COMMENT

THE TWILIGHT OF COMPETENCY AND MENTAL ILLNESS: A CONCILIATORY CONCEPTION OF COMPETENCY AND INSANITY*

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I. INTRODUCTION

The number of defendants in the criminal justice system afflicted with some mental disease or defect is rising and has been over the past several decades.[1] Therefore, criminal defense attorneys, judges, and prosecutors encounter issues such as competency to stand trial, competency to waive constitutional rights, nonresponsibility through diminished capacity, nonresponsibility by reason of insanity, and forcible medication of mentally ill defendants.[2] In the context of a criminal defendant, mental illness most often suggests two concepts: competency and insanity. Competency addresses a defendant's current mental state and determines "the appropriateness of conducting the criminal proceeding in light of the defendant's present [ability or] inability to participate effectively."[3] Insanity, however, focuses on the mental state of the defendant *"at or about the time of the crime"*; proof of

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1. Richard E. Redding, *Why It Is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How to Do It)*, 14 WASH. U. J.L. & POL'Y 407, 409 (2004); *see also* Henry J. Steadman et al., *The Impact of State Mental Hospital Deinstitutionalization on United States Prison Populations, 1968–1978*, 75 J. CRIM. L. & CRIMINOLOGY 474, 475 (1984) (discussing the interdependence of the criminal justice and mental health systems). "Deinstitutionalization" is a term used to describe various ideological, statutory, and procedural changes that prompted a shift from institutional to community care for the mentally ill. *Id.* The movement to deinstitutionalize state mental hospitals gained momentum after 1968. *Id.* at 478. Statistics show that at the close of 1968, state prisons held 168,000 inmates while state mental hospitals housed 399,000 patients. *Id.* at 475. By 1978, a decade later, "the prison population rose 65% to 277,000" and "the hospital population fell 64% to 147,000." *Id.*

2. Redding, *supra* note 1, at 410–11 (stating that many criminal defendants suffer from various forms of mental illness and that their attorneys, prosecutors, and judges will encounter mental health issues).

3. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 454 (1967) [hereinafter *Incompetency*].

insanity provides a complete defense to the crime.[4] Competency and insanity both reference the defendant's mental health; however, they remain separate and discrete concepts.

The current competency standard[5] in the United States is faulty, both in its substance and its procedural application.[6] The standard is vague, overbroad, and difficult to apply.[7] Furthermore, it leads to a criminal justice system where trial courts and defense counsel encounter marginally competent, or to put it another way, "decisionally incompetent" defendants.[8] However, pronouncements by the Supreme Court "virtually assure that the competency adjudication process will not be abolished or radically restructured."[9] The standard is ensconced among history and tradition. Thus, to function within the current system, one must accept its faults and nurture ideas that provide protections where the system fails. Instead of dwelling on the parts of the system resistant to change, focus must shift to the areas of mental health law that can be massaged, like the insanity defense.[10]

The twilight of competency and mental illness breeds controversy. The low threshold of the competency standard sometimes produces a defendant "marginally mentally ill [but] fit

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4. HARLOW M. HUCKABEE, MENTAL DISABILITY ISSUES IN THE CRIMINAL JUSTICE SYSTEM 25 (2000) (comparing competency to stand trial to the insanity defense and showing that the latter is a defense based on the defendant's state of mind at the time the crime was committed).

5. A defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960) (interpreting the federal competency standard).

6. *See infra* Part III (discussing both the substantive failures of the competency standard and the resulting deficiencies in its procedural application).

7. Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 231 (2004) ("Commentators have described the *Dusky* standard as 'unsatisfactorily vague,' 'confusing and ambiguous,' 'sketchy,' and lacking in specificity and detail." (internal footnotes omitted)).

8. Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1347 (1998) (stating that some defendants, in spite of being found competent, "are incompetent to make decisions in their cases").

9. Morris et al., *supra* note 7, at 198; *see also* Godinez v. Moran, 509 U.S. 389, 396 (1993) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966)) (stating that a criminal defendant cannot be tried without being adjudged competent to stand trial).

10. The U.S. Supreme Court memorialized the current competency standard in *Dusky v. United States*. *See Dusky*, 362 U.S. at 402. Notwithstanding its failures, the Court maintains the current standard; therefore, a proposal for its modification or abolition is outside the scope of this Comment. The insanity defense is not a constitutional right; in fact, several states abolished the defense altogether. *See, e.g.*, IDAHO CODE ANN. § 18-207 (2004); KAN. STAT. ANN. § 22-3220 (1995); UTAH CODE ANN. § 76-2-305 (2003).

to stand trial . . . whose decisionmaking abilities are nevertheless impaired."[11] In their role as zealous advocates,[12] criminal defense attorneys are "charged with protecting a defendant's best interests."[13] Therefore, when faced with a mentally ill defendant in need of treatment versus punishment, defense counsel should 1) determine if a nonresponsibility defense is in the client's best interest and 2) notify the court.[14] Once notified by defense counsel, judges should have an affirmative duty to investigate the possibility of imposing the insanity plea on an unwilling defendant.[15] Court-imposed insanity pleas seek to protect a subset of these mentally ill defendants who are unable to appreciate the benefits of an insanity plea.[16] If given the discretion to evaluate the suitability of an insanity defense despite a defendant's resistance, trial judges can provide additional value to the criminal justice system. The discretion protects the marginally competent defendant, fosters society's interest in preventing the conviction of a person lacking legal responsibility, and ensures the integrity of the judicial process.

Part II of this Comment provides an overview of the competency standard, including its history, theoretical justifications for its existence, and evolution from common law to the landmark decision of *Dusky v. United States*. After establishing the background of the competency standard, Part III ventures into the substantive and procedural problems related to the application of the current standard. Part IV surveys current state law relating to a trial court's imposition of an insanity plea over the objection of a defendant. The case law developments in Colorado and Washington, D.C., supply the most comprehensive treatment of the subject and thus a framework for analysis. In addition, Part IV suggests a comprehensive approach to guide trial courts when faced with the question of whether to impose the insanity defense on an unwilling defendant. Part V concludes

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11. Ross, *supra* note 8, at 1347.

12. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2006); *see also* MODEL RULES OF PROF'L CONDUCT pmbl. (2006) (discussing the various functions performed by a lawyer). For a commentary on the lawyer's role as a "vigorous advocate," see generally Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65.

13. Ross, *supra* note 8, at 1384.

14. *Id.* at 1361 ("The lawyer is expected to pursue measures to determine if nonresponsibility is in the client's best interests and to file a notice of intent to use the insanity defense.").

15. *See infra* Part IV.B (discussing whether judges should be allowed to enter a plea of insanity over the objections of the defendant and concluding that judges should so be allowed).

16. *See infra* Part IV.B.

that courts must have judicial discretion to enter the insanity plea against the will of a defendant when necessary.

II. THE COMPETENCY STANDARD

Competency requires that a person have the present "mental ability to understand problems and make decisions."[17] The ABA has specifically delegated five integral decisions to criminal defendants from the time of arraignment to the final disposition of the case.[18] These integral decisions include: "(i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal."[19] The bar on adjudication of an incompetent defendant evolved as a result of the importance of the defendant's ability to make these decisions.

A. *Historical Background of the Common Law Rule Against the Prosecution of an Incompetent Defendant*

The requirement that a criminal defendant be competent to stand trial has historical roots.[20] English common law required a criminal defendant to enter a plea or the trial did not proceed.[21] In the case of a "mute" defendant, one who chose to remain silent over entering a plea, the court ordered weights placed on the defendant's chest until he or she acquiesced.[22] If defendants did not choose silence of their own volition, but instead silence resulted from a mental illness, the court spared defendants from the torture.[23] Thus English common law distinguished between a competent defendant "mute of malice" and an incompetent defendant "mute by visitation of God."[24]

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17. BLACK'S LAW DICTIONARY 302 (8th ed. 2004).

18. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.2, at 199–200 (3d ed. 1993) (noting the decisions attributed to the defendant).

19. *Id.* The ABA standards discuss the allocation of control over the defense between the attorney and the client. *Id.*

20. Morris et al., *supra* note 7, at 201; *see also* Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 574 (1995) (discussing the common law roots for the competency doctrine).

21. *See* Morris et al., *supra* note 7, at 201; Winick, *supra* note 20, at 574.

22. Winick, *supra* note 20, at 574 (explaining the torturous common law procedure for dealing with mute defendants).

23. *Id.* (stating "deaf and dumb" defendants were "spared th[e] painful ritual," and that the scope of the category later expanded to include "lunatics").

24. *Id.*

English common law did not provide representation for a defendant; instead, it required criminal defendants to defend themselves.[25] Under this system of self-representation, competence became all the more important.[26] Generally, the defendant not only had to stand trial but also had to conduct the proceedings on his own behalf.[27] "Just as a defendant who is not physically present cannot defend himself or herself, so too, a mentally incompetent defendant is unable to defend himself or herself . . . ."[28] Therefore the ritual of a common law criminal trial required the defendant be competent.[29]

The procedural evolution of the criminal process eliminated most of the common law justifications for the competency requirement.[30] Still, the constitutional requirement of criminal competency, as it stands today, "derives its substance and much of its form from the common law rule."[31] Criminal defendants are now granted a constitutional right to have counsel present during their trial.[32] Therefore, the former procedural requirement that defendants conduct their own defenses does not serve as a basis for the competency requirement today.[33] However, a criminal defendant must still have the ability to assist his attorney.[34] Certain decisions regarding the course of the defense are left to the discretion of the defendant.[35] Allowing a criminal defendant to make decisions relative to the direction of his

25. *Id.* ("[S]elf-representation rather than representation by counsel was the common practice.").

26. *Id.* "[I]t was imperative that defendants be competent because they were required to conduct their own defense." *Id.* at 575.

27. *Id.* at 575.

28. Morris et al., *supra* note 7, at 201.

29. *Id.*

30. Winick, *supra* note 20, at 575 (asserting that the constitutional right to assistance of counsel requires the counsel, rather than the defendant, to be competent).

31. *Incompetency*, *supra* note 3, at 454.

32. U.S. CONST. amend. VI (establishing a defendant's right to have counsel present at criminal proceedings); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); *see also* Winick, *supra* note 20, at 575 (explaining that a criminal defendant's competency is of secondary importance to the competence of the attorney because the defendant is not required to defend himself).

33. Winick, *supra* note 20, at 575.

34. Dusky v. United States, 362 U.S. 402, 402 (1960) (delineating a two-prong standard for competency, one of which is the ability to assist counsel); *see also* *Incompetency*, *supra* note 3, at 457 (stating the minimum of competency requires the ability to assist one's counsel in the defense). "To proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his attorney and to the court would be unfair to the defendant . . . ." Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 552 (1993).

35. Morris et al., *supra* note 7, at 202; *see also* *supra* note 19 and accompanying text.

defense necessitates his competence.[36] The requirement of competency ensures the accuracy, reliability, and integrity of criminal trials,[37] all of which are important to both the criminal defendant and society as a whole.[38]

B. *Present Day Purposes for the Bar Against the Adjudication of an Incompetent Defendant*

Current justifications for the competency requirement can be divided into two major areas: 1) protection of the individual and 2) public policy or societal interests.[39] The competency standard protects defendants from wrongful conviction, and it protects the defendants' "interest[s] in autonomous decisionmaking concerning their defense."[40] Competent defendants are more likely to have the requisite ability to make appropriate decisions concerning their defenses and to provide their attorneys with the necessary background, the facts surrounding the event, and other information significant to the case.[41] The individual protections provided by the competency standard help ensure the accuracy of a trial court's decision regarding the criminal proceedings, thus securing society's interest in the reliability of criminal proceedings.[42] Accuracy and reliability in criminal decisions "insure public respect and confidence in the criminal process, considerations that are basic to the legitimacy of the criminal justice system."[43]

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36. Morris et al., *supra* note 7, at 202 ("Those decisions [delegated to the defendant] can only be made by a competent defendant.").

37. Bonnie, *supra* note 34, at 552 (explaining that an incompetent defendant could be "unfairly convicted" if he is unable to assist counsel in the defense, which would compromise society's interest in the reliability of court decisions); *see also* Morris et al., *supra* note 7, at 202 (suggesting a link between competency to assist counsel and obtaining accurate convictions).

38. *See* Winick, *supra* note 20, at 575–76 (explaining that accuracy in criminal proceedings defends both the defendant's interest in preventing unjust conviction and society's desire for reliability in the system).

39. *See* Bonnie, *supra* note 34, at 543 (stating that the bar on adjudication exists not only to protect the individual but also societal interests).

40. *See* Winick, *supra* note 20, at 576 (expounding on some of the individual interests protected by the constitutional competency requirement).

41. Morris et al., *supra* note 7, at 202. "An incompetent defendant may not be able to appreciate what evidence is relevant to establish a defense, to confer intelligently with counsel, to assess the evidence presented by the prosecution, or to testify coherently at trial." *Id.*; *see also Incompetency*, *supra* note 3, at 457 (illustrating the importance of a defendant's comprehension and ability to communicate to the administration of the case).

42. Winick, *supra* note 20, at 575–76 (stating that accurate criminal adjudication serves a "societal interest in the reliability of the criminal process").

43. *Id.* at 576.

The competency requirement quells yet another societal concern: the preservation of the dignity of the process.[44] In the United States, the judicial process, both civil and criminal, exemplifies an adversarial system.[45] The Supreme Court pronounced the competency standard "fundamental to an adversary system."[46] The adjudication of a defendant lacking rational participation strips the adversary process of its character as a "reasoned interaction between the state and the defendant."[47] The process becomes a "communal attack" on a helpless being.[48] The competency requirement also "preserve[s] the courtroom decorum," which in turn keeps the process dignified.[49] A mentally incompetent defendant might display inappropriate behavior such as outbursts, "bizarre" defenses, and refusal to cooperate.[50] Disruptions within the courtroom threaten the dignity of the criminal process as a whole.[51]

C. *Evolution of the Competency Standard in Case Law*

The common law rule against the conviction, and further prosecution, of an incompetent defendant is a long-established tradition.[52] The federal competency statute adjudges competency based on whether a defendant is "presently suffering from a mental disease or defect rendering him mentally incompetent to

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44. *Id.*; *see also Incompetency*, *supra* note 3, at 458 (explaining that society has an interest in maintaining the dignity of the criminal process). "[T]he doctrine serves to preserve the criminal process's moral dignity . . . ." Bonnie, *supra* note 34, at 543.

45. An adversary system is "[a] procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker." BLACK'S LAW DICTIONARY 58 (8th ed. 2004).

46. Drope v. Missouri, 420 U.S. 162, 171–72 (1975).

47. Morris et al., *supra* note 7, at 202.

48. *Id.*; *see also Incompetency*, *supra* note 3, at 458 (claiming the adversary process becomes an "invective against an insensible object" when a defendant is not a conscious and intelligent participant).

49. Winick, *supra* note 20, at 576.

50. *See* Morris et al., *supra* note 7, at 201–02 (explaining that inappropriate behavior in a courtroom can cause disruption); *Incompetency*, *supra* note 3, at 458.

51. Morris et al., *supra* note 7, at 201 (illuminating the disturbance of the trial process as a result of a defendant's inappropriate behavior).

52. "[I]f a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought." WILLIAM BLACKSTONE, 2 COMMENTARIES *24; *see also* Drope v. Missouri, 420 U.S. 162, 170 (1975) (expounding on the tradition of preventing an incompetent defendant from trial and conviction); AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1 cmt. "Commentary Introduction" (1989) (describing sanity at the time of trial as one of the earliest criminal mental health issues, and noting that American and British legal systems addressed only insanity at the time of the offense earlier).

the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[53] In 1960, the Supreme Court interpreted the federal statute for competency to stand trial in the case of *Dusky v. United States*.[54] The Court in *Dusky* established the test for competency to stand trial.[55] The standard espoused by the Court, and still followed today,[56] requires the defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[57]

Six years after *Dusky*, in *Pate v. Robinson*, the Supreme Court recognized that the conviction of a defendant determined to be incompetent is a violation of the defendant's due process right to a fair trial.[58] The Court went further and upheld an Illinois statute placing an affirmative duty on the judge to raise the issue of competence sua sponte if "the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial."[59] Thus, the Court established that a defendant has a right to further inquiry into the issue of competence, so long as the evidence raises the issue.[60] In *Drope v. Missouri*, the Court suggested several criteria that taken together, or in some cases standing alone, are relevant to the determination of whether further inquiry into competence is necessary: (1) evidence of a defendant's irrational behavior before trial, (2) a defendant's irrational behavior in the court room, and (3) a prior medical opinion or evaluation that suggests incompetence to stand trial.[61]

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53. 18 U.S.C. § 4241(d) (2000).

54. Dusky v. United States, 362 U.S. 402, 402 (1960) (determining that the record did not support a finding of competency under 18 U.S.C. § 4244).

55. *Id.*

56. Morris et al., *supra* note 7, at 207–09 (discussing the present validity of *Dusky*).

57. *Dusky*, 362 U.S. at 402 (announcing the two-prong standard for competency to stand trial); *see also* Godinez v. Moran, 509 U.S. 389, 396 (1993) (positing that the standard for competence to stand trial is distinct from the standard for competence to waive counsel or plead guilty); *Drope*, 420 U.S. at 172 (explaining the court's approval of the competence standard espoused in *Dusky*); Pate v. Robinson, 383 U.S. 375, 388 (1966) (describing the standard for competence to stand trial as "reasonably well settled").

58. *Pate*, 383 U.S. at 378. The majority opinion states that the conviction of an incompetent defendant violates due process; however, the Court only made the statement to identify a concession made by the State. *Id.*

59. *Id.* at 385 (citing ILL. REV. STAT. ch. 38, ¶ 104-11 (1963), *recodified at* 725 ILL. COMP. STAT. 5/104-11 (2000)).

60. *Id.* at 385–86. "*Pate v. Robinson* imposes a constitutional obligation on trial judges to raise the competency issue and hold a hearing to appraise a defendant's competency whenever sufficient evidence of incompetency comes to their attention." Winick, *supra* note 20, at 600.

61. *Drope*, 420 U.S. at 180.

Godinez v. Moran established that a defendant, judged competent by at least the constitutionally required standard of *Dusky*, is not required to meet an additional, *higher* standard of competency upon electing to waive the right to counsel.[62] Although the Court stated that a *higher* standard is not necessary to waive counsel, competency is not the end of the inquiry.[63] There is a distinction between general competency to stand trial and the capacity necessary to affect a waiver of constitutional rights.[64] Competency seeks to determine the defendant's "*ability* to understand the proceedings."[65] By contrast, when a defendant pleads guilty or waives a constitutional right the court must determine that the decision was "uncoerced" and that he actually *does* understand the significance and consequences of his choice.[66]

Therefore, when a criminal defendant wants to waive a constitutional right, or make the equivalent of a guilty plea, there is a requisite two-part inquiry.[67] The judge must determine, first, that the defendant is competent and, second, that the "waiver of his constitutional rights is knowing and voluntary."[68] The Court thereby established the general standard for competency to waive constitutional rights relating to criminal proceedings,[69] separate from the issue of competency to stand trial, which cannot be waived.[70]

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62. *Godinez*, 509 U.S. at 398–99 (reasoning that because all defendants must make decisions during trial, a higher standard of competence cannot be required for the decision to waive the right to counsel).

63. *Id.* at 400.

64. *Id.* at 398, 401 n.12 (differentiating the competency standard that requires an ability to understand the proceedings from the standard required to waive constitutional rights, which is a requirement that the defendant actually understand the significance and consequences of a particular decision).

65. *Id.* at 401 n.12.

66. *Id.* (contrasting the "knowing and voluntary" analysis from the competency inquiry).

67. *Id.* at 400–02.

68. *Id.* at 400.

69. *Id.* "The Court's opinion suggested that the standard for competency to stand trial should be the same as that applied to other competency questions arising in the criminal process." Winick, *supra* note 20, at 590. Even though *Godinez* dealt with a determination of competency to plead guilty, the Court explained that a guilty plea is virtually a waiver of several constitutional rights; thus, the standard for a guilty plea is equivalent to the standard for waiver of other constitutional rights. *Godinez*, 509 U.S. at 398–99 (listing the range of decisions regarding constitutional rights that the defendant who pleads guilty is making).

70. Pate v. Robinson, 383 U.S. 375, 384 (1966) (discounting the state's claim that the incompetent defendant waived a competency hearing as preposterous).

III. DEFICIENCIES IN THE CURRENT COMPETENCY STANDARD

Both substantive and procedural maladies pervade the current competency standard. Substantive issues include the ambiguity of the *Dusky* standard and the failure to account for varying capacities required at different phases of criminal proceedings.[71] The substantive failures affect the procedural application of the standard resulting in the delegation of the competency determination and the automatic commitment of marginally competent defendants.[72] The relationship between the faulty substantive requirements and ensuing procedural problems is critical to the understanding of the necessity of compelled insanity pleas.

A. *Substantive Issues*

1. Ambiguity of the Dusky *Standard.* The ideals sustained and championed by the requirement of competency to stand trial are essential to the achievement of a just outcome.[73] Courts and legislatures alike agree on the importance of the requirement.[74] Nevertheless, the standard espoused in *Dusky*, and ultimately adopted by courts in most states, fails to provide a practical framework in which a defendant's competence can actually be judged.[75] Perhaps unintentionally, Justice Thomas summed up the major difficulties encountered in the application of the standard for competency:

> Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While

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71. *See* Morris et al., *supra* note 7, at 231; Ronald Roesch et al., *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model*, 2 PSYCHOL. PUB. POL'Y & L. 96, 101–02 (1996) (arguing that a defendant's competency cannot be properly evaluated one-dimensionally).

72. *See* Bonnie, *supra* note 34, at 550 (discussing judicial deference to clinical opinion in pretrial competency determinations); *see also Incompetency*, *supra* note 3, at 472 (complaining that the competency standard results in commitment of defendants capable of rational participation in the proceedings).

73. Morris et al., *supra* note 7, at 202; *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 295–96 (1992) (discussing the rationales for the bar against adjudication of incompetent defendants).

74. *See* 18 U.S.C. § 4241 (2000) (codifying the federal requirement for competency); Dusky v. United States, 362 U.S. 402, 402 (1960) (interpreting the federal standard); *see also* Morris et al., *supra* note 7, at 207–08 (discussing the phenomenon of state courts embracing the *Dusky* language when interpreting states' competency statutes).

75. *See* Morris et al., *supra* note 7, at 207–08 (explaining the shortcomings in state courts' analyses of the *Dusky* standard, deriving from the Supreme Court's failure to explain the *Dusky* holding).

> psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, . . . the Due Process Clause does not impose these additional requirements.[76]

However, "[i]t is difficult to ascertain an individual's ability to process information and engage in rational decisionmaking."[77]

Scholarship on the subject of competency, from both medical and legal fields, consistently finds inadequacies in the current definition of competency to stand trial.[78] "Commentators have described the *Dusky* standard as unsatisfactorily vague, confusing and ambiguous, sketchy, and lacking in specificity and detail."[79] Although due process does not require that the competency standard have any additional requirements,[80] without them trial courts, mental health professionals, and lawyers are at a loss as to how to measure competency.[81] A defendant must meet the threshold of competency outlined by the *Dusky* court, but the factors and considerations necessary to determine competency are not set out by the Supreme Court.[82] Thus states' codifications of the competency standard vary.[83] Some states codified the *Dusky* language.[84] Others made a more elaborate standard by listing criteria for a competency determination.[85] A few states

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76. Godinez v. Moran, 509 U.S. 389, 402 (1993).

77. Winick, *supra* note 20, at 597.

78. *See, e.g.*, Morris et al., *supra* note 7, at 212–18 (providing the details of a research experiment that tested forensic clinicians' ability to apply competency standards); Roesch et al., *supra* note 71, at 101 (finding United States' procedures for competency determination insufficient due to its one-dimensional conception of competency to stand trial); Winick, *supra* note 20, at 578–82 (discussing the costs and burdens of the current competency process); *Incompetency*, *supra* note 3, at 455–56 (criticizing the incompetency determination and the resulting costs for the accused).

79. Morris et al., *supra* note 7, at 231 (internal quotation marks omitted) (footnotes omitted).

80. *Godinez*, 509 U.S. at 402 (recognizing that mental health professionals desire more complex measures of competency than is constitutionally required).

81. *See* Morris et al., *supra* note 7, at 200 (describing the judge's desire to delegate the competency determination to mental health professionals); Uphoff, *supra* note 12, at 68–77 (considering the difficulty of discerning competence in mentally ill defendants); *Incompetency*, *supra* note 3, at 470–71 (explaining that psychiatrists often misunderstand the appropriate competency test).

82. *Godinez*, 509 U.S. at 396 (restating the *Dusky* standard without further discussion of how to evaluate "sufficient present ability"); Pate v. Robinson, 383 U.S. 375, 387 (1966) (recognizing the *Dusky* standard but failing to elaborate on factors to be considered); Dusky v. United States, 362 U.S. 402 (1960) (holding that a defendant need only have the "sufficient present ability" to understand the proceedings to be competent).

83. Morris et al., *supra* note 7, at 207.

84. *Id.*

85. *See, e.g.*, FLA. STAT. ANN. § 916.12(3) (West Supp. 2006) (listing factors that the defendant must be able to understand in order to be deemed competent, including the

supplanted the competency determination with a test for mental illness.[86]

The interplay of legal and medical concepts embodies the competency determination.[87] The ultimate decision regarding a defendant's competency resides with the judge; however, the determination may result from a judge's adoption of a clinical opinion or the judge's own determination.[88] Regardless, the "quite broad, open-textured, and vague [standard], permit[s] clinical evaluators substantial latitude in interpreting and applying the test," which presents significant problems with the competency determination.[89] Evaluators governed by the same legal standard often apply the standard differently, producing varying outcomes.[90] As a result, competency determinations correlate with the psychological evaluator's understanding of the concept of competence rather than the standard nominally applied.[91] Until legislatures and courts define the standard for competency more narrowly, evaluators do not deserve blame for using clinical descriptions to assess defendants, nor do they deserve blame for failing to "divine a more definitive standard."[92]

2. Failure to Distinguish Decisional Competence. Not only is the *Dusky* standard vague and broad,[93] but its one-dimensional nature fails to distinguish between different conceptions of competency and the varying contexts in which courts determine competency.[94] Justice Blackmun recognized that "[c]ompetency for one purpose does not necessarily translate to competency for another purpose."[95] The current standard does not allow for a

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charges pending against him and the adversarial nature of the proceedings).

86. *Incompetency*, *supra* note 3, at 459–60 (finding that courts rely heavily on psychiatric opinion and some states have even replaced competency evaluation with tests for mental illness).

87. *See* Morris et al., *supra* note 7, at 200.

88. *See id.*; Winick, *supra* note 20, at 619–21 (stating that discretion vested in clinical evaluators is troubling, as judges almost always defer to health care professionals).

89. Winick, *supra* note 20, at 619.

90. *See* Morris et al., *supra* note 7, at 223–26 (finding that forensic evaluators failed to differentiate between varying standards for competency when making their evaluations).

91. Winick, *supra* note 20, at 620.

92. *See* Morris et al., *supra* note 7, at 238 (arriving at this conclusion after an analysis of the shortcomings of the competency standard); Winick, *supra* note 20, at 620–21 (criticizing the Court's failure to further define the competency standard as resulting in clinical latitude in evaluating competency).

93. *See* Winick, *supra* note 20, at 619.

94. *See* Roesch et al., *supra* note 71, at 101–02.

95. Godinez v. Moran, 509 U.S. 389, 413 (1993) (Blackmun, J., dissenting).

contextual determination of competency.[96] Instead a person is either competent or incompetent, leaving no room for cases falling somewhere in the middle.[97]

Several scholars support a theoretical delineation of competency.[98] Instead of a single construct, they assert that the determination should be split into two forms: the ability to assist counsel and decisional competence.[99] "Competency to assist counsel refers to the minimum capacities defendants need to assist in their own defense"[100] and applies to the "ability to consult with his lawyer" prong of the *Dusky* standard.[101]

Decisional competence is essentially the ability to make a rational choice in furtherance of a defense strategy.[102] "[D]ecisionmaking about defense strategy encompasses cognitive skills and capacities for rational thinking that assisting counsel, as defined in *Dusky* and *Drope*, does not require."[103] As mentioned before, there are several decisions throughout the adjudication process reserved for the defendant.[104] The competency standard is a prophylactic measure, by which a defendant lacking the mental capacity to

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96. Roesch et al., *supra* note 71, at 101 (noting the friction between a contextual view of competency to stand trial and current competency decisions in the United States).

97. *Id.* at 108 (evaluating legal competencies as "conjunctive and categorical" where the "degree of competency" does not matter).

98. One respected scholar, Professor Bonnie, views competence as being "two related but separable constructs." Bonnie, *supra* note 73, at 291. This theoretical view of competency yields several advantages: 1) it is an instructive framework for well-settled issues of competency law.; 2) it provides clarification of the areas remaining unsettled, 3) it provides the ability to uncover similarities among competency in the criminal context and competency in other legal contexts, and 4) it offers the ability to aid in defining the "psycho-legal abilities" included in the two constructs. *Id.*; *see also* Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1594–99 (2000) (praising Professor Bonnie's conceptualization of competency because it highlights the two primary concepts encapsulated in the principle: the ability to assist counsel and competency to make specific decisions); Winick, *supra* note 20, at 621 ("Professor Bonnie's efforts to delineate in detail the various components of competency to stand trial deserve[ ] applause.").

99. *See* Bonnie, *supra* note 34, at 561–68 (differentiating between the cognitive skills required to make decisions about defense strategy and those needed to assist counsel); *see also* Roesch et al., *supra* note 71, at 103–04 (discussing Professor Bonnie's distinction between minimum capacities required of a defendants to assist in their own defenses and the higher standard required for "decisional competence"); Slobogin & Mashburn, *supra* note 98, at 1594–99 (commenting on the distinction drawn by Bonnie).

100. Roesch et al., *supra* note 71, at 104 (emphasis omitted).

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

102. Roesch et al., *supra* note 71, at 104.

103. Bonnie, *supra* note 34, at 567.

104. *See supra* note 19 and accompanying text (enumerating the decisions reserved for a defendant).

make those decisions is protected from prosecution.[105] However, a theoretical delineation of competence would allow adjudication of some decisionally incompetent defendants.[106] Decisions required of a defendant will vary from case to case.[107] When a defendant's decisions do not implicate constitutional rights or protections, prosecution of the defendant should continue, regardless of the defendant's decisional imcompetence.[108] Therefore, the bar on adjudication would only fall on a defendant incompetent to assist counsel and a decisionally incompetent defendant faced with decisions of constitutional import.[109]

Alas, competency remains a single construct,[110] "but the view that decisional competence is a separate construct provides the best 'fit' with prevailing law and practice."[111] A trend exists in case law "to analyze competency of criminal defendants in terms of the specific decision that they must make."[112] However, the Supreme Court continues to insist on a one-dimensional concept of competency.[113]

The Court's opinion in *Godinez* only confuses the issue.[114] The Court first claims to see no distinction between the competence required to stand trial and the competence required to waive constitutional rights.[115] A mere two pages later, the Court contradicts its statement by delineating the differences in a footnote to the opinion:

> The focus of a competency inquiry is the defendant's mental capacity [and] whether he has the *ability* to understand the

105. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975) (likening a mentally incompetent defendant to an absent defendant lacking the opportunity to defend himself).

106. Roesch et al., *supra* note 71, at 104.

107. *Id.*

108. *Id.* (suggesting that decisional competence should only be required in cases where constitutional rights are waived).

109. *Id.*

110. Bonnie, *supra* note 34, at 548 (discussing the need to "extract[] decisional competence from the unitary concept of 'competence' in criminal adjudication").

111. *Id.* at 567.

112. Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637, 650 (1980).

113. *See* Godinez v. Moran, 509 U.S. 389, 396–402 (1993) (finding the *Dusky* criteria all that was required to find a defendant competent); Drope v. Missouri, 420 U.S. 162, 172 (1975) (focusing solely on defendant's ability to understand the proceedings and to assist counsel); Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that the abilities to assist counsel and understand the proceedings are the only necessary facets of competence).

114. *See* Slobogin & Mashburn, *supra* note 98, at 1590–94 (critiquing the *Godinez* opinion as creating ambiguities concerning the level of competency required to waive counsel and the extent of understanding a defendant must have to waive rights).

115. *Godinez*, 509 U.S at 398.

> 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 . . . .[116]

Thus, the concept of competence to stand trial is separate from, and demands less than, the standard of competence required to waive constitutional rights, refuse the insanity plea, or plead guilty.[117]

B. Procedural Issues

1. Who Makes the Competency Determination? Competency to stand trial is a legal determination, and the ultimate decision of a defendant's competency lies with the judge presiding over the case.[118] But who *really* decides if a defendant is competent? The competency assessment process is a combined effort.[119] Judges, lawyers, and forensic examiners share responsibility for assuring the constitutional protection against prosecution of an incompetent person.[120] However, the current trend places the legal determination completely in the hands of psychiatrists and psychologists.[121] Commentators criticize a system that morphs shared roles into a single determination left unchecked or unsupported by the other participants.[122]

Commentators take issue with judges' reluctance to examine the evidence carefully and the resulting deferential stance towards clinical opinions.[123] The judge, and only the judge, bears the responsibility for the ultimate decision on a defendant's competence.[124] Society entrusts the judge to evaluate all the evidence, including lay testimony, expert opinion, and any other relevant evidence, and *then* make a decision as to the course of the court proceedings.[125] However, "[c]ompetency determinations

116. *Id.* at 401 n.12.

117. Bonnie, *supra* note 34, at 567.

118. HUCKABEE, *supra* note 4, at 26, 43.

119. Morris et al., *supra* note 7, at 227–28 (noting the tendency of judges to defer judgment on competency to mental health professionals).

120. *Id.* (explaining the role of judges, attorneys, and mental health professionals).

121. Bonnie, *supra* note 34, at 550; *see also* Winick, *supra* note 20, at 620 (condemning the effective delegation of the responsibility for the competency determination to clinical evaluators).

122. *See* Morris et al., *supra* note 7, at 234–37 (urging judges and attorneys to take a more active role in competency determinations).

123. *See* Bonnie, *supra* note 34, at 550; Morris et al., *supra* note 7, at 199.

124. HUCKABEE, *supra* note 4, at 26.

125. *Compare id.* at 129–30 (providing an example of the considerations necessary in the judicial determination of competency by recounting one judge's careful determination), *with* James L. Werth, Jr. et al., *Requests for Physician-Assisted Death:*

by and large turn on the testimony of psychiatric experts."[126] Judges may think it is futile to perform an investigation outside of soliciting the opinion of an *expert* in the field.[127] The Supreme Court has reinforced this attitude through statements that suggest clinicians are more qualified and better suited for making the assessment than judges and lawyers.[128]

Judges are not alone in their mistakes; clinicians are faulted for failing "to differentiate clinical issues from forensic issues."[129] Despite this shortfall, clinicians assess some aspects of competency better than people in the legal profession.[130] For example, a clinician can better determine whether a defendant is afflicted with a mental disease, and the medical expert can explain the impact of this disease on a defendant's ability to assist counsel or to understand the proceedings against him.[131] Competency, however, "is more a legal than a clinical question, involving legal and normative judgements and not merely clinical ones."[132] Courts are, and should be, receptive to the field of psychology and its teachings; a comprehensive evaluation of an individual's competency must rest on more than a layman's observation of the defendant's behavior.[133] A clinician's job, though, must be to assess the individual's competency by the legal standard supplied by the courts.[134]

Lawyers also play a vital role in the competency assessment procedure.[135] Part of the complaint about judges accepting the psychiatrist's evaluation is the fear that the psychiatrist,

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Guidelines for Assessing Mental Capacity and Impaired Judgment, 6 PSYCHOL. PUB. POL'Y & L. 348, 359 (describing the physician's responsibility in assessing capacity, which relegates the judge's function to merely reviewing the clinician's work).

126. Medina v. California, 505 U.S. 437, 465 (1992) (Blackmun, J., dissenting) (minimizing the role of law, relative to medicine, in determining competency).

127. *See* Morris et al., *supra* note 7, at 200 (explaining the 99.7% rate of agreement between health professionals' and judges' determinations of competency by one simple thought of judges: "'[M]ental health professionals are more qualified . . . to answer the question of competency than are judges . . . .'").

128. *See, e.g.*, *Medina*, 505 U.S. at 465 (Blackmun, J., dissenting) ("[I]t is the experts and not the lawyers who are credited as the best informed . . . ." (internal quotation marks omitted)).

129. Morris et al., *supra* note 7, at 237; *see also Incompetency*, *supra* note 3, at 460.

130. Morris et al., *supra* note 7, at 235 (recognizing that medical professionals can contribute to the competency determination by examining the defendant for a mental disorder).

131. *Id.*

132. Winick, *supra* note 20, at 623.

133. *Incompetency*, *supra* note 3, at 470.

134. *Id.* at 469–71.

135. Morris et al., *supra* note 7, at 235 (noting that it is the defense attorney "who knows best whether the defendant's impairments impede or compromise the defense of the case").

although well-equipped to determine the defendant's mental state, lacks the requisite knowledge pertaining to the defendant's capabilities to interact with and assist counsel.[136] Defense lawyers are able "to make informed, comparative judgments about a particular client's understanding of the proceedings against him . . . . [and] to assess that client's ability to make decisions required of the client and to provide whatever assistance counsel deems necessary."[137] The defense lawyer must communicate this information to the clinician to facilitate the clinical evaluation.[138] The information is not only integral to the evaluation but also to the clinician's *ability* to evaluate competency based on the *Dusky* standard.[139]

2. Procedural Result of Competency Determination: Commitment. The competency determination leads the defendant down one of two unequal paths: continuation of trial or automatic commitment in a mental health facility.[140] Incompetence suspends the criminal proceedings and forces the defendant to undergo treatment without consent.[141] Federal courts finding a defendant incompetent must surrender the defendant to the custody of the Attorney General.[142] The Attorney General then places the defendant in the most appropriate facility, generally a mental hospital, for a period of time not to exceed four months.[143] Commitment seeks to provide the defendant with enough time to alleviate the defendant's incompetence, so the trial can continue.[144] If, upon the termination of the initial four month commitment period, a "substantial probability" exists that in the near future the defendant will be returned to competence, then the court may

136. *Id.*

137. Uphoff, *supra* note 12, at 87.

138. Morris et al., *supra* note 7, at 235–36. Taking the suggestion a step further, Morris comments that the attorney may be required to attend the interview with the health professional to assure all relevant information is communicated and to allow the evaluator to observe the relationship between the attorney and defendant. *Id.*

139. *Id.* at 236. As discussed above, the *Dusky* standard focuses on the client's ability to consult with the attorney, so clearly the attorney holds information that will be useful to the clinician's assessment. *See* Dusky v. United States, 362 U.S. 402, 402 (1966); *see also supra* note 113 (discussing the narrow focus of the *Dusky* standard).

140. Winick, *supra* note 20, at 578 (noting that nearly all defendants found incompetent are hospitalized); *Incompetency*, *supra* note 3, at 455 (describing the process by which a criminal proceeding is suspended and the defendant is committed to a mental institution immediately upon determination of mental incompentency).

141. Roesch et al., *supra* note 71, at 97.

142. 18 U.S.C. § 4241(d) (2000).

143. *Id.*

144. *Incompetency*, *supra* note 3, at 462.

prolong the defendant's commitment.[145] Absent a "substantial probability" determination, the law prohibits further detention in the facility without the initiation and completion of civil commitment proceedings.[146] The law of competence "invoked in the name of fairness to the accused, has often resulted in a commitment when it is really in [the defendant's] interest to have trial continue."[147]

Detention in a mental facility may cause significant burdens on the defendant and his defense.[148] Defense lawyers operate as advocates for clients, and professional rules of conduct demand zealous advocacy.[149] "To protect the client's interests, counsel will want to forego using a procedure that potentially causes greater hardship and injustice to the defendant."[150] Therefore, an attorney may resist raising the issue of competency. When a defendant truly cannot participate in his own defense, then the burdens of commitment may be justified because of the prejudice that would result from continued prosecution.[151]

The substantive shortcomings of the competency standard result in a poor procedural outcome for some defendants.[152] Under a system that recognized the difference between competence to assist counsel and decisional competence, finding that the defendant cannot assist counsel would be a bar against adjudication, whereas decisional incompetence would not stop the proceedings against the individual.[153] Therefore, automatic commitment would be reserved

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145. 18 U.S.C. § 4241(d)(2) (2000); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (refusing to establish a bright line rule to decide the appropriate length of commitment but limiting this period of time to something reasonable).

146. 18 U.S.C. § 4246 (2000) (requiring release of a defendant upon recovery).

147. *Incompetency*, *supra* note 3, at 455.

148. *Id.* at 456 (listing a lost opportunity to prove his innocence, significant time delays, and the commitment itself as costs imposed on the incompetent defendant); *see also* Winick, *supra* note 20, at 579–82.

149. MODEL RULES OF PROF'L CONDUCT pmbl. (2006); *see also* 1 AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE § 4-1.2 (2d ed. 1980) (explaining defense counsel's role in the adversarial system, slotting counsel as an advocate for the client). *But cf.* Nix v. Whiteside, 475 U.S. 157, 174 (1986) (drawing a line in the level of advocacy owed to clients by defense counsel at assisting in client perjury).

150. Uphoff, *supra* note 12, at 89.

151. *See* Bonnie, *supra* note 34, at 561–63 (arguing for a multidimensional competency framework in which only absolute incompetence in assisting counsel results in commitment).

152. Winick, *supra* note 20, at 577, 580 (noting that commitment prevents the court from setting bail, which lengthens the defendant's time in custody and commenting that most people in this situation were brought into the commitment process for inappropriate reasons).

153. Roesch et al., *supra* note 71, at 104.

for the defendant whose "disability severely impairs his [or her] ability to participate in the proceedings."[154]

IV. THE CONTROVERSY: THE INSANITY DEFENSE AS A DECISION

Who has the authority to assert the insanity defense: the defense counsel, the defendant, the judge, or all three? Courts,[155] legislatures,[156] and scholars[157] all see it differently. The Supreme Court provides little guidance, leaving the decision to the states.[158] States addressing the issue recognize a conflict between competing interests: the defendant's autonomy in decisionmaking[159] and the state's interest in "withholding punishment from those who are morally blameless."[160] Whether the state believes in balancing the

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154. *Incompetency*, *supra* note 3, at 473.

155. *Compare* United States v. Marble, 940 F.2d 1543, 1548 (D.C. Cir. 1991) (placing the defendant's decision to refuse the insanity defense beyond the reach of the court), People v. Gauze, 542 P.2d 1365, 1370 (Cal. 1975) (equating the right of a defendant to withdraw an insanity plea to the inability of a court to compel the insanity plea), Boyd v. People, 116 P.2d 193, 195 (Colo. 1941) (precluding a court from entering an insanity plea against the defendant's will), *superseded by statute*, COLO. REV. STAT. § 16-8-103(2) (1973), *as recognized in* Hendricks v. People, 10 P.3d 1231 (Colo. 2000) (en banc), *and* People v. Gonzalez, 229 N.E.2d 220, 223 (N.Y. 1967) (refusing to impose a burden on a trial judge to charge the jury with the insanity defense although not raised at trial by a pro se defendant), *with* State v. Pautz, 217 N.W.2d 190, 192 (Minn. 1974) (endorsing the trial judge's decision to raise the issue of insanity sua sponte), State v. Kahn, 417 A.2d 585, 592 (N.J. Super. Ct. App. Div. 1980) (allowing trial judge to interpose the insanity defense in a case where the defendant's ability to understand the significance of waiving the defense was called into question), *and* State v. Smith, 564 P.2d 1154, 1156 (Wash. 1977) (declaring unconstitutional the conviction of a defendant who committed a crime while clearly insane).

156. *Compare* COLO. REV. STAT. § 16-8-103(1)(a) (2005) (allowing only the defendant or the defense counsel to assert the insanity defense), *with* CAL. PENAL CODE § 1018 (West 1985 & Supp. 2006) (legislating that all pleas be made by defendant, and only the defendant, in person).

157. *Compare* David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense over the Defendant's Objection*, 15 HASTINGS CONST. L.Q., 295, 295–97 (1998) (arguing that the defendant's right to choose his own defense eclipses society's interests), Ross, *supra* note 8, at 1381–84 (describing the disadvantages of the judge as a gatekeeper of the defendant's insanity plea), *and* Singer, *supra* note 112, at 639–40 (arguing against surrogate decisionmaking), *with* Bonnie, *supra* note 34, at 543–46 (arguing that societal interests should prevail and that defendant incompetence precludes valid decisionmaking).

158. H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 742 (2000); *see also* Brookhart v. Janis, 384 U.S. 1, 6–7 (1966) (holding that counsel for defendant cannot override a client's expressed desire to plead not guilty). The *Brookhart* opinion is over thirty years old, and it remains unclear whether Justice Black, writing for the majority, intended the rule to encompass pleading not guilty by reason of insanity. Uviller, *supra*, at 743.

159. Cohn, *supra* note 157, at 296–97.

160. Note, *The Right and Responsibility of a Court to Impose the Insanity Defense*

competing interests on a case-by-case determination,[161] or envisions one interest as superior in all cases determines the outcome of the conflict.[162] The case law is fairly undeveloped in the area.[163] However, the issue received comprehensive treatment in Colorado[164] and the District of Columbia.[165] The two jurisdictions resolved the analysis of an individual's interest versus society's interest,[166] but with differing outcomes.[167]

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over the Defendant's Objection, 65 MINN. L. REV. 927, 930 (1981) [hereinafter *Right and Responsibility*].

161. Hendricks v. People, 10 P.3d 1231, 1241 (Colo. 2000) (en banc) (explaining the fact-intensive inquiry which the court employed); *see also* David J. Rubin, *Crazy Not to Plead Insanity*, FORENSIC ECHO, June 10, 2001, http://echo.forensicpanel.com/2001/6/11/crazynot.html (stating that the California Supreme Court requires a balancing of the interests of the public against the individual's interests).

162. Cohn, *supra* note 157, at 302 (recognizing at least one case in which a federal court placed "society's interest in protecting those who are morally blameless as superior to the interest of the defendant in selecting his own defense").

163. *See* Uviller, *supra* note 158, at 737 (describing the cases as "difficult to locate"); *see also* Singer, *supra* note 112, at 644 (identifying this area of law as underdeveloped).

164. *See, e.g., Hendricks*, 10 P.3d at 1243–44 (finding inappropriate the trial court's application of statutes allowing defense counsel to plead insanity for the defendant over his objection); Labor v. Gibson, 578 P.2d 1059, 1061 (Colo. 1978) (overturning a trial court's imposition of an insanity plea); Les v. Meredith, 561 P.2d 1256, 1258 (Colo. 1977) (upholding a statute that empowered the court to enter a plea of insanity against the defendant's wishes and recognizing the statute supersedes *Boyd v. Colorado*); Boyd v. People, 116 P.2d 193, 195 (Colo. 1941) (presenting the common law theory that the court may not enter a plea of not guilty by reason of insanity for the defendant), *superseded by statute*, COLO. REV. STAT. § 16-8-103(2) (1973), *as recognized in* Hendricks, 10 P.3d 1231.

165. *See, e.g.*, United States v. Marble, 940 F.2d 1543, 1547–48 (D.C. Cir. 1991) (upholding trial court's decision not to impose an insanity defense over defendant's objection); United States v. Wright, 627 F.2d 1300, 1309 (D.C. Cir. 1980) (reaffirming *Whalem*); Whalem v. United States, 346 F.2d 812, 818–19 (D.C. Cir. 1965) (holding that trial judges have the right to impose the insanity defense over the defendant's objection), *overruled by Marble*, 940 F.2d 1543; Frendak v. United States, 408 A.2d 364, 378–79 (D.C. 1979) (reinterpreting *Whalem*). Additionally, scholars have analyzed the D.C. case law. *See, e.g.*, Singer, *supra* note 112, at 644–50; *Right and Responsibility*, *supra* note 160, at 928.

166. Uviller, *supra* note 158, at 737–41 (discussing the cases from the D.C. Circuit).

> From both cases, the court derived the idea of respect for the defendant's choices . . . . As defendants bear the ultimate consequences, . . .
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> . . . [t]he defendant is not the only party in interest. His wish to forego a defense must be weighed against the interest of the society in having him adjudicated guilty only upon proof of all the elements of culpability, including a mind sufficiently rational to be blameworthy.

Id. at 740–41 (internal quotation marks omitted).

167. *Compare Marble*, 940 F.2d at 1546–48 (upholding trial court's decision not to impose an insanity defense over defendant's objection), *with Hendricks*, 10 P.3d at 1243–44 (reversing trial court's decision to allow defense counsel to raise defense of insanity over defendant's objection).

A. *Can a Trial Judge Impose the Insanity Defense?: Summary of the Current Case Law Opposing and Allowing Such an Imposition*

1. Washington, D.C., Cases. In 1965, the United States Court of Appeals for the District of Columbia Circuit decided *Whalem v. United States.*[168] The decision not only granted trial courts discretion to impose the insanity defense against the defendant's objection but also mandated action by the trial judge to prevent the conviction of a defendant lacking mental responsibility.[169] In this case, the defendant, Mr. Whalem, was convicted of burglary and attempted rape.[170] Mr. Whalem committed the crimes while on recuperative leave from a hospital where he was civilly committed.[171]

The court declared Whalem competent to stand trial and the case proceeded.[172] Defense counsel never raised the issue of his mental status when he committed the crimes.[173] On appeal, Whalem claimed the trial court erred in not imposing the defense of insanity.[174] The appeals court determined the trial judge did not err in failing to impose the defense against the defendant's will.[175] In arriving at this conclusion, the court reaffirmed the earlier decision of *Overholser v. Lynch,*[176] which concluded that a defendant does not have an absolute right to prevent the issue of insanity from entering the case.[177]

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168. *Whalem*, 346 F.2d 812.

169. *Id.* at 818–19; *see also* Singer, *supra* note 112, at 646 (observing that the *Whalem* court approved of judicial discretion to impose the insanity defense but failed to provide standards to control when the trial judge should impose the insanity defense).

170. *Whalem*, 346 F.2d at 813.

171. *Id.* at 814.

172. *Id.*

173. *Id.*

174. *Id.* at 813.

175. *Id.* at 819.

176. *Id.* at 818 (citing Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 705 (1962), *overruled by* United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991)).

> In *Lynch*, the District of Columbia Circuit Court, affirming the trial court's imposition of the insanity defense over a defendant's objection, stated that the lower court had almost a positive duty . . . not to impose a criminal sentence on a mentally ill person. . . .
>
> Although *Whalem*'s holding is identical to the *Lynch* holding, the *Whalem* court felt compelled to affirm its conclusion in *Lynch* because the Supreme Court had reversed *Lynch* [on other grounds]; the Court ruled that a trial court could not use automatic commitment statutes to hospitalize defendants acquitted by reason of insanity where the court had imposed the defense over the defendant's objections.

Right and Responsibility, *supra* note 160, at 930 n.17 (internal quotation marks omitted).

177. *Lynch*, 288 F.2d at 393–94; *see also* Singer, *supra* note 112, at 646; *Right and*

In *Frendak v. United States*, the trial court imposed the insanity defense over the objection of both the prosecution and the defense.[178] The court acquitted the defendant by reason of insanity.[179] She appealed, questioning the validity of *Whalem* in light of two Supreme Court decisions,[180] *North Carolina v. Alford*[181] and *Faretta v. California*.[182] The two decisions hold, respectively, that it is constitutional for a district court to accept a guilty plea despite the defendant's adamant rejection of guilt[183] and that it is constitutional for a defendant to represent himself.[184] The District of Columbia Court of Appeals relied on *Alford* and *Faretta* in deciding the *Frendak* case.[185] The Court of Appeals emphasized the significance of deferring to a defendant's decisions in regard to his defense.[186] In light of the importance of deferring to the defendant, the court modified and reinterpreted *Whalem*.[187] The court held that a defendant found competent to stand trial has the sole discretion to assert or waive the insanity defense, provided the court determines the waiver to be "intelligent and voluntary."[188]

Fifteen years after the *Whalem* decision, the United States Court of Appeals for the District of Columbia Circuit restated its support for the *Whalem* approach in *United States v. Wright*.[189] In *Wright*, the court held that the district court judge properly exercised his discretion when he refused to impose the insanity defense against the objection of a defendant.[190] The government "urge[d] modification of [the] *Whalem*" approach in an effort to tailor the outcome to the recent decision of the District of

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Responsibility, *supra* note 160, at 930.

178. Frendak v. United States, 408 A.2d 364, 369 (D.C. 1979).

179. *Id.* at 366–67.

180. *Id.* at 372.

181. North Carolina v. Alford, 400 U.S. 25 (1970).

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

183. *Alford*, 400 U.S. at 38.

184. *Faretta*, 422 U.S. at 834–35.

185. *Frendak*, 408 A.2d. at 376 (finding the rationale of *Faretta* and *Alford* persuasive on the issue).

186. *See* Cohn, *supra* note 157, at 305.

187. Singer, *supra* note 112, at 649.

188. *Frendak*, 408 A.2d at 367; *see also* Singer, *supra* note 112, at 649.

189. United States v. Wright, 627 F.2d 1300, 1309 (D.C. Cir. 1980), *overruled by* United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991). Please note that this decision, rendered by the United States Court of Appeals for the District of Columbia Circuit conflicts with the earlier cases decided by the District of Columbia Court of Appeals. *See* text accompanying notes 174, 185 (identifying the courts of decision in the *Whalem* and *Frandek* cases).

190. *Wright*, 627 F.2d at 1309.

Columbia Court of Appeals in *Frendak*.[191] The *Wright* court refused the government's request because they believed that "*Whalem* better reflect[ed] the jurisprudential concerns underlying the [insanity] defense" than the decision in *Frendak*.[192]

The court outlined three reasons for retaining *Whalem*.[193] First, the court deemed *Alford* and *Faretta* irrelevant to the determination of the propriety of a court-imposed insanity defense.[194] "Neither case involved an insanity issue, and for that reason alone their relevance is *de minimus*."[195] Second, the court believed the *Whalem* approach sufficiently acknowledged and took into consideration the defendant's choice, even while reserving a role for the court.[196] And finally, the court dismissed the "voluntary and intelligent" test as "merely recreat[ing] the *Whalem* inquiry under new and less candid labels."[197]

In 1984, Congress passed the Insanity Defense Reform Act (IDRA).[198] The IDRA established insanity as an affirmative defense in federal courts.[199] "The defense of insanity is available only to a person able to prove by clear and convincing evidence his inability to appreciate the nature and quality or the wrongfulness of his acts, and that such inability resulted from a 'severe' mental disorder."[200] This change drastically undercut the *Lynch* opinion, as well as the *Whalem* opinion, which relied heavily on *Lynch*.[201] The *Lynch* court concluded the societal interest in preventing punishment of someone lacking mental responsibility withholds from both the defendant and his counsel

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191. *Id.* at 1309 & n.67; *see also Frendak*, 408 A.2d at 367 (holding that a competent defendant enjoys the sole discretion to assert or waive the insanity defense so long as the court determines the waiver to be knowing and voluntary).

192. *Wright*, 627 F.2d at 1309.

193. *Id.* at 1309–12; *see also Right and Responsibility*, *supra* note 160, at 935–36 (discussing the three motivations for the court's retention of *Whalem*).

194. Cohn, *supra* note 157, at 305–06; *see also Right and Responsibility*, *supra* note 160, at 935 (explaining the court's effort to minimize the relevance of the *Alford* and *Faretta* opinions).

195. *Wright*, 627 F.2d at 1310.

196. *Id.* at 1310–11; *see also* Cohn, *supra* note 157, at 306 (listing the three reasons espoused by the *Wright* court for retaining the *Whalem* decision); *Right and Responsibility*, *supra* note 160, at 935–36 (discussing the reasoning of the *Wright* court).

197. *Wright*, 627 F.2d at 1311; *see also* Cohn, *supra* note 157, at 306; *Right and Responsibility*, *supra* note 160, at 936.

198. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17 (2000)).

199. 18 U.S.C. § 17 (2000) (providing federal legislation for the use of the insanity defense).

200. United States v. Marble, 940 F.2d 1543, 1547 (D.C. Cir. 1991).

201. *See supra* notes 176–77 and accompanying text.

absolute discretion to waive the insanity defense.[202] However, an affirmative defense places the burden of proof on the defendant.[203] In essence, the IDRA placed the decision to waive or assert the defense in the absolute discretion of the defendant and his counsel,[204] directly conflicting with the *Lynch* holding.[205]

In *Marble v. United States*, due to the effects of the IDRA on the underpinnings of *Lynch*, the only authority supporting *Whalem*,[206] the United States Court of Appeals for the District of Columbia Circuit was forced to succumb and fell into accord with the District of Columbia Court of Appeals.[207] The *Marble* court concluded that the IDRA destabilized the rationales in *Lynch* and *Whalem*, thus the court found that it could "no longer distinguish the decision not to plead insanity from other aspects of a defendant's right . . . to direct his [or her] own defense."[208]

2. Colorado Cases. In 1941, the Colorado Supreme Court first addressed the propriety of a trial court imposing the insanity defense upon an unwilling defendant.[209] In *Boyd v. People*, a deaf defendant appealed the trial court's entry of not guilty by reason of insanity that lacked his consent.[210] The defendant stood mute at trial due to his condition and the absence of his attorney at arraignment.[211] The *prosecution* actually entered the plea for the defendant, at the prior request of defense counsel.[212]

The trial court's denial of a motion to withdraw the plea of insanity constituted prejudicial error, and the Colorado Supreme Court reversed, stating that "[u]nder no circumstances can the

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202. Overholser v. Lynch, 288 F.2d 388, 393 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 705 (1962), *overruled by Marble*, 940 F.2d 1543; *see also* Singer, *supra* note 112, at 645 (explaining how society and the defendant benefit from hospitalization rather than imprisonment).

203. BLACK'S LAW DICTIONARY 451 (8th ed. 2004).

204. 18 U.S.C. § 17 (2000) (denominating the insanity defense as an affirmative defense).

205. *See Marble*, 940 F.2d at 1546–47 (1991) (stressing the *Lynch* court's reliance on the premise that both the prosecution and the defendant could raise insanity, as it was not an affirmative defense).

206. *Id.* at 1547.

207. *Id.*; Uviller, *supra* note 158, at 742 (discussing the holding of the *Marble* decision).

208. *Marble*, 940 F.2d at 1547.

209. Boyd v. People, 116 P.2d 193 (Colo. 1941), *superseded by statute*, COLO. REV. STAT. § 16-8-103(2) (1973), *as recognized in* Hendricks v. People, 10 P.3d 1231 (Colo. 2000) (en banc).

210. *Id.* at 193–94.

211. *Id.* at 194–95.

212. *Id.* at 193.

court, on its own motion, enter the plea of not guilty by reason of insanity."[213] The opinion assigned to the defendant the "absolute right to be tried on the plea of not guilty."[214] The plea of not guilty by reason of insanity intimates guilt because it is "in the nature of confession and avoidance," and therefore cannot be mandated by the court.[215]

The Colorado legislature took the opposite stance, as indicated in the Colorado Code of Criminal Procedure, which in pertinent part states:

> If counsel for the defendant believes that a plea of not guilty by reason of insanity should be entered on behalf of the defendant, but the defendant refuses to permit the entry of such plea, counsel may so inform the court. The court shall then conduct such investigation as it deems proper, which may include the appointment of psychiatrists, or psychologists to assist a psychiatrist to examine the defendant and advise the court. After its investigation the court shall conduct a hearing to determine whether the plea should be entered. If the court finds that the entry of a plea of not guilty by reason of insanity is necessary for a just determination of the charge against the defendant, it shall enter such a plea on behalf of the defendant, and the plea so entered shall have the same effect as though it had been voluntarily entered by the defendant himself [or herself].[216]

In *Les v. Meredith*, the constitutionality of this statute was challenged shortly after its original enactment in 1972.[217] The defendant, who was charged with three felonies and a class one misdemeanor, pleaded not guilty to all charges.[218] The trial judge, acting on authority ascribed to him by the statute, entered the plea of not guilty by reason of insanity over the defendant's objection.[219] After being reassigned, the case ended with a directed verdict of insanity.[220] The petitioner filed a writ of

213. *Id.* at 195.

214. *Id.*

215. *Id.*, *quoted in* Singer, *supra* note 112, at 652 (mentioning the plea of not guilty by reason of insanity cannot be forced onto a defendant because it is "in the nature of confession and avoidance").

216. Act of June 4, 1972, ch. 44, 1972 Colo. Sess. Laws 190, 226 (recodified at COLO. REV. STAT. § 16-8-103(2) (2005)).

217. Les v. Meredith, 561 P.2d 1256, 1257 (Colo. 1977) (en banc).

218. *Id.*

219. *Id.* at 1257–58.

220. *Id.* at 1258. A directed verdict occurs when the trial judge, based on the evidence presented, determines only one logical outcome exists and removes the case from the jury. BLACK'S LAW DICTIONARY 1592 (8th ed. 2004).

habeas corpus, which "the court made . . . absolute on the ground . . . that [the statute] was unconstitutional."[221] The trial court relied heavily on the *Boyd* decision in declaring the statute unconstitutional.[222]

The Supreme Court of Colorado disagreed with the trial court and upheld the statute as facially constitutional.[223] The *Les* opinion cited improvement of the "administration of justice" in support of judicial discretion to enter the insanity plea irrespective of the defendant's wishes.[224] The Colorado Supreme Court recognized that "the language in *Boyd* might be interpreted as questioning the constitutionality of an act" like the one at issue in the case.[225] However, the court identified the language as dicta and thereby not binding.[226]

A little over a year later, in *Labor v. Gibson,* the Colorado Supreme Court again addressed the issue in a decision that seems to contradict its prior decisions.[227] In *Labor*, the trial judge entered a plea of not guilty by reason of insanity over the objections of both the petitioner *and* his counsel.[228] In this situation, the trial court had no authority to enter the plea because neither defense counsel nor defendant requested the plea.[229] Under Colorado's statute, the trial court may enter the plea over the defendant's objection when defense counsel raises the issue.[230] Once the issue is brought to the attention of the judge, the judge has the right and responsibility to investigate to determine if the plea is "necessary for a just determination of the charge."[231] Thus, the Supreme Court of Colorado reversed the trial court and vacated the entry of the insanity plea.[232]

A more recent decision from the Supreme Court of Colorado on the issue of involuntary insanity pleas is *Hendricks v. People*.[233] Here, the lower court used an erroneous standard to interpret section 16-8-103(2), deciding "that a defendant has the

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221. *Les*, 561 P.2d at 1258. A writ of habeas corpus brings a party before a court to challenge the legality of the party's imprisonment or detention. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

222. *Les*, 561 P.2d at 1258.

223. *Id.*

224. *Id.* at 1259.

225. *Id.*

226. *Id.*

227. Labor v. Gibson, 578 P.2d 1059 (Colo. 1978) (en banc).

228. *Id.* at 1060.

229. *Id.*

230. *See* COLO. REV. STAT. § 16-8-103(2) (2005); *Labor*, 578 P.2d at 1060.

231. COLO. REV. STAT. § 16-8-103(2) (2005), *quoted in Labor*, 578 P.2d at 1060.

232. *Labor*, 578 P.2d at 1061.

233. Hendricks v. People, 10 P.3d 1231 (Colo. 2000) (en banc).

absolute right to waive assertion of the mental status defenses if that waiver is done voluntarily and intelligently."[234] The Colorado Supreme Court determined the plain language of the statute contradicts the lower court's interpretation,[235] and "in no way intimates that [the] 'just determination' [language] is limited by the 'voluntary and intelligent' waiver principles adopted by the court of appeals."[236]

The Colorado Supreme Court questioned the lower court's opinion by summarizing the relevant case law in Colorado, critiquing the analysis used by the court of appeals, and establishing the "appropriate analytical framework" for applying Colorado statute 16-8-103(2).[237] According to the Supreme Court of Colorado, the application of section 16-8-103(2) requires a court to balance two competing interests: "the public's interest in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interest in autonomously controlling the nature of her defense."[238] The balance entails consideration of the defendant's mental state at the time he committed the offense and at the time of trial.[239] The purpose for each consideration, respectively, is to assess "whether there is substantial evidence that the defendant may be not guilty due to [the defendant's] mental status"[240] and "to determine whether a defendant's reasons [to forego a viable insanity defense] exceed a basic rationality threshold."[241] The Court of Appeal's failure to consider the former weakened that court's analysis in the eyes of the Colorado Supreme Court.[242] The supreme court believed it impossible to give effect to society's interest without considering "the viability of the mental status defense."[243] The court further held that the defendant's interest in autonomous decisionmaking "will predominate over the broader interest of society," provided that the reasons for refusal of the defense pass "the basic rationality test."[244]

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234. *Id.* at 1235 (citing Colorado v. Hendricks, 972 P.2d 1041, 1044 (Colo. Ct. App. 1998)).
235. *Id.* at 1238.
236. *Id.*
237. *Id.* 1238–44.
238. *Id.* at 1240–41.
239. *Id.* at 1241.
240. *Id.*
241. *Id.* at 1243.
242. *Id.* at 1240.
243. *Id.* at 1241.
244. *Id.* at 1243.

B. Should Trial Judges Impose the Insanity Defense: Proposal in Favor of Court-Imposed Insanity Pleas

The deficiencies of the competency standard and the current case law addressing the issue of judicial interposition of insanity pleas demonstrate a need for change. First, all states should grant trial courts the discretion to enter the plea of insanity over the objection of a defendant. The judge should only do so in limited circumstances and upon a determination that it is necessary. Second, if defense counsel believes the insanity plea is in the best interests of the defendant and suggests its imposition to the judge, then states should mandate an investigation by the trial judge.

There are two competing interests essential to this determination.[245] "On one hand, society has a legitimate interest in refusing to punish" a defendant lacking criminal responsibility.[246] On the other hand is the defendant's right to autonomous decisionmaking.[247] A trial judge is responsible for "safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice" by virtue of the duties implicit in a judge's role.[248] Judicial discretion in this area would allow the court to balance the rights involved and to provide for a "just determination of the charge against the defendant."[249] Although the court should be granted absolute discretion to determine if a case requires the insanity plea, the court should only impose the insanity plea in the appropriate circumstances.

The trial judge's role as an impartial moderator controlling the flow of the proceedings does not alleviate the responsibility to introduce issues relevant to a just determination of the case.[250] The court cannot, however, sua sponte enter the plea of insanity.[251] When a defendant and his counsel disagree about the assertion of the insanity plea, defense counsel should advise the

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245. Cohn, *supra* note 157, at 295.

246. *Id.*

247. *Id.* at 295–97.

248. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1(a) (3d ed. 2000), *available at* http://www.abanet.org/crimjust/standards/trialjudge.html.

249. Labor v. Gibson, 578 P.2d 1059, 1060 (Colo. 1978) (en banc) (internal quotation marks omitted) (quoting an earlier version of COLO. REV. STAT. § 16-8-103(2) (2005)).

250. *See id.*; AM. BAR ASS'N, *supra* note 248, § 6-1.1(a).

251. *Labor*, 578 P.2d at 1060.

judge of the difference of opinion.[252] Notifying the judge triggers the trial judge's discretion and mandates an investigation.[253]

Defense counsel is in the best position to evaluate not only the client's interaction with counsel, but also the most strategic outcome for the case.[254] As discussed above, the lawyer is an advocate for the client and has a duty to work zealously on his behalf. "[A] lawyer's decision to pursue an insanity defense is, presumably, a calculation of the route to the most favorable outcome for the client."[255] An acquittal based on the plea of insanity results in consequences not associated with other defenses.[256] Defendants are usually committed to a mental hospital, bypassing the requirements of involuntary civil commitment.[257] "Furthermore, society attaches a stigma to mental health defenses that does not exist with other affirmative defenses."[258] Because of these drastic consequences, most lawyers would not seek an insanity defense unless it was clearly in the client's best interest.[259]

Once defense counsel informs the trial judge of the conflict between him and the defendant, the state should impose a duty upon the judge to investigate. The obligation should extend only to the inquiry; it should remain in the trial judge's discretion whether or not to actually impose the insanity defense. At the "just determination" hearing[260] the judge would have the opportunity to assess the conflict between the defendant and his counsel and to determine the most appropriate outcome for the particular case.

During the hearing, the court should address several questions. First, what are the defendant's reasons for refusing the insanity defense? The *Frendak* court espoused several legitimate reasons why a defendant might choose to forego the insanity defense:[261] 1) the defendant's preference for a determinate prison sentence over the possibility of commitment "for a period longer than the potential

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252. *Id.*

253. *Id.*

254. Morris et al., *supra* note 7, at 235–37; *see also supra* notes 135–39 and accompanying text.

255. Uviller, *supra* note 158, at 739.

256. *Labor*, 578 P.2d at 1061; Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 633 (2005).

257. Jones v. United States, 463 U.S. 354, 370 & n.20 (1983); Toone, *supra* note 256, at 633.

258. Toone, *supra* note 256, at 633.

259. *See* Ross, *supra* note 8, at 1361, 1370.

260. Hendricks v. People, 10 P.3d 1231, 1241 (Colo. 2000) (en banc) (suggesting the inquiry be called the "just determination" inquiry).

261. Frendak v. United States, 408 A.2d 364, 376–77 (D.C. 1979) (outlining the legitimate reasons a defendant might prefer a prison sentence over commitment).

jail sentence,"[262] 2) the disparate quality of medical treatment,[263] 3) the avoidance of the stigma associated with the insanity defense,[264] 4) the loss of legal rights resulting from an insanity acquittal,[265] and 5) the choice to accept punishment as a political or religious statement that would be denigrated by the insanity defense.[266] A defendant's interest in controlling the defense or defenses used "to marshall against the state's accusations" is fundamental to individual autonomy.[267] Satisfied that the defendant's choice has a "plausible grounding in reality," the trial court should afford the appropriate weight to that decision.[268] The imposition of the insanity defense should occur in very limited circumstances and "only in the most compelling cases."[269]

Second, does the defendant's choice to forego the insanity defense stem from a rational basis? There are several factors the court should consider in resolving this question: "the quality of defendant's decision not to raise the defense; the reasonableness of defendant's motives in opposing presentation of the defense; and the [judge's] personal observations of the defendant throughout the course of the proceedings."[270] The defendant's decision should be required to pass a "basic rationality test."[271] The court should make sure "that the defendant's choice is [not] the product of pathological

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262. *Id.* at 376; *see also Jones*, 463 U.S. at 370 (holding that acquittal by reason of insanity allows the government "to confine [the defendant] to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or herself or society").

263. *Frendak*, 408 A.2d at 376; *see also Right and Responsibility*, *supra* note 160, at 934 (claiming a defendant may prefer "a structured prison life [rather than] the often harsh and dangerous environment of a mental hospital"). The court explains that mental hospital commitment entails restrictions and routines, which do not exist in the daily life of an inmate. *Frendak*, 408 A.2d at 376 (quoting Matthews v. Hardy, 420 F.2d 607, 611 (D.C. Cir. 1969)). One commentator described mental institutions as "overcrowded, inadequately staffed, poorly maintained, and unsanitary." Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1197 (1974).

264. *Frendak*, 408 A.2d at 377. The defendant may prefer the stigma associated with a criminal conviction over that attached to the label "ex-mental patient." *Right and Responsibility*, *supra* note 160, at 934.

265. *Frendak*, 408 A.2d at 377.

266. *Id.*

267. Cohn, *supra* note 157, at 296.

268. Hendricks v. People, 10 P.3d 1231, 1243 (Colo. 2000) (en banc) (internal quotations omitted) (quoting Slobogin & Mashburn, *supra* note 98, at 1595).

269. *Id.* at 1241 n.12.

270. United States v. Robertson, 430 F. Supp. 444, 446 (D.D.C. 1977). Other factors bearing on rationality of the defendant's decision include: 1) the seriousness of the crime charged and the respective consequences of the crime, 2) any other available defenses, 3) political or religious considerations associated with the defendant's choice, 4) any other consequences of the acquittal that may be considered detrimental to the defendant. Singer, *supra* note 112, at 664.

271. *Hendricks*, 10 P.3d at 1243.

delusions or hallucinations, is [not] based on beliefs that are intrinsically irrational or on reasons that are clearly irrelevant, or is [not] the result of a mood disorder that impairs the defendant's judgment or motivation to act self-interestedly."[272]

Third, is there sufficient evidence of insanity to submit to a jury, or rephrased, is the insanity defense viable? As the *Hendricks* court suggests, the trial court should have a responsibility to investigate the defendant's state of mind at the time he committed the crime.[273] The court should, if it would be helpful, appoint a neutral psychiatrist to examine the defendant.[274] The psychiatrist's evaluation might shed light on the defendant's state of mind at the time of the offense.[275] Scholars and courts cite society's interest in protecting the innocent from unjust conviction as a justification for the imposition of the insanity defense.[276] A lack of evidence to support the viability of the insanity defense tends to indicate the defendant's culpability. Imposing the insanity plea over the defendant's objection no longer protects society's interest in preventing an unjust conviction of a defendant lacking criminal responsibility. Therefore, a finding by the court that the nonresponsibility defense is not supported by "substantial evidence" should provide a complete bar against submitting the defense over the defendant's objection. Furthermore, imposing a weak insanity defense over the defendant's objection severely harms the defendant. Forcing the defendant's hand in this circumstance not

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272. Winick, *supra* note 20, at 599. For example a defendant who justifies waiver of an insanity defense by reasoning that he is shrinking and certainly will be invisible by the time trial commences would not pass a basic rationality test. Slobogin & Mashburn, *supra* note 98, at 1593.

273. *Hendricks*, 10 P.3d at 1241.

274. *Id.*

275. *Id.*; *see also* Singer, *supra* note 112, at 664 (proposing that the court appoint a psychiatrist on its own initiative who reports directly to the court, which might assist the court's investigation of the pertinent issues).

276. *Compare Hendricks*, 10 P.3d at 1240 (indicating that the court's responsibility to inquire about the imposition of the insanity defense rests on the comparison of two interests, one of which is "ensuring that criminal liability is not imposed on someone lacking the mental capacity to commit the crime"), State v. Pautz, 217 N.W.2d 190, 192 (Minn. 1974) (classifying a trial judge's decision to raise the issue sua sponte of the defendant's sanity at the time of the crime as "admirably . . . fulfill[ing] his duties and obligations"), *and* Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir. 1965) (finding the court's role in protecting mentally ill defendants from conviction to be part of the "structural foundation" of the court), *overruled by* United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991), *with* Cohn, *supra* note 157, at 295, 307, 314 (noting that society's interest in preventing the conviction of a defendant lacking moral blame is not only a legitimate societal interest, but it also protects our conception of criminal justice), *and* Slobogin & Mashburn, *supra* note 98, at 1636 (observing an independent state interest "in ensuring that the criminal justice system accurately assesses the culpability of those it prosecutes").

only sends him to bat with a nonviable defense, but also precludes him from presenting evidence of any other available defenses.

The purpose of the "just determination" inquiry is for the court to evaluate all the issues discussed above. The outcome should vary with the specific facts involved; thus, the determination must be made on a case by case basis. If the court determines that the defense should be interposed when other possible defenses exist, then the judge should order the bifurcation of the trial.[277] Any other substantive defenses should be tried first, similar to a guilt/innocence phase, and only upon the failure of such defenses should the insanity issue be tried.[278]

Finally, if there are no other substantive defenses, or those defenses are unsuccessful, the defendant should not be committed to a mental hospital automatically.[279] Instead, the court should initiate civil commitment proceedings against the defendant.

V. CONCLUSION

In the late 1990s, the Unabomber's refusal to plead insanity focused attention on the debate regarding a mentally ill defendant's ability to prevent the imposition of a nonresponsibility defense.[280] Theodore Kaczynski was indicted in California in June 1986 and in New Jersey in October 1986; the government gave notice that it was seeking the death penalty in May 1987.[281] Defense counsel conceded Kaczynski's competence to stand trial; however, evaluators appointed by both the defense and the prosecution agreed Kaczynski suffered from paranoid schizophrenia.[282] Kaczynski's attorneys quickly determined his best chance involved some mental nonresponsibility defense.[283] However, Kaczynski adamantly

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277. *See* Frendak v. United States, 408 A.2d 364, 369 & n.4 (D.C. 1979) (outlining the bifurcation process used in Washington, D.C., when defendants raise the insanity defense, which first requires the government to establish all elements of the crime beyond a reasonable doubt, then the jury considers the issue of nonresponsibility due to insanity).

278. *Id.*

279. Lynch v. Overholser, 369 U.S. 705, 719–20 (1962) (holding the mandatory commitment language in the D.C. statute inapplicable to a defendant whose acquittal was based on an insanity plea entered over his objection).

280. Ross, *supra* note 8, at 1343–44 (discussing Theodore Kaczynski, the Unabomber).

281. *See* United States v. Kaczynski, 239 F.3d 1108, 1110–11 (9th Cir. 2001). Ultimately, the judge sentenced Kaczynski to four life sentences plus thirty years for the bombings, which spanned seventeen years, killed three people, and injured twenty-two. David Johnston, *Judge Sentences Confessed Bomber to Four Life Terms*, N.Y. TIMES, May 5, 1998, at A1.

282. William Glaberson, *Lawyers for Kaczynski Agree He Is Competent to Stand Trial*, N.Y. TIMES, Jan. 21, 1998, at A1.

283. *See* David S. Jackson, *At His Own Request*, TIME, Jan. 12, 1998, at 40 (discussing the evolution of defense counsel's strategy from using a mental

rejected any plans by the defense attorneys to depict him as mentally ill.[284] Kaczynski eventually accepted a plea bargain, which eliminated the need for trial.[285]

Despite never reaching trial, the Kaczynski case presented an issue many jurisdictions rarely confront.[286] The case provided a high profile example of a defendant, competent to stand trial, but afflicted with a mental illness that prevented him from appreciating the benefits of a mental defect defense.[287] In addition, Kaczynski's case sparked attention to the conflict between a society that values independence and autonomy and a criminal justice system concerned with convicting only those culpable of their crimes.[288] This Comment concludes that a balance is within arm's length. The existing standard for competency to stand trial is confusing and ambiguous.[289] Although aware of the deficiencies, courts are reluctant to suggest "language that would give real meaning to *Dusky*'s largely-undefined competency construct."[290] Furthermore the requirement of competency and the standard used to judge competency are constitutionally mandated and therefore are fairly likely to remain intact.[291] Within this framework, states have the power to adjust the legal treatment of the mentally ill. The primary target for change is the insanity defense. States should provide a mechanism for court-imposed insanity pleas, involving the cooperation of criminal defense attorneys and judges. The discretion should be created whether it is carved out of common law, or passed by legislation.

Sara Longtain

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nonresponsibility defense to the ultimate decision to use evidence of mental illness in the sentencing phase as a mitigating factor).

284. *Id.*

285. William Glaberson, *Life Without Parole for the Unabomber*, N.Y. TIMES, Jan. 25, 1998, at 2 WK.

286. Ross, *supra* note 8, at 1359–61 (indicating that jurisdictions rarely consider the allocation of decisionmaking between lawyer and client in the realm of mental illness and insanity).

287. Jackson, *supra* note 283, at 40, (noting that "Ted Kaczynski has one big problem: he is apparently too crazy to appreciate how crazy he is, but not crazy enough to be legally insane").

288. Slobogin & Mashburn, *supra* note 98, at 1583.

289. *See supra* Part III (describing the numerous problems with the competency standard as it currently exists).

290. Morris et al., *supra* note 7, at 232.

291. *See supra* notes 9–10 and accompanying text (reviewing the due process requirement of competency to stand trial and the standard's concrete nature, resistant to modification).