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**ARTICLE: EMOTIONAL COMPETENCE, "RATIONAL UNDERSTANDING," AND THE CRIMINAL DEFENDANT**

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**SUMMARY:**

... *Adjudicative competence, more commonly referred to as competence to stand trial, is a highly under-theorized area of law. ... Exploring the relevance of such research for adjudicative competence and demonstrating how a decision-making focus sometimes is invoked in the cases illuminates an approach that may give substance to the sketchy outlines of Dusky rational understanding. ... This Part, then, seeks to articulate, with reference to the decision-making model presented in Part I, the theoretical underpinnings of an adjudicative competence standard that incorporates a sophisticated understanding of emotion. ... In *Drope v. Missouri*, for example, the Supreme Court found that while a recent suicide attempt did not per se signal incompetence, it was highly relevant to whether a competence inquiry was required, presumably because it provides some indication of serious depression. ... It has argued specifically that courts and examiners should consider whether clinical depression (whether unipolar or bipolar) has impaired substantially a defendant's perception, appreciation, and ability to choose, and that the emotional deficits attending certain forms of brain damage should be regarded as important concomitants of impaired capacity for reasoning and choice. ...*

**HIGHLIGHT: ABSTRACT**

*Adjudicative competence, more commonly referred to as competence to stand trial, is a highly under-theorized area of law. Though it is well established that, to be competent, a **criminal defendant** must have a "rational" as well as "factual" understanding of her situation, the meaning of such "rational understanding" has gone largely undefined. Given the large number of criminal prosecutions in which competence is at issue, the doctrine's instability stands in stark contrast to its importance.*

*This Article argues that adjudicative competence, properly understood, asks whether a **criminal defendant** has capacity to participate meaningfully in the host of decisions potentially required of her. Further, sound assessment of such capacity requires attention to both the cognitive and emotional influences on rational decision-making in situations of personal relevance and risk. The role of emotion has been neglected, both in traditional accounts of decision-making and in assessments of adjudicative competence, and merits particular attention. This Article explores two examples of potentially competence-threatening emotional dysfunction--severe psychiatric mood disorder and organic brain damage--either of which may interfere unreasonably with decision-relevant emotional perception, processing, and expression. Existing legal theory and forensic testing methods, which reflect a predominantly cognitive approach, do not account adequately for such dysfunction. Shifting the adjudicative competence inquiry away from a general search for "rationality" and toward a more finely grained examination of the cognitive and emotional influences on rational decision-making processes offers our best hope for giving meaning to "rational understanding."*

**TEXT:**

## [\*1376] INTRODUCTION

*[C]ognition is not as logical as it was once thought and emotions are not always so illogical. <sup>1</sup>*

The legal standard for adjudicative competence <sup>2</sup> appears simple: as the Supreme Court declared in *Dusky v. United States*, the test is whether a **criminal defendant** "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." <sup>3</sup> This surface clarity, however, disguises a fundamental lack of transparent meaning. A robust conception of adjudicative competence that gives meaning to the *Dusky* standard must ask whether a **criminal defendant** has the capacity to participate meaningfully in the host of decisions potentially required of her, and sound assessment of such capacity requires careful attention to both the cognitive and emotional influences on rational decision-making. To date, no such theory of *Dusky* rationality has been adequately articulated, and implementation of the adjudicative competence construct is commensurately unstable. A decision-making approach, one that overtly concerns itself with both emotion and cognition, offers a path to both legitimate and stabilize a confused area of criminal law.

Adjudicative competence is, in many respects, the neglected younger sibling of the insanity defense, a

secondary status that may explain its instability and relatively low profile. Its jurisprudence has grown up in insanity's shadow, to the extent that it until recently was referred to as "present insanity."<sup>4</sup> Indeed, in the execution context the language of insanity and competence continues to be confusingly intertwined.<sup>5</sup> Forensic experts often undertake to examine both competence and legal insanity at the same time and--unfortunately--by the same [\*1377] criteria, generally that of insanity; courts historically have done little better.<sup>6</sup> The two doctrines also meet with the same generally disdainful attitude, as incompetence, like insanity, appears to many to be a mechanism by which perpetrators of criminal acts can escape accountability.<sup>7</sup> But legal insanity and adjudicative competence are importantly distinct: the former looks to whether a person is able to understand the nature and quality of her acts, so as to justify attachment of criminal consequences, while the latter looks to whether a defendant is possessed of sufficient capacity to defend her own interests within the various stages of an ensuing prosecution.<sup>8</sup>

Though the insanity defense claims the lion's share of attention, adjudicative competence is far more important. Certainly, it has a much deeper reach into the defendant population. Indeed, one commentator has asserted that "[v]irtually every **criminal defendant** who appears to be mentally ill at any time within the criminal trial process is examined for competency,"<sup>9</sup> as compared with the extremely small number of defendants who mount an insanity defense.<sup>10</sup> Actual or suspected adjudicative incompetence affects a consistently significant percentage [\*1378] of misdemeanor and felony defendants:<sup>11</sup> it is implicated in as many of 8% of cases,<sup>12</sup> accounts for tens of thousands of forensic examinations and admissions to inpatient medical facilities every year,<sup>13</sup> and easily is the most common subject of mental health testimony in criminal cases.<sup>14</sup> The consequences of an incompetence adjudication are, from a defendant's perspective, grave: such a finding may well translate into long-term confinement, particularly for those defendants deemed dangerous to themselves or others, without opportunity for a finding of guilt or innocence.<sup>15</sup>

Indeed, among inpatients with criminal-justice-system involvement, those with questioned competence or who have been adjudicated incompetent far outnumber those for whom insanity at the time of the offense is the issue--perhaps by a margin as great as 100 to 1.<sup>16</sup>

Despite the evident importance of adjudicative competence, and despite its solid historical pedigree,<sup>17</sup> it remains a surprisingly neglected and ill-defined area of law.<sup>18</sup> This is despite the fact that the governing legal standards appear straightforward. [\*1379] The law is clear, for example, that a **criminal defendant** has a fundamental constitutional right not to be tried, convicted, sentenced, or executed while incompetent.<sup>19</sup> The substantive meaning of "incompetence" might appear similarly clear, but in fact is theoretically slippery.<sup>20</sup> The meaning of each term embedded within the *Dusky* standard--notably the distinction between a "rational" and a "factual" understanding--has escaped significant elaboration by courts and theorists.<sup>21</sup> It is also highly unpredictable in application, in large part because the task of implementing *Dusky* generally falls to forensic experts, to whom courts defer heavily but to whom firm guidance as to the legal standard is seldom given.<sup>22</sup> These experts--typically psychologists and psychiatrists, but sometimes specialists in other areas of medicine and the mind sciences<sup>23</sup>--may differ wildly in approach, theoretical framework, understanding of the relevant legal constructs, and conclusions. Factually similar cases therefore may meet different outcomes; indeed, it is common for different experts to reach diametrically opposed conclusions [\*1380] in the same case.<sup>24</sup> Forensic

experts and legal theorists have collaborated, particularly in very recent years, to formulate standardized mechanisms for defining and measuring competence-relevant facts, but these tests are not yet widely used, despite their promise of promoting some measure of uniformity. <sup>25</sup>

In short, adjudicative competence, despite its enormous importance, is on whole a surprisingly ramshackle affair. <sup>26</sup> It is poorly understood, under-theorized, and inconsistently implemented.

This Article proposes that a coherent theory and practice of adjudicative competence requires a robustly articulated concept of the baseline rationality we expect of **criminal defendants**. The first step in such an articulation is recognition that the *Dusky* standard embraces a requirement of "decisional competence," that is, the ability to make, communicate, and implement minimally rational and self-protective choices within the unique context of the criminal case. <sup>27</sup> The crucial, yet to date entirely unexplored, next step is to recognize that both cognition and emotion--colloquially, thinking and feeling--make important contributions to such rational decision-making capacity. The role of emotion in adjudicative competence therefore is the primary focus of this Article.

Part I.A situates adjudicative competence within a family of law-relevant competencies and briefly outlines the decision points at which it may affect any given criminal proceeding. Part I.B demonstrates that decisional competence is inherent in the "rational understanding" component of the *Dusky* standard. Part I.C then articulates the necessary components of the rational decision-making on which a **criminal defendant's** decisional competence depends. Drawing on certain courts' analysis of the disruptive effects of psychotic thought disorder, this Section models how an appropriately fine-grained analysis of competence will seek to articulate precisely where in the decision-making process the defendant has gone astray and explain why those defects implicate her ability to represent her own interests within a criminal proceeding.

Part II then argues that the role of emotion is wrongly neglected in the traditional account of decision-making, including its application to adjudicative competence, and that attention to emotion's role illuminates certain threats to competence that are not perceptible with a solely cognitive view. The historical privileging of cognition within adjudicative competence mirrors the traditional, if of late largely discredited, disparagement and neglect of emotion within both law and the mind [\*1381] sciences. Part II.A therefore calls special attention to emotion's role in decisionmaking. Part II.B then explores two illustrative contexts in which a focus on emotion will yield results that a cognitive inquiry likely will not: cases in which a defendant suffers from a severe psychiatric mood disorder or from organic brain damage, where such condition unreasonably interferes with decision-relevant emotional perception, processing, and expression. Existing legal theory and forensic testing methods do not account explicitly for competence-relevant emotional dysfunction, and a predominantly cognitive approach is likely to miss or discount its impact.

Part III addresses weighty issues of implementation and policy, asking how a focus on the thinking-and-feeling elements of rational decision-making might be applied and whether such an application would further the goals of the adjudicative competence doctrine without unduly threatening other valuable societal goals. This Part argues that the transparency benefits of this approach are substantial and, further, that it could be implemented with an acceptable level of reliability and consistency. Part III

proposes further that while this approach may generate tensions with other social goods--such as promoting defendant autonomy and protecting public safety--it will not add appreciably to those tensions already attending the adjudicative competence inquiry.

This Article concludes that a proper view of the *Dusky* standard requires that, when judging whether a defendant is competent to decide for herself how to navigate the shoals of criminal prosecution, we look to both her thought processes and emotional functioning.

## I. "RATIONAL UNDERSTANDING" AND RATIONAL DECISION-MAKING

Adjudicative competence doctrine, like all law-relevant competencies, traditionally has sought to balance competing interests. On the side of finding competence wherever possible are respect for a defendant's autonomy and the state's interest in enforcing its criminal law; the countervailing interest is, fundamentally, that of protecting those who cannot protect themselves.<sup>28</sup> Significantly, the common-law doctrine of competence is thought to have developed "as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."<sup>29</sup> Prosecution of an incompetent defendant is thought to be an unfair fight of the worst kind, one that threatens grave harm to the individual, endangers reliability of outcome, and erodes the dignity of the process. Adjudicative [\*1382] competence thus is "fundamental to an adversary system of justice."<sup>30</sup> For the adversary system to have legitimacy, the defendant must be meaningfully present as an autonomous actor capable of taking, should she so choose, permissible steps to attempt to protect herself from the assertion of state power.

Adjudicative competence therefore may be implicated at any stage in a criminal proceeding at which it appears that the defendant may lack such self-protective capacity, and--as the following Sections demonstrate--at each such juncture the operative inquiry is whether she is capable of making rational decisions in service of her defense. While this focus on "decisional competence" has not been explicitly endorsed by the Supreme Court, it is implicit in the case law; indeed, it is hard to imagine a viable concept of competence that excludes it. Accepting a role for decisional competence requires a theory as to the necessary components of rational decision-making with reference to the particular decisions facing **criminal defendants**.<sup>31</sup> This Part undertakes an articulation of those components and, using examples from certain cases involving psychotic defendants, demonstrates how such an approach promotes accuracy and transparency in competence determinations.

### A. *Introduction to Adjudicative Competence*

Adjudicative competence is but one in a family of legal competency constructs that includes capacity to consent to or refuse medical care and research, enter into a contract, execute a will, and handle one's own property and finances.<sup>32</sup> Some legal (in)competencies are status-based--for example, the law categorically deems children unable to make any number of decisions on their own behalf--but the majority are individually-determined departures from a baseline assumption of autonomy.<sup>33</sup>

Three common threads tie all law-relevant competencies together. First, competence is best understood as (to borrow a term familiar to the sciences but relatively foreign to law) an open-textured construct,

the meaning of which "*can never be* [\*1383] *fully reduced to a set of concrete operations and observational terms.*"<sup>34</sup> Because competence "is an abstraction" that "retains the elusive quality of an idea," law provides "broad discretion in determining whether a set of case facts satisfies the criteria."<sup>35</sup> Second, connecting all legal competencies is the recognition that "some individuals may not have the capacities to make important decisions in their lives" and that these "incapacities may jeopardize their welfare or that of others."<sup>36</sup> Law therefore provides a mechanism for identifying such individuals and in such cases authorizes (and sometimes obligates) the state to curtail their rights. Courts make these decisions with deliberately heavy reliance on mental health professionals.<sup>37</sup> Third, because determinations of legal incompetence are by nature profoundly paternalistic,<sup>38</sup> the objective is not to ensure that an individual has the highest possible level of decision-making capacity, but rather to avoid state intervention if she has the bare minimum required.<sup>39</sup>

Moreover, the relevant decision-making capacity is utterly context-dependent; "[n]o single legal criterion or test applies across all legal competencies," and the law does not presume that (in) competence in one arena will imply or affect (in)competence in another.<sup>40</sup> The consequence of incompetence also will vary: in some situations, such as inability to handle one's financial affairs, surrogate decision-making may be permitted; in others, the subject will be unable to access a good, such as dangerous medical treatment to which she is incompetent to consent; and in others, such as inability to provide for the basics of one's survival, the person may be institutionalized.

As part of the universe of legal competencies, adjudicative competence, broadly defined, includes competence to waive *Miranda* rights; plead guilty; dismiss counsel; stand trial and make the various decisions required during trial; pursue or abandon appeals and other avenues for post-conviction relief; and be executed.<sup>41</sup>

[\*1384] Within any given criminal case, then, the issue of competence may be raised at multiple junctures.<sup>42</sup> After a defendant is arrested and charged, any party (or the trial judge) may raise the issue of possible incompetence. The court will then determine whether there is a bona fide doubt as to competence.<sup>43</sup> If not, the case proceeds (though the process may well begin again if incompetence is argued at a later point). If so, the court will order an inquiry in conformance with the law of the jurisdiction, which will almost certainly entail examination by a mental health professional (and likely more than one) in an inpatient or outpatient setting. A clinical expert (or experts) will likely submit a written report and testify at a hearing, and probably will proffer a recommendation as to the ultimate issue of legal competence.<sup>44</sup> The trial court is overwhelmingly likely to agree with the expert recommendation.<sup>45</sup> If multiple experts give differing testimony, the court is likely to side with the prosecution's expert, as the burden of proof as to incompetence generally will rest with the defendant.<sup>46</sup>

If the defendant is found competent, the trial will continue (again, with the same caveat as to new evidence of incompetence, which may take the form of increasingly erratic behavior at trial). If, however, the defendant is found incompetent, she will be subjected to a period of continued evaluation and treatment--potentially including involuntary medication should certain stringent requirements be met<sup>47</sup>--in accordance with jurisdiction-specific timelines, bounded by an outside requirement of "reasonableness."<sup>48</sup> Should competence at any point be restored, proceedings will resume; but should the defendant be deemed unlikely to [\*1385] be restored to competence within a "reasonable" time,

she must be released or civil commitment proceedings must commence.<sup>49</sup> During a period of indeterminate incompetence it is not clear whether the criminal charges may remain pending, or for how long.<sup>50</sup>

Finally, should a competent defendant be sentenced to death, she may face further inquiry should she decide to waive all appeals,<sup>51</sup> and may have a claim of incompetence to be executed if she has experienced a substantial decline in mental health while incarcerated.<sup>52</sup>

Unfortunately, the substantive meaning of the competency construct underlying this straightforward procedure remains relatively undeveloped. But one strong theme that emerges from the cases, albeit largely sub rosa, is that--consistent with competence inquiries generally--the primary concern should be whether the defendant is capable of making critical decisions. As the following Section demonstrates, such decisional competence is an integral component of the *Dusky* standard.<sup>53</sup>

### *B. Decisional Competence as a Component of Adjudicative Competence*

The roots of the decisional competence construct may be found in the "rational understanding" component of *Dusky* itself.<sup>54</sup> In *Dusky* the Court was faced with a defendant who, according to medical experts, suffered from schizophrenia but "understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, . . . knew who his attorney was and that it was his duty to protect the defendant's rights," and [\*1386] could furnish at least some relevant historical information with substantial accuracy.<sup>55</sup> His incompetence, they testified, stemmed not from his inability to grasp factual concepts but, rather, from the "confused thinking" caused by his mental illness, which they asserted had rendered him unable to "interpret reality from unreality."<sup>56</sup> Nonetheless, the district court found Dusky competent to proceed to trial.<sup>57</sup>

In a brief per curiam opinion, the Court accepted verbatim the Solicitor General's proposed definition of competence:

[I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events" . . . the "test must be 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."<sup>58</sup>

Thus, the factual understanding displayed by Dusky was necessary but not sufficient for competence. What was also required was some sort of rational understanding, which, though apparently crucial, remained undefined.

Subsequent cases attempting to define what evidence would raise a bona fide doubt as to *Dusky* incompetence have yielded some additional hints as to what types of irrationality might be relevant. The Court, while resisting any attempt to define "a general standard" for such evidence,<sup>59</sup> has

delineated certain facts that generally warrant further inquiry--such as a "history of pronounced irrational behavior" <sup>60</sup> or a recent suicide attempt <sup>61</sup>--and others that are insufficient to foreclose the inquiry even if relevant to the ultimate determination--such as lucid speech and behavior in the courtroom. <sup>62</sup> Despite these clues, the value added by a requirement of "rational" as well as "factual" understanding has remained unclear.

[\*1387] That situation changed somewhat with *Godinez v. Moran*, <sup>63</sup> in which the Court read a decision-making focus into the standard for *Dusky* rationality. *Godinez* answered a brewing debate among the lower courts and commentators as to whether different substantive standards of competency applied to different aspects, or at different stages, of a criminal proceeding. <sup>64</sup> The short answer, the Court held, was no.

Richard Allen Moran, charged with killing the owner and a patron of a bar as well as his former wife, was found competent not only to stand trial but also to waive his rights to an attorney and trial; after a colloquy, the trial court accepted his waiver of counsel and plea; and he was convicted and sentenced to death. <sup>65</sup> Moran later argued that he had been "mentally incompetent to represent himself." <sup>66</sup> The Ninth Circuit agreed, reasoning that while Moran might have been *Dusky*-competent for purposes of standing trial with counsel, he should have been found competent to waive counsel and plead guilty only if determined also to have "the capacity for 'reasoned choice' among the alternatives available to him." <sup>67</sup> The Ninth Circuit interpreted such capacity for "reasoned choice" as articulating a different (and more stringent) standard than that outlined in *Dusky*. <sup>68</sup>

The Court rejected the notion that there was a substantive difference between "reasoned choice" and "rational understanding." <sup>69</sup> Listing the wide array of choices required of defendants whether they go to trial or plead guilty, the Court held that the same standard applied to both universes of decision-making. <sup>70</sup> The only sense in which a higher standard applied is that certain decisions--such as those made by Moran to discharge counsel and plead guilty--additionally require a separate determination that they were made knowingly, intelligently, and [\*1388] voluntarily. <sup>71</sup> In the end, the Court appeared to regard the dispute as one of semantics, as it believed capacity for "reasoned choice" or "rational choice" to mean nothing other than a "rational understanding" in the *Dusky* sense. <sup>72</sup>

Decided more than three decades after *Dusky*, *Godinez* represents the Court's most specific effort to explain what "rational understanding" might mean. <sup>73</sup> The effort is in one sense frustratingly opaque: after *Godinez*, "rational understanding" likely means what the Ninth Circuit meant when it spoke of capacity for "reasoned choice," though it might mean something slightly different and somehow less demanding. <sup>74</sup> What is clear, though, is the Court's focus on *defendant decisionmaking* as the crucial capacity to which the rationality aspect of the competence construct is directed.

To be sure, *Godinez* did not use the term "decisional competence," urged on it by prominent commentators, <sup>75</sup> or make absolutely explicit that *Dusky*'s "rational understanding" standard was meant to embrace such a concept. Indeed, the dissenters complained bitterly that the majority had imposed an unduly passive notion of *Dusky* competence on very consequential decisions. <sup>76</sup> Some therefore have interpreted *Godinez* "to mean that defendants' decision making abilities need not be considered when making judgments about their competence, because the *Dusky* standard makes no specific reference to

'decision making.'" <sup>77</sup> But this conclusion is belied by the *Godinez* majority's nearly single-minded focus on the various decisions that might be required of a **criminal defendant**. <sup>78</sup> Indeed, the Court asserted that

*all criminal defendants*--not merely those who plead guilty--may be required to make important decisions once criminal proceedings have been initiated. [\*1389] And while the decision to plead guilty is undeniably a profound one, it 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. <sup>79</sup>

That the *Dusky* standard must be understood to revolve around ability to make rational decisions pertaining to one's status as a **criminal defendant** was reinforced by Justice Kennedy, who in concurrence stated flatly that "[w]hat is at issue here is whether the defendant has sufficient competence to take part in a criminal proceeding and to make the decisions throughout its course." <sup>80</sup>

Accordingly, in very recent years a number of forensic theorists have embraced the notion that decisional competence not only survived *Godinez* but was in fact promoted to a protected position within the *Dusky* standard. <sup>81</sup> Significantly, a panel of theorists and practitioners who collaborated on a comprehensive, longterm MacArthur Foundation adjudicative competence study defined decisional competence as a discrete domain and designed a forensic assessment instrument specifically to measure such competence. <sup>82</sup> The MacArthur study also revealed that discrete measurement of decisional competence might catch some defendants who otherwise would be deemed competent. <sup>83</sup> And far from being controversial, [\*1390] the centrality of decisional competence is widely accepted in the field of competence to consent to medical treatment. <sup>84</sup>

The extent to which a focus on decisional capacity is being implemented in the criminal-law context, however, unquestionably is hindered by the lack of transparency in the case law, in which "rational understanding," not rational decisionmaking, remains the operative term. Expert assessments, which form the sole basis for nearly all judicial determinations of adjudicative competence, "tend to give little, if any, attention to decisional competence." <sup>85</sup> Even those most prominently advocating a decisional competence approach concede that its precise meaning within the well-established *Dusky* formula is not clear at present. <sup>86</sup> This confusion should be put to rest. Decisional competence should be recognized as the core of the "rational understanding" component of adjudicative competence.

### *C. A Theoretical Model of Competence-Relevant Decision-Making*

Having shown that rational decision-making capacity is key to *Dusky* rational understanding, it is essential to define more precisely the decisions at issue. Some decisions facing **criminal defendants**--for example, strategic calls as to whether to waive indictment or demand certain forms of discovery--routinely are entrusted to the attorney, while others plainly are the province of the defendant. <sup>87</sup> These defendant-driven decisions are whether to demand a jury trial, represent oneself, testify on one's own behalf, be present at trial, or plead guilty. <sup>88</sup> More broadly, the defendant is thought also to have the

right to make global decisions as to the theory of her defense--for example, whether to pursue an insanity defense--and the objectives to be pursued by counsel. <sup>89</sup> When we speak of decisional competence, then, it is the competence to make these choices, and not a more general decision-making ability, about which the law should care. And construing the requirement of *rational* decision-making capacity in light of the goals sought to be [\*1391] balanced by adjudicative competence doctrine, <sup>90</sup> we may conclude further that the decisional capacity we demand of a **criminal defendant** is that which renders her capable of making critical defendant-driven decisions in a minimally rational and self-protective manner.

Still, the content of such "rationality" requires yet further explication. Rationality is far from self-defining. <sup>91</sup> Though it is difficult to articulate the components of decision-making processes, and more difficult still to judge the rationality of their operation, recent decades have seen significant advances in our understanding of such processes. <sup>92</sup> Exploring the relevance of such research for adjudicative competence and demonstrating how a decision-making focus sometimes is invoked in the cases illuminates an approach that may give substance to the sketchy outlines of *Dusky* rational understanding.

The literature on decision-making is vast, <sup>93</sup> but there is some degree of consensus as to the necessary building blocks of the types of decisions faced by **criminal defendants**. As an initial matter, most agree that a focus on rationality should look to process rather than outcome, despite the fact that the latter is far more accessible. <sup>94</sup> The danger of adopting a predominantly outcome-driven test for competence-relevant rationality is that it may encourage examiners and courts simply to substitute their judgments for those of defendants whose choices appear misguided. <sup>95</sup> Judging reasonableness of outcome can play an important role, as manifestly bizarre or self-destructive decisions might be evidence of a faulty [\*1392] process, but it is to that process that the search for rationality should be directed. <sup>96</sup>

Decision-making processes generally may be described as consisting of perception, understanding, reasoning, and choice. <sup>97</sup> One making a "rational" decision should have at least minimally intact ability to: (1) perceive the world accurately; (2) think coherently about those perceptions and thereby form valid understandings; (3) run those understandings through a sound reasoning process guided by personally relevant goals; and (4) imagine a conclusion logically flowing from that process, express that conclusion to others, and formulate and execute a course of action flowing logically from the preceding steps. <sup>98</sup> Each of these steps is both theoretically and practically complex (and a potential site for a finding that a defendant lacks decisional competence).

The extent to which courts have examined defendants' competence with reference to a decision-making model is quite limited. However, certain helpful clues as to such a model's utility may be found in the treatment of defendants with severe thought disorder. <sup>99</sup>

[\*1393] Persons with severe thought disorder, particularly those diagnosed with schizophrenia, often are labeled "psychotic," <sup>100</sup> and psychosis is very strongly associated with findings of adjudicative incompetence. <sup>101</sup> Indeed, it appears that many examiners regard psychosis as the sine qua non of incompetence, starting and ending their analysis with that diagnosis. <sup>102</sup> Unfortunately, the underlying rationale as to *why* the thought disorder associated with psychosis is thought to disrupt *Dusky* rationality seldom is made plain. Indeed, few courts have attempted to define *Dusky* rational

understanding at all, let alone by reference to decisionmaking processes. <sup>103</sup> There are, however, several prominent exceptions.

[\*1394] Those courts that have attempted to explain the relevance of psychosis to adjudicative competence generally have located the operative decision-making defects at the stages of perception and understanding. Perception, or the human body's transformation of sensory stimuli into internal images, <sup>104</sup> is a crucial threshold requirement, <sup>105</sup> but is not as straightforward as it may seem. Because sensory stimuli are transformed into conscious perceptions by complex (and largely nonconscious) neural processes, factors ranging from stress to neurological disorder can intervene, with sometimes seriously distorting consequences, between percept and perception. <sup>106</sup> Once an object is perceived, with or without prior distortion, a decider will form thoughts and beliefs--or understandings--about it. <sup>107</sup> Generally accurate understandings about relevant aspects of the external world are, like perception, necessary but not sufficient for competent decisionmaking. <sup>108</sup>

Defendants with severe psychosis frequently display perceptual and understanding processes that are so profoundly distorted as to obviate competence. Such was the conclusion in *Lafferty v. Cook*, <sup>109</sup> an unusually thoughtful decision by a sharply split Tenth Circuit panel. Ronald Lafferty was diagnosed as suffering from a "paranoid delusional state" but deemed competent; he then attempted suicide by hanging, and four examiners opined that Lafferty's "paranoid delusional system," aggravated by oxygen deprivation to his brain, had rendered him incompetent by [\*1395] impairing "his ability to perceive and interpret reality." <sup>110</sup> Lafferty's delusions included the strong belief that all those involved in his case--including his lawyer--"were part of a corrupt man-made order" against which he was required by God to rebel. <sup>111</sup> Because he displayed factual understanding of the proceedings, <sup>112</sup> the majority recognized that its task was to determine the meaning of *Dusky's* rational understanding requirement. <sup>113</sup> After examining the trial record in *Dusky* the majority determined that "a defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." <sup>114</sup> Thus, the majority concluded, "sufficient contact with reality" is the "touchstone for ascertaining the existence of a rational understanding." <sup>115</sup>

This test, focused primarily on the effects of psychosis on perception and understanding, has been adopted by a small handful of other courts. <sup>116</sup> In *In re Heidnik*, for example, the Third Circuit found a death row inmate incompetent to abandon appeals <sup>117</sup> because his decisions were based on a flawed "perception of [\*1396] reality," <sup>118</sup> including "fixed false beliefs" that his victims had killed themselves and that his execution would lead to the end of capital punishment. These delusional beliefs were "all-encompassing in nature" and colored "every aspect of his cognitive functioning," <sup>119</sup> with the result that Heidnik was "seeing people as other than what they are." <sup>120</sup> A similar approach was recently taken as well in *Utah v. Mitchell*, in which Brian David Mitchell was found incompetent to stand trial for the kidnapping of Salt Lake City teenager Elizabeth Smart. <sup>121</sup> After determining that Mitchell suffered from a delusional disorder characterized by fixed, false beliefs (including that Smart was destined to be his wife and that God required his conviction and imprisonment in order to trigger an eventual personal battle with the Antichrist), <sup>122</sup> the court concluded that his "ability to accurately perceive and interpret external reality" was unduly impaired. <sup>123</sup> The court therefore found him unable to make rational choices, which it equated with the "rational understanding" required by both Utah law and *Dusky*. <sup>124</sup> Thus, as these cases demonstrate, severe defects in perception and understanding can impede a

defendant's ability to make decisions on his own behalf.

Defects in reasoning--the process by which one draws inferences and conclusions from premises <sup>125</sup>--also can defeat competence. Flaws in logical reasoning are perhaps the most obvious and intuitive examples of irrationality; for example, were a defendant to understand (and believe) that all defense attorneys are their [\*1397] clients' advocates, and that the person assigned to represent her is a defense attorney, and yet conclude that her defense attorney is the state's advocate, we might well conclude that her logical reasoning powers are impaired. Significantly, though, such defects seldom are reflected in the cases; instead, as the above cases demonstrate, at least with regard to psychotic defendants, courts have found incompetence *despite* intact logical capacity. This makes sense: while deductive reasoning is a necessary component for competence, <sup>126</sup> it is far from sufficient, for such reasoning maps quite poorly onto real-world decision-making, in which the validity of premises matters and where decisional conditions are often confusing and in flux. <sup>127</sup> Flexible reasoning--which requires fluid intelligence, ability to use deductive and inductive reasoning as appropriate, and incorporation of background goals, knowledge, and learning--provides a more appropriate model for the reasoning process underlying the pragmatic, real-world decision-making faced by **criminal defendants**. <sup>128</sup> Thus, though Lafferty's reasoning was logical--his conclusions and decisions, such as a desire to discharge counsel and refrain from presenting an insanity defense, were consistent with his premises--the court found it dispositive that delusional beliefs irredeemably distorted his premises. <sup>129</sup>

The extent to which courts have identified competence-threatening defects in choice--including the component steps of formulating a conclusion, expressing that conclusion, and taking action accordingly--is limited. Choice warrants separate articulation, <sup>130</sup> as it is possible that a defendant might display valid reasoning on the basis of sound premises and yet reach a conflicting or somehow [\*1398] irrational conclusion, <sup>131</sup> lack ability to communicate her choices, <sup>132</sup> or be unable to act in accordance with her choices. For example, the record indicates that Lafferty may have had additional defects in this domain, as he had chosen to discharge counsel but was unable to take action implementing that choice. For reasons that he apparently would not explain, Lafferty refused to put his expressed desire to represent himself on the record in the required form, with the result that counsel was not discharged. <sup>133</sup>

The *Lafferty*, *In re Heidnik*, and *Mitchell* decisions represent some of the only examples of an overt attempt by the courts to define rational understanding, let alone an attempt to do so by reference to an articulation of the affected stages of a rational decision-making process. This approach is far from uncontroversial. The dissenting judge in *Lafferty*, for example, took strong issue with what he saw as the majority's misguided "quest to articulate the one true legal definition of competency." <sup>134</sup> Such criticism, though, is overcome by the significant advantages of a transparent and finely grained approach. In the case of psychosis incorporating delusional perception and understanding, one clear benefit of locating the site of dysfunction and teasing out its effect is avoidance of, on the one hand, overinclusion attending simplistic equation of psychosis with incompetence <sup>135</sup> and, on the other, underinclusion attending simplistic reliance on logic as the sine qua non [\*1399] of competence. <sup>136</sup> But the methodological benefits go even further, as thought-content disorders are not the only sort to warrant such an articulation; these may just be the easiest cases. A defendant like Mitchell may be relatively easy to identify should he choose to verbalize his beliefs, delusional by any objective standard.

Certainly other, possibly less obvious, disorders might have equivalent impact. These cases therefore are valuable also because they model an approach that can be applied to other disorders, including--as the next Part proposes--emotional disorders.

As this Part has shown, then, a model of human decision-making--even a basic one such as that offered here--incorporates a number of complex underlying concepts, each of which represents a site of potentially competence-threatening "irrationality."<sup>137</sup> In the case of psychosis, the most endangered sites appear to be perception and understanding, though defects at those stages also will frustrate flexible reasoning and potentially destabilize choice. Perhaps not surprisingly, then, despite controversy over methodology, the *conclusion* that severe impairment to a defendant's cognitive processes--particularly that associated with thought-content disorder--can defeat the presumption of competence is reflected in a number of cases.<sup>138</sup> It also has been urged by scholars writing in the area of competence to consent to medical treatment.<sup>139</sup>

Largely missing from this traditional account of decision-making and its relevance to adjudicative competence, however, is the influence of emotion. Defendants with profound impairments of emotional perception, processing, and expression may be equally unable to make self-interested rational decisions, although they may appear to be in touch with reality in a way that psychotic persons often do not. That is the subject of the following Part.

## II. EMOTIONAL COMPETENCE AND RATIONAL UNDERSTANDING

As the preceding Part explained, the key to *Dusky* rational understanding is whether a **criminal defendant** is capable of making defendant-driven decisions--such as whether to plead guilty, discharge counsel, raise an insanity defense, present mitigating evidence, and challenge or acquiesce to her conviction and [\*1400] sentence--with recourse to at least minimally intact rational decision-making processes. Such a determination requires a highly particularized inquiry into whether the defendant's perception and understanding of relevant aspects of the world are accurate; whether she is able to engage in appropriately flexible reasoning; and whether she can formulate, express, maintain, and implement choices. Such a determination should be made in light of the specific demands of the criminal case, with an eye always toward whether the defendant's decisionmaking capacities permit her to hold up her end of a highly adversarial proceeding. Before the defendant is found incompetent on the basis of a flaw at any decision-making juncture, an examiner or court should be able to articulate the origin of that fault and explain how it is thought to disrupt rationality.

All evidence suggests that no such approach is being implemented. Because judicial determinations almost always rest entirely on the recommendation of experts, and because those experts generally do not explain either their methodology or the basis for their conclusions, it is very difficult to know *what* underlies most adjudicative competence decisions.<sup>140</sup> But to the extent that examiners and courts sometimes reveal their conception of the distinction between a "rational" and "factual" understanding, it appears clear that the generally operative concept of *Dusky* rationality is focused almost entirely on disordered cognitive processes, such as those seen in thought disorder. The role of emotional disorder, though sometimes mentioned, remains almost entirely unexplored.<sup>141</sup> Indeed, it is sometimes deliberately disregarded.

This Part, then, seeks to articulate, with reference to the decision-making model presented in Part I, the theoretical underpinnings of an adjudicative competence standard that incorporates a sophisticated understanding of emotion. The two examples it explores, depression and brain damage, represent two situations in which severe emotional dysfunction might disrupt the rational decision-making capacity demanded by *Dusky* but to which a purely cognitive approach is particularly ill-suited.

### A. *The Role of Emotion in Decision-Making*

Emotion is implicated in decision-making processes at many, or perhaps all, of [\*1401] the junctures described in the previous Part. <sup>142</sup> Its role, however, historically has been both underexplored and undervalued. <sup>143</sup> As a result, emotion is more poorly understood than are the various cognitive mechanisms underlying human decisionmaking. Fortunately, this situation is changing rapidly. <sup>144</sup> But despite these advances, no concerted effort has been made to tie contemporary emotion research into the formulation of competence-relevant decision-making. <sup>145</sup> Because of emotion's importance, such an effort is vital.

The first task is to define emotion, which is used here as an umbrella term encompassing the concepts of emotion, feelings, mood, and affect. <sup>146</sup> Theorists generally agree on the existence of certain "core" emotions--including fear, anger, [\*1402] happiness, sadness, surprise, and disgust--a repertoire on which humans demonstrate many variations. <sup>147</sup> "Affect" refers to the positive or negative quality of a feeling-state, but is used also to describe the manner in which a person externalizes feeling-states--for example, one whose facial expressions appear to display no emotion is said to have a "flat affect." <sup>148</sup> "Mood" refers to feeling-states--such as anxiety and depression--that are "more transient, diffuse, and less attributable to particular sources" than emotions. <sup>149</sup>

Fundamentally, each of these aspects of emotion is thought to be in important respects both separate and separable from "cognition," <sup>150</sup> which refers generally to intellectual or "thinking" processes (including many that operate below the level of consciousness) not necessarily imbued with emotional content. <sup>151</sup> In recent years most emotion theorists have come to agree that this dividing line is anything but sharp, <sup>152</sup> and that many, perhaps all, emotions have cognitive aspects. <sup>153</sup> Nonetheless, the two realms are still helpfully conceptualized separately, even as [\*1403] we gain a more sophisticated understanding of their interrelatedness. <sup>154</sup> Referring to cognition and emotion as separate--as thinking and feeling--remains so common in both scientific and colloquial conversation that it retains communicative value. Moreover, as discussed below, emotion has unique influences that cannot be accounted for, either theoretically or practically, with cognitive tests.

Historically, to the very limited extent that emotion has been considered within decision-making theory it has been regarded solely as a distorting factor whose presence disrupts rationality. <sup>155</sup> This disparaging attitude has been particularly influential within law, in which passion traditionally is cast as the enemy of reason. <sup>156</sup> Certain aspects of emotional experience unquestionably can distort rational decision-making; scholars have largely legitimated the folk wisdom, reflected in numerous areas of legal doctrine, that emotion can be a powerful and sometimes disruptive force. <sup>157</sup> However, recent developments in emotion theory have made clear that emotion also can play a *positive* role. <sup>158</sup> Indeed,

in recent years a number of legal theorists have drawn on emotion theory to assert that "emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions." <sup>159</sup> Negative and positive perspectives--both grounded fundamentally in the realization that emotion cannot be eliminated but instead should be better understood--are equally important to an examination of emotion's influence on competence-relevant decision-making. <sup>160</sup>

[\*1404] Most importantly for the purposes of this Article, emotion has a significant influence on the decision-making model proposed in the preceding Part. <sup>161</sup> This is because emotion represents an important mechanism for the perception and processing of information, one that captures different information than would cognition alone. <sup>162</sup> Emotion also affects the perceived value, personal relevance, or attractiveness of the information being processed, and therefore will shape motivation and goals. <sup>163</sup> These impacts of emotion may be specifically mapped on to the four previously described stages of decision-making.

First, emotion can influence both which stimuli are perceived and how they are perceived. <sup>164</sup> This is first seen through the mechanism of attention. Because emotionally salient stimuli tend to be the ones of greatest significance to one's thriving, they will be attended to disproportionately. <sup>165</sup> Thus, one without recourse to emotion's guidance will find herself largely unable to sort effectively among the nearly infinite competitors for her attention. Once a stimulus is attended to, emotion continues to have an influence. For example, a fearful person might believe that the shadow of a tree is that of a man wielding a knife, where others would not perceive such an aggression. <sup>166</sup> In such a case, while the common tendency is to describe the distortion as residing in what the person "thought she saw," it may also reside one stage earlier: the emotion has shaped *both* "what she saw" and what she "thought she saw." Extremes of emotion may also influence perceptual recall. In acute cases of trauma, for instance, persons might become unable to recall the emotionally powerful incident, or instead may recall it so vividly and frequently that other information is kept out of accessible memory. <sup>167</sup> Thus, the emotional salience of stimuli can substantially affect attention to, as well as perception and memory of, both those stimuli and emotionally nonsalient [\*1405] stimuli.

Emotion also has a strong influence at the understanding stage. Different emotional states are associated with distinct information-processing modes; <sup>168</sup> for example, studies have suggested that persons in whom a "sad mood" has been evoked process information more slowly but possibly more accurately than "neutrals," while those in a "happy mood" tend to process information more quickly but with a lower level of accuracy. <sup>169</sup> But from the perspective of competence assessment, perhaps the most significant contribution of emotion to this stage of decision-making is through "appraisal" and "appreciation." Intimately tied to emotional salience, appraisal and appreciation are interdependent aspects of understanding that concern awareness of personal significance. Appraisal describes a "lighting-fast" judgment as to whether and how particular stimuli matter to one's well-being and goals, <sup>170</sup> a judgment that will then shape information processing. <sup>171</sup>

Intact appraisal leads to emotional reactions to personally relevant stimuli. <sup>172</sup> Such appraisal and the attending emotion then contribute heavily to the specific understanding, or *appreciation*, that information presented to (and decisions required of) a person are applicable to her and carry consequences for her personal situation. <sup>173</sup> For example, a defendant may understand that the death

penalty is a potential consequence of her prosecution. To say that she cannot *appreciate* that fact would mean that she literally does not think it applies to her--for example, because she believes that she is immortal--or that she realizes that it applies, but does not attach to that realization any emotional significance. Without appreciation, [\*1406] a defendant lacks *Dusky* "rational understanding." <sup>174</sup> This is largely because a person without appreciation does not have access to the fear, hope, or other emotional reactions to relevant information that normally would guide personally consequential decision-making. <sup>175</sup>

Reasoning also will be influenced by emotion states. For example, one exposed to a negative feeling (*e.g.*, fear evoked by recalling the sighting of a snake) generally will report an increased (and likely inaccurate) estimation of the likelihood of future occurrence of events that, though completely unrelated, may provoke the same negative feeling (*e.g.*, a terrorist attack). <sup>176</sup> That reasoning process likely would be quite different were the subject to have entered the probabilistic exercise with a different affective prior. However, the mechanisms by which emotion influences reasoning remain contested. Research has suggested, for example, that persons in a positive mood disproportionately draw inferences consistent with maintenance of positive mood. <sup>177</sup> Other researchers, however, argue that positive affect can be shown to make reasoning "more efficient and more thorough, as long as the task is one that is meaningful, interesting, or important to the decision maker." <sup>178</sup> To simplify a complex area, emotion's influence on reasoning is highly contextual.

Finally, emotion can profoundly influence choice, including its communication and implementation. The person described above, inordinately fearful of terrorist attack, might make specific choices (*e.g.*, engaging in increased risk avoidance) on the basis of her affectively driven reasoning. Emotion-driven choice can also be far more primal. Feeling-states predispose the actor to particular behavioral responses--anger, for example, is highly associated with risk-taking behavior and aggression, fear with risk avoidance and escape, and disgust with avoidance and withdrawal. <sup>179</sup> [\*1407] Some emotional experiences--notably fear--appear to be nearly automatic responses to certain types of stimuli, with the result that they (and the outward behaviors with which they are associated, such as freezing, running, or striking out) are experienced as involuntary, or at least very difficult to override cognitively. <sup>180</sup> It also has been suggested that extreme emotional instability causes inability to maintain a consistent choice preference. <sup>181</sup> Ability to communicate a choice may also be impaired--for example, a person who firmly wishes to obtain a divorce may feel unable to say so (and be thus frustrated in realizing his goal) because of intense fear of public exposure to shame for having failed in his marriage.

As the above discussion reveals, a very significant movement within the mind sciences--one that is increasingly reflected in legal theory <sup>182</sup>--asserts that, not only is emotion not the natural enemy of rationality, <sup>183</sup> it is intimately connected to the perception and processing of information, appraisal of value, formation of goals, motivation of behavior, and implementation of choice. <sup>184</sup> Emotion can be a strong force contributing to rational thought by marking particular stimuli as meaningful and generating a sense of personal relevance and value that will shape goals and motivations. Thus, a lack of emotion where one normally would expect it to be present can deprive the decision-maker of vital information and guidance. Emotion can also be disruptive, in that it may derail optimal perception, understanding, reasoning, and communication, or may override one's otherwise preferred choices. While emotion and cognition are deeply intertwined, the influence of the former cannot always be seen or accounted for by

reference only to the latter.

A complete account of the decisional competence component of *Dusky* rationality therefore demands close attention to the positive and negative contributions of [\*1408] both cognition and emotion. <sup>185</sup> Because adjudicative competence is concerned with radical departures from minimal norms of rational decision-making, we must think carefully about the sorts of emotional dysfunction that might take a defendant so far outside these norms as to be declared unfit to determine her own fate within a criminal proceeding. That is the project of the following Section.

### *B. Emotional Disorder and Rational Decision-Making*

We previously have explored the intimate relationship between cognition and emotion in human decision-making, and in the preceding Part we saw how some courts have begun to delineate how certain defects in cognitive processes might undermine adjudicative competence. A similar effort is possible with regard to emotional dysfunction. However, no such effort has been undertaken to date.

This is not to say that emotion is never discussed at all in connection with adjudicative competence. Indeed, the case law occasionally surrenders small hints that emotion is considered at least marginally relevant. <sup>186</sup> Milton Dusky, for example, apparently experienced "emotional turmoil," as well as "depression, feelings of inadequacy and unworthiness," and Richard Allen Moran was described as depressed and wracked by remorse and guilt. <sup>187</sup> The significance of these emotional and mood states was never explained, but they were for some reason considered worthy of mention. <sup>188</sup> Similarly, commentators and forensic theorists sometimes, in passing, mention emotion-states as a potentially relevant consideration. <sup>189</sup> One (now quite outdated and likely seldom used) standardized [\*1409] forensic assessment instrument incorporated a direct measure of a defendant's "ability to deal emotionally with the criminal process." <sup>190</sup>

However, while it seems that from time to time scholars, examiners, and courts regard emotion as somehow relevant to adjudicative competence, there is no operative theory as to why or how this is so. <sup>191</sup> There certainly are few indications that emotion is thought to be relevant because its intact functioning is critical to rational decision-making. Indeed, given the very long history of rationality being explicitly opposed to emotion and the extremely recent genesis of research and scholarship challenging that opposition, <sup>192</sup> there is every reason to believe that when courts, examiners, and commentators have spoken of rational understanding they have understood it to have nothing do to with emotion--or even to refer to the utter *absence* of emotional influence.

The following Subsections propose two situations in which emotion ought properly to be considered in determinations of adjudicative competence. The first is that of defendants with psychiatric illnesses, particularly severe clinical depression, that can impair the accurate perception and processing of decision-relevant information, derail formation of self-protective motivation, and impair stable, self-interested choice. In these cases, we may be concerned about a lack of emotional *balance*, as well as the damaging influence of a *surfeit* of particular emotions, such as grief and despair, and a *dearth* of others, such as joy or hope. The second is that of defendants with neurological defects, usually caused by brain damage, that impair perception, processing, and expression of emotion in a manner that appears to

disrupt rational decision-making. Here, our concern stems from a general *lack* of emotion. <sup>193</sup>

[\*1410] *1. Mood Disorder and Dusky-Relevant Emotional Dysfunction*

A defendant's competence may be threatened by mood disorder, a term encompassing a range of mental illness but generally used to signify either "unipolar" or "bipolar" depression. <sup>194</sup> Unipolar depression captures the cluster of symptoms most commonly associated with depression: loss of interest in or pleasure from most activities; feelings of worthlessness, guilt, and despair; change (usually a retardation) in motor activity; decreased energy; difficulty thinking, concentrating, or making decisions; and, frequently, thoughts of suicide. <sup>195</sup> Depression also may incorporate manic episodes, periods associated with an unusually elevated mood (such as euphoria), psychomotor agitation, inflated self-esteem and grandiosity, pressured speech, and poor judgment. <sup>196</sup> A person in whom major depressive episodes and manic episodes alternate generally will be diagnosed as suffering from "bipolar" disorder, or what is referred to colloquially as "manic depression." <sup>197</sup> Some manifestations of these disorders are relatively short-lived or can have but minor effects on functioning. <sup>198</sup> While such manifestations might have some impact on rational decision-making--for example, were a defendant required to make a very consequential choice while in the midst of a severe but short-term depressive or manic episode--competence generally is liable to be seriously threatened only by more severe and persistent manifestations, particularly where latitude is given for choices to be postponed until a short-term episode has passed. <sup>199</sup>

The effects of severe clinical depression on, inter alia, attention, perception, concentration, and memory are well-recognized in the clinical literature, and any one of these effects could derail one or more of the stages of competence-relevant decision-making. <sup>200</sup> On the perceptive level, the severely depressed may focus so disproportionately on mood-congruent stimuli as to neglect important contrary information. For example, such persons may ponder or commit suicide out of "a desire to give up in the face of perceived insurmountable obstacles or an intense wish to end an excruciatingly painful emotional state that is perceived by the [\*1411] person to be without end," though a non-depressed person might perceive other, more hopeful, facts and possibilities. <sup>201</sup> Depression-linked perceptive and understanding deficits may become so severe as to incorporate delusions, hallucinations, and other symptoms characteristic of thought disorder. For example, the depressed may develop feelings of "worthlessness or guilt... of delusional proportions (e.g., a person who is convinced that he or she is personally responsible for world poverty)." <sup>202</sup> Moreover, depression appears to significantly derail normal appreciation, preventing formation of self-interested motivation. A severely depressed person may be capable of accurately grasping the factual parameters of her situation and options but report simply *not caring* about what the correct course of action might be or how it might hinder or further her personal well-being. <sup>203</sup> Even if the depressed person does care about risk, the normal direction of such caring may be reversed: she may *want* to take undue risks and may choose a clearly self-harming outcome. <sup>204</sup>

Nor are major depressive episodes the only culprits: the mania associated with bipolar depression also can profoundly distort perception, understanding, reasoning, and choice. In terms of perception and understanding, manic persons generally will be highly distractible and unable to distinguish between relevant and irrelevant stimuli and thoughts. Those experiencing mania often will exhibit disturbances

of thought form, such as extremely fast, pressured, tangential, and even nonsensical speech, as well as of thought content, such as "[g]randiose delusions" as to their personal power and importance. <sup>205</sup> On the level of reasoning, the manic [\*1412] are prone to overestimate wildly their personal abilities and chances of success in difficult situations. Further, persons experiencing mania are prone to impulsive and imprudent choices, often in service of seeking immediate pleasure and gratification. <sup>206</sup> The extreme lability of affect associated with mania also can occasion frequent and dramatic changes of course, obviating decision-making consistency. <sup>207</sup>

Despite these dramatic effects, the academic literature and case law generally do not reflect any significant examination of the effects of depression, whether unipolar or bipolar, on adjudicative competence. <sup>208</sup> However, because mood-disordered defendants present with some regularity, so too do these issues. Perhaps because of the lack of a strong theoretical exploration of mood disorder in this context, the case law reflects a highly confused attitude as to its relevance.

On the one hand, depression is sufficiently well recognized (and its effects potentially so devastating) that courts sometimes take note of it, <sup>209</sup> and sometimes rely on it to support incompetence findings. In *Drope v. Missouri*, for example, the Supreme Court found that while a recent suicide attempt did not per se signal incompetence, it was highly relevant to whether a competence inquiry was required, presumably because it provides some indication of serious depression. <sup>210</sup> More recent cases reflect a similar acknowledgment that depression is relevant, though there is no particular consensus as to how or explanation of why. <sup>211</sup> This [\*1413] was the case in *State v. Holland*, in which the Supreme Court of Utah relied on the defendant's bipolar mood disorder to reverse a trial court's finding of competence and remand for a hearing. <sup>212</sup> Though the court did not explain why manic depression signaled possible incompetence, it seemed irritated with the trial court for relying heavily on its assessment of Holland as "articulate," suggesting that it may have found the trial court's test overly cognitive. <sup>213</sup> On the other hand, courts also--and perhaps more frequently--dismiss the import of depression in a manner that reflects a strong privileging of cognition. <sup>214</sup>

Indeed, the dissenting judge in *Holland* focused on the defendant's lack of evident thought disorder, apparently regarding affective disorder to be irrelevant. <sup>215</sup> Depression's negation of self-protective motivation often has met with a similarly dismissive attitude. For example, in *United States v. Rivera*, two court-appointed experts agreed that the defendant suffered from clinical depression and was highly unmotivated to assist in his defense. <sup>216</sup> The court nonetheless found him competent, crediting testimony from one expert that Rivera had "the ability to effectively communicate with his attorney and to assist in the planning of his defense but simply chooses not to do so," <sup>217</sup> and rejecting contrary evidence that "depression prevents the defendant from being motivated enough to communicate [\*1414] with his attorneys." <sup>218</sup> It then recounted apparently "rational" behavior, such as speaking coherently, as further evidence of Rivera's competence. <sup>219</sup> The court appeared to believe that depressed persons could be motivated to care about their fate if they chose to be so motivated. <sup>220</sup> In addition to being tautological, such reasoning signals a fundamental disregard of the role of emotion-dependent appreciation and motivation within rational decision-making.

The tension between these attitudes as to the impact of depression is perhaps most clearly seen in the very thorny context of execution volunteer cases. Because competent defendants are free to decide

whether to challenge a lawfully imposed punishment, death row inmates generally will be presumed able to acquiesce to execution;<sup>221</sup> but because such acquiescence may spring from suicidal depression, purported best friends often come forward to try to prevent what they consider a suicide by execution.<sup>222</sup>

[\*1415] It appears that, in this battle, confusion reigns supreme<sup>223</sup> but that a disproportionate focus on cognitive abilities is winning. This certainly was the case in *Rumbaugh v. Proconier*.<sup>224</sup> Two forensic examiners agreed that Rumbaugh was "profoundly depressed" and that such depression substantially affected "his capacity in the premises" on which his decisions were reached, and might "act as a coercive force and impair[] his ability to exercise free will to make a decision."<sup>225</sup> They nonetheless concluded that he was competent to exercise rational choice because he understood his position and was able to "think coherently" and reason "logically."<sup>226</sup> The Fifth Circuit, though recognizing the challenge of determining what "rational" might mean in such circumstances, noted that Rumbaugh had filed "an extremely coherent and well-reasoned *pro se* state habeas corpus petition" and upheld the finding of competence because Rumbaugh's decision to end his life was "logical," given the intense suffering caused by his depression.<sup>227</sup>

As with the majority opinion in *Rivera*, the *Rumbaugh* majority's approach fails to give adequate consideration to the disabling effects of depression. As the dissenting judge in *Rumbaugh* correctly argued, the majority opinion rested on a limited and largely cognition-driven standard of rationality, erroneously equating [\*1416] "'rational' with logical."<sup>228</sup> On the majority's view, "a person's cognition, his understanding, is deemed tantamount to an ability to choose rationally."<sup>229</sup> Such a result displays a lack of respect for the vital contributions of emotion, particularly through the mechanisms of appraisal and appreciation, to rational decisionmaking.

A similarly dismissive attitude often attends the impact of depression on choice. Consider *Smith v. Armontrout*, in which the Eighth Circuit deemed competent a severely depressed defendant who had over the course of his imprisonment changed his mind as to whether to pursue or abandon appeals at least ten times.<sup>230</sup> The dissenters urged careful attention to the destabilizing effects of depression with its "frequent mood changes"<sup>231</sup> and "unstable and self-destructive tendencies."<sup>232</sup> Though such lability is a common aspect of depression, particularly the bipolar sort, the majority without significant elaboration deemed Smith capable of choosing to "suffer the consequences of" his crime and declined to order a new evaluation.<sup>233</sup> *Armontrout* does not appear to be an outlier case. While inability to maintain a consistent choice may be seen by courts as irritating or threatening to finality, it seldom is considered as an indicator of possible adjudicative incompetence.

Thus, the cases reveal a very real and persistent disagreement over the appropriate level of consideration to be given to affective disorder, particularly clinical depression, when determining adjudicative competence. Even those examiners and courts that think depression relevant appear to lack an articulated theory as to why. And, unfortunately, the general resolution of that debate reflects simplistic notions of decision-making, consisting of nothing more than intact cognition plus the powers of deductive reasoning.

[\*1417] 2. *Brain Damage and Dusky-Relevant Emotional Dysfunction*

Another manifestation of emotional dysfunction relevant to competent decisionmaking is that attending certain forms of brain damage, particularly to regions of the frontal lobes. The emotional deficits associated with such brain damage appear to be highly correlated with persistent inability to make self-protective choices in situations of risk to one's own thriving, despite retention of cognitive capacity. Though such disorder almost certainly is less common than clinical depression, these cases now are beginning to surface and their proper resolution promises to be hotly contested.

Evidence of concurrent emotion-and-reasoning deficits attending brain damage is found in the cognitive neuroscience literature--particularly (but by no means exclusively) the work of Antonio Damasio <sup>234</sup>--and is grounded in the story of the most famous neurological patient in history, Phineas Gage. <sup>235</sup> In 1848, Gage survived a railroad-construction accident in which an iron rod was propelled at high speed through his head. Amazingly, he remained conscious and appeared to recover with nothing more than disinfectant and bandages. His miraculous recovery, however, was elusive. It was only a matter of time before all who knew him concluded "Gage was no longer Gage." <sup>236</sup> Whereas before he had been polite, prudent, and hard working, he became impatient, foul-mouthed, and prone to fits of rage. Though still intelligent and skilled, Gage became unable to keep a job; in fact, as his doctor recalled, "he was good at 'always finding something which did not suit him'" and appeared to have become incapable of planning or forethought. <sup>237</sup> He became transient and died penniless 13 years later. <sup>238</sup>

The Gage case led to a number of fundamental insights animating the modern neurosciences, including that "a lesion of circumscribed areas of the brain could cause the loss of very specific mental or nervous functions in humans." <sup>239</sup> Further, [\*1418] that the "new Gage" lacked emotional regulation and became unable to plan for (or execute action toward) a stable future suggested that such abilities might be both intertwined and dependent on the brain areas damaged in the accident. <sup>240</sup> Though many brain areas now have been shown to be involved with emotional perception, processing, regulation, and expression, <sup>241</sup> damage to the ventromedial portions of prefrontal cortex--the areas damaged in Gage <sup>242</sup>--has been shown to interfere with "social and emotional competence while not affecting cognitive competence in other domains." <sup>243</sup> It therefore is to these areas--and to prefrontal cortex <sup>244</sup> more generally--that researchers have looked for an intersection between emotion and decision-making.

In *Descartes' Error* Damasio describes clinical evidence of what he dubbed a "Gage matrix" of disabilities attending frontal lobe damage. His most detailed description is of a patient known as "Elliot," whom Damasio styled as a "modern-day Phineas Gage." Following surgery for a brain tumor in which portions of his frontal lobes were removed, Elliot went on a downward spiral--losing jobs, squandering money on suspect investment schemes, and alienating [\*1419] family members--that eventually resulted in inability to support himself. <sup>245</sup> Examinations revealed that Elliot was intelligent, had intact cognitive abilities, and displayed normal knowledge of ethics, social conventions, and moral value. On two measures of functioning, though, he was highly abnormal. First, Elliot was emotionally flat. He was able to recognize and describe the emotional salience of stimuli, such as pictures of gruesome injuries, but displayed no normal physiological reactions to such stimuli. <sup>246</sup> Second, he displayed a profound dissociation between "real-life failure and laboratory normalcy" in making choices. <sup>247</sup> In laboratory conditions, he was able to solve hypothetical problems as well or better than most, but in his personal life, he continuously made disastrous choices in the face of clear warning signals, resulting in the loss of virtually all his assets and social supports. <sup>248</sup> Damasio reports having

examined twelve other patients with similar brain damage: each displayed the same "combination of decision-making defect and flat emotion and feeling," leading him to conclude that "[t]he powers of reason and the experience of emotion decline together," and that "their impairment stands out in a neuropsychological profile within which basic attention, memory, intelligence and language appear so intact that they could never be invoked to explain the patients' failures in judgment." <sup>249</sup>

The clinical evidence of this precise correlation between emotional dysfunction and impaired personal decision-making is limited--at least in part because brain damage is often diffuse, meaning that persons with damage to ventromedial prefrontal cortex often will have damage elsewhere, such that "Gage matrix" symptoms may present as part of a larger and more varied set of disorders. <sup>250</sup> [\*1420] Moreover, Damasio's account of *why* emotion and reasoning are so intertwined is contested within cognitive neuroscience. <sup>251</sup> His theory, rooted in what he calls the "somatic marker hypothesis," appears directed primarily to appraisal, appreciation, and choice: lack of emotion, he has proposed, might prevent these persons "from assigning different values to different options," making their "decisionmaking landscape hopelessly flat" or, perhaps, "too shifty and unsustained" to support sound and consistent choices. <sup>252</sup> Whether this account is correct remains to be rigorously tested. But regardless of debates as to the nature of underlying mechanisms, it is now accepted that brain damage affecting emotional perception, processing, and expression--particularly damage to the frontal cortices--is correlated with diminished rationality, particularly in the realm of highly personal decision-making. <sup>253</sup>

This research has at least three important implications for assessments of adjudicative competence. First, persons with specific forms of frontal lobe damage might with some regularity become defendants, as their extreme decision-making deficits may lead to poor choices (and, in rare cases, disinhibited and aggressive behaviors) with criminal consequences. <sup>254</sup> If this is so, it is particularly important [\*1421] that adjudicative competence doctrine have a theory as to how such persons should be regarded. Second, such persons may exhibit intact cognitive abilities and yet be incapable of the kind of high-stakes, highly personal decision-making required of **criminal defendants**, and that inability will present together with--and perhaps be caused by--severe impairment in ability to experience and express emotion. In these cases, failure to consider impaired emotional capacity might lead to an erroneous finding of competence, either because deadened emotion is not recognized as a clue leading to further inquiry that might uncover brain damage, <sup>255</sup> or because of imposition of an overly cognitive test in which the emotion and decision-making deficits, even if proven, are dismissed as irrelevant. <sup>256</sup> Third, other brain-damaged persons (for example, those with more diffuse sites of injury) may display the above-described impairments as well as cognitive and motor deficits. In these cases, the danger of false negative might be lower; but as competence determinations look to the *combined* effects of impairments, failure to take seriously those going to emotion and personal decision-making could remove important information from the calculus.

These issues are novel, and to date are scarcely reflected in the case law. However, to the limited extent that they have been addressed they have met with inconsistent results.

Consider the case of "Jane," a prominent member of society with a long and impressive record of educational and professional accomplishments and philanthropic activities. <sup>257</sup> Unbeknownst to her, she suffered from a congenital blood-flow defect known as an arteriovenous malformation ("AVM"),

located in the left frontal lobe of her brain. Very late in her life, Jane began suddenly to engage in a series of obviously foolish financial schemes, and experienced a downfall much like that of Damasio's Elliot. She lost virtually all of her family's money, was sued for financial improprieties, and eventually was convicted for minor participation in what was revealed to be a fraudulent investment scheme. The brain damage was discovered in the sentencing phase, after new defense counsel--seeking to determine the cause of her sharp change in life circumstances and struck by her odd emotional profile--arranged for psychiatric and developmental testing and, [\*1422] finally, a neurological exam and brain scan. The scan both showed the AVM and revealed that at some point, likely quite late in Jane's life and probably shortly before the start of her "downfall," the AVM had ruptured and bled. Extensive neuropsychological testing then revealed that Jane retained her extremely high intelligence and virtually all of her cognitive abilities, though she did display the highly tangential and perseverative speech characteristic of a thought disorder. <sup>258</sup> This general cognitive intactness had largely masked others' ability to recognize her progressively more serious deficits. However, her affect was noticeably constricted and she was consistently unable to make self-protective choices in personal, particularly financial, matters. Significantly, she appeared utterly incapable of perceiving the mental instability of the fraud's ringleader and the implausibility of her representations and promises, though those facts were immediately evident to others. She also appeared strangely detached from the extremely serious repercussions of her conviction for both her and her family. A court-appointed expert, after considering the defense's evidence and examining Jane, opined that she was incompetent to be sentenced. <sup>259</sup>

Jane's case would appear to be the first in which an examiner has explicitly relied on evidence of a "Gage matrix" disorder to make a finding of adjudicative incompetence. Other instances in which similar issues were raised have met with very different outcomes, as decision-makers in those cases regarded evidence of emotional dysfunction, even if presumed to be true, to be irrelevant.

The first such case is *North Carolina v. Shytle*. <sup>260</sup> Wanda Graybeal Shytle shot herself in the head after killing a number of family members. Expert examinations conducted after her self-inflicted injury indicated that while her intelligence and memory were intact, the significant damage to Shytle's brain "impaired her emotional response[s] to situations" and led to inappropriate behavior, such as laughing at serious moments, that suggested that she failed to grasp the seriousness of her plight. <sup>261</sup> One examiner testified that she was incompetent because "her affective appreciation of events has been lost," preventing her from "understanding her legal situation and cooperating with her attorney." <sup>262</sup> The North Carolina Supreme Court was asked whether, "if an individual's cognitive, reasoning ability is separated from basic emotional responses or affect," she would be "competent [\*1423] not only to aid in [her] defense but also to proceed to trial." <sup>263</sup>

Two trial judges, without significant discussion, determined that she was competent, and the North Carolina Supreme Court agreed:

There was evidence that the defendant had an IQ within the normal range and that she knew what the charges were and what could happen to her if she was convicted. If this did not worry or upset her because of her altered medical condition, it does not mean that she did not understand those facts ... If the defendant's situation did not bother her it does

not mean she did not comprehend it. <sup>264</sup>

This analysis--in which the extreme abnormality of *Shytle's* lack of emotional reaction to her potentially dire situation was sanitized by the presence of bare intellectual understanding--ignores the importance of appreciation in shaping self-protective motivations and goals. <sup>265</sup> In *Shytle*, then, cognitive function simply trumped emotional dysfunction, without a considered effort to determine how the latter might have affected rationality.

Similar evidence met with a similar disposition in the recent clemency petition of Donald Beardslee, executed in 2005 for taking part in a multiple murder to avenge a small debt. <sup>266</sup> Though the issue argued there was not competency but, rather, potential mitigation providing a reason to spare his life, the way in which the brain-damage arguments were treated is relevant and illuminating. <sup>267</sup> In an [\*1424] eleventh-hour bid for clemency, Beardslee's attorneys came forward with new evidence suggesting that he had brain damage--present at birth and aggravated by two head injuries in adulthood, one of which resulted in coma--that, among other deficits, impaired emotional capacity. <sup>268</sup> According to a defense expert and family members, throughout his life Beardslee appeared unable appropriately to express emotion, was unusually gullible and naive, and exhibited terrible judgment when making personal decisions under conditions of stress and uncertainty. <sup>269</sup>

In a response closely paralleling that in the *Shytle* case, prosecutors offered a purely cognitive theory: Beardslee could not be seriously brain-damaged, at least not in a legally meaningful way, because he had a relatively high IQ, well-developed cognitive skills, got good grades, had before his incarceration been capable of caring for himself, and had a solid work history. <sup>270</sup> To the extent that Beardslee failed to show emotion, the state argued, that merely showed his lack of remorse. The Governor of California, Arnold Schwarzenegger, agreed. While acknowledging that the claim that brain injury left Beardslee "unable to process emotions . . . warrant[ed] more extensive discussion," Schwarzenegger declined to enter that discussion and instead concluded that Beardslee's apparently intact [\*1425] cognition answered the inquiry. <sup>271</sup> Though "many observers ha[d] reported that Beardslee" had "a flattened affect for much of his life" and had argued that "this lack of emotion [wa]s a symptom and byproduct of his mental deficiency," Schwarzenegger concluded that the fact that "Beardslee had a flat affect . . . does not have persuasive value" showing that he lacked "capacity to make reasoned decisions." <sup>272</sup> Beardslee was executed. <sup>273</sup>

In both the Beardslee and *Shytle* cases, then, legal decision-makers held that evidence of cognitive function simply overrides evidence of emotional dysfunction. The fact that these states of being can coexist--and, further, that emotional dysfunction can correlate with and signal rational decision-making deficits even where cognition is intact--was simply not considered credible. Nor did the decision-makers in those cases appear to regard as important the fact that persons with profoundly impaired emotional function might be incapable of formulating the self-protective motivation that would animate active participation in their defense, including cooperation with counsel. In contrast, in Jane's case an examiner took such emotional impairments seriously, in conjunction with evidence of other (and arguably more cognitive) impairment, and determined her to be adjudicatively incompetent. This

juxtaposition, paralleling that of the courts' and examiners' varying treatment of depression, indicates that current theory and practice fail to reflect a consistent and sophisticated understanding of emotion's influence on rational decision-making.

### III. MEASUREMENT AND POLICY CONSIDERATIONS

Thus far, this Article has argued that both cognition and emotion are integral to the rational decision-making on which adjudicative competence depends. It has urged that decisional competence be recognized as key, that examiners and courts--whose interdependent efforts are vital to determinations of adjudicative competence--undertake any given competence determination by reference to the component parts of rational decision-making, and that such examination articulate and take seriously the effects of both thought disorder and emotional disorder, particularly where the latter is not adequately captured by a cognitive focus. It has argued specifically that courts and examiners should consider whether clinical depression (whether unipolar or bipolar) has impaired substantially a defendant's perception, appreciation, and ability to choose, and that the emotional deficits [\*1426] attending certain forms of brain damage should be regarded as important concomitants of impaired capacity for reasoning and choice. It is worth asking, though, whether this proposal is amenable to implementation that would further the goals of adjudicative competence doctrine. This Part addresses those concerns.

The question of whether emotional competence is amenable to accurate, consistent definition and measurement is no small matter. This difficulty is not unique to emotional considerations; because of the open-textured nature of the construct, it inures to *all* attempts to define and measure competence.<sup>274</sup> The real question, then, is whether there is something about emotional disorder that makes it so different from cognitive disorder as to prevent it from being articulated, measured, and considered as part of the legal test for adjudicative competence. While there is good reason to raise this question, it should be answered in the negative.

One prominent competence theorist, Paul Appelbaum, raised just this question within the context of a parallel debate over capacity to consent to medical treatment.<sup>275</sup> Appelbaum agreed that "disturbing questions" had been raised "about the lack of attention to emotional issues in competence assessment."<sup>276</sup> He cautioned, however, that before incorporating emotional considerations we ought to satisfy ourselves of the existence of a substantial target population whose incompetence is not likely to be captured by more traditional cognitive measures, as well as of the feasibility of measuring such dysfunction. Perhaps, he argued, the historical focus on cognition at emotion's expense is warranted if it reflects "the experience of the courts with regard to the major causes of decision-making incapacity."<sup>277</sup> Thus, he asserted, "[i]t is imperative to know before beginning that the game is worth the candle."<sup>278</sup> Appelbaum's concerns, which have not to date been followed up within the consent-to-treatment literature,<sup>279</sup> are well placed, though he almost certainly was wrong that historical neglect of emotion's role might reflect the wisdom of experience. Such neglect is entirely consistent with and reflective of the historical disregard of emotional considerations that is now [\*1427] under sustained attack.<sup>280</sup> And if we look beyond that neglectful pedigree, the outlook is hopeful.

The search for "rational" cognition is, after all, not so very different from the search for "rational"

emotion; as LeDoux has pointed out, "cognition is not as logical as it was once thought and emotions are not so illogical," <sup>281</sup> and as to both we operate with reference not to an ideal but to a rough account of the normal. <sup>282</sup> Thinking and reasoning are not "inherently rational, optimal, desirable, or even smart. A thorough history of human thinking will include quite a few chapters on stupidity." <sup>283</sup> And as abundant research on bounded rationality <sup>284</sup> has confirmed, people consistently exhibit normatively non-rational processes when forming judgments and making decisions. <sup>285</sup> While reliance on cognitive heuristics and biases <sup>286</sup> is in one sense irrational, it cannot be the sort of irrationality about which adjudicative competence is concerned, if for no other reason than that it is far too common. <sup>287</sup> Similarly, the fact that most people are of only average intelligence and routinely make foolish choices cannot be legally significant. But by buying into the adjudicative competence requirement, we necessarily assume that we can somehow, and with some level of consistency, tell the difference between everyday irrationality and the competence-threatening sort. <sup>288</sup>

Even when considering only cognitive function this is often far from an easy call, as discussion of the thought-disorder cases reveals. But the quest for such [\*1428] rationality is significantly furthered by the decision-making approach argued here. Indeed, that approach is largely reflected in the forensic assessment instrument created by the MacArthur team. <sup>289</sup> More widespread use of that instrument, the MacCAT-CA, would promote clarity and consistency, at least in terms of assessing cognitive disorder. Encouraging close articulation of the necessary steps of decision-making--including by use of the MacCAT-CA--should not, though, be read to imply that each step must be ideally executed for the entire process to be deemed minimally rational.

A similar analysis pertains to emotional disorder. Though this Article has explained how a dearth or surfeit of particular emotions, a general lack of emotional capacity, or lack of emotional balance can threaten competence, that does not signify that a defendant must have optimal emotional health to be competent, just as she is not required to display above-average intelligence and sharp, non-biased reasoning skills. <sup>290</sup> **Criminal defendants** often will present with emotional disturbances, only a small subset of which might threaten competence. <sup>291</sup> Defendants may well have had mood disorders and emotional problems before committing the conduct of which they are accused; the offense conduct might have been motivated by emotional disturbance or itself may have caused trauma; and the prospect of conviction and punishment may trigger significant stress and suffering. <sup>292</sup> While these factors might matter to adjudicative competence in any given instance, they might not, though a prudent approach would [\*1429] regard many such emotional disturbances as warranting further examination. What we are concerned about is the presentation of extreme disorders that can be shown to seriously disrupt one or more identifiable stages of minimally stable, self-protective decision-making processes.

In this regard, examination of competence-threatening emotional disorder may not be on quite as solid a footing as a cognitive approach. However, it still falls well within acceptable limits. An example is illustrative. Consider the MacCAT-CA, which, as "primarily a cognitive assessment tool," <sup>293</sup> is not well suited to an assessment of emotion's role. For example, it contains only one indirect measure of affect, the "appreciation subscale," but that subscale is not specifically directed to the emotional component of appreciation, but rather to its thought-disorder iteration. <sup>294</sup> Moreover, the understanding and reasoning portions of the MacCAT-CA rely on the defendant's responses to a hypothetical incident, which by reason of being "one step removed from the defendant's actual case" <sup>295</sup> may be particularly ill-suited to

capturing "Gage matrix" dysfunction, in which intact laboratory response to hypotheticals stands in contrast to real-life failure. <sup>296</sup> These limitations suggest that the MacCAT-CA will be of little use in cases of emotional dysfunction. But such a conclusion would be overstated. While a new instrument could be developed to incorporate the types of emotional considerations urged here, assessment of emotional competence need not await such a test. No forensic assessment instrument is intended to stand alone, but instead is meant to be considered as part of a holistic evaluation including clinical observation, review of the defendant's medical and psychiatric history, interviews with those in a position to shed light on her behavior, and evaluation of the particular issues and demands at play in the specific case. <sup>297</sup> Thus, the MacCAT-CA could be supplemented with a more emotion-focused inquiry were the examiner, defense attorney, prosecutor, [\*1430] or judge to suspect a relevant emotional disorder.

At least with regard to depression, such an examination is likely to be fruitful. Clinical depression is a relatively well-understood disease affecting a large number of persons. <sup>298</sup> While its definition and diagnosis always will be subject to meaningful debate, this is equally true of schizophrenia and other psychotic disorders. Moreover, as the cases demonstrate, the possible incompetence of such persons is not always captured by cognitive tests. Capturing such impairments will depend on whether emotional factors are explicitly considered relevant to the legal standard. What is lacking is not a strong empirical foundation for depression diagnoses; it is, rather, a strong theoretical foundation within law, such as that offered herein, affirming that such depression might matter to competence, and explaining how. If courts direct examiners to make such assessments, those examiners have ready access to the diagnostic tools to comply.

The prognosis for assessment of "Gage matrix" disorder is more mixed. While it now appears clear that emotional capacity and reasoning decline together in persons with specific forms of frontal damage, causation remains unclear. Though causation is a highly contested issue in the study of psychotic and mood disorders as well, the novelty of the emerging brain research warrants particular caution when deciding whether to attribute to it real legal significance. <sup>299</sup> It is also difficult to know how many people, let alone how many **criminal defendants**, might be affected by such brain damage. There is reason to believe they may be overrepresented in the defendant population. <sup>300</sup> It has been suggested, too, that a large percentage of death row inmates suffer from frontal lobe damage, <sup>301</sup> and at least some of those may well display such disorder. But detection issues loom large. The emotional flatness characteristic of "Gage matrix" disorder could mimic the flat affect displayed by those considered "psychopaths" or even those attempting, for reasons of ego maintenance or self-protection, to project a tough image. <sup>302</sup> Because of the high cost and uncertain payoff of brain imaging, in addition to [\*1431] privacy concerns, it would be neither feasible or desirable to image all defendants' (or even all capital defendants') brains, absent other strong indicators of incompetence or brain injury.

Still, "Gage matrix" disorder should be allowed to inform competence assessment. In cases like Jane's, where a strange emotional profile--particularly one incorporating highly unusual affective flatness and inability to "read" the emotional signals of others--presents together with a history of evidently self-destructive behaviors, there is good reason to suspect such disorder. Because cognition tends to remain intact in such persons, attention to the emotional aspect will matter, because without it we are left with a purely outcome-driven inquiry: we think the defendant may be incompetent because of the terrible

choices she has displayed in life. Such an assessment will fall far short of that required to trigger an inquiry or justify an incompetence finding, and cognitive tests likely will reveal nothing unusual. Following up on the suspicion created by the addition of apparent emotional disorder, then, generally by neuropsychological examination and brain imaging, may bring very important information to the table. The current state of scientific knowledge permits a conclusion that such a profile is underlain by a defective decision-making process, although we may not yet know precisely why. The high correlation of emotion and reasoning defects suggests that the latter are both substantial and not something over which the defendant has control. Thus, even under the most cautious approach, presentation of such a profile should raise a bona fide doubt as to competence sufficient to warrant more searching inquiry.<sup>303</sup> Whether any resulting evidence of brain damage should be considered to establish *Dusky* incompetence will be a harder call, highly dependent on the exact nature of the damage and the extent to which medical experts and courts are able to articulate its effect on the defendant's ability to make sound, self-protective decisions in the context of her case.<sup>304</sup> Given the limitations of existing standardized tests such a determination almost certainly will require creative solutions, potentially including administration of the type of experimental gambling tasks used by Damasio in his research,<sup>305</sup> observation of the defendant in actual decision-making situations, and interviews of persons who have observed her [\*1432] real-life decision-making processes.

Even once we have satisfied ourselves that we *can* incorporate emotional evaluation into competence determinations, we still must ask ourselves if we *should*. It is possible that fewer defendants will be deemed incompetent under the proposed approach, because the effort might lead examiners away from simplistic determinations--for example, those that de facto equate psychosis with incompetence--but it seems more likely to result in more--potentially many more--incompetence determinations, particularly of the severely depressed.<sup>306</sup> Because of the doctrine's delicate balancing act between competing values, undue expansion of the test threatens to both impair defendants' autonomy and frustrate the state's interest in public safety and law enforcement.

Structural features of the competence determination, however, largely guard against any serious threat to autonomy and public safety. In nearly every case, the consequence of an incompetence determination is not termination of criminal proceedings: it is a delay in proceedings while the defendant is evaluated and treated.<sup>307</sup> Extensive delay in proceedings surely can weaken a prosecution case, but confinement for restoration of competence may not continue indefinitely and must be justified by treatment progress, creating incentives for timely resolution. Depression, even severe depression incorporating elements of thought disorder, often is amenable to treatment, particularly with medication<sup>308</sup>--and in very extreme cases medical staff may be permitted to administer such medication involuntarily.<sup>309</sup> The period of evaluation and treatment also is useful for detecting malingering.<sup>310</sup> Further, even if the interest in enforcing criminal law never is vindicated, the defendant might still be incapacitated, as should she be incapable of competence restoration but dangerous to herself or others she will be subject to [\*1433] civil commitment proceedings.<sup>311</sup> And while the potential for encroachment on autonomy is real, most defendants (particularly those with viable defenses) who truly are capable of autonomous decision-making have strong incentives to try to prove that they have been wrongly identified as incompetent, to avoid both the stigma of involuntary mental health treatment and the possibility of long-term confinement with no opportunity for a determination of guilt or innocence.<sup>312</sup>

Further, to the extent that some number of defendants might escape both prosecution and confinement, that is an acceptable (if potentially painful) price to pay. <sup>313</sup> This is particularly relevant to disposition of brain-damaged defendants who, like Jane, likely will never get better. Though it is possible that medical experts might identify strategies to improve such defendants' competence, it is prudent to assume that most will be adjudicatively incompetent for life. The same result may obtain with regard to that percentage of the severely depressed whose disease defies treatment. <sup>314</sup> Should such defendants be neither dangerous nor otherwise subject to civil commitment, they may in fact go permanently "unwhipped of justice." <sup>315</sup> But the number of such defendants is likely to be relatively small; they will by definition not present an imminent danger to public safety; and the ill effects of their disorders may be effectively cabined by surrogate decisionmaking, for example, by appointment of guardians to handle their financial affairs. Though not without cost, such a result is far less offensive to the system of criminal justice than the trial of an incompetent person in contravention of her fundamental constitutional rights. <sup>316</sup>

## CONCLUSION

This Article has proposed a thinking-and-feeling conception of the *Dusky* [\*1434] requirement of rational understanding. To implement this conception, it is vital that courts, examiners, and legal scholars join forensic theorists in recognizing the centrality of decisional competence. Because most courts and examiners do not explicitly so frame their inquiry, they deprive themselves of transparent access to decision-making theory's large and useful trove of substantive knowledge and analytical tools. Further, courts, examiners, and legal theorists must join the contemporary mind sciences in recognizing that emotion is both deeply intertwined with the mechanisms of cognition and of independent significance within rational human decision-making. Looking for and describing the specific cognitive and affective substrates of defendants' decision-making processes provides a language and methodology that will expose the theoretical and practical underpinnings of competence determinations. <sup>317</sup>

But transparency is not the only virtue. The advocated approach also will uncover certain threats to competence that simply would not be noticed, or regarded as important, under a more simplistic or purely cognitive approach. If, for example, we are unaware that inability to perceive and process emotional information is highly correlated with defective reasoning under conditions of personal risk, a defendant's deficits in the former domain--even if proven--lack any logical hook into tests of competence. And if we lack understanding of emotion's role in appraisal, appreciation, and choice, we not only cannot articulate *why* it is that a profoundly depressed person might be incapable of formulating and communicating a sound, stable, self-protective choice, we cannot voice any theory under which that phenomenon might *matter*. Under the approach advocated here, evidence of cognitive function never should be allowed simply to trump evidence of emotional dysfunction; nor should the converse be true. Adjudicative competence doctrine and practice should strive, rather, to reflect the "harmonious integration of reason and passion in the brain." <sup>318</sup>

This is not to say that the adjudicative competence conundrum can be solved for once and for all by reference to the insights of the mind sciences. <sup>319</sup> Nor, despite significant advances in our understanding

of human decision-making, may we [\*1435] reasonably expect to discover and define some stable conception of rationality. <sup>320</sup> Rationality will, like competence, always retain the somewhat elusive quality of an idea. Shifting the inquiry away from a general search for "rationality," however, and toward a more finely grained search for rational decision-making processes by reference to both cognitive and emotional influences, is one way out of the "black hole" into which courts sometimes feel themselves drawn. <sup>321</sup> This approach is transparent, theoretically defensible, and amenable to concrete implementation. It offers our best hope for giving meaning to "rational understanding."

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure  
Jurisdiction  
Personal Jurisdiction & In Rem Actions  
In Personam Actions  
Minimum Contacts  
Criminal Law & Procedure  
Guilty Pleas  
Competency  
Criminal Law & Procedure  
Defenses  
Insanity  
Insanity Defense

### FOOTNOTES:

<sup>n1</sup> JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 35 (1996).

<sup>n2</sup> See NORMAN G. POYTHRESS ET AL., *ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES* 40 (2002) (defining "adjudicative competence" as the ability of the defendant to "understand[] his jeopardy and ... to advise the lawyer who is representing him"); *THE MACARTHUR ADJUDICATIVE COMPETENCE STUDY, EXECUTIVE SUMMARY*, <http://macarthur.virginia.edu/adjudicate.html> (2001) [hereinafter *MACARTHUR STUDY, EXECUTIVE SUMMARY*] ("[A]djudicative competence" is a "more appropriate term than 'competence to stand trial,' given that approximately 90 percent of all criminal cases in the United States are resolved by means of guilty pleas, rather than at trial.").

<sup>n3</sup> 362 U.S. 402, 402 (1960) (per curiam).

<sup>n4</sup> See, e.g., *Cooper v. Oklahoma*, 517 U.S. 348, 357-60 nn.8-14 (1996); see also *Godinez v. Moran*, 509 U.S. 389, 405-06 (1993). The intertwining of insanity and competence has its origins in Blackstone and Hale, who conceived incompetence as a form of "madness" likely distinguished from legal insanity only by reason of afflicting a defendant after his offense but before trial, sentence, or execution. See WILLIAM BLACKSTONE, 4 *COMMENTARIES* \*24; MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 34-35 (1736).

<sup>n5</sup> See generally *Ford v. Wainwright*, 477 U.S. 399 (1986) (using insanity and competency interchangeably); cf. ABA *CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* § 7-5.6(b) (1989) (discussing the problems with using insanity and incompetency interchangeably).

<sup>n6</sup> RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 16, 51 (1980); see Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921, 982

(1985) ("Clinicians, particularly psychiatrists, historically have misunderstood the legal issues involved with incompetency, frequently confusing it with legal insanity or with the clinical definition of psychosis.").

<sup>7</sup> See, e.g., *United States v. Gigante*, 166 F.3d 75, 79, 84 (2d Cir. 1999) (recounting multiple competency determinations in case against Vinny "Chin" Gigante). Gigante, who was widely believed to be malingering, inspired a storyline in *The Sopranos* in which Uncle Junior feigns incompetence (but later develops symptoms of incompetence). See *The Sopranos: Whoever Did This* (HBO television broadcast Nov. 10, 2002), <http://www.hbo.com/sopranos/episode/season4/episode48.shtml>.

<sup>8</sup> See, e.g., *Godinez*, 509 U.S. at 403 (Kennedy, J., concurring) (stating that legal standards attending insanity and competence are procedurally and substantively distinct); *Jackson v. Indiana*, 406 U.S. 715, 739 (1972) (distinguishing insanity and incompetence). Persons are presumed to be both competent at the time of criminal proceedings and sane at the time of the offense, but may be found both incompetent and insane (presumably in a forensic inquiry before trial, for incompetence will bar trial); competent and insane (which must be the case whenever a defendant goes to trial but prevails on the insanity defense); or incompetent and sane (in which case we attempt to restore competence so imposition of criminal consequences may be determined on the merits). Conflating the two inquiries creates potential for serious injustice, for example, by subjecting the incompetent but sane person to trial because she understands right from wrong, despite the fact that she is not in a position adequately to protect her own interests. See *Cooper*, 517 U.S. at 364 (stating that the consequences of being tried while incompetent are "dire").

<sup>9</sup> Winick, *supra* note 6, at 924.

<sup>10</sup> "The insanity defense is raised in only about 1% of felony cases in the United States, and although success rates vary widely across jurisdictions, it is successful only in 26% of the cases where it is raised." David R. Katner, *Raising Mental Health Issues-Other than Insanity-In Juvenile Delinquency Defense*, 28 AM. J. CRIM. L. 73, 73 n.1 (2000) (quoting Marnie E. Rice & Grant T. Harris, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOL. PUB. POL'Y & L. 126, 127 (1997)). See generally Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991) (citing similar data regarding percentages of the usage and success of the insanity defense); Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63 (1994) (comparing public perceptions on the usage of the insanity defense to the actual usage of the defense).

<sup>11</sup> A surprisingly large number of defendants accused of low-level crimes are referred for competence evaluation, despite the relatively lenient possible punishment as compared to the potentially long-term nature of an incompetence commitment, whether for evaluation, treatment, or both. See ROESCH & GOLDING, *supra* note 6, at 56 (stating 30% of the committed defendants in 1978 study were charged with disturbing the peace); Robert A. Burt & Norval Morris, *A Proposal for Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 79 n.54 (1972) (referring to a 1950s-era study that indicated that within the questioned-competence population accused misdemeanants far

outnumbered felons). *But see* ROESCH & GOLDING, *supra* note 6, at 52-53 (reporting finding from a 1975 study that those accused of violent interpersonal crimes were disproportionately represented in the "incompetent population").

¶12 *See* POYTHRESS ET AL., *supra* note 2, at 9 (claiming 8.2% are referred); Patricia A. Zapf & Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, COURT REV. Summer 2000, at 28 (stating that between 2 and 8% of felony defendants are referred). *But see* Winick, *supra* note 6, at 928 n.21 (discussing a 1973 study of Manhattan cases which showed 0.87% of defendants referred).

¶13 *See* THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 69 (2d ed. 2003) (estimating 25,000 competency evaluations annually in the 1980s in the United States); 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) (discussing a recent estimate of 60,000 evaluations each year); Zapf & Roesch, *supra* note 12, at 28 (estimating between 25,000 and 39,000 evaluations in United States annually).

¶14 "In 1994, the American Bar Association's Criminal Justice Mental Health Standards noted that 'the issue of present mental incompetence, quantitatively speaking, is the single most important issue in the criminal mental health field.'" MACARTHUR STUDY, EXECUTIVE SUMMARY, *supra* note 2.

¶15 *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 719 (1972).

¶16 Winick, *supra* note 6, at 923 n.3; *see also* Burt & Morris, *supra* note 11, at 66 n.1 (discussing a 1967 study that found over half of criminal offenders in surveyed hospitals were admitted for incompetence while insanity acquittees accounted for 4%) (citing P. SCHEIDEMANDEL & C. KANNO, *THE MENTALLY ILL OFFENDER* 20 (1969)).

¶17 *E.g.*, Medina v. California, 505 U.S. 437, 446 (1992) ("The rule that a **criminal defendant** who is incompetent should not be required to stand trial has deep roots in our common-law heritage."); *Cooper*, 517 U.S. at 356-357 (citing King v. Frith, (1790) 22 How. St. Tr. 307, 311, Queen v. Goode, (1837) 112 Eng. Rep. 572 (K.B.), and King v. Pritchard, (1836) 173 Eng. Rep. 135); *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899); *United States v. Lawrence*, 26 F. Cas. 887 (D.C. Cir. 1835); *Guagando v. State*, 41 Tex. 626 (Tex. 1874); *Freeman v. People*, 4 Denio 9 (N.Y. Sup. Ct. 1847).

¶18 *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 540-41 (1993) (arguing that there exists little research on the meaning of incompetence and that case law fails to define the meaning of competence). This neglect is most pronounced in the academic legal literature; the forensic literature is significantly more developed. *See, e.g.*, RICHARD I. FREDERICK ET AL., *EXAMINATIONS OF COMPETENCY TO STAND TRIAL: FOUNDATIONS IN MENTAL HEALTH CASE LAW* (2004); GRISSO, *supra* note 13; POYTHRESS ET AL., *supra* note 2.

¶19 *See e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993); Drope v. Missouri, 420 U.S. 162, 171

(1975); *Pate v. Robinson*, 383 U.S. 375 (1966). While the Court has left open a small window for experimentation with innocence-only adjudications of the incompetent, *see Jackson*, 406 U.S. at 740-41 (mentioning statutes in certain states that permit incompetent defendants to have a trial to determine their innocence, but where a finding of guilty will not be entered against them), that invitation has not been answered. Further, a different substantive standard of "competence" applies in the execution context. *See generally Ford v. Wainwright*, 477 U.S. 399, 410-11 (1986) (setting forth standard for competence to be executed); *see also* note 52, *infra*.

¶20 *See Zapf & Roesch*, *supra* note 12, at 28 ("Although the concept of competency to stand trial has been long established in law, its definition, as exemplified by the ambiguities of *Dusky*, has never been explicit.").

¶21 *See id.* (arguing that crucial phrases within the *Dusky* standard are ill defined); *see also United States v. Housh*, 89 F. Supp. 2d 1227, 1229 (D. Kan. 2000) (arguing that few cases "have given meaning to the 'rational understanding' phraseology used by the *Dusky* court").

The "rational understanding" test appears in both the "communication with counsel" and "understanding of the proceedings" prongs of the *Dusky* standard. There would appear to be no meaningful distinction between the terms as used in these two prongs; further, courts seldom address them separately. One sense in which the first requirement might be independently significant is where a rational defendant lacks mechanical ability to communicate. *Cf. Jackson*, 406 U.S. at 718 (discussing the defendant's inability to communicate and lack of hearing as components of his incompetence). The type of irrationality about which *Dusky* is primarily concerned, though, is a rational decision-making deficit, which might affect both understanding of the proceedings *and* ability to communicate with counsel. *See infra* Part I.B.

¶22 *See, e.g., Medina*, 505 U.S. at 465 ("Competency determinations by and large turn on the testimony of psychiatric experts, not lawyers.") (citing study showing rates of judicial agreement with experts' recommendations "typically exceeding 90%"); Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 Hous. J. HEALTH L. & POL'Y 193, 199-200 & nn.28-30 (2004) (citing several studies indicating 90-100% rate of agreement by judges with an expert's assessment of competency); Zapf & Viljoen, *supra* note 13, at 352, 364 (showing agreement rates of almost 100%, though "the typical forensic evaluation is left largely unguided").

¶23 *See Winick*, *supra* note 6 at 930 & nn.29-30 (arguing historical reliance on psychiatrists is giving way to increasing reliance on psychologists, social workers, and examiners from other disciplines); *see also LEDOUX*, *supra* note 1, at 38-39 (defining "mind sciences").

¶24 *See, e.g., Riggins v. Nevada*, 504 U.S. 127, 130-31 (1992) (explaining that four experts expressed a range of opinions and conclusions); Morris et al., *supra* note 22, at 215-16 (estimating that psychiatrists would agree on the outcome of a *Dusky* standard evaluation at most 80% of the time).

¶25 *See generally POYTHRESS ET AL.*, *supra* note 2; *see also Grisso*, *supra* note 13, at 80-81 (explaining how researchers have attempted to standardize evaluation mechanisms).

- ¶n26 See Winick, *supra* note 6, at 922 (arguing that adjudicative competency has a "status in the criminal mental health system that is perhaps the most frequently misunderstood by attorneys, judges, and mental health professionals, as well as by the public").
- ¶n27 The term was coined by Richard J. Bonnie. Bonnie, *supra* note 18, at 567; *see also infra* Part I.B.
- ¶n28 See, e.g., *Medina v. California*, 505 U.S. 437, 457 (1992) (Blackmun, J., dissenting) (arguing that the Due Process Clause prevents trying a person who is incompetent); Bonnie, *supra* note 18, at 551-53 (arguing that a defendant who does not understand the nature of the criminal proceedings cannot be tried).
- ¶n29 *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)).
- ¶n30 *Id.* at 171-72; *see also* *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (concluding that a correct determination of competence is fundamental to the fairness of a trial). The adversarial nature of the adjudicative competence construct is perhaps what most distinguishes it from other law-relevant competencies, particularly capacity to consent to medical treatment.
- ¶n31 See Bonnie, *supra* note 18, at 548 ("The greatest need for theoretical development arises in relation to decisional competence."); *see also id.* at 571 (noting that "case law on decisional competence in criminal adjudication" is "skimpy").
- ¶n32 GRISSO, *supra* note 13, at 7. Competence to consent to and refuse medical treatment is perhaps the most explored of these. *See generally* THOMAS GRISSO & PAUL S. APPELBAUM, *ASSESSING COMPETENCE TO CONSENT TO TREATMENT* (1998) (discussing competence generally and how it relates to consent to and refusal of medical treatment).
- ¶n33 See, e.g., Paul S. Appelbaum, *Ought We to Require Emotional Capacity as Part of Decisional Competence?*, 8 KENNEDY INST. OF ETHICS J. 377, 378 (1999) ("Contemporary ideas of competence are tied inextricably to the ideal of self-determination in modern Western societies.").
- ¶n34 ROESCH & GOLDING, *supra* note 6, at 12-13 (stating that "*no absolute set of facts is ever dispositive of competency*," though the "'rationally consult, assist, and comprehend' standard of *Dusky* (and the surrounding cases) is an attempt, albeit rather vague, to set forth the theoretical terms of the competency construct").
- ¶n35 GRISSO, *supra* note 13, at 22.
- ¶n36 *Id.* at 2.
- ¶n37 See *id.* (explaining the long history of relying on mental health professionals for assessment of "human abilities, emotions, and potentials").

- n38 See, e.g., Elyn R. Saks & Stephen H. Behnke, *Competency to Decide on Treatment and Research: MacArthur and Beyond*, 10 J. CONTEMP. LEGAL ISSUES 103, 104 (1999) ("[T]he tension between autonomy and paternalism remains central to the assessment of competency.").
- n39 Burt & Morris, *supra* note 11, at 85; see also Appelbaum, *supra* note 33, at 378 (arguing that the standards of competence should be such that only a small number of people are not "permitted to make decisions on their own").
- n40 GRISSEO, *supra* note 13, at 9; see *Sell v. United States*, 539 U.S. 166, 183 (2003) (noting that a defendant may be incompetent to be tried but competent to refuse medical treatment).
- n41 GRISSEO, *supra* note 13, at 3. Because *Miranda* competence and the competence of juveniles both are the subject of an extensive and generally separate jurisprudence, neither is addressed in this Article. However, some of the arguments herein may well apply with equal force to juveniles. See, e.g., MENTAL HEALTH SCREENING AND ASSESSMENT IN JUVENILE JUSTICE 357 (Thomas Grisso et al. eds., 2005) (discussing juveniles' ability to appreciate their *Miranda* rights); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) (evaluating a study comparing competence in juveniles with that of adults).
- n42 See ROESCH & GOLDING, *supra* note 6, at 131-38 & Figure 5-1 (outlining the potential junctures requiring determinations of defendant competency and including a graphical rendering of this process).
- n43 See, e.g., *Drope v. Missouri*, 420 U.S. 162, 178-81 (1975) (determining that the evidence presented created a sufficient doubt of the defendant's competence and requiring further inquiry by the lower court); *Pate v. Robinson*, 383 U.S. 375, 378-86 (1966) (holding that the evidence presented raised a sufficient doubt as to the defendant's competence such that he was deprived of due process when the trial court failed to give him an adequate hearing).
- n44 See *Bonnie*, *supra* note 18, at 550 ("[J]udges practically insist on ultimate issue opinion in reports and testimony on competence to stand trial."); ROESCH & GOLDING, *supra* note 6, at 18 (stating that experts "typically testify in conclusory terms, often parroting the statutory language"). There is a substantial debate as to whether a competence examiner ever should proffer an opinion as to the ultimate issue of adjudicative incompetence. See generally Christopher Slobogin, *The "Ultimate Issue" Issue*, 7 BEHAV. SCI. & L. 259 (1989).
- n45 See *supra* note 22 and accompanying text (explaining that agreement rates are near 100%).
- n46 See *Medina v. California*, 505 U.S. 437, 451-52 (1992) (holding that a state may place the burden on a defendant to show incompetence by a preponderance of the evidence); cf. *Cooper v. Oklahoma*, 517 U.S. 348, 355-56 (1996) (holding that a state may not impose a clear and convincing evidence burden on a defendant).
- n47 See *Sell v. United States*, 539 U.S. 166, 179 (2003); *Riggins v. Nevada*, 504 U.S. 127, 135

(1992); *Washington v. Harper*, 494 U.S. 210, 227 (1990).

n48 *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that it is unconstitutional to confine the defendant indefinitely solely on the basis of adjudicative incompetence; confinement may continue only for a reasonable period to determine likelihood of competence restoration and be justified by progress toward that goal).

n49 *Id.* Many or most adjudicatively incompetent defendants can likely be shown to be dangerous to themselves or others, subjecting them in most jurisdictions to civil commitment. Some commentators have complained that *Jackson* has not prevented permanent commitment for the adjudicatively incompetent, but merely has shifted the mechanism. *See Winick, supra* note 6, at 927 & n.17, 940-41 & nn.73-79.

n50 This question was left unanswered by *Jackson*. *See Jackson*, 406 U.S. at 740 (declining to reach question of whether due process prohibits "holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence").

n51 *See Rees v. Peyton*, 384 U.S. 312, 313-14 (1966) (per curiam).

n52 *Ford v. Wainwright*, 477 U.S. 399 (1986). The standard for competence to be executed is a relatively minimal one, looking to whether the prisoner has "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him." *Id.* at 403-04 (quoting FL. STAT. § 922.07 (1985)). This is generally interpreted to require only a showing that those to be executed "know the fact of their impending execution and the reason for it." *Id.* at 422 (Powell, J., concurring). If this is the correct standard, competence to be executed likely requires little or none of the decision-making capacity discussed with regard to adjudicative competence in *infra* Part I.B. However, such capacity might be relevant were a more expansive notion of competence to be executed to be adopted. *See, e.g., id.* at 414-15 (appearing to regard as relevant whether a condemned inmate can confer with counsel and contribute to an assessment of the fairness and accuracy of the sentence); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 877-78 (7th ed. 2001) (comparing the instances of some states following and modifying the standards set forth in *Ford*); ABA *CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* 7-5.6(b) (1989) (defining when an inmate is incompetent to be executed).

n53 *See Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

n54 *See id.*

n55 *Dusky v. United States*, 271 F.2d 385, 388, 389-92 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960) (per curiam).

n56 *Id.* at 389.

n57 *Id.* at 389-90.

¶58 *Dusky*, 362 U.S. at 402 (quoting the Solicitor General's brief). The experts defined "orient[ation] to time, place, and person" thus:

This means that he is able to know the day of the week, the hour, the place in which he finds himself geographically, and the circumstances of his present situation. He knows he is in a courtroom; he knows the day of the week and the day of the year, and he knows that you are his attorney and Judge Smith is the judge.

*Dusky*, 271 F.2d at 389. Though *Dusky* pertained only to the proper interpretation of the federal competence statute, 18 U.S.C. § 4244 (2006), some version of the *Dusky* test now has been adopted in virtually every jurisdiction. See Winick, *supra* note 6, at 923 n.4; see also MODEL PENAL CODE § 4.04 (1962).

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

¶60 *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966).

¶61 *Drope*, 420 U.S. at 179.

¶62 See *Pate*, 383 U.S. at 385-86 (holding that the defendant's alertness at trial was not in and of itself enough to conclude that the defendant was competent).

¶63 509 U.S. 389 (1993).

¶64 The chief proponent of a "*Dusky-plus*" standard for certain critical decisions was Bonnie. See Bonnie, *supra* note 18.

¶65 *Godinez*, 509 U.S. at 392-93.

¶66 *Id.* at 393.

¶67 *Id.* at 394. This "reasoned choice" standard was drawn from *Rees v. Peyton*, in which the Court held that a death-row inmate was competent to waive appeals only if he were shown to have "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. 312, 314 (1966) (per curiam); see also *Godinez*, 509 U.S. at 415 (Blackmun, J., dissenting) ("The standard applied by the Ninth Circuit in this case--the 'reasoned choice' standard--closely approximates the 'rational choice' standard set forth in *Rees*.").

¶68 Similarly, Bonnie had argued that decision-making capacity was not required in every case. Rather, he explicitly "unhinge[ed] decisional competence from the *Dusky* formula," with the former coming into play only after *Dusky* competence is established and certain decisions are faced by the defendant. Bonnie, *supra* note 18, at 577-600.

¶69 *Godinez*, 509 U.S. at 397-98 (finding that how the standards might differ "is not readily apparent," and noting that even respondent argued that the distinction was "merely one of 'terminology'"); *id.* at 407 (Kennedy, J., concurring) (pointing to "the lack of any clear distinction between a 'rational understanding' and a 'reasoned choice' in this case").

¶70 *Id.* at 398-400.

¶71 *Id.* at 400-02 (citing, inter alia, *Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam), and *Johnson v. Zerbst*, 304 U.S. 458 (1938)); *see also* *Faretta v. California*, 422 U.S. 806 (1975) (holding that the defendant has a right to defend himself as long as he decides to do so voluntarily and intelligently). As the *Godinez* Court clarified:

The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings . . . . The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.

509 U.S. at 401 n.12. "In this sense," then, "there *is* a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*." *Id.* at 401.

¶72 *Id.* at 397-98.

¶73 *See Bonnie*, *supra* note 18, at 593 (noting that before *Godinez*, the Court had "not had the occasion to elaborate further on the substantive aspects of the competence doctrine").

¶74 *Godinez*, 509 U.S. at 397-98 (holding that, assuming there is a difference between "reasoned choice" and "rational understanding," the latter describes the required level of competence).

¶75 *See, e.g., Bonnie*, *supra* note 18 (discussing the need for a decisional competence standard).

¶76 *See Godinez*, 509 U.S. at 412-13, 415-16 & n.3 (Blackmun, J., dissenting) (evaluating the difference between a passive rational understanding standard and an active rational choice standard).

¶77 GRISSO, *supra* note 13, at 73.

¶78 *Godinez*, 509 U.S. at 399 (noting that "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights").

¶79 *Id.* at 398-99 (holding that "[i]f the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty").

¶80 *Id.* at 403 (Kennedy, J., concurring); *see also id.* at 406-07 (discussing single standard applicable to "the variety of decisions that a defendant must make"). Moreover, the primacy of decision-making abilities was reaffirmed in *Cooper*, in which a unanimous Court cited *Godinez* for the proposition that

the fundamental unfairness of trying an incompetent defendant stems from his inability to make the myriad of decisions, both large and small, concerning the course of his defense. *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996).

<sup>81</sup> See GRISSEO, *supra* note 13, at 73; Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development & Validation of a Research Instrument*, 21 LAW & HUM. BEHAV. 141, 144 (1997) (noting that at the heart of competence is the ability "to make rational, self-interested decisions").

<sup>82</sup> See POYTHRESS ET AL., *supra* note 2, at 38 (discussing why the study findings led to a two-part test for competence). The MacArthur Competence Assessment Tool-Criminal Adjudication ("MacCAT-CA") is the first competence assessment instrument to seek to measure decision-making capacity directly.

The MacCAT-CA and the FIT-R come closer than earlier instruments to providing information that goes beyond 'factual understanding' to begin to address questions of defendants' decision making capacities. This is an important advance, and instruments that do not provide such information are not in step with the evolution of the legal construct of competence in recent years.

GRISSEO, *supra* note 13, at 146. The MacArthur team, of which Bonnie was a part, agreed with Bonnie's pre-*Godinez* theory that decisional competence becomes of independent significance only in cases in which the defendant is competent to assist counsel, and that decisional deficits might be overcome with surrogate decision-making. These particular aspects of their decisional competence formulation are not necessarily supported by *Godinez*.

<sup>83</sup> Although one quarter of the defendants studied were found to be competent to assist counsel, half of that "competent" group were impaired on a least one decisional competence measure. See POYTHRESS ET AL., *supra* note 2, at 103-04. The sample from which this data was obtained was persons who had been deemed incompetent, implying that perhaps no discrete measurement is necessary because decisionally incompetent persons are already being captured adequately. This is not necessarily so. The data simply show that among those adjudicated incompetent there are persons with serious decisional deficits, and we do not know how such persons' incompetence was captured. It remains possible that where courts and examiners are focusing solely on non-decisional capacities such persons may be wrongly deemed competent.

<sup>84</sup> See, e.g., Louis C. Charland, *Appreciation and Emotion: Theoretical Reflections on the MacArthur Treatment Competence Study*, 8 KENNEDY INST. OF ETHICS J. 359, 360 (1999) (defining competence to consent to treatment as "decision-making capacity").

<sup>85</sup> POYTHRESS ET AL., *supra* note 2, at 11. A 1998 study concluded that examiners "primarily paid attention to understanding and appreciation abilities and neglected the defendant's capacity to make decisions in a large majority of the reports." Zapf & Viljoen, *supra* note 13, at 364 (citing Jennifer Skeem et al., *Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUM. BEHAV. 519 (1998)). This trend might shift should the MacCAT-CA come to be more widely

used.

<sup>86</sup> See Bonnie, *supra* note 18, at 593-94 (arguing there are many unanswered questions about the competence doctrine).

<sup>87</sup> *Id.* at 546, 559, 568.

<sup>88</sup> See *id.* at 553 & nn.57-58, 568-69 & nn.102-05, 109; see also Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Adams v. United States ex rel. McCann, 317 U.S. 269, 278-81 (1942); United States v. Teague, 953 F.2d 1525, 1531-1534 (11th Cir. 1992).

<sup>89</sup> See Bonnie, *supra* note 18, at 553 n.58; see also ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (1986) (listing certain decisions that are to be made by the accused and explaining, in commentary, that certain decisions are entrusted to the lawyer).

<sup>90</sup> See *supra* pp. 1381-1382; cf. Steven J. Morse, *Rationality and Responsibility*, 74 So. CAL. L. REV. 251, 254 (2005) (arguing rationality can take on many meanings depending on the context and social mores); Steven J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 295 (2003) ("How much rational capacity must be impaired under what conditions to warrant excuse or mitigation is, of course, a normative, moral, political, and legal question."). While Morse's discussions of rationality are positioned within a discussion of responsibility, they nonetheless may inform understanding of the concept within the competence construct.

<sup>91</sup> See Steven J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 530 (1996) ("There is no uncontroversial definition of rationality.").

<sup>92</sup> See, e.g., Keith J. Holyoak & Robert G. Morrison, *Thinking and Reasoning: A Reader's Guide*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 1, 3 (Keith J. Holyoak & Robert G. Morrison eds., 2005) ("Thinking and reasoning, long the academic province of philosophy, have over the past century emerged as core topics of empirical investigation and theoretical analysis in the modern fields known as cognitive psychology, cognitive science, and cognitive neuroscience.").

<sup>93</sup> An overview of this complex topic goes far beyond the project of this Article. For an introduction to the field, see generally EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH (Sandra L. Schneider & James Shanteau eds., 2003); JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER (Terry Connolly et al. eds., 2d ed. 2000).

<sup>94</sup> See, e.g., Winick, *supra* note 6, at 966 (noting it is both tempting and "easy to confuse the quality of the decision-making process with the reasonableness of the result reached").

<sup>95</sup> See, e.g., Saks & Behnke, *supra* note 38, at 124 (arguing that we should avoid "declaring people who make good choices competent and people who make bad choices incompetent"); see also Lafferty v. Cook, 949 F.2d 1546, 1566 & n.15 (10th Cir. 1992) (Brorby, J., dissenting) (objecting to the court's use of defendant's unsuccessful trial strategy as a basis for determining incompetence).

¶96 See Bonnie, *supra* note 18, at 575 (noting the importance of the decisional process, rather than the outcome of that process).

¶97 In the competence context, these abilities generally are grouped under the headings of understanding, appreciation, reasoning, and choice. See POYTHRESS ET AL., *supra* note 2, at 48 ("Taken together, these four criteria operationalize the 'rationality' requirement to which the Supreme Court referred in *Godinez v. Moran* (1993)."). The MacCAT-CA, designed to reflect this theory of competence, measures only the first three. See *id.* at 59-68 (evaluating factual understanding, reasoning, and appreciation). Because I consider appreciation to be an aspect of understanding, see *infra* Part II.A., and believe it important to consider the threshold role of perception, I prefer the formulation of perception, understanding, reasoning, and choice.

¶98 See Saks & Behnke, *supra* note 38, at 114 (noting competence to consent to medical treatment requires "understanding relevant information; assessing the evidence and forming appropriate beliefs about it; reasoning about the evidence with a degree of intactness; and communicating a choice"); Appelbaum, *supra* note 33, at 379 (determining that "competence for decision making" consists of "the abilities: to express a choice; to understand relevant information; to appreciate the significance of that information for one's own situation; and to reason with relevant information so as to engage in a logical process of weighing options") (citing Jessica W. Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345 (1996)); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1067 (2002) (discussing the requirements of accurate perception, instrumental reasoning, evaluation of actions, and weighing of decisions).

¶99 To simplify a somewhat confusing nomenclature, "thought disorder" refers herein to dysfunction in cognitive thought processes that is identified by its effect on either the content or form of speech. See Peter Bachman & Tyrone D. Cannon, *Cognitive and Neuroscience Aspects of Thought Disorder*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 494 (noting that thought disorder, thus defined, is a type of dysfunction generally occurring "within the context of a more extensive psychopathology, including diagnoses as diverse as schizophrenia, mood disorders, certain personality disorders, and autism") (citations omitted). This definition is not entirely consistent with that of "formal thought disorder," which historically has been defined as the speech impairment itself rather than the underlying cause. The Diagnostic and Statistical Manual of Mental Disorders acknowledges the "difficulty inherent in developing an objective definition of 'thought disorder'" and therefore focuses in its description of schizophrenia on the concept of "disorganized speech." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION 300 (4th ed. 2000) [hereinafter DSM-IV-TR]. However, the speech disorders typical of thought disorder are best regarded as symptoms of underlying defects in cognitive processing. See Bachman & Cannon, *supra*, at 493, 495, 498 (discussing examples of patients with thought disorders and problems with cognitive processing). A disorder of "thought content" generally will include hallucinations (sensory perceptions not based in reality, for example, hearing voices or seeing visions) or delusions (understandings and beliefs similarly unrelated to reality). See DSM-IV-TR, *supra*, at 299 (defining delusions as disorders of thought content, while characterizing hallucinations as disorders of

perception). "Thought form" disorder describes a "disorganization of underlying thought processes indicated by abnormal speech," for example, highly tangential speech (sometimes called a "flight of ideas") or the confusing jumble of loose associations sometimes called "word salad." Bachman & Cannon, *supra*, at 495-96. Cases that explicitly discuss the "disordered thought form" manifestation are scarce. However, it is not unusual to see embedded within cases descriptions of bizarre speech that suggest the presence of disordered thought form. For example, the defendant in *Strickland v. Francis*, 738 F.2d 1542, 1544-45 n.3 (11th Cir. 1984), exhibited various forms of nonsensical speech, including repeated and acontextual use of the word "supplemental," evidencing "a certain disorganization of thought process." *See also* *United States v. Hems*, 901 F.2d 293, 294-95 (2d Cir. 1990) (noting that the incompetent defendant's testimony was "rambling, confused, irrelevant, or incomprehensible," at one point devolving into "a profane and scatological barrage"); *State v. Haycock*, 766 A.2d 720, 722 (N.H. 2001) (defendant "tend[ed] to 'ramble' and his 'thoughts' [were] 'tangential' and 'paranoid'"); *cf.* *Gov't of Virgin Islands v. Charles*, 72 F.3d 401, 405-09 & n.2 (3d Cir. 1995) (finding the paranoid schizophrenic defendant's record colloquies were "rambling" but not entirely "incoherent"; he was deemed competent to represent himself and reject an insanity defense); *United States v. Housh*, 89 F. Supp. 2d 1227, 1230 (D. Kan. 2000) (noting, in support of competency finding, that defendant's "speech was normal in content and form"). Though the cases do not make this clear, a thought-form disorder could impair the communication with counsel prong of *Dusky* as well as the rational understanding of the proceedings prong.

n100 *See* DSM-IV-TR, *supra* note 99, at 297-98 (offering varied definitions of psychosis and psychotic symptoms, all of which include delusions or hallucinations, some of which include disorganized speech and behavior).

Note that what this Article defines as "thought disorder" may also be found in non-psychotic mental illnesses, such as amnesia, delirium, and dementia. *See* DSM-IV-TR, *supra* note 99, at 135-80. These phenomena also may be highly relevant to an adjudicative competence determination. *See, e.g.*, *United States v. Rinchack*, 820 F.2d 1557, 1569 (11th Cir. 1987) (discussing standards by which to evaluate defendant's amnesia); *United States v. Borum*, 464 F.2d 896, 900 (10th Cir. 1972) (holding that defendant must show prejudice from having amnesia in that he cannot provide the necessary facts to his attorney); *Wilson v. United States*, 391 F.2d 460, 463-64 (D.C. Cir. 1968) (discussing the standards for evaluating the competence of an amnesia patient). While these issues go beyond the purview of this Article, the methodological approach advocated in this Part applies equally to such mental disorders.

n101 *See* Jodi L. Viljoen et al., *Diagnosis, Current Symptomatology, and the Ability to Stand Trial*, 3 J. FORENSIC PSYCHOL. PRAC. 23, 23-25, 30 (2003) (noting that no non-psychotic individual in the sample was deemed incompetent, while nearly 20% of the psychotic defendants were; "research has consistently found that defendants with psychotic disorders are more likely to be judged unfit than those with non-psychotic disorders," and "hallucinations and delusions" are particularly associated with such judgments).

n102 *See, e.g.*, *Liles v. Saffle*, 945 F.2d 333, 339 (10th Cir. 1991) (disapproving of an examiner who "was of the belief that only psychotic individuals could be considered incompetent, and any individual who was nonpsychotic was therefore competent").

¶103 *See, e.g., Housh*, 89 F. Supp. 2d at 1229 ("[F]ew reported Tenth Circuit cases have given meaning to the 'rational understanding' phraseology used by the *Dusky* Court.").

¶104 William M. Goldstein & Robin M. Hogarth, *Judgment and Decision Research: Some Historical Context*, in RESEARCH ON JUDGMENT AND DECISION MAKING: CURRENTS, CONNECTIONS, AND CONTROVERSIES 3, 7 (William M. Goldstein & Robin M. Hogarth eds., 1997) (noting perception is the process by which "an object in the environment . . . stimulates a person's sensory organs to produce multiple cues . . . to the object's identity and properties").

¶105 It is hard to imagine a competent defendant who lacks anything approaching normal perceptive abilities; we would not, for example, consider trying a comatose person. Perceptive deficits short of coma may also cause incompetence. Theon Jackson, for example, who was deaf and could not speak, was considered incompetent in large part because his disabilities were so extreme as to forestall any communication with counsel. *See Jackson v. Indiana*, 406 U.S. 715, 717-18 (1972) (noting as well that Jackson was developmentally disabled). Though one imagines that a defendant like Jackson could now be rendered competent because of improved methods for communicating with the developmentally disabled and hearing impaired, it is possible to imagine a defendant for whom no accommodation is sufficient.

¶106 *See, e.g., Goldstein & Hogarth, supra* note 104, at 7 (noting perception involves "the psychological construction or inference of a percept from an incomplete and fallible collection of sensory cues").

¶107 "Thinking," as "the systematic transformation of mental representations of knowledge to characterize actual or possible states of the world, often in service of goals," is a bridge between perception and understanding. Holyoak & Morrison, *supra* note 92, at 2 (emphasis omitted).

¶108 Recall that *Dusky* could understand the parameters of his situation and relate with accuracy certain relevant facts. *Dusky v. United States*, 271 F.2d 385, 389 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960) (per curiam). *See also Saks & Behnke, supra* note 38, at 113 ("Pure understanding" is necessary but not sufficient; "[b]ecause making a decision in one's best interests requires assessing how those interests are likely to be affected, the patient must be able to form adequate beliefs in order to be a competent decision maker.").

¶109 949 F.2d 1546, 1548 (10th Cir. 1992). Lafferty, a former Mormon who was excommunicated from the Church of Latter-Day Saints for "unorthodox religious views," murdered several persons whom he believed had supported his wife in leaving him.

¶110 *Id.* at 1552.

¶111 *Id.*

¶112 Like *Dusky*, Lafferty "physically knew the nature of the proceedings against him, and their possible consequences." *Id.*

¶113 *Id.* at 1550 ("The aspect of the *Dusky* standard that is the critical focus of attention in this case is the requirement that a defendant have a *rational* as well as factual understanding of the proceedings against him.").

¶114 *Id.* at 1551.

¶115 *Id.*

The state court paid lip service to *Dusky's* requirement that competency requires a rational understanding which is different from, and more than, factual understanding. Nonetheless, in view of the evidence that Lafferty's illness interfered with his accurate perception of reality, the court's statements that Lafferty's understanding was rational simply renders that requirement a nullity.

*Id.* at 1556.

¶116 The Second Circuit, in a pre-*Lafferty* decision, agreed that a defendant's "impaired sense of reality" can, where it prevents him from "focusing on his legal needs and from acting effectively on his intellectual understanding" of his position, cause him to be unable to "make any rational decisions regarding the defense." *United States v. Hemsli*, 901 F.2d 293, 296 (2d Cir. 1990); *see also* *Bryan v. Gibson*, 276 F.3d 1163, 1170 (10th Cir. 2001) (*aff'd in part and vacated in part by* *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003)) (finding that "sufficient contact with reality" is "the touchstone for ascertaining the existence of rational understanding" and affirming the jury's factual determination that the defendant was competent to stand trial (quoting *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1992))); *United States v. Housh*, 89 F. Supp. 2d 1227, 1230-31 (D. Kan. 2000) (finding that the defendant met the *Dusky* "rational understanding" standard, in part because his mental deficits did not affect his perception of reality to a great extent); *State v. Haycock*, 766 A.2d 720, 722 (N.H. 2001) (adopting *Lafferty's* "sufficient contact with reality" standard of rational understanding); *Wilcoxson v. State*, 22 S.W.3d 289, 305 (Tenn. Crim. App. 1999) (requiring the defendant to have sufficient contact with reality to be found competent); *cf.* *Valdez v. Ward*, 219 F.3d 1222, 1241 (10th Cir. 2000) (rejecting defendant's claim that his homophobia was enough of an "irrational conviction" to make him incompetent).

¶117 112 F.3d 105, 111 (3d Cir. 1997) (per curiam) ("*Lafferty* is in accord with our distinction between factual and rational understanding."). The competence relevant to appointment of a next friend is a dominant frame through which the competence of severely depressed prisoners is measured. Because the *Rees v. Peyton* test refers specifically to defects in a death-row inmate's "premises," 384 U.S. 312, 314, it is particularly likely that courts faced with a *Rees* challenge will focus on pre-reasoning defects in factual premises. This point is explored further in Part II.B.1.

¶118 *Heidnik*, 112 F.3d at 109 & n.4.

¶119 *Id.* at 109.

¶120 *Id.* at 110.

¶121 *Utah v. Mitchell*, No. 031901884 (Third Judicial District Court, Memorandum of Judge Judith S. Atherton, dated July 26, 2005).

¶122 Two prominent forensic theorists, Jennifer Skeem and Stephen Golding, found Mitchell to be suffering from a delusional disorder that obviated adjudicative competence. *See id.* at 25, 32-33. Much of their evaluations, and the court's, centered on the difficult issue of distinguishing between a fixed delusional belief system and religious beliefs that, though unconventional, are properly regarded as non-delusional and even protected. This same issue was presented in *Lafferty*, which also concerned a Utah defendant who had been removed from the Church of Latter-Day Saints. This issue, as well as that of defendants with potentially "delusional" political beliefs and motivations, warrants a far more careful explication than is possible here.

¶123 *Id.* at 58 (citing to *Lafferty*). The court continued:

Since having the capacity to realistically determine what is in one's own best interest is nothing more or less than having the ability to make reasoned, rational choices, it follows from the court's conclusion that because Defendant's religious belief system is the basis upon which he makes decisions concerning his criminal case, he also lacks the capacity to consult with counsel with a reasonable degree of rational understanding and is ... incompetent to proceed to trial.

*Id.*

¶124 Utah law, while largely parroting *Dusky*, also spells out in more detail the precise abilities subsumed under the general standard, and in those sections it articulates that a defendant must be able to "engage in reasoned choice of legal strategies and options." UTAH CODE ANN. § 77-15-5(4)(a)(i)-(vii) (2005). The *Mitchell* court reasoned that because *Godinez* rejected any distinction between "reasoned choice" and "rational understanding," the rational understanding standard incorporates the ability to make rational decisions about one's criminal case. *Mitchell*, No. 031901884 at 5 n.2; *see supra* Part I.A.

¶125 *See, e.g.,* Holyoak & Morrison, *supra* note 92, at 2.

¶126 Saks & Behnke, *supra* note 38, at 113 (arguing that to be competent one "must also be able to reason with some degree of intactness. Reasoning allows one to put together the relevant information one has purely understood and, having assessed, has formed beliefs about.").

¶127 Jonathan St. B. T. Evans, *Deductive Reasoning*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 169, 170, 175, 179. "It is no longer appropriate to equate performance on deductive reasoning tasks with rationality or to assume that logic provides an appropriate normative account of everyday, real world reasoning." *Id.* at 181.

¶128 *See* Keith J. Holyoak, *Analogy*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 117, 118 (noting that "fluid intelligence" is the ability to reason with novel information); Steven A. Sloman & David A. Lagnado, *The Problem of Induction*, in THE

CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 95-97 (stating that like deductive reasoning, inductive reasoning "concerns the logical relations that hold between statements irrespective of their truth or falsity. In the case of inductive logic, however, these relations admit of varying strengths, a conditional probability measure reflecting the *rational* degree of belief that someone should have in a hypothesis given the available evidence.").

¶129 *Lafferty v. Cook*, 949 F.2d 1546, 1554-55 (10th Cir. 1992) ("This court cannot accept as consistent with *Dusky* and its progeny a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a paranoid delusional system *need only act consistently with his paranoid delusion to be considered competent to stand trial.*" (emphasis added)); *see also* *In re Heidnik*, 112 F.3d 105, 111 (3d Cir. 1997) (per curiam) (finding Heidnik incompetent despite his "considerable intelligence and expressive powers"). These courts rejected as sufficient what Kahneman and Frederick describe as "coherence rationality," or "the strict conception that requires the agent's entire system of beliefs and preferences to be internally consistent and immune to effects of framing and context." Daniel Kahneman & Shane Frederick, *A Model of Heuristic Judgment*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 267, 277.

¶130 Though heavily reliant on the prior stages, choice additionally requires "assessment of the value of an option or the probability that it will yield a certain payoff (judgment) coupled with choice among alternatives (decision making)," as well as "construction of a course of action that can achieve a goal." Holyoak & Morrison, *supra* note 92, at 2.

¶131 For example, a defendant who believes that she will be punished by God for escaping a jail term might conclude that it is in her best interest to reject a plea offer, despite her ability to reason through why the offer is otherwise in her best interest. The belief is a factor that intervenes between the preliminary conclusion (it is good to take the offer) and the ultimate conclusion (it is bad to take the offer). Clearly, these stages of judgment and decision-making overlap heavily. *See, e.g.*, Holyoak & Morrison, *supra* note 92, at 3.

¶132 For example, because of his communication deficits, Theon Jackson would not have been able to express a choice as to the course of his defense even had he the ability to arrive at one. *See Jackson v. Indiana*, 406 U.S. 715, 718-19 (1972).

¶133 *Lafferty*, 949 F.2d at 1549.

¶134 *Id.* at 1557-58 (Borby, J., dissenting). In the dissent's view, the finding of competence was adequately grounded in record evidence of Lafferty's intellectual functioning and the prosecution's expert testimony offering "a generally functional view of rationality centering on whether a person can piece things together, see relationship between incidents, remember information, and thereby factually and theoretically assist in his defense." *Id.* at 1564-66; *cf.* *State v. Barnes*, 948 P.2d 617, 638 (Kan. 1997) (holding that expert reports of defendant's delusions and paranoia were overcome by evidence that he "had comprehension of the roles of the various participants in the trial," understood the charges and possible consequences, and "was able to respond appropriately in court and cooperate with his attorney").

¶135 Consider the following "typical colloquy between judge and psychiatrist: 'Doctor, is he incompetent?' 'Your Honor, he is psychotic!'" Burt & Morris, *supra* note 11, at 92 & n.109. For example, were a psychotic defendant's delusional thinking limited to the belief that she is actually a Russian princess, such belief may or may not have any effect on ability to protect her interests in a criminal proceeding, particularly if her notions as to the relevant facts and law comport closely to those relevant to one who is not a Russian princess. Similarly, were her psychosis limited to occasional auditory hallucinations that did not touch on the subject matter of the trial or cause her to become confused, distracted, or inappropriate in conversations with her attorney or during trial, they may not threaten competence.

¶136 *See, e.g., Lafferty*, 949 F.2d at 1557-58 (Brorby, J., dissenting) (comparing defendant's lack of severe symptoms to Dusky's severe symptoms); *see also Rumbaugh v. Procunier*, 753 F.2d 395, 404 (5th Cir. 1985) (Goldberg, J., dissenting) (discussing how logic is a central part of evaluating a choice, and in turn, competence).

¶137 Of course, many irrational and nonrational processes, such as reliance on common heuristics and biases, might threaten normative "rationality" in an important sense and yet not signal incompetence. *See infra* Part III.

¶138 *See Singleton v. Norris*, 319 F.3d 1018, 1032-33 (8th Cir. 2003) (Heaney, J., dissenting) (discussing defendant's delusions and references to himself as God and that he was commissioned by God); *Strickland v. Francis*, 738 F.2d 1542, 1546, 1551 (11th Cir. 1984) ("Strickland was out of touch with reality and totally incapable of assisting in his defense"; he "suffered from delusional characteristics and had psychotic disorders that made it difficult for him to deal with reality."); *Bruce v. Estelle*, 536 F.2d 1051, 1063 (5th Cir. 1976) (finding that defendant's schizophrenia "caused him to misperceive important elements of the proceedings").

¶139 *See, e.g., Saks & Behnke, supra* note 38, at 116-17, 119, 123. "Accurate beliefs about the world are essential to competency, because decisions take effect in the world." *Id.* at 116.

¶140 *See, e.g., GRISSO, supra* note 13, at 79 ("Little is known empirically about the methods that clinicians actually use in collecting data for competence to stand trial evaluations.").

¶141 Like the distinction between cognition and emotion, *see infra* pp. 1402-1403, that between a thought disorder and an emotional disorder is overly simplified. Many mental illnesses in which thought disorder plays a prominent role--for example, schizophrenia--commonly also have affective elements, such as blunted affect. *See DSM-IV-TR, supra* note 99, at 298. Similarly, affective disorders--such as clinical depression--commonly entail cognitive deficits. *See id.* at 348-49. But these distinctions between and among disorders reflect that certain dysfunctions are more about one than the other, which is part of how they are clinically distinguished.

¶142 *See Leda Cosmides & John Tooby, Evolutionary Psychology and the Emotions, in HANDBOOK OF EMOTIONS* 91, 93 (Michael Lewis & Jeanette M. Haviland-Jones eds., 2d ed.

2000) (arguing that emotion's function is

to direct the activities and interactions of the subprograms governing perception; attention; inference; learning; memory; goal choice; motivational priorities; categorization and conceptual frameworks; physiological reactions . . . ; reflexes; behavioral decision rules; motor systems; communication processes; energy level and effort allocation; affective coloration of events and stimuli; recalibration of probability estimates, situation assessments, values, and regulatory variables . . . and so on . . . );

Nicole A. Roberts et al., *The Impact of Orbital Prefrontal Cortex Damage on Emotional Activation to Unanticipated and Anticipated Acoustic Startle Stimuli*, 4 COGNITIVE, AFFECTIVE, & BEHAV. NEUROSCIENCE 307, 316 (2004) ("[D]eviations in emotional response" in certain brain-damaged patients "can be expected to have an adverse impact on such cognitive processes as attention, learning, memory, and decision making, all of which are profoundly influenced by emotional reactions.").

¶143 Melissa L. Finucane et al., *Judgment and Decision Making: The Dance of Affect and Reason*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH, *supra* note 93, at 327, 329 ("Affect has ... rarely been recognized as an important component in research and theory in judgment and decision making."); Alice M. Isen & Aparna A. Labroo, *Some Ways in Which Positive Affect Facilitates Decision Making and Judgment*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH, *supra* note 93, at 365, 367 (noting that "the field of decision making has been slow to incorporate research on affect"); Ola Svenson, *Values, Affect, and Processes in Human Decision Making: A Differentiation and Consolidation Theory Perspective*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH, *supra* note 93, at 287, 296 (noting that "the very strong emphasis on cognitive functions in decision research during the past few decades has led to neglect of the roles of affect, emotional involvement, and affective components in decision processes").

¶144 See Isen & Labroo, *supra* note 143, at 366 (discussing the increasing interest in affect); Svenson, *supra* note 143, at 289 ("[D]ecision researchers are becoming increasingly interested in the effects of emotion and affect on human decision processes."). An overview of the study of emotion is beyond the scope of this Article. See generally HANDBOOK OF EMOTIONS, *supra* note 142; HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); EMOTIONS: ESSAYS ON EMOTION THEORY (Stephanie H.M. van Goozen et al. eds., 1994); COGNITIVE NEUROSCIENCE OF EMOTION (Richard D. Lane & Lynn Nadel eds., 2000).

¶145 The one instance in which such a connection has been urged is within a small debate in the area of capacity to consent to medical treatment. See Charland, *supra* note 84 (arguing emotions play a positive role in determining competence); Louis C. Charland, *Is Mr. Spock Mentally Competent? Competence to Consent and Emotion*, 5 PHIL., PSYCHIATRY, & PSYCHOL. 67 (1998) (arguing emotions are essential to competence); see also 5 PHIL., PSYCHIATRY, & PSYCHOL. 83 (1998) (compiling articles responding to Charland).

¶146 See Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 123-24 & n.19 (2006) (using a similar definition). For a treatment of

definitional debates within emotion theory, see generally THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 3, 51 (Paul Ekman & Richard J. Davidson eds., 1994).

<sup>n147</sup> However, multiple taxonomies of the emotions have been offered, with different lineups. See, e.g., ROBERT PLUTCHIK, EMOTION: A PSYCHOEVOLUTIONARY THESIS 133 (1980) (describing eight basic emotions); James A. Russell, *A Circumplex Model of Affect*, 39 J. PERSONALITY & SOCIAL PSYCHOL. 1161, 1163 (1980) (describing eight emotions on a sliding four-directional plane).

<sup>n148</sup> See, e.g., THE NATURE OF EMOTION, *supra* note 146, at 49-96, 184, 199; Paul Slovic, *What's Fear Got to Do with It? It's Affect We Need to Worry About*, 69 Mo. L. REV. 971, 971, 989 (2004). Affect is sometimes also used in the global sense here proposed for "emotion." See Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 3 (2005).

<sup>n149</sup> Blumenthal, *supra* note 148, at 3.

<sup>n150</sup> See, e.g., Gerald L. Clore, *For Love or Money: Some Emotional Foundations of Rationality*, 80 CHI.-KENT L. REV. 1151, 1153 (2005) ("If cognition is about truth and falsity and is concerned with categorization, then emotion is about goodness and badness and is concerned with evaluation."); Carroll E. Izard, *Cognition Is One of Four Types of Emotion-Activating Systems*, in THE NATURE OF EMOTION, *supra* note 146, at 203, 204 ("Emotion is about motivation, cognition about knowledge."); Daniel M.T. Fessler et al., *Angry Men and Disgusted Women: An Evolutionary Approach to the Influence of Emotions on Risk Taking*, 95 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 107, 118 (2004) ("[E]motions constitute a relatively autonomous channel of influence on decision making, operating in conjunction with, but largely independent of, more strictly cognitive processes.") (citation omitted).

<sup>n151</sup> See, e.g., Joseph E. LeDoux, *Cognitive-Emotional Interactions in the Brain*, in THE NATURE OF EMOTION, *supra* note 146, at 216 (arguing that cognition "is nothing more than a word that we use to describe a group of related but diverse information-processing functions, including sensory processing, perception, imagery, attention, memory, reasoning, and problem-solving"); Pheobe C. Ellsworth, *Levels of Thought and Levels of Emotion*, in THE NATURE OF EMOTION, *supra* note 146, at 192, 193 (explaining cognition's competing definitions as "sensory information processing" and "conscious propositional analysis").

<sup>n152</sup> See Jeffrey A. Gray, *Framework for a Taxonomy of Psychiatric Disorder*, in EMOTIONS: ESSAYS ON EMOTION THEORY, *supra* note 144, at 29, 30 (explaining there is no brain structure "implicated in the control of emotional behavior that has not been implicated also in a variety of perceptual, cognitive, and motor functions"); VAN GOOZEN ET AL., *Preface*, in EMOTIONS: ESSAYS ON EMOTION THEORY, *supra* note 144, at viii ("One of the liveliest debates in the field of emotions is the relation between affect and cognition. Some hold that affect determines cognition, others that cognition determines affect.").

¶153 See, e.g., ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* (1988); Jennifer S. Beer et al., *Frontal Lobe Contributions to Executive Control of Cognitive and Social Behavior*, in *THE COGNITIVE NEUROSCIENCES III* 1091, 1095, 1101 (Michael S. Gazzaniga et al. eds., 2004) (describing the orbitofrontal cortex as the synthesizer of emotion). One sense in which this is thought to be so is that emotions are "about" objects in the world. See, e.g., MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001).

¶154 See LeDoux, *supra* note 151, at 220-23 ("Knowing these differences sets the stage for examining the links between the systems.").

¶155 See Clore, *supra* note 150, at 1151 ("A long tradition, stretching from classical philosophy to the present, views passion as the enemy of reason."); Isen & Labroo, *supra* note 143, at 366 (explaining that under the (formerly) popular analogy between cognitive processing and the running of a computer program, "affect was conceptualized as an 'interrupt' or disruption in an otherwise goal-directed program"); Bruce E. Kaufman, *Emotional Arousal as a Source of Bounded Rationality*, 38 J. ECON. BEHAV. & ORG. 135, 139 (1999) (arguing that increasing levels of emotion cause rational decision-making ability to deteriorate); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 234 (2005) (asserting that lawyers are "resistant to the idea that their reasoning should ever be 'clouded' by emotion").

¶156 See Maroney, *supra* note 146, at 120 ("A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong.").

¶157 Cosmides & Tooby, *supra* note 142, at 107 (arguing certain events trigger "emotion programs in which the desire to attempt certain actions should be overwhelming, to the point where the actions are experienced as compulsory," and that phenomenon receives cultural recognition in the law of "crimes of passion") (citation omitted).

¶158 See Charland, *supra* note 84, at 359 ("[I]n addition to their negative role, emotions also have a positive role to play in competence."); Van Goozen et al., *Preface*, in *EMOTIONS: ESSAYS ON EMOTION THEORY*, *supra* note 144, at x (explaining that contemporary "emotion theory views emotional impulses as in some way adaptive and rational").

¶159 Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1, 7, 11 (Susan A. Bandes ed., 1999); see also Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 666 (1989) (critiquing the "myth of dispassion," which "rests on two fictions: (1) that emotion necessarily leads to injustice, and (2) that a just decision maker is necessarily a dispassionate one").

¶160 See, e.g., Isen & Labroo, *supra* note 143, at 367 (arguing the "realization that affect is a regular part of thought processes and motivation or processing goals" prompts more "realistic and complex" science).

¶161 See Svenson, *supra* note 143, at 297 (explaining that emotion's influence on decision-making may be procedural or representational).

¶162 See Ryan, *supra* note 155, at 232 ("[W]ithout the information gleaned from the emotional sense that imbues human interaction and institutions with meaning, our world would seem reduced to hollow shells and randomly-acting forms.").

¶163 See, e.g., Robert Nozick, *Emotions*, in *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 87, 93 & n.\*, 96-97 (1990) (arguing emotions provide a "picture of value," as a type of "analog recording to language's digital picture of events," and thus represents a different way of knowing); Clore, *supra* note 150, at 1164 ("[A]ffect serves as information" and "provides information about value.").

¶164 See Gray, *supra* note 152, at 30 ("At the level of perception, the detection and interpretation of stimuli are known to be deeply influenced by emotional state.").

¶165 See, e.g., Finucane et al., *supra* note 143, at 347 ("[M]uch research by social, clinical, and physiological psychologists demonstrates that mood and emotion can direct attention toward or away from particular features in the environment.") (citation omitted).

¶166 See, e.g., Cosmides & Tooby, *supra* note 142, at 104 (discussing perceptual mechanisms and how fear alters them).

¶167 See RICHARD S. LAZARUS, *EMOTION AND ADAPTATION* 17 (1991) ("When a person is in a traumatic situation, perception and thought may be impaired, blocked, distracted, even paralyzed."); Cosmides & Tooby, *supra* note 142, at 111 (describing phenomenon among rape victims of experiencing prolonged period of time in which images of attack dominate).

¶168 This area of research is one of overlap between thinking and reasoning; it is discussed primarily under the rubric of the latter.

¶169 Daniel C. Molden & E. Tory Higgins, *Motivated Thinking*, in *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING*, *supra* note 92, at 295, 311.

¶170 Clore, *supra* note 150, at 1154 ("[S]uch evaluations are core features of the resulting emotions."); see also LAZARUS, *supra* note 167, at 151-52:

Very rapidly, perhaps even simultaneously, we draw on a variety of stored information about the environment, person variables, and their relational meaning ... [W]e must indeed automatically do something similar to what I have described, or else the emotion process would not be adaptive and our emotional lives would be much more chaotic than they are.

¶171 LAZARUS, *supra* note 167, at 144, 145, 149-51 ("Although knowledge is the cold cognitive stuff of which personal meaning is made, it is not an appraisal with its personal heat until the

implications for personal well-being have been drawn.") (citation omitted).

n172 See Gray, *supra* note 152, at 30 ("[A]t the cognitive level, it is widely accepted that appraisal of a stimulus (e.g., as threat or promise) plays a vital role in the initiation of the appropriate emotional state . . . ."); Izard, *supra* note 150, at 206 (arguing that appraisal depends on memories of our experiences).

n173 Charland, *supra* note 84, at 362; POYTHRESS ET AL., *supra* note 2, at 63-64 ("Unlike understanding, which reflects comprehension at a more general and abstract level (i.e., how the legal system is supposed to work), appreciation relates to a defendant's beliefs about how legal actors and processes will play out in his or her own case."); *cf.* Appelbaum, *supra* note 33, at 381 ("Since appreciation and appraisal rest on similar cognitive abilities, it is probably not correct to say that one requires the other, so much as to say that impairment of one function is likely to be accompanied by impairment of the other.").

n174 POYTHRESS ET AL., *supra* note 2, at 63-64. In the first iteration of failed appreciation, where the defendant believes she is immortal, the competence defect is caused by delusional thinking, a manifestation of thought disorder. See *supra* Part I.C. It is this form of appreciation, not the affective element, to which the MacArthur researchers primarily direct their inquiry.

n175 See Charland, *supra* note 84, at 362-63, 370. In the thought-disorder iteration, the effect on emotion is secondary: the delusional thought prevents access to the emotional reaction that would obtain were the cognitive assessment accurate. In the second iteration, the effect is primary: the person lacks ability to generate the emotional response at all, even given an accurate cognitive trigger.

n176 See, e.g., Fessler et al., *supra* note 150, at 108 (discussing Johnson and Tversky's "affective generalization hypothesis").

n177 See, e.g., Robyn A. LeBouef & Eldar B. Shafir, *Decision Making*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 243, 258 (arguing that emotions can influence the momentary evaluation of outcomes and choice). *But see* Fessler et al., *supra* note 150, at 108 (discussing contrary evidence).

n178 Isen & Labroo, *supra* note 143, at 377. "[T]here is now growing evidence that positive affect promotes both efficient and thorough problem solving and generally enhances cognitive ability and processes." *Id.* at 383 (citation omitted). "[P]ositive affect has a substantial facilitating impact on organization of thought, cognitive flexibility and elaboration, evaluation of evidence, negotiation tactics and responsiveness, variety-seeking and risk-taking propensities, and the efficiency and thoroughness of decision strategies." *Id.* at 387.

n179 See, e.g., Fessler et al., *supra* note 150, at 109-10 (drawing on the work of, inter alia, Fridja and Lazarus); see also Cosmides & Tooby, *supra* note 142, at 107 ("Specific acts and courses of action will be more available as responses in some states than in others, and more likely to be implemented.").

n180 See LEDOUX, *supra* note 1, at 143-45 (discussing conditioned fear learning); see also

Elizabeth A. Phelps et al., *Intact Performance on an Indirect Measure of Race Bias Following Amygdala Damage*, 41 NEUROPSYCHOLOGIA 203, 203-04 (2003) (stating that fear responses of the amygdala are "automatic and not dependent on conscious, control processes").

¶181 See LeBouef & Shafir, *supra* note 177, at 258 ("Emotion and affect . . . influence people's preferences; however, because these sentiments are often transient, such influence contributes to reversals of preferences . . .").

¶182 See Maroney, *supra* note 146, at 121-23 (discussing the increase in research from the 1970s through today).

¶183 See Clore, *supra* note 150, at 1152 (arguing that emotions are both operational tools that contribute to rationality and feedback mechanisms that "tell us whether we have chosen rationally"); Slovic, *supra* note 148, at 990 (claiming that emotion and the "affect heuristic" enable us "to be rational actors in many important situations. But not in all situations. It works beautifully in some circumstances and fails miserably in others. The law must learn to tell the difference.").

¶184 See, e.g., Finucane et al., *supra* note 143, at 343 (stating that an "affect heuristic" guides decisions, particularly "when the required judgment is complex or mental resources are limited").

¶185 See Svenson, *supra* note 143, at 321 (claiming consideration of affect "opens possibilities for a deeper understanding of decision processes").

¶186 In one reported case a court found a defendant incompetent to stand trial because "he did not emotionally appreciate his peril sufficiently to assist his legal counsel in defense of the charge filed against him," though the higher court later overturned that ruling after finding that the defendant was in remission and his unusual emotional expression and inappropriate affect could be explained to the jury. *State v. Gwaltney*, 468 P.2d 433,434 (Wash. 1970) (finding that the defendant "was afflicted with the emotional disease of schizophrenia").

¶187 *Godinez v. Moran*, 509 U.S. 389, 410 (1993); *Dusky v. United States*, 271 F.2d 385, 388 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960) (per curiam); see also *Bonnie*, *supra* note 18, at 587 (discussing Moran's depression and remorse).

¶188 See *Strickland v. Francis*, 738 F.2d 1542, 1548-49 & nn.12, 14 (11th Cir. 1984) (discussing the psychiatrist's explanation of how anxiety affects rational thought processes and relevance of emotional content of examinee's speech); *Moore v. United States*, 464 F.2d 663, 665 (9th Cir. 1972) (noting that the defendant had "mood swings" and "deep-seated emotional problems of long duration"); *Wilcoxson v. State*, 22 S.W.3d 289, 307-08 (Tenn. Crim. App. 1999) (finding that the defendant "'has been diseased emotionally and socially all of his life,'" is "'[e]motionally immature'" and "'emotional[ly] labile,'" and has "'elevated affect'" and depressive components to his hallucinations).

¶189 See, e.g., *Bonnie*, *supra* note 18, at 573 ("Problems in appreciating the situation and its consequences may arise due to limitations in cognitive capacity, to disturbances of thought, or to affective disorders."); *Burt & Morris*, *supra* note 11, at 92 (discussing the possibility that courts might

"provide treatment opportunities to any defendant whose emotional stability and consequent trial competency could be improved"); Viljoen et al., *supra* note 101, at 24 ("Within Canadian law, a broad number of mental disorders can be used as bases for finding a defendant unfit, such as psychotic, affective, cognitive, personality, and substance abuse disorders.") (citation omitted).

¶190 GRISSEO, *supra* note 13, at 132 (assessing the 1973 Competence Screening Test (CST)). As Grisso noted, measurement constructs and legal criteria do not correspond perfectly, as the CST judged "understanding of the consequences of the proceedings" with a measure of "'ability to deal emotionally.' . . . Thus the legal construct is cognitive, whereas the measurement construct refers to an affective component." *Id.* at 132-33. However, Grisso mused that measures of affective and coping skills could relate to any of the *Dusky* components. *Id.*

¶191 *Cf.* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 912-14 (7th ed. 2001) (citing cases on psychopaths and "affective insanity," including *United States. v. Currens*, 290 F.2d 751, 761-63 (3d Cir. 1961)).

¶192 *See supra* Part II.A.

¶193 This distinction between "organic" brain disease and psychiatric disease is firmly entrenched in the theory and practice of both law and medicine, but it is anything but a hard distinction, and its validity is increasingly under attack. *See, e.g.*, DSM-IV-TR, *supra* note 99, at xxx-xxxi, 181. For example, Antonio Damasio asserts that:

[t]he distinction between diseases of 'brain' and 'mind,' between 'neurological' problems and 'psychological' or 'psychiatric' ones, is an unfortunate cultural inheritance that permeates society and medicine. It reflects a basic ignorance of the relation between brain and mind. Diseases of the brain are seen as tragedies visited on people who cannot be blamed for their condition, while diseases of the mind, especially those that affect conduct and emotion, are seen as social inconveniences for which sufferers have much to answer.

ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* 40 (1994).

¶194 DSM-IV-TR, *supra* note 99, at 345-46.

¶195 *See id.* at 349-50, 369 (defining Major Depressive Episode and Major Depressive Disorder).

¶196 *See id.* at 357-59 (defining Manic Episode).

¶197 An extremely rapid and temporally compressed switching between depressive and manic symptoms may be characterized as a "mixed episode." *Id.* at 362-63, 382-83 (defining Mixed Episode and Bipolar I Disorder). *See generally* KAY REDFIELD JAMISON, *AN UNQUIET MIND: A MEMOIR OF MOODS AND MADNESS* (1995) (recounting the personal history of a professor of psychiatry's struggle with manic-depressive illness).

¶198 See, e.g., DSM-IV-TR, *supra* note 99, at 376-77, 381-82 (noting that Dysthymic Disorder or Depressive Disorder Not Otherwise Specified may not entail serious functional deficits); *id.* at 365 (explaining that a Hypomanic Episode may be of brief duration).

¶199 See, e.g., *id.* at 349 (stating that a Major Depressive Episode will have "clinically significant . . . impairment[s] in social, occupational, or other important areas of functioning").

¶200 See generally DSM-IV-TR, *supra* note 99, at 345-428; 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1338-77 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000); SEVERE DEPRESSIVE DISORDERS (Leon Grunhaus & John F. Greden eds., 1994).

¶201 DSM-IV-TR, *supra* note 99, at 351.

¶202 *Id.* at 350; see generally JAMISON, *supra* note 197 (describing psychotic aspects of author's manic episodes).

¶203 See *Godinez v. Moran*, 509 U.S. 389, 410-11, 417 (1993) (Blackmun, J., dissenting) (explaining that Moran's remorse and guilt might have made him "inclined to exert less effort towards his own defense," as he reported the he "really didn't care about anything" at the time of trial, leading him to a "self-destructive 'choice'"). This connection has been discussed, albeit in a quite limited fashion, within the literature on competence to consent to medical treatment and experimentation. See Carl Elliot, *Caring About Risks: Are Severely Depressed Patients Competent to Consent to Research?*, 54 ARCH. GEN. PSYCHIATRY 113, 114 (1997) (discussing patients who do not care about the risks of possible courses of treatment and may even seek out the risky treatments). In a very preliminary exploration of the subject, a team of researchers suggested that depressed and manic persons display distorted premises when making personally relevant decisions under conditions of uncertainty. See Harold J. Bursztajn et al., *Beyond Cognition: The Role of Disordered Affective States in Impairing Competence to Consent to Treatment*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 383, 383-85 (1991) ("[T]he extant models" for judging such competence "have tended to emphasize cognitive processes as the sole elements of competence. The role of affect and of affective disorders in impairing competence has been scanted.").

¶204 See Elliot, *supra* note 203, at 115.

¶205 DSM-IV-TR, *supra* note 99, at 357. Bipolar depressives in whom thought disorder plays a prominent role may be diagnosed as suffering from either a mood disorder with psychotic features or schizoaffective disorder. See *id.* at 319-23. For an empirical analysis of competence cases in which affective disorder and psychoticism are presented together, see Viljoen et al., *supra* note 101, at 28, 33-34 (finding "significant correlations between depression and impaired understanding and between withdrawal and impaired reasoning on the MacCAT-CA for defendants with psychotic disorders"; another study "found that conceptual disorganization and delusional thinking had a stronger impact on legal abilities in defendants with affective disorders than those with schizophrenia"); see also Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Diagnosis, Psychopathology, and*

*Competence-Related Abilities*, 15 BEHAV. SCI. & L. 329, 337 & tbl.1, 340-43 & tbl.6 (1997).

¶206 For example, the DSM-IV-TR states that those experiencing manic episodes

may be hostile and physically threatening to others. Some individuals, especially those with psychotic features, may become physically assaultive or suicidal. Adverse consequences of a Manic Episode (e.g., involuntary hospitalization, difficulties with the law, or serious financial difficulties) often result from poor judgment and hyperactivity.

DSM-IV-TR, *supra* note 99, at 359.

¶207 *See id.* at 357.

¶208 As previously noted, such issues sometimes are mentioned in passing. *See, e.g., Bonnie, supra* note 18, at 575 (explaining that a decision may be non-delusional but nonetheless be "powerfully influenced by delusional beliefs or pathological emotions ... Organic deficits, retardation, psychotic thought disorder, delirium and dementia, extreme phobia or panic, anxiety, euphoria and depression may impair a defendant's capacity to weigh information in order to make rational choices, consistent with starting premises and assigned values."); *see also* Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 873-75 (1987) (discussing defendants' desire for self-destruction but not examining its effect on adjudicative competence). It is also possible that, because certain specific manifestations of depression can include psychosis, those particular manifestations might be captured by a *Lafferty*-like test. However, the non-psychotic manifestations will not be.

¶209 *See supra* notes 187-88 (citing depression in *Dusky, Drope, Godinez, and Wilcoxson*).

¶210 420 U.S. 162, 179-80 (1975).

¶211 *See, e.g., Liles v. Saffle*, 945 F.2d 333, 339 (10th Cir. 1991) (holding that the defendant's history of mental illness was enough to require the court to hire a psychiatrist to help him with his defense); *United States v. Mason*, 935 F. Supp. 745 (W.D.N.C. 1996) (denying the defendant's claim that, because he attempted suicide after his last conviction, he had been incompetent to be tried).

¶212 921 P.2d 430, 436 (Utah 1996). An expert testified on an earlier remand that Holland "'suffered from a mental illness that is known as bipolar disorder with mixed features,'" or "manic depressive illness," and that he had been incompetent "due to 'impulsivity, poor judgment, and the suicidality [sic] that he expressed at the time.'" *Id.* at 434.

¶213 *Id.* at 435. Oddly, the court apparently considered Holland's mood disorder relevant only to the "ability to consult with counsel" prong of *Dusky*. *Id.* at 435-36.

¶214 *See, e.g., Rivers v. Turner*, 874 F.2d 771, 773-74 (11th Cir. 1989) (finding that no inquiry by counsel was warranted despite repeated and recent suicide attempts and psychiatric treatment, as defendant could communicate with counsel, understand defense strategy, and respond appropriately to questions); *United States v. Pappert*, 45 F. Supp.2d 1231, 1235-36 (D. Kan. 1999) (explaining that a

history of hospitalization is not sufficient to overcome the impression of the defendant as "lucid and rational"); *Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999) (holding that hospital treatment for depression did not per se require a competency hearing); *Collier v. State*, 959 S.W.2d 621, 624-25 (Tex. Crim. App. 1997) (finding that the testimony of defendant's psychiatrist that defendant had major depressive disorder, but was "rational, of average intelligence, and competent," was not sufficient to require the trial court to conduct a competency hearing); *Myers v. State*, No. 06-04-00033-CR, 2004 Tex. App. LEXIS, at \*3-5 (Tex. App. Oct. 5, 2004) (finding that evidence that the defendant had a long history of bipolar disorder and hospitalization did not indicate a "severe mental illness" requiring further inquiry, particularly in light of his factual understanding of the case and "rational dialogue" with counsel).

¶215 *Holland*, 921 P.2d at 438 (Howe, J., dissenting) (stating that Holland--who denied depression and suicidal ideation--appeared to understand the consequences of his decisions, and was not "out of touch" in the *Lafferty* sense but instead "was always well rooted in reality").

¶216 No. 90 CR 1001-1, 1995 U.S. Dist. LEXIS 349 (N.D. Ill. Jan. 12, 1995). Rivera initially had been deemed incompetent and unlikely to be restored to competency in the foreseeable future; he was committed on the basis of dangerousness. After a period of treatment he was again examined for competency; those evaluations were the subject of the instant opinion. Both experts found that Rivera suffered from, inter alia, "a major affective disorder" and was "depressed." *Id.* at \*8, 12.

¶217 *Id.* at \*9, 14. One expert believed that Rivera, at least in part because of his depression, saw no point to cooperating in his defense. *Id.* at \*10 & n.2. However, he also believed that he was competent because his depression was not "severe enough to impair his ability to participate in the proceedings or to understand the legal consequences of the proceedings." *Id.*

¶218 *Id.* at \*13. The defense expert also believed that Rivera exhibited "a type of psychosis, manifesting itself in magical or delusional thinking," a finding the court rejected. However, the court also made clear that this expert's major reason for finding Rivera incompetent was not psychosis but rather the depression that prevented him from caring enough to take self-protective action. *Id.* at \*12-13.

¶219 *Id.* at \*15; *cf.* *Commonwealth v. Goodreau*, 813 N.E.2d 465, 473 (Mass. 2004) (taking seriously the import of defendant's depression and self-harming goals, but ultimately upholding the competence finding).

¶220 *See* *United States v. Landsman*, 366 F. Supp. 1027, 1029-30 (S.D.N.Y. 1973) (holding that the depressed defendant was competent despite his "expressed lack of will to assist his defense" because he had the "ability" to so choose); *cf.* *Goodreau*, 813 N.E.2d at 343, 352-53 (citing defendant's "intellectual capabilities" and concluding that, despite his later claims that depression blocked self-protective motivation and led to his guilty plea, nothing had been "preventing counsel from developing a defense"); *North Carolina v. Avery*, 337 S.E.2d 786, 790 (N.C. 1985) (citing expert testimony that the removed portion of the defendant's frontal lobes controlled "affect and mood but has no significant effect on memory," such that the defendant appeared to "ha[ve] chosen not to remember the events of the allegations").

¶221 These cases are governed by the "rational choice" rule of *Rees v. Peyton*, 384 U.S. 312, 314 (1966), which post-*Godinez* likely has the same meaning as *Dusky* rational understanding. *See supra* Part I.A.

¶222 *See, e.g.*, *Smith v. Armontrout*, 865 F.2d 1502 (8th Cir. 1988) (holding that defendant's waiver of appeals was valid); *State v. Passaro*, 567 S.E.2d 862, 865 n.9 (S.C. 2002) (citing statistics that 12% of executions from 1993-1995 were the result of waived appeals); *State v. Sagastegui*, 954 P.2d 1311, 1322 (Wash. 1998) (holding that the court must stick to a prior competency ruling despite pleas from next friends for a hearing). To be sure, so long as the United States has a system of capital punishment, there must be some circumstances under which a death-row inmate competently may choose to forgo the fight for her life. In some situations a person may have not just logical but sound reasons for wanting to end life, and respect for individual autonomy dictates that inmates enjoy the same right as others to make such a choice. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that competent persons have a right to refuse life-saving treatment); *Vacco v. Quill*, 521 U.S. 793 (1997) (same). But clearly the situation is altered where the death is to come not from disease or a reasoned decision to abandon treatment but instead by state-ordered execution; and in any right-to-die context the possible impact of affective disorder should be robustly considered. *See OR. REV. STAT. § 127.825* (2003) ("No medication to end a patient's life in a humane and dignified manner shall be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment."). For an exploration of the issues raised by execution volunteers and a proposed test for distinguishing between inmates whose choice not to fight execution is permissible and those for whom the choice should be disallowed as suicidally motivated, see John H. Blume, *Killing the Willing: Volunteers, Suicide, and Competency*, 103 MICH. L. REV. 939 (2005).

¶223 Consider the long and hotly contested battle over whether Michael Ross was competent to abandon challenges to his 2005 execution by the State of Connecticut. Ross for years attempted to be put to death--indeed, after his original death sentence was overturned, he had sought unsuccessfully to stipulate to the death penalty, which was then reimposed after a new hearing--but a series of purported next friends argued that his desire to die was caused by the depression associated with "death row syndrome." A District Court first credited expert testimony that Ross' decision was "driven by suicidal despair, rather than an exercise of free will." *Ross v. Lantz*, No. 05-CV-116(RNC), 2005 U.S. Dist. LEXIS 908, at \*8 (D. Conn. January 25, 2005). However, Ross eventually was found competent and executed. *See Ross ex rel. Dunham v. Lantz*, 408 F.3d 121 (2d Cir.), *cert. denied*, 544 U.S. 1028 (2005).

¶224 753 F.2d 395, 398 (5th Cir. 1985), *cert. denied sub nom.* *Rumbaugh v. McCotter*, 473 U.S. 919 (1985).

¶225 *Id.* at 399, 400.

¶226 *Id.* at 397-402. At the hearing, Rumbaugh (apparently to make clear that he had affirmatively chosen to die) lunged at a court officer with a hand-made weapon and commanded the officer to shoot him; he was indeed shot, though he did not die. *Id.* at 397; *see also Rumbaugh v. Estelle*, 558 F. Supp.

651, 653-54 (N.D. Tex. 1983). While Rumbaugh was being taken to a hospital, one expert testified that the incident supported his conclusion that Rumbaugh's decision to die was rational. *See Rumbaugh*, 753 F.2d at 397.

¶227 *Rumbaugh*, 753 F.2d at 402.

Rumbaugh is able to feed relevant facts into a rational decision-making process and come to a reasoned decision . . . [o]ne of the facts is that Rumbaugh is mentally ill, he has severe depression, with no hope of successful treatment, which would reduce his current mental discomfort to a tolerable level . . . . [His] assessment of his legal and medical situations, and the options available to him, are reasonable[, though] if the medical situation *vis-a-vis* treatment were different, Rumbaugh might reach a different decision about continuing judicial proceedings. In other words, Rumbaugh's disease influences his decision because it is the source of mental pain which contributes to his invitation of death.

*Id.* The court refused to conclude "as a matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience." *Id.* at 403.

¶228 *Id.* at 404 (Goldberg, J., dissenting); *see also Rumbaugh*, 558 F. Supp. at 653 (relating expert's testimony that Rumbaugh's decision was "rational or at least logical"). Judge Goldberg's arguments were echoed by Justices Marshall and Brennan in a dissent from the denial of certiorari. *See Rumbaugh v. McCotter*, 473 U.S. 919, 919 (1985) (Marshall, J., dissenting). Though Judge Goldberg argued that *Rees* "rational choice" competence was quite different from *Dusky* "rational understanding" competence and that Rumbaugh would have been *Dusky*-competent, the case was decided before *Godinez*, and such comments no longer have persuasive force. *See Rumbaugh*, 753 F.2d at 411-12.

¶229 *Rumbaugh*, 753 F.2d at 409.

¶230 865 F.2d 1502, 1503-06 (8th Cir. 1988) (en banc); *see also id.* at 1512 (Lay, C.J., dissenting).

¶231 *Id.* at 1513 (Heaney, J., dissenting).

¶232 *Id.* at 1511 (Lay, C.J., dissenting). The dissenters quoted the following testimony of forensic examiners:

Now, a problem there for me is on the rational side. In the past some courts have interpreted that as an affective component that's a lot more subjective . . . . [I]t's a fuzzy area. I'm not sure that person who is facing death, who is condemned to die, who experiences hopelessness anyway, who does have some lack in social skills, in terms of coping skills, I'm not sure that that allows a person to be 'fully rational.' I don't know what the standard is or what the ideal is there.

*Id.* at 1509. "He's cognitively aware. I don't know how emotionally aware he is." *Id.*

¶233 *Id.* at 1507.

[n234](#) See, e.g., DAMASIO, DESCARTES' ERROR, *supra* note 193. Other important work on the role of emotion in decision-making has been pursued by, inter alia, Edmund Rolls. See, e.g., EDMUND T. ROLLS, THE BRAIN AND EMOTION (1999).

[n235](#) An account of the Gage case may be found in DAMASIO, DESCARTES' ERROR, *supra* note 193, at 3-33; see also MICHAEL S. GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 537-39 (2d ed. 2002); Michael S. Gazzaniga & Megan S. Steven, *Free Will in the Twenty-First Century: A Discussion of Neuroscience and the Law*, in NEUROSCIENCE AND THE LAW: BRAIN, MIND AND THE SCALES OF JUSTICE 51, 59-62 (Brent Garland ed., 2004).

[n236](#) GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 539.

[n237](#) DAMASIO, DESCARTES' ERROR, *supra* note 193, at 9, 11 (quoting Dr. John Harlow, who memorialized his interactions with Gage in John M. Harlow, *Passage of an Iron Rod Through the Head*, 39 BOSTON MED. & SURGICAL J. 389 (1848-49)).

[n238](#) See DAMASIO, DESCARTES' ERROR, *supra* note 193, at 9-10.

[n239](#) John T. Cacioppo & Gary G. Berntson, *Social Neuroscience*, in THE COGNITIVE NEUROSCIENCES III, *supra* note 153, at 977 (citation omitted). Of course, few patients suffer brain injury because of metal rods like Gage's tamping iron; bullets to the head are far more common in modern life. See, e.g., State v. Shytle, 374 S.E.2d 573, 574 (N.C. 1989) (evaluating the expert's argument that the self-inflicted gunshot wound to the head impaired the defendant's emotional responses); State v. Avery, 337 S.E.2d 786, 790 (N.C. 1985) (explaining that the defendant shot himself through the head and portions of the frontal lobes were thus removed). Other causes also abound. "Damage to the frontal lobes can be caused by a myriad of insults, including direct trauma, vascular lesions, infectious, degenerative and metabolic processes." G. Michelle Reid-Proctor et al., *Evaluation of Legal Competency in Patients with Frontal Lobe Injury*, 15 BRAIN INJURY 377, 381 (2001); see also Pate v. Robinson, 383 U.S. 375, 378, 381 (1966) (explaining that defendant was hit on the head by a brick as a child and later shot himself in the head).

[n240](#) GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 533-39 (arguing that cases like that of Gage demonstrate that we

need to understand how emotion and motivation influence our ability to process information and choose actions ... Although he showed no obvious impairment in his intelligence and perceptual or motor abilities, he was no longer able to evaluate appropriately the significance of events and regulate his emotional responses.)

*Id.* at 538.

[n241](#) The brain areas most obviously implicated in emotion are the amygdala, hippocampus, orbitofrontal cortex, and ventromedial prefrontal cortex. See GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 545-46, 553 (discussing the role each of those areas plays in emotion); Heatherton et al., *Introduction: Emotion and Social Neuroscience*, in THE COGNITIVE

NEUROSCIENCES III, *supra* note 153, at 973, 974 (explaining the role of the amygdala and the hippocampus). For definitions and descriptions of these and other brain areas, see GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 62-95. The effect of damage to emotion-relevant brain areas on competence, and on decision-making generally, is a promising site of future research, both scientific and legal.

¶242 GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 538. This research was made possible by the remarkable fact that Gage was buried with his tamping rod, and Dr. Harlow had his body exhumed and retained both the rod and Gage's skull. These were examined nearly a century later by Hanna Damasio and colleagues, who used computer simulation techniques to recreate the trajectory of the rod through Gage's brain. See Hanna Damasio et al., *The Return of Phineas Gage: The Skull of a Famous Patient Yields Clues About the Brain*, 264 SCIENCE 1102 (1994).

¶243 Heatherton et al., *supra* note 241, at 974.

¶244 Prefrontal cortex is the most evolutionarily "new" portion of the human brain and is thought to be critical to "higher" brain functions, including reasoning and executive control. *See e.g.*, GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 75.

¶245 DAMASIO, DESCARTES' ERROR, *supra* note 193, at 34-37. Though this issue is not discussed by Damasio in detail, it signals another area of the law to which such emotional dysfunction could be relevant: that of entitlement to disability benefits. Because of Elliot's cognitive intactness, he initially was denied benefits; after Damasio's investigation, he was granted benefits.

¶246 *Id.* at 45 (characterizing this emotionally flat state as "*to know but not to feel*") (emphasis in original).

¶247 *Id.* at 46.

¶248 *Id.* at 41-50.

¶249 *Id.* at 53-54. Those with prefrontal damage "cannot generate emotions relative to the images conjured up by certain categories of situation and stimuli, and thus cannot have the ensuing feeling," but can experience primary emotions (such as instinctive fear) and thus may appear to have intact affect in some situations. *Id.* at 138-39. This clarification is important, as it can explain Gage's "fits of rage" and account for the fact that even persons like Elliot are capable of sometimes experiencing and expressing some emotion. It would be very strange for literally all emotional capacity to be eliminated, as there is no single center of emotion center in the brain.

According to Damasio, individual expression of "Gage matrix" impairment will vary--for example, according to the stage of life at which the individual's brain damage occurred. However, he believes these persons share a common core of impairments, including being "[r]igid and perseverant in their approach to life" and unable to organize their lives and futures; displaying stereotyped mannerisms; and having diminished experience of pleasure and pain. Such patients will also display normal intelligence and a lack of motor, sensory, or communication defects. *Id.* at 58.

¶250 For example, persons with damage to various regions of the frontal lobes may have broad impairments to what is called "executive function" or "executive control." Executive function refers to a cluster of high-level brain functions "which orchestrate relatively simple ideas, movements, or actions into complex goal-directed behavior." Laurence B. McCullough et al., *Implications of Impaired Executive Control Functions for Patient Autonomy and Surrogate Decision Making*, 12 J. CLINICAL ETHICS 397, 398 (2001) (citing T. Shallice, *Specific Impairments of Planning*, 298 PHIL. TRANSACTIONS ROYAL SOC. B: BIOLOGICAL SCI. 199 (1982)) (arguing that impairment to executive control caused by, inter alia, depression, brain trauma, or psychosis can cause "apathy and impairment of goal directed thinking; reduced emotional control resulting in marked personality changes . . . and diminished ability to engage in abstract thinking"); see also Reid-Proctor et al., *supra* note 239, at 381 (discussing personality changes that may accompany frontal lobe injuries).

¶251 See, e.g., Beer et al., *supra* note 153, at 1095-98 (presenting three competing theories).

¶252 DAMASIO, DESCARTES' ERROR, *supra* note 193, at 52-53. Damasio also theorized that Elliot's decisionmaking "defect appeared to set in at the late stages of reasoning, close to or at the point at which choice making or response selection must occur." *Id.* at 50-51.

¶253 See, e.g., GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 547 ("The orbitofrontal cortex seems to be especially important for processing, evaluating, and filtering social and emotional information. The result is that damage to this region impairs the ability to make decisions that require feedback from social or emotional cues."); see also *id.* at 553 ("[T]he orbitofrontal cortex must rely on learned information about the emotional qualities of stimuli in order to assess the utility of our actions."); Laurence R. Tancredi, *Neuroscience Developments and the Law*, in NEUROSCIENCE AND THE LAW, *supra* note 235, at 71, 87-88 (discussing different research on brain damage and its effects on emotion and reason). Damasio asserts that while it is true that "uncontrolled or misdirected emotion can be a major source of irrational behavior," "[r]eduction in emotion may constitute an equally important source of irrational behavior." DAMASIO, DESCARTES' ERROR, *supra* note 193, at 52-53.

Damasio's theory of a "Gage matrix" also is supported by research on deficits among anosognosiacs, persons with right-hemisphere cortical damage who suffer obvious left-side motor defects (such as paralysis) but who fail consciously to recognize their affliction. Anosognosiacs have flattened emotion and feeling. They are similar to frontal-damage patients in terms of highly impaired decision making—but unlike frontal patients they are obviously disabled and thus are likely shielded from many opportunities to make bad decisions. Because "patients with prefrontal lesions appear neurologically normal," they "can engage in a variety of social interactions that will easily expose their defective reasoning." *Id.* at 67.

¶254 See, e.g., Reid-Proctor et al., *supra* note 239, at 381 ("Involvement with the legal system may especially be likely if pre-morbid antisocial, histrionic or narcissistic personality features are intensified following frontal lobe injury."); see also GAZZANIGA ET AL., COGNITIVE NEUROSCIENCE, *supra* note 235, at 550 (arguing while these patients generally are "more hurtful to themselves than

others," some with orbitofrontal damage might also exhibit antisocial behavior disorders and difficulties controlling violent or aggressive impulses). *But see Gazzaniga & Steven, supra* note 235, at 62 (arguing that scientists may be overstating the link between brain damage and antisocial behavior). The possibility of post-brain-damage involvement in crime is strongly supported by the case of "Jane," discussed *infra* note 257 and accompanying text.

¶255 Such was the case with "Jane," a defendant whose case is discussed *infra* note 257 and accompanying text.

¶256 *Cf. Reid-Proctor et al., supra* note 239, at 382 (noting that commonly used screening tests which focus on memory or orientation may be relatively insensitive to deficits in executive functioning, making it easier for an examiner to be misled regarding competency in patients suffering frontal lobe injury).

¶257 "Jane" is based on a former client of the author. Out of respect for that defendant's privacy and that of her family, the author has chosen not to identify her or discuss her case in detail in this Article. All descriptions of Jane and her situation are based on factual statements made in publicly filed documents in her case. Dr. Norman Relkin was instrumental in helping the author master the science so as to understand Jane's illness and impairments.

¶258 Jane's speech disorders also appeared linked to brain damage, in that scarring from the AVM rupture extended into areas connected with production of language. While others had noticed her increasingly bizarre speech, it appears to have been written off because she was getting older and perhaps more "quirky." She was also a speaker of English as a foreign language, a factor that may have impeded some persons' ability to discern that her speech had become disordered.

¶259 The evidence of Jane's previously undiscovered brain damage also raised significant issues as to her legal responsibility for the conduct of conviction. For a variety of reasons not relevant to this discussion, that issue has not been and likely never will be litigated.

¶260 374 S.E.2d 573 (N.C. 1989).

¶261 *Id.* at 574.

¶262 *Id.*

¶263 *Id.* at 575.

¶264 *Id.* at 576. Recall that apparently being "unbothered" by the very serious ramifications of her criminal case was also a symptom exhibited by Jane, and was one of the attributes that most troubled defense counsel and led to further investigation of her impairment.

¶265 *See id.* at 575 (holding that as long as a defendant can converse with her attorney and understand the discussion, she is competent). Even if the behavioral expression of Shytle's apparent affective disorder was not considered relevant to competence, it likely should have been considered

relevant to whether her appearance to a jury would deprive her of a fair trial. *See, e.g., Sell v. United States*, 539 U.S. 166, 179, 185 (2003) (stating that the Constitution allows the involuntary administration of "antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial" only if their administration is unlikely to cause side effects, such as a diminished "ability to express emotions," that undermine the fairness of the trial); *Riggins v. Nevada*, 504 U.S. 127, 138 (1991) (stating the possibility that defendant's medication caused side effects that could have affected the defendant's outward appearance, testimony, ability to follow the trial, or ability to communicate with counsel); *see also id.* at 142-44 (Kennedy, J., concurring) (discussing how drugs may unfairly alter a defendant's "emotional responses"); note 267, *infra* (raising similar issues with regard to Donald Beardslee and "Jane").

n266 *See, e.g., Bob Egelko et al., Donald Beardslee Executed; Killer Put to Death at San Quentin*, S. F. CHRON., Jan. 19, 2005, at A1.

n267 Not only was Beardslee's purported brain injury relevant to his conduct, in that it might, if adequately substantiated, have suggested that he responded to the chaotic and stressful circumstances of the crime with confusion and panic, leading him to imitate the actions of his co-defendants, but it might also have explained imposition of the death penalty, as his "constricted emotional range was likely to be viewed" by the jury "as indicating aloofness, indifference or even callousness." Decl. of Rubin C. Gur, Ph.D., Ex. 51 in Support of Petition for Executive Clemency, Donald J. Beardslee PP11-12, at 5-6 (Dec. 30, 2004) (on file with author) (hereinafter "Gur Declaration"). Similarly, Jane's relatively flat affect could make her appear "cold," and the prosecutor repeatedly expressed frustration with what he considered her lack of remorse. Further, it was reported to the author that several schoolchildren who observed part of her trial on a field trip were scared by Jane's vacant demeanor and regarded her as "spooky." These concerns echo those expressed in *Sell*, 539 U.S. at 181, 185, and *Riggins*, 504 U.S. at 142-44, with regard to the potential for psychotropic medication to alter a defendant's emotional expression. *But see State v. Gwaltney*, 468 P.2d 433,434-35 (Wash. 1970) (holding that the defendant's uncontrollably inappropriate emotional expression could be adequately explained to jury).

n268 *See generally* Pet. for Executive Clemency, Donald J. Beardslee (Dec. 30, 2004) (on file with author). According to that petition and the supporting materials, Beardslee showed early signs of brain damage and throughout his life exhibited both abnormal emotional perception and expression and poor judgment. As a young man he suffered head injuries in a car accident, and several years later was hospitalized with a skull fracture and frontal lobe injury after being hit by a falling tree. *Id.*

n269 According to Dr. Rubin Gur, likely damage to portions of Beardslee's right-hemisphere prefrontal cortex significantly impaired his "ability to inhibit responses to cognitive and emotional stimuli," thus damaging his ability to plan and engage in "reasoned, purposeful, self-controlled goal-directed behavior." Gur Declaration, *supra* note 268, P8, at 3. *See also* Dean E. Murphy, *Brain Damage Is Cited in Plea for Killer's Life*, N.Y. TIMES, Jan. 18, 2005, at A14 (quoting Dr. Gur as testifying at clemency hearing, "He couldn't really understand people's emotions ... He couldn't know himself how to behave, so he would rely on others to interpret things for him. He would mimic people's behavior."). Beardslee's argued "impairments in the areas of emotional processing" were consistent with his "stiff, emotionally constricted, relatively flat affect" and "poor ability to decipher emotional cues." Gur

Declaration, *supra* note 268, P10, at 4-5.

A very significant limitation on Dr. Gur's analysis was that he had not personally examined Beardslee, nor had he access to any brain scans; he presented what he called a "behavioral image" of Beardslee's brain, a computer-generated schematic representation of clinical data that essentially hypothesized what the brain probably looked like. *See id.* P6, at 2. Therefore, one of the requests put forth by Beardslee's lawyers was that the execution be stayed for the purpose of obtaining actual brain scans. That request was denied. In contrast, in Jane's case the ability of the defense to access sophisticated brain-scanning technology and neuropsychological testing yielded compelling evidence of her brain damage, its precise location, and its behavioral impact.

¶270 Letter of James P. Fox, District Attorney, et al. to Arnold Schwarzenegger, Governor of California 7-8, 12 (Jan. 7, 2005) (on file with author). The prosecutor in Jane's case also repeatedly denied that she could be significantly brain-damaged, primarily because of her intact intelligence.

¶271 Governor Arnold Schwarzenegger, Statement of Decision: Request for Clemency by Mr. Donald J. Beardslee 3 (Jan. 18, 2005) (on file with author).

¶272 *Id.* at 3-4. Thus, Beardslee's assertions were never tested; the Governor concluded that, even if verified, the emotional deficits would be irrelevant.

¶273 Moreover, the Governor's decision, by relying on an assessment that Beardslee's impairments did not prevent him from knowing right from wrong, *see id.* at 5, reflects a fundamental confusion between the legal standards governing clemency and insanity, in a way that directly parallels the persistent confusion between competence and insanity. This parallel suggests that decision-makers looking to competence might similarly make decisions based on the incorrect standard.

¶274 *See* ROESCH & GOLDING, *supra* note 6, at 101. The authors ask:

If competency is viewed as a construct, and if it cannot be reduced to a particular operational definition, and if even court decisions themselves are (more or less) fallible, then how can one proceed to improve the reliability and validity of assessment procedures used (or to be developed) in its determination?

*Id.*

¶275 *See* Appelbaum, *supra* note 33.

¶276 *Id.* at 378; *see also id.* at 382-84 (noting that this is the case because emotion signals value and assists in formulation of goals, and as brain-damage research suggests a strong link between emotion and reasoning) (citing BECKY COX WHITE, COMPETENCE TO CONSENT 131, 137 (1994), and DAMASIO, DESCARTES' ERROR, *supra* note 193, at 38).

¶277 *Id.* at 386.

¶278 *Id.*

¶279 These questions represent a rich site for potential future research, ideally as a collaborative effort between scientists and legal scholars.

¶280 *See supra* Part II.B.

¶281 LEDOUX, *supra* note 1, at 35.

¶282 Thanks to Liam Murphy for clarifying this point.

¶283 Holyoak & Morrison, *supra* note 92, at 2.

¶284 The notion of "bounded rationality," or the "intelligent use of one's limited cognitive resources," was introduced by Herbert Simon. Goldstein & Hogarth, *supra* note 104, at 3, 13. Like the literature on decisionmaking generally, the literature on bounded rationality is vast, and this Article does not attempt to survey or summarize it. *See generally* BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selten eds., 2002); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

¶285 *See, e.g.*, Daniel Kahneman & Shane Frederick, *A Model of Heuristic Judgment*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 92, at 267, 287 (discussing how people rely on heuristics and biases to make judgments).

¶286 *See* Finucane et al., *supra* note 143, at 341, 343 (proposing the existence of an "affect heuristic").

¶287 Saks & Behnke, *supra* note 38, at 105, 115.

Our knowledge of the pervasive irrationality that governs decision making--indeed, that governs all human activity--serves as a reason for extreme caution ... Even generally effective decision makers who indisputably have the ability to form accurate beliefs misuse statistics, misunderstand probabilities, and accord undue weight to vivid examples. They may also be profoundly affected by irrational and unconscious factors. Unless we are willing to declare most people incompetent, declaring only the mentally ill who lack reasoning skills incompetent risks unjustifiably discriminating against individuals on the basis of mental illness.

*Id.* at 105.

¶288 This distinction roughly parallels that between ordinary cognitive limitation and mental retardation, relevant to attributions of criminal responsibility and relative culpability. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 308-09 nn.3, 5 (2002) (discussing differences between normal or average cognitive function and that displayed in persons with mental retardation).

¶289 Forensic theorists have made significant strides toward articulating the substrates of adjudicative competence and attempting to more consistently and "accurately" measure them. Though the earliest forensic assessment instruments ("FAIs") were little more than simple checklists, newer

ones are more detailed and standardized. *See* GRISSO, *supra* note 13, at 10-12. There is a large and rich literature explaining, evaluating, and critiquing the various FAIs, an explication of which is beyond the project of this Article. *See id.* at 141-45. The MacCAT-CA, theoretically based on the notion of decisional competence, is poised to become the "gold standard" for assessments of adjudicative competence. *But see id.* at 140-41.

n290 *See, e.g.,* United States v. Landsman, 366 F. Supp. 1027, 1028 (S.D.N.Y. 1973) (explaining that the defendant with an aneurism at the base of his left frontal lobe was:

not a well man, physically or mentally ... However, many people who are not well are legally able to stand trial, and it is this Court's heavy burden to decide whether or not, in this instance, the defendant's physical or emotional problems are so severe as to bar a substantial public interest in the resolution by trial of a criminal indictment.)

n291 This Article does not, for example, advocate imposition of a general concept of "emotional competence" that is relevant to one's ability to lead a stable and happy life, such as that explored in CAROLYN SAARNI, THE DEVELOPMENT OF EMOTIONAL COMPETENCE (1999).

n292 *See, e.g.,* Commonwealth v. Goodreau, 813 N.E.2d 465, 473-74 (Mass. 2004) (remarking that depression in the face of likely life imprisonment, and remorse and empathy for one's victims, are "eminently rational"); Nebraska v. Stooksbury, 2003 Neb. App. LEXIS 322, \*13-14 (Neb. Ct. App. Dec. 23, 2003) ("Most people facing the charges against Stooksbury would likely be less than overjoyed at the very real prospect of prison time; thus, the fact that Stooksbury seemed depressed to his counsel is hardly surprising, but it does not rise to the level of establishing incompetence."); Reedy v. Wright, 60 Va. Cir. 18, 43 (Va. Cir. Ct. 2002) (noting that while the defendant may have been suicidal, "[i]t is also not self-evident that contemplation of suicide by a man on trial for murdering his own 2-year-old and 4-year old children demonstrates legal incompetency").

n293 POYTHRESS ET AL., *supra* note 2, at 89.

n294 POYTHRESS ET AL., THE MACARTHUR COMPETENCE ASSESSMENT TOOL-CRIMINAL ADJUDICATION: PROFESSIONAL MANUAL 13 (1999) (explaining that appreciation measures primarily are directed to delusional beliefs).

n295 Zapf & Viljoen, *supra* note 13, at 360, 362 (characterizing this as the tool's main limitation).

n296 *See* DAMASIO, DESCARTES' ERROR, *supra* note 193, at 50 (arguing that the dissociation could be due to various laboratory realities: (1) no real need to make a decision, just to reason about one; (2) no continuing shifts and changes in constraints and circumstances; the "ongoing, open-ended, uncertain evolution of real-life situations was missing"). This is true more generally of patients with frontal lobe injury and deficits in executive functioning, whose deficits are often difficult to detect with standard neuropsychological testing. *See* Reid-Proctor et al., *supra* note 239, at 382 ("[T]he test taking environment is artificial; the examiner provides a great deal of structure to the patient, which may mask the patient's difficulties with such issues as irritation, problem solving, and self-direction.").

- ¶297 See POYTHRESS ET AL., *supra* note 2, at 89 (stating "no claim is made that" the MacCAT-CA "assesses systematically all of the dimensions or issues potentially relevant to adjudicative competence"). That a defendant's abilities must be examined in light of the specific demands of the particular criminal case is one on which theorists uniformly agree. See, e.g., Winick, *supra* note 6, at 974 & nn.250-51. However, this is a common point of failure in actual evaluations. See, e.g., *id.* at 973 ("Clinical evaluators applying the competency standard rarely inquire into what skills are actually needed by a particular defendant in view of the plea or trial strategy his counsel will follow.").
- ¶298 See generally KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 200, at 1652-61 (explaining the treatment of depression).
- ¶299 See Brent Garland, *Future Directions, in NEUROSCIENCE AND THE LAW*, *supra* note 235, at 44-47 (noting consensus among lawyers and neuroscientists at a conference that "[f]or the well-being of both" law and science "the science must be presented, used, and discussed in a realistic and accurate fashion--one that reflects both the limitations and the potentials of the science"). However, law should not be based on antiquated views that conflict with modern science; if science has moved on but the law has not, the latter should try to catch up. Deborah Denno, *A Mind to Blame: New Views on Involuntary Acts*, 21 BEHAV. SCI. L. 601, 603-04 (2003).
- ¶300 See *supra* p. 1420 & n.254.
- ¶301 See D. Michael Bitz & Jean Seipp Bitz, *Incompetence in the Brain Injured Individual*, 12 ST. THOMAS L. REV. 205, 247 (1999) (discussing a study that found head injuries "in 100% of death row inmates"); Michael Sarapata et al., *The Role of Head Injury in Cognitive Functioning, Emotional Adjustment & Criminal Behavior*, 12 BRAIN INJURY 821, 822 (1998) (explaining prior research indicating prevalence of brain damage in offenders).
- ¶302 Morse has suggested that "psychopaths" who lack capacity for empathy should be excused from criminal responsibility. Morse, *Rationality and Responsibility*, *supra* note 90, at 264. Note, however, that "psychopathy" is not properly a mental health term, though some aspects of what is commonly meant by the term may be found in the diagnostic classification for "antisocial personality disorder." DSM-IV-TR, *supra* note 99, at 701-03. Even assuming this to be correct, is it not immediately apparent that a failure of empathy would have an impact on *competence*, as competence is concerned primarily with capacity for self-regard and self-protection; however, the impulsivity associated with antisocial personality disorder might be relevant. Future research may shed light on this question. See generally Christopher J. Patrick, *Emotional Processes in Psychopathy, in VIOLENCE AND PSYCHOPATHY* 57 (2001) (discussing which characteristics of psychopaths lead them to criminal acts).
- ¶303 See *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (holding that where there is doubt as to the defendant's competence, the judge must conduct a competency hearing). One form of relief requested by Beardslee, which was denied, was a brain scan and further testing to substantiate his claims of brain injury and resultant emotional deficits. See Governor Schwarzenegger's Statement of Decision, *supra* notes 271-73. Under the approach advocated here, though applied in the very different context of a

clemency determination, that request should have been granted.

¶304 This analysis could apply equally to assessment of other forms of emotional impairment linked to brain injury, not just to the specific sort described in this Article.

¶305 DAMASIO, DESCARTES' ERROR, *supra* note 193, at 212-17.

¶306 This is, of course, an empirical question that warrants exploration.

¶307 *Cf.* Commonwealth v. Goodreau, 813 N.E.2d 465, 474-75 (Mass. 2004) (holding that the record supported the finding that defendant's depression eased sufficiently during his confinement as to render him competent because he was able to effectively communicate with his lawyer). On remand, Milton Dusky was found competent because both medical examiners and his attorney found his condition much improved. *Dusky v. United States*, 295 F.2d 743, 746 (8th Cir. 1961). Indeed, the vast majority of those referred for evaluation and treatment are eventually ruled competent. *See* GRISSO, *supra* note 13, at 70 (citing studies where only 10-30% of those evaluated found incompetent); ROESCH & GOLDING, *supra* note 6, at 29, 47-48 & tb1.3.1 (explaining that incompetence rate of evaluatees averaged 30% across ten studies, from a low of 4% to a high of 77%); Winick, *supra* note 6, at 925 & nn.9-10 (stating that 25% of evaluatees were deemed incompetent and subsequently hospitalized). Some of these competence findings, though, would come out differently under the proposed test.

¶308 *See, e.g.*, Atul C. Pande, *Pharmacotherapy of Depressive Disorders*, in SEVERE DEPRESSIVE DISORDERS, *supra* note 200, at 243-67 (discussing the treatment of depression with medication); *see generally* DEPRESSION: NEUROBIOLOGICAL, PSYCHOPATHOLOGICAL, AND THERAPEUTIC ADVANCES 365 et seq. (Adriaan Honig & Herman M. van Praag eds., 1997).

¶309 *See* Sell v. United States, 539 U.S. 166, 179-83 (2003) (setting the standard for involuntary medication of defendants).

¶310 *See* Cooper v. Oklahoma, 517 U.S. 348, 365-66 (1996) ("[I]t is unusual for even the most artful malingerer to feign incompetence successfully for a period of time while under professional care.").

¶311 *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that if the defendant is not competent to stand trial and likely will not recover the state must institute commitment proceedings or release the defendant); Stephen Hunt, *Treatment, Not Trial for Mitchell*, SALT LAKE TRIB., Jul. 27, 2005, at A1 (quoting Elizabeth Smart's father as saying that "a long-term hospital stay for Mitchell would be a satisfactory resolution to the case as long as the suspect is kept off the streets").

¶312 *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 492-94 (1980) (discussing the stigmatizing consequences of psychiatric hospital confinement).

¶313 *See* Cooper, 517 U.S. at 368 n.24 (explaining that a mentally retarded individual charged with a minor crime may not be competent and yet may not be committed); *Jackson*, 406 U.S. at 738 (holding that the defendant must be released if a commitment hearing is not initiated).

¶314 Though modern depression treatments can be quite effective, relapse and remission rates are distressingly high. *See, e.g.,* Anthony S. Hale, *The Treatment of Depression: The Reuptake Inhibitors*, in *DEPRESSION: NEUROBIOLOGICAL, PSYCHOPATHOLOGICAL, AND THERAPEUTIC ADVANCES*, *supra* note 308, at 34-38. However, if a defendant can with treatment be rendered competent for the duration of the legal proceedings, it is of no legal import--at least not with regard to competence--if she should later relapse. Moreover, relapses are not always at the same level of intensity as the original episodes, and chronic depressives tend not to be those manifesting the most extreme forms of the disease. *See* KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 200, at 1354. Therefore, relapse and remission rates are not good predictors of the number of defendants who will be so disabled, so permanently, as to pose the dilemma I describe.

¶315 *Cooper*, 517 U.S. at 366-68 (quoting *United States v. Chisolm*, 149 F. 284, 288 (S.D. Ala. 1906)).

¶316 *Id.* at 366.

¶317 Such an approach, if implemented consistently, would move the jurisprudence quite far away from the present state of affairs, in which most examiners' reports and judicial rulings simply cite the *Dusky* standard, recite apparently relevant facts, and conclude that the defendant is or is not competent. *See, e.g.,* GRISSE, *supra* note 13, at 11-13.

¶318 LEDOUX, *supra* note 1, at 21.

¶319 *See* Stephen J. Morse, *New Neuroscience, Old Problems*, in *NEUROSCIENCE AND THE LAW*, *supra* note 235, at 158 (arguing that "new neuroscience... may have fewer deep normative implications for law and society than popular imagination and even many scientists believe"). *But see* Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 *PHIL. TRANSACTIONS ROYAL SOC. B: BIOLOGICAL SCI.* 1775 (2004) (arguing that neuroscience will help change the law by altering the public's perception about "free will and responsibility"); Tancredi, *supra* note 254, at 90-91 ("In the future, it should be possible to determine the impact of emotions on any one decision and to develop a method for weighing when the emotions trump an individual's ability to make a personal rational choice.").

¶320 *See* Brent Garland, *Monitoring and Imaging the Brain*, in *NEUROSCIENCE AND THE LAW*, *supra* note 235, at 11 (noting debate as to whether neuroscience can help define rationality).

¶321 *Rumbaugh v. Procunier*, 753 F.2d 395,404 n.2 (5th Cir. 1985) (Goldberg, J., dissenting).

