Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial

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In Indiana v. Edwards*, the U.S. Supreme Court held that the Sixth Amendment permits a trial court to impose a higher competency standard for self-representation than to stand trial. The Court declined to specify the contents of a permissible representational competence standard, but cited with support the construct of adjudicative competence developed by Professor Richard Bonnie. While Bonnie's proposal may provide an appropriate framework for evaluating the competence of represented defendants' decisions, it is at most a starting point for defining the capacities needed for self-representation at trial. This Article begins by exposing three reasons why Bonnie's approach is inadequate to address self-representation. First, Bonnie selected the functional abilities necessary for decisional competence only in reference to the norm of autonomy. Second, Bonnie did not consider the unique decisionmaking context presented by self-representation. Third, Bonnie derived the elements in his decisional competence construct from the subset of abilities considered necessary to consent to medical treatment. While many similarities exist*

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between a represented defendant and a medical patient, this analogy does not hold for unrepresented defendants forced to make decisions at trial without an expert's assistance. Next, the Article — conceptualizing self-representation as an exercise in problem solving, where the major "problem" is the prosecution of a criminal charge — draws upon psychological theories of problem solving to identify abilities necessary for decisionmaking at trial. Applying a normative theory of representational competence that balances concerns of autonomy, reliability, and fairness, the Article concludes by suggesting a subset of abilities that may be critical for self-representation at trial.

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INTRODUCTION

On April 22, 2002, Zacarias Moussaoui, the alleged twentieth hijacker in the attacks of September 11, stood up in federal district court and launched into a fifty-minute tirade against his attorneys, the United States, and Israel.[1] Quoting extensively from the Koran in both English and Arabic, he told Judge Leonie M. Brinkema that he wanted to fire his court-appointed attorneys, represent himself, and hire a Muslim lawyer as his legal consultant.[2] He then prayed at length for the destruction of the United States and Israel.[3] Judge Brinkema, who ordered a competency hearing, observed that Moussaoui "appear[ed] to know and understand what [he was] doing" and stated: "You are very bright. . . . Unless the doctor comes up with something, I will find this is a knowing and intelligent waiver of counsel."[4] On the basis of four reports by mental health experts,[5] the observations of detention center personnel, and the defendant's court appearances and written motions,[6] Judge Brinkema found Moussaoui competent to stand trial.[7] Assuming he was therefore competent to represent himself,[8] Judge

[1] Brooke A. Masters, *Moussaoui Wants to Be Own Lawyer; Suspect Also Denounces U.S., Israel During Hearing*, WASH. POST, Apr. 23, 2002, at A1.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Judge Brinkema appointed Dr. Raymond Patterson "to perform a forensic competency evaluation of Zacarias Moussaoui to assist the Court in determining whether the defendant is competent to make the decision to waive counsel, or whether the decision is the product of a mental disease or defect rendering the decision involuntary or without a knowing appreciation of its consequences." United States v. Moussaoui, No. CRIM. 01-455-A, 2002 WL 1311729, at *1 (E.D. Va. Apr. 26, 2002). Patterson met with Moussaoui briefly four times and submitted a preliminary report to the court. Transcript of Motion Hearing Before the Honorable Leonie M. Brinkema at 3, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. CRIM. 01-455 A), *available at* http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui061302.htm. In response, defense counsel retained two mental health experts and tendered their views to the court. *Id.* at 3-4. Patterson then submitted a more detailed supplemental report, based on a nearly two-hour interaction with Moussaoui. *Id.* at 4. The defense filed a brief response to that report. *Id.*

[6] Transcript of Motion Hearing Before the Honorable Leonie M. Brinkema, *supra* note 5, at 3-4, 11-14.

[7] *Id.* at 16 (finding Moussaoui competent under *Dusky* standard to stand trial).

[8] *Id.* at 46 ("I don't need you to explain to me why you are making the decision to represent yourself, why you do not want these attorneys to represent you any longer, not for purposes of the *Faretta* [self-representation] evaluation. I don't need that, and I've already indicated that I have found you competent. So there's no issue about your competency.").

Brinkema probed Moussaoui's understanding of the disadvantages of self-representation[9] and found that he had effected a knowing and intelligent waiver of the right to counsel.[10] Moussaoui, who continued to assert that his defense attorneys were conspiring to kill him, was allowed to represent himself despite stern warnings from the judge, who called the decision "unwise."[11] Proceeding pro se, Moussaoui filed questionable handwritten motions on an almost daily basis, including two entitled "Stop Leonie Brinkema DJ Playing Game with My Life" and "Keep Mad, Out of Control Standby Hord of Blood Sucker, Out of Halal, Pure Pro Se Land."[12] Moussaoui also filed pleadings which, according to one news report, included "veiled, and in some cases overt, threats to public officials, attacks on foreign governments, attempts to communicate with persons overseas and efforts to obtain materials unrelated to this case."[13] Other odd behavior included insulting his standby counsel and calling Judge Brinkema a "death judge," a "would-be Nazi SS officer,"[14] and a "duplicitous 'she-Clinton.' "[15] Eventually, Judge Brinkema, having endured Moussaoui's outbursts and insults, expressed that she had had enough.[16] The judge issued an order in which she threatened to revoke Moussaoui's right to represent himself if he continued to abuse it.[17] One of Moussaoui's standby attorneys noted at that time: "We never thought he was competent to defend himself. . . . We've always had concerns about his mental health."[18]

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[9] *Id.* at 18-44.

[10] *Id.* at 48 ("I'm satisfied that you understand what you are doing by waiving your right to counsel, that you are doing so at this point for sufficiently rational reasons, unwise but rational, and I'm going to make the finding that this is a valid waiver and therefore allow you to proceed pro se."); *see also* United States v. Moussaoui, No. CRIM. 01-455-A, 2002 WL 1311738, at *1 (E.D. Va. June 14, 2002) (granting Moussaoui's motion to dismiss court-appointed counsel and proceed pro se).

[11] Tom Jackman, *Moussaoui Allowed to Defend Himself*, WASH. POST, June 14, 2002, at A1.

[12] Sarah Livingston Allen, Faretta*: Self-Representation, or Legal-Misrepresentation?*, 90 IOWA L. REV. 1553, 1555 (2005).

[13] Jerry Markon, *Judge Blasts Moussaoui's Conduct; Terrorist Suspect Could Lose Right to Represent Himself*, WASH. POST, Nov. 7, 2003, at A7.

[14] *Id.*

[15] Jess Bravin, *War on Terror's Thankless Task Is Legal Defense*, WALL ST. J., July 25, 2002, at B1.

[16] Markon, *supra* note 13, at B1.

[17] *Id.*

[18] *Id.* Based on Moussaoui's repeated violations of orders of the court, Judge Brinkema finally found that Moussaoui had forfeited his right to represent himself and ordered his standby counsel to once again serve as the attorneys of record. Jerry

Pro se defendants of borderline mental competency, such as Moussaoui, expose a fundamental tension between respecting the autonomy of a defendant who wants to control his defense and concerns over the fairness and reliability of the adjudication. Allowing a "barking lunatic,"[19] as one commentator described Moussaoui, to control and conduct his defense at trial casts doubt on the accuracy of a resulting conviction and the legitimacy of the criminal justice system. At the same time, a defendant has a Sixth Amendment right to represent himself at a criminal trial according to his own lights,[20] despite the harm his defense likely will suffer.[21]

One possible means of addressing this tension would be to designate some defendants as competent to proceed to trial only if represented. In June 2008, the U.S. Supreme Court endorsed such an approach in *Indiana v. Edwards*.[22] In *Edwards*, the Supreme Court held that the Sixth Amendment permits a trial court to impose a higher competency standard for self-representation than to stand trial.[23] The Court declined to specify the elements of a permissible competency standard for self-representation at trial (denominated in this Article as "representational competence"),[24] but indicated that findings of incompetence based on a lack of decisionmaking ability and severe mental illness would withstand constitutional scrutiny. In support of a statement that greater abilities may be required to present one's defense than to stand trial with representation, the *Edwards* Court cited with approval the construct for adjudicative competence proposed by Professor Richard Bonnie.[25]

Markon, *Lawyers Restored for Moussaoui*, WASH. POST, Nov. 15, 2003, at A2.

[19] Jonathan Turley, *A Fool and His Lawyer; Can You Be Competent to Stand Trial but Unfit to Represent Yourself?*, L.A. TIMES, Mar. 26, 2008, at A21.

[20] *See* Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 950 (1991) (arguing that adequate "competency standard [must] protect a person's expression of [eccentric] values and beliefs, however unconventional, because one important purpose of competency doctrine is to allow people to pursue their interests according to their own lights").

[21] *See* Faretta v. California, 422 U.S. 806, 834 (1975).

[22] 128 S. Ct. 2379 (2008).

[23] *Id.* at 2387-88.

[24] The term "representational competence" is intended to capture those abilities that a court should require a defendant to possess in order to represent himself *at trial*. I do not address a defendant's competence to waive the right to counsel or to plead guilty, either unrepresented or represented.

[25] *See Edwards*, 128 S. Ct. at 2386-87 (citing N. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 103 (2002)).

In a series of articles in the early 1990s,[26] Bonnie suggested that adjudicative competence — or competence to participate in one's defense — should be disaggregated into two concepts: a foundational concept of competence to assist counsel[27] and a context-dependent concept of decisional competence.[28] Bonnie suggested that all defendants must possess competence to assist counsel, while only those defendants called on to make decisions during an adjudication must possess decisional competence.[29] Competence to assist counsel, according to Bonnie, requires the abilities to understand the nature and purpose of the criminal process, appreciate one's potential jeopardy, and identify and communicate relevant information to counsel.[30] Decisional competence, on the other hand, includes those abilities required for legally valid decisionmaking.[31] Bonnie proposed a number of tests for decisional competence that vary by the decision at issue and whether the defendant's decision is in accord with counsel's advice.[32] In order to waive counsel and proceed pro se, Bonnie argued that a defendant should possess the ability to make reasoned choices.[33] He defined this standard of decisional competence to include the following functional elements: expression of choice, understanding of factual information, appreciation of that information for the defendant's own case, and rational manipulation of information.[34] In essence, Bonnie proposed that, to waive counsel, a defendant should be capable of using logical processes to compare the benefits and risks of options in a decisional framework free of delusional beliefs or pathological emotions.[35]

Bonnie's construct for adjudicative competence rightly has been much lauded by scholars for adding an important decisional element

[26] *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539 (1993) [hereinafter Bonnie, *Beyond* Dusky *and* Drope]; Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992) [hereinafter Bonnie, *A Theoretical Reformulation*]; Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419 (1990) [hereinafter Bonnie, *Mental Retardation*].

[27] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554-55, 561-67.

[28] *See id.* at 554-56, 567-87.

[29] *See id.* at 548, 568.

[30] *Id.* at 562-63.

[31] *Id.* at 548.

[32] *See id.* at 576-80.

[33] *See id.* at 579. Bonnie acknowledged that self-representation at trial may require additional abilities related to performance. *See id.* at 557 n.68.

[34] *See id.* at 571-72.

[35] *See id.* at 574-75.

to the competency analysis,[36] but a close analysis of the underpinnings and origin of the framework reveals its insufficiency for self-representation at trial. Bonnie indicated his intent that his theory of adjudicative competence should "embrace the full range of competencies in the criminal process,"[37] but he never considered whether a defendant could be competent to waive the right to counsel yet incompetent to represent himself at trial. Bonnie's core concern involved a defendant's ability to make decisions while represented by counsel. Competence for self-representation at trial, however, presents a host of different challenges and calls for separate consideration. Indeed, Bonnie recognized that self-representation at trial may require additional abilities not included within his constructs of competence to assist counsel and decisional competence.[38]

Bonnie's construct does not extend to representational competence for three reasons. First, while his foundational concept of competence to assist counsel protects the moral dignity of the judicial process and the reliability of the adjudication,[39] Bonnie identified only the norm of defendant autonomy as important in selecting the functional abilities necessary for decisional competence.[40] Recognizing the values of

[36] *See, e.g.*, John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 232-33 (2008) (recognizing that "[a]pproaching 'decisional competency' as the ability to make a rational choice on a particular question in furtherance of a defense strategy is more nuanced and useful than the unitary approach" that the Supreme Court adopted in *Godinez v. Moran* and advocating for courts' adoption of Bonnie's basic rationality test, as modified by Professors Christopher Slobogin and Amy Mashburn); Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1596-97 (2000) (characterizing Bonnie's decisional competency hierarchy as "extremely helpful" in resolving the confusion created by *Godinez* and allowing "sophisticated discussion of decisional competency issues").

[37] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 560; *see also* Bonnie, *A Theoretical Reformulation*, *supra* note 26, at 301.

[38] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 557 n.68 ("The focus here is only on the decisionmaking abilities required for effecting a legally valid waiver of one's right to be represented by counsel in favor of self-representation, i.e., to exercise one's '*Faretta* right.' I am not referring to whatever performance abilities may be required, in addition to decisional competence, for self-representation at a trial.").

[39] *See id.* at 554-55.

[40] *See id.* at 553, 556-57, 559-60. While Bonnie selected the components of his decisional competence test with only the norm of autonomy in mind, he argues that the ultimate decision of whether to allow a defendant to represent himself should take into account other values, such as preserving the dignity of the proceeding. *See* Richard J. Bonnie, *Ferguson Spectacle Demeaned System*, 17 NAT'L L.J., Mar. 13, 1995, at A23 [hereinafter Bonnie, *Ferguson*] ("[E]ven if he is competent to make this decision [to represent himself at trial], a mentally ill defendant does not have an

reliability and actual and apparent fairness, however, calls for consideration of additional decisional abilities in the unique context of self-representation. Second, because Bonnie generated his proposal within the context of the few decisions allocated to a represented criminal defendant,[41] his construct does not account for the unique decisionmaking context of self-representation. When proceeding without counsel at trial, a defendant is called upon to make a greater number of decisions, of a greater variety, within a short period of time, and without assistance. Third, Bonnie derived the elements in his decisional competence construct from those identified as essential for competence to consent to medical treatment.[42] While many similarities exist between a represented defendant and a medical patient, this analogy does not hold for unrepresented defendants forced to make decisions at trial without an expert's assistance. In essence, Bonnie's construct implicitly assumes that a lawyer will identify a decision point, distill relevant information, generate and analyze the utility of potential options, and present a recommendation to the defendant. A pro se defendant who proceeds to trial, however, will not have the benefit of a lawyer's aid and must participate in all stages of the decisionmaking and advocacy process. Therefore, self-representation at trial implicates a broader range of cognitive abilities and decisionmaking or problem-solving skills.

To identify additional abilities necessary for autonomous decisionmaking at trial,[43] this Article draws upon psychological theories of problem solving. Self-representation is, at base, an exercise

absolute right to represent himself if allowing him to do so would undermine the dignity of the trial process.").

[41] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 553-54.

[42] *See id.* at 570.

[43] This Article will focus on decisionmaking abilities relevant to *controlling* one's defense. Additional abilities may be necessary to *conduct* the defense. As I argue in a follow-up piece, a person competent to make decisions regarding his defense should be entitled to represent himself even if he lacks the performance or execution skills necessary to conduct it. *See* E. Lea Johnston, *Representational Competence: Defining the Limits of the Right to Self-Representation at Trial*, 86 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 54-55). In such situations, a court should appoint standby counsel to effectuate the decisions of the defendant. *See id.* At least one court has taken this tack, appointing standby counsel to carry out the strategic and tactical decisions of a defendant with severe communication problems. *See* Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir. 1991). The appointment of standby counsel to perform an execution function is one way to ensure that a defendant's constitutional right to control his defense is impeded only to the extent necessary to protect the interests of the State.

in problem solving,[44] where the major "problem" is the prosecution of one or more criminal charges. Social problem-solving theory is one of the earliest and most comprehensive prescriptive models of decisionmaking. This theory, developed by Professors Marvin R. Goldfried and Thomas D'Zurilla[45] and refined by D'Zurilla and Professor Arthur M. Nezu,[46] defines social problem solving as the self-directed cognitive, affective, and behavioral process by which an individual attempts to identify effective solutions for specific problems encountered in the natural environment.[47] D'Zurilla and his colleagues understood the process, also called applied problem solving,[48] as conscious, rational, effortful, and purposeful.[49] They defined a problem as "any life situation or task (present or anticipated) that demands a response for adaptive functioning, but no effective response is immediately apparent or available to the person [confronted with the situation] due to the presence of [one or more] obstacles."[50] Obstacles may include novelty, ambiguity, performance skill deficits, or lack of resources.[51] The theory conceives of problem solving as consisting of two domains: a motivational component called problem orientation and four goal-directed, cognitive-behavioral problem-solving skills. These skills include problem definition and formulation, generation of alternative solutions, decisionmaking, and solution implementation and verification. Requiring the possession of

[44] *See generally* Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 FORDHAM L. REV. 2659, 2669-70 (1999) (describing how technology may assist clients and attorneys in engaging in "detailed, multi-faceted diagnostic process" of problem solving that is required to determine best way to proceed in given case).

[45] *See* T. J. D'Zurilla & M.R. Goldfried, *Problem Solving and Behavior Modification*, 78 J. ABNORMAL PSYCHOL. 107, 107-20 (1971).

[46] *See* THOMAS J. D'ZURILLA & ARTHUR NEZU, PROBLEM-SOLVING THERAPY: A SOCIAL COMPETENCE APPROACH TO CLINICAL INTERVENTION 10-39 (Springer 2d ed. 1999) [hereinafter D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY]; Thomas J. D'Zurilla & Arthur Nezu, *Social Problem Solving in Adults*, *in* ADVANCES IN COGNITIVE-BEHAVIORAL RESEARCH AND THERAPY 201, 202-22 (PC Kendall ed., Academic Press 1982) [hereinafter D'Zurilla & Nezu, *Social Problem Solving in Adults*].

[47] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 10; Thomas J. D'Zurilla et al., *Social Problem Solving: Theory and Assessment*, *in* SOCIAL PROBLEM SOLVING: THEORY, RESEARCH, AND TRAINING 11, 12 (E. Chang et al. eds., 2004).

[48] Other terms used interchangeably with "social problem solving" include interpersonal cognitive problem solving, personal problem solving, practical problem solving, everyday problem solving, everyday cognition, and practical intelligence. *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 10-11.

[49] *Id.*

[50] *Id.* at 11.

[51] D'Zurilla et al., *supra* note 47, at 13.

at least a subset of these decisional components — widely viewed as essential for optimal decisionmaking — may be appropriate as a means to ensure that a defendant who wishes to proceed unrepresented at trial is sufficiently capable of recognizing and advancing his own interests.

This Article explores the implications of *Edwards*, exposes the problems in applying Bonnie's construct to self-representation at trial, and presents components of problem-solving theory for consideration in an applicable standard. Part I discusses the facts, holding, and rationales of *Edwards*, with an emphasis on decisionmaking abilities. Part II introduces the adjudicative competence construct developed by Bonnie and referenced by the Court in *Edwards*. Part III explains the insufficiency and inapplicability of Bonnie's proposal for self-representation at trial. Part IV outlines the decisional components of social problem-solving theory. Part V presents a normative theory of representational competence — which balances the competing concerns of autonomy, reliability, and fairness — as a lens through which to analyze the importance of each of these elements for self-representation at trial. This Part finishes by proposing that, unless a defendant's self-representation poses a grave threat to the reliability or fairness of the proceeding, a defendant capable of autonomous decisionmaking within the context of trial should be allowed to control his defense. The Article concludes with a tentative proposal to include a subset of problem-solving abilities in a representational competence standard.

I. *INDIANA V. EDWARDS*

In July 1999, the State of Indiana charged Ahmad Edwards with theft, criminal recklessness, aggravated battery, and attempted murder.[52] Over the course of the next four years, the trial court ordered numerous competency evaluations and held three competency hearings.[53] Appointed and retained neuropsychiatrists diagnosed Edwards with a "delusional disorder grandiose type"[54] and schizophrenia.[55] Their reports documented that Edwards was often

[52] Indiana v. Edwards, 128 S. Ct. 2379, 2382 (2008); *see also* Joint Appendix at 1a, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 906153 [hereinafter *Edwards* Joint Appendix].

[53] *Edwards*, 128 S. Ct. at 2382; *see also Edwards* Joint Appendix, *supra* note 52, at 106a-15a, 202a-03a.

[54] *Edwards* Joint Appendix, *supra* note 52, at 21a, 26a-27a.

[55] *Id.* at 164a.

"confused,"[56] was "quite tangential, expansive, and disorganized in his verbal output,"[57] and presented "impairments of disorganized thought processes, delusional ideation, and bothersome hallucinations."[58] The trial court twice found Edwards incompetent to stand trial.[59] At one hearing, Edwards described his deficiencies in this way: "I guess I, it's hard for me to communicate with anybody. I just, I'm not, I can't concentrate, I come out of concentration so easy. It's just not, nothing makes sense when I do, you know."[60] In late 2003, the trial court ordered Edwards into the custody of the Indiana Department of Mental Health for evaluation and treatment.[61]

Upon receiving antipsychotic medication and psychotherapy,[62] Edwards's cognitive, communicative, and behavioral abilities improved.[63] In July 2004, a staff forensic psychiatrist reported that Edwards's "thought processes are no longer disorganized"[64] and that "[t]here is no evidence of present or recent hallucinations."[65] The doctor found that Edwards "communicates very well," "[h]is speech is easy to understand," and "his thought processes are coherent."[66] On

[56] *Id.* at 28a.

[57] *Id.* at 30a.

[58] *Id.* at 221a. The Court in *Edwards* reported that the defendant had "serious thinking difficulties and delusions." *Edwards*, 128 S. Ct. at 2382. The evidence reflected that, consistent with his untreated mental illness, Edwards's functioning varied over time. *Compare Edwards* Joint Appendix, *supra* note 52, at 61a-62a (reporting in March 2001 that Edwards "appears able to think clearly" and "to carry on a normal conversation and answer questions appropriately"), *with id.* at 164a (reporting in November 2002 that Edwards's "thought process is markedly impaired with loose associations, illogic, irrelevance, and marked incoherence").

[59] Edwards was found incompetent to stand trial in August 2000, *see Edwards*, 128 S. Ct. at 2382; *Edwards* Joint Appendix, *supra* note 52, at 365a, and in November 2003, *see Edwards* Joint Appendix, *supra* note 52, at 206a-11a. Edwards had been found competent to stand trial in April 2002. *Edwards* Joint Appendix, *supra* note 52, at 106a-14a.

[60] *Edwards* Joint Appendix, *supra* note 52, at 505a.

[61] *See Edwards*, 128 S. Ct. at 2382; *Edwards* Joint Appendix, *supra* note 52, at 206a-11a. This was Edwards's second commitment to the Indiana Department of Mental Health for evaluation and treatment. *See Edwards* Joint Appendix, *supra* note 52, at 48a-49a. He had been held at Logansport State Hospital for three months but apparently received no therapy or medication (except Benadryl) during his stay. *See id.* at 56a, 61a, 110a.

[62] *See Edwards* Joint Appendix, *supra* note 52, at 216a, 230a.

[63] *See id.* at 230a-32a; *see also id.* at 165a (indicating that Edwards's competence restoration was impossible without medication).

[64] *Id.* at 231a.

[65] *Id.* at 232a.

[66] *Id.*

the basis of this report, the trial court found Edwards competent to stand trial.[67] In June 2005, Edwards proceeded to trial with the assistance of counsel.[68] A jury convicted Edwards of theft and criminal recklessness, but was unable to reach agreement on the battery and attempted murder counts.[69]

Prior to retrial, Edwards petitioned the court to proceed pro se.[70] Edwards explained that he and his attorney disagreed as to which defense to present to the attempted murder charge.[71] Edwards preferred a self-defense theory, while his attorney wanted to argue lack of intent to kill.[72] The trial court, while satisfied that Edwards was waiving his right to counsel knowingly, voluntarily, and intelligently,[73] denied Edwards's motion.[74] The court explained its reasoning in this way:

> I spent some time going over [the reports of numerous doctors who had evaluated Edwards's competency and mental health]. . . . Each and every report where a . . . neurological exam was performed found either delusions, a delusional disorder of the grandiose type or schizophrenia of an

[67] *See id.* at 226a-36a; Brief for Petitioner at 8, Indiana v. Edwards, 128 S. Ct. 2379 (2008) (No. 07-208), 2008 WL 336303 [hereinafter *Edwards* Brief for Petitioner].

[68] *Edwards*, 128 S. Ct. at 2382. Immediately before the start of trial, Edwards asked to proceed pro se. *Edwards* Joint Appendix, *supra* note 52, at 509a. Edwards expressed concern that his appointed attorney had not devoted sufficient time to reviewing his case and had limited Edwards's access to trial materials. *Id.* at 509a-10a. The court found that Edwards had knowingly and voluntarily waived his right to counsel, *id.* at 512a, but denied his request to proceed pro se because allowing Edwards to proceed on his desired defense (insanity) would have required a continuance, *id.* at 515a, 520a, 524a. This decision was not at issue on appeal.

[69] *Edwards*, 128 S. Ct. at 2382.

[70] *Id.* at 2382-83; *Edwards* Joint Appendix, *supra* note 52, at 279a-82a, 522a.

[71] *Edwards* Joint Appendix, *supra* note 52, at 523a. In Edwards's words: "My objection is me and my attorney actually had discussed a defense, I think prosecution had mentioned that, and we are in disagreement with it. He has a defense and I have a defense that I would like to represent or present to the Judge." *Id.*

[72] *Id.* at 525a. Edwards's attorney explained: "What [Edwards has] indicated to me is that were he to proceed to trial, representing himself, that his defense would be self-defense. He is prepared to go forward with that defense on his own today. That is not the defense that I would be intending to advance to the jury in this case. And for the record, as his counsel, and I really haven't wavered from this since I first became familiar with this case, I believe that the defense that would be most in Mr. Edwards'[s] interests to be advanced at trial would be basically that he didn't intend to kill anybody . . . ." *Id.*

[73] *See Edwards* Brief for Petitioner, *supra* note 67, at 3; *Edwards* Joint Appendix, *supra* note 52, at 512a-27a.

[74] *See Edwards* Brief for Petitioner, *supra* note 67, at 3; *Edwards* Joint Appendix, *supra* note 52, at 527a.

> undifferentiated type. . . . Several of the reports refer to rambling writings as an indication of an inability to stay focused. The report upon which we relied in finding that Mr. Edwards was competent . . . still found that there was schizophrenia of an undifferentiated type; found that Mr. Edwards acknowledged his need for counsel; found that Mr. Edwards was able to plan a legal strategy in cooperation with his attorney. . . . I'm going to carve out a third exception [to the right to self-representation]. . . . I think it requires abilities that exclude the doctors' findings, if you will. With these findings, he's competent to stand trial[,] but I'm not going to find he's competent to defend himself. So the request to proceed pro se will be denied.[75]

The court appointed counsel to represent Edwards over his objection. At retrial, Edwards's attorney pursued the line of defense that Edwards had rejected.[76] On December 19, 2005, the jury convicted Edwards of the remaining counts,[77] and the court sentenced him to thirty years in prison.[78]

Edwards appealed his conviction to Indiana's intermediate appellate court.[79] He argued that the trial court violated his Sixth Amendment right to self-representation when it refused to permit him to represent himself at his retrial. Citing U.S. Supreme Court precedent, Edwards asserted that the standard for competence to waive the right to counsel is identical to that for competence to stand trial.[80] Edwards argued that, because the trial court found him competent to stand trial under *Dusky v. United States*, he was necessarily competent to represent himself.[81] *Dusky* had established that a defendant is competent to stand trial when he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."[82] Courts have interpreted this standard to require that a

[75] *Edwards* Joint Appendix, *supra* note 52, at 526a-27a; *see also* Edwards v. State, 854 N.E.2d 42, 47-48 (Ind. App. 2006).

[76] Indiana v. Edwards, 128 S. Ct. 2379, 2390 (2008) (Scalia, J., dissenting).

[77] *Edwards* Brief for Petitioner, *supra* note 67, at 4.

[78] *Id.*; *see also Edwards*, 128 S. Ct. at 2383.

[79] *See Edwards*, 854 N.E.2d at 44.

[80] Edwards v. State, 866 N.E.2d 252, 255 (Ind. 2007).

[81] *See id.*

[82] Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and

defendant be able to identify and convey relevant information to counsel, appreciate his status as a defendant in a criminal prosecution, and understand the charges, the purpose of the criminal process, and the purpose of the adversary system, including the role played by defense counsel.[83] The appellate court agreed with Edwards, finding that the U.S. Supreme Court's decision in *Godinez v. Moran*[84] prohibited a state from imposing a higher competency standard for a defendant to represent himself than to stand trial with the assistance of counsel.[85] The Indiana Supreme Court affirmed on that basis.[86] At Indiana's request, the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court vacated and remanded, holding that the Sixth Amendment[87] *permits* a trial court to require a defendant to meet

object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

[83] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554 & nn.62-64. After *Godinez*, the *Dusky* standard may also require the capacity to understand the rights to silence, jury trial, confrontation, and trial counsel. Slobogin & Mashburn, *supra* note 36, at 1590.

[84] 509 U.S. 389 (1993). In *Godinez*, the defendant, who had initially pleaded not guilty in the shooting deaths of three people and was found competent to stand trial, later informed the trial court that he wished to discharge his attorneys and change his pleas to guilty in order to prevent the presentation of mitigating evidence at his sentencing. *Id.* at 391-92. The trial court determined that the defendant had made an intelligent and knowing waiver of his constitutional right to assistance of counsel and accepted his guilty plea. *Id.* at 392. In responding to the defendant's subsequent habeas petition, the district court affirmed the trial court's findings, but the Ninth Circuit Court of Appeals reversed. *Id.* at 393. The Ninth Circuit held that the competency to waive constitutional rights "requires a higher level of mental functioning than that required to stand trial," and that a defendant is competent to waive counsel or plead guilty only if he has the ability to make a " 'reasoned choice' among the alternatives available to him." *Id.* at 394. The United States Supreme Court disagreed, stating that it "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id.* at 398.

[85] *See* Edwards v. State, 854 N.E.2d 42, 48 (Ind. App. 2006).

[86] *See* Edwards v. State, 866 N.E.2d 252, 260 (Ind. 2007).

[87] The majority identifies the Sixth Amendment as the constitutional basis for its decision in *Indiana v. Edwards*, 128 S. Ct. 2379, 2381, 2383-84 (2008), but its emphasis on the fundamental fairness of the proceeding suggests that its holding was motivated by due process concerns. *See id.* at 2387, 2388. The text of the *Edwards* decision, with the exception of its discussion of *Faretta*, generally refers to the requirements of "the Constitution." *See id.* at 2381, 2383, 2385. The Court's reliance on *Dusky* and *Drope v. Missouri*, 420 U.S. 162 (1975), which held that the Due Process Clause prohibits the trial of an incompetent defendant, *see id.* at 172, as support for the notion that the self-representation right may be limited by mental competency also suggests due process origins in *Edwards*. *See Edwards*, 128 S. Ct. at 2383, 2386-87 (discussing relationship of *Dusky/Drope* standard to case at bar). In his dissent, Justice

a higher threshold of competency to represent himself than to stand trial or effect a valid waiver of counsel.[88] The Court invoked several strands of reasoning to support its holding. First, the Court found that precedent[89] "point[ed] slightly in the direction of" its holding.[90] In particular, the Court observed that *Dusky*'s mental competency standard focused on a defendant's "present ability to consult with his lawyer," thus emphasizing the centrality of representation to the competency inquiry.[91] Second, the Court found that the varying nature of mental illness called for applying a different mental competency standard to different activities.[92] Referencing the ebb and flow of Edwards's lucidity, the Court observed, "In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel."[93] Third, the Court asserted that allowing a borderline-competent defendant to represent himself would not be respectful of his autonomy because the representation could result in a "humiliating" spectacle.[94] Finally, the Court found its holding consistent with the government's interests in securing a reliable verdict and an actual — and apparent — fair trial.[95]

Scalia notes that the right to self-representation may be understood to stem from the Due Process Clause in addition to the Sixth Amendment. *Id.* at 2390-91 (Scalia, J., dissenting); *see also* Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment).

[88] *Edwards*, 128 S. Ct. at 2387-88.

[89] The Court found that *Faretta* and *Godinez*, while relevant, were not controlling. *See id.* at 2384-85 (analyzing applicability of *Faretta* and *Godinez*). *Faretta* did not consider the issue of competency. *See id.* at 2384. *Godinez*, which, like *Edwards*, involved a "borderline-competent criminal defendant," held that the Sixth Amendment does not require a defendant to satisfy a higher mental competency standard to represent himself than to stand trial. *See id.* at 2384-85. *Godinez* did not address, however, whether the Constitution *allows* a trial court to impose a higher competency standard. *Id.* at 2385. Additionally, *Godinez* involved a defendant who sought to proceed pro se to enter a plea of guilty, not to go to trial. *Id.*

[90] *Id.* at 2386.

[91] *Id.* (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)); *see also id.* (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)). The Court also referenced *Faretta*'s partial reliance on preexisting state laws, all of which were consistent with a competency requirement for self-representation. *See id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 2387.

[95] *Id.* ("Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial. . . .

The U.S. Supreme Court left to lower courts the task of crafting a specific competency standard for self-representation, but its opinion in *Edwards* provides guidance for identifying capacities and skills relevant to such a standard. In particular, the Court evidenced concern for a defendant's "mental condition"[96] or "mental fitness."[97] While these terms are undefined, they appear to capture, at least in part, elements of adjudicative competence, or powers of understanding, reasoning, and appreciation of charges.[98] The Court indicated its belief that a defendant requires greater decisionmaking powers to represent himself at trial than to assist counsel.[99] The Court also repeatedly highlighted the importance of a defendant's expressive ability or communication skills.[100] It is unclear whether poor communication skills on their own, however, could support a finding of representational incompetence, or whether such evidence is merely important as an indicator of disorganized thinking.[101] Finally, the

Further, proceedings must not only be fair, they must appear fair to all who observe them." (internal quotation marks omitted)).

[96] *Id.* at 2385.

[97] *See id.* The Court also used the terms "mental capacity," *see id.* at 2385, 2387, and "mental competency," *see id.* at 2383, 2384, 2386.

[98] The Court, in a parenthetical, quoted a passage from a 2002 study that states, "Within each domain of adjudicative competence (competence to assist counsel; decisional competence) the data indicate that understanding, reasoning, and appreciation [of the charges against a defendant] are separable and somewhat independent aspects of functional legal ability." *Id.* at 2386-87 (citing and quoting N. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 103 (2002)).

[99] *See id.*

[100] *See id.* at 2387 (citing "impaired expressive abilities" as impeding defendant's ability to represent himself and drawing readers' attention to rambling, nonsensical motions and documents filed by Edwards); *id.* at 2388-89 (referencing motion drafted by Edwards and including excerpt of motion in appendix of opinion). In prior cases, the Court has found that a defendant's ability to communicate effectively may factor into whether the Due Process Clause requires appointment of counsel. *See* Gagnon v. Scarpellli, 411 U.S. 778, 790-91 (1973) (involving probation hearing).

[101] Indiana urged the Court to adopt a standard that would allow trial courts to "deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." *Edwards*, 128 S. Ct. at 2388 (quoting *Edwards* Brief for Petitioner, *supra* note 67, at 20 (emphasis omitted)). Indiana's communication-based standard would not require a finding of decisional incompetence or even a finding of mental illness. *See Edwards* Brief for Petitioner, *supra* note 67, at 26. While it did not adopt the standard, the Court did not criticize it as being incomplete or constitutionally impermissible. Instead, the Court merely voiced uncertainty as to how the standard would operate in practice. *Edwards*, 128 S. Ct. at 2388. Because the legal response to a finding of representational incompetence involves appointing an attorney to serve as a surrogate decisionmaker, *see id.* at 2390, 2394 (Scalia, J., dissenting) (highlighting fact that, after Edwards's pro se request was denied, his lawyer advanced defense that defendant had explicitly rejected), decisional

Court, in passing, listed the following conditions as impeding a defendant's ability to represent himself: "[d]isorganized thinking, deficits in sustaining attention and concentration, . . . anxiety, and other common symptoms of severe mental illnesses."[102]

In *Edwards* the U.S. Supreme Court encouraged trial courts to "take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."[103] While the Court abstained from speculating about the constitutional permissibility of any particular standard, its opinion suggested that decisional competence is a relevant, if not essential, component of representational competence.[104] The term "decisional competence" was coined by Professor Bonnie in the context of his proposal for a dual standard of adjudicative competence, and the Court in *Edwards* cited this construct with approval.[105] While Bonnie did not address representational competence directly,[106] his construct suggests that, to be allowed to proceed pro se, a defendant should possess not only the capacities to understand and attend to the proceedings, but also the abilities to express a choice, understand and appreciate information bearing on decisions, and reason.[107] Close analysis of Bonnie's approach, however, demonstrates that it does not fully and adequately address the abilities required for self-representation.

II. PROFESSOR RICHARD BONNIE'S CONSTRUCT OF ADJUDICATIVE COMPETENCE

The U.S. Supreme Court in *Edwards* indicated its support of Bonnie's adjudicative competence framework. After referencing "the basic tasks needed to present his own defense without the help of counsel," the Court alluded to the importance of competence to assist counsel and decisional competence and cited with approval the competency construct delineated in *Adjudicative Competence: The*

competence should be an essential component of representational competence.

[102] *Edwards*, 128 S. Ct. at 2387 (quoting Brief for the American Psychiatric Association et al. as Amici Curiae in Support of Neither Party at 26, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 405546).

[103] *Id.* at 2387-88.

[104] *See id.* at 2386-87.

[105] *See id.*

[106] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 557 n.68.

[107] *See id.* at 571-72; *id.* at 560 ("These . . . concepts [of competence to assist counsel and decisional competence] seem to embrace the full range of competencies in the criminal process.").

MacArthur Studies.[108] This work, the culmination of research conducted by the MacArthur Foundation Research Network on Mental Health and the Law, draws upon Professor Bonnie's theoretical framework for competency to stand trial.[109]

Bonnie made a valuable contribution to the legal competency literature by defining "the meaning of incompetence [in criminal adjudication] in relation to the social purposes that the rules are designed to serve" and disaggregating the competence necessary to participate in one's defense into two separate constructs.[110] Bonnie identified three independent values implicated by barring adjudication on grounds of incompetence: the moral dignity of the judicial process, the reliability of the adjudication, and a defendant's autonomy interest in being able to make certain decisions relating to his defense.[111] Bonnie constructed a competency model responsive to these norms by separating adjudicative competence into a foundational concept of competence to assist counsel[112] and a context-dependent concept of decisional competence.[113] While all defendants should be competent to assist counsel as a threshold matter, a defendant need only be decisionally competent to make one of the several decisions allocated to him in the criminal process.[114] These decisions include whether to plead guilty,[115] waive the right to a jury trial,[116] waive the right to counsel,[117] testify,[118] and be present at trial.[119]

Competence to assist counsel, as understood by Bonnie, operationalizes the *Dusky* standard for competence to stand trial. Bonnie theorized that this foundational concept, which does not encompass decisionmaking abilities, serves the interests of dignity and reliability by ensuring, respectively, that a defendant is a "fit" subject for prosecution and that he is capable of recognizing and relaying

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[108] *Edwards*, 128 S. Ct. at 2386-87 (quoting N. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 103 (2002)).

[109] N. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 56-57 (2002) (describing Bonnie's conceptual model).

[110] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 541.

[111] *See id.* at 551-54; Bonnie, *Mental Retardation*, *supra* note 26, at 426-28.

[112] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554-55, 561-67.

[113] *See id.* at 554-56, 567-87.

[114] *See id.* at 545, 568.

[115] *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[116] Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942).

[117] Faretta v. California, 422 U.S. 806, 834 (1975).

[118] Rock v. Arkansas, 483 U.S. 44, 51-53 (1987); Jones v. Barnes, 463 U.S. 745, 751 (1983) (dictum).

[119] Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988) (dictum).

relevant information to counsel.[120] Bonnie defined competence to assist counsel to include "an actual understanding of the nature and purpose of the criminal process, appreciation of one's own situation as a criminal defendant, and a capacity to recognize and relate relevant information to the attorney."[121] He argued that the stringency of this standard in application should vary by "the complexity of the charges and the attorney's actual need for information."[122] A finding of incompetence in this domain precludes adjudication.[123]

Decisional competence, on the other hand, serves the interest of autonomy and is required only in those few instances in which a defendant must make a decision in the context of his adjudication.[124] After surveying the scarce relevant case law, Bonnie suggested that the test for decisional competence should vary according to the particular decisionmaking context at issue.[125] Bonnie used the abilities identified by Professors Thomas Grisso and Paul S. Appelbaum in their work in medical treatment decisionmaking as a "starting point" for determining potential capacities necessary for criminal adjudication.[126] In order to make competent medical decisions, Grisso and Appelbaum had proposed that patients should possess the capacity to communicate a choice, understand relevant information, appreciate the nature of the medical situation and its likely consequences, and manipulate information rationally.[127] Bonnie assessed the applicability of each of these abilities for decisional competence in a criminal proceeding by surveying its relationship to the standards alluded to in the case law and to the norms of dignity, reliability, and autonomy.[128]

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[120] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554-55; Bonnie, *Mental Retardation*, *supra* note 26, at 426-28, 430-31.

[121] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 562-63.

[122] *Id.* at 561.

[123] *Id.* at 554.

[124] *Id.*

[125] *See id.*; Bonnie, *A Theoretical Reformulation*, *supra* note 26, at 305-14.

[126] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 570 & n.111 (citing Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988)); Bonnie, *A Theoretical Reformulation*, *supra* note 26, at 305; *see also* Bonnie, *Mental Retardation*, *supra* note 26, at 435 & n.64. For a short synopsis of Grisso's and Appelbaum's construct for competency to make medical decisions, see THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 398-400 (2d ed. 2003).

[127] *See* Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study, I: Mental Illness and Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105, 109-11 (1995) [hereinafter Appelbaum & Grisso, *The MacArthur Treatment Competence Study*].

[128] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 572-76.

Ultimately, Bonnie suggested five tests of varying degrees of stringency, which could be applied to different decisions.[129] These tests include, from least to most stringent, expression of preference,[130] basic understanding,[131] minimum appreciation or basic rationality,[132] substantial appreciation,[133] and reasoned choice.[134]

Bonnie's least stringent test of decisional competence, *expression of preference*, includes the ability to express a choice among alternatives and to maintain a stable preference.[135] The *understanding* test captures a defendant's comprehension of the parameters of options related to a particular decision, including his prerogatives as a decisionmaker.[136] Bonnie's decisional competence framework includes two levels of *appreciation*, or a defendant's ability to appreciate the significance of information for his own case.[137] The element of *minimum appreciation* assesses the plausibility of the reasons underlying a decision,[138] while *substantial appreciation* evaluates the rationality of the defendant's belief system.[139] The latter element serves to exclude cases of gross irrationality and decisions "powerfully influenced by delusional beliefs or pathological emotions."[140] Finally, the test of *reasoned choice* includes the capacity to seek relevant information to inform the decision and to use "logical processes" to compare the benefits and disadvantages of the options.[141] The element of reasoning evaluates a defendant's ability to apply logic, distinguish legally relevant from irrelevant information, and make correct inferences and deductions.[142]

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[129] *See id.* at 571-76. Professor Terry A. Maroney has proposed a modified test for decisional competence, which includes elements of perception, understanding, reasoning, and choice. *See* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1392 (2006).

[130] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 572.

[131] *See id.* at 572-73.

[132] *See id.* at 573-74.

[133] *See id.* at 574-75.

[134] *See id.* at 575-76.

[135] *See id.* at 572.

[136] *See* POYTHRESS ET AL., *supra* note 109, at 60, 65-66 (analyzing "understanding" in context of decisions to plead guilty and waive right to jury trial). Generally speaking, a defendant's performance on understanding lines of inquiry primarily measures his prior exposure to, and memory for, legally relevant information. *Id.* at 136.

[137] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 573.

[138] *See id.* at 574.

[139] POYTHRESS ET AL., *supra* note 109, at 60, 64, 67.

[140] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 575.

[141] *See id.* at 575-76; *see also* POYTHRESS ET AL., *supra* note 109, at 60, 66-67.

[142] *See* POYTHRESS ET AL., *supra* note 109, at 136.

While, as an empirical matter, the abilities do not form a hierarchy of rigor,[143] each of Bonnie's decisional tests subsumes the elements of the less stringent test before it.[144] When the context of a decision indicates that a choice is likely to be unreliable — such as when a defendant rejects his counsel's advice and insists on waiving his right to counsel and representing himself — Bonnie suggested that the most stringent decisional competency standard, reasoned choice, should apply.[145] The reasoned choice test includes the five functional abilities identified briefly above: expression of preference, factual understanding, minimum appreciation, substantial appreciation, and reasoned choice.[146] Bonnie argued that a finding of decisional incompetence should not preclude adjudication and suggested surrogate decisionmaking by counsel as a means to overcome decisional deficiencies.[147]

Bonnie's decisional competence construct has been widely lauded within the academic community.[148] While some commentators have offered amendments to Bonnie's proposal,[149] none have questioned the propriety of using the construct as the conceptual framework for adjudicative competence, even within the context of self-representation at trial.[150] An analysis of the origins of the construct,

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[143] *See* Thomas Grisso & Paul S. Appelbaum, *Comparison of Standards for Assessing Patients' Capacities to Make Treatment Decisions*, 152 AM. J. PSYCHIATRY 1033, 1035-37 (1995); R. J. Gurrera et al., *Cognitive Performance Predicts Treatment Decisional Abilities in Mild to Moderate Dementia*, 66 NEUROLOGY 1367, 1370 (2006).

[144] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 571.

[145] *See id.* at 579, 586.

[146] *See id.* at 572-76.

[147] *See id.* at 579-80.

[148] *See, e.g.*, King, *supra* note 36, at 233 (noting that adoption of Bonnie's proposal would lead to more accurate determinations of which criminal defendants are competent "to meaningfully take part in [their] defense"); Slobogin & Mashburn, *supra* note 36, at 1596-97 ("Bonnie's decisional competency framework is extremely helpful. First, it resolves the confusion created by *Godinez* and the cases leading up to it, which failed to distinguish between assistance and decisional competency. Second, its competency hierarchy allows sophisticated discussion of decisional competency issues.").

[149] *See* Maroney, *supra* note 129, at 1391-92 & n.97 (reordering and slightly changing emphasis of components of Bonnie's decisional competence construct); Slobogin & Mashburn, *supra* note 36, at 1594-98 (rejecting Bonnie's components of substantial appreciation and reasoning as insufficiently deferential to autonomy and adding element of "basic self-regard").

[150] *See* Christopher Slobogin, *Mental Illness and Self-Representation:* Faretta, Godinez *and* Edwards, 7 OHIO ST. J. CRIM. L. 391, 402-03 (2009) (arguing that, to waive one's right to counsel and to represent oneself at trial, one should possess "basic rationality," as defined by Bonnie, and "basic self-regard").

however, reveals its incompatibility with self-representation. In particular, the normative underpinnings and factual context underlying Bonnie's decisional competence proposal suggest its limited applicability to the very different context of self-representation.

III. INSUFFICIENCY OF BONNIE'S CONSTRUCT FOR REPRESENTATIONAL COMPETENCE

While it may be appropriate to require pro se defendants to possess certain abilities included in Bonnie's adjudicative competence construct, the construct is not a proper or sufficient measure of representational competence. Three aspects of Bonnie's construct account for its inapplicability. First, while Bonnie's foundational concept of competence to assist counsel promotes the reliability of the adjudication and protects the moral dignity of the criminal process,[151] Professor Bonnie identified relevant functional abilities of decisional competence only in reference to the norm of autonomy.[152] As *Edwards* made clear, representational competence serves to respect the autonomy of the defendant while safeguarding the reliability of the proceeding and the actual and apparent fairness of the adjudication. The cognitive and decisional components of a representational competence standard, therefore, should balance concern for respecting a defendant's autonomy with preventing grave threats to accuracy or fairness. Second, Bonnie originally defined decisional competence within the context of the handful of decisions entrusted to represented criminal defendants.[153] The context in which these decisions are made differs significantly from that which pro se defendants encounter at trial. Third, Bonnie derived his decisional competence construct wholly from the model for competence to consent to medical treatment.[154] Informed consent may provide an apt analogy for proceeding to trial with counsel, because in both situations the individual must merely respond to the advice of an expert. In the context of self-representation, however, a defendant will not have the benefit of an expert's assistance. Pro se defendants must therefore possess a greater array of problem-solving abilities to manage a criminal trial alone.

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[151] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554-55.

[152] *See id.* at 553, 556-57, 559-60.

[153] *See id.* at 554.

[154] *See id.* at 570.

A. Failure to Deal Squarely with Reliability and Fairness Concerns

Decisional competence, as defined by Bonnie, serves to safeguard the interest of autonomous decisionmaking by the defendant.[155] Bonnie identified decisional competence as "an inherent, though derivative, feature of any legal doctrine that prescribes a norm of client *autonomy*."[156] Flowing from this precept, Bonnie identified as crucial only those abilities recognized by psychologists in other contexts as necessary for autonomous decisionmaking.[157] These abilities, described previously, include expression of choice, understanding, appreciation, and reasoning.[158] Bonnie acknowledged that preserving moral dignity and protecting against erroneous convictions are also important values at stake in a criminal adjudication.[159] In his view, however, correct application of the *Dusky* standard usually[160] protects these norms by ensuring that the defendant is a "fit" subject for prosecution and is capable of identifying and conveying relevant information to counsel.[161]

While the interest of autonomy is paramount, competing values may warrant reflection in the decisional components of a representational competence construct. In 1979, Professor Alan R. Felthous argued that competency to waive counsel and "make one's defense" should serve these purposes: (1) ensure reliability of criminal adjudications, (2) assure a fair trial, and (3) protect the dignity and integrity of legal

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[155] *See id.* at 553 ("A construct of 'decisional competence' is an inherent, though derivative, feature of any legal doctrine that prescribes a norm of client *autonomy*."); *id.* at 556-57 ("Which abilities should be regarded as *necessary* for legally valid decisionmaking, and therefore included within a 'test' of decisional competence, must derive from a normative conception of client autonomy in criminal defense."); *id.* at 559-60 ("The criteria for decisional competence, the procedures for resolving doubts about competence, and the legal responses to incompetence can be sensibly formulated only in the context of a more general theory concerning client autonomy in the attorney-client relationship.").

[156] *Id.* at 553.

[157] *See id.* at 570-71.

[158] *See id.* at 570-76.

[159] *See id.* at 551-52.

[160] Bonnie's early work suggested that correct application of the foundational construct of competence to assist counsel should suffice to safeguard the dignity and reliability of the proceeding. *See id.* at 551-52, 555, 561. In a 1995 article regarding the trial of Colin Ferguson, however, Bonnie indicated that a court could prohibit a defendant from representing himself — even if the defendant is competent to stand trial and decisionally competent to waive the right to counsel — if his self-representation would undermine the dignity of the trial process. *See* Bonnie, *Ferguson*, *supra* note 40, at A23.

[161] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 551-52, 555, 561.

processes.[162] In *Edwards*, the U.S. Supreme Court drew upon these purposes in justifying the permissibility of a higher standard for self-representation at trial. First, the Court stressed that "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."[163] In addition, "proceedings must not only be fair, they must 'appear fair to all who observe them.' "[164] To exemplify this point, the Court in *Edwards* cited the response of a psychiatrist who observed, in horror, a patient trying to conduct his own defense.[165] The patient, who represented himself in a murder case, "dressed as a cowboy in court, tried to subpoena Jesus[,] and clearly traumatized his estranged wife . . . in a cross-examination that forced her to relive the murders of her parents."[166] The experience led the psychiatrist to question the legitimacy of a system that allows an "insane man" to defend himself.[167]

Concerns of reliability and fairness — even if considered secondary to the value of autonomy — implicate an additional set of functional abilities. When a defendant rejects his counsel's assistance and proceeds to trial alone, the reliability of the judicial outcome will depend on the defendant's ability and willingness to challenge the prosecution and to function, to some minimal degree, as its adversary. The defendant will not have the benefit of his counsel's recognition of points at which decisions may be made, identification of options, evaluation of those options, or construction of a plan of action consistent with the decision reached. And for the most part, a pro se defendant is not entitled to a trial judge's advice or instruction.[168]

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[162] *See* Alan R. Felthous, *Competency to Waive Counsel: A Step Beyond Competency to Stand Trial*, 7 J. PSYCHIATRY & L. 471, 474 (1979). Felthous identified as a fourth purpose the need to ensure that a defendant, if found guilty, knows why he is being punished. *Id.* Satisfaction of the *Dusky* standard likely suffices to satisfy this concern.

[163] Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008).

[164] *Id.* (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).

[165] *Id.*

[166] Turley, *supra* note 19, at A21 (discussing case of Scott Louis Panetti). The defendant was convicted after the jury deliberated for ninety minutes, but his execution was stayed by the Supreme Court on grounds of insanity. *Id.*

[167] *Edwards*, 128 S. Ct. at 2387 (quoting Brief of Ohio et al. as Amici Curiae in Support of Petitioner at 24, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 449963); Turley, *supra* note 19, at A21.

[168] *See* McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) (stating that pro se defendant has no "constitutional right to receive personal instruction from the trial judge on courtroom procedure"). Surveying the case law, Myron Moskovitz concluded that a trial judge must advise the pro se defendant of his right to trial (i.e., to plead not

Several cognitive capacities are relevant to a defendant's ability to challenge the prosecution's case and therefore may be necessary to ensure minimally reliable and fair proceedings. First, in an ideal world, the defendant would be able to comprehend — without the assistance of counsel — the government's case.[169] He would understand the elements of the charged offense, be capable of identifying facts (including physical evidence and likely witness testimony) helpful to the prosecution, and assess the legal significance of that evidence in relation to the elements of the offense and the government's burden of proof. Second, the defendant would be able and willing to apply a critical eye to the prosecution's case. He would be capable of following the evidence adduced at trial and able to identify deficiencies within the context of the government's theory of liability. Third, he would be able to shape a rational, responsive defense. This process would involve (in addition to identifying deficiencies in the prosecution's evidence) locating favorable evidence, understanding its legal relevance, identifying and evaluating possible defenses, and selecting the defense most likely to result in acquittal or that otherwise best accords with the defendant's values. Finally, the defendant would be able to implement his defense through the myriad decisions made at trial.[170]

guilty) and his right to a jury trial. *See* Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 333 (2004) (exploring extent to which trial judge must assist pro se defendant). A trial judge should not, however, help the defendant evaluate the benefits and disadvantages of these options or provide strategic advice. *See id.* Nor, in most jurisdictions, must a trial judge inform the defendant of his privilege against self-incrimination, his right to testify, his right of compulsory process, his right of confrontation, his right to exercise peremptory challenges, or his right to make opening or closing statements. *See id.* at 333-37.

[169] To some degree, a defendant must be able to comprehend the state's case in order to stand trial. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (holding that defendant must have "a rational as well as factual understanding of the proceedings against him" to be competent to stand trial); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975) (stating that, to stand trial, person must possess "the capacity to understand the nature and object of the proceedings against him"). Courts have interpreted this standard to require that a defendant be able to appreciate his status as a defendant in a criminal prosecution and understand the charges, the purpose of the criminal process, and the purpose of the adversary system, including the role served by defense counsel. *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 554 & nn.62-63. To satisfy this standard, a defendant generally must demonstrate comprehension of information presented by counsel or the trial court.

[170] Decisions subsidiary to the selection of a defense include what information and argument to include in an opening statement, which witnesses to cross-examine and what lines of inquiry to pursue, what evidence to object to and on what grounds, which witnesses (if any) to call, whether to testify, what physical evidence (if any) to introduce, and what information and argument to emphasize in a closing statement.

This is not to suggest that all of these abilities are appropriate for inclusion in a representational competence standard or that a defendant should be capable of performing any of these functions *well*. Requiring a mastery of these processes would restrict the right to self-representation to those trained in the law, a result clearly at odds with the U.S. Supreme Court's intent in *Faretta v. California*, which first established the Sixth Amendment right to self-representation.[171] Indeed, few recent law school graduates possess all of these abilities. But any serious discussion of capacities relevant to ensuring the reliability of a criminal adjudication should at least consider a subset of the skills inherent in the adversary process.

While the elements of Bonnie's decisional competence construct are limited to those abilities he deemed necessary to ensure autonomous decisionmaking, reliability and dignity concerns also impacted Bonnie's analysis of when to require particular abilities in a given context. Bonnie argued that "[t]he choice of a test of competence in a particular decisionmaking context should take into account the consequences, for both the defendant and society, of determinations of competence and incompetence in that particular context."[172] Societal consequences include reliability and, presumably, the actual and apparent fairness of criminal adjudications. An underlying concern for the reliability of criminal adjudications led Bonnie to advocate for stringent decisional tests — the absence of implausible beliefs in a defendant's decisional framework[173] and the presence of a logical, deliberate reasoning process[174] — in decisional contexts in which

[171] *See* Faretta v. California, 422 U.S. 806, 833 n.43 (1975) (anticipating that right to self-representation would be available to "ignorant and illiterate, or those of feeble intellect"); *see also id.* at 835 (recognizing that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"); *id.* at 836 ("We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."). In *Faretta*, the Supreme Court considered the claim of a state defendant with a high school education who did not want to be represented by the public defender due to his belief that that office was "very loaded down with . . . a heavy case load." *Id.* at 807. Relying on the history of the right to self-representation, the text of the Sixth Amendment, and the importance of a defendant's autonomy interest, the Court held that the Sixth Amendment implicitly provides that a criminal defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. *See id.* at 832-34.

[172] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 575.

[173] *See id.* at 574-75.

[174] *See id.* at 575.

reliability is particularly at risk.[175] Bonnie also argued that, even if a defendant meets the stringent test of the reasoned choice standard and so is decisionally competent to waive his right to counsel, a court may still deny his motion for self-representation if granting the request would undermine the dignity of the trial process.[176] These positions have led subsequent commentators to criticize Bonnie's framework as insufficiently deferential of defendants' autonomy.[177]

It is possible that identifying a broader set of abilities requisite to autonomous decisionmaking could reduce the overall stringency of the standard a defendant must meet to proceed pro se. For instance, it may be easier for a defendant to meet a low threshold for several abilities typically found in the general population than to meet a very high threshold for a single ability (e.g., a deliberate and complex reasoning process) more rarely held. Possessing multiple decisional abilities that lie at the heart of the adversarial process may also better protect the reliability and fairness of the proceeding. Before proceeding to investigate additional decisional abilities, however, it is useful to discuss two additional reasons why Bonnie's construct of adjudicative competence provides an insufficient basis for determining whether to allow self-representation at trial. These include important contextual differences in decisionmaking by represented and unrepresented defendants and problems inherent in assuming that medical treatment decisionmaking is analogous to self-representation.

B. Contextual Differences

Bonnie generated his decisional competence proposal in the context of decisions that defendants are authorized to make *when represented by counsel*. In Bonnie's words, decisional competence "derives from legal rules that establish that the defendant must make or have the prerogative to make certain decisions regarding the defense or disposition of the case."[178] These decisions — including whether to

[175] Bonnie argues that "the tension between reliability and autonomy should be resolved in favor of a particularly demanding test of competence" when "a substantial risk of injustice exists," such as when a defendant waives representation by counsel or insists on pleading guilty against the advice of counsel. *Id.* at 579-80.

[176] *See* Bonnie, *Ferguson*, *supra* note 40, at A23.

[177] For reasons similar to those expressed by Professors Slobogin and Mashburn, I believe that the *reasoned choice* and *substantial appreciation* elements of Bonnie's decisional competence construct are insufficiently deferential to autonomy. *See* Slobogin & Mashburn, *supra* note 36, at 1597, 1600-03.

[178] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 553.

plead guilty,[179] waive the right to a jury trial,[180] waive the right to counsel,[181] testify,[182] and be present at trial[183] — "legally and ethically require a defendant's personal participation."[184] Because a defendant should participate in "fundamental" decisions, Bonnie reasoned, the defendant should possess at least a subset of the abilities needed for self-interested decisionmaking.[185] Bonnie grounded his competency tests in "a practical understanding of the attorney-client relationship."[186] He suggested that the most stringent decisional competency standard — reasoned choice — should apply when a defendant seeks to act against the advice of counsel and a substantial risk of injustice exists.[187]

Two key differences distinguish the decisional context a represented defendant faces when making a fundamental decision from that which an unrepresented defendant encounters at trial. First, the few decisions entrusted to a defendant represented by counsel can generally be made in advance of trial, in a calm environment with minimal time constraints. Prior to trial, an attorney and his client will anticipate decisions concerning whether to plead guilty, testify, or request a jury trial and can consider these choices at their relative leisure. A pro se defendant, however, will need to make hundreds of decisions during the course of trial, often while an impatient decisionmaker (the judge or jury) is waiting. As Bonnie recognized, his construct does not take into account the significant pressures and stresses of trial.[188]

Second, and more fundamentally, counsel will assist a represented defendant in making the decisions identified by Bonnie.[189] As a matter

[179] *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[180] Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942).

[181] Faretta v. California, 422 U.S. 806, 834 (1975).

[182] Rock v. Arkansas, 483 U.S. 44, 51-53 (1987); Jones v. Barnes, 463 U.S. 745, 751 (1983) (dictum).

[183] Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988) (dictum).

[184] Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 568-69.

[185] *See id.* at 545, 568-69. Professors Grisso and Appelbaum defined these capacities, in the context of competence to consent to medical treatment, to include the abilities to express a choice, understand factual information, appreciate the personal significance of relevant information, and reason. *See id.* at 570 & n.111 (citing Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment,* 319 NEW ENG. J. MED. 1635 (1988)).

[186] Bonnie, *A Theoretical Reformulation*, *supra* note 26, at 306.

[187] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 579.

[188] *See id.* at 554-55, 557 n.68; *see also* POYTHRESS ET AL., *supra* note 109, at 89.

[189] Counsel has an ethical duty to advise the defendant and assist him in reaching what, in the attorney's view, is a prudent decision. *See, e.g.*, RESTATEMENT (THIRD) OF

of basic ethics, counsel should identify for his client the decision point, clarify the issue, distill the possible options, gather relevant information, perform key analysis, and present his recommendation.[190] The task left to a represented defendant is to select among the options outlined by his counsel.[191]

Two examples illustrate the latter point regarding counsel's assistance in decisionmaking. In the course of advising a defendant concerning whether to testify, counsel will perform much of the evaluative work. He will explain the mechanics of testifying, the subjects likely to be covered, and the relationship between testifying and cross-examination. Counsel will also assess the benefits and potential hazards of testifying. As the Maryland Court of Appeals in *Martin v. State* explained:

> Counsel, of course, would presumably know of any prior inconsistent statements given by the defendant and of any

LAW GOVERNING LAWYERS § 20 (2000) ("A lawyer must notify a client of decisions to be made by the client under §§ 21-23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* § 22 ("As between client and lawyer, subject to Subsection (2) and § 23, the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution."); MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). The amount of information that an attorney must disclose varies according to the situation. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 cmt. e ("The lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.").

[190] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20; Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 CARDOZO L. REV. 1213, 1246 (2006) ("When courts treat defendants as having absolute control, the defendant's decision will be informed by advice of counsel.").

[191] In light of this allocation of decisionmaking authority — and the significant assistance that counsel will provide for those few decisions entrusted to the defendant — Bonnie suggested that the primary norm implicated by a defendant's possession of decisional competence is his autonomy, not the reliability of the proceeding. *See* Bonnie, *Mental Retardation*, *supra* note 26, at 430-31. In other words, given counsel's role in making key decisions and advising the defendant as to those few decisions within his authority, allowing the adjudication of a defendant without decisional competence would not pose a significant threat to the accuracy or fairness of the proceeding.

> criminal convictions that might be used for impeachment purposes. He would consider what the defendant would say if he testified, how he might hold up under cross-examination by the prosecutor, and the nature and extent of any inconsistency between the expected testimony of the defendant and other evidence in the case, and develop some approximation of his overall credibility. From all of this, counsel could gauge the prospect of impeachment in a meaningful way, weigh it against the effect of leaving the State's evidence unrebutted by the defendant's testimony, and advise the defendant accordingly.[192]

Similarly, the U.S. Supreme Court has observed that, when deciding whether to plead guilty or assert his right to proceed to trial, a represented defendant will "rely upon his counsel to make an independent examination of the facts, circumstances, pleadings[,] and laws involved and then to offer his informed opinion as to what plea should be entered."[193] Thus, even for "fundamental rights" that lie within the control of a defendant, counsel plays a vital role in assuring that the defendant's decision is sound. A pro se defendant benefits from no such safeguard. This reality also contributes to a conclusion that Bonnie's analogy of decisionmaking within a criminal adjudication to medical decisionmaking is inapt for self-representation.

C. Improper Analogy to Medical Treatment Decisionmaking

The final reason why Bonnie's approach to decisional competence is inapplicable to self-representation lies in its derivation from the model for competency to consent to medical treatment. Professor Bruce Winick invoked the analogy between decisionmaking in criminal representation and that in therapeutic settings.[194] Bonnie drew upon

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[192] Martin v. State, 535 A.2d 951, 954 (Md. Ct. Spec. App. 1988).

[193] Von Moltke v. Gillies, 332 U.S. 708, 721 (1948) (plurality opinion).

[194] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 543 ("Professor Winick's article made an important contribution by linking the literature on competence of criminal defendants to the literature on treatment decisionmaking."); *see also* Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 962-68 (1985) (noting that when mentally or physically ill patient assents to treatment, even if assent is not fully competent, the patient's decision is honored, and that likewise presumption should exist in favor of accepting defendant's assent to stand trial or to plead guilty, despite any mental impairment); Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 268-71 (1987) (restating analogy).

Professor Winick's insight[195] and applied to criminal adjudication the construct developed by Professors Grisso and Appelbaum to measure a patient's competence to consent to medical treatment.[196] There are many similarities in the decisional contexts of responding to a physician's advice for medical treatment and responding to an attorney's advice for decisions relating to criminal adjudication, and thus Bonnie's application of principles of therapeutic competence to criminal adjudication represents a valuable insight.[197] A significant limitation of Bonnie's proposal, however, stems from his decision not to consider the applicability of decisional abilities beyond those included in the Grisso and Appelbaum construct that might be relevant for decisionmaking without the assistance of counsel.[198]

Grisso and Appelbaum drew upon the work of Professor Loren H. Roth and his colleagues, who in 1977 scrutinized judicial opinions, statutes, regulations, and proposed agency guidelines to identify various tests utilized by legal authorities for competency to consent to medical treatment.[199] Roth's analysis revealed that courts did not apply a uniform standard to judge a patient's competence to consent, but rather chose from a small number of possible standards to select the test to be used in a particular instance.[200] These standards included evidencing a choice, arriving at a "reasonable" outcome, basing one's choice on "rational" reasons, possessing the ability to understand, and demonstrating actual understanding.[201] Rejecting the "reasonable"

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[195] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 543, 548.

[196] *See id.* at 570 & n.111 (citing Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment,* 319 NEW ENG. J. MED. 1635 (1988)). Professor Maroney also relied on the medical treatment literature in deriving her decisional competency standard. *See* Maroney, *supra* note 129, at 1392 & n.98.

[197] *See* Slobogin & Mashburn, *supra* note 36, at 1596-97.

[198] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 570-71 ("The conceptual terrain according to Appelbaum and Grisso includes abilities to (1) communicate a choice; (2) understand information; (3) appreciate the significance of information in relation to one's own situation; and (4) engage in a process of rational manipulation, or reasoning. . . . Building on this foundation, and on the skimpy case law on decisional competence in criminal adjudication, I will present a menu of five progressively more inclusive legal tests.").

[199] *See* Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 280-82 (1977). This seminal work by Roth and his colleagues led to an "evolving consensus" about the standards that courts typically apply when determining a patient's competence to consent to treatment. *See* GRISSO, *supra* note 126, at 394, 398; Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 105, 108.

[200] Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 108.

[201] Roth et al., *supra* note 199, at 280-82.

outcome of choice test as insufficiently deferential to autonomy,[202] Grisso and Appelbaum modified and refined the remaining standards and presented them as "maxims" for legal competence to consent to treatment.[203] Each legal standard implicates a set of decisional abilities, which together constitute the domain of functional abilities relevant to legal competence for informed consent.[204] These abilities include the capacity to communicate a choice, to understand relevant information, to appreciate the nature of the situation and its likely consequences, and to manipulate information rationally.[205]

Critically, the four abilities that Grisso and Appelbaum identified as necessary for competence to consent to medical treatment were not generated through an application of psychological theory, an evaluation of which psychological functions are most crucial to decisionmaking as a descriptive matter, or a normative exploration of which abilities should be required for informed decisionmaking.[206] Rather, Grisso and Appelbaum derived these abilities from the particular legal standards identified by Roth and his colleagues as governing informed consent.[207] According to Stephen Anderer, while Grisso and Appelbaum "believed that starting with psychological functions would allow for instruments with . . . greater theoretical coherence," they "felt constrained to use [legal standards that had been developed by courts on an ad hoc basis] in order to maximize ecological validity."[208]

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[202] *See* GRISSO, *supra* note 126, at 454. Grisso explained that he and Appelbaum rejected the "reasonable" outcome of choice test because:

> It suggests that individuals are competent if they choose what others would choose, whereas modern notions of informed consent allow individuals to make whatever choice they wish as long as they have the capacities to understand, appreciate, reason, and express a choice.

Id.

[203] *Id.* at 394. Appelbaum and Grisso also presented case law applying each of the four tests of competency. *See* Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 109-11.

[204] *See id.* at 109.

[205] *See id.* at 109-11.

[206] *See* THOMAS GRISSO & PAUL S. APPELBAUM, ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS 31-32 (Oxford Univ. Press 1998) (describing process through which four functional abilities were selected).

[207] *See* GRISSO, *supra* note 126, at 400 ("[These four abilities] are important to consider when determining what functional abilities are relevant for forensic evaluations of competence, because one or more of them will be used by virtually all courts."); *see also* GRISSO & APPELBAUM, *supra* note 206, at 20.

[208] S. J. Anderer, Development of an Instrument to Evaluate the Capacity of Elderly

Given the origins of the "maxims" for competence to consent to medical treatment, further analysis is needed to determine whether the four abilities identified by Roth and his colleagues, as refined by Grisso and Appelbaum, constitute the optimal or essential abilities for autonomous decisionmaking by criminal defendants.[209] Grisso and Appelbaum acknowledged that other cognitive capacities not encompassed by their competency test are relevant to informed decisionmaking, including problem-solving abilities.[210] Even the four elements embraced by Grisso and Appelbaum are not without contention: neither courts nor medical ethicists agree as to their conceptualization or inclusion in a standard of competence.[211] Grisso and Appelbaum observed that, while courts and medical ethicists generally agree that competence to consent should require the ability to understand information disclosed under the law of informed consent,[212] courts and ethicists only "sometimes" recognize the element of reasoning as an essential element.[213] Spirited disagreement exists, in particular, over requiring an appreciation element.[214]

It may be normatively optimal to require represented defendants to possess a subset of the abilities identified by Grisso and Appelbaum,

Persons to Make Personal Care and Financial Decisions 55 (May 1997) (unpublished Ph.D. dissertation, Allegheny University of Health Sciences) (on file with Hahnemann Library, Drexel University).

[209] *Cf.* Lynne S. Webber, et al., *Assessing Financial Competence*, 9 PSYCHIATRY, PSYCHOL. & L. 248, 250 (2002) (arguing that measures of decisionmaking abilities in one situation are not necessarily valid proxy measures of financial competency).

[210] *See* GRISSO & APPELBAUM, *supra* note 206, at 20 ("What cognitive abilities and characteristics might be relevant when assessing patients' functioning in decision-making situations? Certainly a number could be nominated: orientation, attention, memory, intelligence, abstract thinking and problem-solving, to name only a few.").

[211] *See id.* at 31-33; *see also* Paul S. Appelbaum, *Assessment of Patients' Competence to Consent to Treatment*, 357 N. ENG. J. MED. 1834, 1838 (1997) ("Notwithstanding general recognition of the criteria for decision-making capacity, there is a divergence of opinion about which criteria should be included and how they should be applied.").

[212] *See* GRISSO & APPELBAUM, *supra* note 206, at 38; Christopher Slobogin, *"Appreciation" as a Measure of Competency: Some Thoughts About the MacArthur Group's Approach*, 2 PSYCHOL., PUB. POL'Y, & L. 18, 21 (1996) ("With perhaps a few exceptions, everyone seems to agree that to be competent one must understand the legally relevant facts, regardless of the context.").

[213] GRISSO & APPELBAUM, *supra* note 206, at 52.

[214] Broad disagreement exists concerning the conceptualization and inclusion of the element of appreciation. *See id.* at 43; Slobogin, *supra* note 212, at 21-27 (arguing, in essence, that "substantial rationality" test, as captured in Perceptions of Disorder (POD) instrument, is too subjective, too deferential to physicians' judgments, and insufficiently deferential to patients' beliefs and values, and thus is normatively undesirable).

given that in many ways criminal defendants represented by counsel are similarly situated to patients advised by physicians. However, in light of the descriptive legal origin of the abilities, one should not assume that the extension of these capacities to the criminal justice context as a normative matter is appropriate.[215] It is even more dubious to apply these standards unblinkingly to self-representation at trial, which presents a host of decisional and situational demands not encountered in the context of informed consent.[216]

Perhaps more fundamentally, competence to consent to medical treatment, like competence to stand trial, is premised on the disclosure of material information by an expert.[217] Informed consent consists of three elements: disclosure of treatment-relevant information, voluntariness of a patient's decision, and a patient's competence to consent.[218] Some jurisdictions may measure the adequacy of a physician's disclosure differently,[219] but a majority requires that a physician disclose the information that a reasonable patient would find material to a decision about a proposed treatment.[220] Under prevailing law, a patient should receive five bodies of information from his physician: information on the nature of the

[215] In recognition of Bonnie's effort to apply their competency construct to criminal adjudication, Appelbaum and Grisso noted that "[a]lthough this model was formulated explicitly to describe competence judgments related to consent for treatment, it may well be more broadly applicable to decision-making competence in general." Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 111 n.3.

[216] *Cf.* Anderer, *supra* note 208, at 37-38 (concluding that dimensions of decisionmaking captured by Grisso and Appelbaum's competency construct for informed consent are insufficient in context of guardianship, due to unstructured nature of decisions in everyday living and difference in legal standards).

[217] *See* Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319(25) NEW ENG. J. OF MED. 1635, 1637 (1988) [hereinafter Appelbaum & Grisso, *Assessing Patients' Capacities to Consent*] ("Except in cases of the most severe mental impairments, it is not possible to assess decision-making ability when a patient is uninformed or inadequately informed. For their ability to be demonstrated, patients must be supplied with sufficient information on which to base a decision about treatment — the nature of the disorder and of the proposed intervention, the likely benefits, risks, and discomforts, and possible alternatives, including the option of no treatment, along with their risks and benefits.").

[218] *See* GRISSO, *supra* note 126, at 391-92; Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 106.

[219] A minority of jurisdictions requires that physicians disclose "that amount of information that a reasonable member of their profession would discuss with patients in a similar situation." GRISSO & APPELBAUM, *supra* note 206, at 7-8 (discussing "professional standard of disclosure" as proposed in Natanson v. Kline, 350 P.2d 1093 (Kan. 1960)).

[220] GRISSO & APPELBAUM, *supra* note 206, at 8.

disorder for which treatment is proposed, the nature of the proposed treatment, the risks and benefits associated with the treatment and their likelihood of occurrence, and any available alternatives to the proposed treatment, along with their risks and benefits.[221] A physician should convey information in a manner designed to facilitate a patient's comprehension.[222] Failure to provide sufficient information may expose a physician to liability for assault and battery or negligence.[223] Thus, a physician (not a patient) will define the problem, present alternative treatments, and identify and evaluate the benefits and disadvantages of those alternatives.[224]

Competence to consent to medical treatment is not separable from the disclosure requirement.[225] One commentator reported that "some psychologists have begun conceptually to merge the competence and informed elements in the legal model by viewing competence as a function of the manner in which information is presented to [individuals]."[226] Indeed, competence is defined in relation to the disclosed information. Grisso defined "competence to consent" as "an individual's legal capacity to accept a proposed treatment, to refuse treatment, or to select among treatment options."[227] Thus, an individual in the sphere of informed consent occupies a place of relative passivity: he receives information, its evaluation, and a recommendation; he then must use his mental processes to either accept or reject the advice.[228] A pro se defendant who proceeds to trial, on the other hand, must be proactive in identifying decision points, gathering relevant information, brainstorming decisional options, and evaluating those options in light of his case.

Other contextual differences exist as well. First, a physician's role is to encourage his patient to participate in treatment designed to

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[221] GRISSO, *supra* note 126, at 393-94.

[222] *Id.* at 394. Grisso recommended that, to ensure that a person's incompetence is not a product of poor disclosure of information, the disclosure should be evaluated for its clarity, complexity of verbal explanation, length, method of disclosure, and the amount of time a patient was given to process the information. *See id.* at 401.

[223] William M. Altman et al., *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1671, 1677 (1992).

[224] *See* Anderer, *supra* note 208, at 38 (listing differences between decisionmaking in context of informed consent and in everyday decisionmaking about personal and financial affairs).

[225] GRISSO, *supra* note 126, at 392.

[226] Altman et al., *supra* note 223, at 1692.

[227] GRISSO, *supra* note 126, at 392.

[228] *See* GRISSO & APPELBAUM, *supra* note 206, at 10 (referring to patient's ability to "utilize the disclosed information" as essence of capacity to consent).

improve the patient's health.[229] To that end, the physician will be committed to facilitating decisions that he believes are in his patient's best interest.[230] A pro se defendant, on the other hand, will lack not only an expert's assistance in evaluating options, but also his sympathetic ear and aid in clarifying the defendant's thoughts with probing questions. Also, consenting to medical treatment is a relatively private decision, typically involving a patient, his family or friends (if any and present), and his medical team. A pro se defendant, however, will need to make and express decisions before a neutral or perhaps hostile audience: inconvenienced jurors and witnesses, and a judge likely frustrated by the pro se defendant's lack of familiarity with procedural and evidentiary rules. Self-representation also necessitates making and communicating decisions in the public forum of a trial, a particularly stressful prospect for some persons.

In addition, consenting to medical treatment typically involves one decision.[231] A patient often will choose between several treatment options (at a minimum, the proposed treatment and no treatment), each with its own risks and benefits, but the choice, though perhaps complicated, likely is a single decision. Self-representation at trial, by contrast, involves hundreds of decisions made in short succession.[232] A pro se defendant will need to make these decisions quickly, and ideally the decisions reached should not be inherently contradictory. Also, while a patient might opt to revisit his decision, his task generally ends once he communicates his decision to his medical team. A pro se defendant, however, must (unless assisted by standby counsel) translate his decisions into courtroom-appropriate action.

Finally, a pro se defendant who proceeds to trial must, to some degree, serve an important societal role in subjecting the prosecution's

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[229] *See* Appelbaum & Grisso, *The MacArthur Treatment Competence Study*, *supra* note 127, at 106 (referring to aim of informed consent law as "encouraging patients' participation in the decision-making process").

[230] *See* Appelbaum & Grisso, *Assessing Patients' Capacities to Consent*, *supra* note 217, at 1637 ("Because depriving patients of their decision-making rights is a serious infringement of liberty, every effort should be made to help each patient perform best. Thus, if a patient has difficulty understanding relevant information, the examiner should try to educate the patient before concluding that the deficiency is fixed.").

[231] A patient may, of course, change his mind as to that decision, but it is still, at base, one decision.

[232] These decisions include, but are not limited to, which defense to exert and how to establish it, which witnesses to call and what to ask them, whether to testify and what to say, what evidence to introduce and how to introduce it, whether and how to cross-examine unfavorable witnesses, whether and how to object to incompetent evidence, what to include in opening and closing statements, and which jurors to strike and on what basis.

case to adversarial testing. Whereas the consequences of a patient's decision to reject lifesaving treatment arguably do not extend beyond the patient and his loved ones,[233] the government has a strong interest in a pro se defendant's ability and willingness to challenge its case and thus contribute to the reliability of the proceeding and further the legitimacy of the criminal justice system.[234] As discussed previously, serving as the government's adversary — without the benefit of an attorney's assistance and advice — calls for a host of cognitive capacities not implicated in the context of informed consent.

In light of the origins and limited normative underpinnings of Bonnie's decisional competence proposal, we must look elsewhere for guidance as to which abilities may be requisite to decisions made in the course of self-representation that are worthy of judicial deference. At base, self-representation is an exercise in problem solving. Psychologists and other experts in the mind sciences have identified cognitive, behavioral, and affective abilities necessary for effective decisionmaking. This Article now turns to an examination of one psychological theory, social problem solving, to glean insight into potential abilities for sound, autonomous decisionmaking in the context of self-representation at trial.

IV. INSIGHTS FROM SOCIAL PROBLEM-SOLVING THEORY

To recognize the applicability of problem-solving theory for self-representation at trial, it may be useful to imagine yourself in the shoes of a pro se defendant. You are charged with theft. You inform your court-appointed attorney that you did not take your neighbor's property; this is a case of mistaken identity. Your attorney seems skeptical and suggests that, while you might have taken the property, perhaps you intended to return it. Frustrated and confident of your ability to persuade a jury of your innocence, you fire your attorney and move to proceed pro se. Your motion is granted, and, because yours is a relatively straightforward case, the court does not appoint standby counsel to assist you. You now face many decisions, not the least of which is what defense to exert. From the perspective of the court, what are the stages of the decisionmaking process through

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[233] *See* Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 327-28 (2003) (suggesting that relatively low capacity threshold for right to refuse medical treatment reflects society's belief that individual — even one with borderline mental competency — should be able to exercise control over his health, when that decision does not intrude upon rights of others).

[234] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008).

which you should proceed to arrive at a sound defense? What abilities does each decisionmaking stage require? Which of these abilities are essential to ensure that your chosen defense is the result of autonomous decisionmaking and does not pose too grave a threat to the reliability or fairness of the proceeding? Must you be capable of analyzing the government's evidence, for example? Should you possess the ability to brainstorm multiple options before deciding upon a course of action? Must your defense be plausible? Must you possess the will to challenge the prosecution's case at all?

Problem-solving theory offers an answer to many of the questions posed. As numerous commentators have observed, modern law treats competency as a functional construct tailored to the demands of a particular context.[235] To identify the range of decisional abilities potentially necessary for self-representation at trial, our initial inquiry should focus on disaggregating the problem-solving process in which a defendant must engage in order to control his defense.[236] This disaggregation will allow us to identify abilities necessary for making decisions worthy of deference without the assistance of counsel at a criminal trial.

The law has relied on psychological insight into problem solving in a variety of contexts. Academics and the American Bar Association have long identified problem solving as essential to effective lawyering.[237] In addition, psychologists have used problem-solving theory to derive the functional components of various competency standards. In operationalizing the reasoning component of informed consent, for instance, psychologists have drawn on problem-solving

[235] *See, e.g.*, GRISSO, *supra* note 126, at 22-24.

[236] *See* Knauer, *supra* note 233, at 326 (illustrating functional nature of capacity by observing that standard of testamentary capacity disaggregates elements of testamentary plan and incorporates them as features of legal standard).

[237] *See, e.g.*, Josiah M. Daniel III, *A Proposed Definition of the Term "Lawyering,"* 101 LAW LIBR. J. 207, 213-14 (2009) (reporting that American Bar Association task force, created to study and propose how to improve process by which law students are prepared for practice, identified "fundamental lawyering skills essential for competent representation" as including problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, litigation, and alternate dispute resolution); Linda Morton, *A New Approach to Health Care ADR: Training Law Students to be Problem Solvers in the Health Care Context*, 21 GA. ST. U. L. REV. 965, 966 (2005) (analyzing "use of real public health problems to train law students in problem solving, with the hope that ultimately such training will become more interdisciplinary"); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 867-68, 902-07 (2008) (suggesting broader definitions of legal problems for more effective problem solving in context of mediation).

theory.[238] Similarly, psychologists have used problem-solving theory to identify functional abilities relevant to managing one's personal finances, which is one aspect of guardianship determinations.[239]

Social problem solving is one of the earliest and most comprehensive psychological models of decisionmaking.[240] Developed by Professors Marvin R. Goldfried and Thomas D'Zurilla[241] and refined by D'Zurilla and Professor Arthur M. Nezu,[242] the model is

[238] In developing their instrument to evaluate individuals' reasoning process, called Thinking Rationally About Treatment ("TRAT"), Grisso and Appelbaum chose to include elements common among the problem-solving models developed by George Spivack and his colleagues, Irving L. Janis and Leon Mann, and Robin M. Hogarth. *See* Anderer, *supra* note 208, at 52. Those elements include "seeking information, generating consequences, weighting consequences, recognizing the probability of consequences, and comparing alternatives." *Id.* at 52. All five of these elements are included in the D'Zurilla, Goldfried, and Nezu model. *Id.* at 52-53.

[239] Anderer drew from social problem-solving theory when creating his functional assessment instrument, the Decisionmaking Instrument for Guardianship ("DIG"). *See id.* at 54-76. While he found all aspects of the D'Zurilla and Nezu model applicable, he included problem definition and formulation, generation of alternatives, and consequential and comparative thinking (two reasoning abilities that fall within the decisionmaking stage of the D'Zurilla-Nezu model) in his instrument due to limitations in his chosen format. *See id.* at 63-69, 76.

Financial competency may provide a useful analogy to representational competence. Financial management is a cognitively complex, multidimensional activity that bears critically on individuals' functional independence and personal autonomy. *See* Daniel C. Marson et al., *Assessing Financial Capacity in Patients with Alzheimer Disease: A Conceptual Model and Prototype Instrument*, 57 ARCHIVES OF NEUROLOGY 877, 877-79 (2000); Roy Martin et al., *Declining Financial Capacity in Patients with Mild Alzheimer Disease: A One-Year Longitudinal Study*, 16 AM. J. GERIATRIC PSYCHIATRY 209, 210 (2008). Like self-representation, financial activities require technical knowledge (such as understanding financial concepts and the components of a bank statement); the ability to master certain prescribed, formalized routines (such as cashing a check and depositing funds); and the application of judgment to maximize one's self-interest (such as that necessary for prudent investment decisions and to withstand fraud). *See* Jennifer Moye, *Guardianship and Conservatorship*, *in* EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 309, 323 (Grisso ed. 2003); Daniel C. Marson, *Loss of Financial Competency in Dementia: Conceptual and Empirical Approaches*, 8 AGING, NEUROPSYCHOLOGY & COGNITION 164, 164 (2001). The component of financial judgment — defined to involve "the capacity for rational, practical, considered and astute decisions in novel, ambiguous or complex social situations" — may provide a particularly apt analogue for decisions made in the context of self-representation. *See* Moye, *supra,* at 324.

[240] *See* Anderer, *supra* note 208, at 42.

[241] *Id.* (citing M. R. Goldfried & T. J. D'Zurilla, *A Behavioral-Analytic Model for Assessing Competence*, *in* 1 CURRENT TOPICS IN CLINICAL AND COMMUNITY PSYCHOLOGY (D. Spielberger ed., 1969)); *see also* D'Zurilla & Goldfried, *supra* note 45, at 107.

[242] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46; D'Zurilla & Nezu, *Social Problem Solving in Adults*, *supra* note 46.

prescriptive, meaning that it represents a model of effective or successful problem solving derived from clinical judgment and research.[243] While a number of decisionmaking and problem-solving models exist, most originate from or are otherwise encompassed by the framework that D'Zurilla and his colleagues developed.[244] Social problem solving is intended to encompass impersonal problems such as insufficient finances, personal or intrapersonal problems such as cognitive or health problems, interpersonal problems such as marital conflicts, and broader community and social problems such as crime and racial discrimination.[245] Empirical evidence supports the application of the model to decisionmaking by a variety of individuals,[246] ranging from average college students to persons suffering from depression or mental illness.[247] Thus, social problem-solving theory should be relevant to decisionmaking necessary for self-representation in a criminal trial.

D'Zurilla and his colleagues defined *social problem solving* as the self-directed cognitive, affective, and behavioral process by which an individual attempts to identify effective solutions for specific problems encountered in the natural environment.[248] This theory envisions problem solving as consisting of a motivational component called problem orientation and four goal-directed problem-solving skills.[249] These skills include problem definition and formulation, generation of alternative solutions, decisionmaking, and solution implementation and verification.[250] Each process or skill makes a distinct contribution to the problem-solving process while interacting with and affecting the efficacy of the other problem-solving components.[251] While every

[243] *See* A. M. NEZU ET AL., PROBLEM-SOLVING THERAPY FOR DEPRESSION: THEORY, RESEARCH, AND CLINICAL GUIDELINES 32 (Wiley 1989).

[244] *See* Anderer, *supra* note 208, at 48-53; *see also* D'Zurilla et al., *supra* note 47, at 20 (describing Problem-Solving Inventory instrument, designed by P. P. Heppner and C.H. Petersen, as derived from items based on D'Zurilla's and Goldfried's original problem-solving model).

[245] D'Zurilla et al., *supra* note 47, at 11.

[246] *See* Anderer, *supra* note 208, at 42.

[247] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 34-38 (summarizing experimental studies of various components of social problem-solving model).

[248] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 10; D'Zurilla et al., *supra* note 47, at 12.

[249] *See* D'Zurilla et al., *supra* note 47, at 14.

[250] *Id.*

[251] *See* Arthur M. Nezu & Christine M. Nezu, *Toward a Problem-Solving Formulation of Psychotherapy and Clinical Decision Making*, *in* CLINICAL DECISION MAKING IN BEHAVIOR THERAPY: A PROBLEM-SOLVING PERSPECTIVE 35, 39 (Arthur M.

aspect of problem solving may not be critical to a defendant's ability to represent himself in a minimally competent way, exploration of these abilities provides necessary context for selecting those abilities necessary for self-representation. The components of social problem-solving theory are described in detail below.

A. Problem Orientation

Problem orientation, the first domain of social problem solving, is a motivational process that involves the general cognitive, affective, and behavioral response of an individual when confronted with a specific problem.[252] Problem orientation reflects an individual's beliefs, opinions, and feelings about problems and his own problem-solving ability,[253] and is a product primarily of an individual's previous experience with problems and problem solving.[254] The cognitive component of problem orientation includes a sensitivity to recognize problems when they occur,[255] beliefs about the causes of problems, appraisals of problems' significance for one's well-being, personal control expectancies, and commitments of time and energy to problem solving.[256] The affective component consists of emotional states associated with problematic situations, including negative affect (e.g., anger, anxiety, depression) and positive affect (e.g., hope, eagerness, excitement).[257] The behavioral component of problem orientation consists of tendencies to confront or avoid problems.[258]

An individual's problem orientation may influence his appraisal of problems, his initiation of problem-solving activities, the efficiency of problem solving, and the amount of time and effort he is willing to expend to cope with obstacles.[259] Positive problem orientation,

Nezu & Christine M. Nezu eds., 1989) [hereinafter Nezu & Nezu, *Toward a Problem-Solving Formulation*].

[252] *See* Arthur M. Nezu & Christine M. Nezu, *Problem Solving Therapy*, 11 J. OF PSYCHOTHERAPY INTEGRATION 187, 188 (2001) [hereinafter Nezu & Nezu, *Problem Solving Therapy*].

[253] *See* D'Zurilla et al., *supra* note 47, at 14.

[254] *See* Thomas J. D'Zurilla & Arthur M. Nezu, *Development and Preliminary Evaluation of the Social Problem-Solving Inventory*, 2 PSYCHOL. ASSESSMENT 156, 157 (1990) [hereinafter D'Zurilla & Nezu, *Development and Preliminary Evaluation*].

[255] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 41.

[256] *See* D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157.

[257] *See id.*

[258] *See id.*

[259] *See id.* at 156-57.

associated with adaptive functioning or effective problem solving,[260] comprehends an individual's general disposition to recognize problems accurately when they occur, correctly locate the cause of a problem, consider problems as opportunities for benefit or gain, believe that problems are solvable, hold optimism about one's ability to solve problems successfully, acknowledge that solving problems requires time and effort, and address problems with celerity rather than avoiding them.[261] Negative problem orientation, in contrast, involves an individual's tendency to ignore problems, inaccurately identify the source of a problem, consider problems to be a significant threat to his well-being, expect problems to be intractable, doubt his ability to solve problems, and become frustrated when problems occur.[262]

The concept of problem orientation may be more accessible if one imagines a person who discovers that his car is no longer parked where he left it the night before. An individual with positive problem orientation would approach the mystery of the missing vehicle as follows. He would recognize the disappearance of his car as a problem, ascribe it to a rational source (i.e., could it have been towed? did my roommate borrow it?), realize that not having a car is a significant but not unmanageable problem, and allocate sufficient time and energy to addressing the situation. He would believe himself capable of finding his car (or at least of securing alternative transportation until he acquires a new one) and feel "up to the challenge" of dealing with the situation.

An individual with negative problem orientation, on the other hand, may fail to recognize the disappearance of his car as a problem worthy of attention or be unwilling to allocate more than a few minutes to addressing the situation. He may believe that he is unable to deal with a problem of this magnitude or exaggerate the consequences of the problem for his well-being to the extent that he is rendered helpless to proceed. He may experience debilitating anger, fear, or grief. The individual may even ascribe the disappearance to an irrational source (i.e., the spirit of my deceased grandmother must have taken the car to exact revenge for neglecting her in the years before her death). Most people probably fall somewhere in between these two extremes. It should be evident from this example, though, that an individual with an extremely negative problem orientation — if general in nature — would not only find himself incapable of addressing the problem of his missing car, but would also be unable to make the myriad decisions

[260] *See* D'Zurilla et al., *supra* note 47, at 15.

[261] *See id.*; Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 188.

[262] *See* Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 188.

called for at a criminal trial if unrepresented. The following subsections consider the four skills identified by social problem-solving theory as necessary for effective problem solving.

B. Problem Solving

The second domain of social problem solving involves the rational application of four problem-solving skills, designed to maximize the probability of identifying an effective solution to a problem.[263] Once a person has recognized the existence of a problem that he wishes to address, he must perform a series of goal-directed tasks to reach an effective solution.[264] These tasks include (a) problem definition and formulation, (b) generation of alternative solutions, (c) decisionmaking, and (d) solution implementation and verification.[265] The cognitive and behavioral activities associated with each of the four problem-solving processes, as summarized by Professors Arthur M. Nezu and Christine M. Nezu, are presented in Table 1. While serving unique functions, the tasks are linked in the sense that the successful completion of one step in the problem-solving process enables the effective application of the next skill.[266] Adaptive functioning is associated with rational problem solving,[267] a constructive problem-solving style involving the rational, deliberate, and systematic application of the four problem-solving skills.[268] These skills are presented in a sequential fashion, but effective problem solving in practice often involves continual and reciprocal movement between tasks before an effective solution is implemented.[269]

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[263] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 22.

[264] *See id.*

[265] *See* D'Zurilla et al., *supra* note 47, at 14.

[266] *See generally* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 33 (discussing implications of well-defined problem and realistic goals for subsequent stages of problem-solving process).

[267] *See* D'Zurilla et al., *supra* note 47, at 15.

[268] *Id.* For an extended exposition of these four skills, see D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23-34.

[269] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 34; Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 40.

Table 1. Activities Associated with Four Major Problem-Solving Processes[270]

PROBLEM DEFINITION AND FORMULATION

1. Gather all available facts about the problem.
2. Describe these facts in clear and unambiguous terms.
3. Differentiate between facts and assumptions.
4. Identify those factors that make the situation a problem.
5. Set a series of realistic problem-solving goals.

GENERATION OF ALTERNATIVES

1. Generate as many alternative solutions as possible.
2. Defer critical judgment.
3. Generate alternative strategies first, then think of as many tactics for each strategy as possible.

DECISIONMAKING

1. Evaluate each alternative by rating (a) the likelihood that the alternative, if implemented optimally, will achieve the desired goals and (b) the value of the alternative in terms of personal, social, long-term, and short-term consequences.
2. Choose the alternative(s) that have the highest utility.

SOLUTION IMPLEMENTATION AND VERIFICATION

1. Carry out the chosen plan.
2. Monitor the effects of the implemented solution.
3. Compare or match the predicted and actual effects.
4. Self-reinforce if the match is satisfactory; recycle through the process if the match is unsatisfactory.

[270] This table is taken, verbatim, from Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 54.

1. Problem Definition and Formulation

The first stage of the problem-solving process is problem definition and formulation. Problems in the real world are usually "messy," meaning that they are vague and associated with irrelevant cues, inaccurate information, and unclear goals.[271] To ultimately identify an effective solution, social problem-solving theory holds that a person must clarify the nature of a problem and identify realistic problem-solving goals.[272] An individual faced with a problem should gather task and social-behavioral information associated with the perceived imbalance between the demands posed by the problem and the responses available to address the situation in a satisfactory manner.[273] Task information refers to the demands associated with performing various tasks necessary to function in particular societal roles (i.e., employee, parent, pro se defendant).[274] Social-behavioral information refers to a problem solver's personal goals and expectancies and those of others with whom he must interact in the problematic situation.[275] While gathering this information, a problem solver should translate the ambiguous and unfamiliar informational context of the problem into more specific or familiar terms.[276] He should differentiate between relevant and irrelevant information and distinguish between facts and assumptions.[277] A problem solver should use gathered information to comprehend the nature of the problem by identifying which conditions are unacceptable, what changes are desired, and (ideally) which obstacles, such as informational deficit, ability deficit, or uncertainty, prevent him from meeting the demands.[278] A problem

[271] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23.

[272] *See* D'Zurilla et al., *supra* note 47, at 16; D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157. An early description of the problem definition and formulation stage included these operations: (a) describing available facts in clear, concrete terms, (b) separating relevant from irrelevant information and facts from assumptions, (c) identifying problem-solving goals, and (d) identifying obstacles, conflicts, or demands that make the situation problematic. *See* Arthur Nezu & Thomas J. D'Zurilla, *Effects of Problem Definition and Formulation on the Generation of Alternatives in the Social Problem-Solving Process*, 5 COGNITIVE THERAPY & RES. 265, 265-66 (1981). For an extended discussion of this element, see D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23-28.

[273] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 48.

[278] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 24.

solver should articulate realistic or attainable goals in specific terms.[279] After he has clarified the problem and specified his goals for resolving it, he should reappraise the significance of the problem for his personal well-being.[280] During this stage of the problem-solving process, an individual will find it useful to generate alternative problem formulations because the way a problem is stated will affect problem-solving outcomes.[281] Negative problem orientation, subjective biases, and distortions in problem attribution and information processing may reduce an individual's effectiveness at this stage of the problem-solving process.[282]

For our friend with the missing car, problem definition and formulation will involve gathering information to help him frame and define his problem. Let us assume that all signs point to the fact that someone took his car during the night. Investigation reveals that he was not parked in an illegal parking spot and that, without a history of prior unpaid tickets (of which he has none), the city would not have towed his car anyway. He still has his car keys, so he knows the car was not taken by using his keys. A call to his neighbor, the only other person with keys to his car, reveals that she did not take the car and her set of keys is in her possession. Thus, our friend believes his car was hotwired. At this point, he could define his problem as his car having been stolen. This definition would suggest the goal of locating his car. More pressing, however, may be the individual's need to travel to work. He therefore might define his problem as not having a means of transportation to reach his office. In this case, he might identify his goal as finding a way to arrive at work on time.

2. Generation of Alternative Solutions

After an individual clarifies the nature of the problem and his personal goals for resolving the situation, he should generate alternative solutions. Social problem-solving theory posits that brainstorming as many potential solutions as possible will maximize

[279] *Id.* at 25.

[280] *Id.* at 25-26.

[281] *Id.* at 26. Alternative formulations may reveal that the initially identified problem stems from an antecedent problem or is part of a broader problem, either of which may be more important to recognize. *Id.* at 27. Research demonstrates that a well-defined problem usually will have a positive impact on the generation of relevant solutions, improve the effectiveness of the decisionmaking process, and enhance the accuracy of solution verification. *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 47.

[282] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23-24.

the likelihood that the best possible solution will surface.[283] To accomplish this goal, D'Zurilla and Goldfried stressed three principles: quantity, deferment of judgment, and strategic variety.[284] The first principle is that quantity breeds quality, meaning that an individual will identify more high quality ideas as he generates additional alternatives.[285] Deferment of judgment refers to the notion that an individual will produce a greater number of high quality ideas when he defers critical evaluation of alternatives until the decisionmaking stage, when he will compare alternatives and select the solution most likely to achieve his goals.[286] Ideas that are irrelevant to the problem should be discarded.[287] Finally, the principle of strategic variety suggests that an individual should generate strategies for solving a problem before brainstorming specific actions or tactics for accomplishing each strategy.[288]

Going back to our example, assume that the problem-plagued individual articulates his problem as lacking a means of transportation to get to work. His goal is to find a way to arrive at work on time. The individual may brainstorm the following options: he could walk to work, take a bus, call a friend for a ride, or contact a taxi. If he is creative, and if his work permits, he may consider calling his boss and seeking permission to work from home. Each alternative is relevant to his problem and defined goal. Because our fictitious friend is an ideal problem solver, he defers judgment on, and elaboration of, each option

[283] *See id.* at 28-29; D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157; D'Zurilla et al., *supra* note 47, at 16; Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 189. The conceptualization of this skill derives from divergent production operation, a facet of Joy Paul Guilford's Structure-of-Intellect Problem Solving model. *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 28 (citing J.P. GUILFORD, THE NATURE OF HUMAN INTELLIGENCE (McGraw-Hill 1967)).

[284] *See* Thomas J. D'Zurilla & Arthur Nezu, *A Study of the Generation-of-Alternatives Process in Social Problem Solving*, 4 COGNITIVE THERAPY & RES. 67, 68 (1980) [hereinafter D'Zurilla & Nezu, *A Study of the Generation-of-Alternatives Process*]. D'Zurilla and his colleagues derived these principles from J.P. Guilford's divergent production operation and Alex Osborn's method of brainstorming. D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 28 (citing J.P. GUILFORD, THE NATURE OF HUMAN INTELLIGENCE (McGraw-Hill 1967) and A. OSBORN, APPLIED IMAGINATION: PRINCIPLES AND PROCEDURES OF CREATIVE PROBLEM SOLVING (3d ed. 1963)).

[285] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 28.

[286] *Id.*

[287] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 48.

[288] *See* D'Zurilla & Nezu, *A Study of the Generation-of-Alternatives Process*, *supra* note 284, at 67-68. D'Zurilla and Nezu referred to this principle as "strategy." *Id.*

until his brainstorm is finished. Brainstorm complete, he must now assess his options and select the one most likely to solve his problem.

3. Decisionmaking

The third stage of the problem-solving process, decisionmaking, involves evaluating and comparing the costs and benefits of different solutions in order to select the solution most likely to achieve one's goals.[289] The decisionmaking component of the D'Zurilla and Goldfried model is based upon expected utility theory, in which the expected utility of a given alternative is a function of the value and likelihood of predicted consequences.[290] Inherent in decisionmaking are causal and consequential thinking, i.e., identifying cause-effect relationships and anticipating the consequences of one's actions.[291] Selection of the best solution depends upon an individual's identifying the likely benefits and costs associated with a certain alternative, assigning a value or measure of personal importance to each consequence, and estimating the probability that each consequence will occur if he implements that alternative.[292]

Personal, social, short-term, and long-term consequences should be considered in the decisionmaking stage.[293] Personal consequences include the time and efforts necessary to implement a particular alternative and the consistency of the alternative with one's ethical and moral standards.[294] Social consequences may include effects on a problem solver's family, friends, or community.[295] It is important that a problem solver evaluate whether an alternative can be implemented in its optimal form, given his practical limitations or skill deficits.[296] After identifying the value and likelihood of consequences associated with each alternative, a problem solver judges the utility of each option, compares them, and selects the solution with the best expected

[289] *See* D'Zurilla et al., *supra* note 47, at 16; Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 189. For an extended discussion of decisionmaking, see D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 29-31.

[290] *See* Arthur Nezu & Thomas J. D'Zurilla, *An Experimental Evaluation of the Decision-Making Process in Social Problem Solving*, 3 COGNITIVE THERAPY & RES. 269, 270 (1979) (citing C. W. CHURCHMAN, PREDICTION AND OPTIMAL DECISIONS (Prentice-Hall 1961) and Edwards et al., *Emerging Technologies for Making Decisions*, *in* NEW DIRECTIONS IN PSYCHOLOGY II (T.M. Newcomb ed., Hold, Rinehart & Winston 1965)).

[291] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 49.

[292] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 29-30.

[293] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 50.

[294] *See id.*

[295] *Id.*

[296] *See id.*

utility.[297] D'Zurilla and Nezu acknowledged that rational decisionmakers will vary in their evaluation of alternatives due to differences in personal values, norms, tolerances, and commitments.[298]

Returning to our hypothetical, the carless individual's decisionmaking process will involve generating a list of advantages and disadvantages associated with each brainstormed option. He may note, for instance, that walking to work would leave him sweaty and forty-five minutes late for a scheduled meeting. The bus, while economical, carries similar disadvantages, because the nearest bus stop is over a mile from his office. Calling a friend for a ride offers a unique advantage: reaching out for help would allow him to express vulnerability and thus might deepen their personal relationship. He knows of one friend who lives nearby; upon reflection, however, he realizes that she might have children, so she may be busy dropping them off at school. Calling a taxi would be the most expensive option but would likely result in his arriving at work before his meeting. Asking to work from home carries the disadvantage of possibly irritating his boss and — if permission were granted — not attending the scheduled meeting in person. If he were able to work from home successfully, however, this experience conceivably could pave the way for his being allowed to work from home periodically in the future.

Having identified benefits and concerns associated with each option, the problem solver would then assign a value and probability of occurrence to each potential consequence. Let us assume the following reasoning process. The individual quickly decides that walking or taking the bus would almost definitely result in his arriving to work sweaty and late and that both conditions are unacceptable. He realizes that he does not have enough money for a taxi, so he rejects that alternative. Given what he knows of his boss and her preferences, he estimates that there is around a 50 percent chance that his boss will allow him to work from home. He assigns a high value to missing the meeting, but estimates a likelihood of approximately 40 percent that his boss will allow him to participate by phone, which would be acceptable to him. He believes that he has a roughly 90 percent chance of meeting his work responsibilities from home and that, by doing so, there would be a more or less 20 percent likelihood that he would be permitted to work from home again in the future. He assigns a high value to this opportunity. The problem solver believes there is only a small chance of around 5 percent that his request would annoy his boss, and he thinks that, if he did annoy her, the permanent damage

[297] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 30.

[298] *Id.* at 31.

would be slight. (The individual would perform a similar analysis for the option of calling a friend for a ride.) Having weighed all his options, he decides to ask his boss if he may work from home.

4. Solution Implementation and Verification

After an individual selects what he considers to be his best option, he then must implement the solution and ascertain its effectiveness for solving his problem. Social problem-solving theory defines solution implementation and verification, the final problem-solving step, as carrying out a chosen solution, monitoring its consequences, and evaluating its effectiveness.[299] Solution implementation requires performance skills that may differ from those skills necessary for effective problem solving.[300] For instance, a person may possess intact decisionmaking powers but lack an ability to implement a chosen solution due to anxiety, emotional distress, or deficits of technical or social skills.[301]

The conceptual framework for solution verification derives from control theory and the cognitive-behavioral conception of self-control.[302] Control theory focuses on the negative feedback loop, or those actions taken to reduce the discrepancy between anticipated and actual task performance.[303] The cognitive-behavioral conception of self-control includes self-monitoring, self-evaluation, and self-reinforcement.[304] Monitoring involves measuring the effects of an implemented solution.[305] Self-evaluation requires comparing the actual to the anticipated outcome, as envisioned at the problem definition and formulation stage.[306] Self-reinforcement involves acknowledging a job well-done, so long as the congruence between anticipated and

[299] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 31-34; D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157; Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 189.

[300] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 32.

[301] *Id.*

[302] *Id.*

[303] *Id.* (citing C.S. Carver & M.F. Scheier, *Control Theory: A Useful Conceptual Framework for Personality-Social, Clinical, and Health Psychology*, 92 PSYCHOL. BULL. 111 (1982) and G.A. MILLER ET AL., PLANS AND THE STRUCTURE OF BEHAVIOR (Holt, Rinehart & Winston 1960)).

[304] *Id.* at 32-33 (citing A. Bandura, *Vicarious and Self-Reinforcement Process*, *in* THE NATURE OF REINFORCEMENT (R. Glasner ed., 1971) and F.H. Kanfer, *Self-Regulation: Research, Issues, and Speculations*, *in* BEHAVIOR MODIFICATION IN CLINICAL PSYCHOLOGY (Appleton Century-Crofts 1970)).

[305] *See* Nezu & Nezu, *Toward a Problem-Solving Formulation*, *supra* note 251, at 52.

[306] *See id.*

actual performance is satisfactory.[307] If the discrepancy is unsatisfactory, then an individual must identify the source of the difficulty and attempt to remediate the situation.[308] Effective problem solvers may return to the problem-solving process to find a better solution or refine problem-solving goals when an initial outcome is unsatisfactory.[309]

Concluding our hypothetical, assume our friend calls his boss and asks to work from home. She seems slightly annoyed but agrees to his proposal and allows him to participate in the meeting by phone. He performs satisfactorily from home, but no one seems to notice. Nevertheless judging the resolution of his problem largely a success, the problem solver vows to try working from home again in the future and, next time, to supplement his effort by distributing some sort of stellar work product so that others will notice his efficiency and level of engagement.

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Social problem-solving theory offers insight into cognitive, behavioral, and affective abilities necessary for effective, rational decisionmaking. To determine which, if any, components of problem solving to include in a representational competence standard, we must develop a normative lens and then subject each problem-solving ability to scrutiny through this lens.

V. APPLYING PROBLEM-SOLVING THEORY TO REPRESENTATIONAL COMPETENCE

Social problem-solving theory suggests a range of decisionmaking abilities requisite to reaching sound, autonomous decisions. A subset of these abilities may be crucial enough to self-representation to warrant inclusion in a representational competence standard. To evaluate the importance of each ability, we must develop and apply a normative theory of representational competence. Reasons of sound public policy — in addition to the Court's guidance in *Edwards* — suggest that representational competence exists to preserve and effectuate the autonomy of the criminal defendant while protecting, to some minimal degree, the reliability and actual and apparent fairness of the proceeding. Thus, this Article proposes that a court should

[307] D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 33.

[308] *Id.*

[309] *See* D'Zurilla et al., *supra* note 47, at 17.

allow a defendant capable of autonomous decisionmaking at trial to control his defense unless the self-representation poses a *grave threat* to the reliability or fairness of the adjudication. Application of this theory distills certain abilities that should be included in a representational competence construct. Future work will provide a detailed exploration of the applicability of problem-solving theory for self-representation.[310]

A. Normative Theory of Representational Competence

As commentators have observed, courts and scholars should derive the abilities necessary for decisionmaking worthy of judicial deference, and therefore included within a test of competence, from a normative conception of the purposes that the competency standard serves.[311] To arrive at a normatively appropriate competency standard, we must identify and evaluate the values implicated by self-representation and then use these values to assess the importance of various decisional abilities. Self-representation by a marginally competent defendant recognizes and promotes the autonomy of the defendant while potentially impairing the reliability of the adjudication, the actual and apparent fairness of the proceeding, and the perceived legitimacy of the criminal justice process.[312] Refinement of the competence standard will reflect a balancing of these values and interests. Normative considerations will also affect the threshold required for each functional ability within the context of a particular case and the level of incongruence that courts will tolerate between a defendant's ability

[310] For extended treatment of the applicability of problem-solving theory to self-representation, see Johnston, *supra* note 43, at 17-63.

[311] *See, e.g.*, Bonnie, *A Theoretical Reformulation*, *supra* note 26, at 298 ("Which abilities should be regarded as *necessary* for legally valid decision-making, and therefore included within a 'test' of decisional competence, must be derived from a normative conception of client autonomy in criminal defense."); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 31 (1995) ("A competency evaluation . . . inevitably involves subjective cultural, social, political, and legal judgments that are essentially normative in nature. The decision regarding which standard of competency should be used turns on moral, political, and legal judgments concerning the appropriate level of ability that individuals must possess to exercise a variety of liberty and property interests.").

[312] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (discussing impact of marginally competent defendant's self-representation on his dignity, objective of providing fair trial, reliability of adjudication, and appearance of fairness to observers).

and that arguably required by the defendant's situation before ordering intervention by the State.[313]

At base, self-representation recognizes the autonomy of the defendant.[314] In the words of Justice Scalia, the right to control one's defense embraces "the supreme human dignity of being master of one's fate rather than a ward of the State — the dignity of individual choice."[315] While *Faretta* derived a right to self-representation from our nation's history and the text of the Sixth Amendment,[316] subsequent courts have emphasized the central role of autonomy to the self-representation right.[317] To borrow a term from philosopher Stanley I. Benn, autonomy is the "telos," or animating factor, of the right to self-representation.[318]

In finding a constitutional right to self-representation, the *Faretta* Court articulated three independent aspects of autonomy. First, the Court stressed "the inestimable worth of free choice."[319] Allowing a defendant to control his defense honors the dignity and individualism of the defendant.[320] Because a defendant will suffer the consequences of a conviction, he must be free to decide whether representation is to his advantage.[321] This choice, while often misguided, "must be honored out of 'that respect for the individual which is the lifeblood of the law.' "[322]

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[313] *See* GRISSO, *supra* note 126, at 32-36 (defining interactive component of competency standards).

[314] *See* Martinez v. California, 528 U.S. 152, 160 (2000); McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."); Faretta v. California, 422 U.S. 806, 834 (1975).

[315] *Edwards*, 128 S. Ct. at 2393 (Scalia, J., dissenting).

[316] *Faretta*, 422 U.S. at 818.

[317] *See, e.g.*, Bribiesca v. Galaza, 215 F.3d 1015, 1020 (9th Cir. 2000) ("At its heart, the rule expounded by the Supreme Court in *Faretta* is a rule protecting individual autonomy.").

[318] Benn defined the "telos" of a right as "whatever it is for the sake of which the right exists, that gives point to ascribing it." Stanley I. Benn, *Human Rights — For Whom and for What?*, *in* HUMAN RIGHTS 59, 62 (E. Kamenka & A. Tay eds., 1978).

[319] *Faretta*, 422 U.S. at 834.

[320] *See* McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. . . . In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way.").

[321] *Faretta*, 422 U.S. at 819, 834.

[322] *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J.,

Second, *Faretta* recognized that allowing a defendant to control his defense is critical to "the substance of an accused's position before the law."[323] In essence, the Court honored a defendant's ability to respond to the prosecution on his own terms, in his own way. The Court rejected the coercive power of the government to haul a person into court, force a state-funded lawyer upon him, and authorize that lawyer to override the strategic and tactical positions of the defendant.[324] Indeed, self-representation is the means of last resort for a defendant wanting to make strategic or tactical decisions with which his attorney disagrees. When a defendant is represented, his counsel holds the authority to make binding decisions of strategy and tactics.[325] In cases recognizing this authority, courts stress that, if a defendant believes it critical to proceed in a manner contrary to that chosen by his attorney, he can always release his attorney and proceed pro se.[326] A pro se defendant, on the other hand, has no other options. If a court overrides his desire to control his defense, the defendant has no recourse and must relinquish control over his preferred means of defense against the government.[327]

Third, effectuating a defendant's rejection of counsel is a necessary correlate of the agency relationship that binds client to counsel. Familiar black letter law holds that an agent does not have the authority to bind the principal unless the principal implicitly or explicitly consents to the contours of the representation.[328] In this vein, the Court in *Faretta* explained the traditional allocation of most

concurring)).

[323] *Id.* at 815 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)). Relatedly, the Court found that the right to control his defense personally belongs to the defendant, not to the State or society. The Court interpreted the Sixth Amendment as "not provid[ing] merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *See id.* at 819.

[324] *See id.* at 807, 820, 833, 834.

[325] *See* Gonzales v. United States, 128 S. Ct. 1765, 1769-70 (2008). Under current case law, a defendant can control the strategy and tactics of his case only when he forgoes assistance of counsel. *See id.*; Jones v. Barnes, 463 U.S. 745, 751 (1983). Otherwise, counsel has the authority to select, over a defendant's objection, which witnesses to call, which witnesses to cross-examine, what evidence to admit, and other "tactical" decisions, including possibly which defense to exert. *See Gonzales*, 128 S. Ct. at 1769-70.

[326] *See Jones*, 463 U.S. at 751 (explaining that defendant only has authority to make "certain fundamental decisions," and suggesting that, if he wants additional control, he could "elect to act as his or her own advocate").

[327] Many, but not all, courts have recognized a defendant's right to decide whether or not to raise an insanity defense. *See* CHRISTOPHER SLOBOGIN, MINDING JUSTICE 211-12 (2006).

[328] *See* 3 AM. JUR. 2D *Agency* § 270 (2009).

trial decisions to counsel as premised on "the defendant's consent, at the outset, to accept counsel as his representative."[329] By definition, if a defendant withholds consent, then his attorney lacks the authority to speak for him.[330]

As discussed previously, the *Edwards* Court premised its holding that the Constitution permits a trial court to impose a more stringent standard for self-representation than to stand trial partly on concerns about accuracy, fairness, and the legitimacy of the criminal justice system to outside observers.[331] However, given the history of the right to self-representation and the Court's articulation of the right at its genesis in *Faretta*, these values appear less fundamental than respect for a defendant's autonomy. Courts recognizing a right to self-representation consistently have acknowledged that judgments in cases involving pro se defendants are less likely to be accurate or reliable than when a defendant is represented by counsel.[332] The U.S. Supreme Court has long recognized that, without counsel's assistance, a defendant may be convicted on an invalid indictment or incompetent evidence.[333] In other words, though he has a perfect defense, a pro se defendant may be found guilty because he lacks the skills and knowledge necessary to prepare and present it.[334] It is hard to fathom additional factors beyond those explicitly anticipated by the Court, except perhaps a complete lack of motivation to contest the State's charges, that could lead to an inaccurate verdict. In addition, the fact that self-representation typically requires judicial and societal

[329] *Faretta*, 422 U.S. at 820-21.

[330] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2394 (2008) (Scalia, J. dissenting); *Gonzales*, 128 S. Ct. at 1773 (Scalia, J., concurring) (noting that "action taken by counsel over his client's objection . . . would have the effect of revoking the agency with respect to the action in question"). *Cf.* Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." (internal quotation marks omitted)).

[331] *See Edwards*, 128 S. Ct. at 2387.

[332] In *Faretta*, the Court concluded that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta*, 422 U.S. at 834. *See also* Flanagan v. United States, 465 U.S. 259, 268 (1984) (stating that "the [*Faretta*] right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding"); McKaskle v. Wiggins, 465 U.S. 168, 176 n.7 (1984).

[333] *Faretta*, 422 U.S. at 833 n.43.

[334] *Id.*

tolerance for some degree of indecorum weakens the absolute value of maintaining the appearance of fairness.[335]

A range of normative standards exists that would accommodate the recognition that a defendant's autonomy should receive more weight than the interests of reliability, actual fairness to the defendant, and the appearance of fairness to the outside world.[336] A court could deny self-representation, for example, only to prevent a wrongful conviction or a substantial miscarriage of justice.[337] This strikes me as too stringent a standard and insufficiently protective of the government's interest in the fairness and outward legitimacy of the criminal justice process. It is not difficult to imagine a situation, for instance, where the public assumes a defendant's guilt, but condemns a conviction because the court did not treat the defendant fairly or the adversarial process appeared to be a sham. At the other end of the spectrum, a court could allow self-representation so long as it would not present any threat to the reliability or fairness of the adjudication or otherwise call into

[335] *See* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 487 (1996) ("[M]ost pro se defendant cases disrupt the criminal justice system to some degree.").

[336] Slobogin and Mashburn have argued that "[s]ocietal 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." Slobogin & Mashburn, *supra* note 36, at 1597. Instead, "[o]nly autonomy interests . . . should be relevant in determining the content of the decisional competency standard, at least with respect to the decision[] . . . to waive the right to counsel." *Id.*; *see also id.* at 1591-92 (arguing that competency to waive counsel should not take into account defendant's ability to represent himself). Slobogin and Mashburn argued in particular that concerns about reliability "should not affect the predicate determination of decisional competence." *Id.* at 1601. However, Slobogin and Mashburn advocated for overriding a defendant's autonomous choices when reliability concerns are particularly compelling. *See id.* at 1585, 1601.

[337] "Miscarriage of justice," while a legal term of art, does not have a settled definition in the law. *See* Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN. ST. L. REV. 967, 972-73, 1032-40 (2005) (arguing that post-September 11 experience suggests that traditional conception of miscarriage of justice should be extended beyond field of wrongful criminal convictions to include detention of individuals who do not satisfy definition of inadmissible and removable "terrorist" aliens in immigration law or of enemy combatants in military orders); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 341-42 (1993) (examining Supreme Court's "unexamined, indeed concealed, infidelity to current and past understandings of 'miscarriage of justice' "). *See also* Michael Naughton, *Redefining Miscarriages of Justice*, 45 BRIT. J. CRIMINOLOGY 165 (2005); Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43, 49-50 (2009).

question the legitimacy of the proceeding. Or, a court could deny self-representation "in the interests of justice." These standards seem insufficiently deferential of autonomy and too amenable to abuse by judges looking to avoid the substantial inconvenience of managing unrepresented defendants at trial. Because self-representation is often harmful to a defendant's case, to some extent *every* instance of self-representation at trial could pose a threat to the reliability of the proceeding.

Though perhaps not perfect, I suggest that a court should allow a defendant capable of autonomous decisionmaking at trial to control his defense unless the self-representation poses a *grave threat* to the reliability or fairness of the adjudication. The standard recognizes that autonomy and a preference for self-determination lie at the heart of the right to self-representation, but allows a court to override a defendant's autonomy when faced with a serious threat to the actual fairness, apparent fairness, or reliability of the proceeding. This standard would be sufficiently deferential of autonomy, while accommodating the U.S. Supreme Court's concerns regarding fairness and reliability in *Edwards*. Assuming it withstands scrutiny by courts and commentators,[338] this normative framework should guide the evaluation of functional abilities for inclusion in a representational competence standard.

Defendants incapable of autonomous decisionmaking, however, do not possess a cognizable autonomy interest.[339] As John Stuart Mill

[338] Some may ask whether the severity of the punishment should influence the application of this standard. The language of the test affords some flexibility in this regard. For instance, in recognition of the government's heightened interest in ensuring the reliability and apparent fairness of a capital case, a court could find that even a small risk of an erroneous imposition of the death penalty would constitute a "grave" threat to the legitimacy of the process. Frankly, I am uncomfortable with the idea of a court's according more or less weight to a defendant's autonomy interest based on the severity of the penalty. If a defendant is capable of meaningful autonomy — and if a substantial threat does not exist to the reliability or fairness of the proceeding — then a defendant should be permitted to exercise his constitutional right to control his defense, no matter the penalty faced by the defendant. A defendant's right to express his autonomy and control his fate is just as strong when facing death as when facing a one-year prison sentence. In fact, the severity of a potential penalty may incentivize a defendant to consider his options more carefully. When he reaches a decision that would conflict with the one appointed counsel would impose, the decision is likely to be the product of strongly held beliefs, values, and priorities and thus be of greater autonomous value.

[339] Slobogin and Mashburn have described the relationship between incompetence and autonomy in this way:

expressed, it is error to formulate principles "as universal rules for attaining a given end . . . without regard to the possibility . . . that some modifying cause may prevent the attainment of the given end by the means which the rule prescribes."[340] *Faretta* rested on a conception of an autonomous individual as capable of identifying his own interests, evaluating a situation in light of those interests, and making an informed, rational decision to advance those interests.[341] Persons who are incapable, because of a mental illness or defect, of identifying and protecting their interests are incapable of exercising meaningful

> 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 citizens — 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.

Slobogin & Mashburn, *supra* note 36, at 1586-87.

[340] Fred D'Agostino, *Mill, Paternalism and Psychiatry*, 60 AUSTRALASIAN J. PHIL. 319, 322 (1982) (quoting John Stuart Mill, *A System of Logic Ratiocinative and Inductive*, *in* 8 COLLECTED WORKS OF JOHN STUART MILL 946 (J.M. Robson ed., Univ. of Toronto Press 1974 (1843))). Even Mill, one of the staunchest opponents of paternalism by the state, recognized that his harm principle — the principle that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection" and "to prevent harm to others," John Stuart Mill, *On Liberty*, *in* 18 COLLECTED WORKS OF JOHN STUART MILL 213, 223 (J.M. Robson ed., Univ. of Toronto Press 1977 (1859)) — applies only "to human beings in the maturity of their faculties." *Id.* at 224. Thus, paternalism might be warranted for children, the "delirious," or others without "the full use of the reflecting faculty." *See* D'Agostino, *supra*, at 321 (quoting Mill, *On Liberty*, *in* 18 COLLECTED WORKS OF JOHN STUART MILL, *supra*, at 223).

[341] The *Faretta* Court expressed that the right to self-representation should serve as a conduit for a defendant's exercise of "his informed free will." Faretta v. California, 422 U.S. 806, 835 (1975). The Court also stressed the defendant's right to elect, "intelligently," to control his defense. *Id.* at 807; *see* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 456 (2007) ("Imbedded within this notion of autonomy and free choice [in *Faretta*] . . . is the idea that the decision to proceed pro se is going to be made freely, *i.e.*, without a cloud of mental illness.").

autonomy.[342] Preventing these persons from representing themselves is not violative of autonomy and is a reasonable application of the government's *parens patriae* power, through which the government protects those who cannot care for themselves.[343]

By recognizing that certain capacities are requisite to the existence of autonomy, our normative theory leads to the preliminary conclusion that representational competence should only include a particular decisional ability when one of two criteria is met. First, representational competence should encompass those functional abilities necessarily present for the exercise of meaningful autonomy. Second, representational competence should require a functional ability if its absence poses a grave threat to the reliability or the actual or apparent fairness of the adjudication. Decisional abilities crucial to reliability and fairness likely will be those at the heart of adversarial testing.[344]

It is important to emphasize that research findings should validate any proposed representational competence standard before adoption by a court. A court should not require a pro se defendant to possess any cognitive or behavioral ability unless empirical evidence demonstrates that incompetent defendants actually differ from competent defendants along those dimensions.[345] In addition,

[342] *See* King, *supra* note 36, at 211 ("In cases involving criminal defendants suffering serious mental impairment, the very reasoning behind the model of client-centered representation and client autonomy can fall apart, especially in cases involving defendants who, although competent to stand trial, are 'decisionally incompetent' and, therefore, unable meaningfully to assist in their own defenses."); Slobogin & Mashburn, *supra* note 36, at 1586.

[343] *See* Allen v. Illinois, 478 U.S. 364, 373 (1986); H. L. v. Matheson, 450 U.S. 398, 449 n.46 (1981).

[344] Interpreting the Sixth Amendment, the Supreme Court has defined a fair trial as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 466 U.S. 668, 685 (1984). I do not consider the suggestion that a pro se defendant should possess decisional abilities sufficient to allow him to engage in a minimal degree of adversarial testing to contradict *Faretta*'s mandate that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation." *Faretta*, 422 U.S. at 835. For an explanation of how my approach to representational competence comports with the dictates of *Faretta*, see *supra* notes 341-43 and accompanying text.

[345] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 579 (stating that data regarding distribution of abilities relating to "rational decisionmaking" in general population of criminal defendants, and regarding relation between these abilities and mental disorder, should be used to determine competency standards for varying decisional contexts when defendant disagrees with his attorney, but that systematic research on these issues had only recently begun); *cf.* Anderer, *supra* note 208, at 39, 73 (making this point in context of guardianship proceedings).

empirical evidence should prove that those differences create an unacceptable risk of unreliability or unfairness as a general matter.[346] Caution is especially appropriate when considering the inclusion of decisionmaking abilities because research demonstrates that the average person (much less the average criminal defendant seeking to proceed pro se) may not employ optimal decisionmaking strategies.[347] Empirical evidence should also demonstrate whether a potentially incompetent defendant seeking to proceed pro se differs from the majority of pro se criminal defendants in his capacity to make decisions, how he differs, and whether those differences are of a kind and magnitude justifying intervention.[348]

In sum, normative considerations should guide the selection of abilities, drawn from problem-solving theory, for inclusion in a representational competence standard. In general, abilities should only be required if they are essential to the exercise of autonomy, the reliability of the adjudication, or the actual or apparent fairness of the proceeding. While a detailed exploration of the importance of each problem-solving ability is provided elsewhere,[349] some tentative observations about the importance of certain abilities for self-representation at trial are appropriate at this juncture.

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[346] *Cf.* Anderer, *supra* note 208, at 39, 73.

[347] *See* Barry Edelstein, *Challenges in the Assessment of Decision-Making Capacity*, 14 J. AGING STUD. 423, 428 (2000) (describing research indicating that many individuals do not engage in formal rational manipulation of information presented in decisionmaking evaluations); Arthur M. Nezu & Christine M. Nezu, *Clinical Prediction, Judgment, and Decision Making: An Overview*, *in* CLINICAL DECISION MAKING IN BEHAVIOR THERAPY: A PROBLEM-SOLVING PERSPECTIVE 9, 18-19 (Arthur M. Nezu & Christine M. Nezu eds., 1989) [hereinafter Nezu & Nezu, *Clinical Prediction*]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (establishing widespread use of heuristics, or mental shortcuts, in making decisions); *see also* Maroney, *supra* note 129, at 1397, 1427 (describing individuals' common reliance on cognitive heuristics and biases and suggesting "flexible reasoning" as more appropriate model for real-world decisionmaking); Saks, *supra* note 20, at 958 ("Even generally effective decisionmakers who clearly have the ability to form accurate beliefs misuse statistics, misunderstand probabilities, and accord undue weight to vivid examples. They also may be affected profoundly by irrational and unconscious factors.").

[348] *Cf.* Anderer, *supra* note 208, at 39 (making this point in context of competence for guardianship).

[349] *See* Johnston, *supra* note 43, at 17-63.

B. Problem-Solving Abilities Potentially Necessary for Self-Representation

Social problem-solving theory is useful in highlighting motivational and decisional abilities necessary for optimal decisionmaking. Analyzing each ability through our normative lens, it is possible to identify capacities critical to the existence of autonomous decisionmaking, the reliability of the adjudication, or the actual or apparent fairness of the proceeding. While a detailed analysis of each problem-solving ability is beyond the scope of this Article,[350] I offer a preliminary analysis of the importance of three abilities: a willingness to address a problematic situation, an ability to gather information to define a problem, and abilities necessary to make (and, to some degree, execute) decisions within the hurly-burly of a criminal trial.

1. Problem Orientation: Willingness to Attend to Problems

An orientation to attend to problems is critical to a reliable and fair conviction. Remember that problem orientation, as defined by D'Zurilla and Nezu, is a motivational process that involves the cognitive, affective, and behavioral response of an individual when confronted with a problematic situation.[351] The behavioral element of problem orientation involves an individual's tendencies to confront or avoid problems,[352] while the affective component consists of his emotional response to problematic situations.[353] In order to ensure, at a minimal level, the reliability and apparent fairness of a conviction following trial, a defendant must not be unwilling (due to mental illness or another mental condition) or unable (due, for instance, to disabling emotions) to address and attend to the problem that the prosecution presents.[354] In essence, this element of positive problem

[350] For a comprehensive analysis of the importance of each problem-solving ability for self-representation, see *id.*

[351] *See* Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 188.

[352] *See* D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157.

[353] *See id.* For a compelling exploration of emotion's role in problem perception and appraisal, see Maroney, *supra* note 129, at 1404-05; *id.* at 1404 (arguing that emotion "affects the perceived value, personal relevance, or attractiveness of the information being processed, and therefore will shape motivation and goals").

[354] Several commentators have opined on the importance of motivation to competence. *See* Altman et al., *supra* note 223, at 1686 (highlighting importance of motivation in psychological literature and suggesting that competency should take into account a person's lack of motivation to participate meaningfully in medical care decisions); Ian Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand*

orientation indicates an individual's desire to engage in a problem-solving process and not to abdicate his autonomy to the wishes of the prosecution.[355]

An unwillingness to contest charges because of depression or another disabling mental condition may not constitute a valid expression of autonomy,[356] poses a severe threat to the reliability of a conviction, and undermines the proceeding's apparent fairness. A familiar example of a defendant unwilling to attend to the problem of the prosecution is Richard Moran, the defendant in the U.S. Supreme Court case of *Godinez v. Moran*.[357] Moran was charged with three counts of capital murder.[358] Originally, he pleaded not guilty with the assistance of counsel.[359] Two psychiatrists appointed to assess his competency observed that, while he was competent to stand trial, Moran was "very depressed" and that, "because he is expressing and feeling considerable remorse and guilt, [he] may be inclined to exert less effort towards his own defense."[360] Several months later, Moran discharged his attorneys and pleaded guilty to three counts of capital murder.[361] He explained that he wished to represent himself "because he opposed all efforts to mount a defense" and wanted to prevent the presentation of all mitigating evidence at the capital sentencing proceeding.[362] Moran later testified that, at the time, "I 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."[363] After waiving his right to counsel, Moran presented no defense, called no witness, and offered no mitigating evidence on his own behalf.[364] He was sentenced to death.[365] In

Trial, 19 INT'L J. L. & PSYCHIATRY 39, 53 (1996); Maroney, *supra* note 129, at 1404, 1409-11, 1413-15 (discussing importance of emotion to motivation in context of adjudicative competency). Slobogin and Mashburn have proposed a test for decisional competence that includes a volitional element, coined "basic self-regard." *See* Slobogin & Mashburn, *supra* note 36, at 1598. "Basic self-regard" is defined as "a willingness to exercise autonomy." *See* SLOBOGIN, *supra* note 327, at 195.

[355] *See* Slobogin & Mashburn, *supra* note 36, at 1608-09 (arguing that defendant's abdication of autonomy by refusing to evaluate unfavorable evidence violates principle of "basic self-regard" and should result in finding of incompetence to proceed pro se).

[356] *See id.* at 1607-08.

[357] 509 U.S. 389 (1993).

[358] *See id.* at 391.

[359] *See id.* at 409 (Blackmun, J., dissenting).

[360] *See id.* at 410.

[361] *See id.*

[362] *See id.*

[363] *See id.* at 410-11.

[364] *Id.* at 412.

essence, this "self-destructive" orientation left Moran, in the words of Justice Blackmun, "helpless to defend himself,"[366] and he "volunteered himself for execution."[367] *Godinez* demonstrated that, to safeguard the reliability and apparent fairness of a criminal trial, courts should not allow a defendant to represent himself if he, because of a mental illness or disability, has a negative problem orientation and lacks a willingness to challenge the government's case.

2. Problem Definition: Gathering Information

One prerequisite to the exercise of meaningful autonomy — as well as to a minimal degree of reliability — is an ability to gather information to define the contours and implications of a decision. As defined by D'Zurilla and Nezu, problem definition and formulation involves gathering relevant information about a problematic situation and using it to comprehend the nature of the problem and formulate realistic goals.[368] The ability to define and advance one's interests in a given situation depends upon the ability to understand why and how a situation is problematic. If a defendant lacks a basic ability to comprehend a problematic situation and understand the way it may affect his interests, then he necessarily is incapable of defining and advancing his interests in response to that problem.[369] In this respect, he is incapable of exercising meaningful autonomy.

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[365] *See id.* at 393 (majority opinion).

[366] *See id.* at 417 (Blackmun, J., dissenting).

[367] *See id.* at 416.

[368] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 23.

[369] In some ways, the capacities inherent in problem definition are extensions or heightened forms of the abilities necessary to stand trial with counsel. *Dusky* established that to be competent to stand trial, a defendant must have "a rational as well as factual understanding of the proceedings against him" and "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975). Bonnie has interpreted the *Dusky* standard to require an understanding of the nature and purpose of the criminal prosecution, a capacity to understand the criminal charges, and a capacity to recognize and relate relevant information to counsel concerning the facts of his case. *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 551-52, 561. These abilities were operationalized in the MacArthur Competence Assessment Tool — Criminal Adjudication, or MacCAT-CA, to include an understanding of the adversary nature of the proceeding, the basic roles of participants, and the possible consequences of conviction ("understanding"); the ability to recognize and relate information relevant to constructing a legal defense ("reasoning"); and the holding of plausible beliefs about how participants and procedures will play out in one's case ("appreciation"). POYTHRESS ET AL., *supra* note 109, at 60. The cognitive abilities to recognize the

Moreover, when a defendant rejects counsel's assistance and chooses to proceed to trial, the reliability of the judicial outcome will depend on the defendant's ability to analyze and understand the prosecution's case. To understand the "problem" of the prosecution's case, a defendant must be capable of comprehending the elements of the offense, gathering information on the government's likely prosecution theory, following the introduction of evidence at trial, and assessing the legal significance of that evidence.[370] A defendant's inability to gather and comprehend this information would be fatal to his attempt to function as the government's adversary, even to a minimal degree.

3. Solution Implementation

Certain elements of solution implementation may be necessary to ensure that a proceeding satisfies basic guarantees of fairness and reliability. Solution implementation involves performing or carrying out a chosen solution in a particular context.[371] This problem-solving stage requires skills of execution that may differ from those skills necessary to reach a satisfactory decision in the abstract.[372] For instance, a person may possess intact decisionmaking powers, but lack the ability to implement a chosen solution due to deficiencies in social skills, lack of relevant technical skill, anxiety, or emotional distress.[373] As a preliminary point, *Faretta* emphasized that a defendant need not perform *well* at trial — indeed, all members of the U.S. Supreme Court indicated their expectation that a defendant would fare poorly.[374]

relevance of information, understand one's legal situation, and appreciate one's jeopardy are similar to the abilities to gather relevant information on a nebulous problem, evaluate that information, and understand how the information (and, relatedly, the broader problem) affects one's interests. Often the "problem" in self-representation, however, will not be defined for the defendant, so he will need to engage in an active information-gathering and evaluative process in order to discern the problem's contours and scope. In practical terms, it will be far easier for an individual to hold a rudimentary understanding of the nature of the proceeding and the possible consequences of a conviction — after these have been explained to him by an attorney — and to identify relevant legal information — after having been prompted by an attorney — than to perform similar functions without assistance.

[370] Professors Leonard L. Riskin and Nancy A. Welsh have defined the way parties typically conceptualize the "problem" in civil litigation as the applicable law, the legally relevant facts, and how they mesh. *See* Riskin & Welsh, *supra* note 237, at 867-68.

[371] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 31-34; D'Zurilla & Nezu, *Development and Preliminary Evaluation*, *supra* note 254, at 157; Nezu & Nezu, *Problem Solving Therapy*, *supra* note 252, at 189.

[372] *See* D'ZURILLA & NEZU, PROBLEM-SOLVING THERAPY, *supra* note 46, at 32.

[373] *See id.*

[374] *See* Faretta v. California, 422 U.S. 806, 833-34 & n.43 (1975) (majority

Mandating that a pro se defendant possess strong performance and implementation skills before allowing him to control his defense also trivializes the importance of autonomy to the self-representation right.

Some aspects of solution implementation may be necessary, however, to ensure that a proceeding is reliable and fair and appears fair to outside observers. For instance, a pro se defendant should possess the capacity to sustain decisional competence from moment to moment within the context of trial. Making decisions within a hectic trial environment requires the abilities to maintain concentration or attention, sustain mental coherence, make decisions within a short timeframe, and withstand the stress likely to accompany trial participation.[375] In addition, a defendant should be able to communicate his decisions to a functionary of the court. To satisfy the *Dusky* standard to stand trial, a defendant must be able to communicate pertinent information to counsel and express a preference as to fundamental decisions within his decisional domain.[376] Bonnie included these abilities in his foundational competence to assist counsel standard.[377] Self-representation may, depending on the level of support a court provides to a defendant, require communicative abilities of a different degree. For instance, if a court fails to appoint standby counsel, a pro se defendant must be able to communicate with a judge, witnesses, and potentially a jury. These individuals will not assist the defendant in articulating a decision or encourage him with a sympathetic ear. The abilities to maintain concentration, sustain mental coherence, make decisions in a short timeframe, withstand the stress of trial, and communicate to functionaries of the court — all critical to a defendant's capacity to make decisions in the real-life setting of a criminal trial and to execute them to a minimal degree — are crucial to reliability, the actual and apparent fairness of the proceeding, and the legitimacy of the criminal justice system.

opinion); *id.* at 838-39 (Burger, J., dissenting).

[375] The *Edwards* Court alluded to some of these elements. The Court listed some conditions that "impair the defendant's ability to play the significantly expanded role required for self-representation," including deficits in sustaining attention and concentration and anxiety. Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (quoting Brief for the American Psychiatric Association et al. as Amici Curiae in Support of Neither Party at 26, *Edwards*, 128 S. Ct. 2379 (No. 07-208), 2008 WL 405546).

[376] *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975).

[377] *See* Bonnie, *Beyond* Dusky *and* Drope, *supra* note 26, at 561. The MacCAT-CA operationalized this capacity as a "reasoning" ability to recognize and relate information relevant to constructing a legal defense. POYTHRESS ET AL., *supra* note 109, at 60.

Applying our normative theory of representational competence, it is possible to identify a subset of problem-solving abilities potentially necessary for self-representation at trial. These capacities include the willingness to address a problematic situation, the ability to gather information to define a problem, and the abilities necessary to make (and, to some degree, execute) decisions within the real-life context of a criminal trial. While some of these capabilities are extensions of those necessary to assist counsel, others are not addressed in Bonnie's adjudicative competence construct. Requiring the possession of these abilities and attributes prior to permitting a defendant to represent himself at trial should advance the values of autonomy, reliability, and fairness.

CONCLUSION

In June 2008, the U.S. Supreme Court in *Edwards* held that the Sixth Amendment permits a trial court to impose a higher competency standard for self-representation than to stand trial. It left to lower courts the task of generating a constitutionally permissible standard, but indicated that a defendant's decisionmaking abilities may be an important element of competence to proceed pro se at trial. Until now, models of decisional competence for self-representation have included the construct proposed by Professor Bonnie and other tests derived from his framework. While Bonnie's construct may provide an appropriate standard for evaluating the competence of represented defendants' decisions, it is at most a starting point for identifying the abilities needed for self-representation at trial. In particular, self-representation involves a decisionmaking context much more demanding than that faced by represented defendants.

This Article looks to social problem-solving theory to illuminate abilities requisite to autonomous decisionmaking. Applying a normative theory of representational competence that balances concerns of autonomy, reliability, and fairness, the Article suggests a subset of abilities that may be critical for self-representation at trial. Potential capabilities include a willingness to address a problematic situation, an ability to gather information to define a problem, and the abilities necessary to make and, to some degree, execute decisions within the real-life context of a criminal trial. Future work will explore the relationship between additional problem-solving abilities and representational competence.

Let us return to the Moussaoui case. Does it appear that Moussaoui possessed the problem-solving abilities identified here as important to representational competence? It seems likely that, for the most part,

he did. Moussaoui certainly was willing to attend to the problem of the prosecution and wanted to challenge the prosecution's case.[378] He asserted his innocence,[379] filed numerous motions in his defense,[380] and prevailed initially in his arguments that the trial court should exclude evidence linking him to the September 11 attacks and prohibit the government from seeking the death penalty.[381] He also seemed capable of gathering information to define the contours of a problem. Take, for instance, the "problem" or decision point of whether to accept representation by counsel. Moussaoui appears to have questioned his appointed counsel thoroughly about their willingness

[378] *See* John Rosenthal, *Doing Justice to Zacarias Moussaoui*, 146 POL'Y REV. 39, 39 (Dec. 2007 & Jan. 2008) (quoting Transcript of Jury Trial, United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010) (No. 01-455-A): "and I will testify of the entire truth. Nobody can not say now that they don't know that I want to testify. I will take the stand, and I will say the truth that I know."); *"I Can't Wait for the Jury": Moussaoui, Citing Koran, Demands to Proceed Without Appointed Counsel*, LEGAL TIMES, Apr. 29, 2002, at 15 ("In the name of Allah, I, Zacarias Moussaoui, today the 22nd of April, 2002, after being prevented for a long time to mount an effective defense by overly restrictive and oppressive condition of confinement, take the control of my defense by entering a pro se defense set for presentation in order to mount a significant defense of the life that Allah, the most masterful, has granted to me.").

[379] *"I Can't Wait for the Jury," supra* note 378, at 15 ("I'm innocent until proven guilty, OK, so even if the government have blocked my money, I believe that they have no right and this should be fought in court.").

[380] In regards to the seemingly bizarre nature of some of his pretrial motions, Moussaoui himself repudiated such motions, calling them merely "propaganda": "I knew that my pleadings were being put on the Internet. . . . I carry on my propaganda war." Rosenthal, *supra* note 378, at 42. As John Rosenthal has argued, due in part to Judge Brinkema's ruling prohibiting the broadcast of court proceedings and the unexpected consequence that electronic transcripts were only made available at a price, "the part of the record of the Moussaoui case that is readily accessible to the public is disastrously skewed." *Id.* at 41.

> Courtesy of the court, the bizarre ramblings in Moussaoui's pretrial motions have been freely available on the Internet for over five years now, during which time they have irrigated the fevered mental landscapes in which anti-American phantasms prosper the world over. On the other hand, and also courtesy of the court, Moussaoui's remarkably lucid and coherent testimony has, for all intents and purposes, been as inaccessible to the public as it would have been had Moussaoui testified before the Star Chamber.

Id. at 41-42.

[381] *See* Jerry Markon, *Dismissal of Terror Charges Appealed; Federal Judge Barred Sept. 11 Evidence, Death Penalty in Moussaoui Case*, WASH. POST, Oct. 8, 2003, at A2. This ruling was reversed, allowing the government to seek the death penalty. Jerry Markon, *Prosecutors Want Moussaoui Trial in October*, WASH. POST, Mar. 23, 2005, at A2. For a discussion of Moussaoui's success in presenting an adequate defense, see Allen, *supra* note 12, at 1556.

to follow his wishes on matters of strategy and defense.[382] Concluding that self-representation was necessary in order to present a defense consistent with his priorities and religious beliefs, he dismissed his attorneys.[383] Moussaoui also was, to some extent, capable of communicating with the court to execute his decisions. While some of his exhortations were rambling and sermon-like and earned censure from the court,[384] he ultimately appeared able to communicate his

[382] Moussaoui recounted his experience with appointed counsel in this manner:

> So the first encounter was with [Gerald] Zerkin. Lawyer Zerkin, after not even a week, we have a very direct discussion where I said to him that if he doesn't want to adapt, to follow the guidance of my defense the way I want, according to my principle, my belief, my understanding, and my religion, OK, he have to make a professional judgment and withdraw from the case. He say he can't. . . . So at first, [attorney Edward] MacMahon have a very relaxed attitude. He say, "This is your defense, Mr. Moussaoui. We are here to help you, OK, and we will do as you wish. You want to do this according to Islam principle," so on and so forth, OK. Nice talk. The same for Mr. [Frank] Dunham. But on January 30, the last day of the month, I believe, after like something of great importance, we have an argument, a divergence of opinion about a tactical point, OK, and Frank send them, MacMahon and Zerkin, to visit me, OK, to clarify a situation. When they came, they didn't discuss the point they were supposed to discuss. They wanted to assert their right as a lawyer to define the strategy and the tactic on the defense of my life. . . . [B]ecause before in a sense, I always told whatever I disagree with. They say, "From now on, finished. We are going to do as we wish." I say, "This is my life, and you have not any understanding of the situation. You have no information. You have nothing from the FBI. You have nothing, and you want to be in charge." He says, "We are the lawyer, and we are, by statute or whatever, we are in charge." So I say, "So are you sure?" So I asked them three time, because this is the manner of the Muslim, to assert something, we used to — we ask three time the same question. And if he respond three time, it means that it's OK now. So they say, "Yes. Indeed, we will just inform you when we believe that it's important." OK. So I say, "If it's like that, I dismiss you. You are not my lawyer anymore."

"I Can't Wait for the Jury," supra note 378, at 15.

[383] *See id.* Moussaoui also seemed fundamentally to distrust any attorney appointed by a government with which he was at war. *See* Rosenthal, *supra* note 378, at 57 (observing that, while "Moussaoui laid out numerous particular grounds for accusing the court-appointed defense lawyers of what he styled 'criminal non-assistance,' . . . the fundamental fact of his being at war with the United States was, as he made unmistakably clear, the single overriding reason for his refusing their representation"). Another possible motive for wanting to fire his court-appointed counsel, as Moussaoui's appellate brief stated, was that "his lawyers had to consistently tell [Moussaoui] they were unable to share crucial [classified] evidence with him, and these circumstances irreparably damaged the attorney-client relationship." Adam Liptak, *The Right to Counsel, in the Right Situations*, N.Y. TIMES, Feb. 26, 2008, at A11.

[384] *See* Cameron Stracher, *Eyes Tied Shut: Litigating for Access Under CIPA in the*

points effectively.[385] There is little evidence that Moussaoui was unable to make decisions within a reasonable time or otherwise to withstand the stress of trial. Moussaoui may have been incapable — or at least unwilling — to maintain appropriate courtroom demeanor, however. In fact, it was partially on this basis that Judge Brinkema found that Moussaoui had forfeited his right to represent himself and ordered his standby counsel to once again serve as attorneys of record.[386]

Given these abilities, but lapses in courtroom behavior, was Moussaoui "simply crazy," as his defense attorneys insinuated,[387] or was such a characterization "cheap," since "[b]roadly speaking for the American people anybody who fly a plane into a building is somebody who is crazy," as Moussaoui "noted dryly"?[388] We may never truly know. But perhaps one just way to evaluate the competency of a borderline criminal defendant who wants to represent himself at trial would be to evaluate his ability to, on his own terms, analyze and solve the problem of the prosecution.

Government's "War on Terror," 48 N.Y.L. SCH. L. REV. 173, 177 (2003) (quoting district court order characterizing Moussauoi's motions as containing "extensive inappropriate rhetoric" and "replete with irrelevant, inflammatory and insulting rhetoric").

[385] *See* Rosenthal, *supra* note 378, at 53 (quoting Judge Brinkema from Trial Transcript, United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010) (No. 01-455-A) as saying, "He has actually a better understanding of the legal system than some lawyers I've seen in court"); *"I Can't Wait for the Jury," supra* note 378, at 15. Rosenthal has noted that while Moussaoui's court-appointed lawyers appeared to want to "confuse" members of the jury with numerous "theories," most of which attempted to "demean or discredit the defendant," "Moussaoui was proposing, in effect, to educate them: to offer them a unique insider's view of the 9/11 plot." Rosenthal, *supra* note 378, at 53.

[386] *See* Jerry Markon, *Court Reins in Terror Suspect; Moussaoui Ordered to Use Attorneys*, WASH. POST, Dec. 30, 2003, at B3; Markon, *supra* note 13, at A7. In *Illinois v. Allen*, the Supreme Court held that a defendant whose speech or conduct "is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial" may forfeit his right to be present at trial, even when he is proceeding pro se. 397 U.S. 337, 338 (1970).

[387] Rosenthal, *supra* note 378, at 53.

[388] *Id.*