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Bruce J. Winick

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Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of *Medina v. California* and the Supreme Court's New Due Process Methodology in Criminal Cases

BRUCE J. WINICK*

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I. INTRODUCTION

Much judicial and scholarly attention has addressed the definition of competency and when it must be ascertained in varying legal contexts.¹ However, little attention has been given to the procedures

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1. *See, e.g.*, *Zinermon v. Burch*, 494 U.S. 113 (1990) (competency to consent to voluntary hospitalization); *Ford v. Wainwright*, 477 U.S. 399 (1986) (competency to be executed); *Drope v. Missouri*, 420 U.S. 162 (1975) (competency to stand trial); *Pate v. Robinson*, 383 U.S. 375 (1966) (competency to stand trial); *Dusky v. United States*, 362 U.S. 402 (1960) (competency to stand trial); RICHARD C. ALLEN ET AL., *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* (1968); PAUL S. APPELBAUM ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* (1987); Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992); Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977); Elyn R. Saks,

used in determining competency.² This Article will examine these procedural issues by focusing on the burden of proof in determining competency to stand trial in the criminal process. It will analyze the United States Supreme Court's recent decision in *Medina v. California*,³ which upheld the constitutionality of a California statute that erected a presumption in favor of competency to stand trial and placed the burden of proof upon the party asserting the defendant's incompetency.

In upholding the statute, the Court departed from precedent by rejecting the application of the *Mathews v. Eldridge*⁴ balancing test as the appropriate standard to determine due process in criminal cases. Instead, the Court adopted an historically based test that limits the requirements of due process to traditional notions of fairness.⁵ Because traditional practices did not reject placement of the burden of proof upon the defendant when the defense seeks a finding of incompetency, the Court declined to hold that the California statute violated due process.⁶

This Article analyzes the Court's new due process methodology in criminal cases and the merits of its decision to uphold the California statute's presumption in favor of competency to stand trial and its placement of the burden of proof on the party asserting incompetency. Part II examines the Court's opinion in *Medina* and the new due process approach that it adopts. Part III analyzes the criticisms of the Court's new approach in Justice O'Connor's concurring opinion and in Justice Blackmun's dissenting opinion. This Part then criticizes the majority's historical approach as too restrictive and

Competency to Refuse Treatment, 69 N.C. L. REV. 945 (1991); Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUSTON L. REV. 15 (1991) [hereinafter Winick, *Competency to Consent to Treatment*]; Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, 14 INT'L J. L. & PSYCHIATRY 169 (1991) [hereinafter Winick, *Voluntary Hospitalization*]; Bruce J. Winick, *Incompetency to Stand Trial: Developments in the Law, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 3* (John Monahan & Henry J. Steadman eds., 1983) [hereinafter Winick, *Incompetency to Stand Trial*].

2. *But see, Ford*, 477 U.S. at 412-18 (analyzing the constitutionality of Florida's procedures for determining competency to be executed); Bruce J. Winick, *Competency to be Executed: A Therapeutic Jurisprudence Perspective*, 10 BEHAV. SCI. & L. 317, 324-28 (1992) [hereinafter Winick, *Competency to be Executed*] (analyzing procedures for determining competency to be executed); Winick, *Voluntary Hospitalization*, *supra* note 1, at 199-212 (analyzing the procedures that should be required for determining competency to consent to voluntary hospitalization).

3. 112 S. Ct. 2572 (1992).

4. 424 U.S. 319 (1976).

5. *Medina*, 112 S. Ct. at 2577.

6. *Id.* at 2578-81.

inconsistent with much of the Court's existing criminal justice jurisprudence. Part III also discusses the inconsistency of the Court's new methodology with the need for judicial flexibility in considering the fairness of criminal practices historically deemed just or approved in precedent.

Part IV considers the question of allocating the burden of proof on the issue of incompetency to stand trial. This Part examines the majority's application of its new due process standard to the burden of proof issue as well as the application of the *Mathews v. Eldridge* balancing test by the concurring and dissenting opinions. Although Part III criticizes the majority's new approach, I conclude that placing the burden on the party challenging competency is correct. The Court's new approach, proper application of the *Mathews* standard, and consideration of three factors—fairness, probability, and policy—often invoked in determining the allocation of burdens of proof, all support this conclusion. The California statute's allocation of the burden of proof promotes several significant social policies. Its allocation of the burden may reduce a number of inappropriate burdens imposed by the incompetency-to-stand-trial doctrine. Moreover, it should facilitate the speedy disposition of criminal charges; and enhance therapeutic values, increasing the mental health of affected defendants.

Part V considers the importance of the presumption in favor of competency established by the California statute, and the implications of its endorsement by the Supreme Court. Although a presumption in favor of the competency of the mentally ill is one of the major reforms of modern mental health law, broad dicta in *Zinermon v. Burch*⁷ calls into question the continued viability of this presumption. While the issues presented in *Medina* are different from those in *Zinermon*, the Court's approval of the presumption in favor of competency in *Medina* steps away from the implications of the *Zinermon* dicta. Part V analyzes the importance of the presumption for mental health law doctrine, and hails the decision to uphold the presumption in *Medina* as an important step toward a general presumption in favor of competency.

Finally, Part VI argues that the Court could have reached the same result in *Medina* by applying the *Mathews* balancing test. Accordingly, this Part contends that the Court's new due process methodology is dicta. Because this dicta is highly questionable, the Article concludes that the Court should reconsider its approach in future cases.

7. 494 U.S. 113 (1990).

II. *MEDINA V. CALIFORNIA* AND THE SUPREME COURT'S NEW APPROACH FOR DETERMINING THE REQUIREMENTS OF DUE PROCESS IN CRIMINAL CASES

The Due Process Clause of the Fourteenth Amendment, along with the Equal Protection and Privileges and Immunities Clauses, effected a fundamental reordering of the American constitutional system.⁸ These provisions placed significant new limitations on the states, extending greater protection for individual liberties than the original Constitution and the Bill of Rights afforded.⁹ In the criminal area, the Due Process Clause of the Fourteenth Amendment imposed procedural requirements that dramatically increased the fairness of the administration of criminal justice in the states. For the first century of its history, scholarly debate focused on whether the Due Process Clause incorporated the provisions of the Bill of Rights, thereby making them applicable to the states. Under a selective incorporation approach, the Supreme Court gradually applied to the states virtually all of the guarantees in the Fourth, Fifth, Sixth, and Eighth Amendments.¹⁰ This incorporation produced the criminal law revolution often associated with the Warren Court.

8. See RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 11 (1981); Robert Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1981). See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

9. The original Constitution imposed several relatively minor limitations on state legislatures. E.g., U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ."); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). With these exceptions, the original Constitution did not place direct restrictions on the authority of the states to abridge personal rights until the adoption of the post-Civil War amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments. The first ten amendments, adopted in 1791, collectively known as the Bill of Rights, placed limits only upon the federal government. See, e.g., *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833).

10. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* §§ 10.2, 11.6-7 (3d ed. 1986); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 772-74 (2d ed. 1988); see, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Klopper v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right of confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right against self-incrimination); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment ban on cruel and unusual punishments); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25 (1949) (Fourth Amendment freedom from unreasonable search and seizure); *In re Oliver*, 333 U.S. 257 (1948) (Sixth Amendment right to public trial). The Fifth Amendment right to a grand jury indictment remains unincorporated. *Hurtado v. California*, 110 U.S. 516 (1884).

After resolving the question of incorporation, the Court still needed to decide what additional requirements the Due Process Clause would impose on the states as a result of its generalized commitment to the principle of fairness.¹¹ The Court's selective incorporation approach to the Fourteenth Amendment's Due Process Clause rejected the rigid "total incorporation" approach proposed by Justice Black. Black would have read the Clause to incorporate only the specifically enumerated rights contained in the first eight amendments.¹² In a variety of cases, the Court relied on the general and ambiguous command of the Due Process Clause to condemn unjust practices in criminal cases. Sometimes the Court used an open-ended inquiry into fairness,¹³ and sometimes it used the more focused fairness approach of *Mathews v. Eldridge*.¹⁴

In *Medina v. California*,¹⁵ the Court considered what approach it should apply in considering whether state criminal practices violate the Due Process Clause. The Court rejected application of *Mathews* in the criminal context. Instead, it announced a more narrowly focused historical test derived from *Patterson v. New York*.¹⁶

The issue in *Medina* concerned the constitutionality of a statutory presumption in favor of the competency of a criminal defendant that placed the burden of proof on the party challenging the defendant's capacity. The defendant, Teofilo Medina, Jr., was charged with murder and other related offenses. Prior to his trial, Medina's counsel

11. See Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); John E. Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

12. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-05 (1992) ("It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution. . . . But of course this Court has never accepted that view."); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring). Justice Black advocated total incorporation in a number of cases. E.g., *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

13. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973) (state evidence rules preventing defendant from impeaching his own witness held to violate due process); *In re Winship*, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt in all criminal cases, including cases of juvenile delinquency, as a matter of due process); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (prejudicial pretrial publicity held to violate due process); *Brady v. Maryland*, 373 U.S. 83 (1963) (right to discovery of exculpatory evidence within the possession of the prosecution); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to trial transcript on appeal).

14. The Court invoked the standard of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right to an independent psychiatrist to assist defendant in considering whether to raise an insanity defense); see also *United States v. Raddatz*, 447 U.S. 667 (1980) (applying *Mathews* to uphold use of magistrates to conduct suppression hearings).

15. 112 S. Ct. 2572 (1992).

16. 432 U.S. 197, 201-02 (1977).

moved for an evaluation of the defendant's competency.¹⁷ California, like all other American jurisdictions, prohibits the trial of a mentally ill defendant who cannot understand the nature of the criminal proceedings or assist counsel in the conduct of the defense.¹⁸ The trial court granted the motion for a competency determination, and held a six-day hearing before a jury, as required by California law.¹⁹ The trial court instructed the jury, in accordance with the California statute, that the defendant was presumed competent and that he had the burden of proving his incompetence by a preponderance of the evidence.²⁰ Although the evidence was conflicting, the jury found Medina competent to stand trial.²¹

The court empaneled a new jury for the criminal trial. The jury found Medina guilty. At a subsequent sanity hearing, held under California law in cases where a defendant enters a plea of not guilty by reason of insanity, the jury found that Medina had been sane at the time of the offenses. Following a penalty trial, the jury recommended and the trial court imposed the death penalty for the murder convictions.²²

On appeal to the California Supreme Court, Medina challenged the constitutionality of the statute's presumption in favor of competency and its placement of the burden of proof on the issue on a defendant who asserts his own incompetency. The California Supreme Court affirmed, noting that "the states ordinarily have great latitude to decide the proper placement of proof burdens."²³ The court concluded that the statutory presumption and allocation of the burden of proof did not subject the defendant to "hardship or oppression" because "one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry."²⁴

17. *Medina*, 112 S. Ct. at 2574.

18. CAL. PENAL CODE § 1367 (West 1982). See generally Winick, *Incompetency to Stand Trial*, *supra* note 1; Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1986) [hereinafter Winick, *Restructuring Competency*].

19. *Medina*, 112 S. Ct. at 2574. Most jurisdictions, unlike California, do not use a jury to determine competency to stand trial; rather, a trial judge determines competency at a pretrial hearing. Winick, *Incompetency to Stand Trial*, *supra* note 1, at 13.

20. CAL. PENAL CODE § 1367 (West 1982). Other states, by case law or statute, similarly create a presumption and place the burden of proof on those seeking to rebut it. See, e.g., OHIO REV. CODE ANN. § 2945 (Anderson 1992); *Child v. Wainwright*, 148 So. 2d 526, 527 (Fla. 1963); *State v. Aumann*, 265 N.W.2d 316, 319-20 (Iowa 1978).

21. *Medina*, 112 S. Ct. at 2575.

22. *Id.*

23. *People v. Medina*, 799 P.2d 1282, 1291 (1990).

24. *Id.*

The United States Supreme Court granted certiorari²⁵ and affirmed.²⁶ Justice Kennedy, writing for a five justice majority, rejected the contention that the statute's presumption in favor of competency and placement of the burden of proof on the defendant violated due process.²⁷ The Court considered the standard that should apply in determining the requirements of due process in the criminal context and declined to apply the balancing approach of *Mathews v. Eldridge*²⁸ that it had used to measure the requirements of due process in a number of areas, including two criminal cases. Instead, the Court adopted a new, more limited due process approach for criminal cases that emphasized traditional concepts of fairness.²⁹ Applying this new approach, the majority upheld the California statutory scheme.

Justice Kennedy began his opinion for the majority by recognizing that "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."³⁰ The Court's original recognition of this substantive due process limitation on the states appeared in 1966 in *Pate v. Robinson*.³¹ Although dicta, this principle has been often reiterated and is now so embedded in criminal competency jurisprudence that it is rarely questioned.³² Although holding that procedural due process requires "further inquiry" when the record presents a reasonable doubt concerning a defendant's competency,³³ the Court had never considered the degree of formality required by the Due Process Clause for such an inquiry.³⁴ *Medina*

25. *Medina v. California*, 112 S. Ct. 336 (1991).

26. *Medina*, 112 S. Ct. at 2576 (1992).

27. *Id.* at 2577-81. Justice O'Connor, with whom Justice Souter joined, wrote a separate opinion, concurring in the judgment but disagreeing with the majority's approach. *Id.* at 2581. Justice Blackmun, with whom Justice Stevens joined, dissented. *Id.* at 2583.

28. 424 U.S. 319 (1976).

29. *Medina*, 112 S. Ct. at 2577.

30. *Id.* at 2574 (citing *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966)).

31. 383 U.S. at 378; see Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 76 (1972) (analyzing the statement in *Pate* as dicta); Winick, *Restructuring Competency*, *supra* note 18, at 968 (same).

32. See Winick, *Restructuring Competency*, *supra* note 18, at 968; see, e.g., A.B.A. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.1(a) (1989). The courts consistently treat *Pate* as gospel, as do most commentators. But see Burt & Morris, *supra* note 31; Winick, *Restructuring Competency*, *supra* note 18.

33. *Drope*, 420 U.S. at 180; *Pate*, 383 U.S. at 385-86. This procedural due process principle was the holding of *Pate*. See Winick, *Restructuring Competency*, *supra* note 18, at 968.

34. The Court, however, has determined that the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel apply to an evaluation of the defendant's competency when the statements or information elicited at the examination can be

presented that opportunity.

Petitioner Medina argued that the Court's decision in *Mathews v. Eldridge*³⁵ provided the proper analytical framework for resolving the procedural due process question. *Mathews*, which arose in an administrative law context, announced a three-factor balancing test for determining the level of process that is due in a particular context.³⁶ That test requires consideration of: (1) the private interest affected; (2) the risk that the procedure challenged will produce an erroneous deprivation of that interest, and the value of additional or substitute procedural safeguards in reducing that risk; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that will result from requiring the additional safeguard.³⁷ The Court previously invoked the *Mathews* test in a variety of contexts,³⁸ including cases involving criminal procedure,³⁹ with the result that the test had emerged as the general approach for measuring the content of procedural due process.⁴⁰

The Court in *Medina*, however, backed away from *Mathews* as the appropriate test for assessing the validity of state procedural rules in the criminal process.⁴¹ Pointing to the specific guarantees enumerated in the Bill of Rights for protecting criminal defendants, the *Medina* majority concluded that the Due Process Clause of the Fourteenth Amendment has "limited operation" in the field of criminal law.⁴² In the majority's view, expansion of constitutional guarantees

used against the defendant for any purpose other than the pretrial determination of competency. *Estelle v. Smith*, 451 U.S. 454 (1981).

35. 424 U.S. 319 (1976). For a qualified endorsement of the applicability of the *Mathews* balancing test in the criminal procedure area, see Nowak, *supra* note 11, at 402.

36. For commentary on the *Mathews* standard, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Winick, *Voluntary Hospitalization*, *supra* note 1, at 200-01.

37. *Mathews*, 424 U.S. at 335.

38. *E.g.*, *Washington v. Harper*, 494 U.S. 210, 229 (1990) (upholding administrative hearing for involuntary administration of antipsychotic medication to state prisoner); *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (standard of proof for termination of parental rights); *Parham v. J.R.*, 442 U.S. 584, 599-600 (1979) (hearing required for civil commitment of juvenile sought to be hospitalized by parents); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (standard of proof for involuntary civil commitment of mental patients).

39. *See supra* note 14.

40. *See Parham v. J.R.*, 442 U.S. at 599 (characterizing the *Mathews* balancing test as "a general approach for testing challenged state procedures under a due process claim").

41. *Medina v. California*, 112 S. Ct. 2572, 2576-77 (1992). Because the Court based its decision, at least in part, on federalism, the question remains whether the *Mathews* test or the *Medina* approach will apply in federal due process cases. *See United States v. Wise*, 976 F.2d 393, 411 n.4 (8th Cir. 1992) (suggesting the *Mathews* approach would still apply under the 5th Amendment).

42. *Id.* at 2576 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

beyond those explicitly enumerated in the Bill of Rights through use of "the open-ended rubric of the Due Process Clause [would invite] undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."⁴³ The Court distinguished the two criminal cases in which it had applied the *Mathews* test by observing that "it is not at all clear that *Mathews* was essential to the results reached in those cases."⁴⁴ The *Medina* majority, therefore, rejected *Mathews* as the appropriate test for applying the Due Process Clause in the criminal context.

In place of *Mathews*, the Court adopted an historical approach derived from *Patterson v. New York*.⁴⁵ Under this approach, a state criminal practice is not subject to correction under the Due Process Clause "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"⁴⁶ The Court thereby signaled a new deference to the states in matters of criminal procedure by substituting the tradition-based approach of *Patterson* for what it considered to be the more intrusive balancing approach of *Mathews*.

Justice O'Connor, in a separate opinion on behalf of herself and Justice Souter, disagreed with the majority's rejection of the *Mathews* test and criticized its new approach as inconsistent with precedent and the nature of the due process inquiry.⁴⁷ Applying the *Mathews* test, however, she concurred in the judgment. Justice Blackmun dissented on behalf of himself and Justice Stevens.⁴⁸ The dissent criticized the majority's new due process approach and argued that the statute's placement of the burden of proof on the defendant was inconsistent with the doctrine of *Pate v. Robinson*,⁴⁹ which had recognized that trying an incompetent defendant would violate due process.

III. CRITICISM OF THE COURT'S NEW DUE PROCESS APPROACH

Four of the Justices in *Medina* disagreed with the majority's rejection of the *Mathews* balancing test. Justice O'Connor, joined by Justice Souter, would have applied the *Mathews* standard to uphold

43. *Id.*

44. *Id.* at 2577 (discussing *United States v. Raddatz*, 447 U.S. 667 (1980) and *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

45. 432 U.S. 197, 201-02 (1977).

46. *Medina*, 112 S. Ct. at 2577 (quoting *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

47. *Medina*, 112 S. Ct. at 2581 (O'Connor, J., concurring).

48. *Id.* at 2583 (Blackmun, J., dissenting).

49. 383 U.S. 375 (1966).

the California statute.⁵⁰ Justice O'Connor conceded that *Mathews* did not consider the weight that should be given historical practice. But *Mathews* failed to take this historical dimension into account, Justice O'Connor explained, because the case arose "in the context of modern administrative procedure [where] there was no historical practice to consider."⁵¹ Justice O'Connor noted that the absence of historical practice also may occur in the criminal context, as illustrated by *Burns v. United States*, a recent case involving the federal criminal sentencing guidelines that had no historical analogue.⁵² She suggested that the *Mathews* balancing test may be helpful in such contexts.⁵³ While agreeing that "historical pedigree" can give a procedural rule a presumption of constitutionality, Justice O'Connor argued that such a presumption must be rebuttable.⁵⁴ Justice O'Connor criticized the majority's exclusively historical approach as particularly inappropriate for the construction of due process, "perhaps the 'least frozen' concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."⁵⁵ She suggested that the Court's opinion should be read "to allow some weight to be given to countervailing considerations of fairness in operation, considerations much like those . . . evaluated in *Mathews*."⁵⁶ Indeed, "[a]ny less charitable reading of the Court's opinion would put it at odds" with many of the Court's criminal cases in which the justices had relied on due process to require the states to implement procedural safeguards that were not rooted in historical tradition.⁵⁷

Justice Blackmun, in a dissent joined by Justice Stevens, similarly criticized the majority's "historical-categorical approach."⁵⁸ The dissent illustrated the deficiencies in the majority's approach by explaining that had the Court applied the approach in the foundational competency-to-stand-trial cases of *Pate* and *Drope*, the Court would

50. 112 S. Ct. at 2581-82 (O'Connor, J., concurring).

51. *Id.* at 2582.

52. *Id.* (citing *Burns v. United States*, 111 S. Ct. 2182, 2188 (1991) (Souter, J., dissenting)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process right to psychiatric examination when sanity is significantly in question); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process right to hearing and counsel before probation revocation); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence); *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process right to trial transcript on appeal)).

58. *Medina*, 112 S. Ct. at 2585 (Blackmun, J., dissenting).

not have recognized a defendant's due process right to a competency hearing. The majority's historical approach would have required a different result in *Pate* and *Drope* because those cases lacked evidence that the denial of a hearing on competency would offend any deeply rooted American tradition.⁵⁹ Moreover, Justice Blackmun noted that *Patterson*, the case from which the majority derived its tradition-based approach, did not rely exclusively on tradition. In addition to considering tradition, the Court balanced governmental interests in procedure against the defendant's hardship.⁶⁰ Although the *Medina* majority rejected the *Mathews* approach in favor of the essentially historical test of *Patterson*, Justice Blackmun observed that the Court's statements were not fully consistent with what it actually did in *Patterson*, nor with its approach in *Medina*.⁶¹ The Court's new emphasis on an exclusively historical approach, therefore, seems artificial in light of the fact that both the Court in *Patterson* and the majority in *Medina* considered the underlying fairness of the challenged procedural rules.⁶² Although the majority purported to disavow *Mathews*' applicability to criminal cases, its opinion "ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews v. Eldridge* test it earlier appears to forswear."⁶³

For the reasons set forth in both the concurring and dissenting opinions, the majority's rejection of the *Mathews* balancing test is inappropriately restrictive. Moreover, an exclusively historical approach is inconsistent with a large number of the Court's prior criminal cases. In those cases, cited by Justice O'Connor but ignored by the majority, the Court held that the Due Process Clause required procedural safeguards despite a lack of historical tradition.⁶⁴ In other criminal cases not discussed by the Court in *Medina*, the Court invoked due process to prohibit unfair practices without any showing that traditional notions of justice rejected these practices. For example, in *United States v. Marion*⁶⁵ and *United States v. Lovasco*,⁶⁶ the Court recognized in dicta that lengthy periods of pre-arrest and pre-indictment delay in prosecution, although not cognizable under the Sixth Amendment right to speedy trial, would violate due process if they prejudiced the defendant and resulted from unjustified actions of

59. *Id.*

60. *Id.* at 2585 (citing *Patterson v. New York*, 432 U.S. 179, 203 n.9, 210 (1977)).

61. *Id.* at 2584-85.

62. *Id.* at 2586.

63. *Id.*

64. See *supra* note 57.

65. 404 U.S. 307, 324 (1971).

66. 431 U.S. 783, 795 (1977).

the prosecutor. Such periods of delay, neither covered by the right to speedy trial nor condemned by history,⁶⁷ do not offend traditional notions of justice. Yet the Court established a rule limiting them, thereby extending procedural protections beyond traditional requirements. The Court justified its new rule stating that undue periods of delay would violate "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'"⁶⁸ Absent historical condemnation of these practices, the Court clearly invoked contemporary conceptions of justice to invalidate these practices.

The Court also has relied on due process to condemn various police evidence-gathering practices that did not exist at common law or at the time of the Fourteenth Amendment's adoption, and thus were not offensive to traditional concepts of justice. In *Stovall v. Denno*⁶⁹ and *Manson v. Brathwaite*,⁷⁰ for example, the Court recognized in dicta that unnecessarily suggestive identification procedures—such as one-person show-ups and single-picture photo-displays—would violate due process if they produced a likelihood of irreparable misidentification. Similarly, in *United States v. Russell*,⁷¹ the Court recognized in dicta that certain police entrapment practices could be so "outrageous" that they violate "that 'fundamental fair-

67. The Court cited a number of courts of appeals cases applying a due process limit on such periods of pre-indictment and pre-arrest delay, but none were decided prior to 1952. *Marion*, 404 U.S. at 315 n.8.

68. *Lovasco*, 431 U.S. at 790 (citation omitted) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin v. California*, 342 U.S. 165, 173 (1952)); see also *id.* at 795 ("elementary standards of 'fair play and decency'"). Due process also is violated when a prosecutor deliberately uses perjured testimony to obtain a conviction, *Mooney*, 294 U.S. at 112 (dicta), or deliberately suppresses evidence favorable to the accused, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or fails to divulge evidence within its possession bearing on defendant's credibility, *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Similarly, the Court has employed due process fairness notions to invalidate vindictive resentencing by judges and recharging by prosecutors designed to discourage defendants from exercising their statutory right to appeal. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) ("Due process of law, . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."); accord *Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (applying *Pearce* to invalidate vindictive prosecutorial recharging following a defendant's invocation of his statutory right to a trial *de novo*). Thus, the Court has used due process as a general check upon prosecutorial misconduct.

[T]he prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones." If that safeguard fails, review remains available under due process standards.

United States v. Ash, 413 U.S. 300, 320 (1973) (citations omitted) (footnote omitted).

69. 388 U.S. 293, 302 (1967).

70. 432 U.S. 98, 116 (1977).

71. 411 U.S. 423 (1973).

ness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment."⁷²

By placing due process limits on police law enforcement practices, *Russell* invoked a notion of due process first enunciated in *Rochin v. California*.⁷³ The Court in *Rochin*, offended by police use of a stomach pump to forcibly remove evidence directly from the body of an accused, invalidated his conviction as a matter of due process.⁷⁴ Rejecting the concurrences' suggestions to resolve the case on the basis of the Fifth Amendment privilege against self-incrimination,⁷⁵ the Court relied on principles of fairness embodied in the concept of due process of law. Due process, noted Justice Frankfurter in his opinion for the Court, requires the states to "respect certain decencies of civilized conduct" in criminal prosecutions.⁷⁶ As an "historic and generative principle, [due process] precludes defining, and thereby confining these standards of conduct more precisely than to say convictions cannot be brought about by methods that offend a 'sense of justice.'"⁷⁷ The "vague contours" of the Due Process Clause, Justice Frankfurter wrote, must be interpreted by judges in light of history, though its content is "not final and fixed."⁷⁸ The Court thus adopted a fluid and flexible conception of due process embracing both traditional and contemporary notions of justice. It rejected "freezing 'due process of law' at some fixed stage of time or thought . . ."⁷⁹ Although the stomach pump was "a contrivance of modern science,"⁸⁰ and therefore not prohibited by traditional concepts of fairness, its forcible use constituted "conduct that shocks the conscience,"⁸¹ violating due process.

The approach of *Rochin* and these other due process cases cannot be reconciled with the exclusively historic approach of *Medina*. These cases did not involve a specifically enumerated guarantee of the Bill of Rights, but reflect the Court's use of the Due Process Clause itself to prohibit unfair practices. In these cases, due process func-

72. *Id.* at 431-32 (citing *Rochin v. California*, 342 U.S. 165 (1952) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)); see also *Hampton v. United States*, 425 U.S. 484, 492-93 (1976) (Powell, J., concurring) (recognizing that police "overinvolvement" in the crime might violate due process).

73. 342 U.S. 165 (1952).

74. *Id.* at 174.

75. *Id.* at 174-75 (Black, J., concurring); *id.* at 179 (Douglas, J., concurring).

76. *Id.* at 173.

77. *Id.* (quoting *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936)).

78. *Id.* at 170.

79. *Id.* at 171.

80. *Id.* at 175.

81. *Id.* at 172; see also *Irvine v. California*, 347 U.S. 128, 133 (1954) (limiting *Rochin* to police conduct involving coercion and physical assault).

tions as a useful safety valve, allowing the Court to police manifestly unjust criminal procedure, even if not condemned by our history and tradition. That useful function should not be impeded by an exclusively historical approach to due process adjudication.

The approach of *Medina* threatens to limit the Court's need for flexibility in responding to new forms of injustice that lack any historical antecedent.⁸² Ironically, a recent example of this need occurred in a competency case decided only one month before *Medina*. In *Riggins v. Nevada*,⁸³ the Court held that the trial of a defendant who had been forcibly medicated with antipsychotic drugs violated due process. The Court analyzed the defendant's substantive due process interest in being free from unwanted medication and the procedural fairness of his resulting trial. The medication administered to the defendant during his trial altered his demeanor and ability to participate in the proceedings, presenting a strong possibility of prejudice.⁸⁴ Justice Kennedy, author of the majority's opinion in *Medina*, wrote a concurring opinion in *Riggins* that expressed greater concern than the *Riggins* majority about the potentially prejudicial effects of these drugs on a defendant's demeanor and trial abilities.⁸⁵ Indeed, Justice Kennedy proposed the additional requirement that the prosecution must demonstrate the absence of prejudicial effects in order to justify antipsychotic medication.⁸⁶ *Riggins* provided the first occasion for the Court to consider the effect of antipsychotic medication on the fairness of a criminal trial.⁸⁷ As a result, no historic condemnation of involuntary use of these drugs on criminal defendants existed. Neither the majority nor Justice Kennedy, however, hesitated to invalidate the practice even absent traditional disapproval. Both

82. As Dean Kadish stated in an early discussion of the meaning of due process:

[I]n the light of its ultimate relation to the preservation of the conditions of a free society, the residuary procedural guarantee of due process is readily seen to be incompatible with changeless meanings. Freezing the meaning of due process, which in the final analysis is more a moral command than a strictly jural precept, destroys the chief virtue of its generality: its elasticity. Future generations would become bound to the perceptions of an earlier one; the experience that develops with changing modes of governmental power, unpredicted and unpredictable at an earlier time, as well as the deeper insights into the nature of man in organized society that are gained in continually changing social contexts, would become irrelevant.

Kadish, *supra* note 11, at 341 (footnote omitted).

83. 112 S. Ct. 1810 (1992).

84. *Id.* at 1813.

85. *Id.* at 1817-19 (Kennedy, J., concurring).

86. *Id.* at 1817.

87. This was not surprising because these drugs are a relatively recent innovation, having first been introduced in the early 1950s. See Bruce J. Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769, 778.

opinions concluded that the practice offended due process because it placed such a prejudicial burden on a defendant without sufficient justification. The Court in *Riggins* considered possible justifications for involuntary medication, but found the record insufficient to support any of them.⁸⁸ In its discussion of the state interests that might justify involuntarily medicating the defendant during trial, the Court balanced the interests of the state against the interests of the defendant, including the defendant's interest in the fairness and accuracy of the trial. Although the Court in *Riggins* did not mention *Mathews v. Eldridge*, its balancing approach was more consistent with the standard of *Mathews* than with the Court's new tradition-based approach in *Medina*.

The new approach of *Medina* would also deprive the Court of needed flexibility to consider the constitutionality of historically accepted practices that come to be regarded as unjust in light of evolving concepts of fairness. For example, in *Witherspoon v. Illinois*,⁸⁹ the Court considered a challenge to jury selection practices in capital cases that, although criticized by commentators,⁹⁰ were accepted at the time. Under these practices, prosecutors used the challenge for cause to remove all potential members of the jury with scruples against capital punishment. *Witherspoon* limited the use of the challenge for cause in death penalty cases to jurors whose opposition to capital punishment was so strong that they could not find the defendant guilty or impose a death sentence.⁹¹ Any wider use of the challenge, the Court found, would violate due process by "stacking the deck" against the accused.⁹² Because the trial in *Witherspoon* occurred before the Court applied the Sixth Amendment right to jury trial to the states through the Fourteenth Amendment,⁹³ the Court invoked generalized due process notions of fairness to invalidate a widely tolerated use of the challenge for cause. Under an exclusively historical approach, such flexibility to condemn a practice that produced capital juries biased in favor of the death penalty may not have been available.

88. *Riggins*, 112 S. Ct. at 1815-16.

89. 391 U.S. 510 (1968).

90. See Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 549-52 (1961). See generally Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 40-62 (1982).

91. *Witherspoon*, 391 U.S. at 513-14.

92. *Id.* at 522-23.

93. See *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Court has also invoked due process to require that, in appropriate circumstances, the trial judge permit questioning at *voir dire* concerning juror bias. *Ham v. South Carolina*, 409 U.S. 524 (1973).

The Court also needs flexibility to reconsider the constitutionality of practices that a prior Court approved. Sometimes the Court must overrule a prior due process precedent that approved a practice now thought constitutionally unfair. In such a case, not only is there an absence of tradition condemning the practice in question, but a Supreme Court decision approving it. *Jackson v. Denno*⁹⁴ presented such a situation. *Jackson* involved a constitutional challenge to the practice, specifically approved by the Court eleven years earlier,⁹⁵ of allowing the jury that determines guilt or innocence also to determine the voluntariness of a confession. Although the Court had previously upheld the practice, it became concerned that a jury might conclude that an involuntary confession was true, and as a result, would be unable to ignore it in its determination of the defendant's guilt.⁹⁶ The Court therefore overruled its precedent and found that the practice did not satisfy due process.⁹⁷ The force of precedent provides a restraining influence on the Court in these circumstances. The new approach of *Medina*, however, would be unduly constraining, imprisoning the Court in its own precedents. Once the Court had approved a particular practice, the approach of *Medina* would seem to insulate the practice from reconsideration by a future Court.

The restricted due process approach of *Medina* thus impinges on the Court's historic role in constitutional adjudication in criminal cases. *Medina* is inconsistent with many of the Court's prior due process decisions, as well as with several more recent criminal cases in which the Court explicitly applied the *Mathews* balancing approach.⁹⁸ It also is inconsistent with the Court's approach in other, non-criminal due process contexts.⁹⁹ The Court in *Medina* sought to limit its analysis to the criminal due process context, observing that the Due Process Clause has "limited operation" in the field of criminal law in view of the specific guarantees enumerated in the Bill of Rights for criminal defendants.¹⁰⁰ The majority concluded that use of the Due Process Clause to expand constitutional criminal protections beyond those explicitly enumerated in the Bill of Rights would involve "undue interference" with both "considered legislative judgments" and the "careful balance that the Constitution strikes between liberty

94. 378 U.S. 368 (1964).

95. *Stein v. New York*, 346 U.S. 156 (1953).

96. *Jackson*, 378 U.S. at 382.

97. *Id.* at 377, 387.

98. See *supra* note 14 and accompanying text.

99. See *supra* note 38 and accompanying text.

100. 112 S. Ct. 2572, 2576 (1992).

and order.”¹⁰¹

The Court’s analysis, however, cannot be so limited. The Court sometimes must make similar due process determinations in the civil procedure context. In the civil area, like its criminal counterpart, the Bill of Rights enumerates specific guarantees.¹⁰² As a result, the use of the Due Process Clause to expand procedural protections in the civil area also would invite “undue interference” with both legislative judgments and the balance struck by the Constitution. Yet in the civil context, the Court has not hesitated to use the Due Process Clause to impose additional requirements on the states, sometimes interfering with “considered legislative judgments,” based upon the Court’s evolving notions of fairness.

A line of cases in which the Court has determined the validity under the Due Process Clause of a plaintiff’s method of providing notice to the defendant of the commencement of a lawsuit illustrates such action by the Court in the civil context. In *Mullane v. Central Hanover Bank & Trust Co.*,¹⁰³ the Court held that the Due Process Clause requires service of process through means reasonably calculated to afford actual notice to the defendant.¹⁰⁴ If plaintiff had an alternative, reasonably practicable method of service that more likely would produce actual notice than the method of service used, then the service used would violate due process.¹⁰⁵ Emphasizing practicability, the Court sought to balance considerations of fairness against considerations of cost. The due process inquiry is not a quest for perfect notice, but rather for reasonable notice at reasonable cost. The approach adopted in *Mullane* is similar to the balancing test adopted in *Mathews v. Eldridge*. Both tests involve an explicit balancing of the interests of the parties and a rough cost/benefit analysis of the value of the procedural safeguard in question.

Moreover, like *Mathews*, but unlike *Medina*, traditional concepts of fairness did not limit the Court’s approach in *Mullane*. *Mullane* invalidated notice by publication as inconsistent with due process when plaintiff knew or could reasonably ascertain the address of the defendant.¹⁰⁶ Service by publication, however, was a traditional mode of service that, at least in *in rem* cases, was widely used at the time of the adoption of the Fourteenth Amendment. The Court endorsed ser-

101. *Id.*

102. *E.g.*, U.S. CONST. amend. VII (protecting the right to trial by jury).

103. 339 U.S. 306 (1950).

104. *Id.* at 314.

105. *Id.* at 315.

106. *Id.* at 318-19; *accord*, *Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

vice by publication in such cases in *Pennoyer v. Neff*¹⁰⁷ in 1877 and specifically upheld it in 1890 in *Arndt v. Griggs*.¹⁰⁸ Even though this method of service was approved by tradition, the Court in *Mullane* used the Due Process Clause to condemn service by publication for defendants with known addresses. Similarly, in a 1982 application of *Mullane*, the Court held that posting of a summons on the door of the abode of the defendant was not a constitutionally permissible method of service.¹⁰⁹ Even though the Court traditionally approved notice by posting, it used the Due Process Clause to invalidate this method of service. The Court's new tradition-based approach in *Medina* therefore is inconsistent with its due process methodology in civil procedure cases.

Medina's exclusively historical approach, as Justice O'Connor noted, is particularly inappropriate for construction of the vaguely worded Due Process Clause, "perhaps the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."¹¹⁰ Even more than other constitutional provisions, the Due Process Clause contains ambiguous and open-ended language capable of broad construction to effectuate its purposes as they may be conceived and reconceived over time, in light of the experiences and exigencies of succeeding generations. The vague provisions of the Constitution "were purposely left to gather meaning from experience."¹¹¹ The Constitution's adaptability to changing times makes it a document "intended to endure for ages to come."¹¹² The Due Process Clause, "the least specific and most comprehensive protection of liberties,"¹¹³ is one of a number of broad and general phrases in the Constitution that exist as "organic living institutions,"¹¹⁴ for which an exclusively traditional approach seems particularly inappropriate.

[T]he very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-nineteenth century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would

107. 95 U.S. (5 Otto) 714, 721-22 (1877).

108. 134 U.S. 316 (1890); see also *Blinn v. Nelson*, 222 U.S. 1 (1911); *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458 (1905).

109. *Greene v. Lindsey*, 456 U.S. 444 (1982).

110. *Medina*, 112 S. Ct. 2572, 2582 (1992) (O'Connor, J., concurring).

111. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (emphasis added).

112. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.).

113. *Rochin v. California*, 342 U.S. 165, 170 (1952) (Frankfurter, J.).

114. *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

add new "intermediate premises."¹¹⁵

An exclusively traditional approach to due process is inconsistent with this conception of the Due Process Clause. Moreover, the majority's conclusion that the Due Process Clause has limited operation in the criminal law area in view of the specific guarantees enumerated in the Bill of Rights seems puzzling. As the Ninth Amendment makes clear, the guarantees explicitly enumerated in the Bill of Rights were not intended to be exhaustive.¹¹⁶

The majority's approach in *Medina*, therefore, is unduly restrictive, preventing the Court from playing its historical role in due process adjudication. Tradition, of course, is relevant to whether a challenged practice satisfies due process, even if not dispositive of the issue.¹¹⁷ Tradition may, as Justice O'Connor suggests, justify a presumption in favor of a procedural practice, but that presumption must be rebuttable.¹¹⁸ The Court should not be prevented in appropriate

115. *Duncan v. Louisiana*, 391 U.S. 145, 175 (1968) (Harlan, J., dissenting); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 102-09 (1962); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 15 (1960) (The Constitution was "[c]onceived in ambiguity," the framers intending that it mean "whatever the circumstances of the future will allow it to mean."); Leonard W. Levy, *Introduction to AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS* 2 (Leonard W. Levy ed., 1966) ("The framers also had a genius for studied imprecision or calculated ambiguity. . . . [The Constitution] thereby permitted, even encouraged, nay necessitated, continuous reinterpretation and adaptation.").

116. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."). James Madison, its draftsman, described the circumstances giving rise to the need for the Ninth Amendment as follows:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].

1 ANNALS OF CONGRESS 439 (Gales & Seaton eds., 1834); see also *Griswold v. Connecticut*, 381 U.S. 479, 488-89 (1965) (Goldberg, J., concurring) ("[The Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.") (footnotes omitted); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 34-38 (1980); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 626-27 (5th ed. 1891); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227-28, 264-65 (1983); Symposium, *Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988).

117. See Kadish, *supra* note 11, at 343 ("Solutions of the problems of another day are useful but certainly not determinative of today's problems.").

118. See *supra* note 54 and accompanying text.

cases from considering whether contemporary notions of fairness sufficiently condemn a practice honored by history so that it no longer satisfies due process. Because the Court's approach in *Medina*, if taken literally, would foreclose such an inquiry, it is inconsistent with the normative role of the Court in construing an organic, living Constitution.¹¹⁹ By placing exclusive emphasis on traditional concepts of fairness, the new approach threatens to freeze procedural practices in a nineteenth century mold, preventing the progressive evolution of procedural justice.¹²⁰ To the extent that *Medina*'s test prevents the Court from reconsidering the fairness of an historically approved practice or from condemning new forms of injustice, the Court should reject it.

The *Mathews* test, by contrast, is less rigid. If a party challenging a procedural practice can show that an alternative practice would sufficiently increase the accuracy of adjudication to justify the fiscal, administrative, and social costs of its imposition, *Mathews* would condemn the practice even if historically supported. Although the Court should use *Mathews* sparingly—only in cases in which the balance tips decisively against a challenged practice supported by tradition—the very notion of due process of law contemplates that the Court consider whether the practice so offends contemporary notions of fairness that it should be condemned as unconstitutional.

In light of these difficulties with *Medina*'s exclusively historical test, it is not clear that the Court should construe the test literally. As Justice Blackmun noted, the majority in *Medina*, by considering the fairness of placing the burden of proof on the defendant, did not take its own formulation of the new test literally.¹²¹ Moreover, in other contexts where the Court has used tradition-based standards for measuring due process, it has looked beyond considerations of tradition. In the area of jurisdiction, for example, the Court has read the Due Process Clause to limit a state's assertion of jurisdiction over a non-

119. Indeed, the *Medina* test's quest for historic condemnation of a practice either denies or disguises the Court's normative role in giving meaning to the phrase "due process of law." See Kadish, *supra* note 11, at 339-40 (a "purely historical search can be expected to do little more than further obscure the judicial value-choosing inherent in due process adjudication, which can proceed with greater expectation of success if pursued openly and deliberately rather than under disguise.").

120. See *Rochin v. California*, 342 U.S. 165, 171-72 (1952) (Frankfurter, J.) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . ."); Kadish, *supra* note 11, at 343 ("[a]cceptable resolutions of due process predicaments are not likely to be forthcoming from the application of pre-formed molds, which by definition ignore the unique character in which each generation's problems are presented.").

121. See *supra* notes 58-63 and accompanying text.

resident when jurisdiction would offend "traditional notions of fair play and substantial justice."¹²² Although stressing tradition, the Court recognized that "[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage."¹²³ In *Shaffer v. Heitner*,¹²⁴ the state court had asserted jurisdiction over the defendant by attaching the defendant's property which was located in the state but unrelated to the claim. The Supreme Court determined that *quasi-in-rem* jurisdiction, although traditionally accepted,¹²⁵ no longer conformed to evolving conceptions of fairness and was inconsistent with due process. Although the Court's new approach in *Medina* places greater emphasis on tradition, it seems perhaps inevitable that in the future, the Court will consider, as it recently did in *Riggins v. Nevada*, the fairness of the challenged practice in light of the respective interests of the parties, even if such a balancing approach is not performed by using the specific formulation of *Mathews*.

IV. ALLOCATION OF THE BURDEN OF PROOF ON THE ISSUE OF INCOMPETENCY

A. *The Constitutionality of the California Statute*

Although the Court's rejection of the *Mathews* balancing test for criminal cases is questionable, the Court's decision to uphold the constitutionality of placing the burden of proof on the defendant to demonstrate incompetency is correct. Both the historical approach adopted by the majority in *Medina* and the *Mathews* test support the majority's conclusion.

1. APPLICATION OF THE COURT'S NEW APPROACH

As the majority observed, although the rule barring trial of an incompetent defendant has deep roots in common law, "no settled tradition" exists concerning how the burden of proof should be allocated in a proceeding to determine competency.¹²⁶ The Court noted the lack of clarity on this issue in the common law at the time of the

122. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

123. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). For differing conceptions of the role of tradition in applying the *International Shoe* standard, compare *Burnham v. Superior Court*, 495 U.S. 604, 622-27 (1990) with *id.* at 628-40.

124. 433 U.S. 186 (1977).

125. *See, e.g., Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877).

126. *Medina v. California*, 112 S. Ct. 2572, 2577-78 (1992).

adoption of the Constitution, as well as in contemporaneous English practice.¹²⁷ Early nineteenth century American decisions display divergent views on the burden of proof issue.¹²⁸ Moreover, the Court observed, contemporary statutes and cases reflect "no settled view" on the matter.¹²⁹ Consequently, the majority could find no historical basis for concluding that placing the burden of proving incompetency on the defendant violated due process.¹³⁰

Although beyond the scope of the tradition-based test, the majority then considered the fairness of placing the burden of proof on the defendant. Allocating the burden to the defendant, as the Court noted, only affects the determination of competency in a "narrow class of cases" in which the evidence is in equipoise.¹³¹ The Court reiterated the principle that due process guarantees a defendant the right not to be tried while incompetent and imposes on the states the obligation to provide procedures adequate to protect that right.¹³² However, the majority concluded that once a state provides a defendant access to procedures for determining competency, due process does not "require[] the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial."¹³³

The petitioner asserted that an incompetent defendant does not possess the ability to adduce evidence of his incompetency; thus, placing the burden of proof on him would deny him a fair opportunity to demonstrate that he was incompetent.¹³⁴ Rejecting this contention, the Court found that the defendant's right to the assistance of counsel¹³⁵ and the availability of psychiatric evidence mitigated the problems an incompetent defendant might encounter in carrying the

127. *Id.* at 2578.

128. *Id.* (citing *United States v. Chisholm*, 149 F. 284, 290 (S.D. Ala. 1906) (defendant bears burden of raising a reasonable doubt as to competence); *State v. Helm*, 61 S.W. 915, 916 (Ark. 1901) (burden on defendant to prove incompetency)).

129. *Id.* (comparing CONN. GEN. STAT. § 54-56d(b) (1991); PA. STAT. ANN. TIT. 50, § 7403(a) (Purdon Supp. 1991) (placing burden of proof on party raising the issue) with *Wallace v. State*, 282 S.E. 2d 325, 330 (Ga. 1981); *State v. Aumann*, 265 N.W.2d 316, 319-20 (Iowa 1978); *State v. Chapman*, 721 P.2d 392, 395-96 (N.M. 1986); *Barber v. State*, 757 S.W.2d 359, 363 (Tex. Crim. App. 1988) (en banc) (burden of proof may be placed on defendant) and with *Diaz v. State*, 508 A.2d 861, 863-64 (Del. 1986); *Commonwealth v. Crowley*, 471 N.E.2d 353, 357-58 (Mass. 1984); *State v. Bertrand*, 465 A.2d 912, 916 (N.H. 1983); *State v. Jones*, 406 N.W.2d 366, 369-70 (S.D. 1987) (burden of proof rests with the prosecution)).

130. *Id.*

131. *Id.* at 2579.

132. *Id.* (quoting *Drope v. Missouri*, 420 U.S. 162, 172-73 (1975)).

133. *Id.*

134. See *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976).

135. *Medina*, 112 S. Ct. at 2580 (citing *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981)).

burden of proof.¹³⁶ The Court noted that any impairment in the ability of the defendant to assist counsel is probative evidence that he meets that standard. Furthermore, the Court observed, "counsel will often have the best informed view of the defendant's ability to participate in his defense."¹³⁷ The Court found that due process does not "require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused."¹³⁸ The Court concluded that "a reasonable opportunity" to demonstrate incompetency satisfies due process.¹³⁹ The Court found the California procedure "constitutionally adequate" to guard against the trial of an incompetent defendant,¹⁴⁰ and held that the state's placement of the burden of proof on the defendant did not offend due process.

2. APPLICATION OF THE *MATHEWS V. ELDRIDGE* APPROACH

The approach of *Mathews v. Eldridge* calls for a broad balancing of the parties' interests in the procedural safeguard in contention. The Court must weigh the value of that safeguard to the individual against the fiscal, administrative, and social costs of its imposition. Due process, therefore, does not mandate a quest for the optimal level of procedural fairness. Fairness imposes costs, and the insight of the *Mathews* approach was that the Court must consider these costs when determining the level of fairness that the Constitution requires.¹⁴¹ *Mathews* thus calls for a rough cost/benefit analysis of the safeguard claimed to be constitutionally required: would imposing the safeguard in question sufficiently increase the accuracy and fairness of the proceedings to justify the added costs and burdens it would produce?

Four of the justices in *Medina* disagreed with the new due process approach adopted by the majority for determining the level of procedure required by the Constitution in criminal cases. Justices O'Connor and Souter, who concurred in the Court's judgment,¹⁴² and Justices Blackmun and Stevens, who dissented,¹⁴³ favored continued use of the *Mathews* approach. Although both the concurrence and the dissent applied *Mathews* to the burden of proof question presented

136. *Id.*; see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right to psychiatric assistance in determining whether to raise insanity defense).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 2581 (quoting *Drope v. Missouri*, 420 U.S. 162, 172 (1975)).

141. The *Mathews* standard replaced the relatively unlimited, open-ended fairness inquiry that had previously prevailed. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that an evidentiary hearing is required before terminating welfare benefits).

142. *Medina*, 112 S. Ct. at 2581 (O'Connor, J., concurring).

143. *Id.* at 2583 (Blackmun, J., dissenting).

in *Medina*, they reached contrary conclusions concerning the constitutionality of California's placement of the burden on the defendant to demonstrate his own incompetency to stand trial.

Justice O'Connor's concurring opinion reached the same conclusion as the majority by applying the *Mathews* approach.¹⁴⁴ Justice O'Connor stated that the "main concern" of the prosecution in these cases is that a defendant will feign incompetency to avoid trial.¹⁴⁵ This concern would be heightened, Justice O'Connor suggested, if the burden of proof were on the prosecution. In such a case, she reasoned, a defendant would have less incentive to cooperate with a psychiatric evaluator because an inconclusive examination would make it difficult for the prosecution to carry the burden.¹⁴⁶ She also suggested that placing the burden on the prosecution would provide the defendant with a disincentive to cooperate in making available friends or family members who might have relevant information concerning the defendant's mental state.¹⁴⁷ Justice O'Connor noted that states may respond to these considerations by concluding that "a more complete picture" of the defendant's mental condition will be obtained by placing the burden of proof on the defendant, thereby giving him "the incentive to produce all the evidence in [his] possession."¹⁴⁸ Because placing the burden on the defendant will thereby increase the overall availability of information on the competency question, Justice O'Connor suggested that the resulting increase in accuracy "may outweigh the danger that in close cases a marginally incompetent defend-

144. *Id.* at 2581-82 (O'Connor, J., concurring).

145. *Id.* at 2582. Justice O'Connor previously has expressed concern about the possibility that defendants will feign incompetency in order to gain the benefit of various legal rules. *Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring) ("[T]he potential for false claims and deliberate delay in this context is obviously enormous.") (referring to incompetency to be executed). Justice O'Connor's concern about the ability of defendants to feign incompetency successfully may be exaggerated. Although unstructured clinical evaluations may not adequately detect malingering and deception, structured clinical interviews and the use of a variety of objective psychometric measures that have recently been validated provide a higher degree of accuracy in the ability of clinicians to detect malingering. See, e.g., R. Michael Bagby et al., *Detection of Dissimulation with the New Generation of Objective Personality Measures*, 8 BEHAV. SCI. & L. 93 (1990); Kirk Heilbrun et al., *An MMPI-Based Empirical Model of Malingering and Deception*, 8 BEHAV. SCI. & L. 45 (1990); James R. P. Ogloff, *The Admissibility of Expert Testimony Regarding Malingering and Deception*, 8 BEHAV. SCI. & L. 27 (1990); Richard Rogers et al., *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 BEHAV. SCI. & L. 85 (1990); David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75 (1990). The clinical evaluator can also improve accuracy by obtaining third party information (from hospital or other records or individuals) to provide a method of external verification.

146. *Medina*, 112 S. Ct. at 2582.

147. *Id.*

148. *Id.*

ant is brought to trial.”¹⁴⁹ Moreover, placing the burden of proof on the prosecution will not necessarily increase the reliability of the competency determination process. Therefore, Justice O’Connor concluded that, under *Mathews*, the equities did not sufficiently weigh in the defendant’s favor to rebut the presumption of constitutionality given to the California procedure.¹⁵⁰

In his dissent, Justice Blackmun also applied the *Mathews* balancing test, but reached the opposite conclusion. The dissent expressed concern that, under the California procedure upheld by the Court, defendants will be subjected to trial even though the evidence concerning their incompetency is inconclusive.¹⁵¹ Justice Blackmun warned that placing the burden on the defendant would produce “a systematic and unacceptably high risk that persons will be tried and convicted who are unable to follow or participate in the proceedings determining their fate.”¹⁵² In his view, due process should require that the state bear the burden of proving that the defendant is competent to stand trial.

One factor overlooked by Justice Blackmun, however, limits the risk that placing the burden on the defendant will produce the conviction of incompetent defendants. Competency is a fluctuating state. A defendant’s condition may change over time.¹⁵³ This imposes a continuing burden on the trial court to reconsider the issue of competency if at any time, even after the court has found the defendant competent, his conduct raises a reasonable doubt about his continued competency.¹⁵⁴ Indeed, the Court in *Drope* cautioned that “a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”¹⁵⁵ Thus, a defendant found competent even though the evidence at the competency hearing was inconclusive may again raise the issue if during trial his condition renders him unable to fol-

149. *Id.* at 2583.

150. *Id.*

151. *Id.* at 2587 (Blackmun, J., dissenting).

152. *Id.*

153. CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 198-99 (1984); PRESIDENT’S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 123 (1983); Paul S. Appelbaum & Loren H. Roth, *Clinical Issues in the Assessment of Competency*, 128 AM. J. PSYCHIATRY 1462, 1465 (1981); Joanne Lynn, *Informed Consent: An Overview*, 1 BEHAV. SCI. & L. 29, 35-36 (1983); Winick, *Restructuring Competency*, *supra* note 18, at 966.

154. *See, e.g.*, FLA. R. CRIM. P. 3.210(b) (requiring competency determination if reasonable grounds to question the defendant’s competency emerge “at any material stage of a criminal proceeding.”).

155. *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

low and participate in the proceedings. A pretrial competency determination constitutes, at best, a prediction about how the defendant will perform at his future trial. If the trier of fact predicted the defendant's competence on the basis that the evidence concerning his incompetency was inconclusive, but events during the trial suggested that this prediction was incorrect, the court should order a mistrial and a new competency determination.¹⁵⁶ If during the trial counsel perceives that his client's impairment is interfering with his ability to communicate or to follow and understand the proceedings, the attorney can bring concrete examples of such incapacities, more persuasive than previous, largely hypothetical predictions, to the court's attention in support of a motion for a new competency determination. These concrete examples of the defendant's impairment, unavailable at the initial competency determination, will enable a defendant previously unable to bear his burden of proof to carry that burden. The risk of erroneously convicting an incompetent defendant is therefore considerably less than Justice Blackmun feared.

Another issue of competency bears on the risk of error—the competency of defense attorneys. Although the Sixth Amendment guarantees the effective assistance of counsel,¹⁵⁷ the quality of the criminal defense bar is so varied that, at least in some areas, the promise of the Sixth Amendment remains unfulfilled. Many criminal attorneys, including public defenders, are excellent—talented, sophisticated lawyers who zealously represent their clients' interests. Sadly, however, some are not. Some have not kept up with the rapidly changing developments in the law; some suffer under case loads too heavy to devote sufficient time to a particular case; some are incompetent and even unethical. As with competency to stand trial, we can best understand the notion of competency of counsel in terms of a continuum of competency. Where we place the line for incompetency is, of course, a normative legal question. In a system that prizes finality of adjudication, it is not surprising that the law presumes the competence of a properly licensed attorney and places a high burden on a convicted defendant to demonstrate his representation was constitutionally ineffective.¹⁵⁸ Indeed, much of the Supreme Court's criminal procedure jurisprudence builds on the assumption that counsel in criminal cases are competent.¹⁵⁹

Although this assumption is generally warranted, there is no

156. See *Hamm v. Jabe*, 706 F.2d 765 (6th Cir. 1983).

157. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

158. See *id.* at 687-91.

159. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (waiver of Fifth Amendment claim when counsel fails to make a contemporaneous objection).

blinking the reality that some defense attorneys fall far short of the standard. Moreover, the risks increase in cases involving mentally ill defendants, both because many attorneys do not understand the complexities of the law or the clinical issues in this area, and because their clients are particularly vulnerable to malpractice. Notwithstanding these risks, it is sensible to assume the competency of counsel. The arguments in support of placing the burden of proof of incompetence to stand trial on the defendant assume that the defense attorney is competent to represent his client's interests and will do so vigorously. Only then will allocating the burden of proof to the defendant not sacrifice the accuracy of an incompetency determination. When counsel is uninformed about clinical matters or the law in this area, or unwilling or unable to devote the necessary time and energies, the accuracy in the adjudication of competency decreases. As a result, a trial court should be particularly sensitive to the possible ineffectiveness of counsel, and when appropriate, should question counsel to ensure that the defendant's interests are properly represented. Counsel for an impaired client bears a special degree of professional responsibility.¹⁶⁰ A court must be especially alert to the potential breakdown in the adversary system when defense counsel is ineffective in representing a mentally ill defendant.

Justice Blackmun also premised his dissent on the notion that because the Constitution prohibits trial of an incompetent defendant, the courts cannot constitutionally try a defendant whose evidence of incompetency is inconclusive.¹⁶¹ A procedural rule is not unconstitutional, however, because it fails to eliminate the possibility of an erroneous deprivation of constitutional rights. In general, procedural rules should effectuate substantive rights, and should not frustrate their protection. A variety of pleading and evidence rules, however, sometimes produce results that do not fully promote substantive rights. Nevertheless, accomplishment of goals of efficiency, economy, and avoidance of delay justify these rules. Placing the burden of proof of incompetency on the defendant may result in some incompetent defendants facing trial because the evidence of incompetency is inconclusive. This does not necessarily justify the conclusion that the prosecution should bear the burden of proof.

In other contexts, the Supreme Court has upheld the allocation of burdens of proof or has set standards of proof in ways that would similarly produce the risk of erroneous deprivation of substantive con-

160. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.3, 1.14 (1983).

161. *Medina v. California*, 112 S. Ct. 2572, 2583 (1992) (Blackmun, J., dissenting).

stitutional rights. For example, in *Lego v. Twomey*,¹⁶² the Court upheld a practice under which, at a pretrial suppression hearing in a criminal case, the state bore the burden of proof by a preponderance of the evidence that a challenged confession was voluntary under the Fifth Amendment. The defendant argued that unless the Court required a standard of proof "beyond a reasonable doubt," courts might admit confessions even though there was a reasonable doubt concerning their voluntariness. The defendant further argued that this result was inconsistent with his Fifth Amendment freedom from compulsory self-incrimination and his due process right to have the state prove his guilt beyond a reasonable doubt. Although Justice Brennan, in dissent, found the argument persuasive,¹⁶³ the Court explicitly rejected it.¹⁶⁴

Similarly, in *Addington v. Texas*,¹⁶⁵ the Court held that to justify involuntary civil commitment of a mental patient, the state must prove by clear and convincing evidence that the patient satisfies the state's statutory commitment criteria.¹⁶⁶ The Court rejected the patient's contention that due process required the more rigorous "beyond a reasonable doubt" standard. Although an individual has a constitutional right to liberty unless the individual meets the civil commitment criteria, the procedures approved by the Court did not eliminate the risk of error in the application of those criteria. It is possible that courts applying the *Addington* clear and convincing standard could commit individuals who are not mentally ill or do not otherwise meet the criteria while courts might not commit these individuals under a reasonable doubt standard.

In *Ford v. Wainwright*,¹⁶⁷ the Court held that execution of an incompetent inmate would violate the Eighth Amendment's ban on cruel and unusual punishment. The Court suggested that a state might allocate to the death row inmate both the burden of production concerning his mental illness, and the burden of proof of his incompetency to be executed.¹⁶⁸ Although placing the burden of production and proof on the prisoner creates a risk that the state will execute incompetent defendants as a result of their inability to produce sufficient evidence concerning their incompetency, the Court's suggestion implied that this would not offend due process.

162. 404 U.S. 477 (1972).

163. *Id.* at 494.

164. *Id.* at 487-89.

165. 441 U.S. 418 (1979).

166. *Id.* at 432-33.

167. 477 U.S. 399 (1986).

168. *Id.* at 416-17 (dicta); see Winick, *Competency to be Executed*, *supra* note 2.

These cases illustrate that procedural rules do not offend due process simply by producing the risk of an erroneous deprivation of a constitutional right. Even under *Mathews v. Eldridge*, the Court could not invalidate a procedural rule simply because it produced the risk of an erroneous deprivation of a constitutional liberty. Rather, under *Mathews*, the Court would balance the respective interests of the parties to ascertain whether the defendant's proffered substitute procedure, allocating the burden of proof to the prosecution, would further his interest in avoiding trial while incompetent sufficiently to justify the costs that the procedure would impose on the state.

As Justice O'Connor's concurring opinion demonstrated, application of the *Mathews* balancing test in *Medina* would lead to the same result as that reached by the majority because of the potential decrease in the reliability of the competency process produced by placing the burden on the prosecution. Justice O'Connor suggested that the principal reason motivating the state to place the burden of proof on the defendant was the desire to minimize the possibility of the defendant's feigning incompetency in order to avoid trial.¹⁶⁹ A rule placing the burden on the prosecution, she feared, would give the defendant a disincentive to cooperate with the psychiatric evaluation and with the state's access to family and friends who might have information bearing on his competency. The California Supreme Court in *Medina* made a similar point, suggesting that "one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry."¹⁷⁰ In Justice O'Connor's view, this consideration tips the balance required by *Mathews* in favor of upholding the approach taken by the California statute.

The majority's conclusion in *Medina* therefore seems justified. The risk seems small that allocating the burden of proof of incompetence to the defendant will produce an erroneous deprivation of his right not to be convicted while incompetent. Moreover, by producing a disincentive to the production of evidence in the defense's control, allocating the burden to the prosecution could increase the risk of inaccurate competency determinations, resulting in finding competent defendants who are incompetent. This type of error may impose serious burdens on both defendants and the state.¹⁷¹ The Court's conclusion therefore would seem proper under an application of the *Mathews* balancing test that the majority rejected.

169. See *supra* note 145 and accompanying text.

170. *People v. Medina*, 799 P.2d 1282, 1291 (Cal. 1990).

171. See *infra* part IV.B.3.

B. *The Wisdom of Allocating the Burden of Proof to the Party Asserting Incompetency to Stand Trial*

The Court's conclusion sustaining the constitutionality of the California statute appears correct under both a tradition-based approach and the more fairness-oriented standard of *Mathews*. Apart from the question of constitutionality, it is appropriate to consider the wisdom of the California statutory scheme. Although "wisdom" in this sense is a question of legislative judgment rather than of constitutional adjudication, a consideration of the reasonableness of that judgment gives a better perspective to the Court's conclusion in *Medina*. Three factors—fairness, probability, and policy—often invoked by appellate courts in allocating burdens of proof, support the Court's conclusion to uphold the California statute.

1. FAIRNESS

In allocating burdens of pleading and proof, appellate courts often invoke the consideration emphasized by Justice O'Connor in her concurring opinion—that the defendant has greater access to the facts concerning his incompetency.¹⁷² In a classic article on allocating burdens of pleading and proof, Professor Edward Cleary identified this consideration as one of the three principle factors that courts should consider in making burden allocation decisions.¹⁷³ Cleary called this consideration "fairness." He suggested that when evidence relating to a particular matter lies more within the control of one party, the burden of proof on that matter, other things being equal, should be allocated to him.¹⁷⁴

Because the defendant and his counsel have greater control over the evidence concerning incompetency than the prosecution, the defense should bear the burden of proof. Placing the burden on the defendant would not be unfair to him because he has greater access to the information necessary to carry the burden. It would avoid unfairness to the prosecution, which otherwise might be hampered in its ability to adduce the necessary evidence to carry the burden. Moreover, because the defendant possesses greater control over the evidence than the prosecution, placing the burden on the defense should increase the reliability of the competency determination process.

172. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (allocating the burden of pleading good faith qualified immunity in a civil rights action against a public official to the defendant based in part on the conclusion that "whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant.").

173. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

174. *Id.* at 12.

2. PROBABILITY

“Fairness” is not the only consideration that enters into the determination of where to allocate the burden of proof. Professor Cleary identified two additional considerations, which he called “probability” and “policy.”¹⁷⁵ Cleary suggested that courts make a rough estimate of the likely probabilities concerning resolution of the outcome of the issue and that courts allocate the burden of proof, other things being equal, “to the party who will be benefitted by a departure from the supposed norm.”¹⁷⁶

In the context presented in *Medina*, the question is how probable it is that a defendant who undergoes a formal competency evaluation will be found incompetent. Although the Court in *Medina* did not discuss this consideration, it supports the reasonableness of the balance struck by the California statute. Under *Pate v. Robinson*¹⁷⁷ and *Drope v. Missouri*,¹⁷⁸ due process requires trial judges to make a formal competency determination whenever the facts and circumstances present a reasonable doubt about the defendant’s competency.¹⁷⁹ In practice, trial judges order a formal competency evaluation in virtually every case in which doubt exists about competency.¹⁸⁰ “Several studies have concluded that the vast majority of defendants inappropriately are referred for competency evaluations and have suggested that the competency process is often invoked for strategic purposes”¹⁸¹ Perhaps because the competency process is so easily

175. *Id.* at 11-12.

176. *Id.* at 12-13.

177. 383 U.S. 375 (1966).

178. 420 U.S. 162 (1975).

179. *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 385.

180. Winick, *Restructuring Competency*, *supra* note 18, at 925; *see, e.g.*, RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 192 (1980) (reporting on a survey of judicial attitudes in North Carolina).

181. Winick, *Restructuring Competency*, *supra* note 18, at 933; *see, e.g.*, A.B.A. STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, *CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* introduction at 7.142-43, 7.162 (1st tent. draft 1983) [hereinafter ABA TENTATIVE DRAFT]; BRUCE J. ENNIS & RICHARD D. EMERY, *THE RIGHTS OF MENTAL PATIENTS* 102-03 (rev. ed. 1978); ROESCH & GOLDING, *supra* note 180, at 49-50, 192-98; David E. Bennett, *Competency to Stand Trial: A Call for Reform*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 569, 572 (1968); Paul A. Chernoff & William G. Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505, 515-16 (1972); Gerald Cooke et al., *Factors Affecting Referral to Determine Competency to Stand Trial*, 130 AM. J. PSYCHIATRY 870, 874 (1973); Stuart E. Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. C.R.-C.L. L. REV. 379, 380 (1968); Stephen L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial*, 8 L. & HUM. BEHAV. 321, 322, 332 (1984); Abraham L. Halpern, *Use and Misuse of Psychiatry in Competency Examinations of Criminal Defendants*, 5 PSYCHIATRIC ANNALS 123, 124 (1975); A. Louis McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U. L. REV. 46, 47-50 (1969); Ronald Roesch & Stephen L. Golding, *Treatment and Disposition of Defendants*

invoked, a larger number of defendants evaluated for competency are found competent—as many as 96% or more in some jurisdictions,¹⁸² and probably no less than 75% in most.¹⁸³ National estimates suggest that only about 25% of those evaluated for competency are found incompetent.¹⁸⁴ Using these estimates,¹⁸⁵ it is more probable than not that a defendant subjected to a formal competency determination will be found competent. Thus, “probability” would support placing the burden of proof of incompetency on the party (defense or prosecu-

Found Incompetent to Stand Trial: A Review and a Proposal, 2 INT'L J.L. & PSYCHIATRY 349, 366 (1979); Saleem A. Shah, *Legal and Mental Health System Interactions: Major Developments and Research Needs*, 4 INT'L J.L. & PSYCHIATRY 219, 242-43 (1981); Ralph Slovenko, *The Developing Law on Competency to Stand Trial*, 5 J. PSYCHIATRY & L. 165, 165 (1977); Henry J. Steadman & Jeraldine Braff, *Crimes of Violence and Incompetency Diversion*, 66 J. CRIM. L. & CRIMINOLOGY 73, 73 (1975); Henry J. Steadman & Eliot Hartstone, *Defendants Incompetent to Stand Trial*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 39, 42 (John Monahan & Henry J. Steadman eds., 1983); Alan A. Stone, *Comment*, 135 AM. J. PSYCHIATRY 61, 62 (1978); David B. Wexler et al., *Special Project—The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 161-62 (1971).

These sources suggest that both sides often invoke the competency evaluation to obtain delay; prosecutors do so to avoid bail or an insanity acquittal, or obtain hospitalization that might not otherwise be possible under the state's civil commitment statute; defense attorneys do so to obtain mental health recommendations for use in making an insanity defense, in plea bargaining, or at sentencing. Winick, *Restructuring Competency*, *supra* note 18, at 933.

182. LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, *COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS* 64, 65 (DHEW Pub. No. (ADM) 74-103, 1974) (Massachusetts); Richard H. Bendt et al., *Incompetency to Stand Trial: Is Psychiatry Necessary?*, 130 AM. J. PSYCHIATRY 1288 (1973) (Massachusetts).

183. ROESCH & GOLDING, *supra* note 180, at 48-49 (North Carolina); Robert L. Goldstein, *"The Fitness Factory," Part I: The Psychiatrist's Role in Determining Competency*, 130 AM. J. PSYCHIATRY 1144, 1145-46 (1973) (New York); Andrew L. Laczko et al., *A Study of Four Hundred and Thirty-Five Court-Referred Cases*, 15 J. FORENSIC SCI. 311, 320 (1970); Steadman & Hartstone, *supra* note 181, at 41.

184. HENRY J. STEADMAN, *BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* 4 (1979); Steadman & Hartstone, *supra* note 181, at 39-41; Winick, *Restructuring Competency*, *supra* note 18, at 925.

185. The estimates referred to are based on competency evaluations by clinicians and not necessarily on judicial determinations of competency in contested cases. When a trial judge orders a competency evaluation, two or more psychiatric (or psychological) evaluators interview the defendant and submit a report on his competency to the court. When these reports are consistent, the parties often stipulate to the reports, thereby avoiding a formal hearing. Allocation of the burden of proof becomes important only in cases where there is such a contested hearing. The above data suggests that only 25% of defendants evaluated for competency are found incompetent, but does not differentiate between cases with and without a contested hearing. Although these estimates do not provide a fully reliable basis for conclusions about the results of contested hearings, they provide reasonable support for the conclusion that it is more likely than not that defendants who require such a formal judicial determination of competency will be found competent. At the very least, these studies provide a reasonable basis for judicial estimates of probability in such circumstances for purposes of applying Professor Cleary's analysis. See Cleary, *supra* note 173, at 12 (referring to a "judicial, i.e., wholly nonstatistical, estimate of the probabilities of the situation").

tion) that asserts the more improbable event, *i.e.*, that the defendant is incompetent. This is precisely how the California statute involved in *Medina* allocated the burden.

3. POLICY

According to Professor Cleary, courts should also consider policy in allocating burdens of proof.¹⁸⁶ Allocation of the burden of proof affects various social policies.¹⁸⁷ Professor Cleary quotes Julius Stone's admonition that "the courts should not essay the impossible task of making the bricks of judge-made law without handling the straws of policy."¹⁸⁸

The Court did not base its determination in *Medina* on an analysis of the social policy implications of the allocation of the burden of proof of incompetency. Perhaps the majority omitted the social policy consideration because it rejected the *Mathews* balancing test as the proper standard. *Mathews* more explicitly requires an analysis of policy considerations. The *Mathews* test contemplates judicial assessment of the probable value, if any, of additional or substitute procedural safeguards and the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.¹⁸⁹ Applying this standard, the Court often has alluded to the social cost of requiring additional procedural protections, expressing concern, for example, with the adverse impact on family values of imposing an adversarial hearing when parents seek to commit their minor children to mental hospitals,¹⁹⁰ with the impact on professional education of imposing an adversarial hearing when a medical school faculty dismisses a medical student because of deficiencies in his clinical skills,¹⁹¹ and with the impact on the educational process of imposing formal hearings as a prerequisite to short-term suspension from public school.¹⁹²

186. Cleary, *supra* note 173, at 11.

187. *See, e.g.*, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (allocating the burden of proof to plaintiffs to effectuate Congressional policy).

188. Cleary, *supra* note 173, at 12 (quoting Julius Stone, *Burden of Proof and the Judicial Process*, 60 L.Q. REV. 262, 283 (1944)).

189. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

190. *Parham v. J.R.*, 442 U.S. 584, 610 (1979).

191. *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978).

192. *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975).

a. Reducing the Burdens of the Incompetency-to-Stand-Trial Doctrine

What policies are affected by allocating the burden of proof on the issue of incompetency to stand trial? The most obvious concern is that placing the burden on the defendant creates the risk that courts will find some truly incompetent defendants competent and require them to stand trial even though they cannot effectively understand the proceedings or consult with counsel. As demonstrated earlier, however, that risk may be small because allocation of a preponderance of the evidence burden will affect only a small category of marginally impaired defendants. Moreover, the trial court must reconsider the competency question if evidence of the defendant's impairment emerges at trial. Therefore, placing the burden of proof on the defendant does not frustrate the protective policies underlying the incompetency-to-stand-trial doctrine.

The Court in *Medina* reiterated the oft-quoted dicta from *Pate v. Robinson* that the trial and conviction of an incompetent defendant would violate due process.¹⁹³ For defendants who are able to carry the burden of demonstrating their incompetency by a preponderance of the evidence, the California statute will not undermine fairness and accuracy of adjudication. Moreover, even when defendants cannot carry this burden, these values probably will not be undermined.

Like other constitutional rules, the incompetency doctrine sometimes produces unintended consequences. Even though the doctrine protects defendants who are severely impaired by mental illness, it raises significant problems and has been criticized as imposing serious burdens on defendants and high costs on the states.¹⁹⁴ Although originally designed to protect the defendant, the doctrine is frequently so burdensome to incompetent defendants that the ABA Committee that developed the *Criminal Justice Mental Health Standards* suggested that defense counsel may conclude that it is in their clients' best interests not to raise the issue.¹⁹⁵

193. 112 S. Ct. 2572, 2574, 2579, 2581 (1992) (citing *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966)). For analysis showing that the language in *Pate* was dicta, see NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 49 (1982); Burt & Morris, *supra* note 31, at 76; Winick, *Restructuring Competency*, *supra* note 18, at 968-70.

194. Winick, *Restructuring Competency*, *supra* note 18, at 925, 928-49 (analyzing the burdens and costs imposed by the incompetency doctrine); Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243 (1987).

195. According to the Committee:

Because of the sometimes severe consequences historically attendant upon a determination of incompetence defense counsel may conclude that it is in the defendant's best interest to proceed to trial although technically the defendant

An adjudication of incompetency is thus, at best, a mixed blessing for the defendant. To a great extent, the concept of incompetency to stand trial is based on myth and sanist stereotyping concerning the mentally ill.¹⁹⁶ Moreover, the concept is based also on an unrealistic view of the competency of non-mentally ill defendants, many of whom possess a low level of ability to understand and participate meaningfully in the criminal process. The burdens and costs imposed by the incompetency doctrine make it appropriate for judges and legislators to seek to minimize its negative consequences. One way of accomplishing this is to define narrowly the class of cases in which a defendant may be found incompetent to stand trial. However, the broad standard for incompetency approved by the Court in *Dusky v. United States*¹⁹⁷ and followed in substance in all jurisdictions,¹⁹⁸ appears to be constitutionally required. As a result, narrowing the standard itself may not be constitutionally permissible. Another way of accomplishing this result is to place the burden of proof on the party asserting that the defendant is incompetent. Grossly incompetent defendants may require the protections afforded by the incompe-

might be incompetent to stand trial. For example, the length of involuntary commitment for treatment to restore competence may extend well beyond the possible maximum sentence for a relatively minor offense; a finding of mental illness could result in stigma which the defendant finds more opprobrious than the stigma of conviction; the evaluation itself may require the defendant to reveal to a court-appointed expert information which the defendant would prefer to keep secret; in a case in which the probable penalty is a relatively minor fine, introduction of the cumbersome incompetence evaluation proceedings appears an unnecessary expenditure of systemic resources. The defendant may even prefer to be punished by being sentenced to a prison than to be committed to a mental hospital for treatment, given the inadequate conditions in many public mental institutions. The defense attorney may also feel, if the case against the defendant is weak or if the defense does not depend upon the competence of the client, that the defense would prevail at trial despite the defendant's incompetence.

ABA TENTATIVE DRAFT, *supra* note 181, Standard 7-4.2(c) commentary at 7.160 (footnotes omitted).

196. See Winick, *Restructuring Competency*, *supra* note 18, at 970-75. Michael Perlin defines "sanism" as "irrational, unconscious, bias-driven stereotypes and prejudices," similar to those exhibited in cases involving racist, sexist, and other bigoted decisionmaking. Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 91-93 (1991); see also Michael L. Perlin, *On "Sanism,"* 46 S.M.U. L. REV. 373 (1992); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1992); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. (forthcoming 1993).

197. 362 U.S. 402, 420 (1960) (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 a factual understanding of the proceedings against him").

198. Winick, *Incompetency to Stand Trial*, *supra* note 1, at 5; see, e.g., CAL. PENAL CODE § 1367 (West 1982).

tency doctrine. But those whose mental illness only marginally impairs their ability to understand and participate in the proceedings may actually be better off if required to face and resolve their criminal charges more quickly. Postponing the criminal trial until after a sometimes lengthy period of hospitalization and treatment may not increase these defendants' ability to obtain better results in the criminal process. Therefore, it may be appropriate to limit the incompetency-to-stand-trial status to severely impaired defendants. Placing the burden of proof on the party asserting the defendant's incompetence can help minimize the inappropriate use of the incompetency doctrine for defendants who are not as severely impaired by moving those who are only marginally incompetent from the incompetent to the competent category. On the other hand, placing the burden of proof on defendants who assert incompetency should not affect the result reached in cases where the impairment is severe. Only in cases in which the evidence is so equivocal or inconclusive that the trier of fact concludes that incompetency is no more likely than competency, will placing the burden on the party asserting incompetency make a difference. As a matter of social policy, it may be beneficial to use the burden of proof on the issue to treat marginal cases as competent and allow the criminal process for such defendants to proceed.

b. Facilitating the Speedy Disposition of Criminal Charges

Other relevant social policy considerations may point in the same direction. The Sixth Amendment guarantee of the right to speedy trial reflects a strong social policy in favor of the expeditious resolution of criminal charges.¹⁹⁹ Unlike many of the Bill of Rights protections afforded criminal defendants, the speedy trial right serves not only the interests of the defendant in avoiding delay in the resolution of charges, but also the interests of society.²⁰⁰ The lengthy trial delays that often follow a finding of incompetency to stand trial may be accompanied by the death or disappearance of witnesses, the fading of memories, and the disappearance of evidence. Both the prosecution and defense suffer burdens that may significantly impede a just and accurate resolution of the case.

Aside from its potential impact on the accuracy of adjudication, a lengthy delay may compromise the basic policies underlying the

199. U.S. CONST. amend. VI; *see Doggett v. United States*, 112 S. Ct. 2686, 2690-91 (1992); *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

200. *See Barker*, 407 U.S. at 519 ("In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.").

criminal law. If the defendant is guilty, delay diminishes the potential for rehabilitation. The passage of time between the criminal act and the application of punishment weakens the deterrent effect of the criminal sanction. Delay also frustrates the interests of victims in seeing that justice is done.

If the defendant is innocent, undue delay will be especially prejudicial. Defendants found incompetent typically are held in custody, rather than released on bail or on their own recognizance.²⁰¹ The conditions of confinement in the typical forensic facility may be so oppressive that defendants prefer prison punishment.²⁰² For the increasing number of defendants charged with minor offenses who are found incompetent, the duration of incompetency commitment may exceed the period of penal confinement they would have received if convicted.²⁰³ The stigma of unresolved charges can be severe, often costing a defendant his job and injuring his reputation. The anxiety and concern produced by delaying the trial may create emotional problems for the defendant and his family that persist beyond his vindication.

Because an adjudication of incompetency produces delay, placing the burden of proof on the party contesting competency serves the policy in favor of speedy disposition of criminal charges. Allocating the burden of proof in this manner would affect only marginally impaired defendants. The courts would find these defendants competent and would have the opportunity to resolve their charges more expeditiously. The delays of an incompetency determination may be appropriate for severely impaired defendants, but more difficult to justify for those whose impairment is only marginal. These marginally impaired defendants, as well as the public, may benefit more from a speedy resolution of their charges than from a postponement of trial and a lengthy incompetency commitment.

c. The Therapeutic Impact of Allocating the Burden of Proof on Incompetency

Another area of social policy not considered by the Court in *Medina* involves the impact of its procedural ruling on therapeutic values. Particularly when the Court decides issues of mental health law, the impact of its decisions on therapeutic considerations should

201. Winick, *Restructuring Competency*, *supra* note 18, at 946-47.

202. *See, e.g.*, ABA TENTATIVE DRAFT, *supra* note 181, Standard 7-4.2(c) commentary at 7.160; Winick, *Restructuring Competency*, *supra* note 18, at 942.

203. *See, e.g.*, ABA TENTATIVE DRAFT, *supra* note 181, Standard 7-4.2(c) commentary at 7.160; Winick, *Restructuring Competency*, *supra* note 18, at 942.

not be ignored. This insight is at the core of what David Wexler and I call "therapeutic jurisprudence."²⁰⁴ In this section, I assess the therapeutic impact of *Medina*, concluding that therapeutic considerations also support the Court's result.

Placing the burden of proof on the party asserting incompetency may have positive therapeutic value. Placement of the burden of proof will make a difference only in cases in which the evidence concerning competency is so evenly distributed that the trier of fact cannot conclude that it favors one determination rather than another. In cases in which the evidence even slightly favors one conclusion, the allocation of the burden of proof, because it must be carried by a preponderance of the evidence, will not affect the outcome. In cases like *Medina*, in which the defendant asserts that he is incompetent, placing the burden on him will thus affect only a presumably small category of cases in which the defendant is marginally incompetent.

There also may be therapeutic value in avoiding application of the incompetency label to marginally impaired defendants. Not only might such labeling have a negative impact on their mental health, but withholding the incompetency label from these defendants may present therapeutic opportunities. Defendants in this category are impaired by mental illness and probably could benefit from treatment. Even if their impairment is not clearly sufficient to meet the standard for incompetency, a brief period of mental health treatment might improve their ability to face their charges more effectively by increasing their understanding of the proceedings and their capacity to participate with counsel in decisionmaking. When a court finds a marginally incompetent defendant competent as a result of his inabil-

204. The theory of therapeutic jurisprudence suggests the need to study the therapeutic implications of various legal rules and practices. The theory focuses attention on the therapeutic dimension, an often neglected ingredient in the calculus necessary to perform a sensible policy analysis of mental health law and practice, and requires systematic empirical examination of this dimension. See DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991) [hereinafter WEXLER & WINICK, *ESSAYS*]; 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 Wexler & Winick, *Therapeutic Jurisprudence as a New Approach*]; David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1992). To identify the therapeutic dimension as a significant factor is not, of course, intended to suggest that it should trump other considerations. There may be countervailing normative considerations that outweigh the therapeutic consequences of a particular rule. Therapeutic jurisprudence is not a method of determining which factor should predominate in decisionmaking. Rather, it merely seeks to raise questions that call for a more complete analysis of the relevant considerations.

ity to carry the burden of proof, his counsel still may be able to seek a trial continuance for a brief period of treatment. Courts frequently grant continuances to physically ill or disabled defendants who request brief trial delays to undergo treatment. Such continuances are a reasonable accommodation of conflicting interests. Courts freely grant such continuances unless they believe the defendant is feigning illness to delay the trial, or is otherwise acting in bad faith. If the court already has heard sufficient evidence concerning the defendant's mental illness to believe that he is not fabricating his condition, and if a brief period of treatment seems likely to be beneficial to the defendant and to increase his ability to function at trial, the court may be willing to grant a continuance of reasonable duration, even though the court has found the defendant competent.²⁰⁵

In some cases, a defense attorney will anticipate that the court will find the mentally ill defendant competent because evidence of incompetence does not meet the preponderance standard. In such a case, defense counsel could seek a trial continuance by proposing a reasonable treatment plan worked out in advance with the defendant and an appropriate clinician. The place of treatment, of course, would depend on the defendant's bail status. If the defendant is in custody, the defendant could receive treatment either in jail or in a hospital prison ward or other secure mental health facility; if released, the defendant could receive treatment in the community on an outpatient or voluntary inpatient basis.

The literature on the psychology of choice²⁰⁶ suggests that the

205. See *Morris v. Slappy*, 461 U.S. 1, 11 (1983) (“[B]road discretion must be granted trial courts on matters of continuances . . .”) (citation omitted). For the suggestion that trial continuances replace the formal competency process now existing for defendants asserting their incompetency as a bar to trial, see Winick, *Incompetency to Stand Trial*, *supra* note 1, at 25-27; Winick, *Restructuring Competency*, *supra* note 18, at 979-83; see also Burt & Morris, *supra* note 31, at 67 (suggesting a more general replacement of the incompetency plea with a system employing trial continuances and eventual trials of defendants remaining impaired after a six-month period).

206. For discussion of the psychological literature on the effect of choice on motivation and performance, and the implications for law and social policy in a variety of areas, see Winick, *Competency to Consent to Treatment*, *supra* note 1, at 46-53; Winick, *Voluntary Hospitalization*, *supra* note 1, at 192-99; Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 752-72 (1991) [hereinafter Winick, *Wagering with the Government*]; Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT’L J.L. & PSYCHIATRY (forthcoming 1993). This literature is based on studies involving populations that are not as impaired as mentally ill defendants found incompetent to stand trial. Whether conclusions about the relationship between patient choice and the efficacy of treatment can be generalized to the more impaired population discussed here is an open question deserving investigation. Therapeutic jurisprudence seeks to identify such open empirical questions and to call for their analysis by social scientists. See *supra* note 204.

potential for successful treatment of marginally incompetent defendants will increase when the defendants are involved in treatment planning and accept treatment voluntarily rather than as a result of court coercion. These defendants would have been subjected to coercive treatment had they been found incompetent and committed to a forensic facility. Many of these facilities are inadequately staffed and funded. In addition, defendants may spend lengthy periods confined there before they are restored to competency. Defendants who perceive a strategic advantage in delaying or avoiding trial may artificially prolong their commitment. Because their trials will be resumed upon their restoration to competency, a disincentive to a positive treatment response may result. A defendant who has been found competent because he has failed to carry his burden of proof, however, will not be subject to this disincentive. If the court grants a requested trial continuance to such a defendant to allow for needed treatment, the commencement of his trial will not depend upon a favorable response to treatment. As a result, to the extent that the defendant perceives that a successful response to treatment will improve his functioning, and chances for a more favorable outcome at trial, an incentive to improvement will exist.

In addition, to further increase the efficacy of treatment, the defendant and the court could enter into an agreement linking treatment to the continuance. Under such an agreement, the defendant receives the continuance in exchange for participation in a treatment program with periodic progress toward trial capacity, perhaps based on a schedule of target goals and dates. Tying treatment participation and response to the continuance can be seen as a "contingency contract," a device that, according to psychological theory, should enhance the efficacy of the treatment program.²⁰⁷ In cases involving defendants seeking an incompetency adjudication, placing the burden of proof on them may have the effect of creating therapeutic opportunities.

In cases in which the state asserts that the defendant is incompetent, even though the defendant wishes to be deemed competent, plac-

207. See Winick, *Wagering with the Government*, *supra* note 206 (analyzing contingency contracting as a mechanism for accomplishing individual and social change); see also WEXLER & WINICK, *ESSAYS*, *supra* note 204, at 314-17 (suggesting the use of contingency contracting in the incompetency to stand trial context); David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991) (proposing the use of contingency contracting in the insanity acquittee conditional release process); Wexler & Winick, *Therapeutic Jurisprudence as a New Approach*, *supra* note 204, at 998-1000 (proposing contingency contracting in the incompetency to stand trial treatment process).

ing the burden of proof on the state might have an even greater therapeutic potential. In a small percentage of cases, the defendant, although mentally ill, does not assert incompetency, but the prosecution or the court raises the issue.²⁰⁸ When the prosecution asserts that the defendant is incompetent, it will bear the burden of proof under the California statute.²⁰⁹ Although the Court in *Medina* did not discuss the question, the Court would presumably uphold assignment of the burden of proof to the prosecution when it raises the issue over the defendant's objection. Placing the burden on the state would be beneficial to the defendant not merely because it facilitates the objective of pleading guilty or standing trial, but also because it minimizes the particularly severe and unfair burdens of an unwanted incompetency determination.²¹⁰ Because the benefits of the incompetency doctrine may not outweigh the burdens it imposes on defendants wishing to stand trial notwithstanding their impairment, states should limit involuntary incompetency to grossly impaired defendants.

Placing the burden of proof on the state in such cases is one way of increasing therapeutic value. Moreover, defendants for whom the allocation of the burden of proof to the prosecution may affect the result (presumably only a small category of marginally impaired defendants) also would experience the same therapeutic advantages and opportunities available to those who assert their incompetency. When the state bears the burden of proof in this context, the court will find marginally incompetent defendants competent, and will permit these defendants to plead guilty or stand trial according to their wishes. These defendants will be able to accept needed mental health treatment before, during, or after their trial, on a voluntary basis, free of the potential disincentives to successful treatment faced by their counterparts, those defendants adjudicated incompetent.

Marginally competent defendants may benefit from treatment, largely to the extent that they desire it. Having their criminal charges disposed of, either by trial or guilty plea, will remove potential obstacles to successful treatment. Placing the burden of proof on the party asserting incompetency will increase the ability of defendants to deal effectively with their mental health problems free of the pressures of

208. Winick, *Incompetency to Stand Trial*, *supra* note 1, at 8-9; Winick, *Restructuring Competency*, *supra* note 18, at 951.

209. *Medina v. California*, 112 S. Ct. 2572, 2574 (1992) (citing CAL. PENAL CODE § 1369(f) (West 1982)).

210. See Winick, *Restructuring Competency*, *supra* note 18 (criticizing the incompetency process when applied involuntarily and suggesting that defendants wishing to do so with the approval of counsel, should be permitted to waive their incompetency and plead guilty or stand trial in an impaired state).

pending criminal charges. Thus, whether the defendant asserts that he is incompetent or that he is competent, the California statute, approved by the Court in *Medina*, can produce a beneficial therapeutic effect.

A variety of social policies thus provide support for placing the burden of proof on the party asserting incompetency. These social policies and the previously discussed considerations of fairness and probability make the allocation of the burden by the California statute a reasonable one. Although the approach used by the majority in *Medina* may be questioned, the result reached by the Court is correct.

V. THE PRESUMPTION IN FAVOR OF COMPETENCY

In addition to its effect on defendants in the criminal process, the Court's decision in *Medina* endorsing the presumption in favor of competency may have significance for the future of mental health law in general. The California statute erected a presumption in favor of competency and placed the burden of proof on the party asserting incompetency. By specifically approving this statutory presumption, the Court appears to be moving in a different direction from the approach it took in *Zinermon v. Birch*.²¹¹

In broad dicta in *Zinermon*, the Court seemed to question the presumption of competency. While considering the competency of a mental patient to consent to voluntary hospitalization, the Court suggested that

even if the State usually might be justified in taking at face value a person's request for admission to a hospital for medical treatment, it might not be justified in doing so without further inquiry as to a mentally ill person's request for admission and treatment at a mental hospital.²¹²

The Court's statement went considerably beyond the facts of the case, which involved a grossly incompetent patient who thought the mental hospital he was entering was heaven.²¹³ While it is appropriate to require further inquiry on the question of competency when a patient exhibits signs of gross impairment, most mental patients seeking voluntary hospitalization, even though mentally ill, are not incompetent to make that decision. The required inquiry is justified for patients such as the one in *Zinermon* because the evidence of his impairment exhibited upon admission destroyed the presumption of competency

211. 494 U.S. 113 (1990).

212. *Id.* at 133 n.18. For an analysis showing that this statement was dicta, see Winick, *Voluntary Hospitalization*, *supra* note 1, at 180-81.

213. Winick, *Voluntary Hospitalization*, *supra* note 1, at 181.

to which patients are generally entitled. However, requiring such an inquiry for *all* mental patients seeking hospital admission suggests that mental illness *per se* destroys the presumption of competency.

Not only does the breadth of the *Zinermon* dicta threaten the voluntary hospitalization process,²¹⁴ but it questions one of the most important reforms of modern mental health law and our historic political and constitutional commitment to the principle of individual autonomy. In a society deeply committed to principles of individual autonomy and self-determination,²¹⁵ it is appropriate that people be presumed competent. Moreover, it is essential that any legal status of incompetency that deprives an individual of freedom to act for himself be narrowly defined.²¹⁶

Respect for individual autonomy is an important policy served by statutes like the California one that explicitly create a presumption in favor of competency. Indeed, even in the absence of a statute, courts have frequently recognized this presumption to protect and promote autonomy values.²¹⁷ Moreover, these values underlie the broad scholarly support that exists in favor of the presumption.²¹⁸

In addition to the political value our society traditionally has attributed to the principle of individual autonomy, psychological considerations support the presumption in favor of competency. Principles of psychology suggest that presuming individuals competent rather than incompetent fosters their functional abilities and pro-

214. See *id.* at 191-99; Bruce J. Winick, *Voluntary Hospitalization After Zinermon v. Burch*, 21 PSYCHIATRIC ANNALS 1 (Sept. 1991).

215. Winick, *Competency to Consent to Treatment*, *supra* note 1, at 17-18.

216. See generally Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992) [hereinafter Winick, *On Autonomy*].

217. See, e.g., *Lotman v. Security Mut. Life Ins. Co.*, 478 F.2d 868, 873 (3d Cir. 1973); *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir. 1970); *Rogers v. Okin*, 478 F. Supp. 1342, 1361, 1363-64 (D. Mass. 1979), *aff'd in part, vacated in part*, 634 F.2d 650 (1st Cir. 1980) (en banc), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Child v. Wainwright*, 148 So. 2d 526, 527 (Fla. 1963); *Howe v. Commonwealth*, 99 Mass. 88, 98-99 (1868); *Lane v. Candura*, 376 N.E.2d 1232, 1235 (Mass. App. Ct. 1978); *Grannum v. Berard*, 422 P.2d 812, 814 (Wash. 1967).

218. See, e.g., SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 341 n.167, 375 (3d ed. 1985); 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBS. IN MED. & BIOMED. & BEHAV. RES., *MAKING HEALTH CARE DECISIONS: A REPORT ON THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP* 3, 56 (1982); THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS* 314 (1986); George J. Annas & Joan E. Densberger, *Competence to Refuse Medical Treatment: Autonomy vs. Paternalism*, 15 U. TOL. L. REV. 561, 575 (1984); Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988); David B. Wexler, *Reflections on the Legal Regulation of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 132, 136 (1975); Winick, *Competency to Consent to Treatment*, *supra* note 1, at 22-23 & n.19, 35-37.

motes their psychological well-being.²¹⁹ A sense of competency and self-determination is a prerequisite for psychological health.²²⁰ Denying people the opportunity to feel competent and self-determining (the effect of labeling them incompetent) "undermines people's motivation, learning, and general sense of organismic well-being."²²¹ Indeed, the stress of losing the opportunity to be self-determining may cause "severe somatic malfunctions" and even death.²²² Treating people as incompetent and denying them control over important aspects of their lives may cause them to develop what psychologist Martin Seligman called "learned helplessness"²²³—a generalized feeling of ineffectiveness that debilitates performance and undermines motivation and perceptions of competence. A presumption in favor of competency, particularly one that places the burden of proof on those who raise the competency question, can be defended as a mechanism for promoting the psychological health of individuals especially vulnerable to the negative effects of labeling them incompetent.

By questioning the presumption in favor of the competency of the mentally ill, *Zinermon* presents unintended antitherapeutic consequences. The Court's dicta also runs counter to one of the most significant developments in modern mental health law. Under the approach that once prevailed in American law, an adjudication of incompetency rendered an individual generally incompetent.²²⁴ But

219. See Winick, *On Autonomy*, *supra* note 216 (analyzing the psychological value of choice); Winick, *Competency to Consent to Treatment*, *supra* note 1, at 46-53 (same); Winick, *Voluntary Hospitalization*, *supra* note 1, at 192-99 (same).

220. Edward L. Deci & Richard M. Ryan, *The Empirical Exploration of Intrinsic Motivational Processes*, in 13 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 39, 61, 72 (1980).

221. EDWARD L. DECI, *THE PSYCHOLOGY OF SELF-DETERMINATION* 209 (1980) (discussing studies); see also Bruce J. Winick, *Side Effects of Incompetency Labeling* (manuscript on file with author) (exploring the negative psychological effects of labeling an individual incompetent and denying him the ability to be self-determining).

222. DECI, *supra* note 221.

223. See SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 378 (1981); MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975); MARTIN E.P. SELIGMAN, *HUMAN HELPLESSNESS* (1980); Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 *J. ABNORMAL PSYCHOLOGY* 49 (1978); Deci & Ryan, *supra* note 220, at 41-42, 60-63, 67; Steven F. Maier & Martin E.P. Seligman, *Learned Helplessness: Theory and Evidence*, 105 *J. EXPERIMENTAL PSYCHOLOGY* 33 (1976); Jerry W. Thornton & Paul D. Jacobs, *Learned Helplessness in Human Subjects*, 87 *J. EXPERIMENTAL PSYCHOLOGY* 367 (1971); see also DECI, *supra* note 221; cf. Julian B. Rotter, *Generalized Expectancies for Internal Versus External Control of Reinforcement*, 80 *PSYCHOLOGICAL MONOGRAPHS* 1 (1966) (viewing behavior as a function of individual expectancies concerning whether outcomes are determined by the individual's own actions or by external forces beyond his control).

224. See PAUL S. APPELBAUM & THOMAS G. GUTHEIL, *CLINICAL HANDBOOK OF*

the law has rejected that notion of general incompetency in favor of an approach requiring adjudications of specific incompetency.²²⁵ Under the more modern view, the court determines an individual incompetent to perform only particular tasks or roles, such as to decide on hospitalization, to manage property, to consent to treatment, or to stand trial.²²⁶ An adjudication of specific incompetency does not render the individual legally incompetent to perform other tasks or to play other roles. Indeed, modern law presumes that people are competent to make decisions unless they have been adjudicated incompetent.²²⁷ This general presumption of competency applies to the mentally ill as well as to the medically ill, 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.²²⁸

PSYCHIATRY AND THE LAW 219 (2d ed. 1991); PAUL S. APPELBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 82 (1987); BRAKEL ET AL., *supra* note 218, at 185, 258, 438-39; DAVID B. WEXLER, MENTAL HEALTH LAW 40 (1981); Allan M. Tepper & Amiram Elwork, *Competence to Consent to Treatment as a Psycholegal Construct*, 8 L. & HUM. BEHAV. 205, 207 (1984); Winick, *Competency to Consent to Treatment*, *supra* note 1, at 22-23.

225. *E.g.*, Rogers v. Commissioner, 458 N.E. 2d 308, 312-13 (Mass. 1983); State *ex rel.* Jones v. Gerhardstein, 416 N.W.2d 883, 894-95 (Wis. 1987); APPELBAUM & GUTHEIL, *supra* note 224, at 219; APPELBAUM ET AL., *supra* note 224, at 82-83; BRAKEL ET AL., *supra* note 218, at 185, 405-07 (table 7.2, col. 1); RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 289 (1986); Tepper & Elwork, *supra* note 224, at 207; Winick, *Competency to Consent to Treatment*, *supra* note 1, at 23.

226. APPELBAUM ET AL., *supra* note 224, at 82-83; TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 71-72 (2d ed. 1983); BRAKEL ET AL., *supra* note 218, at 185 & n.73; THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS 314-15 (1986); Tepper & Elwork, *supra* note 224, at 207-08; David B. Wexler, *The Structure of Civil Commitment: Patterns, Pressures, and Interactions in Mental Health Legislation*, 7 L. & HUM. BEHAV. 1, 2 (1983); Winick, *Competency to Consent to Treatment*, *supra* note 1, at 23.

227. *See supra* notes 224-226 and accompanying text.

228. *See, e.g.*, Rennie v. Klein, 653 F.2d 836, 846 & n.12 (3d Cir. 1981) (en banc), *vacated & remanded on other grounds*, 458 U.S. 1119 (1982); Rogers v. Okin, 634 F.2d 650, 657-59 (1st Cir. 1980), *vacated & remanded on other grounds sub nom.*, Mills v. Rogers, 457 U.S. 291 (1982); Winters v. Miller, 446 F.2d 65, 71 (2d Cir. 1971); Davis v. Hubbard, 506 F. Supp. 915, 935-36 (N.D. Ohio 1980); Wyatt v. Stickney, 344 F. Supp. 373, 379 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Anderson v. State, 663 P.2d 570, 573-74 (Ariz. Ct. App. 1982); People v. Medina, 705 P.2d 961, 973 (Col. 1985) (en banc); *In re* Boyd, 403 A.2d 744, 747 n.5 (D.C. Ct. App. 1979); Gundy v. Pauley, 619 S.W.2d 730, 731 (Ky. Ct. App. 1981); Rogers v. Commissioner, 458 N.E.2d 308, 314 (Mass. 1983); Rivers v. Katz, 495 N.E.2d 337, 341-42 (N.Y. Ct. App. 1986); *In re* K.K.B., 609 P.2d 747, 749 (Okla. 1980); State *ex rel.* Jones v. Gerhardstein, 416 N.W.2d 883, 890-91, 894-96 (Wis. 1987); BRAKEL ET AL., *supra* note 218, at 258; James C. Beck, *Right to Refuse Antipsychotic Medication: Psychiatric Assessment and Legal Decision-making*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 368, 369 (1987); National Task Force of the National Center for State Courts' Institute on Mental Disability and the Law, *Guidelines for Involuntary Civil Commitment*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 409, § E7, at 466, 468 n.23

Zinermon's broad language questioning the presumption of competency for the mentally ill was therefore troubling on a number of accounts. Even more perplexing was the fact that the Court's analysis was based on an artificial distinction between medical and mental illness, and confusion about the nature of mental illness and its effects on competency.²²⁹ By questioning the presumption of competency, the Court's language ran counter to the direction of a generation of mental health law reform. It echoed an earlier time when mental illness was equated with general incompetency, a view that modern case law and statutory reform have consistently repudiated. Ironically, the Court's statements could help perpetuate the stigma that long has plagued the mentally ill, and contribute to the feelings of helplessness and lack of self-efficacy that keep many mental patients from dealing effectively with their social and health problems. Presuming the mentally ill to be competent and treating them as such is more consonant with the goal of restoring them to the greatest degree of functional normality to which they are capable. Moreover, a broad reading of Zinermon's language could significantly jeopardize the liberty of mentally ill persons to exercise a wide variety of rights and make decisions in an unlimited number of areas.

A presumption in favor of competency is not, of course, a conclusive presumption. When reasonable doubt about competency is raised, due process requires a fair determination of the issue.²³⁰ But the presumption is not shattered by the emergence of such doubt; it continues to inform the adjudication of the issue by placing the burden of proving incompetency on the party challenging the presumption. When that party fails to demonstrate incompetency by a preponderance of the evidence, the presumption remains unrebutted

(commentary) (1986); Winick, *Competency to Consent to Treatment*, *supra* note 1, at 37-40; 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 and John Parry eds., 1986); *see also* FLA. STAT. § 745.43 (Supp. 1990) ("Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness . . ."). The mere presence of psychosis, dementia, mental retardation, or "some other form of mental illness or disability is insufficient in itself to constitute incompetence." APPELBAUM & GUTHEIL, *supra* note 224, at 220.

Similarly, mental illness alone does not justify a determination that a criminal defendant is incompetent to stand trial. *E.g.*, *Feguer v. United States*, 302 F.2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962); *Martin v. Dugger*, 686 F. Supp. 1523, 1572 (S.D. Fla. 1988); ROESCH & GOLDING, *supra* note 180, at 18-24; Gerald T. Bennett & Arthur F. Sullwold, *Competence to Proceed: A Functional and Context-Determinative Decision*, 29 J. FORENSIC SCI. 1119, 1122 (1984); Winick, *Restructuring Competency*, *supra* note 18, at 923-24 n.4; *see also* FLA. R. CRIM. P. 3.215(b) (1990) (adjudication of incompetency to stand trial does not render defendant incompetent for any other purpose).

229. *See* Winick, *Voluntary Hospitalization*, *supra* note 1, at 187-91.

230. *E.g.*, *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1965).

and the criminal proceedings may continue, or in a context like *Zinermon*, the patient may accept voluntary hospital admission or treatment.

The California statutory presumption in favor of competency in *Medina* represents the enlightened approach of modern mental health law. Because the dicta in *Zinermon* questioning the presumption in favor of the competency of the mentally ill was so troubling, the Court's decision in *Medina*, upholding a statute adopting the identical presumption is heartening. Although the issues in *Medina* were different from those in *Zinermon*, with the result that *Medina* in no way affects the Court's earlier holding in *Zinermon*, *Medina's* endorsement of the presumption of competency is a welcome step away from the questionable implications of *Zinermon's* broad dicta. Although *Medina* did not present the Court with an opportunity to reconsider the implications of its dicta in *Zinermon*, the Court's more recent decision is a step in that direction.

VI. CONCLUSION

The California statute upheld in *Medina* properly recognizes a presumption in favor of competency and effectuates that presumption by allocating the burden of proof on incompetency to stand trial to the party raising the question. In so doing, the statute minimizes inappropriate use of the incompetency status and unnecessary delay in the resolution of the defendant's charges. It also creates therapeutic opportunities for defendants who are marginally impaired by mental illness. In addition, the statute reinforces competency by presuming it and avoiding inappropriate incompetency labeling in cases of only marginal impairment, thereby promoting the psychological well-being of those individuals affected. Furthermore, it may actually increase the accuracy of the competency determination process by avoiding a potential disincentive for the defendant to produce evidence in his possession and control. The result in *Medina*, therefore, is clearly correct.

Less clear, however, is the wisdom of the Court's new approach to determining the requirements of due process in the criminal area. The Court went out of its way to adopt its new due process approach. Having previously used the standard of *Mathews v. Eldridge* in the criminal context, the Court simply could have affirmed the decision below on the basis of that standard. The defendant had not shown that reallocating the burden of proof to the prosecution would increase the accuracy of competency adjudication sufficiently to justify the fiscal and social costs of doing so. Under *Mathews*, therefore,

the California statute would withstand the defendant's due process attack. Indeed, allocating the burden of proof to the party asserting incompetency, as does the California statute, not only seems constitutionally permissible under *Mathews*, but it may be the most reasonable approach to this issue and one that best effectuates the presumption in favor of competency that has been a major reform of modern mental health law.

Instead of affirming on the basis of *Mathews*, however, the Court reached out to adopt a new and questionable due process methodology in criminal cases. Under this new approach, only practices that offend traditional notions of fairness will violate due process. The approach of *Medina* is open to criticism to the extent that it is read to deny the Court the ability to consider whether a practice honored by tradition has become so unfair in light of evolving standards of justice that it is no longer the due process of law that our Constitution promises when the state seeks to deprive an accused of his liberty. The *Medina* test also deprives the Court of needed flexibility to consider newly emerging forms of injustice that have no historical analogue and to reconsider practices previously upheld that now appear to be manifestly unjust. The Court's new test is inconsistent with the balancing approach used in other procedural due process contexts—civil procedure and administrative law—and with the Court's prior criminal justice jurisprudence. It also is inconsistent with the Court's historic role in construing an organic, living Constitution designed to endure for the ages.

Not only is the Court's new approach unwise, but it was unnecessary. Because the decision below was clearly correct under *Mathews*, there was no need for the Court to fashion a new due process methodology. A majority of the Court likes to think of itself as conservative—properly deferential to legislative judgment, sensitive to the anti-democratic potential of constitutional review, bound by tradition, and exercising judicial self-restraint. Yet it was an activist Court that adopted the new exclusively tradition-based approach of *Medina*. In reaching and resolving an issue that was unnecessary to its decision, the Court neglected what Alexander Bickel called the "passive virtues."²³¹ A truly conservative Court should avoid unnecessarily deciding constitutional questions, and when it invokes the Constitution should proceed narrowly, going no further than the facts of the case require.²³² Because the Court could easily have decided *Medina*

231. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961).

232. See, e.g., *Jean v. Nelson*, 472 U.S. 846, 854 (1985):

under the *Mathews* test, as Justice O'Connor's concurring opinion demonstrates, it was inappropriate for the Court to fashion a new constitutional approach that will apply to all criminal cases.

Because its new approach was unnecessary, *Medina's* precedential force is uncertain. Indeed, the Court's approach may properly be seen as dicta. Because the Court was closely divided on the issue of due process methodology, with five justices favoring an exclusively traditional approach and four favoring the more flexible balancing test of *Mathews*, it was particularly inappropriate for the Court to announce in dicta a new approach that will have such wide implications. Whether the Court's new test will be applied as rigidly as its language suggests remains to be seen, however. In an appropriate case, the Court may feel free to consider contemporary concepts of fairness even when the practice in question is not condemned by history and tradition. Justice Kennedy, author of the majority opinion in *Medina*, did precisely this in his concurring opinion in *Riggins v. Nevada*, decided one month earlier, agreeing with the Court's conclusion that the trial of a defendant while forced to take a heavy dose of antipsychotic medication offended due process. Moreover, in two cases the Court decided in its 1992 Term, it cited *Medina* and suggested that contemporary practices should be looked at when assessing the fairness of a procedure challenged as a matter of due process.²³³ Because the new approach announced in *Medina* was largely dicta, it should not be read to preclude the use of due process to invalidate practices such as those in *Riggins* that seem manifestly unfair even in the absence of a record of historical condemnation.

Medina thus reaches the right result—upholding the California presumption in favor of competency and its allocation of the burden of proof to the party contesting competency—but for the wrong reason. Although its result is correct, its reasoning needs reexamination. Indeed, because the Court could easily have reached its conclusion by

Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision. This is a "fundamental rule of judicial restraint. . . . [I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."

(citations omitted).

233. *Herrera v. Collins*, 113 S. Ct. 853, 866 (1993) ("In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the states, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence 8 years after his conviction transgresses the principle of fundamental fairness 'rooted in the traditions and conscience of our people.'") (citation omitted) (emphasis added); *Parke v. Raley*, 113 S. Ct. 517, 525 (1992) ("Respondent cites no historical tradition or *contemporary practice* indicating that Kentucky's scheme violates due process.") (emphasis added).

applying the standard it purported to reject, the Court's new approach is more readily open to reexamination. As a result, a future Court, more sensitive to its historic role, can and should discard this unduly rigid limitation on its ability to protect fundamental fairness and fulfill the promise of due process of law.