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The Burden of Proving Competence to Stand Trial: Due Process at the Limits of Adversarial Justice

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I. INTRODUCTION

A defendant's mental competence to stand trial is a fundamental prerequisite to participation in our adversarial system of criminal justice, but proving that this requirement is satisfied presents unique challenges. While an incompetent defendant's inability to comprehend the

nature of the proceedings or to assist his attorney challenges the very validity of the adversarial system, most jurisdictions rely on that same adversarial system to resolve questions of competence. These questions about the competence of the defendant and the legitimate scope of the adversarial system all arise in the context of the competency hearing procedure.

The burden of proof in competency hearings has emerged as a salient issue, deeply dividing courts on the constitutional, moral, and policy implications. State supreme courts and the federal circuit courts of appeals have split on whether the due process clause permits states to place the burden of proof in competency hearings on the defendant. Although the issue has been addressed in many opinions, the question is benighted by well-intentioned, but misguided rhetoric. Many courts have tried to address the issue fully; few have realized that the facts of the specific cases before them disguise this chimerical issue's other features. Courts can only undertake a proper analysis of the due process requirements of the burden of proof in competency hearings after competency jurisprudence has been pruned of useless and confusing arguments and addressed with a full understanding of the role competence plays in the adversarial system.

This Note analyzes the limitations that the due process clause places on states in allocating the burden of proof in competency hearings. Part II briefly describes the histories of the competency requirement, the standard of competence to stand trial, and the procedures used in competency decisionmaking. Part III examines in greater detail the development of the burden of proof in competency hearings and introduces the contemporary controversy over the allocation of the burden. Part III closes with a description of *People v. Medina*, the most recent of the burden of proof decisions, which presents well the arguments for and against a constitutional prohibition against allocating the burden of proof to the defendant. Part IV assesses the arguments against a constitutional requirement that states bear the burden of proof and attempts to free competency jurisprudence from much of the confusing rhetoric which characterizes the case law. Part V assesses the arguments for such a constitutional requirement, undertakes a due process analysis of the burden of proof, and discusses the role of social values in allocating the risk of error between litigants in the criminal justice process. Part V concludes that because of the value society places on competence, due process requires that the State bear the burden of proof in competency hearings.

II. THE COMPETENCE TO STAND TRIAL REQUIREMENT

The requirement of competence to stand trial arose in the common law out of concern for fairness to the defendant.[1] The fiercely adversarial nature of the criminal justice process in the seventeenth and eighteenth centuries is difficult for twentieth century observers to imagine: a defendant accused of a serious felony could not be represented by counsel, and had to plead his own case against an experienced prosecutor.[2] With the sides so unevenly matched, it is little surprise that the law came to view competence as a fundamental prerequisite to the imposition of the adversarial process on a defendant. Moreover, the justifications for the competency requirement followed logically from the defendant's direct participation in the process. These justifications are four:[3] it is fundamentally unfair to try an incompetent defendant; it is inhumane to subject an incompetent defendant to trial and punishment; the trial of an incompetent defendant is inconsistent with the law's disfavor of trials in absentia;[4] and finally, the pathetic spectacle of the trial of an incompetent defendant diminishes society's respect for the dignity of the criminal justice process.[5] Despite the continued currency of all four rationales, fairness to the defendant has always been the principal basis for the requirement.

Fundamental, therefore, to an adversarial system of justice, the competency requirement is a component of the due process that is guaranteed by the Fifth and Fourteenth Amendments. In 1899 in *Youtsey v. United States*,[6] the Sixth Circuit Court of Appeals expressed this requirement in quasi-jurisdictional terms, holding that the "fundamen-

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1. Blackstone wrote:

> [I]f a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

4 WILLIAM BLACKSTONE, COMMENTARIES *24-25. *See also* Freeman v. People, 4 Denio 9, 20 (N.Y. Sup. Ct. 1847).

2. Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 952 (1985).

3. *See generally id.* at 952-53; Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-59 (1967).

4. Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (stating that "the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself"); *see also* Drope v. Missouri, 420 U.S. 162, 171 (1975); Winick, *supra* note 2, at 952.

5. Freeman v. People, 4 Denio at 20; Winick, *supra* note 2, at 952.

6. 97 F. 937 (6th Cir. 1899).

tal right of the court to try the main issue" of guilt or innocence depended upon the defendant's mental competence.[7]

The United States Supreme Court gave the first definitive explication of the constitutional requirement in 1966 in *Pate v. Robinson*.[8] Robinson was charged with murdering his wife. His attorney claimed that Robinson was incompetent to stand trial, but the trial judge rejected this argument. The Illinois Supreme Court affirmed his subsequent conviction, holding that the evidence of incompetence was inadequate to require further judicial inquiry, and that because of the attorney's failure to request a hearing, Robinson had waived his right to plead incompetence.[9] The United States Supreme Court reversed, wholly rejecting the Illinois court's waiver reasoning, and holding that waiver is an inapposite concept when the fundamental issue is the defendant's competence.[10] Justice Clark, writing for the Court, also disagreed with Illinois' finding that the evidence had been insufficient to require a hearing sua sponte and required that state procedures be adequate to protect a defendant's constitutional right to be competent to stand trial.[11]

Nine years later in *Drope v. Missouri*,[12] the Court imposed on trial courts a greater responsibility for monitoring the competence of defendants. As in *Robinson*, state procedures were facially adequate to protect the defendant's competency right.[13] Also like *Robinson*, in which the defendant had a long history of disturbed behavior, the trial court had accorded too little weight to a plain sign of the defendant's possible incompetence—a suicide attempt during the trial.[14] Chief Justice Burger's majority opinion identified three relevant sources of information concerning competence: evidence of the defendant's behavior; his demeanor at trial; and prior medical opinion on his competence.[15]

Because its creation was motivated by concern for the patently dysfunctional quality of the trial of incompetent defendants,[16] the standards for competence to stand trial are defined in functional terms. Unlike the standard for insanity with which it is often confused,[17] the

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7. *Id.* at 941; *See also* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1342 (1977) (describing competence as a "prerequisite" fact which "determine[s] the appropriateness of the forum").

8. 383 U.S. 375 (1966).

9. *Id.* at 376-77.

10. *Id.* at 384.

11. *Id.* at 378.

12. 420 U.S. 162 (1975).

13. *Id.* at 173.

14. *Id.* at 179.

15. *Id.* at 180.

16. *See supra* notes 1-5 and accompanying text.

17. *See, e.g.*, Freeman v. People, 4 Denio 9, 27 (N.Y. Sup. Ct. 1847) (criticizing the trial court

standard for competence to stand trial has evolved little.[18] Most modern cases follow the formulation the Supreme Court announced for federal cases in 1960, in *Dusky v. United States*.[19] In a brief per curiam opinion, the Court agreed with a cooperative Solicitor General[20] that the test for competence to stand trial must be "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[21] Although the Supreme Court has never held expressly that states must apply the standard it announced in *Dusky*,[22] states have followed the same formulation.[23] Although the *Dusky* standard is simply stated, the means of establishing whether a defendant satisfies the requirement are not clear.

The constitutional right to a hearing on competence is triggered when a bona fide doubt[24] arises as to the defendant's competence. In both ancient and contemporary practice, competency issues are resolved in separate proceedings.[25] The form of the competency proceeding varies among jurisdictions. Some states empanel "lunacy commissions" (expert panels) to interview the defendant and present

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for using "a single criterion of sanity, that is, a capacity to distinguish between right and wrong" to determine competence to stand trial); State v. Bethune, 71 S.E. 29, 32 (S.C. 1911) (erroneously describing incompetence to stand trial as an affirmative defense).

18. *Compare, e.g., Freeman*, 4 Denio at 20 (stating that "[t]he true reason why an insane person should not be tried, is that he is disabled by an act of God to make a just defense if he have one") *with* CAL. PENAL CODE § 1367 (West 1982) (providing that "[a] defendant is mentally incompetent if . . . the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner"). By contrast, the standard for the insanity defense has evolved considerably. *See, e.g.* Barbara A. Weiner, *Mental Disability and the Criminal Law*, in SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 693, 707 (3d ed. 1985); David L. Bazelon, *Psychiatrists and the Adversary Process*, SCI. AM. June, 1974, at 18.

19. 362 U.S. 402 (1960). Because the Court was interpreting 18 U.S.C. § 4244 (currently codified at 18 U.S.C. § 4241 (1988)), *Dusky* applies only to federal cases.

20. Although Dusky petitioned for certiorari, the Solicitor General apparently did not oppose the petition, and had argued that "the record in this case does not sufficiently support the findings of competency to stand trial." *Id.* at 402 (quoting from the Solicitor General's brief). The Court also endorsed the standard proposed by the Solicitor General. *Id.*

21. *Id.*

22. Project, *Eighteenth Annual Review of Criminal Procedure*, 77 GEO. L.J. 695, 867 (1989).

23. *See* DEBRA WHITCOMB & RONALD L. BRANDT, COMPETENCY TO STAND TRIAL 1 (Policy Brief of the National Institute of Justice) (observing that every state has adopted the *Dusky* standard); *see, e.g.*, CAL. PENAL CODE, § 1367 (West 1982); IOWA CODE ANN. § 812.3 (West 1979); Wallace v. State, 282 S.E.2d 325 (Ga. 1981).

24. *Robinson*, 383 U.S. at 385; *Drope*, 420 U.S. at 173.

25. *See, e.g.*, Freeman v. People, 4 Denio 9, 19 (N.Y. Sup. Ct. 1847) (observing that the trial court had empanelled a jury to determine the defendant's competence); Martin v. Estelle, 546 F.2d 177, 179 (5th Cir.) (stating that a separate hearing is constitutionally required so that the competency decision may be made "uncluttered by evidence of the offense itself" (quoting Townsend v. State, 427 S.W.2d 55, 63 (Tex. Crim. App. 1968))), *cert. denied*, 431 U.S. 971 (1977).

their findings to the court, which may or may not inquire further.[26] Other jurisdictions follow the common-law practice of trying the matter to a jury.[27] Still other jurisdictions permit the trial judge to decide if the defendant is competent.[28] Although the states must provide sufficient procedural protection for the competency right,[29] the Constitution does not prescribe any particular method of decisionmaking.[30] Competency hearings are unique among collateral proceedings, moreover, in that they do not resolve their subject conclusively; the judge and counsel are under a continuing obligation to raise the issue again if the defendant becomes incompetent during the course of the trial.[31]

III. THE HISTORY OF THE BURDEN OF PROOF IN COMPETENCY DECISIONMAKING

A. The Burden at Common Law and Today

Though the competency requirement has a long history, the burden of proof in competency hearings appears to have become an issue only recently. The courts' recognition of their unique responsibility to ensure that only competent defendants are tried can be traced as far back as 1790.[32] The allocation of the burden of proof appears not to have been an issue in these early cases because courts viewed as paramount their role in safeguarding the process. As recently as 1954, however, one treatise author confidently declared the majority rule to be that because the defendant is presumed to be competent, the defendant bears the burden of proof.[33]

Courts were not unanimous, however, with regard to either the allocation of the burden of proof or the amount of evidence needed to carry that burden. Tennessee apparently placed the burden of proving competence on the state in *Jordan v. State*.[34] In *United States v.*

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26. *See, e.g.*, State v. Marks, 211 So. 2d 261, 262 n.2 (La. 1968).

27. *See, e.g.*, CAL. PENAL CODE § 1369(f) (West 1982); *Freeman*, 4 Denio at 27.

28. *See, e.g.*, 18 U.S.C. § 4241(d) (1988).

29. *Robinson*, 383 U.S. at 378.

30. *See, e.g.*, Youtsey v. United States, 97 F. 937, 943 (6th Cir. 1899).

31. *Drope*, 420 U.S. at 181; *see also* Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348, 352 (2d Cir.), *cert. denied*, 459 U.S. 991 (1982).

Any discussion of competency procedures would be incomplete without noting that most competency issues are not resolved through an adversarial hearing. *See Mental Incompetency: Where Should Burden of Proof Be?*, NAT'L L. J. Dec. 10, 1990, at 9, 9 (observing that "for most cases, the competency burden is merely academic," because the adversaries usually agree about the defendant's competence).

32. *See* William T. Pizzi, *Competency to Stand Trial in the Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 25-27, 57 (1977).

33. HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 434-35 (1954).

34. 135 S.W. 327 (Tenn. 1911).

Chisholm the Federal Circuit Court held that the defendant bore the burden of generating a "fair, reasonable doubt" of his competence to stand trial.[35] *Chisholm* thus appeared to apply a reasonable doubt standard that was weighted in the defendant's favor, although the defendant bore the burden of production.[36] Similarly, the Court of Appeals of Maryland in *Jolley v. State*[37] upheld a state law[38] requiring that the defendant's competence to stand trial be proved beyond a reasonable doubt.

Other courts allocated the burden of proof to the party raising the issue.[39] The number of jurisdictions allocating the burden to the movant may be greater than a superficial reading of the case law indicates, because a court that allocates the burden to the prosecution or defendant in a given case may have done so because that party raised the issue. California provides a good example. The section of the California Penal Code which establishes that competence to stand trial is subject to a preponderance of the evidence standard does not mention allocation of the burden of proof.[40] The California Supreme Court, however, has interpreted this to mean that the burden is on the moving party. In re *Bye*[41] presented an unusual problem: the prosecutor challenged the defendant's competence to stand trial, and persuaded the jury in the competency hearing that, despite the defendant's wish to proceed to trial on the minor charge, he was incompetent. The defendant argued unsuccessfully on appeal that the preponderance standard was inadequate to sustain a finding of incompetence. A California court of appeals upheld this law, noting that incompetence had to be proved by a preponderance of the evidence.[42] In 1990, in *People v. Medina*[43] the California Supreme Court upheld a competency finding. In *Medina*, however, the court held that the defendant bore the burden of proving

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35. 149 F. 284, 290 (C.C.S.D. Ala. 1906) (defining the burden in jury instructions).

36. *See infra* notes 144-47 and accompanying text.

37. 384 A.2d 91, 98 (Md. 1978); *see also* Ley's Case, 1 Lewin 239, 168 Eng. Rep. 1026 (1828) (apparently applying a reasonable doubt standard).

38. MD. CTS. & JUD. PROC. CODE ANN. art. 59, § 23 (1957).

39. In Regina v. Podola, 1 Q.B. 325 (1960), the Queen's Bench upheld a jury instruction which placed the burden of proof on the defendant, who had raised the issue.

40. CAL. PENAL CODE § 1369(f) (West 1982) provides:

> (f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

41. 172 Cal. Rptr. 186 (Cal. Ct. App. 1981).

42. *Id.* at 188.

43. 799 P.2d 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991); *See also infra* part III.C.

his incompetence.[44]

B. The Current Controversy

The current controversy over the allocation of the burden of proof in competence to stand trial proceedings can be traced to the Third Circuit Court of Appeals' 1976 decision in *United States v. DiGilio*.[45] DiGilio was charged with misappropriation of government records. Prior to trial, DiGilio's attorney moved for a determination of DiGilio's competence to stand trial, and DiGilio was examined at a clinic under court order. Although DiGilio suffered from organic mental illness brought about by trauma and was functionally retarded, the trial court placed the burden of proof on him and found DiGilio competent to stand trial.[46] The Third Circuit reversed DiGilio's conviction, holding that the trial court had misallocated the burden of proof.[47]

Although *DiGilio* has played a significant role in subsequent constitutional decisions,[48] it is unclear whether the court pronounced a constitutional holding. The *DiGilio* court had to allocate the burden of proof in a case arising under a federal statute, 18 U.S.C. § 4244, which was silent on the issue.[49] Section 4244 empowers both litigants and the trial judge to raise the issue of the defendant's competence to stand trial.[50] At the time of the *DiGilio* case, there was little litigation on the burden of proof issue under the statute.[51] The District of Columbia Circuit Court of Appeals, however, had ruled on a related provision, 18 U.S.C. § 4245, which applied when questions concerning the defendant's competence to stand trial arise for the first time after trial.[52] The D.C. Circuit had assumed, without deciding, that the burden is on the government in these post-trial cases, and held that the district court's finding of competence was not clearly erroneous.[53] Reasoning by analogy to this sister statute, and relying on the D.C. Circuit decision, the Third Circuit held in *DiGilio* that it would be anomalous to place the burden on the defendant at trial, only to have it shift to the govern-

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44. *Medina*, 799 P.2d at 1291-92.

45. 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

46. *Id.* at 986.

47. *Id.* at 988.

48. *See infra* notes 63-73 and accompanying text.

49. *DiGilio*, 538 F.2d at 986. Section 4244, interpreted in *DiGilio*, is currently codified at 18 U.S.C. § 4241 (1988).

50. *See* 18 U.S.C. § 4241 (1988).

51. *DiGilio*, 538 F.2d at 986.

52. *Id.* at 987 (citing Fooks v. United States, 246 F.2d 629 (D.C. Cir. 1956) (per curiam), *cert. denied*, 355 U.S. 806 (1957)).

53. *See DiGilio*, 538 F.2d at 987.

ment following trial.[54] Thus, at first glance the decision is one of statutory construction.

Perhaps mindful that the dicta in the D.C. Circuit's opinion was a slender reed on which to rely, the Third Circuit turned to constitutional protections of the competency right to inform its opinion. The court noted that in *Pate v. Robinson*[55] the Supreme Court had rejected the state's waiver argument and had concluded that it is illogical to argue that a defendant who is incompetent to stand trial can "knowingly or intelligently" waive his rights.[56] The Third Circuit reasoned, in language that was to resonate through subsequent decisions, that "[i]t is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp."[57]

Finally, the *DiGilio* court noted that the allocation of the burden of proof is relevant primarily in cases where the evidence is in equipoise, and that theoretically these cases are rare.[58] The issue for the Third Circuit became, therefore, what to do in these admittedly rare circumstances. Noting that the Supreme Court in *Drope v. Missouri*[59] had announced that competence to stand trial is fundamental to the operation of the adversarial judicial process,[60] the Third Circuit held that "what we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried."[61] The court concluded that the prosecution must bear the burden of proof, and therefore must lose when the evidence is in equipoise.[62]

The two arguments advanced by the Third Circuit in *DiGilio*, that it is contradictory to require a possibly incompetent defendant to prove his incompetence, and that when the evidence is in equipoise, due process requires that courts allocate the risk of error to the prosecution, have become familiar themes in subsequent cases. In *People v. McCullum*[63] the Illinois Supreme Court, relying largely on the *DiGilio* analysis, struck down a state statute that had reversed the state courts' consistent allocation of the burden of proof to the state. The weight of

54. *Id.* at 988.
55. 383 U.S. 375 (1966).
56. *DiGilio*, 538 F.2d at 988 (citing *Robinson*, 383 U.S. at 384).
57. *Id.*; *see also infra* part V.A.
58. *DiGilio*, 538 F.2d at 988.
59. 420 U.S. 162 (1975).
60. *DiGilio*, 538 F.2d at 988.
61. *Id.*
62. *Id.*
63. 362 N.E.2d 307 (Ill. 1977).

authority, clearly in favor of an allocation to the defendant at least as recently as 1954,[64] began to shift.

The shift in authority continued with the Seventh Circuit Court of Appeals' decision in 1982, in *United States* ex rel. *Bilyew v. Franzen*.[65] Bilyew was convicted of murdering a young girl. The trial followed a competency hearing at which Bilyew bore the burden of proof under the same statute the Illinois Supreme Court had struck down in *McCullum*. In Bilyew's case, however, the Illinois Supreme Court held that the error in allocating the burden was harmless because the trial judge had indicated that the burden of proof did not affect his competency decision.[66] The Seventh Circuit reversed the district court's denial of Bilyew's habeas corpus petition, and following the Third Circuit's reasoning in *DiGilio*, it held that the error could not constitutionally be deemed harmless.[67] Several state court decisions continued this line of cases: a dissenting Ohio appellate judge relied on *DiGilio* in *State v. Pruitt*,[68] as did judges writing for the majorities in cases in Delaware[69] and South Dakota,[70] the South Dakota court basing its opinion on the state constitution.

DiGilio's influence was not limited to constitutional decisions, however. In *State v. Heger*[71] the North Dakota Supreme Court filled a gap in a state statute, holding that the prosecution must bear the burden of proof, because a "great injustice" would occur if the competency decision were erroneous and an incompetent defendant were put on trial.[72] Citing *DiGilio*, the court wrote that the majority of courts place the burden of proof on the state.[73] In *Commonwealth v. Crowley*[74] the Massachussetts Supreme Judicial Court similarly relied on the Third Circuit's reasoning in *DiGilio* to interpret an ambiguous state statute and placed the burden of proof on the state.

Those who champion a due process right in the burden of proof in competence to stand trial have not been unopposed. Early decisions following *DiGilio* failed to challenge it directly, however. In *State v. Pedersen*[75] the Iowa Supreme Court held that a new statute placed the

64. *See supra* note 33 and accompanying text.
65. 686 F.2d 1238 (7th Cir. 1982).
66. *Id.* at 1244.
67. *Id.* at 1246.
68. 480 N.E.2d 499, 505-06 (Ohio Ct. App. 1984) (opinion of Day, J.).
69. Diaz v. State, 508 A.2d 861, 863-64 (Del. 1986).
70. State v. Jones, 406 N.W.2d 366, 369 (S.D. 1987).
71. 326 N.W.2d 855, 858 (N.D. 1982).
72. *Id.*
73. *Id.*
74. 471 N.E.2d 353, 357-58 (Mass. 1984).
75. 309 N.W.2d 490, 496 (Iowa 1981).

burden of proof in competency hearings on the defendant.[76] The Iowa court's decision relied in part on the fact that an earlier statute had made this allocation expressly, but the court also noted that since defendants were presumed to be competent, they should be found competent when the evidence is in equipoise.[77] The Georgia Supreme Court similarly ignored *DiGilio* when it held in *Wallace v. State*[78] that the burden of proof is on the defendant. The Georgia court rejected the defendant's argument that the prosecution must prove competence because of the state's burden of disproving all mitigating circumstances in a capital case, rightly concluding that incompetence is not a mitigating circumstance. Having clarified the difference between competence and insanity, the court then clouded the issue again by implying that because the United States Supreme Court had upheld the constitutionality of placing the burden on a defendant of proving insanity at the time of the crime,[79] its allocation of the burden in competency proceedings was likewise constitutional.[80]

Although *Pedersen* and *Wallace* did not challenge directly the Third Circuit's holding in *DiGilio*, the arguments the Iowa and Georgia Supreme Courts advanced in support of their decisions are typical of those found in subsequent cases: the presumption of competence requires a finding of competence when the evidence is in equipoise; and the United States Supreme Court's decisions upholding the allocation of the burden of proving insanity at the time of the offense answer the constitutional concerns about the allocation of the burden in competency proceedings.

The first direct affront to *DiGilio*'s reasoning came in an Ohio appellate court's decision in *State v. Pruitt*.[81] The three-judge panel split three ways on the constitutionality of a statute that was interpreted as

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76. Five years earlier, the Iowa Supreme Court had arrived at the same conclusion in a decision based on the state constitution. State v. Aumann, 265 N.W.2d 316 (Iowa 1978). *See* Roxann M. Ryan, Comment, *Should the Burden of Proving Incompetence Rest on the Incompetent?*, 64 IOWA L. REV. 984 (1979). The defendant conceded that he had no federal constitutional claim because he believed that the United States Supreme Court's decision in Rivera v. Delaware, 429 U.S. 877 (1976), precluded his claim. In *Rivera* the Court dismissed for want of a substantial federal question a prisoner's claim that placing on him the burden of proving an insanity defense was unconstitutional. *See infra* note 135.

77. 309 N.W.2d at 496.

78. 282 S.E.2d 325, 330 (Ga. 1981), *cert. denied*, 455 U.S. 927 (1982).

79. *See* Leland v. Oregon, 343 U.S. 790 (1952).

80. *Wallace*, 282 S.E.2d at 330. In State v. Chapman, 721 P.2d 392, 395 (N.M. 1986), the Supreme Court of New Mexico similarly refused the defendant's constitutional challenge to a state law that placed the burden of proof on the defendant. The court in *Chapman* relied conclusively on a pre-*DiGilio* decision upholding this allocation of the burden. *Id.* (citing State v. Ortega, 419 P.2d 219, 228 (N.M. 1966)).

81. 480 N.E.2d 499 (Ohio Ct. App. 1984).

placing the burden of proving competence to stand trial on the defendant. Two judges upheld the statute: one noted summarily that it was constitutional;[82] the other, like the Supreme Court of Georgia in *Wallace*, viewed the issue as analogous to the clearly constitutional practice of requiring the defendant to prove insanity.[83] A third judge, noting that a simple allocation to either party results in contradictions, agreed with the Third Circuit in *DiGilio* that fundamental fairness forbids the trial of a defendant when the evidence is in equipoise.[84]

The dissension reached the Federal Courts of Appeals with the Fifth Circuit's 1987 decision in *Lowenfield v. Phelps*.[85] In *Lowenfield* the defendant challenged his murder conviction on the grounds that he had been unconstitutionally required to carry the burden of proof at his competency hearing. The Fifth Circuit criticized the Seventh Circuit for extending *DiGilio* to the states in the *Bilyew* decision. Noting that no other circuit court of appeals had chosen to follow *Bilyew*, the Fifth Circuit refused to follow it for three reasons. According to the Fifth Circuit, the *Bilyew* court had adopted without analysis the Illinois Supreme Court's conclusion in *McCullum* that it is unconstitutional to place the burden on the defendant. Moreover, *Bilyew* had confused the restrictions placed on federal prosecutors with the wide latitude given to state legislatures. Despite *DiGilio*'s language announcing a rule of "due process dimensions,"[86] the Fifth Circuit limited the holding in that case to the federal statute under which it arose. Finally, the Fifth Circuit held that even if the Seventh Circuit were correct and it is unconstitutional to place the burden of proof on the defendant, the error in Lowenfield's case was harmless since there was no reasonable probability that a different allocation of the burden would have resulted in a finding that he had been incompetent to stand trial.[87]

Over the past decade and a half, the weight of authority, which previously had upheld the constitutionality of allocating the burden of proof to the defendant,[88] has been called into question. Although several states had upheld the constitutionality of this choice at the time of *Lowenfield*, no state court had fully answered the constitutional concerns that the Third Circuit raised in *DiGilio* and that the Seventh Circuit enforced against Illinois in *Bilyew*. Moreover, the Fifth Circuit's

82. *Id.* at 509 (opinion of Nahra, J.).

83. *Id.* at 509 (opinion of Markus, J.).

84. *Id.* at 506 (Day, J., dissenting in part).

85. 817 F.2d 285 (5th Cir. 1987), *aff'd on other grounds*, 484 U.S. 231 (1988).

86. United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

87. *Lowenfield*, 817 F.2d at 295.

88. *See supra* note 33 and accompanying text.

disposition of *Lowenfield*—holding that regardless of the burden of proof, any error had been harmless—meant that the facts and posture of that case rendered the burden of proof issue less salient than the court's rhetoric suggested. Onto this confused stage strode Teofilo Medina. In *People v. Medina*[89] the California Supreme Court held that placing the burden of proof in competency hearings on the defendant is constitutional.

C. People v. Medina

The facts of *Medina* illustrate the difficult choices courts must make in competency proceedings. Teofilo Medina spent most of his life in prison following one conviction for firing a gun in a crowded restaurant and another for rape and kidnapping.[90] After serving time in the Arizona State Prison for the latter conviction, Medina was paroled in 1984. Despite his long history of committing violent crimes, when Medina was paroled he appeared to have a good chance at life outside prison. One of his sisters offered to have him live with her family, and another gave him a car. With a new identity, Medina stayed in touch with parole authorities for two months following his release. His success outside was short-lived, however, and ended when he was arrested following a "rampage" which left in its wake four convenience store clerks killed execution-style, a woman raped, and another woman the victim of a violent assault. He was subsequently charged with three of the murders.[91]

Medina's behavior following his arrest raised serious doubts about his competence to stand trial. While at the county jail awaiting trial, he was disciplined for destroying a television set and threatening deputies.[92] He was stabbed while emerging from a shower room, and was placed in a padded cell after he twice tried to kill himself.[93] While talking with his defense attorney, Medina slashed his own throat with a razor blade he had hidden in a matchbook, but he recovered from the superficial wound.[94]

To determine Medina's competence to stand trial, two court-appointed experts and a psychiatrist selected by his defense counsel ex-

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89. 799 P.2d at 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991).

90. *Lengthy Trial Expected for Parolee Charged in 3 Execution-Style Killings*, L.A. TIMES, June 30, 1986, at part 2, p. 1, col. 4.

91. *Id.*

92. *Psychologist Says Murder Suspect Fit for Trial, Though Schizophrenic*, L.A. TIMES, July 18, 1986, at part 2, p. 5, col. 4 [hereinafter *Fit for Trial*].

93. *Id.*

94. *Id.*; *Medina*, 799 P.2d at 1288; *Murder Suspect Tries to Slash Own Throat*, L.A. TIMES, July 12, 1986, at part 2, p. 2, col. 2.

amined Medina.[95] Medina behaved erratically during these interviews. During one interview with a court-appointed doctor, Medina broke the glass partition separating them;[96] he told another that he heard his dead brother's voice and that he saw Jesus and Saint John.[97] Medina told another doctor that he saw himself as a "warlock, or a high priest, someone who has been in collaboration with Satan.' "[98] Nevertheless, both court-appointed experts concluded that Medina was competent to stand trial.[99] Testimony from the jail psychiatrist supported a finding of competence. The defense's psychiatrist, who had known Medina while he was imprisoned in Arizona, concluded that Medina was incompetent. During the competency hearing, Medina disrupted the proceedings with several outbursts, kicked over the defense table, and refused to come out of a holding cell following a break because of the presence of a news photographer. Despite this behavior and the testimony of the defense psychiatrist, the jury empanelled to hear the issue found him competent to stand trial.[100] Because of his outburst during the competency hearing, Medina was shackled throughout the remainder of the proceedings.[101]

Medina appealed his subsequent conviction, arguing that the state court unconstitutionally had required him to bear the burden of proof in his competency hearing.[102] Rejecting this challenge, the California Supreme Court held that placing the burden of proof on the defendant did not violate the requirements of due process.[103]

The majority relied principally on the argument, first advanced in the *DiGilio* era by the Georgia Supreme Court in *Wallace v. State*,[104] that the burden of proof in competency determinations is analogous to the burden of proving an insanity defense. The California Supreme Court reasoned that because the United States Supreme Court had upheld the allocation to the defendant of the burden of proving insanity in *Leland v. Oregon*,[105] making the defendant bear the burden of proving incompetence is likewise constitutional. The California court read *Leland* broadly, noting that, like insanity, competence was not an ele-

95. *Medina*, 799 P.2d at 1288; *Fit for Trial*, *supra* note 92.
96. *Fit for Trial*, *supra* note 92.
97. *Id.*
98. *Id.*
99. *Medina*, 799 P.2d at 1288; *Fit for Trial*, *supra* note 92.
100. *Medina*, 799 P.2d at 1288; *Medina Judged Competent to Stand Trial in 3 Killings*, L.A. TIMES, July 23, 1986, at part 2, p. 7, col. 1.
101. *Medina*, 799 P.2d at 1299.
102. *Id.* at 1288-89.
103. *Id.* at 1292.
104. 282 S.E.2d 325, 330 (Ga. 1981), *cert. denied*, 455 U.S. 927 (1982); *see supra* notes 78-80 and accompanying text.
105. 343 U.S. 790 (1952).

ment of the crime charged,[106] and relied on the Fifth Circuit's reasoning in *Lowenfield v. Phelps*[107] that the states have great latitude in allocating the burden of proof.

The *Medina* majority also noted that the availability of relevant evidence to each side is an important factor in allocating the burden of proof.[108] In *Morrison v. California*[109] the United States Supreme Court had established a rule weighing the convenience to the parties and opportunity for knowledge concerning the fact to be proved against the potential hardship and oppression to the defendant. Applying the principles in *Morrison* to Medina's case, the California Supreme Court held that the defendant and his counsel would probably have better access to the facts relevant to the court's competency inquiry than the state would.[110] In response to the Seventh Circuit's concern in *Bilyew* that an incompetent defendant would be unable to cooperate with his counsel,[111] the California court observed that the defendant's attorney could attest to this fact, while the prosecution would not see the defendant's inability to cooperate with counsel.[112]

The majority concluded its opinion on the competency issue by rejecting the defendant's challenge to the operation of the presumption of competence.[113] Medina argued that the presumption should drop out of the case once a legitimate doubt regarding competence arises. The majority disagreed, observing that the presumption's primary role is to "place on defendant (or the People, if they contest his competence) the burden of rebutting it."[114] According to the majority, the presumption remains in effect throughout the case.

In dissent Justice Mosk argued that because the due process clause requires the court to determine mental competence, the prosecution must bear the burden of proving competence beyond a reasonable

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106. *Medina*, 799 P.2d at 1290.

107. 817 F.2d 285, 294 (5th Cir. 1987), *aff'd on other grounds*, 484 U.S. 231 (1988); *see supra* notes 85-87 and accompanying text.

108. *Medina*, 799 P.2d at 1291.

109. 291 U.S. 82 (1934).

110. *Medina*, 799 P.2d at 1291.

111. United States *ex rel.* Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982); *see supra* note 67 and accompanying text.

112. *Medina*, 799 P.2d at 1291; *see also Justices Rule on Competency; State Court: They Affirm the Constitutionality of a Law That Places the Burden of Proving Mental Incapability on the Defense*, L.A. TIMES, Nov. 20, 1990, at part A, p. 3, col. 2 (citing California Deputy Attorney General Jay M. Bloom, who indicated that proving the quality of the attorney-client relationship would he difficult for the state hecause of the attorney-client privilege).

113. *Medina*, 799 P.2d at 1291-92.

114. *Id.* at 1291. This statement suggests that the rule in California is that the hurden is on the moving party. *See supra* notes 39-44 and accompanying text.

doubt.[115] Although he agreed with the majority that a defendant's competence to stand trial is not an element of the crime, Justice Mosk argued that because due process requires both competence to stand trial and that the elements of the crime be proved beyond a reasonable doubt "[b]y parity of reasoning, it bars conviction except on proof beyond a reasonable doubt by the prosecution that the defendant is in fact mentally competent."[116]

In a separate dissent Justice Broussard joined the battle with the majority using the arguments which were established in *DiGilio* and extended to the states in the Seventh Circuit's decision in *Bilyew*.[117] Justice Broussard noted that *DiGilio* cited two arguments against placing the burden of proof on a defendant of questionable competence: first, requiring a possibly incompetent defendant to prove his own incompetence is contradictory; and second, due process requires that when the evidence is in equipoise, the defendant must not be tried.

Justice Broussard went further than preceding cases had,[118] however, and specifically rebutted the majority's reliance on *Leland v. Oregon* for the proposition that because the United States Supreme Court upheld placing the burden of proving insanity on the defendant, the allocation of the burden to the defendant in a competency hearing likewise is constitutional.[119] Justice Broussard identified two flaws in the majority's use of *Leland*. First, the insanity defense cases are inapposite because the opportunity to advance an insanity defense presupposes that the defendant is competent to stand trial. Justice Broussard noted that although competence is not an element of the crime, the law requires that the prosecution bear the burden on other matters not involving an element, such as the voluntariness of a confession, and that the crime was committed within the limitations period.[120] Second, *Leland* and its progeny fail to address *DiGilio*'s second concern—that the risk of error is too great to permit trial of a defendant when the evidence of competence is no greater than that of incompetence.[121] Noting that the United States Supreme Court had refused to recognize waiver of the competence right in *Pate v. Robinson* and *Drope v. Missouri*,[122]

115. *Id.* at 1310-11 (Mosk, J., dissenting).

116. *Id.* at 1311.

117. *See supra* notes 65-67 and accompanying text.

118. *Medina*, 799 P.2d at 1313 (Broussard, J., dissenting); *cf.* United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States *ex rel.* Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982).

119. *Medina*, 799 P.2d at 1313.

120. *Id.* at 1313-14.

121. *Id.* at 1314.

122. Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162, 171 (1975); *see also supra* notes 8-15 and accompanying text.

Justice Broussard argued that evidence of competence must outweigh evidence of incompetence.[123] He responded to the majority's argument that convenience and opportunity for knowledge permit the allocation of the burden to the defendant by distinguishing the burden of production from the burden of persuasion; while the burden of production may be shifted to the defendant, due process dictates that the burden of persuasion remain with the state.[124]

Medina is the first case to join all of the arguments regarding the allocation of the burden of proof in competency determinations. Although the majority and dissenting opinions in *Medina* are well-reasoned, much of the rhetoric concerning the relationship between the due process clause and the burden of proof in competency proceedings merely confuses the issue. This deadwood must be pruned away before one can undertake a proper due process analysis.

IV. Arguments Against A Constitutional Requirement that the State Must Bear the Burden of Proof

A. Leland v. Oregon *and the Constitutionality of Requiring the Defendant to Prove Nonelemental Matters*

1. *Leland v. Oregon*

In *Leland v. Oregon*[125] the United States Supreme Court held that it was constitutionally permissible for Oregon to require that criminal defendants bear the burden of proving beyond a reasonable doubt that they were insane at the time of the offense. In *Davis v. United States*[126] the Supreme Court had held that the federal government bore the burden of disproving insanity. Leland challenged his murder conviction on the grounds that an old state statute, which placed the burden of proof on the defendant, was unconstitutional under *Davis*.[127] Justice Clark, writing for the Court, observed that the burden of proving insanity had been placed on the defendant historically, and that at trial, the issue arose only after the prosecution had proved all elements of the offense charged beyond a reasonable doubt.[128] The Court refused to extend *Davis* to the states, noting that it "establishe[d] no constitutional doc-

123. *Medina*, 799 P.2d at 1315.
124. *Id.* at 1316.
125. 343 U.S. 790 (1952).
126. 160 U.S. 469 (1895).
127. *Leland*, 343 U.S. at 793. When *Leland* was decided in 1952, Oregon was the only state that required a defendant to prove an insanity defense beyond a reasonable doubt. *Id.* at 798.
128. *Id.* at 797, 799.

trine." The Court upheld the Oregon rule, finding that it did not violate generally accepted concepts of basic standards of justice.[129]

The Supreme Court's subsequent decision in *Mullaney v. Wilbur*[130] appeared to question *Leland*'s rule of deference to the states in defining their criminal law. In *Wilbur* the defendant challenged his murder conviction on the grounds that a Maine statute unconstitutionally allocated to the defendant the burden of proving that the crime occurred in the heat of passion. The Supreme Court agreed.[131] Although it was bound by the state's definition of the crime of homicide, the Court refused to elevate form over substance; because whether the defendant acted in the heat of passion was a critical question in determining the degree of punishment under Maine's relatively simple homicide statute, the prosecution must bear the burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion.[132] Justice Rehnquist, concurring in the decision, argued that *Leland* was distinguishable from *Wilbur*: Maine's redefinition of homicide in the latter case "effect[ed] an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense."[133]

A year later in *Rivera v. Delaware*,[134] the Supreme Court held that a challenge similar to that in *Leland* did not present a substantial federal question, dismissing both the case and any question that *Wilbur* had signalled the downfall of *Leland*.[135] Justice Brennan, joined by Justice Marshall, dissented from the dismissal, arguing that despite its decision in *Wilbur*, the Court continued to exalt form over substance. "[T]he plea of insanity, whether or not the State chooses to characterize it as an affirmative defense, relates to the accused's state of mind, an essential element of the crime, and bears upon the appropriate form of punishment."[136] Since *Rivera*, the Supreme Court consistently has permitted states to define the elements and procedures of affirmative

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129. *Id.* at 799 (quoting Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring)).

130. 421 U.S. 684 (1975).

131. *Id.* at 703-04.

132. *Id.* at 697-98.

133. *Id.* at 706 (Rehnquist, J., concurring).

134. 429 U.S. 877 (1976).

135. Interestingly, the defendant in State v. Aumann, 265 N.W.2d 316 (Iowa 1978), apparently believed that *Rivera* precluded his federal constitutional claim concerning the allocation of the burden of proof in competency hearings. *Id.* at 319. The Supreme Court's recent grant of certiorari in *Medina v. California*, 116 L.Ed. 2d 276 (1991), on this very issue indicates that in fact there is a substantial federal question, even if the answer to it is that the Constitution does not prescribe the burden of proof (contrary to this Note's conclusion). *See also* Comment, *supra* note 76, at 994 (criticizing the Iowa Supreme Court's reliance on *Rivera* in *Aumann*).

136. *Rivera*, 429 U.S. at 880 (Brennan, J. dissenting).

defenses.[137]

2. The *Leland* Argument in the Competency Controversy

Several courts have concluded that *Leland*'s holding with regard to the insanity defense is apposite to the burden of proof in competency decisionmaking.[138] This argument has some merit, but it has been greatly overextended, and the opinions often have left in doubt the basis for the analogy to competency hearings.

Courts that rely on *Leland* to uphold the placement of the burden of proving competence on the defendant argue that *Leland* implicitly holds that states may cast onto the defendant the burden of proving any issue not comprising an element of the offense.[139] In the view of these courts, *Leland* extends constitutional protection to the burden of proving only those issues that are elements of the offense, although *Wilbur* suggests that states may not disingenuously redefine their criminal law to avoid protecting this right. According to these courts, since competence to stand trial is not an element of the crime charged, states possess broad discretion in establishing procedures for competency decisionmaking.

These courts' reliance on *Leland* is unjustified.[140] Their reading of *Leland* is essentially one in which state powers are defined in negative

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137. Martin v. Ohio, 480 U.S. 228 (1987) (upholding an Ohio statute allocating the burden of proving self-defense to the defendant); Patterson v. New York, 432 U.S. 197 (1977) (upholding a New York law that required the defendant to prove a defense of extreme emotional disturbance in order to reduce a second-degree murder charge to one of manslaughter); *see also* Ake v. Oklahoma, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting) (doubting that due process requires a state to provide an insanity defense); People v. Medina, 799 P.2d at 1282, 1290 (Cal. 1990) (describing this trend), *cert. granted*, 116 L.Ed. 2d 276 (1991).

138. *See, e.g., People v. Medina*, 799 P.2d 1282, 1290-91 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991); *see also supra* notes 79-87 and accompanying text.

139. *See, e.g., Medina*, 799 P.2d at 1290; Wallace v. State, 282 S.E.2d 325, 330 (Ga. 1981) (citing Patterson v. New York, 432 U.S. 197 (1977), which followed *Leland*); *see also* Comment, *supra* note 76, at 996; *supra* notes 79-87 and accompanying text.

140. *Medina*, 799 P.2d at 1313-14 (Broussard, J., dissenting); *see also* Comment, *supra* note 76, at 996 (criticizing the Iowa Supreme Court's reliance on *Leland* in State v. Aumann, 265 N.W.2d 316 (Iowa 1978)); *supra* notes 118-24 and accompanying text.

The most obvious criticism of this argument is that it confuses the issues of competence to stand trial and insanity at the time of the crime and ignores the fact that in order to assert an insanity defense, a defendant must be competent to stand trial. *Medina*, 799 P.2d at 1313 (Broussard, J. dissenting) (observing that "[i]n the insanity context, a rule placing the burden of proof of insanity on the defendant imposes that burden on a defendant who, by necessity, must have already been found to be presently competent to assist in his own defense"). This is similar to an argument the Third Circuit first advanced in *DiGilio*—that it is contradictory to require a possibly incompetent defendant to prove his incompetence. United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *see also supra* notes 55-57 and accompanying text. These two closely related arguments are susceptible to the same criticisms, and this Note discusses them in the context of the other arguments advanced to support a due process requirement that the prosecutor shoulder the burden of proving competence. *See infra* part V.

terms—all issues that are nonelemental are within the state's discretion. As Justice Mosk noted in his *Medina* dissent, although states have broad discretion to define criminal offenses and defenses, this discretion may not operate to deprive a defendant of a constitutional right.[141] The courts relying on *Leland* fail to recognize that there are issues which are neither elements of the crime nor discretionary, such as constitutionally prescribed procedural protections. States' freedom to design their criminal law is limited to the definition of crimes and affirmative defenses and should not be extended to the definition of procedures necessary to ensure fundamental rights. Since competence to stand trial is a fundamental due process right, cases such as *Leland*—in which a state allocates the burden of proving facts necessary to establish an entitlement to a substantive statutory right—are inapposite.[142]

By relying on decisions which do not address the concern that state procedures must be adequate to protect a constitutional right, the decisions opposing *DiGilio* fail to demonstrate conclusively that the result in *DiGilio* is not mandated by the Constitution, and they serve only to confuse due process jurisprudence.

B. Burdens of Proof, Convenience, and Morrison v. California

1. Burdens of Proof

Because competence to stand trial is a prerequisite to participation in our adversarial system of criminal justice, the process of formally proving competence stretches the legal system's adversarial framework, including the concepts of burden of proof and presumption. A thorough analysis demonstrates that in competency hearings, these concepts ultimately fail to achieve their primary purpose of guiding decisionmakers. The courts nevertheless have concentrated on the roles of these two concepts in defining competency jurisprudence.

The roles that the burden of proof plays in competency hearings define the constitutional implications of that burden for the defendant. The meaning of the phrase "burden of proof," however, is obscure. Many courts and scholars have searched in vain for universal principles to govern the analysis of the effects of burdens of proof and of presumptions, yet the field remains a dense thicket.[143] Despite the patent need for a common understanding of how these rules operate, the judicial opinions fail to discuss, or even to recognize, the differences among

141. *Medina*, 799 P.2d at 1311 (Mosk, J., dissenting).

142. *Id.*

143. MCCORMICK ON EVIDENCE § 342 (Edward W. Cleary, ed., 3d ed. 1984) [hereinafter MCCORMICK] (stating that "[o]ne ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof' ").

jurisdictions.

The phrase "burden of proof" can refer either to the burden of producing evidence or to the burden of persuading the factfinder.[144] The burden of production typically is considered satisfied when the burdened party produces enough evidence to make the issue one of fact for the jury.[145] The burden of persuasion, on the other hand, operates at the moment of decision, and is satisfied when enough evidence has been introduced to satisfy the standard of persuasion.[146] These two concepts are characterized by their weight—the evidentiary quantity the party bearing the burden must satisfy—and their allocation—the identification of which party bears the burden.[147]

The absence of directed verdict standards in competency hearings restricts the role of the burden of proof. The principal distinction between the burden of production and the burden of persuasion in most proceedings is that a party's failure to meet the burden of production results in a directed verdict.[148] There is no directed verdict standard in competency hearings, however. Once a bona fide doubt has triggered the hearing process, the burden of production has no meaning, and the sole effect of the burden of proof is to allocate the ultimate burden of persuasion.[149]

Presumptions generally are defined as rules which permit or mandate the inference of one fact (the fact presumed) from the proof of another (the fact proved).[150] This traditional understanding affects the role presumptions play in decisionmaking. Some authorities hold that presumptions shift both the burden of production and the burden of persuasion on the issue.[151] This appears to conform to the view of courts that place the burden of persuasion in competency hearings on the defendant on the grounds that the law presumes a defendant to be

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144. *Id.* at § 336.

145. *Id.* at § 338.

146. *Id.* at §§ 339-41.

147. *See* Underwood, *supra* note 7, at 1300.

148. McCormick, *supra* note 143, at § 336.

149. Occasionally, a court may provide a competency hearing upon evidence that fails to satisfy the bona fide doubt standard, and the presumption of competence may act as a de facto directed verdict standard. Once satisfied, however, the presumption should cease to operate.

150. Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165, 165 (1969); McCormick, *supra* note 143, at § 342.

151. Edmund M. Morgan, Basic Problems of Evidence (1954). Morgan's approach directly contradicts the "Bursting Bubble" theory of Thayer which dominates American law on presumptions. *See* James B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1896). A detailed explication of these contrasting approaches is beyond the scope of this Note because the presumption of competence is not a true presumption covered by either approach. *See infra* notes 155-56 and accompanying text. *See generally* Ashford & Risinger, *supra* note 150, at 169; McCormick, *supra* note 143, at § 344, p. 980.

competent.[152] In *People v. Medina*[153] the California Supreme Court ratified this view, and rejected the defendant's contention that the presumption should cease to operate after a doubt arises about the defendant's competence.[154] The California court's description of the presumption of competence essentially restates the burden of proof: the primary role of the presumption is to place upon the defendant the burden of rebutting it.

Unfortunately, the presumption of competence is not really a presumption. Under the traditional definition—a rule which permits the inference of one fact from the proof of another—the presumption of competence, like the presumption of innocence, is misnamed.[155] There is no fact presumed and so there can be no logical inference. True presumptions prescribe a rule which might be paraphrased: "If *A* is proved, then you may (or must, in the case of a mandatory presumption) infer that *B* is true." But the presumption of competence may be paraphrased: "You may (or must) believe that the defendant is competent." The presumption of competence is really a substantive rule of law which permits trials to proceed in the absence of contradictory evidence, and allocates the initial burden of production to the party challenging competence.[156]

Despite the apparent simplicity of the *Medina* court's holding, it is difficult to reconcile its interpretation with the constitutional requirements the United States Supreme Court announced in *Drope v. Missouri* and *Pate v. Robinson*.[157] Those cases establish that once there is a bona fide doubt raised about the defendant's competence, the trial judge must conduct a separate competency hearing.[158] The presumption of competence permits trials to go forward in the absence of such a doubt. The Supreme Court has not addressed the presumption's role in

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152. *See supra* note 33 and accompanying text.

153. 799 P.2d 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991); *see also supra* part III.C.

154. 799 P.2d at 1291. Medina's argument essentially is that the "Bursting Buhble" analysis of presumptions should obtain. *See supra* note 151.

155. *See* McCormick, *supra* note 143 at § 340, pp. 967-68.

156. Ashford and Risinger argue that the presumption of sanity (i.e., at the time of the offense) consists of a presumption, which allocates to the defendant the burden of production, and an assumption, which in their terminology is the assignment of the burden of persuasion to the prosecution. Ashford & Risinger, *supra* note 150, at 171-74. Under their approach, the presumption of competence arguably *is* a true presumption because it assigus the burden of production. But as described below, *see infra* note 159 and accompanying text, tbis assigument is to all actors in the process. Thus, even under their approach, the presumption of competence is not truly a presumption.

157. 420 U.S 162 (1975); 383 U.S. 375 (1966); *see also supra* notes 8-15 and accompanying text.

158. *See supra* notes 8-15 and accompanying text.

the competency hearing itself.

Maintaining as separate doctrines the presumption of competence and the burden of proof in competency hearings is counterproductive and confusing. The principal danger is that courts—like the California Supreme Court in *People v. Medina*—will mistake the presumption of competence for a true presumption and, by applying divergent state evidence law,[159] will accord the presumption too much weight. Due process requires that states provide procedures sufficient to protect the right to competence, and courts should not permit erosion of this protection by the idiosyncratic interpretation of a facially universal rule. Even if assigning the burden of proof to the defendant is constitutionally permissible, and states are permitted to retain the presumption of competence as a policy that justifies the burden of proof allocation, they should not be permitted to ascribe evidentiary weight to it as well.

Like the "presumption" of competence, the "burden of proof" in competency decisionmaking is misnamed. The Supreme Court has established the threshold level of evidence for triggering the competency decisionmaking process. In doing so, the Court not only decided the weight of the initial burden of production—a bona fide doubt about the defendant's competence—but also distributed the burden of production among the actors in the adversarial system. This "burden" might be better described as an obligation that the actors owe to the process itself. The adversarial terminology and precepts thus break down in competency hearings. At these limits of adversarial justice, courts should be chary of imposing adversarial requirements and should fall back on their obligation to discover the truth before proceeding to trial.[160] Courts should play an active role in the competency decisionmaking process, and should seek out additional evidence if that presented by the state and the defense fails to produce a clear result.

Despite its inaccuracy, courts are likely to rely on the old terminology. Courts must nevertheless consider that in competency decisionmaking, these concepts do not have their usual effects. The burden of production is attenuated by the requirements of due process. The sole effect of the presumption of competence is to allocate the burden of persuasion, and it is this allocation that must conform to due process. In *People v. Medina*[161] the California Supreme Court justified its allocation of the burden of persuasion on the basis of convenience and opportunity for knowledge.

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159. *See* McCormick, *supra* note 143, at § 344 (describing presumptions in civil cases).

160. *See* Pizzi, *supra* note 32, at 57.

161. 799 P.2d 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991); *see supra* part III.C.

2. The Convenience Argument

Courts and legislatures allocate the burden of proof to a particular party for many different reasons, including policy, probability, and convenience.[162] Courts may place the burden on the party that has a peculiar opportunity for knowledge of the evidence.[163] Similarly, the courts may place the burden on the party seeking to demonstrate something that is improbable.[164] In *Morrison v. California*[165] a defendant charged with selling real property to a Japanese national challenged the validity of a statute that shifted the burden of proving citizenship to the defendant when the government proved that real property was used or occupied by an ineligible alien.[166] Justice Cardozo, writing for the Court, observed:

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.[167]

The California Supreme Court in *People v. Medina*[168] relied on *Morrison* in upholding the allocation of the burden of proof to the defendant, concluding that the defendant might have better access to the facts than would the prosecution.[169] Whether it is or is not constitutional to place on the defendant the burden of proving competence, the convenience argument is flawed both in its premises and in its use of the case law.

The underlying premise of the convenience argument—that the defendant has greater access to evidence of his competence—ignores the context in which competency decisions are made. Certainly evidence concerning the attorney-client relationship, which makes up one prong of the *Dusky* standard,[170] is more likely to be available to the defendant than to the prosecution. A brief survey of the reported decisions, however, indicates that testimony regarding this relationship frequently is

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162. McCORMICK, *supra* note 143, at § 337.

163. Underwood, *supra* note 7, at 1335 (observing that this is the rule in federal courts and some states, but noting that the burden of persuasion does not shift because of this rule).

164. *Id.* at 1336-38.

165. 291 U.S. 82 (1934).

166. *Id.* at 84 (describing § 9a of California's Alien Land Law).

167. *Id.* at 88-89.

168. 799 P.2d 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d 276 (1991).

169. *Id.* at 1291.

170. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (describing this part of the test as " 'whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' ").

not determinative; the testimony of experts, family, and those associated with the defendant during pretrial detention often carries more weight.[171] The defendant does not have exclusive access to information from these other sources. While it may be easier for the defendant to obtain cooperation from family members, the prosecution is better positioned to obtain evidence from jailers and fellow prisoners. Neither side possesses an advantage over the other in obtaining expert testimony.[172] Thus, the *Medina* court's conclusion that the defendant has better access to information probative of competence is empirically suspect.[173]

The California Supreme Court's reliance on *Morrison* is also incorrect. First, *Morrison*'s convenience standard was substantially undermined by *Tot v. United States*,[174] where the United States Supreme Court held that the convenience standard was merely a corollary to the rational connection test it announced.[175] Second, although the rational connection test has not survived either,[176] an examination of the relationship between the fact proved and the fact presumed is fundamental to all of the Court's jurisprudence in the area of presumptions.[177] But the presumption of competence—which is not a true presumption[178]—cannot be measured against these standards. *Morrison, Tot*, and subsequent Supreme Court cases in this area simply are inapposite to the presumption of competence.

Finally, the convenience argument is most compelling as a justification for shifting the burden of production; yet the lack of a competency analogue to the directed verdict standard renders the burden of produc-

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171. *See, e.g.*, United States v. Makris, 535 F.2d 899 (5th Cir. 1976) (affirming a district court's finding of competence although the district judge had placed "primary emphasis" on the composite testimony of lay witnesses, and had not credited medical testimony); Wallace v. State, 282 S.E.2d 325 (Ga. 1981) (affirming a competency finding although the lay witnesses testifying that the defendant was competent were opposed by three psychiatrists); Young v. Smith, 505 P.2d 824 (Wash. Ct. App. 1973) (affirming a competency finding although the lay witnesses testifying that the defendant was competent were opposed by three psychiatrists).

172. *See, e.g.*, CAL. PENAL CODE § 1369(a) (West 1982) (requiring the court to appoint one psychiatrist or psychologist to examine the defendant, and two if the defendant asserts his competence); 18 U.S.C. § 4241(b) (1988) (authorizing the court to order psychiatric examinations).

173. *But see* Pizzi, *supra* note 32, at 56 (arguing that prosecutors' limited access to evidence makes the *DiGilio* holding untenable).

174. 319 U.S. 463 (1943).

175. *Id.; see also* MCCORMICK, *supra* note 143, at § 347. Under *Tot*'s test, a presumption is constitutional if there is a "rational connection" between the fact proved and the fact presumed. *Tot*, 319 U.S. at 467. The test forbade arbitrary presumptions. *Id.*

176. In Leary v. United States, 395 U.S. 6 (1969), the Court required more than a merely rational connection: it required that the presumed fact "is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36.

177. Compare, for example, the *Tot* rational connection test, *supra* note 175, with the *Leary* "more likely than not" standard, *supra* note 176.

178. The presumption of competence is not a true presumption because there is no inference drawn from a proven fact. *See supra* notes 155-56 and accompanying text.

tion indistinguishable from the burden of persuasion.[179] Moreover, convenience cannot possibly be the true reason for California's rule: the court implicitly affirmed that the burden is really on the movant,[180] but, even when the prosecution moves for a competency hearing, the defendant retains his supposed advantages in convenience and opportunity for knowledge.[181] Clearly, convenience can justify the allocation of the burden to the defendant only when he is the movant; therefore, California cannot logically claim that convenience alone justifies its allocation.

V. Arguments For A Constitutional Requirement that the State Must Bear the Burden of Proof

The major arguments in favor of a due process right in the allocation of the burden of proof have changed little since the Third Circuit first identified and advanced them in 1976.[182] The first—the contradiction argument—is that it is contradictory to require a possibly incompetent defendant to prove his own incompetence.[183] The second—the equipoise argument—is that the burden of proof using a preponderance standard is dispositive only when the evidence is in equipoise, and that in such a case due process requires that the defendant not be tried.[184] Like the arguments opposing them, these arguments too often have been overextended and framed confusedly. In order to understand properly the genuine constitutional issues, one must first discard those which are merely makeweight.

A. United States v. DiGilio's *Contradiction Argument*

The premise of the contradiction argument is that a defendant's possible incompetence handicaps her for participation in the competency decisionmaking process. The argument confuses a real constitutional right—the right to be competent to stand trial[185]—with an illusory one—the right to be competent to undergo a competency hearing. Simply put, the law has never assumed that any degree of mental competence is necessary in a competency hearing. Although it failed to explain fully this inherent tension in the contradiction argument, the majority in *People v. Medina* sensed it, observing that an incompetent

179. *See supra* notes 148-49 and accompanying text.

180. *Medina*, 799 P.2d at 1291; *see also supra* notes 39-44 and accompanying text.

181. *See also In re* Bye, 172 Cal. Rptr. 186 (Cal. Ct. App. 1981) (upholding the statute in a case in which the prosecutor bore the burden of proof).

182. United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *see also supra* notes 45-62 and accompanying text.

183. *DiGilio*, 538 F.2d at 988; *see also supra* notes 55-57 and accompanying text.

184. *DiGilio*, 538 F.2d at 988; *see also supra* notes 58-62 and accompanying text.

185. *See supra* notes 8-15 and accompanying text.

defendant's inability to assist his attorney could be used as evidence of incompetence.[186]

There are several troubling consequences to the contradiction argument. Taken to its logical end, it leads to a recursive definition of competence that would deprive the legal system of its ability to make any competency determination at all. If the defendant must possess some competence to have his competence determined, then competency-hearing competence cannot be presumed once a bona fide doubt regarding competence to stand trial has been raised. Would a hearing be necessary to determine this hearing competence? If so, what level of competence is required for participation in such a hearing? The proponents of the contradiction argument cut short this infinite regression by stating summarily that to counteract the defendant's possible incompetence, the scales should be weighted in favor of a finding of incompetence.[187] Although this proposition relieves some tension, the contradiction argument remains untenable because it is premised on the belief that the more incompetent a defendant is, the less able he is to prove it.[188] This premise is counterintuitive. The greater the defendant's incompetence, the more readily available evidence of incompetence should be.

The contradiction argument also ignores the history and purposes of the competency requirement.[189] The requirement arose at a time when self-representation was the norm, not the exception. An incompetent defendant at common law was, therefore, handicapped by the legal process to an extent unimaginable today.[190] Although sometimes justified by concern for the dignity of the legal process,[191] competence has always been expressed in functional terms, reflecting a pragmatic concern for fairness to the defendant.[192] The proponents of the contradiction argument, however, conspicuously fail to identify the capabilities lacking in an incompetent defendant that handicap him for participation in competency hearings and that require solicitude under the due

186. 799 P.2d 1282, 1291 (Cal. 1990), *cert. granted,* 116 L.Ed. 2d 276 (1991).

187. *See, e.g., DiGilio,* 538 F.2d at 988 (holding that "there is no room for a rule of law placing any burden of proof on the defendant").

188. *See, e.g., Medina,* 799 P.2d at 1312 (Broussard, J. dissenting) (stating that it is basically unfair to place "the burden of proof on a defendant whose incompetence, if actually present, will impair his ability to adequately assist in the task of meeting his burden of proof").

189. *See supra* part II.

190. *See* Winick, *supra* note 2, at 952-53. The law's solicitude is manifest not only in the competency requirement, but also in the rule that the defendant must be represented at a competency hearing. *See, e.g.,* State v. Pedersen, 309 N.W.2d 490, 496 (Iowa 1981). On a related issue, the United States Supreme Court observed in Massey v. Moore, 348 U.S. 105, 108 (1954), that the competence needed to stand trial pro se may be greater than that required to stand trial with the assistance of counsel.

191. *See supra* note 5.

192. *See supra* notes 1-2 and accompanying text.

process clause.

A review of the competency decisionmaking process reveals that the defendant's cooperation is of minimal significance in gathering and presenting evidence. Defendants usually are examined by mental health professionals who testify at the competency hearing, as do attorneys, cellmates, jail staff, family members, and friends.[193] When the defendant testifies at all, it is for the purpose of determining his understanding of the proceedings and ability to consult with his attorney. Those capabilities commonly associated with competence—for example, the ability to consult with defense counsel, to provide facts concerning alibis, background information with which witnesses may be located or impeached—are largely irrelevant in competency hearings.[194] The common law sequestered competency decisionmaking in a process that lacks competence as a prerequisite; the defendant need not be competent to participate in this process. While judicial concern for the hardships an incompetent defendant faces is commendable and appropriate, a rule of constitutional proportions can be justified only by a rational analysis of those hardships.

B. Due Process, Social Values, and United States v. DiGilio*'s Equipoise Argument*

1. Due Process Jurisprudence and the Relevance of Social Values

The antecedents of contemporary jurisprudence regarding due process and burdens of proof lie in the Supreme Court's 1958 decision in *Speiser v. Randall*[195] and its 1976 decision in *Mathews v. Eldridge*.[196] In *Speiser* the Court held that the burden of proof at trial must reflect and protect social values. Courts must reduce the risk facing the party

193. *See, e.g., supra* note 171 and sources cited therein.

194. The law expresses this understanding of the differing prerequisites to participation in a trial and in a competency hearing by requiring that competency hearings must be conducted by counsel. *See, e.g.*, State v. Pedersen, 309 N.W.2d 490, 496 (Iowa 1981). *See also supra* note 190.

Permitting a defendant to conduct competency hearings pro se could give rise to a dilemma: would a defendant who carried pro se his burden of proving his incompetence to stand trial be considered competent to stand trial by virtue of his ability to understand and participate in the competency hearing?

The case of Frankfort, Illinois, attorney Alan Schroeder comes very close to this situation: Schroeder was charged in 1989 with selling cocaine to a teenager. His lawyer questioned his competence to stand trial, but Schroeder continued to practice law, and represented his clients in court. *See Attorney denied bid to practice*, CHI. TRIB., June 13, 1991, at Sec. Du Page, p. 3. The irony was compounded when the judge ruled that Schroeder was fit for trial, but, relying on the same psychiatric report submitted on that issue, banned him from practicing law as a condition of his bond. *See Disciplinary Committee Bypassed: Suburban Chicago judge rules lawyer unfit for practice, fit for cocaine trial*, A.B.A. J., June, 1991, at 22.

195. 357 U.S. 513 (1958).

196. 424 U.S. 319 (1976).

that has an interest of "transcending value" by placing the burden of proof on the other party.[197] This concern that the risk implicit in the burden of proof should properly reflect social values was instrumental in the Court's decision in In re *Winship*,[198] in which the Court struck down a New York law that permitted a court to make a finding that a youth was a delinquent upon a preponderance of the evidence that the youth had committed acts which would be criminal if committed by an adult.[199] In *Eldridge* the Court established a multifactored test for determining whether given procedures conform to the requirements of due process: courts must consider the private interest at stake, the risk of error in the state's chosen procedures and the probable value of additional safeguards, and the government's interest in the chosen procedures.[200] The risk of error was the crucial concern in both *Speiser* and *Eldridge*.[201]

Risk of error and social values were determinative in *Addington v. Texas*, in which the Supreme Court revisited the due process questions surrounding burdens of proof.[202] Addington's mother challenged his indefinite commitment to a state mental hospital on the grounds that the preponderance standard used in the hearing was constitutionally inadequate.[203] The Court agreed, noting that the *Eldridge* test was applicable and observing that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[204] The Court held that only the higher "clear and convincing" standard of proof could justify commitment.[205] Although the individual interest was clearly strong, the Court also stressed the normative function of the burden of proof: "[T]o 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the cor-

197. 357 U.S. at 525.

198. 397 U.S. 358 (1970).

199. *Id.* at 359-60.

200. *Eldridge*, 424 U.S. at 334-35.

201. Two lines of cases diverge from the Court's decision in *Winship*. Leland v. Oregon, 343 U.S. 790 (1952), was the first in a series of cases interpreting the due process clause in light of state definitions of crimes that placed the burden of proof on the defendant. The cases in the *Leland* line concerned themselves principally with determining whether a state was impermissibly attempting to place upon the defendant the burden of disproving an element of the state's case against him. These cases establish a rule of deference to the states in their definition of criminal law. As previously discussed, these cases are inapposite to the issue of the burden of proving competence to stand trial because competence is a fundamental constitutional right, which the states are not free to ignore. *See supra* part IV.A.2. The second line of cases include *Eldridge* and those discussed subsequently in the text. *See infra* notes 202-16 and accompanying text.

202. 441 U.S. 418 (1979).

203. *Id.* at 421-22.

204. *Id.* at 427.

205. *Id.* at 432-33.

rectness of factual conclusions for a particular type of adjudication.' "[206]

The Court further highlighted the significance of social values in setting standards of proof in 1982 in *Santosky v. Kramer*.[207] In *Santosky* parents challenged the procedures under which New York state terminated their parental rights. New York law permitted the termination of parental rights on evidence satisfying a "fair preponderance" standard.[208] The Court applied the *Eldridge* test, but first noted that *Addington* established that due process requires consideration not only of the private and public interests affected, "but also a societal judgment about how the risk of error should be distributed between the litigants."[209] In its analysis of the risk of error factor, the Court noted the "practical and symbolic consequences" that raising the standard of proof would have.[210] After weighing the several factors, the Court concluded that, as in *Addington*, due process required at least clear and convincing evidence.[211]

Then-Justice Rehnquist argued in dissent that the Court's "myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme 'fundamentally fair.' "[212] He asserted that due process, as a flexible concept, requires a "broad look" at the statutory scheme,[213] and that such a broad look reveals that apart from the standard of proof, additional assurances of accuracy were present in the application of the statute.

Justice Rehnquist also disagreed with the majority's analysis of the risk of error and argued that the majority had given short shrift to the risk of error to the state. Citing Justice Harlan's concurring opinion in *Winship*, Justice Rehnquist noted that the preponderance standard is appropriate "when the interests at stake are of roughly equal societal importance."[214] New York State's interest in the welfare of the child was certainly as weighty as that of the parents in their continued parental rights. In such a circumstance, Justice Rehnquist believed that New York was justified in distributing the risk of error in a roughly equal

206. *Id.* at 423 (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

207. 455 U.S. 745 (1982).

208. *Id.* at 747.

209. *Id.* at 755.

210. *Id.* at 764.

211. *Id.* at 768-69. In Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990), the Supreme Court recently reaffirmed the appropriateness of the clear and convincing standard where "the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *Id.* at 2853 (quoting *Santosky*, 455 U.S. at 756)).

212. *Santosky*, 455 U.S. at 771 (Rehnquist, J., dissenting).

213. *Id.* at 775-76.

214. *Id.* at 787.

fashion.[215]

The majority and dissenting opinions in *Santosky* demonstrate that the value society places on a decision must complement the risk of error factor that *Eldridge* prescribed. *Addington* and *Santosky* demonstrate that the Constitution prescribes a range within which society, through legislation or court decision, may assign risk between the litigants. The disagreement between the majority and the dissent in *Santosky* over the interests to be balanced[216] demonstrates that societal values are an elusive, but often determinative, concept.

2. The *Eldridge* Standard Applied

Because most courts that have addressed the constitutionality of placing the burden of proof in competency hearings on the defendant have relied on *Leland* and its progeny, there is scant analysis of the issue under the *Santosky* multifactored test.[217]

In *Brown v. Warden, Great Meadow Correctional Facility*[218] the Second Circuit applied the *Santosky* rule to the preponderance standard in response to a prisoner's challenge that the reasonable doubt standard was constitutionally required. The court restricted its analysis to the private interest affected. The court noted that an erroneous competency determination will not lead necessarily to a conviction, that the other protections of trial remain in place, and that the trial court must remain vigilant for signs of incompetence throughout the trial.[219] Furthermore, the Second Circuit observed that a finding of incompetence may not be in the defendant's best interest because a commitment for incompetence may result in greater hardship than a conviction would have imposed.[220] The court concluded that the preponderance standard properly balances the risk of error.[221]

The Second Circuit's enumeration of the private interests affected raises several questions. The first is whether it is appropriate to consider together the many different scenarios under which competency hearings arise. While the court quite properly noted that the defendant may be harmed more than helped by a finding of incompetence[222] and

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215. *Id.*

216. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1323 (1982) (stating that the disagreement in *Santosky* was over the interests being balanced).

217. For one commentator's application of the test to the competence issue, see Comment, *supra* note 76.

218. 682 F.2d 348, 352 (2d Cir.), *cert. denied*, 459 U.S. 991 (1982).

219. *Id.*

220. *Id.* at 352-53.

221. *Id.* at 352.

222. There is a great deal of literature on the dangers to defendants of incompetence find-

that the actors in a trial may possess ulterior motives for raising the issue,[223] these facts suggest that a single standard of proof is inappropriate. More fundamentally, they also suggest that a due process analysis based upon *Santosky* may not be appropriate because of the difficulty of identifying reliably the interests of the parties. Specific cases present vastly differing interests, and the exigencies of analysis, as well as fairness to a defendant raising a challenge in a specific case, dictate that these several scenarios should be considered severally. The analysis in this Note, therefore, proceeds on the basis of a paradigmatic case in which the defendant raises the issue of competence and in which there is no danger that a finding of incompetence will be more onerous than a conviction at trial.[224]

The first private interest affected in the paradigmatic case is the interest in a trial that is fundamentally fair because the defendant both understands the nature of the proceedings and is able to assist his counsel.[225] Although the Second Circuit in *Brown* was correct in noting that an error in a competency decision will not lead necessarily to conviction,[226] this argument should not be overextended. If any homage at all is due the wisdom of the common law, one must conclude that incompetence contributes materially to the likelihood of an erroneous conviction.[227] The risk of error in the competency hearing is not attenuated by the possibility that even an incompetent defendant will be found innocent. Nevertheless, the Second Circuit did identify several considerations that lessen the significance of the standard of proof, including the continuing duty of all actors to monitor the defendant for

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ings. *See generally* Winick, *supra* note 2; 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; Robert A. Burt & Norval Morris, *Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972); Note, *supra* note 3.

223. *See generally* Uphoff, *supra* note 222; David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 HAST. CONST. L.Q. 295 (1988).

224. People v. Medina, 799 P.2d 1282 (Cal. 1990), *cert. granted*, 116 L.Ed. 2d (1991) (*see also supra* part III.C), represents just such a case: Medina, who now faces execution, likely would have preferred an indefinite commitment for incompetence to a guilty verdict which could lead to California's gas chamber; this is not to suggest, however, that the issue of competence in the paradigmatic case is not bona fide.

225. Pate v. Robinson, 383 U.S. 375, 378 (1966); Dusky v. United States, 362 U.S. 402, 402 (1960); *see also supra* notes 20-21 and accompanying text.

226. *Brown*, 682 F.2d at 352. *See also* Underwood, *supra* note 7, at 1342-43 (claiming that competence, as a "prerequisite" fact, "has no necessary relation" to the accuracy of a decision to convict).

227. *See supra* notes 1-5 and accompanying text; *see also* Ashford & Risinger, *supra* note 150, part IV (discussing presumption theory and the increased risk of error); Comment, *supra* note 76.

signs of incompetence.[228] The initial competency decision is not, therefore, a final one.[229]

The government's interests in the decisionmaking process are also significant. The cost of committing a defendant to a mental hospital following an erroneous finding of incompetence can be high.[230] The government also has significant interests in the efficient resolution of criminal charges and in conducting a trial while witnesses' memories are fresh. Nevertheless, the cost to the government of an error in the decision is low relative to the cost to the defendant. An erroneous finding of competence may lead to an erroneous conviction; an erroneous finding of incompetence will merely postpone the trial.[231]

Because the allocation of the burden of proof only affects the decision in close cases, the risk of error is relatively small. Indeed, some commentators and courts have argued based on statistical theory that such close cases—where the evidence of competence is in equipoise with the evidence of incompetence—are too rare to be considered.[232]

Due process jurisprudence in the competency context should not be further befogged by concern for the relevance of simplistic statistical models. In *United States* ex rel. *Bilyew v. Franzen* the Seventh Circuit rejected Illinois' argument that the burden of proof is immaterial because the probability of true equipoise is exceedingly small.[233] In an appendix to the opinion, the court noted that the model on which this conclusion is based is objectionable in three respects. First, the Seventh Circuit noted that factfinders are not likely to perceive evidence along a continuous spectrum; instead, they "can experience only a small, finite number of degrees of certainty that a defendant is fit to stand trial."[234] Second, the model assumes without foundation that the weights of evidence are distributed in such a way that equipoise is rare in fact.[235] Finally, the model fails to recognize that the burden of proof creates procedural differences that may skew the results. The court observed,

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228. *Brown*, 682 F.2d at 352.

229. Courts may consider the finality of a decision as a factor in determining whether a given standard of proof is acceptable. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2854 (1990); Santosky v. Kramer, 455 U.S. 745, 759 (1982).

230. *See, e.g.*, Winick, *supra* note 2, at part I.A (noting that the costs of competency evaluations are "staggering," and citing a study of Dade County, Florida, which found that the cost of caring for a typical incompetent defendant exceeds $22,000).

231. *See* Comment, *supra* note 76, at 998.

232. *See* United States *ex rel.* Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982) (citing David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121 (1976)).

233. 686 F.2d 1238, 1245 (7th Cir. 1982) (citing People v. Bilyew, 383 N.E.2d 212 (Ill. 1978)).

234. *Id.* at 1248.

235. *Id.*

for example, that the party bearing the burden usually must present evidence first and argue first.[236]

These criticisms are well taken, and others are available: a simple hypothetical application of current due process standards reveals the irrelevance of Illinois' statistical assumption in due process analysis. In *Bilyew* Illinois argued that the risk of error was exceedingly small because the probability of true equipoise is negligible.[237] If the likelihood of equipoise truly is negligible, however, then the burden on the government is also exceedingly small. The two effects of the supposed rarity of equipoise cancel each other out; thus, the probability that an equipoise situation will arise does not affect the result under an *Eldridge* multifactored analysis. For purposes of due process analysis, therefore, one should assume that equipoise may occur. If equipoise does occur, the risk of error is significant because the preponderance standard of proof is a relatively low one.

Even using the "broad look" approach that then-Justice Rehnquist advocated in *Santosky*,[238] the risk of error remains high. Unlike the New York child welfare system examined in *Santosky*, competency proceedings lack the safeguards necessary to protect the individual's interest. Criminal court judges are unlikely to be familiar with the defendant, and there are no prior proceedings at which the standard of proof is applied. Competency decisionmaking thus represents the normal case in which the standard of proof is crucial.[239]

The interests of all parties in competency hearings are significant and compelling, and there is a real danger of an erroneous decision. The three *Eldridge* factors—in particular, the relatively low cost to the government of an erroneous finding of incompetence[240]—suggest that assigning the burden of proof to the defendant is constitutionally impermissible. This conclusion is reinforced by the significance of the social values at stake.

3. Social Values and the Equipoise Argument

DiGilio's second argument is that due process requires that when the evidence concerning a fundamental right such as competence is in

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236. *Id.*

237. *Id.* at 1245; *see also* People v. Bilyew, 383 N.E.2d 212 (Ill. 1978); *supra* notes 65-67 and accompanying text.

238. *Santosky*, 455 U.S. at 770 (Rehnquist, J., dissenting); *see also supra* notes 212-13 and accompanying text.

239. *Cf. id.* at 785 n.12 (distinguishing *Santosky* from the "normal" case in which "the standard of proof is a crucial factor in the final outcome of the case").

240. *See supra* note 231 and accompanying text.

equipoise, the state must lose.[241] This argument comprises three premises: First, competence to stand trial is a capability that is fundamental to due process. Second, the burden of proof when the preponderance standard is used is most important when the evidence concerning the fact to be proved is in equipoise. Last, due process requires that evidence supporting the existence of a fundamental capability be weightier than the evidence against its existence.

Because the preponderance standard reflects a "roughly equal" distribution of the risk of error between the litigants,[242] the allocation of the burden of persuasion reflects a relatively minor difference in this distribution. As the *DiGilio* court noted, the issue essentially is which party should bear the risk of error when the evidence is in equipoise.[243] Yet *Addington* and *Santosky* held that the Constitution requires that the distribution of risk reflect society's concern for the interests affected and the nature of the decision.[244] Although the preponderance standard is permissible whenever the interests are of similar weight, the question in allocating the burden of persuasion is which, of two roughly equal interests, is more deserving of the additional protection when the evidence is evenly stacked.

The defendant's interest in a fundamentally fair trial must prevail over the state's interests. The common law developed the presumption of competence as a rule of substantive law[245] that provides an initial burden of production the defendant must overcome before the court will delay a trial. Once triggered, however, courts should not permit this device to subject a defendant about whose competence the evidence is equivocal to the hazards of trial when he is possibly uncomprehending and unable to assist his attorney. A due process requirement that the prosecution bear the burden of proving competence to stand trial merely restates the well-established constitutional importance of the competency right.

Though criminal defendants may benefit little from a rule which places on the prosecution the burden of proving competence to stand trial, the symbolic effects of such a rule should not be overlooked. Especially with questions such as competence to stand trial, when the private and governmental interests are both compelling and when the risk of error is significant, social values play a dispositive role and dictate that when the evidence is in equipoise, the factfinder should give the

241. United States v. DiGilio, 538 F.2d 972, 988 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *see also supra* notes 59-62 and accompanying text.

242. *Santosky*, 455 U.S. at 787, 788 n.13 (Rehnquist, J., dissenting).

243. 538 F.2d at 988; *see also supra* notes 59-62 and accompanying text.

244. *Addington*, 441 U.S. at 423; *Santosky*, 455 U.S. at 754-55; *see also supra* part V.B.1.

245. *See supra* notes 155-56 and accompanying text.

benefit of the doubt to the defendant.

VI. Conclusion

Although the issue is a very narrow one, the burden of proof in competency decisionmaking plays important symbolic and instructional roles. Too often, however, courts have relied on arguments that obscure, rather than highlight, the significance of these roles. Those who oppose a due process right in having the prosecution bear the burden have generally failed to analyze closely the constitutional bases of the cases on which they rely, and have applied irrelevant evidence law without stepping back to ask basic questions about the nature of competency decisionmaking and the presumption of competence. Likewise, those who advocate such a due process right have advanced arguments that ignore the purposes of competence to stand trial. Although these advocates arrive at the correct conclusion, their failure to undertake a full due process analysis gives little reassurance to legislative decisionmakers and other courts that their conclusion is correct.

Competency decisionmaking is not usually adversarial; participants in the criminal justice system often may agree about the defendant's mental state and cooperate with one another in order to reach a correct result. This will not always be the case, however, particularly when the possibility of a death sentence distorts the defendant's options. In such controversial cases, the courts and legislatures considering the process should not fall back on the adversarial process without being mindful of the dangers of doing so, not because an adversarial competency hearing requires too much of an incompetent defendant, but because the familiar incidents of the adversarial system break down at the system's margins. Burden of proof is a convenient mechanism for assigning the risk of error and the responsibility for producing evidence, but it is unhelpful when the parties are responsible principally for the integrity of the system and are capable of playing diametrically opposite roles. In the end, it is more helpful to frame the question in terms of which finding should prevail when the evidence is close rather than which party should prevail.[246]

Ultimately, the value that society places on one's right to be tried only when mentally competent dictates that a defendant be found incompetent when the evidence is in equipoise. Although the individual

246. *See* Pizzi, *supra* note 32, at 57 (stating that "[o]nce the issue is raised, the court has the responsibility to determine it correctly," and that "[t]he burden of proving competency belongs to the court").

interests of both the defendant and the state are compelling, due process dictates that the benefit of the doubt be given to the defendant's right to a fundamentally fair trial.

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