REPRESENTATIONAL COMPETENCE: DEFINING THE LIMITS OF THE RIGHT TO SELF-REPRESENTATION AT TRIAL

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In 2008, the Supreme Court held that the Sixth Amendment permits a trial court to impose a higher competence standard for self-representation than to stand trial. The Court declined to delineate a permissible representational competence standard but indicated that findings of incompetence based on a lack of decisionmaking ability would withstand constitutional scrutiny. To date, no court or commentator has suggested a comprehensive competence standard to address the particular decisional context of self-representation at trial. Conceptualizing self-representation as an exercise in problem solving, this Article draws upon social problem-solving theory to identify abilities necessary for autonomous decisionmaking. The Article develops and applies a normative theory of representational competence to evaluate particular problem-solving abilities in light of competing norms of self-representation. It concludes by proposing a representational competence standard.

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> [A]s a human being, please, let me handle my own case. I know I don't know much about law, I don't know anything, but I know enough to get me through.
>
> Jeffrey Connor[1]

INTRODUCTION

On April 3, 2006, the Honorable Carmen Espinosa entertained Jeffrey Connor's third request to discharge his attorney and proceed pro se.[2] Connor expressed distrust in his court-appointed attorney and disagreed with him on matters of strategy.[3] Evidence suggested, however, that Connor might have impaired mental abilities. Several years before, Connor had suffered a stroke, possibly secondary to cocaine abuse.[4] The stroke left him partially paralyzed and might have damaged the frontal lobe of his brain, impairing his judgment and cognitive abilities.[5] A neuropsychological evaluation indicated that the defendant "showed word-finding difficulty, memory difficulty, and some thinking impairment that was secondary to [the] stroke."[6] Connor refused evaluation by court-ordered psychologists,[7] but one

1 Brief of the Defendant with Attached Appendix at 6–7, State v. Connor, 973 A.2d 627 (Conn. 2009) (No. S.C. 18101) (quoting Transcript of Record at 21–22, State v. Connor, No. 18101 (Conn. Super. Ct. Apr. 3, 2006)).

2 *See Connor*, 973 A.2d at 640.

3 *See id.* at 641.

4 *Id.* at 636.

5 *Id.* at 637.

6 *Id.* at 636 (quoting Dr. Madelyn Baranoski, a court-appointed clinical psychologist).

7 *See id.* at 635–37. The defendant refused to cooperate with the first court-ordered competence exam and staged a hunger strike. *See* Brief of the State of Connecticut—Appellee with Attached Appendix at 5, *Connor*, 973 A.2d 627 (No. S.C. 18101). He also refused to cooperate with the second team of court-appointed

expert testified to a "strong possibility" of "significant mental health problems."[8] Connor's behavior oscillated widely: at times, he appeared lucid and interacted in "an intelligent, reasonable way,"[9] while on other occasions he ate his own feces[10] and appeared "comatose."[11] This inconsistency prompted the state to charge,[12] and a previous presiding judge to find,[13] that Connor was malingering.[14] That judge had rejected Connor's first self-representation request on the grounds that his preoccupation with irrelevant matters—including an apparent obsession with imagined outstanding "worldwide" warrants—precluded him from focusing on the pending charges of kidnapping, larceny, and robbery.[15] Connor attested that, "although he could not 'hold any thoughts' when he first was arrested, 'now it seems like someone is helping me and . . . it's got to be God or a spirit or something.'"[16] Connor pleaded with the court to allow him to handle his own case.[17]

Assuming that Connor is competent to stand trial, *must* the judge grant his motion to proceed pro se? Given evidence of Connor's mental impairment, *may* she grant his request? In the wake of *Indiana v. Edwards*,[18] the answers to these questions remain unclear. Though

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mental health professionals and would not sign a release allowing them to examine his medical records. *Id.* A third appointed psychologist testified that his repeated attempts to interview Connor were "so fraught with lack of cooperation' that he . . . w[as] forced to 'look[ ] at [the defendant's] informal behavior on the unit and devis[e] a [15]-item forced choice test of court knowledge." *Id.* at 6–7 (third, fourth, fifth, and sixth alterations in original) (quoting Transcript of Record, State v. Connor, No. 18101 (Conn. Super. Ct. Aug. 19, 2004)). Based on the defendant's thirteen incorrect answers, the psychologist found that Connor was deliberately giving wrong answers, was malingering, and was competent to stand trial. *See id.* at 7.

8 *Connor*, 973 A.2d at 636 (quoting Dr. Baranoski).

9 *Id.* at 637 (quoting Dr. Tim Schumacher, a court-appointed clinical psychologist); *see also id.* at 639 (describing Connor's pro se requests as "clear, cogent and ardent" (quoting Judge Miano of the trial court)); *id.* at 640–42 (noting Connor's participation in the hearing before Judge Espinosa).

10 *See id.* at 636.

11 *See id.* at 638–40.

12 *See id.* at 639.

13 *See id.* at 639–40.

14 Indeed, the defendant admitted to refusing to participate in prior proceedings because the judge was "a total jerk." *Id.* at 641 (quoting Connor).

15 *Id.* at 638. Judge Miano granted Connor's second request to represent himself but later rescinded his permission when the defendant was unresponsive at two hearings. *Id.* at 639.

16 *Id.* at 640 (alteration in original) (quoting Connor).

17 *See* Brief of the Defendant with Attached Appendix, *supra* note 1, at 6 (quoting Transcript of Record, *supra* note 1, at 21–22).

18 554 U.S. 164 (2008).

competence has been widely discussed by courts and commentators alike, no clear standards currently exist to define when a criminal defendant, who is competent to stand trial, may be incompetent to represent himself.

In *Edwards*, the U.S. Supreme Court held that the Sixth Amendment permits a trial court to impose a higher competence standard for self-representation than to stand trial. The Court declined to expound upon the contents of a permissible representational competence standard but indicated that findings of incompetence involving a lack of decisionmaking ability due to severe mental illness would withstand constitutional scrutiny.[19] Post-*Edwards*, we are left to ask which abilities are necessary for self-representation. Lower courts have yet to provide much guidance on how to go about answering this question.

This ambiguity and void in the law suggest the need for a competence standard based on normative theories of self-representation and decisionmaking. Incompetence is ultimately a normative judgment, expressing society's determination that sufficient interests exist to warrant denying a person's right to control his fate. Allowing a mentally ill individual to control his defense may cast into doubt the accuracy of a resulting conviction and the legitimacy of the adjudication. At the same time, a defendant has a Sixth Amendment right to represent himself at trial according to his self-defined interests, despite probable damage to his defense.[20] Balancing the competing norms implicated by self-representation, this Article suggests that a defendant capable of autonomous decisionmaking should be allowed to control his defense, unless a defendant's self-representation poses a grave threat to the reliability or fairness of the proceeding.[21]

Self-representation is, at base, an exercise in problem solving,[22] where the major "problem" is the prosecution of one or more criminal charges. Psychological theories of problem solving identify cognitive, behavioral, and affective abilities requisite for sound decisionmaking. Social problem-solving theory is one of the earliest

19 *See id.* at 174–77.

20 *See* Faretta v. California, 422 U.S. 806, 834 (1975).

21 This Article is confined to competence for self-representation *at trial*. It does not address competence for individuals wishing to represent themselves and plead guilty.

22 *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 (1999) ("[E]merging technologies will enable the professional and client to quickly and efficiently obtain and share enough information about the problem the client is facing, in order to make a jointly informed diagnostic decision.").

and most comprehensive prescriptive models of decisionmaking.[23] This theory conceives of everyday problem solving as consisting of a motivational component called problem orientation and four goal-directed cognitive, behavioral, and affective problem-solving skills.[24] These skills include problem definition and formulation, generation of alternative solutions, decisionmaking, and solution implementation.[25] In determining those abilities necessary for self-representation, social problem-solving theory may offer important insight. Requiring the possession of at least a subset of problem-solving abilities may be an appropriate means to ensure that defendants who wish to represent themselves at trial are sufficiently capable of recognizing and advancing their own interests.

This Article derives a representational competence standard from social problem-solving theory. Part I discusses *Edwards* and its guidance for a constitutionally permissible representational competence standard. Part II presents a normative theory of representational competence, which balances the competing norms of autonomy, reliability, and fairness. Part III introduces the cognitive, behavioral, and affective elements of social problem-solving theory and employs the normative theory developed in Part II to analyze and evaluate the importance of particular abilities for self-representation at trial. Part IV discusses the importance of including a causation element in a representational competence standard and of precluding self-representation only for individuals whose functional deficits stem from mental illness or disability. The Article concludes by suggesting a representational competence standard.

I. *INDIANA V. EDWARDS*

In *Indiana v. Edwards*, the U.S. Supreme Court held that the Sixth Amendment[26] permits a trial court to require a defendant to meet a higher threshold of competence for self-representation than to stand

23 *See* Stephen J. Anderer, Development of an Instrument to Evaluate the Capacity of Elderly Persons to Make Personal Care and Financial Decisions 42, 48–53 (May 1997) (unpublished Ph.D. dissertation, Allegheny University of Health Sciences) (on file with Hahnemann Library, Drexel University).

24 *See* Thomas J. D'Zurilla et al., *Social Problem Solving: Theory and Assessment*, *in* SOCIAL PROBLEM SOLVING 11, 14 (Edward C. Chang et al. eds., 2004).

25 *See id.*

26 The majority identifies the Sixth Amendment as the constitutional basis of its decision, *see* Indiana v. Edwards, 554 U.S. 164, 169–72 (2008), but its emphasis on the fundamental fairness of the proceeding suggests that its holding was motivated more by due process concerns. *See id.* at 176–78; *see also id.* at 169, 174–76 (discussing the relationship of the *Dusky/Drope* standard to the case at bar).

trial.[27] *Edwards* was unforeseen, given that the Court in *Godinez v. Moran*[28] had prohibited an appellate court from imposing a higher competence standard for self-representation than for standing trial.[29] After *Godinez*, most states assumed that the standard for competence to represent oneself (denominated in this Article as "representational competence"[30]) was equivalent to the standard for competence to stand trial.[31] *Dusky v. United States*[32] established that, to stand trial, a defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[33] Because Edwards had been found competent to stand trial

27 *Id.* at 176–78. To effect a valid waiver of counsel, a defendant must "knowingly and intelligently" forgo the benefits of representation. Faretta v. California, 422 U.S. 806, 835 (1975); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

28 509 U.S. 389 (1993). In *Godinez*, the U.S. Supreme Court responded to the Ninth Circuit Court of Appeals's findings that competence 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 (quoting Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992)) (internal quotation marks omitted). The Court rejected this approach and the idea that a competence standard "higher than (or even different from) the *Dusky* standard" must apply to the decisions of whether to plead guilty or to waive the right to counsel. *Id.* at 398.

29 *See* Edwards v. State, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006), *aff'd in part, vacated in part*, 866 N.E.2d 252 (Ind. 2007), *judgment vacated*, 554 U.S. 164.

30 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).

31 *See* State v. Connor, 973 A.2d 627, 647–48, 647 n.19 (Conn. 2009).

32 362 U.S. 402 (1960) (per curiam).

33 *Id.* at 402 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)); *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 object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). Courts have interpreted this competence 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 played by defense counsel. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 554 & nn.62–63 (1993). After *Godinez*, the *Dusky* standard may also require "the capacity to understand the rights to

and to effect a valid waiver of his right to counsel,[34] the Court of Appeals of Indiana[35] and the Supreme Court of Indiana[36] each found that he was, de facto, competent to represent himself.

The U.S. Supreme Court disagreed, holding that the Sixth Amendment[37] permits a trial court to impose counsel upon an unwilling defendant found competent to stand trial.[38] The Court employed several strands of reasoning in support of its holding. First, the Court found that precedent[39]—requiring that, to stand trial, a defendant possess "sufficient present ability *to consult with his lawyer*"[40]—"points slightly" in the direction of its holding in that it emphasizes the centrality and importance of representation to the competence inquiry.[41] Second, the Court found that the varying nature of mental illness calls for applying a different mental competence standard to different activities.[42] Third, the Court asserted that allowing a borderline-competent defendant to represent himself is not respectful of his auton-

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silence, a jury trial, confrontation, and trial counsel." Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1590 (2000).

34 *See* Indiana v. Edwards, 554 U.S. 164, 167–68 (2008); *id.* at 181–82 (Scalia, J., dissenting); *see also supra* note 27 (discussing the standard for a valid waiver).

35 *See* Edwards v. State, 854 N.E.2d 42, 48 (Ind. Ct. App. 2006), *aff'd in part, vacated in part*, 866 N.E.2d 252 (Ind. 2007), *judgment vacated*, 554 U.S. 164.

36 *See Edwards*, 866 N.E.2d at 260.

37 *See supra* note 26.

38 *Edwards*, 554 U.S. at 176–78.

39 The Court found that *Faretta* and *Godinez*, while relevant, were not controlling. *See id.* at 171–72 (analyzing the applicability of *Faretta* and *Godinez*). *Faretta* did not consider the issue of competence. *See id.* at 171. *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 competence standard to represent himself than to stand trial. *See id.* at 171–74. *Godinez* did not address, however, whether the Constitution *permits* a trial court to impose a higher competence standard. *See id.* at 173–74. Additionally, *Godinez* involved a defendant who sought to proceed pro se to enter a plea of guilty, not to go to trial. *See id.*

40 *Id.* at 174 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)); *see also id.* ("[A] person whose mental condition is such that he lacks the capacity . . . *to consult with counsel* . . . may not be subjected to a trial." (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975))); *id.* at 175–76 (further discussing the *Dusky* and *Drope* standards).

41 *Id.* at 174–76. The Court also referenced *Faretta*'s partial reliance on preexisting state laws, all of which were consistent with a competence requirement for self-representation. *See id.*

42 *Id.* 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." *Id.* at 175–76.

omy because the representation could result in a "humiliating" spectacle.[43] Finally, the Court found its holding consistent with the government's interests in securing a reliable verdict and an actual—and apparent—fair trial.[44]

While the Court declined to speculate as to permissible components of a representational competence standard, *Edwards* indicates that decisionmaking abilities are particularly relevant to one's competence to proceed pro se.[45] First, the Court's central concern was a defendant's "mental condition"[46] or "mental fitness."[47] While these terms are undefined by the Court, they appear to capture, at least in part, elements of *adjudicative competence*, or powers of understanding, reasoning, and appreciation.[48] After referencing "the basic tasks needed to present his own defense without the help of counsel," the Court cited with approval the competence construct developed by Professor Richard Bonnie.[49] In a series of articles published in the 1990s,[50] Bonnie made a valuable contribution to the competence literature by disaggregating adjudicative competence into a foundational concept of competence to assist counsel[51] and a context-dependent concept of decisional competence.[52] While at least one commentator has suggested that Bonnie's construct (albeit amended) should apply

43 *Id.* at 176.

44 *Id.* ("[I]nsofar 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. . . . Further, proceedings must not only be fair, they must 'appear fair to all who observe them.'" (quoting Wheat v. United States, 486 U.S. 153, 160 (1988))).

45 *See id.* at 174–77.

46 *See id.*

47 *See id.* The Court also used the terms "mental capacity," *see id.* at 174, 176–77, and "mental competency," *see id.* at 170–75.

48 *See id.* at 175–76 (citing and quoting NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE 103 (2002)).

49 *See id.* (citing POYTHRESS ET AL., *supra* note 48, at 103). Adjudicative Competence, the culmination of research conducted by the MacArthur Foundation Research Network on Mental Health and the Law, draws upon Professor Richard J. Bonnie's theoretical framework for competence to stand trial. *See* POYTHRESS ET AL., *supra* note 48, at 56–57 (describing Bonnie's conceptual model).

50 *See* Bonnie, *supra* note 33, at 539; 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*].

51 *See* Bonnie, *supra* note 33, at 554–55, 561–67.

52 *See id.* at 554, 557–59, 567–87.

to self-representation,[53] I have argued elsewhere that Bonnie's construct is insufficient for, and somewhat inapplicable to, self-representation at trial.[54] Second, the Supreme Court repeatedly highlighted the importance of a defendant's expressive ability or communication skills.[55] Given the Court's overriding emphasis on mental (as opposed to physical) competence, however, it is likely that a defendant's inability to communicate is relevant to the extent that it signals deficits in organized or rational thought. Finally, the Court, in passing, lists the following conditions as impeding self-representation: disorganized thinking, deficits in sustaining attention and concentration, anxiety, and "other common symptoms of severe mental illnesses."[56]

The U.S. Supreme Court is not alone in failing to delineate the components of representational competence. Lower courts to date have provided little guidance as to which abilities should be necessary for self-representation.[57] At most, courts require general evaluation of

53 *See* Christopher Slobogin, *Mental Illness and Self-Representation:* Faretta*,* Godinez *and* Edwards, 7 OHIO ST. J. CRIM. L. 391, 402–03 (2009).

54 *See* E. Lea Johnston, *Setting the Standard: A Critique of Bonnie's Competency Standard and the Potential of Problem-Solving Theory for Self-Representation at Trial*, 43 U.C. DAVIS L. REV. 1605 (2010). Particular abilities identified by Bonnie are critical to representational competence, including the abilities to understand one's legal situation, appreciate one's jeopardy, recognize relevant information, and communicate that information to counsel. *See* Bonnie, *supra* note 33, at 551–52, 561. In this way, Bonnie's analysis serves as an important foundational precursor for the proposal articulated in this Article.

55 *See* Indiana v. Edwards, 554 U.S. 164, 176 (2008) (citing "impaired expressive abilities" as impeding the defendant's ability to represent himself and drawing readers' attention to rambling, nonsensical motions and documents filed by the defendant (quoting Brief for the American Psychiatric Ass'n & American Academy of Psychiatry & the Law as Amici Curiae in Support of Neither Party at 26, *Edwards*, 554 U.S. 164 (07-208) [hereinafter APA Brief])); *id.* (referencing a motion drafted by Edwards). In prior cases, the Court has found that a defendant's ability to communicate effectively may factor into determining whether the Due Process Clause requires appointment of counsel. *See* Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973) (directing that "whether the probationer appears to be capable of speaking effectively for himself" should be considered when deciding whether counsel should be appointed to satisfy due process in the context of a probation hearing).

56 *Edwards*, 554 U.S. at 176 (quoting APA Brief, *supra* note 55, at 26).

57 Typical is the approach taken by the Supreme Court of Connecticut in *Connor*, in which the court stated:

> [W]e do not believe that it is prudent, at least at this time, to attempt to articulate a precise standard for determining whether a mentally ill or incapacitated defendant who has been found competent to stand trial also is competent to represent himself at trial. For present purposes, it suffices to say that the trial court should consider all pertinent factors in determining whether the defendant has sufficient mental capacity to discharge the essen-

a defendant's ability "to carry out the basic tasks needed to present his own defense."[58] To the extent that courts are charging court-appointed psychologists and psychiatrists with the task of evaluating defendants' ability to proceed pro se, courts appear to be delegating to those professionals the legal responsibility of defining which abilities are *legally necessary* for self-representation. Commentators have widely criticized courts' tendency to abdicate their role in defining the legally relevant content of competence standards in the criminal context.[59]

This Article strives to fill the void left by the Court in *Edwards* and lower courts by suggesting a standard for representational competence that is informed both by normative and psychological theory. The next Part provides a normative theory of representational competence that balances competing considerations of autonomy, accuracy of verdicts, and fairness of adjudications. The Article then applies this theory to discrete problem-solving abilities and concludes by suggesting a comprehensive competence standard.

II. NORMATIVE THEORY OF REPRESENTATIONAL COMPETENCE

The abilities that a court should include within a representational competence standard must be derived from a normative conception of the purposes served by the measure.[60] Arriving at a normatively appropriate competence standard requires identifying and evaluating

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> tial functions necessary to conduct his own defense, including the defendant's ability to relate to the court or the jury in a coherent manner.

State v. Connor, 973 A.2d 627, 657 n.32 (Conn. 2009); *see also* Edwards v. State, 902 N.E.2d 821, 829 (Ind. 2009) ("We . . . decline in the absence of experience under the current *Edwards* language to attempt to tinker with [the standard for representational competence].").

58 United States v. Ferguson, 560 F.3d 1060, 1068 (9th Cir. 2009) (quoting *Edwards*, 554 U.S. at 175–76).

59 *See, e.g.*, GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 136 (3d ed. 2007) ("[C]onclusory reliance on diagnosis or unsubstantiated opinion [by mental health examiners] will exacerbate the tendency on the part of courts and lawyers to avoid investigating the competency issue; this abdication in turn will ill serve defendants, who deserve a legal, not a clinical, determination of competency."); THOMAS GRISSO, EVALUATING COMPETENCIES 10–19 (2d ed. 2003) (detailing the criticisms waged against forensic mental health evaluations for legal competencies and recent advances in attempts to mitigate these shortcomings).

60 *See, e.g.*, Bonnie, *A Theoretical Reformulation*, *supra* note 50, at 298; 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 appro-

the values implicated by self-representation and assessing various decisional abilities through the lens of those values. Self-representation by a marginally competent defendant recognizes and promotes the autonomy of the defendant but potentially impairs the reliability of the adjudication, the actual and apparent fairness of the proceeding, and the perceived legitimacy of the criminal justice process.[61] A representational competence standard should reflect a balancing of these values and interests. What is needed, in a nutshell, is to identify the capacities required by a pro se defendant to exercise meaningful autonomy and those abilities whose absence makes a trial intolerably unfair or unreliable.

The fundamental principle served by self-representation, as recognized in *Faretta v. California*,[62] is autonomy.[63] The literature justifying the importance of autonomy in the criminal justice context is surprisingly sparse.[64] Immanuel Kant understood autonomy as a condition of freedom from domination by others and of mastery over one's inclinations in his choice of ends and actions.[65] The aspect of autonomy most relevant here—the freedom to select and pursue

priate level of ability that individuals must possess to exercise a variety of liberty and property interests.").

61 *See Edwards*, 554 U.S. at 176 (discussing the impact of a marginally competent defendant's self-representation on his dignity, the objective of providing a fair trial, the reliability of the adjudication, and the appearance of fairness to observers).

62 422 U.S. 806 (1975).

63 *See id.* at 834; *see also* Martinez v. Court of Appeal, 528 U.S. 152, 160 (2000) ("[T]he right to self-representation at trial [is] grounded in part in a respect for individual autonomy." (citing *Faretta*, 422 U.S. at 834)); 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.").

64 *See, e.g.*, Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2003); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1150 n.8 (2010) (cataloguing the paucity of literature defending the autonomy interest of criminal defendants); *id.* at 1163–74 (deriving an argument in support of a criminal defendant's autonomy interest from history, constitutional text, and jurisprudential concerns); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 336–39 (1987); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707–15, 1747–77 (1992); *cf.* Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 660–68 (1999) (exploring the extent to which the need to respect the autonomy of the criminal defendant justifies the privilege against self-incrimination).

65 *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785), *reprinted in* PRACTICAL PHILOSOPHY 43, 89 (Mary J. Gregor ed. & trans., 1996) ("Autonomy of the will is the property of the will by which it is a law to itself . . . ." (footnote

one's own ends independently of coercion by others[66]—resembles John Locke's enunciation of freedom as an individual's condition "to think, or not to think; to move, or not to move, according to the preference or direction of his own mind."[67] Personal autonomy as self-determination is best apprehended as a negative freedom, a freedom from interference, rather than a positive freedom, a freedom to receive something.[68] The authors of the Bill of Rights "understood the inestimable worth of free choice"[69] and drafted the Sixth Amendment to honor "that respect for the individual which is the lifeblood of the law."[70]

Recognizing a criminal defendant's autonomy is justified both on deontological and utilitarian grounds.[71] A deontological theory of autonomy holds that all competent individuals have a natural, inalienable right to be treated as autonomous persons capable of rational choice.[72] Kant has argued that the ability to act autonomously serves as the basis for the distinctive dignity of human beings.[73] In Kant's view, overriding the decisions of a rational defendant in the name of his "best interests" dehumanizes the defendant, rendering him an object or a "means" of the attorney's will.[74] The value of autonomy "is not in what choice is ultimately made, but rather in the fact that the choice is personal to the individual."[75] An individual's values "are those reasons with which the agent most closely identifies—those that form the core of his personality, that make him who he is."[76] An individual's ability to maintain his identity depends upon his ability to

omitted)); Paul Guyer, *Kant on the Theory and Practice of Autonomy*, 20 SOC. PHIL. & POL'Y 70, 80 (2003).

66 Guyer, *supra* note 65, at 80.

67 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 237 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

68 *See* Candace Cummins Gauthier, *Philosophical Foundations of Respect for Autonomy*, 3 KENNEDY INST. ETHICS J. 21, 33 (1993); Guyer, *supra* note 65, at 73.

69 Faretta v. California, 422 U.S. 806, 833–34 (1975) ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.").

70 *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

71 *See* Strauss, *supra* note 64, at 336–39.

72 *See* Winick, *supra* note 64, at 1715.

73 *See* KANT, *supra* note 65, at 85 ("*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature.").

74 *See* Gauthier, *supra* note 68, at 24.

75 Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 660 (2009).

76 Luban, *supra* note 64, at 470 (citing Gary Watson, *Free Agency*, 72 J. PHIL. 205, 216 (1975).

maintain his values.[77] Thus, any attempt to override the expression of a person's values by force "directly assaults the integrity of his or her personality."[78] Unencumbered choice is essential for an individual to fashion his character, and the Kantian approach values autonomy (the process) even if it may lead to suboptimal results (the product).[79]

A court-appointed attorney—and the court, and society as a whole—may well have different goals, values, and priorities than the defendant. As John Stuart Mill has observed, the individual is the one most interested in his well-being and is the most knowledgeable about his feelings, values, priorities, and circumstances.[80] Attorneys and criminal defendants likely have very different social and economic standing and may differ in cultural or racial background.[81] As a result, it may be difficult for an attorney to understand and recognize his client's values and goals.[82] An attorney's inability to identify accurately his client's values and interests may be particularly acute when

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77 *See id.*

78 *Id.* at 471; *see also id.* at 473 ("[O]verriding your real values in the name of values I impute to you . . . because your values form the core of your personality, attacks your integrity.").

79 *See* Heymann, *supra* note 75, at 661–62.

80 *See* JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN 5, 94 (Oxford Univ. Press World's Classics ed. 1946).

> He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.

Id.

81 *See* Strauss, *supra* note 64, at 329.

82 *See* Mimi Steward, *Just Injustice*, 12 NAT'L BLACK L.J. 230, 240 (1993) ("An attorney from a different socio-economic group, race or gender might fail to recognize that he and his client operate within different value systems."); *id.* at 245–46; Strauss, *supra* note 64, at 329 ("Attorneys and clients in criminal cases often are separated by vast differences in social, economic, or racial status. In these circumstances it is difficult for the attorney to understand fully the underlying wishes and goals of the client. Communication, which might help minimize certain cultural differences, is typically not forthcoming." (footnote omitted) (citing Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1035–36 (1981))). For an exploration of this concept in the area of the workplace, see Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 39 (2005), assuming that "surface-level differences, such as diversity in race or age, also imply differences in underlying attributes, such as values and beliefs."

the client is mentally ill. Professor Michael Perlin has argued that "sanism," an irrational prejudice against the mentally ill on par with other biases such as homophobia, pervades criminal justice jurisprudence and lawyering.[83] "Sanism" may manifest in a general tendency to distrust decisions of persons with mental illness and in assumptions that individuals who exercise their right to counsel are "crazy" and incapable of sufficiently autonomous decisionmaking. Beyond an attorney's biases, an attorney's self-interest may also militate against recognizing the values and interests of his client.[84]

Respecting the autonomy of an individual is especially crucial within the context of a criminal trial, where the stakes are high and decisions are likely to be of great personal value.[85] A criminal trial may be the most important event in a person's life.[86] The outcome of a criminal trial holds tremendous consequences for the defendant, potentially affecting his liberty, personal relationships, status in the community, current and future employment prospects, and personal identity. As the Court stated in *Faretta*, "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."[87]

The consequences of coerced representation are particularly dire given the allocation of decisionmaking authority between counsel and client. In essence, counsel is vested with the authority to make all decisions of strategy and tactics.[88] The only decisions reserved to

83 *See* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE 21–24, 48–58 (2000); Michael L. Perlin, "*Too Stubborn to Ever Be Governed by Enforced Insanity": Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT'L J.L. & PSYCHIATRY (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523944.

84 *See* Strauss, *supra* note 64, at 329–30 (arguing that a lawyer's interest in convenience, saving time, or maximizing profit may affect the choices he makes on behalf of his client).

85 *See id.* at 337.

86 I am grateful to Christopher Slobogin for characterizing the context of a criminal trial in these terms.

87 Faretta v. California, 422 U.S. 806, 834 (1975).

88 *See* Gonzalez v. United States, 553 U.S. 242, 247–50 (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). The Court recognized this reality in *Faretta*. *See Faretta*, 422 U.S. at 820–21 ("It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." (citations omitted)).

defendants include whether to plead guilty,[89] waive the right to a jury trial,[90] waive the right to counsel,[91] testify,[92] or be present at trial.[93] By foisting a lawyer on an unwilling defendant, we not only force a defendant to put on his case through counsel, but we also eliminate his ability to make strategic and tactical decisions concerning his defense.

Deciding how to respond to the state's charge—with the public watching—may be of profound personal value to the defendant. He may wish to win acquittal by asserting a particular right, even when his attorney believes the legal argument has little merit.[94] He may prefer a guilty verdict to the stigma of being labeled "insane."[95] He may want to use his "day in court" to express a certain political view.[96] He may opt for a term of imprisonment over implicating friends or family, endangering important personal relationships, jeopardizing his status in the community, or violating his personal moral code.[97] Defendants who make such choices would not be prioritizing acquittal or the shortest term of imprisonment, perhaps prompting their attorneys to

89 *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

90 *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942).

91 *See Faretta*, 422 U.S. at 834.

92 *See* Rock v. Arkansas, 483 U.S. 44, 51–53 (1987); *Jones*, 463 U.S. at 751 (dictum).

93 *See* Taylor v. Illinois, 484 U.S. 400, 418 n.24 (1988) (dictum) (citing Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963)).

94 *See* Nelson v. California, 346 F.2d 73, 81 (9th Cir. 1965) (holding that an attorney may waive the client's right to assert a defense based on the Fourth Amendment over his objection).

95 *See* Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637, 637–39, 637 n.2 (1980) (listing the "onerous consequences" that may attend a successful insanity defense).

96 *See* United States v. Robertson, 430 F. Supp. 444, 447 (D.D.C. 1977) (quoting the defendant as rejecting an insanity defense "for personal reasons of a quasi-political nature"); Phillip J. Resnick, *The Political Offender: Forensic Psychiatric Considerations*, 6 BULL. AM. ACAD. PSYCHIATRY. & L. 388, 391 (1978). A recent, high-profile case where a defendant's desire to express his political views governed the selection of his trial defense is the case of Scott Roeder, who killed late-term abortion provider George Tiller. *See* Monica Davey, *Doctor's Killer Puts Abortion on the Stand*, N.Y. TIMES, Jan. 29, 2010, at A1 (quoting the defendant as testifying to support a voluntary manslaughter instruction that "I did what I thought was needed to be done to protect the children. I shot him," and "[i]f I didn't do it, the babies were going to die the next day.").

97 *See* Luban, *supra* note 64, at 455–57, 457 n.3 (describing cases in which defendants prioritized the maintenance of relationships or consistency with their "personal code of honor" over acquittal or large settlements).

reject their expressed wishes as not maximizing their interests.[98] In the words of Professor David Luban, to impose a lawyer's choices on an unwilling defendant in the name of the defendant's best interests "is to miss the extent to which an individual is harmed by being forced to do something that he believes is wrong."[99]

Utilitarian arguments also support designating autonomy as the predominant norm of self-representation. Mill argued that allowing an individual to frame the plan of his life without state interference is necessary for both individual happiness and social progress.[100] According to Mill, engaging in autonomous decisionmaking is necessary for the psychological and moral development of the individual and ultimately for self-fulfillment.[101] Mill believed that individuals assess their own interests and abilities more accurately than the government.[102] In Mill's view, individuals are likely to achieve optimal results if allowed to govern their own affairs, so long as they do so without causing harm to others.[103] Thus, governmental interference with individual decisionmaking ultimately results in more harm than allowing individuals to make their own decisions, even if some choices prove to be unwise.[104] In addition, as a general matter, confining permissible decisions to those that conform to communal standards of rationality and reasonableness poses a threat to liberal society and the marketplace of ideas.[105]

Allowing criminal defendants to exercise self-determination may enhance an individual's happiness and maximize societal utility in several ways. As the Court stressed in *Faretta*, "To force a lawyer[']s decisions] on a defendant can only lead him to believe that the law contrives against him."[106] Permitting the individual to make decisions consistent with his goals and values best assures that decisions will maximize individual preferences.[107] Because defendants will be most familiar with the facts underlying the prosecution, they may be in the best position to select the defense that best corresponds to the

98 *See id.* at 487–88 & n.79 (observing that "[a]ttorneys are trained in skills almost exclusively concerned with attaining maximizing ends" such as the shortest sentence or the largest judgment).

99 *Id.* at 489.

100 *See* Gauthier, *supra* note 68, at 27–29.

101 *See* Winick, *supra* note 64, at 1714, 1764.

102 *Id.* at 1714.

103 Heymann, *supra* note 75, at 660.

104 *See* Winick, *supra* note 64, at 1714.

105 *See* David J. Garren, *Paternalism* (pt. 2), 48 PHIL. BOOKS 50, 53 (2007).

106 Faretta v. California, 422 U.S. 806, 834 (1975).

107 Strauss, *supra* note 64, at 338.

truth.[108] Cognitive and social psychological theory suggests that self-determination also amplifies an individual's ability to recognize and achieve his goals by increasing his motivation and effort.[109] Other research suggests that individuals express more satisfaction in the results of their decisions when they have participated in the decision-making process.[110] Allowing a defendant to govern his defense may also reduce feelings of alienation from the legal process and result ultimately in individuals' gaining greater respect for the rule of law.

One recent empirical study suggests that defendants who represent themselves do as well—and perhaps may do better—than those who are represented by counsel. A 2007 study conducted by Professor Erica Hashimoto found that pro se defendants in state courts were convicted at rates equivalent to or lower than those of represented felony defendants.[111] Pro se defendants in federal court did not fare significantly worse than represented defendants.[112] One factor contributing to these findings may be the dismal state of indigent defense in many jurisdictions.[113] Courts and commentators have documented inadequate funding for indigent defense systems,[114] inadequate compensation for those who defend indigent defendants,[115] lack of training and supervision for counsel,[116] and inade-

108 *See* H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 725, 728 (2000).

109 *See* Winick, *supra* note 64, at 1755–68.

110 *See* Strauss, *supra* note 64, at 339 & n.107; Winick, *supra* note 64, at 1767 & n.261.

111 *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, 447–50 (2007) (presenting data showing that twenty-six percent of pro se defendants received felony convictions, compared with sixty-three percent of their represented counterparts).

112 *See id.* at 451–54 (presenting data showing that, while represented defendants who went to trial were about twice as likely to achieve an acquittal as their pro se counterparts, the acquittal rate of defendants who went to trial or pleaded guilty was about the same in both groups).

113 *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045, 1122–27 (2006) (documenting and discussing the "true constitutional crisis" of indigent defense in the United States and suggesting proposals for reform).

114 *See id.* at 1045–46; Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 136 (2008).

115 *See* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 900–01 (Mass. 2004); N.Y. Cnty. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397 (2003).

116 STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE 11 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

quate investigative and expert resources,[117] as well as defendants' experience languishing in jail for long periods without access to an attorney and feelings of pressure to accept plea bargains in the absence of counsel's advice.[118] In these circumstances, it is hardly surprising that defendants with no legal training—but an understanding of the facts of their cases and a commitment to winning them—may enjoy similar acquittal rates to those of their represented counterparts.

While the interest of autonomy is paramount to self-representation, the U.S. Supreme Court in *Edwards* recognized that competing values may warrant overriding a defendant's decision to proceed without counsel. In particular, the Court suggested that a trial court could deny a motion for self-representation when "a defendant's lack of capacity threatens an improper conviction or sentence" or undercuts the provision of a fair trial.[119] The Court also noted that "proceedings must not only be fair, they must 'appear fair to all who observe them.'"[120]

The values of accuracy and fairness appear less fundamental than respect for a defendant's autonomy, however. Since the original recognition of the right to self-representation, the Supreme Court has assumed that judgments in cases involving pro se defendants are less likely to be accurate or reliable than when defendants are represented by counsel.[121] In *Flanagan v. United States*,[122] the Court emphasized that the right to self-representation, like the right to retain counsel of one's choice, "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the

117 *See* M. Isabel Medina, *Reforming Criminal Indigent Defense in Louisiana—An Introduction to the Symposium and a Brief Exploration of Criminal Indigent Defense and Its Relationship to Immigrant Indigent Defense*, 9 LOY. J. PUB. INT. L. 111, 113 (2008); Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, CONST. PROJECT, 61–62, 93–95 (Apr. 2009), http://www.constitutionproject.org/manage/file/139.pdf.

118 *See* Nat'l Right to Counsel Comm., *supra* note 117, at 86, 89.

119 Indiana v. Edwards, 554 U.S. 164, 176 (2008).

120 *Id.* at 177 (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)).

121 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 v. California, 422 U.S. 806, 834 (1975); *see also* Flanagan v. United States, 465 U.S. 259, 268 (1984) ("[T]he [*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, 177 n.8 (1984) ("[S]elf-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant . . . .").

122 465 U.S. 259.

proceeding."[123] In addition, the fact that self-representation typically involves some degree of indecorum suggests that the value of maintaining the appearance of fairness should not be sacrosanct.[124]

As I have argued elsewhere, a court should allow a defendant capable of autonomous decisionmaking to control his defense unless the self-representation poses a *grave threat* to the reliability, fairness, or integrity of the adjudication.[125] Recognizing that certain capacities are requisite to the existence of autonomy, this normative theory leads to the conclusion that decisional abilities should only be required if one of two criteria is met. First, representational competence should require those functional abilities necessarily present for the exercise of meaningful autonomy.[126] Second, a representational competence standard should include a particular functional ability if its absence poses a grave threat to the reliability or the actual or apparent fairness of the adjudication. This standard should be sufficiently deferential to autonomy while accommodating the Supreme Court's concerns in *Edwards*.

The next Part draws upon social problem-solving theory to identify abilities considered critical for sound, autonomous decisionmaking. Requiring the possession of at least a subset of problem-solving abilities may be appropriate as a means to ensure that defendants who wish to proceed at trial unrepresented are sufficiently capable of recognizing and advancing their own interests. By subjecting problem-solving abilities to scrutiny through my normative lens, I identify certain capabilities that may be particularly crucial for representational competence.

III. The Promise of Problem-Solving Theory for Representational Competence

Self-representation at trial poses unique challenges for a criminal defendant and requires a broader array of skills than those necessary

123 *Id.* at 268.

124 *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.").

125 *See* Johnston, *supra* note 54, at 1614, 1626, 1656, 1661.

126 As others have argued, an individual whose decisionmaking capacity is impaired may be unable to act in an autonomous manner. *See, e.g.*, Luban, *supra* note 64, at 465–66.

to make decisions when represented.[127] A represented defendant is authorized to make only a few decisions within the context of a criminal adjudication.[128] Ethical responsibilities dictate that, for each of these decisions, counsel will identify for his client the decision point, clarify the issue, distill the possible options, gather relevant information, perform key analysis, and present his recommendation.[129] The task left to the defendant is to select among the options outlined by counsel. Many, if not all, of these decisions are amenable to consideration prior to trial. To participate in these fundamental decisions, Professor Richard Bonnie and others have asserted that a defendant should be capable of expressing a choice, understanding relevant information, and, to a variable extent, reasoning and appreciating the consequences of the decisions for his case.[130]

A pro se defendant, however, faces a markedly different and more challenging decisional context than his represented counterpart. To defend himself from prosecution, a pro se defendant will be called upon to make a multitude of decisions in short succession: which defense, if any, 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 information to include in opening and closing statements, and which jurors to strike and on what basis. The list goes on and on. For each of these decisions, a pro se defendant must—often unassisted[131]—identify the relevant decision point,

127 Self-representation at trial likely requires a broader skill set than to plead guilty. This subject is worthy of separate consideration and is beyond the scope of this Article.

128 *See supra* notes 89–93.

129 *See* 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."). 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.*, MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 20 (2000). 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.").

130 *See* Bonnie, *supra* note 33, at 571–72, 586; Slobogin & Mashburn, *supra* note 33, at 1597–98.

131 Under *McKaskle*, a trial court may impose standby counsel to assist a pro se defendant in procedural matters over his objection. McKaskle v. Wiggins, 465 U.S.

gather information to understand the situation, brainstorm alternative responses, evaluate these alternatives, and select a responsive strategy for addressing the problem. He will need to make decisions extemporaneously, during the course of trial, often while an impatient decisionmaker (the judge or jury) is waiting. Finally, a pro se defendant must, unless assisted by standby counsel, translate his decisions into courtroom-appropriate action.

In addition, a pro se defendant who proceeds to trial must, to some degree, serve the important societal role of subjecting the state's case to adversarial testing. The government and society have a strong interest in a pro se defendant's ability and willingness to challenge the state's case. To the extent a defendant is unable, because of mental illness or disability, to make autonomous decisions or perform in a minimal way as an adversary, the reliability and fairness of the proceeding, and the legitimacy of the criminal justice system, will be at risk.[132]

While Bonnie's analysis serves as an important conceptual precursor to this project,[133] to date no commentator has proposed a comprehensive competence standard to address the particular decisional context of self-representation at trial. To discern the components of an appropriate standard, it is useful to look to psychological theories of problem solving.[134] Self-representation, at its core, is an exercise in problem solving, where the "problem" is the prosecution of one or more criminal charges and the "solution" is the selection and implementation of an effective defense. To identify the range of decisional

168, 184 (1984). A pro se defendant does not have a constitutional right to the assistance of standby counsel, however. *See* United States v. Bova, 350 F.3d 224, 226 (1st Cir. 2003); McQueen v. Blackburn, 755 F.2d 1174, 1178 (5th Cir. 1985).

132 *See* Indiana v. Edwards, 554 U.S. 164, 176–77 (2008).

133 *See supra* text accompanying note 54.

134 The law has relied on psychological insight into problem solving in a variety of contexts. The American Bar Association has identified problem solving as essential to effective lawyering. *See* Josiah M. Daniel, III, *A Proposed Definition of the Term "Lawyering,"* 101 LAW LIBR. J. 207, 213–14 (2009) (reporting that an American Bar Association task force, created to study and report on how to improve the process by which law students are prepared for practice, defined '"fundamental lawyering skills essential for competent representation' as problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, and litigation and alternate dispute resolution" (quoting TASK FORCE ON LAW SCH. & THE PROFESSION, AM. BAR ASS'N, LEGAL AND PROFESSIONAL DEVELOPMENT 135 (1992))). Scholars are in accord. *See, e.g.*, 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, 970–71 (2005); 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 (2008).

abilities potentially necessary for self-representation, our initial inquiry should focus on disaggregating the problem-solving process.

Of the many problem-solving theories propounded, one in particular—social problem-solving theory—is notable for its comprehensiveness and applicability to real-life disputes. Developed by Professors Marvin R. Goldfried and Thomas D'Zurilla[135] and refined by D'Zurilla and Professor Arthur M. Nezu,[136] the model is prescriptive, meaning that it represents a model of effective or successful problem solving derived from clinical judgment and research.[137] Social problem solving is defined as the self-directed cognitive, behavioral, and affective process by which an individual attempts to identify effective solutions for specific problems encountered in the natural environment.[138] D'Zurilla and his colleagues define 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 or people confronted with the situation because of the presence of one or more obstacles."[139] Obstacles may include novelty, ambiguity, deficiency of performance skills, or lack of resources.[140] A *problem* is thus a particular person-environment relationship marked by a perceived imbalance between demands and adaptive response availability.[141]

By definition, social problem-solving theory applies to problems in everyday life. 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

135 *See* Anderer, *supra* note 23, at 42 (citing Marvin R. Goldfried & Thomas J. D'Zurilla, *A Behavioral-Analytic Model for Assessing Competence*, *in* 1 CURRENT TOPICS IN CLINICAL AND COMMUNITY PSYCHOLOGY 151 (Charles D. Spielberger ed., 1969)); *see also* Thomas J. D'Zurilla & Marvin R. Goldfried, *Problem Solving and Behavior Modification*, 78 J. ABNORMAL PSYCHOL. 107 (1971) (outlining "real life" scenarios for implementation of their theory as well as techniques for problem-solving enhancement).

136 *See* THOMAS J. D'ZURILLA & ARTHUR M. NEZU, PROBLEM-SOLVING THERAPY (2d ed. 1999); Thomas J. D'Zurilla & Arthur Nezu, *Social Problem Solving in Adults*, *in* 1 ADVANCES IN COGNITIVE-BEHAVIORAL RESEARCH AND THERAPY 201 (Philip C. Kendall ed., 1982).

137 *See* ARTHUR M. NEZU ET AL., PROBLEM-SOLVING THERAPY FOR DEPRESSION 32 (1989).

138 *See* D'ZURILLA & NEZU, *supra* note 136, at 10; D'Zurilla et al., *supra* note 24, at 11, 12.

139 D'Zurilla et al., *supra* note 24, at 12; *see* D'ZURILLA & NEZU, *supra* note 136, at 11.

140 *See* D'Zurilla et al., *supra* note 24, at 13.

141 *See* D'ZURILLA & NEZU, *supra* note 136, at 12.

and social problems such as crime and racial discrimination.[142] Thus, social problem-solving theory should be relevant in analyzing the decisionmaking process of a pro se defendant in a criminal trial.

Social problem-solving theory conceives of everyday problem solving as consisting of a motivational component called problem orientation and four goal-directed problem-solving skills.[143] These skills include problem definition and formulation, generation of alternative solutions, decisionmaking, and solution implementation.[144] Each process or skill makes a distinct contribution while interacting with and affecting the efficacy of the other problem-solving components. To evaluate the importance of these abilities for self-representation, this Part subjects problem-solving components to scrutiny through the normative lens outlined in Part II.

Two points are important to emphasize at the outset. First, to accord due respect for a defendant's autonomy, a court should find a defendant incompetent only if his inability to satisfy a functional component of a representational competence standard stems from a mental illness or disability. Including a causation element in a representational competence standard may be constitutionally compelled and, anyway, should help prevent courts from depriving individuals of their right to represent themselves merely because their choices are odd or different. This threshold requirement is explored in Part IV.

Second, any proposed competence standard should be validated by research findings before adoption by a court. A court should not require a pro se defendant to possess any particular cognitive or behavioral ability unless empirical evidence demonstrates that incompetent defendants actually differ from competent defendants along that dimension.[145] In addition, research should indicate whether that difference creates an unacceptable risk of unreliability or unfairness.[146] Caution is especially appropriate when considering the inclusion of decisionmaking abilities, because research demonstrates that

142 *See* D'Zurilla et al., *supra* note 24, at 11.

143 *See id.* at 14.

144 *See id.* Social problem-solving theory also includes the skill of solution verification. *See id.* For reasons outlined in footnote 331, this Article will not consider to any great length the applicability of solution verification for representational competence.

145 *See* Bonnie, *supra* note 33, at 579 (stating that "data regarding the distribution of abilities relating to 'rational decisionmaking' in the general population of criminal defendants, and regarding the relation between these abilities and mental disorder," should inform competence standards for varying decisional contexts when a defendant disagrees with his attorney, but that systematic research on these issues has only recently begun); Anderer, *supra* note 23, at 39, 73.

146 *See* Anderer, *supra* note 23, at 39, 73.

the average person (much less the average criminal defendant seeking to proceed pro se) may not employ optimal decisionmaking strategies.[147] Whether a defendant seeking to proceed pro se differs from the majority of pro se criminal defendants in his capacity for solving problems, how he differs, and whether those differences are of a kind and magnitude justifying intervention are questions worthy of study and are beyond the scope of this paper.[148]

A. Problem Orientation

Problem orientation, the first domain of social problem solving, is a motivational process that involves the general cognitive, behavioral, and affective response of an individual when confronted with a specific problem.[149] Problem orientation reflects an individual's beliefs, opinions, and feelings about problems and his own problem-solving ability.[150] It is a product primarily of an individual's previous experience with problems and problem solving.[151] The cognitive component of problem orientation comprehends a sensitivity to recognize problems when they occur, beliefs about the causes of problems, appraisal of problems' significance for one's well-being, personal control expectancies, and commitments of time and energy to problem solving.[152] The behavioral component encompasses tendencies to confront or avoid problems.[153] The affective component of problem orientation consists of emotional states associated with problematic situations, including negative affect (e.g., anger, anxiety, depression) and positive affect (e.g., hope, eagerness, excitement).[154] Problem orientation has five components: problem perception, problem attribution, approach/avoidance style, problem appraisal, and time/effort commitment.[155] While it may be inappropriate to include

147 *See* Barry Edelstein, *Challenges in the Assessment of Decision-Making Capacity*, 14 J. AGING STUD. 423, 428 (2000). *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (establishing the widespread use of heuristics, or mental shortcuts, in making decisions).

148 *See* Anderer, *supra* note 23, at 39.

149 *See* Arthur M. Nezu & Christine Maguth Nezu, *Problem Solving Therapy*, 11 J. PSYCHOTHERAPY INTEGRATION 187, 188 (2001).

150 *See* D'Zurilla et al., *supra* note 24, at 14.

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

152 *See id.*

153 *See id.*

154 *See id.*

155 This description of the five dimensions of problem orientation is a composite and reformulation of categories identified by D'Zurilla and Nezu. *See* D'ZURILLA & NEZU, *supra* note 136, at 19–22 (defining problem orientation as consisting of prob-

all of these components in a representational competence standard, the standard should encompass those elements essential to a defendant's autonomy and the reliability and actual and apparent fairness of a conviction.

From a normative standpoint, three aspects of problem orientation are appropriate and important to include in a representational competence standard. First, a defendant should possess some degree of problem perception, or the ability to recognize the presence of a problem or decision point.[156] If a defendant is unable to recognize a decision point, then his reaction at that moment cannot stand for a deliberate exercise of autonomous decisionmaking. In the context of self-representation, a defendant should be capable, to the extent he possesses necessary procedural and evidentiary knowledge (an important caveat), of recognizing points at trial at which he could advance his defense. *Faretta* mandates that a defendant's lack of procedural knowledge is irrelevant to his competence to represent himself.[157] In reality, however, a defendant's ability to recognize points at which he can act at trial—as well as to generate alternatives at those decision points—will be constrained by a lack of procedural or evidentiary knowledge. Under the mantle of *Faretta*, courts should not require a defendant to recognize decision points that are obvious only to persons familiar with the minutiae of evidentiary or procedural rules.[158] But a defendant should be capable of recognizing common decision points at trial, at a macro level, of which he has been informed by a judge, standby counsel, or an evaluating mental health professional. For instance, a defendant should not be permitted to represent himself if he lacks an ability to comprehend, if introduced to the concept, that he can object to the introduction of the state's evidence during its case-in-chief. An inability to recognize that the state's presentation

lem perception, problem attribution, perceived control, problem appraisal, and time/effort commitment); D'Zurilla & Nezu, *supra* note 136, at 206 (defining an individual's "problem-solving set" as consisting of problem perception, acceptance of the view that problems are inevitable and that problem solving is a viable means of coping with them, perceived control, and "the set to 'stop and think' when confronted with a problem instead of responding 'automatically' with habits based on previous experience in similar situations").

156 *See* D'Zurilla & Nezu, *supra* note 136, at 20.

157 *See* Faretta v. California, 422 U.S. 806, 835, 836 (1975).

158 For instance, a court should not expect a pro se defendant to be able to recognize that the state's introduction of hearsay presents a decision point as it would under Federal Rule of Evidence 802. Similarly, a test for problem orientation should not require a pro se defendant to be capable of recognizing that he could potentially object to the state's introduction of an unauthenticated written record as he could under Federal Rule of Evidence 901.

of compelling evidence is a problem that may be addressed, in part, during the presentation of its case suggests that the defendant's silence at that time would evince a lack of meaningful autonomy and pose too great a threat to the reliability and fairness of the proceeding. Evidence suggests that a person's tendency to recognize problems is a stable trait that remains fairly consistent across situations.[159] To move beyond the constraining effect of a lack of technical knowledge, evaluators may wish to test a defendant's ability to perceive decision points by using nonlegal, familiar, everyday hypotheticals.

Second, a defendant should be capable of ascribing a problem to a rational, nondelusional source.[160] If a defendant is unable to engage in a reality-based search for the cause of a stressful situation, then he will be incapable of accurately appraising the problem and setting realistic goals for remedying the situation.[161] A court should hold a defendant incompetent to represent himself if he attributes the underlying offense or the origin of the prosecution to a source that is impossible, either absolutely or as to the individual. To demonstrate the capacity for rational problem attribution, I suggest that a defendant seeking to represent himself need only be able to identify a plausible source of the prosecution.[162] All potentially plausible rationales should suffice, including those that seem paranoid but conceivably could enjoy evidentiary support. This is, admittedly, a low bar and likely will serve to disqualify from self-representation only those whose perceptions of reality are severely impaired by mental illness.[163]

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159 *See* Nezu & Nezu, *supra* note 149, at 188.

160 *See* D'ZURILLA & NEZU, *supra* note 136, at 20; *see also* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1394–96 (2006) (discussing the importance, for adjudicative competence, of an accurate perception of reality).

161 *See generally* Maroney, *supra* note 160, at 1394–96 (discussing case law that finds inadequacies in defendants' powers of "perception and understanding" stemming from fixed, delusional beliefs).

162 For discussion of a similar standard proposed in the context of decisionmaking, see notes 270–87 and accompanying text.

163 One could argue that a defendant, to establish that he is capable of rational problem attribution, should be able to identify a reason for the prosecution that is *actually* supported by some evidence. *Cf.* Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 962–65 (1991) (defining a "delusion" as a belief unsupported by evidence). Research suggests, however, that most defendants charged with an offense actually committed the offense or a related one. *See* Hashimoto, *supra* note 111, at 452 (concluding on the strength of an empirical study of felony defendants that less than one percent of criminal defendants represented by counsel are acquitted at trial); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 807 ("Yet in the end . . . the vast majority of defendants plead guilty or, if

For instance, a defendant could demonstrate adequate powers of problem attribution by explaining his involvement in the incident underlying an offense as a misunderstanding or his having been framed up by the police.[164] While perhaps improbable, these explanations would not be impossible or delusional on their face, and therefore should suffice to establish adequate powers of problem attribution. A defendant should be found incompetent to represent himself, however, if he explains the prosecution as a manifestation of a spirit-lord's revenge for sins in a past life. While to some extent all things are possible, this explanation would be incapable of evidentiary support and should, assuming that the belief stems from mental illness or disability, disqualify the defendant from self-representation. For this reason, Brian David Mitchell, the individual who abducted Salt Lake City teenager Elizabeth Smart, should have been found incompetent to represent himself, had he been competent to stand trial.[165] Mitchell believed that God had ordained his prosecution, conviction, and imprisonment to trigger a personal battle with the Antichrist.[166] Such delusional beliefs about the source of a prosecution would color every subsequent stage of the defendant's decision-making process at trial and would render the proceeding, in essence, a farce.

Third, a defendant's approach/avoidance style should be one in which he possesses a willingness to tackle problems. This element implicates the defendant's personal control beliefs, or beliefs about his ability to address problems adequately.[167] If a defendant believes himself incapable of solving problems and thus persistently avoids and evades decision points, then he will be incapable of making the host

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they go to trial, are convicted."). We do not obligate defendants to admit to their crimes and actually privilege their right not to confess. Imposing a duty of candor as to the basis of a prosecution at the stage of competence evaluation is inappropriate. Rather, while an imperfect proxy, we should assume a defendant sufficiently capable of rational problem attribution if he is able to identify a plausible cause—one that *could* enjoy evidentiary support—for the prosecution.

164 As this example indicates, my proposed test for problem attribution involves ensuring that a defendant does not attribute the prosecution to a clearly delusional source, as opposed to confirming his ability to identify accurately the likely basis of the prosecution.

165 *See* Maroney, *supra* note 160, at 1396 (discussing Findings and Conclusions Re: Defendant's Competency to Proceed to Trial, Utah v. Mitchell, No. 031901884 (3d Jud. Dist. Ct. Utah July 26, 2005)). Mitchell was ultimately found incompetent to stand trial. *Id.*

166 *See id.* (discussing Findings and Conclusions Re: Defendant's Competency to Proceed to Trial, *Mitchell*, No. 031901884).

167 *See* D'Zurilla & Nezu, *supra* note 136, at 21.

of decisions (often in quick succession) that trial demands. For the defendant who opts to go to trial, an unwillingness to challenge the prosecution's case because of mental illness or disability may signal an inadequate approach/avoidance style.[168]

A familiar example of a defendant unwilling to attend to the problem of prosecution is Richard Moran, the defendant in *Godinez v. Moran*.[169] Moran was charged with three counts of capital murder.[170] Originally, he pleaded not guilty with the assistance of counsel.[171] Two psychiatrists appointed to assess Moran's competence observed that, while he was competent to stand trial, Moran was "very depressed"[172] and that, "because he is expressing and feeling considerable remorse and guilt, [he] may be inclined to exert less effort towards his own defense."[173] Several months later, Moran discharged his attorneys and pleaded guilty to three counts of capital murder.[174] 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.[175] 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."[176] After waiving his right to counsel, Moran "presented no defense, called no witness, and offered no mitigating evidence on his own behalf."[177] He was sentenced to death.[178] In essence, this "self-destructive" orientation left Moran "helpless to defend himself,"[179] and he "volunteered himself for execution."[180] A complete unwillingness to contest charges because of depression or another disabling mental condition poses a severe threat to the reliability of a

168 It should be observed, however, that a defendant need not present a defense at trial. If a defendant believes that the state lacks sufficient evidence to convict, he may choose to rest after the state's case. *See* FED. R. CRIM. P. 29(a).

169 509 U.S. 389 (1993). For a thoughtful discussion of this case in a similar context, see Slobogin & Mashburn, *supra* note 33, at 1606–08.

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

171 *See id.* at 409 (Blackmun, J., dissenting).

172 *Id.* at 410 (quoting Dr. William D. O'Gorman).

173 *Id.* at 409–10 (quoting Dr. Jack A. Jurasky).

174 *Id.* at 410.

175 *Id.*

176 *Id.* at 410–11 (alterations in original) (quoting Moran).

177 *Id.* at 412.

178 *Id.* at 393 (majority opinion).

179 *Id.* at 417 (Blackmun, J., dissenting).

180 *Id.* at 416.

conviction, undermines the appearance of fairness of the proceeding, and should result in a finding of representational incompetence.[181]

Professors Christopher Slobogin and Amy Mashburn have proposed a test for decisional competence that includes a similar volitional element.[182] They advocate that competence to waive the right to counsel should include "basic self-regard," defined as "a willingness to exercise autonomy."[183] A "willingness to consider alternative scenarios"[184] or "alternative reasons"[185] in a decisional context will satisfy this volitional element. Slobogin and Mashburn have also described basic self-regard as a "willing[ness] to consider relevant information."[186] Basic self-regard, according to these scholars, demonstrates that a defendant has engaged in "a deliberative thought process" for a particular decision.[187] In their words, the test "does not evaluate the

181 The analysis in this Article does not address the competence of unrepresented defendants who plead guilty. Given the similarities in capital sentencing proceedings and trial, however, the representational competence standard proposed here may be appropriate for that context as well.

182 *See* Slobogin & Mashburn, *supra* note 33, at 1584. Several commentators have opined on the importance of the relationship between motivation and competence. *See* William M. Altman et al., *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1671, 1686 (1992) (highlighting the importance of motivation in psychological literature and suggesting that competence 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 Trial*, 19 INT'L J.L. & PSYCHIATRY 39, 53 (1996) (noting that certain psychiatric conditions may result in apathy, "apparent disinterest" in one's own fate, and an unpreparedness to communicate with legal representatives, and thus ultimately strike at the heart of an accused's ability to participate in the trial process); Maroney, *supra* note 160, at 1404, 1409–11, 1413–15 (discussing the importance of emotion to motivation in the context of adjudicative competence); *see also* Bonnie, *A Theoretical Reformulation*, *supra* note 50, at 297 n.32 (referencing possible inclusion of a motivational component for competence to stand trial).

183 *See* CHRISTOPHER SLOBOGIN, MINDING JUSTICE 195 (2006).

184 *See* Slobogin & Mashburn, *supra* note 33, at 1598.

185 *Id.* at 1584.

186 *See id.* at 1586, 1601, 1606.

187 *Id.* at 1598. Elsewhere, Slobogin has argued that a defendant should be permitted to proceed pro se so long as he can give nondelusional, self-regarding reasons for the waiver of representation. *See* Slobogin, *supra* note 53, at 402–03. If a defendant is decisionally competent to waive his right to counsel, Slobogin argues, courts should not question his competence to control and conduct a defense. *See id.* I respectfully disagree with this position. As Slobogin recognizes, one established characteristic of some forms of mental illness is that a person may be delusional about some subjects and completely lucid as to others. *See* Slobogin & Mashburn, *supra* note 33, at 1603; *see also* Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 573 (1977) ("It is a striking clinical commonplace that crazy persons behave normally a great deal of the time and in

premises of the ultimate decision, nor does it require inquiry into the 'rationality' of the reasoning process; it only requires that such a process took place."[188]

The proposal articulated in this Article is slightly different. A willingness to attend to problems does not necessarily indicate an *intent* to entertain alternative solutions or even to engage in a deliberative thought process. For instance, a defendant who believes the prosecution's case is, at its core, a case of mistaken identity may be unwilling to ponder the benefits and disadvantages of his chosen defense or to consider mounting an alternative one. Yet he may be committed to addressing the problem of the prosecution by contesting the government's case. It is this willingness to challenge the prosecution's case that lies at the heart of the volitional element of this proposal.[189]

Two elements of problem orientation, as defined by social problem-solving theory, are too subjective for inclusion in a representational competence standard. Problem appraisal involves the ability to appraise the significance of a problem for one's well-being.[190] The degree to which an individual feels threatened by a problem, however, will vary by the individual's values and personality.[191] It would therefore be difficult for an evaluator to find, with certainty, that an individual was over- or underreacting to a given problem. Indeed, such a finding would likely largely reflect the values and subjective judgments of the evaluator. Similarly, the element of time/effort commitment involves an individual's willingness to commit a certain amount of time or effort to solving a problem.[192] This element, too, will vary

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many ways. Even when they are in the midst of a period of crazy behavior, much of their behavior will be normal."); Singer, *supra* note 95, at 643–44 (illustrating the ways in which an individual may be incompetent in one area, but competent in all or many others); Winick, *supra* note 64, at 1774–75 & nn.274–75. Just because a defendant is able to articulate a rational reason for dismissing counsel (such as the heavy workload of public defenders) does not mean that he will be able to justify his defense with a plausible reason.

188 Slobogin & Mashburn, *supra* note 33, at 1603.

189 In application, the difference between "positive problem orientation" and "basic self-regard" standards may be a distinction without a difference. In analyzing the *Godinez* case under their standard, Slobogin and Mashburn find that Moran seemed to lack basic self-regard because "his reasoning appeared to represent a complete abdication of autonomy." *Id.* at 1608. Recently, Slobogin has recognized that "an individual who fails to contest the state's claims in a capital case will often lack, at the least, basic self-regard." Slobogin, *supra* note 53, at 399–410. In situations such as that in *Godinez*, the defendant would fail to demonstrate positive problem orientation, also leading to a finding of representational incompetence.

190 *See* D'ZURILLA & NEZU, *supra* note 136, at 20.

191 *Accord* Anderer, *supra* note 23, at 59.

192 *See* D'ZURILLA & NEZU, *supra* note 136, at 21.

according to the values and personality characteristics of individual defendants. Therefore, representational competence should not require a defendant to possess an ability to appraise problems or a willingness to allocate a particular amount of time or effort to solving them.

In summary, three elements of problem orientation—problem perception, rational problem attribution, and a willingness to tackle problems—may be essential predicates to autonomy and the reliability and fairness of a criminal adjudication. If an individual is unable to recognize the existence of a problem, unable to attribute it to a rational source, or unwilling to attend to it because of a mental illness or disability, then the individual's response at that decision point will not be indicative of meaningful autonomy. In addition, self-representation will not subject the state's case to adversarial testing if the defendant lacks these abilities. Evidence suggests that one's problem orientation may facilitate or hinder later problem-solving activities,[193] so possession of the capabilities encompassed by problem orientation is likely critical for arriving at sound decisions within the context of a criminal trial. The relevance and importance of these capabilities for autonomous decisionmaking and a reliable and fair adjudication suggest that courts should include these three abilities in a representational competence standard.

B. Problem Definition and Formulation

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.[194] These skills include (a) problem definition and formulation, (b) generation of alternative solutions, (c) decisionmaking, and (d) solution implementation.[195] Goldfried, D'Zurilla, and Nezu conceptualize these skills as goal-directed tasks.[196] 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

193 *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 35, 41 (Arthur M. Nezu & Christine M. Nezu eds., 1989). 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. *See* D'Zurilla & Nezu, *supra* note 151, at 156–57.

194 *See* D'ZURILLA & NEZU, *supra* note 136, at 22.

195 *See* D'Zurilla et al., *supra* note 25, at 14.

196 *See* D'ZURILLA & NEZU, *supra* note 136, at 22.

application of the next skill.[197] While these skills are presented in a sequential fashion, effective problem solving in practice often involves continual and reciprocal movement between tasks before an individual implements an effective solution.[198]

The first stage of the problem-solving process is problem definition and formulation. Problems in the real world are often "messy," meaning that they are vague and associated with irrelevant cues, inaccurate information, and unclear goals.[199] Of primary importance at the problem formulation stage, according to social problem-solving theory, is to gather relevant information about how and why a situation is troubling or why action is necessary.[200] The problem-solver should be capable of distinguishing between relevant and wildly irrelevant information.[201] He should be able to use relevant information to comprehend the nature of the problem, formulate goals, and (ideally) identify any obstacles that may stand in the way of achieving those goals such as deficits in information or ability.[202] A problem-solver's conception of a problem will affect his goals for responding to the situation, his generation of alternative solutions, and his valuation of those alternatives.[203] Research demonstrates that a well-defined problem enhances the effectiveness of the decisionmaking process.[204]

Problem formulation is an essential component of all decisions inherent in self-representation, but it may be most critical, from the standpoint of the reliability and apparent fairness of an adjudication, to the process of formulating a defense.[205] To satisfy minimal standards of reliability, a defendant should be capable of selecting and constructing his defense in response to the government's case. Assessing the "problem" of a prosecution prior to trial involves gathering

197 *See generally id.* at 33 (discussing the implications of a well-defined problem and realistic goals for subsequent stages of the problem-solving process).

198 *See id.* at 34; Nezu & Nezu, *supra* note 193, at 40.

199 *See* D'ZURILLA & NEZU, *supra* note 136, at 23.

200 *See id.*

201 *See* Nezu & Nezu, *supra* note 193, at 48.

202 *See* D'ZURILLA & NEZU, *supra* note 136, at 24–25.

203 *See id.* at 26. For an assessment of the importance of problem definition in the context of formulating public policy, see Jeffrey Barnes, *The Continuing Debate About 'Plain Language' Legislation: A Law Reform Conundrum*, 27 STATUTE L. REV. 83, 89 (2006), which states, "Problem formulation is probably the most critical point in the policy-making process. It is so important because it largely determines the goals, which in turn influence the means for achieving them."

204 *See* Nezu & Nezu, *supra* note 193, at 47.

205 Other critical decisions may include which witnesses to call and what lines of cross-examination to pursue with hostile witnesses. *See* Freckelton, *supra* note 182, at 50–51.

information on the government's likely prosecution theory and assessing the likely evidence to be introduced against the defendant.[206] To this end, a criminal defendant should be capable of understanding the elements of the charged offense, identifying facts (including physical evidence and likely witness testimony) helpful to the state, and roughly evaluating the significance of that evidence to the government's case. As the trial unfolds, the defendant should be able to comprehend the course of the proceedings and the substantial effect of the government's evidence.[207] He should be able to examine the government's case and discern potential deficiencies in the evidence. Finally, he should be capable of identifying favorable evidence and understanding its legal relevance. Some of these abilities—in particular, the abilities to understand the elements of the offense and to identify favorable, relevant evidence—are already captured by the *Dusky* competence standard for standing trial and Bonnie's foundational concept of competence to assist counsel.[208]

It is important to stress that there will be no one correct definition of a defendant's "problem" in relation to his prosecution. As a preliminary matter, much of the information gathered prior to trial will be speculative. The defendant will know the offense with which he is charged and should have a copy of the complaint, which likely

206 Leonard L. Riskin and Nancy A. Welsh have defined the way parties typically conceptualize the "problem" in civil litigation as determining the "applicable law, . . . the legally relevant facts, and how . . . they mesh." Riskin & Welsh, *supra* note 134, at 867–68. These authors argue that mediation offers the opportunity to define the "problem" in a lawsuit more broadly so that the focus of the case can be on addressing the parties' underlying interests. *See id.* at 904. For additional information on problem definition within the context of mediation, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 84–99 (1994); Riskin & Welsh, *supra* note 134, at 884–85; Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 22 (1996).

207 *See* Slobogin & Mashburn, *supra* note 33, at 1591 (asserting that understanding "the nature of the state's evidence and the nature of his own" is essential to understanding the significance of a decision to proceed without counsel). For an international perspective, see Freckelton, *supra* note 182, at 44–45, describing the common law standard in Australia for fitness to stand trial without counsel as including a defendant's ability to "*follow the course of proceedings* so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities"; to understand "*the substantial effect of any evidence* that may be given against him"; and to "*have sufficient capacity to be able to decide what defence he will rely upon*." (quoting *R v Presser* [1958] VR 45, 48 (Austl.)).

208 *See* Dusky v. United States, 362 U.S. 402, 402 (1960); Bonnie, *supra* note 33, at 554 & nn.62–63; *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 object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

will include only "an extremely truncated description of the criminal conduct."[209] He may not, however, be entitled to a copy of the police report[210] or a list of prosecution witnesses.[211] More generally, framing a problem is a subjective act, reflecting the values and priorities of an individual problem-solver. As Jeffrey Barnes has observed in the context of public policy:

> [P]roblems are "mental constructs, abstractions from reality shaped by our values, perceptions, and interests"; in other words, they are subjectively perceived. . . . And because people are differently placed in society, a problem is not the same to all interested parties; there will be as many definitions of the problem as there are interested parties.[212]

For instance, one defendant may conceptualize the feared result of a prosecution as a possible term of imprisonment, while another may be more concerned about safeguarding his reputation among his cohorts. Therefore, any test of one's ability to frame or define a problem should not assess the accuracy of the ultimate problem definition, but rather should evaluate one's ability (and proclivity) to gather information about a problematic situation, distinguish relevant from wildly irrelevant data, and use that information to define the problem in light of one's goals and values.

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209 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.1(c) (5th ed. 2009). For a critique of modern pleadings as unduly narrowing the definition of problems in litigations, see Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727 (2005). Professor Moffitt has observed that modern "[p]leadings define problems in a way that stands in stark contrast with researchers' best current understanding of problem-solving practices." *Id.* at 729. While pleadings may appropriately frame a litigated problem by focusing attention on claims and defenses, pleadings define problems in ways that may discourage prudent and efficient settlement. *Id.* at 736–37. Moffitt has explained the phenomenon in this way:

> The process of drafting and receiving initial pleadings invites disputants to frame disputes as binary clashes, to conceive of past events in absolute terms, to base solutions solely on entitlements stemming from prior events, and to filter out as irrelevant a vast body of information related to the circumstances underlying the dispute.

Id. at 737.

210 *See* LAFAVE ET AL., *supra* note 209, § 20.3(k). In most states a defendant will be entitled to his written or recorded statement. *See id.* § 20.3(c).

211 Many states require pretrial disclosure of the prosecution's anticipated witnesses beyond the disclosure required as to expert witnesses. *See id.* §§ 20.1(c), 20.3(h). Many of these states also require disclosure of those witnesses' written or recorded statements. *See id.* § 20.3(b).

212 *See* Barnes, *supra* note 203, at 89–90 (quoting PETER BRIDGMAN & GLYN DAVIS, THE AUSTRALIAN POLICY HANDBOOK 45 (3d ed. 2004)).

C. Generation of Alternatives

The second stage of the problem-solving process, after problem definition and formulation, involves the generation of alternatives for solving a problem. Social problem-solving theory posits that brainstorming as many potential solutions to a problem as possible will maximize the likelihood that the optimal solution will surface.[213] To accomplish this goal, D'Zurilla and Goldfried stress three principles: quantity, deferment of judgment, and variety of strategy/tactics.[214] The first principle is that quantity breeds quality, meaning that an individual will produce more high quality ideas as he generates additional alternatives.[215] Deferment of judgment refers to the notion that an individual should defer critical evaluation of alternatives until the decisionmaking stage in order to produce the greatest number of high quality ideas.[216] Finally, the principle of strategic variety suggests that a problem-solver should generate strategies for solving a problem before brainstorming specific actions or tactics for accomplishing each strategy.[217]

A representational competence standard should not require a criminal defendant to employ optimal techniques for generating alternative solutions, but it probably should comprehend the basic ability to generate more than one option in response to a given problem. By definition, an individual cannot solve a problem without generating at least one possible solution. It is also likely true that a person's ability to generate an *adequate* response depends on his capacity for brainstorming multiple options. In the context of a criminal trial, generating alternative approaches at a given decision point—whether when deciding what defense to exert, how to build that defense, or how to respond to a witness called by the state—is a function normally served by counsel. Given the centrality of this process to problem solving in general and criminal litigation in particular, it seems reasonable to require a defendant seeking to represent himself at trial to possess the

213 *See* D'ZURILLA & NEZU, *supra* note 136, at 28–29; D'Zurilla & Nezu, *supra* note 151, at 157; D'Zurilla et al., *supra* note 24, at 16; Nezu & Nezu, *supra* note 149, at 189.

214 *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). D'Zurilla and his colleagues derived these principles from J.P. Guilford's divergent production operation and Alex Osborn's method of brainstorming. *See* D'ZURILLA & NEZU, *supra* note 136, at 28 (citing J.P. GUILFORD, THE NATURE OF HUMAN INTELLIGENCE (1967); ALEX F. OSBORN, APPLIED IMAGINATION (3d ed. 1963)).

215 *See* D'ZURILLA & NEZU, *supra* note 136, at 28.

216 *See id.*

217 *See* D'Zurilla & Nezu, *supra* note 214, at 68. D'Zurilla and Nezu refer to this principle as "strategy." *Id.*

ability to generate alternative strategies for solving a problem at a given decision point. One aspect of trial makes testing this ability within the context of criminal adjudication troublesome, however.

The generation of strategic alternatives at trial will be informed to a large extent by a defendant's store of legal, procedural, and evidentiary knowledge. For instance, a defendant's ability to select a defense responsive to the government's case will be constrained by ignorance of possible defenses to the pending charges. Similarly, a defendant's ability to exclude a piece of evidence will depend upon his knowledge of evidentiary and procedural rules. The degree to which a defendant is able to identify the optimal response to a problem presented by the state's case, then, is inextricably tied to his knowledge of the legal framework that defines and bounds potential litigation options.

Indeed, some courts appear to recognize the importance of a defendant's technical knowledge for understanding the value of counsel and for a defendant's ability to respond appropriately to the state's case. When evaluating a defendant's knowing and intelligent waiver and his competence to proceed pro se, some courts inquire into a defendant's legal or procedural knowledge directly.[218] Others ask about a defendant's involvement in previous criminal trials, his prior representation by counsel, and any prior self-representation as a proxy for ascertaining his familiarity with legal rules.[219] Some courts will ask a defendant about his understanding of the purpose of a particular stage of trial and even discuss potential strategies for cross-examination.[220] While these questions are certainly relevant to a defendant's understanding of the risks and disadvantages of proceeding without

218 Both the Third and Sixth Circuits have suggested that trial courts model their inquiry after that contained in the *Bench Book for United States District Court Judges*, which includes questions on defendants' study of law and familiarity with the rules of evidence and criminal procedure. *See* Julian A. Cook, III, *Crumbs from the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process*, 81 NOTRE DAME L. REV. 1895, 1933 (2006). For a copy of these guidelines, see *United States v. McDowell*, 814 F.2d 245 app. at 251–52 (6th Cir. 1987). Other circuits have adopted similar guidelines. *See, e.g.*, United States v. Evans, 478 F.3d 1332, 1340 n.8 (11th Cir. 2007).

219 *See, e.g.*, *Evans*, 478 F.3d at 1340 n.8 (asking about a defendant's previous experience with criminal trials); United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989) (stating that a trial court may consider a defendant's "involvement in previous criminal trials [and] his representation by counsel before trial" in determining whether he understands the risks of self-representation); *McDowell*, 814 F.2d app. at 251 (including questions about a defendant's representation of himself or another defendant).

220 *See* United States v. England, 507 F.3d 581, 585, 587 (7th Cir. 2007).

counsel, they also bear upon a defendant's ability, without counsel, to navigate complex evidentiary and procedural requirements at trial and to generate appropriate options at certain trial stages.[221]

Faretta makes clear, however, that a defendant's lack of procedural knowledge is irrelevant to his competence to represent himself.[222] There are two ways to reconcile the reality that technical knowledge is critical to a defendant's generation of strategic options at trial with *Faretta*'s mandate that courts not penalize defendants wishing to dispense with counsel for lacking technical knowledge. The first option would be to test a defendant's capacity for generating alternatives within the context of a nonlegal, familiar, everyday problem. For instance, a court could pose a hypothetical about a defendant's car breaking down while he was driving to work and ask him to brainstorm several options for arriving at work on time.[223]

The second approach would involve, in the interest of advancing the fairness and reliability of an adjudication, supplying a defendant with certain fundamental legal, procedural, and evidentiary information. While "[a] court does not have to give the defendant a crash course in criminal law or trial procedure before a defendant's waiver of his right to counsel will be voluntary,"[224] some courts have chosen to advise a defendant of certain procedural rules before granting a request to proceed pro se. For instance, some courts advise a defendant wishing to represent himself that, if he chooses to testify, he must ask questions to himself.[225] Professor Myron Moskovitz has interpreted the Due Process Clause to *require* trial judges to read to pro se defendants a list of trial rights.[226] The proposed list includes the rights of access to legal materials, to pretrial discovery, to jury trial, to ask questions to prospective jurors, to exercise challenges for cause and a specified number of peremptory challenges, to present an open-

221 *Cf. id.* at 587 ("This Court examines the background and experience of the defendant merely to gauge whether he appreciated the gravity of his waiver, not in the hopes of finding adequate legal training.").

222 *See* Faretta v. California, 422 U.S. 806, 836 (1975) (stating that a defendant's "technical legal knowledge . . . [is] not relevant to an assessment of his knowing exercise of the right to defend himself").

223 *See* Johnston, *supra* note 54, at 1651–52.

224 *England*, 507 F.3d at 586.

225 *See, e.g.*, United States v. McDowell, 814 F.2d 245 app. at 251–52 (6th Cir. 1987).

226 *See* Myron Moskovitz, *Advising the* Pro Se *Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 341 (2004); *see also* Slobogin, *supra* note 53, at 399–400 (arguing that the assumption that because "one is capable of understanding the charges, the penalties, and the 'adversary process,' . . . then one can understand the nature of self-representation. . . . is egregiously wrong").

ing statement, to object to prosecution evidence on evidentiary grounds, to cross-examine prosecution witnesses in compliance with the rules of evidence, to subpoena witnesses for the defense, not to testify, to testify with a warning that the prosecutor will have the right to cross-examine, and to present a closing argument.[227] All of this information would be useful in helping a defendant brainstorm and ultimately select appropriate ways to proceed at trial and would increase the likelihood of a reliable verdict that appears fair to outside observers.

Assuming that a defendant is supplied or already possesses knowledge of potential defenses, it may be particularly important to the reliability of an adjudication to establish a defendant's ability to brainstorm relevant, responsive defenses. In assessing a defendant's competence to represent himself, courts appear particularly concerned about a defendant's ability to use relevant information to fashion a response to the pending charges.[228] In a plurality opinion, for example, the U.S. Supreme Court stated that, to be valid, a waiver of counsel "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."[229] This language, however, is not binding upon lower courts.[230] While many courts advise a defendant of possible defenses,[231] some do not.[232] Given that a defendant's ability to select a legally recognized defense is critical to

227 *See* Moskovitz, *supra* note 226, at 341.

228 *See, e.g.*, People v. Burnett, 234 Cal. Rptr. 67, 76 (Ct. App. 1987) (characterizing the ability "to understand and use relevant information rationally in order to fashion a response to the charges" as a basic skill relating to the presentation of a defense), *abrogated by* People v. Hightower, 49 Cal. Rptr. 2d 40 (Ct. App. 1996).

229 Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality opinion). This standard has been quoted approvingly in subsequent cases, though only as dicta. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 244 n.32 (1973).

230 *See* Brian H. Wright, Comment, *The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro Se with a Defendant's Right to Assistance of Counsel*, 76 MARQ. L. REV. 785, 790–91 (1993).

231 *See, e.g.*, United States v. Evans, 478 F.3d 1332, 1340 (11th Cir. 2007); Maynard v. Boone, 468 F.3d 665, 677 (10th Cir. 2006); Shafer v. Bowersox, 329 F.3d 637, 647, 649 (8th Cir. 2003).

232 *See* John M. Stevens, *Waiver of Counsel in Pennsylvania: Constitutional Issues Facing Criminal Defendants, Counsel, and Courts*, 12 WIDENER L.J. 29, 40–50 (2003) (discussing the variety among Pennsylvania courts' practices in providing information to defendants seeking to waive the right to counsel); *see also, e.g.*, United States v. Wadsworth, 830 F.2d 1500, 1504 (9th Cir. 1987) (stating that a valid waiver is possible merely if a defendant is "aware of the nature of the charges against him, the possible penalties,

ensuring a reliable verdict, courts should, as a matter of due process, advise a defendant of possible defenses to pending charges. Because a defendant need not present any defense at trial and may refuse to consider any defense inconsistent with his understanding of the truth, courts should assess the ability to identify—but not the actual intent to pursue—relevant defenses.[233]

In conclusion, a pro se defendant should possess the ability to generate alternative solutions at decision points because this capacity appears sufficiently critical to his ability to make meaningful choices and to perform as a minimally effective adversary to the state. A defendant's ability to brainstorm alternative responses to problems at trial will depend upon his legal and technical knowledge. Therefore, courts should consider supplying a defendant with technical knowledge critical to his functioning at trial, including a list of potential defenses to the pending charges. Alternatively, courts should consider testing a defendant's ability to generate more than one potential solution within a nonlegal, everyday, problem-solving context.

D. Decisionmaking

The third stage of problem solving—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.[234] 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."[235] Social problem-solving theory conceptualizes decisionmaking as a logical process through which a problem-solver compares the costs and benefits of alternative solutions and

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and the dangers and disadvantages of self-representation" (citing United States v. Rylander, 714 F.2d 996, 1005 (9th Cir. 1983))).

233 *See* Hernandez-Alberto v. State, 889 So. 2d 721, 729 (Fla. 2004) ("The court may not inquire further into whether the defendant could provide himself with a substantively qualitative defense, for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all." (quoting State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997)) (internal quotation marks omitted)).

234 *See* D'Zurilla et al., *supra* note 24, at 16; Nezu & Nezu, *supra* note 149, at 189. For an extended discussion of decisionmaking, see D'ZURILLA & NEZU, *supra* note 136, at 29–31.

235 *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. WEST CHURCHMAN, PREDICTION AND OPTIMAL DECISIONS (1961); W. Edwards et al., *Emerging Technologies for Making Decisions*, *in* 2 NEW DIRECTIONS IN PSYCHOLOGY 261 (T.M. Newcomb ed., 1962)).

selects the solution with the greatest utility.[236] The decisionmaker is expected to identify the likely advantages and disadvantages flowing from each alternative, quantify probabilities for and assign values to each consequence, calculate the utility of each option,[237] and then compare the options.[238] A rational decisionmaker, under this theory, will select for implementation the solution with the greatest expected utility.[239]

Evidence suggests, however, that few—if any—individuals actually reach decisions in this manner. If most individuals do not utilize a process of rational manipulation when making decisions, then this ability must not be critical for meaningful autonomy or arriving at a reliable or fair verdict. This section presents evidence of actual decisionmaking and suggests a standard for reasoning that is both more tolerant of individuals' differences and potentially sufficient to safeguard the values of autonomy, fairness, and reliability. In particular, I argue that courts should require that a pro se defendant be capable of identifying a minimally plausible rationale for a decision. Few elements of competence have generated more spirited disagreement,[240]

236 *See* D'Zurilla et al., *supra* note 24, at 16; Nezu & Nezu, *supra* note 149, at 189. The "decisionmaking" component of social problem-solving theory resembles Professor Richard Bonnie's "reasoned choice" test. *See* Bonnie, *supra* note 33, at 575. Bonnie defines the ability to reason as the "capacity to use logical processes to compare the benefits and risks of the decisional options." *Id.* Bonnie derived this standard from that developed by Professors Thomas Grisso and Paul Appelbaum in the context of medical decisionmaking. *See id.*

237 The anticipated utility of an alternative is a function of the value and likelihood of predicted consequences. Nezu & D'Zurilla, *supra* note 235, at 270.

238 *See* D'ZURILLA & NEZU, *supra* note 136, at 29–30.

239 *See id.* at 30.

240 *Compare* Bonnie, *supra* note 33, at 571–72, 586 (advocating a "reasoned choice" standard for waiver of counsel, which requires a defendant to be capable of expressing a choice, understanding factual information, appreciating the significance of that information for the defendant's own case, and rationally manipulating information), *with* Saks, *supra* note 163, at 962–65 (advocating a sophisticated "understanding and belief" view by which the patient may reach his own judgments regarding the truth of information, so long as his beliefs are nondelusional—ruling out beliefs that "plainly fail to do what they purport to do, that is, portray the world accurately" or those for which there is no evidence), *and* Slobogin & Mashburn, *supra* note 33, at 1597–98 (advocating a "basic rationality and self-regard" standard for waiver of counsel, which requires a defendant to be capable of expressing a preference, understanding relevant information, providing nondelusional reasons for his decisions, and a "willingness to exercise autonomy, which usually can be demonstrated by a willingness to consider alternative scenarios"). Courts also impose widely different standards for a defendant's ability to reason rationally. *Compare* State v. Bauer, 245 N.W.2d 848, 859–60 (Minn. 1976) (finding a defendant incompetent to waive his right to counsel in part because the defense he offered "was both irrational and not a legal defense"),

and I acknowledge that my approach may not earn others' approval. Yet I hope that this contribution adds to the debate and will generate conversation on whether, and to what extent, representational competence should assess a defendant's ability to reason.

1. Differences in Individuals' Decisionmaking Styles

Requiring criminal defendants to demonstrate an ability to manipulate information in a rational and deliberate manner runs counter to evidence of actual decisionmaking.[241] Research reveals that few individuals, if any, regularly engage in optimal decisionmaking strategies.[242] It would exceed most people's mental capacity (and the time available for reaching a decision) to brainstorm all possible alternatives, identify the risks and benefits associated with each alternative, assign a probability and value to each consequence, compute each alternative's utility, compare the alternatives, and select the one most likely to accomplish the individual's goals. The term "bounded rationality" captures the limited capability to process large amounts of information at a given point in time.[243] As a means to cope with bounded rationality and to simplify complex decisional operations,

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overruled by Godinez v. Moran, 509 U.S. 389 (1993), *with* Evans v. Raines, 800 F.2d 884, 886 n.1 (9th Cir. 1986) (requiring that a defendant be capable of processing information in a logically consistent manner).

241 *See* Edelstein, *supra* note 147, at 428 (describing research indicating that "many individuals do not engage in a formal rational manipulation of the information presented in decision-making evaluations"); *see also* Maroney, *supra* note 160, at 1397, 1427 (describing individuals' common reliance on cognitive heuristics and biases and suggesting "flexible reasoning" as a more appropriate model for real-world decisionmaking); Saks, *supra* note 163, 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." (footnote omitted)).

242 Citing the work of J.F. Yates and A.L. Patalano, Professor Jennifer Moye describes three modes of decisionmaking that individuals may employ: analytic, rule-based, and automatic. *See* Jennifer Moye et al., *Empirical Advances in the Assessment of the Capacity to Consent to Medical Treatment: Clinical Interpretations and Research Needs*, 26 CLINICAL PSYCHOL. REV. 1054, 1065 (2006) (citing J. Frank Yates & Andrea L. Patalano, *Decision Making and Aging*, *in* PROCESSING OF MEDICAL INFORMATION IN AGING PATIENTS 31 (Denise C. Park et al. eds., 1999)). The analytic mode involves the deliberate, sequential comparison of risks and benefits and requires the most time and cognitive energy. *See id.* The rule-based or heuristic mode uses rules, developed as individuals gain experiences with classes of decisions, as shortcuts in the decisionmaking process. *See id.* The automatic mode operates without awareness and requires little time and few cognitive resources. *See id.*

243 *See* Nezu & Nezu, *supra* note 198, at 17–18.

humans employ heuristics, or mental shortcuts used consciously or subconsciously.[244]

In their groundbreaking empirical work, Professors Amos Tversky and Daniel Kahneman demonstrated that individuals making decisions under conditions of uncertainty utilize heuristics to reduce the complexity of a decision to manageable proportions.[245] These cognitive shortcuts are responsible for "severe and systematic errors" in judgment.[246] Two common heuristics relevant to evaluating risks inherent in decisionmaking include availability and representativeness.[247] The availability heuristic involves individuals' tendency to estimate the probability of an event by the ease with which instances of that event can be recalled.[248] For example, a person might overestimate his likelihood of acquittal using a self-defense strategy after reading of a high-profile acquittal based on self-defense. The representativeness heuristic, on the other hand, involves individuals' tendency to mistake a resemblance for a causal relationship.[249] Stated differently, when a person faces an ambiguous choice, he tends to choose the option most representative of a previous, known pattern, without questioning whether that pattern has relevance to predicting a future event.[250] Thus, individuals tend to assign a higher probability of occurrence to events brought to mind easily.[251] For instance, if a defendant ascribes a prior conviction to his counsel's "soft" cross-examination of the victim, the pro se defendant might opt to conduct a "hard" cross-examination of the victim in the instant case. In addition to utilizing heuristics, individuals often employ biased search strategies and exhibit overconfidence and hindsight bias, which also contribute to judgmental errors.[252]

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244 *See* John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15, 16 (2006); Arthur M. Nezu & Christine M. Nezu, *Clinical Prediction, Judgment, and Decision Making: An Overview in* CLINICAL DECISION MAKING IN BEHAVIOR THERAPY, *supra* note 193, at 9, 18–19.

245 *See* Tversky & Kahneman, *supra* note 147.

246 *Id.* at 1124.

247 *See* Montgomery, *supra* note 244, at 22; Nezu & Nezu, *supra* note 244, at 19.

248 *See* Nezu & Nezu, *supra* note 244, at 19.

249 *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1086 (2000); *see also* Nezu & Nezu, *supra* note 244, at 20–23 (discussing the representativeness heuristic).

250 Montgomery, *supra* note 244, at 22–23.

251 *See* Tversky & Kahneman, *supra* note 147, at 1127.

252 *See* ARTHUR FREEMAN ET AL., CLINICAL PSYCHOLOGY 172 (2008) ("*Biased search strategies* lead clinicians to falsely confirm their hypotheses about their clients' diagno-

While the use of heuristics may lead to systematic errors of judgment, these mental shortcuts also can contribute to accurate and efficient decisionmaking. Research indicates that experts over time develop complex heuristic and automatic decisional processes to reach decisions that are effective but hard to explain to others.[253] The inability to articulate a large number of "rational reasons" to justify a decision may convey the misimpression that valid rationales do not exist.[254] Professor Jennifer Moye cautions that "[a]ssessment approaches that assume explicit analytic-type processing may unfairly jeopardize individuals who make decisions through more implicit approaches."[255] Thus, an individual may be an effective, "rational" decisionmaker without utilizing the logical process that social problem-solving theory proscribes. In addition, other research suggests that, even when individuals do engage in a deliberate processing of the costs and benefits of alternative solutions, they are not accustomed to recalling the factors that contributed to their decisions.[256] This research calls into question the validity of instruments that assess the rationality of an individual's decisionmaking process.[257]

For all of these reasons, it is inappropriate to require defendants, in order to exercise their right to self-representation, to possess the ability (or proclivity) to make a decision by comparing the potential consequences of alternative solutions in a deliberate, logical, probability-laden way.[258] Assuming that most adults are capable of

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ses, case formulations, progress, receptiveness to treatment, or other hypotheses as a result of *only* gathering or searching for information or *only* using search strategies, instruments, or tools, that are consistent with one's way of thinking, and excluding or disregarding search tools or information that could potentially disconfirm hypotheses."); Ulrich Hoffrage, *Overconfidence*, *in* COGNITIVE ILLUSIONS 235 (Rüdiger F. Pohl ed., 2004) (noting that "overconfidence occurs if our confidence in our judgements, inferences, or predictions is too high when compared to the corresponding accuracy"); Montgomery, *supra* note 244, at 24 ("'Hindsight bias' causes an observer to overestimate the predictability of an event when the observer already knows what happened."); Nezu & Nezu, *supra* note 244, at 25–28.

253 *See* Moye et al., *supra* note 242, at 1065.

254 *See id.*

255 *See id.* at 1072.

256 *See* Edelstein, *supra* note 147, at 428.

257 *See* Moye et al., *supra* note 242, at 1069–70.

258 *See* Edelstein, *supra* note 147, at 429 ("One might ask whether older adults must be capable of rational decision making to be competent, if the average older adult approaches decision making through rules rather than a rational consideration of risks, benefits, and costs. Are our current standards unreasonably exclusionary?"). For this reason, the "reasoned choice" standard proposed by Bonnie also appears inappropriate as a decisional competence standard. *See* Slobogin & Mashburn, *supra* note 33, at 1603.

autonomous decisionmaking, the fact that most do not appear to employ a process of rational manipulation of information when making a decision suggests that this ability is not requisite to autonomy. For the same reason, this ability cannot be considered essential to the reliability or fairness of a criminal trial. Furthermore, requiring the ability to engage in a deliberate, calculation-intensive reasoning process for pro se defendants, given the socioeconomic and educational status typical of this population,[259] may be especially unjust. Imposing this requirement could, in effect, eliminate the constitutional right to self-representation for a majority of criminal defendants. Instead, courts should consider adopting a less stringent test for a defendant's ability to make sound decisions in the context of self-representation at trial. One possible standard would be to require an ability to articulate a plausible rationale, capable of—if not actually enjoying—evidentiary support.

2. Identifying a Plausible Reason for a Decision

To select a more appropriate standard for assessing a defendant's ability to reason in the context of self-representation, it is useful to evaluate the importance of reasoning through our normative lens. This Article posits that a defendant capable of autonomous decisionmaking should be allowed to control his defense unless the self-representation poses an impermissibly grave threat to the reliability or actual or apparent fairness of the adjudication. To constitute a meaningful expression of autonomy, a defendant's key decisions, such as the selection of a defense,[260] should at a superficial level be tethered to reality.[261] Indeed, as others have argued, giving credence to grossly

259 *See* Shiv Narayan Persaud, *Conceptualizations of Legalese in the Course of Due Process, from Arrest to Plea Bargain: The Perspectives of the Disadvantaged Offenders*, 31 N.C. CENT. L. REV. 107, 115 n.37 (2009) ("Most convicted offenders sentenced to a term of imprisonment are poor, uneducated and underemployed." (quoting MATTHEW B. ROBINSON, JUSTICE BLIND? 281 (3d ed. 2009))).

260 While it may be normatively optimal to require all of a defendant's decisions relating to his representation to be justified by a plausible reason, subjecting each decision to court scrutiny would be unworkable. The decision of which defense theory, if any, to advance is so crucial to the apparent fairness and reliably of a resulting conviction that it warrants consideration in a representational competence standard. It may be that other decisions are so critical to the fairness or accuracy of the outcome that they, too, should be evaluated when deciding whether or not a defendant is competent to represent himself at trial. I do not speculate as to the identity of any additional crucial decisions here.

261 *See* Hashimoto, *supra* note 111, at 456 ("[I]f pro se defendants decide to represent themselves because of delusions or irrationality related to mental illness, it would appear that meaningful autonomy and free choice are not furthered by recog-

irrational decisions would denigrate the very principle of autonomy.[262] Delusional defendants who are disconnected from reality are incapable of assessing relevant evidence and protecting themselves from harm.[263] In the words of Professor Elyn Saks, such defendants "have lost the ability to discern truth."[264] Unable to recognize their interests, they lack a cognizable autonomy interest in the context of self-representation.[265] This insight suggests that a representational competence standard should (at least) prevent persons incapable of making decisions plausibly grounded in reality from controlling their defenses.

The norms of promoting reliable and fair adjudications are also advanced by disqualifying individuals disconnected from reality from representing themselves. As discussed previously, a defendant's selection of a defense may be a decision particularly critical to the reliability and fairness of an adjudication.[266] A defense unmoored from reality is unlikely to subject the prosecution's case to adversarial testing. In addition, a defendant's pursuit of such a defense would threaten to create just the kind of humiliating spectacle that the

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nizing the right of self-representation."); John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 211 (2008); Slobogin & Mashburn, *supra* note 33, at 1586; Winick, *supra* note 63, at 1771–72.

262 *See* Slobogin & Mashburn, *supra* note 33, at 1594 (arguing that honoring reasons devoid of sense or self-regard undermines the twin goals supporting a preference for autonomy: "the goal of respecting people's true desires and beliefs and the goal of acknowledging that doing so is an important value in our society").

263 *See* Saks, *supra* note 163, at 956 (characterizing "delusional beliefs" as those that are "so patently false that those who hold them must have suffered a severe breakdown of their ability to assess evidence").

264 *See id.* at 961.

265 *See* King, *supra* note 261, 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." (footnotes omitted)); Slobogin & Mashburn, *supra* note 33, at 1586.

266 *See supra* note 205 and accompanying text. Courts have expressed particular concern about a mentally ill defendant's decision to advance a defense that is based on delusions or is otherwise clearly implausible. *See, e.g.*, Commonwealth v. Simpson, 689 N.E.2d 824, 829 (Mass. App. Ct. 1998) (labeling as "dramatically irrational" the defendant's defense that "he was entitled to hammer a sleeping woman in the head, as well as knife her, because of a pervasive conspiracy arrayed against him by multiple forces, some only heard and unseen").

Edwards Court suggested undermines the dignity of the accused and begets the appearance of an unfair trial.[267]

The difficult question, then, becomes what standard a court should employ, as a prerequisite to self-representation, to assess a defendant's ability to make rational decisions concerning the selection of a defense. In the interest of respecting a defendant's autonomy—and in recognition of a defendant's right to make poor choices regarding his defense—the standard should be low. *Faretta* and its progeny have made clear that autonomy, not reliability or fairness, is the telos of the right to self-representation.[268] Because a defendant's autonomy is paramount, it is preferable to err on the side of allowing a potentially delusional defendant to control his defense than to impose counsel on an unwilling, nondelusional defendant. It is impossible, however, to craft a standard that functions perfectly to distinguish odd or unpopular beliefs made by persons capable of identifying and advancing their interests from odd or unpopular beliefs made by persons incapable of identifying or advancing their interests due to mental illness or disability.[269]

To honor the preference for autonomy, I suggest that a defendant possesses adequate reasoning ability if he is capable of justifying his selection of a defense with a single[270] reason that has a plausible grounding in reality.[271] Justifications with a plausible grounding in

267 *See* Indiana v. Edwards, 554 U.S. 164, 176–77 (2008) (leaving unclear whether the defendant's chosen defense was delusional or not plausibly linked to reality); *cf. id.* at 181–82, 186 (Scalia, J., dissenting) (arguing the dignity interest protected by the right of self-representation is the "dignity of being master of one's fate," not preventing "the defendant's making a fool of himself by presenting an amateurish or even incoherent defense").

268 *See* Martinez v. Court of Appeal, 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).

269 *Cf.* Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 537–38 ("The most important task for the legal standard of competency is to distinguish effectively between foolish, socially deviant, risky, or simply 'crazy' choices made competently, and comparable choices made incompetently. Although incompetent behavior may be restrained, identical competent behavior may not." (footnote omitted)).

270 Under my proposed test, so long as a defendant justifies a decision with a *single* plausible reason—even if other, clearly delusional reasons are also offered—he would possess adequate reasoning ability to represent himself at trial.

271 This standard is inspired by that offered by Professor Elyn Saks in the context of medical treatment decisionmaking. *See* Saks, *supra* note 163, at 962–65. For a discussion of Saks's standard—and an explanation for why that standard should not be

reality would include reasons enjoying a modicum of evidentiary support and those *capable* of evidentiary support in the world as we understand it. In contrast to the requirement that a defendant demonstrate a capacity for engaging in a logical, probability-laden decisionmaking process, this standard would accommodate individuals' differing decisionmaking styles. The standard would also respect variation in defendants' beliefs, values, and preferences. It has the added benefit of providing a fairly objective measure of plausibility, which would serve to constrain courts' ability to find incompetent those decisions that they simply believe to be unwise.

Examples may be useful to elucidate the contours of this proposed test. Under this standard, a defendant would be competent to represent himself if he articulates a reason supporting the selection of his defense that, though refuted by all available evidence, is capable of evidentiary support. For instance, a defendant charged with murder would be found competent to represent himself in the following circumstance: the defendant wants to pursue a mistaken identity defense, even though he can produce no evidence of an alibi, his fingerprints were found on the gun that killed the victim, and several eyewitnesses intend to testify that they saw the defendant pull the trigger. He should be competent to represent himself because, while no evidence (besides his possible testimony) *actually* supports his defense, it is plausible that it *could*. It is possible that multiple eyewitnesses could be mistaken or lying.[272] It is possible that the forensic

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grafted without alteration into the context of self-representation—see *infra* notes 288–96 and accompanying text.

272 *See* Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 3 (2007) ("[D]ecades of research on the topic have consistently found that mistaken identification is the leading cause of wrongful convictions. In fact, it is so common that it practically rivals the sum of all other errors that lead to wrongful convictions." (footnote omitted)); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1490 n.7 (2008) (citing studies demonstrating that hundreds of defendants have been wrongfully convicted on account of eyewitness testimony or false confessions); *see also* William David Gross, Comment, *The Unfortunate Faith: A Solution to the Unwarranted Reliance upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307, 313 (1999) ("The preference for direct eyewitness testimony, with its inherent degree of mistake, is the 'greatest single threat to the achievement of our ideal that no innocent man shall be punished.'" (quoting Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970))). For an explanation of the psychological factors that contribute to the unreliability of eyewitness identification, see Douglas J. Narby et al., *The Effects of Witness, Target, and Substantial Factors on Eyewitness Identifications*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 23 (Siegfried Ludwig Sporer et al. eds., 1996), and Aldert

examiner who linked the defendant to the fingerprints erred.[273] A pro se defendant, lacking the skill and acumen of a trained attorney, likely would be unable to establish such deficiencies in the state's evidence. But, beyond the fact that the defendant's defense could actually represent an accurate account of what happened, our criminal justice system generally does not sanction defendants for presenting unsubstantiated, inaccurate, or frivolous defenses,[274] except in

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Vrij, *Psychological Factors in Eyewitness Testimony*, *in* PSYCHOLOGY AND LAW 105 (Amina Memon et al. eds., 1998).

273 *See* Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 1001–16 (2005) (discussing twenty-two cases in which mistakes were discovered in fingerprint evidence); Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, 37 GOLDEN GATE U. L. REV. 39, 41 (2006); Robert Epstein, *Fingerprints Meet* Daubert*: The Myth of Fingerprint "Science" Is Revealed*, 75 S. CAL. L. REV. 605, 605–06 (2002); Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2932–33, 2933 n.227 (2009) (discussing a National Academy of Sciences report finding that little or no scientific evidence supports the validity of fingerprints); Nathan Benedict, Note, *Fingerprints and the* Daubert *Standard for Admission of Scientific Evidence: Why Fingerprints Fail and a Proposed Remedy*, 46 ARIZ. L. REV. 519, 521–22 (2004).

274 Rules of Professional Responsibility do not bind pro se defendants. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT pmbl. annot. (6th ed. 2007) ("The Rules of Professional Conduct govern lawyer discipline."); *see also* Trujillo v. Bd. of Educ., Nos. CIV 02-1146 JB/LFG, CIV 03-1185 JB/LFG, 2007 WL 2461630, at *11 (D.N.M. May 31, 2007). And, while ethical rules prohibit criminal defense attorneys from advancing frivolous arguments on behalf of their clients, these rules are secondary to a defendant's right to force the prosecution to prove each element of its case and are rarely enforced. *See* Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1168 (2003) (discussing application of Rule 3.1 of the *Model Rules of Professional Conduct* and Section 110 of the *Restatement (Third) of the Law Governing Lawyers*). Indeed, a comment in Section 110 of the *Restatement (Third) of the Law Governing Lawyers* characterizes the rule as providing a "more permissive requirement for advocacy in criminal-defense representations," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 cmt. a (2000), which perhaps explains why criminal defense lawyers are "rarely disciplined or otherwise sanctioned for asserting frivolous positions in advocacy, aside from instances of contempt," *id.* § 110 Reporter's Note cmt. f. *See also In re* Becraft, 885 F.2d 547, 550 (9th Cir. 1989) ("[C]ourts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding."). Some states may, by statute, require a defendant who pursues a frivolous defense to bear the costs of the state's prosecution. *See, e.g.*, State v. Stanosheck, 180 N.W.2d 226, 228–29 (Neb. 1970).

It is important to note, however, that a court may exclude evidence offered by a pro se defendant relating to an irrelevant or unsupportable defense. *See, e.g.*, State v. Warshow, 410 A.2d 1000, 1002 (Vt. 1979); State v. Aver, 745 P.2d 479, 483 (Wash. 1987). In addition, even if a court allows the evidence, it may refuse to submit corresponding instructions on the defense to the jury. *See, e.g.*, United States v. Kabat, 797

instances of contempt.[275] In our criminal justice system, a verdict of "guilty" is penalty enough.

A court should find a defendant incompetent if the beliefs constituent to his reasoning regarding the selection of a defense are incapable of evidentiary support in the world as we understand it. Reasons incapable of evidentiary support would include beliefs "either impossible absolutely, or, at least, impossible under the circumstances of the individual."[276] An example of an impossible belief would include a defendant's assertion, in justification of his decision to pursue a self-defense theory, that the victim had threatened the defendant by engaging in a slow-motion dance with knives while suspended in midair.[277] This assertion would contradict the laws of nature as we understand them and so would not constitute adequate reasoning. An example of a belief impossible as to the individual would include a person's claim that he killed millions of people while being locked in a mental hospital.[278] This assertion would be "impossible under the circumstances of the individual,"[279] so the professor of this belief would be, as to this matter, incompetent.

One potentially troubling aspect of the proposed standard is its treatment of religious beliefs. Many in our society share common

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F.2d 580, 590–92 (8th Cir. 1986); Commonwealth v. Brugmann, 433 N.E.2d 457, 462 (Mass. App. Ct. 1982).

275 If a pro se defendant refuses to heed warnings by a judge to stop arguing unsupportable views of the law or introducing inadmissible evidence, he may be held in contempt. *See* United States v. Cohen, 510 F.3d 1114, 1117–18 (9th Cir. 2007). In addition, if a defendant lies on the stand, he may be prosecuted for perjury. *See* 18 U.S.C. § 1621 (2006) (criminalizing perjury).

276 Guiteau's Case, 10 F. 161, 170 (D.D.C. 1882) ("[T]he insane delusion, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual." (emphasis omitted)); *see* McKinnon v. State, 181 S.E. 91, 95 (Ga. Ct. App. 1935) (concluding that a belief was not a delusion, where, although "no doubt incorrect, . . . there were facts to sustain it"); Scott v. Scott, 72 N.E. 708, 710 (Ill. 1904) ("An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason."); State v. Lewis, 22 P. 241, 250 (Nev. 1889) ("An insane delusion is an unreasonable and incorrigible belief in the existence of facts, which are either impossible absolutely, or impossible under the circumstances of the individual.").

277 *Cf.* People v. Morton, 570 N.Y.S.2d 846, 847 (App. Div. 1991) (involving a defendant, found competent to stand trial, who claimed that his frail, sixty-six-year-old mother had "learned a 'devine [sic] oriental assassin dance', which involved spinning around in a violent yet graceful manner while striking him with her knuckles, elbows and knees").

278 This example was drawn from Saks, *supra* note 163, at 964.

279 *Guiteau's Case*, 10 F. at 170.

religious beliefs that defy evidentiary support, such as the belief in God or the belief that Jesus Christ rose from the dead. Some courts have allowed the presentation of defenses motivated by religious beliefs, especially when those beliefs are held by a majority or vocal minority of people in the United States. For instance, a court in Nebraska allowed defendants charged with criminal trespass on abortion clinic property to argue that their actions were necessary in order to protect the lives of unborn children.[280] Other manifestations of religious beliefs may be perceived as clearly delusional, such as a mother's belief that she was God and that Satan had hidden himself in the body of her child, thus justifying her beating, tearing the flesh from, and ultimately killing her infant son.[281] It is impossible to craft a standard of sound reasoning based on evidentiary support that distinguishes between delusional and rational (or, at least, socially tolerated) religious beliefs.[282]

The proposed standard would treat all religious beliefs, assuming they are incapable of evidentiary support, as inadequate for establishing one's ability to reason. As I argue in Part IV, however, courts should only find incompetent those defendants whose functional deficits stem from mental illness or mental disability. Under that standard, a court could not find incompetent a person who supports a key decision of his defense with a religious belief when that person does not have a mental illness or disability. The causation element, in effect, privileges the religious views of non–mentally ill defendants.[283] It could be argued, then, that this standard discriminates against mentally ill people who hold nonconventional religious beliefs. That is,

280 *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 34 n.119 (2003).

281 *See* Pope v. State, 396 A.2d 1054, 1059 (Md. 1979).

282 *See* Saks, *supra* note 163, at 963 n.51. Other standards not based on evidentiary support—such as one crediting only beliefs associated with a mainstream religion, with a religion practiced by a substantial body of persons, or with a religious system supported by a text in broad distribution—would discriminate against lesser known religions, and the application of such a standard may bear no rational relationship to individual believers' competence to make sound decisions. *Cf.* Luban, *supra* note 64, at 478–79 (proposing that "acceptable reason[s]" to establish competence include beliefs accepted by a "recognized group"). A nebulous standard prohibiting "irrational" or "clearly delusional" beliefs, ostensibly could separate delusional from rational religious beliefs, but its application would turn on the subjective values and perspective of the trial court.

283 A central premise of this Article is that courts should generally permit a defendant capable of meaningful autonomy to respond to the prosecution's charges on his own terms. If the defendant *chooses* (as opposed to being compelled by mental illness) to explain his actions or make decisions on the basis of his religious beliefs, then he generally should be permitted to do so.

unfortunately, a valid criticism. But, while not a perfect proxy, it is likely that decisions motivated by religious reasons that are, themselves, the product of mental illness do not reflect the best interests of the individual believer. If this observation is generally true, then the standard is a rational—though imperfect—measure of competence.

Under the proposed standard, a decision to select a particular defense that is justified by a defendant's opinions, values, or understanding of others' intentions would be worthy of deference.[284] While intangible perspectives on or responses to the world are not easy to verify or refute with evidentiary support,[285] most would not be impossible. A primary aim of self-representation is to allow a defendant to sculpt his defense in accordance with his values and priorities.[286] Therefore, courts should presume that such reasons are rational.[287] Examples would include reasons justifying a decision such as "the victim intended to kill me," "I feared the victim would take my money," or "I care more about defending my reputation than going to prison."

Professor Saks has made the case for a similar, but more rigorous, standard in the context of medical treatment decisionmaking.[288] Saks has argued that a competence standard should perform three functions: identify the abilities necessary to make decisions deserving of deference, protect an individual's expression of his values and beliefs, and designate as incompetent a reasonably small class of people.[289] Her analysis of case law involving civil competence determinations, especially those concerning testamentary competence, reveals that courts predominantly characterize as "delusional"—and thus find

284 *See* Saks, *supra* note 163, at 984–92 (arguing that beliefs incapable of evidentiary support—such as values, intentions, and feelings—should not be considered delusional unless they include beliefs that are patently false).

285 *See id.* at 974.

286 *See* Faretta v. California, 422 U.S. 806, 815–17 (1975); *see also* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 189–90 (2000) ("Underlying the autonomy viewpoint is the notion that attorneys will not make better decisions than clients because they often do not fully understand a client's interests and needs, especially when there are major social, economic, or cultural differences between the two. The autonomy viewpoint suggests that allowing a client control of decisions will produce decisions that better meet client needs and affirm a client's sense of personhood and individuality." (footnote omitted)).

287 *See generally* Jennifer Moye et al., *A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship*, 47 GERONTOLOGIST 591, 595 (2007) ("Choices that are linked with lifetime values are rational for an individual even if outside the norm. A person's race, ethnicity, culture, and religion may impact individual values and preferences.").

288 *See* Saks, *supra* note 163, at 962–65.

289 *See id.* at 949–50.

incompetent—those beliefs that are *actually* supported by no evidence.[290] Saks argues that courts should adopt this standard in the context of competence to consent to medical treatment.[291] Saks acknowledges that utilization of the concept of "delusion" is suboptimal in that it "fail[s] . . . to single out falsehoods so patent that no capable person would believe them."[292] In particular, it is possible that evidence supporting a belief may exist but be inaccessible.[293] Notwithstanding the possible infringement on idiosyncratic expression, Saks considers this standard the best available for medical treatment decisionmaking.[294]

Saks's standard may be appropriate in the context of medical treatment decisionmaking, but it is too stringent for self-representation. In particular, society should expect patients deciding upon a course of medical treatment to be capable of articulating a true or accurate reason justifying their decisions.[295] In the context of criminal defense, however, a defendant does not owe a duty to profess "truth." Rather, we allow and even encourage defendants to craft a defense based on perceived deficiencies in the government's case, regardless of the ultimate "truth" of the defense.[296] The reason professed by a defendant to justify the selection of his defense (and the defense itself) may well be strategic, rather than representative of

290 *See id.* at 956.

291 *See id.* at 962–65.

292 *Id.* at 963.

293 *See id.*

294 *See id.*

295 *See id.* (defending her standard as "rul[ing] out beliefs that plainly fail to do what they purport to do, that is, portray the world accurately").

296 Defense strategies reflect a defendant's evaluation of the state's case and are not sculpted, necessarily, to reveal the "truth." *See* Edward Roslak, Comment, *Game Over: A Proposal to Reform Federal Rule of Evidence 609*, 39 SETON HALL L. REV. 695, 708 (2009) (describing how, "when presented with a choice of strategies, both [defendants and prosecutors] have a strong incentive to ensure not that the best kinds of information enter the trial arena, but rather that whatever information or lack thereof promotes the achievement of the party's desired partisan outcome" and observing that "a 'truthful' outcome is not necessarily as relevant to the parties as achieving their own goals"). Professional rules governing defense attorneys recognize the utility of this practice. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 110 (2000) (providing that, while "[a] lawyer may not . . . assert or controvert an issue [in a proceeding], unless there is a basis for doing so that is not frivolous," "a lawyer for the defendant in a criminal proceeding . . . may so defend the proceeding as to require that the prosecutor establish every necessary element"); *id.* § 110 cmt. f ("[A] lawyer defending a person accused of crime, even if convinced that the guilt of the offense charged can be proved beyond a reasonable doubt, may require the prosecution to prove every element of the offense, *including those facts as to which the lawyer knows the accused can present no effective defense*." (emphasis added)).

what the defendant believes to be true. Therefore, to be competent to control his defense, a defendant should be able to articulate a reason for a decision that is *capable* of evidentiary support, not necessarily supported by *actual* evidence.

Professor Richard Bonnie has proposed a competence standard for use in criminal adjudication that is similar to the one proposed by Professor Saks.[297] The thrust of Bonnie's standard, coined the "basic rationality" test, is that a defendant should "be able to express a reason for [a] decision that has a plausible grounding in reality."[298] He defines "plausible" as "not grossly irrational."[299] This standard is intended to foreclose decisions affected by "gross delusions."[300] Bonnie does not clarify whether reasons plausibly grounded in reality must *actually* be supported by some evidence or may merely be *capable* of evidentiary support. His citation to Saks's work,[301] however, indicates his intent to adopt her standard of "delusion."[302] This reference suggests that plausible reasons are supported by some modicum of evidence. Bonnie also equates the "ability to give a plausible reason" with at least a "minimal ability to appreciate one's situation,"[303] signaling that a "plausible" reason would have an actual basis in reality. For reasons articulated in response to Saks's position above, I suggest that requiring a defendant to profess a "true" (or evidentially substanti-

297 *See* Bonnie, *supra* note 33, at 574. The "basic rationality" test is one of five standards for decisional competence that Bonnie suggests for criminal adjudication. *See id.* at 572–76. To decide which test should apply to various decisions made by criminal defendants, Bonnie evaluates the degree to which the decision implicates the norms of dignity, reliability, and autonomy. *Id.* Bonnie argues that the "basic rationality" test should apply to a defendant's decisions to plead guilty in accordance with counsel's advice, *id.* at 578, and to waive the right to a jury trial against counsel's advice, *id.* at 582, 584. To waive the right to counsel, Bonnie suggests that defendants should meet a more demanding decisional competence test called "reasoned choice." *See id.* at 579, 586. This test would require the ability to engage in a logical, deliberate reasoning process involving a comparison of the consequences of potential alternative solutions. *See id.* at 575–76. The test also includes the element of "substantial appreciation," defined as the ability to make decisions free from the influence of "cognitive and emotional factors which [could] impair a person's ability to relate what she 'understands' about the reasons for choosing one or another course of action to her own situation." *Id.* at 574. Others have advanced compelling reasons why this standard is insufficiently deferential to a defendant's autonomy. *See* Slobogin & Mashburn, *supra* note 33, at 1603.

298 Bonnie, *supra* note 33, at 574.

299 *Id.* at 576 fig.1.

300 *Id.* at 574.

301 *See id.* at 574 n.121 (citing Saks, *supra* note 163).

302 *See* Saks, *supra* note 163, at 956.

303 *See* Bonnie, *supra* note 33, at 575 n.124.

ated) reason for a decision fails to take into account the vulgar realities of our criminal defense system. Similar to the standard proposed in this Article, however, Bonnie would find a defendant decisionally competent if only one of several reasons expressed for a decision were plausible.[304] In other words, Bonnie agrees that a defendant should only be found incompetent when *all* of his reasons for a decision are patently false.[305]

Professor Christopher Slobogin has advocated for a similar, and perhaps even more stringent, test of reasoning as the appropriate standard for representational competence.[306] Slobogin explicitly adopts Bonnie's "basic rationality" test[307] but interprets it to require overriding any decision that rests, in part, on a delusional belief.[308] In other words, if a defendant appears to make a decision in part for "clearly false" beliefs and in part for rational reasons, the defendant should be found incompetent to make the decision. The implications of Slobogin's proposed standard may be gleaned from his application of the standard to the case of Colin Ferguson, the Long Island Rail Road Killer.[309] Ferguson apparently decided to represent himself in order to avoid an insanity defense.[310] While evidence of his reasoning is scarce, a statement by one evaluating psychologist suggests that Ferguson's decision was at least partially motivated by wanting to avoid spending the rest of his life in a mental hospital or being "viewed as a crazy person."[311] These reasons are certainly rational, as Slobogin rec-

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304 In applying his "basic rationality" standard to the context of a guilty plea, Bonnie states:

> [T]he plea would not be valid, even if the defendant adequately understands the nature and consequences of a guilty plea, if none of the defendant's reasons for pleading guilty has any plausible grounding in reality (i.e., if all the defendant's reasons for pleading guilty rest on patently false beliefs about the world.)

Id. at 578.

305 *See id.*

306 *See* Slobogin, *supra* note 53, at 401–05.

307 *Id.* at 402.

308 *See* SLOBOGIN, *supra* note 183, at 202 (arguing that a defendant's decision should be overridden in the presence of evidence of "clearly false beliefs" and that, "if part of the reason" a defendant rejects the insanity defense is delusional, "then he fails even the basic rationality test"); *id.* at 204; *see also* Slobogin, *supra* note 53, at 403 ("[The basic rationality and self-regard test] requires an understanding of the risks and benefits of the decision, the absence of clearly erroneous beliefs about those risks and benefits, and the willingness to act on what is known.").

309 *See* SLOBOGIN, *supra* note 183, at 203–04.

310 *See id.* at 203.

311 *See id.* at 204.

ognizes.[312] Ferguson also appeared to believe, however, "that he did not commit the crimes, despite overwhelming evidence to the contrary."[313] If one reason for Ferguson's rejection of an insanity defense was a belief that he did not shoot the victims, and if he fired his attorneys for refusing to pursue a defense of innocence, then, Slobogin argues, Ferguson should have been found incompetent to waive his right to assistance by counsel, given the overwhelming evidence of his guilt.[314]

Slobogin's approach is troubling for two reasons. First, his test appears to be insufficiently deferential to autonomy. Professor Saks has discussed the impact of "the pervasive influence of the irrational and the unconscious" in "the mental lives of us all."[315] If irrationality permeates the everyday decisions of "competent" people, then we should be wary of overriding decisions driven, only in part, by reasons unsupported by apparent evidence. Indeed, many consider the decision to waive counsel to be inherently delusional. The adage that "one who is his own lawyer has a fool for a client"[316] reflects the commonly held belief that, despite a pro se defendant's apparent belief to the contrary, a self-represented defendant will harm, not help, his case by discharging counsel and representing himself.[317] Moreover, bravado and bluff are common in the criminal defense arena. It is not uncommon for a defendant to attest vociferously to his innocence one day and to admit guilt when a favorable plea bargain is offered the next, thus suggesting that his professed innocence was a farce or, in Saks's parlance, "delusional." To account for common puffery and the pervasive influence of the irrational, courts should allow a defendant the benefit of the doubt and permit him to exercise his constitutional right to control his defense so long as he can articulate a plausible reason supporting his selection of a defense.

Second, Slobogin finds dispositive the "delusion" that Ferguson maintained his innocence in the face of strong evidence of guilt. While it is possible that a defendant's account of events underlying a charge could qualify as "delusional"—whether defined as unsupported by any evidence or incapable of evidentiary support—courts

312 *See id.*

313 *Id.*

314 *See id.*

315 Saks, *supra* note 163, at 950; *see also* Morse, *supra* note 187, at 549 n.38 (referencing theoretical views positing that "all human beings are suffering from some form of mental disorder to some extent at all times").

316 Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

317 A recently conducted empirical study questions the veracity of this adage. *See* Hashimoto, *supra* note 111, at 447–54.

should hesitate to deny a defendant the right to proceed pro se merely because he refuses to admit to the state's version of the facts. The state's allegations are just that—unproven assertions—until they are accepted by a judge or jury beyond a reasonable doubt. It seems unjust to assume in advance of trial that the prosecution's allegations are true and a defendant's denial of them and alternative explanation are "delusional." Also, it is uncontroverted that the majority of defendants who plead "not guilty" are ultimately convicted.[318] In light of this fact, judges and defense attorneys often assume that most defendants are guilty of the crimes charged.[319] Many defendants however, never admit to their crimes, even to their attorneys.[320] And society does not demand that they do so. A defendant does not owe a duty to confess his crime to his attorney, to the jury, or to the court, which is why we do not require defendants to testify and explain their actions. Indeed, society to some degree sanctions the mounting of farfetched defenses.[321] Consistent with this premise, in establishing a right to self-representation, the Supreme Court in *Faretta* rejected and derided the British practice in the Star Chamber of disallowing a defendant to advance a defense unless his counsel attested to its merit.[322]

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318 *See id.* at 452 (concluding that only one percent of criminal defendants represented by counsel are acquitted at trial, the same rate as that of nonrepresented defendants); Uphoff, *supra* note 163, at 807 ("Yet in the end . . . the vast majority of defendants plead guilty or, if they go to trial, are convicted.").

319 *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (quoting the attorney of Cameron Todd Willingham, who may have been wrongly executed for murdering his three children, as saying, "Everyone thinks defense lawyers must believe their clients are innocent, but that's seldom true. . . . Most of the time, they're guilty as sin.").

320 *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 212 (2002) ("Defendants who are charged with more serious crimes are much less likely to confess to their attorneys; some attorneys believe that this reluctance derives from the defendant's belief that an attorney is more likely to zealously defend a client whom he believes to be innocent rather than one whom he knows to be guilty.").

321 Some state ethics decisions indicate that a lawyer could, consistent with his ethical responsibilities, pursue an otherwise frivolous defense intended to result in jury nullification. *See* D.C. Bar Legal Ethics Comm., Ethics Op. 320 (2003) (permitting lawyers to argue defenses that may lead to jury nullification because "lawyers defending a criminal case are authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules").

322 *See* Faretta v. California, 422 U.S. 806, 821–22, 822 n.18 (1975).

As a society, we typically do not find defendants "insane" merely because they insist upon their innocence. But Slobogin's test could function to invalidate the decisions of defendants who insist upon their innocence in the face of overwhelming evidence of guilt when it appears that this belief partially motivates their decisions. Because it may be difficult to distinguish a guilty defendant who *really* believes that he is innocent from one who merely wants to put the government to its proof (and suggests alternative scenarios as "what-ifs"), courts should hesitate before denying a defendant the right to control his defense on this basis. And, where a defendant expresses belief in an implausible series of events underlying the charged offense but articulates additional, plausible, rational reasons for his selection of a defense, the court should allow the defendant's decision to stand.

Two implications of the standard proposed in this Article—that a defendant possesses adequate reasoning ability if he is capable of justifying his selection of a defense with a single reason capable of evidentiary support in the world as we understand it—are worth mentioning. First, if a defendant has fixed false beliefs that are resistant to reason, but these false beliefs only marginally affect the selection of his defense or are tangential to it, then a court should allow his defense to stand.[323] Restricting findings of incompetence to select a defense to situations in which delusions clearly form the underpinnings of the defense should prevent courts from succumbing to the temptation to impose counsel on a defendant wanting to pursue a foolish, yet lucid, defense or one espousing "odd" beliefs.

Second, courts should not assess the wisdom of a defendant's decisions, so long as the defendant appears capable of ascribing a problem to a rational source and can identify a plausible reason to support a decision.[324] Professor Nancy Knauer has pointed out the difficulty in evaluating the quality of an individual's decisionmaking process without measuring the "quality and social desirability of the decision ultimately reached."[325] She states succinctly, "[C]apacity has the potential to become the ultimate self-fulfilling doctrine: those who exercise approved choices have capacity, whereas those who exercise socially undesirable choices lack capacity."[326] This cautionary note has particular salience in the context of self-representation, where,

323 *See* Slobogin & Mashburn, *supra* note 33, at 1603.

324 *See* Luban, *supra* note 64, at 477 (discussing the views of Dennis Thompson and Joel Feinberg on the subject).

325 *See* Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 342–43 (2003).

326 *Id.* at 343.

despite empirical evidence to the contrary,[327] courts widely assume that deciding to forgo representation by an attorney is a "bad" decision,[328] which is probably the product of mental illness.[329] Relatedly, the likelihood that a defendant's chosen defense will succeed, either as an absolute matter or as compared to an alternative (rejected) defense, should not factor into the proposed competence standard. While others would surely disagree,[330] allowing a court to weigh the merits of a defense in a competence determination creeps too close to sanctioning the substitution of the court's judgment of a defendant's best interests for his own.

In sum, in order to honor the preference for autonomy and to safeguard the reliability and fairness of the proceeding, a defendant should be capable of justifying key decisions, such as the selection of a particular defense, with a single reason that has a plausible grounding in reality. Acceptable justifications include reasons enjoying evidentiary support and those capable of evidentiary support in the world as we understand it. A court should find a defendant incompetent if the beliefs constituent to his reasoning are incapable of evidentiary support. Reasons incapable of evidentiary support include beliefs either impossible as an absolute matter or impossible under the circumstances of the individual. This standard would accommodate individuals' differing decisionmaking styles; respect variation in defendants' beliefs, values, and preferences; and constrain a court's ability to find

327 *See* Hashimoto, *supra* note 111, at 447–54.

328 On multiple occasions, the Supreme Court has remarked that "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." Godinez v. Moran, 509 U.S. 389, 400 (1993) (alteration in original) (quoting Faretta v. California, 422 U.S. 806, 834 (1975)).

329 *See* Hashimoto, *supra* note 111, at 459 ("Because of the long-held assumption that those who represent themselves are mentally ill, a defendant's decision to represent himself, even absent other indications of mental illness, may well give rise to a concern on the part of the court that the defendant is mentally ill."). Hashimoto's empirical study questioned the validity of the assumption that many, or most, defendants who choose to proceed pro se are mentally ill. Her analysis of the incidence of court-ordered competence evaluations in cases in which a defendant was unrepresented at the disposition of the case suggested that seventy-eight percent of pro se defendants did not exhibit signs of mental illness, at least not sufficient to warrant a competence evaluation. *See id.* at 456, 458. Of the twenty-two percent of pro se defendants who were evaluated, only nine percent were ordered to undergo competence evaluations prior to invoking the right to self-representation. *Id.* at 459.

330 *See* Thomas R. Litwack, *The Competency of Criminal Defendants to Refuse, for Delusional Reasons, a Viable Insanity Defense Recommended by Counsel*, 21 BEHAV. SCI. & L. 135, 144 (2003).

"incompetent" those decisions that a court believes to be unwise or eccentric.

E. Solution Implementation

The final stage of problem solving involves solution implementation,[331] or carrying out the chosen solution.[332] Solution implementation requires performance skills that may differ from those skills necessary for effective problem solving.[333] For instance, a person may possess intact decisionmaking powers but lack the ability to implement a chosen solution due to anxiety, emotional distress, or deficits in communication, social, or technical skills.[334] In addition, a person may manifest the ability to make decisions in one setting—unhurried and with the assistance of his social support network, for instance—but be unable to make decisions in a real-life decisionmaking context.

As a preliminary point, *Faretta* makes clear that a defendant need not perform *well* at trial—indeed all members of the Court indicated their expectation that an unrepresented defendant would fare poorly.[335] In recognizing a right to self-representation, the Court acknowledged that a defendant will likely lack the skill and knowledge necessary to prepare a defense.[336] In addition, as previously mentioned, *Faretta* stresses that a defendant's possession of technical legal knowledge is irrelevant to his competence to proceed pro se.[337] Therefore, requiring any degree of technical knowledge or skill—or mastery of relevant statutes or rules—is clearly prohibited by the Court's precedent.

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331 *See* D'Zurilla & Nezu, *supra* note 136, at 31–34. In addition to solution implementation, Goldfried, D'Zurilla, and Nezu include solution verification in this final problem-solving stage. *See id.* Solution verification refers to the process of evaluating the degree to which the outcome matches the problem solver's expectations and the individual's response to the congruence or discrepancy. *See id.* at 32–34. Because of the unique nature of trial, solution verification is of limited utility for a competence analysis. While some trial decisions will have immediate consequences susceptible to evaluation, a pro se defendant will not be able to assess the effectiveness of many strategic decisions until the conclusion of trial, if ever.

332 *See* D'Zurilla & Nezu, *supra* note 136, at 31–34; D'Zurilla & Nezu, *supra* note 154, at 157; Nezu & Nezu, *supra* note 149, at 189.

333 *See* D'Zurilla & Nezu, *supra* note 136, at 32.

334 *See id.*

335 *See* Faretta v. California, 422 U.S. 806, 834 (1975).

336 *See id.* at 833 n.43 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

337 *See id.* at 835, 836 ("[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation.").

Requiring pro se defendants to possess strong performance and implementation skills in order to maintain control over their defenses also fails to recognize the importance of autonomy to the self-representation right. Because the predominant aim of self-representation is to preserve and effectuate the autonomy of the defendant, it is largely inappropriate to include solution implementation in a threshold competence inquiry. A person's ability to carry out his decisions personally is irrelevant to his status as an autonomous decisionmaker.[338] If an individual possesses those abilities necessary to identify his best interests and make decisions consistent with those interests, then the Sixth Amendment gives him the right to control his defense.

To the extent that a defendant is decisionally competent but lacks necessary performance skills, courts should appoint standby counsel to effectuate the decisions of the defendant.[339] 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.[340] The appointment of standby counsel to perform

338 *See* United States v. McDowell, 814 F.2d 245, 250 n.2 (6th Cir. 1987) ("Any limitations due to physical or educational impairments that do not affect the ability of the accused to choose self-representation over counsel can probably be overcome, if necessary, through the use of stand-by counsel or interpreters."). Similar sentiments have been expressed in the context of guardianship proceedings. *See* Jennifer Moye, *Guardianship and Conservatorship*, *in* EVALUATING COMPETENCIES, *supra* note 59, at 309, 311–12 ("[T]he inability to write checks related to severe arthritis in an older adult does not imply the individual is incapable of managing funds, in the same way that a spinal cord injury in a younger adult does not assume any incompetence, but rather that assistance may be needed in completing a task. The need for psychosocial or nursing services to accomplish a task at the elder's direction should not be confused with impairment in judgment and decision making that may underlie the need for a substitute decision maker."); Anderer, *supra* note 23, at 35–36, ("The final decision regarding how his or her needs will be met should be made by the individual if his or her decisionmaking processes are intact. . . . Before a substitute decisionmaker is appointed, a determination must be made that the person cannot make the decisions that the substitute decisionmaker will make.").

339 *See Faretta*, 422 U.S. at 815 ("To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms." (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942))).

340 *See* Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir. 1990) (holding that the Sixth Amendment rights of a defendant who was physically incapable of conducting jury voir dire and examination of witnesses, and had not asked for assistance, were not violated when the trial court appointed an attorney who could communicate on his behalf); *id.* at 1464 n.11 (explaining that the defendant was permitted to ask any questions of witnesses that he wanted but had to do so through standby counsel).

this 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.[341] Indeed, an argument exists that due process requires the appointment of standby counsel to communicate or execute a defendant's decisions when the defendant is unable to do so but retains adequate problem-solving and decisional abilities.[342] Courts are in agreement, for example, that a criminal defendant who does not speak English has a due process right to a translator in order to effectuate his rights to testify and cross-examine hostile witnesses and to ensure the provision of a fair trial.[343] For similar reasons, a deaf or blind defendant has a due process right to an interpreter to permit him to participate in his defense.[344] By extension, a pro se defendant with a communication-related deficiency should have a due process right to standby counsel or some other agent to effectuate his decisions in order to honor his constitutional right to self-representation.

To authorize a substitute decisionmaker to override a defendant's decisions when the defendant is not adequately (in the opinion of the court) capable of executing those decisions could, in effect, limit the self-representation right to a select, privileged few. Such a rule would permit trial courts to deny self-representation to defendants who are

341 This concept is related to the requirement in constitutional law that an official act that infringes on an individual's substantial liberty interest must be the least restrictive means of achieving a compelling state interest. *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (evaluating the application of the compelling government interest and strict scrutiny requirements in First Amendment litigation); Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003) (analyzing the concept of least restrictive regulatory measures in the context of the World Trade Organization and the General Agreement on Tariffs and Trade). Some courts have held that due process requires courts to appoint guardians to make decisions only in those limited areas in which the ward suffers from incapacity. *See* John Parry, *Incompetency, Guardianship, and Restoration*, *in* THE MENTALLY DISABLED AND THE LAW 369, 384–85 (Samuel Jan Brakel et al. eds., 3d ed. 1985); Anderer, *supra* note 23, at 25.

342 *See* STEPHEN J. ANDERER, AM. BAR ASS'N DIV. FOR PUB. SERVS., MONOGRAPH NO. 1, DETERMINING COMPETENCY IN GUARDIANSHIP PROCEEDINGS 14–15 (Nancy A. Coleman et al. eds., 1990).

343 *See, e.g.*, United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994) (discussing the right to testify); United States v. Lim, 794 F.2d 469, 470 (9th Cir. 1986) (per curiam) (collecting cases); United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (discussing due process). Individuals also have a due process right to a translator in deportation proceedings. *See* Perez-Lastor v. INS, 208 F.3d 773, 777–78 (9th Cir. 2000).

344 *See* People v. Doe, 602 N.Y.S.2d 507, 509 (Crim. Ct. 1993); *see also* Terry v. State, 105 So. 386, 387 (Ala. Ct. App. 1925) (discussing the state constitution).

illiterate or have a speech impediment, a meager educational background, or a limited proficiency with the English language. A court could even deny self-representation, contrary to *Faretta*, to a person deemed unable to master the intricacies of trial procedure.

These are not mere theoretical possibilities. In 1980, Wisconsin adopted a competence standard to measure a defendant's ability to conduct "meaningful" self-representation.[345] Relevant considerations include a defendant's educational background, literacy, fluency in English, and actual handling of the case, as well as "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury."[346] Under this standard, a trial court terminated a pro se defendant's representation on grounds of competence, when the defendant, during the cross-examination of a particular witness, asked questions that were repetitive and lacked foundation, testified in the course of asking several questions, and interrupted the court.[347] Another trial court held incompetent a twenty-five-year-old high school graduate with no history of treatment for mental illness,[348] who, according to a federal habeas court, "was able to understand criminal proceedings, understood legal terminology and trial procedures, was not delusional[,] and was of normal intelligence."[349] The trial court's basis for finding the defendant incompetent was his lack of "a rudimentary understanding of how to secure expert testimony and what type of information to present."[350]

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345 *See* Pickens v. State, 292 N.W.2d 601, 611 (Wis. 1980), *overruled in part on other grounds by* State v. Klessig, 564 N.W.2d 716 (Wis. 1997).

346 *See* State v. Marquardt, 705 N.W.2d 878, 891–93 (Wis. 2005); *Klessig*, 564 N.W.2d at 724; *Pickens*, 292 N.W.2d at 611; *In re* Termination of Parental Rights to Sophia S., 715 N.W.2d 692, 699 (Wis. Ct. App. 2006).

347 *See In re* Commitment of Stokes, No. 2004 AP 1555, 2007 WL 521243, at *2, *12, *14 (Wis. Ct. App. Feb. 21, 2007). After exhaustively reviewing the trial transcript, however, a reviewing court found that the defendant did not engage in obstreperous or disruptive conduct and that he "was able to conduct an acceptable, if not at times eloquent, questioning of the witnesses." *Id.* at *15. The court reversed and remanded the case for a new trial. *Id.*

348 Gomez v. Berge, No. 04-C-17-C, 2004 WL 1852978, at *3 (W.D. Wis. Aug. 18, 2004).

349 *Id.* at *3.

350 *Id.* at *4. On direct appeal, the circuit court found that, although Gomez had seemed competent to stand trial and to have executed a valid waiver of counsel, his actual handling of the case at trial demonstrated that he did not understand the disadvantages of self-representation and lacked the competence to conduct his own defense. *See id.* at *6. In particular, the trial court was frustrated by the defendant's rambling open statement (and its opening the door to the admission of tapes previously suppressed), his desire to call witnesses who possessed either irrelevant or cumulative testimony, and the defendant's failure to secure an expert witness. *See id.* at *3.

Similar results followed in California, when the state courts adopted a "coherent communication" standard.[351] This standard permitted one trial court to deny self-representation to a defendant with a speech impediment.[352] Another denied a defendant's request to proceed pro se because he had a seventh-grade education, read at a ninth-grade level, and had "rather low verbal skills."[353] Both of these decisions were upheld on appeal.[354] These cases[355] demonstrate the salience of Justice Scalia's concern, voiced in his dissent, that *Edwards* would result in judges' denying pro se requests to avoid the messiness and inconvenience of administering trials with unrepresented defendants.[356]

While representational competence should not include a robust communication or performance element, several elements of solution implementation may be appropriate for inclusion in a representational competence standard.[357] In particular, a defendant should be able to make decisions within the context of trial. This requires the ability to sustain mental organization,[358] maintain concentration or attention, make decisions within a short timeframe, and withstand the stress likely to accompany trial participation.[359] Trial is stressful and necessitates the ability to make decisions within a short period of time

351 *See* People v. Manago, 269 Cal. Rptr. 819, 820–21 (Ct. App. 1990); People v. Burnett, 234 Cal. Rptr. 67, 74–77 (Ct. App. 1987). *Burnett* held that one aspect of a defendant's competence to proceed pro se is an ability to "coherently communicate" his defense to the trier of fact. *Id.* at 76.

352 *See* People v. Watkins, 8 Cal. Rptr. 2d 5 (Ct. App. 1992).

353 *See Manago*, 269 Cal. Rptr. at 821.

354 *See Watkins*, 8 Cal. Rptr. 2d at 8; *Manago*, 269 Cal. Rptr. at 819.

355 This line of cases was overruled in *People v. Welch*, 976 P.2d 754, 775 (Cal. 1999). *See* People v. Santacruz, No. E039277, 2007 WL 1365744, *9 n.5 (Cal. Ct. App. May 10, 2007). California courts have not revived this line of cases since *Edwards*.

356 *See* Indiana v. Edwards, 554 U.S. 164, 188–89 (2008) (Scalia, J., dissenting). Courts have recognized that "a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable in *pro se* cases." United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972).

357 *See* Maroney, *supra* note 160, at 1392, 1397–98 & n.130 (arguing that decisional competence should include the ability to "formulate and execute a course of action," but not detailing the functional components of the execution or performance element).

358 I am grateful to Richard Bonnie for stressing the importance of this element of representational competence.

359 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 anxiety and deficits in sustaining attention and concentration. *Edwards*, 554 U.S. at 176 (quoting APA Brief, *supra* note 55, at 26).

before an impatient, potentially hostile audience.[360] Often within the span of a few minutes, a defendant will need to decide, for example, whether to object to arguably prejudicial or irrelevant questions in the direct examination of a witness, whether to cross-examine the witness, and what lines of inquiry to pursue. A representational competence standard should not require the ability to make numerous decisions under stress consistently. Sound reasons of trial strategy, for instance, may support advancing multiple (and perhaps contradictory) defenses, abstaining from objecting to all possibly irrelevant questioning, and not pursing every line of questioning consistent with one's defense. But a defendant arguably should have the capacity for making a decision without protracted delay, remembering that decision, and acting in general accordance with that decision as the trial proceeds.

Alternatively, sound reasons of policy support imposing a different competence standard for pretrial and trial decisions. Certain forms of mental illness may lead individuals to decompensate under stress, causing their thinking to become tangential, circumstantial, and inefficient.[361] Such individuals may be perfectly capable, however, of making rational decisions outside a frenzied, public, trial environment. In addition, certain decisions of high personal value may be made prior to trial, such as what defense to exert and which witnesses to call.[362] Given these realities, courts should consider allowing a

360 *See* State v. Latimer, No. 99-1945-CR, 2000 WL 124502, at *3 (Wis. Ct. App. Feb. 3, 2000) (upholding a denial of a motion to proceed pro se partially on the grounds that the defendant "would likely be unable to make decisions about his case within the proper time frames, and this inability would paralyze him at trial").

361 *See* Brief for Petitioner at 8, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407) (detailing a forensic psychiatrist's testimony that Panetti, a schizophrenic, "decompensates when under stress, causing his thinking to become tangential, circumstantial, and inefficient"); *see also* State v. Doss, 568 P.2d 1054, 1058 (Ariz. 1977) ("There was evidence that the defendant was physically unable to carry on his defense, and at various times the defendant has acknowledged that stress affects his speech and presents a danger of a seizure."); People v. Berling, 251 P.2d 1017, 1022 (Cal. Ct. App. 1953) (attributing defendant's dizziness, fainting, and inability to concentrate to "an emotional and nervous upset from strain" of trial).

362 Richard Bonnie has identified certain strategic and tactical decisions that may be of particular import to criminal defendants. *See* Bonnie, *supra* note 33, at 569 & n.110. In particular, the selection of particular defenses, such as insanity, is likely to implicate the personal values of the defendant. Recognizing this reality, many, but not all, courts have recognized a defendant's right to decide whether or not to raise an insanity defense. *See* SLOBOGIN, *supra* note 183, at 211–12. Given the high personal value of this and other decisions, it may be appropriate to require a lower threshold of representational competence for decisions of particular personal import that are capable of being made prior to trial.

defendant with minimally intact decisionmaking abilities to make binding decisions prior to trial. If the defendant lacks an ability to make decisions within the bustle of trial, then counsel should be appointed to represent the defendant at trial. In this instance, all trial decisions should be made consistently with the defendant's pretrial decisions unless the defendant directs otherwise. This dual approach is normatively superior, for it would usurp the decisionmaking power of the defendant only to the extent that he is decisionally incompetent.

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.[363] Self-representation may, depending on the support provided to a defendant, require communicative abilities of a different degree. Counsel, as an agent of the defendant, is ethically bound to listen to the defendant, ask clarifying questions, and assist the defendant in reaching a conclusion.[364] Counsel should be patient, sympathetic, and respectful. At trial, a pro se defendant may need to communicate decisions to a court actor with weaker allegiance to the defendant, like the court, the jury, or, if one is appointed, standby counsel.[365] As discussed previously, under due process principles, a court should appoint standby counsel to communicate a defendant's decisions to the judge or jury if the defendant is capable of communicating with counsel but not with others at trial.

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363 *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975). Interpreting the *Dusky* standard, Bonnie defined competence to assist counsel to include "a capacity to recognize and relate relevant information to the attorney." Bonnie, *supra* note 33, at 562–63.

364 *See, e.g.*, 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."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000) ("A lawyer must notify a client of decisions to be made by the client under §§ 21–23 [including 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] and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

365 Christopher Slobogin has argued that "rarely" will a defendant be able to communicate with his attorney and respond adequately to a judge's questions concerning his understanding of an attorney's role (necessary to effect a valid waiver of counsel), but be unable to communicate adequately to a jury. *See* Slobogin, *supra* note 53, at 405. He does not provide empirical data to support this claim.

In sum, the principles of *Faretta* and the predominant goal of allowing autonomous defendants to control their defenses militate against requiring every pro se defendant to possess masterful communication or performance skills. However, courts should consider including three aspects of solution implementation in a representational competence standard. These capabilities include being able to sustain mental organization, withstand the stress of trial, and communicate decisions to a functionary of the court. These abilities—critical to a defendant's capacity for making decisions in the real-life setting of a criminal trial and executing them to a minimal degree—may be crucial to the actual and apparent fairness of a proceeding and the legitimacy of the criminal justice system. A summary of the representational competence standard proposed in this Article appears in Table 1.

TABLE 1. COMPONENTS OF REPRESENTATIONAL COMPETENCE STANDARD

Ability	Associated Social Problem-Solving Domain
Capacity for perceiving problematic situations	Problem orientation
Ability to identify a plausible source for the prosecution	Problem orientation
Willingness to attend to the prosecution	Problem orientation
Ability to gather information to evaluate the state's case	Problem definition
Ability to generate alternative courses of action	Generation of alternative solutions
Ability to justify key decisions with a plausible reason	Decisionmaking
Ability to maintain mental organization	Solution implementation
Ability to withstand the stress of trial	Solution implementation
Ability to communicate decisions to a functionary of the court	Solution implementation

IV. IMPORTANCE OF CAUSATION

To accord due respect for a defendant's autonomy, a court should find a defendant incompetent only if his inability to satisfy a functional component of a representational competence standard results from a mental illness or mental disability. While some lower courts have confined the holding in *Edwards* to mentally ill defend-

ants who want to represent themselves,[366] it is unclear the extent to which *Edwards* requires a finding of mental illness or disability to support a determination of representational incompetence. The express holding of the Court—"the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"[367]—appears to require causation as an essential element of representational competence. Other language in the decision, however, is less clear. For instance, the Court does not reject Indiana's proposed standard of "coherent communication" as constitutionally impermissible for failing to include a mental illness or disability element.[368] Instead, the Court refrains from endorsing the proposal as a federal constitutional standard because the Court is "sufficiently uncertain . . . as to how that particular standard would work in practice."[369]

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366 The Seventh Circuit, for instance, described "severe mental illness" as "a condition precedent" for denying the right of self-representation on the grounds of competence. *See* United States v. Berry, 565 F.3d 385, 391 (7th Cir. 2009). In the court's words:

> Certainly, the right to self-representation cannot be denied merely because a defendant lacks legal knowledge or otherwise makes for a poor advocate. And the *Edwards* Court repeatedly cabined its holding with phrases like "mental derangement," "gray-area defendant," "borderline-competent criminal defendant," and, of course, "severe mental illness." Edwards himself, after all, suffered from schizophrenia and delusions, not just a personality disorder. So even if we were to read *Edwards* to *require* counsel in certain cases—a dubious reading—the rule would only apply when the defendant is suffering from a "severe mental illness." Nothing in the opinion suggests that a court can deny a request for self-representation in the absence of this.

Id. at 391 (internal citations omitted) (quoting Indiana v. Edwards, 554 U.S. 164, 171, 173, 175–76 (2008)); *see also* State v. Connor, 973 A.2d 627, 655 (Conn. 2009) ("We therefore conclude that, when a trial court is presented with a mentally ill or mentally incapacitated defendant who, having been found competent to stand trial, elects to represent himself, the trial court also must ascertain whether the defendant is, in fact, competent to conduct the trial proceedings without the assistance of counsel.").

367 *Edwards*, 554 U.S. at 178.

368 *See id.* In its brief, Indiana suggested that a defendant need not be mentally ill to lack necessary communicative abilities for self-representation. *See* Brief for Petitioner at 26, *Edwards*, 554 U.S. 164 (No. 07-208) ("At the same time, [a finding of incompetence] does not depend on any formal medical or psychological diagnosis of the defendant. What counts are observations of the defendant, not, strictly speaking, the defendant's mental or physical diagnosis (though that diagnosis may well inform a court's determination).").

369 *Edwards*, 554 U.S. at 178.

Causation is one of the defining hallmarks of legal competence standards in civil and criminal contexts.[370] In the words of Professor Thomas Grisso, "Legal competence constructs require *causal inferences to explain an individual's functional abilities or deficits related to a legal competence.* That is, when a person's deficient abilities related to the legal competence are known, the legal competence construct requires ascription of the likely reasons for those deficiencies."[371] Most competence standards require that legally recognized deficiencies originate from a mental illness or mental disability.[372] Indeed, some have argued that depriving an individual of a constitutional right in the absence of mental impairment would be unconstitutional.[373]

Limiting the legal recognition of a functional disability to those deficits caused by a mental illness or disability would help ensure that courts do not deprive individuals of their constitutional right to represent themselves merely because their choices are odd or different. A fundamental tenet of mental health law is that "the legally relevant behavior of mentally disordered persons is a product of their mental disorder and not of their free choice."[374] A state's power to deprive an incompetent defendant of his Sixth Amendment right to self-representation and to impose a substitute decisionmaker extends from its *parens patriae* authority.[375] Therefore, the justification for a

370 *See* Thomas Grisso, *Legally Relevant Assessments for Legal Competencies*, *in* EVALUATING COMPETENCIES, *supra* note 59, at 21, 29–32 (2d ed. 2003); *see also* Morse, *supra* note 187, at 539 ("The structure of all mental health laws is fundamentally the same: all require findings of (1) a *mental disorder*; (2) a *behavioral component*; and (3) a *causal connection* between the mental disorder and the behavioral component (at least in principle).").

371 Grisso, *supra* note 370, at 29.

372 *Id.* For statistics and other information particular to guardianship, see Moye, *supra* note 338, at 326, and Anderer, *supra* note 23, at 5–6, reporting that guardianship statutes in thirty states include mental illness among specified disabilities, and that thirty-six states employ more general terms such as mental deficiency, mental disability, mental condition, mental infirmity, mental incapacity, weakness of mind, mental weakness, mental deterioration, or in need of mental treatment.

373 *See* Anderer, *supra* note 23, at 7–8; *see also In re* Conservatorship of Goodman, 766 P.2d 1010, 1011–12 (Okla. Civ. App. 1988) ("If a purpose of the statute is to allow involuntary intervention in the property affairs of citizens, absent a finding of mental incompetence, it is unconstitutional as it is a clear violation of the State and Federal Constitutional provisions which guarantee every citizen the right to life, liberty and property." (citing U.S. CONST. amends V, X, XIV; OK CONST. art II, §2)); State *ex rel.* Shamblin v. Collier, 445 S.E.2d 736, 740 (W. Va. 1994) (quoting *In re Conservatorship of Goodman*, 766 P.2d at 1011–12).

374 Morse, *supra* note 187, at 539 n.19.

375 *See generally* Winick, *supra* note 64, at 1772 ("The *parens patriae* power allows government to engage in decisionmaking in the best interest of persons who by reason of age or disability are incapable of making such decisions for themselves.").

state's intervention should be to protect the defendant from decisions that stem from illness or disability rather than from those choices that are the product of the individual's free will.[376] Put simply, individuals capable of rational, autonomous decisionmaking should not have to suffer the state's "protection" or the abdication of their ability to make choices. Requiring demonstration that a functional deficit stems from a mental disorder or disability should restrict the application of the state's *parens patriae* power to its legitimate boundaries and "prevent the application of the incapacity standard to those whose decisions are merely eccentric or unpopular."[377] A court has other tools besides findings of incompetence to deal effectively with disruptive or obstreperous behavior that is the product of a defendant's conscious, rational will.[378] Requiring a causation component thus serves as an important safeguard of a defendant's autonomy and prevents excessive state paternalism.

In addition, to some degree, a causation requirement would prevent findings of incompetence based on functional deficits that are temporary.[379] For instance, a person could exhibit functional disabilities as a result of sleep deprivation, grief, ingestion of medication, or drug withdrawal. In such circumstances, a short passage of time could resolve the underlying condition and restore the individual's functional ability, thus proving unwarranted the rejection of self-representation in a particular case.[380] Therefore, to support a finding of representational incompetence, the cognitive or behavioral deficit should be the product of an enduring and disabling condition that is beyond the individual's ability to control or ameliorate.[381]

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376 *See* Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. PHIL. 105, 115 (1971) (arguing that there must be "further evidence of derangement, or illness, or severe depression, or unsettling excitation" before an individual's actions may be deemed involuntary).

377 Anderer, *supra* note 23, at 6.

378 *See* Illinois v. Allen, 397 U.S. 337, 343–44 (1970).

379 *See* Grisso, *supra* note 370, at 30.

380 *See generally* Moye, *supra* note 338, at 325–26 (explaining that appointing a guardian may not be necessary if the functional deficiency can be modified or remediated easily). When a defendant is found incompetent to stand trial, but a substantial probability of future competence exists, courts regularly order mental health treatment in an attempt to restore competence. *See* Stephen G. Noffsinger, *Restoration to Competency Practice Guidelines*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 356 (2001). The great majority of defendants initially found incompetent to stand trial regain competence after weeks or months of treatment. *See* Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 980 (1985).

381 *See* Moye, *supra* note 339, at 325–26 (discussing state guardianship statutes' requirement of a causal component).

CONCLUSION

Was Jeffrey Connor competent to represent himself? Ultimately, the trial judge found that he was.[382] State law held that a defendant competent to stand trial was necessarily competent to represent himself, so the judge's inquiry focused on Connor's powers of understanding.[383] The trial court also considered Connor's problem-solving skills. The court determined that Connor had launched a "calculated" plan to thwart the prosecution by refusing to cooperate with court-ordered competence exams and pretending to be comatose in court.[384] A consulting forensic psychiatrist opined that Connor's unwillingness to cooperate likely was motivated by a fear of leaving "the security of a correctional institution."[385] Connor ultimately revealed his ruse to the court, explaining that the prior trial judge had been a "total jerk."[386] Connor's antics delayed his prosecution for nearly two years.[387] This ability to manipulate the criminal justice system, in the eyes of the presiding trial judge[388] and the state supreme court on appeal,[389] indicated that Connor possessed the degree of competence required by the Sixth Amendment.

Other evidence supports the court's finding that Connor was competent to represent himself at trial. Connor appeared to perceive problematic situations, possessed a willingness to attend to the prosecution (once he stopped malingering), appeared capable of communicating adequately with the court and jury, and was able to withstand

382 *See* State v. Connor, 973 A.2d 627, 641–42 (Conn. 2009).

383 *See id.* at 656.

384 *See id.* at 641 & n.10.

385 *Id.* at 639 (quoting Dr. Huberto Temporini).

386 *See id.* at 641. Connor responded to Judge Espinosa's comment that he had refused to speak or participate in court proceedings by stating, "Yes, I know. Because the judge over in that other courtroom was a total jerk." *Id.* He also explained that he had failed to cooperate because he did not want Lorenzen, a public defender, to represent him and had been unsuccessful in dismissing him. *Id.*

387 *See id.* at 634–35 (failing to cooperate with a competence evaluation ordered on June 2, 2004); *id.* at 642 (standing trial on April 27, 2006).

388 *See id.* at 641 ("[Connor] devised a calculated plan to disrupt the trial in front of Judge Miano because he wasn't getting his way with his lawyer . . . .").

389 *Id.* at 652 ("Our conclusion [that the defendant was competent to stand trial and to waive his right to counsel under the Sixth Amendment] is buttressed . . . by the fact that the trial court reasonably found that the defendant had engaged in a pattern of malingering, which apparently was designed to subvert the state's efforts to bring the defendant's case to trial.").

the stress of trial.[390] He also demonstrated adequate decisionmaking abilities, at least for certain key decisions. For instance, Connor articulated several plausible reasons for waiving his right to counsel. Connor explained that his court-appointed attorney "doesn't do his job. He's not doing no justice for me. I can do a better job myself."[391] He also complained that his attorney did not respond to his letters or phone calls,[392] refused to call the witnesses whom Connor requested,[393] and had lied to him.[394] One other reason expressed by Connor for dismissing his attorney—that his counsel had "crippled" him[395]—was potentially implausible. But, under the test delineated in this Article, one plausible reason would suffice to demonstrate adequate decisionmaking ability for waiving the right to representation.

Some aspects of Connor's representation at trial are more troubling, however. First, it is unclear whether Connor was capable of supporting his chosen defense with a plausible reason. Connor appeared obsessed with outstanding detainers or warrants[396] and seemed to believe that the length or circumstances of his incarceration might provide a defense to the charges of kidnapping, robbery, and larceny.[397] The State argued that "[t]he fact that the defendant's trial strategy may have been suspect . . . has no bearing" on whether he was

390 The sufficiency of Connor's abilities to gather information to define the contours of a problem, generate alternative courses of action, and identify a plausible origin for the prosecution is unclear.

391 Brief of the State of Connecticut—Appellee with Attached Appendix, *supra* note 7, at 7 (quoting Transcript of Record, *supra* note 1, at 6).

392 *See* Brief of the Defendant with Attached Appendix, *supra* note 1, at 9.

393 *See Connor*, 973 A.2d at 641. Connor apparently gave his attorney a list of 120 witnesses to call, of which his attorney selected five. *Id.*

394 Brief of the State of Connecticut—Appellee with Attached Appendix, *supra* note 7, at 14 (quoting Transcript of Record, *supra* note 1, at 25–26).

395 Brief of the Defendant with Attached Appendix, *supra* note 1, at 3. Though it is unclear from the record, it is possible that Connor meant that counsel had failed to obtain an earlier trial date so a medical issue in his leg was allowed to fester and ultimately left him "crippled." *See id.* (responding to the trial court's question for why Connor wanted to dismiss his attorney: "Because he crippled me . . . [H]e didn't—he didn't get my speedy trial motion to go through, he waited all this time, three and a half years and—and my foot is literally purple, it's—it's—it's frozen" (alterations in original) (quoting Transcript of Record, *supra* note 1, at 8)).

396 *See* Brief of the State of Connecticut—Appellee with Attached Appendix, *supra* note 7, at 8.

397 *See Connor*, 973 A.2d at 642 ("The defendant . . . repeatedly referred to extraneous matters relating to his health and his treatment in prison, including his allegation that correction officers intended to kill him."); Brief of the Defendant with Attached Appendix, *supra* note 1, at 10.

competent to represent himself at trial.[398] But, if Connor's defense consisted of establishing the conditions of his confinement—and if his selection of that defense was premised on a belief, animated by mental illness or disability, that these conditions were somehow legally relevant—then this choice may indicate insufficient decisionmaking ability. However, it is also possible that Connor did not intend to wage an affirmative defense but rather sought merely to point out the shortcomings in the State's case. If this was his defensive strategy, then the choice appears to have been both rational and somewhat effective. According to the State, Connor successfully cross-examined the victim by pointing out two inconsistencies in her testimony and identified an apparent inconsistency in the testimony of an eyewitness.[399] The trial court recognized that Connor "handled things" such as cross-examination "very well,"[400] and Connor was ultimately acquitted of one of the charges against him.[401] Second, Connor may have been unable to maintain focus or mental organization during the proceeding.[402] Under the framework proposed in this Article, an inability to maintain mental organization over the course of the trial, if the product of a mental illness or disability, would be a valid basis for finding Connor incompetent to represent himself.

Perhaps for these reasons, the Supreme Court of Connecticut remanded *Connor* to the trial court to determine Connor's competence, given his mental incapacity or impairment, to "'carry out the basic tasks needed to present his own defense without the help of counsel.'"[403] The supreme court instructed the trial court to "consider the manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury."[404] The state supreme court declined to provide additional guidance on the substance of a measure for representational competence.[405]

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398 Brief of the State of Connecticut—Appellee with Attached Appendix, *supra* note 7, at 27.

399 *Id.* at 31.

400 *Id.* at 32 (quoting Transcript of Record, *supra* note 1, at 71).

401 *Connor*, 973 A.2d at 642. It is unclear the extent to which his acquittal of the stalking charge was due to effective cross-examination.

402 *See* Reply Brief of the Defendant-Appellant with Attached Appendix at 2, 4, *Connor*, 973 A.2d 627 (No. S.C. 18101).

403 *Connor*, 973 A.2d at 657 (quoting Indiana v. Edwards, 554 U.S. 164, 175–76 (2008)).

404 *Id.*

405 *Id.* at 657 n.32.

This Article draws upon social problem-solving theory to suggest necessary elements of a representational competence standard. In particular, problem-solving theory suggests that, to represent oneself at a criminal trial, one should possess foundational abilities to perceive problematic situations, generate alternative courses of action, maintain mental organization, and communicate decisions to a functionary of the court. Within the context of a prosecution, a defendant should also possess the ability to identify a plausible source of the prosecution, an ability to gather information to evaluate the state's case, a willingness to attend to the prosecution, and an ability to withstand the stress of trial. Finally, for certain key decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying a decision with a plausible reason. So long as a pro se defendant possesses these capacities, his self-representation should satisfy minimal requirements of reliability and fairness and accord sufficient deference to the important principle of autonomy.