

# Competency to Stand Trial and the Seriousness of the Charge

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Authorities disagree as to whether and how the mental capacity required for competence to stand trial should change as the charges against a defendant become more serious. Intuition and practice in other areas of law and psychiatry suggest that the mental capacity required should increase in these circumstances. The reasons relate to our belief that serious mistakes are more to be avoided and to a principle of “proportionality,” according to which the threshold level of capacity required is derived, in part, from the consequences of a person’s being found competent. The article compares two approaches to “proportionality.” The conclusions have implications for the wording of examiners’ conclusions and for the criteria by which patients are regarded as “restored to competence.”

*J Am Acad Psychiatry Law* 34:458–65, 2006

People don’t like to make mistakes. Knowing that mistakes happen, however, people weigh the consequences of the different kinds of mistakes they may make and alter their behavior accordingly. Walkers stay farther from the edge of a footpath when the gentle drop beside them gives way to a precipice.

This sense, that worse mistakes are more to be avoided, seems to explain the behavior of doctors and courts when they are asked to let an unconscious patient die. The seriousness of what is proposed prompts a meticulous search for evidence that the patient might improve or would want treatment to continue.<sup>1,2</sup> It also seems to explain why psychiatrists “overpredict” violence when forced to choose between sending home from the hospital someone who might act violently and admitting someone who might not.<sup>3</sup> They examine the consequences of the two types of error available to them and take those consequences into account when they make their decisions.<sup>4,5</sup>

The question of whether a defendant is competent to stand trial is similarly “binary,” in the sense that two types of error are possible. The defendant can be

incorrectly judged competent to stand trial or incorrectly judged incompetent. This article examines the implications of preferring some types of error to others for the assessment of competency to stand trial. It asks whether, all other things being equal, the seriousness of the charge that a criminal defendant faces should affect the evidence a psychiatrist gives and the conclusion a court reaches.

## The Mental Capacity Necessary for Competence

Trials are said to be more reliable when the defendant is competent.<sup>6</sup> He may be able to point to evidence of which other people are unaware. Fairness, too, seems to demand that he know what is happening and be able to contribute to his defense,<sup>7</sup> and the dignity of the law is protected when a convicted defendant knows why he is being punished.<sup>8</sup> These concerns suggest that someone who avoids a trial by pleading guilty should be competent also. The American Psychiatric Association observed that a mentally ill defendant who pleads guilty becomes a party to “a bargain to which he did not competently agree” (Ref. 9, p 5).

The principles of English common law preventing the trial of mentally incompetent defendants were incorporated into U.S. criminal law during the 19th

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century.<sup>10</sup> The first half of the 20th century saw these principles evolve into specific requirements that a defendant be able to understand what was happening during his trial and help his attorney.<sup>11</sup> The U.S. Supreme Court held in *Dusky* in 1960 that the proper question was whether the accused had “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him” (Ref. 12, p 402).

The American Bar Association (ABA) Standards for Criminal Justice<sup>11</sup> combined this *Dusky* standard for competence to stand trial with wording taken from the Supreme Court’s judgment in *Drope v. Missouri*, that a defendant be able to “assist in preparing his defense” (Ref. 13, p 171). Most states subsequently adopted the *Dusky* and *Drope* wording, either intact or with minor changes.<sup>14</sup> Connecticut General Statute 54-56(d) defines an incompetent defendant as someone, “unable to understand the proceedings against him or to assist in his own defense.”

In the wake of these legal developments, mental health professionals developed operational definitions of competence to stand trial.<sup>15</sup> Thirteen criteria listed by the Harvard Medical School Laboratory of Community Psychiatry included a defendant’s “appraisal of available legal defenses,” “understanding of court procedure,” and “capacity to testify.”<sup>16</sup> State<sup>17</sup> and federal<sup>18</sup> courts developed their own lists. The development of medical and legal criteria followed similar paths. In 1980, the Harvard Medical School criteria were enacted in Florida’s Rules of Criminal Procedure.<sup>19</sup>

### How Much Capacity Is Necessary for Competence?

These lists of requirements, along with others that have been developed more recently,<sup>14,20</sup> have the potential to act as an *aide-mémoire* and to help clinicians to structure both the reports they write and the evidence they give in court. They can also help doctors and lawyers to communicate with each other.<sup>8</sup> They describe the elements that legal competence might comprise. What they cannot do, however, is resolve the related questions of how much of each of these elements and what combination of them should suffice for legal competence.<sup>21</sup>

The usual position of the courts and academic authorities is that the answers depend on the case.

Like other forms of legal competence, competence to stand trial is said to be “contextual.” That is to say, whether a given person will be assessed as competent depends on the circumstances in which the assessment takes place.<sup>20,22–26</sup> The next question that arises, therefore, is which factors contribute to the “context” and, hence, alter the quantity or quality of mental capacity necessary for competence to stand trial?

The appellate courts have not provided a list. Some medical and legal commentaries make no reference to the necessary level of capacity’s changing with the circumstances.<sup>27,28</sup> Those who describe a threshold that varies from one case to another differ as to which aspects of the circumstances are important. The most frequently identified consideration is the complexity of the case. The ABA and others have suggested that complicated cases require more mental capacity,<sup>8,11</sup> echoing calls for a more demanding threshold in higher courts where the procedures can be more difficult to understand.<sup>29</sup>

The personality of the attorney, it has also been argued, should affect whether a defendant is found competent because sympathetic attorneys require less mental capacity of their clients.<sup>8,30</sup> A third recommendation has been that a lower level of capacity should suffice when the defendant’s mental condition is permanent because a finding of incompetence is then more likely to be followed by prolonged involuntary hospitalization.<sup>31</sup> A fourth suggestion has been that a higher threshold for competence be applied when the defendant’s counsel disagrees with how the defendant proposes to conduct his case.<sup>32</sup>

Fifth, it has been argued that more capacity should be required of defendants who represent themselves.<sup>33</sup> Finally, some commentators and courts have suggested that the mental capacity sufficient for legal competence should depend on the nature of the defense the defendant offers.<sup>34</sup> Where that defense is based on the conduct of a series of business transactions, for instance, a level of cognitive function sufficient to remember and describe the details of those transactions should be required.<sup>10</sup>

### Seriousness and Competence to Stand Trial

#### Why Might the Seriousness of the Criminal Charge Matter?

Serious charges are usually so called because of the consequences for a defendant if he is tried and con-

victed. The U.S. Supreme Court described the consequences for a defendant erroneously found competent in a death penalty case as “dire.”<sup>35</sup> One legal review, noting that the consequences of the choices a defendant made were different at different stages of adjudication, concluded that those different consequences justified the application of different standards of competence to different decisions.<sup>36</sup>

Outside the criminal arena this practice seems to be widely adopted. A principle of proportionality, sometimes referred to as a “sliding scale,”<sup>37</sup> has been described with respect to legal competence to give informed consent, to make a will, and to refuse medication.<sup>38–46</sup> Graver consequences lead assessors and courts to require evidence of greater mental capacity before a person is permitted to act (or have others act) in accordance with his stated wishes. Application of the principle is not limited to secular law. Under the Catholic church’s Code of Canon Law, the threshold level of capacity required for a person to enter into an agreement rises with the seriousness of that to which one is agreeing.<sup>47,48</sup>

There have been suggestions that the criminal law should adopt this principle of proportionality with respect to competence to stand trial. The commentary accompanying the ABA’s Mental Health Standard 7-4.1, for instance, states that, along with the complexity of the case, the “severity” of the charge should inform the assessment of competence.<sup>11</sup> The ABA’s proposed test for competence to plead guilty similarly requires the assessor to take into account both the “nature . . . of the charges” and the “consequences of conviction” (Ref. 11, Standard 7-51). The ABA discussion deviates from some noncriminal reviews of competence by implying that severity is objectively measurable. Presumably, however, different defendants may view the same charges very differently.

### Appellate Cases

The appellate courts have not described consistently what should be the relationship between the seriousness of the charge and the standard for competence. They do seem consistently to have sought to ensure that for serious charges that standard is, at least, not low. First, they have emphasized the effort expected. In overturning a conviction that followed a guilty plea, the U.S. Supreme Court reflected that,

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in

canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence [Ref. 49, pp 243–4].

Second, they have used a broad definition of the kinds of incapacity that are relevant. Competency to represent oneself, the Supreme Court of Wisconsin noted, requires a court to consider whether the defendant has “any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury” (Ref. 50, p 611).

The U.S. Supreme Court has not stated whether the seriousness of the charge should affect the amount of capacity required for competence. It has examined the question indirectly, however, in a series of cases culminating in 1993 that addressed whether different standards of legal competence are required for the different decisions a defendant faces.

In *Massey* the Supreme Court had held that, “One might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel” (Ref. 51, p 108). The District of Columbia Circuit of the U.S. Court of Appeals subsequently held that competence to plead guilty requires more mental capacity than does competence to stand trial,<sup>52</sup> and the Ninth Circuit held that the standard of competence varies, “with specific reference to the gravity of the decisions” (Ref. 53, p 215). Other circuits of the court of appeals decided that the standards for competence to plead guilty and competence to stand trial are identical.<sup>54,55</sup>

In *Godinez v. Moran*<sup>56</sup> the Supreme Court concluded that the standards were, indeed, the same and that the standard for waiving the right to counsel, previously held by three circuits of the court of appeals to be “vaguely higher,”<sup>57–59</sup> was the same also. The consequences of a defendant’s acting on his own behalf were not relevant to the standard that should be used to decide whether he would be allowed to do so.<sup>56</sup> This remains the law, although the Supreme Court of Wisconsin has since held that the standard for waiving the right to counsel can be set higher than that for standing trial provided that this is justified on grounds of public policy.<sup>60</sup>

### Why Has the Seriousness of the Charge Not Been Held to Affect the Capacity Necessary for Competence?

The failure of the higher courts consistently to endorse the principle that more mental capacity should be required for competence when the charge is serious is not the only respect, therefore, in which

those courts have rejected suggestions by “psychiatrists and scholars”<sup>56</sup> that different types and degrees of capacity should be required in different circumstances. With the exceptions mentioned earlier, those courts seem generally to have been reluctant to allow different standards of legal competence to apply to different decisions. This reluctance may not derive from principled opposition to the alternative suggestions that have been made. There are pragmatic reasons for the higher courts to have favored one standard.

First, the administration of justice becomes more complicated if defendants are able to participate in some parts of the process but not in others. Different findings in relation to a defendant’s competence to plead and stand trial, for instance, raise the possibility of his being tried without the opportunity to plea bargain,<sup>54</sup> a state of “semicompetence” that judges<sup>61</sup> and legal commentators<sup>36</sup> have both described as unsatisfactory. Second, the consequences of allowing different standards to apply to different decisions may be inconsistent. If a defendant’s decision to change his plea to guilty in the course of his trial were questioned, one court might apply the competency standard for standing trial while another might use the standard for pleading guilty.<sup>56,62</sup>

### **If the Seriousness of the Charge Is Relevant, How Should Assessors Take It Into Account?**

The defendant in *Godinez v. Moran*<sup>56</sup> represented himself, presented no evidence in mitigation and was executed in 1996. If the consequences for a defendant of going to trial do not alter the standard that will be used to decide whether he is competent to do so, then psychiatrists in court seem to face a dilemma. In addition to running counter to the intuition that worse mistakes are more to be avoided, such a stance is at variance with the principle of proportionality. In other areas of medicolegal practice, the literature suggests that greater levels of mental capacity are necessary for competence to make a binding decision when the consequences of that decision are serious.

Supreme Court cases notwithstanding, some data suggest that psychiatrists and psychologists have applied a principle of proportionality to competence to stand trial, albeit without making the practice explicit. Goldstein and Stone<sup>63</sup> found that disagreements over competence arose because doctors, uncertain of a defendant’s true level of capacity, based

their conclusions on what they anticipated would be the consequences if he stood trial. For defendants found incompetent, Rosenfeld and Ritchie<sup>64</sup> showed an association between ratings of competence and the seriousness of the charge. This association held whether seriousness was rated according to penal code category, length of possible sentence, or the felony/misdemeanor distinction.

Indeed, it seems unlikely that a legal decision could substantially affect the views of many clinicians as to the proper approach in a difficult case. And it is not clear that the law following *Godinez* precludes all consideration of the consequences for a defendant in determining whether he is competent. Justice Kennedy noted in his concurrence that the decision assumed the choices *Godinez* made in going to trial, in pleading guilty, and in waiving his right to counsel were “equivalent.” The justice argued that this equivalence was irrelevant: “We should not confuse the content of the standard with the occasions for its application” (Ref. 56, p 403). In his view, the Court had left open the possibility that different standards would be allowed for “non-equivalent” decisions.

If psychiatrists and courts are to continue to use different criteria for competence for serious charges, the question arises as to what principles they should apply. In noncriminal settings, the justification most frequently offered for raising the level of capacity required as the consequences of being legally competent become more serious is that the value of respecting the defendant’s autonomy should be weighed against the harm done by allowing him to act against his best interests.<sup>65</sup> Best interests are usually defined in terms of the “risks and benefits”<sup>66,67</sup> or the “risk-benefit ratio”<sup>68,69</sup> of what is proposed. This version of proportionality sees a direct relationship between the seriousness of the potential harm and the amount of capacity that will be required before a decision to risk that harm will be respected. It requires the assessor to “balance” the competing values of respecting autonomy and risking harm (Fig. 1).

Winick described the practical consequences of applying this approach to the assessment of competence to stand trial:

The presumption of competency. . . will vary with the degree of autonomy present and the risk/benefit ratio of [acting in accordance with the defendant’s expressed preference] . . . where, for example, the risk/benefit ratio is questionable, the individual may be found incompetent, and thus prevented from acting in accordance with his expressed preference [Ref. 32, p 271].

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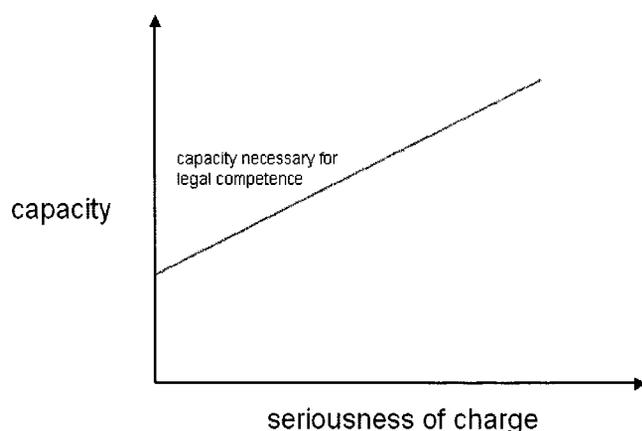


Figure 1. "Balancing" approach.

The Supreme Court's decision in *Godinez v. Moran*<sup>56</sup> seems to oppose this balancing approach to proportionality when the competencies to stand trial, to forego the right to counsel, and to plead guilty are at issue. In particular, the court's decision that the likely consequences of the defendant's representing himself are not relevant to the threshold, or "standard," to be used seems to preclude any consideration of the "risk/benefit ratio."

There are also practical difficulties in applying the balancing approach to the adjudication of competence to stand trial. First, much of the information necessary to a proper calculation of costs and benefits, information relating to the impression that the defendant will make on a judge and jury, the chances of his being convicted, and the likely effect of his sentence on him is either unavailable to the assessor or of doubtful reliability. Second, and partly as a consequence, a psychiatrist's confidence in his or her assessment of a defendant's mental capacities is not "all or nothing." Additional information may make the assessor more sure. Third, and even if the psychiatrist does feel sure of the assessment, there is no unit of capacity, or indeed of risks and benefits, to help the psychiatrist make the necessary calculation.

Most important, however, the approach to proportionality seemingly opposed by the U.S. Supreme Court may not be the form of proportionality that psychiatrists use when assessing capacity outside the criminal courts. An alternative approach assumes that proportionality derives, not from an attempt to balance capacity against risks and benefits, but from the assessor's desire for a greater level of confidence when the consequences are severe (Fig. 2).<sup>40,41,70,71</sup> Raising the threshold in these circumstances would

also increase the number of instances in which people facing serious charges are incorrectly assessed as not competent to stand trial. This is the price that those who adopt the "level of confidence" approach are prepared to pay to reduce the number of people who are incorrectly found competent. They can argue also that the consequences of being incorrectly held incompetent, typically detention in a hospital, are less severe than the consequences of being tried and sentenced. They are also open to correction by subsequent assessments.

The "level of confidence" approach thus gives effect to a desire to be more certain when the consequences are more serious. Outside the criminal arena, this desire has been articulated by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research when it wrote, "When the consequences for well-being are substantial, there is a greater need to be certain that the patient possesses the necessary level of capacity" (Ref. 42, p 60), and by the National Bioethics Advisory Commission in its call for "increased scrutiny" of decisions to participate in research when the risk is more than minimal.<sup>72</sup> In criminal cases, *Weinstock et al.*<sup>73</sup> justified the use of a sliding scale in competency proceedings on the grounds that "more stringent attempts" should be made to exclude the possibility that the defendant is not competent when the charge is a serious one.

## Conclusions

The evaluation of trial competency and the related provision of psychiatric treatment consume a significant proportion of the public resources allocated to mental health care in the United States. Approxi-

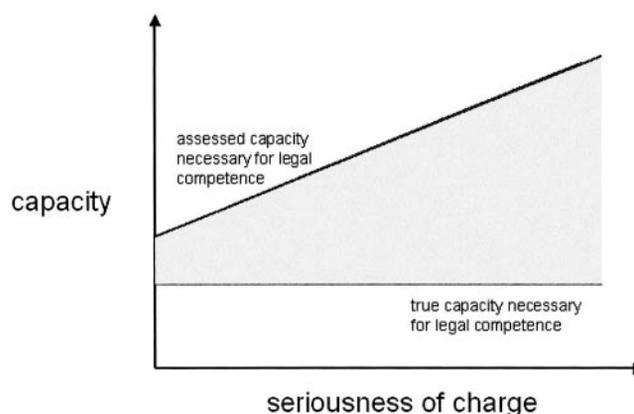


Figure 2. "Level of confidence" approach.

mately 25,000 trial competency evaluations are conducted annually.<sup>14</sup> Ten percent of all state-provided psychiatric hospital beds (and one-third of all forensic mental health beds) are occupied by people who have been found incompetent to stand trial.<sup>74</sup> Most of these patients do not face long prison terms if convicted.<sup>75</sup> When the charges are serious, however, the decision as to whether a defendant is competent can have profound consequences.<sup>56</sup>

This article has argued that psychiatrists assessing the competence of criminal defendants to stand trial should take into account the seriousness of the charges. Specifically, when the charges are serious, psychiatrists should seek a greater level of confidence before suggesting that a defendant is competent. This is a form of proportionality similar to that which courts and doctors employ when they assess competence outside the criminal courts. It is less at odds with the U.S. Supreme Court's decision in *Godinez v Moran*<sup>56</sup> than is the "balancing" approach to proportionality because it implies not a change in the "standard", but a change in the level of confidence that the standard has been met.

Research suggests that, in some instances at least, psychiatrists do take the seriousness of the charge a defendant is facing into account when they offer their opinions. It also is likely that some of the factors that courts have permitted to raise the required level of capacity, factors such as the complexity of the case, are invoked more often when the charges are serious. Terms such as "understand" and "assist" are, in any case, sufficiently broad that courts can already allow doctors considerable latitude in the criteria they use in evidence.

The terms that a witness uses to communicate his or her findings, in competency proceedings and elsewhere, depend in part on how close he or she wishes to go to the ultimate issue before the court.<sup>76</sup> Competency to stand trial is an area in which conclusory opinions are often provided, and restricting oneself to answering "yes" or "no" on each of the two limbs of the *Dusky* and *Drope* standard seems to amount to much the same thing. Witnesses who offer conclusory testimony seem able to take the seriousness of the charges into account as and when they see fit, although they will usually have explained their reasoning and may be asked to defend it on cross-examination.

Witnesses who prefer to avoid stating a view on the ultimate issue face different decisions. On the

one hand, avoiding the ultimate issue should mean not saying whether the defendant's mental capacities are sufficient, given the seriousness of the charges, for him to be found competent. On the other, without some further advice along these lines many courts will regard what a witness has to say as unhelpful. A witness may be able to convey that the defendant's deficits are of particular relevance, given the nature of the charges. Of greatest value to the court, however, may be transparency, both in written reports and in testimony, as to the defendant's mental state, the effect of any functional impairment on his ability to understand and assist and the weight that the witness has given to the seriousness of the charges that the defendant faces.

The relevance of the defendant's view of the seriousness of the charges has not been widely discussed in the literature and requires further examination. Two further, practical, consequences for psychiatrists in court seem to follow from the arguments presented here. First, when it is a psychiatrist's practice to offer a conclusion on a defendant's competence, the interests of transparency would best be served by an acknowledgment that, should the seriousness of the charges change, the conclusion may be different.

Second, the possibility arises that a defendant might be regarded as "restored to competence," not because his condition has improved, but because further assessment has led to the assessor's being able to say with greater confidence that the necessary standard has been met. It seems reasonable, for instance, that when a defendant's chosen course is manifestly against his best interests, when the charges are serious ones, when his mental capacity seems adequate, but when the assessor has some doubts, that defendant should be admitted to a hospital to confirm that his mental capacity has been correctly assessed.

### Acknowledgments

The author thanks Dr. Fred Storey and Dr. Madelon Baranoski for their suggestions made in discussion.

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