known about how unconscious bias can infect forensic testimony for over 65 years. See Note, Psychiatric Assistance in the Determination of Testamentary Capacity, 66 HARV. L. REV. 1116, 1121 (1953). This bias persists today. See Sara Gordon, Crossing the Line: Daubert, Dual Roles, and the Admissibility of Forensic Mental Health Testimony, 37 CARDozo L. REV. 1345, 1381 (2016) (“Given the impact that unconscious bias can have on decision making, many mental health professionals believe that true objectivity among forensic mental health experts is an unrealistic expectation”).

\(^{85}\) Compare ambiguities inherent in the “G2i problem” with Busby v. State, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999) (if expert is appointed and defendant requests a different or additional expert, only proof that the trial court erred in finding the appointed expert sufficient will show Ake error; question was whether appointed mental health experts were also able to testify as drug abuse experts).


\(^{87}\) Whereas psychiatrists assess individual patients for purposes of making individual treatment decisions, courts are interested in assessing the psychological characteristics of individuals to aid legal decisionmakers in dispensing fair and just outcomes pursuant to applicable law. For psychiatric testimony to aid in this process, psychiatric experts must apply to individual defendants or litigants data that are derived from the study of groups in a valid manner, and judges must understand the predicates for the appropriate use of such data. We suspect that often neither of these desiderata are met when psychiatric testimony is introduced.

Id. at 689-90
or “Fit;” (2) Helpfulness; (3) Reliability and Validity; and (4) Unfair Prejudice. Certainly the fear of prejudice here is a real one.

Think again also about the holding in Ake that a criminal trial is “fundamentally unfair” unless a defendant has access to “the raw materials integral to the building of an effective defense.” Importantly, the Ake Court also stressed that, “through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense.” I believe that, without the sort of extra witness I urge here, it is impossible for the fact finder to actually make a “sensible and educated determination” about the case in question.

Subsequently, in McWilliams, the Court built on its Ake holding to explain that the defendant had the right to an expert to “translate these data [medical records, other doctors’ reports] into a legal strategy.” Importantly, here the Court noted that such an expert could have appropriately explained that the defendant’s “purported malingering was not necessarily inconsistent with mental illness.” It is counter-intuitive to the OCS of many – including many judges – but the reality is that there are

89 See id. at 472 (“When diagnostic testimony is at issue, the prejudice inquiry is a crucial tool for ensuring that expert testimony aids the adjudication process. This inquiry requires close attention to whether the testimony rests on a valid empirical framework that permits extrapolation to an individual case, as well as the extent to which the testimony departs from the diagnostic skills the expert is known to possess (as a result of proficiency testing or some other measure of validity”).
91 Id. at 80-81.
92 Id. at 80-81.
93 McWilliams v. Dunn, 137 S. Ct. 1790 (2017).
94 Id. at 1800.
95 Id.
multiple cases that involve defendants who, although feigning, are nonetheless severely mentally ill. An observation that must be read hand-in-glove with the reality that the "fear of faking" is significantly exaggerated. A hidden issue here is how clinicians may overdiagnose malingering in black defendants. An additional expert is critical to explain all of this, again, counter-intuitive and reliable empirical data.

The same factors can “play out” in cases involving juvenile sentencing. Although a series of US Supreme Court cases, relying on developments in neuroscience that counsel “toward a reconsideration of culpability as applied to juvenile offenders,” have made it clear that “children are

some cases almost obsessively, on testimony that raises the specter of malingering;” see Perlin, supra note 7, at 679, and id., n.287 (emphasis added) (citing cases).

97 Perlin, Borderline, supra note 34, at 1410-11. On how “people with real mental illness malingered,” see Christopher Slobovin, A Defense of the Integration Test as a Replacement for the Special Defense of Insanity, 42 Tex. Tech L. Rev. 523, 539 (2009). Again, counter-intuitively to those who rely on false OCS, a significant number of insanity defendants minimize their level of mental illness. See Linda S. Grossman & Orest E. Wasylkiw, A Psychometric Study of Stereotypes: Assessment of Malingering in a Criminal Forensic Group, 52 J. Personal. Assessment 549, 555 (1998) (22-39% of all insanity defendants studied showed evidence of minimizing their psychopathology); John H. Blume, Killing the Willing: "Volunteers," Suicide and Competency, 103 Mich. L. Rev. 939, 982 (2005) (defendants may also “malingering” when they are sick, often because they wish to avoid the stigma of mental illness). The additional expert could explain this – again dissonant with OCS – to the fact-finders. See also, Perlin, Borderline, supra note 34, at 1412 (quoting, in part, Dorothy Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am. J. Psychiatry 584, 588 (1988) (stating that death row juveniles “almost uniformly tried to hide evidence of cognitive deficits and psychotic symptoms”); Dorothy Onnow Lewis et al., Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 841 (1986) (stating that all but one of a sample of death row inmates studied attempted to minimize rather than exaggerate their degree of psychiatric disorders: “In reality, the empirical evidence is quite to the contrary: it is much more likely that seriously mentally disabled criminal defendants will feign sanity in an effort not to be seen as mentally ill, even where such evidence might serve as powerful mitigating evidence in death penalty cases. Thus, juveniles imprisoned on death row were quiet to tell Dr. Dorothy Lewis and her associates, ‘I’m not crazy,’ or ‘I’m not a retard’”).

98 On “the consensus of scholars that the public’s fears of fakery are exaggerated,” see Dora W. Klein, Memoir as Witness to Mental Illness, 43 Law & Psychol. Rev. 133, 147 (2018-2019). See Perlin, Borderline, supra note 34, at 1390 (“So much of the insanity defense debate is dominated by the fear of defendants faking so as to ‘beat the rap’”). On how “the ‘default drive’ of prosecutors is simply to argue that the defendant was faking or malingering,” see id., at 1405, and sources cited at id. n. 197. See generally, Henry F. Fradella, From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era, 18 U. Fla. J. L. & Pub. Pol’y 7, 12-13 (2007);


100 See e.g., Jenny E. Carroll, Brain Science and the Theory of Juvenile Mens Rea, 94 N.C.
constitutionally different from adults for purposes of sentencing.”\(^{101}\) the organized prosecutorial bar is clear in its skepticism of these developments in brain science.\(^{102}\) Again, additional expertise may be needed in such cases.

Also, nomenclature matters. Although the Supreme Court made it clear in \(\text{Hall v. Florida}\), some six years ago, that heretofore, it would use the phrase “intellectual disability” rather than “mental retardation” to conform with changes in the U.S. Code and in the most recent version of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-5),\(^{103}\) contemporaneous cases still use the discredited language.\(^{104}\) There are significant differences in the way these phrases are conceptualized and the attendant stigmas,\(^{105}\) and an additional expert may be required in cases in jurisdictions that have ignored the Supreme Court’s ruling on this matter as well.\(^{106}\)

The “additional” expert can also educate jurors about the pervasiveness of sanism, and he or she can explain why sanism may be driving their

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\(^{102}\) See Terry Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 NOTRE DAME L. REV. 89, 172 (2009), and id. n. 329, citing AM. PROSECUTORS RESEARCH INST., A PROSECUTOR’S GUIDE TO PSYCHOLOGICAL EVALUATIONS AND COMPETENCY CHALLENGES IN JUVENILE COURT 1, 18, 42-45 (2006) (presenting data with goal of disputing “sham mental defenses” and countering “disturbing” trend of using “expert testimony to excuse the dangerous and harmful behavior of youth”), as discussed in Michael L. Perlin & Alison J. Lynch, “Some Mother’s Child Has Gone Astray”: Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing, (manuscript in progress). See also, responding to the OCS- inspired rhetorical question, “Well, if this is so, what about all the juveniles who don’t commit crimes?”), Susan Frelich Appleton, Deanna M. Barch & Anneliese M. Schaefer, The Developing Brain: New Directions in Science, Policy, and Law, 57 WASH. U. J.L. & POL’Y 1, 5 (2018), positing “a dynamic framework in which brain development and social context, including peer associations, interact.”


decision-making.\textsuperscript{107} This sanism “distort[s] our abilities to consider information rationally,”\textsuperscript{108} and it is fatuous to think that jurors – or judges\textsuperscript{109} – will be able to figure this out on their own.

There is more (although this is focused more on the behavior of judges than on the behavior of jurors). There is no longer any question of the disparity in decision making in cases that focus on the rule in \textit{Daubert} cases:\textsuperscript{110} “in such cases, the prosecutor's position is sustained (either in support of questioned expertise or in opposition to it) vastly more often than is that of defense counsel’s.”\textsuperscript{111} This cannot be the result of random chance, and it is likely that Professor Susan Rozelle’s blunt assessment – “the game of scientific evidence looks fixed”\textsuperscript{112} – is, sadly, accurate. The “additional” expert can best explain this sort of teleological behavior to the court,\textsuperscript{113} teleology that has been noticed in at least one state Supreme Court opinion.\textsuperscript{114}

\textit{Daubert} was supplemented by the Supreme Court some six years later in the case of \textit{Kumho Tire Co. Ltd. v. Carmichael},\textsuperscript{115} so as to apply to

\begin{footnotes}
\item[109] See Perlin, \textit{supra} note 23, at 14 (footnotes omitted) (“Judges are not immune from sanism. ‘[E]mbdedded in the cultural presuppositions that engulf us all,’ judges express discomfort with social science (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective ‘ordinary common sense,’ both of which continue the myths and stereotypes of sanism,” quoting, in part, Anthony D’Amato, \textit{Harmful Speech and the Culture of Indeterminacy}, 32 WM. & MARY L. REV. 329, 332 (1991)).
\item[111] Perlin, \textit{supra} note 29, at 906-07; \textit{id.} at 907, n. 139, citing D. Michael Risinger, \textit{Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?}, 64 ALBANY L. REV. 99, 105-08 (2000). In sixty-seven cases of challenged government expertise, the prosecution prevailed in sixty-one of these. \textit{Id.} at 105. Out of fifty-four complaints by criminal defendants that their expertise was improperly excluded, the defendant lost in forty-four of these. \textit{Id.} at 106.
\item[113] Perlin, \textit{supra} note 10, at 82.
\item[114] See Edmonds v. State, 955 So. 2d 787 (Miss. 2007) (Diaz, P.J., specially concurring: “This case [presents] a disheartening example of the double standard applied to expert testimony in criminal cases”).
\item[115] 526 U.S. 137 (1999).
\end{footnotes}
clinical testimony as well as scientific testimony, mandating that an expert, “whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” ¹¹⁶ But, as Professor Michael Saks pointed out nearly twenty years ago, “one can never underestimate the ingenuity of judges in finding ways to evade rules that tell them to do something that would lead to a result contrary to the one suggested by their intuitions.” ¹¹⁷ It is precisely those “intuitions” (often, again, a false “ordinary common sense”) that concern me so. ¹¹⁸

A recent example: In 2018, the North Carolina Court of Appeals rejected testimony by a forensic psychologist on the “fight or flight” doctrine as such testimony would not have assisted the jury in a voluntary manslaughter case. ¹¹⁹ There, Dr. Amy James – whose testimony was excluded – had testified that scientific research about this phenomenon has been going on for ninety years and that there were “hundreds of studies” in the area. ¹²⁰ The court reasoned that the witness’s testimony “as an expert witness does not provide insight beyond the conclusions that jurors can readily draw from their own ordinary experiences in their own lives.” ¹²¹ In short, the Court rejected testimony based on reams of valid and reliable research (research that may have yielded findings dissonant with jurors’ false “ordinary common sense,” likely a substitution for the judges’ own “ordinary common sense.” ¹²²

¹¹⁶ Id. at 152.


¹²⁰ Id. at 840. See generally, WALTER B. CANNON, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RAGE: AN ACCOUNT OF RECENT RESEARCHES INTO THE FUNCTION OF EMOTIONAL EXCITEMENT (1915).

¹²¹ Thomas, 814 S.E.2d at 841 (emphasis added); For a comprehensive discussion of the physiology of the “fight or flight” response, see GEORGE S. EVELRY JR. & JEFFREY M. LATING, A CLINICAL GUIDE TO THE TREATMENT OF THE HUMAN STRESS RESPONSE 33-34 (3d ed. 2013), and Baicker-McKee, supra note 14, at 133-35, citing, inter alia, KEVIN T. PATTON & GARY A. THIBODEAU, ANATOMY AND PHYSIOLOGY 512-16 (9th ed. 2015).

¹²² See Michael L. Perlin & Naomi M. Weinstein, Said I, but You Have No Choice: Why a Lawyer Must Ethically Honor a Client's Decision about Mental Health Treatment Even If It is Not What S/He Would Have Chosen, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 73, 87-88 (2016) (discussing the self-referentiality and non-reflectivity of such alleged “ordinary
Some thirty years ago, Professors David Wexler and Robert Schopp urged the admission of expert testimony (and the promulgation of specific *jury instructions*) as “debiasing mechanisms” that would, optimally, counter the use of the hindsight bias in mental health malpractice litigation.\(^{123}\) Although the initial version of this article\(^{124}\) has been cited extensively in the legal literature,\(^{125}\) to the best of my knowledge, this specific recommendation has not been adopted by any court. I hope this article rekindles interest in that proposal.

A fascinating parallel change in criminal practice has recently been suggested by Professor Bruce Green, who argues that there should be two criminal defense lawyers. According to Professor Green:

This Article's proposed *disruptive innovation* is that indigent defendants be assigned two lawyers—each of whom would have primary responsibility for different functions. The “settlement lawyer” would take the lead outside judicial proceedings, undertaking responsibility for the counseling and negotiating roles. The “trial lawyer” would be the principal advocate. These roles correspond to the different but interconnected processes—plea bargaining and trial—by which most criminal prosecutions in the United States are resolved.\(^{126}\)

Professor Green identifies eight reasons why his recommendation makes sense: that it would lessen the likelihood that lawyers will encourage their clients to plead guilty without conducting a full investigation; that it would enhance accountability; that it would address the problem of the isolated and insular defense lawyer; that it would promote client trust; that it would obviate some of the limitations currently imposed on defense

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counsel; that it would enable each lawyer to truly focus on her specific role; that it may lead to improvements in procedural law and practice, and that it might expand the pool of lawyers interested in pursuing a career in criminal defense law. He concludes that, “perhaps one day, new thinking may lead to changes that realistically can be implemented to “disrupt” the indigent defense process for the better.”

Although the issues that Professor Green explores in his paper are not the same as the ones I am describing here, I believe that the innovation he recommends come from the same spirit that the one I suggest here does – to help reconceptualize the criminal trial in ways that are more sound and fairer to the defendant.

V. Therapeutic jurisprudence

I further believe that these reforms are required by the principles of therapeutic jurisprudence. Therapeutic jurisprudence recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences. It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles. Professor David Wexler clearly identifies how the inherent tension inherent in this inquiry must be resolved: “the law’s use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.” Therapeutic jurisprudence “look[s] at law as it actually impacts people's lives,” and it

127 Id. at 683-90.
128 Id. at 696.
131 Perlin, supra note 65, at 751. In my first article about therapeutic jurisprudence, I predicted that “therapeutic jurisprudence will also restructure the contours of forensic testimony as well as the contours of the relationship between fact-finders and expert witnesses.” Perlin, What Is, supra note 129, at 635.
133 Bruce J. Winick, Foreword: Therapeutic Jurisprudence Perspectives on Dealing with
supports “an ethic of care.”\textsuperscript{134} It attempts to bring about healing and wellness,\textsuperscript{135} and to value psychological health.\textsuperscript{136} Importantly, therapeutic jurisprudence is concerned with the way that legal rules and procedures are applied by expert witnesses.\textsuperscript{137}

I have written elsewhere about how TJ can redeem a heuristics-driven jurisprudence,\textsuperscript{138} and have talked about how the TJ filter “can be used to shine light on the presence of sanism and pretextuality and the false use of OCS” in considerations of sex offender law and many other areas of forensic mental disability law.\textsuperscript{139} Recently, I concluded that judges often “decide cases teleologically, taking refuge—perhaps unconsciously—in time-worn heuristics that appeal to their own distorted ‘ordinary common sense’.”\textsuperscript{140} I believe that the reform I suggest in this paper might be a way to help end—or at least, limit—these distortions.\textsuperscript{141}

At the least, if the additional expert can explain cogently to jurors why they take refuge in groundless stereotypes, closing their eyes to valid and reliable research,\textsuperscript{142} it is more likely that there will be at least a modest


\textsuperscript{135} Id., citing Bruce Winick, \textit{A Therapeutic Jurisprudence Model for Civil Commitment, in Involuntary Detention and Therapeutic Jurisprudence: International Perspective on Civil Commitment} 23, 26 (Kate Diesfeld & Ian Freckleton eds., 2003).

\textsuperscript{136} Id.


\textsuperscript{138} See Michael L. Perlin, “‘They Keep It All Hid’: The Ghettoization of Mental Disability Law and Its Implications for Legal Education,” 54 \textit{St. Louis U. L. J.} 857, 876 (2010).

\textsuperscript{139} Michael L. Perlin & John Douard, “Equality, I Spoke That Word/As If a Wedding Vow”: \textit{Mental Disability Law and How We Treat Marginalized Persons}, 53 \textit{N.Y.L. Sch. L. Rev.} 9, 28 (2008-09); see also, Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, “Some Things are Too Hot to Touch”: \textit{Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses}, 35 \textit{Touro L. Rev.} 405, 410 (2019) (“TJ is the vehicle through which we can best understand the pernicious power of OCS”).

\textsuperscript{140} Perlin, supra note 10, at 103.

\textsuperscript{141} Professor Amy Ronner relies on TJ principles in urging the admission of testimony to “inform the judge of the psychological effect of interrogation on a youthful offender and apprised him or her of the empirical studies showing that juveniles tend to misunderstand and waive their \textit{Miranda} rights,” Amy D. Ronner, \textit{Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles}, 71 \textit{U. Cin. L. Rev.} 89, 113 (2002).

\textsuperscript{142} On this specific issue in neonaticide, cases, see Perlin, \textit{Neonaticide}, supra note 34, at 29 (“While mental disability law jurisprudence and insanity defense jurisprudence are incoherent, neonaticide jurisprudence is especially incoherent. We take refuge in a sanism-drenched, false and distorted OCS, and we use this to inherently rationalize self-
“uptick” in verdicts based on the actual evidence and not on bias and stereotype. As I have discussed here and elsewhere, so much of this bias is unconscious.\footnote{143}{We are beginning to look at unconscious bias in related areas of mental disability law. By way of example, on how unconscious bias leads clinicians to over predict future dangerousness in cases involving African-American individuals subject to involuntary civil commitment, see Perlin & Cucolo, \textit{supra} note 62, at 439 n. 49, citing Sandra Graham & Brian S. Lowery, \textit{Priming Unconscious Racial Stereotypes About Adolescent Offenders}, 28 \textit{L. & Hum. Behav.} 483, 499-501 (2004); James Hicks, \textit{Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?} 32 \textit{J. Am. Acad. Psychiatry & Law} 21, 23 (2004). \textit{See also}, Gordon, \textit{supra} note 83, at 1378 n. 198, quoting Adam J. Goldyne, \textit{Minimizing the Influence of Unconscious Bias in Evaluations: A Practical Guide}, 35 \textit{J. Am. Acad. Psychiatry & L.} 60, 60 (2007) (“Emotions such as anger, pity, guilt, affection, resentment, disdain, humiliation, and others may give rise to unconscious motivations that conflict with the motivation to be objective.”).} Of course, unconscious bias permeates other areas of judicial decision-making as well,\footnote{144}{\textit{See e.g.}, Perlin & Weinstein, \textit{supra} note 115, at 82, (“Decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making.”).} but it remains so much more hidden here,\footnote{145}{Not insignificantly, I believe the biases also remain hidden in the legal academy. See Perlin, \textit{supra} note 131, at 876. \textit{See generally}, PERLIN, \textit{HIDDEN PREJUDICE}, \textit{supra} note 1.} making the need for the additional expert even more urgent.

In an earlier paper – dealing with jurors’ attitude towards neuroimaging testimony – I concluded that, “If an indigent criminal defendant is refused access to an independent expert in an area where juror OCS may lead to uncritical acceptance of neuroimaging testimony (because of its visual appeal and its apparent lack of falsifiability), the fairness of the entire trial remains, to me, in question.”\footnote{146}{Michael L. Perlin, \textit{“And I See Through Your Brain”}: \textit{Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process}, 2009 \textit{Stanford Technol. L. J.} 1, * 46 (footnote omitted). On falsifiability in the context of \textit{Daubert} inquiries, \textit{see e.g.}, Barbara Pfeffer Billauer, \textit{Admissibility of Scientific Evidence under Daubert: The Fatal Flaws of Falsifiability and Falsification}, 22 \textit{B.U. J. Sci. & Tech. L.} 21 (2016).} I believe that this same variable – the fairness of the trial – comes into play in all of the areas of forensic mental health law/criminal procedure that I am discussing in this paper.

It is inconsistent with fact-finders’ “ordinary common sense” that an authentically mentally ill person might still appear to be malingering; as I noted previously, the \textit{McWilliams} court understood this, and saw the need for contradictory and pretextual social policies and legal decisions. We do this blindly and with little consideration for the implications of what we do.”).
for an expert to explain this to a jury. What I am urging in this paper is totally consistent with this aspect of McWilliams.

With my colleague, Professor Heather Ellis Cucolo, I have previously argued, in the context of sexually violent predator cases, that “lawyers need to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; recognition of when an expert witness is needed; and the overwhelming potential for bias (making the ideal of a fair trial even more difficult to accomplish),” and that these requirements “demand... a TJ approach to representation.” What I am urging here goes beyond the examination and the cross-examination of the expert retained or assigned to evaluate the individual before the court; rather, I urge the addition of an expert to better explain and contextualize to the fact-finder, basically, what is going on in the entire enterprise, and why the fact-finders’ data-base is likely to be deeply poisoned.

147 McWilliams v. Dunn, 137 S.Ct.1790, 1792 (2018).
148 Cucolo & Perlin, supra note 28, at 322. See also, Heather Ellis Cucolo & Michael L. Perlin, “Far from the Turbulent Space”: Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators, 18 U. PA. J. L. & SOC. CHANGE 125, 167 (2015) (“[The] variables that make SVPA litigation different—the need for lawyers to be able to understand, contextualize and effectively cross-examine experts on specific actuarial tests; the need for lawyers to recognize when an expert witness is needed to rebut the state’s position, and the need for lawyers to understand the potential extent of jury bias (making the ideal of a fair trial even more difficult to accomplish)—all demand a TJ approach to representation and to litigation.”).

In most jurisdictions, SVPA determinations are bench trials, but there are also states in which juries are empaneled. See, e.g., State v. Rosado, 889 N.Y.S.2d 369 (Sup. Ct. 2009); People v. Burroughs, 6 Cal. App. 5th 378, 2016 WL 7048701 (2d Dist. 2016); In re Care and Treatment of Sporn, 215 P.3d 615 (Kan. 2009). In at least one state, courts have ruled specifically that there is no right to a jury trial in such matters. See In re Commitment of R.S., 773 A. 2d 72 (N.J. App. Div. 2001).


150 Faith in counsel’s abilities in such cases is sadly misplaced. See generally, Perlin, Harmon & Chatt, supra note 2, at 304 (“The data demonstrates, beyond doubt, that the
This is even more urgent in SVPA cases in jurisdictions in which there is no right to counsel (based on the pretext that such matters are civil, not criminal).\textsuperscript{151} In a recent article with Professor Cucolo, I stressed that we must discuss that right “in combination with the quality of counsel and her resources and knowledge in this area of the law.”\textsuperscript{152} Given the level of inadequacy of counsel in criminal cases involving defendant with mental disabilities in general,\textsuperscript{153} it is – to put it plainly – preposterous to assume that uncounseled defendants can do the sort of adequate cross-examination Justice White presumed in Barefoot.\textsuperscript{154} Elsewhere, in writing about the death penalty in the context of therapeutic jurisprudence, one of my final recommendations called for a “serious reevaluation of the roles of expert witnesses in testifying to 'future dangerousness' in death penalty cases.”\textsuperscript{155} Certainly, adoption of my proposal would make this reevaluation more likely.

**CONCLUSION**

This proposal will also make it less likely that “junk science” will further contaminate the legal process.\textsuperscript{156} As a colleague and I wrote recently, *Strickland* test has failed miserably as an aspirational bulwark, and that, due to inadequate counsel, defendants with serious mental disabilities continue to have death sentences upheld and, in some cases, be executed. To say that *Strickland* ultimately protects defendants is the ultimate pretext.


\textsuperscript{152} Cuolo & Perlin, supra note 141 at 137.

\textsuperscript{153} See Perlin, Harmon & Chatt, supra note 2.

\textsuperscript{154} See Perlin, supra note 3, at 111, citing, in part, Paul Appelbaum, The Supreme Court Looks at Psychiatry, 141 AM. J. PSYCHIATRY. 827, 831 (1984), (“Barefoot appears to be indefensible on evidentiary grounds, on constitutional grounds and on common sense grounds. It flies in the face of virtually all of the relevant scientific literature. It is inconsistent with the development of evidence law doctrine, and it makes a mockery of earlier Supreme Court decisions cautioning that extra reliability is needed in capital cases. In the words of Dr. Paul Appelbaum, it is an example of "tortuous [reasoning] in the extreme," reflecting "factual inconsistency in the service of a transcendent ideological goal.”).

\textsuperscript{155} Perlin, supra note 4, at 1457.

\textsuperscript{156} On Dr. Grigson’s use – see supra note 54 – of “junk science” as the basis of his opinions,” see Perlin, supra note 4, at 1440.
“scientific discovery moves faster than the law, and it is critical to make sure that the legal system is given an opportunity to catch up, rather than risk allowing ‘junk science’ to influence how a defendant is treated.”

I believe this proposal also “fits” well with the recommendations recently made by Professor Aliza Kaplan and attorney Janis Puracal who proposed “a specialized role of forensic resource counsel.”

Significantly, in discussing why cross-examination alone cannot be a panacea, the authors underscore: “attorneys could be better trained to recognize evidence that is scientific in nature and offer rebuttal experts, rather than relying exclusively on cross-examination.”

My paper title includes a lyric of Bob Dylan’s, from the final verse of his anthemic song My Back Pages. This is the verse in its entirety:

Yes, my guard stood hard when abstract threats too noble to neglect
Deceived me into thinking I had something to protect
Good and bad, I define these terms quite clear, no doubt, somehow
Ah, but I was so much older then I'm younger than that now.

Our reliance on heuristics and false ordinary common sense does deceive us into thinking we have “something” (society) to protect (from “them,” criminal defendants with mental disabilities). The threats to the integrity of the judicial system and the criminal process are far from

157 Perlin & Lynch, supra note 60, at 312.

• assembling commissions to review forensics in the state;
• proposing and appearing as amicus in hearings before special masters to explore advances in forensic methodologies and necessary changes in the law;
• collaborating with forensic resource counsel, lawyers, and experts in other states to find independent scientists who can further the research and assist with facilitated conversations for prosecutors, defense counsel, and judges;
• offering amicus briefing to educate trial and appellate judges; and
• offering seminar trainings for prosecutors, defense counsel, and the judiciary.”

159 Id. at 935 (emphasis added).
160 See https://www.bobdylan.com/songs/my-back-pages/. I have drawn on this song several times before, including once from this verse. See Michael L. Perlin, “‘Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow’: Neuroimaging and Competency to be Executed after Panetti, 28 BEHAV. SCI. & L. 671 (2010). I find it incredulous that there may be a reader of this paper who does not know this song, but, if so, go to 3:39 of https://www.youtube.com/watch?v=rGEIMCWob3U, to hear George Harrison sing this verse (in the best cover, ever, of a Bob Dylan song, from Dylan’s 30th Anniversary Concert, October 1992).
“abstract.” They are real. I believe that it is only through the reform I suggest here that this situation can be ameliorated.