

September 2004

Competency to Stand Trial on Trial

Grant H. Morris

University of San Diego School of Law, gmorris@sandiego.edu


Ansar M. Haroun

USD School of Law, UCSD School of Medicine

David Naimark

USD School of Law, UCSD School of Medicine

Follow this and additional works at: http://digital.sandiego.edu/lwps_public

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Health Law and Policy Commons](#), [Jurisprudence Commons](#), [Law and Psychology Commons](#), [Medical Jurisprudence Commons](#), and the [Public Law and Legal Theory Commons](#)

Digital USD Citation

Morris, Grant H.; Haroun, Ansar M.; and Naimark, David, "Competency to Stand Trial on Trial" (2004). *University of San Diego Public Law and Legal Theory Research Paper Series*. 19.

http://digital.sandiego.edu/lwps_public/art19

This Article is brought to you for free and open access by the Law Faculty Scholarship at Digital USD. It has been accepted for inclusion in University of San Diego Public Law and Legal Theory Research Paper Series by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.



Public Law and Legal Theory Research Paper Series

September 2004

Competency to Stand Trial on Trial

**Grant H. Morris
Ansar M. Haroun, M.D.
David Naimark, M.D.**

COMPETENCY TO STAND TRIAL ON TRIAL

Grant H. Morris,* Ansar M. Haroun, M.D.,** David Naimark, M.D.***

“[S]uperfluity comes sooner by white hairs, but competency lives longer.”¹

I. Introduction: The Theory and Reality of Competency Adjudication

In theory, the requirement that a criminal defendant be mentally competent before the trial can proceed assures that the defendant will receive a fair trial. Indeed, the Supreme

*©Grant H. Morris 2004. Professor of Law, University of San Diego School of Law; Clinical Professor, Department of Psychiatry, School of Medicine, University of California, San Diego. The authors acknowledge, with great appreciation, the University of San Diego for the financial support it provided to this project. The authors also acknowledge, with great appreciation, Professor Cameron Parker, Department of Mathematics and Computer Science, University of San Diego for the statistical analysis he provided of our data.

**Supervising Psychiatrist, San Diego County Forensic Psychiatry Clinic; Associate Clinical Professor of Psychiatry, Program in Law, Logic and Ethics in Medicine, University of California, San Diego; Adjunct Professor, University of San Diego School of Law.

***Forensic Psychiatrist, San Diego County Forensic Psychiatry Clinic; Adjunct Professor, University of San Diego School of Law.

¹WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 1, sc. 2, lines 8-9 (Charles H. Shattuck ed., The Univ. Press of Virginia 1974) (1600).

Court has ruled that the prohibition against conducting a criminal trial of an incompetent defendant “is fundamental to an adversary system of justice.”² In reality, however, an adjudication that the defendant is incompetent deprives the defendant of any trial—assuring that he or she will remain *in limbo* as “accused” until he or she has been restored to competency. For some defendants, especially mentally retarded defendants and others whose incapacity is permanent, that day will never come.³

²*Drope v. Missouri*, 420 U.S. 162, 172 (1975).

³*See Jackson v. Indiana*, 406 U.S. 715 (1972), invalidating a statute permitting indeterminate, and potentially life-time, commitment of a mentally retarded, deaf mute person who had been found incompetent to stand trial. *Id.* at 717-19, 738. Equal protection is denied when incompetent criminal defendants are subjected to a more lenient commitment standard (i.e., incompetence to stand criminal trial) and to a more stringent release standard (i.e., restoration of trial competence) than is applicable to all other persons who are not charged with crimes and who could only be detained under the state’s civil commitment laws. *See id.* at 730. Although the finding of incompetence to stand trial may justify a brief period of detention designed to restore the defendant’s competence, due process requires that incompetent defendants who cannot soon be restored to competency must be released or subjected to “the customary civil commitment proceeding that would be required to commit indefinitely any other citizen.” *Id.* at 738. Although the Court declined to specify when civil commitment or release must occur, the Court noted that detention of incompetent defendants is appropriate only for those defendants who “probably soon will be able to stand trial.” *Id.* And even for those defendants, the Court required that commitment “must be justified by progress toward that goal.” *Id.*

Nevertheless, a review of legislation in the fifty states and the District of Columbia, conducted twenty years after the Supreme Court decided *Jackson v. Indiana*, revealed that the decision has been ignored or circumvented in a majority of jurisdictions. Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 13-33 (1993). Some states ignore *Jackson* by continuing to allow incompetent defendants to be detained until their competence has been restored. *Id.* at 13. Others evade *Jackson* by imposing a lengthy period of treatment before acknowledging that the defendant is permanently incompetent, i.e., that there is no substantial probability that the defendant will become competent to stand trial in the foreseeable future. *See id.* at 15-18. Several states tie the maximum length of the treatment period to the maximum sentence that could have been

In theory, a mentally incompetent defendant has not been convicted for the crime of which he or she has been accused and is presumed to be innocent of that crime.⁴ In reality, however, unlike other presumed innocent defendants who are released on bail until they stand trial, incompetent criminal defendants are routinely confined in maximum security wards of state mental hospitals until they become competent.⁵ Unlike others in our society

imposed if the defendant had been convicted of the crime charged. *Id.* at 17-18. In California, permanently incompetent criminal defendants can be placed on mental health conservatorships using different criteria than are used to establish mental health conservatorships for all other mentally ill people. CAL. WELF. & INST. CODE §§ 5350, 5008(h)(1)(A)-(B) (West 1998). Additionally, by law, other conservatees must be placed in the least restrictive placement. CAL. WELF. & INST. CODE § 5358(a)(1)(A). Permanently incompetent criminal defendant conservatees, however, must be placed in a facility “that achieves the purposes of treatment of the conservatee and protection of the public.” CAL. WELF. & INST. CODE § 5358(a)(1)(B).

⁴Because the incompetent defendant has not been tried for the crime charged against him or her, the defendant retains the status of any accused, but not convicted, criminal defendant. Criminal defendants are presumed innocent until they are convicted. As Justice Stevens noted: “Prior to conviction every individual is entitled to the benefit of a presumption . . . that he is innocent of prior criminal conduct” *Bell v. Wolfish*, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting). *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

⁵For example, on July 2, 2003, there were 156 mentally incompetent criminal defendants confined in Atascadero State Hospital, California’s maximum security mental hospital, of a total patient population of 1190. By comparison, only seventy-three patients in that facility were persons acquitted of crimes by reason of insanity. Most of the other patients were either mentally ill, sentence-serving convicts or sexually violent predators. E-mail from Barrie Hafler, Public Relations Officer, Atascadero State Hospital, to Grant Morris, Professor of Law, University of San Diego School of Law (July 9, 2003, 11:52:01 PST) (on file with Professor Morris).

whose involuntary detention is permitted only if their mental condition meets civil

commitment standards of dangerousness⁶ or inability to provide for their basic needs,⁷

⁶The state exercises its police power to civilly commit mentally ill individuals who pose a danger to themselves or others. *See, e.g.*, CAL. WELF. & INST. CODE § 5300 (West 1998) (requiring that to be subjected to a 180-day renewable civil commitment hold in California, the individual must have attempted, inflicted, or made a serious threat of substantial physical harm upon another person that either resulted in the individual's confinement on a short-term evaluation or treatment hold or that occurred during that hold, and must continue to present a demonstrated danger of inflicting substantial physical harm upon others); MONT. CODE. ANN. § 53-21-126 (1)(b)-(c), (2) (2003) (mandating that the court, in determining whether civil commitment is appropriate, shall consider whether the person "has recently, because of a mental disorder and through an act or an omission, caused self-injury or injury to others" and "whether, because of a mental disorder, there is an imminent threat of injury to the [person] or to others because of the [person's] acts or omissions" and providing that an "[i]mminent threat of self-inflicted injury or injury to others must be proved by overt acts or omissions, sufficiently recent in time as to be material and relevant as to the [person's] present condition"); Nebraska Mental Health Commitment Act, 2004 Neb. Laws Legis. Bill 1083, §§ 28, 45, *amending* NEB. REV. STAT. §§ 83-1009(2), -1037 (1999) (WESTLAW through 98th Neb. Legis. 2d Sess.) (defining a mentally ill person as a dangerous person and subject to civil commitment if he or she presents a "substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm" or presents a "substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of suicide or serious bodily harm"); PA. STAT. ANN. tit. 50, §§ 7301(a), (b)(1), 7304, 7305 (West 2001) (providing that severely mentally disabled persons are subject to civil commitment and defining a severely mentally disabled person as posing "a clear and present danger of harm to others or to himself" as "shown by establishing that within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated"); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (holding that to justify civil commitment, the state must prove "that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others" and that this proof of dangerousness must be based "upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another"). *See generally* 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§2A-4.1 to 4.6 (2d ed. 1998) .

⁷The state exercises its *parens patriae* power to civilly commit mentally ill individuals who are unable to provide for their basic necessities or who lack decision

incompetent criminal defendants are detained simply because they have been adjudicated incompetent to stand trial. Even though civilly committed patients have a right to refuse psychotropic medication unless they lack the capacity to understand the risks and benefits of the medication they refuse,⁸ incompetent criminal defendants may be forcibly medicated

making capacity. *See, e.g.*, CAL. WELF. & INST. CODE §§ 5008 (h)(1)(A), 5350, 5358(a)(1)-(2) (West 1998) (defining “gravely disabled” as “a condition in which a person as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter,” establishing a mental health conservatorship for a gravely disabled person, and authorizing the conservator to subject the conservatee to inpatient commitment); MONT. CODE ANN. § 53-21-126 (1)(a) (2003)(authorizing civil commitment of a person, who, “because of a mental disorder, is substantially unable to provide for [his or her] own basic needs of food, clothing, shelter, health, or safety”); Nebraska Mental Health Commitment Act, 2004 Neb. Laws Legis. Bill 1083, §§ 28, 45, *amending* NEB. REV. STAT. §§ 83-1009(2), -1037 (1999) (WESTLAW through 98th Neb. Legis. 2d Sess.) (defining a mentally ill person as a dangerous person and subject to civil commitment if he or she presents “[a] substantial risk of serious harm to himself or herself within the near future as manifested by . . . evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety”); PA. STAT. ANN. tit. 50, §§ 7301(a), (b)(2), 7304, 7305 (West 2001) (providing that severely mentally disabled persons are subject to civil commitment and defining a severely mentally disabled person as posing “a clear and present danger of harm to others or to himself” as proven “by establishing that within the past 30 days . . . the person has acted in such manner as to evidence that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under this act”). *See generally* PERLIN, *supra* note 6, at §§ 2A-4.6 to 4.7.

⁸Courts in many states have held that civilly committed mental patients have a right to refuse psychotropic medication in the absence of an adjudication that they are incompetent to make treatment decisions. *See, e.g.*, *Riese v. St. Mary’s Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 201, 210 (Cal. Ct. App. 1987) (holding that in nonemergency situations, antipsychotic medication cannot be administered to involuntarily committed civil patients without their consent absent a judicial determination of their incapacity to make treatment decisions); *Rogers v. Commissioner*, 458 N.E.2d 308, 314 (Mass. 1983) (holding that involuntarily committed civil patients do not lose the right to make treatment

to restore their trial competence even if they have that capacity.⁹ For this reason, criminal defendants are sometimes referred for competence assessments so that treatment may be forced upon them even though they are not civilly committable.¹⁰ Especially when the statutory criteria for civil commitment is perceived as too restrictive to permit easy use, an arrest on a minor offense and a spurious request for a competency evaluation can achieve diversion from the criminal process and easy access to coerced treatment.¹¹

decisions unless they are adjudicated incompetent by a judge in incompetency proceedings); *Rivers v. Katz*, 495 N.E.2d 337, 342-344 (N.Y. 1986) (holding that involuntary civil commitment, without more, does not establish that the committed person lacks the mental capacity to comprehend the consequences of medication refusal decisions and that a judicial determination that the patient lacks that capacity is required before the state may administer antipsychotic drugs over the patient's objection). Utilizing the informed consent doctrine, "virtually every court that has considered the matter now recognizes a 'right to refuse' psychotropic medication for institutionalized populations." RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 923 (4th ed. 2004).

⁹*Sell v. United States*, 539 U.S. 166, 177-83 (2003). In *Sell*, the Supreme Court ruled that the government's interest in restoring a defendant's competence to stand trial so that he or she can stand trial on a serious criminal charge overrides the defendant's interest in avoiding the involuntary administration of antipsychotic medication "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.* at 179. The Court noted, however, that under this standard, involuntary administration of antipsychotic medications solely to restore trial competence "may be rare." *Id.* at 180.

¹⁰*See* GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 128 (1997) (asserting that "incompetency referrals are used as a ruse to force treatment of persons who do not meet dangerousness requirements for civil commitment and who may be acting bizarrely").

¹¹*See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL* 78 (Thomas Grisso & Robert G. Schwartz eds., 2000) (asserting that the competency inquiry functions as a surrogate for civil commitment for

Robert Burt and Norval Morris once observed that although “trial of an incompetent defendant may, indeed, be unfair . . . [w]ithholding trial often results in an endless prolongation of the incompetent defendant’s accused status, and his virtually automatic civil commitment.”¹² They characterized this delay of trial and coerced treatment as “a cruelly ironic way” to assure that incompetent defendants are treated fairly.¹³ They proposed instead that the trial of an incompetent defendant should proceed but that special pretrial and trial procedures should be employed to redress the defendant’s incapacity, e.g., require complete pretrial disclosure by the prosecution, impose a higher burden than proof beyond a reasonable doubt, require that a corroborating witness establish elements of the offense, instruct the jury to consider the disability of the defendant.¹⁴ As an alternative,

mentally disordered defendants who the prosecutor or judge believes should be treated in the mental health system); ARTHUR R. MATTHEWS, JR., AM. BAR FOUND., *MENTAL DISABILITY AND THE CRIMINAL LAW* 72, 77 (1970) (suggesting that the competency inquiry often initiates a search for a negotiated dispositional alternative to a criminal trial for mentally disordered defendants, especially if they are charged only with minor crimes). *See also* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL* 885-86 (1974) (noting that in the year following California’s enactment of a restrictive civil commitment law, the number of criminal defendants committed to Metropolitan State Hospital as incompetent to stand trial rose from 20 to 600); Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 *BEHAV. SCI. & L.* 369, 370-71 (2003) (discussing studies documenting an increase in competency to stand trial commitments for nondangerous defendants in response to restrictions placed on civil commitment).

¹²Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 *U. CHI. L. REV.* 66, 75 (1972).

¹³*Id.*

¹⁴*Id.* at 76, 94-95.

Bruce Winick proposed that defendants who object to the incompetency adjudication should, with the concurrence of defense counsel, be able to waive the incompetency status and proceed to trial.¹⁵

These proposals have not succeeded¹⁶ and are not likely to succeed. The Supreme Court has specifically declared: “A criminal defendant may not be tried unless he is competent.”¹⁷ The Court has also held that “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.”¹⁸ These pronouncements virtually assure that the

¹⁵Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 573, 582-96 (1995); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 927-28, 951-79 (1985) [hereinafter *Restructuring*]. *But see* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 542-48 (1993) (critiquing *Restructuring*, endorsing a prohibition against trial of an incompetent defendant, and proposing an enhanced role for counsel and a minimization of formal judicial intervention to determine competence).

¹⁶*See Bonnie, supra* note 15, at 542 (asserting that “the Burt and Morris approach has found little favor in the courts because their proposal is wholly incompatible with settled law In the face of such a deeply rooted doctrine, the abolitionist proposal is, to put it mildly, somewhat quixotic.”).

¹⁷*Godinez v. Moran*, 509 U.S. 389, 396 (1993). In *Godinez*, the Court cited *Pate v. Robinson* for this proposition. *Id.* However, in *Pate*, the state simply conceded that due process is violated if an accused is *convicted* while legally incompetent. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). The Court has not specifically addressed the issue of whether trial of an incompetent defendant is permissible if the defendant is acquitted of the crime in that proceeding. Nevertheless, in *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975), the Court noted that the prohibition against trying a mentally incompetent defendant “is fundamental to an adversary system of justice.”

¹⁸*Pate*, 383 U.S. at 384.

competency adjudication process will not be abolished or radically restructured.

One would anticipate that the severe consequences of an incompetency adjudication¹⁹ would lead lawyers to fiercely dispute the issue whenever it is raised in court. Such a contest, however, rarely occurs.²⁰ Competence to stand trial is not viewed as an adversarial issue. In fact, to assure that the defendant is not deprived of the due process right to a fair trial,²¹ the prosecutor, and the defense attorney,²² as well as the trial judge,²³

¹⁹See *Restructuring*, *supra* note 15, at 928-51 (discussing in detail the staggering costs of conducting competency evaluations and treating those found incompetent and the burdens that the process places on defendants subjected to that process).

²⁰An American Bar Foundation study of competency hearings revealed that most hearings were completed quickly and often perfunctorily. MATTHEWS, *supra* note 11, at 122. See also HENRY J. STEADMAN, BEATING A RAP? 45-47 (1979) (reporting that 64% of competency hearings studied were not contested by either the district attorney or the defense counsel and that most of those hearings “were two- or three-minute rubber stampings of the psychiatric reports”). *Id.* at 47.

²¹U.S. CONST. amend. V (providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”); see also U.S. CONST. amend. VI (providing for various trial rights in all criminal prosecutions, including the assistance of defense counsel).

²²The American Bar Association, in its Criminal Justice Mental Health Standards, approved by the ABA House of Delegates in August 1984, adopted a standard requiring the prosecutor and the defense counsel to move for the evaluation of the defendant’s competence whenever the prosecutor or the defense counsel has a good faith doubt as to the defendant’s competence. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS standard 7-4.2 (b), (c) (1989). See also 18 U.S.C.A. § 4241(a) (2000) (authorizing the defense attorney or the government attorney to file a motion for a hearing to determine the defendant’s mental competence to stand trial and requiring the court to grant the motion, or to order a hearing on its own motion, if reasonable cause exists to believe the defendant is incompetent to stand trial).

²³In *Pate*, 383 U.S. at 385, the Supreme Court held: “Where the evidence raises a ‘bone fide’ doubt’ as to a defendant’s competence to stand trial, the judge on his own

all have an obligation to raise the issue whenever reasonable cause exists to believe that the accused is incompetent.

Once the issue is raised, defense counsel, who the Supreme Court acknowledges “will often have the best-informed view of the defendant’s ability to participate in his defense,”²⁴ typically does not testify in the incompetency hearing. The attorney may be concerned that his or her testimony may violate an ethical responsibility not to disclose confidential communications or any communication protected by the attorney-client privilege.²⁵ The attorney may be concerned that his or her testimony on the defendant’s competency may jeopardize the attorney-client relationship, especially if the attorney believes the defendant is incompetent and the defendant believes to the contrary.²⁶ Even if defense counsel testifies, his or her testimony is far more likely to be discounted as self-interested or biased than is the testimony of a forensic evaluator who conducted an

motion must impanel a jury and conduct a sanity hearing”

²⁴Medina v. California, 505 U.S. 437, 450 (1992).

²⁵See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.8 Commentary at 212-13 (1989). See *infra* note 196 and accompanying text (discussing ABA Standard 7-4.8(b)(ii), which protects the testifying attorney from disclosing such communications).

²⁶See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.8 Commentary at 213 (1989) (discussing the “strain” placed on the attorney-client relationship by the defense attorney’s testimony). See *infra* text following note 196 (suggesting the appropriate solution for the irreparably strained attorney-client relationship).

impartial examination of the defendant.²⁷

Indeed, trial judges appear to have little interest in carefully weighing all the evidence, and in making their own independent assessment of the defendant's competence. Rather, they simply prefer to adopt as their own the conclusion reached by the psychiatrist or psychologist who evaluated the defendant.²⁸ As Justice Blackmun observed, "[A] competency determination is primarily a medical and psychiatric determination. Competency determinations by and large turn on the testimony of psychiatric experts, not lawyers."²⁹ One recent study reported that courts agreed with the forensic evaluator's judgment in 327 out of the 328 cases studied—a 99.7% rate of agreement.³⁰ When judges in that study were interviewed regarding this phenomenon, they asserted: "[M]ental health

²⁷*Medina*, 505 U.S. at 466 (Blackmun, J., dissenting).

²⁸See Steven D. Hart & Robert D. Hare, *Predicting Fitness To Stand Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REP. 53, 56, 59 (1992) (reporting that the court agreed with the forensic evaluator's finding in 77 of 80 cases studied—a rate of agreement of 96.3%). See also RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 54-55 (1980) (discussing studies reporting that judges concur in the evaluator's conclusions approximately 90% of the time). Roesch and Golding concluded that "judges rarely base their decisions on anything but the concluding statement in the psychiatric report to the court." *Id.* at 17. They also found that a majority of judges, in the North Carolina sample they studied, did not even conduct a formal hearing to independently assess the defendant's competence. *Id.* at 198. An American Bar Foundation study revealed that "some courts have more or less consciously delegated their decision-making authority on the competency question to the doctors who perform the psychiatric examination." MATTHEWS, *supra* note 11, at 123.

²⁹*Medina*, 505 U.S. at 465 (Blackmun, J., dissenting).

³⁰Patricia A. Zapf *et al.*, *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?* 4 J. FORENSIC PSYCHOL. PRAC. ___ (in press 2004) (manuscript at 11, on file with Professor Morris).

professionals are more qualified (through their specific training) to answer the question of competency than are judges or other legal professionals.”³¹ One judge, expressing frustration with forensic evaluators who do not testify to the ultimate legal issue, stated that “his job would be ‘much easier’ if the mental health professional would ‘simply state whether the defendant is competent or not.’”³²

It is against this background that this Article considers the legal standards for the determination of competency to stand trial, and whether those standards are understood and applied by psychiatrists and psychologists in the forensic evaluations they perform and in the judgments they make—judgments that are routinely accepted by trial courts as their own judgments. Part II traces the historical development of the competency construct. Part III reports on a survey of forensic psychiatrists and psychologists who were asked to read two case study vignettes and assess the competency of each criminal defendant using three differently-worded competency standards. The objective was to determine whether forensic evaluators would distinguish between the standards (i.e., find the defendant competent under one standard but not under another) or whether they would find the defendant competent under all three standards or incompetent under all three standards. Relying on the results of that survey, Part IV makes specific recommendations to improve the competency assessment process. Fairness to the defendant cannot be achieved unless the competency standard is clearly defined and applied by those who assess and determine

³¹*Id.* at ___ (manuscript at 12).

³²*Id.*

competency.

II. The Competency Standard—From Dawn to *Dusky*³³

Historically, the requirement that the defendant be competent to stand trial in order for the criminal trial to proceed had both ritualistic and protective origins.³⁴ Medieval English law required the defendant to enter a plea before the criminal trial could proceed.³⁵ If the defendant remained mute, increasingly heavy weights were placed on the defendant to induce a plea so that the trial could continue.³⁶ But defendants who were mute because of mental disorder or physical infirmity (i.e., mute by visitation of God) instead of by choice (i.e., mute of malice) were spared this ritual.³⁷ The competency requirement also evolved from the prohibition against trials *in absentia*.³⁸ Just as a defendant who is not physically present cannot defend himself or herself, so too, a mentally incompetent defendant is unable to defend himself or herself, even if the defendant is physically present in the

³³*Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

³⁴GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 11, at 887.

³⁵*Id.*

³⁶*Id.*

³⁷*See id.*

³⁸Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960).

courtroom.³⁹ Delaying the trial until the defendant is both physically and mentally present protects the defendant from an adjudication of guilt that may not be warranted and that could have been avoided if the defendant were present to defend himself or herself.

Today, the competency requirement continues to be supported for both ritualistic and protective reasons. Mute criminal defendants are no longer tortured to force them to plead. The court merely enters a not guilty plea, and the trial proceeds. Nevertheless, trial is delayed for mentally incompetent defendants for two ritualistic reasons. The requirement of competence helps to assure that the trial will be conducted in a dignified manner. An incompetent defendant's inappropriate behavior disturbs, if not destroys, the trial process. The need to maintain proper courtroom decorum is not the only concern. If the defendant is not a rational participant, the very character of the trial process as a reasoned interaction between the state and the defendant is converted into a communal attack against a defenseless being.⁴⁰ The requirement of competence also serves to justify the imposition of punishment if the defendant is convicted. A retributive sanction is justifiably imposed only if the defendant is capable of understanding why society views his or her conduct as morally reprehensible and appropriate for punishment.⁴¹

Despite these ritualistic justifications, the protective functions of the competency adjudication are more frequently cited to vindicate the doctrine's continued existence. The

³⁹*Id.*

⁴⁰*See Note, Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967).

⁴¹*See id.*

requirement of competence safeguards the accuracy of the adjudication.⁴² An incompetent defendant may not be able to appreciate what evidence is relevant to establish a defense, or confer intelligently with counsel, or assess the evidence presented by the prosecution, or testify coherently at trial.⁴³ Accuracy, however, is not the only protective value. Society's promise of a fair trial demands that a defendant subjected to criminal trial be competent.⁴⁴ The defendant, not defense counsel, has the ultimate responsibility for various criminal process decisions, including whether: to plead innocent or guilty, to waive a jury trial, to testify at trial, and to raise particular defenses.⁴⁵ Those decisions can only be made by a competent defendant. As Blackstone asked, rhetorically, in 1769, "And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?"⁴⁶

⁴²*Id.* at 457. The authors declare that "the primary purpose of the incompetency rule is to safeguard the accuracy of adjudication." *Id.*

⁴³*See id.*

⁴⁴*See id.* at 457-58. In *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975), the Supreme Court noted that the prohibition against trying a mentally incompetent defendant "is fundamental to an adversary system of justice." The Court cited *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899) as authority to support its position. In *Youtsey*, the court stated: "It is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life." *Id.* at 941.

⁴⁵Bonnie & Grisso, *supra* note 11, at 75-76. *See also* Bonnie, *supra* note 15, at 568-70 (asserting that the defendant must personally waive several constitutional protections, must define the basic objectives of representation, and must select the main theory of defense).

⁴⁶4 WILLIAM BLACKSTONE, COMMENTARIES *24. In 1790, in proceedings against the defendant for high treason in the Old Bailey, the court applied Blackstone's command,

In 1835, the District of Columbia Circuit Court, in a trial of a defendant for attempting to assassinate President Andrew Jackson, quoted approvingly from Sir Matthew Hale's *History of the Pleas of the Crown*, written one hundred years earlier, in which Hale wrote that if "it appear to the court upon his trial, that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding."⁴⁷ The case is one of the first American cases to suggest that the loss of understanding caused by mental disorder, and not mental disorder in and of itself, warrants the adjudication of incompetency.

Just eleven years later, a New York court specifically tied the finding of incompetency to the defendant's inability to make a rational defense.⁴⁸ In construing the state's competency statute which prohibited trial of insane persons, the court held that

informing the English jury:

[C]ommon humanity . . . would suggest . . . that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing; for, however guilty he may be, the inquiry into his guilt must be postponed to that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law

Frith's Case, 22 How. St. Tr. 307, 318 (1790).

⁴⁷United States v. Lawrence, 26 F. Cas. 887, 891 (D.C. Cir. 1835) (No. 15,577) (quoting MATTHEW HALE, I THE HISTORY OF THE PLEAS OF THE CROWN (HISTORIA PLACITORUM CORONAE) 35 (1736)).

⁴⁸Freeman v. People, 4 Denio 9, 24 (Sup. Ct. N.Y. Co. 1847). The court noted that distinguished writers on criminal jurisprudence agreed that a mentally incompetent defendant should not be tried because "[a] madman cannot make a rational defense . . ." *Id* at 20.

sanity for purposes of competency to stand trial (i.e., the standard of present sanity), is not measured by whether the defendant knows right from wrong (i.e., the standard of sanity at the time of the criminal act).⁴⁹ Rather, if the defendant “is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner he is, for the purpose of being tried, to be deemed sane”⁵⁰

The *Freeman* case may be the first to articulate the two factors that have developed as the common law standard for competency to stand trial—an ability to understand the nature of the proceedings against the defendant and an ability to assist in the defense. As phrased by the *Freeman* court, the first factor focuses on the defendant’s thinking, i.e., the defendant’s ability to understand the proceedings.⁵¹ The second factor focuses on the defendant’s behavior, i.e., the defendant’s ability to make his or her defense, or to assist counsel in making that defense “in a rational manner.”⁵²

⁴⁹*Id.* at 24-25, 27-28.

⁵⁰*Id.* The court noted that although a “madman”—i.e., a person in a general state of insanity whose mental powers were wholly perverted or obliterated—would, necessarily, be incapable of making a rational defense, *id.* at 20, 27, nevertheless, a defendant in a partial state of insanity—i.e., a person whose mental illness is confined to some subject other than the alleged crime and the ensuing trial—“may be fully competent to understand his situation in respect to the alleged offense, and to conduct his defense with discretion and reason.” *Id.* at 27.

⁵¹*Id.* at 24-25.

⁵²*Id.* at 25.

Freeman is of more than historical interest.⁵³ In 1900, more than fifty years after *Freeman* was decided, the California Supreme Court quoted *Freeman*'s two-part standard and asserted: "If this is the true construction of the New York statute, as I have no doubt it is, it is equally the true construction of our own"⁵⁴ Seventy-four years later, the California legislature amended its competency statute to incorporate *Freeman*'s standard, declaring: "A defendant is mentally incompetent [to stand trial] if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."⁵⁵

Today, eight states, including such populous states as California, Illinois, Michigan, and North Carolina, use a standard of competency that includes a requirement that the defendant be able to either assist in or to conduct his or her defense in a "rational manner."⁵⁶ According to the 2000 census, the eight states that employ the "rational

⁵³For example, in 1874, the Texas Supreme Court, citing *Freeman*, stated that the competency question is whether "the accused [is] mentally competent to make a rational defense." *Guagando v. State*, 41 Tex. 626, 630 (1874). In *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899), the United States Court of Appeals for the Sixth Circuit, citing *Guagando*, stated that "the issue to be tried . . . is whether the accused can make a rational defense." *Id.* at 943.

⁵⁴*In re Buchanan*, 61 P. 1120, 1121 (Cal. 1900).

⁵⁵Act of Sept. 26, 1974, ch. 1511, § 2, 1974 Cal. Stat. 3316 (codified as amended at CAL. PENAL CODE § 1367(a) (West 2000)).

⁵⁶The eight states we have identified as "rational manner" states are: California, Illinois, Louisiana, Maine, Michigan, North Carolina, South Dakota, and Wyoming.

manner” standard have a total population of seventy-one million people (25.3% of the population of the United States).⁵⁷ Of the eight, California,⁵⁸ Michigan,⁵⁹ North Carolina,⁶⁰ and Wyoming⁶¹ specifically mention the “rational manner” language in their statutes, and South Dakota⁶² includes the “rational manner” language in a form for an order of a psychiatric examination appended to a statute. In Illinois⁶³ and Louisiana,⁶⁴ general statutory language requiring the defendant to be able to assist in his or her defense has been construed by those states’ supreme courts to mean assist in a rational manner, and in Maine, general statutory language prohibiting trial of an incompetent defendant has been construed by the Maine Supreme Court to require a capacity to assist in a rational manner.⁶⁵

⁵⁷According to the 2000 census, the population of the United States is 281,421,906. The population of states using the “rational manner” standard is 71,271,223. U.S. census taken April 1, 2000 *available at* <http://www.census.gov/Proess-Release/www/2003/SF4> (last visited on Sept. 3, 2003).

⁵⁸CAL. PENAL CODE § 1367(a) (West 2000).

⁵⁹MICH. COMP. LAWS ANN. § 330.2020(1) (West 1999).

⁶⁰N.C. GEN. STAT. § 15A-1001(a) (2003).

⁶¹WYO. STAT. ANN. § 7-11-302(a)(iii) (Michie 2003).

⁶²S.D. CODIFIED LAWS § 23a-46-13 (Form 13) (Michie 1998).

⁶³*People v. Foley*, 192 N.E.2d 850, 851 (Ill. 1963); *Withers v. People*, 177 N.E.2d 203, 206 (Ill. 1961).

⁶⁴*State v. Morris*, 340 So. 2d 195, 203 (La. 1976); *State v. Veal*, 326 So. 2d 329, 331 (La. 1976); *State v. Flores*, 315 So. 2d 772, 773 (La. 1975); *State v. Bastida*, 310 So. 2d 629, 632 (La. 1975).

⁶⁵*State v. Bowman*, 681 A.2d 469, 471 (Me. 1996); *State v. Lewis*, 584 A.2d 622, 624 (Me. 1990).

In most states today, the statutory standard for incompetence to stand trial simply requires mental disorder (or disability or disease or defect) that incapacitates the defendant from understanding the proceedings (or the nature of the proceedings) and from assisting in his or her defense (or assisting or cooperating with counsel in his or her defense).⁶⁶ The “in a rational manner” flourish has not been included in the statutes and has not been construed to be included by the appellate courts of most states. Similarly, the federal statute merely provides that a criminal defendant is incompetent if “he is presently suffering from a mental disease or defect rendering him . . . unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.”⁶⁷ Congress has not further defined the meaning of “properly.”

In 1960, the Supreme Court interpreted the federal competency statute. In *Dusky v.*

⁶⁶*See, e.g.*, COLO. REV. STAT. ANN. § 16-8-102(3) (West 1998); CONN. GEN. STAT. ANN. § 54-56d(a) (West Supp. 2004); IND. CODE ANN. § 35-36-3-1(b) (Michie Supp. 2003); MO. ANN. STAT. § 552.020(1) (West 2002); N.J. STAT. ANN. § 2C: 4-5(b) (West Supp. 2003); N.Y. CRIM. PROC. LAW § 730.10(1) (McKinney 1995); OHIO REV. CODE ANN. § 2945.37(G) (West 1997); VA. CODE ANN. § 19.2-169.1(A) (Michie Supp. 2003); WIS. STAT. ANN. § 971.13(1) (West Supp. 2003). These statutes are derived from, and largely restate, the common law standard. *See, e.g.*, *United States v. Chisolm*, 149 F. 284, 287 (C.C.S.D. Ala. 1906) (instructing the jury that the question to be determined is “whether at this time the prisoner is in such possession of his mental faculties as enables him to rightly comprehend his condition with reference to the proceedings against him, and to rationally aid in the conduct of his defense”); *Webber v. Commonwealth*, 13 A. 427, 431 (Pa. 1888) (stating that “[t]he principal point to be considered by the jury would be whether the defendant was of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defense”).

⁶⁷18 U.S.C.A. § 4241(d) (West 2000).

United States,⁶⁸ the Court, in a *per curiam* opinion, held that a defendant's competency is measured by "whether he 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."⁶⁹ Unlike the language of the "rational manner" standard, which can be interpreted to focus on both the defendant's thinking and his or her behavior,⁷⁰ the *Dusky* standard's use of "rational understanding" to measure both the defendant's comprehension of the proceedings and his or her ability to assist counsel suggests a focus on defendant's thinking for both components of competency.

The *Dusky* opinion is extremely brief—its 231 words are fewer than the 267 words uttered by Lincoln in his Gettysburg Address⁷¹—and was written at the time the Court granted the defendant's writ of certiorari agreeing to hear the case, not after the Court held a hearing and heard arguments on the issue.⁷² In a memorandum to the Court, the Solicitor General, arguing on behalf of the federal government, acknowledged that the district judge's finding that the defendant was oriented to time and place and had some recollection

⁶⁸362 U.S. 402 (1960) (*per curiam*).

⁶⁹*Id.* at 402 (quoting Memorandum for the United States at 11, *Dusky v. United States*, 362 U.S. 402 (1960) (No. 504 Misc.)).

⁷⁰*See supra* notes 50-52 and accompanying text.

⁷¹*See* Lincoln's Gettysburg Address, *available at* <http://www.loc.gov/exhibits/gadd/4403.html> (last visited March 2, 2004).

⁷²*Carroll v. Beto*, 330 F. Supp. 71, 73 (N.D. Tex. 1971).

of events did not sufficiently support the finding of incompetency.⁷³ The Solicitor General proposed the “rational understanding” standard as the appropriate standard for measuring a defendant’s competency.⁷⁴ The Supreme Court simply accepted the Solicitor General’s admission of error and his proposed competency standard.⁷⁵ The Court neither gave an

⁷³Memorandum for the United States at 11, *Dusky v. United States*, 362 U.S. 402 (1960) (No. 504 Misc.). Ironically, it appears that the district judge did not rely solely on the defendant’s orientation to time, place, and person to reach his conclusion that the defendant was competent. At the competency hearing, after all the evidence was presented, the judge stated:

I am of the opinion that the evidence that has been developed thus far, showing as it does that the defendant is oriented as to time and place and person, understands the nature of the charge that is pending against him, understands that he is actually being charged with an offense, understands what that offense is and so far as his ability to recite facts is concerned, in my opinion is able properly to assist in his own defense to the extent that he can develop those facts with his own attorney, it is my conclusion that he . . . is competent to stand trial

MATTHEWS, *supra* note 11, at 118. In response to the defense attorney’s objection and exception to the court’s ruling, the district judge added: “As I understand the narrow scope of the hearing contemplated . . . it simply is an action for us to determine whether he is sufficiently oriented as to time, place and person, and if he has a sufficient amount of background facts that he can work with counsel” *Id.* at 119.

⁷⁴Memorandum for the United States, *supra* note 73, at 11.

⁷⁵*Dusky*, 362 U.S. at 402. The Solicitor General also proposed that if on remand the district judge determined on the basis of additional evidence that the defendant was competent to stand trial, the defendant’s conviction “may properly stand, unless the trial judge, in his discretion, deems it appropriate to grant a new trial.” Memorandum for the United States, *supra* note 73, at 12-13. The Supreme Court did not accept this proposal, remanding the case for a new hearing on the issue of the defendant’s present competency to stand trial and for a new trial if the defendant was found competent. *Dusky*, 362 U.S. at 403.

At his first trial, Dusky’s defense of insanity was rejected, and he was sentenced to a forty-five-year term of imprisonment for the crime of unlawfully transporting in interstate

explanation of its holding nor explained the meaning of any terms in the test.⁷⁶

In the more than forty years since *Dusky* was decided, only a handful of states have enacted statutes incorporating the Supreme Court's standard.⁷⁷ Most have continued to use the common law codification that does not specifically mention the words "rational understanding." Although state legislatures have not rushed to embrace the *Dusky* standard, many state courts have done so. Even though the Supreme Court in *Dusky* was only interpreting the federal competency statute, state courts in interpreting their states' competency statutes have quoted the *Dusky* language verbatim, accepting the *Dusky*

commerce a girl who had been kidnapped. After the Supreme Court's decision, *Dusky* was again found competent to stand trial in a hearing that used the Supreme Court's "rational understanding" standard. At trial, *Dusky*'s insanity defense was rejected, and he received a lighter sentence of twenty years, with a possibility of parole after five years. He was released on parole before his sentence expired. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 11, at 878-79.

⁷⁶The Honorable John W. Oliver, United States District Court Judge for the Western District of Missouri, remarked: "No one quarrels with what the Supreme Court actually held in *Dusky*; unhappiness with *Dusky* is produced by the fact that the Supreme Court said so little as to why it held what it did." John W. Oliver, *Judicial Hearings to Determine Competency to Stand Trial*, in SENTENCING INSTITUTE OF NINTH CIRCUIT, 39 F.R.D. 523, 537, 543 (1965).

⁷⁷See FLA. STAT. ANN. § 916.12(1) (West 2001) (adopting the *Dusky* standard but requiring that for a finding of incompetency that the defendant have "no" rational or factual understanding of the proceedings); N.H. REV. STAT. ANN. § 135:17(II)(b) (Supp. 2003); TEX. CRIM. PROC. CODE ANN. § 46.B.003(a)(1),(2) (Vernon Supp. 2004); UTAH CODE ANN. § 77-15-2 (2003). Additionally, an Arizona statute specifically adopts the *Dusky* standard for defendants under the age of eighteen years, but does not adopt the *Dusky* standard for adult defendants. ARIZ. REV. STAT. ANN. § 13-4501(2) (West 2001).

standard as the required standard for measuring competency.⁷⁸ These decisions have occurred with such frequency that some commentators have asserted that all states construe their statutes to conform with the *Dusky* standard.⁷⁹ One authority declared: “In considering the criteria for determining competence to stand trial, one must begin—and indeed, end—with the criteria set forth in *Dusky v. United States*.”⁸⁰

Dusky has been deified, not only by state courts and commentators, but by the

⁷⁸See, e.g., *Deason v. State*, 562 S.W.2d 79, 81 (Ark. 1978); *State v. Johnson*, 751 A.2d 298, 314 (Conn. 2000) (stating that the Connecticut statutory definition “mirrors the federal competency standard enunciated in *Dusky*”); *Hardy v. State*, 716 So. 2d 761, 763 (Fla. 1998); *Perry v. State*, 471 N.E.2d 270, 274 (Ind. 1984); *State v. Lucas*, 323 N.W.2d 228, 232-33 (Iowa 1982) (stating that “[t]he critical question is” the *Dusky* standard); *Commonwealth v. Russin*, 649 N.E.2d 750, 755 (Mass. 1995); *State v. Wise*, 879 S.W.2d 494, 507 (Mo. 1994); *State v. Garner*, 36 P.3d 346, 352 (Mont. 2001); *Melchor-Gloria v. State*, 660 P.2d 109, 113 (Nev. 1983); *In re Williams*, 687 N.E.2d 507, 510-11 (Ohio Ct. App. 1997) (stating that the *Dusky* standard is “[t]he constitutional test under the Fourteenth Amendment”); *Commonwealth v. Haag*, 809 A.2d 271, 284 n.14 (Pa. 2002); *State v. Garfoot*, 558 N.W.2d 626, 630 (Wis. 1997) (stating that “[t]he basic test for determining competency was established by the United States Supreme Court in *Dusky*” and that the Wisconsin statute “is the codification of the *Dusky* test”).

⁷⁹See, e.g., Debra Whitcomb & Ronald L. Brandt, *Competency to Stand Trial 1* (Nat’l Inst. Just. Policy Brief 1985) (asserting that the *Dusky* “standard has been adopted in every state, either through court decision or by legislation”); Bruce J. Winick, *Incompetency to Stand Trial: Developments in the Law*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 3, 6 (John Monahan & Henry J. Steadman eds. 1983) (asserting that “all jurisdictions construe their respective statutory formulation in conformity with [*Dusky*]”). *But see* MARK C. BARDWELL & BRUCE A. ARRIGO, *CRIMINAL COMPETENCY ON TRIAL* 35 (2002) (asserting that “many state jurisdictions follow *Dusky* in substance or use a variation of *Dusky*’s test”); Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 *HASTINGS L.J.* 1053, 1059 (1977) (asserting that most states have adopted competency standards equivalent to *Dusky* either by statute or case law).

⁸⁰Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 *GEO. WASH. L. REV.* 375, 376 (1985).

Supreme Court itself. Although the *Dusky* decision involved only the interpretation of the federal statute, and although fifteen years after *Dusky*, the Court stated that *Dusky* was the approved standard “as to federal cases,”⁸¹ subsequent cases seem to read *Dusky* more expansively. For example, in its 1993 decision in *Godinez v. Moran*,⁸² the Court stated that a criminal defendant may not be tried unless competent and added that in *Dusky*, “we held that the standard for competence to stand trial is [the *Dusky* standard].”⁸³ Three years later, in *Cooper v. Oklahoma*,⁸⁴ the Court stated that the standard for measuring competence “is well settled,”⁸⁵ citing the *Dusky* decision and quoting the *Dusky* standard as the “well settled” standard.⁸⁶

In *Godinez*, the Court considered whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial.⁸⁷ The Court ruled that because a defendant who stands trial will be confronted with strategic choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty—such as whether to testify and thereby waive the privilege

⁸¹*Drope v. Missouri*, 420 U.S. 162, 172 (1975).

⁸²509 U.S. 389(1993).

⁸³*Id.* at 396.

⁸⁴517 U.S. 348 (1996).

⁸⁵*Id.* at 354.

⁸⁶*Id.*

⁸⁷*Godinez*, 509 U.S. at 391.

against self-incrimination, whether to waive a trial by jury, and whether to waive the right to confront his or her accusers by declining to cross-examine witnesses—no basis existed for requiring a higher level of competence for defendants who choose to plead guilty rather than proceed to trial.⁸⁸ “If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.”⁸⁹

The implication of this statement is that the *Dusky* standard is not merely adequate for all competency issues in a criminal trial, it is the standard that meets the minimum constitutional requirement for competency. Justice Thomas ended his majority opinion in *Godinez* by remarking that the competency requirement “seeks to ensure that [the criminal defendant] has the capacity to understand the proceedings and to assist counsel.”⁹⁰ As stated, Justice Thomas was quoting the common law standard. But then he added: “[W]hile States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.”⁹¹

Neither the concurring nor the dissenting justices in *Godinez* disputed the apparent

⁸⁸*Id.* at 398-99. The decision to plead guilty, said the Court, “is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.” *Id.* at 398. The Court also noted that the competence issue for waiver of the right to counsel is whether the defendant is competent to waive the right, not whether the defendant is competent to represent himself or herself. *Id.* at 399. Competence to represent oneself has no bearing upon one’s competence to choose self-representation. *Id.* at 400.

⁸⁹*Id.* at 399.

⁹⁰*Id.* at 402.

⁹¹*Id.*

elevation of the *Dusky* standard to the constitutional minimum requirement. In concurring, Justice Kennedy, in an opinion joined by Justice Scalia, wrote:

This Court set forth the standard for competency to stand trial in *Dusky* We have not suggested that the *Dusky* competency standard applies during the course of, but not before, trial. . . . The Due Process Clause does not mandate different standards of competency at various stages of or for different decisions made during the criminal proceedings.⁹²

In dissenting, Justice Blackmun, in an opinion joined by Justice Stevens, did not challenge the *Dusky* standard's applicability to the competency to stand trial question. Rather, Justice Blackmun disputed the applicability of the *Dusky* standard to a defendant's decision to plead guilty or to proceed without an attorney.⁹³ As he noted, a person who is competent to play basketball (or to stand trial with the assistance of an attorney) is not thereby competent to play the violin (or plead guilty or stand trial without the assistance of an attorney).⁹⁴

In summary, the creation of a constitutional standard for competency to stand trial is a most disconcerting example of Supreme Court decision making. In *Dusky*, the Court adopted verbatim for federal cases a standard of competency suggested by the Solicitor General in a memorandum to the Court.⁹⁵ The *Dusky* opinion was written at the time the

⁹²*Id.* at 403-04 (Kennedy, J., dissenting).

⁹³*Godinez*, 509 U.S. at 412 -16 (Blackmun, J., dissenting).

⁹⁴*Id.* at 413.

⁹⁵Memorandum for the United States, *supra* note 73, at 11, *adopted in Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

Court granted certiorari.⁹⁶ The Court heard no argument on the appropriateness of the standard, and it made no analysis of the standard.⁹⁷ In *Godinez*, the Court anointed the *Dusky* standard, proclaiming it the constitutional minimum standard for all criminal cases, and not just for the issue of competency to stand trial, but for other competency issues as well.⁹⁸ The Court heard no argument on the appropriateness of elevating the *Dusky* standard to constitutional status, and it made no analysis of the issue.

III. Assessing Competency Assessments: Evaluating the Evaluators

Although *Godinez* holds that the *Dusky* standard is the constitutional minimum for all competency to stand trial decisions,⁹⁹ do psychiatrists and psychologists apply the *Dusky* standard to all competency assessments, and are they instructed to do so by the trial courts who typically accept the evaluator's judgment of the defendant's competence as their own? Or do courts instruct the evaluators using the language of the statutory standard in their jurisdiction? The question is not merely of academic interest, particularly in jurisdictions that distinguish "rational manner" from "rational understanding." For example, in a recent case heard in the San Diego County Superior Court, the trial judge, acting on the prosecutor's request, instructed one of the co-authors that in testifying about the ability of

⁹⁶Carroll v. Beto, 330 F. Supp. 71, 73 (N.D. Tex. 1971).

⁹⁷See *supra* notes 71-76 and accompanying text.

⁹⁸*Godinez*, 509 U.S. at 398-99. See *supra* notes 87-94 and accompanying text.

⁹⁹*Godinez*, 509 U.S. at 398-99.

the defendant to assist counsel, the witness should not testify about the defendant's ability to *think* rationally, because under the California "rational manner" competency standard, the question of the defendant's ability to assist counsel is determined solely by the extent to which the defendant's capacity to *act* rationally has been impaired by his or her mental condition.¹⁰⁰ This interpretation may not be the correct interpretation or even the most appropriate interpretation of the "rational manner" standard.¹⁰¹ Nevertheless, it is a statutory construction that is being applied today by some courts.

A. Methodology

To inquire into forensic evaluators' understanding of the competency standard (or standards), the authors conducted a survey of forensic psychiatrists and forensic psychologists who were asked to read two case study vignettes and assess the competency of each criminal defendant using three differently-worded standards of competency—*Dusky*'s "rational understanding" standard, the "rational manner" standard, and the federal statutory standard that does not use the word "rational."¹⁰² As mentioned above,

¹⁰⁰In the case, the district attorney requested that the judge clarify the meaning of the term "rational manner." The district attorney wanted to limit the testimony of the forensic expert to the question of whether the defendant was capable of acting rationally. The public defender wanted the expert to testify about whether the defendant was capable of thinking rationally. After a meeting in the judge's chambers with the attorneys, the judge instructed the expert to limit his testimony as requested by the district attorney. E-mail from David Naimark to Grant Morris (May 2, 2004, 22:11:44 PDT) (on file with Professor Morris).

¹⁰¹*See infra* notes 125-36 and accompanying text (discussing court decisions equating the "reasonable manner" standard with the "rational understanding" standard).

¹⁰²For a more comprehensive analysis of the survey data, *see* Grant H. Morris et al., *Assessing Competency Competently: Toward a Rational Standard for Competency to*

the federal statutory standard is similar to the statutory standard found in many state statutes, merely requiring that the defendant have a mental disease or defect that makes him or her unable to understand the nature and consequences of the proceedings or to assist in his or her defense.¹⁰³ Unlike most state statutes, however, the federal statute specifies that to be competent, the defendant must be able to “assist properly” in his or her defense.¹⁰⁴ The objective of the survey was to discover whether forensic examiners would distinguish between the standards (i.e., find the defendant competent under one standard but not under another) or whether they would find the defendant competent under all standards or incompetent under all standards.

A questionnaire was mailed to the 922 individuals who are Board Certified in Forensic Psychiatry and who are also members of the American Academy of Psychiatry and Law and to the 189 individuals who are Diplomates in Forensic Psychology from the American Board of Forensic Psychology.¹⁰⁵ The two case study vignettes appear in Table 1.

Stand Trial Assessments, 32 J. AM. ACAD. PSYCHIATRY & L. ___ (in press 2004) (including a discussion dividing the survey results into various subcategories: discipline of the respondent (either psychiatrist or psychologist), jurisdiction in which the respondent conducts his or her primary practice (either “rational understanding” or “rational manner” jurisdiction), amount of experience of the respondent (either inexperienced or experienced)).

¹⁰³18 U.S.C.A. § 4241(d) (West 2000).

¹⁰⁴*See supra* note 67 and accompanying text. The federal statutory standard was interpreted by the Supreme Court in *Dusky* to be the “rational understanding” standard.

¹⁰⁵Of this total of 1111 questionnaires distributed, forty-eight (i.e., thirty-five mailed to psychiatrists and thirteen mailed to psychologists) were returned by the post office as undeliverable. Thus, the questionnaire was mailed successfully to 1063

[AUTHOR'S NOTE: ALL OF TABLE 1 MUST APPEAR ON THE SAME PAGE]

Table 1

COMPETENCY TO STAND TRIAL VIGNETTES

Vignette # 1. A 42-year-old male defendant is charged with stalking a famous movie actor. He tells the forensic examiner that he will plead “not guilty” as he was acting in “self defense”. The defendant completely understands the nature of the criminal proceedings. Regarding his defensive strategy, he explains that the actor implanted microchips into his brain and was controlling his behavior through these microchips by administering painful electric shocks to him each time the defendant behaved in a way that the actor did not like. Apart from the alleged stalking, the defendant’s behavior and speech was and remains normal.

Vignette #2. A 23-year-old female defendant is charged with murdering her husband after learning that he was having an affair with her sister. Upon being arrested, she became belligerent with the sheriff leading to her being “hog tied”. Once in jail, she was “pepper sprayed” by the jail staff after she refused to comply with directions. The jail psychiatrist diagnoses the defendant with impulse control disorder not otherwise specified (NOS) and offers her medication, which she refuses. In court, she screams profanities at the judge, spits at the bailiff, and turns over the defense table. She is selectively mute with the forensic examiner but knows why she is in jail and argues: “The dirty bum deserved what he got.”

In the first vignette, the facts indicate that the defendant’s thinking is impaired although his behavior, other than in committing the crime itself, is normal. Thus, if there is a meaningful difference between the “rational understanding” standard and the “rational manner” standard, we hypothesized that the defendant in the first vignette could be viewed as not having a rational understanding of the issues, but as able to conduct his arguably irrational defense in a rational manner. In contrast, in the second vignette, the defendant’s

individuals.

behavior is impaired—she is belligerent, screams profanities, and refuses to comply with directions—but her thinking is not. We hypothesized that the defendant in the second vignette could be viewed as having a rational understanding of the proceedings, but as not able to conduct her defense in a rational manner.

B. Results

A total of 273 psychiatrists and psychologists responded to the questionnaire, which is a response rate of 25.7%.¹⁰⁶ Although most respondents answered all questions, a few did not.¹⁰⁷ Table 2 includes all answers that were submitted by those who responded.

[AUTHOR’S NOTE: ALL OF TABLE 2 MUST APPEAR ON THE SAME PAGE]

Table 2

RESPONSES TO THE QUESTIONNAIRE

Vignette 1

Standard Applied

Defendant Competent

Defendant Incompetent

¹⁰⁶All responses received within two months of mailing the questionnaire are included within the data. Twelve additional responses were received subsequently, raising the number of responses to 285 (response rate: 26.8%), but these additional responses were not included within the data.

¹⁰⁷A total of 259 respondents answered all three questions to the first vignette; 237 answered all three questions to the second vignette. Fourteen respondents answered only some or none of the questions to the first vignette; thirty-six respondents answered only some or none of the questions to the second vignette.

Rational Understanding	128 (47.6%)	141 (52.4%)
Rational Manner	104 (39.4%)	160 (60.6%)
Assist Properly	130 (49.2%)	134 (50.8%)
Respondents who reached the identical conclusion under all three standards:	196 (75.7%)	
Defendant competent under all three standards:	87 (44.4%)	
Defendant incompetent under all three standards:	109 (55.6%)	
Respondents who did not reach the identical conclusion under all three standards:	63 (24.3%)	

Vignette 2

<u>Standard Applied</u>	<u>Defendant Competent</u>	<u>Defendant Incompetent</u>
Rational Understanding	169 (70.1%)	72 (29.9%)
Rational Manner	149 (61.1%)	95 (38.9%)
Assist Properly	149 (62.1%)	91 (37.9%)
Respondents who reached the identical conclusion under all three standards:	185 (78.1%)	
Defendant competent under all three standards:	130 (70.3%)	
Defendant incompetent under all three standards:	55 (29.7%)	
Respondents who did not reach the identical conclusion under all three standards:	52 (21.9%)	

The data reveal that in answering Vignette 1, respondents divided almost equally in deciding whether the defendant was competent to stand trial. In applying *Dusky's* “rational understanding” standard, 47.6% found the defendant competent, 52.4% found him

incompetent. In applying the “rational manner” standard, 39.4% found the defendant competent, 60.6% found him incompetent. The result was closest when respondents applied the federal statutory standard which does not use the word “rational” at all and focuses only on whether the defendant can “assist properly” in his defense. Under that standard, 49.2% found the defendant competent (130 respondents), and 50.8% found him incompetent (134 respondents).

There was somewhat greater agreement among respondents in analyzing Vignette 2. In applying the “rational understanding” standard, 70.1% found the defendant competent, and 29.9% found her incompetent. In applying the “rational manner” standard, 61.1% found the defendant competent, and 38.9% found her incompetent. In applying the “assist properly” standard, 62.1% found the defendant competent, and 37.9% found her incompetent.

In responding to both vignettes, more than three-fourths of respondents either found the defendant competent under all three standards or incompetent under all three standards. For the first vignette, 75.7% did not differentiate the result based on the standard applied; for the second vignette, 78.1% did not. Of those who did not differentiate, 44.4% found the defendant in Vignette 1 competent, and 55.6% found the defendant incompetent under all three standards. Of those who did not differentiate, 70.3% found the defendant in Vignette 2 competent, and 29.7% found the defendant incompetent under all three standards.

If our hypothesis regarding the vignettes is correct, the defendant in Vignette 1

should have been found incompetent under *Dusky*'s "rational understanding" standard and under the federal statutory standard interpreted to be the *Dusky* standard, but competent under the "rational manner" standard. Only two of the 259 respondents (0.8%) reached that conclusion. In fact, fourteen respondents (5.4%) reached the opposite conclusion. By our hypothesis, the defendant in Vignette 2 should have been found competent under the *Dusky* standard and the federal statutory standard, but incompetent under the "rational manner" standard. Only six of the 237 respondents (2.5%) reached that conclusion; three (1.3%) reached the opposite conclusion.

C. Discussion

1. The Divided Response to the First Vignette

The nearly equally-divided response to the first vignette is not merely surprising, it is shocking. When 128 forensic psychiatrists and psychologists analyze a fact situation (including the defendant's mental condition) and, applying the *Dusky* standard, find the defendant competent to stand trial, and 141 forensic psychiatrists and psychologists analyze the same facts and apply the same legal standard but reach the opposite conclusion, the message is clear: Something is terribly wrong. When 130 forensic psychiatrists and psychologists analyze a fact situation (including the defendant's mental condition) and, applying the federal statutory standard—a standard interpreted by the Supreme Court to be the *Dusky* standard—find the defendant competent to stand trial, and 134 forensic psychiatrists and psychologists analyze the exact same facts and apply the exact same legal standard but reach the opposite conclusion, the message is clear: The defendant's fate

depends only upon who performed the evaluation.

These nearly equal splits of opinion are certainly not a mere fluke of the sample. Even if the true population of forensic psychiatrists and psychologists would analyze a fact situation and, applying the *Dusky* standard would agree on the defendant's competence only 70% of the time, the chances of obtaining the relatively even split of opinion that was observed in the sample (128 to 141) would be less than one in one billion (1.067×10^{-9} or .00000001067). Similarly, if the true population of forensic psychiatrists and psychologists would analyze a fact situation and, applying the federal statutory standard would agree on the defendant's competence only 70% of the time, the chances of obtaining the relatively even split of opinion that was observed in the sample (130 to 134) would be less than one in one billion (2.214×10^{-10} or .000000002214).

If an 80% rate of agreement among the true population of forensic psychiatrists and psychologists could be anticipated, the chances of obtaining the relatively even splits of opinion that were observed in the sample would be less than one in ten quadrillions (or one in 10,000 trillions or one in ten million billions, i.e., 10^{-16}). Although one in one billion and one in ten quadrillions are mathematically very different, they “are really just two different ways to say never.”¹⁰⁸

If judges rely on the expertise of forensic evaluators to determine a defendant's

¹⁰⁸E-mail from Professor Cameron Parker, University of San Diego Department of Mathematics and Computer Science, to Grant Morris, Professor of Law, University of San Diego School of Law (Oct. 18, 2003, 11:51:38 PDT) (on file with Professor Morris).

competence, and they surely do,¹⁰⁹ then it is appropriate to ask whether those evaluators have such expertise. Are forensic psychiatrists and psychologists competent to assess competence? If the finding of competence or incompetence depends not on a scientific evaluation of the facts and the application of a legal standard to those facts, but rather, on an evaluation process that has no inter-rater reliability, the message is clear: We are truly “flipping coins in the courtroom!”¹¹⁰

It is easy to shoot the messenger. We acknowledge that the use of a vignette format to assess a defendant’s competence—especially when the vignette provides very limited data—does not equate with a forensic evaluation of a real defendant. Obviously, the psychiatrists and psychologists who participated in our survey did not have the opportunity to ask the questions they wanted to ask. They did not make their own diagnostic assessment and apply their findings to the applicable legal standard. To encourage them to respond to the questionnaire, the authors intentionally summarized the information available and did not include information that many evaluators might think important, if not determinative of their findings—for example, information on the interaction of the defendant with his or her attorney.

¹⁰⁹See *supra* notes 28-32 and accompanying text.

¹¹⁰The language: “flipping coins in the courtroom,” is derived from the title of a controversial, but influential, law review article that questioned the expertise of psychiatrists to predict dangerousness. See generally Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 694 (1974).

Both vignettes, however, were based on actual cases.¹¹¹ Although the information provided was limited, we believe that the data provided was sufficient—at least minimally sufficient—for the respondent to make a decision. In fact, some respondents commended us for the first vignette, declaring: “Good example” and “Excellent vignette.” One respondent asserted: “It’s a no brainer.” Nevertheless, half the brains who evaluated those facts found the defendant competent and half found him incompetent. Additionally, the first vignette involves a real world fact situation in which defense counsel might raise the issue of competency to stand trial—the defendant has committed a criminal act because of a delusional belief but is unwilling to consider an insanity defense because he does not consider his belief to be delusional.

Although we provided no information about the actual interaction of the defendant with his attorney, often such information is not available. Richard Bonnie noted, “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.”¹¹² Even when such interaction has occurred, Gary Melton and his colleagues observed: “In our experience most attorneys have neither the time nor the inclination to observe, much less participate

¹¹¹The vignettes were based on the facts of *People v. Napolis* and *People v. Bonigionanni*. These cases were trial court cases in the San Diego County Superior Court and are unavailable on Lexis and Westlaw.

¹¹²Bonnie, *supra* note 15, at 556.

in, competency-to-stand-trial evaluations.”¹¹³ In any event, we note that currently evaluators are asked to assess the defendant’s ability or capacity to assist his or her attorney, not the quality of the actual interaction that has occurred between them.

Almost all respondents were willing to answer the first vignette despite the lack of information about the defendant’s interaction with his attorney. Only two of the 273 respondents (0.7%) failed to answer at least one question about Vignette 1. In contrast, twenty-eight respondents (10.3%) failed to answer at least one question about Vignette 2. Most of those respondents simply asserted that they were unable to make a judgment without more information than was provided in the vignette. Five of the twenty-eight specifically mentioned the lack of information about the defendant’s interaction with her attorney. If, however, such information is not commonly available to forensic evaluators, then the fault lies not with the researchers who failed to provide the information in their questionnaire. Rather, the fault lies with a legal system that routinely permits a defendant’s competence to be evaluated without providing the evaluator with information about the attorney/client interaction that is essential to that evaluation. Ironically, although respondents were more reluctant to answer the second vignette questions than the first, for those who did respond, there was far more agreement in their answers to the second vignette than to the first.

2. Analysis of Respondents’ Comments

¹¹³MELTON ET AL., *supra* note 10, at 142.

To encourage a large response to the questionnaire, respondents were not required to explain their answers. Thus, the reasons underlying the respondents' conclusions cannot be systematically evaluated. Nevertheless, we did provide space on the questionnaire for respondents to comment on each vignette and on their responses to each vignette if they wished to do so. More than half the respondents availed themselves of the opportunity to comment on Vignette 1, and an equal number commented on Vignette 2.¹¹⁴ These comments provide insight into the respondents' decision making process.

a. Vignette 1: An Irrational Defendant Who Acts in a Rational Manner

Those respondents who found the Vignette 1 defendant incompetent focused on the defendant's delusion (that the actor implanted microchips in the defendant's brain and was controlling the defendant's behavior by administering electric shocks to him through those microchips) and his self defense plea based on that delusion. Several respondents expressed the opinion that the defendant's decision making was so impaired that he would not be able to assist in his defense. Others expressed concern that the defendant's delusion would preclude him from rationally considering an insanity defense or a plea of guilty.

Although the defendant's delusional self-defense argument is not likely to be successful, his "not guilty" plea might be. For example, to be guilty of the crime of stalking in California, the defendant must "willfully, maliciously, and repeatedly" follow

¹¹⁴A total of 146 comments were received on each vignette, although some respondents commented only on Vignette 1, and some respondents commented only on Vignette 2.

another person.¹¹⁵ It is quite possible that the defendant in the first vignette might be found “not guilty” of the crime because he acted in response to his delusional belief and not with the requisite malice. Under such a scenario, the defendant would have a delusional reason for pursuing a rational defense.

Even if that argument would not succeed, one might well question whether the defendant is incompetent simply because he might not allow his lawyer to raise an insanity defense that might prevent criminal conviction. In California, unless either a temporary restraining order or injunction has been issued against the stalker,¹¹⁶ or unless the stalker has previously been convicted of certain enumerated felonies¹¹⁷—prerequisites that were not mentioned in the vignette—the maximum penalty for the crime of stalking is only one year in the county jail.¹¹⁸ Most criminal defense lawyers would not want to risk an insanity

¹¹⁵CAL. PENAL CODE § 646.9(a) (West Supp. 2004). The crime of stalking also requires that the defendant make “a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.” *Id.*

¹¹⁶*Id.* § 646.9(b). Violation of this provision is punishable by imprisonment in the state prison for two, three, or four years. *Id.*

¹¹⁷*Id.* § 646.9(c). Violation of this provision is punishable by imprisonment in the state prison for two, three, or five years if the defendant has previously been convicted of: (1) wilful infliction of corporal injury on a spouse or former spouse, co-habitant or former co-habitant, or person who is the mother or father of the defendant’s child; (2) intentional and knowing violation of a protective order; (3) wilful threatening of death or great bodily injury to another; or (4) stalking. *Id.*

¹¹⁸*Id.* § 646.9(a).

defense—and indefinite post-trial commitment of their client¹¹⁹—when conviction would result in such a relatively small punishment. These insights suggest that forensic evaluators should not “play lawyer” and make assumptions about what defenses are likely to be raised at trial and their potential for success. They also suggest that evaluators need to interact with defense attorneys prior to conducting their evaluations to understand why the issue of competence to stand trial was raised (whether by the defense attorney, prosecutor, or court on its own motion) and what the defense strategy is likely to be.

Respondents who found the Vignette 1 defendant competent typically explained that although the defendant was delusional regarding the actor he stalked, the defendant’s delusion was “encapsulated” and did not affect his understanding of the criminal process or his ability to assist his attorney. Several respondents expressed their view that the defendant was competent but should be found not guilty by reason of insanity. A few respondents suggested that although “this is a close call,” the information that was provided did not overcome the presumption of competency.

b. Vignette 2: A Rational Defendant Who Acts in an Irrational Manner

In responding to Vignette 2, those who found the defendant incompetent focused on her behavior when she was arrested (she became belligerent), in jail (she refused to comply with directions), in court (she screamed profanities at the judge, spit at the bailiff, and

¹¹⁹*Id.* § 1026(a) & (b) (West Supp. 2004). The insanity acquittee is confined a state hospital until his or her sanity has been restored. The California Supreme Court has interpreted restoration to sanity to require that the defendant not be a danger to the health or safety of himself or herself or others. *In re Franklin*, 496 P.2d 465, 477 (Cal. 1972).

turned over the defense table), and with the forensic examiner (she was selectively mute).

Such behavior suggested that the defendant would not be able to work cooperatively with or assist counsel. A few respondents characterized the defendant as “out of control.” Some questioned the jail psychiatrist’s diagnosis, asserting that the defendant may be psychotic or manic. A few commented that although the defendant was presently incompetent, the problem was not likely to be a long-term problem.

In contrast, those who found the Vignette 2 defendant competent (and they were the clear majority of all respondents), typically asserted that the defendant had the capacity, but not the willingness to cooperate. Despite her anger, her decision to be uncooperative was a voluntary choice on her part. As a second major reason for finding the defendant competent, many respondents focused on the psychiatric diagnosis. Several noted that the defendant either had no mental disorder or only a personality disorder but did not have a psychosis or other Axis I disorder that interfered with her cognitive abilities. Some respondents specifically questioned the jail psychiatrist’s diagnosis. One characterized the diagnosis of impulse control disorder as “next to useless.” A second declared that the diagnosis “sounds improbable.” A third suggested that borderline personality disorder and antisocial personality disorder might be more appropriate diagnoses, and a fourth suggested malingering. A few respondents relied upon the presumption of competence and the lack of any evidence of the defendant’s belligerence toward her attorney.

In most states, to find a defendant incompetent to stand trial, his or her lack of capacity to understand the proceedings or to assist in the defense must be the result of

mental disorder.¹²⁰ The authors specifically included the information about the jail psychiatrist's diagnosis to assure that respondents directed their attention to the capacity issue and did not simply claim that the Vignette 2 defendant was merely angry but not mentally disordered. Frankly, we were surprised that so many respondents took issue with the statement that the jail psychiatrist determined that the defendant had a mental disorder and that the specific diagnosis was impulse control disorder NOS. After all, the law does not require psychosis as a prerequisite for incompetency. And yet, many respondents seemed to impose just such a requirement. In essence, unless the defendant was psychotic, he or she was not considered to be "sick" enough to be found incompetent to stand trial.

Admittedly, a psychotic defendant is a prime candidate for a finding of incompetency, especially if the delusions he or she experiences relate directly to the criminal process or the defense attorney. Such a defendant may lack a rational understanding of the proceedings and may not be able to consult with the attorney with a rational understanding as required by the *Dusky* standard. But if competency is measured by whether the defendant can assist counsel in a rational manner, other mental disorders may qualify. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders states that "[t]he essential feature of Impulse-Control Disorders is the failure to resist an impulse, drive, or temptation to perform an act that is harmful to the

¹²⁰Some states use alternative language to "mental disorder," such as "mental disability," "mental disease," or "mental defect."

person or to others.”¹²¹ Although a person can be diagnosed with impulse control disorder even if that person is not completely unable to control his or her harmful behavior, nevertheless, some degree of difficulty in controlling one’s harmful impulse is necessarily implied by the diagnosis. After all, if a person has normal impulse control, he or she should not be diagnosed with this mental disorder. If the difficulty in controlling one’s harmful impulses is sufficiently severe, it might result in courtroom outbursts or other behavior that prevents the defendant from assisting in his or her defense in a rational manner.

c. Other Comments: Confusing Clinical Considerations with Forensic Assessment

Some comments suggest that some evaluators equate a finding of incompetency with the severity of the defendant’s mental disorder rather than how that disorder incapacitates the defendant from achieving the level of competency required by the law’s standard. Diagnosis, however, is not the only criterion used by these evaluators. In addition, consideration is also given to treatment that will enhance the defendant’s capabilities—even if the defendant may be competent at the time of the evaluation. For example, in finding the Vignette 1 defendant incompetent, one respondent wrote, “[I]n our jurisdiction, we error [sic] on the side of providing treatment to impaired individuals so that the integrity of the trial is protected.” Another wrote: “Defendant should have [an]

¹²¹AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 663 (DSM-IV-TR) (4th ed. text revision 2000).

opportunity to be treated before he makes a final choice of defenses.” A third asserted: “In my state this individual would be treated prior to determining whether he could be tried despite the delusional beliefs that were the basis of his crime.”

Treatment concerns were also a consideration for some of those who found the Vignette 2 defendant incompetent. For example, one asserted: “This woman most likely is a behavior problem but, in my opinion, should be assessed and treated if possible on an inpatient unit where she would be court committed (forensic unit) as incompetent.”

Another wrote: “She appears to need medication. I would lean toward unfit with a greater period of observation as an inpatient.” Some would find the defendant incompetent so that she would have an opportunity to calm down before the trial could proceed. As one respondent phrased it: “In real life where I practice, this lady would be given the opportunity to ‘chill,’ during which time she might better understand where her best interests lie.”

Evaluators eager to improve the mental condition of a criminal defendant should not be tempted to find a competent defendant incompetent in order to delay trial and provide treatment that the evaluator believes is desirable.

The authors do not mean to suggest that only clinical concerns may bias an evaluator’s findings. For example, one respondent offered a policy judgment to support his conclusion that both vignette defendants should be found competent. He asserted: “A rational system of criminal justice would never permit depriving a defendant of the right to a speedy trial.” However, that policy judgment, which would preclude defendants being found incompetent to stand trial, has not been adopted by our society. If an evaluator

accepts the responsibility of performing an evaluation for the court, he or she should also accept the rules under which that evaluation is performed.

3. Assessing Competency: Three Standards or Only One?

How can one explain why more than three-fourths of all respondents did not differentiate between the various standards of competency in answering the questions posed in Vignette 1 and Vignette 2?¹²² There are several possible explanations. As the authors have suggested, some respondents may have based their decisions, not on the language of the competency standards, but rather, on clinical issues such as the defendant's diagnosis (i.e., whether he or she is "sick" enough)¹²³ or the perceived need for treatment (i.e., would the defendant benefit from treatment before he or she stands trial).¹²⁴ Several comments suggest that differences in the competency standard were irrelevant to some respondents' decision making on the first vignette. For example, one respondent wrote: "This defendant should be incompetent to stand trial under any standard." (emphasis in original). Another wrote: "It is hard to imagine any standard by which an individual with such a bizarre delusion about the offense [would be competent]." A third asserted: "This one's a bit obvious—the defendant is so clearly irrational." And a fourth: "He seems clearly impaired—regardless of the standard." A fifth also acknowledged the irrelevancy of the

¹²²See *supra* text following Table 2.

¹²³See *supra* Part IIIC2b.

¹²⁴See *supra* Part IIIC2c.

legal standard, asserting: “Irrespective of the specific legal definition of competency, . . . I’d conclude he is incompetent based on active psychosis that impairs his reasoning ability and judgment.”

In answering the second vignette, one respondent, who questioned the impulse control disorder diagnosis, seemed to suggest that the defendant should be found incompetent, under all three standards, so that she could be medicated over her objection. The respondent wrote: “[G]iven the severity of her control lapses, I have to wonder about a mood disorder. Her refusal of medications, if it persists, may result in the court ordering medication over [her] objection, for which she must first be found incompetent to stand trial.”

Some respondents may have based their decisions on the competency standard used in the jurisdiction in which they practiced and then applied that decision to the other standards with which they were less familiar. Some may not have understood the differences between the standards or did not accept those differences even if they did understand them. For example, one respondent asserted, “I’m not impressed with the standards . . . really being different.” Another perceived the issue in the first vignette as being the defendant’s ability to make a rational choice of defense strategy not affected by his delusion “regardless of the test’s wording.” This same respondent asserted that for the second vignette, “Again, the test really doesn’t matter. . . . The exam would focus on what she’s capable of, not simply the way she now acts, but the wording of the competency standard is no real help otherwise.” Other respondents did not claim that the wording of the

tests was irrelevant but asked for an explanation of operative terms in the various standards. For example, several questioned the meaning of the words “to assist properly” in the federal statutory standard. Others questioned the meaning of the words “to assist counsel . . . in a rational manner” in the “rational manner” standard and “a reasonable degree of rational understanding” or “a rational as well as factual understanding” in the *Dusky* standard.

In the authors’ judgment, only one of the 273 respondents adequately explained why the Vignette 1 defendant might be competent under the “rational manner” language, but be incompetent under the “rational understanding” and “assist properly” standards. As he or she commented: “[Rational understanding] seems less restrictive in determining how well he can assist his attorney. The manner is rational, but his premise is psychotic.” The respondent added that the “properly assist” requirement of the federal statutory standard and the “reasonable degree of rational understanding” requirement of the *Dusky* standard “raise the threshold needed to be competent.”

Perhaps, however, one should not accept the suggested distinction between *Dusky*’s cognitive focus and the “rational manner” standard’s behavioral focus. Perhaps there is only one appropriate standard of competency, not two or three. In several states that employ the “rational manner” standard, courts have interpreted their standard to be the equivalent, or virtual equivalent of *Dusky*’s “rational understanding” standard. For example, Michigan’s competency to stand trial statute specifically uses the “rational manner”

standard.¹²⁵ In a case that pre-dated, and also presaged, the Supreme Court's *Godinez*¹²⁶ decision, the Michigan Court of Appeals rejected a defendant's assertion that a higher standard of competence is required to plead guilty than to stand trial.¹²⁷ The court quoted the Supreme Court's *Dusky* "rational understanding" standard, and then stated: "We feel this is sufficient protection for any defendant, either in standing trial or in submitting a plea."¹²⁸ The court then quoted, without further comment, the Michigan statutory standard.¹²⁹ The implication is that the two standards are identical.

The Illinois competency statute merely provides: "A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense."¹³⁰ In three cases decided in the 1960s, the Supreme Court of Illinois interpreted that statutory standard to be whether the defendant "can, in co-operation with his counsel, conduct his defense in a rational and reasonable manner."¹³¹ Although these cases are not of recent vintage, they were decided

¹²⁵MICH. COMP. LAWS ANN. § 330.2020 (West 1999).

¹²⁶*Godinez v. Moran*, 509 U.S. 389 (1993). *See supra* notes 87-89 and accompanying text.

¹²⁷*People v. Belanger*, 252 N.W.2d 472, 477 (Mich. Ct. App. 1977).

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰725 ILL. COMP. STAT. ANN. 5/104-10 (West 1992).

¹³¹*People v. Foley*, 192 N.E.2d 850, 851 (Ill. 1963); *People v. Richeson*, 181 N.E.2d 170, 172 (Ill. 1962); *Withers v. People*, 177 N.E.2d 203, 206 (Ill. 1961). *See also* *People*

post-*Dusky*, and they are the most recent pronouncements on the subject by the Illinois Supreme Court. That is why we included Illinois as a “rational manner” jurisdiction. Nevertheless, in 1980, the Illinois Court of Appeals applied *Dusky*’s “rational understanding” standard,¹³² and in 1996, the Seventh Circuit Court of Appeals applied *Dusky* in a federal habeas corpus proceeding involving an Illinois state prisoner.¹³³

California is also a “rational manner” jurisdiction.¹³⁴ Although the California Supreme Court noted that the *Dusky* decision only involved the United States Supreme Court’s implementation of the federal statute, nevertheless the California Supreme Court asserted that the *Dusky* standard is “nearly identical” to the standard of competency under the California statute.¹³⁵ The Indiana Court of Appeals, in comparing the “rational understanding” standard with the “rational manner” standard, stated: “[R]ather than posing different tests, these statements represent differently worded versions of the same inquiry.”¹³⁶ If, as these appellate court decisions suggest, the standards are identical, or are at least virtually identical, then respondents who did not distinguish between them did not

v. *Bender*, 169 N.E. 328, 332 (Ill. 1960) (using similar, but not identical language, i.e., whether the defendant “can co-operate with his counsel and conduct his defense in a rational and reasonable manner”).

¹³²*People v. Turner*, 410 N.E.2d 1151, 1154 (Ill. App. Ct. 1980).

¹³³*Eddmonds v. Peters*, 93 F.3d 1307, 1314 (7th Cir. 1996).

¹³⁴CAL. PENAL CODE § 1367(a) (West 2000). *See supra* notes 54-55.

¹³⁵*People v. Hill*, 429 P.2d 586, 593 n. 6 (Cal. 1967).

¹³⁶*Smith v. State*, 427 N.E.2d 1156, 1158 (Ind. Ct. App. 1981).

err in treating them as the same.

IV. Recommendations and Conclusion

More than thirty years ago, an American Bar Foundation study asked: “What are the professional responsibilities of court, counsel, and doctor in a system which lacks clarity of purpose and sufficiency of means? Is the whole business an inadvertent mixture of obsolete forms, bankrupt techniques, and wishful thinking?”¹³⁷ Although these questions were directed at all phases of the criminal process in which mental disorder is an issue, the study maintained that the inquiry into competency to stand trial “is the critical phase in the classification and disposition of criminal defendants having symptoms of mental disturbance.”¹³⁸ If this critical phase of the criminal process is bankrupt, the process itself is bankrupt.

If, as suggested by the title of this article, competency to stand trial really is on trial, then it is time to announce the verdict: Guilty as charged! As discussed in Part I, the theory of adjudicating competency—a beneficent process to assure that the defendant receives a fair trial—is not matched by the harsh reality of the consequences imposed on the defendant found incompetent—an *in limbo*, hybrid status of not quite criminally punishable (though remaining accused of a crime) and not quite civilly committable (though involuntarily

¹³⁷MATTHEWS, *supra* note 11, at 195 (footnote omitted).

¹³⁸*Id.* at 193.

detained for treatment of the mental condition that rendered the defendant incompetent).¹³⁹ Despite these consequences, the competency adjudication process has not been taken seriously, either by prosecutors and defense counsel who raise the issue of competence and introduce evidence on the issue, or by judges who supposedly consider that evidence and make their decisions.¹⁴⁰ Lawyers may raise the issue of the defendant's competence not only when they reasonably believe the defendant is incompetent, but also for tactical and strategic reasons whenever a psychiatric or psychological examination may be helpful to their side of the case.¹⁴¹ Judges often defer their judgment on the question of the defendant's competence to the expertise of psychiatrists and psychologists whose testimony and expressed conclusion on the competency issue provides "cover" for judges who fear reversal on appeal.¹⁴²

¹³⁹See *supra* notes 2-11 and accompanying text.

¹⁴⁰See *supra* notes 24-32 and accompanying text.

¹⁴¹For example, a prosecutor who believes that the defendant may plead an insanity defense may raise the competency issue to obtain a forensic evaluation of the defendant's mental condition at an early stage of the trial process—even though the law typically delays the prosecutor's right to an evaluation of the defendant's sanity until much later, i.e., after the defendant gives notice of an intent to rely upon a psychiatrist's or psychologist's expert testimony to support an insanity defense. A prosecutor may also raise the competency issue to divert the defendant into a coerced treatment situation even if the defendant is not civilly committable. See MELTON ET AL., *supra* note 10 and accompanying text. Defense counsel may raise the competency issue to delay the trial process in an attempt to obtain a consensual disposition of the case without trial. See MATTHEWS, *supra* note 11, at 89-90 (discussing manipulation of the competency issue for discovery and dispositional purposes).

¹⁴²See *supra* notes 28-32 and accompanying text. To assure that a conviction of the defendant is not reversed on appeal, judges who have no reason to suspect that the

But do these mental health professionals have the expertise necessary to assess competency competently and even to decide the competency question? As discussed in Part III, the study we conducted, though limited to two short vignettes, suggests not.¹⁴³ The problem, however, may not lie solely or even primarily with the forensic experts, but rather, with the legal standard used to assess competency, and with the judges and lawyers who fail to participate actively in the competency adjudication process.¹⁴⁴

A. The Competency Standard: Deifying or De-deifying Dusky?

Psychiatrist and critic Dr. Thomas Szasz once wrote: “When it comes to judging ability to stand trial, . . . we seem to be at sea, with no compass to guide us.”¹⁴⁵ We should acknowledge the correctness of his insight. Although Szasz wrote his comment almost forty years ago, just five years after *Dusky* was decided, his assertion is as accurate today as when it was written. Our first two recommendations attempt to assure that Szasz’s

defendant is incompetent to stand trial may also raise the competency issue whenever a defendant pleads insanity.

¹⁴³*See supra* Part III.

¹⁴⁴Because our recommendations are derived from, and respond to, the data from our study of competence assessment, we do not address all of the systemic problems of the competency to stand trial issue. Clearly, however, these broader problems need to be addressed. For example, the competency issue should not be raised by a prosecutor or a defense attorney merely to achieve some tactical or strategic advantage in the criminal trial or to achieve diversion of the defendant from the criminal process into the involuntary mental commitment process. *See supra* note 141 and accompanying text. Similarly, judges should not raise the competency issue when reasonable cause does not exist to believe that the defendant is incompetent. *See supra* note 142.

¹⁴⁵THOMAS S. SZASZ, *PSYCHIATRIC JUSTICE* 27 (1965).

insight does not remain accurate for another forty years.

Although the data from our study are disturbing, one need not conclude that competency cannot be assessed competently and that we should abandon the effort altogether. The Supreme Court will not allow us to do so. As mentioned previously, the Court has specifically prohibited the trial of incompetent criminal defendants.¹⁴⁶ Trial of potentially incompetent defendants without an inquiry into their competency is simply not a viable option.¹⁴⁷

Even Dr. Szasz did not call for elimination of the competence inquiry. Szasz's remedy was to exclude psychiatrists and psychologists from the process of evaluating the defendant and from deciding the defendant's competence to stand trial or serving as expert witnesses on the subject. Rather, he would place the responsibility for deciding the defendant's competency in the hands of a judge or panel of judges, a lawyer or panel of lawyers, or a lay jury.¹⁴⁸ But our data do not support this remedy. The two vignettes used in

¹⁴⁶*Godinez v. Moran*, 509 U.S. 389, 396 (1993). *See also* *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (stating that the prohibition of trial of an incompetent defendant "is fundamental to an adversary system of justice"); *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (acknowledging that "the conviction of an accused person while he is legally incompetent violates due process").

¹⁴⁷*See supra* notes 12-18 and accompanying text (discussing proposals to abolish or to allow waiver of the competency issue and explaining why such proposals are not likely to succeed).

¹⁴⁸SZASZ, *supra* note 145, at 255-56. *See supra* note 15 and accompanying text (discussing other proposals to involve the defense attorney in deciding whether the defendant is competent to proceed).

our study were not typical cases. Rarely do evaluators confront defendants who are irrational but who act in a rational manner (Vignette 1) or who are rational but who act in an irrational manner (Vignette 2). Often the issue of competence is easier to assess and to determine. We are not prepared to exclude psychiatrists and psychologists from assisting courts in resolving the competency issue. Although our recommendations are more modest, nevertheless, we believe they are essential to assure that competency is assessed competently.

Recommendation 1. The “rational manner” standard for judging a defendant’s competency to stand trial should be eliminated. The “rational manner” standard was introduced to American jurisprudence in 1847.¹⁴⁹ However appropriate it may have been for decision making at that time—a time when James Polk was President¹⁵⁰—it is inappropriate today. The standard is ambiguous. Some courts have construed it as a behavioral standard that focuses only on the defendant’s capacity to act rationally, i.e., to behave appropriately in the courtroom or in interactions with defense counsel.¹⁵¹ Others have construed it as a cognitive standard, equating it with *Dusky’s* “rational understanding”

¹⁴⁹Freeman v. People, 4 Denio 9, 24-25 (N.Y. Sup. Ct. 1847). *See supra* notes 48-50 and accompanying text.

¹⁵⁰The White House, History & Tours, Past Presidents, James K. Polk, *available at* <http://www.whitehouse.gov/history/presidents/jp11.html> (last visited March 3, 2004).

¹⁵¹A recent example is the case heard in the San Diego County Superior Court in which the judge limited the forensic expert’s testimony on the issue of the defendant’s ability to assist counsel. The judge ruled that the issue is determined solely by the defendant’s ability to act rationally, not by the defendant’s ability to think rationally. *See supra* note 100 and accompanying text.

test.¹⁵²

As a behavioral standard, the “rational manner” standard fails as an appropriate measure of defendant’s competence. Although the dignity of the court proceedings are not disrupted by a defendant who sits quietly through the trial, the adversarial process necessarily assumes that the defendant will be a rational and active participant in that process. Indeed, the Supreme Court has acknowledged that during the course of the criminal trial, the defendant “may be required to make important decisions”¹⁵³ and “strategic choices.”¹⁵⁴ The objective of providing the defendant with a fair trial cannot be achieved unless the defendant has the requisite rational understanding of the proceedings. As the Supreme Court noted in *Drope v. Missouri*, “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.”¹⁵⁵

As a cognitive standard, the “rational manner” standard is both confusing and unnecessary. *Dusky*’s “rational understanding” standard, which by its language focuses attention on the defendant’s thinking, is a preferable alternative.

¹⁵²See *supra* notes 125-36 and accompanying text.

¹⁵³*Godinez v. Moran*, 509 U.S. 389, 398 (1993).

¹⁵⁴*Id.*

¹⁵⁵*Drope v. Missouri*, 420 U.S. 162, 171 (1975).

In *Godinez*, the Supreme Court, in ruling that the *Dusky* standard is the minimum due process requirement for competency, specifically noted that states may adopt, but are not required to adopt, a competency standard that imposes additional requirements.¹⁵⁶ Therefore, although *Dusky* is not the only possible standard that may be used to measure competency, states are not free to adopt a standard that requires a lower level of competence than is required by *Dusky*'s "rational understanding" standard.¹⁵⁷ A "rational manner" standard might be acceptable if it required the defendant to both rationally understand and rationally act, but it would not be acceptable if it merely required the defendant to act rationally without also requiring that the defendant have a rational understanding. By this analysis, the San Diego County Superior Court judge erred in applying the "rational manner" standard when he refused to consider the quality of the defendant's thinking, i.e., whether the defendant could consult with counsel with a reasonable degree of rational understanding. If the quality of the defendant's thinking is not considered, the competency standard applied is lower than *Dusky*'s minimally required "rational understanding" standard.

Stated theoretically, the "rational manner" standard could be construed to require a higher level of competence than the "rational understanding" standard. Nevertheless, courts in "rational manner" jurisdictions have not availed themselves of the opportunity to so

¹⁵⁶*Godinez*, 509 U.S. at 402.

¹⁵⁷*See id.* (noting that states may "adopt competency standards that are more elaborate than the *Dusky* formulation").

construe it, and, given the almost universal acceptance of the *Dusky* standard, they are not likely to do so in the future. Unless they do so, however, the “rational manner” standard exists only to confuse, not to clarify, the competency question.

Recommendation 2. Legislatures and appellate courts should refine the Dusky “rational understanding” standard. Although the *Dusky* standard is preferable to the “rational manner” standard, it too, is woefully deficient. Commentators have described the *Dusky* standard as “unsatisfactorily vague,”¹⁵⁸ “confusing and ambiguous,”¹⁵⁹ “sketchy,”¹⁶⁰ and lacking in specificity and detail.¹⁶¹ One judge acknowledged the *Dusky*’s “rational understanding” language “eludes any attempt at uniform definition.”¹⁶² What is meant by a

¹⁵⁸Bennett, *supra* note 80, at 377.

¹⁵⁹Mark C. Bardwell & Bruce A. Arrigo, *Competency to Stand Trial: A Law, Psychology, and Policy Assessment*, 30 J. PSYCHIATRY & L. 147, 164 (2002). *See also* Bonnie, *supra* note 15, at 593 (asserting that courts are confused by the question of how the *Dusky* formula applies to impairments of a defendant’s abilities to make rational decisions); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 653 (1993) (mentioning the “ambiguities of the Supreme Court’s test”); Patricia A. Zapf & Jodi L. Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation of Competency to Stand Trial*, 21 BEHAV. SCI. & L. 351, 352 (2003) (asserting that the definition of competency to stand trial, “as exemplified by the ambiguities of *Dusky*, has never been explicit”).

¹⁶⁰MELTON ET AL., *supra* note 10, at 125. Melton also described *Dusky* as a “rather sparsely worded standard.” *Id.* at 122. *See also* Steven L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial*, 8 LAW & HUM. BEHAV. 321, 323 (1984) (asserting “the abstract and open-ended characteristic of the *Dusky* standard allows . . . for a good deal of confusion and ambiguity”).

¹⁶¹Bardwell & Arrigo, *supra* note 159, at 165. Bardwell and Arrigo also characterized the *Dusky* standard as “ambiguous and underspecified.” *Id.* at 214.

¹⁶²Lafferty v. Cook, 949 F.2d 1546, 1558 (10th Cir. 1991) (Brorby, J., dissenting).

“sufficient present ability”¹⁶³ to consult with one’s lawyer? What is meant by “a reasonable degree of rational understanding?”¹⁶⁴ But rather than promoting legislative and judicial efforts to clarify the competency standard by answering those questions, the *Dusky* standard, by its very existence as the Supreme Court’s articulated standard, has obstructed and prevented such efforts. Appellate courts in particular seem unwilling to risk reversal by suggesting language that would give real meaning to *Dusky*’s largely-undefined competency construct. Rather, courts take the safe route and merely quote the *Dusky* standard as being the standard applicable to the case before it. As Jan Brakel recently noted, remarkably little consideration has been given to the concept of rationality as a standard to separate those who are fit to stand trial from those who are not.¹⁶⁵

It is time to de-deify *Dusky*. Although both Florida and Utah have adopted the *Dusky* standard by statute,¹⁶⁶ at least they have also enacted legislation that provides some further guidance to mental health professionals on what issues are to be considered and addressed in the competency evaluation.¹⁶⁷ Other states have not chosen to provide such guidance. The Florida and Utah statutes, however, are no panacea. Those statutes use words

¹⁶³*Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

¹⁶⁴*Id.*

¹⁶⁵S. Jan Brakel, *Competency to Stand Trial: Rationalism, “Contextualism” and Other Modest Theories*, 21 BEHAV. SCI. & L. 285, 286 (2003).

¹⁶⁶FLA. STAT. ANN. § 916.12(1) (West 2001); UTAH CODE ANN. § 77-15-2 (2003).

¹⁶⁷FLA. STAT. ANN. § 916.12(3) (West 2001); UTAH CODE ANN. § 77-15-5(4) (2003).

such as “comprehend,”¹⁶⁸ “appreciate,”¹⁶⁹ “understand,”¹⁷⁰ and “engage in reasoned choice”¹⁷¹ without further clarification or definition. Perhaps this lack of specificity explains, at least in part, a conclusion reached by researchers who conducted a study of Utah forensic evaluators.¹⁷² The researchers found that despite the statutory requirement that evaluators consider and address the defendant’s capacity to “engage in reasoned choice of legal strategies and options,”¹⁷³ such consideration occurred “relatively infrequently.”¹⁷⁴

By and large, the legal profession has left it to mental health professionals to develop their own competence assessment instruments to operationalize the *Dusky* standard. But those instruments are not without their limitations. Until recently, such instruments did not provide for standardized administration and objective, criterion-based scoring.¹⁷⁵ The recently developed MacArthur Competence Assessment Tool–Criminal

¹⁶⁸UTAH CODE ANN. § 77-15-5(4)(a)(i), (iii) (2003).

¹⁶⁹FLA. STAT. ANN. § 916.12(3)(a), (b) (West 2001); UTAH CODE ANN. § 77-15-5(4)(a)(i), (iii) (2003).

¹⁷⁰FLA. STAT. ANN. § 916.12(3)(c) (West 2001); UTAH CODE ANN. § 77-15-5(4)(a)(v) (2003).

¹⁷¹UTAH CODE ANN. § 77-15-5(4)(a)(iv) (2003).

¹⁷²*See generally* Jennifer L. Skeem et al., *Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUM. BEHAV. 519, 522-45 (1998) (reporting on the study of Utah forensic evaluators).

¹⁷³UTAH CODE ANN. § 77-15-5(4)(a)(iv) (2003).

¹⁷⁴Skeem et al., *supra* note 172, at 532.

¹⁷⁵MELTON ET AL., *supra* note 10, at 148.

Adjudication [MacCAT-CA] broadly assesses both the defendant's cognitive and decision making capabilities and is a standardized and nationally norm-referenced clinical measure.¹⁷⁶ However, the MacCAT-CA has been criticized for its primary reliance on a hypothetical vignette format which limits the evaluator's ability to assess the defendant's competence to deal with the specific issues involved in defending his or her particular case.¹⁷⁷ By eliminating items and measures from its more comprehensive prototype¹⁷⁸ (which took two hours to administer),¹⁷⁹ the streamlined MacCAT-CA (which only takes thirty-five to forty minutes to administer)¹⁸⁰ compromised the ability of evaluators to assess a key component of competence—the defendant's ability to make decisions that arise

¹⁷⁶Zapf & Viljoen, *supra* note 159, at 359. Thomas Grisso declared: “The degree of standardization of administration provided by the MacCAT-CA, as well as evidence for interscorer reliability, inspires confidence in the norms and their application in clinical cases.” THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 97 (2d ed. 2003). See generally MELTON ET AL., *supra* note 10, at 145-48 (discussing the MacCAT-CA); Bardwell & Arrigo, *supra* note 159, at 191-99 (discussing the MacCAT-CA).

¹⁷⁷Zapf & Viljoen, *supra* note 159, at 360-61.

¹⁷⁸See Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 *LAW & HUM. BEHAV.* 141, 147-77 (1997) (discussing the MacCAT-CA prototype).

¹⁷⁹Bardwell & Arrigo, *supra* note 159, at 196. The two hours required for administration of the prototype was characterized by researchers as “daunting” in light of other available measures that were administered in thirty to forty-five minutes. Hoge et al., *supra* note 178, at 176.

¹⁸⁰Bardwell & Arrigo, *supra* note 159, at 196.

in the criminal process.¹⁸¹

Some writers have suggested that contemporary assessment tools and continued efforts to improve them will fail due to the inherent problems in the legal definition of competency.¹⁸² Until the courts and legislatures clarify the language of *Dusky*, competence assessment instruments are merely attempts to quantify the unquantifiable.¹⁸³ Even if these instruments can be improved in the future, they are of no value unless they are used.

¹⁸¹*Id.* at 198-99. *See* Bonnie, *supra* note 15, at 567-87 (proposing that decisional competence should be distinguished conceptually and doctrinally from competence to assist counsel).

¹⁸²Bardwell & Arrigo, *supra* note 159, at 151 (asserting that “problems inherent in the legal definitions and difficulties with past instruments suggest that contemporary measures will, by logical extension, be similarly suspect”), 180 (asserting that “assessment difficulties are traceable to the legal standard as set forth in *Dusky* and its progeny”), 199 (asserting that “advances in the clinical evaluation area are constrained by legal cases [specifically mentioning *Dusky*]; thus the psychological measures are limited in what they can achieve”), 201 (asserting that “although clinical and scholarly efforts continue to revamp assessment measures, problems inherent in the controlling and enduring standards [specifically mentioning *Dusky*] logically suggest that the instruments themselves will also be similarly flawed”).

¹⁸³*See* Bennett, *supra* note 80, at 379. Bennett asserts that psychological tests are helpful in delineating areas of inquiry for the evaluator but that the final determination of competence depends on the interrelationship of many factors, some of which are not related to the evaluator’s clinical findings. *Id.* *See also* JOHN W. PARRY, NATIONAL BENCHMARK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 169 (Mara L. Flynn ed., American Bar Association 1998) (asserting that testimony based solely on psychological assessment instruments “is an inadequate foundation for clinical opinion about criminal competence. None of these competency instruments assess legal competency per se, but rather provide an index of abilities that are relevant to making legal determinations about a defendant’s competence.”); Bonnie & Grisso, *supra* note 11, at 77 (asserting that the question of whether the defendant is competent “is a highly contextualized value judgment that depends on the circumstances of the particular case,” thus because not all competence-related abilities are amenable to standardized assessment, no quantifiable test can decide whether the defendant is competent).

Research indicates that, at least currently, the overwhelming majority of psychiatrists and psychologists do not use psychological tests in assessing a defendant's competency.¹⁸⁴

Rather, they rely primarily on their own forensic interview with the defendant.

B. The Competency Adjudication Process: The Roles of Judges, Lawyers, and Forensic Evaluators

Recommendation 3. Judges, lawyers, and forensic evaluators should understand and accept their roles in the competency assessment process. Improving the standard used to measure the defendant's competency will not, in and of itself, assure that the process for determining competency is improved. Problems in the process itself need to be addressed. For example, trial court judges should not be allowed to relinquish their responsibility for deciding the issue of the defendant's competency to stand trial to psychiatrists and psychologists.¹⁸⁵ It is simply unacceptable for judges to assert that mental health professionals are better trained and better qualified to answer the question of

¹⁸⁴Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26 PROFESSIONAL PSYCHOL.: RESEARCH AND PRACTICE 465, 468 (1995) (reporting that only 11% of psychiatrists and 36% of psychologists studied almost always used forensic assessment instruments in assessing competence to stand trial); Skeem et al., *supra* note 172, at 537 (reporting that only 25% of forensic reports studied described using forensic assessment instruments in assessing competence to stand trial). *See also* Miller, *supra* note 11, at 385 (asserting that "most of the experience in using [forensic assessment instruments] resides in inpatient clinicians," not community clinicians). Miller's comment suggests that psychological tests are more frequently used to assess whether an incompetent defendant has been "restored" to competency, rather than whether he or she was incompetent initially.

¹⁸⁵*See supra* notes 28-32 and accompanying text.

competency than they are. Psychiatrists and psychologists are experts in assessing whether the defendant has a diagnosable mental disorder or whether the defendant is malingering.¹⁸⁶ They can explain how a person's mental disorder affects, or may affect, his or her understanding of issues and decision making capability. But they are not expert in deciding whether the defendant has a "sufficient" ability to consult with his or her attorney or has a "reasonable" degree of rational understanding. Those decisions are legal policy decisions appropriately within the province of the judge.¹⁸⁷

Attorneys, especially defense attorneys, have an important role to play in the competency evaluation process. It is simply unacceptable for them to claim that they lack the time and inclination to provide information to the forensic evaluator about their interaction with their client and the defense strategy in the case that may be helpful in assessing the defendant's capacity to consult with counsel. After all, the defense attorney

¹⁸⁶See Perlin, *supra* note 159, at 679 (asserting that in deciding the issue of competency to stand trial, courts focus, "almost obsessively, on testimony that raises the specter of malingering" despite the absence of evidence suggesting that malingering is a significant problem).

¹⁸⁷Ironically, in the *Dusky* case itself, the decision of the trial judge, who did not blindly accept the testifying psychiatrist's conclusion that Dusky was incompetent, was reversed by the Supreme Court. *Dusky v. United States*, 362 U.S. 402, 403 (per curiam). The Supreme Court expressed concern that the trial judge had merely determined that Dusky was oriented to time, place, and person, even though the trial judge expressly stated that he also considered whether the defendant understood the charges against him, was able to recite facts about the case with his attorney, and was able to assist in his own defense. *See id.* In his memorandum to the Supreme Court, the Solicitor General asserted that before the trial judge rejects the conclusion of the forensic expert, the "judge ought at a minimum, have other expert opinion." Memorandum for the United States, *supra* note 73, at 12.

is the individual who knows best whether the defendant's impairments impede or compromise the defense of the case.¹⁸⁸ Admittedly, the law only requires a "global" assessment of the defendant's competence to stand trial, i.e., it asks only for an analysis of the defendant's ability to consult with his or her attorney, not an analysis of the actual consultation between them.¹⁸⁹ Nevertheless, information on the actual interaction between the defense attorney and the defendant and probable defense strategy may be important, if not critical, to the evaluator's assessment. Such information is especially significant in cases in which the defense attorney has raised the issue of the defendant's competency. In its Criminal Justice Standards, the American Bar Association has included a standard that authorizes defense attorneys to attend forensic evaluations of their clients' competence to stand trial.¹⁹⁰ The commentary to that standard notes: "A thorough evaluation may require that counsel be present at the interview to enable the evaluating professional to observe the attorney-client relationship. Counsel's attendance may also ensure that the clinician will receive needed information about the defense strategy in the case"¹⁹¹

Even if the attorney does not attend the evaluation, the attorney and the evaluator

¹⁸⁸Bonnie, *supra* note 15, at 546, 563.

¹⁸⁹The *Dusky* standard, for example, asks only whether the defendant "has sufficient present *ability* to consult with his lawyer with a reasonable degree of rational understanding." *Dusky*, 362 U.S. at 402 (emphasis added).

¹⁹⁰ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-3.6(c)(i) (1989). The standard provides that "the defense attorney is entitled to be present at the evaluation." *Id.*

¹⁹¹*Id.* Commentary at 104.

should engage in a meaningful dialogue before the evaluation is performed. To adequately protect the defendant's legitimate interest in maintaining confidentiality regarding defense strategy and the privilege against self-incrimination, courts can place constraints on the contents of the forensic report or redact portions of the report before it is disclosed to the prosecution and can limit the testimony of the forensic evaluator when the competency issue is considered in court.¹⁹²

If, as the American Bar Association asserts, defense counsel “may well be the single most important witness” on the issue of the defendant's ability to consult and interact appropriately with his or her attorney,¹⁹³ then defense attorneys should be encouraged to testify on this issue in court.¹⁹⁴ It is simply unacceptable for the defense attorney to raise the issue of his or her client's competency to stand trial, listen to the trial judge challenge the forensic evaluator's testimony that the defendant is incompetent, register objection to the court's ruling that the defendant is competent, *and then* state to the judge, “I, as his attorney, have reached [the conclusion that the defendant is not properly able to assist in his defense], although I do not feel, as his attorney, that I should take the witness stand and be

¹⁹²Similarly, if the evaluation is recorded, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution. *Id.* Standard 7-3.6(d).

¹⁹³*Id.* Standard 7-4.8 Commentary at 211. *See also* *Medina v. California*, 505 U.S. 437, 450 (1992), in which the Supreme Court acknowledged that defense counsel “will often have the best-informed view of the defendant's ability to participate in his defense.”

¹⁹⁴*See supra* notes 24-27 (discussing defense attorney reluctance to testify in competency hearings).

sworn and offer evidence in that regard.”¹⁹⁵ But that is exactly what happened at the competency hearing of Milton Dusky!¹⁹⁶

To encourage defense attorneys to testify on the competency issue, the American Bar Association has adopted a standard that would protect the testifying attorney from a requirement that he or she divulge confidential communications or communications protected by the attorney-client privilege.¹⁹⁷ If the defense attorney’s testimony irreparably damages the attorney-client relationship, another defense attorney should be substituted for the testifying attorney. That alternative is clearly preferable to conducting a criminal trial of a truly incompetent defendant who was found competent because the defendant’s first attorney chose not to testify. Substitution of counsel for a legitimate reason is permissible; trial of an incompetent defendant is not.

Finally, psychiatrists and psychologists who perform competency to stand trial evaluations must learn to differentiate clinical issues from forensic issues. Numerous comments from respondents in the study we conducted clearly suggested that decisions on competence were determined by clinical considerations—did the defendant have a serious mental illness,¹⁹⁸ was the defendant psychotic,¹⁹⁹ would the defendant benefit from

¹⁹⁵MATTHEWS, *supra* note 11, at 118.

¹⁹⁶*Id.*

¹⁹⁷ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.8(b)(ii).

¹⁹⁸See *supra* Part IIIC2b.

¹⁹⁹*Id.*

treatment²⁰⁰—and not by the legal standard for competency that was supposedly applicable to the assessment. It is simply unacceptable for an evaluator to assert, as did one respondent did in answering Vignette 1 of our survey, “Irrespective of the specific legal definition of competency, in this case the defendant is incompetent based on active psychosis that impairs his reasoning ability and judgment.”²⁰¹

Although we do not condone this response, we may be able to explain it. If courts and legislatures are unwilling to develop and refine a better standard for measuring competency than the vague *Dusky* standard,²⁰² the evaluator cannot be expected to divine a more definitive standard. If trial judges express interest only in the evaluator’s ultimate conclusion so that they may adopt that conclusion as their own,²⁰³ the evaluator is encouraged to testify only about his or her ultimate conclusion, not the information and the analysis of that information that serves as the basis for the evaluator’s judgment.²⁰⁴ If

²⁰⁰*See supra* Part IIIC2c.

²⁰¹More than thirty years ago, the American Bar Foundation asserted that most doctors approach the issue of competency to stand trial by asking themselves: “Is this patient psychotic?” The American Bar Foundation responded: “This is not the appropriate question.” MATTHEWS, *supra* note 11, at 86.

²⁰²*See supra* notes 158-65 and accompanying text.

²⁰³*See supra* notes 28-32 and accompanying text.

²⁰⁴*See, e.g.,* Skeem et al., *supra* note 172, at 533, noting that evaluators’ reports “generally provide little data to support their conclusions about defendant’s [competency to stand trial] impairments.” When impairments were noted, evaluators “typically provided *no* description of a relationship between the impairment and symptoms of psychopathology . . . or merely *asserted* that there was a relationship. Very few reports provided data or reasoning to specifically describe how a defendant’s psychopathology compromised

defense attorneys do not provide evaluators with information about their interactions with their clients,²⁰⁵ evaluators are unable to analyze that interaction in assessing the defendant's ability to consult with his or her attorney.²⁰⁶ Unless judges, lawyers, and forensic evaluators understand and accept their roles in the competency assessment process, the elusive goal of that process—to assure that the defendant receives a fair trial—will not be achieved.

[competency to stand trial] abilities.” *Id.* (emphasis in original).

²⁰⁵*See supra* notes 188-92 and accompanying text.

²⁰⁶In order to perform a competent evaluation, the forensic psychiatrist or psychologist should contact the defense attorney to discuss the case or to arrange a meeting if the attorney has not taken the initiative to contact the forensic evaluator. Generally, forensic evaluators do not initiate such contact. *See Skeem et al., supra* note 172, at 537 (reporting that only 9% of the forensic reports studied indicated that the evaluator contacted the defense attorney).

