THE CRIMINAL DEFENSE LAWYER'S FIDUCIARY DUTY TO CLIENTS WITH MENTAL DISABILITY

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INTRODUCTION

In January 1998, Theodore Kaczynski, a.k.a. the Unabomber, was indicted on capital murder charges as a result of deaths caused by "letter bombs" he sent through the mail.[1] Even before he was taken into custody, his Manifesto fueled speculation about his mental state.[2] After his arrest, suspicions were confirmed that he was a highly intelligent but mentally disturbed individual. Evaluators for both the defense and the court unanimously concluded that he suffered from paranoid schizophrenia, a serious mental illness.[3] Not surprisingly, his lawyers decided that Mr. Kaczynski's best defense at trial would be

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1. The indictment specified ten counts, all of which focused on mailing bombs that killed two people and maimed two more. Only one of the deaths triggered a federal capital murder charge, because the federal death penalty had not been in effect at the time of the other killing. Altogether Kaczynski allegedly mailed sixteen bombs that killed three people and injured twenty-three more. *See* William Glaberson, *Death Penalty Issue Is Raised as Unabomber Jury Selection Begins*, N.Y. Times, Nov. 13, 1997, at A25.

2. *See, e.g.*, *Expert Consensus: Intelligence Sets This Loner Apart*, Boston Globe, Apr. 5, 1996, at 12 (describing, for example, the views of Dr. Charles Ford, that "[t]he Unabomber 'is clearly someone who is paranoid and extremely insensitive, someone who can inflict enormous pain on others without caring,'" yet who is also "'extremely bright' [and] blames the world or global institutions, such as government or academia, for his problems, rather than look[ing] within himself").

3. *See* William Glaberson, *Lawyers for Kaczynski Agree He Is Competent to Stand Trial*, N.Y. Times, Jan. 21, 1998, at A1 (noting that the court-appointed expert, Dr. Sally Johnson, diagnosed Kaczynski as suffering from "schizophrenia, paranoid type," "the same diagnosis the defense team ... suggested applie[d] to Mr. Kaczynski"). Parc Dietz, a government-retained expert, provisionally concluded that Kaczynski was not suffering from a major mental illness, but did not interview Kaczynski and thus withheld formal diagnosis. *See* William Finnegan, *Defending the Unabomber*, New Yorker, Mar. 16, 1998, at 52, 54.

some form of mental state defense, and that, if he were convicted, the case in mitigation at sentencing should be based on mental abnormality.[4]

Mr. Kaczynski, however, had other ideas. He repeatedly refused to allow psychiatric defenses to be posed on his behalf, and threatened to fire his attorneys if they persisted in that strategy.[5] Although his preferred defense strategy was never clear, Kaczynski may have wanted to assert some type of "necessity" defense,[6] to the effect that his letter bombs were a justifiable effort to put a stop to the depredations of technology (all of his victims were in some way connected to technological innovation).[7] Furthermore, it appears that Mr. Kaczynski was willing to pursue his aims without legal representation if necessary.[8]

To the relief of many, Mr. Kaczynski's case never went to trial. An airing of a necessity-type defense might have resulted in a fiasco not unlike the trial of Colin Ferguson, a psychotic man accused of gunning down six people on a Long Island Railroad train who represented himself[9] and argued, despite several eyewitnesses' testimony to the contrary, that he was not the perpetrator.[10] On the other hand, allowing Kaczynski's attorneys to proceed with a defense based on mental abnormality[11] would probably have resulted in periodic

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4. *See* David S. Jackson, *At His Own Request*, Time, Jan. 12, 1998, at 40, 40 (reporting that Kaczynski's attorneys ultimately rejected the insanity defense, then pushed the argument that Kaczynski was incapable of forming the intent to commit a premeditated crime, but eventually decided, given Kaczynski's objections, to wait until the sentencing phase to present evidence of mental condition).

5. *See* William Glaberson, *Kaczynski Can't Drop Lawyers or Block a Mental Illness Defense*, N.Y. Times, Jan. 8, 1998, at A1 ("Theodore J. Kaczynski tried publicly to dismiss his lawyers today because they would not abandon assertions that he is suffering from mental illness.").

6. A necessity, or "choice of evils," defense is recognized if the harm caused by the crime is necessary to prevent a greater harm. *See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.4, at 441 (2d ed. 1986).

7. This statement is conjecture, based on Kaczynski's willingness at one point to be represented by Tony Serra, knowing that Serra's strategy might be a necessity defense. *See Unabomber,* Tr. Jan. 5, 1998 (visited Mar. 8, 2000), <http://www.unabombertrial.com/ transcripts/0105cham.html>; *see also* Glaberson, *supra* note 5 (describing a letter from attorney Tony Serra to Judge Burrell that stated that Serra was willing and ready to substitute as Kaczynski's attorney and "suggested that he might argue that Mr. Kaczynski felt he had to engage in his anti-technology campaign to, ultimately, save lives"). Kaczynski was also interested in challenging the legality of the search of his cabin. *See infra* note 13.

8. *See* Tr. Jan. 5, 1998, *supra* note 7.

9. *See* David van Biema, *A Fool for a Client*, Time, Feb. 6, 1995, at 66.

10. *See* Glaberson, *supra* note 3 (describing "a widespread sense among lawyers and legal scholars that Judge Burrell [was] under pressure to avoid allowing the case to become the embarrassment to the system it might [have] become if Mr. Kaczynski [were] permitted free rein").

11. The trial judge had indicated, prior to Kaczynski's plea, that he would probably allow the lawyers to raise such a defense over Kaczynski's objection, using non-expert testimony during the guilt phase and expert testimony during the penalty

confrontations between Kaczynski and his lawyers, if not complete pandemonium in the courtroom.[12] Perhaps concerned about the spectacle a full-blown trial of such an individual might create,[13] the government eventually offered a life sentence without parole, an offer Mr. Kaczynski accepted.[14]

The case of Ted Kaczynski casts in stark relief the tension created by a criminal justice system that insists on client autonomy at the same time it claims to convict only those who deserve punishment. Out of respect for Mr. Kaczynski's autonomy, society may feel obligated to honor his decision to abandon legal claims bottomed on assertions of mental abnormality, as well as his decision to plead guilty. Yet out of concern that only the culpable be convicted, society may also feel uneasy about convicting and sentencing to death someone like Mr. Kaczynski without at least airing the impact his mental illness had on his criminal liability.

For similar reasons, the Unabomber case also raises serious issues about the role of the defense lawyer in criminal prosecutions. The traditional view is that the client determines overall goals or ends, while the lawyer is in charge of determining the tactics or means necessary to achieve the goal.[15] Are the insanity defense and similar defenses "ends," or a "means" for achieving an end, such as an acquittal or a reduced charge or sentence? If a defense based on mental abnormality is an end, and therefore controlled by the client,[16] can the court or defense attorney nonetheless dictate the use of a mental abnormality defense over the defendant's objection when the client is suffering from mental disability (which will often be the case when a mental state defense is being considered)? If so, how does the attorney decide when a client is sufficiently impaired due to mental illness to justify overriding the client's decision? Assuming the lawyer concludes the client is incompetent to make decisions, what steps

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phase. *See id.*

12. Kaczynski's one courtroom outburst occurred when he came to believe that the judge and his attorneys were going to force him to raise a mental state defense. *See id.*

13. The government's agreement to forego a trial and capital punishment was also prompted by Kaczynski's willingness to waive his Fourth Amendment claim concerning the search of his cabin. *See* William Glaberson, *Kaczynski Avoids a Death Sentence With Guilty Plea*, N.Y. Times, Jan. 23, 1998, at A1 ("Justice Department officials said the breakthrough came when Mr. Kaczynski's lawyers said he had given up his insistence on making only a conditional plea agreement that would have permitted him to appeal some of Judge Burrell's rulings."). The conclusion of the court's psychiatrist that Kaczynski was suffering from schizophrenia, *see supra* note 3, may have increased the government's reluctance to pursue a trial.

14. *See* Glaberson, *supra* note 13.

15. *See* Model Rules of Professional Conduct Rule 1.2(a) & cmt. (1999); Model Code of Professional Responsibility EC 7-7 (1980).

16. *See* Model Rules of Professional Conduct Rule 1.2 cmt. ("The client has ultimate authority to determine the purposes to be served by a legal representation.").

should the lawyer take?[17] If, on the other hand, the client is competent, does an ethical commitment to client autonomy mandate that lawyers always defer to the client's preferences regardless of concerns for decorum or the likelihood that, as was probably true in the Kaczynski case, the client's decision would make a death sentence inevitable?

This Article provides a framework for answering such questions. Most scholarly approaches on the subject neglect either the mental health aspect or the ethical aspect of these issues. A number of articles focus on the appropriate competency test, but devote little discussion to the ethical repercussions of a finding of incompetency or competency. Other scholarship examines in detail the professional dilemmas of the attorney with a mentally disabled client, but virtually ignores the nuances of the competency construct. This Article redresses this inadequacy by bringing together insights from both fields.[18] The goal is to provide a theoretically coherent and practically useful guide for the criminal lawyer who has a client with a mental disability.

Meeting this goal requires, first of all, some understanding of the competency concept. A client who is "competent" is presumptively entitled to make fundamental decisions regarding his or her case. Thus, the competency construct is an essential component of the criminal justice system's approach to resolving the conflict between autonomy and culpability. This Article argues that, when the issue is whether a client is competent to waive a mental state defense, plead guilty or waive the right to an attorney, the correct competency test should focus on "basic rationality and self-regard." This proposed test requires the client to have an understanding of the rudiments of the criminal process, the ability to give non-delusional reasons for the decision in question, and enough self-regard to consider alternative reasons. The basic rationality and self-regard formulation is probably more demanding than the test the United States Supreme Court requires (depending upon how one construes the Court's decision in *Godinez v. Moran*[19]), but is significantly less stringent than what some lower courts have mandated.[20]

Once a client's competence is assessed with some degree of certainty, the defense attorney is confronted with three possible scenarios, each of which produces its own set of controversies. First,

17. The ethical rules provide no direction about how to determine whether a client is competent to make decisions about strategy, and very little guidance about what to do if the client is incompetent to do so. *See infra* notes 135-48 and accompanying text.

18. Professor Slobogin teaches mental health law, as well as ethics, while Professor Mashburn teaches ethics.

19. 509 U.S. 389 (1993).

20. *See infra* notes 27-44 and accompanying text.

the attorney may believe the client is incompetent. This Article argues that in this situation the attorney has an ethical obligation to ensure the client receives treatment to restore competency, even if that obligation requires raising the incompetency issue in court. Although that prescription may seem obvious, a number of commentators have suggested otherwise,[21] given the negative consequences of an incompetency determination (for example, prolonged hospitalization). We believe that a preference for autonomy and a number of practical considerations dictate the more traditional response to the incompetent client.

Second, the client may be considered competent, either as an initial matter or after receiving treatment to restore competency. In this situation, we propose that the client's decisions should usually govern, at least in the three areas on which this Article focuses: pleading guilty, waiving mental state defenses, and waiving the right to an attorney. We also suggest, however, that the competent client's decision on these matters may be overridden when compelling state interests in assuring the reliability or dignity of the proceedings are at stake. Thus, for instance, in the case of Ted Kaczynski (whom the court found competent), this Article contends that the defense attorneys' strategy should have prevailed despite Kaczynski's preference if the defense attorneys had believed that the insanity defense was the only viable defense, that it had a good chance of success, and that it was clearly in Kaczynski's best interests to assert it. It must also be noted, however, that the likelihood that all three of these criteria will be met in a given case (including Kaczynski's) is extremely low.

The third scenario occurs when a good faith effort at restoring the client to competency is unsuccessful. In this situation, this Article argues that, despite constitutional precedent to the contrary, dismissal of the charges is not always necessary. Rather, when only the client's decision-making competency is at issue, the lawyer should be authorized to assume control of the case, because in this situation the client's autonomy is non-existent.

The theoretical basis for these assertions is a conception of the lawyer not only as an agent for an autonomous principal, but also as a fiduciary for the client. While this theoretical assertion may seem uncontroversial, neither the ABA's Model Rules of Professional Conduct nor the disciplinary rules adopted by most states assert that lawyers owe their clients fiduciary duties. Moreover, the modern view of the attorney's role would condemn as paternalistic the imposition of an unqualified obligation to act in the client's best interests. Although the ethical rules acknowledge that lawyers owe some duties to the courts, disciplinary agencies, and third parties, lawyers'

21. *See infra* note 182 and accompanying text.

obligations to protect the dignity and reliability of the justice system are addressed only in the rule governing prosecutors.[22]

Part I of this Article sets out our definition of competency and why we adhere to it. In the course of doing so, it describes the Supreme Court's decision in *Godinez*, the leading case on criminal competency, and explains its deficiencies. Part II elaborates a theory of the attorney as fiduciary, as distinguished from the attorney as zealous advocate. Using the first two parts as a springboard, Part III examines the defense attorney's ethical obligations to the incompetent client who may be restorable, the competent client who disagrees with the attorney, and the client whose competence is unrestorable.

I. THE COMPETENCY CONSTRUCT

Competency in the criminal context is a multi-faceted construct. This part argues that defendants are competent to make a decision in connection with their own criminal case if they understand the criminal process, are willing to consider relevant information, and hold no fixed false beliefs about the relevant considerations. Under this standard, Ted Kaczynski was probably competent to make the decision about the insanity defense and to waive his right to counsel.

A. *The Legal Landscape Before and After* Godinez v. Moran

It is axiomatic that a decision made by a person who is "incompetent" to make the decision need not be honored.[23] The primary justification for this principle flows from a preference for autonomy—the freedom to make and act upon one's decisions. Society values autonomy because we assume people are ordinarily the best judges of their own interests and because, even if they are not, taking away their opportunity to decide would show insufficient respect for the person. Because of this preference for autonomy, we generally allow individuals considerable latitude when engaging in behavior that is not directly harmful to others. When a person appears to lack autonomy, however, either because of externally imposed coercion or—most relevant in the present context—"internal" causes, society is less likely to respect his or her choices, even if they affect no one else. Because such people are deemed unable to function or to make decisions in their own best interests, society is more willing to override their decisions even if doing so will make them feel degraded or minimized. At the least, the state's *parens patriae* power—its power to act as parent for disabled

22. *See* Model Rules of Professional Conduct Rule 3.8 (1999) ("Special Responsibilities of a Prosecutor"); *infra* Part II.C.

23. Even John Stuart Mill, the father of libertarianism, conceded that mental impairment is a ground for acting paternalistically. *See* Mary Ellen Waithe, *Why Mill Was For Paternalism*, 6 Int'l J.L. & Psychiatry 101, 108-11 (1983).

citizens[24]—authorizes interference with an incompetent person when harm to self would otherwise result and the intervention will not itself cause harm. Beyond this, the state may even have an affirmative duty to intervene under such circumstances.

To take an extreme example, suppose a man is unable to control his bodily movements and is unable to speak. When asked a question, his head nods "yes" or "no" completely randomly. Most would agree that taking some important action—say, giving or withholding experimental but potentially life-saving treatment—based on such a nod would be improper. There is no necessary correlation between the nod and the person's "true" desires. Indeed, the nod is not really a "choice" in any sense of the word; acting on it could be viewed as an insult to him. Therefore, consistent with the autonomy preference, the state is justified in attempting to enable him to respond in a meaningful fashion and, if that fails, in making the decision for him if a decision is necessary.

A second possible justification for refusing to honor the man's "decision" and allowing government intervention under these circumstances is more general in nature. Acting on a random nod would not only be insulting to the individual, it would also make a mockery of the concept of autonomy itself. It would suggest that society sanctions random decision-making. Thus, ensuring competency protects not only individual interests but those of society at large.

In the criminal setting, this principle is operationalized through several different competency requirements. A criminal defendant must be competent to stand trial, competent to plead guilty, competent to waive rights, and competent to be sentenced.[25] If a person is incompetent in one or more of these respects, the state has the authority, under current legal doctrine, to take any one of a number of steps, including rejection of any decision by the defendant, continuance of the proceedings, and forced treatment to restore competency.[26]

An issue that has bedeviled the courts is whether these different competencies require different levels of cognitive ability. While most courts have held that a person who is competent to stand trial is also competent to plead guilty, other courts have required a greater capacity in the latter setting, as well as when a defendant waives counsel. One decision in the latter vein is the Ninth Circuit's opinion

24. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 257-60 (1972) (describing the *parens patriae* power).

25. *See generally* Gary B. Melton et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 119-85 (2d ed. 1997) (discussing competency requirements in the criminal justice system).

26. *See id.*

in *Sieling v. Eyman*.[27] In line with the Supreme Court's decision in *Dusky v. United States*,[28] *Sieling* acknowledged that a defendant is competent to stand trial if he has "a rational, as well as a factual, understanding" of the proceedings and is capable of assisting his counsel.[29] The Ninth Circuit also declared, however, that a defendant is competent to plead guilty or waive counsel only if he has the "ability to make a reasoned choice among the alternatives presented to him."[30] Under this standard, *Sieling* explained, a person who is competent to stand trial is not necessarily also competent to plead guilty or waive counsel.[31] A later Ninth Circuit case put the point even more bluntly: "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial."[32]

The rationale for this differentiation between competencies, according to *Sieling*, is that competency should be assessed "with specific reference to the gravity of the decisions with which the defendant is faced."[33] Trial competency, the court further asserted, is not a sufficient basis for finding that the defendant is able to make decisions of "very serious import."[34] In the latter category the court included both the decision about whether to represent oneself and the choice about whether to plead guilty and thus surrender the rights to trial counsel, jury, confrontation of accusers, and remain silent.[35]

In contrast, the majority of courts equate the competency to stand trial and competency to plead guilty standards.[36] These courts seem to be motivated primarily by practical concerns. As one court stated, a dual competency standard would "create a class of semi-competent defendants who are not protected from prosecution because they have been found competent to stand trial, but who are denied the leniency of the plea bargaining process because they are not competent to plead guilty."[37]

In *Godinez v. Moran*,[38] the Supreme Court resolved this controversy, at least as a federal constitutional matter. Disagreeing

27. 478 F.2d 211 (9th Cir. 1973). When a defendant pleads guilty, "the trial court must look further than to the usual 'objective criteria' in determining the adequacy of a constitutional waiver." *Id.* at 214.
28. 362 U.S. 402 (1960).
29. *Sieling*, 478 F.2d at 214 (citations omitted).
30. *Id.* at 215 (quoting Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970)).
31. *See id.* at 214-15.
32. Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992).
33. *Sieling*, 478 F.2d at 215.
34. *Id.*
35. *See id.* at 214-15.
36. *See* Note, *Competence to Plead Guilty: A New Standard*, 1974 Duke L.J. 149, 155.
37. State v. Heral, 342 N.E.2d 34, 37 (Ill. 1976) (quoting Note, *supra* note 36, at 170).
38. 509 U.S. 389 (1993).

with the Ninth Circuit's approach, it held that, under the Due Process Clause, a person who is competent to stand trial is competent both to plead guilty and to waive counsel.

The Court's analysis with respect to the competency required to plead guilty was straightforward. According to the Court, "the decision to plead guilty . . . is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial."[39] Similar to those who plead guilty, defendants undergoing trial may have to decide whether to waive the right to jury, to confront certain accusers, and to take the stand (thereby surrendering the right to remain silent).

The Court's analysis with respect to competency to waive counsel was somewhat different. The Court recognized that self-representation might involve more complicated decisions than those involved in standing trial or pleading guilty. Yet this fact was irrelevant to the Court, because "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself."[40] The Court pointed out that *Faretta v. California*,[41] which recognized the right to represent oneself, had emphasized that "technical legal knowledge . . . [is] not relevant"[42] to determining whether a defendant is competent to proceed pro se and that a court must honor a competent defendant's decision to do so even though he "may conduct his own defense ultimately to his own detriment."[43] Thus, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[44]

Although the *Godinez* Court held that one size competency fits all, it also required, consistent with long-established precedent, that any waiver of constitutional rights, such as occurs with a guilty plea or waiver of counsel, be "knowing and voluntary."[45] The Court explained the difference between the competency standard and the waiver standard as follows:

> [t]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.[46]

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39. *Id.* at 398.
40. *Id.* at 399 (emphasis omitted).
41. 422 U.S. 806 (1975).
42. *Id.* at 836.
43. *Id.* at 834.
44. *Godinez*, 509 U.S. at 400 (emphasis in original).
45. *Id.* at 400-01 (citation omitted).
46. *Id.* at 401 n.12 (citation and emphasis omitted).

Under *Godinez*, then, a defendant is competent to stand trial, plead guilty, waive counsel and, presumably, waive any other rights or defenses (such as the insanity defense) if he or she meets the *Dusky* competency to stand trial standard. That standard, again, requires a rational and factual understanding of the proceedings and an ability to assist counsel in the defense.[47] Prior to *Godinez*, most courts and state statutes interpreted this language to mean that, at a minimum, a defendant must have some capacity to: (1) understand the essence of the charges; (2) understand the potential outcomes of the criminal process; (3) understand the nature of the adversary process (for example, the roles of the judge, jury, prosecutor, and defense attorney); and (4) communicate to the attorney (and, if necessary, the court) facts pertinent to the offense.[48] After *Godinez*, the courts must also ensure, if they did not already do so in connection with factor (3), that defendants have the capacity to understand the rights to silence, jury trial, confrontation, and trial counsel. Additionally, if the defendant waives any constitutional rights, he or she must not only have the capacity to understand, but must actually understand, the consequences of the waiver decision and arrive at the decision voluntarily.

B. *A Critique of* Godinez

Godinez's equation of competency to stand trial and competency to plead guilty makes sense. The Court correctly noted that a defendant who decides to go to trial rather than plead guilty may subsequently want to waive the jury trial right, forego confrontation of accusers or relinquish the right to remain silent by taking the stand, and is otherwise implicitly or explicitly deciding to retain those rights. Accordingly, defendants who proceed to trial as well as defendants who plead guilty must understand these basic guarantees. As suggested above, if this analysis changes the law in any way, it raises the threshold for competency to stand trial.

There remain two ambiguities in the *Godinez* holding, however. The first concerns the level of competency required to waive counsel. The opinion's statement that, to make a "knowing" waiver, the defendant must "actually . . . understand the significance and consequences of the *particular decision*" signals that the defendant wishing to waive counsel may need to understand more facts, or different facts, than the defendant who is deciding whether to go to trial or plead guilty. Yet the Court also emphasized that "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to

47. *See supra* note 28 and accompanying text.
48. *See* Melton et al., *supra* note 25, at 121-24.

waive other constitutional rights."[49] If, as has apparently occurred in some lower courts,[50] this latter language is interpreted to mean that any defendant capable of comprehending the facts necessary to be competent to stand trial or plead guilty can also make a valid waiver of counsel, then *Godinez* significantly undermines the autonomy preference.

Justice Blackmun suggested why in his dissenting opinion in *Godinez*, stating that "[c]ompetency for one purpose does not necessarily translate to competency for another purpose."[51] The mental acuity of a person who merely meets the minimum threshold of competency to stand trial or plead guilty does not approach the competency we should require of someone who wants to waive counsel. The latter individual must not only understand that, after such a decision, counsel will no longer be available to point out options, provide information about the law, and help make decisions,[52] but also demonstrate some understanding of the details of those options, the relevant types of information, and the variety of decisions that must be made. If, for instance, the defendant cannot explain the nature of the state's evidence and the nature of his own evidence (relevant to plea negotiations as well as going to trial), or fathom the role an attorney plays in making opening and closing arguments, conducting direct and cross-examination, raising timely objections, and proposing precise instructions to the jury, he cannot be said to "actually understand the significance and consequences" of a decision to proceed without counsel.

This is not to say, as does Justice Blackmun in his *Godinez* dissent,[53] that a defendant is only competent to waive counsel if he is competent

49. *Godinez*, 509 U.S. at 399. The concurring opinion of Justice Kennedy, which Justice Scalia joined, is even more adamant on this point. *See id.* at 404 (Kennedy, J., concurring in part and concurring in the judgment) ("If a defendant elects to stand trial and to take the foolish course of acting as his own counsel, the law does not for that reason require any added degree of competence.").

50. *See, e.g.*, Dunn v. Johnson, 162 F.3d 302, 307-08 (5th Cir. 1998) ("The level of competence required to waive the right to counsel is the same as that required to stand trial." (citation omitted)); United States v. Schmidt, 105 F.3d 82, 88 (2d. Cir. 1997) ("For a defendant to waive the right to counsel, she must meet the standard for competence to stand trial."); United States v. Day, 998 F.2d 622, 627 (8th Cir. 1993) (relying on *Godinez* in holding that, to waive counsel, a defendant must simply be competent to make the choice rather than capable of representing himself). *But see* Wilkins v. Bowersox, 145 F.3d 1006, 1011-12 (8th Cir. 1998) (conducting a much more sensitive inquiry).

51. *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

52. Courts routinely appoint "standby counsel" to assist the pro se defendant, but such counsel are to intervene only at the defendant's request. *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (requiring that the defendant have some knowledge of when counsel would be helpful).

53. *Godinez*, 509 U.S. at 416 (Blackmun, J., dissenting) ("The majority's attempt to extricate the competence to waive the right to counsel from the competence to represent oneself is unavailing, because the former decision necessarily entails the latter.").

to represent himself. *Faretta's* clear mandate, which flows from the autonomy preference, is that defendants should be able to waive their right to counsel to their "own detriment."[54] Thus, as the *Godinez* majority suggests, the issue in determining competency to waive counsel is not how well the person would represent himself, but rather whether the person understands "the significance and consequences" of conducting his own defense. Our concern with the majority opinion is not the test it propounds, but with the Court's apparent willingness to conclude that a low level of competency is sufficient to meet it, which is inconsistent with *Faretta*.[55]

To the extent *Godinez* is interpreted to equate the mental capacity to stand trial with the mental capacity to waive counsel, defendants might be allowed to waive counsel in ignorance of that decision's impact, in which case the decision may as well be random. Such an interpretation is similar to saying that a person who can understand the significance and consequences of undergoing surgery also understands the significance and consequences of conducting that surgery oneself.[56] Yet it is far easier to comprehend the risks and benefits of properly conducted medical procedures (for example, "I know there is a 1 in 10,000 chance I could die from the surgery, but the only option is to go blind") than to comprehend how difficult it would be to choose, without the benefit of medical training, the precise procedures to use and how to carry them out.

The second ambiguity in *Godinez* about competency to waive rights concerns not what the defendant must understand but how well the defendant must understand it. More specifically, the majority opinion left unclear whether a defendant's reasons for choosing a particular course of action are important in determining competency. The opinion starts off well enough in this regard by endorsing the *Dusky* competence standard, which requires, *inter alia*, "a *rational* as well as factual understanding of the proceedings."[57] Use of the word "rational" in addition to the word "factual" in this formulation suggests that a mere ability to describe the nature of the criminal process and the legal posture of the case is insufficient. The *Godinez* Court, however, never refers to this standard again in the opinion. Rather, as indicated above, it speaks of the person's "understanding"

54. *See* Faretta v. California, 422 U.S. 806, 834 (1975). *Faretta* also emphasized the "inestimable worth of free choice." *Id.* at 833-34.

55. Although *Faretta* stated that a defendant need not understand technical legal rules, *see id.* at 836, it also made clear that judges must ensure that defendants who wish to waive the right to counsel are "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1969)).

56. *See* United States v. Patterson, 140 F.3d 767, 775 (8th Cir. 1998).

57. *Godinez*, 509 U.S. at 396 (citing Dusky v. United States, 362 U.S. 402, 402 (1960)).

of the proceedings and "understanding" of the significance and consequence of any decisions made. Read literally, this latter language focuses simply on the defendant's comprehension of certain facts, not on his or her belief structure.

To understand this point, imagine a person who understands the charges against him, accurately describes how the criminal justice system works, and knows the rights he will waive if he pleads guilty, but who also believes that he should plead not guilty because he is growing smaller every day and will be invisible by the time a trial date is set.[58] Is such a person competent to plead under the *Godinez* standard? On one hand, he easily could be said to comprehend the "significance and consequences" of his decision, given his knowledge of the legal system and his rights. On the other hand, one could also argue that his plea is invalid because his belief about his diminishing size means he does not "understand" the true consequences of his decision to plead not guilty. But this second interpretation of *Godinez*'s (as opposed to *Dusky*'s) language is not the most obvious one.

Furthermore, the latter interpretation of the *Godinez* standard does not seem to be supported by the Court's resolution of the *Godinez* case itself. The defendant in *Godinez*, Richard Moran, was charged with three counts of capital murder.[59] Nonetheless, he fired his attorneys, pleaded guilty against the advice of counsel, and presented no evidence at the capital sentencing proceeding.[60] Evidence adduced at his habeas proceeding made clear that, although he was competent to stand trial (he understood his situation and the consequences of particular decisions), he was extremely depressed at the time he made these decisions, to the point where he had no desire to defend himself.[61] The Supreme Court did not even mention this latter fact in its majority opinion, and it reversed the Court of Appeals finding that Moran was incompetent to plead guilty and waive counsel.[62] These aspects of the majority opinion suggest that trial courts need not consider the nature of the defendant's objectives when they determine competency.[63]

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58. One of the authors represented a client who believed that both he and the judge were getting smaller on a daily basis.

59. *See Godinez*, 509 U.S. at 391.

60. *See id.* at 392.

61. *See id.* at 409-11 (Blackmun, J., dissenting). For further discussion of this point, see *infra* notes 116-21 and accompanying text.

62. *See Godinez*, 509 U.S. at 402. It should be noted, however, that *Godinez* was a habeas case, a procedural posture which may have reduced the Court's willingness to explicate its holding. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. Miami L. Rev. 539, 589-91 (1993) [hereinafter Bonnie, *Competence*].

63. One sees the same disregard for reasons in the Court's case law on interrogations. *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 373 (1979) (admitting confession by a defendant who mistakenly believed an oral confession was

A failure to inquire into the reasons for pleading guilty or waiving an attorney is antithetical to a preference for autonomy. Such an interpretation would be tantamount to ascribing weight to the random movements of our hypothetical head-nodder. A person who understands his legal situation can still act for senseless reasons (for example, "I'm going to plead guilty because I'm getting smaller") and for reasons that demonstrate a complete lack of self-regard (which, as we argue below, was the case with Moran), as well as for no reason at all (as might be the case with the head-nodder). Honoring such "decisions" undermines both goals animating the preference for autonomy alluded to earlier:[64] the goal of respecting people's true desires and beliefs and the goal of acknowledging that doing so is an important value in our society.

Godinez should thus be interpreted to require, as *Dusky* seems to mandate, a full exploration of a defendant's reasons for waiving or asserting rights, and trial courts should base their competency decisions on the rationality of those reasons. That is not what all lower courts have done, however. For instance, as described below,[65] the trial courts in the Kaczynski and Ferguson cases, both of which purported to apply *Godinez*, appeared to adopt the narrow view of *Godinez*'s understanding test.[66]

In summary, significant questions about the appropriate approach to competency in criminal cases persist after the Supreme Court's decision in *Godinez*. In particular, the decision left the degree of competency required to waive counsel and the role reasons should play in determining competency unclear. The remainder of this part aims to resolve these ambiguities, particularly the latter one.

C. *Toward a Better Competency Standard*

Professor Richard Bonnie has developed a conceptual framework for thinking about competency in criminal cases that helps explain how *Godinez* should be interpreted.[67] The most important component of this analysis is the differentiation between "competency-to-assist"

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inadmissible, on the ground that the defendant stated he understood his *Miranda* rights and thus "knowingly and voluntarily" waived them when he talked); Connecticut v. Barrett, 479 U.S. 523, 529-30 (1987) (admitting a confession by a similarly mistaken defendant, conceding that the defendant's reasons for confessing may have been "illogical" but emphasizing that the defendant said he understood the *Miranda* warnings).

64. *See supra* notes 23-24 and accompanying text.

65. *See infra* notes 101-13, 122-29 and accompanying text.

66. *See also supra* note 50 (citing cases discussing defendants' mental capacities to stand trial).

67. For Professor Bonnie's most recent exposition of his thesis, see Bonnie, *Competence*, *supra* note 62; *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behav. Sci. & L. 291, 293 (1992) [hereinafter Bonnie, *Reformulation*] (calling for "theoretical attention to the concept of competence in relation to criminal defense").

counsel (what this Article labels "assistance competency") and competency to make specific decisions (what Professor Bonnie calls "decisional competency"). Assistance competence requires that the person understand the criminal process and be able to communicate relevant facts to the players in the system (in other words, it is identical to competency to stand trial as typically defined by the courts). Decisional competency, in contrast, is only required when the defendant is entitled to make a decision about his case, such as whether to plead guilty.[68] The flaw in *Godinez* is that it conflates, or at best does not adequately distinguish between, assistance and decisional competency. The two types of competency requirements exist for different reasons and have different criteria.

Assistance competency is required, Bonnie explains, to promote dignity and reliability. To proceed against "[a] person who lacks a rudimentary understanding of the nature and purpose of the proceedings against her . . . offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but as an object of the state's effort to carry out its promises."[69] Furthermore, "[t]o proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his attorney and to the court would be unfair to the defendant and would undermine society's independent interest in the *reliability* of its criminal process."[70] Thus, to adjudicate a person on criminal charges, the person must understand the process and his role in it, and be able to communicate relevant information.

Decisional competency, in contrast, is required to implement the goal of promoting autonomy. As Bonnie argues, "[a] construct of 'decisional competence' is an inherent, though derivative, feature of any legal doctrine that prescribes a norm of client *autonomy*."[71] Such legal doctrines permeate the legal system and include the three areas of interest in this Article: pleading guilty, waiving an insanity defense, and waiving the right to counsel.

Bonnie also provides a useful framework for determining the content of the decisional competency standard. Borrowing from the treatment decision-making literature,[72] he proposes five different levels of competency, each of which subsumes the preceding level(s): (1) the ability to express a preference (the preference test); (2) the ability to understand relevant information (the understanding test); (3) the ability to give a reason for the decision that has a plausible grounding in reality (the basic rationality test); (4) the ability to give

68. *See* Bonnie, *Competence*, *supra* note 62, at 554-60.
69. *Id.* at 551.
70. *Id.* at 552.
71. *Id.* at 553.
72. *See* Paul Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 New Eng. J. Med. 1635 (1988).

reasons that are both plausible and avoid being "powerfully influenced by delusional beliefs or pathological emotions"[73] (the appreciation test); and (5) the ability to demonstrate a rational manipulation of the information (the reasoned choice test).[74]

These tests are discussed further below, but are briefly distinguished here. The preference test requires nothing more than an assent or negative response to a proposed course of action. The understanding test is similar to the narrow view of the *Godinez* standard discussed above: the defendant must be able to understand the supposed costs and benefits of the proposed course of action (as well as express a preference based on that understanding), but the defendant's reasons for acting need not be considered. In contrast, the remaining tests require an understanding of the nature and consequences of the proposed action *and* some ability to deal with those facts in a rational manner. A defendant meets the basic rationality test so long as he subscribes to non-delusional reasons for acting, while the appreciation test further requires the absence of any significant cognitive or emotional problems. Finally, the reasoned choice test (reflecting the language used by the Ninth Circuit in constructing its test for waiver of constitutional rights) requires the absence of significant pathology as well as evidence of an ability to manipulate rationally the relevant information.

Following several other commentators,[75] Bonnie argues that different standards should apply in different settings. For Bonnie, the primary variable in this regard should be whether the client's decision is in accord with, or contrary to, counsel's advice. On the assumption that counsel's recommendations can be trusted, he would only require the understanding threshold for client decisions that are in accord with counsel's advice, except for the decision to plead guilty, where he would require basic rationality in order to ensure the moral dignity of the process.[76] For decisions that run counter to defense counsel's advice, Bonnie concludes that, at a minimum, competency at the appreciation level is required and that, in some situations, a reasoned choice is mandated, on the theory that where the client and attorney disagree reliability of outcome is more likely to be threatened if the defendant's wishes are allowed to prevail.[77]

Bonnie's decisional competency framework is extremely helpful. First, it resolves the confusion created by *Godinez* and the cases

73. Bonnie, *Competence*, *supra* note 62, at 575.

74. *See id.* at 571-76.

75. Most prominent in the criminal context is Bruce Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 Rutgers L. Rev. 243 (1987) [hereinafter Winick, *Incompetency*]. *See also* Loren Roth et al., *Tests of Competency to Consent to Treatment*, 134 Am. J. Psychiatry 279, 283 (1977).

76. *See* Bonnie, *Competence*, *supra* note 62, at 577-78.

77. *See id.* at 579.

leading up to it, which failed to distinguish between assistance and decisional competency. Second, its competency hierarchy allows sophisticated discussion of decisional competency issues. We disagree, however, both with some of Bonnie's theoretical assumptions and with his applications of theory.

As noted above, Bonnie argues that assistance competency is necessary to protect the reliability of the process, as well as the dignity of the process, whereas decisional competency is focused on preserving autonomy. If he adhered to this view throughout his analysis, we would have no quarrel with him on a theoretical level. For instance, reliability and dignity interests must play a pivotal role in establishing the standard for assistance competency. A strong civil libertarian might argue that society's desire for a reliable, dignified process is irrelevant to whether a person has particular mental capacities, and therefore is also irrelevant to the competency issue.[78] But even if autonomy theory held that a person who could merely express a preference is sufficiently autonomous for purposes of communicating with the attorney, in the criminal justice context society should still demand a greater level of competence to ensure that criminal defendants have some understanding of the criminal process (the dignity concern) and can impart relevant information to the attorney (the reliability concern).

Decisional competency, in contrast, should be concerned solely with autonomy. Societal interests regarding reliability and process should play no role in determining when a person has the capacity to make a decision about his or her rights or prerogatives. Although Bonnie initially indicates that that is his view, his discussion of decisional competency standards, briefly described above[79] and discussed in more detail below, makes clear that he ultimately believes otherwise, and that is the nub of our disagreement. As indicated later in this Article,[80] all three interests—dignity, reliability and autonomy—have some role to play in determining how to deal with defendants with mental disability in decisional contexts. Only autonomy interests, however, should be relevant in determining the content of the decisional competency standard, at least with respect to the decisions that are the subject of this Article: the choices to plead guilty, waive a mental state defense, and waive the right to counsel.

Building on that premise, the correct decisional competency standard in all three of these situations, regardless of whether the defendant and counsel see eye-to-eye, is the "basic rationality and self-regard" test, a standard that falls between the basic rationality and appreciation tests. Basic rationality, as noted above, requires

78. For an example of such an argument, see Thomas Szasz, Insanity: The Idea and its Consequences 249-51 (1987).

79. *See supra* notes 68-77 and accompanying text.

80. *See infra* Part II.C.2.

non-delusional reasons for the decision (in addition to the ability to express a preference and an understanding of the relevant information). Basic self-regard requires a willingness to exercise autonomy, which can usually be demonstrated by a willingness to consider alternative scenarios.

Basic rationality and self-regard should be the minimum standard required for decisional competency for reasons to which we have already alluded. Under the lesser, understanding test, the defendant's reasoning process is irrelevant. The basic rationality test, standing alone, only assesses the person's reasons, not the process through which he arrived at them. In either case, autonomy is denigrated—the understanding test gives credence to decisions which are based on no reasons or senseless reasons, and the basic rationality test standing alone gives credence to reasons that are not the result of a deliberative thought process. Basic rationality and self-regard should also be the maximum degree of competency required, primarily because a more rigorous standard too easily allows substitution of the attorney's or the court's desires for the client's. To explore these various propositions further, consider how they apply to the two contexts emphasized by Bonnie—when the client and attorney agree, and when they disagree.

1. Attorney-Client Agreement

One might argue that, when the client and the attorney agree on a decision, the client's reasons are likely to be rational and thus the inquiry into reasons required by the basic rationality and self-regard test is unnecessary. To refrain from such an inquiry, however, ignores the client's motives, however irrational they may be. Perhaps, for instance, the client wants to assert an insanity defense, not for the reasons the attorney considers prudent, but because the defendant thinks that otherwise the attorney will shoot him. Perhaps he wants to plead guilty, in accord with the attorney's recommendation, because he doesn't care what happens to him and thus decision-making falls by default to the attorney. In such situations, concluding that the defendant has "competently" waived the defense is disrespectful both to him and to the concept of autonomy. In the first case, the defendant's patently false belief cannot be considered grounds for an autonomous decision. In the second case, his unwillingness to consider alternatives or even affirmatively delegate to the attorney the choice between them demonstrates a surrender of autonomy.

A second argument for a lower standard when client and attorney agree is purely pragmatic. In essence, the argument is that a determination of incompetence results in negative consequences that

manipulation of the competency standard can avoid.[81] For instance, a finding of incompetence to assert an insanity defense might delay adjudication and subject a defendant to prolonged hospitalization and forcible medication to "restore" competency.[82] Furthermore, once rendered competent the defendant is likely to accede to the attorney's decisions about the defense in any event. Thus, according to this argument, insistence on the basic rationality and self-regard test does more harm than good when the client agrees with the attorney. If these pragmatic concerns are to predominate, however, then a mere expression of preference for, or even a failure to object to, the attorney's position should be sufficient. The better way to deal with these concerns is not to lower the competency standard arbitrarily, but to ensure that the consequences of an incompetency finding are not onerous.[83]

Moreover, if a utilitarian analysis is to inform conclusions about the proper competency test, it is not clear that the costs of an incompetency finding outweigh the benefits. Consider again the scenario in which a defendant is found incompetent to assert an insanity defense despite his agreement with his attorney that it should be asserted. The hospitalization and delay that may accompany such a finding are not necessarily any worse than the consequence of assuming the defendant is competent. In the latter instance, one of two results will usually occur: either acquittal on insanity grounds, which is likely to result in the same "negative consequence"—hospitalization and forced medication—sought to be avoided through imposition of a low competency standard; or conviction, which is presumably no better than hospitalization. Any delay in these dispositions which might be occasioned by a finding of incompetency will often be factored into the disposition itself: if convicted, the person may (and should) receive credit for time spent involuntarily hospitalized as incompetent,[84] and if the person is instead acquitted on

81. One of first proponents of this point of view was Bruce Winick. *See* Winick, *Incompetency*, *supra* note 75 *passim*.

82. *See id.* at 251-58.

83. The most obvious reform in this regard is to ensure that both evaluation and treatment takes place on an outpatient basis whenever feasible. Although at one time most states relied upon long-term hospitalization for both purposes, in the past two decades there has been a significant movement toward the outpatient approach. *See* Melton et al., *supra* note 25, at 128-29; Thomas Grisso et al., *The Organization of Pretrial Forensic Evaluation Services: A National Profile*, 18 Law & Hum. Behav. 377, 382-88 (1994) (indicating that most states have moved to a primary emphasis on outpatient evaluations, with the clear trend being away from inpatient evaluations in recent years); *see also infra* note 196 and accompanying text (arguing that defense attorneys have been remiss in not litigating the duration of hospitalization on incompetency grounds).

84. In virtually every jurisdiction, time spent in jail because of denial of bond is credited toward one's sentence. *See, e.g.*, Federal Sentencing Guidelines, 28 C.F.R. § 2.10(a) (1999); Fla. Stat. Ann. § 907.041(4)(j) (West 1996) (crediting the time a defendant has been held pursuant to a pretrial detention order against his or her

insanity grounds, any treatment received to restore competency will help reduce, if it does not eliminate, the need for hospitalization.[85] Furthermore, of course, the treatment "delay" brings the benefit of ensuring that we know whether or not the client rationally agrees with the attorney once the delusions are eliminated.

The same type of analysis applies in the guilty plea context. If, despite agreement with the attorney's recommendation that such a plea is the appropriate one to make, a defendant is found incompetent to plead guilty, there is no reason to believe that a restored defendant who pleads guilty will receive a worse disposition than if the guilty plea had occurred initially, while he was incompetent. Further, as noted above, time spent in the hospital being restored to competency should count against time to be served in prison after the plea is made (assuming the person is even sent to prison; transfer back to a hospital after conviction may occur as well[86]). Also worth noting is the fact that even competent defense counsel, when pressured by prosecutors, judges, and docket concerns, have been known to arrange plea deals that are not in the client's best interests;[87] clients of questionable competency are most likely to be oblivious to, and therefore harmed by, such actions. In summary, it is not clear that there are any

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sentence upon conviction). Those incompetent defendants who have been denied bond should also generally receive such credit for any time spent hospitalized, and often do. *See* 38 Ill. Comp. Stat. Ann. ¶¶ 104-26(5) (West 1980); Ohio Rev. Code Ann. § 5120.17(F) (Anderson 1998); Ronald Roesch & Stephen Golding, Competency to Stand Trial 167 tbl. 6.18 (1980) (providing a table showing that the maximum sentence of those found incompetent and later convicted was from five to nine years shorter than for those found competent for the crimes of murder, rape, other violent crimes, and property crime; there was no difference in the maximum sentence for assault, however). In the jurisdictions where such credit is explicitly denied, an extremely strong equal protection argument could be made. *See* Commentary to ABA Criminal Justice Mental Health Standards Standard 7-4.15 (1989). Those defendants who are entitled to pretrial release should generally not need to be hospitalized after an incompetency finding, but rather should be treated on an outpatient basis. *See supra* note 83.

85. Acquittal by reason of insanity normally results in hospitalization for as long as the acquittee remains mentally ill and dangerous. *See* Jones v. United States, 463 U.S. 354, 370 (1983). However, if either the mental illness or dangerousness is successfully treated, release should occur. *See* Foucha v. Louisiana, 504 U.S. 71, 77 (1992).

86. *See generally* John Monahan et al., *Prisoners Transferred to Mental Hospitals*, *in* Mentally Disordered Offenders 233 (John Monahan & Henry Steadman eds., 1983) (providing data on the frequency of such transfers).

87. *See* Michael McConville & Chester L. Mirsky, *The Skeleton of Plea Bargaining*, New L.J., Oct. 9, 1992, at 1373, 1374. McConville and Mirsky assert that in the American plea bargaining system, the defense attorney's

> concern is no longer with the sufficiency of the State's evidence but with admonishing the defendant not to be foolhardy and insist upon a trial. . . . By becoming the "left hand" of the court while the prosecutor is the "right hand" the defence [sic] lawyer accepts and adopts the system of discounts and penalties which the prosecution relies upon to obtain pleas.

Id.

practical advantages to a low competency standard when counsel and client agree on decisions about waiving rights.[88]

2. Attorney-Client Disagreement

The basic rationality and self-regard test should not only be the standard when the client and counsel agree, but should also apply when they disagree. Assuming effective counsel, a client is more likely to be acting irrationally when there is such disagreement than when client and counsel agree with one another. However, as long as the client is able to give plausible, non-delusional reasons for his or her decision after demonstrating an understanding and consideration of the relevant information, that decision should be honored even when opposed to the attorney's.

Bonnie argues for a heightened competency standard in this instance because of reliability concerns,[89] ultimately endorsing the reasoned choice test "when the defendant waives representation by counsel or insists [on] acting without counsel or against the advice of counsel."[90] A client who is incompetent under the appreciation or reasoned choice tests probably is more likely than one who is competent under those tests to make decisions that will lead to erroneous determinations. This reasoning, however, trivializes the autonomy preference because it again makes the competency test dependent on factors that have nothing to do with mental capacity. If reliability is the concern, the strategy that will achieve the most reliable result should be selected and the client's wishes ignored. As argued in later parts of this Article,[91] concerns about reliability may on rare occasions affect the determination of when a competent client's wishes may be overridden, but they should not affect the predicate determination of decisional competence.

While these points cast some doubt on Bonnie's assertion that attorney-client agreement and reliability concerns should be relevant to the competency standard, they do not establish why basic rationality and self-regard, as opposed to appreciation, reasoned

88. For further discussion of the advantages and disadvantages of a low competency standard in connection with the attorney's decision to raise the competency issue, see *infra* text accompanying notes 184-209.

89. *See supra* text accompanying note 77.

90. Bonnie, *Competence*, *supra* note 62, at 579. Bonnie initially suggests that the appreciation test "strikes the appropriate balance between paternalistic intuitions and respect for the defendant's prerogatives," *id.*, except when the defendant waives counsel or insists on pleading guilty against counsel's advice, in which case "the tension between reliability and autonomy should be resolved in favor of [the reasoned choice] test of competence." *Id.* at 579-80. Ultimately, as a "simplifying proposal" he suggests that the reasoned choice test should govern whenever "the defendant waives counsel, or insists on acting contrary to counsel's advice in a manner that raises doubts about the client's rationality." *Id.* at 586.

91. *See infra* text accompanying notes 258-63.

choice, or some other more rigorous standard, is sufficient for autonomous decision-making. For that purpose, this Article relies on the work of Professor Elyn Saks, who has written extensively about competency in the psychiatric treatment context.[92] Professor Saks argues that requiring any degree of rationality beyond that demanded by the basic rationality standard is inappropriate, in light of the "pervasive influence of the irrational and the unconscious"[93] in everyone's decision-making process. As she notes, "[p]sychiatrists and psychologists have demonstrated convincingly the ever-present influence of primitive hopes, wishes, and fears on the mental lives of us all."[94] Under a heightened rationality test (as opposed to a "basic rationality" test), too many decisions would be considered incompetent.[95]

That reasoning, if accepted, means that the reasoned choice standard is too demanding. Only if a defendant provides very good reasons for a decision is this test likely to be met when the decision conflicts with the attorney's, especially if the person applying the test *is* the attorney. Of particular concern is the likelihood that, under this test, any such reasons given by a person perceived to be "mentally ill" will be considered incompetent, without any inquiry into whether the illness is substantially affecting the decision.[96] Professor Bonnie emphasizes that the reasoned choice test focuses on a person's ability to process information rationally, rather than the actual decision reached. He also concedes, however, that "if others consider an outcome to be misguided or irrational, this may signal a problem with the defendant's reasoning process."[97] Duncan Kennedy put the matter more forthrightly and more accurately: once one moves beyond the "extreme" cases, "the question of capacity is hopelessly intertwined with the question of what the other wants to do in this particular case."[98]

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92. *See, e.g.*, Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. Rev. 945, 948-61 (1991) (evaluating competing standards of competency to refuse medical treatment).

93. *Id.* at 950.

94. *Id.*

95. *See id.*

96. *Cf.* Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. Crim. L. & Criminology 48, 60 (1996) (noting that a large percentage of attorneys assert an insanity defense without consulting their client despite doubts about their clients' capacity "to understand the decisions they were called upon to make").

97. Bonnie, *Competence*, *supra* note 62, at 575.

98. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 644 (1982). Under Bonnie's definition of reasoned choice, a person who fails one of the other tests can still, in theory, meet the reasoned choice test; an irrational person can often make logical connections between (delusional) premises and conclusions. However, as the text asserts, in practice evaluating the quality of thought "process" very often, and perhaps inevitably, requires consideration of

The appreciation test—which, as Bonnie would define it, renders a person who is "powerfully influenced by delusional beliefs or pathological emotions" incompetent—is not as clearly submissive to the lawyer's opinion or as dismissive of the mentally ill person's. But that is precisely why the cognitive part of that test (referring to delusional beliefs) is problematic. Any standard that tries to split the difference between basic rationality and "reasoned" rationality is too vague to provide meaningful guidance, and thus it too is likely to lead to findings of incompetency that are unmerited. Additionally, it is a well-known feature of mental disorders that a person who has delusions about some things can be perfectly rational about others.[99] By definition, a person who fails the appreciation test but meets the basic rationality test has no delusional beliefs about the decision being made; calling that decision incompetent would again be tantamount to saying that no person with significant mental illness can make competent decisions about anything.

The "affective" component of the appreciation test, having to do with whether the individual is influenced by "pathological emotions," is also very vague. But it does encompass an important aspect of autonomy—impairment of volition (as opposed to impairment of cognition). Rather than speaking of decisions "powerfully influenced" by such impairment, this Article adheres to the tighter basic self-regard formulation. That test is designed to focus attention on a client's willingness to consider alternatives. Unlike a cognitive test, it does not evaluate the premises of the ultimate decision, nor does it require inquiry into the "rationality" of the reasoning process; it only requires that such a process took place. While the basic self-regard inquiry does call for some value judgment, it does not approach the type of judgment required by the reasoned choice or appreciation standards.[100]

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thought content. In any event, this Article will continue to treat the reasoned choice test as a "rationality-plus" test to maintain its position at the top of the competency hierarchy, a position that is probably consistent with the Ninth Circuit's use of that term. *See supra* text accompanying notes 27-35 and *infra* note 100.

99. *See, e.g.*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 297 (4th ed. 1994) ("[A] common characteristic of individuals with Delusional Disorder is the apparent normality of their behavior and appearance when their delusional ideas are not being discussed or acted on.").

100. In *Sieling*, the Ninth Circuit argued for a more rigorous competency standard when the decision is of great "import," and put the decisions to plead guilty and waive counsel in that category. *See* Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973). Yet, as Saks argues, a rule that requires more competence simply because the decision is viewed as more "important" in some objective sense minimizes the contextual factors, not to mention the defendant's desires, connected with each case. *See* Saks, *supra* note 92, at 992-98. For instance, as Kaczynski's case demonstrates, some individuals may consider the decision about whether to assert an insanity defense much more important than any other, even though judges may think otherwise. *See supra* text accompanying notes 1-8. On the other hand, as earlier discussion illustrated, some decisions, such as the right to counsel, require an ability to *understand* more complex

These various points are admittedly abstract. They are best explicated through an analysis of recent instances in which competency was an issue.

D. *Competency in the Unabomber Case and Other Cases*

The case of Ted Kaczynski illustrates the differences between the competency standards just outlined, as well as the difficulties inherent in any attempt to evaluate competency. Kaczynski's lawyers decided very early on that the only viable defense for their client was some type of mental abnormality claim. Kaczynski, on the other hand, opposed such a defense.[101] At one point he and his attorneys did reach an agreement that discarded the insanity defense but allowed the attorneys to argue that his mental illness negated his intent to murder. As part of this agreement, the attorneys stipulated that they would call only lay witnesses, not psychiatric experts, during the trial stage.[102] Even this limited arrangement gave Kaczynski significant pause, however. As he stated to the trial judge, "Your Honor, as you know, I do not agree with counsel concerning major strategic decisions, but I've become aware that legally I have to accept those decisions whether I like them or not."[103]

What lay behind Kaczynski's resistance to mental state defenses? Unfortunately, information about Kaczynski's thought process concerning the psychiatric claims, his plea of guilty, and his desire to represent himself is incomplete, perhaps because the import of *Godinez* acted to de-emphasize the need for information about his motivation. From what is available to the public, it appears that the primary reason for Kaczynski's resistance to his lawyer's strategy was what his attorneys called "a deep and abiding fear" that he would be perceived as mentally ill, a fear he had possessed "for his entire life."[104] Bolstering this theory are statements in his famous Manifesto, suggesting that he would rather die than be subjected to the indignity of being called mentally ill.[105]

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information than other decisions. *See supra* text accompanying notes 49-56. In this sense, the competency level is heightened when the issue is competency to waive counsel.

101. *See* Jackson, *supra* note 4, at 40.

102. *See* Pre-Trial Transcript of *In Camera* Discussion (Redacted), *Kaczynski*, No. CR-S-96-259GEB, 1997 WL 812617 (E.D. Cal. Dec. 24, 1997); Order, United States v. Kaczynski, No. CR-S-96-259GEB, 1997 WL 797428F, at *1 (E.D. Cal. Dec. 22, 1997); *see also* Order, *Kaczynski*, No. CR-S-96-259GEB, 1998 WL 226796, at *2, *7 (E.D. Cal. May 4, 1998) (describing the December 22 agreement).

103. Pre-Trial Transcript Proceedings, *Kaczynski*, No. CR-S-96-259GEB, 1998 WL 10757, at *5 (E.D. Cal. Jan. 7, 1998).

104. Official Trial Transcript, *Kaczynski*, No. CR-S-96-259GEB, 1998 WL 4657, at *10 (E.D. Cal. Jan. 8, 1998).

105. *See* Theodore Kaczynski, Manifesto (visited Mar. 8, 2000), <http://uk.dir.yahoo.com/government/Law/Cases/Theodore_Kaczynski_Case/Unabomber_Manifesto> para.168 ("To many of us, freedom and dignity are more important than a long life

On the surface, this apparent willingness to trade death for diagnosis, although perhaps not a choice most people would make, is not grossly irrational. Indeed, one could argue that this reasoning suffices to meet even the reasoned choice test, given the stigma attached to mental illness and mental state defenses.[106] Psychiatrists, however, would not stop the inquiry at this surface level. The evidence suggests that Kaczynski not only did not want to be labeled mentally ill, but also that he truly believed he was not mentally ill.[107] That belief, many psychiatrists would say, is demonstrably false in light of the large number of mental health professionals who concluded that Kaczynski was suffering from paranoid schizophrenia.[108] Any decision to waive the insanity defense that is based on such a belief could not be considered the product of reasoned choice as defined in this Article,[109] and clearly would be strongly influenced by "pathological" processes (thus failing the appreciation test as well).

The outcome under the basic rationality standard is not as clear, however. That is because the conclusory label "mental illness," and even the diagnosis "paranoid schizophrenia," are not objective facts that can be proved or disproved. The unreliability of psychiatric diagnoses is well-documented;[110] the amorphous and politically charged nature of the term "mental illness" is also well-recognized.[111]

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or avoidance of physical pain."). Kaczynski recently repeated similar sentiments to Time magazine. *See* Stephen J. Dubner, *I Don't Want to Live Long. I Would Rather Get the Death Penalty than Spend the Rest of My Life in Prison*, Time, Oct. 18, 1999, at 44, 46 ("[H]e will not tolerate being called, as he put it, 'a nut,' or 'a lunatic' or 'a sicko.' He says he pleaded guilty last year only to stop his lawyers from arguing he was a paranoid schizophrenic . . . .").

106. *See* Deborah C. Scott et al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 Hosp. & Community Psychiatry 980, 982 (1990) (stating that insanity acquittees are the "most despised" group of individuals in society).

107. The term psychiatrists typically use to describe this phenomenon is "lack of insight." Despite the Catch-22 nature of the construct (if you have insight into your mental illness, you admit you are mentally ill; if you do not, that is proof that you are mentally ill), lack of insight is one of the most common "symptoms" considered diagnostic of mental illness and of incompetency. *See* Grant H. Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 San Diego L. Rev. 343, 432 (1995) ("Most psychiatrists equated incompetence with either their finding of mental disorder or the patient's unwillingness to acknowledge mental disorder.").

108. *See supra* note 3 and accompanying text.

109. *See supra* note 98 and accompanying text.

110. Although laboratory research suggests a relatively high level of agreement between different diagnosticians, field research indicates that reliability even for major diagnoses such as schizophrenia (41%), mood disorders (50%), and organic disorder (37%) is low. *See* Paul B. Lieberman & Frances F. Baker, *The Reliability of Psychiatric Diagnosis in the Emergency Room*, 36 Hosp. & Community Psychiatry 291, 292 (1985).

111. *See* Stephen J. Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527, 605-06 (1978) ("[P]resent definitions of

More importantly, diagnoses and the concept of mental illness are constructs that are not empirically verifiable, but rather exist solely as convenient methods of describing certain constellations of behavior.[112] Given these facts, a belief that one is not "mentally ill," even one that is contradicted by all the experts, cannot by itself be said to be patently false.

Assume, on the other hand, that the evidence that Kaczynski is suffering from mental problems is at the symptom level. That is, assume that Kaczynski is shown to believe that the people to whom he mailed bombs were out to exterminate him personally, despite the absence of any objective evidence to that effect. This belief is demonstrably false. If part of the reason he rejects the insanity defense is because he insists on his victims' ill will toward him, then he fails even the basic rationality test. However, we have no indication, at least from public records, that Kaczynski is delusional in this sense. In the absence of such evidence or any other evidence of clearly false beliefs,[113] and assuming he understands the relevant information, he was competent to make decisions about mental state defenses and to fire attorneys who insisted on such a defense.

As this analysis demonstrates, the basic rationality and self-regard standard is easier to meet than the appreciation or reasoned choice standards. It will still result in numerous incompetency findings, however, because it still requires that the client be able to express a preference, that the client understand and consider the relevant information, and that the client have no patently false beliefs about that information or the reasons for the decision. The following discussion demonstrates this point by looking at the facts of *Godinez*

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mental disorder cover such a wide range of behavior that vast percentages of the population may be considered disordered, including most persons whom the legal system would not consider crazy or different enough to warrant special treatment.").

112. *See id.* at 607 ("Unlike much physical disorder that often can be verified by various tests that measure pathology (whether or not the cause of the symptom, syndrome, or condition is known), there is no objective, empirical referent of *mental* disorder other than crazy behavior itself."). Interestingly, Kaczynski made similar points in his Manifesto. *See* Kaczynski, Manifesto, *supra* note 105, para. 119 ("The concept of 'mental health' in our society is defined largely by the extent to which an individual behaves in accord with the needs of the system and does so without showing signs of stress"), para. 155 ("Our society tends to regard as a 'sickness' any mode of thought or behavior that is inconvenient for the system, and this is plausible because when an individual doesn't fit into the system it causes pain to the individual as well as problems for the system.").

113. It is possible that the beliefs underlying Kaczynski's necessity argument were delusional. For instance, he may have believed that the world will explode in 40 years if all technological advancements are not completely eliminated. However, nothing in his written works suggests his beliefs were that irrational in this sense. *See generally* Dubner, *supra* note 105, at 49 ("In the Unabomber's mind, society was in desperate need of a brave and brazen savior who wouldn't let murder stand in his way. . . . What Kaczynski wants is a true movement, 'people who are reasonably rational and self controlled and are seriously dedicated to getting rid of the technological system.'").

v. Moran,[114] *People v. Ferguson*,[115] and two lesser-known cases, one described by Professor Rodney Uphoff and one by Professor Josephine Ross.

As previously noted, Moran fired his attorneys, pled guilty and refused to present evidence in mitigation at sentencing.[116] Both evaluating psychiatrists, as well as all the courts that considered the matter, agreed that Moran understood his legal situation.[117] He also undoubtedly knew that a failure to present evidence at sentencing would not improve his chance of avoiding a death sentence. In other words, he was competent in the assistance sense and met the understanding test with respect to pleading guilty; he probably also met the understanding standard with respect to waiving counsel, although that conclusion is more doubtful.[118] The "reasons" for his actions, to the extent they can be gleaned from the record, appeared to be a conclusion that he deserved the death penalty and a sense that nothing, not even his life, was worth fighting for.[119] While these reasons might be considered irrational (thus failing the reasoned choice test), and while his decisions appeared to be "powerfully influenced" by his depressive emotions (thus failing the appreciation test), they were not based on clearly false assumptions. Moran may indeed have deserved the death penalty, and the value of his life is not something that can be calculated with any certainty. Under the basic rationality test, then, the outcome of the competency analysis is the same as that reached by the *Godinez* Court (although under the basic rationality test, in possible contrast to the Court's test, substantial inquiry is made into the reasons for Moran's decision).

Our analysis of Moran's competency would not end there, however. There is a strong argument that even if Moran met the basic rationality standard he did not meet the basic self-regard standard, because he was unwilling to consider the alternatives of going to trial and presenting evidence at sentencing. As he subsequently stated, "I

114. 509 U.S. 389 (1993).

115. 670 N.Y.S.2d 327 (App. Div. 1998).

116. *See* Moran v. Godinez, 972 F.2d 263, 264-68 (9th Cir. 1992).

117. *See Godinez*, 509 U.S. at 392-93; *Godinez*, 972 F.2d at 268.

118. The caveat stems from our belief that waiver of counsel requires comprehension of the various roles an attorney carries out in the course of trial and sentencing. *See supra* text accompanying notes 49-56. The answers Moran gave in this regard were "monosyllabic" and thus the amount of evidence on this point is less than ideal. *See Godinez*, 509 U.S. at 411 (Blackmun, J., dissenting). On the other hand, Moran was of average intelligence and the Ninth Circuit subsequently characterized the trial judge's questions about Moran's understanding of the consequences of waiving counsel as "probing and thorough." Moran v. Godinez, 40 F.3d 1567, 1575 (9th Cir. 1994), *amended by* 57 F.3d 690 (9th Cir. 1995) (upholding Moran's death sentences).

119. *See Godinez*, 509 U.S. at 409-10 (Blackmun, J., dissenting) (describing doctors' conclusions that Moran was "very depressed" and that his purpose was to prevent all presentation of mitigating evidence at sentencing).

guess I really didn't care about anything.... I wasn't very concerned about anything that was going on... as far as the proceedings and everything were going."[120] Had his thought process involved an evaluation of the evidence against him, he would have been competent under this standard. Instead, his reasoning appeared to represent a complete abdication of autonomy.[121]

Colin Ferguson, like Moran, was charged with several counts of murder and, like Moran, fired his attorneys.[122] The prosecution's case was based on the reports of a staggering number of eyewitnesses, all of whom claimed that Ferguson boarded a commuter train in Long Island and shot at a large number of people (six were killed and nineteen wounded).[123] His attorneys had wanted to assert a "black rage" insanity defense, to the effect that Ferguson had been driven into psychosis by an oppressive white society. Ferguson rejected both the attorneys and their theory, however, and instead insisted that a white man had stolen his gun and carried out the crimes.[124] Both psychologists who evaluated his competency found Ferguson to be an articulate, well-educated person who, while suffering from paranoid personality disorder, was competent to stand trial.[125] The trial judge conducted his own inquiry of Ferguson and found him competent to stand trial and competent to waive his right to counsel.[126] Ferguson proceeded to represent himself in a fashion that observers unanimously considered bizarre. For instance, he told the jury there were ninety-three counts against him because the year was 1993, announced that he would call as "a witness a parapsychologist and exorcist who would testify that government agents had planted a microchip" in his head, and asked the state's ballistics expert whether the bullet fragments had been tested for "alcohol or substance abuse."[127]

Ferguson's case exposes even more clearly than Moran's why the Supreme Court's decision in *Godinez* should not be interpreted in the narrow sense outlined earlier.[128] The focus of both the experts and the

120. *Id.* at 410-11.

121. Moran's suicide attempt a few months before the plea hearing is also noteworthy. *See Godinez*, 972 F.2d at 265.

122. *See* Van Biema, *supra* note 9, at 66.

123. *See* John T. McQuiston, *Adviser Says L.I.R.R. Suspect Prefers Conviction to Insanity Finding*, N.Y. Times, Feb. 10, 1995, at B5.

124. *See* Van Biema, *supra* note 9, at 66.

125. *See* Robin Topping, *Weighing Competence vs. Sanity*, Newsday, Feb. 5, 1995, at A6 (Nassau & Suffolk ed.).

126. *See id.*

127. For a description of these facts, see Michael L. Perlin, *"Dignity was the First to Leave":* Godinez v. Moran, *Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 Behav. Sci. & L. 61, 73 (1996).

128. Although *Godinez* only established the federal standard, it was handed down before *Ferguson* commenced and the state court in that case applied a test "totally consistent" with that ruling. *Id.* at 72.

court in *Ferguson* focused on whether Ferguson understood the criminal process and the consequences of representing himself. Little attention was paid to Ferguson's reasons for wanting to forego the insanity defense and proceed pro se. Had there been such an inquiry, as structured by the basic rationality and self-regard test, it is likely Ferguson would have been found incompetent.

Although information about Ferguson's reasons for avoiding an insanity plea and wanting to represent himself is scarce, one of the psychologists who evaluated Ferguson opined to the press that these decisions were "an obvious choice on his part," because going to jail with sane inmates for a determinate period of time was preferable to spending the rest of his life in a mental hospital and because "he doesn't wish to be viewed as a crazy person."[129] If those were Ferguson's sole reasons for waiving the insanity defense and counsel, he would be competent in both the assistance and decisional senses to the same extent as Kaczynski. Ferguson, however, also appeared to believe that he did not commit the crimes, despite overwhelming evidence to the contrary. If one of the reasons for rejecting the insanity defense was a belief that he did not shoot the victims, and his reason for firing his attorneys was that they would not pursue that line of defense, his decisional competency is in much greater doubt. Under such circumstances, *Godinez* notwithstanding, he should have been found incompetent to waive counsel.

Cases described by Professors Uphoff and Ross raise a similar type of issue. In Professor Uphoff's case the defendant, who was clearly suffering from psychotic symptoms, refused to consider a motion for a lesser-included offense instruction that the attorney believed was the only viable defense option.[130] Over time, the defendant gave several reasons for this stance: he acted in self-defense, he did not kill the victim at all, and the victim was in fact still alive.[131] The latter reason, and probably the second reason as well, would render the defendant incompetent to make the decision about the lesser included instruction under a basic rationality and self-regard test.

The defendant in Professor Ross's case insisted that she had not been present when the victim was brushed by a car and then assaulted with a tire iron, even though the police officer who arrived at the scene moments after the assault found the defendant there and the victim unequivocally identified her as the assailant. Any possibility of mistaken identification was very slim because the defendant had a large purple circle on her forehead.[132] Later diagnosed with post-

129. Topping, *supra* note 125.

130. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 77-83 (describing State v. Johnson, 395 N.W.2d 176 (Wis. 1986)).

131. *See id.* at 79-80.

132. *See* Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense*

traumatic stress disorder,[133] the defendant also admitted that the car involved in the assault was hers and that no one else drove it.[134] Under these circumstances, she would also fail the basic rationality test.

These applications of the basic rationality and self-regard test illustrate not only the substance of that standard but also the complex nature of mental disorder and its relationship to competency. Unfortunately, reaching an understanding as to how competency is to be defined in the criminal context is only the beginning of the task. Still necessary is a framework for deciding who makes the competency determination and what should happen when a person's competency is suspect. This Article argues that the defense attorney should play a crucial role both in investigating competency and in assuring that appropriate steps are taken when competency is at issue. The precise scope of that role is influenced by a complex array of ethical concerns, which the next part describes and reconciles.

II. AN ETHICAL PERSPECTIVE

A. *Ethical Uncertainty in Cases Involving Mentally Disabled Clients*

Commentary on the Kaczynski trial in the popular media rarely included discussion of the ethical dilemma Kaczynski's refusal to avail himself of an insanity defense created for his lawyers. This omission was troubling because the silence suggests that the attorneys' ethical obligations were defined and bounded by the United States Supreme Court's case-based standards for courts facing competency decisions. Constitutional minima generally impose fewer and lesser obligations on lawyers than ethical norms and rules. Moreover, competency determinations and ethical standards are interdependent and interwoven because, under most circumstances, the defense lawyer plays a critical role in bringing issues of mental health to the court's attention. It is artificial and impractical to isolate these aspects of the problem from one another.

The relevant ethical rules governing most lawyers are contained in the American Bar Association's Model Rules of Professional Conduct.[135] Those rules, as written, are inadequate to address the

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Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense, 35 Am. Crim. L. Rev. 1343, 1348-51 (1998) (describing the case of "Lee Teplinski," a pseudonym).

133. *See id.* at 1368.

134. *See id.* at 1351.

135. Model Rules of Professional Conduct (1999). Forty-one states have disciplinary codes based on the Model Rules, although the adopted versions of some rules vary considerably from state to state. *See* Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards xix-xx (1999). For state variations of Model Rule 1.14, see *id.* at 159.

legal complexities and ethical nuances of the Kaczynski, Moran, and Ferguson cases and other cases involving clients with mental disabilities.[136] Three deficiencies are of particular interest for the purposes of this Article.

First, the rules give very little guidance to the attorney as to how to evaluate a client's mental disability. Model Rule 1.14, entitled "Client Under a Disability," provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interests.[137]

This provision tells the lawyer that the client who has a "mental disability" that "impairs" the client's "ability to make adequately considered decisions" or to "adequately act in the client's own interests" may require special treatment. As explained in Part I, the terms "mental disability" and "impairment" gloss over the variation and complexities of mental health determinations made by non-legal professionals.[138] The references to the client's "adequacy" at making "considered decisions" and acting in his "own interests" do not provide any additional aid.

Second, the Model Rules provide virtually no guidance about the steps a criminal lawyer should take if a client has a significant mental disability. Section (b) of Rule 1.14, excerpted above, calls for appointment of a guardian or other "protective action." Yet appointment of a guardian to make decisions for a criminal defendant is extremely unusual, and no further examples of "protective action" are given. The provision therefore does not address the important issues of whether a criminal defense lawyer must raise the incompetency issue with the client, seek treatment to restore the incompetent client's competency, or bring the defendant's mental health to the court's attention.[139]

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136. *See* Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 Stan. L. & Pol'y Rev. 241, 244-45 (1998).

137. Model Rules of Professional Conduct Rule 1.14.

138. Comment 1 to Model Rule 1.14 does state that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being" and concedes that "to an increasing extent the law recognizes intermediate degrees of competence."

139. *See* Model Rules of Professional Conduct Rule 1.14. Our criticism here is a practical one. Some scholars, however, object to the protective action directive because they prefer the advocacy model which they believe Model Rule 1.14 arguably endorses. *See generally* James R. Devine, *The Ethics of Representing the Disabled*

Third, the Model Rules do not inform the lawyer when a client's decisions about matters likely to arise when the client is mentally disabled must be followed. Model Rule 1.2, entitled "Scope of Representation," provides:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.[140]

Decisions to pursue an insanity or diminished capacity defense, to waive counsel, or to represent oneself are not mentioned.[141] The considerable difficulties presented by a potentially incompetent criminal defendant who disagrees with the attorney's strategy are dealt with only indirectly. The Comment to Model Rule 1.2 simply states: "In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14."[142]

Because of these ambiguities, a lawyer in a Model Rules jurisdiction who has a mentally disabled client like Kaczynski is ethically at sea.[143] Attempting to maintain, consistent with Rule 1.14(a), "a normal client-lawyer relationship" with such a client, the defense attorney might decide to do precisely what the client desires, which in the Unabomber case would mean avoiding psychiatric evaluation and the assertion of a mental state defense. This approach, however, to the extent it involves hiding evidence of incompetency from the court, could violate the duty of candor toward the tribunal.[144] It also involves the lawyer in facilitating the conviction (and, in Kaczynski's case, execution) of a defendant who may not be legally culpable, a course which may be morally repugnant to the attorney and society. It thus may result in something less than zealous advocacy on behalf of the defendant (if the lawyer does not withdraw), another possible violation of the Rules.[145] At the same time, such allegiance to the

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Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma? 49 Mo. L. Rev. 493, 515 (1984) ("[Rule 1.14] makes a valiant attempt to resolve the best interests/advocacy dichotomy by adopting a philosophy which sees the lawyer as an advocate for the disabled person.").

140. Model Rules of Professional Conduct Rule 1.2.

141. *See id.*

142. Model Rules of Professional Conduct Rule 1.2 cmt. 2.

143. *See* Ross, *supra* note 132, at 1348-51.

144. *See* Model Rules of Professional Conduct Rule 3.3(a) (stating that a lawyer "shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client" or "offer evidence that the lawyer knows to be false").

145. *See* Model Rules of Professional Conduct Rule 1.1 (requiring a lawyer to "provide competent representation to a client"), Rule 3.1 (stating that "[a] lawyer shall not . . . assert or controvert an issue . . . unless there is a basis for doing so that is

client's views may be unnecessary, depending on what Rule 1.2(a) means when it says the lawyer need follow only the client's "objectives of representation."

Attempting instead to take "protective action" based on the conclusion that a client with a mental disability cannot "adequately act in [his] own interests,"[146] the lawyer might choose to make decisions about representation that the lawyer thinks best, regardless of the client's wishes.[147] In this scenario, defense counsel and the defendant work at cross-purposes; the lawyer attempts to cajole, manipulate, or coerce the client into, for example, pleading insanity, and uses the power of the court to pursue that aim if necessary. Ironically, this situation may entail more violations of explicit ethical provisions than the first option; in particular, it potentially breaches the lawyer's duties of loyalty, confidentiality, and zealous advocacy.[148]

Finally, a lawyer representing a mentally disabled client might decide that the appropriate protective action is to alert the court to the client's possible incompetency and let experts and the judge determine whether he should follow the course of action described in the first scenario (if the client is competent) or the second (if the client is not). This option, however, poses some of the same ethical issues as the second scenario if the competency motion conflicts with the client's wishes or with the client's interests (for example, because involuntary hospitalization for evaluation and treatment is harmful in some way). Even if these conflicts do not arise, a judicial decision may not resolve all ethical quandaries. An official finding that someone like Kaczynski is competent still does not tell the lawyer whether he has to abide by all of the client's decisions (for example, about the insanity defense). If instead the judge finds the client incompetent, when, if ever, should the lawyer move to act as de facto guardian (or have one appointed) rather than accede to the likely judicial preference for involuntary treatment to restore competency?

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not frivolous").

146. Model Rules of Professional Conduct Rule 1.14(b).

147. The best interests approach has been the subject of scholarly criticism primarily because it is deemed paternalistic. *See* Elliott Andalman & David L. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 Miss. L.J. 43, 48 (1974) (condemning the best interests approach as paternalistic and premised on a fundamental misunderstanding of the lawyer's role); Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 633-37 (1981) (detailing the difficulties lawyers face in a best interests analysis); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515, 547 (arguing that Model Rule 1.14 endorses "benign paternalism").

148. *See* Model Rules of Professional Conduct Rules 1.2 ("Scope of Representation"), 1.3 ("Diligence") & 1.6 ("Confidentiality of Information"); *see also* Tremblay, *supra* note 147, at 517-18 (criticizing Model Rule 1.14 for sacrificing confidentiality and loyalty).

The Unabomber case, from which these scenarios are derived, is admittedly unusual. But its atypicality reveals omissions and contradictions in the ethical codes that are troublesome to most lawyers, not just those who represent clients like Theodore Kaczynski. At bottom, as stated at the outset of this Article, his case is one in which basic values of criminal law—client autonomy and the goal of assuring that only the culpable are punished—come into conflict. It also illustrates analogous ethical conflicts between the principles of client control of the attorney-client relationship and a lawyer's fiduciary obligations to act in the best interests of a client who may not possess sufficient rationality and self-regard to be able to make important decisions. Given these conflicts, the Model Rules' failure to provide more guidance is understandable to some extent. But a better methodology exists for choosing among what will always be imperfect alternatives.

B. *Consequentialism*

That one cannot glean such a methodology from the Model Rules reflects more than the fact that the issues are difficult. The American Bar Association's adoption of the Model Rules represented a shift to an American Law Institute Restatement-style list of disciplinary prohibitions and away from the broader sweep and aspirational reach of the predecessor Code.[149] The Model Rule drafters did not endeavor to adhere consistently to any one ethical theory, nor did they attempt to capture all of the values, interests, and principles relevant to all of the ethical problems a lawyer might confront.[150] This conservative approach has certain strengths, not the least of which is that it is more respectful of an individual lawyer's judgment about matters of morality and professional judgment. A minimalist

149. *See generally* Charles W. Wolfram, Modern Legal Ethics 56-63 (1986) (discussing the evolution from the ABA's Model Code of Professional Responsibility to the promulgation of the Model Rules of Professional Conduct).

150. The Preamble to the Model Rules states:

> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules . . . prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Model Rules of Professional Conduct Preamble, para. 6. Charles Wolfram has argued that the absence of ethical consideration in the Model Rules is not the equivalent of an assertion that morality is unimportant:

> To the contrary, the refusal of the drafters of the Model Rules to engage in a drafting process in which some lawyers would be required to yield to the views of others on matters of personal morality implies that matters of conscience are too important to be logrolled in the process of arriving at compromised statements of professional morality.

Wolfram, *supra* note 149, at 70.

approach is also more flexible and more reflective of the prevailing moral relativism. Its primary weakness is the absence of a set of organizing principles or prime directives which could provide lawyers with guidance in those difficult situations when the ethical rules give conflicting or ambivalent messages, and lawyers acting in good faith and with the best of intentions do not know what to do.

At the same time, it is clear that no *single* ethical theory can provide such organization and guidance. That possibility is suggested by the Model Rules themselves. Despite the desire to avoid a theoretical framework, and perhaps because of it, the Rules in fact represent an unstructured amalgam of such theories. In some respects, for instance, the Model Rules are deontological, or duty-based.[151] They elevate certain duties to normativity: client control, and the attorney's duties of confidentiality, loyalty, and conflict avoidance.[152] As the Kaczynski case illustrates, however, a deontological approach is fragile, inflexible, and has a short shelf-life outside the theoretical realm. Is it either possible or desirable to impose any of the duties listed in the Model Rules–competency, loyalty, avoidance of conflicts, candor to the tribunal, confidentiality, and so on–without exceptions and qualifications? Can any of them be characterized as absolute? Which duty should a lawyer favor when these duties (unavoidably) conflict? No principle of Kantian morality gives us the answer to these questions, which must be answered by practicing lawyers every day.[153]

In other respects, the Model Rules adopt a rule utilitarian ethic. According to this theory, the appropriateness of a rule is judged by its overall ability when implemented to produce the greatest good for the greatest number.[154] Examples of applied rule utilitarianism are the Model Rules' prohibitions against undocumented business transactions between attorneys and clients and oral contingency fee agreements,[155] and their imputation of conflicts of interests to other lawyers in a firm based on presumptions of shared confidences.[156] The faults of utilitarianism center around the difficulty and unworkability of designating any single group to determine the "greatest good for

151. *See id.* at 72-75 (defining deontological and teleological approaches); Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility: Problems and Materials 19-21 (7th ed. 2000) (comparing consequential and deontological standards).

152. *See* Model Rules of Professional Responsibility Rules 1.2, 1.6 & 1.7 (1999).

153. *See* Wolfram, *supra* note 149, at 74-75.

154. *See id.* at 72-74; Morgan & Rotunda, *supra* note 151, at 20. Rule utilitarianism is often distinguished from act utilitarianism, which focuses cost-benefit analysis on the case at hand without consideration of a decision's effect on future cases. *See* Morgan & Rotunda, *supra* note 151, at 20.

155. *See* Model Rules of Professional Conduct Rules 1.8(a) ("Conflict of Interest: Prohibited Transactions") & 1.5(c) ("Fees").

156. *See* Model Rules of Professional Conduct Rule 1.10 ("Imputed Disqualification: General Rule").

the greatest number." For instance, respect for, and deference to, client preferences would always be vulnerable under a greatest good analysis because, in any given situation, sacrificing a client's prerogatives and arguments may benefit many more than it harms.

Some would suggest, as a third general approach, that the rules are, and should be, rights-based, in that they delineate the rights of clients, lawyers, and others (including tribunals, witnesses, third parties, the justice system and society).[157] This approach shares many of the flaws of a deontological system. Does a preference for the rights of clients make the other rights meaningless? How does one map the borders where these rights meet?[158]

This Article advocates the adoption of a fourth theory that is a mixture of these approaches, but one that, as Part III demonstrates, is more structured, explicit, and complete than the amalgam represented by the Model Rules: a consequentialist problem-solving methodology. Consequentialism posits that the appropriateness of a lawyer's advice, decisions and actions should be judged by their consequences.[159] It differs from utilitarianism because it encompasses and vindicates values other than the "greatest good for the greatest number." These other values would derive primarily from duty- or rights-based analysis. Despite the difficulties with these latter approaches, outlined above, an ethical theory couched in the language of duties and rights and the conflicts among them is an important element of a more pragmatic methodology because it is reflective of the way contemporary lawyers think and resolve problems. Entirely rejecting discussion of duties and rights would have its own unfortunate consequences.[160]

Under a consequentialist theory, then, a lawyer should identify both the rights and other values to be advanced or protected and the harms and benefits that might accrue, and then make a thoughtful and considered choice. Any number of values could be considered, depending upon the situation. But, given the focus of this Article, a value that must be emphasized—one to which a lawyer must adhere when representing a criminal defendant—is the predominant position of the client's aims. This proposition follows from the premises of the adversarial system and the preference for autonomy. It would not preclude a lawyer from considering the impact that a particular decision might have on his own sense of morality or fairness and the lawyer's relationship with the client. Nor would it be unethical for the lawyer to be influenced by emotions such as idealism, pity, love,

157. *See* Morgan & Rotunda, *supra* note 151, at 20-21; Wolfram, *supra* note 149, at 74-75.

158. *See* Morgan & Rotunda, *supra* note 151, at 20-21; Wolfram, *supra* note 149, at 74-75.

159. *See* Morgan & Rotunda, *supra* note 151, at 19-20.

160. *See* Wolfram, *supra* note 149, at 74 & n.42.

righteous anger, or a desire for vindication. However, if the lawyer finds that he cannot do what the client directs and that the only factors cutting against following the client's instructions are personal to the lawyer (rather than, say, due to a belief that the client is incompetent), he should probably withdraw from representation.

Even with a thumb on the scale in favor of doing what the client wishes, consequentialism is more flexible than either the deontological or rights-based approaches standing alone. As one of the authors of this Article has described more fully elsewhere,[161] consequentialism authorizes and, in many situations, compels the lawyer to offset the necessary partiality of his own views and limited knowledge, not only by forcing the lawyer to pay attention to the client, but by requiring consideration of a broad range of legal and non-legal factors that may often require consulting other professionals.[162] It prevents the lawyer from retreating into self-evident truths and seeking the easy solace of shibboleths such as the duty of confidentiality. Conceptualizing people or situations in extreme or absolute terms is rejected as unrealistic and, therefore, impractical.

C. *Lawyers as Fiduciaries*

Consequentialism counsels against extremes even with respect to the assumption that the competent client should control the representation. Although there is a preference for client control under our construction, a pure client-control model of the attorney-client relationship is just as incomplete, and therefore just as unworkable, as a system based on pure paternalism. Neither of these doctrines responds adequately to the everyday ethical challenges of law practice. The insight of the consequentialist approach adopted in this Article is that advocacy is premised on autonomy. When autonomy is absent or incomplete (because the client is not decisionally competent), advocacy cannot exist without a conscious assessment of the client's best interests by another person.[163] This approach is preferable to the *unconscious* paternalism and projection that is likely to dominate the relationship when the attorney tries to conform to the directive to "maintain a normal client-lawyer relationship with the [mentally disabled] client."[164]

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161. For further development of these ideas, see Amy R. Mashburn, *Pragmatism and Paradox: Reinhold Niebuhr's Critical Social Ethic and the Regulation of Lawyers*, 6 Geo. J. Legal Ethics. 737 *passim* (1993).

162. *See* Robert Ashford, *Socio-Economics: What Is Its Place In Law Practice?* 1997 Wis. L. Rev. 611, 617, 621 (arguing that legal ethics requires a socio-economics approach, including the requirement to consult with experts in other fields).

163. David Luban has described this approach as "justifying paternalism." David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 460-61. The fiduciary duty notion may be viewed as the theoretical basis for deviations from the lawyer's role as an advocate.

164. Model Rules of Professional Conduct Rule 1.14 (1999).

A useful way of capturing the preference for client-control without trivializing concern for other values is to recognize a fundamental duty on the part of the lawyer to act as a "fiduciary" to the client. This duty would dictate a strong commitment to client-control but acknowledge that it is sometimes in the client's best interest to ignore that precept. It would also mandate a best interests approach when the client's wishes are unclear, either because the client is incompetent, cannot articulate a preference, or does not wish to do so. This concept bridges the gap that theory creates between the advocacy and best-interest approaches. A more pragmatic approach accommodates the reality that a combination of inconsistent theories may produce the most workable conceptualization of the lawyer's role and may be more descriptively accurate of the approach used by most lawyers. As a way of operationalizing the consequentialist analysis, the lawyer's fiduciary duty toward the client should be made explicit.

The Model Rules, however, make no mention of this duty. The absence of this concept from the Model Rules is particularly noteworthy in three provisions. First, in the first paragraph of the Preamble, the drafters of the Model Rules list all of the lawyer's roles: representing clients, and acting as an advisor, negotiator, and mediator. The provision says nothing about a lawyer's role as a fiduciary. Second, although Model Rule 2.1 ("*Advisor*"), addresses questions that may call for an understanding of the domain of other professionals (and thus interests that go beyond the lawyer-client dyad), it does so in the most lukewarm language imaginable and does not say that a lawyer should consult other professionals (such as mental health professionals) if doing so is in a client's best interests.[165]

Third, and most importantly, Rule 1.14, the rule addressing clients with mental disabilities, does not impose an explicit duty to act in the best interests of the client. This omission was not unintentional, nor does it appear to be a byproduct of the view that doing what the client wants (even if the client is mentally disabled) constitutes the best interests of the client. When the Model Rules were under discussion in 1980, a discussion draft of Rule 1.14 circulated which provided: "(b) A lawyer shall secure the appointment of a guardian or other legal representative, or seek a protective order with respect to a client, when doing so is necessary in the client's best interests."[166] This

165. Model Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.*

166. Gillers & Simon, *supra* note 135, at 155 (noting that this provision was contained in a 1980 Discussion Draft of Model Rule 1.14). The ABA's published legislative history of this rule makes no mention of this early proposal. *See* American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998 124-28 (1999) [hereinafter ABA, Legislative History].

proposal was rejected without comment in favor of the existing language, which says nothing about the client's best interests.[167] In 1995, a proposal emerging from the ABA Commission on Legal Problems of the Elderly also suggested bests interests language, which the ABA rejected again.[168]

The ABA's reluctance to acknowledge that lawyers owe their clients a fiduciary duty and, in particular, owe that duty to clients with mental disabilities, is conspicuous. Even if this omission represents the adoption of the advocacy model, as some commentators have suggested,[169] the failure of Model Rule 1.14 to address the implication of the lawyer's role as a fiduciary when representing clients with mental disabilities is a fundamental flaw. The duty is well-established in case law[170] and finds frequent and uncontroversial expression in the Proposed Final Draft of the *Restatement (Third) of the Law Governing Lawyers*.[171] In Comment b to Section 28, addressing the "Lawyer's Duties to Client in General," the ALI states that:

> [a] lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary . . . .
> Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help.[172]

Best interests language also plays an integral role in the ALI's treatment of the potentially incompetent client problem,[173] which, as a

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167. The only discussion reported in the published legislative history had to do with watering down the rule by making the language regarding appointment of a guardian precatory. *See* ABA, Legislative History, *supra* note 166, at 124-28; Gillers & Simon, *supra* note 135, at 155-60.

168. *See* Gillers & Simon, *supra* note 135, at 155-57; *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 (1996) ("Client Under a Disability").

169. *See* Devine, *supra* note 139, at 515. Interestingly, other commentators have concluded that Model Rule 1.14 gives lawyers representing the mentally disabled "unchecked authority" and have advocated interpreting the rule in a narrow and limited way to prevent lawyers from advancing "what the lawyer believes are the client's best interests." Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 Fam. L.Q. 329, 329-30 (1999).

170. *See* Restatement (Third) of the Law Governing Lawyers § 28 reporter's note (Proposed Final Draft No. 1, Mar. 29, 1996).

171. *See id.* §§ 28, 35.

172. *Id.* § 28.

173. The Restatement provides:

> When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and *act in the best interests of the client* . . . .

Id. § 35(1) (emphasis added).

result, is much more helpful and sensible than the approach taken by the Model Rules.[174] A fiduciary duty premised on a client's vulnerability is hardly debatable.

The Model Rules' omission of any reference to this duty is thus puzzling. The refusal to include this language may be the result of concern about creating liabilities and burdening lawyers with unwieldy moral evaluations, rather than a product of reasoned concern for clients. More bluntly, the unwillingness of the Model Rules to recognize explicitly a principle that lawyers act as a fiduciary to their clients, despite its prevalence in the case law and its pragmatic and moral bases, may well reflect the pervasive influence of attorney self-interest in the drafting of the Model Rules.

In contrast to the Model Rules, this Article advances an ethical system that, by requiring a focus on the client's aims as well as other interests, encourages lawyers to develop both the other-directed aspects of their practicing lives and what one of the authors has deemed "radical moral action" on behalf of a client.[175] This approach, when combined with a nuanced understanding of decisional competency, is preferred because it protects the rights of potentially incompetent criminal defendants, ethically compels the lawyer's participation in putting a human face on society and the justice system's concern for decisional competency, and gives the lawyer wide discretion to do what is best given the likely consequences.[176] The

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174. Consider, for instance, how section 35 would deal with the three troublesome scenarios identified earlier. With respect to defining impairment, comment c to that section states:

> Disabilities in making decisions vary from mild to totally incapacitating [and] may impair a client's ability to decide matters generally or only with respect to some decisions at some times .... Lawyers ... should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or at variance with the lawyer's own views.

Id. § 35 cmt. c. With respect to steps lawyers should take when competency is suspect, comment d recognizes that, if local law requires, the lawyer must bring a client's possible incompetency to the court's attention. It goes on to state, however, that this step "should not be considered a duty to the client flowing from the representation and is not provided for by this Section." *Id.* cmt. d. With respect to overriding a client's decision, section 35 states:

> A lawyer representing [an impaired client] for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

Id. § 35(2). Although we do not agree with all of these prescriptions, see *infra* Part III, the ALI rule at least provides more substance than the Model Rules.

175. Mashburn, *supra* note 161, at 779.

176. Our approach shares some of the insights of Therapeutic Jurisprudence and Preventive Lawyering, *see generally* Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 Cal. W.L. Rev. 15, 15-18 (1997) (defining preventive law as a proactive,

next part illustrates the application of this approach in several contexts.

III. THE ROLE OF THE LAWYER REPRESENTING A MENTALLY DISABLED DEFENDANT

As noted above, a defense attorney who has a client with mental disability should be prepared to make three types of decisions. The first involves deciding whether the client's competency is suspect and, if so, whether the court should be alerted to that fact in order to obtain treatment for restoration of competency. The second involves deciding whether to override the competent client's wishes with respect to an aspect of representation, a scenario that can occur with non-mentally disabled clients, but is more likely to occur with those clients who suffer from mental disability. The third involves deciding how to represent a client whose competence is not restorable. This part analyzes these decisions with reference to the ethical theory developed in Part II.

A. *The Obligation to Raise the Incompetency Issue*

Assume a defense attorney believes or suspects that the client is incompetent, in either the assistance or decisional sense. What should the lawyer do? The Model Code of Professional Responsibility provides no answer. It merely states that when an impaired client has no guardian the lawyer may be compelled to make decisions on the client's behalf, but then warns that "a lawyer cannot perform any act or make any decision which the law requires his client to . . . make."[177] The Model Rules of Professional Conduct are somewhat more helpful, stating, as previously noted, that when the client is incapable of making a decision, the lawyer "may seek the appointment of a guardian or take other protective action."[178] The preferred "protective action" in criminal cases has been to attempt to restore the defendant's competency through treatment rather than create a guardianship,[179] perhaps because the stakes involved in criminal litigation are thought to require greater efforts at promoting autonomy. The Model Rules might therefore be read to permit the defense attorney to seek treatment for the incompetent defendant. Ultimately, however, the Model Rules, like the Model Code, provide no definitive guidance for the attorney.

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client-centered but collaborative approach to lawyering, and attempting to integrate that approach with therapeutic jurisprudence), as well as the Ethic of Care. *See generally* Stephen Ellmann, *The Ethic of Care As An Ethic for Lawyers*, 81 Geo. L.J. 2665 (1993) (defining an ethic of care and its applicability to lawyering).

177. Model Code of Professional Responsibility EC 7-12 (1980).

178. Model Rules of Professional Conduct Rule 1.14 (1999).

179. *See* Melton et al., *supra* note 25, at 130-31 (noting that every state requires attempts to restore incompetent defendants).

The ABA's Criminal Justice Mental Health Standards are more forthright. They state that "[d]efense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence," and permit such a motion even over the defendant's objection.[180] The commentary to the Standard states that this position is mandated by the lawyer's obligation to maintain the integrity of the judicial process and the attorney's duty to the court, as well as by the need to ensure defendants are not deprived of their right to make fundamental case decisions. Most courts take the same view.[181]

Many commentators, however, take a different view. They argue that the attorney whose client is incompetent may have an ethical duty to refrain from alerting the court to that fact under some circumstances. Given the possibly adverse consequences of such a motion, they contend, the attorney must make a nuanced decision as to which course of action—notification to the court or surrogate decision-making for the client—is in the client's best interest.[182]

As indicated in Part II, we share the overall goal of achieving the incompetent client's best interest. We are not sanguine, however, about attorneys' ability to ascertain what that interest is in the case of the incompetent client. With two important caveats, this Article argues that an attorney is ethically obligated to seek appropriate treatment for the incompetent client,[183] even if that goal requires alerting the court to the client's mental problems and possibly triggering involuntary hospitalization. This approach is consistent both with our endorsement of the lawyer's role as a fiduciary and with our preference for client control of the attorney-client relationship, because it is generally in the client's best interest to be restored to competency.

Although similar to the ABA's stance, this position is not identical to it. While the ABA requires a formal motion to the court when the attorney suspects his client is incompetent, our primary focus is on seeking treatment in such situations. Such treatment might be

180. *See* ABA Mental Health Standards, *supra* note 84, Standard 7-4.2(c).

181. *See* John M. Burkoff, Criminal Defense Ethics § 6.3(b) (1991).

182. *See* Paul A. Chernoff & William G. Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 Am. Crim. L. Rev. 505, 520-21 (1972); Uphoff, *supra* note 130, at 106, 108 n.175 (suggesting, however, that such situations should be "rare"); Bruce J. Winick, *Reforming Competency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. Crim. L. & Criminology. 571, 580-81 (1995) [hereinafter Winick, *Response*]; *see also* Ross, *supra* note 132, at 1372-81 (discussing how an "ethic of care" might call for disregarding incompetency concerns).

183. As we discuss further, if the attorney can ascertain, perhaps through an independent expert evaluation, that a client is competent in the assistance sense but not in the decisional sense and that the latter competency would be unrestorable regardless of treatment efforts, then treatment to restore competency need not be sought. *See infra* notes 269-80 and accompanying text.

obtainable through extrajudicial means,[184] although as a practical matter a court order may be necessary in many cases involving indigent defendants.

This Article has already suggested the practical reasons for imposing a duty to seek treatment for the incompetent defendant. The avoidance of coerced psychiatric treatment achieved by failing to raise the issue will usually be a pyrrhic victory, given the likelihood the client will be subject to such treatment in any event (in prison, after transfer from prison, due to an insanity verdict, as part of a plea bargain or after dismissal through civil commitment). Those who believe that incompetency should sometimes be hidden from the court are particularly concerned about defendants charged with petty misdemeanors who are found incompetent. They assert that these individuals may spend more time in the hospital being restored than they would spend in jail once convicted, because misdemeanor convictions often result in much less confinement.[185] What this analysis omits, however, is the likely disposition of a minor case if there is no incompetency finding: either jail time in a facility that is unlikely to have good treatment resources[186] or civil commitment or probation in exchange for a dismissal or reduction of charges. While the probation disposition seems preferable to hospitalization on incompetency grounds, probation violations, which are quite frequent when the defendant is mentally ill,[187] will often result in jail time.[188] An incompetency plea in minor cases, on the other hand, often is a precursor to dismissal of charges or withholding of adjudication if the defendant complies with the treatment program.[189]

Furthermore, treatment to restore a person to competency does not

184. *See infra* note 208 and accompanying text.

185. *See supra* note 182.

186. *See generally* Henry J. Steadman et al., The Mentally Ill in Jail: Planning for Essential Services (1989) (describing the paucity of psychiatric services in jails). Many jails lack even routine mental health screening services. *See* Linda A. Teplin & James Swartz, *Screening for Severe Mental Disorder in Jails*, 13 L. & Hum. Behav. 1, 2 (1989) ("Despite the demonstrated prevalence of severely mentally ill jail detainees and the legal mandate that they receive treatment, recent government reports suggest that, although most all *prison* inmates receive routine mental health evaluation upon intake, *jail* detainees typically do not." (citation omitted)).

187. *See* Uphoff, *supra* note 130, at 101 n.151 (noting that mentally ill defendants "fare poorly on probation"). In civil conditional release programs, the most typical condition in cases involving people with mental illness is adherence to medication protocols. Unfortunately, this condition is frequently violated. *See, e.g.*, Gerard R. Kelly et al., *Utility of the Health Belief Model in Examining Medication Compliance Among Psychiatric Outpatients*, 25 Soc. Sci. Med. 1205, 1205 (1987) (reporting that 50% stop taking medication against medical advice).

188. *See* Ross, *supra* note 132, at 1370 n.106 (describing analogous "continuance[s] without a finding," which result in incarceration if probation is violated).

189. *Cf.* Roesch & Golding, *supra* note 84, at 197 ("[M]any attorneys [who made motions for a competency evaluation] expressed a desire to obtain recommendations for treatment, alternatives to prison, and for the legal disposition of the case.").

have to entail a significant deprivation of liberty. Today, in contrast to the practice several years ago when most of the commentators who are cautious about competency motions were writing, many jurisdictions require outpatient intervention when feasible.[190] In minor cases, such evaluation and treatment is standard practice in most jurisdictions.[191] Hospitalization, if it is ordered, is constitutionally limited to the time necessary to restore the individual to competency,[192] which should be less than six months in virtually all cases,[193] and should count as time served if a sentence is imposed.[194] While both the outpatient option and the rules regarding the duration of hospitalization are frequently ignored,[195] that is due as much to the negligence of defense attorneys as to the inertia of the system.[196] Finally, of course, failing to obtain treatment can in some cases seriously harm a person's mental health.[197] In short, if the lawyer is careful in the initial decision about client competency and vigorously monitors the legal system's treatment of the client, concerns about liberty interests alone should not deter the attorney from raising the competency issue.[198]

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190. *See supra* note 83.

191. In Florida, for instance, persons charged with misdemeanors may not be evaluated or treated in a forensic hospital, but must be evaluated and treated either on an outpatient basis or in a civil hospital. *See* Onwu v. State, 692 So. 2d 881, 882-83 (Fla. 1997).

192. *See* Jackson v. Indiana, 406 U.S. 715, 738-39 (1972).

193. *See* Alan Stone, Mental Health and the Law: A System in Transition 212-13 (1976) (stating that virtually all defendants can be restored or declared unrestorable within six months). In 1979, one study found that in the jurisdictions studied the average time spent in the hospital for evaluation was about 17 days. *See* Ronald Roesch, *Determining Competency to Stand Trial: An Examination of Evaluation Procedures in an Institutional Setting*, 47 J. Consulting & Clinical Psychol. 542, 548 (1979). If anything, that average has gone down appreciably in the past twenty years.

194. *See supra* note 84.

195. *See* Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. Davis L. Rev. 1, 77-78 (1993) (stating that, as of 1993, a majority of jurisdictions ignore or circumvent *Jackson*).

196. Clinicians who work at state treatment facilities, if honest, must concede that restoration should take no longer than six months, see *supra* note 193, an expert opinion which should be extremely helpful evidence to a defense attorney seeking release of an inappropriately detained client. In our conversations with state hospital employees in Florida over the past ten years, however, we have been told repeatedly that defense attorneys tend to forget about clients who have been hospitalized, and that they, as well as prosecutors and courts, often ignore reports from hospital staff to the effect that the defendant is restored, especially in serious cases.

197. *See generally* Treating the Homeless: Urban Psychiatry's Challenge (Billy E. Jones ed., 1986) (describing the number of homeless mentally ill and the mental and physical problems they encounter).

198. As an example of a situation in which competency should not be raised, Professor Uphoff uses the case of a mentally ill, clearly incompetent defendant who is charged with intentionally breaking a store window; because the defendant engaged in similar conduct in the past, the prosecutor refuses to drop charges but does offer a sentence of "time served" if the defendant pleads guilty. *See* Uphoff, *supra* note 130,

Professors Rodney Uphoff and Bruce Winick, both of whom argue that the lawyer should generally not raise the competency issue when the client does not want it raised, register other reasons for being hesitant about making a competency motion. Uphoff is particularly concerned about the possibility that attorney-client confidences will be disclosed through such a motion (since the reasons for it will generally have to be explained).[199] He also notes that a competency evaluation and ensuing treatment might reveal incriminating information that the prosecution could use against the defendant.[200] His fears are not unfounded, but they are insignificant. In virtually every state, information revealed pursuant to a competency motion and evaluation may legally be used only for the purpose of resolving competency issues.[201] The likelihood that the prosecution will somehow still be able to obtain incriminating information is too minimal to outweigh the benefits of treatment and assuring autonomy. Put in terms of the discussion in Part II, the attorney's ethical duty of confidentiality should not be elevated to deontological normativity. The Model Rules recognize that "[a] lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority."[202] The implied authority notion should be applicable here if use of the confidential information is limited by law.[203]

Professor Winick argues that the incompetency label has

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at 108 n.175. The offer appears preferable to an incompetency determination but, as indicated in the text, the latter outcome does not have to result in hospitalization. Furthermore, the plea is no guarantee that civil commitment, at least on an outpatient basis, will be avoided; indeed, the facts suggest that the defendant will do it again if not treated in some fashion. Finally, one wonders whether the suggested disposition is really in the client's "best interests," given his clear mental difficulties.

199. *See id.* at 88, 91-92.

200. *See id.* at 101.

201. *See* Samuel Jan Brakel et al., The Mentally Disabled and the Law, tbl. 12.6, col. 8 (1985) (reporting that, as of 1985, the federal government, the District of Columbia and over 20 states enforce such a ban). In *Estelle v. Smith*, 451 U.S. 454 (1981), the Supreme Court strongly suggested that if such protection is not provided, state evaluators must afford those subjected to competency to stand trial evaluations a right to remain silent, which is hardly conducive to a useful evaluation. *See id.* at 467-69.

202. Model Rules of Professional Conduct Rule 1.6 cmt. 7 (1999).

203. Professor Uphoff also raises the specter of the attorney having to testify against the client at a subsequent competency hearing. *See* Uphoff, *supra* note 130, at 94. That scenario should only occur if the incompetent client insists he is competent even after evaluation and the evaluators are unable to obtain information about mental state that is available to the attorney. In that rare instance, the attorney should testify, even if that means rupturing the relationship; however, once restored to competency the client may understand and forgive the attorney's motivations. *Cf.* Jacques Choron, Suicide 50 (1972) (citing several studies from different countries in which 90% to 100% of rescued suicide attempters reported they were glad they had been saved).

debilitating psychological "side effects" beyond what might be associated with forced treatment. In particular, he asserts that the incompetency label can become a self-fulfilling prophecy, acting to diminish self-esteem, inhibit initiative and motivation, and cause depression.[204] Winick's assertions, although somewhat speculative, are persuasive enough to provide reasons for defining incompetency as narrowly as possible. But they do not justify defining that term so narrowly that autonomy is rendered irrelevant. To the extent Winick would allow the attorney to ignore a client's restoration needs based merely on the client's ability to express a preference for the attorney's desire to proceed,[205] he does just that.

Residual concerns relating to the adverse consequences of defense attorney efforts to assure competency may be alleviated by several observations. First, the number of defendants affected by any such consequences would be kept to a minimum if attorneys raised the issue only when there was strong reason to believe the client was incompetent;[206] in this regard, it is worth emphasizing that it would be unethical for a lawyer to raise an unfounded claim of incompetency.[207] Second, the number of defendants subjected to intervention would be reduced even further if courts adopted and attorneys accepted the low

204. *See* Winick, *Response*, *supra* note 182, at 581-82.

205. At certain points in his original article on the topic, Winick seemed willing to endorse a competency test akin to the preference standard. *See* Winick, *Incompetency*, *supra* note 75, at 271 (endorsing a presumption of competency for individuals who are "able to express a choice"). But in later work he reiterated that he would require defendants to meet a test similar to the basic rationality standard. *See* Winick, *Response*, *supra* note 182, at 597 (stating that when defendants who base their choices on "irrelevant reasons ('I will plead guilty because I am an insect'), irrational beliefs ('I will stand trial and thereby become a movie star'), or outright delusions ('I am an extraterrestrial and will return to my planet') that choice does not deserve respect." (citation omitted)).

206. Defense attorneys today raise the competency issue far too often. Most defendants referred for competency evaluation are found competent. *See* Roesch & Golding, *supra* note 84, at 48, tbl. 3.1 (summarizing studies showing that incompetency findings average 30% across studies); Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 391 (1985). *But see* Steven K. Hoge et al., *Attorney-Client Decisionmaking in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 Behav. Sci & L. 385, 392 (1992) (finding that a sizeable proportion of attorneys resist referring their mentally ill clients for competency evaluations, perhaps for some of the reasons identified by Uphoff and Winick). Some of these referrals are "unnecessary" only in the sense that the attorneys are applying a competency standard we consider too rigorous, for which they can hardly be faulted, given the confusion over the correct standard. But many referrals occur for entirely inappropriate reasons. *See* Melton et al., *supra* note 25, at 70-71 (summarizing studies indicating that defense referrals often occur because the attorney who seeks information about treatment or legal issues, such as insanity, has no other way to obtain it, wants to delay the case, or simply does not understand the competency issue).

207. *See* Model Rules of Professional Conduct Rules 3.1 (Meritorious Claims and Contentions) & 3.3 (Candor Toward the Tribunal).

competency threshold we advocate. Third, there should be no objection, ethical or otherwise, to methods of avoiding involuntary evaluation and treatment that are consistent with the obligation to ensure a client's competence.[208]

Finally, while this Article argues that a lawyer is always obligated to ensure assistance competence, there are two narrowly defined situations in which the attorney need not raise the decisional competency issue. The first is when the lawyer, rather than the client, has clear authority to make a particular decision. The second is when the client has authority to make the decision but there are compelling reasons for pursuing a particular path regardless of how rational the client's wishes are.[209] These two exceptions are the subject of the next section.

B. *When Client Decisions May be Ignored*

Up to this point, this Article has assumed that the competent client's decision must be honored. That, of course, is not the law. Many courts have suggested that decisions about matters that are tactical or strategic rather than "fundamental" are for the lawyer to make, regardless of the client's wishes. Ethical rules also appear to state that clients control only the "ends" of litigation, not the "means" by which it is achieved. The topic of lawyer-client autonomy is a large and complex one that this Article does not try to resolve. We do, however, explain why the client should normally control decisions about mental state defenses.

At the same time, even a competent client's decision about a matter that the client should control, such as whether to assert the insanity defense, is not necessarily sacrosanct. The attorney's duty to society may demand that, in narrow sets of circumstances, the wishes of a competent client be ignored. We flesh out the scope of this exception to the autonomy preference through further examination of the decisions made in the Kaczynski, Moran and Ferguson cases.

208. For instance, we see nothing unethical about an attorney privately arranging for treatment to restore competency on an outpatient basis without triggering a state evaluation or treatment. Once an attorney does alert the court to a client's suspect competency, Winick's proposal calling for a series of trial continuances contingent upon proof that the defendant is seeking treatment and is progressing toward restoration of competency may be a good substitute for involuntary hospitalization of those found incompetent. *See* Winick, *Response*, *supra* note 182, at 615-18.

209. Note that we state the attorney need not raise the competency issue in these two situations. An attorney may still decide to do so out of a desire to determine whether the client's competency is restorable or because the client vehemently disagrees with the attorney and the attorney feels compelled to let the court know about the disagreement.

1. Which Decisions Are Presumptively the Client's?

A survey of the relevant law, ethical rules and commentary suggests three possible approaches to the issue of when lawyers should defer to a competent client's wishes. The first has been called lawyer-centered, because it gives the lawyer control in most situations. The second, dubbed client-centered or client-controlled, confers the predominant position on clients.[210] The third, which is a spin-off of the second approach but more conciliatory toward the first, might be called delegation-centered. It requires the lawyer to seek the client's consent to make decisions in specified areas, such as presentation of evidence or legal arguments.

At the constitutional level, the Supreme Court has sent mixed signals as to which approach it endorses in the criminal context. In *Jones v. Barnes*,[211] which involved a claim that an appellate attorney violated the Sixth Amendment right to effective assistance of counsel by refusing to raise certain claims advanced by the client, the Court conceded that a criminal defendant has the authority to decide whether to plead guilty, waive a jury trial, testify on his own behalf, and take an appeal.[212] But it strongly implied that virtually all other decisions could be left to the attorney without violating the Constitution.[213] *Strickland v. Washington*,[214] the Supreme Court's leading case on effective assistance of counsel, is similar in tone. Although the Court stated that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant,"[215] the spirit of the opinion is more accurately reflected in its earlier statement that counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[216]

In contrast, the case which established the right to self-representation, *Faretta v. California*,[217] stated that a defendant should be allowed to "conduct his own defense ultimately to his own detriment."[218] Referring to the Sixth Amendment's "assistance of counsel" language, it also stated that "an assistant, however expert, is

210. For discussions of these two approaches, see David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach 16-19 (1991).
211. 463 U.S. 745 (1983).
212. *See id.* at 751.
213. *See id.* at 753 n.6 ("With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.").
214. 466 U.S. 668 (1984).
215. *Id.* at 691.
216. *Id.* at 690.
217. 422 U.S. 806 (1975).
218. *Id.* at 834.

still an assistant."[219] Other language in *Faretta* appeared to adopt the delegation approach, by referring to the "tradition" of allocating to counsel "power to make binding decisions of trial strategy in many areas" provided the defendant consents, "at the outset," to accept the counsel as his or her representative.[220]

The organized bar is also not entirely clear about which approach it endorses, but it appears to lean toward the lawyer-centered approach. The Model Code seems to grant the client considerable power in the lawyer-client relationship, but also states that a lawyer may "[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."[221] The Model Rules similarly provide that the client controls the "objectives and means of representation" (including decisions about pleas, the jury right, and whether to testify) but state in commentary that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so" and then states that "[a] clear distinction between objectives and means sometimes cannot be drawn."[222] The ABA's Standards for Criminal Justice ("Standards") provide that a defendant has control over what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify, and whether to appeal, but then states that "[s]trategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate."[223]

The behavior of practicing attorneys appears to reflect the principles set out in the ABA Standards. One study of almost 700 attorneys in two major jurisdictions indicated that virtually all attorneys believe the client should decide whether to accept or reject a plea bargain, waive a jury trial, and testify.[224] Much smaller proportions, however, believe the client should "make the call" on whether to: waive a preliminary hearing (78.2%); initiate a plea bargain (68.6%); request a lesser included instruction (37%); raise an affirmative defense (27.3%); file a suppression motion (17.8%); use peremptory challenges (16.7%); decide which defense witnesses to call (11.4%); request appointment of an expert witness (8.1%); or

219. *Id.* at 820.

220. *Id.* at 820-21 (citations omitted).

221. Model Code of Professional Responsibility DR 7-101(B)(1) (1980).

222. Model Rules of Professional Conduct Rule 1.2 cmt [1] (1999).

223. ABA Standards for Criminal Justice Standard 4-5.2 (1992) (hereinafter Criminal Justice Standards). *See also* Restatement (Third) of the Law Governing Lawyers § 33 (Proposed Final Draft No. 1, Mar. 29, 1996) (reserving to the client the decisions on pleading, waiving jury trial, testifying, and appeal). Unlike the ABA Standards, the Restatement allows the client to cede the authority to control these decisions to counsel. *See id.* § 32(1).

224. *See* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. Kan. L. Rev. 1, 39 tbl. 5 (1998).

interview prosecution witnesses (4.9%).[225]

In short, outside of a few well-defined areas, significant confusion exists about which decisions are for the client to make and which should be left to the attorney.[226] Fortunately, with respect to two of the three decisions on which this Article has focused, the confusion is muted, at least in the formal rules. As indicated above, there is consensus that the decision to plead guilty is the client's, and *Faretta* appears to raise to constitutional status the client's right to make the decision to waive counsel.

The decision whether to raise the insanity defense and related defenses is not as clearly demarcated as one the client should make, however. A majority of courts hold that the trial court may not impose an insanity defense over the defendant's objection, but a sizeable minority hold that this decision is within the trial judge's (and therefore the attorney's) discretion.[227] Courts are also split with respect to the decision-making control over the introduction of psychiatric evidence relevant to criminal intent (diminished capacity). At least two state appellate courts,[228] as well as Judge Burrell in Kaczynski's case,[229] have concluded that the attorney controls the decision, but at least one other court has found to the contrary.[230] Similarly, courts disagree about whether the decision to present mitigating psychological evidence at capital sentencing proceedings is up to the attorney, although the trend appears to be toward client direction of that decision.[231]

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225. *See id.*

226. The ambivalence on this score is suggested by the fact that, "[w]ith few exceptions, client-centered writers analyze the decision facing the client in generic terms, without distinguishing the type of decision at stake." Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 505 (1994).

227. *See* David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 Hastings Const. L.Q. 295, 299-301 & n.31 (1988). Most recent cases considering the issue in the context of whether the client has a Sixth Amendment ineffective assistance claim when counsel overrides a decision about the insanity defense have held that the client controls the decision. *See* Jacobs v. Commonwealth, 870 S.W.2d 412, 418 (Ky. 1994); Treece v. State, 547 A.2d 1054, 1062 (Md. 1988). *But see* Robert D. Miller et al., *Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law*, 24 J. Psychol. & L. 487, 504 (1996) (reporting, based on a survey of state attorneys general, that the insanity defense can be raised over the defendant's objection or without the defendant's knowledge in 17 states).

228. *See* State v. Jones, 811 P.2d 757, 773 (Cal. 1991); State v. Samuel, 838 P.2d 1374, 1382 (Haw. 1992).

229. *See* William Booth, *Kaczynski Is Competent For Trial, Lawyers Agree*, Wash. Post, Jan. 21, 1998, at A1 ("Burrell has stated in court that Kaczynski's attorneys are 'in control' of his mental health defense . . . .").

230. *See* State v. Frierson, 705 P.2d 396, 403-04 (Cal. 1985).

231. *Compare* Zagorski v. State, 983 S.W.2d 654, 658 (Tenn. 1998) ("Counsel must remember that decisions, including whether to forego a legally available objective because of non-legal factors, are for the client and not the lawyer."), *and* People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1985) (reviewing cases from different jurisdictions,

Of particular interest is whether a competent defendant has the authority to refuse assertion of a mental state defense even if, as may have been the case with Kaczynski, it is the only viable defense. This scenario is especially complex, given the likelihood that even competent defendants in such cases are denying the very mental illness that both bolsters the insanity defense and makes it difficult for them to see its advantages. It appears that, in practice, attorneys often ignore their client's wishes on this matter. For instance, in the survey reported above, only 27.3% of the attorneys believed that the client should control decisions about affirmative defenses, and only 8.1% believed clients should determine whether an expert witness will be appointed.[232] It is possible that those surveyed were not thinking about the insanity defense and psychiatrists when they answered these two questions. But other research suggests that attorneys are quite capable of failing to consult their clients about the insanity issue. A study of 114 cases in which the insanity defense was raised found that "[i]n more than one-third (36%) of the cases . . . the attorneys appear to have pre-empted their clients' participation in the decision-making process."[233]

Consistent with the preference for autonomy and the theory behind client-centered counseling,[234] one might argue that, where feasible, nontrivial decisions about the course of representation should be left to the client, if he or she is competent to make them. Carried to its logical conclusion, this position would mean, contrary to the apparent practice, that clients should be consulted and permitted to make decisions about suppression motions, witnesses, instructions, and a host of other issues. However, the consequentialist approach described in Part II, while endorsing a client-directed approach, suggests that not all decisions should be treated alike in this regard. Rather, if a lawyer, after full consultation with the client, believes the client is making the wrong choice, he or she must decide whether the client needs to have the ultimate say on the issue, depending upon the practical consequences of the various options and the interests implicated by them. Given the subject of this Article, we confine our

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and ultimately holding that the client controls the decision), *with* People v. Deere, 710 P.2d 925, 931 (Cal. 1985) (concluding that production of mitigating testimony is the lawyer's duty in a capital sentencing hearing), *and* State v. Hightower, 518 A.2d 482, 483 (N.J. Super. Ct. App. Div. 1986) (same). *See generally* Richard J. Bonnie, *The Dignity of the Condemned*, 74 Va. L. Rev. 1363, 1380-89 (1988) [hereinafter Bonnie, *Dignity*] (examining the controversy).

232. *See* Uphoff & Wood, *supra* note 224, at 39 tbl.5.

233. Bonnie et al., *supra* note 96, at 57. Most of the defendants in this study were "non-objecting;" nonetheless, the results indicate attorney willingness to neglect client desires. *See also* Justine A. Dunlap, *What's Competence Got to Do With It?: The Right Not to Be Acquitted by Reason of Insanity*, 50 Okla. L. Rev. 495, 523-27 (1997) (describing cases in which defendants were acquitted by reason of insanity while incompetent to proceed).

234. *See supra* Part I.

analysis along these lines to the issue of who should control decision-making about mental state defenses. We conclude that the decision should be the client's.

The most significant argument against leaving the decision about the insanity defense to the client is the deleterious effect waiver of such a defense might have on the integrity of the criminal process. As Judge Bazelon stated in his dissent in *Whalem v. United States*:[235]

> One of the major foundations for the structure of the criminal law is the concept of responsibility, and the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to age or mental condition he is not responsible for those acts. . . .
>
> In the courtroom confrontations between the individual and society the trial judge must uphold this structural foundation by refusing to allow the conviction of an obviously mentally irresponsible defendant, and when there is sufficient question as to a defendant's mental responsibility at the time of the crime, that issue must become part of the case. Just as the judge must insist that the *corpus delicti* be proved before a defendant who has confessed may be convicted, so too must the judge forestall the conviction of one who in the eyes of the law is not mentally responsible for his otherwise criminal acts.[236]

Many courts have rejected this argument on two grounds.[237] The first ground, as reflected in *Faretta*, is the client's autonomy interest. The second ground, more specific to the insanity defense, is that a conviction can be preferable to an insanity verdict for a number of reasons: (1) the confinement after an insanity acquittal is often longer than imprisonment after conviction for the same offense;[238] (2) prison conditions may be preferable to the conditions in mental hospitals, which include forced treatment and association with the severely mentally disordered; (3) the stigma associated with an insanity verdict (which incorporates a finding that a crime was committed) may be worse than the stigma of conviction; and (4) an insanity plea might trivialize any political or religious message the defendant is seeking to

235. 346 F.2d 812 (D.C. Cir.), *cert. denied*, 382 U.S. 862 (1965).

236. *Id.* at 818 (Bazelon, J., dissenting). Judge Bazelon later suggested a reconsideration of *Whalem*, *see* United States v. Robertson, 507 F.2d 1148, 1161 (D.C. Cir. 1974), but subsequently strongly affirmed it. *See* United States v. Wright, 627 F.2d 1300, 1311-12 (D.C. Cir. 1980).

237. The leading case contrary to the *Whalem* view is *Frendak v. United States*, 408 A.2d 364 (D.C. 1979), which relied heavily on the fact that *Faretta* "stress[ed] the importance of permitting a defendant to make decisions central to the defense—a concern given little if any significance in *Whalem*." *Id.* at 375.

238. In *Lynch v. Overholser*, 369 U.S. 705 (1962), the Supreme Court held that when the insanity defense is judicially imposed the state may not criminally commit the defendant. *See id.* at 711-12. But *Lynch* still permits civil commitment, and in any event rested solely on a construction of the relevant statutes. *See id.*

impart to the jury and the public.[239] These considerations suggest that the insanity defense is rarely a good idea when conviction would result in only a few years imprisonment, and they could even support rejection of the defense when the charge is serious.

Neither the *Faretta* principle nor observations about the reality of an insanity verdict directly responds to Judge Bazelon's argument, however. Even if a person autonomously rejects an insanity plea, Bazelon reasoned, the criminal justice system cannot convict a person who is clearly not responsible for the crime due to mental disability, just as it should not allow a factually innocent person to plead guilty.[240] This moral imperative, he concluded, overrides the dispositional and other potentially negative consequences of an insanity verdict.[241]

One might challenge Bazelon's central assumption by asserting that, in contrast to factual guilt, sanity is not a condition of criminal responsibility.[242] That assertion is rejected in most jurisdictions, however.[243] A stronger response to Bazelon, and one we adopt in this Article, is that insanity is rarely so obvious that conviction of a person who is mentally ill would amount to a travesty of justice. Insanity cannot be determined in the same way factual guilt or innocence can be. The determination of insanity is dependent upon self-reported invisible mental states that are interpreted by laypeople and experts, rather than based on "objective" criteria.[244] Because of the moral

239. *See* Frendak, 408 A.2d at 376-78. *See generally* Cohn, *supra* note 227, at 312-13 (reviewing possible motivations for rejecting an insanity defense).

240. *See Wright*, 627 F.2d at 1310 & nn.72-73. This latter scenario is to be distinguished from the situation in which a defendant claims innocence but wants to plead guilty for strategic reasons (i.e., fear of a longer sentence if convicted at trial). *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("An individual accused of a crime may . . . consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."). The reference in the text is to the clearly innocent person who wants to plead guilty regardless of the consequences. Of course, this latter scenario rarely occurs. But the principle stands: a person known to be innocent should not be able to force society to punish him or her. Even *Alford* strongly implies that the state must prove a "factual basis" for pleas by those who insist on innocence. *Id.* at 38.

241. *See Wright*, 627 F.2d at 1310. As to whether these consequences are "negative," consider that, at least for serious crimes, hospitalization of a person found not guilty by reason of insanity is roughly equivalent to the sentence that would have been received if convicted. *See* Melton et al., *supra* note 25, at 188-89 (describing studies). In addition, the stigma of being mentally ill may be difficult to escape even if an insanity verdict is avoided.

242. *See* Cohn, *supra* note 227, at 311-12.

243. Only approximately five states have abolished the insanity defense. *See* Idaho Code § 18-207 (1987); Kan. Stat. Ann. § 22-3220 (1995); Mont. Code Ann. §§ 46-14-102 to 46-14-103 (1985); Nev. Rev. Stat. Ann. § 174.035 (Michie 1997); Utah Code Ann. § 76-2-305 (1999); *see also* Pouncey v. State, 465 A.2d 475, 478 (Md. 1983) (arguably abolishing the insanity defense in Maryland).

244. *See* Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 Mich. J. Gender & L. 1, 12-27 (1998) (arguing that we can never discover "objective truth" about past mental states in the same way we can know whether an event occurred, given problems with self-knowledge, memory, and

ambiguity of the concept, juries have convicted even those who have presented overwhelming evidence of mental disability at the time of the offense.[245] One could only be sure of an insanity verdict if the judge guaranteed it, and even then there would be no objective way of determining whether that result is "correct."

The moral ambiguity is even greater in connection with evidence of mental state used at sentencing. The Supreme Court has held that the state may not bar capital defendants like Kaczynski from presenting such evidence at the sentencing proceeding to support the case in mitigation.[246] No matter how powerful such evidence is, however, a jury can always lawfully decide that it is outweighed by the evidence in aggravation. Furthermore, research suggests that many types of mental state evidence presented at sentencing have an *aggravating* effect on juries, which apparently equate mental illness with dangerousness.[247]

The mental abnormality defense which gives rise to the strongest argument in favor of leaving the decision in the attorney's hands is the diminished capacity, or lack of criminal intent, defense. About half

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observer/expert attribution).

245. Nationwide, the defense is successful in only one-quarter of the cases in which it is raised, and over 70% of these "successful" acquittals represent cases in which the prosecution agreed that the defendant was so "crazy" there was no need to prosecute. *See* Melton et al., *supra* note 25, at 188 (summarizing studies); *see also* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375, 1403-04 (1997) (concluding, based on news media reports, that "[s]ociety is simply overwhelmingly skeptical about the use of the insanity defense in virtually any case."). One study indicates:

> the only defendant who will likely be found universally insane is the totally mad individual who acts impulsively in response to a glaring psychotic process that is itself tied thematically to a criminal action . . . *Even with respect to such a prototypically insane person*, however, the concept of guilt still has appeal to the lay public.

Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 Law & Hum. Behav. 207, 226 (1987) (emphasis added).

246. *See* Woodson v. North Carolina, 428 U.S. 280 (1976):

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.

Id. at 304; *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (concluding that the sentencer may not be precluded from considering mitigating factors).

247. *See, e.g.*, Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 Law & Hum. Behav. 113, 120 & tbl.1 (1987) (finding that a mental illness defense as a strategy at the capital penalty phase is even less effective than presenting no defense at all); *see generally* Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 Cal. Crim. L. Rev. 3, ¶¶ 19-23 (visited Feb. 11, 2000) <http://www.boalt.org/CCLR/v1slobogintext.htm> (describing studies showing correlation between mental health evidence and death penalty).

the states do not even recognize such a defense,[248] on the ground that the availability of the insanity defense provides adequate recognition of the exculpating effect of mental illness.[249] A strong argument can be made, however, that prohibiting evidence of mental illness that negates mens rea is unconstitutional.[250] In those cases where such evidence strongly suggests that the defendant did not intend to carry out the criminal act, a court might be justified in overriding a client's objection to its presentation; this situation most closely parallels that in which there is no factual basis for a guilty plea. These cases are extremely rare, however,[251] and when they do occur the mental illness is usually so severe the prosecution rarely attempts to convict.[252] In the more typical diminished capacity case, represented by Kaczynski's situation, the evidence that the defendant lacked criminal intent is much weaker, and a failure to raise the defense can hardly be called a manifest injustice. Moreover, like the insanity defense, the diminished capacity defense is stigmatizing, undercuts any political message the defendant might want to impart, and can even result in prolonged hospitalization, depending upon the charges involved.[253]

For these reasons, the decision whether to present evidence of mental state should generally be left up to the client.[254] Even if one subscribes to the lawyer-centered approach to decision-making, the unique considerations associated with decisions about mental state defenses strongly support the conclusion that they should be an exception to that approach.[255] The consequentialist analysis is only

248. *See* Ralph Reisner et al., Law and the Mental Health System: Civil and Criminal Aspects 563-64 (3d ed. 1999).

249. *See, e.g.*, Bethea v. United States, 365 A.2d 64, 85-86 (D.C. App. 1976) ("We are convinced that the principles of diminished capacity should not be incorporated into our rules of criminal adjudication.").

250. *See, e.g.*, Model Penal Code § 4.02 cmt. 2 (1962) ("If states of mind [such as deliberation or premeditation] are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence."); ABA Mental Health Standards, *supra* note 84, Standard 7-6.2 cmt. (finding such a rule required by "logical relevance").

251. For instance, in virtually all cases in which the jury finds the defendant was insane, the defendant intended to commit the criminal act. *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 777, 801 (1985) ("As a factual matter, mental disorder, even of the extreme variety, rarely negates the requirements of an act and appropriate mental state.").

252. *See supra* note 245.

253. *See* People v. Wetmore, 583 P.2d 1308, 1310 (Cal. 1978). The California Supreme Court stated that if a diminished capacity defense results in acquittal because there is no lesser included offense "the state's remedy is to institute civil commitment proceedings." *Id.*

254. Still another reason is that mental state defenses explicitly admit that the defendant committed the crime, thus "increasing the likelihood of conviction if unsuccessful." Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 Ohio St. L.J. 637, 668 (1980).

255. Professor Uviller concludes that decisions about *all* defenses, including the insanity defense, should be the province of the defendant, because the decision hinges on facts that the accused is "in the best position to know" and goes to the foundation

halfway complete at this point, however; still to be considered are societal interests that may dictate lawyer or judicial control of such decisions.

2. When Deferral to the Competent Client's Wishes is Unethical

This Article concluded above that Ted Kaczynski was probably competent to make a decision about the insanity defense and other mental state evidence.[256] It further concluded, just above, that such decisions should generally be left up to the client.[257] So was Judge Burwell wrong when he determined that Kaczynski's lawyers should control this key aspect of the legal strategy?

We think so, on the known facts of that case, but there may nonetheless be very narrow circumstances under which a competent client's decision should be overridden. As Judge Bazelon suggests and as this Article noted earlier,[258] society has interests both in reliable outcomes and a dignified process, interests that are not waivable by a defendant. More specifically, society has an interest, independent of the defendant's, in ensuring that the criminal justice system accurately assesses the culpability of those it prosecutes and that its procedures are not ignored or abused.[259] This Article argues that while these interests should normally not trump the autonomy preference, serious threats to these interests may justify a refusal to defer to the client.

The guilty plea example noted earlier makes the point most clearly. Presumably all would agree that the criminal justice system should not accept a guilty plea (at least outside of the plea bargain context) from a person who is provably innocent,[260] regardless of the person's desires or competency level. Such an outcome would seriously undermine the integrity of the system because it is neither reliable nor respectful of

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of trial itself. *See* H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of Criminal Cases*, 152 Rutgers L. Rev. (forthcoming Apr. 2000).

256. *See supra* note 113 and accompanying text.

257. *See supra* note 254 and preceding text.

258. *See supra* text accompanying notes 240-41.

259. *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 197-202 (1983) (describing as goals of the American criminal procedure, *inter alia*, the "need for a process that evaluates the moral quality of the defendant's actions" and that promotes "the legislature's sentencing system and goals," as well as a process that "articulat[es] fair process norms," including norms that "operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect" and that "provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes" (footnote omitted)).

260. *See supra* note 240; *see also* Nancy Jean King, *Priceless Process: Negotiable Features of Criminal Litigation*, 47 UCLA L. Rev. 113, 170 (1999) ("Without some concession from the prosecutor, it is fair to assume that there is no legitimate basis for a defendant to admit that he is guilty of a crime he did not really commit.").

the criminal justice system's adjudicatory processes.[261]

Now consider three other examples, drawn from cases discussed in this Article. The first is Kaczynski's, in which a mentally ill person faced with capital murder charges, the validity of which is not in dispute, refuses to sanction expert testimony about his mental state at either trial or at sentencing despite his attorneys' belief that it is the only viable defense. The second is Moran's, in which a severely depressed person, also charged with capital murder, insists on pleading guilty and not contesting the prosecution's case at sentencing. The third is Ferguson's, in which a clearly psychotic individual fires his attorneys and makes the claim, against overwhelming evidence to the contrary, that he did not commit the murders with which he is charged.

This Article has argued that, although all three of these individuals were competent in the assistance sense, neither Moran nor Ferguson were competent in the decisional sense and that Kaczynski's decisional competence is not free from doubt. Assume now, however, that all three are competent for all relevant purposes (an assumption that is consistent with the view of the courts involved in those cases).[262] On this assumption, do society's interests in reliability and dignity trump the defendants' decisions to waive mental state defenses, plead guilty and waive the right to counsel that occurred in these cases?

Because of the strong preference for autonomy that informs this Article's analysis, society's interest in promoting reliability in these three contexts should prevail over the defendant's autonomy interests only if the defendant is clearly "innocent" and is taking a position that will lead to a clearly less desirable disposition. Therefore, for instance, a defendant's rejection of a mental state defense should be overridden only in the unlikely event that three factors co-occur: (1) the mental state defense is the only viable one; (2) it is very likely to prevail; and (3) a successful defense would do the client more good than harm (for example, by assuring a shorter time in confinement). In cases that do not involve serious felony charges, criterion (3) may never be met. In the three homicide cases at issue here, the first and third criteria may have been met, but the second criterion was not. Indeed, for reasons discussed earlier,[263] that criterion will virtually never be satisfied.

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261. In contrast, consider the Fourth Amendment right to privacy as implemented through the exclusionary rule. Even though the supposed reason for exclusion is to deter police from engaging in illegal searches of *others*, the defendant may forego a suppression motion without interference from the state, see *United States v. Mauro*, 507 F.2d 802, 805-06 (2d Cir. 1974), because neither the reliability or the dignity of the criminal process is compromised by such an action, and the deterrent threat is still intact (because police are unlikely to count on waiver).

262. *See supra* notes 102, 117 & 125 and accompanying text.

263. *See supra* text accompanying notes 243-45.

The nullifying effect of society's interest in a dignified process must also be carefully cabined. The Supreme Court has recognized that certain fundamental rights, among them the right of the defendant to be present at his own trial[264] and the right of the press to observe the trial,[265] can be trumped by concerns about decorum. That interest should be particularly compelling, however, because otherwise we are ignoring the decision of a competent defendant merely to ensure a tidier proceeding.

Ferguson's self-representation presents the hardest question on this score. Given his delusions, the bizarre nature of his trial was predictable. Perhaps to protect both his dignity and the integrity of the trial process, he should not have been allowed to proceed pro se, or to make the argument that he did not commit the crime.

One might also argue that allowing Moran to plead guilty, fire his attorneys, and leave the prosecution's sentencing case uncontested made a mockery of the system, by signaling that our purportedly adversarial process, devoted to determining the precise culpability of those whom society sentences to death,[266] is a meaningless myth. Here the concern is not, as in Ferguson's case, abuse of the system, but neglect of it. If, however, Moran's guilty plea and waiver of counsel and sentencing evidence was (contrary to our earlier assumption) an exercise of will rather than an abdication of it, then he chose to streamline the process in a manner similar to a guilty plea.[267]

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264. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970) (holding that the right to be present in courtroom may be forfeited if, after being warned, the defendant continues to act "in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.").

265. *See* Chandler v. Florida, 449 U.S. 560, 575 (1981) (holding that the news media can be removed from the courtroom if its presence "compromised the ability of the particular jury . . . to adjudicate fairly"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (holding that the right of the public to attend trials may be curtailed by "overriding" interests, such as the need to assure quiet and orderly trials).

266. The Court has repeatedly stated that "death is different" with respect to society's need to ensure reliable determinations. *See* California v. Ramos, 463 U.S. 992, 998-99 (1983) (stating that the Court's position has long been "that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

267. Bonnie argues for the same position, in part because, even if precluded from directing the defense, the "recalcitrant defendant could still effectively preclude the development and presentation of evidence essential to a 'reliable' decision regarding the suitability of a death sentence." Bonnie, *Dignity*, *supra* note 231, at 1387. This type of defendant has in fact autonomously chosen the death penalty, or at least chosen to forego trial on the issue. We are not sure, however, that Moran fits this category. We have assumed that he would not have tried to help *or* hurt his defense. Compare him to the defendant in *People v. Bloom*, 774 P.2d 698 (Cal. 1989):

> Defendant stated that he did not want to put on a defense, that it would be "counterproductive" to do so because he did not "intend spending the rest of [his] natural life in some institution," and that if granted self-representation he would help the prosecution obtain a death verdict and would address the jury and "seek the death penalty."

Id. at 709-10.

Assuming this was a stable decision by a decisionally competent individual, it deserves dispositive weight.

Kaczynski, like Ferguson and unlike Moran, clearly planned to defend himself using the adversary process. Yet his trial probably would not have resulted in the same surreal atmosphere that characterized the Ferguson trial; Kaczynski certainly was not as overtly psychotic as Ferguson and in fact may have been willing to allow an attorney to make a necessity case (or some other argument) for him.[268] In light of these facts, and assuming Kaczynski was decisionally competent, he probably should have been allowed to pursue the defense as he saw fit.

In short, concerns about reliability or dignity should rarely trump a competent individual's decision about pleading, self-representation or mental state defenses. Only when these societal interests are extremely compelling does the attorney have an ethical obligation to ignore the competent client's wishes and convince the court that it should ignore those wishes as well.

C. *The Permanently Incompetent Defendant*

The final scenario the defense attorney with a mentally disabled client might face involves balancing reliability, dignity, and autonomy concerns when autonomy is non-existent because the defendant cannot be restored to competency. Again, the ethical rules do not provide clear guidance in this situation, leaving it up to the attorney to decide what protective action should be taken.[269] The law, on the other hand, appears to require that charges be dismissed whenever competency is unrestorable, a result that comports with the autonomy preference but has been criticized as insufficiently protective of society's interests in preventing recidivism.[270] We think the solution to this puzzle depends upon whether the person who is unrestorably incompetent is incompetent in the assistance sense or in the decisional sense. If the former, the present legal practice of dismissing charges is appropriate. If the latter, however, adjudication should proceed.

In *Jackson v. Indiana*,[271] the Supreme Court held, on equal protection and due process grounds, that if a person is not restorable to competence there are only two options: release or civil commitment. The Court reasoned that a person who is unrestorable to trial competency cannot be convicted and thus must be treated similarly to any other unconvicted person, meaning that the state may only confine such a person if it can show that he or she meets the criteria for civil commitment (typically, mental illness and

268. *See supra* note 7 and accompanying text.
269. *See supra* text accompanying note 139.
270. For a discussion of the issues, see Melton et al., *supra* note 25, at 130-33.
271. 406 U.S. 715 (1972).

dangerousness).[272] The Court also held that, once unrestorability is demonstrated, continued confinement on the grounds of incompetence would violate the Constitution because the "nature and duration of [the] commitment [would] bear [no] reasonable relationship to [its] purpose."[273]

Jackson has been ignored in a number of jurisdictions, probably because the government does not want to release, or to maintain in relatively insecure civil confinement, incompetent persons charged with serious crime.[274] To deal with this situation, various proposals for trying unrestorable individuals, usually calling for heightened procedural safeguards, have been proposed.[275] Applying this Article's analysis, however, *Jackson* makes sense. Prosecution of a person who does not understand the charges or the system or who is unable to communicate with his attorney about the offense may seriously undermine the integrity of the process, in terms of both reliability and dignity. Moreover, in the wake of the Supreme Court's decision in *Kansas v. Hendricks*,[276] a civil commitment regime is certainly capable of adequately protecting society.[277]

Assume, however, a defendant (like Moran, Ferguson and perhaps Kaczynski) who is competent in the assistance sense but not in the decisional sense. Assume further that the person's decisional incompetency cannot be remedied. Should charges against such a person be dismissed? *Jackson* did not directly address that question. *Godinez* may have. If, as conjectured earlier,[278] that opinion requires only assistance competence (i.e., an understanding of the process, with no need to inquire into reasons) before a person can undergo adjudication, then it may permit trial of such an individual.

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272. *See id.* at 723-30.

273. *Id.* at 738.

274. *See* Morris & Meloy, *supra* note 195, at 9-10.

275. *See* Robert Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. Chi. L. Rev. 66, 76 (1972) (arguing that an incompetent defendant should be entitled to a "super-fair" trial, in which the verdict, whether innocent or guilty, would be final); Donal Paull, *S.B. 133: The Near Resolution of a Major Problem: Fitness in the Criminal Law*, 56 Chi.-Kent L. Rev. 1107, 1118-19 (1980) (discussing a proposed Illinois bill providing that incompetent defendants be tried through to verdict at an "innocent only" trial, which results in the defendant's release if there is acquittal and a vacation of the verdict and a "*Jackson* disposition" if there is a conviction); *see also* ABA Mental Health Standards, *supra* note 84, Standard 7-4.13 (providing that incompetent defendants charged with minor crimes are released or civilly committed, and that those charged with serious felonies be tried and, if convicted, committed under provisions identical to those used for insanity acquittees).

276. 521 U.S. 346 (1997).

277. We are not endorsing all aspects of *Hendricks*. We mention it because it provides an example of how commitment can deal with very dangerous individuals (although *Hendricks* does not impose sufficient limitation on this process). *Cf.* Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 Wis. L. Rev. 186, 193-95.

278. *See supra* text accompanying notes 57-64.

That result is correct, although for different reasons than the Court's. Suppose a person is unrestorably incompetent to make a decision about waiving the insanity defense, but is competent in the assistance sense. Because such an individual understands the trial process and can communicate relevant facts to the attorney, neither dignity interests nor reliability would be undermined by pursuing adjudication. Less obviously, even the autonomy preference would not be slighted by proceeding to trial. Unlike a policy which permits decisions to be made for the incompetent client who has not yet been treated (which this Article rejects), surrogate decision-making in this situation occurs only after society has made a good faith effort to restore the individual's decision-making capacity. In other words, autonomy has been given its due.

When a client's decisional competence is not restorable, then, defense attorneys should act as the ultimate fiduciary, and be authorized to act as guardian.[279] If the lawyer representing such a client believes a guilty plea is preferable to trial, the plea should be made and the court should accept it, regardless of the client's wishes. If instead the lawyer believes an insanity defense is the best defense after a sensitive appraisal of the countervailing factors described earlier,[280] it should be raised, again regardless of the client's wishes. And presumably no waiver of counsel should ever be granted to such a client.

CONCLUSION

This Article has argued that the defense attorney has a multifaceted fiduciary duty toward the client with mental disability. That duty requires, first and foremost, respect for the autonomy of the client. The lawyer shows that respect not only by heeding the wishes of the competent client but by refusing to heed the wishes of the incompetent client. A coherent approach to the competency construct is therefore important. Following the lead of Professor Bonnie, this Article has broken competency into two components: assistance competency and decisional competency. It has defined the former concept in traditional terms, as an understanding of the criminal process and an ability to communicate relevant information, while arguing that the latter concept should be defined in terms of basic rationality and self-regard.

If the defense lawyer's fiduciary duty to respect client autonomy is assumed, it follows that the lawyer with a mentally ill client must assess the client's competency in both the assistance and decisional

279. One means of providing a check on the lawyer in this situation would be to require the lawyer to confer with another attorney, analogous to the "second opinion" requirement in medical practice. *See* Bonnie, *Competence*, *supra* note 62, at 584.

280. *See supra* text accompanying notes 235-39.

senses. Furthermore, if the client appears to be incompetent in either sense, the lawyer must assure that attempts are made to restore competence; if doing so requires alerting the court to the defendant's mental problems, that step must be taken. If, on the other hand, the client is competent, the attorney should generally accede to his or her wishes, at least with respect to pleading guilty, assertion of mental state defenses, and waiving the right to counsel. Occasionally, however, the lawyer's fiduciary duty to the client merges with society's interest in assuring a reliable and dignified process; in the extremely rare instances when these interests are compelling (for example, it is clear that the client who wants to plead guilty is factually innocent, or the trial of the client will make a complete mockery of the system and of the defendant), the attorney is ethically obligated to override the competent client's wishes. Furthermore, the lawyer should act as a surrogate decisionmaker when a defendant is competent in the assistance sense but unrestorably incompetent in the decisional sense.

A subtext of this Article has been that the lawyer acting as fiduciary also owes a duty to the client to assure the system works as it should. The lawyer should resist using a competency motion for purposes other than evaluation and treatment, and, if a competency motion is made, the lawyer should ensure that any resulting intervention occurs in the least intrusive manner possible. Outpatient treatment should be the usual method of restoring competency, and hospitalization, if necessary, should never be prolonged and should be credited toward sentence. A failure to pursue these latter strategies increases the temptation of the defense attorney to ignore the client's autonomy interests out of concern about the possible consequences of a competency motion or of a plea the defendant favors, even though the attorney's calculations about possible outcomes may be offbase, short-sighted, or ultimately less solicitous of the client's treatment needs.

The ethical quandaries created by cases like Theodore Kaczynski's, Colin Ferguson's and Richard Moran's are extremely complex. The thousands of less-conspicuous cases involving defendants with mental illness can be just as daunting to defense attorneys who want to do right. The competency standard we have outlined provides lawyers who are not trained in such matters with relatively clear yardsticks. The client-centered preference for autonomy that we advocate establishes a presumption in favor of the competent client's decisions on pleas and waiver of counsel. Finally, the lawyer's consequentialist-based fiduciary duty that we advance provides the theoretical backdrop for adopting these prescriptions.