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In Defense of Sell: Involuntary Medication and the Permanently Incompetent Criminal Defendant

Lisa Kim Anh Nguyen

In June 2003, the Supreme Court held that a criminal defendant may be involuntarily medicated solely to render him competent to stand trial. The Court explained that the defendant’s liberty interest in avoiding forcible medication must be balanced against the government’s interest in prosecuting the defendant, concluding that the involuntary administration of antipsychotic drugs is constitutionally appropriate in some situations. But, although the Court held that “the Constitution allows the Government to administer those drugs, even against the defendant’s will,” the Court recognized that these circumstances were limited, holding that certain conditions must be satisfied before the government is permitted to engage in such actions.

The legal scholarship examining this recent decision has been largely critical. Many commentators claim that the decision fails to adequately protect a criminal defendant’s consti-
tutional rights. But this objection incorrectly assumes that withholding unwanted medication will always lead to greater individual constitutional protections, overlooking the full set of harms associated with the continued inability to try a criminal defendant.

In assessing the permissibility of involuntary medication, prior scholarship has failed to consider the consequences of allowing criminal defendants to remain unfit for trial. Leaving a criminal defendant incompetent entails serious implications that go further than the government’s interest in prosecution. For some defendants, a temporary commitment to a mental institution in order to restore competency could result in a lifetime confinement for a criminal charge for which they were never convicted.

The Constitution prohibits trying a mentally incompetent criminal defendant to ensure that the defendant will receive a fair trial. But, in practice, the determination that a defendant is incompetent deprives the defendant of a trial altogether. Involuntary medication for the purpose of competency prevents this privation by allowing the defendant to resolve the criminal charges against him. The trial process implicates constitutionally prescribed due process rights that the defendant could not exert if he remained incompetent.

This Comment argues that forcible medication administered to render a defendant competent to stand trial not only protects the government’s interest in prosecution, but also the criminal defendant’s interest not to be held indefinitely without trial. Part I examines the current plight of the permanently incompetent criminal defendant. Part II describes the jurisprudence behind the involuntary administration of psychotropic drugs. Finally,
Part III reexamines forcible medication in light of the consequences of permanent incompetency.

I. THE UNDUE CONFINEMENT OF PERMANENTLY INCOMPETENT CRIMINAL DEFENDANTS

The prohibition against trying an incompetent criminal defendant is a well-established principle, rooted in English common law, and later adopted by American common law. The Fifth Amendment Due Process Clause guarantees that "no person shall . . . be deprived of life, liberty, or property without due process of law." The Sixth Amendment establishes components of a criminal defendant's trial rights that have been incorporated into a constitutional due process right to a fair trial. The Fourteenth Amendment makes these guarantees binding upon the states.

The 1966 decision Pate v Robinson firmly established that "the conviction of an accused person while he is legally incompetent violates due process, and that state procedures must be adequate to protect this right." The Court held that the state's failure to observe procedures adequate to protect the defendant's right not to be tried or convicted while incompetent deprived him of his constitutional right to a fair trial. The Court reaffirmed that the Constitution prohibits the trial of an incompetent criminal defendant in the 1992 decision Medina v California. The Court noted that it had long recognized that "[t]he criminal trial of an incompetent defendant violates due process." The Supreme Court describes fitness to stand trial as (1) the capacity to assist defense counsel; and (2) the present capacity to

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11 US Const Amend V.
12 US Const Amend VI.
13 See Drope v Missouri, 420 US 162, 171–72 (1975). See also Riggins v Nevada, 504 US 127, 139–40 (1992) (Kennedy concurring) ("Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.").
14 US Const Amend XIV.
16 Id at 385.
17 Id.
19 Id at 453.
understand the proceedings against him. The Court adopted this formulation in the 1960 decision *Dusky v United States.* To be competent to stand trial, the Court held that the accused must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding... [and] a rational as well as factual understanding of the proceedings against him." In other words, a defendant must be able to understand the nature and object of the proceedings, consult with counsel and assist in preparing his own defense.

Due process requires that a trial court hold a competency hearing whenever doubt as to a defendant's fitness to stand trial arises. In *Drope v Missouri,* the Court held that the failure to inquire into the defendant's competency deprived him of his due process right. The Court emphasized that even if a defendant is competent at the beginning of trial, the trial court must be sensitive to any changes that might render the accused unfit to proceed at any time throughout the duration of trial.

These cases lay the constitutional framework that protects the trial rights of an incompetent criminal defendant. But, although the bar against trying an incompetent defendant primarily serves to protect the rights of the accused, the prohibition often imposes heavy burdens on the defendant. The determination of incompetency suspends the criminal proceedings, and commits the defendant to a secure mental hospital in order to render him fit for trial. For those defendants unable to be restored to competency, this commitment is indefinite and may even exceed the maximum sentence for the crime charged.

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22 Id.
24 Id at 173.
26 Id at 172.
27 Id at 181.
29 Winick, 32 UCLA L Rev at 925 (cited in note 7).
30 Id at 924, 938.
31 Id at 938. For anecdotal and empirical evidence of indefinite confinement prior to 1972, see Grant H. Morris and J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil*
While the Supreme Court has placed a constitutional limit on the duration of incompetency commitment, in practice, unfit defendants continue to be held in treatment facilities for an indeterminate amount of time. Part A of this section describes the decision prohibiting the indefinite confinement of incompetent criminal defendants. Part B describes the responses to this decision by states, courts, and defendants, and explains how these responses have inhibited the decision's efficacy.

A. Jackson v Indiana

The Supreme Court held the indefinite confinement of permanently incompetent criminal defendants unconstitutional in the 1972 decision Jackson v Indiana. In 1968, 27-year-old Theon Jackson was arrested for two separate purse-snatchings involving the combined value of $9.00. The Court identified Jackson as a "mentally defective deaf mute with a mental level of a pre-school child." Jackson could neither read nor write, and was otherwise unable to communicate except through limited sign language. Two psychiatrists found Jackson incompetent to stand trial, and both testified that Jackson was unlikely to ever be restored to fitness. Despite this testimony, the trial court committed Jackson to the Department of Mental Health until it could certify that Jackson was competent to stand trial.

The Court found Jackson's commitment unconstitutional. The Court ruled that a person "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." The record sufficiently established that Jackson lacked a substantial probability to ever fully participate...
in his trial. Therefore, his continued commitment exceeded the constitutional limit.

The Court provided two constitutional grounds for its decision. The Court found that: (1) Jackson had been denied equal protection because he was committed under more lenient standards than those required under civil commitments; and (2) Jackson had been denied due process because he was committed to restore competency though this restoration was infeasible. The Court held that the state could not constitutionally commit Jackson for an indefinite period of time simply because he was incompetent to stand trial for the charges filed against him.

The decision placed a constitutional limit on the duration of competency commitments for all criminal defendants. The Court held that the determination that a defendant lacks a substantial probability of restoration requires that the state either release the defendant or initiate customary civil commitment proceedings. Moreover, the Court noted that "even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

Courts repeatedly note that "Jackson is an enormously important decision" in cases involving mentally disordered individuals. But despite prohibiting the indeterminate commitment of incompetent criminal defendants, the decision has had "little impact on these practices." The legislative, judicial, and individual responses to Jackson demonstrate that incompetent criminal defendants continue to be unduly confined.

B. Response to Jackson

The response to Jackson by state legislatures, lower courts, and defendants indicate that the decision has failed to compel comprehensive change in competency commitments. "A review of

43 Morris and Meloy, 27 UC Davis L Rev at 8 (cited in note 31).
45 Id at 720.
46 Id at 738.
47 Id.
48 Morris and Meloy, 27 UC Davis L Rev at 8 (cited in note 31) (citations omitted).
49 Id.
legislation in the fifty states and the District of Columbia reveals that *Jackson* has been ignored or circumvented in a majority of jurisdictions.\textsuperscript{51} The *Jackson* court's failure to define key terms in its decision has led lower courts to issue conflicting decisions.\textsuperscript{62} Incompetent defendants confined indefinitely generally fail to invoke *Jackson*.\textsuperscript{53} The decision explicitly protects unfit criminal defendants, but these responses indicate that defendants continue to suffer severe consequences when found incompetent.

1. State legislative responses to *Jackson*.

Many states substantially revised their incompetency commitment procedures as a result of *Jackson*, "minimizing the gross abuse of incompetency commitment that existed prior to the Court's decision."\textsuperscript{54} However, many states failed to fully implement *Jackson* by ignoring or circumventing the decision in some way.\textsuperscript{55} These states incorporated the specific language of *Jackson* into their statutes, but failed to follow the spirit of the decision.

*Jackson* requires treatment to restore competency to cease if there is no "substantial probability that [the defendant] will attain that capacity in the foreseeable future."\textsuperscript{56} In other words, the treatment must stop if the defendant is permanently incompetent. Some states ignore *Jackson* by requiring permanently incompetent defendants to be detained until their competence has been restored.\textsuperscript{57} These states escape *Jackson* by refusing to identify these defendants as permanently unfit.

Other states have disregarded *Jackson* by imposing a lengthy period of treatment before acknowledging that the defendant is permanently incompetent.\textsuperscript{58} These states tie the maximum length of treatment to the maximum possible sentence

\textsuperscript{51} Morris and Meloy, 27 UC Davis L Rev at 78 (cited in note 31).

\textsuperscript{52} See, for example, *Ohio v Sullivan*, 739 NE2d 788, 793 (Ohio 2001) (invalidating the mandatory commitment of an incompetent defendant based on the seriousness of the crime charged regardless of likelihood to restore); *Farrell v United States*, 646 A2d 963, 965–66 (DC Ct App 1994) (upholding a mandatory commitment for sixty days regardless of likelihood to restore).

\textsuperscript{53} Winick, 32 UCLA L Rev at 941 (cited in note 7).

\textsuperscript{54} Id at 940.

\textsuperscript{55} Morris and Meloy, 27 UC Davis L Rev at 9–33 (cited note 31).

\textsuperscript{56} *Jackson*, 406 US at 738.

\textsuperscript{57} Alabama, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, Oklahoma, Utah, Wyoming, and the District of Columbia allow indeterminate commitment by committing criminal defendant until they attain competency, though such attainment is unlikely. Morris and Meloy, 27 UC Davis L Rev at 13 n 57 (cited in note 31).

\textsuperscript{58} Id at 16–17.
for the crime charged.\textsuperscript{59} In four states, the maximum length of
treatment is the maximum possible sentence.\textsuperscript{60} This allows the
defendant to potentially be held for life. Unfortunately, because
these states place a limit on commitment, these confinements
cannot be considered "indeterminate" and do not violate the let-
ter of\textit{Jackson}.

Moreover, the Court's mandate to "release or commit" the
permanently incompetent defendant has led other states to
abuse civil commitment proceedings. The language of the deci-
sion technically permits indeterminate commitments of incompe-
tent defendants as long as the state "institute[s] the customary
civil commitment proceeding that would be required to commit
indefinitely any other citizen."\textsuperscript{61} Four states avoid the\textit{Jackson}
problem by committing incompetent defendants through the civil
commitment process.\textsuperscript{62} However, in these cases, the defendant
will not be treated for incompetency at all.\textsuperscript{63}

2. Judicial interpretations of\textit{Jackson}.

Both state and federal courts have struggled to interpret the
Supreme Court's language in\textit{Jackson}, resulting in a collection of
ambiguous case law. For example, in 1999, appellate courts in
Ohio took different views as to the constitutionality of state pro-
visions that required a period of confinement regardless of the
possibility of restoration. One court found that a trial court had
acted properly in committing a sex offender, even though it was
unlikely that he would ever regain competency.\textsuperscript{64} Only a few
months earlier, another court held that an incompetent defen-
dant could not be committed for a mandatory period of time if
there was evidence that he could not be restored to competency
in the near future.\textsuperscript{65}

In Illinois, courts have provided conflicting standards for
maximum criminal confinement. One state appeals court held
the fifteen-year confinement of an incompetent defendant uncon-
stitutional because the amount of time far exceeded the period
necessary to determine whether the defendant was permanently

\begin{itemize}
\item \textsuperscript{59} Id at 17.
\item \textsuperscript{60} Colorado, Louisiana, North Dakota, and South Dakota. Id at 17 n 75.
\item \textsuperscript{61}\textit{Jackson}, 406 US at 738.
\item \textsuperscript{62} Morris and Meloy, 27 UC Davis L Rev at 13–14 (cited in note 31).
\item \textsuperscript{63} Id.
\item \textsuperscript{64} \textit{Ohio v Bretz}, 1999 Ohio App LEXIS 6443, *19–24 (1999).
\item \textsuperscript{65} \textit{Ohio v Sullivan}, 1999 Ohio App LEXIS 4768, *17 (1999).
\end{itemize}
incompetent. In contrast, another appellate court upheld an extended five-year treatment period for an incompetent defendant despite the fact that the court had already found that "no treatment would render him fit."

Although the Supreme Court explicitly prohibited differing standards between civil commitment and commitment based on incompetence, one court has upheld a state statute enacting "criminal commitments." The New Mexico Supreme Court upheld a state law which subjected a defendant found incompetent to stand trial to different commitment and release criteria than those used to civilly commit. The New Mexico Court dismissed the argument that this standard differed from the civil commitment standard which, unlike the criminal commitment standard, required a person to have a mental illness. The court only stated that it is "well-established" that the government may detain "dangerous defendants who become incompetent to stand trial."

3. The failure of defendants to invoke *Jackson*.

A finding of incompetency necessarily precludes a defendant from asserting his rights himself. "Incompetent defendants often are either unaware of their rights or lack the initiative or resources to assert them." By definition, incompetent defendants lack the ability to understand the proceedings against them and to aid in their own defense. Therefore, indefinitely confined incompetent defendants have generally been unable to bring *Jackson* claims on their own behalf.

As the Court noted in *Dusky*, "One of the reasons that the practice of prolonged hospitalization endures is that neither judicial decisions nor the statutory pronouncements of legislatures are self-executing." Without systemic procedures to prevent indefinite confinement, incompetent defendants rely on defense

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67 *People v Raseaitis*, 467 NE2d 1098, 1104 (Ill App Ct 1984).
70 *Id* at 1149.
71 *Id*.
72 Winick, 32 UCLA L Rev at 942 (cited in note 7).
73 362 US at 402.
74 *Id*.
75 Some states have statutorily required periodic reviews of incompetent defendants. See *Morris and Meloy*, 27 UC Davis L Rev at 10–13 (cited in note 31). Although these reviews are automatic and can be considered a systemic safeguard, incompetent defendants still rely on defense counsel to bring any failure to receive reviews to the attention
counsel to assert their rights for them. But frequently, criminal defense lawyers are either unfamiliar with mental health law, or "neglect their incompetent clients once they have been committed."

The defendant's failure to invoke Jackson contributes to the dangers of a determination of incompetency. "[T]he theory of adjudicating competency—a beneficent process to assure that the defendant receives a fair trial—is not matched by the harsh reality of the consequences imposed on the defendant found incompetent." This section described the systematic burdens of the incompetency process and explained why this "harsh reality" exists. This Comment later considers these burdens against the harms associated with involuntary medication. Before that comparison, this next section describes the interests implicated by involuntary medication.

II. THE LEGAL HISTORY OF INVOLUNTARY MEDICATION

Prior decisions in a number of jurisdictions have found a substantial constitutional right to refuse unwanted antipsychotic medication. In 1971, the Washington Court of Appeals reversed the conviction of a defendant based on its finding that the state's forcible administration of drugs affected the defendant's mental and physical abilities at trial. The court found that the drugs conflicted with the defendant's Sixth Amendment right to appear in court unfettered and to confront the witnesses against him.

Similarly, in 1980, the District Court for the Northern District of Ohio held that the involuntary administration of psychotropic medication infringes upon a patient's protected liberty interests, and may not be imposed without affording the minimum due process protections. The court found that, "at least in some situations," persons confined in the state's custody have a constitutional right to refuse medication. The court explained that the source of that right could best be understood as substantive due process, or in other words, "an aspect of 'liberty' guaranteed by the due process clause of the Fourteenth Amendment."
In 1981, the Massachusetts Supreme Court held that antipsychotic medication may not be administered to a noninstitutionalized individual absent an emergency or court order.\textsuperscript{83} The court noted that although the right to refuse "must be subordinated to various state interests," the state may administer involuntary medication if it satisfies the least intrusive means test.\textsuperscript{84} The court stated that the "right to the least intrusive means is derived from the right to privacy, which stands as a constitutional expression of the sanctity of individual free choice and self-determination as fundamental constituents of life."\textsuperscript{85}

These cases and other decisions like them help inform a thorough analysis of the substantive rights involved in the forced treatment of criminal defendants in order to render them competent to stand trial. Courts have found a variety of interests that involuntary medication may invade.\textsuperscript{86} But the most striking finding in all these cases is that they decline to assert an absolute right to refuse antipsychotic medication.

More recently, lower courts have looked to the Supreme Court decisions \textit{Washington v Harper}\textsuperscript{87} and \textit{Riggins v Nevada}\textsuperscript{88} to determine the scope of the government's power to involuntarily medicate criminal defendants. The Supreme Court itself relied heavily on these two prior decisions in \textit{Sell v United States}\textsuperscript{89} to hold constitutional the involuntary medication of criminal defendants in the competency context.\textsuperscript{90} \textit{Harper} and \textit{Riggins} constitute substantial steps in the \textit{Sell} framework to determine when involuntary medication is constitutionally permissible solely to render a criminal defendant competent to stand trial.

\section*{A. \textit{Washington v Harper}}

In \textit{Harper}, the Supreme Court considered a state law authorizing the forced administration of drugs to inmates who were gravely disabled or who represented a significant danger to

\begin{itemize}
\item \textsuperscript{83} \textit{In re Guardianship of Roe}, 421 NE2d 40, 42 (Mass 1981).
\item \textsuperscript{84} Id at 60–61.
\item \textsuperscript{85} Id at 61 (citations omitted).
\item \textsuperscript{86} For a more detailed discussion of literature and case law asserting various constitutional grounds by which an inmate could refuse forced medication, see Steve Tomashefsky, \textit{Comment, Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment}, 52 U Chi L Rev 773, 795 n 10 (1985).
\item \textsuperscript{87} 494 US 210 (1990).
\item \textsuperscript{88} 504 US 127 (1992).
\item \textsuperscript{89} 539 US 166 (2003).
\item \textsuperscript{90} Id at 177–83.
\end{itemize}
themselves or others.\textsuperscript{91} The case involved a prison inmate with a mental disorder who was “likely to cause harm if not treated.”\textsuperscript{92} The Court found that the Due Process Clause allowed the state to treat the inmate against his will, relying on the facts that the inmate was a danger and the treatment was in his own medical interest.\textsuperscript{93}

The Supreme Court recognized an individual’s significant, constitutionally-protected liberty interest in avoiding unwanted medication, but found that this interest subject to state concerns.\textsuperscript{94} The state’s need to administer medication was “legitimate” and “important,”\textsuperscript{95} and the state law authorizing involuntary treatment amounted to a constitutionally permissible accommodation between interests.\textsuperscript{96} Essentially, the Court found that forcing antipsychotic drugs on a convicted prisoner impermissible absent a finding of overriding justification and a determination of medical appropriateness. The danger the defendant posed to himself and others and the finding that the treatment was medically appropriate met this standard.

B. \textit{Riggins v Nevada}

The Supreme Court reiterated that an individual has a constitutionally protected liberty interest in avoiding involuntary medication in \textit{Riggins}.\textsuperscript{97} The Court once again found the individual’s liberty interest subject to the state’s need to provide appropriate medical treatment.\textsuperscript{98} But unlike \textit{Harper}, the Court found that the state failed to meet its evidentiary burden, and reversed Riggins’ conviction and remanded for further proceedings.\textsuperscript{99}

In its decision, the Court explained that the state failed to demonstrate that “treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins’ own safety or the safety of others.”\textsuperscript{100} The trial court had permitted forced medication of Riggins without taking account of his liberty interest, with a con-

\textsuperscript{91}494 US at 215.
\textsuperscript{92}Id.
\textsuperscript{93}Id at 227.
\textsuperscript{94}Id.
\textsuperscript{95}\textit{Harper}, 494 US at 223–25.
\textsuperscript{96}Id at 236.
\textsuperscript{97}504 US at 133–34.
\textsuperscript{98}Id at 134–35.
\textsuperscript{99}Id at 138.
\textsuperscript{100}\textit{Riggins}, 504 US at 135.
sequent possibility of trial prejudice. The court noted that "[w]hile trial prejudice can sometimes be justified by an essential state interest, the record here contains no finding to support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy." Ultimately, the Court held that a criminal defendant may discontinue antipsychotic medication if the drugs are likely to conflict with the defendant's Sixth Amendment right.

In a concurring opinion, Justice Kennedy emphasized that antipsychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair trial. Kennedy noted that the side effects of drugs can prejudice the accused in two ways: (1) "by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom;" and (2) "by rendering him unable or unwilling to assist counsel." In language later incorporated by the Sell decision, Justice Kennedy stated that involuntary medication would be impermissible until knowledge of antipsychotic medication evolved to produce effective drugs with only minimal side effects.

C. Sell v United States

The Supreme Court authorized the government to involuntarily medicate a mentally ill defendant in order to render him competent for trial in Sell. Forcibly medicating an incompetent criminal defendant to restore competency is permissible when: (1) there are important governmental interests in trying the defendant; (2) the treatment will significantly further those interests; (3) the treatment is necessary to further those interests, considering any less intrusive alternatives; and (4) the treatment is medically appropriate. The Court held that if those conditions are met, the Constitution allows the government to involuntarily administer antipsychotic drugs to render the accused competent to stand trial.

The Sell factors control only when the sole purpose of the forced chemical treatment is to render a defendant competent to

101 Id at 135.
102 Id at 128.
103 Id at 134–35.
104 Riggins, 504 US at 138 (Kennedy concurring).
105 Id at 142.
106 Id at 145.
107 539 US at 180.
108 Id at 180–81.
stand trial. Justice Breyer, writing for the six-justice majority, noted that the standards should only be applied when "seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial." The Court explained that the state should first look to other means by which forcible medication may be authorized before turning to the Sell conditions. Breyer stated that "[a] court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a different purpose, such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk."

The Court laid out a clear framework through which incompetent criminal defendants could be involuntarily medicated. By stating that trial courts first utilize existing mechanisms to medicate unfit defendants, the Court limited the instances in which the Sell conditions could be used. Read in conjunction with the Riggins and Harper, the decision provides stringent protections that restrict the use of involuntary medication.

III. REEXAMINING INVOLUNTARY MEDICATION IN THE SHADOW OF PERMANENT INCOMPETENCE

The failure to administer antipsychotic medication requires the state to reevaluate the defendant's fitness. Justice Kennedy noted that "[i]f the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment . . . unless the defendant becomes competent through other means." But the likelihood that the defendant will achieve competency is slim. "[W]ithout taking prescribed antipsychotic medications, it is doubtful that many mentally ill defendants could have a change in mental status that would lead

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109 Justice Scalia wrote a dissenting opinion joined by Justice O'Connor and Justice Thomas maintaining that the Supreme Court lacked jurisdiction because the district court's order was neither a final decision nor an interlocutory order. Id at 186–87. Moreover, the dissent maintained that the majority allowed criminal defendants to "engage in opportunistic behavior." Id at 191. Scalia explained that, "They can, for example, voluntarily take their medication until halfway through the trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis." Id.

110 Id at 181.

111 Sell, 539 US at 181–82 (emphasis in original).

112 Riggins, 504 US at 145.
to a forensic opinion supportive of restoration of competency to stand trial." As a result, the decision to withhold medication is a decision to leave the defendant permanently incompetent.

This section will reexamine the costs and benefits of involuntary medication against this background of permanent incompetence. Part A will consider the constitutional harms of involuntary medication within the framework of incompetency. Part B will explore the benefits of involuntary medication from the standpoint of the permanently incompetent defendant. The reexamination of involuntary medication from the context of permanent incompetency will reveal that the forcible treatment of unfit defendants results in far lower costs and far greater benefits than prior scholarship has maintained.

A. The Constitutional Costs of Involuntary Medication

The right to refuse unwanted drugs implicates a number of constitutional rights. Many commentators argue that *Sell* does not provide adequate safeguards to protect these rights. While proponents of forcible medication have provided various responses to these arguments, reexamining the claims surround-

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114 See *United States v Brandon*, 158 F3d 947 (6th Cir 1998) (recognizing a First Amendment interest in avoiding forcible medication); *Mackey v Procu nier*, 477 F2d 877, 878 (9th Cir 1973) (noting that involuntary treatment raises "serious constitutional questions respecting cruel and unusual punishment"); *United States v Morgan*, 193 F3d 252 (4th Cir 1999) (recognizing that pretrial detainees have a due process right to refuse antipsychotic medication); *United States v Santonio*, 2001 US Dist LEXIS 8647 (D Utah 2001) (noting that the administration of medication may interfere with a defendant's right to fair trial by creating a prejudicial negative demeanor); *Woodland v Angus*, 820 F Supp 1497 (D Utah 1993) (acknowledging a privacy interest in avoiding forcible medication).

115 See Quinlan, 84 BU L Rev at 275 (cited in note 5) (maintaining that *Sell* does not adequately address the defendant's First, Fifth, and Sixth Amendments rights); Hayes, 94 J Crim L & Criminol at 857 (cited in note 5) (arguing that *Sell* does not adequately protect the defendant's liberty interest to be free from unwanted medication or right to fair trial); Dias, 55 SC L Rev at 517 (cited in note 4) (noting that the *Sell* court failed to address the individual's First Amendment rights or that due process may override the government's prosecutorial interests).

116 In response to the argument that forcible medication violates a defendant's First Amendment rights, the American Psychiatric Association and the American Academy of Psychiatry and the Law maintain that "medications, when properly used to treat the severely mentally ill, positively promote First Amendment interests by enhancing abilities to concentrate, read, learn, and communicate." Brief of Amici Curiae American Psychiatric Association and American Academy of Psychiatry and the Law, *Sell v United States*, No. 02-5664, *26* (filed Jan 22, 2003) (available on Lexis at 2002 US Briefs 5664) ("APA/AAPL Brief"). Similarly, the American Psychological Association states that mental illnesses prevent individuals from thinking clearly, actually depriving them of their
ing two constitutional rights in particular lends special support in favor of forcible medication.

1. Equal protection.

One commentator suggests that allowing the government to forcibly medicate incompetent criminal defendants ignores the equal protection implications of *Jackson.* The Supreme Court emphasized in the 1972 decision that incompetent defendants are entitled to the same “procedural and substantive protection against indefinite commitment than that generally available to all others.” Civil and criminal commitment cannot be distinguished.

Likewise, the civil and criminal distinction cannot legitimate the disparate administration of forcible medication among civil and criminal committees. “If incompetent criminal defendants are civil patients, then they are entitled to the same right to medical self-determination that other civil patients possess.”* Sell* violates this protection by allowing pending criminal charges to justify coerced treatment among incompetent defendants whereas otherwise civilly committed patients may refuse.

Contrary to what these critics claim, *Sell* is consistent with *Jackson,* and comports with equal protection. Incompetent criminal defendants are given the same right to refuse unwanted medication as any other similarly situated civilly committed patient. Proponents of this equal protection argument concede that “civilly committed patients have a right to refuse treatment with

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In recognizing a privacy interest in avoiding involuntary medication in *Woodland,* the Utah court stated that the invasion on such interests is justified as a result of the state’s interest in rendering the patient competent to stand trial insofar as the following factors are considered: (1) the extent to which the procedure may threaten the patient’s safety or health; (2) the extent of intrusion on the patient’s dignitary interests in personal privacy and bodily integrity; and (3) the community’s interest in fairly and accurately determining guilt or innocence. 820 F Supp 1511.


*118* *Jackson,* 406 US at 724.

*119* Id at 723–30. For further discussion of the civil/criminal distinction, see Morris, 41 San Diego L Rev 1177 (cited in note 117).

antipsychotic medication unless they lack the capacity to make treatment decisions.\(^{121}\) *Sell* relies on this principle, implicitly finding that incompetent defendants lack the capacity to make treatment decisions.

Courts have consistently held that involuntarily committed patients may lose the right to make treatment decisions upon a judicial determination of incapacity. In *Rivers v Katz*,\(^{122}\) the New York Supreme Court held that a judicial finding of incapacity to make a reasoned decision as to one's own treatment is required before an involuntarily committed patient may be forcibly medicated with psychotropic drugs against his or her will. In *Steele v Hamilton County Community Mental Health Board*,\(^{123}\) the Ohio Supreme Court held that, a court can issue an order permitting administration of antipsychotic medication without a finding that the involuntarily committed patient was dangerous if the court found that the patient lacked the capacity to give consent regarding treatment, the medication was in his best interest, and no less intrusive treatment would be as effective. The Supreme Court of Massachusetts similarly held in *Rogers v Comm'r of Dep't of Mental Health*\(^{124}\) that involuntarily committed civil patients do not lose the right to make treatment decisions unless a judge finds them incompetent during incompetency proceedings. The *Sell* court adheres to this line of decisions.

Proponents of the equal protection argument contend that a separate judicial finding of incapacity to make treatment decisions must be made before involuntary medication can be administered.\(^{125}\) However, the standards that the Supreme Court administers in cases of involuntary medication echo these prior standards for a judicial finding of incapacity, making a separate finding unnecessary. As in *Steele*, the Court in *Sell* requires that the medication be in the patient's best interest,\(^{126}\) and that no less intrusive means of treatment exists.\(^{127}\) *Sell* implicitly holds that incompetent criminal defendants lack the capacity to make treatment decisions. In other words, a finding of incompetence to stand trial is also a judicial determination of incapacity to make treatment decisions.

\(^{121}\) Id at 1204.
\(^{122}\) 67 NY2d 485 (1986).
\(^{123}\) 736 NE2d 10 (Ohio 2000).
\(^{124}\) 458 NE2d 308 (Mass 1983).
\(^{125}\) Morris, 41 San Diego L Rev at 1202 (cited in note 117).
\(^{126}\) *Sell*, 539 US at 181.
\(^{127}\) Id.
Competence to refuse medication is described as the ability to weigh the risks, benefits, and alternatives to the proposed medication. An unfit defendant does not have either the present capacity to assess the proceedings against him, or the ability to aid in his own defense. These inabilities relate directly to the defendant’s ability to assess the advantages and disadvantages involved in his restoration to competence.

Moreover, Sell in no way inhibits a competent criminal defendant’s ability to refuse medication. “If the confined individual competently chooses to refuse treatment, even if such decision may prolong his or her confinement, the individual’s interest—one that the Supreme Court has repeatedly recognized to be a significant, constitutionally protected liberty interest—should outweigh any claimed governmental interest in coercing treatment.” The decision preserves the right to refuse medication, but only if the defendant has been restored to competence.

The harms associated with forced treatment are difficult to determine because the effects of drugs on an individual defendant cannot be determined until the medication is administered. The American Psychiatric Association (“APA”) and American Academy of Psychiatry and the Law (“AAPL”) argue that any concerns regarding the involuntary treatment of a criminal defendant are “properly considered at a later stage, after competence is restored.” In their amicus curiae brief filed in support of the government in Sell, the two organizations explain that any concerns may ultimately become moot once the defendant has been restored to competence.

Medical treatment improves the defendant’s functionality, possibly enabling him to make decisions that he could not make before. “The defendant may plead guilty and avoid trial; adverse effects often will not occur at all; and any adverse effects are broadly subject to being controlled by adjustment of medication, so the mere possibility of such effects should not stand in the way of restoring competence.” As one commentator noted, a recent study has shown that “involuntary medication did not limit the potential for plea bargaining, nor did involuntary medi-

128 Id.
129 Dusky, 362 US at 402.
130 Morris, 41 San Diego L Rev at 1205 (cited in note 117) (emphasis added).
131 APA/AAPL Brief at *9 (cited in note 116).
132 Id.
134 APA/AAPL Brief at *9 (cited in 116).
cation prevent successful insanity plea[s].”\textsuperscript{135} This study indicates that the defendant should make the decision to refuse medication only after he is rendered competent.

2. The Right to Fair Trial

The involuntary medication of incompetent criminal defendants is constitutionally permissible “only if the treatment is . . . substantially unlikely to have side effects that may undermine the fairness of the trial.”\textsuperscript{136} Still, some commentators maintain that the decision fails to adequately protect the defendant’s Sixth Amendment rights.\textsuperscript{137} These opponents argue that the effects of antipsychotic drugs on a defendant’s demeanor and cognitive abilities will “always hinder a defendant’s right to fair trial.”\textsuperscript{138} Consequently, forcible medication would never be permitted for the sole purpose of rendering a mentally ill defendant competent to stand trial.\textsuperscript{139}

These concerns echo those expressed by Justice Kennedy in his concurrence in \textit{Riggins}.\textsuperscript{140} Justice Kennedy viewed involuntary medication with antipsychotic drugs as a “serious threat to a defendant’s right to a fair trial.”\textsuperscript{141} While he believed that officials could involuntarily administer medication upon “an extraordinary showing by the State,” Justice Kennedy expressed doubt that such a showing could be made in most cases, “given our present understanding of the properties of these drugs.”\textsuperscript{142}

Justice Kennedy’s concurrence relied heavily on the amicus brief filed by the APA in \textit{Riggins} supporting the defendant.\textsuperscript{143} Since then, knowledge of these drugs has dramatically improved, and in \textit{Sell}, the APA shifted their position, arguing in favor of forcible medication rather than against it.\textsuperscript{144} In their brief in support of the government, the APA and AAPL argued that

\begin{footnotesize}
\begin{enumerate}
\item[135] Pinals, 31 New Eng J Crim & Civ Confinement at 103 (cited in note 113).
\item[136] \textit{Sell}, 539 US at 180.
\item[137] See, for example, Hayes, 94 J Crim L & Criminol at 657 (cited in note 5) (arguing that a defendant’s right to a fair trial is jeopardized when antipsychotic medication is administered involuntarily to a defendant solely to render him competent to stand trial).
\item[138] Id at 680.
\item[139] Id at 681.
\item[140] 505 US at 138.
\item[141] Id.
\item[142] Id at 139.
\item[144] See APA/AAPL Brief at *9 (cited in note 116).
\end{enumerate}
\end{footnotesize}
“medication typically enhances rather than impairs a defendant’s ability to participate effectively at trial.” The Sell amicus brief states that adverse effects will often not occur at all and any adverse effects that do surface can often be controlled through the adjustment of medication. The APA and AAPL concluded that “[t]he mere possibility of such effects should not stand in the way of restoring competence.”

Moreover, Riggins set forth the right to discontinue psychotropic medications that might interfere with the defendant’s right to fair trial. If a criminal defendant is still being medicated involuntarily as his trial date draws near, he can move for a Riggins hearing if he believes that such medication will adversely affect his demeanor at trial. “At that point, deciding whether or not the medication might interfere with the fairness of a defendant’s trial would require little speculation on the part of the court.” The hearing would require the court to weigh actual existing side effects, rather than conjecture. Sell and Riggins provide the robust procedural safeguards necessary to protect the fair trial rights of the defendant.

The danger that forcible medication poses to a defendant’s Sixth Amendment rights is trivial and speculative in comparison to the real consequences of a determination of permanent incompetency. Prohibiting involuntary medication will invariably lead to permanent incompetency. “Restoration of competence is often unlikely without antipsychotic medication, and the lack of other effective alternatives could mean a defendant may remain incompetent to stand trial indefinitely.” Opponents of involuntary medication provide no option other than to leave criminal defendants in an indeterminate state of incompetency. As a result, Jackson is implicated, forcing states to “release or commit” the defendant.

Some states implemented statutory procedures for “discharge hearings” or “not-guilty-only trials” in order to adjudicate

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145 Id.
146 Id.
147 Id.
149 Id at *15.
150 Id at *9.
151 Pinals, 31 New Eng J Crim & Civ Confinement at 102 (cited in note 113).
152 Hayes, 94 J Crim L & Criminol at 679 (cited in note 5).
the release or committal of the defendant.\textsuperscript{153} These procedures provide little protection for the defendant's Sixth Amendment rights since many courts do not consider these proceedings to be trials, and so fail to provide the same constitutional guarantees.\textsuperscript{154} Consequently, these hearings deprive the defendant of all of his trial rights including jury trial, confrontation, compulsory process for defense witnesses, the presentation of personal testimony in defense, and an adjudication of either innocence or guilt beyond a reasonable doubt.\textsuperscript{155}

Furthermore, even if these hearings result in release, the charges against the defendant may not be resolved. The \textit{Jackson} court merely requires the defendant's release, not the dismissal of criminal charges.\textsuperscript{156} As a result, defendants are unable to resolve any allegations of criminal conduct.

The failure of states to enforce \textit{Jackson} partially stems from this inability to adequately deal with permanently incompetent criminal defendants without some minimal deprivation of the incompetent defendants' trial rights. In order to resolve the indefinite confinement of permanently incompetent criminal defendants, some judgment as to the charges against the defendant must be made. As long as the defendant remains incompetent, this judgment will always result in some deprivation of rights, making the constitutionality of these types of hearings questionable.\textsuperscript{157}

Allowing defendants to be rendered competent under \textit{Sell} avoids this situation. "Although this improved functional autonomy might result in a defendant being returned to the criminal justice system, the defendant would be best equipped to deal with legal and personal choices if able to more adeptly understand their situation and the proceedings they face."\textsuperscript{158} The competent defendant is in a better position to assess whether he can properly utilize his trial rights or should return to a state of unfitness.

The Court also clearly recognized the importance of inquiring "about trial-related side effects and risks—the answers to which could have helped determine whether forced medication
was warranted on trial competence grounds alone," and set out important safeguards to ensure that the defendant would only be medicated when the balance of interests dictated. The Court states that, "Whether a particular drug will tend to sedate a defendant, interfere with communications with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence." Ultimately, *Sell* provides the broadest protection of trial rights.

B. The Benefits of Involuntary Medication in Practice

Involuntary medication has different implications depending on the severity of the crime for which the defendant is charged. Many state statutes decline to tie the maximum length of the incompetency commitment to the maximum sentence term authorized for the offense charged. Therefore, length of commitment may be the same whether the defendant was charged with a misdemeanor or serious crime. From that context, the benefits of involuntary medication are greater for less serious crimes.

1. Misdemeanors

A misdemeanor is generally thought of as a minor crime, defined as "[a] crime that is less serious than a felony and is [usually] punishable by fine, penalty, forfeiture, or confinement ([usually] for a brief term) in a place other than prison (such as a county jail)." One study found that "a substantial majority of defendants hospitalized for competency evaluation were charged with misdemeanors." Although some courts in the past have been hesitant to seek involuntary medication in minor offenses, its careful use could considerably reduce the unnecessary confinement of criminal defendants hospitalized for competency issues.

The harm associated with indefinite confinement is most compelling in the case of the misdemeanant. "An involuntary

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159 *Sell*, 539 US at 185.
160 Id.
161 Winick, 32 UCLA L Rev at 942 (cited in note 7).
163 Id at 941–42.
164 See, for example, *Brandon*, 158 F3d at 947 (holding that the government's interest in adjudicating a minor offense was not sufficiently compelling); *Santonio*, 2001 US Dist LEXIS 8647, *1 (same).
commitment for treatment to restore competence may extend well beyond the maximum sentence imposable for a relatively minor offense." The Sell court stated that "[t]he potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution." The potential for future confinement for defendants charged with a misdemeanor could in no way vitiate, and in some ways strengthens, the need for prosecution.

Some criminal defendants may refuse treatment without a complete understanding of the criminal consequences of conviction. "If convicted, many of these defendants would pay a small fine or receive a period of probation. Instead, they might spend months or years confined as incompetent." Adhering to the Sell factors, any medication would pose no significant side effects and would be the least intrusive means to attain competency. The criminal defendant could easily lack this information and therefore make an uninformed decision in refusing treatment.

Moreover, in determining competency, most states do not distinguish misdemeanants from felons. Because of this, criminal defendants charged with misdemeanors are more likely to endure punishment disproportionate to their crime. "As a matter of practice, defendants awaiting evaluations to determine their incompetency to stand trial have regularly been sent to maximum security forensic hospitals, regardless of the underlying criminal charge, even though such hospitalization is often not necessary or may even be counter-productive." Forcing misdemeanants into maximum security forensic hospitals may worsen the defendant's psychotic problems by placing him in an environment that is counterproductive to his treatment.

2. Serious, but nonviolent crimes.

In May 1997, Charles T. Sell, a St. Louis area dentist was arrested for filing false insurance claims. Nearly two years later in April 1999, a court found Sell unfit to stand trial and returned him to the United States Medical Center for Federal

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165 ABA Mental Health Standards at 179 (cited in note 155).
166 Sell, 539 US at 180.
168 Sell, 539 US at 181.
169 Id.
170 Perlin, 52 Ala L Rev at 201 (cited in note 50).
Prisoners at Springfield, Missouri.\textsuperscript{172} At the time that Sell's case was heard before the Supreme Court, "six years after his arrest and more than four years after he was first found incompetent to stand trial, he remain[ed], imprisoned, psychotic, and untreated."\textsuperscript{173}

Although the Court found the use of forcible medication solely to render a criminal defendant competent to stand trial constitutionally permissible, the Court held that the government had failed to provide sufficient evidence to authorize such use in the case of Sell.\textsuperscript{174} More than a year after the Supreme Court decision, Sell remains incompetent, still confined in a federal prison hospital despite his wish to proceed to trial.\textsuperscript{175} Approaching his eighth year of confinement, Sell's pretrial commitment remains indefinite even in the shadow of \textit{Jackson}.\textsuperscript{176}

Defendants charged with serious, but nonviolent crimes present the greatest challenge to the \textit{Jackson} release-or-commit mandate. The seriousness of the crime substantially reduces the likelihood that the government will drop the charges. Yet the nonviolent nature of the charge suggests that the defendant might also fail to meet civil commitment standards.\textsuperscript{177} As the Supreme Court once noted, "a mentally retarded defendant accused of a nonviolent crime may be found incompetent to stand trial but not necessarily subject to involuntary civil commitment."\textsuperscript{178}

This dilemma has urged some commentators to suggest that it may be in the defendant's best interests not to raise the competency issues at all.\textsuperscript{179} Recognizing the adverse consequences of a determination of unfitness, the American Bar Association ("ABA") states in the commentary accompanying its Criminal Justice Mental Health Standards that the "severe consequences

\textsuperscript{172} Id at 29.
\textsuperscript{173} Id at 55 (citations omitted).
\textsuperscript{174} \textit{Sell}, 539 US at 186.
\textsuperscript{175} Carolyn Tuft, \textit{Sell Is Sent to Different Prison Hospital}, St Louis Post-Dispatch B1 (Nov 30, 2004).
\textsuperscript{176} One commentator questions whether \textit{Sell} might overrule \textit{Jackson} "sub silencio." Morris, 41 San Diego L Rev at 1204 (cited in note 117).
\textsuperscript{177} \textit{Cooper}, 517 US at 384 n 24.
\textsuperscript{178} Id.
\textsuperscript{179} In fact, soon after the \textit{Jackson} decision, Robert Burt and Norval Morris went so far as to suggest the abolition of the incompetency plea. See Robert A. Burt and Norval Morris, \textit{A Proposal for the Abolition of the Incompetency Plea}, 40 U Chi L Rev 66 (1972). However, their approach found little favor with the courts because of its incompatibility with settled law. Bonnie, 47 U Miami L Rev at 542 (cited in note 28). For a rehabilitation of the Burt and Morris approach, suggesting a waiver of the right rather than the abolition, see Winick, 39 Rutgers L Rev 243 (cited in note 6).
traditionally attendant upon a determination of incompetency” may lead defense counsel to “conclude that it is better for a technically incompetent defendant to proceed to trial.” The commentary continues, noting that “some commentators have contended that defense counsel not only is permitted, but in some instances is required, to decline to raise the issue of a client’s possible incompetence if it seems to be in the client’s best interests to forgo that procedure.”

But ultimately, such an option is constitutionally inviable due to defense counsel’s obligation to inform the court of the defendant’s possible incompetence. The trial of an incompetent defendant is necessarily invalid as a violation of due process, and neither the defendant nor his counsel may waive such protection. The Supreme Court states in *Pate*, “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial.” Given the inability to waive fitness, involuntary medication provides the only constitutionally permissible means for a defendant to proceed to trial in order to avoid the “potentially greater hardship and injustice to a defendant stemming from an incompetency commitment.” By giving the defendant another means to resolve the criminal charges against him, the incompetent defendant can avoid postevaluation commitments to mental health facilities made without “regard to the nature of the crime, the defendant’s dangerousness, or the letter and spirit of the Supreme Court’s *Jackson v. Indiana* decision.”

3. Serious, violent crimes.

Involuntary medication in serious, violent crimes has the greatest potential for abuse, since the government’s interest in prosecuting this category of crime is the greatest. “The more serious the crime charged, the greater is the state’s interest in prosecuting the defendant.” The state will be less willing to allow the charges to be dismissed, and is more likely to opt for

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150 ABA Mental Health Standards at 179 (cited in note 155).
161 Id at 180.
162 Id.
163 Id.
164 *Pate*, 383 US at 384.
185 ABA Mental Health Standards at 179 (cited in note 155).
186 Perlin, 52 Ala L Rev at 207 (cited in note 50).
187 Morris and Meloy, 27 UC Davis L Rev at 17 (cited in note 31).
commitment. The danger that, without medication, the defendant will serve a lengthy confinement without a conviction is great.

Opponents of forcible medication emphasize the danger of wrongful conviction were an incompetent criminal defendant to go to trial. However, the incompetency status does not avoid the penal impositions associated with conviction. Incompetency bears a stigma of guilt that often subjects the defendant to confinement in order to ensure that the defendant does not escape punishment through a finding of unfitness. The presumption that the accused is innocent until proven guilty is constitutionally required. However, there is often an "unstated but lingering assumption that any defendant on whose 'behalf' the incompetency status is raised is, in fact, 'factually guilty' of the underlying crime."  

The assumption of guilt has led to the abuse of civil commitment proceedings in order to punish criminal defendants without a finding of guilt. The incompetency status is somehow viewed as an indicator of guilt. "Although there is nothing in the invocation of the incompetency status that at all concedes factual guilt . . . , it is assumed by all that the defendant did, in fact, commit the crime."  

The seriousness of the crime for which the defendant is charged facilitates the finding of dangerousness that most civil commitment statutes require. Studies have shown that psychiatrists are more likely to find a defendant dangerous, the more serious the alleged crime. Courts have found little distinction between the "dangerousness" of defendants for whom there is only probable cause to believe a crime has been committed and defendants who, under an insanity plea, admit that they have committed the offenses charged. Although the difference be-

188 Estelle v Williams, 425 US 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").
189 Perlin, 52 Ala L Rev at 206 (cited in note 50).
191 Id.
193 Criminal and Quasi-Criminal Proceedings, 4-20 Treatise on Health Care Law § 20.07.
between the two is significant, "courts rarely have been persuaded by this distinction."\textsuperscript{194}

Involuntary medication in order to render a defendant fit to stand trial ensures that punishment will not be inflicted unless the state can prove beyond a reasonable doubt that the defendant committed the offenses he is charged with. Civil commitment does not provide the same safeguards, and in fact the court may still make a finding of guilt by allowing the prosecution to prove that the accused committed the crime by meeting a lower standard of proof. A New Mexico statute requires that if the court determines by clear and convincing evidence that the incompetent defendant committed the crime charged and had previously found the defendant dangerous, the defendant must be detained in a secure, locked facility for a period not to exceed the maximum sentence available had he been convicted in a criminal proceeding.\textsuperscript{195} In other words, the statute potentially allows the court to sentence the defendant to life imprisonment without requiring the defendant's guilt to be proven beyond a reasonable doubt.

CONCLUSION

A criminal defendant has a substantial right to refuse medical treatment. However, that right may be overcome by the government's interest in prosecuting the defendant, and more importantly, the defendant's right not to be confined without trial. A determination of incompetency suspends the criminal proceedings, committing the defendant to a mental institution until fit for trial. For those permanently incompetent, this commitment could far exceed any punishment they may have received if convicted.

The framework laid out by the \textit{Sell} decision to involuntarily medicate the incompetent provides robust protections for the criminal defendant. Moreover, forcible medication allows the defendant to proceed to trial and exercise his rights guaranteed by the Constitution. Consequently, the ability to stand trial, even under forcible medication, provides greater constitutional protections than the indeterminate state attendant upon incompetency.

\textsuperscript{194} Id.
\textsuperscript{195} Id at 253.