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REFORMING INCOMPETENCY TO STAND TRIAL AND PLEAD GUILTY: A RESTATED PROPOSAL AND A RESPONSE TO PROFESSOR BONNIE

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I. INTRODUCTION

In the past several years, the Supreme Court has given increasing attention to the often misunderstood area of the law dealing with the competency of criminal defendants to stand trial and plead guilty.[1] As

* Professor of Law, University of Miami School of Law. I appreciate the helpful comments of David Wexler, Richard Bonnie, and Michael Perlin on an earlier draft of the manuscript and the research assistance of Katherine Diamandis and Douglas Stransky.

[1] Godinez v. Moran, 113 S. Ct. 2680 (1993) (rejecting contention that courts should apply a higher standard of incompetency for determining competency to plead guilty than for determining competency to stand trial); Riggins v. Nevada, 112 S. Ct. 1810 (1992) (reversing a conviction where the defendant was forced to stand trial while on a high dose of antipsychotic medication to which he had objected); Medina v. California, 112 S. Ct. 2572 (1992) (upholding the constitutionality of a state statute creating a presumption in favor of competency and placing the burden of proving incompetency on the party raising the issue); *see also* Perry v. Louisiana, 111 S. Ct. 449 (1990) (remanding 494 U.S. 210 (1990)) (avoiding decision concerning whether state could impose unwanted psychotropic medication to restore a death row inmate found incompetent to competency, so that the state could execute him); Ford v. Wainwright, 472 U.S. 399 (1986) (holding that state could not execute an incompetent death row inmate). Prior to this recent activity in the incompetency-to-stand-trial area, the Court had considered criminal competency issues in Drope v. Missouri, 420 U.S. 162 (1975) (analyzing when due process requires a determination of competency); Jackson v. Indiana, 406 U.S. 715 (1972) (analyzing constitutional limits on the states' authority to hospitalize defendants based on their incompetency to stand trial); Pate v. Robinson, 383 U.S. 375 (1966) (discussing when due process requires a determination of competency); Dusky v. United States, 362 U.S. 402 (1960) (standard for determining competency to stand trial).

Under the incompetency doctrine, if at any time in the criminal proceedings defendants appear mentally ill, the issue of their competency to proceed may be raised. This may occur when the defendant seeks to plead guilty or to stand trial. It may occur when the defendant seeks to waive certain constitutional rights, such as the right to counsel or to a jury trial. Even after conviction, the issue may be raised at a sentencing hearing, or when

a court dealing exclusively with cases and controversies, the Supreme Court has addressed these issues in the usual piecemeal fashion. Although it has considered such issues as the standard of competency that courts should apply,[2] the procedures for its determination,[3] and the use of psychotropic medication in maintaining competency,[4] it has not examined the premises underlying the incompetency doctrine or the need for broad reform in this area.

The incompetency doctrine exists primarily to protect criminal defendants who are severely impaired by mental illness. Yet, existing practices are costly, burdensome to defendants, and, therefore, often inconsistent with the doctrine's stated objectives. Thus, substantial reforms are needed.

Ten years ago I proposed a radical restructuring of the incompetency doctrine.[5] This Article reviews that proposal and refines and expands the thesis. It also responds to recent criticisms of the initial proposal made by Professor Richard Bonnie.[6] In addition, it comments on Professor Bonnie's approach and compares it to the initial proposal. Indeed, by proposing essentially similar changes in the way the law should define and evaluate competency, both approaches attempt to reshape the existing doctrine and eliminate its most objectionable features.

Section II reviews the historical origins of the incompetency doc-

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the state seeks to administer punishment, including capital punishment. Defense counsel usually raises the issue, but the prosecution or the court may also raise it, even over the opposition of the defendants who may prefer to proceed notwithstanding their mental illness. When the competency issue is raised, a court typically will appoint several clinical evaluators to conduct a formal assessment of the defendant's competency. These clinical evaluators examine the defendant and then submit written reports to the court. The court then decides the issue, sometimes following a hearing at which the examiners testify and are subject to cross-examination. If the court finds the defendant incompetent, it suspends the criminal proceedings and remands the defendant for treatment, typically on an inpatient basis. Treatment is designed not to cure the defendant, but to restore competency. If such restoration is thought to have been achieved, a new round of evaluations and hearings will occur, and if the court is satisfied concerning the defendant's competence, it will resume the criminal proceedings. *See generally* 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 MENTALLY DISORDERED OFFENDERS].

2 Godinez v. Moran, 113 S. Ct. 2680 (1993).

3 Medina v. California, 112 S. Ct. 2572 (1992).

4 Riggins v. Nevada, 112 S. Ct. 1810 (1992).

5 Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985) [hereinafter *Restructuring Competency*]; *see also* Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243 (1987) [hereinafter *Incompetency to Stand Trial*].

6 Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539 (1993).

trine and its modern justifications and describes existing practices and the costs and burdens they impose. Section III offers several proposals for a broad restructuring of the incompetency doctrine: A central feature of the overall proposal is that the law should distinguish between cases in which defendants seek an incompetency determination and its resulting postponement of the criminal proceedings; and cases in which defendants object to an incompetency determination, preferring to proceed to trial or to accept a guilty plea notwithstanding their impairment. For defendants who assert their incompetency as a bar to trial, courts should substitute a system of trial continuances for the formal incompetency process. For those who object to an incompetency determination, courts can and should permit them to waive the "benefits" of the incompetency doctrine in cases in which counsel either recommends such waiver or concurs with the defendant's expressed preference. Section III also analyzes the constitutionality of permitting this waiver by a defendant whose decisionmaking and communicative abilities are reduced by mental illness, and argues that this waiver can be both constitutional and consistent with the purposes of the incompetency doctrine.

Section III next suggests that courts should apply a lower standard of competency in cases in which the defendant seeks an incompetency determination than in cases in which the defendant objects to an incompetency determination. Next, it proposes the adoption of a procedural presumption in favor of competency in cases in which the defendant's lawyer recommends waiver of the protections of the competency doctrine or concurs with the defendant's choice to waive this protection. In addition, it compares this approach with Professor Bonnie's approach and attempts to reconcile the two approaches, concluding that the approaches are essentially consistent and that their adoption would harmonize the incompetency doctrine with its underlying purposes.

This Article analyzes problems of incompetency to stand trial resulting only from mental illness. Sometimes defendants are found incompetent as a result of mental retardation. The issues raised by mental retardation are distinct from those raised by mental illness. Unlike mental illness, mental retardation is congenital, untreatable, and unchangeable. Moreover, individuals with mental retardation are always of sub-average intelligence and are often extremely vulnerable to suggestive influences, making waiver issues problematic. For these and other reasons, the discussion in this Article is limited to incompetency produced by mental illness.[7]

[7] *See* James W. Ellis, *Decisions by and for People with Mental Retardation: Balancing Consider-*

II. INCOMPETENCY IN THE CRIMINAL PROCESS: HISTORICAL ORIGINS AND PRESENT PRACTICES

A. HISTORICAL ORIGINS OF THE INCOMPETENCY DOCTRINE

The common law origins of the incompetency doctrine date back to mid-seventeenth century England. Blackstone wrote that a defendant who becomes "mad" after the commission of an offense should not be arraigned "because he is not able to plead . . . with the advice and caution that he ought," and should not be tried, for "how can he make his defense?"[8] The ban on trial of an incompetent defendant stems from the common law prohibition on trials in absentia,[9] and from the difficulties the English courts encountered when defendants frustrated the ritual of the common law trial by remaining mute instead of pleading to charges.[10] Without a plea, the trial could not go forward. In such cases, English courts were obliged to determine whether a defendant was "mute by visitation of God" or "mute of malice." If "mute of malice," the defendant was subjected to a form of medieval torture, the *peine forte et dure,* in which increasingly heavier weights were placed upon the defendant's chest in an effort to compel a plea. If "mute by visitation of God," the defendant was spared this painful ritual. The category "mute by visitation of God" originally encompassed the "deaf and dumb," but its scope gradually expanded to include "lunatics."

At this early stage in the development of the incompetency doctrine in England, self-representation rather than representation by counsel was the common practice.[11] Indeed, in serious criminal cases, counsel was prohibited, and the law required the defendant to "appear before the court in his own person and conduct his own defense

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ations of Autonomy and Protection, 37 VILL. L. REV. 1779 (1992); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 GEO. WASH. L. REV. 414 (1985).

8 WILLIAM BLACKSTONE, COMMENTARIES* 24 (9th ed. 1783); *see also* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN* 34-35 (1736). For a discussion of the historic origins of the doctrine, see GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMM. ON PSYCHIATRY AND LAW, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 912-15 (1974); Winick, *supra* note 1, at 3-4; *Restructuring Competency, supra* note 5, at 952-53.

9 Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants,* 108 U. PA. L. REV. 832, 834 (1960); James J. Gobert, *Competency to Stand Trial: A Pre-and-Post* Jackson *Analysis,* 40 TENN. L. REV. 659, 660 n.11 (1973); *see, e.g.,* Frith's Case, 22 How. St. Tr. 307 (1790); Kinloch's Case, 18 How. St. Tr. 395 (1746).

10 GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 8, at 887-88, 912-13; Winick, *supra* note 1, at 3-4.

11 Faretta v. California, 422 U.S. 806, 823 (1975). For an analysis of the historical origins of the right to counsel, see Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It,* 43 U. MIAMI L. REV. 765, 786-99 (1989).

in his own words."[12] The prohibition against the assistance of counsel continued for centuries in felony and treason cases.[13] As a result, during the formative period of the incompetency doctrine, in many cases, the defendant stood alone before the court, and trial was merely "a long argument between the prisoner and the counsel for the Crown."[14] Thus, it was imperative that defendants be competent because they were required to conduct their own defense.

The common law rationale for the incompetency doctrine has become largely obsolete.[15] Today, the assistance of counsel is available as a matter of constitutional right.[16] As a result, in the modern criminal case, it is counsel that must be competent, and the competence of the defendant, although still required, takes on a secondary importance.

B. MODERN JUSTIFICATIONS FOR THE INCOMPETENCY DOCTRINE

Although the common law justifications for the doctrine have been largely eclipsed, a number of justifications remain for the modern doctrine. In part, *parens patriae* considerations—the desire to prevent unfairness to the defendant and an erroneous conviction that could result from requiring the defendant to stand trial while significantly impaired by mental illness—justify it. Counsel makes many of the strategic decisions in the modern criminal trial, and the defendant, if impaired, may be unable or unwilling to communicate critical facts to counsel or the court.[17] This concern has led the Supreme Court to deem the bar against trying an incompetent defendant "fundamental to an adversary system of justice."[18] Avoiding inaccuracy in criminal adjudication serves not only the individual's interests in

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12 *Faretta*, 422 U.S. at 823 (*quoting* 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1898)).

13 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 211, 211 (2d ed. 1898)); 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341 (1883).

14 *Faretta*, 428 U.S. at 823-24 (*citing* STEPHEN, *supra* note 13, at 326). The ban on representation by counsel in felony cases was eroded by the courts beginning in the mid-eighteenth century, and was finally eliminated by statute in England in 1836. *Id.* at 825.

15 Gobert, *supra* note 9, at 660 n.11; Winick, *supra* note 1, at 5; *Restructuring Competency*, *supra* note 5, at 953; Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 467 (1967).

16 Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). Under the Sixth Amendment, the accused may be represented by counsel of choice "in all criminal prosecutions." U.S. CONST. amend. VI; *see* Winick, *supra* note 8, at 789-90, 798-99. In addition, counsel will be appointed for indigent defendants in all felony and in serious misdemeanor cases in which the defendant receives a term of imprisonment. *Argersinger*, 407 U.S. at 37, 40.

17 *See* HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429-30 (1954); Bonnie, *supra* note 6, at 552.

18 Drope v. Missouri, 420 U.S. 162, 172 (1975).

avoiding unjust conviction, but also the societal interest in the reliability of the criminal process.[19]

The incompetency doctrine also preserves the dignity of the criminal process. This process would be threatened by trying defendants who lack a meaningful understanding of the nature of the criminal proceedings.[20] This justification relates to the need to insure public respect and confidence in the criminal process, considerations that are basic to the legitimacy of the criminal justice system.[21]

The incompetency doctrine also protects criminal defendants' interest in autonomous decisionmaking concerning their defense.[22] Although counsel decides many issues of strategy and tactics, defendants must make certain key decisions,[23] such as decisions whether to plead guilty, whether to waive jury trial, whether to be present during trial, and whether to testify.[24] The importance of these decisions makes it imperative that the defendant is competent to make them.

A final justification for the incompetency doctrine is the need to preserve the courtroom decorum and the resulting dignity of the trial process that permitting the trial of mentally impaired defendants unable to control their courtroom conduct could threaten.[25] However, in light of alternative measures for dealing with this problem, it alone should not serve to justify barring the trial of an otherwise competent defendant.[26]

C. THE MODERN PRACTICE

All American jurisdictions deem criminal defendants incompetent to stand trial if, as a result of mental illness, they are unable to understand the nature of the proceedings or to assist counsel in mak-

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19 Bonnie, *supra* note 6, at 543-44; *Restructuring Competency, supra* note 5, at 954-55.

20 Bonnie, *supra* note 6, at 543, 551.

21 *Restructuring Competency, supra* note 5, at 957; Winick, *supra* note 1, at 5.

22 *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1747-53 (1992) (analyzing the criminal accused's right to autonomy over the defense).

23 Bonnie, *supra* note 6, at 553.

24 *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 52-53 (1987) (decision to testify); Brookhart v. Janus, 384 U.S. 1, 7-8 (1966) (decision to plead guilty); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942) (decision to waive jury trial); *see also* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . .") (dicta); Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); Timothy P. O'Neil, *Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-The-Record Waiver*, 51 U. PITT. L. REV. 809 (1990); *Restructuring Competency, supra* note 5, at 959 n.181. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 (a) (1986).

25 *See Restructuring Competency, supra* note 5, at 853-54; Note, *supra* note 15, at 458.

26 *See* Bonnie, *supra* note 6, at 551 n.49; *Restructuring Competency, supra* note 5, at 853-54.

ing a defense.[27] Courts order virtually all criminal defendants who appear to be mentally ill at any time in the criminal trial process to be evaluated for competency.[28] Usually, defense counsel raises the competency issue by filing a motion requesting a competency evaluation. The prosecution may also raise the issue by motion. In addition, the judge may, *sua sponte*, request a competency evaluation when the evidence presents a bona fide doubt as to the defendant's competency.[29] When there are reasonable grounds to question a defendant's competency, a court's failure to order a competency evaluation violates the defendant's right to due process, requiring reversal of any conviction.[30] As a result, courts typically order a formal competency evaluation in virtually every case in which there is a doubt about the defendant's competency.[31] Several studies have concluded that the vast majority of defendants are referred for competency evaluations inappropriately and have suggested that the competency process is often invoked for strategic purposes.[32]

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[27] *See generally* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1 (1989). For detailed descriptions of the competency process as it functions in several states, see RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL (1980) (North Carolina); HENRY J. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979) (New York); Bruce J. Winick, *The Mentally Disordered Defendant in Florida, in* FLORIDA CRIMINAL RULES AND PRACTICE §§ 7.2-7.44 (1991) (Florida).

[28] *Restructuring Competency, supra* note 5, at 924. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975) ("a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the[se] standards of competence to stand trial").

[29] *Drope*, 420 U.S. at 180.

[30] *Id.* at 162; Pate v. Robinson, 383 U.S. 375 (1966).

[31] *Restructuring Competency, supra* note 5, at 925; *see, e.g.*, ROESCH & GOLDING, *supra* note 27, at 191-93 (reporting on survey of judicial attitudes in North Carolina). These formal evaluations, performed by two to three court-appointed clinicians, who submit written reports to the court, are usually conducted on an out-patient basis in the jail or the court clinic, although in a minority of jurisdictions, they are performed on an in-patient basis. *See* Thomas Grisso et al., *The Organization of Pretrial Forensic Services*, 18 LAW & HUM. BEHAV. 377 (1994).

[32] *Restructuring Competency, supra* note 5, at 933; *see, e.g.*, ABA 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: THE REVISED EDITION OF THE BASIC ACLU GUIDE TO A MENTAL PATIENT'S RIGHTS 102-03 (1978); ROESCH & GOLDING, *supra* note 27, at 49-50, 192-98; 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); Stephen L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial*, 8 LAW & 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 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); Henry J. Steadman & Jeraldine Braff,

It is estimated that 25,000 defendants are evaluated for competency in the United States each year, and that the number is increasing.[33] Perhaps because the threshold for requiring a competency hearing is low, a large percentage of defendants evaluated are found competent—as many as ninety-six percent or more in some jurisdictions, and probably no less than seventy-five percent in most jurisdictions.[34] Nearly all of those found incompetent are hospitalized for treatment.[35] These defendants are treated, usually with psychotropic drugs,[36] and most are returned to court within several months, as having been "restored" to competency.[37] Some are hospitalized for longer periods, and some are never restored to competency.[38]

D. THE COSTS AND BURDENS OF THE COMPETENCY PROCESS

The existing competency process imposes substantial burdens on defendants and is extremely costly, yet a considerable number of defendants may not require formal evaluation.[39]

Empirical research on the costs of competency evaluation and treatment is almost non-existent. However, data from a study conducted ten years ago of costs in Dade County, Florida are useful as a rough basis for projecting national costs.[40] Evaluation costs for an initial competency assessment averaged $2327, excluding court costs and the expense of additional defense attorney, prosecutor, and judge

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Crimes of Violence and Incompetency Diversion, 66 J. CRIM. L. & CRIMINOLOGY 73 (1975); Henry J. Steadman & Eliot Hartstone, *Defendants Incompetent to Stand Trial, in* MENTALLY DISORDERED OFFENDERS, *supra* note 1, at 42; 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).

[33] *See* Steadman & Hartstone, *supra* note 32, at 41-42.

[34] Bruce J. Winick, *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*, 47 U. MIAMI L. REV. 817, 847-48 (1993) (citing studies).

[35] Roesch & Golding, *supra* note 32, at 349; *Restructuring Competency, supra* note 5, at 925.

[36] For an analysis of the use of psychotropic drugs in the treatment of incompetent defendants and the legal issues raised, see Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of* Riggins v. Nevada, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993).

[37] *See Restructuring Competency, supra* note 5, at 936 (the ordinary defendant hospitalized for incompetency in Dade County, Florida spent seven months in the state hospital).

[38] *See id.* at 938.

[39] *Id.* at 932-33. A variety of strategic reasons spur courts and attorneys to seek formal evaluations more frequently than necessary. *See supra* note 30 and accompanying text. The high percentage of defendants found competent and the use of competency screening instruments in some jurisdictions suggest that a less formal screening mechanism could be used to minimize the formal evaluation process. *See Restructuring Competency, supra* note 5, at 933.

[40] *Restructuring Competency, supra* note 5, at 935-37.

time. These costs were based on outpatient evaluations. Inpatient evaluations for competency, still used in some jurisdictions, could easily double or even quadruple these costs.[41] Defendants found incompetent at this initial stage are hospitalized for several months of treatment, at an added average cost of $20,351.[42] Thus, the total cost for a typical defendant found incompetent in Dade County exceeded $22,678. Costs for some cases ran considerably higher.[43]

Using these Dade County figures, which are estimated to be low and are based on costs prevailing ten years ago, it can be estimated that in excess of $185 million is spent annually on competency evaluation and treatment in America.[44] The costs today may be two or three times higher. With attorney and court costs included, the costs of the competency process nationally may exceed one billion dollars per year. Moreover, formal competency evaluations occur in many cases in which less formal screenings could suffice. Therefore, the competency determination results in a diversion of limited clinical resources that otherwise could be used for treatment.

The competency process also frequently imposes serious burdens on defendants. Prior to the Supreme Court's 1972 decision in *Jackson v. Indiana*,[45] defendants hospitalized for treatment following a determination of incompetency to stand trial received what amounted to an indeterminate sentence of confinement in a mental hospital, typically for many years, often exceeding the maximum sentence for the crime charged, and sometimes lasting a lifetime.[46] In *Jackson*, the Court recognized a constitutional limit on the duration of incompetency commitment, holding that a defendant committed solely based on trial incompetency "cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[47] Any continued confinement, the Court held, must be based

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41 *Id.* at 935 n.56 (based on Minnesota data). A recent study concluded that "the traditional use of centrally located, inpatient facilities for obtaining pretrial evaluations survives in only a minority of states, having been replaced by other models that employ various types of outpatient approaches." Grisso, *supra* note 31, at 388.

42 *Restructuring Competency*, *supra* note 5, at 936. This excludes several thousand dollars in court costs, attributable to attorney time and hearings.

43 *Id.* at 936 n.57 (discussing a case in which the defendant was held for competency evaluation and treatment for a period of over 10 years, at a cost estimated to exceed $300,000).

44 Dade County uses a relatively inexpensive system of out-patient evaluations, compared to some jurisdictions which use expensive inpatient evaluations more frequently. *Id.* at 937.

45 406 U.S. 715 (1972).

46 *Restructuring Competency*, *supra* note 5, at 938.

47 406 U.S. at 738.

on the probability that the defendant would become competent within the foreseeable future. If the treatment provided does not advance the defendant toward competency, then the state must either institute customary civil commitment proceedings to detain the defendant, or release the defendant.[48] Although *Jackson* marked an end to the most egregious cases of indefinite incompetency commitment, many states have responded insufficiently to the Court's decision, and abuses persist.[49]

Lengthy incompetency commitment is particularly burdensome for defendants charged with misdemeanors—perhaps a majority of those found incompetent.[50] If convicted, many of these defendants would pay a small fine or receive a period of probation. Instead, they might spend months or years confined as incompetent. Many of the hospitals in which defendants are confined are maximum security institutions that are poorly funded and staffed.[51] Although many states now authorize outpatient treatment for trial incompetency, most defendants found incompetent are hospitalized.[52] Such hospitalization is frequently unnecessarily restrictive of defendant's liberty and stigmatizing.[53] In some jurisdictions, even where forensic hospitalization is not prolonged, other abuses occur. Those jurisdictions use short-term commitment based on incompetency to stand trial as an alternative to ordinary civil commitment.[54] In misdemeanor cases, these defendants often will be released after several months with their charges dismissed. However, even this period of hospital confinement may be unnecessary, may not satisfy state commitment criteria, and will be more restrictive and less therapeutic than typical civil hospitalization.

Even for those defendants found competent, a court-ordered competency evaluation often prevents the setting of bail, thereby insuring that the defendant remains in custody, and separated from family, friends, and other community ties for a lengthy period.[55] Moreover, laws frequently fail to credit this period of confinement against a sentence later imposed.[56] As a result, defendants who are evaluated may be confined for longer than they would have been had

48 *Id.*; *see Restructuring Competency, supra* note 5, at 939-41.

49 GARY B. MELTON ET AL., COMMUNITY MENTAL HEALTH CENTERS AND THE COURTS: AN EVALUATION OF COMMUNITY-BASED FORENSIC SERVICES 3 (1985); *Restructuring Competency, supra* note 5, at 940-41.

50 *Restructuring Competency, supra* note 5, at 942.

51 *Id.*

52 *Id.* at 943.

53 *Id.* at 944-45.

54 *See* Personal communication from Richard J. Bonnie to the author (Nov. 28, 1994) (on file with author) (describing a Virginia practice).

55 *Restructuring Competency, supra* note 5, at 946-47.

56 *Id.* at 947.

they been permitted to waive their incompetency and either plead guilty or stand trial at the outset.

These delays undermine the Sixth Amendment's guarantee of a speedy trial. During the period in which incompetency evaluation and treatment occurs, witnesses may die or disappear, memories may fade, and evidence may become lost or unavailable. These difficulties can burden both the defense and the prosecution, and may significantly impede a just and reliable disposition of the charges. In addition, lengthy delays may compromise the basic purposes of criminal law. If the defendant is guilty, delay in the trial process diminishes the possibility for rehabilitation. Delayed punishment may also weaken the deterrent effect of the criminal sanction and frustrate the interests of victims in seeing justice done.

The incompetency determination also imposes a serious stigma on defendants labeled incompetent to stand trial. Although these defendants already bear the stigma of a criminal accusation, the added stigma of being labelled incompetent may be considerably worse.[57] Moreover, these defendants are further stigmatized by being associated with the often-notorious institutions to which they are committed—high security mental health correctional facilities like Dannamoura, Bridgewater, or Ionia—that evoke in the public imagination an image of the dangerously mad.[58]

The label "incompetent" also has an unfortunate general and global connotation that may make defendants feel not only that they are unfit to stand trial, but also that they are incompetent to do anything.[59] Moreover, the "incompetent" label suggests a permanent deficit, rather than a temporary impairment. Individuals so labeled may come to think that their difficulties cannot be helped. This can impede successful treatment. Imposition of an incompetency label,

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57 *See* ABA TENTATIVE DRAFT, *supra* note 32, Standard 7-4.2(c) commentary at 7.160.

58 *Id.*; Robert A. Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. PA. L. REV. 258, 260-63 (1974); Bruce J. Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769, 807 (1977); *Restructuring Competency*, *supra* note 5, at 944.

59 *See* Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL., PUB. POL'Y & L. (forthcoming 1995); *see also* Bruce D. Sales & Lynn R. Kahle, *Law and Attitudes Toward the Mentally Ill*, 3 INT'L J.L. & PSYCHIATRY 391, 394 (1980).

> [T]he term "incompetent to stand trial" implies a trait-like permanent malady when, in fact, the concept it should convey legally is really a temporary one. An incompetent person is one whom we would expect to stay that way. The term *"unable* to stand trial" is less laden with unnecessary trait-like and permanent implications because unable people often later become able. Attribution theories of attitude change would predict that trait-like attributions should carry more negative connotations than terms that imply more ephemeral phenomena.

Id.

therefore, can be extremely debilitating to the individual.[60] Many criminal defendants already have problems that they feel are beyond their control. Labeling these defendants incompetent, particularly against their will, can foster what Martin Seligman called "learned helplessness." This syndrome, characterized by generalized feelings of helplessness, hopelessness, depression, and lack of motivation,[61] mirrors the symptoms of clinical depression.[62]

Thus, in practice, the incompetency doctrine raises significant problems and imposes substantial burdens on defendants and high costs on states. Although designed for their protection, the competency process places such substantial burdens upon defendants, that the American Bar Association Committee, which developed the *Criminal Justice Mental Health Standards*, suggested that defense attorneys may conclude that it is in their clients' best interests not to raise the issue of competency.[63]

III. RESTRUCTURING THE INCOMPETENCY PROCESS

A. DISTINGUISHING ASSENT FROM OBJECTION

The ABA Committee has indicated that if the problems associated with the competency doctrine persist, "perhaps we should ad-

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60 *See* Winick, *supra* note 59.

61 *See generally* MARTIN E.P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975); HUMAN HELPLESSNESS: THEORY AND APPLICATIONS (Judy Garber & Martin E.P. Seligman eds., 1980); Lyn Y. Abramson et al., *Learned Helplessness In Humans: An Attributional Analysis, in* HUMAN HELPLESSNESS: THEORY AND APPLICATIONS, *supra*, at 3; Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49 (1978); Steven F. Maier & Martin E.P. Seligman, *Learned Helplessness: Theory and Evidence*, 105 J. EXPERIMENTAL PSYCHOL. 3 (1976).

62 Christopher Peterson & Lisa M. Bossio, *Learned Helplessness, in* SELF-DEFEATING BEHAVIORS: EXPERIMENTAL RESEARCH, CLINICAL IMPRESSIONS, AND PRACTICAL IMPLICATIONS 235, 236 (1989).

63 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 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 32, Standard 7-4.2(c) commentary at 7.160.

dress more clearly the concept of possible waiver on the part of a defendant."[64] Under existing practices, defendants deemed incompetent may not stand trial or plead guilty even if they wish to do so.[65] In addition, existing practices require a defense attorney to raise the competency question to the court whenever a genuine doubt about competency arises, even if counsel believes that raising the issue will not be in the defendant's best interest.[66]

In a 1985 article, I suggested that waiver of incompetency might be possible in limited circumstances. I argued that the law should permit defendants impaired by mental illness to stand trial or plead guilty if, with the concurrence of counsel, they clearly and voluntarily expressed their desire to do so.[67] I suggested that the incompetency process be restructured to distinguish between two different types of cases: cases in which defendants assert their own incompetency as a ground for temporarily halting criminal proceedings, and cases in which the prosecution or the court seeks incompetency status, but defendants wish to proceed notwithstanding their impairment. I argued that, in the former cases, a system of trial continuances should replace the existing formal competency process.[68] In the latter cases, courts should consider allowing waiver when the defendant clearly and voluntarily expresses a preference for trial or a guilty plea, and defense counsel concurs. I argued, finally, that even if the court deems the defendant incompetent to waive the supposed benefits of the incompetency doctrine, it should permit defense counsel to waive the doctrine on behalf of the defendant on the grounds that defense lawyers, as fiduciaries, can substitute their judgment for that of an incompetent client.

This proposal for restructuring the incompetency-to-stand-trial doctrine was controversial. It challenged thinking that regarded com-

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64 *Id.* at 7.162.

65 Drope v. Missouri, 420 U.S. 162, 171 (1974) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); ABA TENTATIVE DRAFT, *supra* note 32, at 7.148 (referring to the "apparent conclusion of the Supreme Court that the prohibition [on trying the incompetent defendant] is an absolute one: a defendant who is determined to be incompetent to stand trial cannot, in any event, be tried"); *see, e.g.*, Hamm v. Jabe, 706 F.2d 765 (6th Cir. 1983) (trial court, over objection, properly halted trial once it became convinced defendant was incompetent, even though defense wished trial to continue under proposal that the defendant be excused from courtroom during potentially disturbing testimony). The Supreme Court recently reiterated this constitutional bar. Medina v. California, 112 S. Ct. 2572, 2579 (1992).

66 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 (1989).

67 *Restructuring Competency, supra* note 5, at 927-28.

68 *See* Pate v. Robinson, 383 U.S. 375 (1966).

petency as an essential prerequisite for waiver of rights in the criminal process and seemed inconsistent with the Supreme Court's jurisprudence in this area. However, allowing a defendant of doubtful competence to waive the "benefits" of the incompetency doctrine would not violate the purposes of the doctrine as long as there were safeguards, including requiring the advice and agreement of counsel.[69]

I also argued that the Supreme Court's language in *Pate v. Robinson*, suggesting that incompetent defendants could not waive the incompetency status, was dicta and could therefore be discarded.[70] I examined legal and clinical practices, both in the criminal area and elsewhere, that accept waiver in situations in which the individual whose rights are waived never participates in the decision to waive or is of doubtful competence.[71] These practices suggest that the law should permit a defendant either to accept trial or a guilty plea or to object to trial on the basis of mental illness. I suggested that customary conceptions of competency in the criminal process were artificial, based on myth, unrealistic models of the criminal process, and unfounded distinctions between mentally ill criminal defendants and "normal" defendants.[72]

In the ten years since advancing these proposals, I have developed further some of the ideas on which they were based. More specifically, my work in therapeutic jurisprudence explored in greater detail the distinction between assent and objection and the implications of this distinction for defining competency.[73] I have analyzed

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69 *Restructuring Competency*, *supra* note 5, at 952-59.

70 *Id.* at 968-70.

71 *Id.* at 959-68.

72 *Id.* at 970-75.

73 Therapeutic jurisprudence suggests the need for study of the therapeutic implications of various legal rules and practices. The law functions as a therapeutic agent, producing either therapeutic or antitherapeutic consequences. Therapeutic jurisprudence accordingly seeks to focus attention on an often neglected ingredient in the calculus necessary for performing a sensible policy analysis of law—the therapeutic dimension—and calls for its systematic empirical examination. *See generally* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1992); Symposium, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 623-926 (1993); Michael L. Perlin, *What is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993); David B. Wexler & Bruce J. Winick, *The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law*, *in* LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 211 (James R.P. Ogloff ed., 1992); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENT. & PHYS. DIS. L. REP. 225 (1992). For a recent bibliography of therapeutic jurisprudence work, see *Bibliography of Therapeutic Jurisprudence*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993).

To identify the therapeutic dimension as a significant factor is not, of course, to sug-

the use of this distinction in two non-criminal areas—competency to consent to treatment and competency to consent to voluntary hospitalization.[74] Further, I have analyzed autonomy values and their role in mental health law,[75] and explored the psychological value of allowing individuals to exercise choice[76] and the corresponding disadvantages of denying them the opportunity to be self-determining.[77] In addition, I have analyzed the various procedural modes for determining competency,[78] including the role of presumptions and burdens of proof in this process.[79] This reconsideration over the last ten years has led to several refinements in my arguments and additional proposals. The following section responds to several criticisms of the initial proposal and sets forth further thinking on how to reform the incompetency process.

B. WAIVER AND THE PURPOSES OF THE INCOMPETENCY DOCTRINE

In a recent article, Professor Richard Bonnie, although endorsing much of my proposal, criticized my suggestion that incompetent defendants should be able to waive the "benefits" of incompetency status.[80] Professor Bonnie pointed out that the incompetency doctrine is not designed solely to protect the defendant's interests, but also serves societal interests by preserving the moral dignity of the criminal process and by reducing the number of erroneous convictions. Professor Bonnie argued that permitting trial of an incompetent defendant might compromise both of these benefits.[81]

Properly understood, my proposal does not suggest that incompe-

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gest that it should trump other considerations. Countervailing normative considerations may often justify a legal rule or practice found to produce antitherapeutic consequences, and therapeutic jurisprudence does not purport to be a method of determining which factor should predominate in decisionmaking. *See* David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517 (1992). Its mission is merely to raise questions that call for a more complete analysis of the relevant considerations, and to use insights from the social and behavioral sciences to attempt to reshape the law so that it can more effectively serve therapeutic ends.

74 Bruce J. Winick, *Competency to Consent to Treatment: The Distinction between Assent and Objection*, 28 HOUS. L. REV. 15 (1991) [hereinafter *Competency for 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 *Competency for Voluntary Hospitalization*].

75 Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992).

76 *Id.* at 1755-68; Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT'L J.L. & PSYCHIATRY 99 (1994).

77 Winick, *supra* note 59.

78 *Competency for Voluntary Hospitalization*, *supra* note 74, at 199-212.

79 Winick, *supra* note 34.

80 Bonnie, *supra* note 6, at 543-44.

81 *Id.* at 543.

tent defendants be permitted to waive the incompetency status. Moreover, a proper analysis of the various policies served by the incompetency doctrine, including those discussed by Professor Bonnie, are fully consistent with my proposals. My article acknowledged that moral dignity and reliability of the criminal process and other societal interests are thought to justify the incompetency doctrine,[82] but questioned "whether in practice the competency doctrine actually accomplishes these asserted benefits."[83] Perhaps some of the benefits of the incompetency doctrine apply to defendants who assert their incompetency as a basis for postponing their trials ("objectors" to trial). It is possible that these benefits outweigh the burdens the doctrine imposes upon such defendants.[84] However, for defendants who, with the approval of counsel, prefer trial or a guilty plea ("assenters"), these benefits may be more theoretical than real, and may not outweigh the burdens imposed by the doctrine.

My proposal assumes that the defendant has the ability clearly and voluntarily to articulate a preference for either a trial or for a guilty plea. It also assumes that defense counsel, after careful consideration, concurs in the judgment that this preference is reasonable in the circumstances and that the client's assent is not irrational. This requirement is consistent with the role of the defense lawyer. After defense lawyers receive sufficient information from the defendant and investigate the facts and the law, they typically will select an appropriate defense strategy.[85] When the defendant assents to this strategy, and counsel thinks the defendant has a basic understanding of the choice made, counsel's judgment is entitled to great weight. In most cases it will be counsel's recommendation to go to trial or to enter a guilty plea to which the defendant assents. In some cases, however, the choice will originate with the defendant, and counsel will approve of or at least acquiesce in this choice. Counsel's agreement with the client's choice provides an assurance by a person who has a professional fiduciary relationship with the defendant that proceeding to trial or entering a guilty plea is in the defendant's best interests. In such cases, deference both to the autonomy of the defendant and to the professional expertise of counsel make it appropriate to erect a presumption in favor of competency. Counsel's acquiescence provides reasonable assurance that accuracy in adjudication will not be frustrated. A defense attorney concerned that allowing a guilty plea

82 *Restructuring Competency, supra* note 5, at 949-50.

83 *Id.* at 950.

84 Bonnie, *supra* note 6, at 543-44.

85 *See Restructuring Competency, supra* note 5, at 971-72 (discussing the role of counsel in the attorney-client relationship in criminal cases).

or proceeding to trial with an impaired defendant might result in an unjust conviction, because either the client lacks a basic understanding of the choice made or the choice made seems clearly inconsistent with the defendant's interests, should not provide the concurrence that my proposal requires.

Allowing a trial that is sought by both defendants and their counsel to proceed is a provisional decision that the trial judge can rescind if, as the case unfolds, concerns for accuracy arise. Moreover, if defense counsel realize that the defendant's impairment is more significant than earlier thought and that the client's inabilities seem likely to produce an inaccurate result, then they can seek a determination of incompetency based upon this new information. Because competency is a fluctuating state, and a defendant's condition may change during the course of a trial, the trial judge has a duty to reconsider the issue any time there is a reasonable doubt about the defendant's competency.[86]

The trial court can also minimize the risk of inaccuracy in adjudication by using its power to set aside verdicts in the interest of justice,[87] or allowing a new trial if additional evidence affecting the verdict later materializes that would have been available but for the defendant's incompetency.[88] Thus, a number of safety valves prevent truly incompetent defendants from subjecting themselves to trials.

It is necessary to consider the concern for accuracy in adjudication in perspective. Waivers are customarily accepted in other criminal contexts, even though allowing them might affect accuracy. First, the Supreme Court has held that defendants may waive the right to counsel and represent themselves.[89] Thus, the Court recognizes that

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86 *See* Drope v. Missouri, 420 U.S. 162, 181 (1975) ("[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."); Winick, *supra* note 34, at 841. At best, a pretrial competency determination constitutes a prediction about how the defendant will perform at a future trial. If during trial, defense counsel, contrary to an initial assessment, concludes that the defendant's impairment is materially interfering with the ability to communicate or provide essential assistance, the attorney then can bring concrete examples of such incapacities to the court's attention and seek a mistrial. The court possesses broad discretion concerning the grant of a mistrial and can at that point order a clinical evaluation of competency to assist in determining the issue. *See* Illinois v. Allen, 397 U.S. 337, 342-43 (1970); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); FED. R. CRIM. P. 43(b)-(c). *See also* Hamm v. Jabe, 706 F.2d 765, 768 (6th Cir. 1983) (defense counsel proposed that his marginally competent client be excused from the courtroom during potentially disturbing testimony, but the court instead declared the defendant incompetent and stopped trial).

87 *E.g.*, FED. R. CRIM. P. 33.

88 *See* Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 76 (1972).

89 Faretta v. California, 422 U.S. 806 (1975).

respect for individual autonomy may override the societal concern for accuracy in adjudication.[90] Second, defendants may plead guilty (and thereby waive all trial-related constitutional rights) even if they are unwilling to concede commission of a crime,[91] and even in the absence of a factual basis for believing that they have committed a crime.[92] Even though acceptance of such a plea may produce an erroneous conviction, the desire to honor the accused's interest in resolving the charges, together with the societal interest in facilitating negotiated settlements, outweighs the concern for accuracy. These waiver of counsel and guilty plea cases arose in contexts in which the defendant's competency was not questioned and therefore may not be as persuasive in contexts in which competency is an issue. However, they demonstrate that deference to autonomy sometimes trumps reliability concerns.

Finally, an incompetent defendant not represented by counsel whose "free will" is impaired by mental illness may confess to a crime.[93] Juries give these confessions great weight, and if they are in-

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90 *Restructuring Competency, supra* note 5, at 955.

91 North Carolina v. Alford, 400 U.S. 25 (1970) (defendants may enter valid guilty plea while maintaining their innocence); White Hawk v. Solem, 693 F.2d 825 (8th Cir. 1982) (same), *cert. denied*, 460 U.S. 1054 (1983); *see also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 350.4(4) (Tentative Draft No. 5, 1972) (court should be able to accept a plea "even though the defendant does not admit that he is in fact guilty if the court finds that it is reasonable for someone in the defendant's position to plead guilty".).

92 ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 40-47 (1981); John L. Barkai, *Accuracy Inquiries for all Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants*, 126 U. PA. L. REV. 88, 114-15 (1977); Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 33-34 (1982). Many jurisdictions, however, prohibit acceptance of a plea without demonstration of a factual basis for the plea. *See, e.g.*, FED. R. CRIM. P. 11(f); Barkai, *supra*.

93 Colorado v. Connelly, 479 U.S. 157 (1986). The defendant had a long history of paranoid schizophrenia and had been hospitalized on numerous occasions. *Id.* at 174 (Brennan, J., dissenting). Although treated in the past with antipsychotic drugs, at the time of his confession the defendant had not taken medication for at least six months. *Id.* (Brennan, J., dissenting). The defendant suffered from auditory and visual hallucinations, which a court-appointed psychiatrist concluded interfered with his "ability to make free and rational choices." *Id.* at 161. According to the psychiatrist, the defendant experienced "command hallucinations" in which the "voice of God" ordered him either to confess to a killing or to commit suicide. *Id.* He approached a police officer on a Denver street corner and confessed to a killing, *id.* at 160-61, and repeated his confession following the administration of *Miranda* warnings. *Id.* at 160. Following arrest, the defendant was found incompetent to stand trial. *Id.* at 161. Following treatment and his restoration to competency, the trial court suppressed the defendant's statements as "involuntary," and the Colorado Supreme Court affirmed, finding that the initial statement was not the product of a rational intellect and free will, and that the defendant's mental condition precluded his ability to make a valid waiver of *Miranda* rights. *Id.* at 162-63. The United States Supreme Court reversed, holding that the defendant could waive his *Miranda* rights notwithstanding the contention that such waiver was not the product of "free will" in view of the defend-

accurate, they can produce unjust convictions. If defendants without counsel may confess, thereby waiving their Fifth Amendment and *Miranda* rights notwithstanding their substantial mental impairment, why should mentally impaired defendants who wish to accept counsel's recommendation be unable to waive their due process right to avoid trial while incompetent?

Professor Bonnie correctly points out that the incompetency doctrine preserves the moral dignity of the criminal process. He argues that this interest should bar conviction of defendants "who lack a meaningful moral understanding of wrongdoing and punishment or the nature of criminal prosecution."[94] Would trying mentally impaired defendants in accordance with their wishes (if counsel concurs), or their desire to follow their defense counsel's recommendation frustrate the moral dignity of the criminal process? Two types of cases weigh against justifying a bar on trial. First, a defendant lacking an understanding of wrongdoing might qualify for the insanity defense, and, if so, would be neither convicted nor punished. Thus, a finding of incompetency should not disqualify defendants from making an insanity defense. Second, defendants lacking a meaningful understanding of punishment should not be punished.[95] This does not mean, however, that the defendant should not stand trial. Indeed, courts can consider such a lack of understanding at sentencing, or at the time of the administration of punishment, or they can defer punishment.[96]

Avoiding trial of a defendant who lacks a meaningful understanding of the nature of criminal prosecution raises more serious questions. Although allowing trial for that defendant would be unfair, the question is how much understanding would ensure that the trial does not threaten the moral dignity of the criminal process? Setting this standard too high would disqualify not only mentally ill defendants from facing their charges, but also many "normal" defendants. Indeed, many criminal defendants who are not mentally ill may lack a meaningful understanding of the nature of criminal prosecution.[97] Defendants generally are willing to defer to their attorneys, just as most medical patients are willing to defer to their doctors concerning appropriate medical treatment.[98] Indeed, many defendants do not

ant's mental impairment. *Id.* at 169-71. So long as the defendant's actions were voluntary in the sense that they were not a product of police overreaching, his asserted lack of "free will" was, in the Court's view, constitutionally irrelevant. *Id.* at 170.

94 Bonnie, *supra* note 6, at 543.

95 *Restructuring Competency, supra* note 5, at 957-58.

96 *Id.* at 958.

97 *Id.* at 971.

98 *Id.*

comprehend the nature of their choices and are willing to delegate decisionmaking to a professional in whom they place their trust.

Moreover, a complete understanding of the nature of criminal prosecution is unnecessary in the overwhelming majority of cases that are resolved by a guilty plea.[99] Defendants who plead guilty do not need a high level of understanding concerning the trial process, because they will not participate in it. These defendants need only skills sufficient to enable them to help counsel reconstruct the alleged crime and to allow counsel to assess the strength of the prosecution's case. However, in a substantial number of cases, mentally ill defendants, like defendants generally, are probably guilty and lack a credible defense. For these defendants, a guilty plea is almost always the best option. The plea negotiation process is conducted exclusively by counsel, with little need for the client's assistance. Therefore, when negotiations produce a plea that defendants find more desirable than an incompetency adjudication (which will only postpone trial or a guilty plea), the court should permit them to accept the plea, provided they possess a rudimentary understanding of the consequences (*i.e.*, the sentence and the foregoing of trial and the various trial-related rights). Defendants in these cases do not need a more complete understanding of the nature of a criminal prosecution.

In *Godinez v. Moran*,[100] the Supreme Court recently rejected the contention that the standard for competency to plead guilty is higher than the standard for competency to stand trial. The Court's opinion suggested that the standard for competency to stand trial should be the same as that applied to other competency questions arising in the criminal process. The Court did not consider, however, whether under certain circumstances the standard for competency to plead guilty could be lower than the standard for competency to stand trial. In fact, the notion of competency is best understood as a contextualized inquiry.[101] To the extent that *Godinez* held that courts must apply the same standard of competency across the board, regardless of the

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99 *Id.* at 972. As long as defendants possess the foundational ability to consult with counsel, Professor Bonnie would permit them to plead guilty in accordance with counsel's recommendation, without the need for a high level of decisional competence. Bonnie, *supra* note 6, at 578. Professor Bonnie would insist on more than "basic understanding" (the ability to understand the nature and consequences of the decision) for this purpose. *Id.* He would require "basic rationality" (the ability to express plausible—rather than grossly irrational—reasons for the decision), but not "the ability to make a reasoned choice among alternatives." *Id.*

100 113 S. Ct. 2680 (1993).

101 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1 commentary at 175 (1989) ("A determination of competence or incompetence is functional in nature, context dependent and pragmatic in orientation. . . ."); ROESCH & GOLDING, *supra* note 27, at 10-13; Bonnie, *supra* note 6, at 549.

particular issue or the nature of the case, it is open to serious criticism.

The criminal justice system should not base its notion of competency on a model of the criminal case that assumes a full-blown trial in which defendants testify and in which they require considerable skills to assist counsel in complicated strategic decisionmaking. Rather, it should adopt a flexible standard of competency, requiring only that the defendant possess the abilities that are necessary in the particular case. This is particularly true in misdemeanor cases, in which an overwhelming majority of defendants plead guilty. In the past twenty years, tightening civil commitment standards and the practice of deinstitutionalization have funneled many people who previously would have been civil patients into the criminal courts.[102] As a result, a majority of defendants now evaluated for competency are charged with only minor misdemeanors.[103] Defendants arrested for a petty offense, such as disorderly conduct or shoplifting, can usually plead guilty and pay a small fine. If those defendants are incompetent to stand trial, however, they may face many months of incarceration in a jail or in a maximum security mental hospital that resembles a jail. If defendants eventually are restored to competency and returned to court, they probably will accept the same plea bargain at that point. When mak-

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102 *See* Jennifer C. Bonovitz & Edward B. Guy, *Impact of Restrictive Civil Commitment Procedures on a Prison Psychiatric Service*, 136 AM. J. PSYCHIATRY 1045, 1047-48 (1979) (increasing numbers of jail inmates admitted to jail psychiatric service charged only with minor offenses, such as disorderly conduct or trespass, and also found to have been arrested at family request); Walter Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22, 30-31 (1980) (42% of incompetency commitments were of persons charged with misdemeanors; 20-25% were charged with disorderly conduct). The movement for deinstitutionalization of civil mental patients in the 1970s and 1980s, coupled with the general tightening of civil commitment standards and expansion of the procedural protections afforded civil patients, has made the formerly easy hospitalization of the mentally ill much more difficult. *Incompetency to Stand Trial*, *supra* note 5, at 245. Many of these patients have continued medical, social, and housing needs that remain unmet in the communities to which they are discharged or in which they remain. Some inevitably run afoul of the criminal law. One unintended consequence of these developments has been the increased use of the criminal process as a means of dealing with social problems that previously would have been handled by the civil mental health system. Bonovitz & Guy, *supra*; Shah, *supra* note 32, at 229; Linda Teplin, *The Criminalization of the Mentally Ill: Speculation in Search of Data*, 94 PSYCHOL. BULL. 54 (1983); David B. Wexler, *The Structure of Civil Commitment: Patterns, Pressures, and Interactions in Mental Health Legislation*, 7 LAW & HUM. BEHAV. 1, 11-12 (1983); *Incompetency to Stand Trial*, *supra* note 5, at 245-46. As a result, more mentally ill individuals are arrested and charged with minor misdemeanors, and the incompetency-to-stand-trial process has become a back-door route to the mental hospital.

103 Jeffrey L. Geller & Eric D. Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examination: An Evaluation*, 135 AM. J. PSYCHIATRY 53, 54 (1978) (a substantial majority of defendants hospitalized for competency evaluation were charged only with misdemeanors; 30% were charged only with disturbing the peace); *Restructuring Competency*, *supra* note 5, at 941-42.

ing a guilty plea imposes such nominal consequences on the defendant, the degree of competency required of the defendant should be relatively modest. When the potential consequences are more substantial—a felony conviction carrying a lengthy prison sentence, for example—the degree of competency required to plead guilty should be higher. And cases in which defendants seek to plead guilty to a capital offense, exposing themselves to a possible death sentence, require an extremely high degree of competency and understanding.[104]

Such a sliding-scale approach to competency is reasonable and consistent with the desire to protect the accuracy and moral dignity of the criminal process. Indeed, basic principles of criminal procedure reflect this. Defendants are entitled to fewer procedural protections when tried for petty offenses than when tried for more serious offenses. For example, the United States Supreme Court has recognized a petty offense exception to the Sixth Amendment right to trial by jury.[105] Under this exception, a jury trial is unavailable in cases in which the potential penalty does not exceed six months imprisonment.[106] Similarly, although the right to counsel is an essential feature of the adversary system,[107] indigent defendants are not entitled to

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104 Solem v. Helm, 463 U.S. 277, 294 (1983) (plurality opinion); Enmund v. Florida, 458 U.S. 782, 797 (1982); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Beck v. Alabama, 447 U.S. 625, 637 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion); Coker v. Georgia, 433 U.S. 584 (1977); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); *Gardner*, 430 U.S. at 363-64 (White, J., concurring); Gregg v. Georgia, 428 U.S. 153, 187-89 (1976); Woodson v. North Carolina 428 U.S. 280, 303-04 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 19 (1982).

105 *See* Baldwin v. New York, 399 U.S. 66 (1970); Bloom v. Illinois, 391 U.S. 194 (1968).

106 *See* Duncan v. Louisiana, 391 U.S. 145, 155 (1968). "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 156. "Those who wrote our constitutions knew from history and experience that [the jury trial] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Id.* "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 158. "[A] general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* Because the jury trial right serves important societal as well as individual interests, it may not be waived unilaterally by the defendant. Singer v. United States, 380 U.S. 24 (1965).

107 *See* Faretta v. California, 422 U.S. 806, 834 (1975) ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). *See also* Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put

the appointment of counsel in misdemeanor cases in which they do not receive a sentence of imprisonment,[108] and thus must face a professional prosecutor without assistance.

A similar distinction between petty offenses and more serious crimes exists in the incompetency-to-stand-trial context. To the extent that concerns about accuracy and about the moral dignity of the criminal process make courts reluctant to permit guilty pleas or trials for assenting defendants whose competency is in question, they should be considerably less concerned when the defendant seeks to plead guilty or stand trial for a petty misdemeanor. Concerns for reliability and the moral dignity of the criminal process would be frustrated if grossly incompetent defendants were permitted to plead guilty. When the defendant is unable to understand the very notion of a guilty plea or its consequences, counsel should not go forward with a plea. In such cases, a delay based on the defendant's mental impairment may be burdensome to the defendant, but these burdens arguably are justified by the societal interests in the moral dignity and the reliability of the criminal process. However, imposing the burdens of an incompetency adjudication on an unwilling defendant who would prefer to plead guilty in accordance with counsel's advice or with counsel's acquiescence seems unjustified unless the defendant is grossly incompetent. When competence is more marginal, the societal concerns for accuracy and the moral dignity of the criminal process should not outweigh the defendant's desire to have an expeditious resolution of the charges.

Even if the law continues to bar guilty pleas by defendants when there is doubt about their competence, it should recognize a petty offense (or even a misdemeanor) exception. This exception should apply in cases when the defendant clearly and voluntarily assents to counsel's recommendation or expresses a desire to plead with which counsel approves. Because a high percentage of incompetency cases arise out of misdemeanor charges, such a rule would eliminate much of the cost and many of the burdens of the incompetency process. Limitations on civil commitment and the deinstitutionalization process have unintentionally funneled thousands of individuals into the

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on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id.

108 *See* Scott v. Illinois, 440 U.S. 367, 371 (1980); Argersinger v. Hamlin, 407 U.S. 25, 29 (1972).

criminal system who previously would have been committed civilly. The incompetency process has become a "back-door" commitment route. In effect, these misdemeanor incompetency-to-stand-trial commitments are short-term alternatives to civil commitment, and not truly criminal dispositions. Following a brief period of incompetency hospitalization, these defendants typically are released and their criminal charges dismissed. Many of these individuals do not belong in the criminal process, and most do not belong in the hospital. They belong in the community, but require continued services. Instead of spending millions of dollars in the criminal system on the processing of these misdemeanor incompetency cases, this money should go towards improving services in the community to meet the continued medical and social needs of these individuals. By adopting the petty offense or misdemeanor exception proposed, governments could effectuate these savings and reallocate the funds to necessary community services. Such an exception would be easy to adopt legislatively. An amendment to state incompetency-to-stand-trial statutes or court rules could provide that in all misdemeanor cases (or in all misdemeanor cases in which a prison sentence is ruled out), a defendant clearly and voluntarily electing to plead guilty or *nolo contendere* with the approval of counsel will be presumed to be competent to do so.

Many defendants, whether charged with a misdemeanor or a felony, will wish to stand trial rather than to plead guilty. Applying a low standard of competency for defendants in these cases would not compromise the concerns for accuracy and for preserving the moral dignity of the criminal process. These concerns assume that allowing a defendant with an impaired ability to understand the nature of the proceeding and participate fully in the defense to stand trial would skew the criminal process in favor of the prosecution. Yet, in some cases, the defense strategy does not require the defendant's participation or understanding, and in other cases the defendant's participation does not help significantly.[109] Indeed, in cases in which defendants raise an insanity defense—which many defendants whose competency is in question do—defense counsel may want to present those defendants to the trier of facts before they have been restored to competency and returned to court on what may be a high dose of psychotropic medication, that may affect the jury's assessment of their credibility.[110] In addition, defense counsel often will file a motion

109 *See* ABA TENTATIVE DRAFT, *supra* note 32, at 7.160; Chernoff & Schaffer, *supra* note 32, at 517; *Restructuring Competency*, *supra* note 5, at 956.

110 *See* Riggins v. Nevada, 112 S. Ct. 1810 (1992); Commonwealth v. Louraine, 453 N.E.2d 437, 442 (Mass. 1983); State v. Jojola, 553 P.2d 1296 (N.M. Ct. App. 1976); *In re* Pray, 336 A.2d 174 (Vt. 1975); State v. Murphy, 355 P.2d 323 (Wash. 1960); ABA TENTATIVE

which raises a legal defense that does not require the defendant's participation. These include motions to dismiss the indictment for lack of a speedy trial or for violation of the ban on double jeopardy, and motions to suppress critical evidence obtained in violation of the defendant's Fourth, Fifth, or Sixth Amendment rights, or some other attack on the indictment or on the admissibility of key evidence. They also include cases in which counsel raises police or prosecutorial misconduct. Deferring consideration of these legal challenges until after the defendant has received what might be a lengthy period of confinement for incompetency treatment seems questionable in cases in which counsel wishes to proceed and the defendant clearly and voluntarily agrees.[111] Concerns for accuracy or for preserving the dignity of the criminal process cannot reasonably justify delaying the criminal process in these cases.

Instead of a rigid bar on the trial of a defendant of questionable competency, legislatures should adopt a more flexible, sliding-scale approach. They should employ standards that reflect the highly contextualized nature of competency and base the degree of competency necessary in a particular case on the precise degree of ability that a defendant will require in that case. Especially when the consequences to the defendant are relatively minor, and the defense strategy in the case requires little assistance and participation by the defendant, courts should defer to the autonomy of defendants who are clearly able to agree to the trial strategy recommended by counsel, even if their autonomy is reduced by mental illness. In many cases, respecting such autonomy, and permitting the case to proceed, at least provisionally, will produce just, fair, and accurate results that do not compromise the moral dignity of the criminal process.

Only when defendants' mental illness grossly impairs their ability to understand the choice they must make or their ability to make it rationally, should moral dignity and reliability concerns preclude defendants from making that choice. When the defendants' impairment is not this severe, the law should respect their choice and their counsels' concurrence for two reasons. First, while the defendants' autonomy interests may be somewhat reduced by mental illness, their choice nevertheless represents some degree of autonomy worthy of

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DRAFT, *supra* note 32, at 7.245; *Restructuring Competency, supra* note 5, at 956.

111 In Jackson v. Indiana, 406 U.S. 715, 741 (1972), in referring to *Pate*, the Court noted, "We do not read this Court's previous decisions to preclude the States from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or to make certain pretrial motions through counsel." If such proceedings are not barred even for a defendant adjudicated to be incompetent, then surely they would not be barred for a defendant of questionable competency who assents to counsel's recommendation that such action be taken.

respect. Second, counsel's advice (or concurrence) represents a professional judgment that in the context of the individual case, respecting the defendant's choice will not frustrate moral dignity and reliability interests. Many of these defendants will acquiesce passively in the judgement made by counsel, with the result that the attorney will be functioning as the real decision-maker. In such cases, autonomy interests, although present, are reduced. But even apart from autonomy concerns, counsel's decision to go forward, based on a conclusion that the client, although impaired, possesses enough competency in the circumstances, should sufficiently support a reasonable assurance that the moral dignity and reliability concerns of the criminal justice process will not be frustrated.

C. A PRESUMPTION IN FAVOR OF COMPETENCY

Professor Bonnie argues that even if the protection of the incompetency doctrine should be deemed waivable, my attempt to advance a legally satisfactory theory of waiver fails because "a defendant's ability to express a preference for adjudication does not sufficiently measure competence to waive a constitutional right."[112] Professor Bonnie argues that when fundamental rights like the right to counsel or to a trial are involved, expression of a preference to waive the right is insufficient to effect a valid waiver.[113] To waive such rights, "the waiver must 'be knowing and intelligent' and the court must assure, on the record that these criteria have been satisfied."[114] The "ability to express a preference, absent any understanding of the nature of the choice or the consequences of the decision," Bonnie argues, "is not a sufficient substantive test of legal competence."[115]

I agree with Professor Bonnie that the mere expression of a preference cannot alone meet the requirements for competency to waive certain fundamental constitutional rights, like the right to representation by counsel or the full range of trial rights (waived by a plea of guilty). My proposal, however, did not suggest that expression of preference, alone, should indicate competency. Rather, it argued that the law shall permit defendants whose competency is in question to waive these rights when they clearly and voluntarily express a preference to do so, provided certain other conditions are satisfied, including the concurrence of counsel. It never suggested that the ability to express such a preference indicates competency or that courts should permit incompetent defendants to waive these rights. Indeed, it pointed out

112 Bonnie, *supra* note 6, at 544.
113 *Id.*
114 *Id.*
115 *Id.*

that "[t]he high value attached to the principle of individual autonomy does not mean that incompetent expressions of autonomy are or should be accepted."[116]

Determining whether an expression of preference is competent, however, is often difficult, and a large percentage of cases could be decided either way. It is difficult to ascertain an individual's ability to process information and engage in rational decisionmaking. Moreover, evaluators may confuse the quality of the decisionmaking process with the reasonableness of the decision. With this in mind, my initial article argued that courts should employ a presumption in favor of the competency of an individual who is able to articulate a preference and whose counsel concurs with the choice made.[117] Many cases will involve defendants on the borderline of competence. "To prevent excessive paternalism we should presume that individuals who are able to express a choice are competent."[118] Existing practices in both criminal and non-criminal contexts support this presumption.[119]

Proposing that the law should recognize a presumption in favor of competency in cases in which the defendant can clearly and voluntarily express a preference, is not the same as proposing that it should consider the ability to express a preference as dispositive evidence of competency. The ability to express a choice would not alone "satisfy even the minimum substantive conception of self-determination."[120] When defendants base their preference on "irrelevant reasons ('I will plead guilty because I am an insect'), irrational beliefs ('I will stand trial and thereby become a movie star'), or outright delusions ('I am an extraterrestrial and will return to my planet')," that choice does not deserve respect.[121] However, "[a]n individual able to express a choice is exercising at least some autonomy, and our respect for the principle of autonomy makes it appropriate to utilize a presumption of competency to guide the decision-maker in such a case."[122] The presumption of competency that is proposed here would not shield clearly incompetent expressions of choice. Such a presumption "does not always decide a case; it is a rebuttable presumption."[123]

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116 *Restructuring Competency, supra* note 5, at 966.

117 *Id.* at 966.

118 *Id.*

119 *Id.* at 959-62 (discussing waiver in civil commitment context); *id.* at 963-65 (discussing practices in the contexts of competency to consent to hospitalization, to make a contract, to make a will).

120 Bonnie, *supra* note 6, at 544.

121 *Restructuring Competency, supra* note 5, at 967.

122 *Id.*

123 *Id.*; *see also* Winick, *supra* note 75, at 1776 ("Only in clear cases should an individual be deemed incompetent when he or she is able to articulate a choice."); Winick, *supra* note 34, at 862 ("A presumption in favor of competency is not, of course, a conclusive

Professor Bonnie treats the suggested presumption in favor of competency as a substantive test of competency to waive rights, rather than as a procedural rule concerning how such competency should be ascertained.[124] This proposal, however, contains elements of both a substantive and a procedural rule. The law "should apply only a relatively low standard of competency and minimal scrutiny when the defendant, with the concurrence of his attorney, expresses the wish to stand trial, and a higher standard and more intense scrutiny when the state asserts that the defendant should be tried over his objection that he is incompetent."[125] A clearly expressed choice by defendants to resolve the charges speedily, either by trial or a guilty plea, deserves a degree of respect that permits only limited scrutiny. A high degree of scrutiny is appropriate, however, when the state seeks to prevent defendants from invoking their own incompetency as a shield to an immediate trial. Other than suggesting a low standard of competency for assent and a higher standard for objection, the proposal did not set forth a substantive definition of competency, let alone equate competency with the ability to express a preference. The discussion of the presumption in favor of competency contained the germ of a procedural proposal for adjudicating competency—a proposal that has developed in greater detail in my more recent writings.[126]

How would the suggested procedural presumption in favor of competency work? Although a conclusive or irrebuttable presumption is really a substantive rule, a rebuttable presumption such as the one contemplated is a procedural device that determines how a substantive issue will be decided. A presumption allocates (and sometimes reallocates) a burden of proof. The party challenging a presumption has the burden of demonstrating its falsity. Moreover, a presumption places a production burden on the party challenging it, requiring that party to present evidence negating the presumption. In the absence of such a showing, the presumption is unrebutted, and the truth of the issue that is the subject of the presumption is treated as having been established.

When reasonable doubt about competency is raised in a criminal case, due process requires a fair determination of the issue. This is

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presumption.").

124 Bonnie, *supra* note 6, at 544-45 & n.29.

125 *Restructuring Competency, supra* note 5, at 968.

126 *See Competency for Treatment, supra* note 74 (discussing presumptions of competency in determining competency to make treatment decisions); *Competency for Voluntary Hospitalization, supra* note 74 (discussing presumptions of competency to make voluntary hospitalization decisions); Winick, *supra* note 34 (discussing the role of presumptions of competency and burdens of proof in judicial hearings on competency to stand trial).

actually the holding of *Pate v. Robinson*[127] and *Drope v. Missouri*,[128] two leading Supreme Court competency-to-stand-trial cases that often are construed as placing a total bar on trying an incompetent defendant. The existence of reasonable doubt as to the defendant's competency does not destroy a presumption of competency in cases where the defendant, with the advice and agreement of counsel, clearly and voluntarily expresses a preference in favor of trial or a guilty plea.[129] Even when doubt about competency triggers an inquiry under *Pate* and *Drope*, the presumption in favor of competency continues to inform the adjudication of the issue by placing the burden of proving incompetency on the party challenging the presumption, which in this context would be the prosecution.[130] If the prosecution fails to produce specific evidence of the defendant's incompetency, the presumption remains unrebutted, and the criminal proceeding may continue.[131] To rebut the presumption, the prosecution must produce evidence suggesting that the defendant's choice is the product of mental illness. The prosecution can carry this burden by adducing evidence that suggests, for example, that the defendant's choice is the product of pathological delusions or hallucinations, is based on beliefs that are intrinsically irrational or on reasons that are clearly irrelevant, or is the result of a mood disorder that impairs the defendant's judgment or motivation to act self-interestedly.[132] In addition, the trial judge is free to engage the defendant in a short colloquy that typically occurs in connection with the acceptance of a guilty plea.[133] Courts can require this colloquy when the defendant seeks to plead guilty or waive certain fundamental rights, like the right to counsel. The judge's questioning would provide additional assurance that the defendant's expressed preference is voluntary, that the defendant has at least a rudimentary understanding of the nature of the right sought to be waived, and that the defendant's decision is not the product of cognitive impairment or a mood disorder.

If the prosecution cannot produce any evidence, and the defendant's responses do not raise doubt, the presumption in favor of com-

127 383 U.S. 375 (1966).

128 420 U.S. 162 (1975).

129 Winick, *supra* note 34, at 862.

130 *Id.*

131 *Id.* at 862-63.

132 *See Competency for Treatment*, *supra* note 74, at 44 (discussing operation of presumption of competency in the context of competency to consent to treatment); *Restructuring Competency*, *supra* note 5, at 967; *see also* Jeffrie Murphy, *Incompetency and Paternalism*, 60 ARCHIV FUR RECHTS-UND SOZIALPHILOSOPHIE 465, 473-74 (1974); Allan M. Tepper & Amiram Elwork, *Competence to Consent to Treatment* as a *Psycholegal Construct*, 8 LAW & HUM. BEHAV. 205, 216-18 (1984).

133 *See, e.g.*, FED. R. CRIM. P. 11.

petency remains unrebutted, and no further inquiry occurs. As mentioned, courts can treat their decisions to honor a defendant's desire to stand trial as provisional, and reconsider them as the trial unfolds if the defendant's conduct or demeanor suggests incompetency, or if defense counsel decides to raise the issue. If at the initial competency inquiry the prosecution comes forward with evidence suggesting that the defendant's expression of choice in favor of trial or a guilty plea is incompetent, or if the defendant's responses to the trial judge's inquiries raise a serious question as to the defendant's competency, the court can order a more formal competency evaluation and hold a further hearing on the issue. In many cases, however, employing a procedural presumption of competency and placing the burden of proof on the party challenging competency will avoid the formal clinical evaluation of competency that now typically (and often unnecessarily) occurs.

This procedure satisfies the due process requirement of conducting an inquiry into competency when reasonable doubt is raised about the issue. *Pate v. Robinson*[134] imposes a constitutional obligation on trial judges to raise the competency issue and hold a hearing to appraise a defendant's competency whenever sufficient evidence of incompetency comes to their attention. *Pate* does not, however, specify the nature of the hearing required. Due process is a flexible notion, and does not always require a formal, trial-type hearing. Even if the defendant appears to be mentally ill or has a history of mental illness, an informal inquiry into competency using the presumption proposed here meets the requirement of due process. Again, this presumption applies only in cases in which the defendant, with the advice and concurrence of counsel, clearly expresses a preference for trial or a guilty plea. Courts could hold a more elaborate hearing if the prosecution successfully rebuts the presumption of competency.

Although under *Pate* the existence of mental illness triggers the need for an inquiry into the defendant's competency, an informal inquiry into the issue using a presumption in favor of competency in cases in which the defendant, with the concurrence of counsel, wishes to go forward, with a more formal inquiry held if the presumption is rebutted, should suffice. The existence of mental illness alone, even one of the major mental illnesses like schizophrenia, major depression, or bipolar disorder, is insufficient to rebut the presumption of competency that should attach when a defendant can clearly express a preference in which counsel concurs. Mental illness should not be equated with incompetency. Many individuals suffering from serious

134 383 U.S. 375 (1966).

mental illness retain full decisionmaking capacity, and even when such illness impairs capacity in one area of functioning, it may leave capacity unimpaired in others.[135] Therefore, prosecutors should have to show more than mental illness to rebut the presumption of competency; they should have to produce specific evidence suggesting that the evidence influenced the defendant's decision.

An informal process utilizing a presumption in favor of competency should not promote extensive appellate litigation or collateral attacks on defendants' guilty pleas. In cases in which the presumption of competence is not rebutted, the colloquy between the trial judge and the defendant suggested above should create an adequate record to insulate the case from appeal or collateral attacks questioning competence. Insulation from subsequent attack could be further assured if the court required counsel to state, on the record, that the defendant's decision was the subject of advice and consultation with counsel, that it seems reasonable and to be in the client's best interests, and that counsel believes that the defendant possesses sufficient competence to make the decision. Such a statement by counsel would not necessarily preclude counsel from later raising the question of competency if, as the trial unfolded, counsel became convinced that the defendant's condition had changed, or that counsel's original assessment of competency was wrong. Should counsel become convinced during trial that the defendant actually was incompetent, counsel's motion, together with a detailed recitation of the circumstances giving rise to this change of view, should create sufficient doubt to require the trial court to hold a new inquiry into the matter.[136]

Critics may claim that defense counsel will abuse the process by opting for a trial to test the strength of the prosecution's case, but preserving the ability to bail out if the case appears to be going poorly.

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135 *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) ("In determining whether an individual meets a specified legal standard (*e.g.*, for competence, criminal responsibility, or disability), additional information is usually required beyond that contained in the DSM-IV diagnosis. This might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability. *Id.* at xxiii."); PAUL S. APPLEBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 218, 220 (1991) ("The mere presence of psychosis, dementia, mental retardation, or some other form of mental illness or disability is insufficient in itself to constitute incompetence."); Karen McKinnon et al., *Clinicians Assessments of Patients' Decision Making Capacity*, 40 HOSP. & COMMUNITY PSYCHIATRY 1159 (1989); Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 573, 588 (1978); *Competency for Treatment*, *supra* note 74, at 17-18; *Competency for Voluntary Hospitalization*, *supra* note 74, at 188-90.

136 *See supra* notes 86 to 88 and accompanying text.

This concern underestimates the professional ethics of the defense bar and the ability of trial judges to police counsel appearing in their courts. When attorneys certify that their clients seem competent and that their client's choice to go forward seems to be in their best interest, the law should assume that counsel is acting in good faith and that any subsequent representation to the court by counsel that the client is incompetent also is made in good faith. Few attorneys will wish to risk a trial judge's suspicion that they are attempting to perpetuate a fraud on the court.

Professor Bonnie concedes that a procedural presumption in favor of competency might be appropriate in certain contexts.[137] He suggests, however, that in the criminal context, "such a presumption would not be normatively plausible because the underlying issue is whether the defendant has the abilities needed for self-interested decisionmaking."[138] Professor Bonnie's criticism would apply to a conclusive presumption of competency triggered by an expression of a preference, but not to a rebuttable presumption like the one suggested here. A rebuttable presumption does not beg the question of the issue under consideration; it is merely a procedural device for resolving that issue. Rather than foreclosing inquiry into the underlying question, presumptions and burdens of proof focus the issues and structure and order the modes of their proof. Only when production burdens are not satisfied is further inquiry into an issue precluded. Only if the party assigned a burden of production or proof lacks a fair opportunity to attempt to carry that burden is due process violated.

The Supreme Court's recent decision in *Medina v. California*[139] clearly supports the constitutionality of the use of the presumption of competency suggested here. The Court in *Medina* upheld the constitutionality of a statutory presumption in favor of the competency of a criminal defendant and the placement of the burden of proof in an adjudication of the issue upon the party challenging competency. The Court's rejection of the challenge to the statutory presumption involved there, raised by a defendant who asserted that it was constitutionally unfair to give him the burden of establishing his own incompetency, constitutes an endorsement of the constitutionality of the use of presumptions in the competency-to-stand-trial area.

Medina's endorsement of the constitutionality of presumptions in favor of competency stands in sharp contrast to the Supreme Court's

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137 Bonnie, *supra* note 6, at 544-45.

138 *Id.* at 545 & n.29 ("In the end . . . the argument must fail because it effectively forecloses inquiry on the competence of a person to waive legal safeguards designed to protect incompetent defendants.").

139 112 S. Ct. 2572 (1992); *see* Winick, *supra* note 34 (analyzing *Medina*).

decision two years earlier in *Zinermon v. Burch*.[140] In the course of discussing the necessity of a procedural determination of the competency of a mental patient seeking voluntary admission to a psychiatric hospital, the Court in *Zinermon* noted that, even though the state might be justified in taking at face value a request for admission to a hospital for medical treatment, a state "may 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."[141] This language seems to reject the presumption in favor of the competency of mentally ill persons, and to call for an "inquiry" into the issue whenever a mentally ill person seeks hospitalization. Construed broadly, the *Zinermon* language might suggest the need for such an inquiry whenever a mentally ill person seeks to exercise any rights, including the assertion or waiver of rights in the criminal process. This language, however, was dicta, and if taken literally would undermine the institution of voluntary hospitalization and impose unintended antitherapeutic consequences on patients and serious fiscal costs on the states.[142]

The presumption in favor of the competency of mentally ill persons, which the *Zinermon* dicta seems to question, has been a significant recent development in mental health law.[143] The presumption in favor of competency constitutes a recognition that mental illness does not necessarily produce incompetency, and frequently does not do so.[144] Moreover, it reflects a preference in favor of individual autonomy grounded in both political and legal theory and psychological principles.[145]

Although the implications of the *Zinermon* dicta are questionable,[146] the holding of the case—that some "inquiry" into competency should have been made when the patient involved in that case sought admission to a mental hospital—seems clearly correct, and illustrates the kind of case in which a presumption in favor of competency should be considered to have been rebutted. The patient in *Zinermon* was able to express a preference for hospitalization, but appeared confused and delusional at the time, was unable to state the reasons for his choice, and was hallucinating in a manner that affected his deci-

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140 494 U.S. 113 (1990); *see Competency for Voluntary Hospitalization, supra* note 74 (analyzing *Zinermon*).

141 494 U.S. at 133 n.18.

142 *Competency for Voluntary Hospitalization, supra* note 74, at 177-82, 191, 192-99.

143 *See Competency for Treatment, supra* note 74, at 22-23.

144 *See supra* note 135 and accompanying text.

145 Winick, *supra* note 75.

146 *See Competency for Voluntary Hospitalization, supra* note 74.

sion.[147] In fact, he apparently believed that the psychiatric hospital he was entering was "heaven."[148] These facts certainly suggest the need for an inquiry into competency, and would rebut any presumption in favor of competency that would apply in this and other cases. However, absent facts such as these, suggesting that the individual's expressed choice is the product of mental illness, competency should be presumed, and a formal inquiry into the competency question should be unnecessary.[149]

Although the issues presented in *Medina v. California* were quite different from those presented in *Zinermon*, the *Medina* decision seems to endorse a presumption in favor of competency, whereas the *Zinermon* decision had challenged it.[150] California's statutory presumption in favor of competency examined in *Medina* represents "the enlightened approach of modern mental health law."[151] *Medina* upheld the constitutionality of the California statute, and hence in no way affects the Court's earlier holding in *Zinermon*. But the Court's endorsement of the presumption in favor of competency in *Medina* is a welcome step away from the questionable implications of *Zinermon's* broad dicta.

Medina paves the way for adoption of the proposal made here—that a presumption of competency should attach when a defendant, with the advice and concurrence of counsel, clearly and voluntarily expresses a preference for trial or a guilty plea, and that unless the prosecution can adduce specific evidence showing that the defendant's expressed preference is incompetent, or this conclusion is suggested by the defendant's own statements while engaging in a colloquy with the trial judge, the court should accept the defendant's waiver. By upholding the constitutionality of a statutory presumption in favor of competency and allocation of the burden of proof on the issue to the party asserting incompetency, *Medina* suggests that the proposal advanced here would meet constitutional requirements. Further, the reasons for adopting this presumption are compelling. Such a procedure would further the value deeply ingrained in the

147 *Zinermon*, 494 U.S. at 118-20.

148 *Id.*

149 An American Psychiatric Association Task Force Report that recently examined the *Zinermon* issue concluded that the need for an inquiry into competency could be satisfied by an informal clinical evaluation of the issue occurring at admission, and that a judicial hearing of the kind usually required for involuntary commitment was both unnecessary and unwise. AMERICAN PSYCHIATRIC ASS'N TASK FORCE ON CONSENT TO VOLUNTARY HOSPITALIZATION, CONSENT TO VOLUNTARY HOSPITALIZATION (1993) (TASK FORCE REPORT No. 34); Bruce J. Winick, *How to Handle Voluntary Hospitalization after* Zinermon v. Burch, 21 ADMIN. & POL. IN MENTAL HEALTH 395 (1994).

150 *See* Winick, *supra* note 34, at 858-63.

151 *Id.* at 863.

American constitutional heritage of protecting and promoting individual autonomy.[152] In addition, it would reduce some of the unnecessary costs of the existing incompetency process and reduce the burdens it imposes upon defendants. Moreover, as suggested, the use of the procedural presumption could further these interests without sacrificing the concern for fairness and accuracy in adjudication, and without undermining the moral dignity of the criminal process.

D. COMPARING PROFESSOR BONNIE'S APPROACH AND AN ATTEMPTED RECONCILIATION

In his recent analysis of competency to stand trial, Professor Bonnie criticizes the "open-textured single construct" of competency that usually is applied.[153] Instead, Professor Bonnie suggests viewing competency as two related but somewhat separate constructs—a foundational concept of "competency to assist counsel," which comprises the core constitutional meaning of competency to stand trial,[154] and a contextualized concept of "decisional competency," which relates to the defendant's ability to make various decisions that the criminal process allows the defendant to make.[155] Competence to assist counsel, according to Professor Bonnie, relates to the minimum conditions required for participation in the criminal process.[156] Professor Bonnie relates these minimum components to the underlying societal justifications for the incompetency doctrine—ensuring the moral dignity of the criminal process and the accuracy of adjudication.[157] Accordingly, the concept of competency to assist counsel includes the ability to understand the nature of wrongdoing and punishment, the purpose and effect of the criminal prosecution and conviction, the role of

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152 *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975); *see generally* Winick, *supra* note 75.

153 Bonnie, *supra* note 6, at 548, 551.

154 *Id.* at 548, 561-67; *see id.* at 562 (table 2) (setting forth components of competence to assist counsel).

155 *Id.* at 548, 567-93. Professor Bonnie has identified five separate tests of decisional competence in criminal adjudication. Ranked from lowest to highest, these tests are: (1) Expression of Choice (ability to express a stable preference); (2) Basic Understanding (ability to understand nature and consequences of decision); (3) Basic Rationality (ability to express plausible (*i.e.*, not grossly irrational) reasons for the decision); (4) Appreciation (ability to understand reasons for alternative courses of action) (risks and benefits); and (5) Reasoned Choice (ability to use legal processes to compare and weigh risks and benefits of alternative courses of action). *Id.* at 576 (Figure 1). Each category requires the ability listed parenthetically plus the abilities listed in the earlier-numbered test. *Id.* Professor Bonnie's definition of decisional competence builds on the work of Professors Appelbaum and Grisso, relating to the competency of patients to engage in treatment decisionmaking. *See* Paul S. Appelbaum & Thomas Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988).

156 Bonnie, *supra* note 6, at 554.

157 *Id.* at 555.

defense counsel, and the ability of defendants to relate these understandings to their own situation.[158] In addition, it requires that the defendant be able to recognize and coherently relate pertinent information.[159] This foundational requirement, according to Professor Bonnie, does not include the ability to make decisions that may arise in the criminal case or the defendant's ability to function at trial.[160]

Thus, within Professor Bonnie's framework, a defendant who is competent to assist counsel may not necessarily also be decisionally competent, *i.e.*, may not be competent to make specific decisions in the case. Rather than regarding these two components of competency—ability to assist counsel and decisional competence—as parts of a single construct, Professor Bonnie prefers to regard them as separate constructs. The criminal justice system does not require a defendant to make decisions about all aspects of trial strategy. Most of these decisions are made by the attorney. The law, however, commits a small number of these decisions to the defendant—decisions regarding the plea, whether to waive the right to trial by jury, and whether the defendant will be present and will testify.[161] These decisions are left to the defendant out of respect for individual autonomy. Because not all criminal cases will require decisionmaking about each of these issues, Professor Bonnie's concept of decisional competency is highly contextualized. In Professor Bonnie's view, the foundational ability to assist counsel is required in all cases, and defendants not possessing this core ability should be barred from proceeding, even if they wish to waive the incompetency doctrine. However, a lack of decisional competence should not necessarily bar adjudication.[162] Professor Bonnie's distinction between ability to assist counsel and decisional competence is a useful one. Professor Bonnie's analysis, like my own, is based on the belief "that formal judicial intervention under the competence doctrine should be minimized and that correspondingly greater attention should be paid to the responsibilities and prerogatives of defense counsel."[163] Whereas I question the bar against adjudication if the defendant, although of questionable competence, wishes to assent (with the concurrence of counsel) to trial or a guilty plea, Professor Bonnie accepts and endorses the bar against

158 *Id.* at 555, 562.

159 *Id.* at 555.

160 *Id.* at 555, 561.

161 *Id.* at 553 & n.57, 568-69 (Most trial decisions, including those relating to investigation, discovery, pretrial motions, and trial and appellate strategy, can be made by counsel alone, but a limited number require the personal participation of the defendant).

162 *Id.* at 555-67 ("[A] finding of decisional incompetence need not bar adjudication. Only incompetence to assist counsel bars adjudication."). *Id.* at 561.

163 *Id.* at 548.

adjudication if the defendant lacks the foundational ability to assist counsel.[164] While these approaches are somewhat different, they seek a common goal, and there is more agreement than disagreement.

Recognizing the extent to which the bar on adjudication of an incompetent defendant is ingrained in constitutional theory, the proposal presented here seeks to define competency more narrowly in cases of assent and to call for a procedural presumption in favor of competency when a defendant clearly and voluntarily expresses such assent with the concurrence of counsel. Other than suggesting a lower threshold of competence for those who assent than for those who object to the recommendation of counsel, this proposal did not attempt to set forth a detailed definition of competence. Professor Bonnie's work fills this gap by dividing the construct of competency into the two components of ability to assist counsel and decisional competence, and by providing a detailed analysis of the abilities that a defendant should have and may need in varying contexts. This distinction is useful, and basically consistent with the theory presented here.[165] Restating that theory using Professor Bonnie's terminology shows how the two approaches fit together.

Most defendants able to express a preference for trial or for a guilty plea with the advice and concurrence of counsel will satisfy Professor Bonnie's concept of foundational competency. When counsel has recommended a course of action to a mentally impaired client, and the client has assented to that course of action after consulting with counsel about its likely consequences, or when that course of action is selected by the defendant with counsel's approval, counsel's concurrence with the client's decision represents an implicit representation to the court concerning the defendant's abilities. Counsel should not provide the necessary concurrence without believing that the defendant possesses at least the minimal requirements necessary for understanding the proceedings, communicating relevant information to counsel, and making a decision that is reasonable in the circumstances and is not a product of delusion or gross irrationality. It is unlikely that a defense attorney having serious doubts about the defendant's ability to assist counsel would provide the concurrence that this proposal contemplates as a necessary condition for triggering the presumption in favor of competency. In this sense, an attorney providing concurrence with the defendant's choice is determining that the defendant possesses what Professor Bonnie refers to as the foundational ability to assist counsel.

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164 *Id.*

165 *See supra* notes 116 to 125 and accompanying text.

Defendants unable to meet Professor Bonnie's criteria for ability to assist counsel, therefore, should not receive the concurrence of counsel to proceed or to plead guilty. When the defendant expresses a preference for trial or a guilty plea, and counsel does not concur, believing that the defendant is incompetent to make the decision, it is likely that the court will find the defendant incompetent.[166] In this situation, the court will permit the defendant to proceed only if a formal competency evaluation concludes that the defendant is competent. If, on the other hand, counsel concurs with the defendant's expressed decision, the client's ability clearly and voluntarily to express that decision together with counsel's concurrence will support a presumption that the defendant is able to assist counsel in Professor Bonnie's sense. Doubts concerning the defendant's abilities in this regard, raised either by the prosecution or by the defendant's own responses to the court's inquiries, may be sufficient to destroy the presumption. In such a case, the court must conduct an inquiry into competency, including clinical evaluation when needed. Following this further inquiry, the defendant will be found either competent or incompetent.

If the presumption in favor of competency is not rebutted, the court will deem the defendant competent to plead guilty. Defendants wishing to plead not guilty will be deemed provisionally competent to stand trial. If the defendant is found provisionally competent because the procedural presumption in favor of competency is not rebutted, a further presumption, that the defendant is decisionally competent in Professor Bonnie's sense, is appropriate. To protect the moral dignity of the criminal process and avoid an unacceptable risk of unreliable conviction, Professor Bonnie would categorically bar the adjudication of a case involving a defendant who is unable to assist counsel. Once the defendant meets this standard, however, Professor Bonnie would permit "more flexible responses, such as surrogate decisionmaking or specifically tailored default rules" when a defendant, although able to assist counsel, lacks decisional competence in certain respects.[167] When the defendant's lack of decisional competence (measured under a relatively undemanding standard when the defendant assents to counsel's recommendation) affects decisions regarding issues tradi-

166 The likelihood that the court will find the defendant incompetent in this situation exists under present practices. However, if my proposals are adopted, there probably would not be a need in this situation for the court to find the defendant incompetent. Rather, counsel simply would seek the incompetency continuance suggested in section III E, *infra*.

167 Bonnie, *supra* note 6, at 557; *see also id.* at 561 ("[A] finding of decisional incompetence need not bar adjudication. Only incompetence to assist counsel bars adjudication.").

tionally treated as non-waivable, except through the voluntary and knowing consent of the defendant—such as a plea of guilty and waiver of jury trial—Professor Bonnie would allow a degree of surrogate decisionmaking by counsel. For decisionmaking about jury trial, if the defendant is decisionally incompetent, Professor Bonnie would allow the attorney to make the decision.[168] For decisionmaking about how to plead, if the defendant is decisionally incompetent, Professor Bonnie would allow the attorney to plead the defendant not guilty and obtain a trial, but would not permit a plea of guilty.[169] In addition, in certain circumstances in which the attorney and client disagree with regard to a particular decision, and in which the defendant lacks decisional competence (as measured under a more demanding standard), Professor Bonnie would allow surrogate decisionmaking (except for pleas of guilty).[170] With respect to other decisions, when client and counsel are in agreement, the defendant's lack of decisional competence would not bar trial; rather, counsel would be permitted to make the decision as surrogate decision-maker.[171]

The approach presented here differs only somewhat from Professor Bonnie's with respect to the treatment of defendants with potential decisional incompetence. If the presumption in favor of competency recommended here remains unrebutted, the defendant is presumed to have both competence to assist counsel and decisional competence.[172] This would permit a plea of guilty, and during trial, would permit the defendant to make strategic choices with counsel. The defendant and counsel would discuss whether the defendant should waive jury trial, testify, or raise certain affirmative defenses, such as an insanity defense. If the defendant expresses a preference with regard to those issues, this preference would be presumed to be competent if it is in accordance with counsel's recommendation or counsel concurs in the decision. If counsel believes the defendant's assent is without sufficient understanding of the circumstances, or is the product of mental illness, counsel should not concur. The ultimate decision, however, is left to the attorney, who is always subject to a potential claim of ineffective assistance of counsel.[173] There should

168 *Id.* at 582-86.

169 *Id.*

170 *Id.* at 579-80, 586-87.

171 *Id.* at 545-46, 557, 577, 586.

172 Whether decisional competence can be presumed in cases in which defendants are competent to assist counsel is, of course, an empirical question for which there is presently no available data. Empirical research on this issue would therefore be helpful.

173 In leaving the bulk of competency decisionmaking in the hands of defense counsel, both Professor Bonnie and I assume that counsel is competent and will zealously safeguard the defendant's interests. The Sixth Amendment guarantees the effective assistance of

be little reason to inquire into a defendant's competence to make most decisions. Only in the case of decisions usually requiring judicial inquiry, such as a decision to waive counsel or a jury trial, would the court need independently to ascertain the defendant's competency.

Thus, both Professor Bonnie and I would leave the matter of whether the defendant possesses sufficient competence largely to the judgment of counsel. A lower threshold of competence should be used for defendants who assent to counsel's recommendation than for those that object. When the defendant objects to counsel's recommendation concerning a matter on which the law requires a personal decision by the defendant—such as waiver of jury trial or the decision to testify or to decline to do so—counsel should honor that preference unless the defendant is highly incompetent. If counsel believes the client is competent, counsel must defer to the defendant's preference on an issue that the law leaves to the defendant, and probably also should defer to the client on many other issues. If, on the other hand, counsel believes the client is incompetent, counsel should either seek the treatment continuance described in the next subsection or raise the competency issue, in which case the court would then conduct an inquiry into the matter. When defendants are able to express clearly and voluntarily their assent to a decision, however, counsel's concurrence constitutes an implicit representation that the client is sufficiently competent to make the decision.

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counsel. However, the quality of the criminal defense bar is varied, and in some areas, the promise of the Sixth Amendment remains unfulfilled. Many criminal attorneys are talented, energetic advocates who effectively represent their clients' interests. Sadly, however, some are not. Some suffer under case loads too heavy to devote sufficient time to a particular case. Some are incompetent, and some even are unethical.

Leaving incompetency decisionmaking largely in the hands of counsel thus raises certain risks. These risks increase in cases involving mentally ill defendants, because such clients are particularly vulnerable to malpractice by counsel. Notwithstanding these risks, in designing legal rules it seems sensible in general to make the assumption that defense attorneys are competent and will vigorously represent their clients' interests. To minimize this risk, a trial court should be particularly sensitive to the possibility of ineffectiveness of counsel, and when appropriate, should question counsel to insure that the defendant's interests are properly represented. Counsel for an impaired client bears a special degree of professional responsibility. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.3, 1.14 (1983). 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. *See* Winick, *supra* note 34, at 842-43. Although in general, the trial court should leave the competency question to counsel, when the court has concerns in this area, it would be appropriate to inquire of counsel whether the defendant's mental condition has been fully considered by counsel, and whether counsel has had the opportunity to consult with a defense clinician concerning the question. *See* Bonnie, *supra* note 6, at 578. As Professor Bonnie points out, there is "a problem of quality assurance" in this area, but "[i]f attention to 'competence' should be enhanced in this context, it should be directed toward the competence of counsel, not the competence of the defendant." *Id.*

Unless the prosecution produces evidence suggesting a lack of competence to engage in decisionmaking concerning one of these crucial issues, or unless the court's own colloquy with the defendant produces statements by the defendant suggesting a lack of decisional competence, no further inquiry should occur. With regard to decisions that do not require a defendant's personal decision—the myriad tactical and evidentiary decisions that arise at the pretrial and at the trial stages—both Professor Bonnie and I would allow counsel to act on behalf of a client even when competence to engage in rational decisionmaking is in doubt.

Although Professor Bonnie and I disagree in certain respects, our approaches are more similar than dissimilar. This Article has shown how to apply the use of the procedural presumption in favor of competency in the assessment of both the ability to assist counsel and to decisional competence. Both approaches shift much of the competency determination process from the formal judicial arena to the attorney-client relationship. Rather than having extensive clinical evaluation of competence followed by judicial determination, the bulk of the competency determination instead would occur within the professional relationship. Counsel would always remain free to obtain a clinical consultation as part of the defendant's Sixth Amendment right to effective assistance of counsel,[174] or could always consult another attorney to help in the decisionmaking process. However, leaving the bulk of competency assessment to the attorney-client relationship should produce fair decisions that do not conflict with the societal purposes underlying the competency doctrine. The ability of the prosecutor to adduce specific evidence of incompetency, or of the court to conduct its own inquiry of the defendant during an in-court colloquy, provide additional assurance that leaving much of the decisionmaking in this area to the attorney-client relationship will not undermine the moral dignity of the criminal process or the accuracy of adjudication.

My original proposal drew heavily on an analogy between the attorney-client relationship and the doctor-patient relationship. In the context of competency to make treatment and hospitalization decisions, clinicians typically are trusted to make their own assessments of their patients' competency, at least in cases of patient assent to interventions recommended by the physician.[175] Attorneys, like physicians, have a fiduciary relationship with their clients. Both attorneys

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174 *See* Ake v. Oklahoma, 470 U.S. 68 (1985).

175 *See generally Competency for Treatment, supra* note 74, at 27-28, 31-33; *Competency for Voluntary Hospitalization, supra* note 74, at 180.

and physicians have a professional duty to promote and protect the best interests of their clients. Moreover, like physicians, attorneys are best situated to understand their clients' cases, and therefore to assess competence.

Competence to stand trial is fundamentally a legal question. A lawyer is better able than a clinical evaluator to determine whether a client possesses the skills needed to participate in a criminal trial. Moreover, the lawyer is in the best position to understand the skills that will be needed in the context of a particular case. The special constitutional obligation that the Sixth Amendment places on attorneys to provide effective assistance of counsel to their clients "entails a wide sphere of discretion to define and implement the strategic objectives of the defense."[176] The Sixth Amendment also should insulate the attorney-client relationship from undue prosecutorial or judicial inquiry.[177]

My initial article proposed as an alternative to allowing a defendant of questionable competency to waive the protections of the incompetency doctrine, that counsel should be able to "waive" the doctrine on the defendant's behalf as long as the client assents. The concept of "waiver," however, seems awkward in this context. Counsel may waive a variety of trial-related rights through action or inaction, thereby binding the client whether or not the client participated in the decision.[178] However, there are several critical constitutional rights that, under existing constitutional and ethical theory, require the client's own voluntary and knowing waiver. These include the right to plead guilty, the decision whether to have a jury trial, and the decision whether to testify.[179] Because permitting an attorney to waive these rights would conflict with deeply ingrained principles, Professor Bonnie rejects an across-the-board waiver theory.[180] However, he agrees that "surrogate decisionmaking by the attorney provides an attractive possibility in some contexts."[181] Although an attorney should not be permitted to plead guilty on behalf of a client, Professor Bonnie agrees that surrogate decisionmaking by the attorney should be permitted with regard to certain issues in cases that involve trials.[182]

I accept Professor Bonnie's criticism that "waiver" by the attorney of certain fundamental rights would be inconsistent with accepted

176 Bonnie, *supra* note 6, at 565 (citing Strickland v. Washington, 466 U.S. 668, 688-90 (1984)).

177 *Id.*

178 *See Restructuring Competency, supra* note 5, at 959-60.

179 Bonnie, *supra* note 6, at 545-47; *Restructuring Competency, supra* note 5, at 959 n.181.

180 Bonnie, *supra* note 6, at 545.

181 *Id.*

182 *Id.* at 545-47, 557, 561, 577, 582-87; *see supra* notes 168 to 171 and accompanying text.

doctrine, and that it is unlikely that courts will adopt a general waiver-by-counsel rule. Perhaps my proposal was too broad in this regard, and I now recede from it. But these instances aside, virtually all of the rights and strategic options that a defendant enjoys may be waived by counsel. For those that are not so waiveable, allowing counsel as surrogate decision-maker to make the decision in certain circumstances, as Professor Bonnie suggests, achieves the same result. Therefore, Professor Bonnie's attempt to resurrect the waiver theory as a surrogate decisionmaking approach for many of the issues that arise in cases that are resolved by trial deserves applause.

Both Professor Bonnie and I disagree with the current requirement that attorneys and courts initiate an inquiry into competency whenever they harbor a good faith doubt as to the defendant's competence.[183] This judgment should be left largely in the hands of defense counsel.[184] The current requirement restricts a lawyer's ability to protect and promote the best interests of the client. This restriction erodes client trust and confidence in counsel and impairs the ability of counsel to function effectively. Placing counsel in such a position undermines the Sixth Amendment right to counsel and is constitutionally suspect.[185]

My original proposal addressed waiver in this context, arguing that counsel should be permitted to eschew the competency question when both counsel and client concluded that resolution of the criminal charges would be better for the defendant than an incompetency adjudication. Professor Bonnie grounds his acceptance of this approach in a slightly different premise—that the attorney is in the best position to decide whether an inquiry into competency should be undertaken.[186] Although I adhere to my waiver theory with regard to most rights and strategic options, I accept Professor Bonnie's attempt to reconceptualize the premises supporting my original proposal.

Both approaches would relax the requirement that counsel initiate a formal competency inquiry whenever there is doubt about the

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183 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.2 (1989); Bonnie, *supra* note 6, at 546, 564. For discussion of the current requirement and the ethical dilemma it creates for counsel, see Chernoff & Schaffer, *supra* note 32; Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65.

184 Bonnie, *supra* note 6, at 546, 564.

185 *See* Polk County v. Dodson, 454 U.S. 312, 324 n.17 (1981) ("Our adversary system functions best when a lawyer enjoys the whole-hearted confidence of his client."); ABA STANDARDS FOR CRIMINAL JUSTICE § 4-3.1 commentary, at 4-29 (2d ed. 1980) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence.").

186 Bonnie, *supra* note 6, at 546.

defendant's competence and would leave the judgment as to competency to the attorney and the client. This would eliminate many unnecessary formal judicial determinations of competency. It also would avoid much unnecessary clinical evaluation, and thereby allow a reallocation of scarce clinical resources from evaluation to treatment. Furthermore, it would reduce many of the costs and burdens imposed by existing practices. When a defendant of questionable competency is willing voluntarily to assent to counsel's recommendation concerning a defense strategy, the court should respect those wishes. Both allowing a measure of surrogate decisionmaking by counsel and instituting a presumption in favor of competency in cases of assent provide greater deference to the autonomy both of the individual and of the attorney-client relationship consistent with the protective objectives and societal concerns underlying the incompetency doctrine.

My original proposal suggested that under appropriate safeguards, courts should permit defendants of questionable competency to waive the "benefits" of the incompetency doctrine. However, under *Pate v. Robinson*, incompetent defendants may not waive their rights. To avoid this dilemma, the law should recognize a presumption that would eliminate further inquiry into whether a mentally impaired defendant actually was incompetent in cases in which the defendant assented to a recommendation of counsel in favor of trial or a guilty plea. Use of a procedural presumption would not violate the Court's holding that a fair procedural determination of the competency issue occur whenever reasonable doubt as to competency is raised.[187] Although this presumption might permit waiver by some defendants presumed competent who actually are incompetent, *Medina v. California* shows that a procedural rule governing the determination of criminal competency is not unconstitutional, even though it fails to eliminate the possibility of error in the application of the incompetency test.[188]

States are reluctant to experiment in areas that seem settled by constitutional doctrine, particularly when the results might place criminal convictions and guilty pleas in jeopardy. Therefore, the proposed restructuring of the incompetency doctrine will take time. The proposal was designed to stimulate radical rethinking about the incompetency doctrine, and a period of scholarly analysis and debate is a necessary predicate to law reform.

Therefore, Professor Bonnie's critique of the proposal, and his

187 *See supra* notes 127, 134 and accompanying text.

188 *See* Winick, *supra* note 34, at 843-45. The Court rejected the contrary assertion that Justice Blackmun made in his dissent. *Medina*, 112 S. Ct. at 2583.

own attempt to reshape it are welcome. Professor Bonnie's attempt to differentiate the client's ability to assist counsel from that client's decisional competence is useful. His examination of attorney-client interactions in the areas in which the defendant's decisional competence may be at issue is also useful. Professor Bonnie's work is part of an ongoing research program supported by the John D. and Catherine T. MacArthur Foundation Research Network on Mental Health and the Law, which includes the development of new competency assessment instruments and much needed empirical research on the extent to which a defendant's abilities in one area predicts the existence of needed abilities in another.[189] Professor Bonnie's useful criticisms and his proposed approach have led to the expansion and refinement set forth in this Article. Professor Bonnie is on the same journey, and although his path is somewhat different, his destination is the same. Hopefully, this scholarly dialogue will continue, and further empirical and theoretical work will investigate the questions it raises.

E. SUBSTITUTING A SYSTEM OF TRIAL "TREATMENT CONTINUANCES" FOR THE FORMAL INCOMPETENCY PROCESS IN CASES INVOLVING DEFENDANTS WHO ASSERT THEIR INCOMPETENCY AS A BAR TO TRIAL

There should be no constitutional impediment to replacing the competency evaluation process with a system of trial continuances. Cases in which defendants seek to waive the incompetency doctrine and stand trial or plead guilty over an objection by the prosecution that they are incompetent represent only a small percentage of total cases. In the overwhelming majority of cases, it is the defendants, through their counsel, who raise the incompetency question as a bar to trial. Under existing practices, a formal competency evaluation is triggered by the defendant's request.

Instead of invoking the formal evaluation process in such cases, courts could grant a continuance of reasonable duration to the defendant based on the assertion of counsel that the defendant is incompetent.[190] This would require attorneys to certify that they seek the continuance in good faith and on reasonable grounds and to set

189 Bonnie, *supra* note 6, at 580 & n.138 (citing Steven K. Hoge et al., THE MACARTHUR FOUNDATION RESEARCH NETWORK ON MENTAL HEALTH AND THE LAW, PRELIMINARY REPORT: THE MACARTHUR STRUCTURED ASSESSMENT OF COMPETENCIES OF CRIMINAL DEFENDANTS, February 21, 1992).

190 *Restructuring Competency*, *supra* note 5, at 979-83. Psychiatrist Thomas Szasz and Professors Burt and Morris previously have advanced variations of this continuance proposal. *See* THOMAS S. SZASZ, PSYCHIATRIC JUSTICE 261 (1965); Burt & Morris, *supra* note 88, at 81, 93-95.

forth the specific statements by the defendant that form the basis for the request. Counsel would have to support a request for a further continuance with a statement from a clinician certifying that the defendant was incompetent, stating that the defendant was receiving appropriate treatment, and predicting a restoration of the defendant's competence within a reasonable period.[191] The clinician's statement could also be required to include a specific treatment plan, detailing the kinds of treatment attempted and proposed. Defendants would get substantial choice in electing the type of treatment to improve their trial functioning. The place of treatment would depend on the defendant's bail status. If in custody, such treatment would be administered either in a jail or in a security mental health facility; if released, it would be administered in the community as an outpatient or voluntary inpatient. Defendants would bear the cost of treatment if not in custody, unless they were indigent.

In addition to avoiding the cost of unnecessary clinical evaluation and formal judicial determination of the defendant's competency, this proposal could have considerable therapeutic advantages for the defendant. Based on the literature on the psychology of choice,[192] the potential for successful treatment of defendants who are incompetent to stand trial is increased when the defendant accepts treatment voluntarily rather than when the defendant is coerced to enter a forensic facility.[193] Thus, placing the burden on the defendant (and counsel) to arrange for treatment with a provider of choice as a condition for receiving the requested continuance is both efficient and therapeutic. With active treatment, particularly treatment the defendant seeks to obtain, the great majority of mentally impaired defendants will gain sufficient competency to participate in trial within several weeks or months.[194]

Whereas, under existing practice, an incompetency determination suspends the criminal proceedings, the treatment continuance proposed here need not do so. During the continuance, the court could require the defense attorney to file any pretrial motions that

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191 *Restructuring Competency, supra* note 5, at 979.

192 The literature on the psychology of choice and its implications for the efficacy of treatment in a number of differing contexts is explored in *Competency for Treatment, supra* note 74, at 46-53; *Competency for Voluntary Hospitalization, supra* note 74, at 192-99; Winick, *supra* note 75, at 1755-68; Winick, *supra* note 76, at 100-11.

193 WEXLER & WINICK, *supra* note 73, at 315; *Restructuring Competency, supra* note 5, at 980 & n.272; *see generally* David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991); Winick, *supra* note 75, at 1255-68; Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT'L J.L. & PSYCHIATRY 99 (1994).

194 *Id.* at 980.

can be resolved without the client's assistance.[195] Although the grant of a treatment continuance would suspend the defendant's right to a speedy trial, this scheme would permit defense counsel to file, at any time, a notice with the court that the defendant has become competent. Afterwards, proceedings should resume, with speedy trial periods again running.

Requiring certificates from counsel and from a clinician as conditions for the grant or renewal of a continuance, coupled with judicial supervision, should prevent abuse of the treatment continuance process. The trial judge maintains wide discretion over whether to grant or deny requested continuances,[196] and the judge could condition granting of a treatment continuance on receipt of weekly or monthly reports from the defendant's attorney or the treating clinician or both. The court would always be able to order an independent clinical evaluation or court-supervised treatment if necessary. The prosecutors would also monitor the process and could always move for a formal competency evaluation if they suspected abuse of the continuance process.[197]

The proposal that a defendant voluntarily accept treatment as a condition for the grant of a trial continuance could be joined with a form of "wagering" or behavioral contracting.[198] Under this proposal, to increase the efficacy of treatment, the defendant and the trial court could enter into a contingency contract under which the defendant would receive the continuance sought in exchange for an agreement to participate in an appropriate treatment program and for progressing toward the goal of restoration to competency, perhaps based on a specified schedule of target goals and dates, culminating in a restoration to competency within a period specified in the contract. Jurisdictions could increase the incentive to perform effectively in treatment by denying the defendant credit against any ultimate sentence received for time spent in incompetency commitment unless the defendant makes a substantial effort.[199] In such jurisdictions, a credit against sentence could be used as a reinforcer in the contingency con-

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195 *See* Jackson v. Indiana, 406 U.S. 715, 741 (1972) (suggesting that states may permit such motions even during the time defendant is incompetent).

196 *See* Morris v. Slappy, 461 U.S. 1, 11 (1983); *Restructuring Competency, supra* note 5, at 980.

197 *Id.* at 981. In the alternative, the court could refer the continuance request to a special master or to a special program staffed by clinically trained attorneys assisting the court. *Id.* at 981-83.

198 WEXLER & WINICK, *supra* note 73, at 315-16; *see* Wexler, *supra* note 193; 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 (1991).

199 *See Restructuring Competency, supra* note 5, at 947.

tract to induce an expeditious restoration to competency.[200]

Substituting a system of trial continuances for the existing formal incompetency process also would have the salutary effect of avoiding unnecessary incompetency labeling. As indicated, the term "incompetency to stand trial" has an unfortunate global and permanent connotation, implying an immutable impairment, rather than a temporary difficulty that in most cases is easily remedied.[201] The harmful psychological effects of using an incompetency label can be avoided by granting a "treatment continuance," a label that has no similar negative connotations. Even when it is necessary to make a formal incompetency determination, for example when defendants seek to waive a right that they are determined to be incompetent to waive, they could be found "temporarily impaired" or "temporarily unable to waive" the right in question.[202] Such a label suggests hope rather than hopelessness, and encourages individuals to view their problem as one that appropriate treatment can resolve. Such a redesigned label would be less stigmatizing to defendants and would limit the risk that individuals might interpret their impairment as global and relatively stable, an attribution that would increase the likelihood of learned helplessness and other inhibitory patterns that interfere with a return to competency.[203]

F. DEFINING AND EVALUATING COMPETENCY IN THE CRIMINAL PROCESS

The Supreme Court adopted its classic formulation of the standard for incompetency in the criminal process in the 1960 case of *Dusky v. United States*.[204] The Court held that a court was required to determine whether the defendant "has sufficient present ability to

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200 WEXLER & WINICK, *supra* note 73, at 316.

201 *See supra* note 59 and accompanying text; Sales & Kahle, *supra* note 59, at 394.

202 Winick, *supra* note 59, at nn.181-82. Sales and Kahle have suggested the term "unable to stand trial" as "less laden with unnecessary trait-like and permanent implications because unable people often later become able." Sales & Kahle, *supra* note 59, at 394.

203 Winick, *supra* note 59. *See also supra* notes 183 to 184 and accompanying text. Even if the incompetency-to-stand-trial label is not changed as suggested here, counsel can play an important role in minimizing the antitherapeutic impact of such labeling. Counsel can interpret the label for their clients in a way that suggests that it largely is a vehicle for obtaining an advantageous postponement of the trial, that it will give them the opportunity to obtain needed treatment that will increase their functioning and relieve their suffering, and that their ability to participate in the trial that ultimately will be held will be enhanced as a result, as will the potential for a more favorable outcome. *See supra* note 188 and accompanying text; *see also* Keri A. Gould, *Therapeutic Jurisprudence and the Arraignment Process: A Defense Attorney's Dilemma Whether to Request a Competency Evaluation, in* MENTAL HEALTH LAW AND PRACTICE THROUGH THE LIFE CYCLE (Simon Verdun-Jones & Monique Layton eds., 1994).

204 362 U.S. 402, 402 (1960). All jurisdictions follow *Dusky*, although statutory terminology varies widely. *Restructuring Competency, supra* note 5, at 923 & n.4.

consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."[205] Although some courts had applied a more demanding standard of competency when a defendant attempted to plead guilty or waive counsel (requiring the ability to make a reasoned choice), in *Godinez v. Moran*[206] the Supreme Court recently rejected such a higher standard. Instead, the Court found that the *Dusky* formulation was the appropriate test of competency throughout the criminal process.[207] The *Dusky* standard emphasizes the ability of a defendant to understand and consult, not necessarily the ability to engage in rational decisionmaking. In *Godinez*, the Court distinguished between competency and the knowledge and voluntariness required for the waiver of certain fundamental rights.[208] A competency inquiry, the Court noted, focuses on the defendant's "mental capacity; the question is whether he has the *ability* to understand the proceedings."[209] By contrast, the Court noted, the inquiry into "knowing and voluntary . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced."[210]

Although the Court thus indicated that its competency standard was not as broad as some courts had thought, the standard is still quite broad, open-textured, and vague, permitting clinical evaluators substantial latitude in interpreting and applying the test.[211] The clinical instruments available for competency assessment compound the problem.[212] These instruments typically list the many potentially relevant capacities that a defendant might need without indicating which are most important.[213] Moreover, because clinical evaluators rarely consult with counsel to ascertain the particular skills the defendant will need to function effectively in a particular case, the assessment instruments, by listing a broad range of abilities, encourage clinical evaluators to apply a generalized, abstract standard of competency, rather than a more appropriate, contextualized approach to competency as-

205 *Dusky*, 362 U.S. at 402.

206 113 S. Ct. 2680 (1993).

207 *Id.* at 2686.

208 *Id.* at 2687.

209 *Id.* at 2687 n.12 (*citing* Drope v. Missouri, 420 U.S. at 171) ("[D]efendant is incompetent if he 'lacks the *capacity* to understand the nature and object of the proceedings against him.'") *Id.* (emphasis added by *Godinez* Court).

210 *Id.* (citations omitted).

211 *See* Bonnie, *supra* note 6, at 549-50; *Restructuring Competency*, *supra* note 5, at 982-83.

212 *See* THOMAS GRISSO, EVALUATING COMPETENCIES 78-104 (1986) (discussing instruments).

213 Bonnie, *supra* note 6, at 549.

sessment.[214] By simply relying upon clinical judgment based upon all the circumstances, these instruments make competency assessment a highly discretionary exercise in clinical judgment.[215] In addition, many clinical evaluators are paternalistically oriented, and, without more concrete guidance, tend to classify marginally competent mental patients as incompetent.[216] The literature documents the tendency of clinical evaluations in the criminal courts to misunderstand the legal issues involved in incompetency, frequently confusing it with legal insanity or with the clinical definition of psychosis.[217] Some clinicians over-diagnose incompetency to bring about what seems to them a more humane disposition of the case, or to secure mental health treatment because they assume it will be helpful.[218] The discretion vested in clinical evaluators is made more troubling by the fact that appellate courts rarely review, and almost never reverse, trial court competency determinations,[219] and the fact that trial judges almost always defer to clinical evaluators.[220]

Thus, decisionmaking in this area is effectively delegated to clinical evaluators making low visibility and essentially unreviewed decisions pursuant to a vague, open-textured standard. This arrangement allows for an obscuring of the distinction between the clinical and legal components of incompetency, and allows clinicians to regard a competency assessment as largely an exercise in clinical description. Assessing competency, however, involves cultural, social, political, and legal judgments which are more normative in nature than clinical.[221] The essentially legal nature of the concept of competency in the criminal process calls for courts and legislatures to define competency with greater precision. Moreover, a narrow definition of competency should result in classifying marginally competent defend-

214 *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7.41 commentary at 175 (1989); GRISSO, *supra* note 212, at 76-77; MELTON ET AL., *supra* note 49, at 12; ROESCH & GOLDING, *supra* note 32, at 10-13.

215 Bonnie, *supra* note 6, at 549.

216 *See Restructuring Competency, supra* note 5, at 982-83.

217 *Restructuring Competency, supra* note 5, at 982 (citing studies).

218 *Id.* at 983.

219 Bonnie, *supra* note 6, at 549.

220 *See id.* at 550; Steven L. Golding et al., *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 121 (1984); Steven D. Hart & Robert D. Hare, *Predicting Fitness To Stand Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REP. 53, 56, 59 (1992); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competency to Stand Trial*, 47 J. CLINICAL PSYCHIATRY 29, 30 (1986).

221 *See* GRISSO, *supra* note 212, at 30; *Restructuring Competency, supra* note 5, at 966; *see also Competency for Treatment, supra* note 74, at 25-26 (discussing assessments of competency to consent to treatment).

ants as competent rather than as incompetent.[222] In defining competency to stand trial, the law should not require of defendants suffering from mental illness unreasonably high decisionmaking abilities that many "normal" criminal defendants do not possess.[223] For this reason, Professor Bonnie's efforts to delineate in detail the various components of competency to stand trial deserves applause.[224] Moreover, his efforts and the efforts of his co-researchers in the MacArthur Network on Mental Health and the Law to develop more detailed assessment instruments and to conduct empirical research on the decisionmaking abilities of both "normal" and mentally ill defendants will be most useful.

As suggested, the definition of competency should vary depending on whether the defendant assents or objects to a recommendation made by counsel. Assent to counsel's recommendation provides an assurance that the defendant's choice is reasonable and likely to be in the defendant's best interests. Erring on the side of finding a marginally competent assenting defendant to be competent, therefore, will not undermine the societal interests in accuracy and the moral dignity of the criminal process. When the defendant objects to counsel's recommendation, the assurance that the defendant's choice is reasonable is absent, and the societal concerns justify a higher degree of scrutiny of the defendant's competency.

Professor Bonnie agrees that the legal test for competency should differ according to whether the defendant assents or objects to counsel's recommendation.[225] Furthermore, his analysis of incompetency decisionmaking in the context of decisions whether to raise an insanity defense has demonstrated that such a differential standard accurately describes existing practice.[226] Professor Bonnie found that when the defendant pleads insanity in accordance with counsel's recommendation, courts, in practice, use a "basic understanding" test of competency, in which capacity to understand the nature and consequences of the decision suffices.[227] When defendants refuse a recom-

222 Winick, *supra* note 62, at 850-52.

223 *See Restructuring Competency*, *supra* note 5, at 970-75. Michael Perlin's concept of "sanism" may help to explain this differential approach. *See, e.g.*, Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 91-93 (1991); 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 (1993); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993).

224 *See* Bonnie, *supra* note 6.

225 *Id.* at 576.

226 Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 309-11 (1992); Bonnie, *supra* note 6, at 576-77.

227 Bonnie, *supra* note 6, at 576-77.

mended insanity plea, however, and the defense attorney raises doubts about competency, a higher test of competency is applied.[228] Finally, Professor Bonnie found that when the defendant is deemed competent to stand trial, although not decisionally competent to waive the insanity plea, surrogate decisionmaking on the issue, usually by counsel, is permitted.[229]

Professor Bonnie recommends a two-level test for decisional competence based on whether the defendant assents to or objects to counsel's advice. In general, he suggests that only a basic understanding test of competency should be required for decisions (including those waiving constitutional rights) in which the defendant assents to counsel's recommendation.[230] Under this low-level test, only the ability to express a choice and to understand its nature and consequences would be required, and deficits or impairments bearing on the defendant's reasons for accepting counsel's recommendation would not be the subject of inquiry.[231] When, however, the defendant insists on acting contrary to counsel's advice in a manner that raises doubts about competency, Professor Bonnie suggests that the test should require the ability to make a reasoned choice.[232] This is a more stringent test that requires appreciation and the ability to engage in rational decisionmaking.

Professor Bonnie's approach attempts to define both the lower standard of competency in cases of assent to counsel's recommendation and a higher standard in cases of objection. The results of his further work with the MacArthur Network on Mental Health and the Law to operationalize these standards in assessment instruments and to test their administration are eagerly awaited. Although the Supreme Court in *Godinez* refused to depart from the unitary standard of competency identified in *Dusky*, it declined to do so on constitutional grounds. Thus, the states must accept the *Dusky* standard as a constitutional minimum, but they are free to go beyond it and fashion differing tests of competency for different contexts, including recognizing a distinction between assent and objection. Hopefully, Professor Bonnie's work in this area will provoke further scholarly debate about such differing standards, and the states ultimately will go beyond *Dusky* in this regard.

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228 *Id.* at 577.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.* at 586-87.

IV. CONCLUSION

This Article has recommended a restructured incompetency process that recognizes a distinction between assent and objection and that presumes competency in cases in which the defendant assents to counsel's recommendation, or in which counsel approves the defendant's choice. It has further recommended the use of certifications by counsel, both in cases in which such a presumption is applied, and in those in which defendants seek to raise their mental impairment as a bar to trial and counsel seeks a "treatment continuance." These recommendations will subsume the bulk of the competency determination process within the attorney-client relationship. This is preferable to the present process, in which almost all determinations go through a formal judicial process that relies heavily upon often unnecessary clinical evaluations. The proposal presented here leaves many decisions about competency to counsel, a professional with a fiduciary duty to act in the defendant's best interests, and who is best situated to ascertain the client's deficits and their impact upon the skills needed to participate in the criminal case at hand. When necessary, of course, counsel will have access to clinical assistance in making these decisions, but in most cases, the decision will be left to counsel.

Moving competency determinations from clinicians to defense attorneys should increase the accuracy of competency decisionmaking, particularly in light of the tendency of clinical evaluators to misunderstand the incompetency standard and to over-diagnose incompetency.[233] Moreover, it would recognize that competency in the criminal process is more a legal than a clinical question, involving legal and normative judgements and not merely clinical ones. In addition, it would avoid a serious conflict of interest for counsel that can undermine the attorney-client relationship and threaten the values underlying the Sixth Amendment right to counsel. Finally, subsuming the bulk of competency determination in the attorney-client relationship would avoid an unnecessary drain on scarce clinical time, allowing a reallocation of clinical resources from evaluation to treatment. This reallocation can increase the quality of the incompetency treatment process and limit delays, allowing defendants impaired by mental illness to improve more rapidly and to obtain a more expeditious disposition of their criminal charges.

If implemented, these recommendations can transform the way the law defines and evaluates competency in the criminal process, as well as the way it deals with defendants whose abilities to assume the role of criminal defendants are impaired by mental illness. Those

233 *See supra* notes 216 to 217 and accompanying text.

most seriously impaired would still be able to claim the protections of the existing doctrine, although most would receive treatment continuances rather than a label of "incompetent." Those whose impairment is marginal would be able either to obtain treatment, which they themselves arrange and choose as a condition for receiving a brief continuance, or to plead guilty or face their charges. Courts would usually honor the choice of assenting to counsel's recommendations. They would interfere with only those whose assent seems clearly to be a product of mental illness. The result can be a restructured competency doctrine that fulfills its protective purposes in a way that is more sensitive to individual autonomy, and that avoids many of the unnecessary costs and burdens of delay, stigma, and hospitalization that existing practices too often impose.