THE NOT-SO GOLDEN YEARS: ADDRESSING THE SHORTCOMINGS OF THE CRIMINAL JUSTICE SYSTEM WITH REGARD TO INDIVIDUALS WITH DEMENTIA

Ryder Needham[*]

ABSTRACT

As the average life expectancy in our society continues to rise, there is an increasing prevalence of dementia and other neurological disorders that develop in elderly populations. In some instances, these diseases can lead to severe confusion, and individuals diagnosed with them can break the law because of said confusion. However, because these elderly individuals cannot be deemed competent to stand trial, their charges are often dropped, and they are released to return to their lives. When they have proper guardianship in place, this is a good thing. They will receive the appropriate care and treatment, and someone will be present to ensure they are not a danger to themselves or others. Although, a more serious issue arises when there is no guardianship in place and the individual has no structure or care. There are currently two approaches that Texas can take with regard to incompetence in the criminal setting. The first involves instances in which the defendant is diagnosed with a mental illness, and the second requires that the individual has an intellectual disability. However, there is currently no authority on the steps required when an individual with dementia commits a crime but is incompetent to stand trial.

This Comment focuses on providing steps that a criminal court in Texas may take to ensure the individual with neurological impairment, like dementia, is placed in the best situation to ensure their safety while an appropriate decision is made regarding their long-term treatment. This satisfies the purpose of the criminal justice system while also providing proper care to the individual.

---

* Ryder Needham, Staff Editor, Texas Tech Estate Planning and Community Property Law Journal; J.D. Candidate 2026, Texas Tech University School of Law. The author would like to thank his parents, Sean and Lark Needham, for their unwavering support and encouragement. The author would also like to thank Professor Gerry Beyer, Professor Brian Shannon, Professor Bill Keffer, Professor Brie Sherwin, Josh Mendez, Caden Jackson, and his fellow EPJ Staff Editors for all their advice and assistance in making this possible. Finally, the author wishes to thank Rickie Redman for her insight and mentorship during the comment writing process.

I. INTRODUCTION

A hallmark moment in many peoples' young lives is time spent with their grandparents.[1] Of course, these are not only special moments for the

1. Sandy Brannan, *The Memories We Make with Grandparents are Priceless*, HER VIEW FROM HOME, https://herviewfromhome.com/memories-with-grandparents/?srsltid=AfmBOorXXYBgXjh0PWT00jn4ONTBvcLjj94HoOnnlne6ZrTim09qni5k (last visited Dec. 13, 2024) [https://perma.cc/4JRY-5D3M].

grandchildren but for the grandparents as well.[2] However, many understand the gravity of having these precious moments tarnished by the decreased understanding of self often seen in dementia.[3] By nature, dementia is a degenerative disease that shreds away precious pieces of the brain, little by little.[4] In many cases, this places a difficult burden on the loved ones of the diagnosed individual because it requires them to step into a caregiver role for someone who had always been the one giving the care.[5]

Even more troublesome, though, are the potential outcomes that can occur when an individual does not have a loved one or guardian to provide proper care after a dementia diagnosis.[6] In these circumstances, individuals not only have to deal with the confusion and frailty that comes with dementia but they must to do so alone.[7] Typically, this provides a less than ideal situation for the individual because they may not receive the proper treatment or be able to care adequately for themselves.[8] Specifically, the dementia patient can be even more susceptible to falls and can struggle greatly caring for themselves or accomplishing day to day tasks.[9] Individuals left alone in these situations can regress even faster and may develop more severe symptoms.[10] As their condition worsens, the risk for confusion and wandering becomes even greater as well.[11]

Of course, these instances can lead to a violation of socially accepted norms.[12] The confusion and wandering may lead to a scenario where an individual violates the law because they do not understand the circumstances they are in or what is happening.[13]

The following hypothetical describes one such scenario: Jenny is a seventy-three-year-old widow living in rural Texas on the same piece of land that her father bought in 1925.[14] For most of her life, Jenny was accompanied by her late husband, Jethro.[15] However, five years ago Jethro was diagnosed

---

2. *Id.*

3. *See Laury's Story: 'Mum Became Utterly Lost in the Fog of Her Own Mind,'* ALZHEIMER'S SOC'Y (Sept. 20, 2019), https://www.alzheimers.org.uk/blog/laurys-mum-became-lost-in-fog-her-own-mind [https://perma.cc/8NCJ-SVL3].

4. *See What is Dementia?*, ALZHEIMER'S ASS'N, https://www.alz.org/alzheimers-dementia/what-is-dementia? (last visited Dec. 13, 2024) [https://perma.cc/55DH-LX24].

5. *See Laury's Story: 'Mum Became Utterly Lost in the Fog of Her Own Mind,' supra* note 3.

6. *See* Suzanne Leigh, *Caution: Living Alone Puts People with Cognitive Decline at Risk*, UCSF (Aug. 18, 2023), https://www.ucsf.edu/news/2023/08/425996/caution-living-alone-puts-people-cognitive-decline-risk [https://perma.cc/653S-WGP2].

7. *See id.*

8. *See id.*

9. *See id.*

10. *See* Benjamin A. Shaw et al., *Living Alone During Old Age and the Risk of Dementia: Assessing the Cumulative Risk of Living Alone*, 78 J. GERONTOLOGY 293, 293 (2023).

11. *See id.*

12. Madeleine Liljegren et al., *Criminal Behavior in Frontotemporal Dementia and Alzheimer Disease*, 72 JAMA NEUROLOGY 295, 301–02 (2015).

13. *See id.*

14. Author's original hypothetical.

15. *Id.*

with bladder cancer and eventually succumbed to his diagnosis three years later.[16] Jethro left everything to his wife to ensure that she always had enough to care for herself properly.[17] This was not the only tragedy in Jenny's life, her only son was killed in a tragic car accident when he was only nineteen years old.[18] In spite of this, Jenny has continued to live in the same house and carry on about her normal routine in the town where she grew up.[19]

In the past few years, Jenny has found it more and more difficult to keep up her day-to-day life.[20] She often misplaces things and finds herself in the middle of tasks that she does not remember starting.[21] To make things more difficult, most of the friends that Jenny had in town have moved away or passed, leaving Jenny to sit alone in her home for the majority of the time.[22] This only added to the regression of her mental state and caused her to wander from her home every now and again.[23]

Last month, Jenny wandered through town for many hours in a state of confusion, having no idea where she was or how to get home.[24] Eventually, she made her way to her old friend Gladys's house that was located just south of the town square.[25] Jenny walked inside and sat on the couch waiting for Gladys to return so the two could talk.[26] However, Gladys has been dead for the last seven years.[27]

Eventually, when the new owners of the home returned they discovered Jenny in a frightened state sitting in their living room.[28] Jenny was adamant that her friend Gladys would return home and refused to leave, no matter how many times the true owners tried to convince her otherwise.[29] Seeing no end to the argument, the owners called the police and had Jenny removed.[30] The officers, knowing Jenny as a longtime resident of the town, took her home and made sure she was comfortable before leaving.[31] This cycle continued for the next several weeks.[32] Each time Jenny wandered to the home of her friend, she became more and more defiant and argumentative.[33] As a result, the new owners filed a criminal trespass charge on Jenny to ensure that she

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

could no longer step foot on the premises.[34] When she inevitably returned, she was arrested and taken to jail.[35]

The prosecutor, recognizing that Jenny had no understanding of where she was or why she was there, raised the issue of competency to the court.[36] After a licensed physician conducted an analysis, it was determined that Jenny suffered from Alzheimer's disease and lacked the competency to stand trial.[37] Seeing no alternative, the prosecutor dropped the charges and returned Jenny to her home.[38] The defense attorney assigned to represent Jenny understood that this could happen again if Jenny was not properly monitored and cared for.[39] However, Jenny lacked relatives and had lost all individuals who would be willing to serve as her guardian.[40] Furthermore, even though she had assets at her disposal, she was not competent or dependent enough to set herself up in a nursing facility.[41] Instead, the cycle of confusion and criminal trespass continued.[42]

Although this hypothetical situation may seem minor and harmless, it serves to highlight a shortcoming of the Texas criminal justice system when dealing with individuals who lack the capacity to understand the gravity of their actions as a result of a dementia diagnosis.[43] It has recently come to the attention of society that "the criminal justice system lacks a consistent approach for screening older offenders for dementia," and Texas is not the only state with this shortcoming.[44] In Texas, the Code of Criminal Procedure—with reference to the Health and Safety Code—currently provides steps for resolving issues involving individuals who are deemed incompetent to stand trial for other diagnoses, but it is silent regarding individuals who receive a dementia diagnosis.[45] This Comment focuses on addressing that shortcoming and provides a potential solution in the form of a statutory proposal to expand the scope of the Texas Code of Criminal Procedure.[46]

Part II of this Comment discusses the growing prevalence of dementia in society and how this problem will likely only continue to grow over the

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *See* David Godfrey, *The Experience of Persons with Dementia in the Criminal Legal System*, 43 BIFOCAL 109, 111 (2022).
44. Jessica Wapner, *What Happens when People with Dementia Commit Crimes?*, SCI. AM. (Sept. 1, 2023), https://www.scientificamerican.com/article/what-happens-when-people-with-dementia-commit-crimes/ [https://perma.cc/66AP-JBHL].
45. TEX. CODE CRIM. PROC. ANN. §§ 46B.102-103.
46. *See* discussion *infra* Part V.

next several decades.[47] First, Part II examines the effect of dementia and dementia-related illnesses on the brain, highlighting the impact that such diseases can have on decision-making and on the general understanding of oneself.[48] Part II then focuses on how dementia impacts society as a whole, including the increasing number of cases that can be seen and the financial burden that it places on the country.[49] Finally, Part II touches on the potential criminal tendencies that can occur because of dementia's effect on the brain.[50]

Part III provides a detailed outline of the current approach the Texas criminal court systems take when it comes to the treatment of incompetent individuals.[51] Part III begins by examining the purpose of the prison system and how the use of such a system benefits society.[52] Then, Part III discusses the steps that can be taken if a defendant lacks the capacity to stand trial due to an incompetency finding.[53] In this analysis, Part III discusses the two-prong approach that the Texas criminal justice system currently takes for matters regarding incompetency: mental illness and intellectual disability.[54]

Part IV evaluates the current resources available to dementia patients.[55] First, Part IV addresses the shortcomings of guardianship, specifically how it can be a time-consuming and expensive endeavor.[56] Part IV emphasizes the private nature that is typically found in residential care facilities and nursing homes.[57] In doing so, Part IV also discusses the necessary funding for such placement.[58] Finally, Part IV examines the most unfortunate situation in terms of a dementia diagnosis: the homeless population.[59]

Part V of this Comment begins with a statutory proposal to include dementia as a diagnosis that is sufficient to warrant involuntary commitment.[60] Part V also establishes how involuntary commitment satisfies the purposes of the prison system because it still protects society while the individual receives the treatment and care they deserve.[61] After that, Part V compares and contrasts the statutory proposal to the current involuntary commitment proceedings to establish why this new commitment procedure

47. *See* discussion *infra* Part II.
48. *See* discussion *infra* Part II.
49. *See* discussion *infra* Part II.
50. *See* discussion *infra* Part II.
51. *See* discussion *infra* Part III.
52. *See* discussion *infra* Part III.
53. *See* discussion *infra* Part III.
54. *See* discussion *infra* Part III.
55. *See* discussion *infra* Part IV.
56. *See* discussion *infra* Part IV.
57. *See* discussion *infra* Part IV.
58. *See* discussion *infra* Part IV.
59. *See* discussion *infra* Part IV.
60. *See* discussion *infra* Part V.
61. *See* discussion *infra* Part V.

is necessary.[62] Part V also discusses the benefits of involuntary commitment, such as: providing breathing room for the court to establish proper guardianship, acting as a limbo until a management trust can be established to provide for the appropriate placement of an individual with dementia in a residential care facility, and providing a safety net for individuals who may not have financial stability or the opportunity to establish adequate guardianship.[63]

II. THE GROWING PREVALENCE OF DEMENTIA

"I ain't as good as I once was."[64] Many people have heard parents, grandparents, or country music stars say this at some point in their life.[65] While this can typically be viewed as an excuse for a shortcoming or a reason to get out of work, there is some truth behind it.[66] It is commonly understood that, as we age, more and more health issues become apparent in our lives.[67] Bodies break down and common day-to-day tasks become almost unbearable.[68] Activities and pastimes that used to occur regularly are no longer part of any daily routine.[69] However, perhaps even more tragic are situations when the mind no longer functions like it once did.[70] In these situations, families and friends not only have to deal with a decreased sense of mobility but also be faced with a lessened understanding, awareness, and self-sufficiency.[71]

A. Dementia and Its Effect on the Brain

Dementia is not a specific disease but rather an umbrella term to describe a series of symptoms that affect cognitive thinking skills.[72] Some of the different types of dementia include vascular dementia, Lewy body dementia, frontotemporal dementia, Huntington's disease, and Creutzfeldt-Jakob disease.[73] The most common disease, though, associated with dementia

62. *See* discussion *infra* Part V.
63. *See* discussion *infra* Part V.
64. Toby Keith, *As Good as I Once Was*, *on* HONKEYTONK UNIVERSITY (DreamWorks Nash. 2005).
65. *See id.*
66. See *id.*
67. *See* John Roberts, *Aging changes in organ, tissues, and cells*, MEDLINE PLUS, https://medlineplus.gov/ency/article/004012.htm (last updated Apr. 18, 2023) [https://perma.cc/SFV6-EWKZ].
68. *Id.*
69. *See* Zoran Milanovic et al., *Age-related decrease in physical activity and functional fitness among elderly men and women*, 8 CLINICAL INTERVENTIONS IN AGING 549, 549 (2013) (discussing the effect of aging on the body and the difficulty participating in the same level of physical fitness, as a result).
70. *See Laury's Story: 'Mum Became Utterly Lost in the Fog of Her Own Mind*,*' supra* note 3.
71. *See id.*
72. *What is Dementia?*, *supra* note 4.
73. *Definitions*, DEMENTIA SOC'Y AM., https://www.dementiasociety.org/definitions (last visited Feb. 24, 2025) [https://perma.cc/8JPH-P6AN].

is Alzheimer's disease.[74] All of these diseases can have a negative effect on neurocognition.[75] The earliest symptoms typically include short-term memory loss and mild forgetfulness.[76] The greatest issue concerning dementia is its progressive nature.[77] Eventually most, if not all, individuals with dementia will develop an impairment in judgment and have difficulty with decision making.[78] As this progression continues, these individuals will ultimately struggle to make the decisions necessary for independent living.[79]

Another problem with dementia can be seen in its unpredictable nature.[80] This is not only found in its progression but also in its diagnosis.[81] As mentioned, forgetfulness is an easily detectable early sign of dementia, but it can come and go.[82] Many people dismiss forgetfulness as merely a sign of aging, instead of considering the fact that it could be related to a much more sinister problem.[83] Even after dementia is successfully diagnosed, there is no telling when the patient will begin the steep decline into complete dependency.[84] As a result, there is a heightened difficulty on both the individual and the loved ones close to the patient diagnosed with dementia.[85]

This difficulty can be most accurately described from the perspective of the spouses and family members who witness, firsthand, the loss of their loved one's self-awareness.[86] One example of this is shown in the personal story of Laury, who recounted the decline of her mother's cognition following her diagnosis of early-onset Alzheimer's disease.[87] After the initial diagnosis, Laury and her mother made adjustments in their daily routine to accommodate for her lack of capacity.[88] After adapting to the new lifestyle, Laury even noted that, "though life [was] altered from what it once was, it [was] essentially still the same."[89]

---

74. *Id.*

75. *Id.*

76. *Dementia & the Brain*, UNIV. CAL. S.F., https://memory.ucsf.edu/tl/node/6 (last visited Feb. 24, 2024) [https://perma.cc/B8CS-74PQ].

77. *See* Carolyn Reinach Wolf et al., *Distinguishing Dementia from Mental Illness and Other Causes of Decline*, 89 N.Y. ST. BAR J. 22, 29 (2017) (highlighting the differences that can be seen across a variety of different types of incompetency).

78. *Id.*

79. *Id.*

80. *See* Zawn Villines, *How long the aggressive stage of dementia lasts*, MED. NEWS TODAY, https://www.medicalnewstoday.com/articles/how-long-does-the-aggressive-stage-of-dementia-last (last updated Mar. 30, 2023) (evaluating how long the aggressive stage of a dementia diagnosis can last and emphasizing the inconsistencies between individuals with a dementia diagnosis) [https://perma.cc/Y3P4-GBDE].

81. *See id.*

82. *What is Dementia?*, *supra* note 4.

83. *See* Villines, *supra* note 80.

84. *See id.*

85. *See id.*

86. *See Laury's Story: 'Mum Became Utterly Lost in the Fog of Her Own Mind,' supra* note 3.

87. *Id.*

88. *Id.*

89. *Id.*

However, the most striking thing to Laury was the stark decline in cognition that her mother suddenly experienced.[90] "Mum plateaued for so many years . . . and then, without warning, we just fell off a cliff."[91] Eventually, after the drop off, Laury made the difficult decision to put her mother in a care facility.[92] As the decline continued and her mother entered the final stage of Alzheimer's, Laury noticed that her mother no longer had any sense of recognition and spent the majority of her days displaying fear and aggression.[93] Laury closed her story by reminding the readers that, although the loved ones can become an entirely different person, the individuals who face this diagnosis are "still woven together with the essence of who they were . . . ."[94]

B. Dementia and Its Effect on Society

Dementia is an ever-growing piece of our population.[95] Recent surveys estimate that roughly 4.0% of adults age sixty-five and up report having received a dementia diagnosis.[96] This percentage rose by 1.7% for individuals in the age range of 65–74, and it increased by another 13.1% by those older than eighty-five.[97] Even more concerning than the increasing percentage by age range is the financial impact that dementia can have on the population.[98] The rough estimate cost of dementia care for the United States in 2023 was around three hundred and forty-five billion dollars.[99]

Although the percentage of individuals with dementia has not risen in the last few years, as the average life expectancy increases there is an increased expectation for a rise in its prevalence.[100] The number of elderly individuals in the United States is expected to double in the next five to ten years.[101] As this number continues to rise, it is important to recognize that the number of individuals with dementia-related illnesses will also trend upward.[102]

---

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *See* Ellen A. Kramarow, *Diagnosed Dementia in Adults Age 65 and Older: United States, 2022*, NAT'L HEALTH STAT. REP., CDC 1, 1 (June 13, 2024), https://www.cdc.gov/nchs/data/nhsr/nhsr203.pdf [https://perma.cc/6MP4-G7N2].
96. *Id.* at 7.
97. *Id.*
98. *Id.*
99. *Id.* at 1.
100. *See Fact Sheet: U.S. Dementia Trends*, POPULATION REFERENCE BUREAU (Oct. 21, 2021), https://www.prb.org/resources/fact-sheet-u-s-dementia-trends/ (highlighting that, although the percentage of individuals with dementia has not risen, there is still a rise in the total number of cases due to the ever-increasing size of the general population) [https://perma.cc/D59T-SCL9].
101. *See id.*
102. *See id.*

A dementia diagnosis can also have a detrimental effect on the financial standing of the individual.[103] Many who are diagnosed with dementia see their out-of-pocket health-related expenses increase and their net worth decrease by an average of 60% when compared to peers without a dementia diagnosis.[104] Enrollment in Medicaid also nearly doubled for people with dementia within the first eight years after their diagnosis, while the enrollment rate for their non-diagnosed peers stayed flat.[105] Just as it was for Laury and her mother, the financial and emotional strain caused by a dementia-related diagnosis is quite severe.[106] Families affected by dementia will end up spending around twice as much in out-of-pocket expenses and see their wealth drop to compensate for the increased need for care.[107] Moreover, there is concern that the aging baby boomer population will contribute to a drastic rise in the total number of dementia cases in our country.[108] This rise in dependent individuals is crucial because it will place an even greater strain on families and caretakers.[109]

C. Dementia and Its Potential Criminal Effects

As highlighted earlier, the effects on the brain from dementia can range from mild confusion and forgetfulness to complex hallucinations and a complete loss of self-awareness.[110] Depending on the severity of the case, some individual's diagnosis can even cause them to contribute to criminal behavior.[111] This action does not result from intentional disobedience of the law but rather from a failure to maintain an average appreciation for social norms.[112] Many of the most common criminal issues seen in patients with Alzheimer's disease—or any other dementia-related illness—are public urination, traffic violations, theft, sexual misconduct, and trespassing.[113] These violations stem from the difficulty that these patients have in considering their "self-conscious emotions."[114] In other words, they struggle to see themselves through other's eyes, which leads to a loss of shame or guilt

103. HwaJung Choi et al., *Dementia's financial & family impact: New study shows outsize Toll*, UNIV. MICH. (Oct. 16, 2023), https://ihpi.umich.edu/news/dementias-financial-family-impact-new-study-shows-outsize-toll [https://perma.cc/K3DW-J3VK].

104. *Id.*

105. *Id.*

106. *See Laury's Story: 'Mum Became Utterly Lost in the Fog of Her Own Mind,' supra* note 3.

107. *See* Choi, *supra* note 103.

108. *Fact Sheet: U.S. Dementia Trends*, *supra* note 100.

109. BL Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 130 (2007).

110. Wapner, *supra* note 44.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

about breaking acceptable social patterns.[115]

A recent study noted that there is a distinct difference in the type of crime committed based on the specific dementia diagnosis.[116] For example, the study found that people diagnosed with a behavioral variant of frontotemporal dementia were more likely to have violent tendencies than any other dementia-related diagnosis.[117] Trespassing, a violation that occurs at a higher percentage among individuals with Alzheimer's, typically occurred as a result of wandering due to confusion.[118] Regardless, "crimes committed by people with dementia range from theft, traffic violations with or without the influence of alcohol, violence, and hypersexuality to homicide."[119] This is not to say that all individuals who are diagnosed with a dementia-related illness will develop criminal tendencies.[120] However, there is certainly a correlation, and these individuals can be more susceptible to criminal behavior.[121] Even more concerning is the fact that there have been few attempts to study criminality in the context of dementia.[122]

III. THE CURRENT APPROACH TO INCOMPETENCY IN THE CRIMINAL COURT SYSTEM

The criminal justice system in Texas, and the United States overall, is geared towards accomplishing specific goals while providing for the protection of society and the maintenance of order.[123] The system also strives to do so through ensuring justice and fair treatment.[124] The question presented in this Comment is whether or not the purposes of the prison system can be satisfied while still complying with the fair treatment and justice that is necessary for our society to function efficiently and properly.[125]

A. The Purpose of Prisons

There are four distinct purposes of incarceration that are accepted by society as reasons the prison system should continue: (1) to punish people for committing crimes; (2) to remove people from society who could be dangerous and hurt others; (3) to deter the potential that a similar crime could

115. Wapner, *supra* note 44.
116. *See* Liljegren, *supra* note 12, at 296.
117. *Id.*
118. *Id.*
119. *Id.* (internal footnotes omitted)
120. *See id.*
121. Liljegren, *supra* note 12, at 296.
122. *Id.*
123. Sarah Shelley, *What is the Criminal Justice System? Insights for Aspiring Legal Minds*, U. CUMB. (May 24, 2024), https://www.ucumberlands.edu/blog/what-is-the-criminal-justice-system [https://perma.cc/8BUB-3ZMK].
124. *Id.*
125. Author's original thought.

be committed in the future; and (4) to rehabilitate the mindset of the individuals who violated the law.[126] Here lies the first problem in imprisoning elderly individuals who lack the competency to understand their actions.[127] The only potential purpose accomplished by putting these individuals in jail is that removing them could serve to protect others or themselves.[128]

For example, if an elderly woman continues to criminally trespass because she is confused and believes she is in her house, she could eventually scare someone and be harmed or cause an accident to occur out of a homeowner's misunderstanding of the situation.[129] The other three purposes are unlikely to be satisfied because the individual has no understanding of the situation and, therefore, the likelihood that they will understand the punishment or be rehabilitated is extremely low.[130] This is why the criminal court system requires an action to occur (*actus reus*) and a mindset to commit the action (*mens rea*) before convicting an individual of a crime, and it is also why the courts recognize incompetence and refuse to prosecute an individual who does not understand the gravity of their mistake.[131]

The purposes of the prison system, too, cannot be adequately satisfied through the incarceration of defendants with mental disorders because the jails are often inadequate to accommodate the specific needs of each individual.[132] In fact, "there is a widespread agreement that correctional systems are by and large unprepared or unable to provide a safe and caring environment for persons living with neurocognitive conditions, also known as dementia."[133] Although prisons have become a form of de-facto mental health providers, the services and protections afforded to mental health patients in these environments are anything but satisfactory.[134] Because of this, there is a push for prisoners with mental health issues to be given access to support groups and treatments outside of the prison system.[135] However, this problem can be adequately avoided if the issues are detected prior to

126. Emma Thorpe, *The Purpose of Prisons*, RAPHAEL ROWE FOUND. (Oct. 10, 2022), https://www.raphaelrowefoundation.org/latest-news/the-purpose-of-prisons (introducing the commonly accepted reasons that the prison system exists. Although there may be other reasonable explanations for the prison system, this definition encompasses what is generally accepted by society as the primary purposes for our criminal justice system) [https://perma.cc/X876-28VZ].

127. *See* Wapner, *supra* note 44.

128. *See* Ellis Amdur, *Mental Illness and Crime: Is Enforced Treatment the Answer?*, LEXIPOL (Sept. 2, 2022), https://www.lexipol.com/resources/blog/mental-illness-and-crime-is-enforced-treatment-the-answer/ [https://perma.cc/8T2X-CRSW].

129. Author's original hypothetical.

130. Amdur, *supra* note 128.

131. *See* Wapner, *supra* note 44.

132. Amdur, *supra* note 128.

133. Godfrey, *supra* note 43, at 111.

134. *Mental Health Treatment While Incarcerated*, NAT'L ALL. MENTAL ILLNESS, https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/ (last visited Dec. 13, 2024) [https://perma.cc/5CHV-6JJX].

135. *Id.*

incarceration.[136]

B. The Two-Pronged Approach to Incompetency

As stated before, the primary indicator for a dementia diagnosis is a decline in cognitive function.[137] In fact, this loss of function can sometimes teeter from socially unacceptable to criminal.[138] That is not to say that elderly citizens with dementia will become violent criminals, but violations such as criminal trespass and public indecency are not uncommon for people with this diagnosis.[139] There is a very important question that must be answered in these situations: How does the criminal justice system deal with the perpetrators who do not understand or appreciate the gravity of their offense?[140]

The issue of competency was first raised to the Supreme Court when it decided the 1960 case of *Dusky v. United States*.[141] In that case, a schizophrenic individual was on trial for the kidnapping of a young girl.[142] The Court determined that individuals must have an appreciation of their offense and be able to assist in the preparation for trial.[143] If there is no such appreciation, the defendant is deemed incompetent and cannot stand trial for their crimes until competency is restored.[144] This has come to be recognized as the *Dusky* standard.[145] For the most part, the law does not differentiate between causes of incompetency.[146] It is recognized that incompetency for any reason, be it treatable mental illnesses or dementia, prevents a defendant from standing trial.[147] However, there is not always the same consistency when it comes to determining the proper steps that a court must take once a lack of competency is discovered.[148]

Competency issues can be raised at any time during the trial process by either party or by the trial court itself.[149] Once competency issues are raised, the court must conduct an informal inquiry and determine whether or not the

136. *See* Godfrey, *supra* note 43, at 111.

137. *What Happens to the Brain in Alzheimer's Disease?*, NAT. INST. AGING, https://www.nia.nih.gov/health/alzheimers-causes-and-risk-factors/what-happens-brain-alzheimers-disease (last updated Jan. 19, 2024) [https://perma.cc/LLC3-ZJTC].

138. Wapner, *supra* note 44.

139. *Id.*

140. *Id.*

141. Dusky v. United States, 362 U.S. 402, 402 (1960).

142. *Id.*

143. *Id.*

144. *Id.* at 403.

145. *Id.*

146. *See id.* at 403.

147. *Id.*

148. *See* TEX. CODE CRIM. PROC. ANN. § 46B (distinguishing between the approaches taken to involuntarily commit individuals with mental illnesses and intellectual disabilities).

149. *Id.* § 46B.004.

individual lacks the capacity to continue before the trial may commence.[150] In situations involving mental illness or intellectual disability, the Texas Code of Criminal Procedure currently has steps in place to involuntarily commit the defendants to a proper care facility to ensure their safety and treatment.[151] These steps also follow the guidance of the Texas Health and Safety Code to ensure compliance with all treatment necessary to individuals with diminished capacity.[152]

1. Mental Illness

The Texas Health and Safety Code describes mental illness as "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that[] substantially impairs a person's thought, perception of reality, emotional process, or judgment."[153] If an issue of competency is raised and the defendant is diagnosed with a mental illness, the court can order temporary mental health services for the treatment of the individual.[154] The original period of treatment shall not exceed forty-five days, unless the court order extends the period to ninety days for more severe cases.[155] If competency is unable to be restored during this temporary period, the court can extend the order for inpatient mental health services for up to a year.[156]

Before any of this occurs, the individual may be taken into protective custody.[157] During this time, the defendant must be put in the least restrictive setting that still allows for proper treatment that complies with their specialized needs.[158] The Health and Safety Code also provides steps for an attorney *ad litem* to be assigned to help protect the interests of the incapacitated individual in a representative capacity.[159] All of these steps ensure that the defendant, who is incompetent to stand trial, has their well-being protected and cared for, despite their criminal affiliation.[160]

The primary goal of this treatment is the restoration of competency.[161] Mental illnesses are largely treatable and, oftentimes, the patient can be restored to full capacity to stand trial.[162] However, this statute also

150. *Id.*
151. *Id.*
152. *Id.*
153. TEX. HEALTH & SAFETY CODE ANN. § 571.003(14).
154. *Id.* § 574.034(a).
155. *Id.* § 574.034(g).
156. *Id.* § 574.035.
157. *Id.* § 574.034.
158. *Id.* § 571.004.
159. *Id.* § 574.003.
160. *Id.*
161. *Id.* § 574.
162. *Id.*

specifically cuts dementia out of the definition of mental illness.[163] As such, none of the resources made available by the court under this statute would provide any relief if a defendant were instead diagnosed with a dementia-related illness.[164]

2. Intellectual Disability

The Texas Health and Safety Code defines a person with an intellectual disability as "a person determined by a physician or psychologist licensed in [] [Texas] or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior."[165] These determinations of intellectual disability require a measurement of intellectual functioning, adaptive behavior level analysis, and evidence of the disability from as early as the person's developmental period.[166]

The key difference between these individuals and those diagnosed with a mental illness is that these defendants are unlikely ever to be restored to full competency.[167] As such, the court does not assign them to a treatment facility but instead commits them to a long-term care facility that will be better equipped to provide proper care than a jail or prison system.[168] This residential facility must provide "habilitative services, care, training, and treatment appropriate to the proposed resident's needs."[169]

Although there are some differences behind the goals of the commitment under mental illness and intellectual disability, there are still similar considerations that are afforded to each in an effort to ensure their proper care.[170] Protective custody and an attorney *ad litem* will be given to individuals with an intellectual disability the same way they are given to defendants with a mental illness.[171] Another similarity to the commitment available for defendants diagnosed with a mental illness is that this option available for intellectual disability also does not provide any relief for individuals with dementia.[172] The requirement that an intellectual disability must be present during the developmental stage limits the court from pursuing this option when developing a plan for a dementia patient.[173]

---

163. *Id.* § 571.003(13).
164. *Id.*
165. *Id.* § 591.003(15–a).
166. *Id.* § 593.005(b)(1)–(3).
167. *See* Wolf, *supra* note 77, at 26.
168. TEX. HEALTH & SAFETY CODE ANN. § 593.052.
169. *Id.*
170. *Id.* §§ 574.034, 593.052.
171. *Id.* §§ 574.003, 593.043.
172. TEX. CODE CRIM. PROC. ANN. § 46B.103.
173. *Id.*

IV. THE SHORTCOMINGS OF THE CURRENT RESOURCES AVAILABLE TO INDIVIDUALS WITH DEMENTIA

Although the Texas Code of Criminal Procedures provides no direct steps for individuals deemed incompetent due to dementia, there are resources currently available that provide for such individuals.[174] Guardianship and placement in a specialized nursing home are the most common approaches utilized to ensure dementia patients receive proper treatment while still protecting society at large from their confusion.[175] However, each of these practices have shortcomings that put the criminal justice system in a bind when a defendant is deemed incompetent due to a dementia-related diagnosis.[176]

A. Inconsistent Guardianship Timeline

It is well established that guardianship is the most common solution used to ensure that an incompetent individual has proper care.[177] Guardianship occurs when the court establishes a relationship between a person in need of care and assistance (ward) and a competent individual who can address the needs of the individual (guardian).[178] A proper guardian can provide for the wellbeing of a dementia patient while also making the difficult financial and personal decisions that are in the best interest of the ward.[179] Of course, this is most adequately accomplished if proper guardianship is put into place before the individual becomes incapacitated.[180] When guardianship is not in place beforehand, it can be difficult to find an appropriate candidate.[181]

Although guardianship is often viewed as the most readily available solution for providing treatment for incompetent individuals, it does not come without its fair share of shortcomings.[182] For example, establishing guardianship is the most restrictive step that can be taken to protect an

174. *A Texas Guide to Adult Guardianship*, TEX. HEALTH & HUM. SERV. 1, 39–43, https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/legal-information/gaurdianship/pub395-guardianship.pdf (last visited Dec. 13, 2024) [https://perma.cc/DF72-QNDX].

175. *Alzheimer's Disease – Options for Care*, TEX. HEALTH & HUM. SERV., https://www.dshs.texas.gov/alzheimers-disease/risk-reduction-promoting-cognitive-health/prevention/alzheimers-disease-options-care (last visited Dec. 13, 2023) [https://perma.cc/NE8U-CXXG].

176. Author's original thought.

177. *See* Francesca Toledo, *How Long Does it Take to Get Guardianship*, UNBUNDLED LEGAL HELP, https://www.unbundledlegalhelp.com/blog/how-long-does-it-take-to-get-guardianship/ (last visited Dec. 13, 2024) (describing the process of becoming a guardian and the benefits and risks associated with such a title) [https://perma.cc/T8WL-L35E].

178. *See A Texas Guide to Adult Guardianship*, *supra* note 174, at 2.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

individual who may no longer be able to adequately provide for themself.[183] Many wards lose a lot of say in decisions made in their interest and give up some basic rights that are implicit in our society.[184] Furthermore, in some instances family members are removed from the decision-making process for their loved ones if they are not chosen as the guardian of the incompetent individual.[185] If the wrong guardian is chosen, it can also be difficult to remove them from their representative capacity, and the process would require the help of an attorney and the court system.[186]

However, perhaps the most troubling aspect of establishing guardianship is that it is a time-consuming and costly endeavor.[187] Before guardianship is assigned, a case must be initiated to determine whether the individual no longer has the capacity to care for themself.[188] After initiation of the case, it may be months before an appointment takes place.[189] Of course, this all rests on the assumption that a court can find an appropriate family member, spouse, or friend to fill the guardian position.[190] As a result, many of these individuals who do not have a prior guardianship in place are in limbo while the court determines the best suitor for their situation.[191]

B. Specialized Care Facilities Are Often Private and Require Adequate Funding

Another solution available to properly supervise and care for individuals with dementia are long-term care facilities that specialize in dementia patients.[192] These facilities allow selectivity based on the level of assistance that is necessary for each individual situation.[193] For example, an individual that is mostly able to care for themselves but requires assistance with complex tasks would be better suited for an assisted living facility. [194] These facilities allow the individual some freedom of choice while still ensuring that their fundamental needs are being met daily.[195] On the other side of the spectrum, some facilities specialize in the care and treatment of people with

183. *Id.*
184. *See id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *See id.*
189. *See* Toledo, *supra* note 177.
190. *Id.*
191. *See Protecting The Incapacitated: A Guide to Guardianship in Texas from Application to Oath*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Veterans2&Template=/CM/ContentDisplay.cfm&ContentID=23612 (last visited Dec. 13, 2024) (emphasizing the time required to become a proper guardian) [https://perma.cc/QYX7-BYUZ].
192. *See Alzheimer's Disease – Options for Care*, *supra* note 175.
193. *See id.*
194. *See id.*
195. *See id.*

severe dementia who cannot care for themselves and could also pose a danger to others.[196] These facilities are often secure and provide a safe environment while still ensuring that all needs are being met for the individual.[197]

One type of facility that has become increasingly popular for elderly individuals with dementia are assisted living facilities.[198] Some recent reports show a high percentage of the assisted living population have some form of dementia, with some reports showing as high as 68%.[199] These facilities are particularly promising because they allow for more freedom and autonomy when compared to other types of care facilities while still providing the much-needed support to ensure that the needs of the individual with dementia are satisfied.[200]

However, assisted living facilities come with their fair share of shortcomings.[201] Although these locations can provide an opportunity for gradual change for individuals with a newly developed dementia diagnosis, there are rising concerns about the competency of care that is provided in these facilities for people with more advanced stages of dementia.[202] Other long-term care resources can have shortcomings, as well.[203] For starters, there is a great uncertainty about the quality of care that is being offered to the dependent individuals under the care of the facility.[204] Some cut corners in an effort to save money or fail to give adequate care and supervision to the patients, resulting in even faster mental decline.[205]

Another downside to these resources is that they are typically privately funded and can be very expensive.[206] Many times, families are forced to take on the responsibility of the individual's care, especially when they do not have an abundance of assets at their disposal.[207] Some families are forced to

196. *See id.*

197. *See id.*

198. *See generally* Marianne Smith et al., *Dementia Care in Assisted Living: Needs and Challenges*, 29 ISSUES IN MENTAL HEALTH NURSING (2008) (describing the benefits of an assisted living facility, while also evaluating whether these types of facilities will be able to keep up with the rising demand due to higher numbers of dementia patients).

199. *Id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *See generally* Karren J. Pope-Onwukwe, *Memory Care Facilities: Challenges and Costs*, AM. BAR ASS'N (May 25, 2022), https://www.americanbar.org/groups/senior_lawyers/resources/voice-of-experience/2010-2022/memory-care-facilities-challenges-costs/ (drawing attention to the concerns surrounding long-term memory care facilities including cost and quality of care) [https://perma.cc/QA5V-VBDF].

204. *See id.*

205. *See id.*

206. Susanna Guzman, *How Much Does Memory Care Cost? A Complete State-By-State Guide*, A PLACE FOR MOM (Sept. 20, 2024), https:/r/www.aplaceformom.com/caregiver-resources/articles/cost-of-memory-care [https://perma.cc/UQ89-CVHC].

207. Kate Lang & John Whitelaw, *Overcoming Challenges to Accessing Public Benefits for Persons with Dementia*, 38 NO. 6 BIFOCAL 94, 100 (2017).

incur monthly costs as high as $6,935.[208] Moreover, the problem greatly intensifies when there is no proper guardianship in place to assist with the finances.[209] As a result, although they provide a great resource when utilized efficiently, the long-term residential facilities are often overlooked out of inconvenience.[210]

Aside from being an expensive option, some of the community-based long-term care options can turn away people with dementia and a history of violent acts.[211] It can even be difficult to find adequate memory and nursing care for individuals who lack a violent history or any prior convictions.[212] When all of these factors are considered, it is clear that finding the correct facility to take care of the individuals with dementia can take time, a resource these defendants do not have to spare.[213]

C. Dementia in Homeless Populations

In the worst-case scenario, there are no resources for individuals with dementia.[214] There is a strong correlation between functional decline and homelessness.[215] Although there are many other factors that may contribute to this correlation, the loss of full cognitive capacity is undoubtedly related to the homeless population.[216] This can come from a variety of different causes, but dementia is widely present among this particular group in society.[217]

Some studies suggest that dementia is even more prevalent in the homeless population than in the low-income or general population.[218] Even more concerning than the correlative relationship is the possibility that a causal relationship exists in which homelessness could actually be a risk factor for developing Alzheimer's disease and other dementia-related illnesses.[219] Regardless of what type of relationship is present between homelessness and dementia, it is clear that there is a connection.[220]

---

208. Pope-Onwukwe, *supra* note 203.
209. *See* Guzman, *supra* note 206.
210. *See id.*
211. Godfrey, *supra* note 43, at 111.
212. *Id.*
213. *See id.*
214. *See generally* Richard G. Booth, *Prevalence of dementia among people experiencing homelessness in Ontario, Canada: a population-based comparative analysis*, 9 LANCET 240, 242 (Apr. 2024), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(24)00022-7/fulltext (discussing dementia in homeless people in Canada) [https://perma.cc/948Q-HECU].
215. *Id.* at 244.
216. *Id.* at 247.
217. *Id.* at 248.
218. *Id.*
219. Ganesh M. Babulal, et al., *Associations Between Homelessness and Alzheimer's Disease and Related Dementia: A Systematic Review*, 41 J. OF APPLIED GERONTOLOGY 2404, 2405 (June 24, 2022), https://journals.sagepub.com/doi/pdf/10.1177/07334648221109747 [https://perma.cc/TQ8L-TNU9].
220. *See* Booth, *supra* note 214, at 242.

Of course, this situation is the most troubling of all for dementia patients.[221] Not only does this group lack the funding to provide for themselves but their needs are also much higher due to the loss of competency.[222] This situation creates uncertainty as to guardianship, and the opportunity to afford specialized private care, as mentioned earlier, is all but eliminated.[223] The irreversible loss of cognitive function caused by dementia is undoubtedly considered to contribute to the cycle of homelessness.[224]

V. AMENDING THE TEXAS CODE OF CRIMINAL PROCEDURES TO ALLOW THE INVOLUNTARY COMMITMENT OF INDIVIDUALS WITH DEMENTIA

Although there are resources available that provide for the majority of the population with dementia, there are shortcomings for each that prevent adequate utilization.[225] These shortcomings are particularly noticeable when viewed through the lens of the criminal court system.[226] The prison system is not adequately equipped to properly care for individuals with specialized needs from cognitive impairment.[227] This is recognized by the policies currently in place in the Texas Code of Criminal Procedures that provide an opportunity for involuntary commitment of individuals with mental illnesses or those deemed to have an intellectual disability.[228] Providing similar steps to courts in matters involving dementia would provide a structure that creates breathing room to ensure that the correct decision is made for an ever-growing portion of our population.[229]

A. Statutory Proposal

The current standard for involuntary commitment found in the Texas Code of Criminal Procedures is based on information from the Texas Health and Safety Code.[230] The authority for a civil commitment hearing for both mental illness and intellectual disability also cites a corresponding portion of the Texas Health and Safety Code.[231] This is done to ensure that all

221. *See generally* Babulal et al., *supra* note 219 (discussing the relationship between homelessness and dementia).

222. *See* Booth, *supra* note 214, at 245.

223. *See Protecting The Incapacitated: A Guide to Guardianship in Texas from Application to Oath*, *supra* note 191.

224. *See* Babulal, et al., *supra* note 219, at 2405.

225. TEX. HEALTH & SAFETY CODE ANN. §§ 574.003, 593.043.

226. *See* Wapner, *supra* note 44.

227. *See* Amdur, *supra* note 128.

228. TEX. CODE CRIM. PROC. CODE ANN. §§ 46B.102–103.

229. Author's original thought.

230. *See* TEX. CODE CRIM. PROC. CODE ANN. §§ 46B.102–103 (referencing the Texas Health and Safety Code as the controlling authority for the standard that must be met when sentencing any individual to involuntary commitment).

231. *Id.*

commitments comply with the recommended standard of treatment that individuals of each diagnosis receive.[232]

If a similar section were added to better suit a court in determining placement for an individual with dementia, it would also need to comply with the Texas Health and Safety Code because it is the controlling authority for all instances of mental illness.[233] As such, the following legislative proposal is written from the perspective of amending the Texas Health and Safety Code to act as a reference for the Texas Code of Criminal Procedure.[234] The proposal would allow for the amendment of both Codes to include language to accommodate defendants who are diagnosed with a dementia-related illness.[235]

> LEGISLATIVE PROPOSAL
> Title: Civil Commitment Hearing: Dementia
>
> Section 1: Purpose
> This amendment seeks to establish a clear legal framework and provide courts in Texas with the means for the involuntary commitment of individuals with dementia who may pose a threat to themselves or others.[236] As a result of their diagnosis, individuals with dementia may lack the capacity to understand the consequences of their actions and, therefore, have no place in the prison system because it would not accomplish the desired goal.[237] The involuntary commitment would serve to protect the individual and others in the community.[238]
>
> Section 2: Definitions
> (a) "Dementia" means a series of symptoms related to a loss of memory, cognitive function, and social cues that result in an individual being unable to conduct themselves in everyday life.[239]
> (b) "Involuntary commitment" refers to the legal process by which a court can detain an individual with dementia and put them under state care for treatment, rehabilitation, or long-term care without their consent. [240]

---

232. *See id.*
233. *Id.*
234. *Id.*
235. Author's original thought.
236. *Id.*
237. *Id.*
238. *Id.*
239. *What is Dementia?*, *supra* note 4.
240. *See* Disability Rights Texas, *Involuntary Commitment in Texas*, TEX. L. HELP (Feb. 7, 2023), https://texaslawhelp.org/article/involuntary-commitment-in-texas (defining involuntary commitment in the state of Texas and providing reasons why involuntary commitment can be beneficial) [https://perma.cc/UW27-UYYD].

Section 3: Procedure for Involuntary Commitment
(a) If it appears to a court that a defendant may be a person with dementia, the court shall hold a hearing to determine if the defendant is a person with dementia.[241]
(b) If it is determined that the individual lacks competence due to a finding of dementia, the court shall hold a hearing to determine whether involuntary commitment is beneficial and shall consider factors such as capacity for self-care and likelihood of repeated criminal activity.[242]
(c) Attorney *ad litem*: The court may appoint an attorney *ad litem* to represent the interests of the individual diagnosed with dementia.[243] The *ad litem* shall: (1) present evidence of the individual's financial situation, including funds to financially support treatment and care, and (2) provide recommendations to the court about whether involuntary commitment is in the best interest of the individual based on the specific circumstances.[244] The attorney *ad litem* shall have thirty (30) days to finalize and submit a report to the court.[245]

Section 4: Placement in a Residential Care Facility
(a) Provided that the court determines involuntary commitment is in the best interest of the defendant, the individual shall be placed in a care facility specializing in the care of patients with dementia.[246]
(b) The court shall consider the following factors when determining the placement of the defendant: (1) private funds or assets available for treatment; (2) proximity to family or support network; and (3) the level of care required for the specific case of the individual.[247]

Section 5: Periodic Review of the Individual
(a) In the event that proper guardianship can be established, and upon motion from the guardian, the court shall remove the individual from involuntary commitment and place them in the guardian's care.[248]
(b) If no guardianship is established, the court shall review the placement of the individual once a year to ensure the needs of the individual met.[249]
(c) The attorney *ad litem* shall remain involved to ensure the individual's needs met, in the absence of proper guardianship.[250]

---

241. TEX. CODE CRIM. PROC. CODE ANN. § 46B.103.
242. *Id.*
243. TEX. HEALTH & SAFETY CODE ANN. § 593.043.
244. Author's original thought.
245. *Id.*
246. TEX. HEALTH & SAFETY CODE ANN. § 593.052.
247. Author's original thought.
248. *Id.*
249. TEX. EST. CODE ANN. § 1202.002.
250. TEX. HEALTH & SAFETY CODE ANN. § 593.043.

Much of the language in the proposed statute, such as the attorney *ad litem* and the protective custody, can be found in the other statutes that already exist for the treatment of individuals with mental illness or intellectual disability.[251] Other terms which are not present can be pulled from the language that already exists in the statutory authority for involuntary commitment of individuals with mental illness and intellectual disability.[252] This specific language that should be added to the Health and Safety Code and the Code of Criminal Procedure would better equip courts to handle an entirely different category of incompetent individuals while still ensuring that the purposes of the criminal justice system are satisfied.[253]

Other states across the country have implemented the concept of applying involuntary commitment to elderly individuals with Alzheimer's Disease and other dementia-related illnesses.[254] In 2021, Montana enacted House Joint Resolution 39 that requested a study of the use of involuntary commitment for individuals with dementia-related illnesses.[255] In the proposal, the legislation highlighted three purposes behind involuntary commitment:

> To provide appropriate, humane care and treatment for people with a mental disorder who are in need of commitment; to accomplish that goal in a community setting whenever possible and in an institutionalized setting only when less restrictive alternatives are unavailable or inadequate; and to ensure due process of law for people in need of commitment.[256]

The key language in the House Joint Resolution 39 emphasizes the importance of considering dementia and other related illnesses to be mental impairments.[257] With that comparison in mind, it is clear that grouping dementia patients who have impaired cognitive function with other individuals suffering from intellectual disabilities or mental illness is not a big stretch.[258] While the proposal in Montana is a good starting point, the legislative proposal in this Comment provides extra guidance with regard to some of the issues that are present for individuals with dementia.[259] Specifically, it provides the opportunity to rectify some of the shortcomings present with regard to current accepted practices for dementia patients.[260]

---

251. *See* § 591.
252. *See* §§ 571, 591.
253. Author's original thought.
254. *See generally* Sue O'Connell, *Commitment of Persons with Dementia: Overview of Involuntary Commitment Laws*, MONT. H.J.R. 39 (2021) (discussing the ideas of applying involuntary commitment to individuals with dementia-related illness).
255. *Id.*
256. *Id.* (paraphrasing MONT. CODE ANN. § 53-21-101 (1997)).
257. *Id.*
258. *Id.*
259. Author's original thought.
260. *See* discussion *infra* Sections V.D–F.

B. Involuntary Commitment Accomplishes the Same Protection of Society That the Prison System Would

As discussed earlier, the purpose of imprisoning those who commit crime is fourfold.[261] First, the prison system ensures that people are punished for their crimes.[262] Second, imprisonment removes individuals who may hurt others from society.[263] Third, it deters the others from committing similar crimes in the future.[264] Finally, the prison system provides an opportunity for rehabilitation.[265] Only one of these is likely to be accomplished by putting an individual with dementia in jail: removing a potential threat from society.[266] Without the proper understanding of their mistake, proper punishment and rehabilitation are not likely to be satisfied when a defendant with dementia is imprisoned.[267]

Of course, most crimes committed by defendants with dementia are nonviolent in nature.[268] Still, there are some instances where violence or sexual assault can occur.[269] As dementia progresses, an individual's understanding of social cues and common societal understanding is greatly diminished.[270] As a result, the individual is more likely to cross a severe line.[271] Even if the initial crime was criminal trespass, removing them from society to receive proper treatment will always be the best solution to ensure that nothing further occurs.[272] This protection of society could be accomplished by imprisonment, but it would be better accomplished by placement in a residential care facility specifically designed for the proper care and treatment of individuals with this type of neurological disorder.[273] From a policy standpoint, this is ideal as well because "[i]t is absolutely clear, however, that jailing those with mental illness or substance disorder does little to help, because ordinary jails are not the proper place for . . . mentally ill individuals to receive treatment."[274]

As noted earlier, jails and prisons have unfortunately become a type of de facto mental treatment facility.[275] Some studies suggest that up to 25% of

---

261. Thorpe, *supra* note 126.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *See* Amdur, *supra* note 128.
267. *Id.*
268. Liljegren, *supra* note 12, at 296.
269. *Id.*
270. *See* Wapner, *supra* note 44.
271. *Id.*
272. *Id.*
273. *See* Amdur, *supra* note 128.
274. *Id.*
275. *See Mental Health Treatment While Incarcerated*, *supra* note 134 (examining the current issues present in the criminal justice system with regard to detaining individuals with a mental illness and the

prisoners have some form of mental health illness or intellectual disability.[276] There are other studies that examine the possibility that mental illness can develop as a result of the treatment in the prison system.[277] Regardless, it is clear that prisons deal with their fair share of those afflicted by mental illnesses.[278] However, this problem cannot be allowed to continue.[279] Prisons lack the appropriate means to care for these individuals, and any treatment offered in these facilities is substandard at best.[280] Furthermore, individuals with dementia present a novel issue because they are typically more feeble and more dependent in nature than even some with the most severe mental illnesses.[281] As a result, involuntary commitment to a residential care facility rectifies the situation and provides care without harming the individual by placing them in a location where they will undoubtedly suffer.[282]

One counterargument to the proposed statute is that it addresses an unnecessarily small portion of criminal behavior.[283] By and large, individuals with dementia rarely find themselves in a situation where intervention with involuntary commitment is needed.[284] This is because these individuals often have support systems in place that can accomplish the same goal that involuntary commitment would: the protection of society from future harm.[285] However, no matter how rare a situation may be, it is still prudent practice to ensure that a court system has all the means available to ensure that proper steps are taken to not only protect the public but to protect the individual as well.[286]

Although this subsection of criminal defendants is smaller than a lot of the other incompetent individuals who commit crimes, it is an ever-growing population.[287] In the future, there will likely be more and more occurrences in which dementia patients violate the law.[288] This is simply a result of the increased instances of dementia that will undoubtedly arise within our

---

level of treatment they receive, specifically focusing on the quality of care and the steps that can be taken to better care for these individuals).

276. Liljegren, *supra* note 12, at 305.

277. *Mental Health Treatment While Incarcerated*, *supra* note 134.

278. *Id.*

279. *See id.*

280. *Id.*

281. Wolf, *supra* note 77, at 29.

282. *See* MONT. CODE ANN. § 53-21-101 (1975) (emphasizing the quality of care that can be received in a community commitment, as opposed to a prison sentence).

283. Wapner, *supra* note 44.

284. *See generally A Texas Guide to Adult Guardianship*, *supra* note 174, at 7 (providing that previously established guardianship lowers the need for any intervention by the court into the individual's matters).

285. *See id.*

286. *See generally* Toledo, *supra* note 177 (showing that guardianship can take time to establish, which would leave the individuals in a state of need during the process).

287. *See generally* Wapner, *supra* note 44 (showing the need for change in the criminal justice system as this is becoming more and more of an issue for courts).

288. *See id.*

population.[289] Of course, it is always best to ensure that the criminal justice system is aptly prepared to deal with any and all instances that may occur.[290] It is better for the system to be equipped to deal with an occurrence that may never happen than to need the proper steps and channels and have no authority to do so.[291]

C. Comparing the Proposed Statute To the Involuntary Commitments Currently Available Under the Code of Criminal Procedures

As previously expressed, there are legislative steps in place that provide criminal courts in Texas with a framework to follow for the involuntary commitment of individuals with mental illnesses or intellectual disabilities.[292] However, there are limiting factors in each of those approaches that prevent the application to a defendant who is diagnosed with a dementia-related illness.[293] While it may be true that dementia cannot fall under those umbrellas, the availability of such resources highlights the legislative intent to ensure incompetent individuals receive the treatment they deserve.[294]

There are several differences between the two frameworks currently available for courts to follow.[295] For example, while an individual with an intellectual disability may be involuntarily committed for an indefinite amount of time, defendants with mental illnesses require consistent renewals in their commitment orders.[296] This is due to the rehabilitative nature of the two competency defenses.[297] Intellectual disabilities present symptoms during the developmental phase, and although treatment can help, there is typically little to no chance that the individual will ever be restored to competency.[298] Defendants with mental illness, on the other hand, can be restored to competency with the proper medication and treatment.[299] As such, the periods for commitment are shorter and require more check-ins to determine if competency has been restored.[300]

In many ways, this difference shows the main reason why the involuntary commitment of individuals with dementia should more closely

---

289. Plassman, *supra* note 109, at 130.
290. Wapner, *supra* note 44.
291. *See id.*
292. TEX. CODE CRIM. PROC. CODE ANN. art. 46B.004.
293. *Id.*
294. *Id.*
295. *Id.*
296. TEX. HEALTH & SAFETY CODE ANN. § 574.001-014.
297. *Id.*
298. *Competency of Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System: A Call to Action for the Criminal Justice Community,* NAT'L CTR. ON CRIM. JUST. & DISABILITY 1, 13 (2017), https://www.chhs.ca.gov/wp-content/uploads/2017/12/Competency-White-Paper-2017.pdf [https://perma.cc/Z3DB-MFD5].
299. *Id.*
300. TEX. HEALTH & SAFETY CODE ANN. § 571.003.

mirror that of the involuntary commitment currently made available for individuals with intellectual disabilities.[301] Dementia is degenerative by nature.[302] Although medication and treatment can slow its progression, patients who are diagnosed with dementia will likely never return to their previous capacity.[303] Instead, they will continue to deteriorate mentally and become less competent.[304] The involuntary commitment of individuals with intellectual disabilities focuses on maintenance and providing a safe environment where the needs of the individual are sufficiently met.[305]

Many of the steps currently in place for individuals with intellectual disabilities would be beneficial for those affected by dementia-related illnesses.[306] The residential care facilities function similarly to nursing homes and have the capability to properly care for elderly patients with dementia.[307] Although it is true that the treatment of intellectual disability and dementia is not the same, there is a similarity in the maintenance treatment that is given to both types of incompetency.[308] Of course, while it is ideal to individualize the treatment, the capabilities and tools available at these facilities would be more than capable of treating both types of diagnoses.[309] In contrast, a mental hospital that focuses specifically on restoring competency would not be as beneficial to the independent needs of the individual with dementia.[310]

Furthermore, the assignment of an attorney *ad litem* and protective custody present in the procedures for those with intellectual disabilities would also be beneficial for those with dementia that can no longer care for themselves or represent their own interests.[311] Overall, it is clear that the resources allotted for those diagnosed with intellectual disabilities would be just as beneficial, if not more, for dementia patients who are convicted of committing a crime.[312]

---

301. *Id.* § 591.003.

302. *What Happens to the Brain in Alzheimer's Disease?*, NAT. INST. ON AGING (Jan. 19, 2024), https://www.nia.nih.gov/health/alzheimers-causes-and-risk-factors/what-happens-brain-alzheimers-disease [https://perma.cc/LLC3-ZJTC].

303. *Id.*

304. *Id.*

305. TEX. HEALTH & SAFETY CODE ANN. § 591.

306. Tamar Heller et al., *Caregiving, intellectual disability, and dementia: Report of the Summit Workgroup on Caregiving and Intellectual and Developmental Disabilities*, 4 ALZHEIMER'S & DIMENTIA: TRANSLATIONAL RSCH. & CLINICAL INTERVENTION 272, 274–75 (July 10, 2018).

307. *Id.*

308. *Id.*

309. *Id.*

310. *See* Amdur, *supra* note 128.

311. TEX. HEALTH & SAFETY CODE ANN. § 593.052.

312. Heller, *supra* note 306, at 274–75.

D. The Involuntary Commitment Acts as a Bridge Until Proper Guardianship Can Be Established

As previously mentioned, establishing guardianship is a protracted endeavor that leaves the ward in limbo while waiting for the proper appointment.[313] Assuming an individual with dementia is arrested for committing a crime, a court may feel pressured to find a guardian quickly instead of ensuring the most ideal candidate is selected to protect the interest of the defendant.[314] This statute provides an opportunity for the court to ensure the best decision is made for the individual without the pressure from society to isolate the defendant.[315] Of course, this is not meant to replace guardianship as a means of care for dependent individuals.[316] Instead, it assists the guardianship process by providing more time for important decisions to be made.[317]

One of the key elements to the statute is that it provides the opportunity for the court to revoke the involuntary commitment in situations where proper guardianship can be established.[318] By nature, the state funded commitment places a burden on taxpayers.[319] Adding this system would require an increased number of beds and locations for residential facilities in the state.[320] However, this is necessary because it provides proper care and protection for individuals with dementia.[321] During this time, the attorney *ad litem* is still required to investigate the situation of the defendant and determine if there are any viable options to step in as a permanent guardian for the individual, just as they do for individuals with intellectual disability.[322]

Oftentimes, establishing guardianship can be time consuming.[323] If an individual ends up committing a crime and getting arrested, it is likely a result of a guardianship not already being established, therefore, there was no one watching out for the individual.[324] During the limbo of finding a proper guardian, there is nothing to protect the best interests of the individual and provide the proper care required.[325] While it is true that guardians *ad litem* can be assigned to individuals where a proper guardian can not be established, there are not always individuals with the resources or capacity necessary to

313. Toledo, *supra* note 177.
314. *See id.*
315. *See* discussion *supra* Section V.A.
316. *A Texas Guide to Adult Guardianship*, *supra* note 174, at 2.
317. Toledo, *supra* note 177.
318. *See id.*
319. *See Alzheimer's Disease – Options for Care*, *supra* note 175.
320. *Id.*
321. *Id.*
322. TEX. HEALTH & SAFETY CODE ANN. § 593.004.
323. Toledo, *supra* note 177.
324. *Id.*
325. *Id.*

care for these individuals.[326] Similarly, there are not always individuals available that have the capacity to act as a caretaker for those with intellectual disabilities.[327] These facilities exist for a reason.[328] These facilities could provide a more readily available solution to provide the proper care until a permanent guardian is established.[329]

E. The Involuntary Commitment Acts as a Bridge Until a Management Trust Can Be Created to Fund the Proper Care of the Individual

In some instances, individuals with dementia have the financial capacity to take care of themselves, but they lack the mental capacity to do so.[330] For example, an elderly woman with a large estate might be able to afford placement in a private nursing home specifically focused on the care of individuals with dementia.[331] However, if she lacks the capacity to manage the monthly payments and sign off on her own admission to the facility, then the money is ineffective.[332] One of the duties imposed by the statute on the attorney *ad litem* is the investigation into the financial capacity of the defendant.[333] If it is determined that the individual has an estate that could potentially fund the placement in a private care facility, a trust may be created from the estate to do so.[334]

A management trust would be most applicable in this situation.[335] A court can create a management trust if an individual expresses concern for the well-being of another individual.[336] Specifically, the court can step in and act as the guardian of the trust property until another guardian can be assigned, or the court can choose to assign a guardian in lieu of creating the trust from the property of the incapacitated individual.[337] Either way, the court will act in the best interest of the ward.[338] Although this type of trust is typically used to protect children who do not receive proper treatment, the statute also creates an opportunity for incapacitated individuals to receive proper care and treatment.[339] In this instance, the attorney *ad litem* can act as

326. Toledo, *supra* note 177.
327. *Id.*
328. *See generally* Heller, *supra* note 306 (discussing the importance of services for indivudals with intellectual disabilities).
329. *Id.*
330. *See generally* Robert B. Fleming, *Representing the Elderly Client or the Client with Diminished Capacity*, 50 FAM. L.Q. 27, 30 (2016) (discussing the precautions that must be taken from a financial standpoint when representing an elderly individual of diminished capacity as a result of their diagnosis).
331. Author's original hypothetical.
332. *Id.*
333. *See* discussion *supra* Section V.A.
334. *See* discussion *supra* Section V.A.
335. TEX. EST. CODE ANN. § 1301.
336. *Id.* § 1301.051
337. *Id.* § 1301.053.
338. *Id.*
339. *Id.* § 1301.054.

the concerned individual and propose that the court create a trust from the estate that is available.[340] This is the ideal situation because it ensures that only what is necessary is used to provide care.[341]

The main purpose of providing the individual with a private care facility rests on the degree of care that can be given.[342] The individual, or in this case her guardian, is able to be more selective on the location and specifications of a residential care facility.[343] For example, due to the varying degrees of severity among dementia patients, some may require the specialized attention that only secure treatment facilities can offer.[344] Others may need only moderate assistance that can be found in assisted living facilities.[345]

Involuntary commitment facilities provide what is necessary for an individual to receive proper care but may not offer all the bells and whistles available in a private institution.[346] However, the key to this is the bridge period of the involuntary commitment.[347] This time ensures that all of the individual's finances are put in order and a payment system is established to fund the placement of an individual in a private residential facility.[348] Furthermore, because the individual is securely located in a facility that cares for them properly, the attorney *ad litem* can research the long-term care facilities carefully to ensure the individual receives all the treatment necessary.[349]

F. The Involuntary Commitment Acts as a Safety Net for Those with No Viable Guardians or Financial Assets

Individuals with dementia may not have any living family members or friends that can step in to serve as a guardian.[350] Even worse, the individual may have family members who refuse to assist or be appointed as a guardian.[351] As earlier noted, there is a correlation between a lack of mental capacity and homelessness.[352] These instances create an interesting problem that can be solved by involuntary commitment.[353]

---

340. *Id.* § 1301.051.
341. *Id.* § 1301.054.
342. *See generally* Smith, *supra* note 198 (describing the benefits of an assisted living facility, while also evaluating whether these types of facilities will be able to keep up with the rising demand due to higher numbers of dementia patients).
343. *See id.*
344. *See id.*
345. *See id.*
346. *Disability Rights Texas*, *supra* note 240.
347. *See* discussion *supra* Section V.A.
348. *See* discussion *supra* Section V.A.
349. *See* discussion *supra* Section V.A.
350. *A Texas Guide to Adult Guardianship*, *supra* note 174, at 35.
351. *Id.*
352. *See* Booth, *supra* note 214, at 245.
353. *See* discussion *supra* Section V.A.

Although the goal of the commitment is to provide a grace period in which proper guardianship can be established or financial care can be set up, it still provides individuals with the proper care for an indefinite amount of time.[354] This means that those defendants who have no one to turn to will still receive proper care and treatment even if no guardian can be found.[355] Of course, this is not the ideal solution.[356] Involuntary commitment, as it is for those with intellectual disabilities, is not meant to replace guardianship, but it should be designed to provide breathing room for the court to make decisions in the best interest of the individual.[357] However, in the worst-case scenarios, these commitments could keep individuals with dementia off the streets.[358] By doing so, the commitment accomplishes its primary task of ensuring that the individual receives proper treatment.[359] However, this is not the only benefit because it also helps to prevent future crimes committed by this individual due to their confusion.[360]

VI. CONCLUSION

"What walks on four legs in the morning, two legs during the day, and three legs in the evening? . . . Man."[361] Our society is constantly aging and changing.[362] As our society continues to grow older, we become more feeble.[363] This feebleness is not just in the strength of our bodies but also in the strength of our minds.[364] As such, we can lose our sense of self and behave in ways that go against the normal social standards.[365] As a result, we must take steps to ensure the protection of our oldest members.[366] And yet, the criminal justice system is ill-equipped to handle the influx of problems that undoubtedly surface over the next several decades.[367]

The purpose of the criminal justice system is to provide for the well-being of society and to ensure that individuals who violate the law are

354. *See* discussion *supra* Section V.A.

355. *See generally* discussion *supra* Section V.A (showing that the court will not remove the committed individual from their placement unless a legitimate guardian or trust can be established).

356. *See* discussion *supra* Section V.A.

357. *See* discussion *supra* Section V.A.

358. *See* Booth, *supra* note 214, at 245.

359. Amdur, *supra* note 128.

360. Thorpe, *supra* note 126.

361. Thomas Armstrong, *The Stages of Life According to the Riddle of the Sphinx*, AM. INST. FOR LEARNING & HUM. DEV. (Aug. 8, 2012), https://www.institute4learning.com/2012/08/08/the-stages-of-life-according-to-the-riddle-of-the-sphinx/#:~:text=In%20the%20morning%20of%20life,development%20concept:%20Freud's%20oedipus%20complex.&text=This%20article%20was%20brought%20to,and%20www.institute4learning.com [https://perma.cc/TD2U-HU8S].

362. Plassman et al, *supra* note 109, at 126.

363. Milanovic et al, *supra* note 69, at 549.

364. ALZHEIMER'S ASS'N, *supra* note 5.

365. Wapner, *supra* note 44.

366. *See* discussion *supra* Section V.A.

367. *See* discussion *supra* Section III.B.

punished for their transgressions.[368] Of course, this can only truly be satisfied if individuals have a firm understanding of what they did and how it affects society around them.[369] Individuals with dementia lack the capacity to truly comprehend the gravity of their mistakes.[370] As a result, the purpose of the criminal justice system is unsatisfied by placing them in jail unnecessarily.[371] At the same time, it is important to acknowledge that the rest of society may be unwilling to accept these individuals back if they continue to be a hinderance.[372]

Court ordered involuntary commitments are one potential solution to the problem.[373] The necessary procedures are already in place for other incompetent individuals and could be easily applied to another group hindered by a neurocognitive disorder.[374] Involuntary commitments, like those available to individuals with intellectual disabilities, could act as a bridge to ensure that the needs of society are taken care of while also ensuring that the needs of the individual are also met.[375]

Enacting this statute would provide criminal courts with the proper tools and steps to ensure that people like Jenny are not cast aside to fend for themselves.[376] This statute allows the court to place Jenny in a proper treatment facility and ensure that all her needs are met while protecting herself and society.[377] During this time the court—at the advice of the attorney *ad litem*—could determine the best solution to satisfy the specific requirements of Jenny's situation.[378]

The court could use this time to cast a wide net in an effort to establish appropriate, sufficient guardianship from someone who has Jenny's best interest at heart.[379] Although this can be a time-consuming endeavor, her placement in a treatment facility would remove the ticking clock and ensure that the best decision is made.[380] If no guardianship can be established, the court could order a management trust to be created from the estate that was left to Jenny both by her husband and her father.[381] Again, although this can

368. Shelley, *supra* note 123.
369. *Mental Health Treatment While Incarcerated*, *supra* note 134.
370. Liljegren, *supra* note 12, at 301.
371. *See* Thorpe, *supra* note 126.
372. *See generally id.* (noting that the protection of society is an important function of the criminal justice system).
373. *See* discussion *supra* Section III.B.
374. *See* discussion *supra* Section III.B.
375. *See* discussion *supra* Section V.A.
376. *See* discussion *supra* Section V.A.
377. *See* discussion *supra* Section V.A.
378. *See* discussion *supra* Section V.A.
379. *See* discussion *supra* Section V.A.
380. *See* discussion *supra* Section V.A.
381. *See* discussion *supra* Section V.A.

be a time-consuming ordeal, the placement in a long-term care facility provides Jenny with all the support she needs.[382]

As the average age of society continues to increase, it is important to recognize that this will continue to become an issue.[383] By enacting this statute, the criminal court system can be better prepared with adequate measures to ensure that the defendant is removed from society while also providing proper care and treatment for the individual.[384] Although this statute may primarily be used as breathing room to ensure that the proper solution is reached for everyone, it may also be utilized to protect a portion of the dementia population that would never be able to receive proper care otherwise.[385]

382. *See* discussion *supra* Section V.A.
383. Plassman, *supra* note 109, at 130.
384. *See* discussion *supra* Section V.A.
385. *See* discussion *supra* Section V.A.