
Terry A. Maroney

The Champion, April 2009

The legal standards for adjudicative competence appear simple: as the U.S. Supreme Court declared in Dusky v. United States, the substantive test is whether a criminal defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings.” It is clear, too, that the defendant has a fundamental constitutional right not to be tried, convicted, sentenced, or executed while incompetent, and the procedure by which competence is raised and determined is relatively straightforward. But this apparent clarity is deceiving. Despite its evident importance and solid historical pedigree, adjudicative competence remains surprisingly ill-defined. The substantive meaning of Dusky — notably the distinction between “rational” and “factual” understanding — has escaped significant elaboration. Implementation of Dusky is also highly unpredictable, as it generally falls to forensic experts to whom courts defer heavily but to whom guidance is seldom given. Forensic experts and legal theorists have collaborated to define and measure competence-relevant facts, but these standardized tests are not yet widely used.

A coherent theory of competence is possible, and it promises greater clarity and uniformity. The “rational understanding” component of Dusky should be understood to require “decisional competence,” that is, a defendant’s capacity to make, communicate, and implement minimally rational, self-protective choices within the context of the criminal case. The crucial, yet to date entirely unexplored, next step is to recognize that both cognition and emotion — colloquially, thinking and feeling — make important contributions to such capacity. Thus, assessment of Dusky competence requires careful attention to both the cognitive and emotional influences on rational decision-making.

This article takes on both aspects of the argument. It first shows how decisional competence forms part of the Dusky standard. It then proposes a framework for defining such competence and illustrates how that framework informs cases involving cognitively impaired defendants, particularly those suffering from thought disorders (such as paranoia and schizophrenia). Turning to the role of emotion in rational decision-making, it shows how profound emotional dysfunction — including severe depression and certain forms of brain damage — also can defeat Dusky competence.

I. ‘Rational Understanding’ and Rational Decision-Making

Adjudicative competence doctrine, like all law-relevant competencies, traditionally has sought to balance competing interests. On the side of finding competence wherever possible are respect for a defendant’s autonomy and the state’s interest in enforcing its criminal law; the countervailing interest is that of protecting those who cannot protect themselves. For the adversary system to have legitimacy the defendant must be meaningfully present as an autonomous actor capable of taking, should she so choose, permissible steps to attempt to protect herself from the assertion of state power.

Adjudicative competence therefore may be implicated at any stage in a criminal proceeding at which it appears that the defendant may lack self-protective capacity. At whatever stage competence is examined, the proper inquiry is whether the defendant is capable of making at least minimally rational decisions in service of her defense. While this focus on “decisional competence” has not been explicitly endorsed by the Supreme Court, it is implicit in the case law; indeed, it is hard to imagine a viable concept of competence that excludes it.
The roots of the decisional competence construct may be found in the “rational understanding” component of Dusky itself. Dusky involved a schizophrenic defendant who “understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, … knew who his attorney was and that it was his duty to protect the defendant’s rights,” and could furnish at least some relevant historical information with substantial accuracy. His incompetence, experts testified, stemmed not from inability to grasp factual concepts but, rather, from “confused thinking” caused by his mental illness, which rendered him unable to “interpret reality from unreality.” Nonetheless, the district court found Dusky competent. The Supreme Court disagreed, holding that factual understanding was necessary but not sufficient for competence. What was also required was some sort of “rational understanding,” which, though apparently crucial, remained undefined.

Subsequent cases attempting to define what evidence would raise a bona fide doubt as to Dusky incompetence have yielded some additional hints as to what types of irrationality might be relevant. The Court, while resisting any attempt to define a general standard, has delineated certain facts that generally warrant further inquiry — such as a “history of pronounced irrational behavior” or a recent suicide attempt — and others that are insufficient to foreclose the inquiry even if relevant to the ultimate determination — such as lucid speech and behavior in the courtroom. Despite these clues, the value added by “rational” understanding remained unclear.

That situation changed somewhat with Godinez v. Moran, in which the Court answered a debate as to whether different substantive standards of competency applied to different aspects, or at different stages, of a criminal proceeding. The short answer was no. The Ninth Circuit had asserted there was a difference between a defendant’s capacity for ‘reasoned choice’ among the alternatives available to him and Dusky competence, with a showing of the former being additionally required before a Dusky-competent defendant could discharge counsel and proceed pro se. The Court disagreed, asserting instead that the concepts were the same. Listing the array of choices required of defendants whether they go to trial or plead guilty, the Court held that the same standard applied to both universes of decision-making. The only sense in which a higher standard might apply is that certain decisions — such as to discharge counsel and plead guilty — additionally require a separate determination that they were made knowingly, intelligently, and voluntarily.

Decided more than three decades after Dusky, Godinez represents the Court’s most specific effort to explain “rational understanding.” Though some have read the Court’s failure to use the term “decisional competence” as a sign that decision-making abilities need not be considered in determinations of adjudicative competence, this conclusion is belied by the its nearly single-minded focus on defendant decision-making. This confusion should be put to rest. Decisional competence, or a defendant’s capacity for rational decision-making in the context of her case, should be recognized as the core of “rational understanding.”

Accepting a role for decisional competence requires a theory as to the necessary components of rational decision-making with reference to the particular decisions facing criminal defendants.

Some decisions — for example, strategic calls as to whether to waive indictment or demand certain forms of discovery — routinely are entrusted to the attorney, while others are the province of the defendant. These defendant-driven decisions are whether to demand a jury trial, represent oneself, testify on one’s own behalf, be present at trial, or plead guilty. More broadly, the defendant is thought also to have the right to make global decisions as to the theory of her defense — for example, whether to pursue an insanity defense — and the objectives to be pursued by counsel. Thus, when we speak of decisional
competence, it is the competence to make these choices, not a more general decision-making capacity, about which the law should care. The decisional capacity we demand is that which renders her capable of making critical, defendant-driven decisions in a minimally rational and self-protective manner.

Still, the content of such “rationality,” a term that is far from self-defining, requires yet further explication. The vast decision-making literature yields some consensus as to the necessary building blocks of rational decisions. The model of rational human decision-making offered here incorporates four complex underlying concepts, each of which represents a site of potentially competence-threatening “irrationality.” These crucial elements are perception, understanding, reasoning, and choice.

What follows is an analysis of how any one of these elements may be imperiled by severe cognitive or emotional disorder, resulting in possible incompetence. The usefulness of the model is most clearly seen by examining the competence of persons with thought disorder — that is, dysfunction in cognitive thought processes that generally is identified by its effect on either the content or form of speech (e.g., delusional thoughts or disordered speech patterns).

Thought-disordered defendants, particularly those with schizophrenia, often are labeled “psychotic,” a label strongly associated with findings of incompetence. Indeed, many forensic examiners (wrongly) regard psychosis as the sine qua non of incompetence, starting and ending their analysis with that diagnosis. Unfortunately, why psychotic thought disorder is thought to disrupt Dusky rationality seldom is made plain. There are, however, several prominent exceptions. Those courts that have attempted to explain the relevance of psychosis generally have located decision-making defects at the stages of perception and understanding.

Perception, or the human body’s transformation of sensory stimuli into internal images, is a crucial threshold requirement, but is not as straightforward as it may seem. Because sensory stimuli are transformed into conscious perceptions by complex (and largely nonconscious) neural processes, factors ranging from stress to neurological disorder can intervene, with sometimes seriously distorting consequences, between percept and perception. Once an object is perceived, with or without prior distortion, a decider will form thoughts and beliefs — or understandings — about it. Generally accurate understandings about relevant aspects of the external world are, like perception, necessary but not sufficient for competent decision-making.

Defendants with severe psychosis frequently display perceptual and understanding processes that are so profoundly distorted as to obviate competence. Such was the conclusion in Lafferty v. Cook,9 an unusually thoughtful decision by a sharply split Tenth Circuit panel. Ronald Lafferty was diagnosed as suffering from a “paranoid delusional state” but deemed competent; he then attempted suicide by hanging, and four examiners opined that Lafferty’s “paranoid delusional system,” aggravated by oxygen deprivation to his brain, had rendered him incompetent by impairing “his ability to perceive and interpret reality.” Lafferty’s delusions included the belief that all those involved in his case — including his lawyer — “were part of a corrupt man-made order” against which he was required by God to rebel. Because he, like Dusky, displayed factual understanding of the proceedings, the majority recognized that its task was to determine the meaning of “rational understanding.” The Lafferty majority determined that “a defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him.” Thus, it concluded, “sufficient contact with reality” is the “touchstone for ascertaining the existence of a rational understanding.”

This test has been adopted by a small handful of other courts. In In re Heidnik, for example, the Third
Circuit found a death row inmate incompetent to abandon appeals because his decisions were based on a flawed “perception of reality,” including “fixed false beliefs,” “all-encompassing in nature,” that his victims had killed themselves and that his execution would lead to the end of capital punishment.10 A similar approach was taken in Utah v. Mitchell, in which Brian David Mitchell was found incompetent to stand trial for the kidnapping of Salt Lake City teenager Elizabeth Smart.11 After determining that Mitchell suffered from a delusional disorder characterized by fixed, false beliefs (including that God required his imprisonment in order to trigger a personal battle with the Antichrist), the court concluded that his “ability to accurately perceive and interpret external reality” was unduly impaired. The court therefore found him unable to make rational choices, which it equated with “rational understanding.” Thus, as these cases demonstrate, severe cognitive defects in perception and understanding can impede a defendant’s ability to make decisions on his own behalf.

Defects in reasoning — the process by which one draws inferences and conclusions from premises — also can defeat competence. For example, were a defendant to correctly understand (and believe) that all defense attorneys are their clients’ advocates, and perceive that the person assigned to represent her is a defense attorney, and yet conclude that her defense attorney is the state’s advocate, we would conclude that her logical reasoning is impaired. Significantly, though, such defects are seldom reflected in the cases. Reasoning does not appear to be nearly as threatened by psychosis as are perception and understanding. In the cases cited above, courts have found incompetence despite intact logical capacity. Lafferty’s reasoning was logical — his decisions, such as an effort to discharge counsel, were consistent with his premises, namely, that his lawyers were out to get him. But the court found it dispositive that delusional beliefs irredeemably distorted his premises. This makes sense: while deductive reasoning is necessary to competence, it is far from sufficient, for such reasoning maps poorly onto real-world decision-making, in which the validity of premises matters and where decisional conditions are often confusing and in flux.

The extent to which courts have identified competence-threatening defects in choice — formulating a conclusion, expressing that conclusion, and taking action accordingly — is limited. Choice is nonetheless important, as a defendant might display valid reasoning on the basis of sound premises and yet reach a conflicting or somehow irrational conclusion, lack ability to communicate her choices, or be unable to act in accordance with her choices. For example, Lafferty had chosen to discharge counsel but was unable to take action implementing that choice. For reasons that he would not explain, he refused to put his expressed desire to represent himself on the record in the required form, with the result that counsel was not discharged.

With psychosis, then, the most endangered sites within the rational decision-making process appear to be perception and understanding, though psychosis could also frustrate flexible reasoning and destabilize choice. The cited decisions represent some of the only examples of an overt attempt to define rational understanding by reference to affected stages of rational decision-making processes. This approach, though controversial, has the advantage of being transparent and principled. And this approach need not be confined to thought disorders: other, possibly less obvious, disorders — including emotional disorders — might have equivalent impact.

II. Emotional Competence And Rational Understanding
Defendants with profound impairments of emotional perception, processing, and expression may be equally unable to make self-interested rational decisions, although they may appear to be in touch with reality in a way that psychotic persons often do not.

The role of emotional disorder in adjudicative competence remains almost entirely unexplored. Indeed, it
is sometimes deliberately disregarded.

Emotion has a significant influence on all four stages of decision-making. It represents an important mechanism for the perception and processing of information, one that captures different information than would cognition alone. Emotion also affects the perceived value, personal relevance, or attractiveness of the information being processed, and therefore will shape motivation and goals.

First, emotion influences which stimuli are perceived and how they are perceived. Because emotionally salient stimuli tend to be the ones of greatest significance to one’s survival and thriving, they will be attended to disproportionately. Thus, one without emotion’s guidance will find herself unable to sort among the nearly infinite competitors for her attention. Extremes of emotion may also influence perceptual recall. In acute cases of trauma, for instance, persons might become unable to recall the incident, or instead may recall it so vividly and frequently that other information is kept out of accessible memory. Thus, the emotional salience of stimuli can substantially affect attention to, as well as perception and memory of, both those stimuli and emotionally nonsalient stimuli.

Emotion also has a strong influence on understanding, particularly through processes called “appraisal” and “appreciation,” interdependent concepts that concern awareness of personal significance. Appraisal is a lightning-fast judgment as to whether and how particular stimuli matter to one’s well-being and goals, a judgment that will then shape information processing. Intact appraisal leads to emotional reactions to personally relevant stimuli. Such appraisal and the attending emotion then contribute heavily to the specific understanding, or appreciation, that information presented to (and decisions required of) a person is applicable to her and carries consequences for her personal situation. For example, a defendant may understand that the death penalty is a potential consequence of her prosecution. To say that she cannot appreciate that fact would mean that she has appraised, wrongly, that it does not apply to her — for example, because she believes that she is immortal — or that she realizes that it applies, but does not attach to that realization any emotional significance. A person without appreciation does not have access to the fear, hope, or other emotional reactions to relevant information that normally would guide personally consequential decision-making.

Reasoning also will be influenced by emotion states. For example, one exposed to a negative feeling (e.g., fear evoked by recalling the sighting of a snake) generally will report an increased (and likely inaccurate) estimation of the likelihood of future occurrence of events that, though completely unrelated, may provoke the same negative feeling (e.g., a terrorist attack). Finally, emotion can profoundly influence choice, including its communication and implementation. The person described above, inordinately fearful of a terrorist attack, might make specific choices (e.g., engaging in increased risk avoidance) on the basis of her affectively driven reasoning. Emotion-driven choice can also be far more primal. Feeling-states predispose the actor to particular behavioral responses — anger, for example, is highly associated with risk-taking behavior and aggression, fear with risk avoidance and escape. Some emotional experiences — notably fear — are nearly automatic responses, with the result that they are experienced as involuntary. Extreme emotional instability may also cause inability to maintain a consistent choice preference.

As this brief discussion reveals, not only is emotion not the natural enemy of rationality, it is intimately connected to the perception and processing of information, appraisal of value, formation of goals, motivation of behavior, and implementation of choice. Emotion can contribute to rational thought by marking stimuli as meaningful and generating a sense of personal relevance and value that will shape goals and motivations. Thus, a lack of emotion where one normally would expect it to be present can deprive the decision-maker of vital information and guidance. Excessive or disordered emotion can also
derail optimal perception, understanding, reasoning, and communication, or may override one’s otherwise preferred choices. A complete account of Dusky rationality therefore demands close attention to the positive and negative contributions of emotion.

I here propose two situations in which emotion ought properly to be considered in determinations of adjudicative competence. The first is that of defendants with psychiatric illnesses, particularly severe depression, that impair accurate perception and processing of information, derail self-protective motivation, and impair stable, self-interested choice. Here we are concerned about a lack of emotional balance, as well as the influence of a surfeit of particular emotions, such as despair, and a dearth of others, such as hope. The second is that of defendants with neurological defects, usually caused by brain damage, that impair perception, processing, and expression of emotion. Here, our concern stems from a general lack of access to emotion.

The effects of severe depression on attention, perception, concentration, and memory are well-recognized. First, the severely depressed may focus so disproportionately on mood-congruent stimuli (e.g., facts indicating the situation is hopeless) as to neglect important contrary information. Further, depression may become so severe as to incorporate delusions and hallucinations. Depression may also block self-interested motivation. A severely depressed defendant may be capable of accurately grasping the facts of her situation and options but simply not care about what the correct course of action might be or how it might affect her well-being. Even if she does care, the normal direction of such caring may be reversed: she may want to take undue risks and may choose a self-harming outcome.

Bipolar (or “manic”) depression can be equally devastating. When in a manic episode, these persons are highly distractible and unable to distinguish between relevant and irrelevant stimuli and thoughts. They often will exhibit extremely fast, pressured, tangential, and even nonsensical speech, as well as grandiose delusions as to their personal power and importance. The manic reason poorly: they overestimate wildly their personal abilities and chances of success in difficult situations. Further, they are prone to impulsive and imprudent choices, often seeking immediate pleasure and gratification. Their extreme lability of affect can occasion frequent, dramatic changes of course.

The case law generally does not reflect significant examination of the effects of depression, whether unipolar or bipolar, on competence. However, because mood-disordered defendants present with some regularity, so too do these issues, though the cases reflect a highly confused attitude as to their relevance.

On the one hand, depression is sufficiently well-recognized (and its effects potentially so devastating) that courts sometimes take note of it. In Drope v. Missouri, for example, the Supreme Court found that while a recent suicide attempt did not per se signal incompetence, it was highly relevant to whether an inquiry was required.12 More recent cases reflect a similar acknowledgment that depression is relevant, though there is no particular consensus as to how or why.13

Frequently, though, courts dismiss the import of depression in a manner that reflects a strong privileging of cognition.14 For example, courts sometimes appear to believe that depressed persons could be motivated to care about their fate if they chose to be so motivated — displaying a fundamental ignorance of the impact of depression on appreciation and motivation.15

The tension between these attitudes as to the impact of depression is perhaps most clearly seen in the context of execution volunteer cases. Because competent defendants are free to decide whether to challenge a lawfully imposed punishment, death row inmates generally will be presumed able to
acquiesce to execution; but because such acquiescence may spring from suicidal depression, best friends often come forward to try and prevent what they consider a suicide.

In this battle, confusion reigns supreme — but a disproportionate focus on cognition is winning. This was the case in Rumbaugh v. Procunier,16 in which the Fifth Circuit, though recognizing that Rumbaugh’s severe depression could render him “irrational,” noted that he had filed “an extremely coherent and well-reasoned pro se state habeas corpus petition.” The court upheld the finding of competence because Rumbaugh’s decision to end his life was “logical”; he was “able to feed relevant facts,” such as “the intense suffering caused by his depression,” into “a rational decision-making process and come to a reasoned decision.”17 In other words, that depression may have warped his premises — leading to a conclusion that execution was preferable to life as a severely depressed person — was of no consequence, in contrast to the consideration rightly given to distorted premises attributable to psychosis. As the dissenting judge correctly argued, the opinion rested on a limited, cognition-driven standard of rationality, erroneously equating “’rational’ with logical” and wrongly holding that “a person’s cognition, his understanding, is … tantamount to an ability to choose rationally.”18

Thus, the cases reveal a real and persistent disagreement over the appropriate level of consideration to be given to depression. Unfortunately, the general resolution of that debate reflects simplistic notions of decision-making, consisting of nothing more than intact cognition plus the powers of deductive reasoning.

Another competence-relevant manifestation of emotional dysfunction stems from brain damage, particularly to regions of the frontal lobes. The emotional deficits associated with such damage are highly correlated with inability to make self-protective choices in situations of risk to one’s own thriving, despite retention of cognitive capacity.

Evidence of concurrent emotion-and-reasoning deficits attending brain damage, now solidly supported by the cognitive neuroscience literature, is grounded in the story of the most famous neurological patient in history, Phineas Gage.19 In 1848, Gage survived a railroad-construction accident in which an iron rod was propelled at high speed through his head. Gage’s miraculous recovery, however, was elusive. Though still intelligent and skilled, he underwent profound personality change, alienated family and friends, and became unable to keep a job; in fact, as his doctor recalled, “he was good at ‘always finding something which did not suit him,’” and appeared to have become incapable of planning or forethought.20

The Gage case led to a number of fundamental insights, notably that “a lesion of circumscribed areas of the brain could cause the loss of very specific mental or nervous functions in humans.”21 Further, that the “new Gage” lacked emotional regulation and became unable to plan for (or execute action toward) a stable future suggested that such abilities might be both intertwined and dependent on the ventromedial portions of prefrontal cortex, the brain areas damaged in his accident. The insight proved true: damage to these areas has been shown to interfere with social and emotional, but not cognitive, competence. It is now widely accepted that brain damage affecting emotional perception, processing, and expression — particularly damage to the frontal cortices — is correlated with diminished rationality in the realm of personal decision-making.

This research has three important implications. First, persons with frontal lobe damage might with some regularity become defendants, as their extreme decision-making deficits may lead to poor choices (and, in rare cases, disinhibited and aggressive behaviors) with criminal consequences. Second, they may exhibit intact cognition and yet be incapable of the kind of high-stakes, personal decision-making required of defendants. In these cases, failure to consider impaired emotional capacity might lead to an erroneous finding of competence, either because deadened emotion is not recognized as a clue leading to further
inquiry that might uncover brain damage, or because of imposition of an overly cognitive test in which the emotion and decision-making deficits, even if proven, are dismissed as irrelevant. Third, other brain-damaged persons (for example, those with more diffuse injuries) may display the above-described impairments as well as cognitive and motor deficits. As competence determinations look to the combined effects of impairments, failure to take seriously those going to emotion could remove important information from the calculus.

These issues are novel, and to the limited extent that they have been addressed by courts they have met with inconsistent results. Consider North Carolina v. Shytle.22 Shytle shot herself in the head after killing family members; though her intelligence and memory were intact, the injury “impaired her emotional response[s] to situations” and led to inappropriate behavior, such as laughing at serious moments, suggesting that she failed to grasp the seriousness of her plight. One examiner testified that she was incompetent because “her affective appreciation of events ha[d] been lost,” preventing her from “understanding her legal situation and cooperating with her attorney.” The North Carolina Supreme Court was asked whether, “if an individual’s cognitive, reasoning ability is separated from basic emotional responses or affect,” she would be “competent not only to aid in [her] defense but also to proceed to trial.” The court found her competent:

[T]he defendant had an IQ within the normal range and … knew what the charges were and what could happen to her if she was convicted. If this did not worry or upset her because of her altered medical condition, it does not mean that she did not understand those facts. … If the defendant’s situation did not bother her it does not mean she did not comprehend it.

This analysis — in which the extreme abnormality of Shytle’s lack of emotional reaction was sanitized by the presence of factual understanding — ignores the importance of rational understanding. Though in a very different procedural context, a similar conclusion was reached in the recent clemency petition of Donald Beardslee.23 Cognitive function simply trumped emotional dysfunction.

In contrast, consider “Jane,” who suffered from an undiagnosed defect known as an arteriovenous malformation (“AVM”) in the left frontal lobe of her brain.24 Jane, previously accomplished and principled, began suddenly to engage in obviously foolish financial schemes, lost all her money, and was convicted for minor participation in a fraudulent investment scheme. At sentencing, a brain scan (obtained by new counsel seeking to determine the cause of her sharp downfall and struck by her odd emotional profile) showed the AVM and associated brain damage. Neuropsychological testing revealed that Jane retained her high intelligence and cognitive abilities, which had largely masked others’ ability to recognize her deficits. However, her affect was noticeably constricted and she was consistently unable to make self-protective choices in personal, particularly financial, matters. She appeared utterly incapable of perceiving the evident mental instability of the fraud’s ringleader and was strangely detached from the extremely serious repercussions of her conviction. A court-appointed expert, after considering the defense’s evidence and examining Jane, opined that she was incompetent to be sentenced. Jane’s case would appear to be the first in which an examiner has relied on this sort of evidence to find incompetence. Were the approach offered in this article followed, it would not be the last.

III. Measurement and Policy Considerations
Is emotional competence amenable to accurate, consistent definition and measurement? As the same question applies to all possible causes of incompetence, the real question is whether there is something about emotional disorder that makes it so different from cognitive disorder as to prevent it from being
considered. While there is good reason to raise this question, the answer is no.

The search for “rational” cognition is, after all, not very different from the search for “rational” emotion; as LeDoux has pointed out, “cognition is not as logical as it was once thought and emotions are not so illogical,”25 and as to both we operate with reference not to an ideal but to a rough account of the normal. People consistently exhibit non-rational decision processes and routinely make foolish choices. We are not concerned about this “everyday” irrationality; competence cares only about profoundly abnormal irrationality and assumes that we can tell the difference. This is never an easy call, even with cognitive dysfunction, but it is not significantly harder where emotional dysfunction is concerned. A defendant need not have optimal emotional health to be competent, just as she is not required to display above-average intelligence and sharp reasoning skills. But if a defendant displays extreme disorders that seriously disrupt one or more identifiable stages of minimally stable, self-protective decision-making processes, we should not care if they are cognitive or emotional in origin.

Clinical depression, in particular, is a relatively well-understood disease. What is lacking is not a strong empirical foundation for depression diagnoses; it is, rather, a strong theoretical foundation — such as that offered here — affirming that depression matters to competence, and explaining how. If courts direct examiners to make such assessments, those examiners have ready access to the diagnostic tools to comply.

The instances of brain damage discussed here are rarer and less well-understood. Still, where a strange emotional profile — particularly one of affective flatness and inability to “read” the emotional signals of others — presents together with a history of evidently self-destructive behaviors, there is good reason to suspect such disorder, raising a bona fide doubt as to competence sufficient to warrant further inquiry. Whether any resulting evidence of brain damage establishes Dusky incompetence will depend on its exact nature and the extent to which it disrupts the defendant’s ability to make sound, self-protective decisions in the context of her case.

Even if we are satisfied that we can incorporate emotion into competence determinations, we still must ask if we should. It is possible that fewer defendants will be deemed incompetent under the proposed approach, because the effort might lead examiners away from simplistic determinations — for example, de facto equation of psychosis with incompetence — but it is likely to result in more incompetence determinations, particularly of the depressed. Undue expansion of the test could both impair defendants’ autonomy and frustrate the state’s interest in public safety and law enforcement.

Structural features of the competence determination, however, largely guard against any serious threat to autonomy and public safety. In nearly every case, the consequence of an incompetence determination is not termination of proceedings: it is a delay while the defendant is evaluated and treated. Extensive delay can both curtail defendants’ freedom and weaken a prosecution case, but confinement for restoration of competence may not continue indefinitely and must be justified by treatment progress, creating incentives for timely resolution. Depression often is amenable to treatment, and in very extreme cases medical staff may administer such medication involuntarily. Evaluation and treatment also is useful for detecting malingering (which is rare). Further, even if the interest in enforcing criminal law never is vindicated, the defendant might still be incapacitated, as should she be incapable of competence restoration but dangerous to herself or others she will be subject to civil commitment. And while the potential for encroachment on autonomy is real, most defendants (particularly those with viable defenses) who truly are capable of autonomous decision-making have strong incentives to try and prove that they have been wrongly identified as incompetent, to avoid both the stigma of involuntary mental health treatment and the possibility of long-term confinement with no opportunity for a determination of guilt or innocence.
Further, to the extent that some number of defendants might escape both prosecution and confinement, that is an acceptable price to pay. This is particularly relevant to brain-damaged defendants and the treatment-resistant severely depressed, who likely will be adjudicatively incompetent for life. Should such defendants be neither dangerous nor otherwise subject to civil commitment, they may in fact go permanently unwhipped of justice. But the number of such defendants is likely to be relatively small. They will by definition not present an imminent danger to public safety; and the ill effects of their disorders may be effectively cabined by surrogate decision-making, for example, by appointment of guardians. Such a result is far less offensive than the trial of an incompetent person in contravention of her fundamental constitutional rights.

Conclusion
This article has proposed a thinking-and-feeling conception of Dusky’s requirement of rational understanding. Defining and measuring the cognitive and emotional influences on defendants’ decision-making processes provides a transparent, workable, theoretically sound methodology for competence determinations. Under this approach, evidence of cognitive function never should be allowed simply to trump evidence of emotional dysfunction; nor should the converse be true. Adjudicative competence doctrine and practice should strive, rather, to reflect the harmonious integration of reason and passion in the brain. This is our best hope for giving meaning to “rational understanding.”


Excerpted with the invaluable assistance of Karla Momberger, an attorney specializing in indigent defense.

Notes
1. See The MacArthur Adjudicative Competence Study, Executive Summary, http://macarthur.virginia.edu/adjudicate.html (2001) (“[A]djudicative competence” is a “more appropriate term than ‘competence to stand trial,’ given that approximately 90 percent of all criminal cases in the United States are resolved by means of guilty pleas, rather than at trial”).
3. Part of the universe of legal competencies (which includes capacity to consent to medical care and research, enter into a contract, execute a will, and handle one’s own property and finances, as well as status-based incompetencies such as infancy), adjudicative competence includes competence to waive Miranda rights; plead guilty; dismiss counsel; stand trial and make the various decisions required during trial; pursue or abandon appeals and other avenues for post-conviction relief; and be executed. Because Miranda waiver and competence to be executed raise distinctive legal issues, they are not discussed here.
Subsequent to this article’s original publication, the Supreme Court decided Indiana v. Edwards, 128 S. Ct. 2379 (2008) (holding that some adjudicatively competent but mentally ill defendants may be prevented from choosing to discharge defense counsel). Edwards does not materially alter the analysis or conclusions herein offered. However, counsel confronted with a potentially irrational client who seeks to proceed pro se should consult that case and draw his or her own conclusions as to whether and how it applies.
4. That procedure may be summarized as follows. After a defendant is arrested and charged, any party (or the judge) may raise the issue of competence. The court will determine whether there is a bona fide
doubt as to competence. If not, the case proceeds (though the process may begin again if incompetence is argued at a later point). If so, the court will order an inquiry in conformance with the law of the jurisdiction, which will almost certainly entail examination by a mental health professional in an inpatient or outpatient setting. A clinical expert (or experts) will likely submit a report and testify, and probably will opine on the ultimate issue of competence. The trial court is overwhelmingly likely to agree with the expert recommendation. If multiple experts give differing testimony, the court is likely to side with the prosecution’s expert, as the burden of proof as to incompetence generally will rest with the defendant. If the defendant is found competent, trial will continue. If she is found incompetent, she will be subjected to a period of evaluation and treatment — potentially including involuntary medication should stringent requirements be met — in accordance with jurisdiction-specific timelines, bounded by an outside requirement of “reasonableness.” Should competence at any point be restored, proceedings will resume; but should the defendant be deemed unlikely to be restored to competence within a “reasonable” time, she must be released or civil commitment proceedings must commence. During a period of indeterminate incompetence it is not clear whether the criminal charges may remain pending, or for how long.

5. Actual or suspected incompetence affects a consistently significant percentage of misdemeanor and felony defendants: it is implicated in as many as 8 percent of cases, accounts for tens of thousands of forensic examinations and admissions to inpatient medical facilities every year, and easily is the most common subject of mental health testimony in criminal cases. The consequences of an incompetence adjudication are grave: such a finding may translate into long-term confinement, particularly for those deemed dangerous to themselves or others, without opportunity for a finding of guilt or innocence.


7. Godinez v. Moran, 509 U.S. 389 (1993). Indiana v. Edwards, 128 S. Ct. 2379 (2008), claims not to have altered the reasoning or conclusions of Godinez, but they appear to be in some tension. Counsel would be well advised to consult Edwards in determining how to frame a Godinez-based argument, particularly if a client seeks to discharge counsel.

8. 509 U.S. at 394. This “reasoned choice” standard was drawn from Rees v. Peyton, in which the Court held that a death row inmate was competent to waive appeals only if he were shown to have “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.” 384 U.S. 312, 314 (1966) (per curiam); see also Godinez, 509 U.S. at 415 (Blackmun, J., dissenting) (“The standard applied by the Ninth Circuit in this case — the ‘reasoned choice’ standard — closely approximates the ‘rational choice’ standard set forth in Rees.”).


15. See United States v. Rivera, No. 90 CR 1001-1, 1995 U.S. Dist. LEXIS 349 (N.D. Ill. Jan. 12, 1995); see also Commonwealth v. Goodreau, 813 N.E.2d 465 (Mass. 2004); United States v. Landsman, 366 F. Supp. 1027, 1029-30 (S.D.N.Y. 1973) (depressed defendant was competent despite “expressed lack of will to assist his defense” because he had the “ability” to so choose).


17. The court noted:
Rumbaugh is able to feed relevant facts into a rational decision-making process and come to a reasoned decision; ... one of the facts is that Rumbaugh is mentally ill, he has severe depression, with no hope of successful treatment, which would reduce his current mental discomfort to a tolerable level. ... [His] assessment of his legal and medical situations, and the options available to him, are reasonable[, though] if the medical situation vis-à-vis treatment were different, Rumbaugh might reach a different decision about continuing judicial proceedings. In other words, Rumbaugh’s disease influences his decision because it is the source of mental pain which contributes to his invitation of death.

Id. at 402. The court refused to conclude “as a matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience.” Id. at 403.

18. Judge Goldberg’s arguments were echoed by Justices Marshall and Brennan in a dissent from the denial of certiorari. See Rumbaugh v. McCotter, 473 U.S. 919, 919 (1985) (Marshall, J., dissenting). Though Judge Goldberg argued that Rees “rational choice” competence was different from Dusky “rational understanding” competence and that Rumbaugh would have been Dusky-competent, the case was decided before Godinez, and such comments no longer have persuasive force. See Rumbaugh, 753 F.2d at 411-12.


20. Damasio, Descartes’ Error, supra, at 9, 11 (quoting Dr. John Harlow, who memorialized his interactions with Gage in John M. Harlow, Passage of an Iron Rod Through the Head, 39 Boston Med. & Surgical J. 389 (1848-49)).

21. John T. Cacioppo & Gary G. Berntson, Social Neuroscience, in The Cognitive Neurosciences III 977 (Michael Gazzaniga et al. eds., 2004). Of course, few patients suffer brain injury because of metal rods like Gage’s tamping iron; bullets to the head, blunt trauma, and stroke are far more common.


23. See Pet. for Executive Clemency, Donald J. Beardslee (Dec. 30, 2004); Letter of James P. Fox, District Attorney, et al. to Arnold Schwarzenegger, Governor of California 7-8, 12 (Jan. 7, 2005); Governor Arnold Schwarzenegger, Statement of Decision: Request for Clemency by Mr. Donald J. Beardslee 3 (Jan. 18, 2005).

24. “Jane” is a former client of the author. All descriptions of Jane and her situation are based on factual statements made in publicly filed documents in her case.