

Advances in Assessments for Legal Competencies

In the 1986 first edition of *Evaluating Competencies* (hereinafter, EC), Chapter 1 was entitled "Problems in Assessments for Legal Competencies." During the past 15 years, researchers and clinicians in this field have devoted considerable energy to improving assessment practices in legal contexts. As the present edition will show, the field of forensic assessment for legal competencies has matured considerably. It is fitting, therefore, that the first chapter in this second edition focuses on the field's "advances" in dealing with the "problems" represented in the chapter's 1986 title.

Before turning to that review, the first section of this chapter repeats a series of brief sketches of the legal competencies nearly as they appeared in the first edition. This establishes the domain of the book for new readers. Then we describe the historical problems in forensic assessments for legal competencies that were of concern in the first edition of EC, and we review how far the field has advanced in dealing with these issues. The chapter concludes with a restatement of the need for a conceptual model to guide the development and implementation of methods for assessing legal competencies.

LEGAL COMPETENCIES

Criminal and civil courts frequently make legal decisions about individuals based in part on their physical, mental, and social capacities. Some of these legal decisions involve judgments about *legal competence*. For example, a court may have to consider an elderly person's prospect for managing day-to-day tasks of living, in order to determine whether to appoint a legal guardian to provide assistance to the elderly individual. A criminal court may need to determine whether a defendant with mental illness is able to participate in an upcoming trial.

There are many types of legal competencies in various areas of law. Yet all legal competencies have certain fundamental notions in common as legal concepts:

- All legal competencies recognize the rights of individuals to make decisions and have control of their own lives.
- Legal competencies recognize that some individuals may not have the capacities to make important decisions in their lives. This is of concern because their incapacities may jeopardize their welfare or that of others who will be influenced by their decisions.
- All legal concepts of competence provide a legal mechanism for identifying individuals for whom the relevant incapacities may exist.
- When legal incompetence is determined, it allows, obligates, or justifies the state's intervention in certain ways in order to protect the welfare of the individual, typically curtailing the individual's rights in the best interests of the individual and society.

A key point in concepts of legal competence is the need to weigh whether the individual's capacities are sufficiently impaired to require a finding of legal incompetence. Society authorizes courts to make these critical judgments, and courts often turn to mental health professionals to assist them in identifying individuals' capacities relevant for the decision that the court must make. Society and the law have long recognized psychiatrists and psychologists as experts in assessment and understanding of human abilities, emotions, and potentials. Further, many individuals whom the law declares legally incompetent manifest the same mental deficits that give rise to the need for clinical care. Therefore, legal codes and legal practice rely on mental health professionals to assist courts in their review of mental capacities related to the difficult issues posed by competence laws.

Beyond these common features, legal competencies in various areas of law have somewhat different criteria. Further, each type of legal

competence may be defined somewhat differently across the statutes or case law of the nation's 51 legal jurisdictions. Subsequent chapters provide discussions of the major variations in legal definitions of each of six legal competencies reviewed in this volume. The present discussion provides a more general and very basic introduction to each of the legal competencies addressed in this book, and notes several other legal competencies that will not receive attention in later chapters. Complete citation of references supporting the descriptions of the six legal competencies are reserved for the more detailed discussions in subsequent chapters.

LEGAL COMPETENCIES IN THE CRIMINAL PROCESS

Several points in the criminal trial process may require legal decisions based wholly or in part on a consideration of a defendant's psychological capacities. These include the defendant's capacities: (a) to waive rights to silence and counsel "knowingly, intelligently, and voluntarily," prior to questioning by law enforcement officers; (b) to plead guilty or to dismiss counsel; (c) to stand trial (i.e., to function in the role of defendant in the trial process); (d) to possess the requisite cognition, affect, and volition for criminal responsibility (i.e., the insanity defense); (e) to serve a sentence; and (f) to be executed (i.e., to undergo capital punishment).

Three of these areas produce the most frequent requests for the assistance of mental health professionals: capacities related to standing trial, waiver of rights during police investigations, and criminal responsibility.

Competence to Stand Trial (Chapter 4)

Our legal doctrine of competence to stand trial evolved from English common law. Its earliest form focused simply on the capacity of the accused to plead, a ritualistic requirement without which the trial could not proceed. British common law distinguished allowable causes for remaining "mute" when asked to plead, recognizing that some defendants actually lacked the capacity to respond while others merely chose not to exercise their probable capacity to do so (sometimes motivated by a desire to delay the trial). A plea was not required for "idiots" and "lunatics," who were then excused from prosecution. Others were forced, by various means, to make a plea.

From this notion evolved a more complete doctrine of criminal competence based on a broader concern for fairness in the trial of persons accused of crimes. It was recognized that certain defendants with serious mental deficiencies might not be capable of defending themselves, putting them at risk of suffering the consequences of a miscarriage of justice.

Moreover, their inability to contribute meaningfully to the trial process could weaken the integrity of the justice system itself. In modern law, the definition of competence to stand trial was provided by the United States Supreme Court in *Dusky v. United States* (1960): “whether he [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” (p. 402).

The question of a defendant’s competence to stand trial is raised frequently, in comparison to other competencies in criminal law, although it arises only in a minority of a jurisdiction’s total criminal cases. If the question is raised, this will usually occur prior to a hearing on the criminal allegations. The question can be raised, however, at any stage in the adjudication process, from arraignment through sentencing.

Determining whether a defendant is incompetent to stand trial requires an inquiry into the defendant’s capacities as defined by the *Dusky* standard. Typically the question of incompetence is raised because of present or past evidence suggesting a serious mental illness or other psychological disabilities. An examination of the defendant’s abilities by a mental health professional, therefore, is a standard part of the competence inquiry in most jurisdictions. The forensic examiner’s findings are reported to the court in writing, and sometimes in oral testimony, for use during a competence hearing at which a judge weighs all relevant evidence and makes a finding of competence or incompetence. A finding of incompetence to stand trial usually will result in a delay of the trial process while the state employs involuntary treatment to bring the defendant to competence. The trial process resumes if and when the state’s therapeutic intervention results in conditions suggesting that the defendant is capable of meeting the competence standard.

Capacity to Waive “Miranda Rights” (Chapter 5)

Law enforcement officers sometimes seek a statement from persons suspected of crimes. The statements that suspects make (e.g., offense-related information or confessions) may be entered into evidence in criminal proceedings against the defendant only if the defendant was afforded adequate opportunity to choose to withhold the information or to have the benefit of legal counsel at the time the statement was made. This protection arises from constitutional requirements designed to curtail the potential abuse of power by the state in seeking convictions and criminal sanctions against individuals.

A defendant’s opportunity to claim the right to silence and to legal counsel requires not only freedom from coercive police actions, but also

the defendant's knowledge that the rights are available and an understanding of the nature and significance of the rights. Police are required to inform the individual of the rights (*Miranda v. Arizona*, 1966) in what are called "Miranda warnings," usually consisting of four or five sentences describing the rights. The individual's subsequent choice to waive the rights and make a statement must be made "knowingly, intelligently, and voluntarily." If the waiver does not meet this test, then it was not made "competently," the waiver was invalid, and the information obtained by law enforcement officers would be inadmissible as evidence.

When a waiver's validity is questioned, the court must examine relevant facts to rule on the issue. Generally this will require consideration of circumstances of the police inquiry, as well as the psychological characteristics of the individual who was involved. Mental health professionals may be asked to examine the individual's abilities or mental status in order to provide information about the person's capacities to have understood and appreciated the rights of which the person was informed.

The court may determine that the individual had insufficient capacity to waive the rights knowingly, intelligently, and voluntarily. "Incompetence to waive *Miranda* rights," however, is neither a legal finding nor a formal legal concept. The individual's incapacity to waive *Miranda* rights is more like an intermediate conclusion that may be reached on the way to a legal finding of invalidity of the waiver. Thus, in contrast to incompetence to stand trial, an individual does not acquire a legal status of "incompetent to waive *Miranda* rights." Nevertheless, the concept of a person's capacities to waive the rights may be conceptualized, for purposes of forensic evaluation, as though it were a legal competence.

Criminal Responsibility (Chapter 6)

The law has long recognized two concepts on which responsibility for criminal actions depends: *actus reus*, requiring evidence that the accused person engaged in the alleged act; and *mens rea*, requiring a determination that the accused person manifested the requisite mental state to have intended committing the act or to have foreseen its consequences. The insanity defense doctrine acknowledges that individuals whose mental capacities did not allow them to appreciate the wrongfulness of their acts or to control their behavior should not be held responsible for acts that otherwise would be criminal. Thus a finding of insanity constitutes acquittal.

At issue when testing legal insanity is the individual's state of mind at the time of the offense. Somewhat different legal tests for insanity are



<http://www.springer.com/978-0-306-47344-9>

Evaluating Competencies
Forensic Assessments and Instruments
Grisso, Th.
2003, XXI, 541 p., Softcover
ISBN: 978-0-306-47344-9