RE-EVALUATING COMPETENCE TO STAND TRIAL

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I
INTRODUCTION

The American federal law governing a defendant's competence to stand trial is substantially contained in 18 U.S.C. § 4241, which can be traced to a 1949 statute, and in *Dusky v. United States*, a three-paragraph opinion the Supreme Court delivered in 1960. The term "competence to stand trial" refers to a defendant's ability to "participate" in her trial.[1] It includes those who plead guilty[2] and those who are to be sentenced.[3] This article critically examines the current federal law governing a defendant's competence to stand trial in the federal criminal jurisdiction and explains why it is antiquated and no longer fit for purpose. It proposes a new test whereby competence would be determined by reference to the defendant's capacity to participate effectively in his trial.

A. The Federal Law and its Consequences

Part II focuses on the development of the federal law and its consequences. The principal federal statute—§ 4241—has been correctly characterized as a

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1. Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. AM. ACAD. PSYCHIATRY & L. S3, S3 (2007).

2. In 2016, 97.3% of federal offenders pleaded guilty. U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016, at 4 (May 2017). Some authorities have suggested that because most defendants plead guilty before trial, the term "competence to stand trial" is misleading. They suggest terms such as "adjudicative competence" or "competence to proceed" are more apposite. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation,* 10 BEHAV. SCI. & L. 291 (1992); NORMAN G. POYTHRESS, RICHARD J. BONNIE, JOHN MONAHAN, RANDY OTTO & STEVEN K. HOGE, ADJUDICATIVE COMPETENCE–THE MACARTHUR STUDIES (Ronald Roesch et al. eds., 2002). The term "competence to stand trial" is, however, well ingrained in American jurisprudence as referring to a defendant's competence at all stages of criminal proceedings, from the laying of charges to sentencing. *See generally* Godinez v. Moran, 509 U.S. 389 (1993); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). That is the way the competence to stand trial concept is referred to in this article.

3. United States v. Gigante, 982 F. Supp. 140 (E.D.N.Y. 1997).

"complex enactment."[4] The Supreme Court's opinion in *Dusky v. United States*[5] did not alleviate deficiencies in the current federal law to any significant extent.

The consequences of a finding that a defendant is not competent to stand trial include significant curtailment of her liberty, which is rarely perceived as a victory. It is therefore not surprising to find cases in which a defendant has expressly instructed her attorney not to challenge her competence to stand trial.[6]

B. Deficiencies in the Current Law

Part III examines the jurisprudential and institutional difficulties arising from deficiencies in the current federal law, including the narrowness of the criteria for incompetence. Consequently, many defendants with significant mental illness have been found competent to stand trial.[7] This in turn has contributed to an intolerable phenomenon in United States prisons, namely the "criminalization of mental illness."[8] One estimate suggests there are ten times as many people with severe mental illnesses incarcerated in the United States as there are in psychiatric hospitals.[9] Overall, more than 1.2 million people with mental illness are incarcerated in the United States.[10]

The narrowness of the qualifying criteria in the current federal tests has also led to ad hoc and inconsistent outcomes for defendants who are incapacitated by conditions that do not fit the current criteria. Defendants with profound personality disorders—which are not a mental disease or defect—and those who suffer from neurological disorders are examples of defendants that have created challenges for federal courts. Other forms of incapacity are not pursued in this Article but demonstrate the same point. For example, defendants who are incapacitated through medication are dealt with differently from those incapacitated by illegal drugs, even though both may exhibit identical symptoms

4. FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 51 (6th ed. Mar. 2013).

5. 362 U.S. 402 (1960).

6. *See* Rodney J. Uphoff, *Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?,* WIS. L. REV. 65, 77–98 (1988) (discussing State v. Johnson, 395 N.W.2d 176 (Wis. 1986)).

7. *See generally* United States v. Mitchell, 706 F. Supp. 2d 1148, 1193 (D. Utah. 2010) (finding the defendant competent to stand trial despite his extreme religious beliefs); United States v. Riggin, 732 F. Supp. 958, 964 65 (S.D. Ind. 1990) (finding the defendant competent to stand trial although his fixation on the termination of his employment constituted a personality disorder); Bradley v. Preston, 263 F. Supp. 283, 285 (D.D.C. 1967) (finding the defendant competent to stand trial notwithstanding his claim of amnesia).

8. *See generally* RISDON N. SLATE, JACQUELINE K. BUFFINGTON–VOLLUM & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS & OPPORTUNITY FOR THE JUSTICE SYSTEM 43 (2d ed. 2013).

9. E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014).

10. Am. Psychological. Ass'n, *Press Release: Mental Illness Not Usually Linked to Crime, Research Finds* (Apr. 21, 2014), http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx [https://perma.cc/N8LL-3NMY].

and suffer the same inability to participate in their trials.[11] Other defendants who suffer from physical disabilities,[12] such as deafness[13] or cancer,[14] can also face hurdles when demonstrating their incapacity to stand trial.

Also troubling is the assessment of unrepresented defendants, which has produced a disconcerting body of jurisprudence that attempts to distinguish between a defendant's competence to plead guilty and his competence to conduct a defended hearing without counsel.

Further issues have developed in relation to the way the concept of rationality has unfolded in cases decided after *Dusky*. The requirement that a defendant be able to consult with his lawyer with a "reasonable degree of rational understanding" and have "a rational . . . understanding of the proceedings against him" has not been universally understood.[15]

There are also challenges under the current law for clinicians. Assessing defendants' competence to stand trial has become "a core skill" in forensic psychiatry.[16] Competency to stand trial evaluations are also now "by far the most frequently adjudicated"[17] form of competency in the judicial system.[18]

The analysis in Part III leads to the conclusion that the current federal law governing a defendant's competence to stand trial is antiquated and no longer fit for purpose. The challenge that then arises is to propose a new test for assessing a defendant's competence to stand trial.

C. Guiding Principles

Any test for assessing a defendant's competence to stand trial must be firmly grounded upon an understanding of why the criminal justice system should only

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11. *Compare* Whitehead v. Wainwright, 447 F. Supp. 897, 899 900 (M.D. Fla. 1978) (concluding the defendant was incompetent to stand trial based on effects of medication dispensed by jail staff during trial), *aff'd*, 609 F.2d 223 (5th Cir. 1980), *with* Watts v. Singletary, 87 F.3d 1282, 1284 85 (11th Cir. 1996) (concluding the defendant was competent to stand trial though he slept through much of his trial as a result of his late-night crack cocaine use).

12. Physical incompetence is not covered by any federal competency statute and is treated as an issue for trial courts to assess on a case by case basis by reference to five factors identified in United States v. Doran, 328 F. Supp. 1261, 1263 (S.D.N.Y. 1971).

13. *Compare* State v. Burnett, No. 1638, 2005 WL 32797 (Ohio. Ct. App. 2005) (upholding the trial court's determination that the defendant's deaf-mute condition rendered him incompetent to stand trial), *with* United States v. Jones, 876 F. Supp. 395, 397 (N.D.N.Y. 1995) (finding the defendant competent to stand trial despite a serious heart condition).

14. *Compare* United States v. DeNunzio, 174 F. Supp. 3d 582 (D. Mass. 2016) (finding a defendant recovering from chemotherapy physically competent to stand trial and likely mentally competent to stand trial), *with* United States v. Reddy, No. 01 CR 0058, 2003 WL 22339464 (S.D.N.Y. 2003) (finding a defendant under treatment for lung cancer incompetent to stand trial).

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

16. Mossman et al., *supra* note 1, at S3.

17. GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 125 (3d ed. 2007).

18. *See* Derek Chiswick, *Fitness to Stand Trial and Plead, Mutism and Deafness*, *in* PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY 171 (Robert Bluglass & Paul Bowden eds., 1990) (discussing the legal significance of competency evaluations).

place on trial those who are competent. The following four principles underpin that requirement.

First, defendants who are forced to stand trial in circumstances where they are not competent to do so are deprived of most of their basic constitutional fair trial rights.[19] These rights—which can be traced from the Code of Hammurabi,[20] through Chapter 39 of the Magna Carta,[21] to the Fifth, Sixth, and Fourteenth Amendments of the Constitution—are recognized internationally as being fundamental to a fair and legitimate trial.[22] The key rationale for the competence to stand trial requirement is that it promotes fairness for a defendant by protecting her right to defend herself and ensures that she is not inappropriately exposed to the risks of a criminal trial without access to fair trial rights.[23]

Second, the integrity and legitimacy of the criminal justice system hinges in part upon holding those who have breached criminal laws accountable for their wrongdoing. To hold a defendant truly accountable, he must understand the reasons why he has been prosecuted, convicted, and punished. Absent such understanding, the criminal justice system is merely a vehicle to appease the aggrieved rather than to genuinely punish an offender.

Third, allowing the prosecution of an incompetent defendant undermines society's interest in having a reliable criminal justice system and creates a greater risk of unreliable verdicts.[24] The state's need to uphold the integrity and legitimacy of the criminal justice system by ensuring only competent defendants are tried was emphasized in *United States v. Chisholm*:[25]

> It would be . . . a reproach to justice and our institutions, if a human being . . . were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwhipped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.

Finally, the American criminal justice system, like that in cognate jurisdictions, is founded upon respect for the autonomy and dignity of all participants in a trial.[26] A defendant's right to autonomy and self-determination is compromised if she is placed on trial in circumstances where she lacks the capacity to make trial decisions that are reserved for her and not her lawyer.[27]

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19. Riggins v. Nevada, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring).

20. DINAH SHELTON, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 165 (2013).

21. TOM BINGHAM, THE RULE OF LAW 10 (2010).

22. G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 7, 8, 10 & 11 (Dec. 10, 1948); European Convention on Human Rights, as amended by Protocol Nos. 11 and 14, art. 6 (Nov. 4, 1950).

23. Cooper v. Oklahoma, 517 U.S. 348, 349 (1996); *see also* Stephen J. Morse, *Involuntary Competence,* 21 BEHAV. SCI. & L. 311 (2003).

24. *Cooper*, 517 U.S. at 366 67.

25. 149 F. 284, 288 (S.D. Ala. 1906).

26. R v. Swain, [1991] 1 S.C.R. 933 (Can.).

27. *See* Florida v. Nixon, 543 U.S. 175, 187 (2004) (affirming that the defendant "has 'the ultimate authority'" to determine the exercise or waiver of certain basic trial rights); Faretta v. California, 422

Decisions in this category include the defendant's right to decide how she pleads,[28] whether she testifies,[29] whether to waive trial by jury,[30] and to adduce evidence.[31] These rights are not meaningful if a defendant lacks the capacity to exercise them.[32]

D. A Proposed New Test

Part IV proposes a new test that focuses upon a defendant's ability to participate effectively in his trial. The effective participation test is a unitary test, which covers all phases of a criminal trial and involves a judicial assessment of four functions:[33]

> 1. Understanding: a defendant's capacity to understand relevant information including the charge he faces, the trial process, the role of participants in the trial, the evidence, and the purpose and possible outcomes of the trial.
>
> 2. Evaluation: a defendant's capacity to process information, particularly the case against him, trial directions, and the impact of that information on the defense.
>
> 3. Decision-making: a defendant's capacity to make decisions normally required of the defendant during a trial, including how to plead and whether to give evidence or put forward a particular defense. This also concerns the ability of an unrepresented defendant to conduct his defense in a way that does not breach his fair trial rights.
>
> 4. Communication: a defendant's capacity to communicate his account of his case, and his capacity to instruct his lawyer and to give evidence if he elects to do so.

Finally, Part V examines why the effective participation test offers significant advantages over the current federal tests. Those reasons are linked to the four governing principles set out in this introduction.

E. State Legislation

This article focuses upon the federal law governing a defendant's competence to stand trial. Thirty-three states do, however, have provisions similar to § 4241, and twelve states have legislation that reflects the test set out by the Supreme Court in *Dusky*. Thus, many of the conclusions drawn can apply with equal effect to those states.

U.S. 806, 835 36 (1975) (holding that by "forcing . . . the defendant to accept against his will a state-appointed public defender," the trial court violated the defendant's "constitutional right to conduct his own defense"); Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L & CRIMINOLOGY 885, 911 (2011)

28. Brookhart v. Janis, 384 U.S. 1, 7 8 (1966).

29. Rock v. Arkansas, 483 U.S. 44, 51 53 (1987).

30. Adams v. United States *ex rel* McCann, 317 U.S. 269, 277 79 (1942).

31. Riggins v. Nevada, 504 U.S. 127, 137 (1992).

32. *See Faretta*, 422 U.S. at 834 ("The right to defend is personal."); *see also* Erica J. Hashimoto, *Resurrecting Autonomy: the Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147 (2010).

33. Russ Scott, *Fitness for Trial in Queensland,* 14 PSYCH., PSYCHOL. & L. 327, 341 (2007).

II
THE CURRENT LAW, HOW IT EVOLVED, AND ITS CONSEQUENCES

To understand the deficiencies in the current federal law and why reform is desirable, it is helpful to first understand the current law and how it evolved.

A. Early Common Law

The common law of the seventeenth century recognized that

> If a man in his sound memory commits a capital offense and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment . . . [34]

Many of the early leading common law cases concerning a defendant's competence to stand trial involved defendants who were deaf and mute. In such cases, a jury would be empaneled to determine if the defendant was "mute of malice" or mute *ex visitatione Dei* (by visitation of God). Those adjudged "mute of malice" were subjected to torture in order to force a plea.[35] Those who were found to be mute by visitation of God would have a plea of not guilty entered on their behalf. *Dyson's Case*[36] is an example of an early nineteenth century case in which the defendant was found to be mute by visitation of God. Parke J instructed the jury that if they found Dyson lacked "intelligence enough to understand the nature of the proceedings against her" due to the "defect of her faculties" then the jury "ought to find her not sane." This was the verdict the jury duly returned. *Dyson's Case* foreshadowed a distinction which emerged in twentieth century jurisprudence between factual competence (having the ability to plead) and the more refined concept of decisional competence (having the ability to, for example, give evidence and be cross-examined).

Five years after *Dyson's Case*, Alderson B gave his seminal direction in *R v. Pritchard*,[37] in which he asked the jury to consider if Pritchard had "sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense." Alderson B's directions in *Pritchard* recognized it was insufficient for a defendant to simply have the capacity to plead. The early common law also required that a trial not continue if the defendant lacked the cognitive ability to participate in her trial. Also significant is how the early common law blurred a finding of competence to stand trial with insanity. As will be explained later, vestiges of this can still be seen in § 4241.

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34. SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 34–35 (Sollom Emlyn ed., 1736); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 24). The word "advisedly" used by Hale and Blackstone was defined at the time to mean "deliberately; purposely; by design; prudently." *See* "Advisedly," SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Brandi Besalke ed., 1755), http://johnsonsdictionaryonline.com/?p=15235 [https://perma.cc/3HXJ-GT9P].

35. MELTON ET AL., *supra* note 17, at 126.

36. Esther Dyson's Case (1831) 7 Car. & P. 305, 307 (Eng.).

37. R v. Pritchard, (1836) 173 Eng. Rep. 135, 7 Car. & P. 303.

The *Pritchard* test for competence to stand trial was adopted in nineteenth century American cases,[38] where it was construed to mean that a defendant lacked competence to stand trial if he lacked the intellectual abilities to advance a "rational defense." This requirement can be traced to *Youtsey v. United States*,[39] in which the Sixth Circuit Court of Appeals ordered the retrial of a defendant who suffered debilitating epilepsy that rendered him "unable to advise his counsel as to his defense."[40] The court explained that when issues arose concerning a defendant's capacity to stand trial, the trial court must determine whether or not "the accused [could] make a rational defense."[41] The court also said that a trial court should ascertain if the defendant has "the mental capacity . . . to understand the proceedings against him . . . rationally advise with his counsel as to his defense" and "rationally defend himself."[42] The reference to a defendant's capacity to rationally advise with counsel as to a defense echoed that part of the early common law described by Hale and Blackstone as the need for a defendant to have the capacity to plead "advisedly" to an indictment.[43] Aspects of the rationality criterion articulated in *Youtsey* ultimately became embedded in the Supreme Court's opinion in *Dusky*.

B. 18 U.S.C. § 4241

The origins of 18 U.S.C. § 4241 can be traced to a meeting of the Judicial Conference of the United States in September 1942, during which a committee of federal judges was appointed to study, in cooperation with the Attorney General, "the treatment accorded by the federal courts to insane persons charged with crime."[44] The Judicial Conference proceeded on the basis that issues concerning a defendant's competence to stand trial should be considered in conjunction with an examination of the way insane persons were dealt with in federal courts, and its final report reflected some merging of these issues. This can be traced to an arguable legal lacuna that prevented federal authorities from detaining criminal defendants who were insane because jurisdiction over such persons was thought to reside exclusively within the *parens patriae* jurisdiction of the states.[45] In October 1946, the Judicial Conference adopted with some

38. Freeman v. People, 4 Denio 9 (N.Y. 1847); State v. Harris, 53 N.C. (8 Jones) 136 (1860).

39. 97 F. 937 (6th Cir. 1899).

40. *Id.* at 942.

41. *Id.* at 943 (citing 2 Bish. Cr. Proc. at § 666); Guagando v. State, 41 Tex. 626, 630 (1874); *see also* R v. Frith, 22 How. Str. Tr. 307; R v. Berry, (1876) 1 Q.B.D. 447–50; R v. Pritchard, (1836) 173 Eng. Rep. 135, 7 Car. & P. 303

42. *Youtsey*, 97 F. at 944, 944 47.

43. JOHNSON, *supra* note 34.

44. HARLAN F. STONE ET AL., REPORT OF THE JUDICIAL CONFERENCE OF THE U.S. 18–19 (Sept. 1942); *see* Greenwood v. United States, 219 F.2d 376, 380–85 (8th Cir. 1955).

45. *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code,* 64 YALE L.J. 1019, 1070–71 (1955); CALVERT MAGRUDER ET AL., JUDICIAL CONFERENCE OF THE UNITED STATES REPORT OF COMMITTEE TO STUDY TREATMENT ACCORDED BY FEDERAL COURTS TO INSANE PERSONS CHARGED WITH CRIME 7–9 (1945); *Care and Custody of Insane Persons Charged with*

amendments a draft bill prepared by the committee.[46] The bill was eventually passed into law on September 7, 1949 and became incorporated into federal law as 18 U.S.C. § 4244.

Congress amended the provisions of § 4244 in the Comprehensive Crime Control Act of 1984. That Act has been described as "the most radical change in federal criminal law in the history of [the United States]."[47] While the act made many profound changes to federal criminal law, the changes to the competence to stand trial provisions of § 4244 were comparatively minor.[48] The 1984 provisions concerning the competence of a defendant to stand trial became codified as § 4241.

Four changes were made between § 4244 and § 4241. First, § 4244 permitted motions to challenge competence to stand trial from the time of a defendant's arrest. Following the 1984 amendments, however, such a motion may only be raised under § 4241 after the commencement of the prosecution.[49] Second, § 4244 required a psychiatric or psychological report before a competence hearing was conducted, whereas § 4241(b) confers discretion on the court to order such a report. Third, § 4244 was silent on the standard of proof required, whereas § 4241(c) stipulates the "preponderance of the evidence" standard of proof applies. Fourth, § 4244 referred to a defendant being "*presently insane or otherwise so mentally incompetent* as to be unable to understand the proceedings against him or properly assist in his own defense." On the other hand, § 4241(d) refers to a defendant "presently . . . *suffering from a mental disease or defect rendering him mentally incompetent* to the extent that he is unable to understand the nature and consequence of the proceedings against him or to assist properly in his defense."

Section 4241's reference to a defendant suffering "from a mental disease or defect" bears similarity to aspects of the *M'Naghten* test for insanity.[50] That test provides that a defendant is not guilty by reason of insanity if at the time of the alleged offense she was suffering from "such a *defect of reason, from disease of the mind*, as not to know the nature and quality of the act he was doing." More significantly, the phrase "mental disease or defect" in § 4241 replicated that part of the insanity test that was incorporated into federal law in *Durham v. United States*.[51] The Durham test, however, ceased to be part of federal law following the passing of the Insanity Defense Reform Act 1984. The federal insanity defense now requires a defendant to prove that "at the time of the commission of the acts

Federal Offenses: Hearing on S. 850 Before the Sub–Comm. of the S. Com. on the Judiciary, 80th Cong. 5 (1948).

46. REPORT OF THE JUDICIAL CONFERENCE OF THE U.S. 18 (Oct. 1946), http://www.uscourts.gov/sites/default/files/1946-10.pdf [https://perma.cc/Q6T8-97NM].

47. Kenneth R. Feinberg, *The Comprehensive Crime Control Act of 1984: New Approaches to Federal Criminal Law*, *in* COMPREHENSIVE CRIME CONTROL ACT OF 1984, at 249 (Practising Law Inst. ed., 1985).

48. United States v. Williams, 998 F.2d 258, 265 n.16 (5th Cir. 1993).

49. 18 U.S.C. § 4241(a) (2006).

50. M'Naghten's case, [1843] 8 Eng. Rep. 718 (HL).

51. 214 F.2d 862, 874–75 (D.C. Cir. 1954).

constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."[52] Thus, the federal statutory tests for insanity and incompetence are both confined to defendants who suffer, albeit to different degrees, a mental disease or defect. This reflects a lingering vestige of the early nineteenth century common law under which those who were found incompetent to stand trial were deemed to be insane.

C. Dusky v. United States[53]

In 1958, Dusky, who had a history of psychiatric illness, was charged with kidnapping a 15-year-old girl in Kansas and taking her to Missouri, where two of Dusky's accomplices raped her. Following his arrest, he was referred for a mental health evaluation. Dusky, who denied all memory of the events, was found by one psychiatrist to be suffering schizophrenia but nevertheless "oriented as to time place and person." A second psychiatrist reported that Dusky could not "properly assist" his trial counsel because of his inability to "properly interpret the meaning of the things that had happened." A third psychiatrist confirmed Dusky suffered from schizophrenia. A federal district court ruled that Dusky was competent to stand trial because he was oriented in time and place and because he was able to provide some information to his attorney about the kidnapping incident. Dusky was convicted and sentenced to 45 years' imprisonment. The Eighth Circuit Court of Appeals upheld Dusky's conviction and sentence.[54]

Because it is so brief, it is difficult to extract significant assistance from the Supreme Court's opinion. In three paragraphs, the Court granted Dusky's petition for certiorari, quashed his conviction, and remanded his case to the district court for a new hearing to determine if he was competent to stand trial.[55] More assistance can, however, be derived from the Solicitor General's brief.[56] In the brief, he set out his concerns that the psychiatric evidence relating to Dusky's competence to stand trial was equivocal and that the trial court appeared to have given insufficient weight to the medical evidence that Dusky was suffering from delusions and hallucinations and required tranquilizers during his trial. The Solicitor General was also concerned that the trial judge had considered it sufficient that Dusky was orientated as to time and place and had some recollection of events. The Solicitor General said:

> The test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.[57]

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52. 18 U.S.C. § 17.

53. 362 U.S. 402 (1960).

54. Dusky v. United States, 271 F.2d 385 (8th Cir. 1959).

55. *Dusky*, 361 U.S. 402. Dusky was again found to be competent to stand trial. He was convicted following his retrial and sentenced to 20 years' imprisonment.

56. J. Lee Rankin, Solicitor General, Memorandum for the United States In the Supreme Court of the United States, No. 504 Misc; *Dusky*, 362 U.S. at 1–16.

57. Rankin, *supra* note 56, at 11.

The Court agreed in all respects with the position argued by the Solicitor General and adopted his proposed test for determining whether a defendant is competent to stand trial.

Some commentators have suggested that there are just two prongs to the *Dusky* test: "the defendant's capacity to understand the criminal process as it applies to him or her . . . and the defendant's ability to function in that process, primarily through consulting with counsel in the preparation of a defense."[58] Other authorities have suggested the *Dusky* test may have three discrete requirements,[59] or that in its subsequent opinion in *Drope v. Missouri*[60] the Supreme Court added a further prong, namely an ability "to assist in preparing [a] defense."[61]

At issue in *Drope* was whether the defendant had been deprived of his right to a fair trial when the trial judge declined to conduct a competency hearing. Prior to trial, psychiatric evidence raised questions about Drope's competence to stand trial. Those issues were compounded when, during the trial, Drope attempted to take his own life and was hospitalized. The Missouri legislation governing the competence of a defendant to stand trial was in all material respects the same as § 4241. In delivering the Court's opinion, Chief Justice Burger paraphrased the law in the following way:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.[62]

No reference was made to the "rationality" components of the *Dusky* test because the Missouri statute that governed Drope's case, like § 4241, contains no reference to "rationality." In effect, *Drope* merged parts of the *Dusky* test with the Missouri legislation and in doing so failed to refer to the rationality components of *Dusky*.

The divergence of views in the literature and case law concerning the precise requirements of the *Dusky* test highlights uncertainty about what the Supreme Court meant. The following elements may, however, be extracted from the Supreme Court's decision. First, the test focuses upon the defendant's present abilities. This draws a temporal distinction between competence to stand trial and the defense of insanity, which focuses upon the defendant's state of mind at the

58. MELTON ET AL., *supra* note 17, at 127; Alan R. Felthous, *Competence to Stand Trial Should Require Rational Understanding,* 39 J. AM. ACAD. PSYCHIATRY & L. 19 (2011).

59. RICHARD ROGERS & DANIEL W. SHUMAN, FUNDAMENTALS OF FORENSIC PRACTICE: MENTAL HEALTH AND CRIMINAL LAW 154–57 (2006). Those requirements are that a defendant have: sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; a factual understanding of the proceedings; and a rational understanding of the proceedings.

60. 420 U.S. 162, 171 (1975).

61. United States v. Duhon, 104 F. Supp. 2d 663, 670 (W.D. La. 2000); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope,* 47 U. MIAMI L. REV. 539, 539–601 (1993); American Bar Association, *Criminal Justice Mental Health Standards*, 13 MED. & PHYSICAL DISABILITY L. REP., March–April 1989, at 169.

62. *Drope,* 420 U.S. at 171.

time of the alleged offense. Second, the test focuses on two trial tasks: the defendant's capacity to consult with her lawyer and her understanding of the proceedings against her. Third, the test concerns the defendant's actual capacity in terms of "ability" and "understanding" and not her willingness to participate in the proceedings or communicate with counsel. Fourth, the Court drew an important distinction between a defendant's factual and rational understanding of the proceeding. The rationality test requires a qualitative assessment of a defendant's capacity to assist in her defense and have a rational understanding of the proceeding, which is discussed further in Part III.

D. The Key Features and Consequences of the Current Law

The threshold for initiating an assessment of a defendant's competence to stand trial is satisfied if a bona fide doubt is raised about the defendant's competence.[63] This low threshold is anchored upon the due process provisions of the Fourteenth Amendment. There is, however, a considerable disconnect between this low procedural threshold and the high substantive bar to determining that a defendant is incompetent.

A consequence of the way that the *Dusky* test and § 4241 are framed is that even defendants with significant mental illness may be adjudged competent. A defendant diagnosed with or presenting signs of a significant mental illness may nevertheless satisfy the balance of the criteria set out in the *Dusky* test and § 4241.[64] Thus, "not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges. Likewise, neither low intelligence,

63. Pate v. Robinson, 383 U.S. 375, 385 (1966).

64. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 308 (1989) (noting, in the context of an Eighth Amendment challenge to the death penalty, that the jury had found the defendant competent despite his "organic brain damage" and "mild to moderate retardation"), *overruled on other grounds by* Atkins v. Virginia, 536 U.S. 304, 321 (2002); Burket v. Angelone, 208 F.3d 172, 193–95 (4th Cir. 2000) (holding a defendant with dysthmic disorder competent to stand trial); United States v. Morrison, 153 F.3d 34, 46–47 (2d Cir. 1998) (finding no clear error in the trial court's determination of competency, despite the defendant's potential delusional ideals); United States v. Leggett, 162 F.3d 237, 245 (3d Cir. 1998) (finding no clear error in the trial court's determination of competency, despite the defendant's reference to previous psychiatric problems); Moody v. Johnson, 139 F.3d 477, 482 (5th Cir. 1998) (finding no clear error in the magistrate's finding of competency where evidence of the defendant's brain injuries was contradicted by the state's witnesses); Oats v. Singletary, 141 F.3d 1018, 1025–26 (11th Cir. 1998) (concluding that a state court finding of competency was supported by the record, despite evidence of "mental retardation, organic brain damage, and history of substance abuse"); Miles v. Dorsey, 61 F.3d 1459, 1472–73 (10th Cir. 1995) (finding no clear error in the trial court's determination of competency, despite the defendant's evidence of intellectual disability, mental illness, and substance abuse); United States v. Chischilly, 30 F.3d 1144, 1150 (9th Cir. 1994) (finding no clear error in the trial court's determination of competency, claims of the defendant's memory lapses and illiteracy notwithstanding); Wolf v. United States, 430 F.2d 443, 444–45 (10th Cir. 1970) (upholding the denial of the defendant's motion to vacate sentence despite evidence of his long history of mental illness); People v. Baugh, 832 N.E. 2d 903, 915–16 (Ill. App. Ct. 2005) (concluding the defendant was competent to stand trial despite his narcolepsy); Lawrence v. State, 169 S.W. 3d 319 (Tex. App. 2005) (holding that, despite his "rambling speech, confused thoughts, and incomprehensible answers," evidence was insufficient to suggest the defendant was incompetent to stand trial).

nor mental deficiency, nor bizarre, volatile and irrational behavior can be equated with mental incompetence to stand trial."[65]

The consequences of finding a defendant incompetent may be very profound. Under § 4241(d) a defendant found to be not competent to stand trial is placed in the custody of the Attorney General and hospitalized "for treatment in a suitable facility."[66] The defendant may be detained for a "reasonable period"[67] initially, not exceeding four months, or "for an additional reasonable period of time."[68] If, after a reasonable period of time, the treating facility certifies the defendant has recovered, the court is required to hold another competency hearing. If the court holds the defendant has recovered, it orders that the defendant be discharged from the facility and sets the case for trial. Where a defendant does not recover, or, where he is found to be still incompetent, he may be released from the treating facility provided he will not pose a substantial risk of causing injury to another person or serious damage to the property of another person.[69] Otherwise he is held in the custody of the Attorney General. This requirement is subject to the Supreme Court's holdings in *Jackson v. Indiana*[70] that the indefinite commitment of a defendant solely on the basis of his incompetence to stand trial violates the Fourteenth Amendment, and that the duration of a defendant's commitment must bear some relationship to the purpose for which he is detained.

The complexities arising from the intersection of legal and clinical roads adversely affect the liberty of defendants found incompetent to stand trial and placed in a treatment facility. From a legal perspective, the purpose of treatment is to restore the defendant back to competency.[71] But from a clinical perspective, the rehabilitation of the patient is the primary focus.[72] The consequences of a defendant being found incompetent to stand trial are even more significant when one reviews the frequency with which competency findings are made in the United States. Between 50,000 and 60,000 defendants undergo a competence assessment each year,[73] of whom approximately 15,000 are found not to be competent.[74] It is therefore essential that any test for assessing competence ensures accuracy and reflects the principles set out in Part I.

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65. *Burket*, 208 F.3d at 192 (citing Medina v. Singletary, 59 F.3d 1095, 1106–07 (11th Cir. 1995)).

66. § 4241(d)

67. § 4241(d)(1)

68. § 4241(d)(2)

69. 18 U.S.C. § 4246; *see also Duhon*, 104 F. Supp. at 663 (discussing the applicability of § 4246.).

70. 406 U.S. 715, 731–38 (1972).

71. 18 U.S.C. § 4241(d).

72. This intersection raises numerous issues that are beyond the scope of this article but have been explored elsewhere. *See generally* Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial From a Clinical Perspective,* 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81 (2005).

73. Douglas R. Morris & Nathaniel J. DeYoung, *Psycholegal Abilities and Restoration of Competence to Stand Trial,* 30 BEHAV. SCI. &. L. 710 (2012).

74. Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta–Analytic Review of Compentency to Stand Trial Research,* 17 PSYCHOL. PUB. POL'Y & L. 1, 3 (2011); Patricia A. Zapf & Ronald Roesch, *Competency to Stand Trial: A Guide for Evaluators, in* THE HANDBOOK OF FORENSIC

III
DEFICIENCIES IN THE CURRENT LAW

The brevity of the Supreme Court's opinion meant that the *Dusky* test failed to address several issues concerning a defendant's competence to stand trial. Soon after it was decided, one federal judge bemoaned that it was "not overly helpful in regard to the competency to stand trial question . . . unhappiness with *Dusky* is produced by the fact that the Supreme Court said so little as to why it held what it did."[75] This has led to inconsistencies in the way the test has been applied by federal courts.

Similarly, § 4241 suffers from having a narrow target, namely defendants who have a "mental disease or defect" that renders them "mentally incompetent." This test bypasses defendants who may lack competence to stand trial for other reasons. This narrow focus has also generated issues concerning the way competence assessments are undertaken and has led to concerns that judges are abdicating their judicial responsibilities in favor of health experts.

The deficiencies in the current federal law can be divided into jurisprudential and institutional shortcomings. The jurisprudential shortcomings will be demonstrated by examining the limited scope of the current tests, the problems stemming from Supreme Court opinions concerning unrepresented defendants, and the misunderstandings concerning the "rationality" component of the *Dusky* test. The institutional shortcomings will be demonstrated by explaining the challenges posed by clinical methodologies and the difficulties that lawyers and judges face in understanding and responding to the current federal tests.

A. Jurisprudential Shortcomings

1. Personality disorders

The medical criteria for diagnosing a personality disorder are not the same as those for mental disease. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association, the International Statistical Classification of Diseases, and Related Health Problems (ICD-10), published by the World Health Organization, recognize that personality disorders are a form of mental disorder, but are not mental diseases. Thus, a personality disorder may not necessarily be a "mental disease or defect" under § 4241.

PSYCHOLOGY 305, 326 n.1 (Irving B. Weiner & Allen K. Hess eds., 3d ed. 2006); Daniel C. Murrie et al., *Opinion Formation in Evaluation of Competence to Stand Trial, Results from 8,146 Evaluations,* 24 BEHAV. SCI. & L. 113 (2006). The Administrative Office of the United States Courts has stated that Federal Magistrate Judges conducted 510 criminal competency proceedings in the twelve-month period ending September 30, 2016; however, the Office does not publish statistics on the number of competency hearings conducted by Federal District Court Judges. *See* UNITED STATES COURTS, Table M–4—U.S. Magistrate Judges—U.S. Magistrate Judges Judicial Business (Sept. 2016), http://www.uscourts.gov/statistics/table/m-4/judicial-business/2016/09/30 [https://perma.cc/M8F5-VMNV].

75. John W. Oliver, *Judicial Hearings to Determine Mental Competency to Stand Trial,* 39 F.R.D. 533, 543 (1965).

The courts have struggled to define the relevance of personality disorders to a defendant's competency to stand trial. Personality disorders are described in the DSM-5 as a class of mental disorder characterized by enduring maladaptive patterns of behavior, cognition, and inner experience, exhibited across many contexts and deviating markedly from those accepted by the individual's culture.[76] Examples of personality disorders include paranoid, narcissistic, and obsessive-compulsive personality conditions. One commentator has recently observed that it is unclear whether personality disorders can ever qualify as a mental illness and that "[m]ost courts that have addressed the question have held that they do not, but their findings on this issue are muddled or have been limited to the diagnosis before them."[77] Factors that have contributed to judicial confusion about the significance of personality disorders include the lack of precision around the diagnostic categorization of some personality disorders;[78] the high incidence of personality disorders in some groups in society, including among defendants in criminal trials;[79] and the difficulty of identifying where, on a continuum of a personality disorder, questions about competence are triggered.

In some cases, however, courts have adopted a pragmatic response to this issue. In *United States v. Veatch*, for example, the court found that the defendant understood what was happening at his trial, but "his severe personality disorder . . . wrought with paranoid, narcissistic and antisocial traits, rendered him incapable of effectively assisting counsel in his defense or conducting his own defense."[80] While this approach achieved a laudable outcome, it required the Court to disregard the qualifying criteria in § 4241.

In contrast, other federal cases have said a "personality disorder is separate and distinct from a mental disease or defect."[81] *United States v. Diehl Armstrong* said, for example, "[t]here is uncontradicted evidence . . . that, while bipolar disorder is considered a serious 'mental disease or defect' for purposes of establishing an individual's mental competence, a personality disorder is not."[82]

United States v. McKinney[83] further illustrates the distinction that is often drawn between personality disorders and "severe mental illness."[84] McKinney

76. AM. PSYCHIAT. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 646–49 (5th ed. 2013).

77. E. Lea Johnston, *Communication and Competence for Self–Representation,* 84 FORDHAM L. REV. 2121, 2160 (2016).

78. Thomas A. Widiger & Timothy J. Trull, *Plate Techtonics in the Classification of Personality Disorder*, 62 AM. PSYCHOL. 71 (2003).

79. Stephen D. Hart, *Commentary: The Forensic Relevance of Personality Disorder*, 30 J. AM. ACAD. PSYCHIATRY & L. 510 (2012).

80. 842 F. Supp. 480, 482 (W.D. Okla. 1993).

81. United States v. Riggin, 732 F. Supp. 958, 964 (S.D. Ind. 1990).

82. United States v. Diehl Armstrong, No. 1:07cr26, 2008 W.L. 2963056, at *26 (W.D. Pa. July 29, 2008).

83. 737 F.3d 773 (D.C. Cir. 2013).

84. The "severe mental illness" test was adopted by the Supreme Court in Indiana v. Edwards, 554 U.S. 164, 177–78 (2008), for determining whether a State may insist on certain defendants being represented at trial.

represented himself at his trial until a court ordered competency assessment revealed a personality disorder that gave him grandiose ideas about his ability to represent himself. There was no evidence of severe mental illness. In rejecting McKinney's appeal against the determination that he was competent to stand trial, the Court of Appeals for the District of Columbia Circuit found no basis to conclude that a "personality disorder can, in a clinical sense, constitute a serious mental illness."[85]

In contrast, some courts make no distinction between personality disorders and mental diseases. In *United States v. DeShazer*,[86] for example, the Tenth Circuit Court of Appeals accepted the defendant's uncontested argument that there was no distinction in law between a personality disorder and a mental disease for the purposes of § 4241. This approach was followed in *United States v. Mitchell*,[87] in which a federal district judge had to determine whether the defendant was competent to stand trial in relation to charges of kidnapping and unlawful transportation of a minor. Mitchell had extreme religious beliefs, including that he was a prophet who received instructions from God to abduct his "followers." The court reasoned Mitchell did suffer from one or more personality disorders, but not from a mental disease. Applying *DeShazer*, the court said "it [was] not particularly necessary . . . to determine a specific diagnosis in determining competency,"[88] but that, in any event, Mitchell's personality disorder did not render him incompetent to stand trial and, even if he had a mental disease or defect, he was nevertheless competent.

This sample of cases illustrates the conflicting views about the relevance of the distinction between personality disorders and mental diseases or defects to an assessment under § 4241. This conflict reflects what Professor Johnston describes as "muddled" approaches by the courts and a misunderstanding that there is no meaningful distinction between personality disorders and mental diseases or defects.[89]

The narrow scope of the current federal tests renders those who have severe personality disorders vulnerable. Such defendants may suffer from very debilitating personality disorders that can significantly impact their ability to understand and evaluate information and to make and communicate decisions. This in turn places at risk the defendant's ability to receive a fair trial and the integrity and accuracy of the trial itself.

2. Unrepresented defendants

The first prong of the *Dusky* test focuses upon the defendant's ability "to consult with his lawyer" and resembles the part of § 4241 that refers to a defendant's ability "to *assist* properly in his defense." Neither test provides

85. *McKinney*, 737 F.3d at 778.
86. 554 F.3d 1281 (10th Cir. 2009).
87. 706 F. Supp. 2d 1148 (D. Utah. 2010).
88. *Id.* at 1193.
89. Johnston, *supra* note 77.

guidance on how a court should determine if an unrepresented defendant is competent to stand trial without the assistance of counsel. This issue has produced vexing decisions from the Supreme Court in *Godinez v. Moran*[90] and *Indiana v. Edwards*,[91] which highlight a significant deficiency in the current law.

The right of a defendant to have an attorney is a comparatively recent development that post-dates the origins of the common law doctrine concerning a defendant's competence to stand trial.[92] The Supreme Court did not affirm a defendant's right to a state-provided defense attorney as a constitutional right until three years after it decided *Dusky*.[93] Even more recently, in *Faretta v. California*,[94] the Supreme Court held that a defendant in a state criminal trial had the right to decline the services of an appointed attorney and could represent herself provided that her decision was made "voluntarily" and "intelligently." The Court said:

> Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is . . . necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.[95]

The principle underscoring the Court's decision, its desire to uphold the defendant's right to self-determination, can be difficult to apply in cases where a defendant's competence to stand trial is in issue. This difficulty is illustrated by the conflicting decisions in *Moran* and *Edwards*, where the Supreme Court placed different emphasis on a defendant's rights to self-determination and a fair trial.

Moran shot dead three people in Nevada, including his former wife, after which he endeavored to kill himself.[96] After he initially pleaded not guilty, two psychiatrists assessed Moran and concluded that he was competent to stand trial. The State then announced its intention to seek the death penalty. At his next court appearance, Moran said he wished to dismiss his attorney and plead guilty because he did not want his counsel to mount a defense or present any mitigating evidence during the sentencing phase of his trial. The trial judge granted Moran's requests after applying *Faretta*, concluding that Moran had "knowingly and intelligently" waived his right to counsel and that his guilty pleas were "freely and voluntarily given." After he was sentenced to death, Moran applied to set aside his convictions on the grounds that he was not mentally competent to represent himself. This application and Moran's subsequent appeals were dismissed by the

90. 509 U.S. 389 (1993).

91. 554 U.S. 164 (2008).

92. In England, a defendant charged with a felony was not entitled to counsel as of right until 1836 following the passing of the Trial for Felony Act, 6 & 7 Will. IV. 114, although counsel were permitted to assist any defendant charged with treason from 1696. *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 309 (1978).

93. Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963).

94. 422 U.S. 806, 807 (1975).

95. *Id*. at 819–20.

96. *Moran*, 509 U.S. at 391–96.

state appellate courts and the United States District Court for Nevada. The Ninth Circuit Court of Appeals, however, allowed Moran's appeal. It reasoned that a defendant's competence to waive his constitutional right to an attorney required a higher level of mental functioning than that required to stand trial. The State appealed. By a seven-to-two majority, the Supreme Court overturned the Court of Appeals decision and ruled that the *Dusky* test also governed a defendant's competence to dispense with his counsel and plead guilty.[97]

In *Edwards*,[98] decided fifteen years later, a majority of the Supreme Court held that a defendant could be competent to stand trial but not necessarily competent to represent himself. Edwards, who suffered schizophrenia, shot and wounded a security officer when trying to steal a pair of shoes from a department store. He was initially found incompetent, but later gained competence after receiving treatment in a psychiatric facility. When his trial commenced, Edwards asked to dismiss his assigned attorney and represent himself. Those applications were declined. Following his conviction, Edwards appealed on the basis that his constitutional right to defend himself had been violated. The Indiana appellate courts agreed with Edwards and ordered a new trial. The State successfully appealed to the Supreme Court. Justice Breyer, for the majority, said that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[99]

The Court in *Edwards* conferred upon trial courts the discretion to require representation for defendants suffering from severe mental illness.[100] The Court did not, however, explain what standard was required for a defendant to defend himself without counsel in a contested trial. Instead, it was content to leave this issue to trial judges, who the Court said "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[101]

One possible route to rationalize these decisions is to view *Edwards* as a discrete exception to the *Dusky* test. The "exception" approach reasons that a defendant may be competent to stand trial, waive counsel, and enter a guilty plea, but may still not be competent to undertake the more complex task of representing himself at a contested trial.[102] This approach defers to the principles of autonomy and self-determination evident in *Faretta* by creating a very narrow exception to a defendant's right to dismiss counsel on the basis that, absent a

97. *Id.* at 396–97.

98. 554 U.S. 164, 177–78 (2008).

99. *Id.* at 178.

100. *See* United States v. Ferguson, 560 F.3d 1060, 1070 n.6 (9th Cir. 2009); United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir. 2009).

101. *Edwards*, 554 U.S. at 177.

102. Joanmarie I. Davoli, *Physically Present, Yet Mentally Absent,* 48 U. LOUISVILLE L. REV. 313, 323 (2009); Eulen E. Jang, *Mental Capacity: Reevaluating the Standards,* 43 G.A. J. INT'L & COMP. L. 531, 537 (2015).

serious mental condition, defendants possess the "right to represent themselves and go down in flames if they wished."[103]

Edwards has, however, required both state[104] and federal courts to manage defendants who represent themselves for reasons that are not objectively rational.[105] For example, in *United States v. Roof*,[106] the defendant was diagnosed with "Social Anxiety Disorder, possible Autistic Spectrum Disorder, Mixed Substance Abuse Disorder, depression by history, possible Schizoid Personality Disorder, and possible Avoidant Personality Disorder." He faced the death penalty and elected to represent himself in sentencing and present no mitigation witnesses. The court determined that it had no discretion to deny Roof's constitutional right to self-representation, despite his legal strategy being unsound. The decision reiterates the high standard in *Edwards* for intervening in a defendant's choice to dispense with counsel.

Some scholars have argued that the Court in *Edwards* was motivated by a fear that the spectacle of incompetent unrepresented defendants would bring the criminal justice system into disrepute.[107] This argument refers to the Court's citation of a psychiatrist's rhetorical criticism of the current law: "how in the world can our legal system allow an insane man to defend himself?"[108] Professor Davoli said it was "startling" that the Court in *Edwards* acknowledged its discomfort with unrepresented incompetent defendants but chose not to address the inherent flaws in *Dusky*.[109]

The unsatisfactory state of the law stems from two troublesome aspects of *Moran* and *Edwards*. First, a defendant's competence to dispense with his attorney and plead guilty is assessed using the *Dusky* test, which was developed in the context of a represented defendant. *Dusky* did not purport to address the situation of an unrepresented defendant. Second, in *Edwards*, the Court recognized the limitations of the *Dusky* test but failed to provide any meaningful guidance on how a trial court should assess a defendant's competence to represent themselves in a contested hearing.

3. Rationality: a misunderstood concept

In *Dusky*, the Court said that to be competent a defendant needs to have the ability to consult with his lawyer with a reasonable degree of *rational understanding* and have a *rational understanding* of the proceedings against himself. This bore close similarity to the approach taken in *Youtsey*.[110] Significantly, however, the Court did not explain what test it had in mind when it

103. United States v. Johnson, 610 F.3d 1138, 1140 (9th Cir. 2010).

104. Johnston, *supra* note 77, at 2127.

105. *See e.g.,* United States v. Bernard, 708 F.3d 583 (4th Cir. 2013).

106. United States v. Roof, 2:15-CR-00472, at *16 (D.S.C. Jan. 18, 2017).

107. Tiffany Frigenti, Note, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn—People v. Smith,* 28 TOURO L. REV. 1019, 1043–44 (2013); Jang, *supra* note 102, at 549–50.

108. Indiana v. Edwards, 554 U.S. 164, 177 (2008).

109. Davoli, *supra* note 102, at 324–25.

110. Youtsey v. United States, 97 F. 937, 943–44 (6th Cir. 1899).

stipulated the need for rational understanding. This has led to both jurisprudential and conceptual uncertainties.

The jurisprudential uncertainties are illustrated by comments made in *Moran* and *Edwards* that overlook the rationality prong of *Dusky*. To understand those comments, it is necessary to recall that, in *Drope*, the Court applied Missouri legislation, which, like § 4241, omits any reference to "rationality." The distinction between the *Dusky* test and the legislative test applied by the Court in *Drope* was subsequently blurred in *Moran* and *Edwards*. Writing for the majority in *Moran*, Justice Thomas treated the *Dusky* test as identical to the test applied by the Court in *Drope* even though the Court in *Drope* made no reference to the rationality criterion found in *Dusky*.[111]

Similarly, in *Edwards*, after setting out the *Dusky* test, Justice Breyer said:

> *Drope repeats that standard* . . . it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[112]

The merger of the *Dusky* and *Drope* tests by the majorities in *Moran* and *Edwards* has had the unfortunate effect of diluting the significance of the rationality ingredient of the *Dusky* test. One commentator lamented that

> [t]he *Dusky* rationality standard was a progressive step with widespread influence. Sadly, its significance is fading, even as the standard itself maintains familiarity. Its important requirement for rationality is slipping into oblivion with nary a word.[113]

Judicial uncertainties about the ongoing role of the rationality component of the *Dusky* test may be attributed to concerns that "a concept like rational understanding is difficult to define."[114] This observation arose in the context of a challenge to the constitutionality of the proposed execution of a Mr. Panetti for the murder of his parents-in-law. There was psychiatric evidence that, although Panetti understood the State intended to execute him for murder, his understanding was based on the delusional belief that he was really to be executed to prevent him from continuing to preach. The Court accepted Panetti had been denied an adequate opportunity to argue his right not to be subjected to cruel and unusual punishment.

Others have suggested that the rationality concept suffers from vagueness and an absence of consensus as to its exact meaning.[115] The rationality requirement may also undermine a defendant's right to self-determination when the assessment is based solely on objective considerations.

Nevertheless, it is possible to construct a coherent definition by drawing on the distinction in *Dusky* between a defendant's factual understanding and rational understanding, which can be traced back to *Dyson's Case* in the

111. Godinez v. Moran, 509 U.S. 389, 396 (1993).

112. Indiana v. Edwards, 554 U.S. 164, 170 (2008) (emphasis added).

113. Felthous, *supra* note 58, at 20.

114. Panetti v. Quarterman, 551 U.S. 930, 959 (2007).

115. LAW COMMISSION OF ENGLAND AND WALES, CONSULTATION PAPER NO. 197, UNFITNESS TO PLEAD 3–48 (2010).

nineteenth century. For example, in *Panetti*, it was insufficient that the defendant knew that he was to be executed for murder. A rational understanding could not be affected by pathological delusions such as the belief that he was to be executed to stop him preaching. The American Academy of Psychiatry and Law[116] distinguishes "factual understanding" from "rational understanding" by providing the following two examples. First, a defendant "may have an accurate factual understanding of the legal process as it applies to 'ordinary humans.'" But because he suffers "grandiose religious delusions" and "therefore believes that no earthly court can punish him," he lacks a rational understanding that if found guilty he would be subject to imprisonment. Second, while a defendant may not initially know key facets of the proceedings against him, such as the maximum number of years a sentence carries, he would nonetheless have factual understanding if he "could learn the necessary information" and his "initial deficits only indicate a lack of information rather than any impairment stemming from a mental disorder."

The rationality component of *Dusky* should not be consigned to history. Instead, any defendant must, when making important decisions in relation to her trial, have an understanding that is unaffected by delusions or other genuine disorders that adversely affect her ability to make decisions based upon reality.

B. Institutional Shortcomings

1. Clinical Assessments

The jurisprudential and conceptual weaknesses in the current tests for assessing a defendant's competence to stand trial have created a lacuna that judges and lawyers, due to shortcomings in their skills and training, have been unable to fill. Instead, health professionals have assumed greater prominence in the assessment of a defendant's competence to stand trial. While competency decisions are ultimately for the courts, judges have become increasingly reliant on evidence from health professionals,[117] who in most instances are trained either in psychology or psychiatry.[118] The intersection of law and health sciences in this area is fraught with opportunity for misunderstanding and confusion between health professionals, defendants, lawyers, and judges. This is partly because the law has evolved slowly and continues to reflect vestiges of the eighteenth-century common law. Conversely, psychiatry and psychology have developed rapidly from forming diagnoses based on subjective assessments of patients to evidence-based diagnoses using population-based data about psychiatric and psychological

116. Mossman, et al., *supra* note 1, at S45–46.

117. *Compare* Moore v. Texas, 137 S. Ct. 1039, 1048–49 (2017) (noting that while states have discretion in enforcing the prohibition on executing intellectually disabled defendants, they must be informed by medical expertise), *and* Hall v. Florida, 572 U.S. 701, 721–23 (2014) (same), *with* Wieter v. Settle, 193 F. Supp. 318, 321–22 (W.D. Mo. 1961) (treating psychiatric conclusions as "merely opinion testimony," which "is not and cannot be legally binding").

118. MELTON ET AL., *supra* note 17, at 135.

conditions.[119] Further, there is no direct alignment between the legal construct of competence to stand trial and conventional diagnostic categories in psychiatry or psychology. The language of psychiatrists and psychologists on the one hand and that of lawyers and judges on the other creates significant room for misunderstanding.[120]

These challenges are exacerbated by concerns about variations between psychiatrists, psychologists, and social workers when reporting on a defendant's competence. This issue was exposed in a study of the assessments of sixty evaluators in Virginia and Alabama who had collectively conducted more than 7000 competency evaluations.[121] The researchers found a statistically significant amount of variance in competency evaluations due to differences between evaluators.[122] They also concluded that the evaluator's professional training was a significant predictor of the evaluator's recommendations, with social workers 3.51 times more likely than psychologists to find a defendant incompetent, and psychologists 2.04 times more likely than psychiatrists to make that same finding.[123]

2. Competency Screening Instruments

In 1965, the forensic psychiatrist Dr. Ames Robey developed a checklist for assessing a defendant's competence to stand trial.[124] Researchers have since constructed at least thirteen competency screening instruments that are used to varying degrees.

One of the most comprehensive screening instruments is the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA), which comprises twenty-two topics, sixteen of which do not address the defendant's actual case. Instead, the defendant is asked, for example, to consider a hypothetical case about a violent assault between two acquaintances over a game of pool.[125] The American Academy of Psychiatry and Law has explained:

> Weaknesses of the MacCAT–CA include its limited focus on the complexity of the defendant's case, the defendant's memory of events, and legal demands such as appropriate behavior in court . . . . [I]ts verbal demands may exceed the expressive

119. Joel Paris, *Canadian Psychiatry Across 5 Decades: From Clinical Inference to Evidence–Based Practice,* 45 CAN. J. PSYCHIATRY 34, 34–39 (2000) (reviewing developments in the practice of psychiatry in Canada); *see* INTERNATIONAL PERSPECTIVES ON MENTAL HEALTH (Hamid Ghodse ed., 2011) (describing the practice of psychiatry in 91 countries).

120. David Faigman & Carl E. Fisher, *Towards a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law,* 69 U. MIAMI L. REV. 685 (2015); *see also* discussion *supra* Part III.A.1.

121. Daniel C. Murrie, Marcus T. Boccaccini, Patricia A. Zapf, Janet I. Warren & Craig E. Henderson, *Clinician Variation in Findings of Competence to Stand Trial,* 14 PSYCHOL. PUB. POL'Y & L. 177, 181–82 (2008).

122. *Id.* at 185.

123. *Id.*

124. Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists,* 122 AM. J. PSYCHIATRY 616 (1965).

125. Richard Rogers & Jill Johansson-Love, *Evaluating Competency to Stand Trial With Evidence–Based Practice,* 37 J. AM. ACAD. PSYCHIATRY & L. 450, 453–54 (2009).

> capabilities of mentally retarded defendants who nonetheless understand their charges and can converse satisfactorily with counsel. Evaluees with severe thought disorders, memory impairment, or problems with concentration may not be able to complete assessments with the instrument.[126]

Another screening instrument, the Evaluation of Competency to Stand Trial – Revised (ECST-R) was first published in 2003.[127] It was designed to specifically address what the authors say are the three prongs of the *Dusky* test. The features of the ECST-R have been said to make it "potentially attractive as a tool for examiners to use in the assessment" of a defendant's competence to stand trial.[128] The same authors, however, express concerns about some of the instrument's rating scales and the "internal validity of the scores obtained" that "appear to permit gross incongruencies between . . . ratings and scale interpretations."[129]

The inherent weakness with any competency screening instrument is that there are no objective criteria against which to test its validity. This is because it is impossible to clinically assess how a defendant found incompetent would in fact perform in a trial setting.[130] Thus, while some screening tools may be useful to differentiate between defendants who are competent to stand trial and those who are not, commentators acknowledge the variability and varying usefulness of competence screening instruments.[131]

These deficiencies are compounded when dealing with admissibility of evidence through the application of the test in *Daubert v. Merrell Dow Pharmaceuticals*.[132] The requirement in *Daubert* for "a valid scientific connection to the pertinent inquiry" is particularly in question when clinicians rely on screening instruments that do not specifically address either § 4241 or the *Dusky* test, or which are constructed upon hypothetical scenarios not connected to the defendant's circumstances. Thus, legitimate questions may be asked about the relevance of questions about acquaintances fighting over a pool game to a case where the defendant believes he was commanded by God to abduct and rape his victims.[133]

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126. Mossman, et al., *supra* note 1, at S42.

127. Richard Rogers, Rebecca L. Johnson, Chad E. Tillbrook, Mary A. Martin & Kenneth W. Sewell, *Assessing Dimensions and Competency to Stand Trial: Construct Validation of the ECST–R Assessment* (2003), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1121&context=resec_faculty_pubs [https://perma.cc/FBK6-XBTS].

128. MELTON ET AL., *supra* note 17, at 153.

129. *Id*. at 154.

130. *See* Patricia A. Zapf & Ronald Roesch, *Evaluation of Competence to Stand Trial in Adults*, in FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW: A HANDBOOK FOR LAWYERS 17, 24 (Ronald Roesch & Patricia A. Zapf eds., 2013) ("[T]here can be no hard criterion against which to test the validity of competency evaluations because we do not have a test of how incompetent defendants would perform in the actual criterion situations.").

131. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2nd ed. 2006); MELTON ET AL., *supra* note 17, at 154; Patricia A. Zapf & Jodi L. Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation and Competency to Stand Trial,* 21 BEHAV. SCI. & L. 351 (2003).

132. 509 U.S. 579 (1993).

133. *See* United States v. Mitchell, 706 F. Supp. 2d 1148 (D. Utah. 2010).

That so many competency screening tests have emerged over the past four decades underscores the concern that members of the psychiatric and psychological communities do not agree about which type of instrument is most helpful. These uncertainties, when combined with the reported weaknesses of several of the instruments and the challenge for new instruments to pass the *Daubert* standards, suggest that judges and lawyers—not psychologists or psychiatrists—should lead any inquiry into a defendant's competence. The discrepancies in recommendations between mental health workers reinforce this conclusion.

3. Attorney Deficiencies

Lawyers rarely have the training required to identify mental health issues that may be subtly masked. "[A] lawyer is not a trained mental health professional capable of accurately assessing the effects of paranoid delusions on the client's mental processes."[134]

Additionally, defense lawyers are invariably too overwhelmed and under-resourced to give the attention required by a client who may require a competence assessment. One commentator has noted "[t]he 'meet 'em and plead 'em model of representation common in jurisdictions across the United States."[135] Public defense lawyers "cannot interview clients, investigate the facts of the case, or file appropriate motions, let alone effectively negotiate plea bargains . . . . Hurried conversations in the courtroom itself, or perhaps a hallway or holding cell, are the best that most public defenders can do."[136] The vast majority of defendants can be expected to face such circumstances, as over eighty percent of criminal cases are assigned to publicly funded lawyers.[137] It is a tragic reality that attorneys are often unable to identify and assist clients who are not competent to stand trial. Law reports are replete with cases in which defense lawyers have provided ineffective representation, many amounting to ineffective assistance of counsel, by failing to investigate or present to the court obvious concerns about a defendant's competence.[138]

134. United States v. Salley, 246 F. Supp. 2d 970, 976 (N.D. Ill. 2003) (citing United States v. Timmins, 301 F.3d 974, 981 (9th Cir. 2002)).

135. Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense,* 80 LAW & CONTEMP. PROBS. no. 3, 2017 at 94.

136. *See id.* at 95 (citing Tina Peng, *I'm a Public Defender. It's impossible for me to do a good job representing my clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.52daef163282) [https://perma.cc/LMT6-3Y5T].

137. *Id.* at 91 (citing U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, INDIGENT DEFENSE 1(1992).

138. *See, e.g.*, Hummel v. Rosemeyer, 564 F.3d 290 (3d Cir. 2009); Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997); Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990); Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990); Blakeney v. United States, 77 A.3d 328 (D.C. 2013); United States *ex rel* Newman v. Rednour, 917 F. Supp. 2d 765 (N.D. Ill. 2012); Harris By and Through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994); Matthews v. State, 596 S.E.2d 49 (S.C. 2004).

Sadly, attorneys are rarely able to fulfill the role envisaged in *United States v. Duhon*. There the court, after hearing from medical experts and an independent trial lawyer called as a court-appointed expert, stated that a "multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on a defendant's ability to assist counsel."[139] In such cases, "one of the most evident issues is whether the assessing professional, usually a psychiatrist or a psychologist, really knows what would normally go into the defense of the case."[140]

4. Judicial Deficiencies

Clinicians now occupy a pivotal role in competency assessments.[141] The reasons for this result can be distilled to three factors.

First, like attorneys, judges are unlikely to have the technical knowledge required to question and challenge assessments made by psychiatrists and psychologists. Thus, while ultimately the decision is within the exclusive domain of the judge, in reality, there is a high degree of judicial adoption of the views put forward by clinicians.[142] As noted by Judge Harry Edwards, "the judicial system is encumbered by judges . . . who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner."[143]

Second, the adversarial process is not an optimum forum for testing complex scientific evidence. The adversarial model is predicated on the basis that a criminal trial is "a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest."[144] This theory does not reflect the reality of most prosecutions today in which the defense attorney is more likely to direct his limited resources towards achieving a resolution through a plea bargain than to embark on the time-consuming, challenging, and potentially expensive task of testing the prosecution's arguments concerning a defendant's competence to stand trial. Third, the judicial system involves a "case-by-case" adjudicatory approach,[145] which does not align with the training of psychologists and psychiatrists who, in the pursuit of evidence-based methodologies, apply data developed from groups to individual cases.[146]

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139. United States v. Duhon, 104 F. Supp. 2d 663, 669 (W.D. La. 2000).

140. *Id.*

141. *See* Patricia A. Zapf, Karen L. Hubbard, Virginia G. Cooper, Melissa C. Wheeles & Kathleen A. Ronan, *Have the Courts Abdicated their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, 4 J. FORENSIC PSYCHOL. PRAC. 27 (2004).

142. Keith R. Cruise & Richard Rogers, *An Analysis of Competency to Stand Trial: An Integration of Case Law and Clinical Knowledge,* 16 BEHAV. SCI. & L. 35, 35–36 (1998); Zapf et al., *supra* note 141.

143. Harry T. Edwards, *Reflecting on the Findings of the National Academy of Sciences Committee on Identifying the Needs of the Forensic Science Community*, Address to the National Commission on Forensic Science, Washington, D.C. (2014).

144. Mirjan R. Damaska, *Evidentiary Barriers to Conviction and Two Morals of Criminal Procedure: A Comparative Study,* 21 U. PA. L. REV. 506, 563 (1972–73).

145. Edwards, *supra* note 143.

146. Faigman, et al., *supra* note 120; David L. Faigman, *Judges as "Amateur Scientists,"* 86 B.U. L. REV. 1207, 1220–24 (2006).

Judges generally defer to clinicians' evaluation of a defendant's competence. In one study involving a statutory replication of the *Dusky* test, which focused upon 328 competency determinations in Alabama state courts, researchers found that in all but one case the courts accepted the mental health professionals' recommendations.[147] All judges interviewed indicated their belief that mental health professionals are more qualified to determine whether a defendant is competent. One judge even said his job "would be 'much easier' if the mental health professional would 'simply state whether the defendant was competent or not.'"[148] Caution must be exercised before extrapolating studies of state courts' practices into the federal setting. The Alabama study is, however, generally consistent with other studies which have found that judges have tended to accept the recommendations of health professionals in at least ninety percent of cases.[149]

This heavy dependence upon clinicians' opinions is undesirable, as it leads to three adverse consequences. First, judges and lawyers might forgo making their own appropriate inquiries. This concern has led to one commentator lamenting that "decisionmaking in this area is effectively delegated to clinical evaluators making low visibility and essentially unreviewed decisions pursuant to a vague, open-textured [clinical] standard."[150] Second, judges risk not properly testing the recommendations of clinicians. Judges should test the opinions of clinicians through their own observations and should weigh the subtleties of any competing contentions from health professionals in their overall assessment. Third, serious questions arise about how effectively judges are preserving the fair trial rights of defendants whose competence to stand trial is in issue. This places at risk the fundamental integrity, legitimacy, and reliability of the criminal justice system.

IV

A MORE APPROPRIATE TEST FOR ASSESSING COMPETENCE

This Part explains the provenance and contents of the effective participation test. The test's origins can be traced to the minimum fair trial rights in Article 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has said that the effective participation standard is an overarching trial right that encompasses those set out in Article 6(3).[151]

147. Zapf, et al., *supra* note 141.

148. *Id.* at 35.

149. *See* Cruise & Rogers, *supra* note 142; Ian Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand Trial,* 19 INT'L J.L. & PSYCHIATRY 39 (1996); Stephen D. Hart & Robert D. Hare, *Predicting Fitness to Stand Trial: The Relative Power of Demographic Criminal and Clinicial Variables,* 5 FORENSIC REP. 53 (1992); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competence to Stand Trial,* 47 CLINICAL PSYCHIATRY 29 (1986).

150. Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal in Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 620 (1995).

151. Liselotte van den Anker, Lydia Dalhuisen & Marije Stokkel, Student Paper, *Fitness to Stand Trial: A General Principle of European Criminal Law?*, 7 UTRECHT L. REV. 120 (2011).

The effective participation test has been adopted by the Appellate Chamber of the International Criminal Tribunal for the former Yugoslavia.[152] The basic elements of this test have also been endorsed by the Law Commission of England and Wales.[153] The Scottish Law Commission has also recommended Scotland follow the European Court of Justice's approach by adopting an effective participation standard for defendants required to stand trial.[154]

A. The Matters That a Defendant Must Understand

The court should inquire into nine trial tasks under an effective participation test:[155]

> 1. The defendant must understand the charges she is facing. This involves the defendant understanding in general terms how the prosecution says the charge will be proven against her.
>
> 2. When deciding how to plead, the defendant must be able to rationally evaluate the significance of entering a plea of guilty or not guilty and what consequences will flow from that plea.
>
> 3. The defendant must understand the significance of opting for a trial before a judge and jury or without a jury, evaluate relevant considerations, and communicate her decision rationally.
>
> 4. The defendant should be able to understand the process of challenging jurors for cause or peremptorily, evaluate relevant factors, and decide rationally whether to challenge a juror.
>
> 5. The defendant must be able to follow the proceeding. This includes understanding essential points made by witnesses, understanding the case against her, evaluating evidence and trial rulings, deciding how to advance her own defense either in person or through counsel, and communicating her decisions in a rational manner.
>
> 6. The defendant must understand what is at stake in her trial. This criterion includes a requirement that the defendant understand the significance of any conviction and any sentence that may be imposed.
>
> 7. The defendant must be able to instruct her counsel with sufficient rationality so as to enable her lawyer to understand and advance the defendant's account of events and challenge those parts of the prosecution case that are in issue.
>
> 8. If unrepresented, a defendant must be able to conduct her own case in a way that does not breach her right to a fair trial.
>
> 9. If the defendant elects to give evidence, she must understand the significance of that decision. It is crucial that if a defendant gives evidence she genuinely understands questions put to her and her the capacity to provide answers in a rational way.

These nine trial tasks extend beyond a defendant's capacity to consult with his lawyer and his capacity to understand the proceedings against him. The effective participation test encompasses all aspects of the defendant's trial,

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152. Ian Freckelton & Magda Karagiannakis, *Unfitness to Stand Trial under International Criminal Law: The Influential Decision of the International Criminal Tribunal of the former Yugoslavia in Relation to the Pavle Strugar and its Ramifications,* 21 PSYCHIATRY, PSYCHOL. & L. 611, 614 (2014).

153. LAW COMMISSION OF ENGLAND AND WALES, REPORT NO. 364, UNFITNESS TO PLEAD 10.8–10.29 (2016).

154. *See* Criminal Justice and Licensing (Scotland) Act 2010 (ASP 13) § 170.

155. *See* Stanford v. United Kingdom, App. No. 16757/90, Eur. Ct. H.R. (1994); S.C. v. United Kingdom, App No. 60958/00, 40 Eur. H.R. Rep. 10 (2005).

including all decisions that he may be required to make from when he is required to plead through to when he is sentenced. On occasion, giving effect to the effective participation test may require a suitably qualified person to assist the defendant in understanding information and communicating his decision. It may also be necessary for the court to provide the defendant with sufficient time to be able to carry out these functions. This may be achieved by the court providing frequent recesses and engaging the services of a professional evaluator to monitor the defendant's engagement and responsiveness during the trial.

B. What Level of Understanding Does the Effective Participation Test Entail?

The effective participation test considers both a defendant's cognitive capacity and his decision-making ability. In its reports advocating an effective participation test in England and Wales, the Law Commission suggested a focus upon the defendant's decision-making capacity.[156] The consultation paper recommended an examination of the defendant's ability to make "a particular decision in relation to a particular set of circumstances."[157] Although some commentators have suggested that a capacity-based test is less abstract than tests that focus upon a defendant's cognitive abilities,[158] the Law Commission did not suggest completely abandoning assessment of cognitive abilities. Instead, it recommended assessing reasoning deficiencies in addition to assessing cognitive abilities.[159]

Less straightforward is whether the rationality requirement should be retained if the Supreme Court were to mold the *Dusky* test into an effective participation test. The Law Commission of England and Wales suggested that rationality is a concept that suffers from vagueness and is not universally understood.[160] It argued that requiring a defendant to have a rational understanding risks undermining her autonomy simply because her understanding may not be rational when judged objectively.[161] The Law Commission opined that there should not be a "blanket requirement" that a defendant's understanding be rational.[162] This approach contrasts with that taken in South Australia, which requires an assessment of the defendant's ability "to understand, or to respond rationally to, the charge or the allegations."[163]

156. LAW COMMISSION OF ENGLAND AND WALES, *supra* note 153, at 1.46.

157. LAW COMMISSION OF ENGLAND AND WALES, *supra* note 115, at 2.73.

158. Helen Howard, *Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Competency Test,* 75 J.C.L. 194, 199 (2011).

159. LAW COMMISSION OF ENGLAND AND WALES, *supra* note 115, at 3.38.

160. *Id.* at 3.48–3.58.

161. *Id.* at 3.52.

162. *Id.* at 3.54.

163. Criminal Law Consolidation Act 1935 (SA) 269(H) (Austl.); *see also* LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCESS AND MENTAL DISORDER, Working Paper 14, Ottawa, 31–44 (1975), in which it was recorded that "[i]nstructing counsel is tied to the accused's participation at trial and implies the ability to communicate rationally."

The concern expressed by the Law Commission appears to be partially based upon a misapprehension that rationality equates with a defendant acting in his best interests. These two concepts should not be conflated. In the context of the effective participation test, the rationality requirement means that, when judged objectively, the defendant's capacity to understand, evaluate, make decisions, and communicate is unaffected by delusions or other perception-altering conditions. This requirement ensures the defendant genuinely receives the benefit of his right to a fair trial and can exercise his autonomy in a way that enhances the accuracy and dignity of the criminal justice system.

Uncertainties in English jurisprudence about the meaning of rational understanding do not translate into American experiences, where rationality has been part of the federal law since *Youtsey*. The United States has also had the further advantage of the Supreme Court's guidance in *Panetti*: for a defendant to have a rational understanding, her understanding must not be influenced by psychotic delusions.

C. How is the Effective Participation Test Applied?

An effective participation test requires that a judge's assessment be informed by relevant clinical evidence. This would require psychiatrists and psychologists to provide evidence on an ongoing basis about the defendant's cognitive abilities, his capacity to rationally understand and evaluate relevant information, and to make and communicate his decisions in a rational manner. The psychiatrist or psychologist should provide evidence about any psychiatric or psychological disorder that the defendant suffers from, but identification of a mental disease or defect should not be determinative.

Lawyers would also be expected to play a significant role in assisting the court, particularly where there is an inquiry into a defendant's ability to assist counsel. In this respect, the overriding responsibility of a defense attorney is to discharge her duty as an officer of the court by communicating to the judge freely and frankly any concerns she harbors about her client's competence. Such communications must not be encumbered by concerns about client confidentiality or instructions from the defendant not to challenge her competence.[164] The Eleventh Circuit Court of Appeals has said that "if defense counsel suspects that the defendant is unable to consult with him 'with a reasonable degree of rational understanding' . . . he cannot blindly accept his client's demand that his competency not be challenged."[165] Recognizing the significant role of a defense attorney in assessing a defendant's competence reflects the "multi-disciplinary approach" emphasized by the court in *Duhon*.[166]

164. Nix v. Whiteside, 475 U.S. 157, 166 (1986) (stating that "[a]lthough counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or In any way assisting the client in presenting false evidence or otherwise violating the law").

165. Bundy v. Dugger, 816 F.2d 564, 566–67 n.2 (11th Cir. 1987) (citing Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986)).

166. 104 F. Supp. 2d 663, 669 (W.D. La. 2000).

The trial judge must be given every reasonable opportunity to form his own view about the defendant's capacity to effectively participate in his trial. The very nature of the effective participation test reasserts the judge's crucial position in making these assessments. This may require a competency assessment hearing in which the defendant is required to give evidence relevant to his capacity to effectively participate in his trial. Such a hearing may be particularly useful where it is contended prior to trial that the defendant needs to be able to give evidence to advance his defense but lacks the capacity to do so. But such a hearing would need to be carefully controlled by the trial judge to ensure the right against self-incrimination is respected.

This process may add to the time and costs associated with conducting a trial. Nevertheless, these concerns must not detract from the ultimate goals of ensuring a defendant receives a fair trial; maintaining the integrity, legitimacy, and accuracy of the criminal justice system; and preserving the autonomy and dignity of defendants.

V
WHY THE EFFECTIVE PARTICIPATION TEST SHOULD BE ADOPTED

There are three key advantages to the effective participation test. First, it makes the cause of incompetence a peripheral consideration. Second, it provides one test for all contexts. Third, it returns judicial responsibilities to the forefront.

A. The Peripheral Relevance of the Cause of a Defendant's Incompetence

By focusing on a defendant's competence to understand, evaluate, decide, and communicate in relation to key trial issues, the effective participation test ensures the causes of the incompetence are of secondary relevance. The current federal laws, however, were developed to ensure that a finding of incompetence was reserved for cases where the cause of the incompetence was clearly established. This in turn has placed a high onus on those who wish to appeal decisions by trial judges not to inquire into a defendant's competence.[167]

As Part III demonstrates, any genuine inquiry should not be restricted by the causes of the defendant's incompetence but rather by the consequences of the defendant's condition, namely, her effective participation. Defendants who suffer from, for example, personality disorders, or who fail to meet the narrow criteria in § 4241 and *Dusky*, would be better assessed through the lens of the effective participation test. A key advantage of the effective participation test is that it is unencumbered by the current legislative criterion that requires a defendant to be suffering a "mental disease or defect" and the uncertainty about whether a personality disorder is sufficient. The true variety of disorders that may impede

167 United States v. Morrison, 153 F.3d 34, 46 (2d Cir. 1998); Watts v. Singletary, 87 F.3d 1282, 1289 (11th Cir. 1996); United States v. Nichols, 56 F.3d 403, 411 (2d Cir. 1995); Sheley v. Singletary, 955 F.2d 1434, 1438 (11th Cir. 1992); Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973).

a defendant's ability to stand trial is best accounted for by placing the cause of the defendant's incompetence on the periphery.

B. A Unitary Test

As explained in Part III, the standard of competence required by the Due Process Clause for pleading guilty and waiving one's right to counsel can be accurately described as arbitrary and inconsistent. This unsatisfactory state of affairs has come to pass because, as the Supreme Court recognized in *Edwards*, the *Dusky* test as applied in *Moran* was inappropriate for assessing a defendant's competence to proceed unrepresented in a contested trial. As Justice Blackmun said in his *Moran* dissent, "a person who is 'competent' to play basketball is not thereby 'competent' to play the violin."[168] But the Court in *Edwards* elected not to address the shortcomings in the *Dusky* test, leading to the inconsistent and ad hoc state of the current law.

In contrast, the effective participation test is a unitary test that applies in all circumstances. It requires an assessment of whether, in each situation to be faced by the defendant, he can effectively participate in the proceeding. It recognizes that a defendant's capacity to effectively participate in one phase of his trial does not necessarily translate to another phase. A defendant may be able to effectively instruct counsel to enter a plea of guilty but not have the capacity to effectively give evidence and be subject to cross-examination. Similarly, a defendant who has the capacity to provide effective instructions to counsel may not have the capacity to self-represent.

The advantages of the effective participation test are well illustrated by returning to *Moran*, in which the defendant chose to dispense with his defense attorney and plead guilty because he did not want to mount a defense against the state's case for the death sentence. Had the trial court applied the effective participation test, it would have been compelled to inquire into whether Moran genuinely had the capacity to understand the nature and consequences of his decision to dispense with his counsel and plead guilty. But as Justice Blackmun correctly noted, the state sought to convict and sentence to death a defendant who was "helpless to defend himself."[169]

C. Judicial Responsibilities

The "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."[170] Usually competency hearings are triggered by an application from defense counsel, but a competency hearing can also be carried out upon the motion of a prosecutor or by the trial judge acting on her own volition.

168. Godinez v. Moran, 509 U.S. 389, 413 (1993).
169. *Id.* at 417.
170. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Pate v. Robinson, 388 U.S. 375 (1966)).

Currently, expert testimony constitutes the primary source of evidence from which a trial judge determines competency. However, as observed in Part III, the degree to which many judges now depend upon the views of mental health experts has raised legitimate questions about whether trial judges are delegating their judicial responsibilities to health professionals.

The effective participation test continues to rely upon expert medical testimony, but it requires more engagement from a trial judge, particularly in cases where the defendant seeks to represent herself or to undertake complex functions such as presenting evidence. In these cases, the trial judge is required to draw upon her experience and understanding of how a criminal trial is conducted and how a defendant's rights to a fair trial are honored. The trial judge is expected to make her own observations of the defendant, examine the defendant in court, and consider other sources of information such as the observations of counsel and lay testimony. Judges and not just health professionals must bear the burden of fully assessing a defendant's competence to participate effectively in her trial.

This was demonstrated with resounding effect in *United States v. Gigante*,[171] which involved charges against the head of the Genovese family, part of the criminal organization known as La Cosa Nostra. In a hearing to assess Gigante's competence to stand trial concerning labor payoffs, extortions, mail frauds, and conspiracies to commit murder, four psychiatrists initially concluded that he was not competent to stand trial. In reaching their conclusions, the psychiatrists considered records from 1969 relating to Gigante's regular admissions at a psychiatric hospital. The federal judge, however, was concerned that Gigante was feigning his symptoms and held a hearing to determine the genuineness of his alleged mental incapacity. That hearing involved a detailed inquiry into Gigante's conduct throughout most of his life and resulted in the court concluding he had, for decades, engaged in an elaborate sham in which he pretended to be mentally defective while at the same time directing and controlling a sophisticated criminal enterprise. Gigante was found competent to stand trial, convicted of multiple charges and sentenced to twelve years' imprisonment.[172] His appeal challenging the competency determination was dismissed by the Second Circuit Court of Appeals.[173]

Gigante demonstrates how trial judges can push back against what might at first appear to be persuasive medical opinions concerning a defendant's competence. Defendants who feign their incompetence can be particularly challenging for all involved in a criminal trial. One authority has noted that "seasoned clinicians often rely on their own individualistic perspectives in deciding when to assess for malingering . . . . Unfortunately, the overreliance on clinical judgment can be the source of misdiagnosis and inaccurate information

171. 925 F. Supp. 967 (E.D.N.Y. 1996).
172. United States v. Gigante, 166 F.3d 75, 78 (2d Cir. 1999).
173. *Id.* at 84.

given to the Court."[174] Ironically, psychiatrists have in recent years developed tools that can now accurately assess the likelihood that a defendant is feigning symptoms. The designers of the ECST-R Competency Screening Tool have, for example, also developed an "Atypical Presentation Scale," which is designed to identify feigned incompetence. Studies have shown this is a particularly useful screen for identifying malingering in competency evaluations.[175] Thus, while judges must be alert to the fallibilities of medical opinions, health professionals can play a significant role in providing information that may assist a judge in deciding whether a defendant is competent to stand trial.

VI
CONCLUSION

The deficiencies in the current law governing a defendant's competence to stand trial place at risk defendants with severe mental illness and other conditions that affect their ability to participate. This in turn jeopardizes the rights of these defendants to a fair trial. Equally disturbing is that the current federal law risks undermining the integrity and dignity of the criminal law, a point observed by Justice Blackmun in *Moran*. The current federal law also compromises the accuracy of verdicts by placing on trial defendants who are unable to effectively challenge allegations against them.

The current federal law is almost entirely a product of judicial innovation. The federal statute was substantially devised by federal judges serving on a committee of the Judicial Conference of the United States, and the Supreme Court's efforts to divine a test led it to adopt recommendations of the Solicitor General in *Dusky*. Regrettably, the Supreme Court has not seized opportunities presented in subsequent cases to address deficiencies in the *Dusky* test. The *Dusky* test could evolve into an effective participation test by requiring competency assessments to focus upon the defendant's capacity to understand relevant information, evaluate that information, make decisions in relation to that information, and communicate his decisions.

Judges who become apprised of the deficiencies in the current federal law governing competency will wish to ensure the judiciary constructs a pathway through the current quagmire. Those same judges will want to ensure public confidence in the procedures by making sure that judges, and not health professionals, resume the central role in determining competency issues.

Concerns about the adequacy of competency tests are currently being examined in several cognate jurisdictions. Those jurisdictions have identified significant shortcomings in tests that are based upon the common law or that were devised in an era when the focus was on defendants found to be suffering from mental diseases or defects. While there is no universally accepted formula for

174. Michael J. Vitacco, Richard Rogers, Jason Gabal & Janice Munizza, *An Evaluation of Malingering Screens With Competency to Stand Trial Patients: A Known–Groups Comparison*, 31 L. & HUM. BEHAV. 249, 250 (2007).

175. *Id.* at 251, 258.

assessing a defendant's competence to stand trial, the effective participation test has been accepted by the European Court of Human Rights and by Scotland. It is also the test recommended by the Law Commission for England and Wales.

The effective participation test has several advantages over the existing federal tests. Those advantages include that it provides a unitary test that can apply to all phases of a criminal trial and that it can be engaged whenever a defendant's competence is in issue, regardless of the reasons for their incompetence. The effective participation test relies to some extent upon the evidence of health professionals. Nevertheless, the assessment of a defendant's ability to effectively participate in her trial is quintessentially a judicial decision that is based upon a trial judge's knowledge of what the defendant needs to understand, evaluate, decide, and communicate in the context of her trial. The effective participation test rightfully places the trial judge, and not medical professionals, at the epicenter of the assessment of a defendant's competence to stand trial.