THE SIDE EFFECTS OF INCOMPETENCY LABELING AND THE IMPLICATIONS FOR MENTAL HEALTH LAW

Bruce J. Winick
University of Miami

In addition to labeling people as mentally ill, the law often labels them as incompetent to exercise certain rights or to play particular roles. Indeed, under the broad dicta of Zinermon v. Burch, incompetency labeling may increase dramatically. This article uses principles of social and cognitive psychology to examine the effects of incompetency labeling. Such labeling is shown to produce potentially serious adverse effects. It often alters the way others view and react to the labeled individual and affects his or her self-esteem and self-concept in ways that may inhibit performance, diminish motivation, and depress mood. After analyzing those negative side effects of incompetency labeling, the article examines the implications of these findings for mental health law and makes a number of proposals for changing the law in order to avoid or minimize these adverse effects.

I. Introduction

As with drugs, legal rules designed to produce certain beneficial consequences sometimes create unintended adverse side effects. It is appropriate to identify these negative effects so that they may be factored into legal policy analysis and minimized whenever possible. These effects may take many forms. Sometimes, for example, laws produce negative economic or environmental consequences. Indeed, a body of law and a form of interdisciplinary scholarship have developed that seek to identify and analyze the economic or environmental impact of proposed legal rules or

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Correspondence concerning this article should be addressed to Bruce J. Winick, School of Law, University of Miami, Post Office Box 248087, Coral Gables, Florida 33124-8087.


policies. Legal rules may produce negative psychological or behavioral consequences. The effort to assess the negative psychological and behavioral effects of legal rules and to suggest ways in which they may be minimized can be seen as an exercise in therapeutic jurisprudence.

The law sometimes labels people as incompetent in order to achieve certain consequences considered to be desirable. Thus, criminal defendants who because of mental illness are unable to understand the nature of the criminal proceedings or to communicate with counsel are adjudicated incompetent to stand trial. This adjudication suspends the criminal proceedings until treatment can improve the defendants' condition so that they may participate more effectively in the proceedings. Use of the incompetent-to-stand-trial label thus is justified on grounds of

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4See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (adopting separate but equal doctrine that perpetuated racial segregation), overturned by Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (invalidating school segregation in part because of its negative impact on the "hearts and minds" of those affected); Swift v. Tyson, 41 U.S. 1 (1842) (authorizing federal courts to apply federal common law in diversity cases), overturned by Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-75 (1938) (noting that Swift had produced unpredictability in the planning of everyday affairs as a result of uncertainty as to the rule of law that would be applied to conflicts over them, producing psychological distress and inhibiting interstate economic transactions); see Henry M. Hart, Jr., The Relation Between State and Federal Law, 54 COLUM. L. REV. 489, 497 (1954) ("People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown.") (commenting on the effects of Swift). See also DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 5 (1990) (discussing "law related psychological dysfunction"); Bruce J. Winick, Competency to be Executed: A Therapeutic Jurisprudence Perspective, 10 BEHAV. SCI. & L. 317, 336 (1992) (same).

5The theory of therapeutic jurisprudence suggests the need for study of the therapeutic implications of various legal rules and practices. The law can be seen to function as a therapeutic agent, producing therapeutic or antitherapeutic consequences. Therapeutic jurisprudence accordingly seeks to focus attention on an often neglected ingredient in the calculus necessary for performing a sensible policy analysis of law—the therapeutic dimension—and calls for its systematic empirical examination. See generally DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1992); Michael L. Perlin, What Is Therapeutic Jurisprudence?, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); David B. Wexler, Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship, 11 BEHAV. SCI. & L. 17 (1993); David B. Wexler & Bruce J. Winick, The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law, in LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 211 (James R. P. Ogloff ed., 1992); David B. Wexler & Bruce J. Winick, Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research, 45 U. MIAMI L. REV. 979 (1991) [hereinafter Therapeutic Jurisprudence as a New Approach]; David B. Wexler & Bruce J. Winick, Therapeutic Jurisprudence and Criminal Justice Mental Health Issues, 16 MENTAL & PHYSICAL DIS. L. REP. 225 (1992). To identify the therapeutic dimension as a significant factor is not, of course, to suggest that it should trump other considerations. Countervailing normative considerations may often justify a legal rule or practice found to produce antitherapeutic consequences, and therapeutic jurisprudence does not purport to be a method of determining which factor should predominate in decision making. See David B. Wexler, Justice, Mental Health, and Therapeutic Jurisprudence, 40 CLEV. ST. L. REV. 27 (1992). Its mission is merely to raise questions that call for a more complete analysis of the relevant considerations, and to use insights from the social and behavioral sciences to attempt to reshape the law so that it can more effectively serve therapeutic ends.

paternalism, fairness, and increased accuracy in criminal adjudication. Similarly, individuals suffering from mental illness are sometimes determined to be incompetent to make treatment or hospitalization decisions, to manage property, to enter into contracts, to make a will, to marry, or to vote. The legal rules producing these incompetency adjudications sometimes are defended on paternalistic grounds and sometimes are based on the desire to benefit society or protect others.

These determinations are preceded by a clinical evaluation of the individual by one or more psychiatrists or psychologists and often are made publicly, typically following a formal judicial or administrative proceeding at which the individual is called on to testify or at least to observe. The incompetency label is formally applied, often by a judge who, in black robes and sitting atop an elevated platform, is likely to be perceived by the individual as an authority figure possessed of great wisdom and power. Others known to the individual, including friends, family, employer, and coworkers, soon learn of this adjudication, which usually is made a matter of public record.

Incompetency labeling often imposes negative legal effects on the individuals so labeled—depriving them of their liberty to engage in the relevant activity or exercise the right with respect to which they have been found to be incompetent. Aside from these legal consequences, when the law applies an incompetency label to individuals it brands them in ways that often impose serious social disadvantages, adversely affecting the way others regard and treat them. In addition, this brand and the way individuals perceive it can harm them psychologically in ways that may be serious and long lasting. Not only may they be stigmatized and discredited in the eyes of others, but also their own self-esteem and self-concept may be affected in ways that have a major impact on motivation and functioning. Moreover, the label may significantly diminish their sense of well-being and produce a form of clinical depression.

These consequences have been inadequately analyzed, however. This article

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7Winick, Restructuring Competency to Stand Trial, supra note 6, at 952-59; Note, Incompetency to Stand Trial, 81 HARV. L. REV. 454, 454 (1967).
10See Richard C. Allen et al., Mental Impairment and Legal Incompetency 228-29, 253-54 (1968); Brakel et al., supra note 8, at 438-39.
11See authorities cited in supra note 10.
13See Allen et al., supra note 10, at 255-56; Brakel et al., supra note 8, at 507; Sales et al., supra note 12, at 13-14.
14See Allen et al., supra note 10, at 258; Brakel et al., supra note 8, at 445-46; Sales et al., supra note 12, at 99.
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examines the negative social and psychological effects of incompetency labeling and comments on the implications of these adverse side effects for mental health law. A number of proposals offered are designed to eliminate or minimize these adverse effects. The law should rely more on voluntary approaches, reducing the use of coercion and incompetency labeling. Incompetency should be narrowly defined, and competency should be presumed, even for those who have mental illness. Legal labels and procedures should be redesigned to minimize the potential that their use will foster self-attributions by the individuals labeled that perpetuate their social and health problems.

II. The Adverse Effects of Incompetency Labeling

A. Deviance Labeling and Social Stigma

Primitive societies did not engage in deviancy labeling.\(^15\) Small tribes of hunters and gatherers, agrarian villages, and peasant societies were relatively homogeneous and interdependent. They needed each member of the community and generally could not afford the social costs of ostracizing any of them.\(^16\) Moreover, in simple societies, the social unit tended to be small and was characterized by a number of cross-cutting interpersonal networks, promoting a considerable degree of personal interaction.\(^17\) The high degree of social familiarity in such societies rendered unnecessary the use of labels, which tend to communicate through simple and one-dimensional social stereotypes. The significant kinship and other interpersonal linkages between members of such societies also made deviancy labeling, with its resulting social ostracism, socially costly. Not only would such labeling diminish or preclude the contributions of the individual to the community, but it also would increase the risk of social fragmentation and social conflict.\(^18\)

As societies grew in size and complexity, however, individuals became more expendable. As societies became more heterogeneous, deviancy labeling became more widespread as a means of facilitating communication\(^19\) and of increasing the solidarity of other members of the social order.\(^20\) Instead of reconciling the offender to the group, social ostracism became easier. Social and cultural heterogeneity made reconciliation more difficult and more threatening to those in control.\(^21\) Those perceived as troublemakers thus became expendable and were ritualistically ostracized by deviancy labeling.\(^22\) Deviancy labeling serves to marginalize those labeled,\(^23\) causing them to internalize a deviant self-image, and sometimes as a result, to engage in acts of secondary deviance.\(^24\)


\(^{16}\)See id. at 378–87 (discussing anthropological studies of the practices of primitive societies).

\(^{17}\)Id. at 376.

\(^{18}\)See id. at 376.

\(^{19}\)Id. at 391.


\(^{22}\)Raybeck, supra note 15, at 375.


\(^{24}\)See HOWARD BECKER, *STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963); THOMAS J. SCHEFF, *BEING
A traditional type of deviancy labeling has been application of the label of mental illness. Thomas Scheff and others have criticized the use of the mental illness label on the basis of the severe social disadvantages it poses for those so labeled. Under this view, the mental illness labels lock the individuals into behavior patterns that result from the way others perceive and respond to them and the way the label alters their view of themselves. According to Scheff, the mental illness label causes individuals to adopt a self-conception reflecting a stereotyped image of insanity that has the effect of limiting their capacity for self-control. Individuals' damaged self-concept perpetuates their deviant behavior and launches them on a career of chronic mental disability. In this way, labeling individuals as mentally ill can produce a self-fulfilling prophecy.

Labeling individuals as deviant—such as by characterizing them as mentally ill—may thus produce a lasting stigma that strongly colors the way others regard and interact with them and the way they conceive of themselves. Stigma has been defined as "an attribute that is deeply discrediting." Stigmatizing people often causes others to view them as being unable to participate in life normally. The stigmatizing label thus discredits individuals, often pushing them to the periphery of any social situation in which they are involved. Stigmatization frequently results in excluding individuals from social activities and opportunities. "It is as though society, in an effort to prove the correctness of its label, proceeds to narrow the life chances of the stigmatized person to the preconceived notions connected with the stigma."

Social psychologists use the concept of the "self-fulfilling prophecy effect" to describe this phenomenon. This concept posits that the belief of an individual applying a deviance label ("the marker") to another ("the marked") leads the marker to behave in a manner that serves to elicit behavior from the person marked that tends to confirm the belief or prophecy of the marker. For example, a teacher believing that certain pupils are poor students or are troublemakers may tend to treat them in ways that produce behavior by those students that confirms the teacher's belief.


See infra notes 33–38 and accompanying text.


Id. at 220.

Id. at 221.


Jones et al., supra note 33, at 177.
original views, even if those views were erroneous. An understanding of this phenomenon has led to a rejection of the former practice followed in some school systems of "tracking." Under this approach, students were grouped in accordance with perceived or demonstrated ability in a particular area, such as reading, and were made aware of their teachers' assessments of their abilities by the label affixed to the group, such as Group 1 or Group 6. As a result, many students subsequently behaved in ways that confirmed the expectancies engendered by such grouping; consequently, the tracking process itself altered performance. Similarly, labeling adolescents juvenile delinquents may set in motion forces that lead them to behave in ways that fulfill the assigned deviant image.

Application of a deviance label thus sometimes produces a potent and lasting stigma. The notion of the self-fulfilling prophecy explains these adverse effects by showing how the markers sometimes engage in actions that confirm their expectations about labeled individuals by restricting their behavioral opportunities. Thus, the marker's belief that people with mental disabilities cannot perform certain tasks may lead him or her to deny them any opportunity to engage in or learn those tasks. Even if not mentally ill, people so marked may be denied opportunities to engage in certain life activities and thereby may come to function in ways that resemble the stereotyped image of a mentally ill person.

Labeling an individual as mentally ill or mentally retarded can thus be extremely stigmatizing in ways that are likely to produce a self-fulfilling prophecy effect. The mental illness label often produces social ostracism and difficulties in obtaining employment and housing. Moreover, the responses of others to an individual who has been stigmatized in this highly discrediting way are also likely to damage the individual's self-concept. "When and how pervasively the self-concept will reflect the negativity produced by a stigma depends on the nature of the stigma and on the

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Labeling people as mentally retarded imposes a "shattering stigma," impairing their educational and occupational opportunities and dominating every aspect of their lives. The severe social disadvantages of labeling people as mentally ill or mentally retarded are augmented when the individual also is labeled incompetent, thereby confirming general stereotypes about mental disability and providing a further rationalization for the deprivation of social, occupational, and educational opportunities.

The labeling theory of mental illness associated with Scheff has been controversial. The critics have questioned the extent to which mental illness labeling produces a form of secondary deviance in response to the reactions of others and have argued that it is artificial to view mental illness primarily in this way. They have suggested that mental illness (at least in some of its forms) is legitimately thought of as illness and that the patient's insight that he or she suffers from such illness may be a precondition to improvement. In this view, application of the mental illness label, where appropriate, can be therapeutic in ways that may outweigh its social disadvantages.

The law, however, does not stop at labeling an individual mentally ill. In addition, it often labels those suffering from mental illness as incompetent. The incompetency label has a strongly undesirable global connotation and implies that the individual's incompetency is a personal characteristic, not merely a legal status. Although the patient's insight that he or she suffers from mental illness may be therapeutically essential in some psychiatric conditions, the process of labeling the individual incompetent, as well as the label itself, may be therapeutically detrimental. A patient's acceptance of the mental illness label may be a beneficial prerequisite to taking advantage of therapeutic opportunities only when the patient has a strong internal locus of control.

However, an incompetency label may erode the individual's sense of internal control in ways that make a positive outcome in therapy difficult.
to achieve. Application of an incompetency label usually produces an actual and obvious loss of control. The label is likely also to cause individuals to perceive that they are incompetent, not merely that they have a condition that temporarily interferes with effective functioning. The combined effect may be debilitating, reinforcing and prolonging their mental illness.

B. The Psychological Effects of Incompetency Labeling on the Individual

Early work on stigma dealt with the impact of deviancy labeling on how others view and react to the individual—examining what came to be known as the “halo” and “demon” effects and attribution theory generally. Later work on the effects of labeling focused on the impact on individuals who received the label and on their own self-attributions and sense of self-efficacy. Actual or presumed stigmatization by others often is converted into self-stigmatization. At some level, stigmatized individuals will come to accept the negative message conveyed by the label and discredit themselves. Perhaps even more debilitating than the reactions of others produced by a deviancy label are the effects of the label on individuals’ self-concept and self-esteem and their resulting impact on subsequent behavior.

Labeling individuals as incompetent usually has the effect of removing their ability to make decisions for themselves, at least in the particular area in which their

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46 Warner, supra note 43, at 399.

47 More than 70 years ago, Edward Thorndike showed that a rater’s overall attitude about a subject produced error in evaluating the subject’s performance of a specific task. When the rater’s overall impression of the subject was favorable, he was rated more highly than his performance objectively would merit. Thorndike called this the “halo” effect. When the rater’s overall impression of the subject was negative, the subject was rated less highly than his performance objectively would merit. Thorndike called this the “demon” effect. See Edward L. Thorndike, A Constant Error in Psychological Ratings, 4 J. EXPERIMENTAL PSYCHOL. 25 (1920); see Gerald D. Gibb, Influence of “Halo” and “Demon” Effects in Subjective Grading, 56 PERCEPTUAL & MOTOR SKILLS 67 (1983); Sheldon J. Lachman & Alan R. Bass, A Direct Study of Halo Effect, 119 J. PSYCHOL. 535, 536 (1985); Brian G. Moritsch & W. Newton Suter, Correlates of Halo Error in Teacher Evaluation, 12 EDUC. RES. Q. 29 (1988).

48 Fritz Heider refined Thorndike’s concept of the “halo” and “demon” effects into a general theory of attribution under which people tend to causally link an individual’s success or failure in the performance of a particular task to his general impression of the individual’s overall ability or effort. Accordingly, failure is attributed to, for example, the individual’s stupidity, incompetency, or lack of motivation, whereas success is attributed to his genius or determination. See Fritz Heider, The Psychology of Interpersonal Relations (1958). For general discussion of attribution theory, see, e.g., John H. Harvey et al., New Directions in Attribution Research (1976); Sandra Graham, A Review of Attribution Theory in Achievement Contexts, 3 EDUC. PSYCHOL. REV. 5 (1991).


50 Id. JONES ET AL., supra note 33, at 297.
capacity is thought to be lacking. Individuals considered to be incompetent find that their choices and preferences are ignored and that others make choices for them. They often are treated as objects, rather than as people. As a result, events in their lives are perceived to be outside of their control. They are treated as children, subject to the authority, even if benevolently intended, of others. However, unlike biological or adoptive parents, their surrogate decision makers will likely be impersonal state officials or employees whose paternalism is not based on love and is rarely nurturing.

What are the consequences of this loss of control to people’s mental health and to their motivation and ability to function? The answer will depend on the individuals and how they define their identity. The concept of the self is largely socially determined, the product of a social process in which others play an essential role in individuals’ acquisition of self-knowledge and in the interpretation and evaluation of life experiences. Individuals’ construction of self-identity is largely dependent on the effect of reactions that are received from others. Whether a potentially stigmatizing label will damage the individual’s self-concept will depend on the importance attached to the quality or trait in question in organizing and interpreting social experiences. If individuals link the label received to a central aspect of identity, the stigmatizing process will begin. This process is illustrated by Marcia Millman’s work on the psychology of obesity. The strongly negative reactions that obese people often encounter in public affect self-concept differently, dependent on the individual’s evaluation of the importance of weight and appearance in organizing and interpreting his or her life. Women for whom appearance was central to self-image were found to be more damaged by the negative reactions of others to their obesity, whereas many men, whose self-concept was more centrally related to other qualities, remained largely unaffected by such negative reactions. Thus, some individuals will attend closely to a potentially stigmatizing label and to the reactions that it produces in others, suffering a damaged self-image as a result, whereas others will de-emphasize or even ignore the label, suffering few adverse effects. Potentially stigmatizing labels thus are processed differently with differential impact depending on the individual’s social environment and patterns of social comparison, as well as existing self-concept. If individuals link the stigmatizing label to a central aspect of identity or dispositional make-up, the label and the reactions of others that it generates can have strongly negative effects on self-concept and subsequent behavior. Although being considered overweight or incompetent at tennis or dancing may not damage the self-concept of individuals for whom these attributes are peripheral to self-image, labeling them as incompetent to play an important social or legal role is more likely to be damaging to their self-concept.

I. Learned helplessness and other inhibitory effects on performance. Psychological theory suggests that labeling an individual incompetent may produce a number of adverse effects. Particularly when combined with the actual loss of control that usually accompanies incompetency adjudication, application of the incompetency
label may cause depression and decrease motivation. Moreover, it may set up expectancies of failure in the individual that themselves undermine commitment and diminish subsequent performance.

Perhaps the most serious consequence, combining all of these effects, is a syndrome that experimental psychologist Martin Seligman termed learned helplessness. As originally conceived, learned helplessness referred to the finding that animals exposed to uncontrollable and inescapable aversive stimuli in a laboratory setting developed “helpless” behavior in other settings. The animals, learning that escape was impossible in the laboratory, would not even attempt escape in the second setting, though escape may have been possible. In his early experimental work, Seligman subjected laboratory dogs to inescapable electric shocks on a noncontingent basis (i.e., unrelated to their actions). The dogs initially attempted to escape the shocks through a variety of voluntary movements. When nothing they could do enabled avoidance of the shocks, the dogs ceased all activity and became compliant, passive, and submissive. Moreover, the ability of the dogs to learn to avoid the shocks was found to decrease.

Seligman’s subsequent experiments demonstrated that organisms quickly learn to generalize from their feelings of powerlessness in the experimental context to other contexts, developing a global sense of powerlessness that debilitates functioning. In these studies, experimenters held newborn rats in their hands until the rats ceased all voluntary escape movements. After this procedure was repeated several times, the rats were placed in a vat of water. Although rats in a control group not subjected to the holding procedure were able to swim for up to 60 hr before drowning, those in the experimental group, which had experienced inability to escape from the experimenter’s hand, drowned within 30 min. Indeed, many of them made no attempt to swim and sank immediately. Their sense of powerlessness to escape from the hand-holding procedure by squirming had generalized into a powerlessness to avoid drowning by swimming. Feelings of helplessness, in short, tend to spread quickly from one aversive situation to others.

Learned helplessness in animals has become the subject of continued empirical research, much of which has focused on the effects of uncontrollability on animal physiology. Thus, helpless rats were found to be analgesic; their capacity for feeling...
pain as readily or as deeply as nonhelpless rats was diminished as a result of their increased endorphin levels. In addition, helpless rats were found to experience immunosuppression, fighting off disease less effectively than normal rats.

Seligman's experimental work with animals and then with human subjects led him to generate a theory of learned helplessness that has become a fixture of modern psychology. Learned helplessness posits that subjecting individuals to noncontingent negative (or even positive) consequences can produce generalized feelings of helplessness and hopelessness. Seligman showed that the symptoms produced by this feeling of noncontrollability mirror those of major affective depression. Individuals display retarded initiation of response that parallels the passivity, psychomotor retardation, and social impairment found in depression. They acquire a generalized belief that their actions are doomed to failure. Their self-attribute of failure produces such negative effects as self-blame, guilt, feelings of incompetence, and lowered self-esteem. They develop a generalized apathy, resignation, and lowered intrinsic motivation. Their ability to solve problems is diminished, and their mood is depressed. In summary, they experience the symptoms of clinical depression and a loss of self-confidence that is itself debilitating.

Because Seligman's essentially behavioral explanation of human depression did not seem wholly satisfactory, he reformulated the doctrine of learned helplessness as applied to human subjects. Using various insights derived from cognitive psychology, particularly expectancy and attribution theory, Seligman reconceptualized

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64Peterson & Bossio, supra note 59, at 235.
65Id. at 243. See infra notes 94–101 and accompanying text.
66Peterson & Bossio, supra note 59, at 243.
67Id.
68Id.
69Friedman and Lackey document the relationship between self-confidence and an individual’s capacity for control over events in his life:

Self-confident people are more able to tolerate delay in achieving control, are more able to take calculated risks, and are more persistent in pursuing control, all of which make it more probable that they will improve their scope, degree, and reliability of control. Self-confident people tend to be dogged and venturesome in their pursuit of control and don’t lose heart when obstacles delay their progress. Their confidence leads them to believe that sooner or later they will be successful in improving their control. In contrast, lack of self-confidence is an impediment to control because people who lack self-confidence expect to fail in their efforts to improve their control. They tend to consider struggling for control a waste of time. Their past failures in improving their control have taught them that there is little they can do to insure their success.


When they consider improving their control, the only outcome they can predict with any confidence is failure, so they usually predict failure in completing all but the most routine tasks that they have mastered. And to exhibit some vestige of control when faced with new contingencies, they arrange to fail, often by not trying to succeed. (Id.)
70Abramson et al., supra note 59; see also Peterson & Bossio, supra note 59, at 237-38.
learned helplessness to take into account the importance of cognitive factors. Under the revised model, a perceived noncontingent relationship between their actions and the outcomes they experience leads people to believe that events are outside their control. Beliefs about prior noncontingent relationships between actions and outcomes carry over and foster generalized expectations of lack of control. Seligman postulated that the perceived noncontingency between actions and outcomes, particularly if ascribed to personal limitations that are seen as immutable, causes individuals to question their abilities and to attribute their failures to internal deficits or incapacities. The individual’s perceptions of noncontrol become linked with low expectancies concerning success, fostering feelings of helplessness and hopelessness. Seligman concluded that these feelings are heightened when individuals attribute their helplessness to three factors. The first is attribution of uncontrollability to internal causes (such as lack of intelligence or physical strength) rather than external causes (such as other people or societal conditions). This leads them to accept personal responsibility for failure. The second is attribution of failure to global deficits (“I am bad at problem-solving”) rather than to limited difficulties (“It was a difficult problem”). The third is a perception that the causes of failure are stable (“It runs in my family”; “I have permanent brain damage”) rather than unstable or changeable (“I was tired that day”), so that improvement seems unlikely.

The attributional reformulation of learned helplessness theory posits that objective uncontrollability alone is not debilitating; rather, it is the individual’s cognitive perception that uncontrollability is causally related to an internal deficit that leads to generalized expectations of helplessness that carry over into other situations. The insights of this reformulation suggest that learned helplessness may be a likely consequence of incompetency labeling. Learned helplessness may be especially likely to occur when the incompetency label applied suggests general incompetence and is followed by imposed uncontrollability. An incompetency label causes individuals to perceive and attribute the lack of control they experience to internal and relatively stable factors. Such a label will reinforce their perception and belief that events are truly uncontrollable. Whereas individuals who find themselves not in control of their environment generally may not attribute such uncontrollability to themselves, the application of an incompetency label will substantially increase the likelihood that they will attribute causality to internal inability. In summary, an incompetency label makes salient the individual’s helplessness and responsibility for it, preventing the person from attributing the problem to other causes.

Attribution theory suggests that even when individuals who experience failure or lack of control have not been labeled incompetent, they may posit the existence of an internal deficit that is responsible for their problems. Psychologists Edward Jones and Steven Berglas have used the term self-handicapping to describe this phenomenon. Under this conception, individuals may seek or create reasons for inhibiting

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72 Id.
73 See Peterson & Bossio, supra note 59, at 241.
future performance in order to avoid potential failure and to reduce a threat to their self-esteem. "The self-handicapper . . . reaches out for impediments, exaggerates handicaps, and embraces any factor reducing personal responsibility for mediocrity . . . ." Individuals thus tend to discount the role of their own ability in producing failure, attributing it instead to their real or imagined handicap. Self-handicapping serves to mitigate the impact of failure feedback and allows them to avoid viewing their failure as a reflection of low ability or lack of general competence.

If this performance-inhibiting phenomenon occurs even when individuals are not labeled incompetent, such labeling, particularly when performed by an authority figure such as a judge or psychiatrist, should increase the tendency for individuals to perceive themselves to be handicapped in the area in question. Even more than a self-handicap attribution, application of an incompetency label causes individuals to inhibit future attempted performance in order to preserve self-esteem. The tendency of self-handicapping to produce failure by inhibiting performance would be magnified by application of an incompetency label that in effect communicates to individuals that attempted performance will be useless. Why, after all, should they attempt a task that they have been told they are incompetent to perform?

Individuals who consider themselves to be handicapped sometimes exert prodigious efforts in order to "overcome their handicap." However, they know that even their prodigious efforts will not overcome incompetency. Individuals who understand their failure to be a function of an internal handicap may not attempt performance, at least during the period in which they think their handicap persists, but may at least maintain a general sense of self-competence. "I could succeed," they may think, "but for my handicap." When their failure is clearly and unambiguously attributed to a lasting lack of ability, however, as it often is when they are labeled incompetent, the likelihood that they will internalize the incompetency attribution is increased. This perception can have debilitating effects on their self-esteem and may produce the "paralytic and painful results of having to give up hope." Whereas self-handicapping may thus preserve their public esteem and illusion of control, application of an incompetency label would be devastating to both self-esteem and the sense of self-control.

People suffering from mental illness often have a history of poor performance in social, occupational, and educational contexts and an already impaired sense of self-esteem and self-efficacy. Labeling them as mentally ill may further their tendency to self-handicap and may inhibit future performance in areas in which they expect that their condition will produce failure. If such mental illness labeling occurs in a context in which they are extended therapeutic opportunities that they are motivated to accept, the illness label may provide the insight needed to engage in a

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75 Arkin & Baumgardner, supra note 74, at 202. See also Jones & Berglas, supra note 74, at 201 ("By finding or creating impediments that make good performance less likely, the strategist nicely protects his sense of self-competence.").

76 Jones & Berglas, supra note 74, at 201 ("If the person does poorly, the source of the failure is externalized in the impediment."). See Harold H. Kelly, Attribution in Social Interaction, in Attribution: Perceiving the Causes of Behavior 1 (Edward E. Jones et al. eds., 1971); see also Arkin & Baumgardner, supra note 74, at 171 (analyzing this phenomenon as an application of Kelly's discounting principle).

77 Arkin & Baumgardner, supra note 74, at 170.

78 Arkin & Baumgardner, supra note 74, at 185.

79 Id.
course of therapy that will have beneficial effects. The addition of an incompetency label, however, may destroy this opportunity by making them feel that improvement is unlikely. A student who performs poorly in reading or arithmetic may self-handicap and attempt to avoid future opportunities to engage in these activities. Labeling the student as learning disabled may further this tendency, but an individual who truly has a learning disability may learn strategies and techniques to mitigate or overcome this disability. If the student is labeled as incompetent at reading or arithmetic, however, he or she may never again attempt these activities with the degree of commitment and energy required to master them.

By reinforcing expectancies of failure and producing generalized expectancies of incompetence, the incompetency label when applied to those with mental illness will predictably frustrate what presumably are the goals of mental health intervention. Any sensible system of mental hospitalization and treatment must be designed to restore patients to the greatest possible degree of functional normality. By having choices made for them, patients labeled as incompetent are deprived of the opportunity to engage in decision making and to exercise skills and may experience further loss of functional capacity as a result.\(^80\) Indeed, this is one explanation for why some patients develop an institutional personality syndrome, finding it difficult to exist outside an institution that makes all important decisions for patients and in which they bear little or no responsibility for decision making.\(^81\)

Labeling mentally ill individuals as incompetent may thus be devastating, diminishing self-esteem and inhibiting future performance. Even more than labeling such persons as mentally ill, labeling them as incompetent may produce or perpetuate learned helplessness. Because an incompetency adjudication produces consequences that individuals often perceive as negative and unrelated to their choices or actions, they may develop generalized feelings of uncontrollability,

\(^80\)See Bruce D. Sales & Lynn R. Kahle, Law and Attitudes Toward the Mentally Ill, 3 INT'L J. L. & PSYCHIATRY 391, 392 (1980) (“Apart from the potential stigma of not being able to make one’s own decisions, there are also the potential problems of diminishing self-esteem caused by the outcome of the adjudication and the actual disuse of decision-making powers, which may lead to degeneration of existing capabilities and behaviors.”).

\(^81\)See ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES 3–74 (1962) (discussing the phenomenon of institutional dependence); CHARLES A. KIESLER & AMY E. SIBULKIN, MENTAL HOSPITALIZATION: MYTHS AND FACTS ABOUT A NATIONAL CRISIS 148 (1987); MICHAEL L. PERLIN, 2 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 1–438 (1989) (hospitalization has frequently caused harm or retarded recovery); Robert F. DeVellis, Learned Helplessness in Institutions, 15 MENTAL RETARDATION 10 (Oct. 1977); Richard Cole, Patients’ Rights vs. Doctors’ Rights: Which Should Take Precedence?, in REFUSING TREATMENT IN MENTAL INSTITUTIONS: VALUES IN CONFLICT 59 (A. Edward Doudera & Judith P. Swazey eds., 1982); Edmund G. Doherty, Labeling Effects in Psychiatric Hospitalization: A Study of Diverging Patterns of Inpatient Self-Labeling Process, 32 ARCH. GEN. PSYCHIATRY 562 (1975). In addition to breeding learned helplessness, such total institutions condition passivity and helplessness by reinforcing it and by discouraging assertiveness and autonomous behavior. Conditioned helplessness, however, should be distinguished from learned helplessness. It may be that individuals subjected to situations of uncontrollability learn passivity and helplessness as a matter of operant conditioning, i.e., these behavior patterns are reinforced by environmental consequences. This is not, however, learned helplessness. Learned helplessness posits not that an individual learns a particular behavior pattern, but that he or she acquires a generalized expectation of helplessness. This expectation that outcomes and responses will be independent in the future brings about helpless behavior. For an alternative view of helplessness phenomena, hypothesizing that passivity in a situation that is marked by uncontrollability relates to the individual’s ego-need to save face, see Arthur Frankel & Melvin L. Snyder, Poor Performance Following Unsolvable Problems: Learned Helplessness Or Egotism?, 36 J. PERSONALITY & SOC. PSYCHOL. 1415 (1978); Peterson & Bossio, supra note 59, at 240.
helplessness, and hopelessness. They may respond with passivity, resignation, and lowered self-esteem. Moreover, the incompetency label causes individuals to attribute their failures to themselves, as due to internal shortcomings that are relatively unchangeable, rather than to universal difficulties or temporary deficits. Not everyone, the individual may reason, is incompetent, not even all patients with mental illness. The incompetency label predictably produces depression and withdrawal and saps motivation. In summary, incompetency labeling may be highly antitherapeutic.

2. Effects on motivation. Psychologist Edward Deci's influential work on motivation and behavior has distinguished three different types of motivational subsystems: intrinsic motivational, extrinsic motivational, and amotivational. Intrinsic motivation is based in the need for competence and self-determination. It involves self-determined behavior, an internal perceived locus of causality, feelings of self-determination, and a high degree of perceived competence and self-esteem.

Extrinsic motivation involves greater responsivity to external as opposed to internal cues and arises in contexts in which the behaviors and the rewards are separable. In contrast to the intrinsic subsystem, where rewards are the feelings accompanying self-determined, competent behavior, rewards in the extrinsic subsystem, such as praise or money, are separable from the behavior and its accompanying feelings. The perceived locus of causality for the extrinsic subsystem is external and is experienced as less self-determining. Behaviors are perceived as being controlled by reward contingencies rather than by internal choices, and self-esteem tends to be somewhat lower.

The amotivational subsystem is characterized by an absence of activity. Individuals perceive that there is no relationship between behaviors and rewards or outcomes. Perceived competence, self-determination, and self-esteem tend to be extremely low. People who are amotivational feel helpless, incompetent, and out of control.

Deci's description of the amotivational subsystem parallels Seligman's concept of learned helplessness. According to Deci, with the amotivational subsystem, causality is perceived to be impersonal and behavior and outcomes to be independent. "[S]uch people believe that they cannot attain desired outcomes—so there tends to be no voluntary behavior." 83

Deci considered intrinsic motivation or the need to be self-determining as a basic human need. 84 This inherent human need to be competent and self-determining parallels what Heinz Hartmann called independent ego energy 85 and what Robert White called effectance motivation. 86 Deci cited a variety of studies providing

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83Deci, Intrinsic Motivation, supra note 82, at 67.
84Id. at 208.
empirical verification for the importance of self-determination as a motivational propensity. These studies, Deci argued, demonstrate that “the opportunity to be self-determining is intrinsically motivating and the denial of the opportunity to be self-determining undermines people’s motivation, learning, and general sense of organismic well-being.” Deci concluded that intrinsic motivation is a basic need of the central nervous system. Indeed, in extreme cases, “anecdotal and survey data suggest that the stress of losing the opportunity to be self-determining may cause severe somatic malfunctions and even death.”

When people are labeled incompetent and their decision-making control is removed, they are explicitly reminded that they lack an internal locus of control. Such people function on the basis of neither intrinsic nor extrinsic motivation; rather, what Deci called the amotivational subsystem is operative. In this state, the individual experiences “a minimum of behavior, will feel helpless, hopeless, and self-critical, and will not behave because he can see no use in behaving.” Such people experience a lack of motivation, initiating behavior less frequently and exhibiting less persistence in goal attainment.

Deci’s work suggests that making decisions for oneself is a basic human need, the frustration of which diminishes intrinsic motivation and produces dysfunctional behavior, withdrawal, passivity, and lack of response. When people are allowed to be self-determining, they function more effectively and with greater satisfaction. For example, children in classrooms that stress autonomy have been shown to have higher intrinsic motivation and higher self-esteem than those in control-oriented classrooms. Labeling people as incompetent deprives them of the opportunity for self-determining behavior. Having others make decisions for them produces amotivational behaviors, low self-esteem, passivity, and feelings of inadequacy and incompetence.

3. Effects on mood. Seligman’s observation that conditions of uncontrollability produce the symptoms of clinical depression, and Deci’s description of the emotional component of the amotivational subsystem, point to another adverse effect of incompetency labeling. Such labeling may produce and reinforce depression.
and other alterations of mood. Under this analysis, individuals become depressed when highly desired outcomes are believed improbable and highly aversive consequences are believed likely, and they conclude that their behavioral repertoire is incapable of altering these likely outcomes. The intensity and duration of their depression will depend on how general they perceive the deficit to be, on whether it is thought to be stable or irreversible, and on the degree of the trait's internality or relationship to the individuals' self-identity.

The perception and expectation of uncontrollability may produce four differing components of depression: "depressed affect, lower motivation, cognitive deficits (e.g., inability to learn response contingencies), and lower self-esteem." These symptoms of depression, by impairing the individual's concept of self-efficacy, will in turn have a further debilitating effect on motivation and performance. Because an incompetency label strongly communicates to individuals that they are globally impaired, that their impairment is unlikely to change, and that the deficit is internally caused, depression would seem to be a predictable side effect of such labeling.

Empirical studies have shown that for some people, feelings of depression, loneliness, and shyness may be related to a maladaptive attributional style. Such people may explain their successes and failures in a self-defeating way, thereby fostering expectations of poor performance, which in turn dampen motivation, promote rigidity of behavior, and bring about failure and depression. A maladaptive attributional style would tend to be reinforced when individuals receive an incompetency label. Applying such a label to individuals with existing problems may therefore perpetuate depression and related difficulties.

People who have been labeled incompetent are deprived of their ability to satisfy the basic human need to be self-determining and self-actualizing. Whether it is an innate need or a conditioned desire, a degree of control over important events in their lives seems essential to people's sense of well-being. Happy and well-adjusted people seek to function effectively in life, behaving in ways that generally maximize pleasure and minimize pain. Some degree of actual control and a perception of self-control are essential if this is to be accomplished. Individuals must have some measure of personal control over their actions and the environment in order to function effectively, and belief in one's own efficacy appears essential to effective

97 Abramson et al., supra note 59, at 60.
98 Id.
99 Arkin & Baumgardner, supra note 74, at 249. "The generality of the depression is influenced by the globality of the attributions. The chronicity (or duration) is influenced by the stability of the attributions. The self-esteem component is influenced by the locus of the attributions." Id.
100 Bandura, supra note 94, at 408 ("The impact of mood on self-percepts of efficacy is widespread, rather than confined to the particular domain of functioning in which happiness or sadness was experienced. . . . [D]espondency can thus lower self-percepts of efficacy that give rise to ineffectual performance, breeding even deeper despondency.").
102 Anderson & Arnoult, supra note 93, at 17.
103 See supra notes 84–90 and accompanying text.
104 Arkin & Baumgardner, supra note 74, at 184.
functioning. Without such a belief individuals are unlikely to initiate potentially rewarding actions or to continue such actions to completion.

Using the concept of "locus of control," psychologists have demonstrated a relationship between perceptions of control and mood and feelings of psychological well-being. Under this analysis, individuals who perceive themselves as having an internal locus of control are vital, lively, and essentially happy. On the other hand, those who have an external locus of control lose feelings of mastery and a sense of effectiveness and become demoralized and depressed. Seligman showed that perceptions of inability to control consequences produce depression not only when those consequences are aversive, but even when they are positive. By depriving individuals of control over the decision in question and by explicitly labeling them as unable to exercise self-control, an incompetency adjudication predictably will foster feelings of depression and worthlessness. Labeling individuals incompetent therefore places a cloud over their sense of psychological well-being and depresses mood in ways that are strongly unpleasant and that may be debilitating.

III. The Implications for Mental Health Law

Both Deci's work on motivation and Seligman's work on learned helplessness thus suggest that allowing people to be self-determining generally is essential to their psychological well-being and effective functioning. By contrast, labeling them as incompetent and thereby depriving them of the opportunity for self-determining behavior induces feelings of helplessness, hopelessness, depression, and low self-esteem. These feelings and the self-attribution of incompetency that an incompetency adjudication may produce will predictably undermine motivation and effective performance. Overuse of the incompetency label may therefore produce what in therapeutic jurisprudence terms is described as "law-related psychological dysfunction."

This analysis does not necessarily suggest that the concept of incompetency should never be used. There undoubtedly are cases in which an individual's functioning is so impaired by mental illness that the individual is unable either to make decisions or to make them with any degree of rationality. In such cases, the individual's problems are quite real and are not merely an artifact of being labeled incompetent. An understanding of the negative effects of incompetency labeling, however, suggests the need for a careful cost–benefit analysis of the law's use of the

105Id.
108See, e.g., Deci, Self-Determination, supra note 82, at 41; Lefcourt, supra note 107, at 37; Julian B. Rotter, Generalized Expectancies for Internal vs. External Control of Reinforcement, 80 Psychol. Monographs 1 (1966).
110Wexler, supra note 4, at 5; Wexler & Winick, supra note 5, at 313; Wexler & Winick, The Potential of Therapeutic Jurisprudence, supra note 5, at 211, 226; Wexler & Winick, Therapeutic Jurisprudence as a New Approach, supra note 5, at 979, 994; Winick, supra note 4, at 336.
label. What benefits are achieved by adjudicating people to be incompetent in the various legal contexts in which this occurs, and do these benefits exceed the individual and social costs that such labeling may impose?

The legal concept of competency is ambiguous and artificial in a number of respects. First, the law treats competency as a dichotomous inquiry in which people are either competent or incompetent. This dichotomous approach is artificial, however. It is more appropriate to understand that there are degrees of competency falling along a continuum and that competency is almost always in flux. It also is inappropriate to regard competency as a descriptive concept. Competency is more a normative than a descriptive notion, reflecting a variety of political and moral judgments. In addition, because the incompetency label is used in a variety of legal contexts, there is a tendency to regard people as either competent or incompetent for all purposes. Competency, however, is a contextualized inquiry. People may be incompetent for one purpose yet be competent for others. Finally, the justifications for using the concept of competency vary with the legal context. Because the concept of competence is rarely defined, however, the tendency is to regard the concept as meaning essentially the same thing in each context. The vagueness of the concept and its use in so many different contexts tend to mask the often different social policies that are implicated. It is necessary to identify clearly the social policies involved in each context in which the concept of competence is used, to determine for each whether these policies justify the adverse effects of incompetency labeling, and to specify standards for applying the concept that reflect the relevant social policies operating in these differing areas.111

When the issue is competency to engage in rational decision making, a large number of individuals with mental illness are neither clearly competent nor clearly incompetent. Rather, they properly can be placed in the middle ranges of the competency continuum. Their decision-making capacity may be impaired by mental illness, but they nonetheless are able clearly to express choice and exercise some degree of autonomy and rationality. For these individuals, the use of the incompetency label may be countertherapeutic, defeating the putatively benevolent purposes of the law. Analysis is needed concerning each legal context in which the concept of competence is used to determine when these costs of incompetency labeling outweigh the assumed benefits. In such contexts the law should reconsider the continued use of the incompetency concept. At a minimum, the law in these contexts should recognize a presumption against use of the incompetency label and should define the concept of incompetency narrowly in a way that allows marginal cases to be deemed competent. Even when incompetency labeling is thought justified, a number of steps can be taken to avoid or minimize the harmful effects of such labeling.

The adverse effects of incompetency labeling are sufficiently serious that in many contexts application of the label should be regarded as a deprivation of liberty within the meaning of the Constitution. As a result, in such contexts the state's ability to use its parens patriae power, which requires labeling an individual incompetent, should be limited. In these contexts constitutional considerations suggest that incompetency should be defined more narrowly, that competency should be presumed, and that the

111 Winick, supra note 8, at 22–24; Winick, Restructuring Competency to Stand Trial, supra note 6, at 921.
burden of persuasion should be placed on the party that asserts incompetency. In addition, a number of approaches can be suggested that would avoid incompetency labeling. Even in cases in which such labeling is considered necessary, it may be possible to recharacterize incompetency labels and reshape the labeling process in ways that can minimize adverse effects.

A. Incompetency Labeling as a Deprivation of Constitutional Liberty

The stigma produced by incompetency labeling can be serious and long-lasting. Both the strong social disadvantages suffered by those to whom the law attaches this label, and the effects on the individual's own cognition, motivation, performance, and mood, can be debilitating. Once the existence and extent of this double-edged stigma are recognized, application of an incompetency label can be seen as imposing a deprivation of liberty within the meaning of the Due Process Clause even apart from the associated deprivations that the incompetency label often brings. This is not simply an injury to reputation alone. Without more, such an injury to reputation will not invade constitutionally protected liberty. Incompetency labeling not only damages individuals' reputation in the eyes of the community, but profoundly affects their own self-concept in ways that can be debilitating. Branding individuals as incompetent is a trespass and an assault on their psyche in ways that can leave a lasting imprint.

Moreover, when courts apply an incompetency label, it almost always has the legal effect of depriving individuals of associated liberties. An adjudication that a criminal defendant is incompetent to stand trial, for example, justifies deprivation of what otherwise would be the defendant's Sixth Amendment right to speedy trial. A defendant seeking to be found incompetent may not be thought of as being "deprived" of this right, but the label sometimes is applied over objection to defendants asserting their interest in the speedy resolution of their charges. Individuals found incompetent to vote are thereby deprived of exercising the prerogatives of citizens to participate in the democratic process. When individuals are found incompetent to manage their property, to contract or make a conveyance, to give a gift, or to make a will, they lose the right to enjoy or to dispose of their property as they see fit, an interference with both liberty and property. People who are found incompetent to make treatment decisions will be deprived of authority

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113 Paul v. Davis, 424 U.S. 693 (1976) (distribution by police chief of flyer containing names and photographs of "known shoplifters" held not to infringe a liberty interest, and therefore to require a hearing, absent additional deprivations resulting therefrom).

114 Cf. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.")

115 U.S. CONST, amend. VI; see, e.g., Jackson v. Indiana, 406 U.S. 715, 740 (1972); Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957); United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973); Winick, supra note 1, at 802–805 (discussing speedy trial problems arising in the context of defendants found incompetent to stand trial).

116 Winick, Restructuring Competency to Stand Trial, supra note 6, at 951.

over their bodily integrity\textsuperscript{118} and of the liberty to control personal health.\textsuperscript{119} Individuals committed to a psychiatric facility on the basis of a determination of incompetency thereby lose the basic right to be freed from external restraint.\textsuperscript{120} Individuals found to be incompetent to marry may not exercise the fundamental right to participate in marriage and family life.\textsuperscript{121} An incompetency label thus frequently results in the deprivation of fundamental liberty and property interests within the protection of the Due Process Clause.

Deprivations this serious should not be imposed unnecessarily. Conventional substantive due process and equal protection analysis require strict judicial scrutiny of governmental action producing such deprivations of liberty.\textsuperscript{122} Moreover, the imposition of stigma together with associated deprivations has been recognized to trigger the need for the protection of procedural due process.\textsuperscript{123} Yet, the strongly negative impact on an individual's life, liberty, and property of labeling them

\textsuperscript{118}See Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990) (liberty interest in making personal health decisions); Ingraham v. Wright, 430 U.S. 651, 673 (1977) (noting that "among the historic liberties so protected was a right to be free from . . . unjustified intrusions on personal security"); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891) (holding that court may not order plaintiff to submit to pretrial surgical examination); cf. Winston v. Lee, 470 U.S. 753 (1985) (holding that nonconsensual surgical removal of bullet would violate Fourth Amendment's ban on unreasonable searches and seizures). Lower courts have frequently found that patients have a right to refuse treatment grounded in a liberty interest in "bodily integrity, personal security and personal dignity." E.g., Johnson v. Silvers, 742 F.2d 823, 825 (4th Cir. 1984); Lojak v. Quandt, 706 F.2d 1456, 1465 (7th Cir. 1983), cert. denied, 476 U.S. 1067 (1986); Rogers v. Okin, 634 F.2d 650, 652 (1st Cir. 1980), vacated 

\textsuperscript{119}Riggins v. Nevada, 112 S. Ct. 1810 (1992) (concluding that Due Process Clause protects criminal defendant's interest in avoiding involuntary administration of antipsychotic drugs); Cruzan, 497 at 277-78 (1990) (concluding that a competent person has a constitutionally protected interest in refusing unwanted medical treatment); Washington v. Harper, 494 U.S. 210, 221-22 (1990) (liberty interest in freedom from unwanted antipsychotic medication); Doe v. Bolton, 410 U.S. 179, 192 (1973) (Douglas, J., concurring) (referring to "the freedom to care for one's health and person" as being a fundamental right protected by the Due Process Clause of the Fourteenth Amendment).


\textsuperscript{122}See, e.g., Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (commitment of an insanity acquittee to a mental hospital held to violate substantive due process where the patient, although thought to be dangerous, was no longer mentally ill); Riggins v. Nevada, 112 S. Ct. 1810 (1992) (involuntary administration of antipsychotic medication during criminal pretrial and trial process would violate substantive due process unless such medication was medically appropriate and constituted the least intrusive means either of protecting the safety of other jail inmates or staff or of maintaining defendant's competency to stand trial) (dicta); Turner v. Safley, 482 U.S. 78 (1987) (right to marry); Kramer v. Union Free School Dist. Number 15, 395 U.S. 621 (1969) (right to vote).

\textsuperscript{123}E.g., Vitek v. Jones, 445 U.S. 480 (1980) (stigma of mental hospitalization); Owen v. City of Independence, 445 U.S. 622 (1980) (stigma of wrongful dismissal from employment); Goss v. Lopez, 419 U.S. 565 (1975) (stigma of school suspension); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (stigma of "posting"—the listing of the names of individuals who have been publicly intoxicated, which has the effect of preventing them from purchasing alcoholic beverages).
This page contains text discussing the state's parens patriae power, with a focus on competency labeling and the limitations on liberty and property due tosuch labeling. The text highlights the historical roots of parens patriae power and its application in various cases and statutes. It references cases such as Addington v. Texas, Donaldson, and Mills v. Rogers, among others, to illustrate the constitutional and legal implications of competency labeling and the parens patriae power. The text also mentions the importance of individual autonomy and the need for due process protections in the context of civil commitment and the administration of psychotropic drugs.
assertions of the *parens patriae* power that intrude on constitutionally protected liberty interests, procedural due process requires a hearing on the competency question and a fairly formal determination of incompetency.\footnote{129} \footnote{Rennie v. Klein, 653 F.2d 836, 847 \& n.12 (3d Cir. 1981) (en banc), vacated \& remanded, 458 U.S. 1119 (1982); Rogers v. Okin, 634 F.2d 650, 657–59 (1st Cir. 1980), vacated \& remanded sub nom. Mills v. Rogers, 457 U.S. 291 (1982); Winters v. Miller, 446 F.2d 65, 71 (2d Cir. 1971), cert. denied sub nom., 404 U.S. 985 (1971); Davis v. Hubbard, 506 F. Supp. 915, 935–36 (N.D. Ohio 1980); People v. Medina, 705 P.2d 961, 973 (Colo. 1985) (en banc). See Bruce J. Winick, *The Right to Refuse Psychotropic Medication: Current State of the Law and Beyond, in The Right to Refuse Antipsychotic Medication 7, 17–18* (David Rapoport \& John Perry eds., 1986).} Such a hearing and determination traditionally had been thought unnecessary in cases in which the individual voluntarily sought to waive the right to a hearing and to accept the intrusion or status that the government wished to impose. However, the U.S. Supreme Court’s 1990 decision in *Zinermon v. Burch*, if read broadly, may require a determination of competency in all cases involving waiver.

*Zinermon*’s mandate of an “inquiry” into competency when a mentally ill individual seeks voluntary admission to a mental hospital may be construed to require an assessment of competency whenever an individual with mental illness assents to a waiver of rights. Although patients seeking voluntary hospitalization or treatment previously could have obtained it without the necessity of an inquiry into their competency,\footnote{131} *Zinermon* seems to suggest that competency must first be assessed.\footnote{132} Because some individuals who previously would have been permitted to accept the proposed intervention or status voluntarily and without an assessment of competency now will be found incompetent to do so, *Zinermon* may dramatically increase the use of incompetency labeling. As a result, incompetency labeling, and the adverse side effects it imposes, may increasingly become an unavoidable consequence of assertions of the *parens patriae* power. To the extent that a formal hearing is deemed to be required and is followed by an official finding of incompetency by a judicial or administrative decision maker, these adverse consequences will only increase.

An understanding of the extent of these negative consequences calls for a broad reconsideration of the wisdom of state assertions of the *parens patriae* power. Such paternalism frustrates the political value that society has traditionally placed on autonomy and self-determination\footnote{133} but does so on the ground of beneficence. The justification traditionally has been thought to be that the injury caused by denying the individual’s autonomy would be exceeded by the harm produced by honoring the choices of those who are incompetent.\footnote{134} The added psychological harm of incompetency labeling, however, may call this conclusion into question, at least in many cases. The net harm done to individuals by labeling them incompetent and by
intruding on their liberty and autonomy may in fact exceed the harm of honoring at least some incompetent choices.

Striking an appropriate balance will vary, of course, with the harmfulness to individuals of honoring their possibly incompetent choices. If individuals whose decision-making abilities are significantly impaired by mental illness seek to give away all of their worldly possessions or to elect experimental and dangerous treatment such as psychosurgery, the harm to be avoided by deferring to their choice may far exceed the damage of labeling them incompetent. However, when the harm to be avoided is relatively insignificant—the expenditure or gift of a modest sum, or the election of conventional and nonrisky treatment, for example—it may be better to permit an incompetent choice than to label individuals incompetent.

At least when there is some independent assurance that the individual’s assertedly incompetent choice is not unreasonable or exceedingly injurious, it may be preferable to treat the choice as competent and to allow it to be acted on. For example, if a criminal defendant of doubtful competence expresses the choice to plead guilty or stand trial and counsel agrees that this election would be in the defendant’s best interests, the defendant should be permitted to make the choice. Similarly, if a patient of doubtful competency seeks to assent to conventional treatment or voluntary hospitalization recommended by a therapist as being in the patient’s best interests, the patient should be permitted to do so. In situations like these, the recommendation or approval of professionals with a fiduciary duty to the individual provides reasonable assurance that the choices the mentally ill person seeks to make are not unreasonable and are probably beneficial. In contrast, vetoing that choice on the grounds that it is incompetent and adjudicating the patient incompetent may be injurious.

The harm produced by incompetency labeling, as well as the constitutional preference for individual autonomy, accordingly should restrict government parens patriae interventions to situations in which they are clearly warranted by the need to avoid serious harm. The law should avoid doing harm in the process of attempting to do good. We should heed Justice Brandeis’ admonition to be suspicious of good intentions, particularly when invoked to justify governmental interference with

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135 See Legislative and Social Issues Comm. of the Am. Ass’n on Mental Deficiency, Consent Handbook 7–8 (1977) (“[T]he ‘situational capacity’ principle might result in the same person being found competent to enter into a contract for the purchase of a shirt but not one for the sale of all his assets (where they may be of great value) for a nominal sum.”).


137 Bruce J. Winick, Incompetency to Stand Trial: An Assessment of Costs and Benefits and a Proposal for Reform, 39 Rutgers L. Rev. 243 (1987); Winick, Restructuring Competency to Stand Trial, supra note 6. When counsel disagrees with the wisdom of his possibly incompetent client’s election, however, or when the defendant seeks to discharge counsel and enter a plea to a charge carrying serious consequences, the balance should be struck differently, and the defendant’s competency should become the subject of inquiry.

138 Winick, supra note 8; Winick, supra note 9.
individual choice. Paternalism seems so acceptable because it is part of the human condition and is so deeply rooted in the social biology of our species. Unlike that of many other species, our 9-month gestation period results in birth at a time when infants are unable to care for themselves. Without parental care and nurturing, infants could not long survive. Because such parental paternalism has been necessary for human survival, we tend to accept too readily the metaphor of state paternalism embodied in the parens patriae doctrine. Parental paternalism rarely involves incompetency labeling, however, whereas governmental paternalism often does. Moreover, paternalism on the basis of parental love and a knowledge of the child's interest rooted in actual familiarity is much more likely to be beneficial than that engaged in by impersonal state actors who lack an ongoing relationship with the individual. The law therefore should be more hesitant than it has been to justify paternalism by the state.

C. Defining Incompetency Narrowly

Even for applications of governmental paternalism that continue to be regarded as appropriate, an understanding of the adverse side effects of incompetency labeling argues for a narrow definition of incompetency. Legal standards of incompetency often are broad and vague, permitting clinical evaluators relied on by the courts, who typically are paternalistically oriented, to classify marginally competent people with mental disabilities as incompetent. For example, a typical formulation of the standard for competency to stand trial, approved by the U.S. Supreme Court as the standard to be used in federal cases, is whether the 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 against him." Under this standard, many criminal defendants who wish to stand trial or plead guilty, and whose interests would be furthered by permitting them to do so, instead are found incompetent and subjected to an enforced delay in the exercise of their right to speedy trial, and to the numerous disadvantages—sometimes including unnecessary detention, hospitalization, and treatment—that follow an incompetency adjudication.

Other examples of broad and vague standards of incompetency occur in the context of informed consent to treatment and hospitalization. In its discussion of competency to consent to voluntary hospitalization in Zinermon v. Burch, the U.S. Supreme Court seemed to contemplate that the patient be able "to understand any proffered 'explanation and disclosure of the subject matter' of the [voluntary

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139Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").


141See Winick, Restructuring Competency to Stand Trial, supra note 6, at 933. Dusky v. United States, 362 U.S. 402, 402 (1960). Dusky is followed in substance by all jurisdictions, although statutory terminology varies widely. Winick, Restructuring Competency to Stand Trial, supra note 6, at 923 & n.4.

142See Winick, Incompetency to Stand Trial, supra note 6, at 257–58; Winick, Restructuring Competency to Stand Trial, supra note 6, at 947–48.
admission] forms that person is asked to sign, and . . . ‘to make a knowing and willful decision’ whether to consent to admission.”\(^{144}\) No general agreement exists concerning the appropriate standard for determining competency to provide informed consent to treatment.\(^{145}\) The influential President’s Commission report on health care decision making defines competency to make treatment decisions as requiring a patient to possess a set of values and goals and to be able to communicate with others, understand information, and reason and deliberate.\(^{146}\) The breadth and vagueness of these standards of competency ensure a significant degree of variability among clinicians and courts in their application.\(^{147}\) Moreover, clinicians may apply an artificially high standard of competency, overdiagnosing incompetency in order to bring about what to them seems a more paternalistic result.\(^{148}\)

Many psychiatric evaluators may regard a competency assessment as an exercise in clinical description.\(^{149}\) A competency evaluation, however, inevitably involves subjective cultural, social, political, and legal judgments that are essentially normative in nature.\(^{150}\) The decision regarding which standard of competency should be used turns on moral, political, and legal judgments concerning the appropriate level of ability that individuals must possess to exercise a variety of liberty and property interests. Recognizing the essentially normative nature of the concept of competency calls for courts and legislatures to clarify the often vague notion of competency to be used in a particular context. Moreover, recognizing that competency is more a legal than a clinical question allows greater flexibility in defining the concept. Thus, we can and should define it more narrowly in order to minimize the adverse side effects of

\(^{144}\)Zinermon, 494 U.S. at 133 (quoting FLA. STAT. § 394.455 (22) 1981).


\(^{147}\)See Winick, supra note 8, at 24–25; Winick, Restructuring Competency to Stand Trial, supra note 6, at 982–83.

\(^{148}\)See Winick, supra note 9, at 208 & n.180.

\(^{149}\)George J. Annas & Joan E. Denisbeger, Competency to Refuse Medical Treatment: Autonomy or Paternalism, 15 U. Tol. L. Rev. 561, 574–75 (1984); Winick, supra note 8, at 25.

\(^{150}\)Faden & Beauchamp, supra note 145, at 290; Grasso, supra note 145, at 30; 1 President’s Comm’n Report, supra note 146, at 172 (“’Decisionmaking incapacity’ is not a medical or a psychiatric diagnostic category. . . .”); Annas & Denisbeger, supra note 149, at 575; Paul S. Appelbaum & Thomas Grasso, Assessing Patients’ Capacities to Consent to Treatment, 319 New Eng. J. Med. 1635, 1637 (1988); Roth et al., supra note 8, at 279; Winick, supra note 8, at 25–26; Winick, Restructuring Competency to Stand Trial, supra note 6, at 966. See also Winick, supra note 136, at 46–52 (analyzing the nature of psychiatric diagnosis generally).
incompetency labeling and more effectively achieve the social policies underlying use of the incompetency concept in its varying contexts.

Tests of competency that require a high level of ability to understand information, rationally manipulate it, and appreciate the implications and consequences of alternative options seem artificially stringent and unrealistic, at least in the absence of extraordinary circumstances. Many "normal" people do not possess these abilities. Many nonmentally ill people frequently lose contact with reality and lack the capacity to think straight, pay attention, process information, and perform at least some key social tasks. Many "normal" criminal defendants, as well as many patients with medical but not mental illness, have linguistic, educational, and social problems that severely impair their ability to function competently in making difficult decisions, particularly during the stress of a criminal trial or a serious illness. Although their decision-making competency is sometimes seriously impaired, people who have mental illness are not categorically or inherently more incompetent than nonmentally ill people. More realistic standards of competency are therefore

[Decisions made about research, even by people of dubious competence, may not differ from the decisions that all of us make in everyday life, such as when buying a used car or choosing a brand of shampoo. . . . [T]he increasing technical complexity of our society makes it likely that many decisions in everyday life are made without appreciation of their consequences, without the ability to manipulate in a rational manner the information that is provided, and probably without full knowledge of the relevant details.]

Appelbaum & Roth, supra note 146, at 957.

Winick, Restructuring Competency to Stand Trial, supra note 6, at 970–71. See Note, supra note 7, at 459 ("Many defendants lack the intelligence or the legal sophistication to participate actively in the conduct of their defense."). This conclusion receives empirical support from Grisso’s studies of the abilities of both offender and nonoffender adults to understand the Miranda warnings. See generally Grisso, supra note 145. On the basis of several experimental measures of "Miranda comprehension," at least one-quarter of the adults sampled failed to meet an absolute standard for legally adequate understanding of the Miranda warnings and their implications. Id. at 145.

Winick, supra note 8, at 39–40; see Robert Burt, Taking Care of Strangers: The Rule of Law in Doctor–Patient Relations 142 (1979); Barrie R. Cassileth et al., Informed Consent—Why Are Its Goals Imperfectly Realized?, 302 NEW ENG. J. MED. 896, 899 (1980); Carl H. Fellner & John R. Marshall, Kidney Donors—The Myth of Informed Consent, 126 AM. J. PSYCHIATRY 1245, 1250 (1970); F. J. Ingelfinger, Informed (But Uneducated) Consent, 287 NEW ENG. J. MED. 465, 466 (1972); see also Paul S. Appelbaum et al., Empirical Assessment of Competency to Consent to Psychiatric Hospitalization, 138 AM. J. PSYCHIATRY 1170 (1981) (reviewing empirical studies showing poor recall and understanding of patients in a variety of situations who provided informed consent to medical treatment or research); Sprung & Winick, supra note 8, at 1351 (discussing studies showing deficiencies in recall and understanding of informed consent on the part of nonmentally ill patients).

Winick, supra note 9, at 190 & n.112. See Lisa Grossman & Frank Summers, A Study of the Capacity of Schizophrenic Patients to Give Informed Consent, 31 HOSP. & COMMUNITY PSYCHIATRY 205 (1980) (finding comprehension of consent information in groups of mental patients and medical patients to be fairly equal); Karen McKinnon et al., Clinicians Assessments of Patients’ Decision Making Capacity, 40 HOSP. & COMMUNITY PSYCHIATRY 1159 (1989) ("Clinical evidence suggests that despite alterations in thinking and mood, psychiatric patients are not automatically less capable than others of making health care decisions."); David A. Soskis, Schizophrenic and Medical Inpatients as Informed Drug Consumers, 35 ARCH. GEN. PSYCHIATRY 645 (1978) (patients with schizophrenia found to be more aware of risks and side effects of their medications than medical patients, but medical patients to be more informed about the
needed that require a lower threshold of decision-making ability. The law should not apply to the mentally ill artificially high standards for decision-making competence that many “normal” people are unable to satisfy.155

D. Presuming Competency

In addition to redefining competency standards more narrowly, recognition of the adverse side effects of incompetency labeling supports application of a strong presumption in favor of competency. Such a presumption in favor of competency has been recognized by case law in a number of jurisdictions156 and has received broad scholarly support.157 However, the presumption recently was questioned by the U.S. Supreme Court’s broad dicta in Zinermon v. Burch.158 In analyzing the need for a procedural determination of the competency of a person seeking voluntary admission to a psychiatric hospital, the Court in Zinermon noted that even if a request for admission to a hospital for medical treatment might justifiably be taken at face value, “a state may not be justified in doing so, without further inquiry, as to a mentally ill name and dose of their medication and of their diagnosis); David A. Soskis & Richard L. Jaffe, Communicating with Patients about Antipsychotic Drugs, 20 COMPREHENSIVE PSYCHIATRY 126 (1979) (understanding in both groups equal); Barbara Stanley, Informed Consent in Treatment and Research, in HANDBOOK OF FORENSIC PSYCHOLOGY 63, 72–74 (Irving B. Weiner & Allen K. Hess eds., 1987) (reviewing studies finding little difference between psychiatric and medical patients’ comprehension of consent information); Barbara Stanley et al., Preliminary Findings on Psychiatric Patients as Research Participants: A Population at Risk?, 138 AM. J. PSYCHIATRY 669 (1981) (no differences found between group of mental and medical patients studied).


156See, e.g., Lotman v. Security Mut. Life Ins. Co., 478 F.2d 868, 873 (3d Cir. 1973) (“there is a legal presumption that everyone is sane”); Winters v. Miller, 446 F.2d at 68 (holding that a court finding that a patient was mentally ill does not create a presumption that he is incompetent to make decisions); Rogers v. Okin, 478 F. Supp. 1342, 1361, 1363–64 (D. Mass. 1979) (“[A]lthough committed, a mental patient is nonetheless presumed competent to manage his affairs, dispose of property, carry on a licensed profession, and even to vote.”), aff’d in part, reversed in part on other grounds, 634 F.2d 650 (1st Cir. 1980), vacated sub nom. Mills v. Rogers, 457 U.S. 291 (1982); Child v. Wainwright, 148 So. 2d 526, 527 (Fla. 1963) (noting that a criminal defendant is presumed sane); Howe v. Howe, 99 Mass. 88, 98 (1868) (noting presumption of sanity of grantor wishing to void deed for reason of insanity); Lane v. Candura, 376 N.E.2d 1232, 1235 (Mass. App. Ct. 1978) (noting that there is a presumption of competency when determining whether an adult needs guardian appointed by court to make medical decisions); Grannum v. Berard, 422 F.2d 812, 814 (Wash. 1967) (noting that an individual is presumed sane for purpose of consenting to surgery).

157See, e.g., BRAKEL ET AL., supra note 8, at 341 n.167, 375; 1 PRESIDENT’S COMM’N REPORT, supra note 146, at 3, 56 (discussing informed consent and presumption of competency); GRISSO, supra note 145, at 314–15 (recognizing the presumption in favor of competency and defining standards of competency); Annas & Densberger, supra note 149, at 575 (“The legal rule is that competence is presumed.”); Winick, supra note 8, at 22–23 & n.19 (“The law presumes that people are competent to make decisions unless they have been adjudicated incompetent.”).

person’s request for admission and treatment at a mental hospital. This language seems to disapprove of the presumption in favor of the competency of people who are mentally ill and to call for an “inquiry” into the question whenever a mentally ill person seeks hospital admission, and by implication, whenever such a person seeks to exercise any right. If interpreted this way, Zinermon may present unintended antitherapeutic consequences. If Zinermon is read broadly to require a hearing into competency whenever a mentally ill individual engages in decision making, it will dramatically increase the extent of incompetency labeling and of its significant adverse side effects.

The Zinermon dicta also runs counter to one of the most significant developments in modern mental health law. Under the approach that once had prevailed in American law, an adjudication of incompetency rendered an individual generally incompetent. The notion of general incompetency, however, has been rejected in favor of an approach requiring adjudication of specific incompetency. Under the modern view, competency is regarded as a contextualized inquiry. An individual’s competency is the subject of inquiry only in regard to the specific capacity in question. As a result, under the modern approach, an individual will be determined to be incompetent to perform only particular tasks or roles, for example, to stand trial, make treatment decisions, or manage property. An adjudication of specific incompetency does not render the individual legally incompetent to perform other tasks or play other roles. This trend recognizes that mental illness should not be equated with incompetency, that many individuals suffering from mental illness retain full decision-making capacity, and that even when such illness impairs capacity in one area, it may leave capacity unimpaired in others. As a result, in the context of cases raising a constitutional right to refuse

159Id. For an analysis of why this statement was dicta and a criticism of its implications, see Winick, supra note 9.

160See id. at 192–99 (analyzing potential antitherapeutic consequences of a broad reading of Zinermon).

161See, e.g., Appelbaum et al., supra note 8, at 82; Brackel et al., supra note 8, at 185, 258, 438–39; David B. Wexler, Mental Health Law: Major Issues 40 (1981); Tepper & Elwork, supra note 145, at 207; Winick, supra note 9, at 207; Winick, supra note 8, at 22–23.

162E.g., State ex rel. Jones v. Gerhardstein, 416 N.W.2d 883, 895 (Wis. 1987); Appelbaum et al., supra note 8, at 82–83; Brackel et al., supra note 8, at 185, 405–407 (table 7.2, col. 1); Faden & Beauchamp, supra note 144, at 289; Tepper & Elwork, supra note 145, at 207; Winick, supra note 8, at 23.


164See, e.g., Appelbaum et al., supra note 8, at 82–83; Brackel et al., supra note 8, at 175 & n.73; Grisso, supra note 145, at 314; Tepper & Elwork, supra note 145, at 207–208; Winick, supra note 9, at 186.


In determining whether an individual meets a specified legal standard (e.g., for competence, criminal responsibility, or disability) additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual’s functional impairments, and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

Paul S. Appelbaum & Thomas G. Gutheil, Clinical Handbook of Psychiatry and the Law 218, 220 (1991) (“The mere presence of psychosis, dementia, mental retardation, or some other form of mental illness or disability is insufficient in itself to constitute incompetence.”); McKinnon et al., supra note 154, at 1159; Morse, Crazy Behavior, supra note 151, at 573, 588; Winick, supra note 8, at 17–18; Winick, supra note 9, at 188–90.
antipsychotic medication, courts have begun to recognize that the presumption in favor of competency applies to mentally ill as well as to medically ill people, even to those who have been involuntarily committed under the state’s *parens patriae* power on the basis that they are incompetent to make the hospitalization decision for themselves.\(^{166}\)

The *Zinermon* dicta—with its broad implications that competency should be the subject of inquiry whenever a mentally ill person seeks to exercise choice—should therefore be rethought.\(^{167}\) Indeed, the serious adverse side effects of incompetency labeling documented in this article make such rethinking especially appropriate. In contexts in which individuals seek voluntarily to make a choice, their choices should rarely be disturbed. If the government seeks to question such choices on the basis that the individuals are incompetent, it should bear a heavy burden of demonstrating incompetency. Competency should be the subject of inquiry only in special cases, rather than in every case involving individuals who are or seem to be mentally ill. The presumption in favor of competency should preclude inquiry into the question in the absence of special factors suggesting that the choice made is the product of mental illness. Because mental illness often does not impair decision-making capacity, its existence alone should not require a competency inquiry.

Although the broad implications of the *Zinermon* dicta are highly questionable, the actual holding in the case—that some “inquiry” should have been made into the competency of the patient involved—seems plainly correct and illustrates the kind of case in which the presumption of competency should be considered to have been rebutted. The patient in *Zinermon* was able to express a preference in favor of hospitalization but appeared confused and delusional, was unable to state the reasons for his choice, and was hallucinating in ways that bore directly on his decision.\(^{168}\) Indeed, he apparently deliberated under the delusion that the mental hospital he was entering was “heaven.”\(^{169}\) These facts suggest the need for an inquiry into competency and should rebut the presumption of competency that otherwise should apply. When an expression of choice seems to be based on reasons that appear clearly irrelevant, on beliefs that seem clearly irrational, or on outright delusions or hallucinations, further inquiry into the competency question is justified.\(^{170}\) In the absence of such evidence, however, competency should be presumed and no further inquiry into the subject should be required.


\(^{167}\)See Winick, supra note 9.

\(^{168}\)See Winick, supra note 9.

\(^{169}\)Id.

\(^{170}\)Winick, supra note 9, at 184 & n.91; see Jeffrey Murphy, *Incompetency and Paternalism*, 60 ARCH FUR RECHTS-UND SOZIALPHILOSOPHIE 465, 473–74 (1974); *Tepper* & *Elwork*, supra note 145, at 216–20; Winick, *Restructuring Competency to Stand Trial*, supra note 6, at 967; see, e.g., Dept of Human Services v. Northern, 563 S.W.2d 197 (Tenn. App. 1978) (delusional denial by gangrenous patient that she could live without amputation found to render her incompetent to refuse recommended surgery). Where the patient is delusional, but her delusions are not the primary reason for her treatment decision, however, she should
The U.S. Supreme Court's more recent decision in *Medina v. California*\(^{171}\) is more consistent with the trend of modern mental health law. The Court in *Medina* upheld the constitutionality of a state statute containing a presumption in favor of the competency of a criminal defendant to stand trial and placing the burden of proving incompetency by a preponderance of the evidence on the party raising the competency issue. The issues presented in *Medina* were considerably different from those presented in *Zinermon*. The Court's more recent decision in *Medina*, however, stands as an endorsement of the presumption in favor of competency, in contrast to its earlier questioning of the presumption in *Zinermon*. The Court's decision in *Medina* involved only a question of constitutionality—whether the statutory presumption of competency violated due process by placing on the defendant the burden of proving his own incompetency—rather than a question of the wisdom of the statutory scheme. However, recognition of the adverse side effects of incompetency labeling, which were not considered in *Zinermon*, provides strong support both for the *Medina* decision and the underlying policy judgment made by the California legislature. Whereas *Zinermon* seemed to be a step in the wrong direction, *Medina* sets a truer course.

An understanding of the adverse effects of incompetency labeling thus calls for new legal approaches to minimize application of such labels. In addition to narrowing the definition of incompetency, creating presumptions in favor of competency, and placing burdens of persuasion on those questioning competency, law scholars should rethink the law's reliance on paternalistic approaches and coercion in this area.

**E. Avoiding Incompetency Labeling**

Incompetency labeling should be avoided whenever possible through the use of voluntary rather than coercive approaches in mental health law. An incompetency label should never be a precondition for the receipt of services desired by the individual on a voluntary basis. In appropriate circumstances, incompetency may be a condition for the imposition of involuntary hospitalization or coercive treatment when the state invokes *parens patriae* grounds to override an individual's objection to these interventions. However, an individual who requests services should be entitled...
to receive them solely on the basis of need and availability.\textsuperscript{172} Requiring application of an incompetency label as a condition for the receipt of services that are sought on a voluntary basis is gratuitously stigmatizing and potentially antitherapeutic.

Indeed, in contexts in which the individual voluntarily seeks services, using the mental illness label (apart from the incompetency label) itself may often be damaging to the individual. The requirements of insurance reimbursement and governmental funding that often require a mental illness diagnosis accordingly should be rethought. Preventive services for mental illness often are not subject to reimbursement or funding. It is frequently only when the individual’s condition is exacerbated to the point that hospitalization is required that reimbursement or governmentally funded services become available. Society should reimburse and provide funding for services designed to help people to avoid or to cope with crises that often necessitate hospitalization. Instead, a clinician typically is unable to receive reimbursement for providing such services without first affixing a diagnosis of mental illness. Although people’s crises may be the product of a pathological social situation, they and not the situation receive the diagnosis—a label that in effect announces that they have a mental or emotional “disorder.” The new emphasis on general preventive approaches in medicine reflects recognition that it is both more conducive to patient health and less costly to society to prevent problems rather than to treat them. Yet this emphasis on prevention seems absent in the area of the delivery of mental health services. The refusal to permit people with mental health problems to seek help unless they first are diagnosed as “disordered,” when that label may be damaging and may exacerbate their problems, imposes serious social, health, and economic costs. The law does not require a diagnostic label as a condition for immunization, nutritional counseling, or certain diagnostic testing, like pap smears or mammography for women of certain ages. Rather, such preventive services are encouraged in order to avoid illness or to detect it at an early point when interventions can be more effective and less expensive. It is time to adopt similar preventive approaches in the mental health area and to offer services to those who would benefit from and who desire them without the necessity of branding them with diagnostic labels that may themselves be psychologically dysfunctional.

When the individual does not volunteer for services that the state considers necessary, it should attempt to convince the individual of the desirability of such services or to induce their acceptance through the provision of incentives.\textsuperscript{173} When the state believes that an individual’s best interests would be furthered by accepting hospitalization, treatment, or some other intervention or status, it should seek to persuade the individual of the merits of this course rather than compelling him or her to accept it and attempting to apply an incompetency label in case of refusal. Rather than formally labeling a criminal defendant incompetent to stand trial, for example, the court should offer the defendant the possibility of a continuance of the trial contingent on obtaining appropriate treatment designed to improve functioning at

\textsuperscript{172}See Winick, supra note 8 (suggesting that the law should distinguish patients who assent to treatment from those who object thereto).

\textsuperscript{173}See Bruce J. Winick, Harnessing the Power of the Bet: Wagering with the Government as a Means of Individual and Social Change, 45 U. MIAMI L. REV. 737 (1991) (suggesting that, as an alternative to compulsion, government should offer to enter into contingency contracts with individuals in order to induce certain desired behavior).
Instead of subjecting individuals with mental illness to involuntary commitment proceedings and labeling them as incompetent, the state should attempt to persuade them that voluntary or informal admission would be in their best interest. More use should be made of creative inducement approaches and of negotiation and persuasion, and less reliance should be placed on coercion and the attribution of incompetency. The negotiation process itself is empowering, humanizing, and therapeutic. Compulsion and incompetency labeling should be used as a last resort, if at all.

Even when compulsion appears necessary, the law should seek ways of avoiding the use of an incompetency label whenever possible. There probably will remain cases in which a hearing concerning competency is found to be required—for example, when someone persists in an activity that is clearly and seriously detrimental or refuses an intervention that seems to be unquestionably beneficial, and the individual's action seems to be the product of mental illness. Even in such cases, however, individuals should be given repeated opportunities to change their minds before being adjudicated to be incompetent. Individuals in such a situation may be willing to share decision-making power with an appointed guardian, particularly if the guardian is a family member or friend. Such a restricted guardianship arrangement may be seen as an attractive alternative to a determination of incompetency that may totally divest individuals of decision-making power. Instead of finding individuals incompetent to manage their property, for example, the state should encourage appointment of guardians who would have the more limited power to oversee decisions by the individuals, perhaps including the authority to veto major decisions but not necessarily to make them unilaterally. Individuals might resist an adjudication of incompetency and the appointment of a guardian to exercise full power over the individual's property but might be willing to accept such a partial guardianship arrangement. Similarly, individuals might resist an involuntary commitment or treatment order coupled with a finding of incompetency but be willing to accept appointment of a restricted guardian able to make or assist in such decisions.

Even when other approaches prove unsuccessful and the intervention sought by the state is thought to be essential, incompetency labeling may be avoidable. Just as a court has broad equitable powers to fashion provisional relief in order to avoid irreparable harm pending a permanent disposition of a matter in litigation, judicial and administrative decision making concerning those suffering from mental illness should include the use of flexible provisional remedies. For example, on the basis of a preliminary evidentiary showing, a temporary period of hospitalization or treatment could be ordered, a temporary restraint on the transfer of property pending treatment could be issued, or a temporary continuance pending treatment could be

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175 See Winick, supra note 9, at 192–99 (analyzing the therapeutic value of voluntary hospitalization).

176 See Sales & Kahle, supra note 80, at 392.


granted in a criminal case, thereby avoiding for the time being the necessity of adjudicating the individual incompetent. Individuals faced with such a provisional remedy may agree to enter into negotiations concerning the conditions under which they voluntarily would accept the intervention sought by the state, thereby, it is hoped, rendering compulsion and the use of an incompetency label ultimately unnecessary.

Incompetency labeling also can be avoided by encouraging individuals to make greater use of advance directive instruments and health care proxies. These arrangements allow individuals to anticipate the possibility of a future period in which their decision-making capacity will be impaired and to execute a formal instrument directing how decisions will be made on their behalf or selecting a proxy, such as a trusted relative or friend, to make the decision. A living will is an example of such an advance directive instrument by which patients can express the wish, for example, to discontinue life-support services or nourishment should they be in a persistent vegetative state. Living will-type instruments and durable powers of attorney can be used by mentally ill individuals whose illness is in remission or under control to direct how future hospitalization or treatment decisions should be made in the event that their condition renders them incompetent in the future. They similarly can be used by persons in the early stages of Alzheimer’s disease or some other form of dementia or organic mental disorder to engage in advance planning concerning residential care and management of property. Such advance planning avoids the need for state coercion and incompetency adjudication with its accompanying labeling effects while preserving the individual’s sense of dignity and autonomy.

F. Recharacterizing Incompetency Labels and Reshaping the Labeling Process

Even when an incompetency label is found to be necessary, the law should seek ways of minimizing the potential adverse effects. The language used to label legal statuses should be revised to minimize the potential for negative self-attributions by the individual affected. Instead of finding a criminal defendant incompetent to stand trial, for example, the court could determine the need for what could be called a treatment continuance and in appropriate cases order treatment designed to increase trial functioning. Instead of being adjudicated incompetent to manage their property, individuals could be found temporarily impaired in this area, a label that

179See Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261 (1990) (suggesting the general enforceability of such advance directives when the patient’s future wishes have clearly been expressed).


181See Sales & Kahle, supra note 80, at 394:

For example, the term “incompetent to stand trial” implies a trait-like permanent malady when, in fact, the concept it should convey legally is really a temporary one. An incompetent person is one whom we would expect to stay that way. The term “unable to stand trial” is less laden with unnecessary trait-like and permanent implications because unable people often later become able. Attribution theories of attitude change would predict that trait-like attributions should carry more negative connotations than terms that imply more ephemeral phenomena.
suggests hope rather than hopelessness and encourages them to view their "tempor-
ary" problem as one that can be resolved through appropriate treatment. Even
finding criminal defendants or civilly committed patients to be temporarily incapac-
tated rather than incompetent may limit their perception that their impairment is
permanent and outside their control, an attribution that would increase the adverse
effects of an incompetency label.\textsuperscript{182}

For the same reasons, to the extent that application of an incompetency label is
deemed necessary, that label should be narrowly tailored to the individual's specific
impairment. Thus, individuals who are deemed incompetent to enter into a contract
for the sale of a house or a business should be labeled (if at all) temporarily impaired
to sell a business or a house, rather than generally incompetent to manage property.
This more specific and limited label would not necessarily preclude them, without
the approval of a guardian, from entering into other, less significant contractual
arrangements, such as buying clothes, hiring or discharging a secretary, or selling or
giving away a painting. Limited and context-specific incompetency labels of this kind
are more consistent with the trend in modern mental health law in favor of specific
rather than general incompetency\textsuperscript{183} and would tend to limit the risk that individuals
will interpret the impairment as global and relatively stable, an attribution that
would increase the likelihood of learned helplessness and other inhibitory patterns
that will interfere with their regaining competency in the future.\textsuperscript{184} Similarly, a form
of a nolo contendere or "no contest" plea to a "temporary impairment" status or
even to incompetency in various contexts could be encouraged. Although such a plea
in the criminal area, at least in some circumstances, may be antitherapeutic and
decrease the potential for rehabilitation,\textsuperscript{185} allowing individuals to participate in plea
negotiations and make choices in various mental health contexts can be positive. To
the extent that mentally ill individuals engage in consultation with their counsel and
decide that such a "plea" would be more in their interests than being determined to
be incompetent, the process alone could have important therapeutic advantages.

The role of counsel can be therapeutic in other respects as well. Criminal
defendants who face a determination that they are incompetent to stand trial may be
told certain things by counsel about that determination that can mitigate its potential
adverse effects. For example, counsel can tell them that such a finding is largely a
vehicle for obtaining an advantageous postponement in their trials and that it will
give them the opportunity to obtain needed treatment that will increase their
functioning and relieve their suffering. In addition, counsel can point out that their
ability to participate in the trial that ultimately will be held will be enhanced as a
result of the incompetency postponement, as will the potential for a more favorable
outcome.\textsuperscript{186} This is not a suggestion that counsels relax their advocacy role on behalf
of their clients in pursuing their clients' interests as the clients articulate them. However, if the counsels foresee the inevitability of an incompetency adjudication,

\textsuperscript{182}See supra notes 71–73 and accompanying text.
\textsuperscript{183}See supra notes 162–63 and accompanying text.
\textsuperscript{184}See supra notes 71–73 and accompanying text.
\textsuperscript{185}See Wexler & Winick, Therapeutic Jurisprudence and Criminal Justice Mental Health Issues, supra
note 5, at 229–30. See also Jeffrey A. Klotz et al., Cognitive Restructuring Through Law: A Therapeutic
\textsuperscript{186}See Keri A. Gould, Therapeutic Jurisprudence and the Arraignment Process; The Defense Attorney’s
Dilemma: Whether to Request a Competency Evaluation, in MENTAL HEALTH LAW AND PRACTICE THROUGH
attempting to persuade their clients to negotiate a more favorable settlement or explaining the outcome in ways that will minimize the likelihood of self-attributions by the clients that ultimately would be more damaging, may be little different from the role that counsels in criminal cases often play in the plea bargaining and sentencing process. Real therapeutic potential in the relationship between counsel and client in these contexts may be underappreciated and unrealized. Even when an incompetency label is applied, how counsel interprets it to the client may help to mitigate the potentially serious adverse side effects that otherwise are possible.

IV. Conclusion

Incompetency labeling can produce serious adverse consequences for those labeled. They are stigmatized in the eyes of the community in a manner that influences the way others perceive and treat them. Moreover, they may come to view themselves in ways that can reinforce and even worsen their impairment. Labeling them incompetent may cause them to inhibit performance or to avoid it altogether in the area in which they previously have performed poorly. Their motivation to attempt future behavior in the area in question may be altered in ways that prevent future success, and they may experience serious depression and a damaged sense of psychological well-being. Their sense of self-esteem and self-efficacy may be impaired in ways that are debilitating. They may experience learned helplessness, becoming withdrawn, unresponsive, passive, submissive, helpless, and hopeless. In summary, incompetency labeling may itself be psychologically damaging and even disabling. It may set up a self-fulfilling prophecy that serves to increase and perpetuate the individual's social and mental health problems.

An understanding of the serious adverse consequences of incompetency labeling should sensitize legal decision makers to redesign legal standards, procedures, and the roles of counsel, judges, and other legal actors in ways that are calculated to avoid or minimize these damaging effects. The law should rely less on compulsion and paternalism. Instead, it should encourage voluntariness, providing incentives for individuals to act in desired ways rather than requiring them to do so. In some cases it may be preferable to allow individuals to make their own choices, even if unwise.

Incompetency should be narrowly defined, and competency should be presumed. An inquiry into competency should be required only when specific behavior calls an individual’s behavior into question. Mental illness alone should not justify such an inquiry, and when a determination of competency is required, the burden of proof should be on the party asserting that individuals are incompetent.

When coercive interventions are deemed necessary, creative approaches should be used to avoid or minimize the potential that individuals will respond with a self-attribution of general and permanent incompetency. At a minimum, the terminology of incompetency labels should be redesigned to reflect the limited and context-specific nature of individuals' impairments. The message that the label conveys to individuals need not suggest a permanent impairment of an essential ability to function. Instead, it should allow them to see their condition as a difficulty that can be overcome if they seek treatment and are highly committed to it.

See Winick, supra note 173 (suggesting the use of behavioral contracts as an alternative to government coercion in certain contexts).
Moreover, the message that the label conveys can be powerfully influenced by the lawyers and judges involved in the process. How they communicate to individuals in the labeling process can help individuals to interpret the message of the label in a positive rather than a negative manner, as suggesting hope, not hopelessness. In areas where the law, like medicine, seeks to do good, it too needs to heed the admonition that it avoid doing harm.\footnote{The Hippocratic Oath, which is at the core of medical ethics, imposes a duty of benevolence and nonmalevolence on the physician. The Oath provides:}

\begin{quote}
I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following Oath: [I] will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death. . . . I will preserve the purity of my life and my art. . . . In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing. . . .
\end{quote}

\footnotemark[4]

\footnotetext[4]{State v. Perry, 610 So. 2d 746, 751–52 (La. 1992) (quoting Hippocrates c. 460–400 B.C., Stedman’s Medical Dictionary 647 (4th Unabridged Lawyer’s ed., 1976); see Winick, supra note 4, at 332.}