AN EMPIRICAL STUDY OF MALINGERING IN INSANITY CASES ACROSS TWELVE DECADES*

DEBORAH W. DENNO**

The last 120 years have seen a surge in the use of neuroscientific evidence in American criminal law cases, fueled by discoveries in brain science that have challenged the legal system's assumptions about human thinking and culpability. One key assumption is that many defendants "malinger," that is, feign or fake insanity or mental illness, to garner an acquittal or mitigated punishment. Likewise, when potential evidence that a defendant is malingering is introduced in court, it can have a pronounced and powerful negative effect on the defendant's insanity claim, especially when juries and criminal justice actors are already skeptical of insanity defendants. To shed light on this quandary, this Article relies on an original empirical study ("Neuroscience Study") that I conducted, analyzing all criminal cases (totaling 8,335 cases) that have addressed neuroscientific evidence over the past twelve decades (1900–2020). The Article focuses primarily on the Neuroscience Study's 3,108 insanity cases involving malingering, and it reveals some startling results. For example, one of the strongest arguments prosecutors can make to rebut neuroscientific defense

** Arthur A. McGivney Professor of Law, Founding Director, Neuroscience and Law Center, Fordham University School of Law. All statistics and support for the figures and case distributions discussed in this Article are available in a Statistical Appendix on file with the author and submitted to the *North Carolina Law Review*. I delivered an earlier version of this Article at the *North Carolina Law Review*'s symposium on "The Legal and Ethical Implications of Neuroscience," and I thank Professor John Conley and the *Law Review* for such an informative gathering. I am most grateful to the following individuals for their contributions to this Article at different stages: Kirsten Byrnes; John Costantino; Kathleen Ellis; Diana Goldstein; Lea Johnston; Chunlin Leonhard; Adrianna Levato; Megan Martucci; Michael Perlin; Victoria Phillips; Phillip Resnick; Robert Schug; Rebecca Shore; Erica Valencia-Graham; Oliver Vettoretti; April Xiaoyi Xu; and the Board of Advisors of the Neuroscience and Law Center (Fordham Law School). Erica Valencia-Graham created all the Article's figures and Statistical Appendix with impeccable care and wisdom. I also received helpful comments on earlier versions of this Article from a presentation given at the 2025 Criminal Justice Academic Workshop, hosted by the ABA Criminal Justice Section Academics Committee, in partnership with the AALS Section on Criminal Law. I give special appreciation to two remarkably talented, diligent, and insightful research assistants, Adrianna Levato and Oliver Vettoretti. In addition, I thank the staff of the *North Carolina Law Review*, particularly Mary H. Kwon, for superb comments, editorial oversight, and outstanding care throughout the editorial process. Kathleen Thompson and the Fordham Law School library staff were, as always, skilled and at the ready. I am indebted to six sources for research funding: Fordham University School of Law, Fordham's Neuroscience and Law Center, Mr. and Mrs. John R. Costantino, the Gerald M. Edelman Post-Graduate Fellowship in Neuroscience, the Roger Sachs Family Foundation, and the Barnet and Sharon Phillips Family Fund. No individual or organization acknowledged in this Article necessarily supports the Article's interpretations or conclusions. I take responsibility for any mistakes or misjudgments.

evidence is to claim the defendant is malingering, a tactic that negatively influenced case outcomes in nearly two thirds of the insanity cases in which it was made. In addition, over the past twelve decades, malingering claims in insanity cases have increased substantially, while insanity cases have plummeted. The consequences to defendants and the system as a whole can be severe. An expert's false or inaccurate diagnosis of malingering can lead to highly detrimental outcomes, including longer sentences, offense enhancements, or denied treatment, while also reverberating across cases using neuroscientific evidence more generally. Such blunders effectively controvert the overarching goals of the criminal justice system, propelling unjust punishments and misconceptions about the intertwining of the neuroscience and law.

INTRODUCTION

Over the last 120 years, the number of criminal law cases in the United States involving neuroscientific evidence has surged.[1] "Neuroscience"—generally defined as the branch of science that studies the brain and nervous system[2]—has introduced a range of more sophisticated possibilities for explaining the human mind and behavior, especially in the context of complex

1. *See* Deborah W. Denno, *How Experts Have Dominated the Neuroscience Narrative in Criminal Cases for Twelve Decades: A Warning for the Future*, 63 WM. & MARY L. REV. 1215, 1243–44 (2022) [hereinafter Denno, *Neuroscience Narrative*].

2. NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE 206 (Brent Garland ed., 2004); *see also* OWEN D. JONES, JEFFREY D. SCHALL & FRANCIS X. SHEN, LAW AND NEUROSCIENCE 931 (2d ed. 2021) (defining neuroscience as "[t]he scientific study of the structure and function of the nervous system; includes experimental and clinical studies of animals and humans").

doctrines, such as the insanity defense.[3] Recent neuroscientific discoveries also suggest that some of society's previous assumptions about human thinking and culpability may not accurately reflect how the brain functions, as they are rooted in the science and philosophy of earlier centuries.[4] Indeed, much of the controversy surrounding the intersection of neuroscience and criminal law stems from simplistic and misguided myths about neuroscientific evidence, as well as about how judges, jurors, attorneys, and testifying experts across disciplines use it in court. If the criminal legal system ignores these developments, it risks perpetuating a system that unjustly punishes some people.[5]

What are these myths, and how can they lead to unjust punishments? This Article confronts some of the major ones most closely associated with the insanity defense. For example, a leading misconception is that while defense attorneys are more likely than prosecutors to try to use neuroscientific evidence on behalf of their clients, when prosecutors do introduce neuroscience, it is primarily to suggest that defendants will be a future danger because of their "broken" brains and, as a result, uncontrollable behavior.[6] Yet, my research shows that while such future dangerousness cases exist, they are not nearly as pronounced as some commentators have suggested.[7] Instead, prosecutors employ neuroscientific evidence in other ways that the criminal justice system has insufficiently recognized; for example, it can be used to measure the extent of a victim's brain injury in an effort to bolster arguments suggesting that a

3. *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, 3 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14-1 (3d ed. 2025).

4. *See infra* notes 41–58 and accompanying text.

5. *See generally* Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493 (2015) [hereinafter Denno, *The Myth*] (controverting the popular image of neuroscience as a double-edged sword that will either exonerate defendants or unfairly characterize them as a danger to society).

6. *See* Owen D. Jones & Francis X. Shen, *Law and Neuroscience in the United States*, *in* INTERNATIONAL NEUROLAW: A COMPARATIVE ANALYSIS 349, 362 (Tade Matthias Spranger ed., 2012) (discussing how the defense's employment of neuroscientific evidence in capital sentencing can suggest that "a brain *too* broken may be simply too dangerous to have at large, even *if* it is somehow less culpable"); O. Carter Snead, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1338 (2007) (cautioning against the use of neuroscientific evidence in capital cases, despite its mitigating potential, because some components of the capital sentencing process "—most notably, the aggravating factor of future dangerousness—are no friend to the capital defendant [and, i]n fact, they are often the gravest threat to his life").

7. *See* Denno, *The Myth*, *supra* note 5, at 526–27. The concept of "future dangerousness" is widely recognized in death penalty cases. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 275 (1976) ("[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."); United States v. Fields, 516 F.3d 923, 941 (10th Cir. 2008) (framing the aggravating factor of future dangerousness) ("The defendant poses a future danger to the lives and safety of other persons, as evidenced by one or more of the following: (a) the offenses were a part of a continuing pattern of threatened or impending violence; (b) the defendant's lack of remorse."); *see also* Simmons v. South Carolina, 512 U.S. 154, 162 (1994) (emphasizing that a defendant's future dangerousness bears on sentencing determinations).

defendant intended to kill their victim.[8] Shaken baby syndrome cases are perhaps the most notorious example of this strategy in light of the rise of convictions and sentences now being questioned or overturned based on increasing doubts about the syndrome's application and validity.[9] There is also evidence to suggest that, at least initially, defense attorneys were not fully prepared or informed to rebut shaken baby syndrome evidence, given its credibility within the scientific community and the perceived complexity of its diagnosis.[10]

With respect to insanity cases in particular, the myths proliferate. For example, prosecutors commonly rely on the public's (and, hence, a potential jury's) misconception that significant numbers of defendants "malinger," that is, feign or fake insanity and the mental illness and brain trauma that can accompany it, in an effort to garner an acquittal or mitigated punishment.[11] Likewise, when potential evidence that a defendant is malingering is introduced in court, it can have a pronounced and powerful negative effect on an insanity claim, especially because many criminal justice actors are already skeptical of insanity defendants.[12] In addition, defense attorneys are not always prepared to combat a prosecutor's claims that a defendant is malingering because they do not fully anticipate it. Their focus is on proving the insanity defense itself, not on countering arguments that the defense is feigned or concocted.[13] As a consequence, the prosecution's expert testimony can be impactful in these malingering cases because courts and juries are relatively more primed to accept it, and defense attorneys are less prepared to rebut it. There appear to be parallels here between cases involving shaken baby syndrome and malingering because experts hold sway and defense attorneys are caught off-guard.

8. Deborah W. Denno, *Concocting Criminal Intent*, 105 GEO. L.J. 323, 326 (2017) [hereinafter Denno, *Concocting*].

9. *See* Eza Bella Zakirova, *Shaken Baby Syndrome: As a Controversy in Wrongful Conviction Cases*, 81 ALB. L. REV. 1027, 1027 (2018) (documenting that, from 2001 to 2017, 213 of the 2,000 shaken baby syndrome convictions or charges reported have been dropped, dismissed, or overturned following secondary analyses that revealed that the victim suffered from a diagnosis other than shaken baby syndrome); Maitreya Badami, *Preventing and Correcting Wrongful Convictions for Abusive Head Trauma Using the California Racial Justice Act*, 20 STAN. J.C.R. & C.L. 381, 388–89 (2024) (stating that shaken baby syndrome is a highly controversial diagnosis that has resulted in many wrongful convictions, followed by numerous exonerations of individuals wrongfully convicted of shaken baby syndrome-related assault or homicide); Lesley C. Risinger & D. Michael Risinger, *Introduction to the Symposium with Illustrative Cases and a List of Factors Contributing to the Problems of New Jersey's Post-Conviction Procedures*, 49 SETON HALL J. LEGIS. & PUB. POL'Y 1, 2–4 (2025) (noting that the New Jersey Supreme Court "recently barred the admission at trial of unreliable forensic testimony concerning 'shaken baby syndrome,'" including expert testimony that shaking alone can cause the injuries associated with shaken baby syndrome).

10. Denno, *Concocting*, *supra* note 8, at 355.

11. *See infra* Figure 2.

12. *See infra* Section IV.D and accompanying text.

13. *See infra* note 199 and accompanying text.

To add insight into this quandary, this Article relies on an original empirical study ("Neuroscience Study" or "the Study") that I conducted, analyzing all criminal cases (totaling 8,335 cases) that have addressed neuroscientific evidence over the past twelve decades (1900–2020).[14] The Neuroscience Study presents extensive, systematic data and case studies that demonstrate the use of neuroscientific evidence in courtrooms across the country, encompassing a broad operational definition of the term.[15] Because of the Study's size and scope, analysis of its data can reveal previously hidden influences in the criminal justice system that smaller case studies or empirical analyses could not detect. The twelve-decade timeline can also detect when these influences began to take effect and how they have evolved over time, particularly when examining prosecutors and defense attorneys.[16]

This Article focuses primarily on the Neuroscience Study's 3,108 insanity cases because the Study enables a twelve-decade tracing of the insanity defense, one of the most stable and powerful legal doctrines that has existed in some form in all states. Likewise, nearly all insanity cases involve neuroscientific evidence of some sort, given that the vast majority of defendants who plead insanity claim to possess severe mental illness, brain damage, or some other form of cognitive deficit.[17] My research shows that, generally, defense attorneys want neuroscientific evidence admitted into the courtroom because they think the evidence will have a strong mitigating sway on a jury, an argument and approach that the prosecution generally resists unless it can use other neuroscientific evidence to cut against this mitigation.

The Neuroscience Study has produced some startling revelations in its insanity defense cases. For example, according to the Study's results, one of the strongest arguments a prosecutor can make for rebutting neuroscientific defense evidence is that the defendant is malingering. Indeed, the Study has found that over the past twelve decades, malingering arguments in insanity cases have increased substantially, and they have been impactful. When raised by the prosecution, malingering can be a successful argument against the insanity defense and may reverberate broadly, affecting the defense's use of

14. The Neuroscience Study is collecting and analyzing data beyond 2020, but, for the purposes of this Article, is reporting only up to 2020 to enable a clear decade cut-off and to avoid the potential disruptions attributed to the COVID-19 pandemic at least until we have more post-2020 data to measure those disruptions. *See* Denno, *Neuroscience Narrative*, *supra* note 1, at 1238 ("[P]reliminary reports show that the COVID-19 pandemic influenced crime rates through 2020 and is likely to continue to impact crime rates through 2021 and beyond, much like other historic events.").

15. *See infra* notes 31–40 and accompanying text.

16. *See infra* notes 31–33 and accompanying text.

17. *See generally* Denno, *Neuroscience Narrative*, *supra* note 1 (examining how experts have dominated the neuroscience narrative in insanity cases, which often concern a defendant's brain damage or abnormality).

neuroscientific evidence in general.[18] Malingering is also a commonly undetected influence in insanity cases that researchers have previously overlooked, most likely because of limited sample sizes.

The purpose of this Article is to examine the effects of malingering claims by prosecutors as a way to counter a defense attorney's efforts to prove a successful insanity defense. Part I overviews the Neuroscience Study and the insanity cases that it identified, noting the plunge in the use of the insanity defense from 1900 to 2020, which was most pronounced in the 1980s. Part II discusses how the Study's 302 malingering cases were selected and defined, emphasizing that while insanity cases generally have declined over time, those involving malingering arguments have increased substantially across the twelve decades.[19] Part III investigates the results and impact of malingering claims in insanity cases, noting that such claims significantly influenced the outcome of nearly two thirds of the insanity cases in which they were made. Part IV examines expert testimony related to malingering, looking at three types—State experts, defense experts, and court-appointed experts—in addition to how such claims were brought. Notably, all malingering claims were related to the defendant, except one case, which was related to the victim. Part V raises the implications for the insanity defense posed by the increase in malingering claims and explores how such claims affect cases using neuroscientific evidence more generally.

With this backdrop, this Article offers the following results as guideposts for assessing the impact of malingering claims on insanity determinations:

- Of the 3,108 insanity cases in the Neuroscience Study, 302 cases, or nearly ten percent (9.74%), included a malingering issue.[20] In insanity defense cases not involving a malingering claim, prosecutors instead simply rebutted a defendant's mental illness or insanity-related claim without arguing that the defendant feigned insanity.[21]
- All cases (but one) involving a claim of malingering were related to the defendant.[22]
- Malingering claims in insanity cases have increased substantially over the past twelve decades, rising from three percent of insanity cases in the early

18. *See infra* Section IV.B.

19. Accusations that defendants may be lying about their mental illness have existed for centuries. *See* Phillip J. Resnick & James L. Knoll, IV, *Malingered Psychosis*, *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 51, 64 (Richard Rogers ed., 3d ed. 2008) [hereinafter Resnick & Knoll, IV, *Malingered Psychosis*] ("Concerns about defendants feigning mental disorders to avoid criminal responsibility date back to at least the 10th century.").

20. *See infra* Figures 1, 2.

21. *See infra* Figures 1, 2.

22. *See infra* note 86 and accompanying text.

1900s to about twenty-two percent of insanity cases in the early 2000s, and then leveling off slightly to nineteen percent in the last decade.[23]

- Malingering claims were most frequently raised by the prosecution, yet also commonly identified during a court-appointed expert's evaluations.[24] In some cases, even defense experts concluded that the defendant had malingered.[25]
- When a malingering claim was raised, it influenced the court's judgment in approximately seventy percent of cases, suggesting that malingering plays a substantial role in shaping courts' decisions on insanity.[26] For example, there were only four cases among the 302 malingering cases in which the court determined that the defendant was not malingering based on evidence presented by the defense in opposition to evidence presented by either a State expert or a court-appointed expert.[27]
- Expert testimony related to malingering appeared in about ninety percent of the malingering cases, indicating that experts are a powerful component of these proceedings.[28] Likewise, experts were all the more important because purportedly "objective" indicators, such as testing and neuroimaging of defendants, were rarely conducted, and expert opinion dominated malingering determinations.
- Expert evaluation and lay witness observation of a defendant's mental health and behavior were the most common forms of support for a malingering claim. Neuropsychological testing related to malingering was performed in only 27.2% of cases, while brain imaging testing occurred in only 3.3% of cases.[29]
- By far, the most common allegation of malingering concerned mental illness. Defendants were accused of feigning some form of mental illness in nearly eighty percent of the cases.[30]

The results of this Article's Neuroscience Study provide an unparalled context for examining malingering. Not only does the Study offer both a historical and

23. *See infra* Figure 2.

24. *See infra* Figure 3.

25. *See infra* Figure 3.

26. *See infra* Figure 5.

27. In three cases, defense experts successfully countered evidence presented by court-appointed experts that the defendant was malingering. *See* Eubanks v. Warden, 228 F. Supp. 888, 895–96 (E.D. La. 1964); State v. Champagne, 497 A.2d 1242, 1248 (N.H. 1985); Brown v. Sternes, 304 F.3d 677, 698–99 (7th Cir. 2002). In one case, defense experts successfully countered evidence presented by State experts that the defendant was malingering. *See* Pulinario v. Goord, 291 F. Supp. 2d 154, 178–81 (E.D.N.Y. 2003).

28. *See infra* Figure 6.

29. *See* Statistical Appendix (on file with the North Carolina Law Review).

30. *See infra* Figure 4.

modern perspective spanning over a century, but its size enables a substantial universe of cases from which to draw comparisons.

I. THE NEUROSCIENCE STUDY'S INSANITY DEFENSE CASES

The Neuroscience Study's primary purpose was to examine all criminal cases, totaling 8,335, that involved neuroscientific evidence over the past twelve decades, from January 1, 1900, to December 31, 2020.[31] Predictably, the great majority of defendants were convicted of homicide or some other kind of violent crime, and most cases began as death penalty cases.[32] In scope and size, this research provides the means to assess how the criminal justice system employs neuroscientific evidence from a vast range of perspectives and goals, expanding beyond case studies and research with limited sample sizes.[33] The number of cases available for analysis on the insanity defense alone is sizeable, and the Neuroscience Study contains one of the largest systematic collections of malingering cases in the United States.

I have detailed the strengths and limitations of the Study's data in my prior and ongoing work.[34] In general, the Neuroscience Study's cases were acquired employing the Westlaw and Lexis databases,[35] the world's most widely used legal databases.[36] To ensure validity and reliability when examining all cases across the twelve decades, the Neuroscience Study employed trained and experienced Fordham Law School J.D. student research assistants, who hand-coded (and cross-checked) over 100 key factors relevant to the criminal justice system.[37] While there are noted drawbacks to relying on Westlaw and Lexis, they are the most valid and reliable resources for conducting such research.[38]

The Study's operational definition of neuroscientific evidence data was broad, recognizing the different types of information that courts and experts employ to understand a defendant's or a victim's brain and behavior.[39] My team and I relied on three types of search terms: (1) "neuroimaging tests" (brain scans), which are created by computer images of a human brain—such as an MRI or CT scan; (2)

31. Denno, *Neuroscience Narrative*, *supra* note 1, at 1239.

32. *Id.* at 1243.

33. *See id.* at 1239–43.

34. *Id.* at 1241–42.

35. *Id.* at 1240.

36. *See* Mary Rumsey, *A Guide to Fee-Based U.S. Legal Research Databases*, N.Y.U. L.: GLOBALEX (Aug. 2018), https://www.nyulawglobal.org/globalex/us_fee-based_legal_databases1.html [https://perma.cc/6ZH6-9S4E].

37. Denno, *Neuroscience Narrative*, *supra* note 1, at 1241. These factors included basic case information (such as procedural history, year, jurisdiction, crime, and sentence); findings by medical professionals and diagnosis information; defendant background information; brain scans and other forms of testing; funding requests; future dangerousness issues; malingering claims; ineffective assistance of counsel claims; neuroscience-based defenses; and court decisions. *See id.* at 1280–88.

38. *See id.* at 1241–42.

39. *See id.* at 1240.

"non-neuroimaging tests," which are measures administered by a medical professional to asses an individual's operational capacity—such as the Wechsler Intelligence Scale for Children or the Wechsler Adult Intelligence Scale; and (3) terms associated with "expert testimony," recognizing that experts can testify about an individual's brain functioning without any objective tests or measures whatsoever.[40]

Focusing on the Study's insanity cases only, this Article's specific goal is to analyze how criminal justice actors routinely employ accusations of malingering to counter a defendant's efforts to present and argue for the insanity defense. It is important to evaluate such potent challenges to the insanity defense because it has long reflected "the fundamental moral principles of our criminal law, resting on assumptions that are older than the Republic and beliefs about human rationality, deterrability and free will."[41]

There have been five major insanity defense tests that have existed over the course of the past two centuries: the *M'Naghten* rule,[42] the irresistible-impulse test,[43] the *Durham* (or product) test,[44] the American Law Institute's Model Penal Code ("MPC") test,[45] and the federal insanity standard.[46] Today,

40. *Id.*; *see infra* notes 284–93 and accompanying text.

41. PERLIN & CUCOLO, *supra* note 3, § 14.1-1 (footnotes omitted) (internal quotations omitted).

42. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722 (HL). The English House of Lords presented the defense as follows:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, [1] as not to know the nature and quality of the act he was doing; or, [2] if he did know it, that he did not know he was doing what was wrong.

Id.

43. Kahler v. Kansas, 140 S. Ct. 1021, 1045 (2020) (Breyer, J., dissenting) (noting that some courts broadened the *M'Naghten* test with an irresistible-impulse standard that included the concept that a defendant's incapacity could also include a lack of control).

44. This test was established in the case of *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), *overruled by*, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) ("The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had 'been deprived of or lost the power of his will.'" (quoting State v. White, 270 P.2d 727, 730 (N.M. 1954))). It was abandoned by the Court eighteen years later. *Brawner*, 471 F.2d at 1010 (Bazelon, C.J., concurring) ("We are unanimous in our decision today to abandon the formulation of criminal responsibility adopted eighteen years ago in [*Durham*] . . . . [J]uries will now be instructed in terms of the American Law Institute test.").

45. MODEL PENAL CODE § 4.01(1) (AM. L. INST., Official Draft and Explanatory Notes 1985) [hereinafter MODEL PENAL CODE 1985]. The exact standard is as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Id.* (alteration in original).

46. In 1984, Congress enacted its version of the *M'Naghten* test, called "The Federal test," thereby eliminating the federal system's dominant use of the Model Penal Code test. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 § 20 (renumbered § 17, Pub. L. 99-646,

forty-five states, the federal government, and the District of Columbia retain an insanity defense.[47] Nearly half of these jurisdictions use *M'Naghten* or a variant of *M'Naghten*, while thirteen states and the District of Columbia use the MPC test.[48] Only New Hampshire has adopted the *Durham* Test,[49] while North Dakota relies on its own unique formulation of a standard.[50] Five states have either effectively "abolished" or substantially restricted the language or meaning of the insanity defense.[51]

The evolution of these five insanity tests has primarily centered on how broadly or narrowly they conceive a defendant's inability to be culpable, and what influential political forces may be at play. For example, the *M'Naghten* test generally evaluates (1) whether the defendant understood their actions (cognitive capacity) and (2) whether they knew those actions were wrong (moral capacity).[52] Yet, the MPC expands both of these *M'Naghten* prongs and explicitly recognizes an individual's impaired ability to conform conduct to the law.[53] The MPC test gained widespread popularity until John Hinckley Jr.'s 1982 insanity acquittal under the MPC standard, which prompted immediate public backlash.[54] In response, some jurisdictions, including the federal

§ 34(a), 100 Stat. 3599 (1986)) (codified as amended at 18 U.S.C. § 17(a)). According to the "Federal test,"

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Id.

47. *Kahler*, 140 S. Ct. at 1046 (Breyer, J., dissenting). For a comprehensive breakdown of the types and numbers of insanity tests across states, see *id.* app. at 1051–59. Several U.S. territories also have an insanity defense, including the U.S. Virgin Islands, Guam, Puerto Rico, American Samoa, and the Northern Mariana Islands. *See* V.I. CODE ANN. tit. 14, § 14(4); 9 GUAM CODE ANN. § 7.16; P.R. LAWS ANN. tit. 34A § 74; AM. SAM. CODE ANN. § 46.1301; N. MAR. I. R. CRIM. P. 12.2.

48. *Kahler*, 140 S. Ct. at 1046 (Breyer, J., dissenting).

49. *Id.*

50. *Id.* (quoting N.D. CENT. CODE ANN. § 12.1-04.1-01(1) (2012)).

51. These five states "exonerate a mentally ill defendant only when he cannot understand the nature of his actions and so cannot form the requisite *mens rea*." *Id.* at 1026 n.3 (majority opinion); *see also* KAN. STAT. ANN. § 21-5209; ALASKA STAT. §§ 12.47.010(a), 12.47.020; IDAHO CODE § 18-207(1), (3); MONT. CODE ANN. § 46-14-102; UTAH CODE ANN. § 76-2-305.

52. *Kahler*, 140 S. Ct. at 1038 (Breyer, J., dissenting); *see also* M'Naghten's Case (1843) 8 Eng. Rep. 718, 722 (HL).

53. *See Kahler*, 140 S. Ct. at 1036 n.12; Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 11–17 (2003) (examining the differences between *M'Naghten* and the Model Penal Code test).

54. *See From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html [https://perma.cc/QT5J-4SBR]. For excerpts from the trial transcript and a discussion of the events surrounding Hinckley's attempted assassination of President Ronald Reagan, as well as further legal proceedings up until 2021, see generally RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. (4th ed. 2021). An overview of the

government, eliminated the Model Penal Code's volitional component and introduced other *M'Naghten*-type restrictions.[55]

Irrespective of the to-and-fro over the standards for these five tests, "with striking consistency, they all express the same underlying idea: A defendant who, due to mental illness, lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime."[56] Likewise, for a range of reasons, twenty states have now adopted the 1843 *M'Naghten* standard, or some variation of it.[57] Thus, states have maintained a relatively homogenous guidepost for the meaning of insanity over the twelve-decade time frame of the Neuroscience Study, offering a substantial degree of doctrinal stability for assessing the impact of neuroscientific evidence.[58]

Altogether, the Neuroscience Study's insanity cases constitute one third of the Study's total pool of cases,[59] a significantly higher percentage relative to other studies.[60] There are four reasons for this discrepancy: attorneys more commonly raised the insanity defense in earlier decades;[61] the Neuroscience Study defines an insanity case broadly;[62] the Neuroscience Study's cases were selected because they involved some kind of neuroscientific evidence;[63] and,

facts of the case can also be found in *Hinckley v. United States*, 163 F.3d 647, 648–49 (D.C. Cir. 1999). After Hinckley's verdict, he was committed to a federal institute for psychiatric care. *See* Spencer S. Hsu, *Would-Be Reagan Assassin John Hinckley Jr. Wins Unconditional Release*, WASH. POST (Sep. 27, 2021, at 15:30 ET), https://www.washingtonpost.com/local/legal-issues/john-hinckley-unconditional-release/2021/09/27/8e5f5286-1f9f-11ec-9309-b743b79abc59_story.html [https://perma.cc/WG5L-F9AV]. On September 27, 2021, a federal judge awarded Hinckley unconditional release beginning in June 2022. *See id.*

55. *See* HENRY J. STEADMAN, MARGARET A. MCGREEVEY, JOSEPH P. MORRISSEY, LISA A. CALLAHAN, PAMELA CLARK ROBBINS & CARMEN CIRINCIONE, BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 46–47 (1993).

56. *Kahler*, 140 S. Ct. at 1039 (Breyer, J., dissenting).

57. *Id.* at 1051–55.

58. *See* Denno, *Neuroscience Narrative*, *supra* note 1, at 1232–36.

59. This percentage is based on dividing the 3,108 insanity cases by the 8,335 cases in the Neuroscience Study, which equals 37.29%. *See id.* at 1245.

60. *See* Richard A. Wise & Denitsa R. Mavrova Heinrich, *Toward a More Scientific Jurisprudence of Insanity*, 95 TEMP. L. REV. 45, 61 (2022) ("[B]etween 2013 and 2017 only 241 (.0002%) defendants entered an insanity plea out of 1,375,096 felony convictions [in New York State].").

61. *See infra* Figure 1.

62. For a detailed analysis of how insanity cases were selected and coded in the Neuroscience Study, see Denno, *Neuroscience Narrative*, *supra* note 1, at 1285–88. In a nutshell, the Neuroscience Study defines an "insanity case" as any case in which an insanity defense or insanity-related issue is raised. This umbrella category includes cases where an insanity defense was formally presented and argued before the court, as well as cases in which a defendant contends that an insanity defense should have been asserted, such as claims raised as part of an ineffective assistance of counsel argument. A case need not explicitly use the word "insanity" to be included in the dataset. Courts, especially in the earlier decades, often use alternative terminology to describe the same concept, such as stating that a defendant is "not guilty by reason of mental disease" or applying other language that indicates that an insanity issue is present. *See* Burgess v. State, 962 So. 2d 272, 289 (Ala. Crim. App. 2005) ("The record shows that Burgess originally entered a plea of not guilty by reason of mental disease or defect.").

63. *See supra* text accompanying note 40.

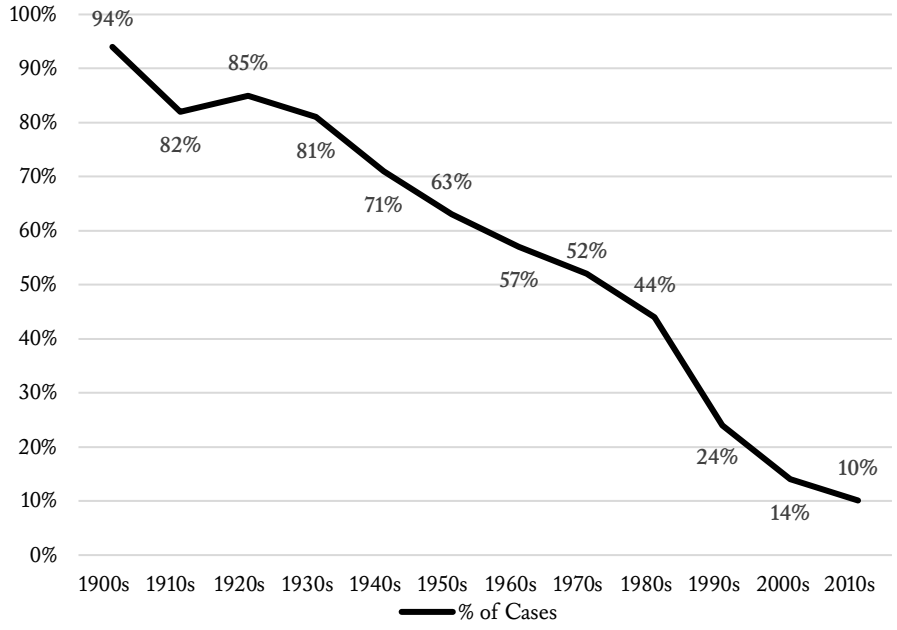
most significantly, most pre-existing data on the insanity defense comes from early studies that counted insanity pleas alone (most of which are dismissed), not from cases that were fully processed by the courts.[64]

The comparison of the usage of the insanity defense across time provides a broader perspective that has eluded earlier studies. As Figure 1 details, the percentage of insanity defense cases shows a strikingly rapid decline over the twelve decades, ranging from ninety-four percent of all cases in the first decade of the twentieth century (1900 to 1910) down to ten percent of all cases in the last documented decade (2010 to 2020).[65]

64. *See, e.g.*, Wise & Heinrich, *supra* note 60, at 61 ("[B]etween 2013 and 2017 only 241 (.0002%) defendants entered an insanity plea out of 1,375,096 felony convictions [in New York State]."); Lisa A. Callahan, Henry J. Steadman, Margaret A. McGreevy & Pamela Clark Robbins, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 333–37 (1991) (examining eight states across eleven years to identify the impact of various insanity reforms by reviewing 8,979 insanity pleas obtained from criminal dockets from each state); Richard A. Pasewark & Hugh McGinley, *Insanity Plea: National Survey of Frequency and Success*, 13 J. PSYCHIATRY & L. 101, 102–07 (1985) (collecting data from 1983–1984 and receiving partial information from forty-seven states and the District of Columbia); Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205, 207–09 (1989) (reporting on data collected from 1985 as a follow-up study to the 1983–1984 study and receiving partial information from forty-seven states and the District of Columbia); Carmen Cirincione & Charles Jacobs, *Identifying Insanity Acquittals: Is It Any Easier?*, 23 LAW & HUM. BEHAV. 487, 488–94 (1999) (reporting on partial data collected from thirty-five states and Allegheny County in Pennsylvania from 1970–1975); Jeffrey S. Janofsky, Mitchell H. Dunn, Erik J. Roskes, Jonathan K. Briskin & Maj-Stina Lunstrum Rudolph, *Insanity Defense Pleas in Baltimore City: An Analysis of Outcome*, 153 AM. J. PSYCHIATRY 1464, 1466–47 (1996) (analyzing 190 insanity pleas in district and circuit court cases from Baltimore City, Maryland, in 1991); Robert L. Randolph & Richard A. Pasewark, *Characteristics, Dispositions, and Subsequent Arrests of Defendants Pleading Insanity in a Rural State*, 11 J. PSYCHIATRY & L. 345, 346–347 (1983) (reviewing sixty-eight cases in Wyoming from 1967 to 1968 in which defendants pleaded insanity); Anne C. Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406 (1978) (analyzing data from forty-six insanity acquittee cases arising in Essex County, New Jersey, during 1976–1977).

65. *See infra* Figure 1.

Figure 1: Insanity Defense Case Distribution by Decade (8,335 Cases)[66]



Other colleagues and I have discussed the potential reasons for this precipitous decline, which became even more pronounced in the early 1980s. It was seemingly due in large part to the outrage resulting from the 1982 verdict of John Hinckley Jr., who was found not guilty by reason of insanity for his attempted assassination of then-President Ronald Reagan, and responsible for the resulting promulgation of the Insanity Defense Reform Act of 1984.[67] Yet, there were also other factors, including the long-held and substantial negative public opinion toward the insanity defense generally, which intensified with Hinckley's verdict, and the heightened burden of proof standard that made it far more difficult for defendants to prove insanity, as opposed to prosecutors having to prove sanity.[68] In due time, attorneys showed an increased willingness

66. The percentages consist of the number of insanity cases divided by the number of the neuroscientific study cases by decade.

67. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified as amended at 18 U.S.C. § 17); *see* Denno, *Neuroscience Narrative*, *supra* note 1, at 1242–51.

68. *See* Denno, *Neuroscience Narrative*, *supra* note 1, at 1242–51; Lisa Callahan, Connie Mayer & Henry J. Steadman, *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987) (stating that scholars have observed that "more reforms in the insanity defense [occurred] during the post-Hinckley time than during a comparable period prior to the shooting and acquittal," though attributing these reforms solely to Hinckley may overlook other causal factors; also suggesting that the Supreme Court decision in *Jones v. United States*, 463 U.S. 354 (1983), may account for a substantial portion of reforms commonly attributed to Hinckley, which

to use neuroscientific evidence in ways apart from just the insanity defense, including as mitigation evidence in death penalty cases.[69]

Another less-apparent factor is the rise of testimony by prosecution or court-appointed experts that the defendant is malingering, specifically, faking claims of mental illness.[70] The Neuroscience Study's pool of insanity cases has yielded enough malingering claims to detect trends and influences that may not be as evident in a smaller study. My team and I have uncovered 302 insanity cases involving malingering that we have studied in detail to determine when and how such claims are made, and the extent to which they successfully rebut defense efforts to present an insanity defense.[71] For the purposes of this Article, I refer to our efforts as the "Malingering Project" or simply "the Project."[72] The

required states using automatic, indefinite commitment of insanity acquittees to place the burden on defendants to prove insanity by a preponderance of the evidence). States wishing to retain or adopt automatic, indefinite commitment were therefore compelled to revise their burden and standard of proof: "Such legal changes in reference to Jones could be attributed to states responding to public pressures to make sure 'Hinckley couldn't happen in our state.'" *Id.*; Richard A. Wise & Denitsa R. Mavrova Heinrich, *Toward A More Scientific Jurisprudence of Insanity*, 95 TEMP. L. REV. 45, 61–63 (2022) (stating that the research consistently shows that public perceptions of the insanity defense are wildly inaccurate; the general public believes the insanity defense is common, easily successful, mostly used in murder cases, and followed by the quick release of acquittees, however, large-scale studies reveal that insanity pleas are extremely rare, only successful in a fraction of cases, and acquittals result in long-term psychiatric hospitalization rather than release); David De Matteo, Daniel A. Krauss, Sarah Fishes & Kellie Wiltsie, *The United States Supreme Court's Enduring Misunderstanding of Insanity*, 52 N.M. L. REV. 34, 68 (2022) (revealing that the public as well as jurors are confused by the insanity defense and its repercussions for the defendant); Eugene M. Fahey, Laura Groschad & Brianna Weaver, *"The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense*, 68 BUFF. L. REV. 805, 807–08 (2020) (explaining that despite contrary evidence, "the public is persistent in its belief that insanity is a loophole that sane defendants frequently fake in order to escape punishment" and "overestimates how often the insanity defense is raised and how successful it is"); Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1397 (1997) (stating that research confirms a persistent pattern of public animosity toward the insanity defense); Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 255–57 (1998) (noting that even before *Hinckley*, multiple surveys of individuals—ranging from politicians, community members, college students, and professionals of all types (from police officers to state hospital aids)—showed that the great majority of respondents believed that the insanity defense enabled defendants to escape responsibility for their crimes).

69. *See* Denno, *Neuroscience Narrative*, *supra* note 1, at 1248–51.

70. A survey conducted in the District of Columbia, prior to the *Hinckley* decision, revealed a pervasive judicial hostility toward the insanity defense when the defense was not founded on overt and indistinguishable psychosis. *See* Richard Arens & Jackwell Susman, *Judges, Jury Charges and Insanity*, 12 HOW. L.J. 1, 2 (1966).

71. *See* Statistical Appendix (on file with the North Carolina Law Review).

72. I have also benefitted from an illuminating body of research on the topic of malingering. *See generally*, *e.g.*, Lillian J. Svete, William W. Tindell, Christopher J. McLouth & Timothy S. Allen, *A Retrospective Analysis of Rates of Malingering in a Forensic Psychiatry Practice*, 53 J. AM. ACAD. PSYCHIATRY & L. ONLINE 26 (2025) (describing a detailed study consisting of a sample of 1,300 cases from a Kentucky forensic psychiatry practice); Chunlin Leonhard & Christoph Leonhard, *Neuropsychological Malingering Determination: The Illusion of Scientific Lie Detection*, 58 GA. L. REV. 483 (2024) (arguing that, despite *Daubert*-era acceptance and growing use, neuropsychological "malingering

following section examines these 302 cases, demonstrating that such claims can be a powerful argument against the insanity defense, as well as have a lasting impact on how courts use of neuroscientific evidence generally.

II. THE NEUROSCIENCE STUDY'S MALINGERING PROJECT

Criminal justice actors employ numerous terms to characterize when a defendant is feigning a mental illness (we have documented forty-seven such terms in just a portion of our cases alone).[73] This Article applies the term "malingering" because it is listed and defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-

tests" lack scientific validation, risk usurping the jury's credibility role, and may violate litigants' Fifth Amendment right against self-incrimination); Chunlin Leonhard & Christoph Leonhard, *Through Smoke and Mirrors: Excluding Malingering Expert Testimony Under the* Daubert *Standard*, 59 GA. L. REV. 1 (2024) (contending that although judges have struggled for decades to keep junk science out of court, the *Daubert* Standard, when faithfully interpreted, remains a potent gatekeeping tool and empowers judges to exclude malingering expert testimony despite its scientific trappings); James L. Knoll IV & Phillip J. Resnick, U.S. v. Greer: *Longer Sentences for Malingerers*, 27 J. AM. ACAD. PSYCHIATRY & L. 621, 622–24 (1999) [hereinafter Knoll IV & Resnick, *Longer Sentences for Malingerers*] (explaining that in the case *United States v. Greer*, the Court treated deliberate feigning of mental illness as obstruction, thereby justifying sentence enhancements and suggesting it may be appropriate for evaluators to warn defendants of the adverse legal ramifications of a potential malingering diagnosis).

73. There are many different terms identified. *See*, *e.g.*, People v. Cleveland, 104 Cal. Rptr. 161, 164 (Cal. Ct. App. 1972) ("malingering" and "simulating"); United States v. Dube, 520 F.2d 250, 252 (1st Cir. 1975) ("fabricate"); State v. Nemecheck, 576 P.2d 682, 685 (Kan. 1978) ("faking" and "attempting to appear"); Gruzen v. State, 591 S.W.2d 342, 352 (Ark. 1979) ("might not have been totally honest"); People v. Creach, 387 N.E.2d 762, 777 (Ill. App. Ct. 1979) ("feign"); Curry v. Zant, 371 S.E.2d 647, 648 (Ga. 1988) ("manipulating"), Commonwealth v. Meech, 403 N.E.2d 1174, 1177 (Mass. 1980) ("answered falsely"); People v. Robinson, 429 N.E.2d 1356, 1359 (Ill. App. Ct. 1981) ("consciously attempting to fake"); State v. Rowe, 285 S.E.2d 445, 448 (W. Va. 1981) ("exaggerated"); Lockett v. Juviler, 480 N.E.2d 378, 381 (N.Y. 1985) ("misrepresentations"); State v. Leach, 370 N.W.2d 240, 246 (Wis. 1985) ("withholding information"); State v. Rojas, 592 N.E.2d 1376, 1380–83 (Ohio 1992) ("tried to persuade experts to believe," "was not honest," "intentionally gave incorrect answers," "tried to make himself look less intelligent than he is," "deliberately answering questions incorrectly," and "falsely reporting"); United States v. Dockins, 986 F.2d 888, 891–92 (5th Cir. 1993) ("appear that he was more disturbed than he really was," "unreliable," and "in control of his memory loss"); State v. Santos, 902 P.2d 510, 513 (Mont. 1995) ("bring[ing] [mental] issues up for effect," "lying," "attempt to impress someone that he's very disturbed," and "deception"); People v. Jones, 931 P.2d 960, 973 (Cal. 1997) ("conscious deceptiveness"); People v. Stack, 724 N.E.2d 79, 84–85 (Ill. App. Ct. 1999) ("inconsistent," "not . . . truthful," "orchestrating," "acting crazy," "bugging up," and "appear insane"); Pulinario v. Goord, 291 F. Supp. 2d 154, 166, 179 (E.D.N.Y. 2003) ("untruthful" and "not being fully forthcoming"); United States v. Ramirez, 495 F. Supp. 2d 92, 105 (D. Me. 2007) ("act-out" and "pretend"); United States v. Knox, No. 05-00270, 2010 WL 2643566, at *5–6 (S.D. Ala. June 29, 2010) ("intentional 'sub-optimal performance,'" "not putting forth his best effort," "have more knowledge and understanding of matters than he portrayed himself to have," "not consistently applying himself to the best of his abilities," and "not consistently putting forth his best effort during testing"); United States v. Puerto, 392 F. App'x 692, 709 (11th Cir. 2010) ("poor effort"); Commonwealth v. Muller, 78 N.E.3d 51, 59 (Mass. 2017) ("appear to have more symptoms than he was genuinely experiencing"); People v. Evans, 966 N.W.2d 402, 408 (Mich. Ct. App. 2020) ("deliberately deceitful").

V")[74] and courts and experts commonly use it when evaluating defendants.[75] According to the DSM-V, "[t]he essential feature of malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs."[76] The DSM-V also notes that malingering is not a recognized mental illness.[77]

A malingering claim can be presented to the court by any party; however, our Malingering Project found that the prosecution presents it most frequently.[78] A defendant's potential malingering can be identified through a range of mechanisms: expert evaluation, neuropsychological testing, or other evidence relating to the defendant's alleged mental health, such as medical history, courtroom observations, lay testimony, and the defendant's own testimony or self-reporting.[79]

A. *The Increase in Malingering Cases Over the Decades*

For the Malingering Project, my team and I collected every case within the Neuroscience Study that mentioned malingering in the context of an insanity defense claim.[80] Of the 3,108 insanity cases within the Neuroscience

74. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 835 (5th ed., text rev. 2022).

75. *See* Seth Feuerstein, Vladimir Coric, Frank Fortunati, Steven Southwick, Humberto Temporini & Charles A. Morgan, *Malingering and Forensic Psychiatry*, 2 PSYCHIATRY 25, 25–26 (2005).

76. AM. PSYCHIATRIC ASS'N, *supra* note 74, at 835.

77. Ubaid Ullah Alozai & Pamela K. McPherson, *Malingering*, NAT'L LIB. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK507837/ [https://perma.cc/A2NH-8LAL] (last updated June 12, 2023) ("[Malingering] is not a psychiatric illness according to DSM-5 (Diagnostic and Statistical Manual of Mental Diseases, Fifth edition).").

78. *See infra* Figure 3.

79. *See* Memorandum from Erica Valencia-Graham on The Malingering Coding Process (Aug. 22, 2025) (on file with author) [hereinafter Valencia-Graham Memorandum]; *see also* Resnick & Knoll, IV, *Malingered Psychosis*, *supra* note 19, at tbl. 4.6. Malingering should be suspected if any of the following are present:

> 1. A nonpsychotic, rational motive for the crime[;] 2. Suspect hallucinations or delusions[;] 3. Current offense fits a pattern of prior criminal conduct[;] 4. Absence of active or negative symptoms of psychosis during evaluation[;] 5. Report of a sudden, irresistible impulse[;] 6. Presence of a partner in the crime[;] 7. "Double denial" of responsibility (disavowal of crime plus attribution to psychosis)[;] 8. Far-fetched story of psychosis to explain crime[;] 9. Alleged intellectual deficit coupled with alleged psychosis[.]

Id. (citations omitted).

80. In many of these malingering cases, issues of insanity and competency are brought together. Generally, competency has to do with the defendant's mental capacity at the time of trial and insanity has to do with the defendant's mental capacity at the time of the offense. Courts often order overlapping psychological evaluations to determine both a defendant's mental state at the time of the offense and their current ability to proceed with trial. In addition, courts sometimes refer to a competency hearing or evaluation as a "sanity" hearing or evaluation. In this context, "sanity" is

Study, 302 cases or nearly ten percent contained a malingering issue.[81] Each of these 302 cases included the following: (1) an insanity issue that involved a guilt-phase insanity defense, or the argument that insanity should have been argued at trial, and (2) any mention of malingering, whether it was made in passing or as a broader argument. Given the complexity of these cases, my team created a memorandum detailing the selection and coding process for these cases.[82]

Figure 2 displays the percentages of malingering cases by decade, with the number of malingering cases as the numerator and insanity cases as the denominator for each decade. The distribution is an approximate inverse of Figure 1's presentation of insanity cases. While insanity cases are far more common in the first half of the twentieth century, malingering claims are rare, with only fifteen cases published prior to 1950 (about five percent of the total malingering cases identified from 1900 to 2020).[83] Malingering claims in insanity cases have increased substantially over the past twelve decades, from three percent of insanity cases in the early 1900s to about twenty-two percent of insanity cases in the early 2000s, and then leveling off slightly to nineteen percent in the last decade.[84] It is challenging to determine whether malingering claims are responsible for lowering insanity defense rates. However, we do know that malingering claims are impactful when raised in insanity defense cases, as discussed below.

synonymous with competency and should be treated as such. This overlap in terminology can create confusion in distinguishing between a defendant's mental state at the time of the offense (insanity) and their present ability to understand and participate in legal proceedings (competency). As a result, some case opinions (especially those from the first half of the twentieth century) and evaluations blur these concepts, using "sanity" and "competency" interchangeably even when the underlying legal standards differ quite significantly. *See*, *e.g.*, Wallace v. United States, 936 A.2d 757, 760, 767–68 (D.C. 2007) (rejecting Wallace's attempts to raise incompetency and an insanity defense after extensive expert testimony showed that, despite some genuine cognitive deficits, he was malingering and was therefore competent to plead guilty); Lipscomb v. United States, 209 F.2d 831, 833–35 (8th Cir. 1954) (determining that despite Lipscomb's claims of insanity and incompetency due to narcotics withdrawal, overwhelming lay and expert testimony, including strong evidence that he was a malingerer, established that he was competent and had knowingly waived counsel when he pled guilty).

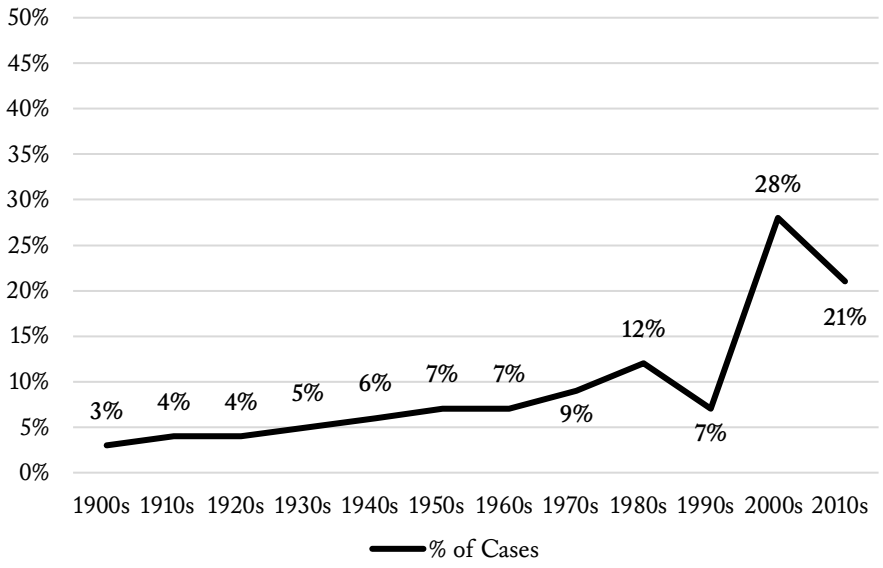
81. *See infra* Figure 2.

82. *See* Valencia-Graham Memorandum, *supra* note 79.

83. *See infra* Figure 2.

84. *See infra* Figure 2.

Figure 2: Malingering Case Distribution by Decade (3,108 Cases)[85]



B. *The Subjects and Sources of Malingering Allegations*

In basically all of the 302 malingering cases, apart from one case, the defendant was the subject of the malingering allegations.[86] In all cases, allegations or suspicions of malingering were raised in three different ways: by the prosecution, the defense, or by court-appointed experts.[87]

As Figure 3[88] shows, the main source of malingering allegations was the prosecution, which claimed that the defendant malingered in 184 (sixty-one percent) of the cases. This outcome is understandable, given the nature of the insanity defense and the kinds of arguments that bolster malingering, which typically focus on defendants' claims of mental illness. For example, in *People v. Cleveland*,[89] the prosecution produced an expert psychiatrist who, as a rebuttal to the defendant's insanity defense, testified that the defendant was malingering and simulating paranoid thinking and schizophrenia.[90] Similarly, in *People v.*

85. The percentages consist of the number of malingering cases divided by the number of the insanity cases by decade.

86. The sole case was *United States v. Wright*, 5 C.M.R. 323 (1952). In *Wright*, the claim of malingering, which was later determined to be unfounded, was made against the complainant, whose accusation of rape against the defendant was upheld, even though the defendant had claimed he was mentally ill and insane at the time of the crime. *Id.* at 323–28.

87. *See infra* Figure 3.

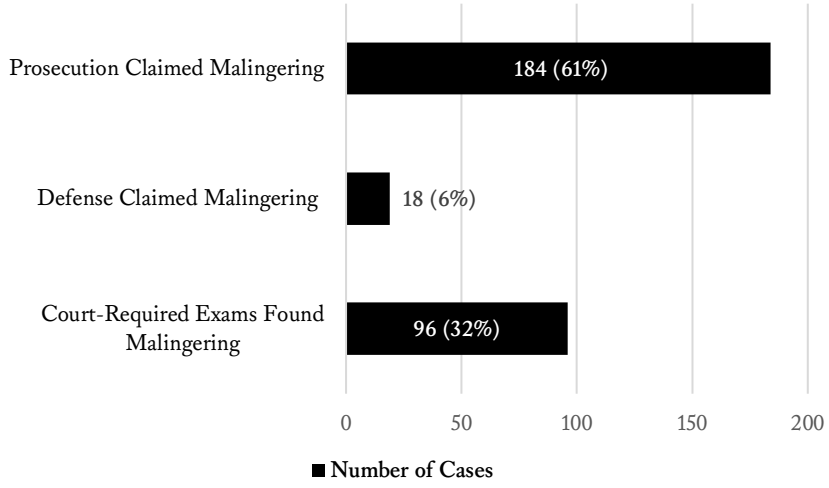
88. *See infra* Figure 3.

89. 104 Cal. Rptr. 161 (Cal. Ct. App. 1972).

90. *See id.* at 164.

Felton,[91] the defendant raised an insanity defense against his burglary charge, supported by testimony from a psychiatrist who believed Felton had suffered a post-epileptic episode that rendered him legally insane at the time of the offense.[92] The State responded by presenting rebuttal evidence from the detective involved in the case, who suggested that Felton's amnesia was feigned.[93] The detective testified about a detailed statement that Felton gave the police, in which he recounted events from the day before and the day of the burglary—statements inconsistent with his claimed memory loss.[94] During cross-examination, the defense psychiatrist conceded that Felton's behavior could be explained in one of two ways: either he was experiencing a genuine post-convulsive episode (supporting his insanity defense), or he was lying.[95] Even though the defense psychiatrist ultimately believed that Felton's mental illness could be genuine, the jury and court sided with the prosecution and denied Felton's insanity defense.[96] The tendency for courts or juries to side with the prosecution when the insanity defense is raised could possibly be one residual of a general belief that defendants may be feigning mental illness.

Figure 3: Sources of Malingering Allegations in Insanity Cases (302 Cases)[97]



91. 325 N.E.2d 400 (Ill. App. Ct. 1975).
92. *See id.* at 401.
93. *See id.* at 402.
94. *See id.*
95. *See id.* at 401.
96. *See id.* at 401–02.
97. Note that the categories presented in this figure are not mutually exclusive because some cases had multiple sources. The denominator for each percentage is 302. Additionally, thirty-five cases did

As would be expected, defense claims of malingering were rare and the circumstances conflicting. For example, in nineteen cases (6.3%),[98] the defense claimed that the defendant was malingering, not as a defense strategy but because direct or cross-examinations of defense experts revealed inconsistencies suggesting some facet of malingering. For example, in *Middlebrooks v. Bell*,[99] two of the State's experts testified that the defendant, Donald Middlebrooks, was malingering.[100] In turn, a defense expert, Dr. Jeffrey Smalldon, acknowledged that Middlebrooks's medical records had some indications that he was lying,[101] even though Dr. Smalldon did not believe that such evidence was inconsistent with Middlebrooks's alleged mental illness.[102] During cross-examination, Dr. Smalldon agreed that Middlebrooks confessed to more involvement in the victim's death in his interview with him than he had in his videotaped confession to the police.[103] Yet, in an effort to resolve the discrepancies between the two confessions, Smalldon noted that Middlebrooks was "a chronic liar."[104] Such a statement bolstered the State's experts' testimony that "Middlebrooks was exaggerating his mental illness symptoms, that he was competent to stand trial, that he did not have a defense of insanity, and that he was not committable."[105] The court ultimately rejected Middlebrooks's various claims and found the prosecution's evidence sufficiently substantial to support a death sentence.[106]

Court-required expert examinations were the source of malingering allegations in ninety-six cases—or nearly one third (31.8%) of the total.[107] These examinations were mostly conducted by experts as part of a court-ordered sanity evaluation prior to trial.[108] This category consists of all court-appointed expert evaluations as well as any examinations or testing conducted by experts who were not hired by, or testifying for, either the State or the defense. The category

not fit into any of the three identified categories. These included cases in which malingering was only mentioned in passing, as well as cases in which malingering was expressly ruled out.

98. *See* Statistical Appendix (on file with the North Carolina Law Review).

99. 619 F.3d 526 (6th Cir. 2010), *vacated sub nom.*, Middlebrooks v. Colson, 566 U.S. 902 (2012).

100. *Id.* at 533.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 540–41.

107. *See supra* Figure 3.

108. *See* Interview with Phillip J. Resnick, Professor of Psychiatry, Case Western Reverse Univ. Sch. of Med. (Nov. 24, 2025) [hereinafter Interview with Resnick] (explaining that court-appointed experts are generally neutral, even if they may not be perceived as such); *see also* Stevenson v. Windmoeller & Hoelscher Corp., 39 F.4th 466, 468 (7th Cir. 2022) (stating that Federal Rule of Evidence 706(a) "codifies the inherent power of a trial judge to appoint an expert who will function as a neutral expert serving the court rather than any particular party").

also includes medical experts at mental health or correctional facilities to which a defendant was sent by the court for treatment.

An example of this latter category can be seen in *United States v. Wilson*,[109] in which the defendant, Ellis Mack Wilson, claimed that he was criminally insane due to epilepsy and should not be convicted of bank robbery.[110] Wilson was treated at St. Elizabeth's Hospital, where he was evaluated by a psychiatrist who testified that "he thought that Wilson, while under observation at St. Elizabeth's, was a malingerer, exaggerating his epileptic symptoms, giving the wrong answers to all of the trick questions and being so uncooperative that they could not obtain a reliable I.Q. grade."[111] The psychiatrist concluded that "Wilson suffered from a sociopathic personality disorder . . . [and] fully understood the difference between right and wrong, but his abstract understanding was not a great restraint because of the absence of normal moral inhibitions."[112] The psychiatrist's opinions had a marked effect on the court, which rejected Wilson's insanity defense with strikingly strong language.[113] As the court explained, "[t]he jury was not bound to accept the conclusionary appraisal of the expert witness, but, even if it did, there is nothing in the law which requires a jury to acquit the kind of sociopath the doctor thought the defendant to be."[114] Likewise, the court's leap to such a conclusion, based on the psychiatrist's report, assumed intentional manipulation on the defendant's part:

> As long as an individual has a substantial capacity for choice, he does not escape the law's criminal sanctions because he chooses imprudently or so prefers his immediate self-interests that he is prepared to commit deliberate transgressions whenever he thinks they will advantage him and that he will not be caught.[115]

Thus, court-appointed examinations can carry significant weight in shaping how a defendant's mental illness is framed and in influencing the court's ultimate decision to reject an insanity claim. The court's depiction of Wilson to the jury put the prospect of malingering on a silver platter and made it hard to ignore.

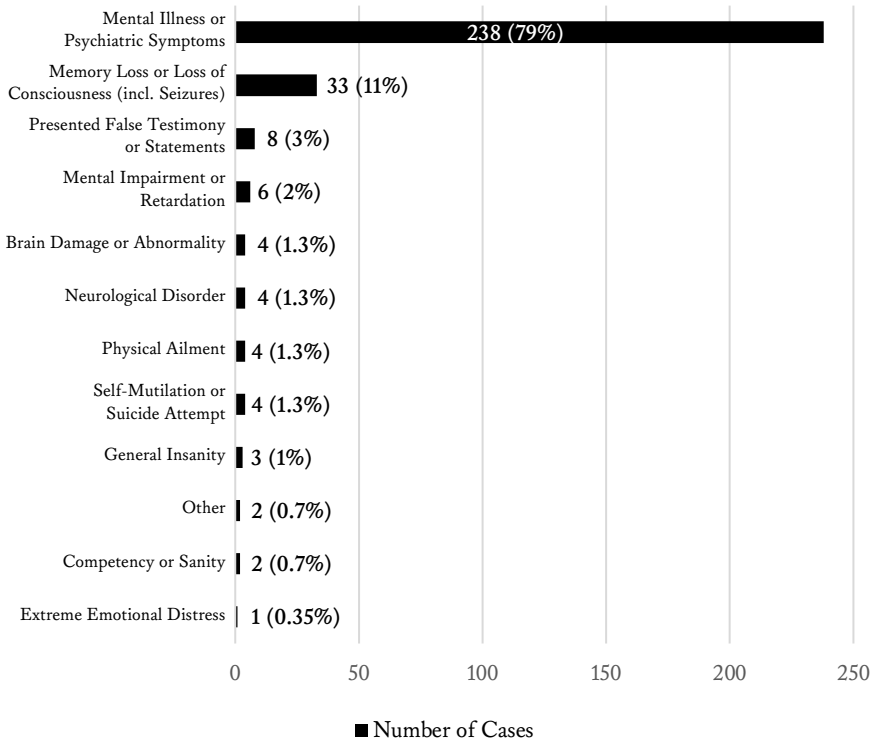
C. *Symptoms or Conditions that Defendants Were Accused of Malingering*

In the Malingering Project, the most common condition or symptom that defendants were alleged to have maligned was mental illness or psychiatric symptoms, which, as Figure 4 shows, occurred in 238 cases, or seventy-nine

109. 399 F.2d 459 (4th Cir. 1968).
110. *See id.* at 460–61.
111. *Id.* at 461.
112. *Id.*
113. *See id.* at 462–63.
114. *Id.* at 463.
115. *Id.*

percent of the total.[116] This dominance is predictable because most insanity defenses are based on the presence of a mental illness or disorder.

Figure 4: Symptom or Condition that Was Allegedly Malingered (302 Cases)[117]



Allegations of malingering in cases involving mental illness frequently focused on claims that defendants exaggerated, fabricated, or feigned symptoms such as hallucinations, delusions, or severe mood disturbances, which were often linked to diagnoses like schizophrenia or other psychotic disorders.[118] In the majority of the cases, these allegedly feigned symptoms formed the basis of the prosecution's rebuttal to the insanity defense, with experts testifying that the defendant's presentation was inconsistent with genuine psychiatric or mental

116. *See infra* Figure 4.

117. Note that the categories presented in this figure are not mutually exclusive because some cases presented multiple malingered symptoms or conditions. The denominator for each percentage is 302.

118. Resnick & Knoll, IV, *Malingered Psychosis*, *supra* note 19, at 59 (noting that malingerers are eager to call attention to their illnesses in contrast to patients with schizophrenia, who are often reluctant to discuss their symptoms).

illness.[119] For example, in *People v. Jones*,[120] the prosecution claimed that the defendant was malingering by exaggerating his symptoms of mental illness after the defense argued that Jones suffered from paranoid schizophrenia.[121] Several experts, including State psychiatrists and court-appointed psychiatrists, believed that Jones was feigning symptoms of schizophrenia due to inconsistencies in his story and changes in his testing performance.[122]

Similarly, in *People v. Stack*,[123] the prosecution's expert disagreed with the defense experts who diagnosed the defendant with schizophrenia and instead believed him to be sane at the time of the murders.[124] Dr. Henry Lihmeyer testified "that he did not believe that defendant was being truthful in describing the delusions he allegedly suffered from and it was his opinion that defendant was malingering."[125] He based this opinion on the following four observations: (1) a seriously mentally ill defendant would likely not provide differing accounts of the murder; (2) the defendant was not truthful because his delusions changed; (3) someone who had recently "experienced a psychotic episode" would not react with such "calm and cooperative behavior" when being arrested; (4) and, after the murders, the defendant's behavior at the hospital changed depending on who else was occupying the room with him.[126] Based on these strikingly subjective criteria, Dr. Lihmeyer opined that the "defendant suffered from a conduct disorder evidenced by events in his childhood, including alcohol abuse beginning at a young age, poor school performance, prior treatment for attention deficit disorder, and aggression."[127]

The next largest category in Figure 6 consists of thirty-three (11%) cases in which defendants were alleged to have malingered memory loss or loss of consciousness. For example, in *United States v. Currier*,[128] the defendant claimed that he suffered from memory lapses and confusion as part of a narrative explaining why he failed to appear in court after being notified by his attorney.[129] To avoid culpability for bail jumping, his defense implied that he suffered from either amnesia or some form of mental impairment caused by a history of syphilis.[130] Two court-appointed experts examined Currier and consulted with Currier's personal physician, Dr. Blier, and found no

119. *See id.*
120. 931 P.2d 960 (Cal. 1997), *overruled by*, People v. Hill, 952 P.2d 673 (Cal. 1998).
121. *Id.* at 968.
122. *See id.* at 973–75.
123. 724 N.E.2d 79 (Ill. App. Ct. 1999).
124. *Id.* at 83–84.
125. *Id.* at 88–89.
126. *Id.* at 83–84.
127. *Id.*
128. 405 F.2d 1039 (2d Cir. 1969).
129. *Id.* at 1041.
130. *See id.*

neurological abnormalities, with the exception of signs of malingering.[131] A report by Dr. Lubin stated that there "was no evidence of syphilis of the central nervous system, psychosis, nor of neurological abnormalities," and diagnosed Currier instead with an antisocial personality disorder.[132] Based on this evidence, the court determined that Currier was competent and did not suffer from a mental disease or defect that caused him to lack substantial capacity to appreciate the wrongfulness of his conduct or conform it to the requirements of law.[133] As the court explained, "Currier's self-serving statements that he was 'confused' and suffered memory lapses certainly do not indicate a mental disease defect, especially in light of Dr. Lubin's conclusion that these 'appeared to be in service of evasion.'"[134]

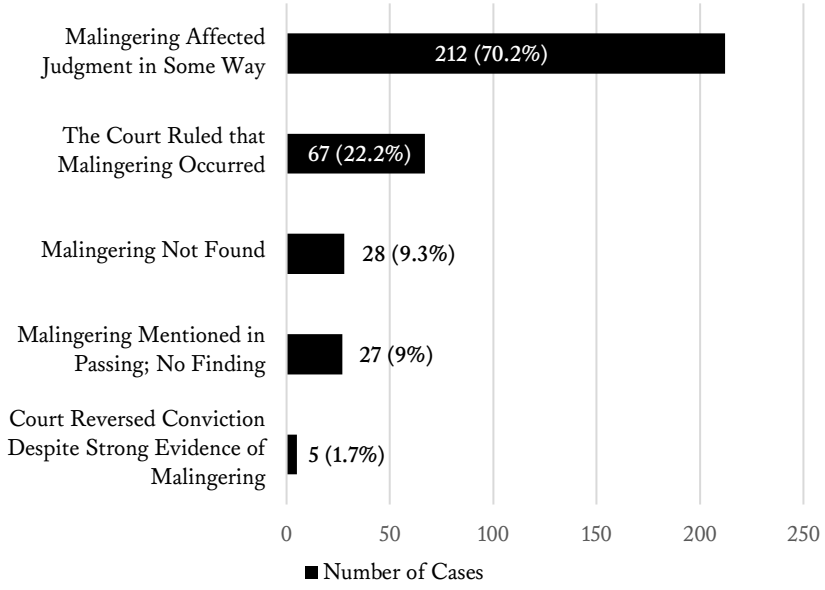
This Part's discussion of the subjects, sources, and symptoms of malingering claims, along with their uptick over twelve decades, provides a foundation for determining the types of influences such claims may have on defendants' efforts to argue for an insanity defense. Given the vague statements made by testifying experts based on interviews with troubled individuals, the consequences of being labeled a malingerer alone could be impactful. The following discussion examines the nature and degree of this effect and its potential bearing on the future of the insanity defense.

III. THE RESULTS AND IMPACT OF MALINGERING CLAIMS

The Malingering Project's data show that malingering claims substantially influenced the outcomes of the insanity defense cases in which they were raised. As Figure 5[135] shows, nearly three-quarters of the cases had outcomes affected by a malingering claim, including instances in which the court made a formal finding of malingering, and cases in which malingering contributed to or bolstered other evidence supporting findings of sanity. A smaller portion—fewer than ten percent—of the cases found no evidence that the defendant malingered or mentioned malingering only in passing, without reaching a finding.

131. *Id.*
132. *Id.*
133. *See id.* at 1042.
134. *Id.*
135. *See infra* Figure 5.

Figure 5: Results of Malingering Claim (302 Cases)[136]



A. *When Malingering Claims Affect a Court Judgment*

Of the 302 malingering cases, the majority—212 cases or 70.2%—constituted the "Malingering Affected the Judgment in Some Way" category. This category indicates whether a court's finding of actual malingering or the evidence of malingering contributed to the outcome of the case, in a minor or major way.

For example, in *People v. Itani*,[137] despite the lack of an official diagnosis or court determination of malingering, State experts identified a range of inconsistencies in the defendant's behavior that notably influenced the court's conclusion that the defendant was sane and competent to stand trial.[138] Likewise, defense counsel's efforts were abysmal; at one point defense counsel testified that "she had no *bona fide* doubt of defendant's fitness."[139] With respect to the defense's argument that the circuit court "should have placed great weight on [the defense expert's testimony]," the court noted that the defense expert's "opinion was somewhat compromised by the fact that [the expert] allowed defense counsel to be present during her clinical interview" and to be "an active

136. Note that the categories presented in this figure are not mutually exclusive because some cases had multiple results. The denominator for each percentage is 302.

137. 890 N.E.2d 1154 (Ill. 2008).

138. *Id.* at 1164, 1169.

139. *Id.* at 1170.

participant."[140] Because the court believed this circumstance prevented the evaluation from being independent and objective,[141] the court denied all of the defendant's claims arguing for an insanity defense.[142]

It may be baffling to understand how the *Itani* court's doubting of the expert's methodology contributes to this case being one where "malingering affected the judgment in some way." Yet, the case outcome suggests one more way in which the system's treatment of malingering is problematic. For example, according to the appellate court, the "circuit court did not abuse its discretion in denying defendant's motion to withdraw his plea of guilty but mentally ill where the evidence established that defendant was fit to stand trial and enter a plea in this case."[143] While the expert witnesses never offered an official malingering diagnosis of the defendant, the circuit court took the evidence of defendant's exaggeration into consideration when upholding the defendant's competency to stand trial and enter a plea.[144] The appellate court also concluded that the presented evidence provided support for the expert's determination that the defendant was manipulative.[145] For example, while the defendant asserted that he had challenges with English, he had been able to understand and participate in several conversations conducted in English.[146] Other experts also concluded that the defendant was not currently suffering from memory or mental health deficits, nor was he suffering at the time he entered his plea.[147] Overall, then, even without an official malingering diagnosis, a court like *Itani* surmised that the defendant was not being truthful, demonstrating the power of nuance and also the Malingering Project's revelation of the impact of even indirect malingering claims.

In turn, in sixty-seven (22.2%) cases, the court ruled directly that malingering had occurred. For example, in *People v. Plackowska*,[148] the court found the malingering evidence persuasive and declared the defendant legally sane as a result.[149] The defendant was convicted of two counts of first-degree murder and two counts of aggravated animal cruelty following a bench trial[150] in which she raised an insanity defense supported by the testimony of forensic psychiatrist, Dr. Phillip Resnick.[151] Dr. Resnick diagnosed the defendant with

140. *Id.*
141. *Id.* at 1170–71.
142. *See id.* at 1170–74.
143. *Id.* at 1168.
144. *Id.* at 1167–68.
145. *Id.* at 1169.
146. *Id.*
147. *Id.*
148. 179 N.E.3d 315 (Ill. App. Ct. 2020).
149. *See id.* at 316–17.
150. *See id.* She admitted to fatally stabbing her eight-year-old son, J.P., and a five-year-old girl she babysat, O.D., along with two dogs. *See id.* at 317.
151. *See id.* at 317, 320–21.

Bipolar I Disorder, manic type, with psychotic features, concluding that she "lacked the substantial capacity to appreciate the criminality of her conduct at the time she stabbed the two children."[152] Indeed, Dr. Resnick specifically stated that Plackowska was not malingering "because a person who was not psychotic could not fake sustained manic behavior such as the behavior the defendant exhibited at the jail after the crimes."[153] However, Dr. Resnick acknowledged that the defendant "had no history of psychiatric illness herself or in her family" and that her "conduct after the killings, such as throwing her cell phone away and telling the story about an intruder, indicated that she had an understanding that what she did was wrong."[154]

In response, the prosecution introduced the testimony of Dr. Alexander Obolsky, who, in contrast to Dr. Resnick, diagnosed the defendant with "severe alcohol use disorder, narcissistic personality disorder, and other specified depressive disorder."[155] Dr. Obolsky also testified that the defendant was sane and therefore "did not lack the substantial capacity to appreciate the criminality of her conduct during the commission of the crimes at issue."[156] Dr. Obolsky believed that Plackowska was malingering during interviews and that her alleged hallucinations were inconsistent and inauthentic[157]—a point of contention and disagreement with Dr. Resnick.[158] Both experts focused a substantial portion of their testimony on whether the defendant was experiencing an "authentic" hallucination.[159] While the appellate court stated that the trial court was justified in siding with Dr. Obolsky's malingering assessment as a basis for its rejection of the defendant's insanity defense, it stressed only that Dr. Obolsky was a qualified expert and that "the trial court's reliance on [his] testimony was not arbitrary or unreasonable."[160] This finding sheds some light on why malingering claims can be so influential in the context of a battle of experts even when much of that battle is based on subjective interpretations.

152. *See id.* at 321.

153. *See id.*

154. *See id.*

155. *Id.* at 321–22.

156. *See id.*

157. *See id.* at 323. For example, Dr. Obolsky observed that the defendant's description of her hallucinations changed several times, that her children also saw the hallucinations, which would be atypical of a genuine hallucination, and that the voices she allegedly heard spoke in English, not her native language of Polish, which is another indication of malingering. *See id.*

158. *See id.* at 323.

159. *Id.* at 321, 323.

160. *Id.* at 326.

B. *When Cases Determine the Defendant Was Not Malingering*

Notably, cases in which it was determined that the defendant was not malingering occurred infrequently—twenty-eight cases or 9.3%[161]—but that finding too is compelling.[162] A particularly startling example can be found in *Brown v. Sternes*.[163] In *Brown*, the defendant argued that his *court-appointed attorney* furnished a deficient defense by "neglecting to thoroughly investigate his medical condition and failing to procure medical records establishing that he suffered from a myriad of psychiatric problems."[164] Brown had been previously diagnosed with schizophrenia; however, his counsel did not provide his medical history to the evaluating experts in his case.[165] This lapse resulted in misleading assessments by the court-appointed experts that Brown was feigning his illness, which the trial court accepted.[166] The appellate court reviewed the expert's evaluation and stressed its weaknesses: "[The expert's] report is summary in nature, evidenced by the fact that [the expert] made but a most modest effort to test the credibility of [the defendant's] assertions concerning his mental health history, his ingestion of prescribed anti-psychotic medication, and his confinement in a psychiatric unit at Menard."[167] Likewise, the expert evaluator "made no effort to locate [the defendant's] medical records to ascertain the veracity of [the defendant's] claims."[168] In deed, explained the court, the expert's "written report simply reflects his summary dismissal of [the defendant's] statements concerning his illness, and an acknowledgment that [the defendant] 'dropped his allegations of multiple hallucinations' after [the expert] had 'confronted and pushed' the defendant."[169]As the court stressed, the expert's "conclusion that [the defendant] was fabricating his history of mental illness (referring to him as 'malinger[ing] in a half-hearted way'), is a particularly dubious judgment when the subject has just recently been diagnosed as a chronic schizophrenic."[170]

During the appeal, every expert who evaluated the defendant and reviewed his complete medical history found evidence of schizophrenia and did not detect malingering.[171] Ultimately, the court determined that the erroneous

161. *See supra* Figure 5.

162. While a finding of "no malingering" was specifically mentioned in only twenty-eight cases, that does not necessarily mean that in the remaining 207 cases, an expert believed that the defendant was malingering. *See* Interview with Resnick, *supra* note 108 (explaining that if an expert does not find that a defendant is malingering, the issue may not be specifically mentioned).

163. 304 F.3d 677 (7th Cir. 2002).

164. *See id.* at 680.

165. *See id.* at 680–83.

166. *Id.* at 684.

167. *Id.* at 683.

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.* at 688–90.

malingering assessment had contributed to the defendant being denied a proper competency hearing and an opportunity to raise an insanity defense, thereby prejudicing his trial and sentencing.[172]

Not all cases where a defendant was found not to be malingering ended in a finding of insanity, however. For example, in *State v. Appacrombie*,[173] the defense expert testified that the defendant was not malingering, and this assessment was not challenged by the prosecution.[174] Yet, the defendant was found guilty of second-degree murder and sentenced to life in prison without the possibility of parole or suspension of sentence even though the circumstances in which she killed the victims were bizarre—two young girls, strangers to the defendant, who were walking by defendant's backyard when the defendant asked them if they were looking for her and shot them when they said "no."[175] On appeal, the defendant argued that the trial court erred in denying the defendant's motion for "Post-Verdict Judgment of Acquittal By Reason of Insanity,"[176] but the appellate court affirmed the defendant's conviction and sentence nonetheless.[177] In reaching this determination, the court seemed to disregard the expert testimony, highlighting that "there was no proof that the defendant had a seizure at or near the time of the homicide as the experts had assumed" and that "[t]he defendant spoke rationally, even if erroneously," to the victims when the defendant asked them if they were looking for her.[178] Likewise, the court viewed the defendant's actions after the killing as appropriate, and the court "could infer that this behavior was an indication that the defendant was aware that her conduct was wrong."[179] Viewing the evidence under a totality of the circumstances test "in the light most favorable to the prosecution," the court held that a trier of fact could have determined that the defendant failed to prove insanity by a preponderance of the evidence.[180] Even though there was substantial evidence bolstering the defendant's deteriorating mental health and neurological issues and no indication that she was malingering, the court found these circumstances unpersuasive.

IV. EXPERT TESTIMONY RELATED TO MALINGERING

The Malingering Project found that expert testimony is the most common and effective method for asserting a claim of malingering. Such testimony both

172. *See id.* at 698–99.
173. 766 So. 2d 771 (La. Ct. App. 2000).
174. *See id.* at 776.
175. *Id.* at 772.
176. *Id.*
177. *Id.*
178. *Id.* at 778.
179. *Id.*
180. *Id.*

strengthens and legitimizes a claim through professional diagnoses, clinical evaluations, behavioral observations, and, in some cases, psychological testing.[181] This evidence often provides a structured and purportedly credible basis for determining whether a defendant is feigning mental illness, cognitive impairment, memory loss, or some other condition or symptom. In general, prosecution or court-appointed experts are more likely to present evidence supporting a finding of malingering, often as a way to rebut an insanity defense or establish competency. Conversely, defense experts are more likely to present findings that refute malingering, emphasizing the presence of genuine mental illness and insanity.

The focus on experts was all the more important in the Neuroscience Study because testing and neuroimaging of defendants were not frequently conducted. Notably, expert evaluation and lay witness observation of a defendant's mental health and behavior was the most common form of support for a malingering claim. Neuropsychological testing related to malingering was performed in only 27.2% of cases, while brain imaging testing occurred in only 3.3% of cases.[182]

On the surface, this lack of corroborating scientific data via testing highlights both the undue influence and the inherent subjectivity of expert testimony in malingering determinations. At the same time, the interpretation of malingering tests and the tests themselves are often fraught with criticism and controversy, at times offering a veneer of objectivity that may not always be warranted.[183] While the topic of neuropsychological testing has been debated elsewhere and is beyond the scope of this Article, it raises important questions about how the challenges posed by malingering assessments are to be addressed.[184]

A. *State Experts*

The great majority of the 302 malingering cases—249 cases or 82.4%—involved State or court-appointed experts, as Figure 6 shows.[185] In over half of these cases,[186] State experts either suspected or determined that malingering was present. For example, in *People v. Anderson*,[187] the State called two experts—in response to the defense experts' finding of insanity—who testified that the

181. *See* Resnick & Knoll, IV, *Malingered Psychosis*, *supra* note 19, at 68; *see also* Phillip J. Resnick, *The Detection of Malingered Psychosis*, 22 PSYCH. CLINICS N. AM. 159, 170 (1999) ("The decision that an individual is malingering is made by assembling all of the clues from a thorough evaluation of a person's past and current functioning with corroboration from clinical records and other people.").

182. *See* Statistical Appendix (on file with the North Carolina Law Review).

183. *See supra* note 72.

184. *See id.*

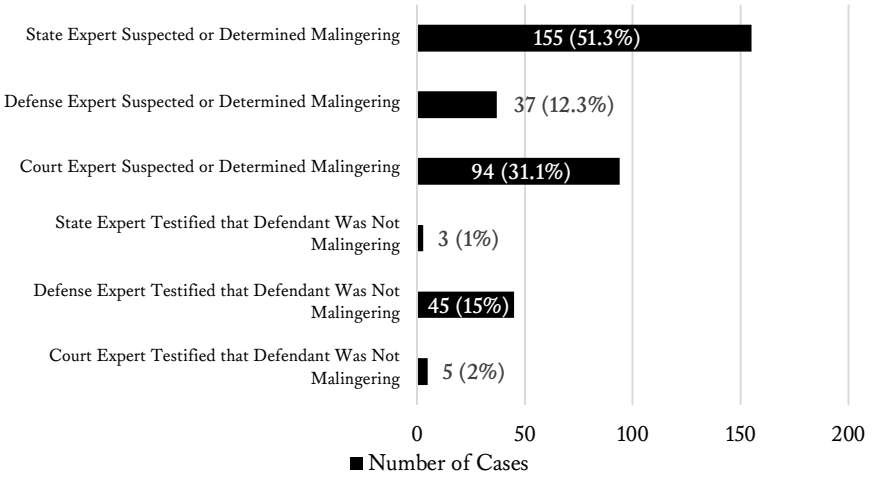
185. *See infra* Figure 6.

186. The "half of these cases" constituted 155 cases or 51.3%. *See infra* Figure 6.

187. 242 N.E.2d 798 (Ill. App. Ct. 1968).

defendant was not insane but was instead suffering from a severe character disturbance, severe impairment of intelligence, and a personality disorder.[188] Both experts "testified that the defendant admitted to them that he had exaggerated and fabricated in his prior interviews to suit his purpose, because he wanted to go to the hospital rather than back to jail."[189] Noting this conflict, the appellate court found the State experts' testimony more convincing,[190] explaining that those experts had access to the prior reports on the defendant submitted by trial court experts, as well as psychological testing.[191] In contrast, the court concluded that the opinions of the defense experts were based on an unverified history provided by the defendant, and the only test administered by a defense expert was an EEG, which showed normal brain activity.[192] Even while acknowledging that the State experts benefited from their access to more information, the court stressed that the defendant's admission of malingering and the State experts' evaluations were central to its decision to affirm the defendant's conviction and reject the insanity defense.[193]

Figure 6: Expert Testimony Related to Malingering (302 Cases)[194]



188. *See id.* at 799.

189. *Id.* at 800.

190. *See id.* at 800–01.

191. *Id.* at 800.

192. *See id.* at 800–01.

193. *See id.* at 801.

194. Note that the categories presented in this figure are not mutually exclusive because some cases had presented multiple expert witnesses. The denominator for each percentage is 302.

B. *Defense and State Experts*

The Malingering Project revealed a startling number of instances in which defense experts provided malingering testimony that was highly detrimental to defendants attempting to argue for an insanity defense. For example, in thirty-seven of the cases (12.3%), a defense expert suspected or determined that the defendant was malingering.[195] In nineteen of those thirty-seven cases (51.3%),[196] a defense expert was the only expert to testify regarding the defendant's malingering. In eleven of the thirty-seven cases (29.7%),[197] at least one defense expert and at least one State expert testified regarding the defendant's malingering. Lastly, in seven cases (19%),[198] at least one defense expert and at least one court-appointed expert testified regarding the defendant's malingering.

Altogether, it is troubling that a substantial number of defense experts are finding that the defendant is malingering, and that, in most such cases the defense expert was the only one to testify on the topic. Of course, defense experts are retained to support the defendant's claims, not to raise concerns that may undermine them. As these findings suggest, defense attorneys in certain cases are not sufficiently prepared for, or aware of, how their experts may testify, even when that testimony potentially weakens the defense's position. Granted, courts have emphasized that experts who testify in criminal cases do so to provide expert analysis rather than advocacy.[199] Yet, in these cases, defense

195. *See supra* Figure 6.

196. People v. English, 185 N.W.2d 139 (Mich. Ct. App. 1970); United States v. Dube, 520 F.2d 250 (1st Cir. 1975); State v. Rowe, 285 S.E.2d 445 (W.Va. 1981); People v. Schiavi, 99 A.D.2d 665 (N.Y. 1984); Bui v. State, 551 So. 2d 1094 (Ala. Crim. App. 1988); Post v. State, 580 P.2d 304 (Alaska 1978); Phyle v. Duffy, 208 P.2d 668 (Cal. 1949); Phillips v. State, 297 S.E.2d 217 (Ga. 1982); Commonwealth v. Melton, 178 A.2d 728 (Pa. 1962); United States v. Wright, 5 C.M.R. 323 (1952); Sanders v. State, 771 S.W.2d 645 (Tex. App. 1989); Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007); State v. Ganster, 433 P.2d 620 (Ariz. 1967); People v. Beivelman, 447 P.2d 913 (Cal. 1968); Jackson v. Caldwell, 461 F.2d 682 (5th Cir. 1972); Gruzen v. State, 591 S.W.2d 342 (Ark. 1979); McBride v. State, 706 S.W.2d 723 (Tex. App. 1986); Pullam v. State, 709 S.W.2d 42 (Tex. App. 1986); McBride v. State, 49 S.W.2d 1048 (Ark. 1932).

197. Middlebrooks v. Bell, 619 F.3d 526 (6th Cir. 2010); People v. Robinson, 460 N.E.2d 392 (Ill. App. Ct. 1984); Thomas v. State, 357 So. 2d 1015 (Ala. Crim. App. 1978); United States v. Dockins, 986 F.2d 888 (5th Cir. 1993); People v. Anderson, 417 N.E.2d 663 (Ill. App. Ct. 1981); United States v. Ramirez, 495 F. Supp. 2d 92 (D. Me. 2007); United States v. Schappel, 336 F. Supp. 12, 14 (D.D.C. 1969); People v. Morgan, 637 P.2d 338 (Colo. 1981); People v. Dresher, 847 N.E.2d 662 (Ill. App. Ct. 2006); State v. Barnes, 740 S.W.2d 340 (Mo. Ct. App. 1987); Sochor v. State, 883 So. 2d 766 (Fla. 2004).

198. Bench v. State, 431 P.3d 929 (Ok. 2018); State v. Tuggle, 504 So. 2d 1016 (La. Ct. App. 1987); State v. Williams, 742 P.2d 1352 (Ariz. 1987); People v. Davis, 220 N.E.2d 75 (Ill. App. Ct. 1966); State v. Leach, 370 N.W.2d 240 (Wisc. 1985); United States v. Wood, 628 F.2d 554 (D.C. Cir. 1980); State v. Devine, 372 N.W.2d 132 (S.D. 1985).

199. *See* United States v. Ramirez, 495 F. Supp. 2d 92, 123 (D. Me. 2007); *see also* Joseph Sanders, *Science, Law, and the Expert Witness*, 72 LAW & CONTEMP. PROBS. 63, 74 (2009) (stating that the legal ideal conceives of the expert witness as a source of independent and disinterested information);

attorneys seem ill-prepared or inexperienced in handling a situation in which their experts seem to hesitantly admit that the defendant could be lying or malingering, even though these same experts had previously diagnosed the defendant with a mental illness.

For example, in *Bui v. State*,[200] the defense expert testified in support of the defendant's insanity plea and believed that the defendant was "suffering from an acute psychotic reaction or depreciation at the time of the killings."[201] However, during cross-examination, the prosecution systematically disabled the defense expert's testimony.[202] The expert conceded "that he did not conduct any psychological tests in evaluating appellant; that he did not talk with the police, [the appellant's wife], or appellant's employer or familiarize himself with the evidence of the case."[203] In addition, the expert acknowledged that he "did not attempt to corroborate any of the information given to him by appellant; and that his conclusion was primarily based upon what appellant had told him during the interviews."[204] To add fuel to fire, the expert noted that "he had never actually seen appellant in a psychotic condition . . . denied any knowledge of literature on the subject of bias on the part of the psychiatrist conducting interviews," and presented oral testimony at trial that contradicted his pre-trial written report.[205] Lastly, and just as damningly, the expert "admitted that appellant could have been lying during the interviews," but did not offer any reason why he did not try to validate the appellant's statements.[206] In affirming the trial court's decision to submit the issue to the jury, the appellate court noted the defense expert's lack of sufficient information and analysis to support insanity.[207] As the court explained, "Where the whole evidence does not satisfy the minds of the jury that the accused is insane at the time of the commission of the act with which he is charged, the jury shall convict the defendant, notwithstanding that the medical witnesses were of the opinion that such person was insane."[208] In essence and not surprisingly, the jury found the expert testimony weak.

In *United States v. Ramirez*,[209] the issue of malingering was addressed extensively by both the defense and prosecution's experts. Dr. Angel Martinez,

Bradford H. Charles, *Rule 706: An Underutilized Tool To Be Used When Partisan Experts Become "Hired Guns*," 60 VILL. L. REV. 941, 946 (2015) ("In some cases, courts have begun to reject the testimony of experts who are deemed to be little more than cheerleaders for their clients' position.").

200. 551 So. 2d 1094 (Ala. Crim. App. 1988).
201. *See id.* at 1101.
202. *See id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *See id.* at 1103–04.
208. *Id.* at 1103.
209. 495 F. Supp. 2d 92 (D. Me. 2007).

a psychologist retained by the defense, conducted two separate evaluations of the defendant.[210] In his first report, Dr. Martinez testified that, based on the tests he administered to the defendant, he determined Ramirez to be malingering. [211] Ramirez's responses on multiple tests demonstrated exaggeration or fabrication of memory impairments and psychotic symptoms, including endorsement of rare and severe symptoms. [212] After analyzing Ramirez's responses in particular on the Structured Inventory of Malingered Symptomatology ("SIMS") and the Personality Assessment Inventory ("PAI"), Dr. Martinez concluded that Ramirez's results suggested "there is a reasonable degree of probability that the defendant is feigning or exaggerating his psychiatric symptoms."[213] In addition, Dr. Martinez's secondary interviews with correctional staff and a social worker reinforced this conclusion and led him to characterize Ramirez as manipulative and lacking observable psychotic behavior.[214]

However, in a strikingly different subsequent report, Dr. Martinez revised his opinion, concluding that Ramirez may have suffered from alcohol-induced psychosis exacerbated by an underlying schizophrenic condition. [215] Dr. Martinez "maintained that the information he gathered from these interpersonal exchanges was secondary and that the test results suggesting malingering had no bearing on his second evaluation." [216] Yet, on cross-examination, Dr. Martinez conceded that a substantial portion of the second report was based on Mr. Ramirez's comments to him, rather than his records.[217] Also on cross-examination, Dr. Martinez admitted he excluded prior malingering findings and could not state with certainty that Ramirez met the legal criteria for insanity at the time of the offense.[218]

In response, the Government presented the expert testimony of clinical psychologist Dr. Christine Scronce, who conducted a comprehensive forensic evaluation shortly after the offense, including interviews, testing, and a video review. [219] Dr. Scronce concluded that Ramirez was malingering and found many examples of "manipulative behavior."[220] As so happens in many of these

210. *See id.* at 101–07.

211. *See id.* at 103. Dr. Martinez also noted that "just because a person malingers does not mean that he or she does not have a psychological disorder. When asked whether Mr. Ramirez was trying to fake alcoholism, Dr. Martinez stated that he did not believe so, in part, because Mr. Ramirez denies having an alcohol problem." *Id.*

212. *See id.* at 104–05.

213. *Id.* at 105.

214. *See id.* at 105–06.

215. *See id.* at 106–07.

216. *Id.* at 106.

217. *Id.*

218. *See id.* at 107.

219. *See id.* at 107–08.

220. *See id.* at 109.

cases, the court determined the State expert's testimony regarding malingering convincing.[221] Both experts characterized Ramirez as "highly manipulative," which strengthened the court's assessment that Ramirez's accounts of his thinking did not comport with his "calculating and controlled behavior."[222]

The court also found the contradiction between Dr. Martinez's two reports troubling and believed that the second report omitted certain relevant evidence.[223] Yet, the court's explanation presumed bias on Dr. Martinez's part rather than acknowledging what might have been a genuine change of opinion after he had the opportunity to personally interview Ramirez.[224] As the court explained, "Dr. Martinez's opinions cross the line between expert analysis and advocacy and [the court], therefore, finds his later-formulated views of limited usefulness in assessing Mr. Ramirez's insanity defense."[225] Based on this assessment, the court determined that Ramirez did not suffer from a severe mental disease or defect and rejected his insanity defense.[226]

Regardless of the court's concern that Dr. Martinez was less credible because the court believed he was advocating rather than analyzing, malingering was central to the court's credibility determination and its finding that Ramirez was criminally responsible.[227] In essence, the court sided with Dr. Scronce's testimony indicating that Ramirez was not suffering from a mental disease or defect at the time of his crime.[228] As the court explained, "Mr. Ramirez is highly manipulative and his psychiatric presentation is consistent with malingering."[229] While the court was "sympathetic" to Mr. Ramirez and "the hard life he has led," it was "convinced that Mr. Ramirez is much brighter and much more in control than he is willing to let on."[230]

The finding of malingering by an expert, especially a defense expert, can significantly undermine an insanity claim or weaken the defendant's overall defense. This circumstance raises a key question: Is there any recourse for defendants when a defense expert testifies that they are lying by way of a claim of ineffective assistance of counsel? As Figure 3 shows, a portion of defense experts provided testimony supporting the claim that the defendant was malingering.[231] Yet, defendants' claims of ineffective assistance of counsel for these episodes were rare. Of the 302 cases involving malingering and insanity,

221. *See id.* at 123.
222. *See id.* at 121–22.
223. *See id.* at 122–23.
224. *See id.*
225. *Id.* at 123.
226. *See id.* at 122–24.
227. *See id.* at 122–23.
228. *Id.* at 123.
229. *Id.*
230. *Id.*
231. *See supra* Figure 3.

a subset of five cases (1.7%) was identified in which a defense expert testified in favor of malingering and the record also contained a neuroscience-related ineffective assistance of counsel ("IAC") claim.[232] Among these five, only two cases—*Sochor v. State*[233] and *Middlebrooks v. Bell*[234]—included IAC claims that were directly related to defense expert testimony supporting malingering.[235] In both *Sochor* and *Middlebrooks*, however, the court either rejected the claim that a defense attorney's decision to introduce evidence from an expert whose testimony supported malingering constituted deficient performance or did not rule on the issue.[236] At least from *Sochor*, it appears that the presentation of malingering evidence by a defense expert, which ultimately undermines the defendant's mental-illness-based defense, does not necessarily constitute ineffective assistance of counsel, so long as the expert's conclusions are reached through reliable methods.[237]

C. *Court-Appointed Experts*

Court-appointed experts also play a significant role in credibility determinations. As Figure 6 shows, there are ninety-nine cases (33.1%) in which court-appointed experts provided testimony related to malingering. Of these, ninety-four cases (31.1%) involved testimony that either suspected or concluded malingering, while in five cases (2%),[238] the court-appointed expert explicitly found no evidence of malingering. In three of those five cases,[239] there was no evidence related to malingering from any other party, so no one opposed the court-appointed expert's findings. In the remaining two cases, *United States v. Knox*[240] and *Eubanks v. Warden*,[241] there was at least one other court-appointed expert who suspected or determined malingering, in opposition to the expert who did not find evidence of malingering.[242] These kinds of distinctions are important given that court-appointed experts overwhelmingly conclude that the defendant is malingering.

232. Bench v. State, 431 P.3d 929 (Ok. 2018); People v. Robinson, 460 N.E.2d 392 (Ill. App. Ct. 1984); Sochor v. State, 883 So. 2d 766 (Fla. 2004); Middlebrooks v. Bell, 619 F.3d 526 (6th Cir. 2010), *vacated sub nom.*, Middlebrooks v. Colson, 566 U.S. 902 (2012); Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007).

233. 883 So. 2d 766 (Fla. 2004).

234. 619 F.3d 526 (6th Cir. 2010), *vacated sub nom.*, Middlebrooks v. Colson, 566 U.S. 902 (2012).

235. *See, e.g.*, 883 So. 2d at 776; 619 F.3d at 533.

236. *See* 883 So. 2d at 775–76; 619 F.3d at 538.

237. *See* 883 So. 2d at 784.

238. United States v. Knox, No. 05-00270, 2010 WL 2643566 (S.D. Ala. June 29, 2010); Eubanks v. Warden, 228 F. Supp. 888 (E.D. La. 1964); Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000); State v. Holt, 449 P.2d 119 (Utah 1969); United States v. Cooper, 465 F.2d 451 (9th Cir. 1973).

239. Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000); State v. Holt, 449 P.2d 119 (Utah 1969); United States v. Cooper, 465 F.2d 451 (9th Cir. 1973).

240. No. 05-00270, 2010 WL 2643566 (S.D. Ala. June 29, 2010).

241. 228 F. Supp. 888 (E.D. La. 1964).

242. *See* No. 05-00270, 2010 WL 2643566 at *5; 228 F. Supp. at 891.

In *United States v. Knox*, for example, the defendant's attorney requested a psychiatric evaluation because Knox believed he had some degree of Alzheimer's, and the attorney was concerned that the defendant was not retaining information that they had discussed.[243] Knox was examined by Dr. Daniel Koch, who found him to be suffering from dementia and requested that he be transferred to a Bureau of Prisons facility for further evaluation.[244] Knox was subsequently found incompetent during his first competency hearing and was sent to FMC Butner for evaluation and restoration of competency.[245] Despite the presence of cognitive defects, the Butner team believed Knox was competent, and some evaluators believed he was intentionally performing suboptimally.[246]

Knox was also evaluated for competency at MCFP Springfield, where he completed twenty-one psychological and neuropsychological tests.[247] There, Dr. Robert L. Denney found significant inconsistencies between Knox's claimed deficits and his actual behavior.[248] His observations indicated that Knox appeared to have more knowledge and understanding than he claimed, as well as a greater ability to read and comprehend material than prior testing had indicated.[249] His conversations also showed sound memory and understanding, as well as knowledge of institutional procedures.[250] In addition, test-validity results suggested that Knox was "not consistently applying himself to the best of his abilities during testing," revealing that his test results likely understated his true functioning.[251] Dr. Denney emphasized that "real-world functioning always trumps test results" and concluded that Knox's inconsistent effort and intact adaptive behavior indicated the absence of genuine dementia.[252] The court considered these opposing expert views and found Dr. Denney's evaluation to be the most reliable due to its thoroughness, use of effort tests, and extended observation period, in addition to Dr. Denney's status as a neuropsychologist whose qualifications, in the court's mind, were unquestionable.[253] Therefore, the court determined by a preponderance of the evidence that Knox was competent to stand trial.[254]

243. No. 05-00270, 2010 WL 2643566 at *1.

244. *See id.* ("Meanwhile, the government had also filed a motion for psychiatric evaluation in response to a notice of insanity defense filed by Defendant.").

245. *See id.* at *4.

246. *See id.* at *5.

247. *See id.*

248. *Id.* at *6.

249. *Id.*

250. *Id.* at *6.

251. *Id.*

252. *Id.* at *7–8.

253. *Id.* at *9.

254. *See id.* at *9.

In contrast, in *Eubanks*, the court sided with the court-appointed expert who concluded that the defendant was not malingering.[255] Eubanks, who was fifteen at the time of the crime, was found guilty of murder and sentenced to death.[256] On appeal, his counsel objected to the admission of a confession, arguing it violated Eubanks' due process rights under the Fifth and Fourteenth Amendments because he lacked the mental capacity to understand or voluntarily make it.[257] Despite these objections, the trial court found the confession voluntary and admitted it and the Louisiana Supreme Court later affirmed the conviction.[258] Eubanks petitioned for a writ of habeas corpus in federal court.[259]

The district court reviewed the record from the state court, which showed that Eubanks's defense attorney applied for the appointment of a lunacy commission and stated that Eubanks "'was not sane at the time of the commission of the alleged offense,' and that the defendant 'has been and is still insane and mentally defective.'"[260] The court appointed Dr. C.S. Holbrook (psychiatrist) and Dr. Nicholas Chetta (Coroner) to examine Eubanks.[261] Dr. Holbrook concluded that Eubanks was "feeble-minded," with a mental age of six to seven years, extremely suggestible, and incapable of self-protection.[262] Dr. Chetta disagreed, labeling Eubanks a "moron" (an acceptable term at the time), and believed he was malingering.[263] However, Dr. Chetta did agree Eubanks exhibited four significant characteristics: Eubanks' IQ was in the range of forty to forty-five, he had a mental capacity of a child of five years of age, he was "not capable of defending himself," and he "would answer commands and do what he is told, and nothing more."[264]

In response to Holbrook and Chetta's disagreement, the court also appointed Dr. N. Tharp Posey, a neuropsychiatrist, as a third member.[265] Dr. Posey admitted Eubanks was a "low-grade moron" with an IQ of forty to forty-five, but concluded—like Dr. Chetta—that he was malingering and capable of standing trial.[266] Based on this majority report, the court ruled Eubanks sane.[267] An additional court-appointed expert, Dr. Irving A. Fosberg, administered psychometric tests, consisting of a Wechsler Bellevue intelligence test, a

255. *See* Eubanks v. Warden, 228 F. Supp. 888, 891–92 (E.D. La. 1964).
256. *See id.* at 889.
257. *See id.*
258. *See id.*
259. *See id.*
260. *Id.* at 890.
261. *Id.* at 890–91.
262. *Id.* at 891.
263. *Id.*
264. *Id.*
265. *Id.* at 891.
266. *Id.*
267. *Id.*

Rorschach test, and a D.A.P. test.[268] Yet, Dr. Fosberg testified that "the Rorschach test confirmed the finding of feeble-mindedness, and completely refuted the claim of malingering."[269] A defense expert, Dr. Edward G. Long, agreed with Dr. Holbrook that Eubanks had an IQ score between forty and forty-five, and a mental age of six to six and one-half years.[270] Dr. Long also thought that Eubanks "lied during the trial, but he did not believe that [Eubanks] was in any way a malingerer," merely that Eubanks "acted as a child."[271] He explained that Eubanks "would try to figure out what people wanted him to say or do, and then he would say or do it in order to please."[272]

Despite this robust evidence, the Louisiana Supreme Court dismissed the mental incapacity argument, holding that even if Eubanks was feeble-minded, that fact affected only the weight and credibility of his confession, not its admissibility.[273] Yet, in a startling finding contrary to most of the Malingering Project's cases, the district court rejected this reasoning.[274] Under a totality of the circumstances test, the court found that Eubanks's age, feeble-mindedness, lack of malingering, low IQ, illiteracy, and suggestibility rendered it impossible to deem his confession voluntary.[275]

D. *Defense Experts' Findings of No Malingering*

Among the 302 cases in our Malingering Project, it was relatively uncommon for the defense to present surrebuttal testimony affirming that the defendant was *not* malingering, or for defense experts to explicitly state during their testimony that malingering was assessed and ruled out.[276] More often, defense experts limited their testimony to establishing that the defendant was insane and suffered from a mental illness or other similar affliction. Indeed, instances in which a defense expert explicitly testified that the defendant was not malingering occurred in only forty-five (14.9%) of the cases.[277] In contrast, prosecution and court-appointed experts more frequently addressed malingering directly by asserting that the defendant was exaggerating or fabricating symptoms.[278]

268. *See id.*
269. *Id.* at 892.
270. *Id.*
271. *Id.*
272. *See id.*
273. *Id.*
274. *Id.* at 892–93.
275. *Id.* at 895.
276. *See supra* Figure 6. Instances where the defense surrebutted testimony presented by the State with testimony that argued that the defendant was not malingering only occurred in three cases in the dataset. Frederick v. State, 37 P.3d 908, 928 (Okla. Crim. Ct. App. 2001); Pulinario v. Goord, 291 F. Supp. 2d 154, 168–69 (E.D.N.Y. 2003); United States v. Burgess, 691 F.2d 1146, 1153 (4th Cir. 1982).
277. *See supra* Figure 6.
278. *See supra* Figure 6.

It is unclear why defense attorneys are not focusing on defending against malingering claims. The only explanation that can be deduced from the data is that defense attorneys are concentrating on presenting evidence to support affirmative defenses and establish a finding of mental illness rather than on surrebuttal that argues no malingering. This testimony and related evidence reinforcing the defendant's insanity or mental illness could, in many cases, be interpreted as an implicit rejection of malingering, even when not stated outright. In these instances, a determination of the defendant's truthfulness and credibility would be left up to judges and juries. It should also be noted that a direct rebuttal or surrebuttal of a malingering claim by the defense is almost never successful,[279] in which case such preparations may not always be time well spent.

In twenty-five (55.5%)[280] of these forty-five cases, a prosecution expert testified that the defendant was malingering. In only one case, *Pulinario v. Goord*,[281] was the defendant able to successfully argue against a claim of malingering made by the prosecution. The malingering issue arose when the State's psychiatrist, Dr. Robert Berger, evaluated the defendant and concluded that she was faking or exaggerating her psychological symptoms.[282] Keila Pulinario, a twenty-one-year-old woman with an IQ of seventy, claimed she shot her rapist while suffering from Post-Traumatic Stress Disorder ("PTSD") and Rape Trauma Syndrome ("RTS").[283]

The defense expert, Dr. Linda Ledray, concluded that Pulinario "had severe psychological problems" and diagnosed her with PTSD and Major Depressive Disorder.[284] She also testified that "the testing completed by petitioner indicated a consistent pattern across measures of high level of

279. *See* Denno, *Neuroscience Narrative*, *supra* note 1, at 1278 (noting how evidence of malingering can "strongly affect[]" court judgments regarding application of the insanity defense).

280. People v. Jones, 931 P.2d 960 (Cal. 1997); United States v. Puerto, 392 F. App'x 692 (11th Cir. 2010); People v. Powell, 422 P.3d 973 (Cal. 2018); Commonwealth v. Muller, 78 N.E.3d 51 (Mass. 2017); People v. Franklin, No. 1-17-1628, 2020 WL 5820799 (Ill. App. Ct. Sep. 30, 2020); Neuman v. State, 773 S.E.2d 716 (Ga. 2015); Routh v. State, 516 S.W.3d 677 (Tex. App. 2017); Davis v. State, 121 So. 3d 462 (Fla. 2013); Pulinario v. Goord, 291 F. Supp. 2d 154 (E.D.N.Y. 2003); People v. Krauser, 146 N.E. 593 (Ill. 1925); United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982); Middlebrooks v. Bell, 619 F.3d 526 (6th Cir. 2010); People v. Skorka, 498 N.E.2d 607 (Ill. App. Ct. 1986); Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990); United States v. Montgomery, 635 F.3d 1074 (8th Cir. 2011); People v. Plackowska, No. 2-17-1015, 2020 WL 4463108 (Ill. App. Ct. Aug. 3, 2020); Frederick v. State, 37 P.3d 908 (Okla. Crim. App. 2001); People v. Romero, 105 N.E.3d 1048 (Ill. App. Ct. 2018); State v. McDonald, 192 S.E. 365 (S.C. 1937); People v. Demagall, 114 A.D.3d 189 (N.Y. App. Div. 2014); Gibson v. Commonwealth, 104 S.W. 351 (Ky. 1907); People v. Gilberg, 240 P. 1000 (Cal. 1925); People v. Raizen, 211 A.D. 446 (N.Y. App. Div. 1925); People v. Loomis, 80 P.2d 1012 (Cal. 1938); Awkal v. Mitchell, 613 F.3d 629 (6th Cir. 2010).

281. Pulinario v. Goord, 291 F. Supp. 2d 154 (E.D.N.Y. 2003).

282. *Id.* at 165.

283. *Id.* at 156.

284. *Id.* at 165.

depression, fear, [and] anxiety."[285] Dr. Berger disputed this diagnosis and "devoted his report to demonstrating that petitioner was a malingerer, consciously feigning and simulating her mental disorder."[286] He further described the petitioner as a "superficially cooperative' examinee who 'attempts to present herself in a favorable light," asserting that she responded in "an exaggerated manner, endorsing a variety of inconsistent symptoms and attitudes."[287]

During trial, after Pulinario admitted that she had been untruthful with both Drs. Berger and Ledray about certain aspects of her sexual history, the prosecution moved to preclude Dr. Ledray's testimony.[288] The trial judge ruled that the petitioner had "willfully refuse[d] to cooperate fully in the examination" and barred all testimony from Dr. Ledray regarding PTSD.[289] This decision had a devastating impact on the defense:

> Because Dr. Ledray was unable to testify that petitioner was suffering from PTSD at the time of the shooting, the defense was unable to pursue its defense of mental disease or defect . . . and determined that it could not ask the jury to consider the defense of extreme emotional disturbance.[290]

On review, the federal court held that the trial court's reliance on Dr. Berger's malingering conclusion was flawed.[291] Dr. Berger's independent reports indicated malingering before Pulinario admitted during the trial that she was being untruthful about one detail in her interview with Dr. Berger.[292] As the court explained, "It would be both illogical and unjust to preclude evidence of the defendant's psychiatric condition because the defendant manifested the symptoms of that psychiatric condition."[293] The court agreed with the defense's claim that "failure to be forthcoming completely, indeed when lies are told regarding sexual encounters involving rape . . . is a typical, not an atypical, . . . consistent behavior with rape trauma syndrome."[294] Additionally,

> [h]ad Dr. Ledray been allowed to testify at trial concerning petitioner's mental condition at the time of the shooting, arguably she would have testified that it is not uncommon for rape victims to tell untruths and

285. *Id.*
286. *Id.*
287. *Id.* at 166.
288. *Id.* at 167–68.
289. *Id.* at 169.
290. *Id.*
291. *Id.* at 178.
292. *Id.* at 179.
293. *Id.* at 177.
294. *Id.* at 168.

> withhold information because they feel that "others will judge them and not believe they were raped . . . . If they were doing something illegal, or something they believe may be used against them, they will often leave these details out to prevent additional blame and shame."[295]

The federal court found that precluding Dr. Ledray's testimony violated Pulinario's Sixth Amendment right to present a defense.[296] The trial court had imposed an "extreme sanction" without proof that the petitioner's conduct was "willful, in bad faith and motivated by a desire to obtain a tactical advantage."[297] The court noted that when a defendant's psychiatric condition causes uncooperativeness, that defendant has "acted neither 'willfully' nor in bad faith to gain a tactical advantage."[298] The court concluded that the exclusion "fatally undermined" [299] and "eviscerated petitioner's defense," making "conviction based on misconceptions by the jury inevitable."[300]

CONCLUDING COMMENTS AND IMPLICATIONS

Malingering claims against defendants are a remarkably powerful prosecutorial strategy. They have also increased substantially over the decades, along with potentially striking impacts on historically entrenched legal doctrines, such as the insanity defense.[301] As this Article's Malingering Project showed, the prosecution makes malingering arguments in criminal cases nearly exclusively. Yet, defense attorneys bolster such claims on rare occasions, with, not surprisingly, negative consequences for the defendants they represent.

Even when defense attorneys do not commit the egregious error of enabling experts to conclude their client is malingering, they often fall short in other ways. For example, the Malingering Project showed that it was unusual for the defense to present surrebuttal testimony contending that the defendant was not malingering or to introduce an expert to testify that they ruled malingering out. Most often, the defense was focused on demonstrating that the defendant was insane and therefore was seemingly unprepared for prosecutorial efforts to hit back with malingering accusations.

The consequences to defendants and the system as a whole can be severe. Testifying experts have stressed that "[a]n inaccurate diagnosis of malingering by an expert does a major disservice to justice" because it can wrongly result in

295. *Id.* at 164.
296. *Id.* at 160.
297. *Id.*
298. *Id.* at 178.
299. *Id.* at 180.
300. *Id.*
301. *See supra* notes 80–115 and accompanying text; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 714 (1990).

longer sentences.[302] While the fear that defendants can successfully malinger insanity has permeated the American legal system for over a century, there is no evidence that feigned insanity that leads to acquittal has been a consistent problem in the courts.[303] Likewise, commentators urge that an expert should not make a malingering diagnosis "unless there is a high degree of certainty."[304] False determinations of malingering can potentially cause "adverse outcomes, such as denial of treatment or offense enhancement," effectively controverting the overarching goals of the criminal justice system.[305]

There are parallels here with the early problems this country's criminal justice system experienced with shaken baby syndrome evidence. My Neuroscience Study showed that, initially, defense attorneys refrained from, or were not prepared to offer, surrebuttal to prosecutorial claims concerning the diagnosis and reliability of shaken baby syndrome evidence.[306] As the science grew more sophisticated, so did defense counsels' efforts to question long-held assumptions behind the sources of childhood head trauma and their clients' culpability in causing it.[307] Similar reasoning can be applied to malingering claims. There are indications that the criminal justice system may be more open to questioning the sociocultural and scientific underpinnings of claims of fakery.[308] At the very least, surrebuttal is a strategy for defense attorneys to test in light of the marked imbalance in how defendants are now represented.

302. *See* Knoll IV & Resnick, *Longer Sentences for Malingerers*, *supra* note 72, at 624.

303. *See* Perlin, *supra* note 301, at 714.

304. *Id.*

305. *See* Mary Alice Conroy & Phylissa P. Kwartner, *Malingering*, 2 APPLIED PSYCH. CRIM. JUST. 29, 31–32 (2006).

306. *See supra* notes 7–10 and accompanying text.

307. *See supra* notes 7–10 and accompanying text.

308. *See supra* notes 291–99 and accompanying text.