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The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*

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I. PREFACE

Over the last twenty years, a sophisticated legal literature on treatment decisionmaking and patient competence has emerged.[1] Specific analyses of proper criteria of incompetence, and mechanisms of surrogate decisionmaking, are rooted in rich theoretical discussions of autonomy, paternalism, and informed consent. This literature has exposed puzzling questions at the intersection of clinical reality and moral theory, such as whether the operational meaning of competence varies, and ought to vary, in relation to the risks and benefits of proposed treatments, and whether different "competence" standards are and should be applied according to whether patients accept or refuse recommended treatment.[2] Commentators have explored these issues extensively in relation to psychotropic medication[3] and, more recently, admission to psychiatric hospitals.[4]

In contrast to this rich theoretical literature on competence and treatment decisionmaking, the literature on competence of criminal defendants has been almost exclusively "applied." The social science literature is largely descriptive, depicting characteristics of persons found incompetent, factors associated with findings of incompetence by clinicians and courts, and the consequences of being found incompetent.[5] A twenty-year effort to apply scientific techniques to competence assessment has yielded little.[6] Most surprisingly, little research exists on fundamental empirical issues relating to the meaning of incompetence. These issues include the functional abilities and disabilities of criminal defendants—with and without mental disorders—

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1. *See* PAUL S. APPELBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE (1987); RUTH FADEN & THOMAS BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986). The word "competence" is out of vogue in the mental disability field. A variety of factors account for this: The term has a normatively undesirable global connotation. The implication that incompetence is a personal characteristic suppresses its situational and interactive aspects. Finally, the term ultimately is a legal conclusion with inescapably moral dimensions. Notwithstanding all of this, I am using the term, uncritically, as a shorthand for the functional incapacities of criminal defendants that trigger the application of various legal rules in a criminal case. In so doing, I am not endorsing the naive idea that "competence" is an objective, clinically measurable phenomenon. In referring to the "objective" aspects of judgments about competence, I will use the terms "abilities" and "capacities" interchangeably.

2. *See, e.g.*, Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 38 HOUS. L. REV. 15 (1991).

3. *See, e.g.*, Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945 (1991).

4. *See, e.g.*, Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, 14 INT'L J. L. & PSYCHIATRY 169 (1991) [hereinafter Winick, *Competency to Consent to Voluntary Hospitalization*].

5. *See, e.g.*, Thomas Grisso, *Five-Year Research Update (1986-1990): Evaluations for Competence to Stand Trial*, 10 BEHAV. SCI. & L. 353, 360-62 (1992).

6. *Id.* at 366.

as they bear on the tasks required of criminal defendants, and the needs and expectations of criminal defense attorneys.[7]

Although issues relating to the competence of criminal defendants are frequently litigated, most of the case law concerns not the meaning of "competence" *per se*, but rather the procedures for raising and resolving doubts about a defendant's competence. In this context, finality of criminal adjudication constitutes the overriding concern; courts express more concern about the design and implementation of procedures to ensure that doubts about competence are raised and resolved at the outset of the litigation—for "cleansing" the case, as it were—than about the meaning of competence.[8] The only real legal controversy concerns whether the standard for "competence to plead guilty" is higher than the standard for "competence to stand trial."[9] Yet even in this context, there is very little discussion about autonomy and client decisionmaking; instead, attention is directed mainly to practical issues such as the undesirable impact of a "two-competence" rule on plea bargaining and finality of adjudication. Frankly, after reviewing the applied forensic literature and the legal commentary in this area, one has a strong suspicion that what is most needed is a good theory.

What, then, can be found in the sparse theoretical literature on competence of criminal defendants? The leading theoretical accounts tend to focus more on the disutility of the legal rules barring adjudication than on the meaning of incompetence in relation to the social purposes that the rules are designed to serve. In 1972, for example, Robert Burt and Norval Morris called attention to the high costs of incompetency commitments, both to the defendant and to society, and argued that the "incompetency plea" should be abolished in favor of a system of trial continuances.[10] Under their proposal, cases would be brought to trial after six months, notwithstanding the defendant's mental impairment, and special safeguards similar to those used in cases involving amnesic defendants would be used to ensure the reliability of the adjudication.[11]

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7. *Id.*

8. *See, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

9. *See, e.g.*, James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 460-66 (1985).

10. Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972).

11. *Id.* at 82, 92-95. Special safeguards in an amnesia case include "that the government's case must satisfy an extraordinary burden of proof and . . . make whatever other adjustments [that] are necessary to redress the defendant's disadvantages at trial." *Id.* at 82-83 (footnote omitted).

Despite its contribution to the scholarly literature, the Burt and Morris approach has found little favor in the courts because their proposal is wholly incompatible with settled law and with "centuries of common-law theology," as they put it.[12] Even in 1972, the common-law bar against convicting incompetent defendants clearly had been constitutionalized, and the "incompetency plea" could not be abolished altogether.[13] As the Supreme Court subsequently stated in *Drope v. Missouri*, the bar against trying the incompetent defendant "is fundamental to an adversary system of justice."[14] In the face of such a deeply rooted doctrine, the abolitionist proposal is, to put it mildly, somewhat quixotic.[15]

More than a decade after Professors Burt and Morris published their article, Professor Bruce Winick sought to rehabilitate the abolitionist approach without so flagrantly contradicting the pronouncements of the Supreme Court.[16] He pointed out that hospitalization for competence evaluation and commitment upon a finding of incompetence often are not in the defendant's best interests (as compared with disposition of the criminal case).[17] Because the rule prohibiting conviction of incompetent defendants aims primarily to protect the defendant's right to a fair adjudication, Professor Winick argues, the defense should be able to waive the supposed "protections" of the incompetence doctrine.[18]

At this point, Professor Winick's argument confronts a conceptual roadblock because waiver by the defendant entails mental competence to waive, precisely the matter in dispute. Professor Winick offers two ways to evade this difficulty. One possibility is to prescribe a minimal standard of competence. Thus, he suggests that mere expression of a preference for adjudication by the defendant would

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12. *Id.* at 75.

13. Pate v. Robinson, 383 U.S. 375, 378 (1966). The Court noted and apparently endorsed the government's stipulation that "conviction of an accused person [who] is legally incompetent violates due process." *Id.* (citation omitted).

The "incompetence plea" bars adjudications adverse to the defendant, not adjudication *per se*. Thus, one-way "innocence-only" procedures are permissible. *See, e.g.*, CAL. PENAL CODE § 1368 (West 1992); ILL. ANN. STAT. ch. 38, para. 104-11 (Smith-Hurd 1992). For convenience, however, I will sometimes characterize the rule as one that "bars adjudication." Despite the awkwardness of the phrase, I will also refer to the defendant's constitutional right not to be prosecuted or convicted while incompetent.

14. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citation omitted).

15. The Supreme Court recently reaffirmed the constitutional bar against prosecuting and convicting incompetent defendants in Medina v. California, 112 S. Ct. 2572, 2581 (1992).

16. Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243 (1987) [hereinafter Winick, *Incompetency to Stand Trial*].

17. *Id.* at 245-58.

18. *Id.* at 259-62.

suffice to effect a valid waiver.[19] Alternatively, Professor Winick suggests that the attorney, acting as surrogate decisionmaker on behalf of the incompetent client, should be permitted to waive the "incompetence plea" as long as the client assents.[20]

In developing his argument, Professor Winick expressly invokes an analogy between decisionmaking in criminal representation and decisionmaking in therapeutic settings. He recognizes the possibility that competence to say "yes,"—i.e., to concur with an attorney's recommendation—may be predicated on a lower standard of competence (perhaps even akin to simple "assent") than competence to say "no"—i.e., to decline to follow the attorney's advice.[21] As mentioned above, the idea of differential standards of competence, perhaps on a sliding scale tilted in a paternalistic direction, has received increasing theoretical attention in bioethics.[22] Professor Winick's article made an important contribution by linking the literature on competence of criminal defendants to the literature on treatment decisionmaking. In the final analysis, however, Professor Winick's argument stumbles on the same hurdle that tripped Professors Burt and Morris.

The argument's fatal flaw is the assumption that the bar against adjudication is designed solely to protect the *defendant's* interests. In fact, the incompetence doctrine also serves *societal* interests. First, the doctrine serves to preserve the criminal process's moral dignity by prohibiting prosecution and conviction of defendants who lack a meaningful moral understanding of wrongdoing and punishment or the nature of criminal prosecution.[23] Second, society also has an independent interest in the reliability of the outcomes in criminal cases, including an interest in avoiding erroneous convictions.[24] This explains why a defendant's unqualified right to take a case to trial does not entail a correlative "right" to plead guilty; at a minimum, a court may decline to accept a guilty plea that lacks an adequate factual foundation.[25]

Other constitutional protections that are generally understood to

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19. *Id.* at 269-72.

20. *Id.* at 278-81. Significantly, adjudication would still be barred if an incompetent client *objected* to adjudication. Of course, such cases hardly ever arise in practice. Anyone who would say something such as "I don't want to be tried or convicted" is probably competent.

21. *Id.* at 269-72.

22. *See supra* notes 2-4.

23. *See infra* note 49 and accompanying text.

24. *See* WAYNE R. LAFAVE & JERROLD H. ISRAEL, CRIMINAL PROCEDURE 32-43 (2d ed. 1992). Social scientists would prefer the terms "validity" or "accuracy" to "reliability" in this context. However, recent constitutional vocabulary typically refers to reliability of the outcome as a synonym for accuracy.

25. North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).

safeguard the defendant's interests also serve societal interests. Accordingly, the defendant does not necessarily have the sole option to waive these interests. For example, society has an independent interest in the pedagogical features of criminal trials, especially jury trials. In addition, public access to and participation in criminal proceedings helps to assure accountability of the judiciary and to effectuate democratic ideals of self-governance. Taken together, these interests explain why a defendant's unqualified right to insist on a jury trial does not entail a correlative constitutional right to a bench trial[26] and why a defendant's right to a "public trial" does not entail a correlative right to insist on a private trial.[27]

Thus, the first problem with Professor Winick's analysis is that the incompetence doctrine does not derive exclusively from a desire to protect the defendant's right to a fair adjudication. The doctrine also affects societal interests in the moral dignity and reliability of the criminal process. A second problem also exists. Even if the incompetence doctrine derived exclusively from a desire to protect the defendant's interests, thereby implying that its protections should be waivable, neither of Professor Winick's two efforts to formulate a legally satisfactory theory of waiver fully succeeds.

First, a defendant's ability to express a preference for adjudication does not sufficiently measure competence to waive a constitutional right (assuming that only the defendant can waive the right). Expression of a preference either to waive the right to representation by counsel or to plead guilty rather than have a trial is not enough to effect a valid waiver of these important constitutional rights. To be valid, the waiver must be "knowing and intelligent" and the court must assure, on the record, that these criteria have been satisfied.[28] Thus, if the defendant must personally effect the waiver of the right not to be tried while incompetent, the mere ability to express a preference, absent any understanding of the nature of the choice or the consequences of the decision, is not a sufficient substantive test of legal competence. Knowing that a defendant makes a choice and says "yes" or "no" would not satisfy even the minimum substantive conception of self-determination.

The idea that expressing a preference effects a waiver might be reformulated as a procedural proposition, rather than a substantive one. That is, even though competence to waive requires the ability to

26. Singer v. United States, 380 U.S. 24, 26 (1965).

27. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980).

28. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969); Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

understand the nature and consequences of the decision, expression of a preference might raise a presumption that the defendant is competent (in a more demanding sense) to make the decision to waive and has, in fact, made a "knowing and intelligent" waiver. In some contexts, evidence that a person has some abilities might raise a presumption that she has other abilities. For example, expressing a preference may provide a presumptively valid basis for self-admission to a psychiatric hospital or even for waiver of a jury trial by a defendant who has previously been determined able to understand relevant information. In the present context, however, such a presumption would not be normatively plausible because the underlying issue is whether the defendant has the abilities needed for self-interested decisionmaking.[29]

Recognizing the weaknesses of the personal waiver theory, Professor Winick offers an alternative theory in which the attorney, as a surrogate decisionmaker, can effect a valid waiver on behalf of the defendant, as long as the defendant assents. As I will suggest later, surrogate decisionmaking by the attorney provides an attractive possibility in some contexts.[30] Authorization of it across the board, however, would nullify fundamental principles of criminal adjudication. An attorney could not plead guilty on behalf of the defendant, for example. The question, then, is whether a case for surrogate decisionmaking can be made *in this context*: Should a criminal defense attorney be authorized to decide that it is not in the defendant's best interests to be subjected to evaluation and commitment on grounds of possible incompetence, even though the defendant may actually be incompetent? This question, which has important implications for the practice of criminal defense, exposes fundamental issues of legal theory. It therefore provides a useful vehicle for introducing several questions explored later in this Article.

Professor Winick's suggestion—that when a defense attorney declines to raise questions about a client's competence, the "incompetence plea" is waived—presents two puzzles. The first is a reliability problem: the defendant's impairments may prevent disclosure of

29. Although Professor Winick refers to the presumption of competence, he does so in support of the substantive conclusion that the test of competence should be a low one. Winick, *Incompetency to Stand Trial*, *supra* note 16, at 270-72. An alternative argument for a presumption would rely on a normative preference for non-interference and an empirical assumption that most people who are able to express a preference are also able to understand the reasons for the expressed preference. It might even be plausible to argue that the risks associated with an occasional false positive (a person erroneously presumed to be competent) are so low that the presumption should be conclusive. In the end, however, the argument must fail because it effectively forecloses inquiry on the competence of a person to waive legal safeguards designed to protect incompetent defendants.

30. *See infra* part III.B.

important information and may thereby compromise the attorney's capacity to make informed judgments about defending the case, including the decision whether a competence inquiry is in the defendant's best interests. The current doctrinal response to this problem requires attorneys and courts to initiate an inquiry whenever they harbor a genuine doubt about the defendant's competence.[31] Professor Winick's proposal leaves this judgment in the hands of counsel. I tend to agree with Professor Winick[32] but I ground my argument in a slightly different premise: the attorney is in the best position to decide whether the defendant's impairments actually impede defense of the case, i.e., to decide whether the defendant *is* competent, or at least to decide whether further inquiry should be undertaken. This is not the same as saying that the attorney "waives" the defendant's right not to be convicted while incompetent.

The second theoretical puzzle raised by the attorney-waiver theory relates to disposition of the case. To the extent that disposition of the case requires decisionmaking by the defendant, the defendant's incompetence precludes valid decisions. Thus, little will be accomplished by allowing the attorney to decline to raise, or to waive, the incompetence plea unless surrogate decisionmaking by the attorney is also allowed to effect a valid disposition. ("Innocent-only" adjudications do not pose problems in this context because the difficulty discussed above relates exclusively to dispositions adverse to the defendant.)

Clearly, the attorney has no authorization to enter a guilty plea as surrogate for an incompetent client. Thus, some mechanism must be established to assure, at least, validity of a proffered guilty plea, and doubts about the defendant's mental capacity to understand the nature and consequences of the plea must be raised and resolved. However, the attorney-waiver theory may be legally plausible if surrogate decisionmaking by the attorney were permitted in *tried* cases.

Surrogate decisionmaking in tried cases poses an intriguing possibility. Most trial decisions do not require personal participation by the defendant, even though many of them have the effect of waiving constitutional protections. Under prevailing legal and ethical rules, however, some trial-related decisions do require the defendant's personal participation. These include whether or not to waive jury trial and whether or not to testify—decisions required in every case.[33]

31. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 (1984).

32. *See infra* part III.B.

33. *See infra* part IV.A. The proposition in the text is slightly overstated, of course. Jury trials are not available in every criminal case. The federal Constitution requires jury trials only

Should a defendant's decisional incompetence bar adjudication? If surrogate decisionmaking were permitted, what would be the scope of the attorney's surrogate authority? Two basic approaches could be taken. Under a two-way rule, the attorney could decide, on behalf of the client, all trial decisions, including whether or not to waive jury trial or whether or not the client should testify.[34] Under a one-way rule, the attorney's surrogate prerogative would be restricted to decisions that invoke, rather than waive, constitutional rights.[35] Thus, if the attorney chooses to have a jury trial, this decision would not require the defendant's competent participation. However, a decision by the attorney to have a bench trial would require competence of the client to waive his constitutional right to a jury trial.[36] Either of these approaches leaves room for surrogate decisionmaking by attorneys under some circumstances, and accordingly, might leave some room for a surrogate decision not to raise doubts about the defendant's incompetence. In short, Professor Winick's waiver theory could have some residual application in tried cases.

My aim in the preceding pages has been twofold. First, I have tried to demonstrate that the subject of competence of criminal defendants is ripe for theoretical development. Second, I have tried to show that it is possible to develop a theory of competence in the criminal process that takes into account, and builds on, the insights of

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if the offense is punishable by more than six months' confinement. Baldwin v. New York, 399 U.S. 66, 73-74 (1970).

34. I am referring in the Article to the usual case in which the defendant assents to the attorney's decision. However, the possibility of two-way surrogate decisionmaking on behalf of an incompetent client also entails the logical possibility of a decision by the attorney overriding the client's (incompetent) objection. As a practical matter, such a possibility likely would arise when the attorney believes that it is in the defendant's best interests to remain silent although the defendant wants to testify. Whether the attorney's decision should govern in this situation presents an interesting puzzle. The alternatives are to preclude trial or to permit the client's "choice" to control, despite the client's incompetence. Although resolution of this question is peripheral to my primary aims in this Article, I am inclined to say the client's wishes should control. The underlying normative proposition is that the client who is able to assist counsel, and can therefore be tried, has a right to testify without regard to possible decisional incompetence. *Cf.* Commonwealth v. DeMinico, 557 N.E.2d 744, 745 (Mass. 1990).

35. In the context of whether or not to testify, a one-way rule is not possible because either choice involves waiver of a constitutional right. *See* Rock v. Arkansas, 483 U.S. 44, 52 (1987) ("[t]he opportunity to testify is also a necessary corollary to the . . . guarantee against compelled testimony.").

36. Even under this one-way view, the law must prescribe a test of competence and must specify the obligations of defense attorneys and judges in relation to monitoring and resolving doubts concerning the defendant's competence. For example, the law might permit the attorney to exercise considerable discretion in deciding whether his doubts about the client's competence to waive this right should be brought to judicial attention. *See infra* part III.B.

Professors Burt, Morris, and Winick, but that remains compatible with settled traditions of law.

In essence, I argue that "competence" of criminal defendants is best viewed not as an open-textured single construct, but rather as two related but separable constructs[37]—a foundational concept of competence to assist counsel, and a contextualized concept of decisional competence. Competence to assist counsel, as I define it, encompasses the criteria articulated in *Dusky v. United States*[38] and *Drope v. Missouri*,[39] which typically are said to denote "competence to stand trial." Decisional competence refers to the additional abilities required for legally valid decisionmaking. In the most controversial part of my argument, I suggest that the "tests" of decisional competence should and, in practice, do vary according to context.[40]

Part II presents an overview of my argument. In Part III I focus on competence to assist counsel. Unlike Professors Burt, Morris, and Winick, I accept and endorse the bar against adjudication if the defendant lacks the abilities necessary to assist counsel; that is, I accept *Dusky* and *Drope*. However, like Professors Burt, Morris, and Winick, I believe that formal judicial intervention under the competence doctrine should be minimized and that correspondingly greater attention should be paid to the responsibilities and prerogatives of defense counsel.

The greatest need for theoretical development arises in relation to decisional competence. By extracting decisional competence from the unitary concept of "competence" in criminal adjudication, I hope to stimulate courts and commentators to reach beyond *Dusky* and *Drope*. Building on Professor Winick's insights, I aim to explore and develop the analogy between decisionmaking in the attorney-client relationship and in the doctor-patient relationship. In addition, I want to encourage a closer link between the law governing competence of criminal defendants and the rapidly developing law governing decisionmaking by criminal defendants.[41]

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37. *See infra* parts II-IV.

38. 362 U.S. 402 (1960). "[T]he 'test will be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " *Id.*

39. 420 U.S. 162 (1975). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Id.* at 171.

40. *See infra* part IV.B.

41. For example, in Rock v. Arkansas, 483 U.S. 44 (1987), the Court declared a constitutional right to testify, which has provoked an unresolved controversy regarding the

In Part IV, I explore the concept of decisional competence and apply the theory in several specific decisionmaking contexts. The aim is to further develop my claim that tests for decisional competence should vary according to the context and to illustrate the possibilities for surrogate decisionmaking. In Part V, I comment on the Ninth Circuit's decision in *Moran v. Godinez*[42] which draws a distinction similar to the one drawn in this Article between competence to assist counsel and decisional competence. Having granted certiorari in *Moran*, the Supreme Court has an opportunity to take the law beyond *Dusky* and *Drope*. Part VI concludes with a discussion of a recent decision by the Tenth Circuit which illustrates continued judicial uncertainty about the meaning of the *Dusky* formula in relation to decisional competence.

II. A THEORY OF COMPETENCE IN CRIMINAL DEFENSE

What does it mean to be "competent" to participate in one's own defense? Forensic clinicians say that the meaning of competence is highly contextualized and that the standard, however formulated, is an "open-textured" one.[43] Whether a defendant is "competent" depends on the seriousness and complexity of the charges, on what is expected of the defendant in the given case, on the client's relationship with the attorney, on counsel's skill, and other "interactive" factors.[44] The instruments available for structuring forensic interviewing and decisionmaking in this context typically list the many potentially relevant abilities, even though they may not have particular significance in a given case. These instruments do not prescribe definitive "scoring" criteria, but rely instead upon a clinical judgment based on all the circumstances of the given case.[45]

The current practice of competence assessment and adjudication lacks normative texture and, as a result, is highly discretionary. Appellate courts rarely review and almost never reverse trial court decisions that find defendants incompetent, or decline to do so. In a

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respective roles of attorney and client and the need for a contemporaneous judicial determination that a non-testifying defendant has made a "knowing and intelligent" waiver of the right to testify. For discussion of this controversy, see, e.g., United States v. Teague, 953 F.2d 1525, 1532-33 (11th Cir. 1992) (en banc), and cases cited therein.

42. 972 F.2d 263 (9th Cir.), *cert. granted sub nom.* Godinez v. Moran, 113 S. Ct. 810 (1992).

43. *See* RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 10-13 (1980); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1 commentary at 175 (1986) ("A determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation.").

44. *See* THOMAS GRISSO, EVALUATING COMPETENCIES 76-77 (1986).

45. *Id.* at 78-104 (reviewing and discussing the most widely-used instruments).

sequential decisionmaking process, discretion tends to slide backwards. It should, therefore, come as no surprise that trial judges almost always defer to clinical opinion in pretrial competence determinations.[46] Thus, forensic clinicians rather than judges effectively exercise discretion to define competence, which is a source of continuing dissatisfaction to commentators, if not to forensic clinicians and judges.

Conceptualizing competence as an open-textured construct obscures the critically important distinction between the clinical/descriptive and legal/evaluative dimensions of competence assessment. Adjudication of "competence to stand trial" lacks the normative texture needed to help separate the role of the expert and the role of the judge. Notwithstanding the trend away from "ultimate issue" testimony by mental health professionals in other contexts, forensic clinicians commonly discover that judges practically insist on ultimate issue opinion in reports and testimony on competence to stand trial.[47]

Perhaps this highly subjective, discretionary approach to competence assessment and adjudication is preferable to any of the available alternatives. It is certainly preferable to a regime in which the defendant's mental and physical disabilities have no legal significance. Moreover, an open-textured inquiry is sometimes superior, notwithstanding its discretionary features, to more structured normative criteria. Typically, this superiority stems from the fact that any effort to limit the factors that may be considered will be underinclusive and any effort to order the factors or to prescribe structured decision rules will not fit all cases. For example, the persistence of "best interests of the child" as the standard for child custody determinations reflects a settled preference for the highly individualized approach. Though the pendulum in criminal sentencing has recently swung in the direction of more determinate normative criteria, the Constitution requires

46. *See* Stephen L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 321 (1984); Stephen D. Hart & Robert D. Hare, *Predicting Fitness to Stand Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REPORTS 53, 56, 59 (1992) (in a study of males remanded for competency to stand trial the courts agreed with 77 out of 80 clinician recommendations); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competency to Stand Trial*, 47 J. CLINICAL PSYCHIATRY 29-30 (1986).

47. *See, e.g.*, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.9 and accompanying commentary at 118-30 (1986) (specifically permitting ultimate issue testimony for opinions on competence to stand trial while precluding it for opinions on criminal responsibility).

individualized decisionmaking in capital sentencing adjudication.[48]

In my opinion the open-textured approach to competence assessment in criminal adjudication is inferior to the more structured approach outlined in this Article. It is possible, in this setting, to formulate criteria which facilitate objective decisionmaking and meaningful judicial supervision while producing normatively attractive outcomes. The proposed approach has several additional advantages. First, it is compatible with the intuitive understanding of clinicians and judges regarding the meaning of competence and with the settled features of existing law. Second, it helps to clarify the issues in areas where the law remains unsettled or controversial, such as the circumstances under which incompetence bars adjudication and whether the "test" for competence to plead guilty differs from the test for competence-to-stand trial. Third, because this approach derives from a theoretical analysis of the purposes served by the pertinent legal rules, it provides a framework for defining the "psycho-legal abilities" that are relevant to competence determinations and thereby facilitates research designed to improve the scientific basis of competence assessments in criminal cases.

A. *Premises*

A review of cases and commentary yields three conceptually independent rationales for barring adjudication on grounds of a defendant's incompetence. I will label them *dignity*, *reliability*, and *autonomy*.

A person who lacks a rudimentary understanding of the nature and purpose of the proceedings against her is a not a "fit" subject for criminal prosecution and punishment. To proceed against such a person offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object of the state's effort to carry out its promises. Only cases involving defendants who lack a meaningful moral understanding of wrongdoing and punishment or the nature of a criminal prosecution implicate the dignity rationale.[49]

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48. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989).

49. Lists of purposes served by the incompetence doctrine typically include the need to preserve the decorum of the courtroom and the dignity of the trial process. *See, e.g.*, Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 458 (1967). However, I do not regard this as a viable rationale for a bar against adjudication. If necessary, a disruptive defendant can be removed from the courtroom and an otherwise competent defendant can waive her right to be present. Moreover, judges should be very tolerant of "disturbing" behavior in the courtroom during plea proceedings and bench trials. In short, the "dignity" rationale for the incompetence doctrine refers to the inherent morality of the process carried out in the

Beyond the minimal demands of the dignity rationale, the bar against adverse adjudication in cases involving incompetent defendants serves as a prophylactic protection against erroneous convictions. Just as the assistance of competent counsel is regarded as a prerequisite of reliable adjudication, so too is the participation of a competent defendant. As stated by Henry Weihofen in 1954, a mentally impaired defendant might be unfairly convicted if he "alone has knowledge" of certain facts but does "not appreciate the value of such facts, or the propriety of communicating them to his counsel."[50] To proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his attorney and to the court would be unfair to the defendant and would undermine society's independent interest in the *reliability* of its criminal process. This provides the basis for the Supreme Court's belief that the bar against trying the incompetent defendant "is fundamental to an adversary system of justice."[51]

As critics of the existing legal arrangements have correctly noted, the bar against prosecuting incompetent defendants evolved at a time when the defendant bore responsibility for mounting her own defense.[52] Indeed, assistance of counsel was actually precluded in felony and treason cases until the mid-eighteenth century.[53] Today, in contrast, assistance of counsel is available as a matter of constitutional right in all serious criminal cases.[54] Although representation by counsel does not render the traditional rules obsolete, the construct of incompetence itself must be operationalized in the context of the attorney-client relationship. Thus, to the extent that the meaning of incompetence derives from its instrumental function, it refers to the

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courtroom, not to its outward appearances. I discuss these issues in Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 315-16 (1992) [hereinafter Bonnie, *Theoretical Reformulation*].

50. HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429-30 (1954); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES * 24:

> [I]f a man in his sound memory commits a capital offense, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed . . . .

51. Drope v. Missouri, 420 U.S. 162, 172 (1975). Social scientists should note that courts use reliability in constitutional adjudication as a synonym for "validity" or accuracy of outcome. *See supra* note 24.

52. *See* Winick, *Incompetency to Stand Trial*, *supra* note 16, at 260.

53. Faretta v. California, 422 U.S. 806, 823 (1975).

54. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

capacity to provide whatever assistance counsel requires in order to explore and present an adequate defense.[55]

A third feature of the competence construct, which is conceptually independent of the two aspects thus far mentioned, derives from legal rules that establish that the defendant must make or have the prerogative to make certain decisions regarding the defense or disposition of the case. A construct of "decisional competence" is an inherent, though derivative, feature of any legal doctrine that prescribes a norm of client *autonomy*. In theory, one could imagine a system of criminal adjudication that leaves no room for client self-determination—one which bars self-representation, does not permit guilty pleas, and commits all decisions regarding defense of the case to counsel rather than the defendant.[56] Under these legal arrangements, a defendant's decisional competence would not be relevant. But this does not describe our system.

In our system, the law commits some decisions regarding the defense or disposition of the case to the defendant and not to the attorney. According to all authorities, these include decisions regarding the plea, and, if the case is to be tried, whether it should be tried before a jury, whether the defendant will be present, and whether the defendant will testify.[57] In more general terms, the defendant is permitted, if not required, to make decisions regarding the objectives of representation, including the basic theory of defense.[58] For some of

55. *See, e.g.*, *Drope*, 420 U.S. at 171 ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); Dusky v. United States, 362 U.S. 402, 402 (1960) ("[T]he 'test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' " (quoting the Solicitor General)).

56. *Faretta*, 422 U.S. at 834 holding that a defendant is constitutionally entitled to waive assistance of counsel and to represent himself, makes such a system constitutionally implausible, but it is noteworthy that three Justices dissented.

57. *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 52-53 (1987) (whether to testify); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (whether to plead guilty); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942) (waiver of jury trial). *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2(a) (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

58. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2(a) (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). In contrast, "decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA STANDARDS OF PROFESSIONAL CONDUCT § 4-5.2(b) (1986); *see also* Jones v. Barnes, 463 U.S. 745, 746 (1983) (regarding lawyer's prerogative to decide what issues to raise on appeal). The distinction between "objectives" and "means" of representation is, of course, indeterminate at the margins.

these decisions (i.e. those involving waivers of constitutional rights), the obligation imposed on courts to assure that the defendant's decision is knowingly, intelligently, and voluntarily made reinforces the principle of self-determination.[59] Not surprisingly, judicial scrutiny is likely to be most intensive when the defendant decides to represent himself.[60]

B. *The Conceptual Vocabulary*

Against this theoretical backdrop, I want to propose a simple and relatively uncontroversial conceptual vocabulary that reflects a sensible understanding of the main purposes served by competence determinations in the criminal process. The vocabulary itself is meant to be normatively neutral.[61] It carries no implications regarding the psychological abilities that a legal "test" of competence should encompass and, specifically, regarding the "level" of competence that should be required in any specific context.

I want to draw a key conceptual distinction between a foundational concept of "competence to assist counsel" and a contextualized concept of "decisional competence." (See Table 1). "Competence to assist counsel," refers to the minimum conditions required for participating in one's own defense. Taking their guidance from *Dusky* and *Drope*, most courts and commentators refer to: (1) capacity to understand the charges, the purpose of the criminal process, and the adversary system, especially the role of defense counsel;[62] (2) capacity to appreciate one's situation as a defendant in a criminal prosecution;[63] and (3) ability to recognize and relate pertinent information to counsel concerning the facts of the case.[64] As I define the concept here,

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59. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938).

60. Westbrook v. Arizona, 384 U.S. 150 (1966).

61. The vocabulary obviously is not normatively neutral to the extent that it assumes that (in)competence matters in the ways described in the previous section.

62. This refers to the "factual understanding" component of *Dusky*. Dusky v. United States, 362 U.S. 402, 402 (1960).

63. This refers to the "rational understanding" component of *Dusky*. *Id.*

64. This phrase elaborates on the cognitive process needed to "consult with" and "assist" counsel mentioned in *Dusky* and *Drope*. In addition, the "ability to assist counsel" may also encompass an affective or "motivational" component pertaining to capacity to cooperate with the attorney, thereby enabling the attorney to perform her assigned role in the process. *Cf.* State v. Johnson, 395 N.W.2d 176, 183 (Wis. 1986) (finding reason to doubt defendants competency based, in part, on psychologist's letter to defense counsel indicating his "belief that [the defendant's] thinking impinges on his ability to rationally aid in the preparation of his defense").

A separate motivational component is not necessary to encompass delusional beliefs pertaining to the role of counsel because they are included within the concept of appreciation. Aside from delusions about counsel's role, other clinical problems that interfere with

Table 1

Two Realms of Competence in Criminal Defense: Conceptual Summary

Competence to Assist Counsel

- Foundational requirement
- Incompetence precludes adjudication
- Serves interests in dignity of criminal process and reliability of adjudication
- Does not encompass decisionmaking abilities

Decisional Competence

- Independently significant if and only if defendant is competent to assist counsel
- Required only when decision must be made by defendant
- Promotes interest in autonomous decisionmaking by defendant
- Abilities required, and legal test, vary according to decisionmaking context
- Incompetence does not preclude adjudication

however, it does *not* encompass the ability to make decisions that may arise in the case or the defendant's likely behavioral functioning at trial.

As customarily defined, these components serve both the dignity and reliability rationales described above. The capacities required to assure the dignity of the process would seem to include the ability to understand the nature of wrongdoing and punishment, the purpose and effect of a criminal prosecution and conviction, and the ability to relate this understanding to one's own situation as a defendant. The capacities required to assure the reliability of the outcome would seem to include the ability to understand the role of the defense attorney and to apply that understanding to one's own situation, and the ability to recognize and relate pertinent information in a coherent manner.

The capacities required to preserve the dignity of the process and to assure reliability are conceptually distinct. Although they probably overlap a great deal empirically, abundant clinical experience demonstrates that they are not congruent, and that the ability to perform one set of tasks does not necessarily predict ability to perform the other. Some mentally disabled defendants who understand the process and their own situations are unable to assist counsel; and, con-

motivation to cooperate present difficulties in distinguishing between "can't" and "won't." The possibility that failure to cooperate or assist could be construed as "inability" to cooperate or assist raises serious moral hazard problems. *See, e.g.*, Commonwealth v. Logan, 549 A.2d 531, 539 (Pa. 1988). These issues, whether competence to assist counsel should include a motivational component and, if so, how it should be operationalized, need more systematic attention than they have thus far received.

versely, a delusional defendant may be able to understand counsel's role and to relate relevant information but may believe that the criminal prosecution serves a benevolent divine plan and has no punitive purpose or effect. Despite the conceptual and empirical divergence of these two groups of capacities, however, it is sensible to combine them in a single foundational construct because both of these rationales, dignity and reliability, underlie the traditional bar against prosecution and conviction of incompetent defendants.[65]

In most cases, questions about "competence to assist counsel" arise at the outset of the process, before significant interactions with counsel have occurred and before strategic decisions regarding defense of the case have been encountered or considered. This has two implications: First, for defendants regarded initially as incompetent, restorative intervention achieves sufficient improvement to permit the procedural bar to be lifted in most cases. Second, determinations of competence in borderline cases, either upon initial assessment or upon restoration, are best regarded as provisional.

A defendant who is provisionally competent to assist counsel may not be competent to make specific decisions[66] that are encountered as the process unfolds.[67] Decisionmaking involves cognitive tasks in addition to those required for assisting in one's defense, as defined above, including abilities to understand and choose among alternative courses of action. Which abilities should be regarded as *necessary* for legally valid decisionmaking, and therefore included within a "test" of decisional competence, must derive from a norma-

65. Although both rationales underlie the traditional bar against prosecution, the reliability and dignity rationales can be disentwined. For example, it is possible to imagine a system in which prosecution could proceed against a defendant who is unable to assist counsel if reliable adjudication could otherwise be assured. Burt & Morris, *supra* note 10, at 93-95. If the law permitted prosecutions in such cases, then the foundational dimension of competence would include only those capacities necessary to assure the dignity of the process.

It should also be noted that the dignity rationale does have independent and exclusive force in relation to the variety of companion common-law doctrines (carried forward in many contemporary statutes) that barred the *sentencing* of a defendant who became incompetent after conviction and that barred the *execution of sentence* against a prisoner who became incompetent after pronouncement of judgment. In fact, the ban on executing the "presently incompetent," now constitutionalized in Ford v. Wainwright, 477 U.S. 399 (1986), can only be understood in dignitarian terms. *See* Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67, 86-88 (1990).

66. As noted earlier, relevant "decisions" are those that the law commits to the competent defendant and not to the lawyer.

67. The question also arises whether a defendant who is unable to assist counsel, as defined here, may nonetheless be decisionally competent. Although the question is solely of theoretical interest because inability to assist counsel bars adjudication, the relation between abilities required for assisting counsel and for decisionmaking should be explored empirically.

tive conception of client autonomy in criminal defense. For the moment, however, the focus is not on the precise content of the "test," but rather on whether decisionmaking capacity, however defined, is best understood as a component of a single construct of competence in the criminal process or rather as a separate construct.

Competence in the criminal process might be sensibly understood as a single construct if a generally applicable test of decisionmaking ability could be defined and folded into a unitary test of adjudicative competence. This approach would promote efficiency in assessment because it would not require contextualized application and would resolve all potential disputes about competence at one time. Despite these practical advantages, however, the "single construct" approach has two serious normative disadvantages. First, it is fundamentally incompatible with the contemporary understanding of the contextual nature of legal incompetence. It is now axiomatic that a person may be competent for one purpose, such as decisionmaking about medical treatment, but not about others, such as the management of financial affairs. Tests of competence, and the procedures required to resolve doubts about competence, vary from context to context, depending upon both normative and practical considerations. Adherence to the idea that a criminal defendant is competent for all decisionmaking purposes, or for none, would be anomalous in the face of such a pervasive understanding.

A second problem with the single construct approach is that it unnecessarily links the finding of decisional incompetence to the procedural bar against adjudication. Prosecution of a defendant who is not competent to assist counsel, as defined above, should be categorically barred to preserve the moral dignity of the criminal process and to avoid an unacceptable risk of unreliable convictions. However, more flexible responses, such as surrogate decisionmaking or specifically tailored default rules, should be available to deal with deficiencies in decisional competence. The bar against adjudication is, in effect, a categorical default rule that, in most situations, does not serve the interest of either the defendant or society. In no other legal context does a finding of decisional incompetence have such paralyzing consequences.

In the context of waiver of counsel and choosing to represent oneself, decisional competence is by all accounts a separate construct.[68] A defendant who is competent to proceed to adjudication

68. The focus here is only on the decisionmaking abilities required for effecting a legally valid waiver of one's right to be represented by counsel in favor of self-representation, i.e., to exercise one's "*Faretta* right." I am not referring to whatever performance abilities may be

with counsel may not be allowed to proceed to adjudication *without* representation. In *Faretta v. California*,[69] the Supreme Court explicitly recognized the constitutional right to self-representation, but also acknowledged that the right increases the danger of unreliable adjudication.[70] *Faretta* holds, in effect, that autonomy can trump reliability.[71] However, in the wake of *Faretta*, courts have uniformly concluded that autonomy prevails *only* if the defendant satisfies a more demanding test of decisional competence than would otherwise be required for adjudication with counsel.[72]

Faretta and its progeny reflect an explicit trade-off between autonomy and reliability in cases involving defendants who want to represent themselves. These considerations, however, may also conflict in cases involving defendants who are represented by counsel. Thus, we should expect the test for decisional competence to be especially demanding in situations where reliability is seriously threatened, such as when a defendant wants to plead guilty against his lawyer's advice,[73] or rejects the most plausible theory of defense in favor of a theory that the attorney believes to be unsupportable.

Moreover, autonomy is more at stake in some decisional contexts than in others. Decisions whether or not to raise an insanity defense, or whether or not to seek leniency in a capital prosecution, inevitably implicate the personal values of the defendant. Other decisions, such

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required, in addition to decisional competence, for self-representation at a trial. Nor does this discussion have any bearing on the abilities required to waive one's right to counsel during a custodial interrogation.

69. 422 U.S. 806 (1975).

70. *Id.* at 834. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.*

71. *Id.* "[T]he defendant . . . must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " *Id.* (citation omitted).

72. *See, e.g.*, State v. Harding, 670 P.2d 383 (Ariz. 1983); People v. Burnett, 188 Cal. App. 3d 1314 (Cal. Ct. App. 1987); People v. Arguello, 772 P.2d 87 (Colo. 1989); State v. Bauer, 245 N.W.2d 848 (Minn. 1976). These rulings had been presaged by Westbrook v. Arizona, 384 U.S. 150 (1966). At a minimum, the defendant must have the capacity to understand and weigh the risks and benefits of self-representation, including the risk that the defendant might be erroneously convicted due to deficiencies of his self-representation. This situation does not entirely sacrifice society's independent interest, because a valid *Faretta* waiver may require the "mental ability to present a rudimentary defense" or "some minimal ability to present a personal defense." *See Burnett*, 188 Cal. App. 3d at 1318-29.

73. Concerns about reliability may be so compelling that the defendant is denied the prerogative to decide to plead guilty, even if he is competent. *See, e.g.*, CAL. PENAL CODE § 1018 (West 1992) (precluding a defendant from pleading guilty to a capital offense without the consent of his lawyer). However, the same concerns that underlie the California statute might yield an alternative rule that respects the defendant's prerogative to reject counsel's advice, but only if the defendant meets a demanding test of competence.

as whether to waive indictment or preliminary hearing, are primarily matters of "legal judgment" and therefore so unlikely to implicate the defendant's personal values that the attorney may be allowed to make them without the defendant's participation at all. Furthermore, even if client participation is required, it may be required only if the decision goes in one direction (i.e., to waive the right), in which case one would not expect an especially demanding test for competence.

Even when autonomy is clearly at stake, paternalistic concerns appear more prominently in some decisional contexts, requiring attorneys and courts to take extra steps to resolve doubts about competence. For example, the attorney may be obligated to raise in court whatever genuine doubts she has about a client who instructs her not to present a case in mitigation at a capital sentencing proceeding.[74] However, this same attorney may not be obligated to raise these concerns about a defendant who has assented to her recommendation that a jury trial be waived in favor of a bench trial.[75]

In short, decisions that defendants are expected or permitted to make in the course of a criminal defense are normatively diverse. As *Faretta* demonstrates, a single criterion of decisional competence is not likely to fit every decisional context. Practical reasons may exist for deploying a single test of decisional competence, but any such criterion will inevitably produce undesirable results, either by respecting client prerogatives in cases where doing so endangers reliability, or by barring adjudication in cases in which the mentally impaired defendant is not called upon to waive any constitutional rights or to make any other significant decisions.

In summary, rules relating to a defendant's decisional competence derive from the rules allocating decisionmaking prerogatives in criminal defense. Client autonomy may be displaced entirely in some contexts, in which case competence does not come into play at all. When the law permits or requires client participation, however, competence is a prerequisite to validity. My sole claim at this point is that the normative diversity of decisional contexts in criminal defense strongly implies that the criteria for decisional competence, and the procedures required for raising and resolving doubts, likely will vary from one context to another.

The criteria for decisional competence, the procedures for resolv-

74. *See, e.g.*, Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987); Commonwealth v. Crawley, 526 A.2d 334, 340 n.1 (Pa. 1987); *see also* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1388-89 (1988) [hereinafter Bonnie, *The Dignity of the Condemned*].

75. *Cf.* McCarlo v. State, 677 P.2d 1268 (Alaska Ct. App. 1984).

ing doubts about competence, and the legal responses to incompetence can be sensibly formulated only in the context of a more general theory concerning client autonomy in the attorney-client relationship. Insofar as the theory aims to describe the existing legal rules, it must explain why certain decisions are allocated to the competent defendant rather than to counsel,[76] and why counsel generally has no legally enforceable obligation, analogous to the physician's duty in medicine, to facilitate informed client decisionmaking.[77] Recognizing that legal rules cannot assure autonomous action, even for competent persons, what function do they actually serve?[78] Development of such a theory would exceed the ambition of this Article. However, I will venture some tentative assertions in support of a "weak" theory of client self-determination: Attorneys have an obligation to inform clients of their prerogative to make binding decisions regarding defense and disposition of the case. However, clients need not personally make such decisions in any authentic sense and the attorney's obligation to provide information pertinent to a given decision is generally contingent upon the client's desire to be informed. In my view, only in the context of such a theory can one make sense of the law governing decisional (in)competence in the criminal process.

The next two sections will elaborate on the theoretical implications of the distinction between competence to assist counsel and decisional competence. These two concepts, as defined above, seem to embrace the full range of competencies in the criminal process. I am presently inclined to regard competence to plead guilty and competence to stand trial as particular elaborations of these foundational concepts. However, as I will discuss below, these are provisional opinions which may be modified in light of empirical investigation and further theoretical discourse.

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76. For example, should the attorney be permitted, or even obligated, to introduce mitigating evidence in a capital case over the defendant's objection? *See* Bonnie, *The Dignity of the Condemned*, *supra* note 74. Should the attorney be permitted to seek a lesser included offense instruction over the defendant's objection? *Cf.* State v. Johnson, 395 N.W.2d 176 (Wis. 1986).

77. In response to a perceived pattern of attorney dominance in the attorney-client relationship, several commentators have proposed that the informed consent doctrine be implanted in the law of attorney-client relations. *See, e.g.*, Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Mark Spiegel, *Lawyering and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987). To date, however, facilitation of informed client decisionmaking remains an aspirational ethical norm rather than a legal duty.

78. *See* FADEN & BEAUCHAMP, *supra* note 1, at 274-97.

III. COMPETENCE TO ASSIST COUNSEL AND THE ROLE OF THE ATTORNEY

One of the most important advantages of separating decisional competence from the foundational construct of competence to assist counsel is that it permits tailored responses to cases involving decisional incompetence that are not possible when abilities relating to decisionmaking are folded into a single construct of adjudicative competence. Discrete tests of decisional competence can be defined to fit particular decisionmaking contexts. Most importantly, a finding of decisional incompetence need not bar adjudication. Only incompetence to assist counsel bars adjudication. It follows, however, that the components of competence to assist counsel must be defined and applied with its preclusive effect in mind.

A. *A Two-Step Approach*

Does the application of "competence to assist counsel" depend on the particular defendant's factual situation? This issue has both practical and theoretical dimensions. On the one hand, viewing competence to assist counsel in absolute terms has many practical advantages. Most importantly, definitive assessments could be made early in the process against a single normatively-derived standard and need not be focused on the circumstances of the particular defendant's case (which are not likely to be evident to the evaluator in any event). Moreover, in theoretical terms, the capacities required to preserve the moral dignity of the criminal process can be formulated and assessed without reference to the facts of a particular defendant's case.

On the other hand, an absolute standard will either be underinclusive or overinclusive in terms of the ultimate concern with reliability of the outcome. If the threshold of competence to assist counsel is set too low, deficient interactions between attorney and client could lead to erroneous convictions. If the threshold is set too high in order to account for the demands presented by the most intricate case, some defendants will unnecessarily be found incompetent and hospitalized. As a result, some reliable convictions will unnecessarily be barred. Thus, reliability concerns suggest that "competence to assist counsel" must be sufficiently linked to the particular defendant's situation to take into account the complexity of the charges and the attorney's actual need for information.[79]

79. This is the common understanding reflected in the forensic literature on assessment of competence in criminal defendants. *See, e.g.*, GRISSO, *supra* note 44, at 76-77. In Grisso's terminology, assessment of competence to assist counsel has "interactive" dimensions. *Id.* at 23-26.

Table 2

Components of Competence to Assist Counsel

1. Understanding the nature and purpose of criminal prosecution and punishment and the nature of the adversary process, especially the role of defense counsel.
2. Capacity to understand the criminal charge(s).
3. Appreciation of one's own situation as a defendant in a criminal prosecution.
4. Capacity to recognize and relate pertinent information to counsel concerning the facts of the case.

An analogous problem is raised when a defendant has amnesia at the time of the offense. Under the prevailing judicial practice, courts determine the legal significance of a genuine claim of amnesia in light of the strength of the evidence in the particular case; they bar adjudication only if a significant possibility exists that the defendant would have been able to produce evidence raising a reasonable doubt about guilt.[80] The court makes a reliability judgment on a case-by-case basis.

Professors Burt and Morris, who propose abolition of the "incompetence plea," argue that the more flexible amnesia rule should displace the currently prevailing *per se* rule.[81] Adjudication should be permitted, they argue, as long as the procedures are designed suitably to redress the disadvantages attributable to the defendant's mental disability. In my view, the analogy between amnesia and other mental disabilities would be apt if reliability were the only relevant consideration. However, the Burt and Morris proposal fails to account for the widely-shared intuition that adjudication of guilt is morally inappropriate unless the defendant has a basic understanding of the prosecutorial process. The moral dignity of the criminal process requires, as a minimum, a categorical bar on adjudication in some cases. If this is acknowledged, much is gained by including within the foundational test of competence certain *minimum* capacities for assisting counsel in addition to those required to preserve the dignity of the process.

From a normative standpoint, a two-step approach would seem to provide a sensible resolution. An "absolute" level of capacity to assist counsel should be required in all cases. The components of the test probably should include an *actual* understanding of the nature and purpose of the criminal process, appreciation of one's own situa-

80. *E.g.*, Wilson v. United States, 391 F.2d 460, 463-64 (D.C. Cir. 1968).

81. Burt & Morris, *supra* note 10, at 82-83.

tion as a criminal defendant, and a capacity to recognize and relate relevant information to the attorney.[82] However, adjudication should be barred, even for defendants who meet these minimum requirements, if their disabilities, in relation to understanding the charges or communicating with counsel, raise serious doubts about the reliability of the process in the particular case.

I suspect that prevailing clinical and judicial practice conforms to this two-step model. By law, courts and attorneys currently must refer defendants for evaluation whenever a *bona fide* doubt about mental capacity, regardless of context, is raised.[83] The threshold for referral is set very low in order to cleanse all cases of doubts about competence. The evaluators find most defendants competent and most other defendants are restored to competence after a short period of treatment. However, even after a reasonable period of treatment a small proportion of defendants do not become clearly competent. In these borderline cases, I suspect that, in practice, defendants are returned to court as "competent" after meeting a fairly low standard. The case then proceeds unless the *attorney* raises further doubts, indicating a genuine concern about the adequacy of the defendant's assistance in the particular case.

This observation implies that the attorney is best situated to know whether the defendant's impairments compromise the defense of the case. In some situations, this might lead an attorney to question the competence of a client who has been (provisionally) "found" competent in a previous evaluation earlier in the case. In other situations, however, an attorney might see no reason to question the "competence" of an impaired client because, in the attorney's judgment, the defendant's impairments do not affect his ability to develop a defense.

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82. A definition of competence to assist counsel often includes understanding the charge, and forensic specialists typically emphasize that this is one of the interactive aspects of competence assessment. That is, a defendant who is able to understand some charges may not be able to understand more complex charges. My tentative view, however, is that ability to understand the charges in one's own case is *not* an independent prerequisite for competence to assist counsel. Such competence only requires the ability to relate pertinent information to the attorney. A defendant's inability to understand the subtleties of the charge may become pertinent later on in the process if the defendant seeks to plead guilty because the incapacity may affect the reliability of the admissions embedded in the plea. Richard J. Bonnie, *The Competence of Criminal Defendants With Mental Retardation to Participate in Their Own Defense,* 81 J. CRIM. L. & CRIMINOLOGY 419, 435-42 (1990) [hereinafter Bonnie, *The Competence of Criminal Defendants with Mental Retardation*]; Bonnie, *Theoretical Reformulation*, *supra* note 49, at 311-12.

83. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2(c) and accompanying commentary at 179-81 (1986).

B. *The Role of the Defense Attorney*

As previously noted, one of the most interesting and controversial issues about competence to assist counsel concerns the circumstances under which the attorney must raise the issue and seek a competency evaluation.[84] The prevailing view obligates the attorney to raise the issue formally whenever she has a "good faith doubt" about the client's competence, notwithstanding the belief that such a course is not in the client's best interests. Imposing this obligation on the attorney, as well as on the prosecution and the trial court, is generally thought to be a necessary corollary of the procedural bar against adjudication of incompetent defendants.[85]

I disagree. Even though the Due Process Clause bars disposition of cases against defendants who are unable to assist counsel, it does not follow that the issue must be raised in formal judicial proceedings. Other procedural arrangements, such as *ex parte* judicial review of counsel's decision not to raise the issue, a second opinion by a disinterested lawyer, or consultation with a forensic mental health professional can protect the constitutional values at stake. These approaches would substitute the attorney's informed judgment about the client's competence (in relation to the actual need for client participation in the particular case) for the formal evaluation and, possibly, adjudication, which are now thought to be required.[86]

This suggestion may seem to require a significant departure from existing constitutional doctrine. I would argue, however, that it is actually more compatible with prevailing constitutional principles than the current practice of routine judicial involvement. First, I am not proposing a modification of the defendant's underlying *substantive* right not to be convicted while incompetent. Instead, I am arguing that *procedural* due process does not always require the defense attor-

84. *See* Paul A. Chernoff & William G. Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505 (1972); Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65.

85. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 and accompanying commentary at 177-83; *see, e.g.*, State v. Johnson, 395 N.W.2d 176 (Wis. 1986); State v. Haskins, 407 N.W.2d 309 (Wis. Ct. App. 1987).

86. It also follows that the process of evaluation and treatment should be more fully within the attorney's control. Professor Winick has proposed that the court should routinely grant continuances upon the request of counsel and that other judicial involvement should be severely limited. *See* Winick, *Incompetency to Stand Trial*, *supra* note 16, at 281-84. In practice, attorneys appear to seek clinical assessment in about half of the cases in which they doubt their clients' mental capacity to participate in the defense. In the other cases, the attorneys seek consultation from a colleague or the participation of a client's relative. *See* Steven K. Hoge et al., *Attorney-Client Decisionmaking in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCI. & L. 385 (1992).

ney to bring her doubts about a defendant's competence to judicial attention.[87] In the context of treatment refusals by involuntarily committed psychiatric patients, application of the constitutionally required criteria by clinical decisionmakers satisfies due process;[88] and in the context of admission to a mental hospital by an "assenting" patient, a clinician may make any constitutionally required competence determination.[89]

The logic of Sixth Amendment jurisprudence powerfully reinforces the argument that attorney decisionmaking regarding client competence satisfies the procedural requirement of the Due Process Clause. The constitutional obligation of attorneys to provide effective representation entails a wide sphere of discretion to define and implement the strategic objectives of the defense.[90] Courts are properly reluctant to intrude upon the attorney-client relationship for the purpose of monitoring attorney performance.[91] In more general terms, the Sixth Amendment protects the autonomy of the attorney and client to present the defense as they see fit without unwarranted prosecutorial or judicial interference.[92]

No reason exists, in principle, why defense attorneys cannot make reasonable judgments regarding whether a defendant's mental disabilities are significant enough to impede adequate preparation of the defense. As a practical matter, attorneys may need clinical assistance to recognize deficits that might not be evident to the attorney or to compensate for any impairments that are evident. But indigent defendants should have access to such clinical evaluation and assistance as a matter of right, within the framework of the Sixth Amendment and the attorney-client relationship, rather than as a feature of an extrinsic judicial obligation to resolve doubts about a defendant's competence.[93]

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87. As noted in the Preface, Professor Winick utilized a different route to reach the same destination. *See supra* notes 16-36 and accompanying text. He argued that the attorney should be authorized to waive the incompetency plea on behalf of an assenting, but possibly incompetent, client. *Id.* However, my argument is not grounded in a waiver theory; I am arguing that the attorney is in the best position to determine whether the defendant is competent to assist counsel.

88. Washington v. Harper, 494 U.S. 210 (1990).

89. Zinermon v. Burch, 493 U.S. 113 (1990). *See generally* Winick, *Competency to Consent to Voluntary Hospitalization*, *supra* note 4.

90. Strickland v. Washington, 466 U.S. 668, 688-90 (1984).

91. *Id.* at 689-90.

92. *See, e.g.*, Geders v. United States, 425 U.S. 80, 91 (1976); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

93. A stronger case can be made for such assistance under the Sixth Amendment, or under the due process right to develop a defense, than the case for evaluation and assistance in developing an insanity defense as recognized in Ake v. Oklahoma, 470 U.S. 68 (1985). Indeed,

Another important advantage of this proposed reformulation of the procedures relating to pretrial competence determinations is that it would avoid a controversial feature of current policy and practice. Defense attorneys currently have an obligation to seek a competence assessment whenever they have a "good faith doubt" about client competence, regardless of the client's preferences or the attorney's own judgment that raising the issue is not in the defendant's best interests. Moreover, in some cases, the attorney may have to disclose client statements to demonstrate the factual basis for the requested evaluation.[94] If the process of clinical evaluation and assistance were brought entirely within the attorney-client relationship, these considerations would be alleviated, if not erased.

In sum, I am proposing that the law explicitly confer authority on attorneys to make the decisions which they now must make in the shadow of an ambiguous obligation to seek judicial resolution. When the attorney concludes that the client lacks the necessary capacities to assist counsel, and if adequate clinical intervention is not otherwise available, the attorney may be obligated, as a last resort, to seek a judicial determination of incompetence and an order of commitment. The necessity of such a procedure should be left to the defense attorney,[95] subject, of course, to the constitutional obligation to provide effective assistance of counsel.

The central role that defense attorneys inevitably play in deciding how to respond to clients with mental disabilities calls attention to a more general point that underlies many of the ideas developed in this

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the *Ake* right is easily transformed into a more general right to have access to the evaluative and consultative services of a mental health expert to assist the attorney in carrying out his obligation to provide effective representation, in all of its aspects.

As a corollary, the attorney would have an obligation to seek necessary clinical evaluation and assistance to help resolve representational difficulties. An inept performance by the attorney would, of course, invalidate a defendant's conviction if it amounts to constitutionally deficient representation under *Strickland*.

94. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2(e) and accompanying commentary at 182.

95. Evans v. Kropp, 254 F. Supp. 218 (E.D. Mich. 1966) is an excellent illustration of constitutionally deficient performance by counsel who failed to invoke the bar against adjudication where the client was unable to assist counsel. For a closer case which does not reveal whether the defendant's impairments affected the reliability of adjudication, see People v. Baldwin, 541 N.E.2d 1315 (Ill. App. Ct. 1989).

Greater reliance on attorney decisionmaking, in lieu of formal judicial involvement, raises the possibility of conflicts of interest. The attorney may prefer to proceed despite the defendant's impairments, both because the defendant cannot monitor the attorney's performance and because raising the issue could increase the amount of time that must be spent on the case. Of course, current legal rules may not substantially diminish the risks of such self-serving behavior because the responsibility for raising the issue effectively rests with the attorney.

Article. Issues relating to adequacy of attorney performance often masquerade as issues of client competence. If the primary objective is to assure that the interests of mentally disabled defendants have adequate protection, attention should be focused less on whether a particular defendant is "competent" and more on whether the attorney has taken appropriate steps to identify client impairments, to seek clinical assistance in assessing and responding to these impairments, and to assure that any persisting impairments do not compromise preparation or presentation of a reasonable defense. If courts doubt the capacities of attorneys to carry out these obligations, then the focus should be on raising the level of attorney representation, not "restoring" the competence of defendants.

IV. DECISIONAL COMPETENCE

I have argued that decisional competence should be distinguished conceptually and doctrinally from competence to assist counsel.[96] Although the relevant psychological capacities may be highly correlated, decisionmaking about defense strategy encompasses cognitive skills and capacities for rational thinking that assisting counsel, as defined in *Dusky* and *Drope*, does not require. It is possible to define a single, broad construct of "adjudicative competence" to encompass decisionmaking capacities as well as those required for assisting counsel.[97] However, conceptualizing competence as a unitary construct is undesirable for many reasons: it would prescribe a single test of competence for normatively diverse decisions; it would be incompatible with the contextual or "specific" approach to decisional capacities that the law now generally reflects; and it would unnecessarily bar adjudication in cases where alternative responses to incompetence are available.

Existing law on this subject is unsettled, but the view that decisional competence is a separate construct provides the best "fit" with prevailing law and practice. The criteria for competence to waive counsel are distinct from, and more demanding than, the criteria for "competence to stand trial."[98] Courts also have explicitly held that the tests for competence to plead guilty, waive constitutional rights, and "waive" an insanity plea are distinct from, and more demanding than, the test for competence to stand trial.[99] Moreover, even when

96. *See supra* part II.B.

97. *See supra* pp. 217.

98. *See supra* pp. 213-21.

99. *See, e.g.*, Moran v. Godinez, 972 F.2d 263 (9th Cir.), *cert. granted sub nom.* Godinez v. Moran, 113 S. Ct. 810 (1992) (waiver of constitutional rights); Briggs v. United States, 525

courts have said that competence is a unitary construct, the results actually reached often belie this assertion.[100]

I have thus far sought to establish that decisional competence is conceptually distinct from competence to assist counsel and that the criteria for decisional competence differ from one context to another. Therefore, the tasks remain to identify alternative tests for decisional competence and to suggest how demanding the test should be in the various decisionmaking contexts that arise in criminal defense.

To this end, I will first summarize the law relating to the defendant's decisionmaking prerogatives in criminal defense. Next, I will present a menu of available tests for decisional competence in criminal defense derived from the literature on treatment decisionmaking and the relevant case law on decisional competence in criminal cases. Then, drawing on these materials, I will sketch my own tentative views regarding the tests of decisional competence that should be used in various contexts. I use a distinctly normative approach here, but my analysis yields results that are fully compatible with background norms in criminal adjudication, with implicit theories of autonomy in mental health law, and with the intuitions of judges and lawyers that are embedded in existing practice.

A. *Decisions in Criminal Defense*

Many types of decisions can arise during the course of defending a criminal case. Most of these, such as decisions concerning investigation, discovery, pretrial motions, and trial and appellate strategy, counsel can quite properly make alone without the defendant's direct participation. Although many of these decisions may, in effect, waive constitutional rights, they do not require personal participation by the defendant; counsel acts on the defendant's behalf, and binds the defendant, subject of course to Sixth Amendment standards of adequate representation.[101] However, several specific contexts legally and ethically require a defendant's personal participation. The defendant must personally waive several constitutional protections,

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A.2d 583 (D.C. Cir. 1987) (insanity plea); Chavez v. United States, 656 F.2d 512 (9th Cir. 1981) (guilty plea).

100. For example, some courts appear to include a demanding standard of decisional competence, along the lines of "reasoned choice," in the single test. They uphold convictions, however, even in the face of strong doubts about decisional competence, if the defendant was clearly competent to assist counsel as defined in *Dusky* and if no reason arises for concern about the reliability of the conviction. *See, e.g.*, Suldon v. State, 580 N.E.2d 718 (Ind. Ct. App. 1991); People v. Heral, 323 N.E.2d 138 (Ill. App. Ct. 1975).

101. *See, e.g.*, Smith v. Murray, 477 U.S. 527 (1986) (waiver of constitutional objection to admissibility of psychiatric testimony by failure to preserve it on direct appeal).

including the cluster of rights effected by a guilty plea,[102] the right to a jury trial,[103] the right to testify,[104] and the right to be present at trial.[105]

Significantly, the constitutional requirement of personal waiver of a particular right does not necessarily entail the broader proposition that the attorney has an enforceable duty to elicit a decision by the client to invoke the right. Therefore, the principle of self-determination underlying the waiver cases is one-directional. When counsel makes a decision to assert, rather than waive, these constitutional rights, no definitive rule of law appears to require client participation,[106] even though applicable standards of professional practice and ethical guidelines obligate the attorney to elicit client decisionmaking on these issues.[107]

The client prerogatives to define the basic objectives of representation and to select the main theory of defense lie at the core of the idea that the client acts as the principal and the attorney as the agent in legal representation. This implies that the attorney must accede to the client's wishes in regard to these fundamental choices. But the distinction between "objectives" and "means" of representation is not particularly helpful in defining the decisionmaking prerogatives of attorney and client.[108] For example, some otherwise tactical decisions, involving professional risk-benefit judgment, may implicate deeply held personal values of the defendant. Because the defense of insanity implicates a defendant's personal values more than any other defensive theory, the decision to invoke or forego the insanity defense now is generally held to belong to the client.[109] Other defensive claims may also have substantial personal meaning in particular cases.[110]

Sorting decisions into categories—into a sphere of client deci-

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102. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

103. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278-81 (1942).

104. *E.g.*, United States v. Teague, 953 F.2d 1525 (11th Cir. 1992) (en banc).

105. Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988) (dictum).

106. *See, e.g.*, Johnson v. Duckworth, 793 F.2d 898 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986) (rejection of prosecution's plea offer by attorney without personal participation by the client does not constitute ineffective assistance of counsel under circumstances of this case).

107. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 31(e) and cmt. e (Preliminary Draft No. 6, 1990).

108. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

109. For an elaborate discussion of the general allocation of decisionmaking prerogatives in the course of addressing the insanity plea, see Treece v. State, 547 A.2d 1054 (Md. 1988).

110. If the client insists on raising a defense of entrapment, should the client's preferences be ignored? Moreover, cross-examining a prosecution witness, clearly a matter of tactics, also implicates the defendant's Sixth Amendment right of confrontation. If the attorney would not otherwise cross-examine a witness, should the client's contrary instructions be followed?

sions and a residual category of decisions within attorney control—is neither sensible in theory nor compatible with judicial practice. On the one hand, the legally enforced sphere of client control must fall short of what might be widely regarded as the preferred professional practice. To say that an attorney should promote client participation on all important decisions regarding defense of the case is *not* to say that courts should overturn convictions because the attorney failed to do so. Further, to say that the client must personally make a decision to waive a jury trial is not to say that the client must make a decision to have a jury trial. Respect for client autonomy may require that the defendant have an *opportunity to decide*, but in the absence of a client's insistence on waiving a jury trial, the attorney probably has freedom to request one.

On the other hand, the attorney probably has an obligation to adhere to the preferences of an insistent client even on matters relating to legal strategy and tactics. To say that the attorney has no presumptive obligation to secure an informed client decision on whether to raise an entrapment defense, or to seek a lesser-included defense instruction, or to forego cross-examining a key prosecution witness, is *not* to say that the attorney is free to ignore the client's objections to such decisions.

B. *Tests of Decisional Competence in Criminal Adjudication*

Although forensic experts have not yet conceptualized the clinical content of alternative tests of decisional competence in the context of criminal defense, the formulations developed by Appelbaum and Grisso in their continuing research on decisional competence for medical treatment can be used as a starting point.[111] The conceptual terrain, according to Appelbaum and Grisso, includes abilities to (1) communicate a choice; (2) understand information; (3) appreciate the significance of information in relation to one's own situation; and (4) engage in a process of rational manipulation, or reasoning, about the information. These tasks are not necessarily hierarchical with regard to the required cognitive functions: a person who is able to engage in a rational process of reasoning may not be able to appreciate the significance of the information in her own situation; a person who is able to reason rationally may experience such profound ambivalence and emotional instability as to be unable to express a stable preference; or the threshold of required understanding may be set so high that a person who is able to engage in certain

111. *See* Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988).

basic reasoning tasks may not be able to understand the information that must be manipulated.

From the standpoint of legal doctrine, however, it is useful to arrange these abilities in a practical hierarchy of "tests" with successively more inclusive criteria in the following sequence: (1) a "preference" test, which is defined to include only the ability to express a preference; (2) an "understanding" test, which is defined to include the ability to express a preference and the ability to understand relevant information; (3) an "appreciation" test, which is defined to include the abilities to express a preference, to understand relevant information and to appreciate the significance of the information in one's own case; and (4) a "reasoning" test, which includes the abilities to express a preference, to understand relevant information, to appreciate the significance of the information as applied to oneself and to process the information in a rational manner to reach a decision.[112] Building on this foundation, and on the skimpy case law on decisional competence in criminal adjudication,[113] I will present a menu of five progressively more inclusive legal tests. (As will be explained below, this menu includes five tests rather than four because I have subdivided the Appelbaum-Grisso "appreciation" concept into two sepa-

112. This hierarchical arrangement, in a ladder sequence, generally tracks the relations among the "tests" as the courts seem to perceive them and is also the most plausible arrangement from a normative perspective:

(1) Ability to express a choice is a necessary condition for a finding of competence; the only issue is whether it should be regarded as a sufficient condition.

(2) Logically, understanding information is a necessary precondition for the abilities to appreciate and reason about *that* information. A court could, of course, prescribe such a sophisticated level of understanding for legally effective decisionmaking that a person who has no deficits in appreciation or basic reasoning ability would nonetheless lack the capacity to understand the necessary information. It would not be normatively plausible, however, for a court to prescribe such a sophisticated level of understanding as a test for *competence*. (For example, a court may require understanding of legal doctrine and procedures as a prerequisite for self-representation, but this is not a requirement of decisional competence.)

(3) Appreciation and rational manipulation are not hierarchical in functional terms, and a competence test conceivably could exclude either ability. In practice, however, I am not aware of any context in which a court has adopted a "reasoning ability" requirement for decisional competence while expressly refusing to take into account delusions and other impairments of appreciation. At the same time, the case law is replete with decisions finding defendants decisionally incompetent due to deficits in appreciation. Although case law does not explicitly address the issue, it is normatively plausible to adopt an appreciation test without also including, as a further ground for incompetence, deficits in ability to process information rationally.

113. Decisions regarding the insanity defense and guilty pleas are summarized and discussed in Bonnie, *Theoretical Reformulation*, *supra* note 49, at 308-14.

rate tests—a minimal appreciation test which I have labeled a "basic rationality" test and a more demanding, and more elastic, test of substantial appreciation.)

1. EXPRESS A PREFERENCE

The least demanding *legal* test of decisional competence is the *ability to communicate a preference*. A defendant who is unable to express a choice or who is unable to maintain a stable preference, is not competent to decide whatever questions the client may be permitted or required to decide. However, the mere ability to express a preference is not likely to be regarded as a sufficient measure of competence in many legal contexts, and is especially unsuitable in the context of criminal defense.[114] Moreover, a bare expression of a preference, without any understanding, is hardly a meaningful exercise of self-determination.[115]

2. BASIC UNDERSTANDING

The ability to understand relevant information about a particular decision is the criterion most often utilized both in treatment settings and in criminal defense. Clients who cannot understand the relevant considerations after they have been conveyed, or who cannot understand their own prerogatives as a "decisionmaker," lack the competence to make a decision, even if their only decision is whether to accept or reject the attorney's advice. An "understanding" test can vary in stringency according to which considerations are regarded as relevant, therefore requiring understanding by the defendant. In the context of treatment decisionmaking, the focus is on the ability to understand the risks and benefits, or advantages and disadvantages, of the treatment options. The equivalent inquiry in criminal defense decisionmaking would encompass the defendant's ability to understand the advantages and disadvantages of choosing one decisional option (e.g. jury trial) or the other (e.g. bench trial). However, the case law suggests that what I will call the *basic understanding test* for decisional competence in criminal defense has a more limited reach. The issue typically arises in the context of decisions to waive constitutional protections. As a result, the basic understanding test in crimi-

114. *See supra* notes 27-29 and accompanying text.

115. The law may only require simple "assent" to an attorney's recommendation in some contexts; however, in such cases the law does not insist on the defendant's personal participation in the decision at all, and the defendant's incompetence therefore lacks legal significance.

nal defense refers to the ability to understand that which must be understood to effect a valid waiver of constitutional rights.

In most contexts, a valid waiver requires understanding the nature of the right and the consequences of waiving it. The definition of what must be understood may be made more or less inclusive. For example, a defendant who waives a right to a jury trial must be able to understand that a judge, rather than a group of people from the community, will make the decision about his guilt or innocence.[116] But the defendant probably does not have to be able to understand the selection process, including the concept of peremptory challenges.[117] Similar questions can apply to the waivers of other rights such as the waiver of the right to testify and the waivers implicit in guilty pleas.

3. APPRECIATION

The legal criteria for a valid waiver do not encompass the person's reasons for deciding to waive.[118] The key question in criminal defense, as in other contexts, is which abilities required for rational choice should also be regarded as necessary for decisional competence. Aside from the ability to express a preference and a basic understanding of the nature and consequences of the decision, should anything else be required? A defendant who is able to comprehend relevant information may be unable to *appreciate the significance of that information* in her own case. Problems in appreciating the situation and its consequences may arise due to limitations in cognitive capacity, to disturbances of thought, or to affective disorders. Problems in appreciation appear most often in cases involving psychotic defendants who deny their illnesses, or whose delusions or affective impairments pathologically distort their beliefs about the desirability or undesirability of a difficult course of action.

a. Minimum Appreciation (Basic Rationality)

Consider a possibly innocent defendant who insists on accepting a plea bargain, against counsel's advice, because he believes that the devil will prevent all defense witnesses from appearing at his trial. Or consider a defendant who insists on waiving a jury trial, against counsel's advice, because she believes that the judge and he have the same "earth mother." Each of these defendants may have sufficient under-

116. *See, e.g.*, United States *ex rel.* Williams v. DeRobertis, 715 F.2d 1174, 1180 (7th Cir. 1983).

117. *See, e.g.*, United States *ex rel.* Wandick v. Chrans, 869 F.2d 1084, 1088 (7th Cir. 1989) (citing *DeRobertis*, 715 F.2d at 1178).

118. The defendant's reasons for choosing to waive the particular right have relevance only if the defendant succumbs to coercive threats.

standing of the rights being waived to effect a valid waiver. Yet, I am confident that no court would regard these defendants as decisionally competent.[119] Even the least demanding approaches to decisional competence in most other legal contexts include some minimal dimension of appreciation to exclude cases of gross irrationality.[120]

The *basic rationality test* adds an additional element to the "basic understanding" test—that the defendant be able to express a reason for the decision that has a plausible grounding in reality.[121] Although the "rational understanding" component of *Dusky* implicitly includes this additional element, it is rarely at issue in relation to decisional competence *per se* because gross delusions are likely also to affect the defendant's competence to assist counsel.[122] In the rare case where the delusion only affects a particular decision,[123] isolating the defendant's decisional incompetence affords dispositional flexibility not available under the unitary *Dusky* formula.

b. Substantial Appreciation

Because it permits findings of decisional incompetence only in extreme cases, the "basic rationality" test represents only a modest interference with the defendant's decisionmaking prerogatives. The "substantial appreciation test" provides a more elastic formula than the "basic rationality" test for taking into account cognitive and emotional factors which impair a person's ability to relate what she "understands" about the reasons for choosing one or another course of action to her own situation. The criterion is sufficiently flexible to take into account the subtleties of mental disorder. Thus, a defendant may be able to give plausible, non-delusional reasons for reaching a certain decision, thereby satisfying the basic rationality test, but the

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119. I am assuming in all illustrative cases that the defendant is competent to assist counsel as defined above. In each of these cases, the defendant insists on acting contrary to counsel's advice for wholly irrational reasons. The client's competence is often put in issue in cases of this kind and courts virtually always find these defendants incompetent. In contrast, the client's decisional competence is rarely an issue when she accedes to counsel's advice. The exception concerns defendants with mental retardation. Consequently, cases concerning the proper test for competence to plead guilty usually involve defendants with mental retardation. *See, e.g.*, Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

120. *See* Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); Saks, *supra* note 3.

121. For a discussion of the advantages of a "gross delusion" test in the context of treatment refusals, see Saks, *supra* note 3.

122. *See, e.g.*, State v. Champagne, 497 A.2d 1242, 1245 (N.H. 1985) (defendant's delusions clearly impaired capacity to appreciate situation as defendant in criminal prosecution, although the defense raised the issue as decisional incompetence to enter insanity plea).

123. *See, e.g.*, State v. Jones, 664 P.2d 1216 (Wash. 1983).

decision may nonetheless be so powerfully influenced by delusional beliefs or pathological emotions that it should not be binding.[124]

4. REASONED CHOICE

A defendant who is able to understand information relevant to a decision and is able to appreciate the meaning of the decision in his situation may nonetheless lack the capacity to use logical processes to compare the benefits and risks of the decisional options. As noted above, Appelbaum and Grisso[125] use the phrase *rational manipulation of information* to refer to the process of weighing information to reach a decision. What is important here is the decisional *process*, not its *outcome*, although if others consider an outcome to be misguided or irrational, this may signal a problem with the defendant's reasoning process. Organic deficits, retardation, psychotic thought disorder, delirium and dementia, extreme phobia or panic, anxiety, euphoria and depression may impair a defendant's capacity to weigh information in order to make rational choices, consistent with starting premises and assigned values. The *reasoned choice test*, adopted by some courts in relation to competence to plead guilty or to waive counsel,[126] appears to encompass both an appreciation criterion and the capacities for rational manipulation described by Appelbaum and Grisso.[127]

Figure 1 depicts the five legal "tests" for decisional competence in criminal adjudication. Each test in this cumulative sequence is more demanding in the sense that additional capacities are added to the criteria specified for competence. The choice of a test of competence in a particular decisionmaking context should take into account the consequences, for both the defendant and society, of determinations of competence and incompetence in that particular context. Moreover, what is expected of defendants in relation to decisionmaking should be anchored in a practical understanding of the attorney-client relationship, and in a theory of client autonomy in criminal defense. In the following pages I will present my own views regarding the principles that should guide the choice of criteria for decisional competence in criminal adjudication. The theoretical framework

124. Conceptually, what I call the "basic rationality" test is actually a weak version of what Appelbaum and Grisso call the "appreciation" test. The ability to give a plausible reason for one's choice requires minimal ability to appreciate one's situation. I characterize this as a "separate" legal test because this level of rationality may be regarded as requisite to a valid "choice," even if the courts may be reluctant to pursue a more qualitative inquiry.

125. Appelbaum & Grisso, *supra* note 111, at 1636.

126. *See, e.g.*, United States v. Masthers, 539 F.2d 721, 726 (D.C. Cir. 1976); Seiling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973).

127. Appelbaum & Grisso, *supra* note 111, at 1636.

presented up to this point, however, stands on its own and is normatively neutral regarding the choice of tests of competence. Accord-

Figure 1

Legal Tests of Decisional Competence in Criminal Adjudication:

Test		Criteria
"Expression of Choice"		Ability to express a stable preference
"Basic Understanding"	+	Ability to understand nature and consequences of decision
"Basic Rationality"	+	Ability to express plausible (i.e., not grossly irrational) reasons for the decision
"Appreciation"	+	Ability to understand reasons for alternative courses of action (risks and benefits);
	+	Ability to appreciate significance of this information in one's own case
"Reasoned Choice"	+	Ability to use logical processes to compare and weigh risks and benefits of alternative courses of action

ingly, acceptance of the framework leaves the reader entirely free to reject the prescriptive ideas outlined in the remainder of this Part of the article.

C. *The Significance of Counsel's Advice*

In the Preface, I summarized Professor Bruce Winick's proposal to allow waiver of the incompetence plea by an assenting defendant acting on counsel's advice.[128] Implicit in this proposal is the normative view that the legal test for competence should differ according to whether the defendant follows or rejects counsel's advice. I endorse this proposition explicitly.[129] As demonstrated elsewhere in the context of decisions on insanity pleas, I also believe that this proposition accurately describes existing practice.[130] When the defendant pleads insanity on counsel's recommendation, the operational test of compe-

128. *See supra* notes 16-22 and accompanying text.

129. Whether the criteria for competence to accept or refuse recommended treatment should differ is a matter of debate in the bioethics literature. *See, e.g.*, Dan W. Brock, *Decisionmaking Competence and Risk*, 5 BIOETHICS 105 (1991); Saks, *supra* note 3; Mark R. Wicclair, *Patient Decisionmaking Capacity and Risk*, 5 BIOETHICS 91 (1991).

130. Bonnie, *Theoretical Reformulation*, *supra* note 49, at 309-11.

tence is "basic understanding" (factual understanding suffices); thus, the defendant is described as "competent to stand trial." However, when the defendant refuses to plead insanity, but the attorney doubts the client's rationality, assessment of the defendant's competence encompasses her reasons for rejecting the defense. Once the issue is raised, impairments of appreciation appear relevant to judicial conceptions of competence. Finally, if the defendant is found competent to "stand trial" (i.e., assist counsel) but not competent to "waive" the insanity plea, surrogate decisionmaking (usually by the attorney) is permitted. The competence of "refusing" defendants has been litigated almost entirely in the context of refusals to plead insanity, but I think the applicable legal principles can be generalized.

1. DECISIONS IN ACCORD WITH COUNSEL'S ADVICE

In general, "basic understanding" (capacity to understand the nature and consequences of the proposed decision) is a suitable test of competence for decisions, including those waiving constitutional rights, that the defendant makes in accord with counsel's advice;[131] mental impairments or deficits bearing on the defendant's reasons for following counsel's advice ordinarily lack legal significance. No useful purpose would be achieved in this context by increasing the competence requirement beyond basic understanding. A risk exists, of course, that the decision is not in the defendant's best interests, but this danger relates to the deficiencies of counsel's decisionmaking and would not be reduced substantially by raising the test for the defendant's competence.[132] Moreover, any aggregate gain in protection of the defendants' interests (in reducing agency costs, as it were) that would be achieved if the test were strengthened clearly does not suffice to justify the costs of administering a higher standard of competence.

It could also be argued that a more meaningful exercise of self-determination by criminal defendants has value in itself, even if the outcome of the decisionmaking process would not be affected.

131. The discussion in the Article pertains only to those decisions that require the defendant's personal participation. Decisions to invoke constitutional protections, rather than waive them, may not require the defendant's personal participation as a matter of law, even though it is customarily sought as a matter of professional practice. In other words, a court will not reverse a conviction because the defendant was not given an opportunity to plead guilty or to opt for a bench trial, and questionable competence to make those decisions therefore would be immaterial.

132. In theory, exposing counsel's decisions to more demanding scrutiny by clients and the courts would serve a "checking" or monitoring function, but effective client monitoring requires a much higher level of client participation than a marginal adjustment in the test of decisional competence likely would achieve.

Increasing client participation in criminal defense is a worthwhile objective, but achievement of such an aspirational norm requires major changes in the practice of criminal defense. A more demanding test of competence would not have much impact on the relative roles played by attorneys and clients. The purpose of the competence requirement is to establish the *minimum* conditions for autonomous participation. From this standpoint, the necessary conditions are ordinarily satisfied if the client is aware that she has the prerogative to decline the attorney's advice, and is able to understand the nature and consequences of the decision.

Only decisions to plead guilty should be subject to a more demanding test than basic understanding. In this context, a "basic rationality" test is appropriate. Under this test, the plea would not be valid, even if the defendant adequately understands the nature and consequences of a guilty plea, if none of the defendant's reasons for pleading guilty has any plausible grounding in reality (i.e., if all the defendant's reasons for pleading guilty rest on patently false beliefs about the world.) This exception is rooted in the dignity rationale for the competence requirement.[133] However, as long as the defendant enters the plea on advice of counsel, the test for competence should not be any more demanding than the basic rationality test. In this respect, I disagree with the cases that hold that the test for competence to plead guilty is "ability to make a reasoned choice among alternatives." Rigorous application of such a test would deny defendants with mental disabilities the advantages of plea bargaining. Admittedly, the plea bargaining process can victimize defendants with mental disability, especially if they are poorly represented by defense counsel. However, this is a problem of quality assurance, not autonomy. If attention to "competence" should be enhanced in this context, it should be directed toward the competence of counsel, not the competence of the defendant. In this context, the most important concern is reliability, not autonomy. Accordingly, special care should be exercised to assure that the plea is based on a reliable factual foundation.[134]

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133. Bonnie, *Theoretical Reformulation*, *supra* note 49, at 313.

134. Courts are not inclined to preclude guilty pleas by defendants with mental illness or mental retardation, or to invalidate them later, unless the waiver has questionable validity or the prosecution inadequately establishes the reliability of the conviction. For recent examples of decisions rejecting claims of decisional incompetence, see, e.g., State v. Bailey, 464 N.W.2d 626 (S.D. 1991); State *ex rel.* Wilson v. Hedrick, 379 S.E.2d 493 (W. Va. 1989); Suldon v. State, 580 N.E.2d 718 (Ind. Ct. App. 1991). For one of the rare decisions invalidating guilty pleas (entered with counsel's advice), see Matusiak v. Kelly, 786 F.2d 576 (2d Cir. 1986). The facts of *Matusiak* raise doubts about both the validity of the waiver and the reliability of the conviction. For a general discussion of problems associated with guilty pleas by defendants

2. DECISIONS REJECTING COUNSEL'S ADVICE

Disagreement with counsel is not, in itself, evidence of incompetence. Counsel's advice may reflect poor judgment or may fail to take adequate account of the defendant's values and preferences. Defendant's behavior may also be associated with oppositional personality traits that do not amount to legal incompetence. However, under some circumstances, rejection of counsel's advice raises legitimate doubts regarding the defendant's capacity for rational decisionmaking. At a minimum, when the attorney has genuine doubts about the defendant's decisional competence, she has a duty to take appropriate steps to obtain clinical consultation. In many instances, the problem will be resolved. Assuming, however, that the disagreement persists, the underlying ethical and legal dilemma must be confronted.

Unless the defendant is decisionally incompetent, his preferences bind the attorney. The choice of a test of competence turns on this question: How paternalistic should the legal system be when defendants insist on pursuing courses of action that attorneys consider adverse to the defendant's own best interests? Ideally, the answer should be based upon data regarding the distribution of abilities relating to "rational decisionmaking" in the general population of criminal defendants, and regarding the relation between these abilities and mental disorder. Unfortunately, systematic research on these issues has only recently begun. In the absence of such information, it is premature to express any definitive views on the appropriate test. However, in order to provoke further discussion, I will outline what strikes me as a plausible view.

In most contexts involving decisions made against advice of counsel, the "appreciation" test strikes the appropriate balance between paternalistic intuitions and respect for the defendant's prerogatives.[135] In a few contexts, however, such a substantial risk of injustice exists that the test of competence should be strengthened to include not only appreciation but a capacity for reasoned choice (i.e. a capacity to compare and weigh alternative courses of action in a logical manner). This test should be used when the defendant waives representation by counsel or insists on pleading guilty without counsel or against the advice of counsel. In those contexts, the tension between reliability and autonomy should be resolved in favor of a particularly

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with mental retardation, see Bonnie, *The Competence of Criminal Defendants with Mental Retardation*, *supra* note 82, at 435-46.

135. In some contexts, however, basic rationality would provide an acceptable alternative because adhering to the defendant's preference does not pose a significant risk of injustice. One such context would be a decision waiving jury trial against counsel's advice.

demanding test of competence. Generally, the case law fits this pattern.[136]

3. IMPLICATIONS FOR EVALUATION PROTOCOLS

Differentiating in this way between assenting and refusing defendants facilitates efficiency in forensic assessment of decisional competence.[137] Assuming that "basic understanding" is the test for decisional competence by assenting defendants, a defendant's capacity to understand the nature and consequences of the key decisions that he may be required to make can be assessed simultaneously with his ability to assist counsel. It is not clear, empirically, whether the ability to understand that which must be understood to establish competence to assist counsel predicts the ability to understand the nature and consequences of decisions to plead guilty, to waive jury trial, to testify etc., or whether one of these predicts the others. These questions are now being researched.[138] Depending on the empirical relation among these "abilities to understand," the appropriate assessment tools can be used at the time of the initial evaluation. Accordingly, at the time of this initial assessment, it will be possible in most cases to provide a report on the defendant's competence to assist counsel *and* on the defendant's decisional competence—insofar as the decisions are eventually made in accord with counsel's advice.

For defendants regarded as competent at the time of the initial assessment, further evaluation will be required only in the small fraction of cases in which the defendant's mental condition changes or in which the defendant resists counsel's advice in a manner which leads

136. In addition to cases cited from the Ninth Circuit, see, e.g., United States v. Johns, 728 F.2d 953 (7th Cir. 1984); United States v. Kincaid, 362 F.2d 939 (4th Cir. 1966); State v. Bishop, 781 P.2d 581 (Ariz. 1989); People v. Russell, 173 N.W.2d 816 (Mich. Ct. App. 1969); State v. Bauer, 245 N.W.2d 848 (Minn. 1976). For two recent cases that I believe courts erroneously decided, see State v. Fayle, 658 P.2d 218 (Ariz. App. 1982); Wilkins v. State, 802 S.W.2d 491 (Mo. 1991) (en banc).

137. Simultaneous, resolution of all doubts about competence provides one of the apparent advantages of viewing competence in the criminal process as a unitary construct. The gain in efficiency is largely illusory, however, because issues regarding decisionmaking ability often do not arise until after the initial evaluation has been conducted. Any change in the defendant's behavior or condition which presents new doubts about competence will require further inquiry anyway, regardless of the test. Moreover, any gain in efficiency depends entirely on prescribing a very low standard of decisional competence for all decisionmaking contexts. Yet, an undemanding test of decisional competence is normatively undesirable in some contexts, especially when the client "irrationally" refuses to make the choice that counsel believes to be in the client's best interests. I strongly suspect that, in practice, courts apply a different and higher standard in such cases, even if they proclaim to be applying a single test.

138. Steven K. Hoge et al., *The MacArthur Foundation Research Network on Mental Health and the Law, Preliminary Report: The MacArthur Structured Assessment of Competencies of Criminal Defendants*, February 21, 1992 (on file with the author).

counsel to doubt the defendant's ability to make rational choices. Under these circumstances, the Sixth Amendment obligates counsel to seek assistance. The main objective at this point is to resolve the disagreement; clinical consultation may be helpful in this effort. In the event that disagreement persists, however, clinical assessment of the defendant's "competence," according to the applicable standard, will be necessary to guide counsel's decision regarding her own obligations and prerogatives.

4. ASSENT AND REFUSAL: A NOTE ABOUT ETHICS AND LAW

Controversy persists as to whether different competence criteria for assents and refusals can be justified as a matter of ethical principle. With one exception, however, I can defend my position here on the narrower ground that different *legal* tests are warranted even if the meaning of competence, in principle, does not differ. Assume, for example, that the appreciation formula provides the preferable definition of competence in most significant decisionmaking contexts—i.e., basic decisions regarding trial strategy and basic theories of defense, including whether or not to plead insanity. Where the defendant refuses to accept counsel's recommendation to plead insanity, the test of appreciation will be applied explicitly. However, where the defendant accedes to counsel's recommendation, it would not make sense, as a practical matter, to look deeper than basic cognitive understanding, because a finding of competence or incompetence (under an appreciation test) would have the same consequence—i.e. the insanity plea will be raised either way. If the defendant's appreciation *is not* impaired, the defendant will raise the defense personally, and if his appreciation *is* impaired, the attorney will raise the defense as surrogate decisionmaker. Thus, no practical reason prompts a look beneath cognitive understanding in cases involving assenting clients.

This line of argument will not justify different competence criteria for assenting and refusing clients who plead guilty. In principle, the reasoned choice formula would seem to be ethically plausible, given the consequences of a guilty plea. What then would explain a less demanding legal test of competence for clients who plead guilty on advice of counsel? It might be argued, as above, that there is no practical need to look beneath the assenting client's basic understanding of the nature and consequences of the plea, but this argument fails because the defendant who has impaired abilities to think rationally will not be permitted to plead guilty, and a surrogate guilty plea will not be allowed. Thus, important consequences turn on which legal test is used. Use of the reasoned choice test would increase signifi-

cantly the costs of adjudication—by requiring more competence determinations and by increasing the number of tried cases.

In a system that disposes of cases largely through plea negotiation, the reasoned choice criterion of competence would not be in the best interest of many mentally disabled defendants because it would deny them the advantages of plea bargaining. Thus, in this one context, differential criteria for assent and refusal must be defended in explicitly paternalistic terms. On the one hand, the less demanding basic rationality test is more likely than the reasoned choice test to serve the interests of assenting defendants. On the other hand, the "reasoned choice" standard is necessary to protect the interests of defendants who insist on pleading guilty against advice of counsel.

D. *Illustrative Applications: Bench or Jury Trial*

Waiver of jury trial requires the defendant's personal participation, and practice guidelines typically require the defendant's involvement in deciding whether a case should be tried before a judge or a jury. As an illustrative exercise,[139] I have explored the implications of the theory outlined in this article for three permutations of attorney-client interaction in this decisional context: (1) waiver of jury trial on advice of counsel; (2) waiver of jury trial against advice of counsel; and (3) invoking jury trial against advice of counsel. (See Table 3).[140]

Table 3

Tests of Decisional Competence: Bench or Jury Trial

Decision to Invoke Jury Trial (with or against advice of counsel):	Decisional Competence Not Required
Decision to Waive Jury Trial (with advice of counsel):	Basic Understanding Test
Decision to Waive Jury Trial (against advice of counsel):	Basic Rationality Test

1. WAIVER OF JURY TRIAL ON ADVICE OF COUNSEL

Test. The test for competence to waive the right to jury trial, in favor of a bench trial, on advice of counsel should be (and probably is)

139. I have previously applied these ideas in the context of decisions about guilty pleas in Bonnie, *Theoretical Reformulation*, *supra* note 49, at 311-14.

140. The fourth possibility, invoking jury trial on advice of counsel, raises no difficulties because the governing law probably permits counsel to make the decision without the defendant's participation. A court would not reverse a conviction on the ground that the defendant was not told that he could waive a jury trial or was not competent to make the decision.

the ability to understand the nature and consequences of the decision. Based on the existing case law, the defendant must be able to understand that he has a constitutional right to have his guilt or innocence decided by a group of people from the community and that if he chooses to give up this right, the decision will be made by the judge alone.[141] The "basic understanding" test is preferable to a more demanding test because the decision by counsel to recommend a bench trial presumptively reflects an informed professional judgment regarding the probabilities of conviction under both procedures and remains itself subject to scrutiny for constitutional inadequacy. In addition, the choice between a jury trial and a bench trial will not likely displace, subordinate, or overlook preferences or values of the defendant unrelated to the goal of minimizing the probability of conviction. Finally, the very remote likelihood that the defendant will have wholly irrational reasons for waiving a jury trial when counsel has recommended this course does not justify the costs of administering a more demanding standard of competence that focuses on the defendant's reasoning process or on the rationality of her reasons for choosing a bench trial.

Monitoring. The Supreme Court has never decided whether waiver of jury trial requires contemporaneous documentation on the record or a colloquy with the defendant, which guilty pleas require.[142] If it were required, a proper colloquy could be designed to assure actual understanding of the pertinent information. Perhaps, however, the likelihood that attorneys will opt for a bench trial when it is not in the defendant's interests to do so is too slight to warrant an extended colloquy to document the validity of the waiver. If no colloquy were required, the alternative strategy would be to elicit from the defendant only an "expression of choice." In effect, expression of the defendant's preference to waive jury trial would raise a conclusive presumption of actual understanding (which itself assumes ability to understand).[143]

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141. United States v. DeRobertis, 715 F.2d 1174, 1180 (7th Cir. 1983). Other courts also require that a defendant understand: that a jury is composed of 12 members of the community, that the defendant may participate in the selection of jurors, and that the jury verdict must be unanimous (or whatever the law provides regarding number of jurors and unanimity). *E.g.*, United States v. Martin, 704 F.2d 267 (6th Cir. 1983); United States v. Delgado, 635 F.2d 889 (7th Cir. 1981).

142. Jells v. Ohio, 111 S. Ct. 1020 (1991) (Marshall, J. dissenting from denial of certiorari); *see also* United States v. Cochran, 770 F.2d 880, 852 (9th Cir. 1985) (holding that trial court's failure to personally question defendants before accepting waiver of right to jury trial not reversible error).

143. This statement contains a somewhat difficult and implicit constitutional theory. The "expression of choice" would have the effect of insulating the waiver from direct challenge.

Consequences of Decisional Incompetence. Surrogate decision-making by the attorney would be appropriate if a defendant were able to assist counsel, but were nonetheless unable to effect a valid waiver of jury trial.[144] A requirement of consultation with another attorney would provide a contemporaneous documentation of the attorney's reasoned choice and, under these circumstances, surrogate waiver would be preferable to either of the alternatives—jury trial by default or a bar against adjudication.

2. WAIVER OF JURY TRIAL AGAINST ADVICE OF COUNSEL

Test. The most sensible test for competence to waive a jury trial against counsel's advice is not immediately apparent. Because history and the constitutional text sanctify the right to a jury trial, waiver should not be taken lightly. Yet, the waiver of jury trial rarely sacrifices the defendant's interests in a reliable adjudication. The basis for paternalistic intervention is therefore somewhat more attenuated than when the defendant insists on pleading guilty or pursuing an unpromising theory of defense against counsel's advice. As a general proposition, I suggested earlier that decisional competence should be assessed according to an appreciation test when the defendant rejects counsel's advice (and counsel raises the issue).[145] In this context, though, I think a "basic rationality" test suffices to vindicate the society's interest in assuring that waiver of jury trial reflects a meaningful exercise of self-determination.[146]

Monitoring. A client's refusal to follow the attorney's recommendation typically raises no genuine doubt about the client's compe-

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Any claim designed to second guess the attorney's decision would have to be formulated as an ineffective assistance claim. Thus, if the defendant subsequently claimed that her attorney failed to explain the nature and consequences of the decision, the claim could prevail only if the attorney's recommendation to opt for bench trial amounted to constitutionally deficient performance. Similarly, if the defendant claimed, implausibly, that she was unable to understand what she had been told, the claim would prevail only if the attorney's failure to recognize or rectify the defendant's impaired understanding amounted to constitutionally deficient performance.

144. As a practical matter, competence to waive jury trial (on advice of counsel) is unlikely to arise as a discrete decisional competence issue. It is highly unlikely that a defendant who is competent to assist counsel (and is able to understand the adversary system) would be unable to understand the nature and consequences of a decision waiving a jury trial. Researchers are now empirically testing this proposition. *See supra* note 138.

145. *See supra* part IV.B.3.

146. State v. Champagne, 492 A.2d 1242 (N.H. 1985), is illustrative. Champagne killed his parents because he believed they were members of a band of "flesh eaters" who catch, sell, and eat other people. Although the issue raised in the case concerned his competence to plead insanity, one feature of his delusional thinking was the possibility that flesh eaters would be on the jury. If he had waived jury trial on the basis of this belief, the court may have invalidated the decision under the "basic rationality" test.

tence. The defendant may reject counsel's advice because he assesses the probabilities differently, weighs the alternatives differently, or defines his self-interest differently. In some cases, the defendant's obstinate or oppositional behavior expresses more general characterological propensities that define who the defendant "is" and do not amount to incompetence. On some occasions, though, the defendant's behavior signals a possible impairment of reasoning that should trigger the attorney's obligation to inquire. Clinical assessment may not be necessary. It may be sufficient for defense counsel to obtain a "second opinion" from another attorney. If, based on clinical assessment or other consultation, counsel concludes that the defendant understands the nature and consequences of the waiver and has plausible reasons for making the choice, the attorney should make a record. To promote finality, it may also be desirable for the defense to request an in camera hearing for the purpose of a judicial colloquy to document the defendant's understanding and the plausibility of his reasons.

Consequences of Decisional Incompetence. Conceivably, a defendant could be competent to assist counsel, but decisionally incompetent to waive the right to jury trial.[147] If so, surrogate decisionmaking clearly would be the appropriate response. Barring adjudication would not be sensible; instead, the attorney should be permitted, as surrogate, to invoke the constitutionally guaranteed option.

3. INVOKING JURY TRIAL AGAINST ADVICE OF COUNSEL

Defendants sometimes insist on *invoking* a constitutional right against counsel's advice. These instances usually include refusing a proffered plea agreement in favor of a trial or, less frequently, insisting on a jury trial in lieu of a recommended bench trial. Most often, the defendant's competence is not in doubt in these cases. But let us assume that a major mental disorder influences the defendant's decisionmaking and that, as a result, it could plausibly be said that the defendant has grossly irrational reasons for refusing to plead guilty or for insisting on a jury trial or that these reasons reflect an impaired appreciation of reality. Should this matter? Ultimately, the question is whether decisional competence is required at all for decisions *invoking* constitutional rights.

Let us consider the consequences of saying that the defendant is

147. *Cf.* McCarlo v. State, 677 P.2d 1268 (Alaska Ct. App. 1984) (After determining that McCarlo was competent to stand trial, the court separately analyzed whether McCarlo had made a voluntary and knowledgeable waiver of his right to a jury trial.).

permanently decisionally incompetent to reject a proposed plea agreement. Neither a forced guilty plea or a surrogate guilty plea is legally possible, so a bar to adjudication provides the only available response. Would it make sense to foreclose adjudication, possibly permanently, despite the competence of the defendant to assist counsel in preparing for and conducting a trial? I do not think so. Incompetent rejection of a plea agreement by the defendant should not bar a trial, the constitutional default.

Apparent irrationality in decisionmaking should raise a red flag, of course, and defense counsel would have an obligation, under prevailing norms of adequate representation, to take appropriate steps to secure clinical consultation and assessment. The assessment might reveal more pervasive problems that raise doubts about the defendant's competence to assist counsel. Even if competence to assist counsel is not in doubt, therapeutic intervention and counseling may resolve the conflict between attorney and client regarding whether to try the case. But, if the defendant remains unwilling to accede to counsel's advice, the case should go to trial. No requirement of decisional competence qualifies the defendant's prerogative to reject a guilty plea.

If what I have said about the prerogative to go to trial is sound, it follows that the defendant also has an unqualified prerogative to invoke a jury trial in the face of counsel's recommendation to opt for a bench trial.

E. *A Simplifying Proposal*

I have sketched these ideas in order to stimulate discussion of the factors that should be considered in defining and administering tests of decisional competence in criminal adjudication, and have not taken into account the practical problems raised by prescribing multiple tests. If simplification into two tests were a paramount objective, I would be inclined to condense these ideas as follows: (1) In all situations in which the defendant accedes to counsel's recommendation regarding defense or disposition of the case, including guilty pleas, the test should be "basic rationality." As I have noted earlier, this approach, which encompasses the basic understanding of rights and the consequences of waiving them, together with a requirement of minimum rationality, is a fairly close approximation of the *Dusky* formula, as applied to decisional competence. (2) When the defendant waives counsel, or insists on acting contrary to counsel's advice in a manner that raises doubts about the client's rationality, the test should be "ability to make a reasoned choice," a formulation that

should encompass a qualitative criterion of appreciation, together with the cognitive abilities required for rational decisionmaking.

V. A COMMENT ON *MORAN V. GODINEZ*

The decision by the United States Court of Appeals for the Ninth Circuit in *Moran v. Godinez*,[148] now before the United States Supreme Court on a writ of certiorari, raises some of the issues discussed in this article, including the relation between competence to assist counsel and decisional competence and the criteria for waiving representation by counsel and pleading guilty. The Ninth Circuit's holding that the "standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights" presents these issues.[149]

Richard Moran was charged with three counts of capital murder in Nevada for killing two people in a bar on August 2, 1984 and for shooting his former wife in a separate incident seven days later.[150] Immediately after shooting his wife, Moran attempted suicide by shooting himself in the abdomen and slashing his wrists. While in the hospital recovering from his wounds, he summoned the police and confessed to all three homicides.[151] Soon after discharge from the hospital, he was referred for forensic assessment of his competence to stand trial, and two examining psychiatrists interviewed him separately on September 12 and September 17.[152] Each psychiatrist concluded that Moran understood the charges and was able to assist his attorney.[153] Taking note of his depression and remorse, one of the psychiatrists observed that "Moran may not make the effort necessary to assist counsel in his own defense."[154] The record also shows that Moran was prescribed several depressants and anti-anxiety drugs during the pretrial period.[155]

Two months later, in November, Moran appeared in court, "expressed extreme remorse" for the killings, discharged his counsel, changed his pleas to guilty, refused the trial court's offer of standby counsel, and announced that he wanted no mitigating evidence

148. 972 F.2d 263 (9th Cir. 1992), *cert. granted sub nom.* Godinez v. Moran, 113 S. Ct. 810 (1992).

149. *Moran*, 972 F.2d at 266.

150. *Id.* at 264. Unless otherwise indicated, the factual summary in the text is drawn from the Ninth Circuit opinion.

151. Moran v. State, 734 P.2d 712, 713 (Nev. 1987).

152. *Moran*, 972 F.2d at 267 n.7.

153. *Id.* at 268.

154. *Id.*

155. *Id.* at 264.

presented on his behalf at the sentencing proceeding.[156] The trial court accepted Moran's waiver of counsel and pleas of guilty after conducting a plea colloquy during which Moran uttered "monosyllabic responses to leading questions from the court about his legal rights and the charged offenses."[157] In January, 1985, a three-judge panel imposed death sentences for each of the three homicides.[158] The sentencing panel found that the aggravating circumstances outweighed the mitigating circumstances in all three murders.[159] On direct appeal, the Nevada Supreme Court affirmed two death sentences and reversed the third.[160]

Wholesale capitulation by remorseful capital defendants is not unusual. Such defendants typically insist on pleading guilty against counsel's advice and instruct counsel to refrain from introducing any evidence in mitigation, or like Richard Moran, they discharge their attorneys and plead guilty while unrepresented. These defendants also frequently request sentences of death. This behavior presents puzzling and controversial questions regarding the ethical and legal obligations of defense attorneys and trial judges.[161]

Capital defendants who have failed to defend themselves or seek leniency at trial and who have received death sentences often regret their behavior thereafter. They then file appeals or habeas petitions seeking to nullify the convictions and death sentences they so ardently sought. The possibility of strategic behavior in such cases cannot be altogether ruled out, but the most likely explanation is that medication, counseling, and the passage of time alleviate the prisoners' acute distress and they eventually come to prefer life, even with suffering and guilt, to death. Moran filed his state habeas petition in July of 1987.[162] Among other claims, he alleged that he had not been competent to waive counsel or to enter valid guilty pleas in November of 1984 and that, in any event, the trial court had not undertaken a constitutionally adequate inquiry regarding his competence to do so.[163]

After an evidentiary hearing, the state habeas court concluded that Moran had been competent to waive counsel and to enter his guilty pleas.[164] In reaching this conclusion, the court apparently

156. *Id.*
157. *Id.*
158. *Id.*
159. 734 P.2d at 713.
160. *Id.* at 715.
161. I have discussed these problems in Bonnie, *The Dignity of the Condemned*, *supra* note 74.
162. Moran v. Godinez, 972 F.2d 263, 264 (9th Cir. 1992).
163. *Id.*
164. *Id.* at 264.

relied exclusively on the reports of the two psychiatrists who had found Moran competent to stand trial in September of 1984.[165] The Nevada Supreme Court affirmed, and Moran then filed his federal habeas petition.[166] After relief was denied in the district court, the Ninth Circuit reversed:

> Given the record in this case, the state court should have entertained a good faith doubt about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights. Due process therefore required that the court hold a hearing to evaluate and determine Moran's competency to waive constitutional rights before it accepted his decision to discharge counsel and change his pleas. This the state court failed to do.[167]

In reaching its conclusion, the Ninth Circuit applied well-settled procedural principles, developed in *Drope v. Missouri*[168] and *Pate v. Robinson*,[169] which obligate a trial court to conduct an adequate inquiry whenever significant doubt is raised regarding a defendant's competence. According to the Ninth Circuit, Moran's self-destructive behavior, his decisions to abandon his defense, his statement that he was taking medication, and his monosyllabic responses to the colloquy questions raised sufficient doubt regarding his competence to require the trial court to undertake a further inquiry.[170] The determination that Moran was competent in September did not relieve the court of its obligation to inquire in the November proceeding because, as indicated by the Supreme Court in *Drope*, the trial court has a continuing constitutional duty to monitor the defendant's competence.[171]

Under *Drope*, Moran is entitled to relief upon a showing that a constitutionally adequate inquiry was not made at the time of his guilty plea and waiver of counsel. He does not need to *prove* that he was actually incompetent in November.[172] Thus, the Ninth Circuit's application of *Drope* is not predicated upon a substantive ruling on the legal test for competence to waive counsel and plead guilty. Under the Ninth Circuit's analysis, the trial court's inquiry regarding Moran's competence at the time of his guilty pleas was constitutionally inadequate even if the test for competence to plead guilty and

165. *Id.* at 267.
166. *Id.* at 264.
167. *Id.* at 265.
168. 420 U.S. 162 (1975).
169. 383 U.S. 375 (1966).
170. *Moran*, 972 F.2d at 265.
171. 420 U.S. at 181.
172. *Id.* at 180-82.

otherwise waive constitutional rights is identical to the test for competence to stand trial.

Why, then, did the Ninth Circuit find it necessary to hold that the standard for competence to plead guilty, and otherwise to waive constitutional rights, is different from the standard for competence to stand trial? The answer lies in the increasingly restrictive rules governing the prerogatives of federal courts in habeas proceedings. In the course of its ruling dismissing all of Moran's constitutional claims, the state habeas court stated that Moran had been "competent" at the time of the plea proceeding in November of 1984.[173] The question before the Ninth Circuit was whether this "finding" was entitled to a "presumption of correctness" under the federal habeas statute.[174] If it was, then the trial court's failure to conduct a constitutionally adequate inquiry at the time of Moran's plea would have been harmless. The Ninth Circuit concluded that the state habeas court's finding of competence was not binding because the judge had applied an incorrect legal standard of competence:

> The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial.[175]

Thus, the Ninth Circuit concluded, the habeas court's finding that Moran had been "competent" in November, 1984 was not entitled to the presumption of correctness. The court went on to examine the record and conclude that it could not "support a finding that Moran was mentally capable of the reasoned choice required for a valid waiver of constitutional rights" at the time of his guilty pleas.[176]

Although the Ninth Circuit reached the correct result in *Moran*, its analysis does not entirely comport with the approach recommended in this Article. The court states that there are two compe-

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173. 972 F.2d at 264.

174. Whether an appellate court should accord the presumption of correctness to state court findings on mixed questions of law and fact relating to waivers of constitutional rights is unclear. *See, e.g.*, Creech v. Arave, 947 F.2d 873, 879 n.5 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 2963 (1992). The *Moran* court assumed that the presumption applied if the state court used the correct legal standard. 972 F. 2d at 266 n.6.

175. 972 F.2d at 266 (citations omitted).

176. *Id.* at 267 (footnote omitted).

tence tests—one for "competence to stand trial" and one for "competence to waive constitutional rights." The test for "competence to stand trial" includes "merely" rational and factual understanding of the proceedings and ability to assist counsel. (This language, drawn from *Dusky* and *Drope*, is functionally equivalent to "competence to assist counsel" as I have defined it here.) In contrast, "competence to waive constitutional rights" requires capacity to make a "reasoned choice" among alternatives—a higher standard.

I agree, of course, that "competence" of criminal defendants is best viewed as two constructs, not one. However, I would redraw the distinction so that the two applicable constructs are "competence to assist counsel" (rather than "competence to stand trial") and "decisional competence" (rather than "competence to waive constitutional rights"). I doubt that the Ninth Circuit would quibble much about this relabeling. My main disagreement with the court's analysis pertains to its assumption that the same test of decisional competence ("ability to make a reasoned choice") applies to *all* waivers of constitutional rights or, more generally, to all decisions that the defendant is required or expected to make in criminal defense. As I have noted above, the criteria for decisional competence should not be the same in all contexts, or even for all waivers of constitutional rights.

Fortunately, the Supreme Court need not resolve these questions in order to decide the particular issue raised in *Moran*. On the facts of this case, the Ninth Circuit's analysis is sound. First, even if Moran was competent to assist counsel (in both September and November), this finding does not suffice to establish that he was competent to waive counsel and plead guilty in November. The latter finding pertains to Moran's decisional competence, a distinct issue. Second, *in this context*—when a capital defendant waives counsel and enters a guilty plea without (or against) counsel's advice—the criteria for decisional competence must be especially demanding. "Capacity for reasoned choice among alternatives" provides a sensible formulation of the competence standard in this context.

On the first point, the Supreme Court should explicitly endorse the proposition that "competence" in criminal defense is *not* a unitary construct. The *Dusky/Drope* test does not encompass the abilities required for competent decisionmaking, and it would be unwise to reformulate the *Dusky/Drope* test so that decisionmaking abilities were encompassed within a single competence formula. Any criterion of decisional competence used in the unitary test would be too demanding in some contexts and not demanding enough in others. Moreover, a unitary test would unnecessarily preclude adjudication in

cases where surrogate decisionmaking provides a plausible response to decisional incompetence.

Efficiency and finality provide the only possible advantages of a unitary test. Yet even these advantages will not likely result because sequential assessment and repeated judicial inquiries would be required under even a unitary test. An analysis of the facts of *Moran* illustrates the need for sequential assessment. At the time that the doctors evaluated Moran, he and his lawyer had not yet had extensive interactions, and it would have been premature and speculative for these examiners to address Moran's possible competence to waive counsel, to plead guilty, or to make any other decision that might be anticipated. The initial evaluation, which was properly focused on competence to assist counsel, could not have definitively resolved any doubts that might—and in fact did—subsequently arise regarding Moran's competence to make particular decisions regarding his defense or the disposition of the case. This is why decisional competence must be sequentially evaluated, regardless of how the standard is defined. In sum, little would be gained, and much would be lost, by a ruling that "competence" is a single construct, encompassing abilities required to make decisions and waive constitutional rights, as well as the foundational abilities required to assist counsel.

Assuming that decisional competence and competence to assist counsel are understood as separate constructs, the further question is whether the criteria for competence to waive counsel and plead guilty (without or against counsel's advice) should be as demanding as the Ninth Circuit has required. If the Supreme Court addresses this question at all, it need only decide that the "reasoned choice" formula applies to the following situations: (1) waiver of counsel and a decision to represent oneself at trial under *Faretta*; (2) waiver of counsel and a decision to enter a guilty plea without advice of counsel; and (3) entry of a guilty plea against advice of counsel.[177] In these situations, the obligations of the trial court and counsel can be clearly stated. Moreover, incompetence does not bar adjudication because default rules are available: if the defendant is not competent to waive counsel, counsel can be provided; if defendant's competence to make a "reasoned choice" to plead guilty without or against counsel's advice is doubted, the case can be tried.[178]

177. Moran discharged counsel and entered his guilty plea. The same competence test should apply if the defendant retains counsel, but enters the guilty plea against counsel's advice because this situation would be functionally equivalent.

178. Although the issue is not before the Court, Moran also apparently refused to introduce evidence in mitigation. I have argued that the test for decisional competence should also be

One final point should be noted. It is not possible to say, based on the existing record, whether Moran was able to make a "reasoned choice among alternatives" in November of 1984. Even if the right questions had been asked at that time, the court might have concluded that he had good reasons for deciding not to contest his guilt or seek leniency (he felt guilty and remorseful); that he was able, notwithstanding his acute depressive symptoms, to understand the possible consequences of these decisions and the arguments against them (including the possibility of later regret); and that he was able to weigh these considerations in a reasoned manner. Obviously, the mere fact that Moran regretted his decision three years later does not demonstrate that he lacked competence to make a reasoned choice in November of 1984.

On the other hand, a clinical investigation of his mental and emotional state conceivably could have raised a significant possibility that his decision to capitulate was anchored in transient emotional distress and unresolved conflict. Under these circumstances, perhaps therapeutic intervention would have helped to resolve the problem relatively quickly. Today, there is simply no way of knowing. This further indicates why the decisional competence of a defendant who insists on waiving counsel and pleading guilty—and in a death penalty case, foregoing presentation of a case in mitigation—should be fully explored in the trial court. If the issue is ignored in the trial court, it is likely to receive—and should receive—critical attention in federal habeas proceedings. *Moran* is typical in this respect as well.

VI. BEYOND *DUSKY* AND *DROPE*

The Supreme Court decided *Dusky v. United States* in 1960. Although the Court has subsequently decided a number of cases regarding the procedural aspects of competence assessment and adjudication,[179] including such esoteric questions as who bears the burden of persuasion when the evidence is in equipoise,[180] it has not had the occasion to elaborate further on the substantive aspects of the competence doctrine. As a result, many fundamental questions remain unanswered. Courts seem especially confused about the relation between the competence doctrine and legal rules relating to decision-making by criminal defendants. No one seems sure whether and how

heightened in this situation. *See* Bonnie, *The Dignity of the Condemned*, *supra* note 74, at 1388-89; *see also* State v. Tyler, 553 N.E.2d 576 (Ohio 1990).

179. *E.g.*, Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

180. *See* Medina v. California, 112 S. Ct. 2572 (1992).

the components of the *Dusky* formula, as later embellished in *Drope,* apply to impairments of abilities required for rational decisionmaking.

According to one view, *Dusky* does not provide the exclusive test of competence in the criminal process. Instead, the test for competence to stand trial, as defined in *Dusky*, is supplemented by a separate, "higher" test for guilty pleas and, perhaps, for waiving constitutional rights. Such an approach has the advantage of permitting adjudication in cases involving defendants who are able to satisfy the *Dusky* criteria, but who may have impaired decisionmaking abilities. However, an unqualified dual-competence approach poses problems because it precludes modes of adjudication other than jury trials (e.g. negotiated guilty pleas and bench trials) for some defendants with mental disability. In addition, any doctrinal formulation that increases the complexity of competence determinations and multiplies findings of incompetence tends to erode finality.

In response to these concerns, many courts have insisted that *Dusky* states the sole test of competence in criminal adjudication.[181] But what does *Dusky* mean in relation to decisional competence? Two answers can be discerned in the case law. On the one hand, some courts seem to have focused exclusively on the factors expressly mentioned in *Dusky*—the defendant's ability to "understand" the proceedings and consult rationally with counsel.[182] Under this view, the court conclusively presumes that a defendant who has these abilities also has the abilities required for rational decisionmaking. This approach tends to promote efficiency of assessment and finality of adjudication, but it can lead to morally dubious results when defendants with obvious mental impairments insist on making what appear to be self-defeating decisions, such as pleading guilty against counsel's advice or discharging counsel altogether in capital cases. On the other hand, some courts have held that the *Dusky* formula implicitly incorporates decisionmaking abilities.[183] This approach legitimizes

181. For examples of courts that have applied the "single test," see, Allard v. Helgemoe, 572 F.2d 1, 3 (1st Cir. 1978) and cases cited therein. However, the "multiple test" view predominates when the issue is whether the *Dusky* test applies to insanity pleas. *See, e.g.*, Frendak v. United States, 408 A.2d 364, 379 (D.C. Cir. 1979). By all account, the test for competence to waive counsel and represent oneself is more demanding than the *Dusky* test. *See* cases cited *supra* note 72.

182. *See, e.g.*, Felde v. Butler, 817 F.2d 281, 282-83 (5th Cir. 1987); Commonwealth v. Logan, 549 A.2d 531, 537 (Pa. 1988).

183. *E.g.*, United States v. Hemsi, 901 F.2d 293, 295 (2d Cir. 1990). For a discussion of the broad view of the *Dusky* formula, see ABA STANDARDS FOR CRIMINAL JUSTICE § 7-4.1 commentary at 168 (1986) and Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W. L. REV. 365, 385 (1981).

paternalism when defendants have serious decisionmaking impairments, but it has a major disadvantage—if taken seriously in practice, it would preclude adjudication in many cases involving mentally disabled defendants.[184]

The Tenth Circuit's recent decision in *Lafferty v. Cook*.[185] nicely illustrates the continuing judicial uncertainty about the meaning of *Dusky* in relation to decisional competence. Ronald Lafferty and his brother were convicted of murdering their sister-in-law and her infant daughter in 1984.[186] Lafferty's brother pled guilty and received a life sentence.[187] Lafferty was convicted at trial and was sentenced to death.[188] The homicides apparently were linked to what the trial judge characterized as Lafferty's "unorthodox religious views"—views that had previously led to his excommunication from the Mormon Church.[189] During the days preceding the murders, Lafferty, his brother and two companions "participated in prayer meetings at which they discussed Ron Lafferty's religious revelations," one of which directed him to "remove" the eventual victims.[190]

At arraignment, Ron Lafferty and his brother refused appointment of counsel, expressing the belief that all lawyers are corrupt, and contended that because God had directed their actions, Utah had no jurisdiction to try them.[191] The trial court ordered a competence assessment of Ron Lafferty.[192] Two psychiatrists found that even though Lafferty fully understood the charges and proceedings in an intellectual sense, his understanding of his situation was distorted by "grandiosity" and by a "paranoid personality system or disorder."[193] He seemed not to realize "how serious things were."[194] Both examiners concluded that he was incompetent.[195]

At a two-day hearing in October, 1984, Lafferty and his brother

184. Because each of these approaches seems unsatisfactory, actual practice probably does not conform to any of them. In practice, as commentators have routinely noted, the meaning of incompetence is highly contextual; those who apply the law—examining clinicians and trial judges—largely have discretion to define the term.

185. 949 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992).

186. *Id.* at 1548.

187. State v. Lafferty, 749 P.2d 1239, 1241 (Utah 1988).

188. 949 F.2d at 1549.

189. *Id.* at 1548.

190. *Id.*

191. *Id.* at 1561. No question appears to have been raised about the competence of Dan Lafferty, although the refusal of appointed counsel appears to have been a joint decision by both brothers.

192. *Id.*

193. *Id.* at 1562.

194. *Id.*

195. *Id.* at 1561-62.

insisted that their main reason for refusing appointed counsel was "because we feel that we have our own best interests at heart," and they objected to the doctors' characterization of Ron Lafferty's religious experience as a manifestation of mental disorder.[196] The trial judge "painstakingly explained how foolish it was for the brothers to represent themselves" but he eventually ruled that Lafferty was competent.[197] (The trial judge apparently deferred ruling on the self-representation issue.) A month later, Lafferty was sent to the state hospital for another competence examination after he attacked a guard at the jail.[198] All four examiners concluded that he was competent and, based on the reports, the judge reaffirmed his earlier competence finding.[199]

Matters changed drastically when Lafferty attempted to hang himself in late December.[200] At a hearing on January 28, 1985, Lafferty was still experiencing difficulties with his memory resulting from oxygen deprivation during the suicide attempt, and the judge ruled that he was not yet competent to stand trial.[201] Lafferty's final competence hearing was held on April 2.[202] Three examiners from the state hospital testified that although Lafferty understood the proceedings against him and their possible consequences, "he was unable as a result of his paranoid delusional system to interpret them in a realistic way."[203] Lafferty "believed that the examining doctors, the court system and personnel, and his own lawyer were part of a corrupt man-made order which he rejected and which he believed was actually on trial. Because of these delusional beliefs, the doctors concluded that Lafferty could not cooperate with a lawyer."[204] The prosecution offered testimony by an expert who had examined the documents but had not interviewed Lafferty.[205] He concluded that Lafferty's paranoid delusional system was irrelevant to the issue of competency and that his refusal to assist his attorney, while a product of delusion, reflected a conscious choice.[206]

The trial judge ruled that Lafferty was competent, finding that even though Lafferty suffered from a mental illness, his condition was

196. *Id.* at 1562.
197. *Id.* (footnote omitted).
198. *Id.* at 1562.
199. *Id.* at 1563.
200. *Id.*
201. *Id.*
202. *Id.* at 1564.
203. *Id.* at 1552.
204. *Id.*
205. *Id.*
206. *Id.* at 1553.

not severe enough to prevent him from comprehending the proceedings or the punishment he faced.[207] The court also found that he was able to assist his attorney "if he chooses to do so."[208] With regard to Lafferty's paranoia, the trial judge appears to have accepted the view of the prosecution's expert:

> Although the defendant may be operating within a paranoid delusional system, there is no evidence, except a suicide attempt, of irrational behavior within that system or within the system of his religious beliefs. In fact, his refusal to cooperate, assist counsel or admit that he is amenable to the laws of the State of Utah are all consistent with his paranoia and any delusional system pertaining to religion.[209]

After ruling that Lafferty was competent to stand trial, the court conducted a telephone hearing with Lafferty and his counsel regarding the possibility of an insanity plea.[210] Lafferty's lawyer had filed a notice of intent to present an insanity defense during the period when Lafferty had been declared incompetent.[211] Lafferty insisted that he did not want to present such a defense because he did not believe that he was insane.[212] After he told the judge he would refuse to cooperate with experts appointed to examine him, the court ruled that the insanity defense could not be raised.[213]

At a subsequent pretrial hearing, the court considered Lafferty's renewed request to represent himself together with Lafferty's counsel's motions to withdraw.[214] The court denied these motions because Lafferty refused to state on the record that he wished to represent himself.[215] However, the court informed Lafferty that he would have every "reasonable opportunity to direct his counsel's strategy and presentation of the case."[216]

During the trial, defense counsel attempted to present testimony by experts who had examined Lafferty during the competence proceedings in support of a claim of "diminished capacity" that, if accepted, would reduce the offense to manslaughter.[217] However,

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207. *Id.* at 1564.

208. *Id.* at 1565 (quoting Utah v. Lafferty, No. 9303, slip op. at 7 (D. Utah Apr. 8, 1985)).

209. *Id.* at 1554 (quoting Utah v. Lafferty, No. 9303, slip op. at 7).

210. *Id.* at 1549.

211. *Id.*

212. *Id.*

213. Under Utah law, refusal to cooperate with state-appointed examiners precludes the defense from raising a claim of insanity. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

when counsel began to present this evidence, "Lafferty refused to let him proceed, contrary to the attorney's forcefully expressed belief that the presentation was absolutely imperative."[218] Left with no option, his attorney rested.[219] The trial court convicted Lafferty of capital murder and subsequently sentenced him to death.[220]

One can easily understand the predicament confronted by the trial judge in this case. He clearly recognized that Lafferty was mentally ill, that his religious beliefs were intertwined with a paranoid delusional disorder, and that his capacity for rational decisionmaking was impaired.[221] Yet, at the same time, the judge apparently believed that Lafferty's disorder was not severe enough to preclude adjudication. Thus, at the time of the final competency hearing in April, the court faced a stark choice—to allow the case to proceed despite Lafferty's impairment or to find him incompetent, in which case he probably never would be brought to trial. The trial judge decided to allow the case to go to trial and accordingly ruled, under the *Dusky* formula, that Lafferty had a "rational understanding" of the proceedings and was "able" to assist counsel if he chose to do so.

After the appellate court affirmed his convictions and sentences on direct appeal, Lafferty filed a federal habeas petition that, after a brief detour in the state courts, the federal district court denied. Lafferty then appealed to the Tenth Circuit. In a 2-1 decision, a panel of the Tenth Circuit reversed the district court and granted Lafferty's petition. Like the trial judge, each member of the appellate panel recognized that the case required an interpretation of *Dusky*. According to the majority:

> This court cannot accept as consistent with *Dusky* and its progeny a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a paranoid delusional system need only act consistently with his paranoid delusion to be considered competent to stand trial.
>
> . . . .
>
> . . . The state court paid lip service to *Dusky*'s requirement that competency requires a rational understanding which is different from, and more than, factual understanding. Nonetheless, in view of the evidence that Lafferty's illness interfered with his accurate perception of reality, the court's statements that Lafferty's

218. *Id.*

219. *Id.*

220. *Id.*

221. The trial judge explicitly held that "Mr. Lafferty lacks the ability to engage in a rational decisionmaking process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the costs and benefits of treatment." *Id.* at 1554 n.8.

> understanding was rational simply renders that requirement a nullity. . . .
>
> Under the state court's view, then, a defendant suffering from paranoid delusions is to be held competent to make decisions on how best to present his mental state to a judge and jury even though that mental illness may strip him of the ability to realistically determine where his best interests lie. Indeed, a defendant operating in a paranoid delusional system may well believe that he is not mentally ill and therefore, as did Lafferty, refuse to present the defense at all. This result cannot be reconciled with the requirements of due process.[222]

In doctrinal terms, the Tenth Circuit ruled, as a matter of law, that the *Dusky* test encompasses decisionmaking abilities. Because the trial judge had ignored Lafferty's impaired capacity for rational decisionmaking, it had erred when it found Lafferty competent, thereby enabling him "to make the crucial decision to waive an insanity defense, contrary to the forceful advice of his frustrated attorney, by refusing to cooperate in the mental examinations which are state law prerequisites to assertion of the defense at trial."[223]

In dissent, Judge Brorby insisted that administration of *Dusky*'s formula should be left to the discretion of trial judges, and he chastised the majority for "impermissibly substitut[ing], de novo, its findings as to Mr. Lafferty's rational abilities for those of the trial court."[224] In response to the majority's ruling that the trial judge had ignored a legally relevant component of the *Dusky* test, Judge Brorby argued that "rational understanding" is an open-textured concept that "eludes any attempt at uniform definition."[225] This implies that an impairment of rational decisionmaking capacity is not a separate component of the *Dusky* test, as the majority appears to have ruled.[226]

Although Judge Brorby did not elaborate on the rationale for his interpretation of *Dusky*, his reluctance to include capacity for rational decisionmaking as a distinct element appears to be grounded in a distaste for the paternalistic tendencies inhering in this approach:

> The majority is unable to point to any evidence which shows Mr. Lafferty was not accurately perceiving reality as it related to

222. *Id.* at 1554-56 (citation omitted) (footnote omitted).

223. *Id.* at 1555. Because the trial judge had not applied the correct legal standard, its competence finding was not entitled to the "presumption of correctness" in federal habeas proceedings.

224. *Id.* at 1558 (Brorby, J., dissenting).

225. *Id.*

226. It follows from Judge Brorby's analysis that the trial judge had applied the correct legal test and that the federal courts on habeas review should have presumed his competence finding to be correct.

> the murder charges and courtroom proceedings. Rather, it relies solely upon the testimony at the last competency hearing and upon Mr. Lafferty's refusal to present an insanity defense as evidence of incompetence. From this fragment of the record, the majority concludes Mr. Lafferty was a person suffering from mental illness to such a degree that he was unable to make decisions on the basis of a realistic evaluation of his own best interests. In reaching this conclusion, the majority substitutes its judgment of what is "realistic" and "best" for Mr. Lafferty. By taking issue with the subjective wisdom of Mr. Lafferty's decisions concerning how he wanted his case handled, the majority in effect chills constitutionally protected individual decisionmaking.[227]

Neither of the views expressed in *Lafferty* is satisfactory. By folding decisionmaking abilities into a unitary test of competence, the majority's approach unwisely precludes adjudication in cases like Lafferty's. But Judge Brorby's approach, which allows such cases to be prosecuted, appears to foreclose any inquiry into the defendant's competence to make decisions regarding the defense and disposition of the case. The major thesis of this Article is that an alternative exists. The key move, conceptually, is to unhinge decisional competence from the *Dusky* formula.

Sensible resolution of Mr. Lafferty's case requires two separate inquiries. The first question is whether Lafferty was competent to assist counsel. To what extent did his delusional system, as it might have been aggravated by the organic brain injury experienced during the suicide attempt, impair his abilities to appreciate his situation as a defendant in a criminal prosecution and to assist counsel in his own defense? Standing alone, neither his belief that "all lawyers are corrupt" nor his obstinacy and uncooperativeness are indicative of incompetence. Obviously, a defendant's paranoid distrust of "all lawyers" could preclude rational communication with an appointed attorney, but Lafferty apparently did not harbor such a profound distrust. He was able to communicate with, and provide necessary factual information to, his counsel, and the trial judge clearly felt that a fair adjudication was possible, notwithstanding Lafferty's delusional disorder. Based on the cold print in the appellate decisions, I see no reason why adjudication should have been barred. Trying Lafferty did not offend the moral dignity of the criminal process and any doubts about the reliability of the adjudication were linked to Lafferty's decisions about litigation strategy, not to any impairment of his ability to communicate with counsel.

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227. 949 F.2d at 1566 (Brorby, J., dissenting) (citation omitted).

According to the trial court and Judge Brorby, this conclusion fully disposes of the dispute; Lafferty's mental disorder has no legal significance because he is competent under *Dusky*. But even if Lafferty's disorder does not preclude adjudication, another question must be addressed: Was Lafferty competent to make decisions in his own best interests? Should his decisions be regarded as binding on his attorney and on the trial judge? No reason appears why the resolution of this problem should be tied to the *Dusky* formula or to the bar against adjudication that it entails. If Lafferty lacks decisional competence, surrogate decisionmaking by the attorney provides a suitable response. Lafferty's failure to cooperate with the examiners might have barred an insanity plea, but his attorney could have been explicitly authorized to introduce clinical testimony in support of a diminished capacity defense, thereby providing the jury an alternative to a capital murder conviction.

A finding of decisional incompetence and surrogate decisionmaking by the attorney clearly would effectuate the paternalistic intuition underlying the Tenth Circuit's decision in *Lafferty*. To say that this option should be available, however, is not to say that it should be routinely exercised, or even that it should have been exercised in Lafferty's case. Whether a defendant fails to "appreciate" the nature and consequences of the decision or lacks the capacity to make a "reasoned choice" is, of course, not a clinical "fact," but rather a thick value judgment anchored in intuitions about individual autonomy and social obligation. I suspect that all the judges in *Lafferty v. Cook* knew that the case was about autonomy, but they did not know how to frame the issue within the language of the *Dusky* formula. My primary aim in this Article has been to show that sensible resolution of cases such as *Lafferty v. Cook* requires a broadened conceptual framework, one that supplements, but does not displace, *Dusky* and *Drope*.