

# Data on Evaluations as a Foundation for States Rethinking Competency to Stand Trial

Hallie Fader-Towe, JD, and Debra A. Pinals, MD

Competency to stand trial policies and processes vary significantly across jurisdictions, and, increasingly, state policymakers are looking for ways to improve their efficiency, equity, and effectiveness. This commentary describes the importance of certain data, including the number of evaluations ordered, to inform state policymaking, drawing on the strategies highlighted in a recently released guide for policymakers, *Just and Well: Rethinking How States Approach Competency to Stand Trial*.

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The critical importance of defendants' competence to stand trial (CST) is well-recognized as a component of due process in constitutional law. Yet, despite the clarity of the constitutional principle, the systems in place to understand whether defendants are competent to stand trial and then, if necessary, provide restoration services are anything but clear. States across the country are realizing that the very approach put in place to ensure defendants' due process is actually jeopardizing it through time-consuming processes and overwhelmed systems. Around the country state mental health directors, local judges and state court leaders, disability rights groups, and other stakeholders are engaged in intensive discussions related to the management of forensic cases and processes. Although CST figures prominently in the national discourse, there are still many underexplored aspects of CST relevant to policymakers, including the most basic of questions such as the number of evaluations that are conducted annually. In this issue of *The Journal*, Morris *et al.* discuss efforts to

quantify the number of competency evaluations while offering potential strategies to improve future data collection.<sup>1</sup> This commentary expands on the role that accurate data about evaluations can play in improving state and local policymaking at the intersection of criminal justice and behavioral health. It also draws from perspectives that were developed in the publication, *Just and Well: Rethinking How States Approach Competency to Stand Trial*.<sup>2</sup>

From our work in and for state governments, we see how CST has become an important lens into both the challenges and the opportunities that exist at the intersection of mental health and the criminal-legal system. In recent years, state-level reports and task forces have sought to address concerns about increasingly crowded and delayed CST processes in numerous states. Since 2018, 13 states volunteered to participate in a virtual peer learning Community of Practice series hosted by the Substance Abuse and Mental Health Services Administration's GAINS Center for Behavioral Health and Justice Transformation following the elevation of CST as a priority by the federal Interdepartmental Serious Mental Illness Coordinating Committee.<sup>3</sup> Recommendations on CST were one of the policy areas canvassed in the 2020 report by the President's Commission on Law Enforcement and the Administration of Justice.<sup>4</sup>

Yet, with all this attention on an important area, Morris *et al.* point out the limited data available to facilitate problem solving based on data. Stakeholder

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Ms. Fader-Towe is a Program Director in the Behavioral Health Division at the Council of State Governments Justice Center, New York, NY. Dr. Pinals is Clinical Professor of Psychiatry and Director of the Program in Psychiatry, Law and Ethics at the University of Michigan, Ann Arbor, MI, and Medical Director of behavioral health and forensic programs for the Michigan Department of Health and Human Services, Ann Arbor, MI. Address correspondence to: Hallie Fader-Towe, JD. E-mail: HFader@csg.org.

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task forces, testimonials, media accounts, and court cases indicate the growing pressures on CST processes related to backlogs in local jails as people await evaluation and restoration services. Designed to protect a specific due process right (that all citizens are ensured adequate assistance to counsel) for a limited number of cases, many CST processes are now, somewhat ironically, becoming due process violations themselves.

As Morris *et al.* note, several circumstances have also made accurate accounting and research on CST a critical concern for policymakers who may have previously been reluctant to delve into something that many may initially see as a niche area.<sup>1</sup> For one thing, national media coverage has recently highlighted truly tragic stories of people enmeshed in CST processes for minor offenses and the cascade of damage caused. These stories describe the heartbreak and confusion that come with being in a CST process while not being provided with transparent and clear expectations and highlight the seemingly endless circuits among jail, state hospitals, and the courts.<sup>5,6</sup>

States and local governments are also being pushed to reexamine CST for legal and fiscal reasons. The U.S. Supreme Court found decades ago that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed” (Ref. 7, p 738). Yet not all states have established or are meeting time limits for confining individuals at various stages of the competency to stand trial process. States have legislated or are finding out in court what this “reasonable” period should be. In the best-known example, Washington State was ordered to comply with its own statute’s requirements and provide competency evaluations within 14 days and restoration services within seven days of a court order and has accrued over \$100 million dollars in fines for being in contempt of this order.<sup>8</sup> Numerous states, at least a dozen by our count, have also faced or are facing similar lawsuits.

In addition, as Morris *et al.* note, CST is expensive.<sup>1</sup> Although average daily costs for people with mental health needs or intellectual and developmental disabilities in jail and in state hospitals vary from place to place, they are often more expensive than daily costs for community-based treatment and housing. The cost of forensic evaluators, attorneys and court resources, and transportation only add to the

CST bill, but the expenses are paid from different accounts, thus the total cost to the taxpayer may get lost.

In the last couple of years, awareness of this crisis has led to scholarship and the development of policy recommendations for all three branches of state government to examine a range of assumptions relevant to competence to stand trial. The National Association of State Mental Health Program Directors Research Institute, Inc. (NRI), for example, has put together several research documents using state data to examine the competency system,<sup>9</sup> as well as ways that states are developing alternative models within the competency system.<sup>10</sup> A pair of articles was also published in *Psychiatric Services* in 2020 synthesizing challenges to advancing policymaking on this topic and identifying opportunities to expand thinking about diversion throughout the CST process.<sup>11,12</sup> Also in 2020, the Conference of Chief Justices and the Conference of State Court Administrators established the National Judicial Task Force to Examine State Courts’ Response to Mental Illness and prioritized CST as one of its first areas of examination and development of policy recommendations.<sup>13</sup>

With this momentum in mind, The Council of State Governments Justice Center brought together policymakers from all three branches of state government, researchers, people with firsthand experience in CST, and practitioners to describe the state of the field nationally and develop practical recommendations for states. The resulting report, *Just and Well: Rethinking How States Approach Competency to Stand Trial*,<sup>2</sup> was released in the fall of 2020. Developed in partnership with the American Psychiatric Association Foundation (which jointly leads the Judges and Psychiatrists Leadership Initiative with The Council of State Governments Justice Center), the National Association of State Mental Health Program Directors, the National Center for State Courts, and the National Conference of State Legislatures, the report sought to improve understanding of the CST process and offer strategies to help states realize a new vision for CST.

The report articulated a vision for an ideal CST process that plays a discrete, more limited, role at the intersection of behavioral health and criminal justice. In this vision, the CST process would be used only where the criminal justice system had a strong interest in restoring competency so that a person may proceed to face criminal charges. Otherwise,

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**Table 1** Rethinking Competency to Stand Trial: The Just & Well Strategies

Strategy 1	Convene diverse stakeholders to develop a shared understanding of the current CST process
Strategy 2	Examine system data and information to pinpoint areas for improvement
Strategy 3	Provide training for professionals working at the intersection of criminal justice and behavioral health
Strategy 4	Create and fund a robust system of community-based care and supports that is accessible for all before, during, and after criminal justice contact
Strategy 5	Expand opportunities for diversion to treatment at all points in the criminal justice system, including after competency has been raised
Strategy 6	Limit the use of the CST process to cases that are inappropriate for dismissal or diversion
Strategy 7	Promote responsibility and accountability across systems
Strategy 8	Improve efficiency at each step of the CST process
Strategy 9	Conduct evaluations and restoration in the community, when possible
Strategy 10	Provide high-quality and equitable evaluations and restoration services, and ensure continuity of clinical care before, during, and after restoration and upon release

dismissal or diversion could serve to connect people with needed treatment and supports in the community. Indeed, a more robust community-based system of care and supports (such as housing) is a critical component of this vision, both to reduce the risk of any justice system involvement and serve as a viable alternative to incarceration. Where justice does demand that a person be restored to competency to face charges, the ideal system would draw from experience across the country to improve efficiency, effectiveness, and equity. To move toward this vision, *Just and Well* includes 10 practical strategies for state policymakers (see Table 1). The improved data that Morris *et al.* describe are a critical component to these strategies.

As a first step, we recommend the importance of mapping existing CST processes to help all stakeholders understand relevant policies and practices that can help inform where there may be aspects that can be improved. Often judges, attorneys, jail administrators, forensic examiners, state hospital administrators, community-based treatment providers, and people with direct experience with CST only see and understand parts of the whole. For this reason, the first recommendation in *Just and Well* is to convene diverse stakeholders to develop a shared understanding of the current CST process (see Table 1, Strategy 1). This approach can serve as the critical groundwork needed to develop a shared sense of responsibility and accountability across systems (see Table 1, Strategy 7).

Without this common understanding of local processes and how they aggregate into state processes, it is difficult to even know whom to approach to examine system data and information to pinpoint areas for improvement (see Table 1, Strategy 2). In addition to counting the number of evaluations, we

recommend looking at data about individual demographics, process duration, and outcomes to help understand the costs of the status quo and identify places for potential policy improvements.

Examining the number of evaluations being conducted opens understanding about the resources that are and should be dedicated to local and state CST processes, as noted by Morris *et al.* The number of evaluations ordered over time helps illustrate the need for forensic evaluators, court time, and potentially jail time if people are detained awaiting evaluation. It also may highlight needed treatment services for individuals within the competency processes for whom access to psychiatric medications and other supports may be critical, whether they are in jail, in state hospitals, or in the community (see Table 1, Strategy 4). Specifically, most defendants found incompetent to stand trial have some type of mental illness that can benefit from treatment, and the setting in which that treatment takes place may or may not be equipped to manage their symptoms. By understanding case volume, policymakers and funders can plan for appropriate service delivery. The Washington State Department of Social and Health Services demonstrates the value of this type of accounting that Morris *et al.* recommend; clear charts on the department's website illustrate both the number of evaluations ordered each year, and by order type over time, and help tell the story of what has helped create diversion programs that offer robust services to help meet class member needs.<sup>8</sup>

A better understanding of the number of evaluations can also offer insight into the need for policy change. Analyses of evaluation demographic data have helped illuminate the disturbing finding that black and Hispanic people were more

likely than white people with similar charges and diagnoses to be sent for inpatient evaluation in a strict-security facility (compared with less secure settings).<sup>14</sup> Although more research is needed on questions pertaining to race and equity within forensic processes, data related to individuals in the competency systems can help stakeholders look further into policies and practices that may be leading to structural disparities and differential outcomes and identify ways to better ensure equity in access to care and treatment of individuals in need (see Table 1, Strategies 5 and 10).

Improved data about evaluation orders may prompt rethinking which cases are sent for competency evaluation in the first place. Some states participating in a Midwest learning collaborative noted that a large number of evaluations were ordered for misdemeanors and low-level offenses, prompting conversations about whether there is a better way to serve justice than sending an accused person through the CST process (unpublished report available from authors).<sup>15</sup> Hawaii recently passed legislation to change its processes for low-level cases based on a similar analysis.<sup>16</sup> Judicial perceptions of these processes were recorded in another study by NRI that commented on these concerns.<sup>17</sup> Additional analyses of evaluation orders by individual can document what many practitioners and family members observe: that the same person may be evaluated and restored multiple times, even within the same case. For example, Colorado found not only that more than 500 CST referrals in one year involved people who had previously received competency-related services, but also that this number had more than doubled over the past six years.<sup>18</sup> (see Table 1, Strategy 6).

Analyses of evaluations across jurisdictions within a state may find differences in practice that prompt important conversations about the underlying causes of these differences, leading to potential policy and practice changes and identification of training needs (see Table 1, Strategy 3). For example, analyses of orders for evaluation by jurisdiction shed light on differences in local court practice in Minnesota, providing fodder for discussions about whether these differences are justified, or changes should be sought.<sup>19</sup> Similarly, comparisons of evaluation outcomes across jurisdictions within Virginia illuminated the potential need for additional standardization of evaluation approaches and training.<sup>20</sup>

When CST is necessary, understanding the number of evaluations can help policymakers develop new, realistic timeframes that fit the local structures and capacities and encourage efficiency (see Table 1, Strategy 8). This can often mean switching to conducting evaluations and restoration in the community (see Table 1, Strategy 9), or even identifying opportunities to move cases into community-based diversion. It is important, however, that timeframes and other “bright line rules” be developed mindful of preventing potential perverse incentives; for example, a rule that automatically transfers responsibility to another agency after a given time may incentivize delay by those seeking to avoid responsibility and costs.

The fragmentation of data about CST evaluations is understandable given the fragmentation among interested stakeholders and differences across jurisdictions. These are numbers that state and local policymakers need now, particularly given the unprecedented disruptions to mental health and criminal justice in 2020, which only amplified troubling trends and concerns about disproportionately routing individuals with mental illness, intellectual and developmental disorders, and other conditions into criminal legal processes.

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