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Public Law and Legal Theory Research Paper Series

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Mental Disorder and the Civil/Criminal Distinction

Grant H. Morris

Mental Disorder and the Civil/Criminal Distinction

Grant H. Morris*

I. Introduction

In his song, “Ring Them Bells,”¹ Bob Dylan sounds an alarm. “The shepherd is asleep,” he tells us, “and the mountains are filled with lost sheep.” Dylan recites a litany of disastrous consequences that can only be averted if the faithful are awakened and renew their faith. The final line of that song is particularly disturbing: “And they’re breaking down the distance between right and wrong.”

This essay discusses one instance in which the distance between right and wrong has broken down. It is the evaporating distinction between sentence-serving convicts and mentally disordered nonconvicts who are involved in, or who were involved in, the criminal process—people we label as both bad and mad. By examining one Supreme Court case from each of the decades that follow the opening of the University of San Diego School of Law, the essay demonstrates how the promise that nonconvict mentally disordered persons would be treated equally with other civilly committed mental patients was made and then

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¹BOB DYLAN, *Ring Them Bells*, on OH MERCY ALBUM (CBS Records Inc. 1989).

broken.

II. The 1960s: *Baxstrom v. Herold*²—The Promise Made

On May 17, 1954, only six weeks after the University of San Diego School of Law commenced operations,³ the United States Supreme Court decided the historic case of *Brown v. Board of Education*.⁴ To the question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?,” the unanimous Court responded: “We believe that it does.”⁵ Such segregation deprives minority group children of the equal protection of the laws guaranteed them by the Fourteenth Amendment.⁶ With simple elegance, Chief Justice Warren, writing for the Court, declared: “Separate educational facilities are inherently unequal.”⁷

The right of similarly situated persons to be treated equally before the law is not

²383 U.S. 107 (1966).

³The University of San Diego School of Law commenced operations on April 5, 1954.

⁴347 U.S. 483 (1954)

⁵*Id.* at 493.

⁶*Id.* at 495. The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

⁷*Id.* Although Rosa Park’s arrest in Montgomery, Alabama on December 1, 1955 for refusing to stand to allow a white bus rider to take her seat is generally regarded as the event that started the civil rights revolution, *Brown*’s promise that the law will treat equally persons of different races presaged Ms. Parks’ arrest by eighteen months.

limited to persons of different races. Nonconvict mental patients, for example, are similarly situated with each other and cannot be treated as convicts. In its 1966 decision in *Baxstrom v. Herold*,⁸ the Supreme Court held unconstitutional a New York statute that authorized, through administrative decision, the civil commitment of mentally ill, sentence-expiring convicts and their continued confinement in a maximum security mental institution operated by the Department of Correction.⁹ Under the invalidated statute, sentence-expiring convicts were the only persons subject to civil commitment who were denied a jury review on the question of whether their mental condition met the civil commitment criteria. They were also the only persons who were denied court hearings on the question of whether they were dangerously mentally ill, a prerequisite for confinement in a maximum security mental institution.¹⁰

Writing for a unanimous Court,¹¹ Chief Justice Warren rejected the assertion that a person's criminal tendencies or dangerous propensities are established by his or her past criminal record.¹² Equal protection "demands"¹³ that sentence-expiring convicts receive the same procedural safeguards that all others receive in the civil commitment process; they

⁸383 U.S. 107 (1966).

⁹*Id.* at 110-11.

¹⁰*Id.* at 110-13.

¹¹Justice Black concurred in the result but wrote no opinion. *Id.* at 115.

¹²*Id.* at 114.

¹³"Demands" is the word choice of the Chief Justice. *Id.* at 115.

cannot be specially classified to avoid the standard procedural roadblocks to civil commitment.¹⁴ Equal protection also demands that they receive the same procedural safeguards that all other civilly committed patients receive before they may be placed in maximum security confinement; they cannot be specially classified to avoid the standard roadblocks to such placement.¹⁵ “[T]here is no conceivable basis,” wrote the Chief Justice, “for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”¹⁶

Although the *Baxstrom* Court considered only a sentence-expiring convict’s right to *procedural* protections in the civil commitment process and in decisions to place the patient in maximum security confinement,¹⁷ just six years later, the Court construed its *Baxstrom* precedent broadly, stating: “*Baxstrom* held that the State cannot withhold from a few the procedural protections *or the substantive requirements* for commitment that are

¹⁴*Baxstrom*, 383 U.S. at 110.

¹⁵*Id.* at 110.

¹⁶*Id.* at 111-12 (1966).

¹⁷*See also Humphrey v. Cady*, 405 U.S. 504 (1972). In *Humphrey*, the Supreme Court applied its *Baxstrom* precedent to an individual convicted of the misdemeanor of contributing to the delinquency of a minor. In lieu of a one-year maximum sentence, he was committed pursuant to the Wisconsin Sex Crime Act to the sex deviate facility in the state prison for a potentially indefinite period, i.e., initial commitment for a period equal to the maximum sentence followed by renewable five-year commitment periods. *Id.* at 506, 507. The Court ruled that petitioner’s contention that he was denied equal protection in the renewal commitment, which did not accord him a jury trial accorded other persons undergoing civil commitment, was substantial enough to warrant an evidentiary hearing in a federal habeas corpus proceeding. *Id.* at 508.

available to all others.”¹⁸ If convicts were to be civilly committed upon expiration of their criminal sentences, the state was required to use the same civil commitment statutes—the same procedures and same criteria—used to civilly commit any other person, and to commit them to mental hospitals in which all other civilly committed patients were placed, not in a facility administered by the Department of Correction. Sentence-expiring convicts could not be separately categorized for civil commitment purposes.¹⁹ After all, when a prisoner’s

¹⁸Jackson v. Indiana, 406 U.S. 715, 727 (emphasis added).

¹⁹As a result of the *Baxstrom* decision, nearly one thousand sentence-expiring prisoners were discharged from confinement under the unconstitutional law that mandated their placement in maximum security mental hospitals administered by the New York State Department of Correction. Almost all of the 992 *Baxstrom* patients were civilly committed—using the criteria and procedures applicable to all others who were civilly committed—and placed in mental hospitals administered by the New York State Department of Mental Hygiene. Within a six-month period, 79 were discharged to the community, 22 were conditionally released on convalescent care, 273 were reclassified to voluntary patient status, and 24 were reclassified to informal patient status. Only six had to be retransferred to maximum security hospitals operated by the Department of Corrections as dangerously mentally ill. Within the following six months, an additional sixty-eight *Baxstrom* patients were discharged and only one was retransferred to a maximum security hospital. Grant H. Morris, “Criminality” and the Right to Treatment, 36 U. CHI. L. REV. 784, 795 (1969). The results strongly suggest that psychiatrists in the Department of Mental Hygiene: (1) overpredicted dangerous mental illness, (2) were unwilling to accept and treat as mental patients those who were identified as “dangerous” or labeled as “criminals,” and (3) had the ability to treat such patients when they were integrated with and given treatment indistinguishable from that provided to other civilly committed mental patients. *Id.* at 796. See also HENRY J. STEADMAN & JOSEPH J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 55-161 (1974) (finding that the *Baxstrom* patients were not very dangerous and were successfully treated in civil mental hospitals, *id.* at 108, and that when released to the community, few displayed dangerous behavior, *id.* at 158); Grant H. Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFF. L. REV. 651, 670-75 (1968) [hereinafter Morris, *Confusion of Confinement*].

sentence expires, his or her debt to society has been paid, and the prisoner is no longer subject to further punishment.

Although *Baxstrom* was decided almost forty years ago, it is not just a viable precedent, it is a venerable precedent. *Baxstrom* has been cited in 505 court decisions, including nineteen Supreme Court decisions.²⁰

III. The 1970s: *Jackson v. Indiana*²¹—The Promise Extended

Prior to 1972, criminal defendants found mentally incompetent to stand trial, i.e., unable to understand the criminal proceedings against them or to assist in their defense,²²

²⁰See Westlaw Keycite for *Baxstrom v. Herold*, 383 U.S. 107 (1966) (examined on December 22, 2003). The Supreme Court most recently cited *Baxstrom* in *Kansas v. Hendricks*, 521 U.S. 346, 369-70 (1997). Justice Thomas, who wrote the Court's majority opinion in *Hendricks*, cited *Baxstrom*, as did Justice Kennedy, who wrote a concurring opinion. *Id.* at 372 (Kennedy, J., concurring). See *infra* text accompanying notes 112-16.

²¹406 U.S. 715 (1972).

²²See, e.g., 18 U.S.C.A. §4241 (2000). The Supreme Court has ruled that the prohibition against conducting a criminal trial of an incompetent defendant “is fundamental to an adversary system of justice.” *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The suspension of criminal proceedings is warranted to assure the accuracy, fairness, and dignity of the trial process and to justify the imposition of punishment if the defendant is convicted. In many cases, the accused may be the only individual who has knowledge of the facts underlying the criminal charge, and thus, an accurate assessment of guilt requires the defendant's assistance. To assure fairness in the criminal process, the accused must have the basic capacity to assist counsel in presenting a defense. The dignity of the criminal process would be undermined by the spectacle of an incompetent defendant's trial. The objective of punishment requires that a convicted defendant comprehend the reasons why the court is imposing punishment. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-59 (1967); Barbara A. Weiner, *Mental Disability and the Criminal Law*, in AMERICAN BAR FOUND., THE MENTALLY DISABLED AND THE LAW 693, 694 (Samuel J. Brakel et al. eds. 3d ed. 1985). The suspension of criminal proceedings against incompetent defendants is “a by-product of the ban against trial *in absentia*; the mentally

were confined until their competence was restored.²³ For many, “a finding of incompetence to stand trial was tantamount to a life sentence.”²⁴ However, in *Jackson v. Indiana*,²⁵ the Supreme Court, again in a unanimous²⁶ decision, invalidated a statute permitting indeterminate, and potentially life-time, commitment of a mentally retarded, deaf-mute person who had been found incompetent to stand trial.²⁷ The Court ruled that its six-year old *Baxstrom* principle was not limited to sentence-expiring convicts but applies as well to mentally incompetent criminal defendants: “If criminal conviction and

incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.” Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960).

²³A 1965 study of Matteawan State hospital, a maximum security institution administered by the New York State Department of Correction, revealed that 208 of the 1062 mentally incompetent defendants at that facility had been detained there for twenty years or more. SPECIAL COMM. ON THE STUDY OF COMMITMENT PROCEDURES AND THE LAW RELATING TO INCOMPETENTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT 73 (1968). The patient longest in residence at Matteawan at that time was an eighty-three-year-old patient who had been accused of burglary in 1901 and who had been found mentally incompetent to stand trial. *Id.* at 72. After sixty-four years of confinement at Matteawan, he was, at least theoretically, still awaiting restoration to competence so that he could undergo a criminal trial.

²⁴Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 4 (1993).

²⁵406 U.S. 715 (1972).

²⁶Justice Powell and Justice Rehnquist did not participate in the Court’s consideration or decision of the case. *Id.* at 741.

²⁷*Id.* at 717-19, 738.

imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.”²⁸ Equal protection is denied when incompetent criminal defendants are subjected to a more lenient commitment standard (i.e., incompetence to stand criminal trial) and to a more stringent release standard (i.e., restoration of trial competence) than is applicable to all other persons who are not charged with crimes and who could only be detained under the state’s civil commitment laws.²⁹

Although the finding of incompetence to stand trial may justify a brief period of detention designed to restore the defendant’s competence, due process requires that incompetent defendants who cannot soon be restored to competency either must be released or be subjected to “the customary civil commitment proceeding that would be required to commit indefinitely any other citizen.”³⁰ Although the Court declined to specify when civil commitment or release must occur, the Court noted that detention of incompetent defendants is appropriate only for those who “probably soon will be able to stand trial.”³¹ And even for those defendants, the Court required that commitment “must be

²⁸*Id.* at 724.

²⁹*Id.* at 730.

³⁰*Id.* at 738.

³¹*Jackson*, 406 U.S. at 738. An incompetent defendant can only be held for a “reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.” *Id.* If such probability does not exist, the defendant must be released or civilly committed. If such probability does exist, the defendant may be detained for a limited time to attempt to restore his or her

justified by progress toward that goal.”³²

Although *Jackson* was decided more than thirty years ago, it, too, is not just a viable precedent, it is a venerable precedent. *Jackson* has been cited in 636 court decisions, including twenty-five Supreme Court decisions.³³

IV. The 1980s: *Jones v. United States*³⁴—The Promise Broken

If sentence-expiring convicts and permanently incompetent criminal defendants cannot be specially classified for civil commitment purposes, it is logical to assume that any nonconvict cannot be specially classified for that purpose—even if the individual has been involved in the criminal process. In *Jackson*, the Supreme Court noted that the *Baxstrom* principle had been extended to post-trial commitment decisions involving individuals who had been absolved from criminal responsibility by insanity verdicts.³⁵ A successful insanity defense precludes criminal responsibility. A seriously mentally

competency. *Id.*

³²*Id.*

³³See Westlaw Keycite for *Jackson v. Indiana*, 406 U.S. 715 (1972) (examined on December 22, 2003). The Supreme Court most recently cited *Jackson* in *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (noting that when detention's goal is no longer practically attainable, detention no longer “bear[s][a] reasonable relation to the purpose for which the individual [was] committed.” *Jackson*, 406 U.S. at 738). In 2003, Justice Souter, joined by Justice Stevens and Justice Ginsberg, wrote a dissenting opinion that cited *Jackson* for the same principle. *Demore v. Hyung Kim*, 538 U.S. 510, 123 S. Ct. 1708, 1726, 1732 (2003) (Souter, J., dissenting).

³⁴463 U.S. 354 (1983).

³⁵*Jackson v. Indiana*, 406 U.S. 715, 724 (1972).

disordered person who engages in criminal behavior but who is found not guilty of the crime because of that disorder is not blameworthy and is not subject to criminal punishment.

Relying upon *Baxstrom*, the Court of Appeals for the District of Columbia Circuit,³⁶ and the highest appellate courts in several states,³⁷ held that an insanity verdict could not by itself justify the indeterminate detention of an insanity acquittee. Although a finding of insanity at the time of the criminal act warrants a post-trial evaluation of the acquittee's current mental condition, once that evaluation is completed, the acquittee should not be distinguished from other nonconvict mentally disordered persons in the criteria applied to the commitment decision and the procedures employed in the commitment process.³⁸

³⁶*Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968). Chief Judge David Bazelon, writing for the court, relied on *Baxstrom* as establishing the principle that “the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill.” *Id.* at 647. To confine an insanity acquittee without affording him the standard civil commitment procedural protections denies him equal protection. *Id.* at 652. The court rejected the argument, which the Supreme Court also rejected in *Baxstrom*, that expeditious commitment of nonconvict mentally ill persons is justified because of their dangerous or criminal propensities. *Id.* at 649.

³⁷*See, e.g., State v. Clemons*, 515 P.2d 324, 328-29 (Ariz. 1973); *Wilson v. State*, 287 N.E.2d 875, 881 (Ind. 1972); *People v. McQuillan*, 221 N.W.2d 569, 579-80, 586 (Mich. 1974); *People v. Lally*, 224 N.E.2d 87, 92 (N.Y. 1966); *State v. Krol*, 344 A.2d 289, 296-99 (N.J. 1975); *State ex rel. Kovach v. Schubert*, 219 N.W.2d 341, 346-47 (Wis. 1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975).

³⁸*See generally* Grant H. Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L. J. 855 (asserting that although insanity acquittees can be subjected to a post-trial evaluation to assess their current mental condition, they should not be distinguished from other nonconvict mentally disordered persons in commitment, release, and treatment decisions).

Nevertheless, in its 1983 decision in *Jones v. United States*,³⁹ a narrowly divided Supreme Court held that “insanity acquittees constitute a special class that [can] be treated differently from other candidates for commitment.”⁴⁰ As a special class, insanity acquittees can be subjected to automatic, indeterminate commitment⁴¹ without first undergoing the civil commitment process. For civil commitment generally, the state is required to prove, by clear and convincing evidence, that the person is both mentally ill and dangerous.⁴² According to the five-judge *Jones* majority, the state has no such burden for insanity acquittee commitment. In his criminal trial, Jones pleaded insanity as a defense to the crime charged against him.⁴³ The insanity verdict established beyond a reasonable doubt that he committed a criminal act and did so because of mental illness.⁴⁴ The legislature may determine that the insanity verdict supports an inference of continuing mental illness⁴⁵

³⁹463 U.S. 354 (1983).

⁴⁰*Id.* at 370.

⁴¹The District of Columbia statute interpreted in the *Jones* case provided, and continues to provide, that within fifty days of commitment, a judicial hearing shall be held at which the insanity acquittee can prove his or her eligibility for release. D.C. CODE § 24-501(d)(2)(A) (2001). At that hearing, the burden is placed on the insanity acquittee to prove by a preponderance of the evidence that he has recovered his sanity and will not in the reasonable future be dangerous to himself or others. *Id.* § 24-501(d)(2)(B), (e).

⁴²*Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

⁴³*Jones*, 463 U.S. at 359-60.

⁴⁴*Id.* at 363.

⁴⁵*Id.* at 366.

and continuing dangerousness.⁴⁶ Thus, insanity acquittees can be distinguished from others, such as incompetent criminal defendants, about whom such proof is lacking.⁴⁷

⁴⁶*Id.* at 364. The *Jones* majority reasoned that proof of the commission of a criminal act is “concrete evidence” that “may be at least as persuasive as any prediction about dangerousness that might be made in a civil-commitment proceeding.” *Id.*

⁴⁷The Court distinguished insanity acquittees from persons subjected to the regular civil commitment process without any criminal charges brought against them and from criminal defendants found incompetent to stand trial. Incompetent criminal defendants cannot be committed indefinitely because no affirmative proof has been offered that they committed criminal acts or were dangerous. *Id.* at 364 n.12 (discussing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

Some states have enacted statutes that provide for an evidentiary hearing on the question of a permanently incompetent defendant’s guilt of the crime charged. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 2004); N.M. STAT. ANN. § 31-9-1.5 (Michie 2000). If, at that hearing, the defendant is found to have committed a crime, he or she is subjected to additional treatment without undergoing the civil commitment process. Some might assert that, consistent with *Jones*, the determination of factual guilt in the evidentiary hearing justifies the extended commitment of permanently incompetent criminal defendants. Such statutes, however, do not conform to the requirements of *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Supreme Court declared that the purpose of committing an incompetent is to determine whether the individual will be restored to competency in the near future, and if so, to treat the individual toward that end. *Jackson*, 406 U.S. at 738. No other purpose was identified by the Court in *Jackson*, and no other purpose has been identified by the Court since it decided *Jackson*. Because a factual finding of guilt is not related to progress in treatment to restore competence, a factual guilt hearing cannot justify an extended period of treatment. Even if the factual guilt finding could justify placement of incompetent defendants into a special class for commitment purposes initially, the special commitment must end when the justification for that commitment ends. If the incompetent defendant has not progressed toward restoration of competence, he or she can no longer be committed as an incompetent defendant. Subsequent commitment of the permanently incompetent defendant, if it is to occur at all, must be achieved through the customary civil commitment process used to commit any other citizen. *Jackson*, 406 U.S. at 738. *See Morris & Meloy, supra* note 24, at 18-23 (critiquing the use of evidentiary hearings to establish guilt of permanently incompetent criminal defendants so that they may be detained without customary civil commitment proceedings).

In a dissenting opinion,⁴⁸ Justice Brennan challenged the majority's logic. He noted that an insanity trial focuses on the defendant's mental condition in the past, at the time of the alleged criminal act. The post-trial commitment decision focuses on the defendant's mental condition now and in the future. The finding of insanity at the time of the criminal act simply does not provide an adequate basis from which to infer the present and future mental condition of the insanity acquittee.⁴⁹ Insanity acquittees are similarly situated with sentence-expiring convicts who can "not be treated differently from other candidates for civil commitment."⁵⁰ Just as the state bears the burden of proving that sentence-expiring convicts and others subjected to the civil commitment process are currently mentally ill and dangerous, the state should also be obligated to prove the same for insanity acquittees. Michael Jones, for example, had been charged with shoplifting. If he had been found guilty of this nonviolent, petit larceny, the maximum sentence that could have been imposed was one year.⁵¹ Instead of that one year of punishment, he faced indeterminate—potentially lifetime—confinement as an insanity acquittee. Justice Brennan asserted that the *Jones* majority did not "purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom*. It is clear, therefore, that the separate facts of criminality and mental illness

⁴⁸Justices Marshall and Blackmun joined in Justice Brennan's dissenting opinion. *Jones*, 463 U.S. at 371 (Brennan, J., dissenting), and Justice Stevens wrote a separate dissent. *Id.* at 387 (Stevens, J., dissenting).

⁴⁹*See id.* at 377 (Brennan, J., dissenting).

⁵⁰*Id.* at 376.

⁵¹*Jones*, 463 U.S. at 359.

cannot support indefinite psychiatric commitment, for both were present in *Baxstrom*.”⁵²

Michael Perlin has asserted that the *Jones* majority’s abrupt departure from the Court’s *Baxstrom* and *Jackson* precedents was an overtly political decision designed to restore the public’s faith in the judicial process.⁵³ He may well be correct. After all, *Jones* was decided exactly one year and eight days after the insanity acquittal verdict of John Hinckley for his attempted assassination of President Ronald Reagan.⁵⁴

V. The 1990s: *Kansas v. Hendricks*⁵⁵—The Promise Forgotten

In 1990, the state of Washington enacted the nation’s first Sexually Violent Predator

⁵²*Id.* at 380 (Brennan, J., dissenting). In *Foucha v. Louisiana*, 504 U.S. 71 (1992), the Court held that due process precludes the continued detention of a dangerous, but not mentally ill, insanity acquittee. *Id.* at 83. Justice White, who wrote the majority opinion, also addressed the equal protection issue in a portion of the opinion in which three other justices joined. Justice White embraced and applied Justice Brennan’s equal protection analysis in *Jones*. Because the state did not provide for continuing confinement of sentence-expiring convicts who may be dangerous when their sentences expire, it may not continue the confinement of insanity acquittees who may be dangerous but who are no longer insane. *Id.* at 85. The state lacked a particularly convincing reason for discriminating against insanity acquittees who are no longer mentally ill. *Id.* at 86. They are similarly situated with sentence-expiring convicts. *Id.* at 85. If sentence-expiring convicts cannot be separately categorized for civil commitment purposes, insanity acquittees who are no longer mentally ill cannot be so categorized.

⁵³See Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 211-12 (2000). See generally MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 333-48 (1994).

⁵⁴John W. Hinckley attempted to assassinate President Ronald Reagan on March 30, 1981. After a lengthy trial, the jury rendered a verdict of not guilty by reason of insanity on June 21, 1982. The *Jones* case was decided by the Supreme Court on June 29, 1983.

⁵⁵521 U.S. 346 (1997)

[SVP] legislation.⁵⁶ Within five years, a handful of states enacted similar, if not virtually identical, legislation.⁵⁷ Unlike the sexual psychopath legislation that it replaced,⁵⁸ SVP statutes did not merely *substitute* indeterminate confinement in a mental hospital for

⁵⁶See 1990 Wash. Laws ch. 3 (codified at WASH. REV. CODE ch. 71.09 (§§ 71.09.010-902) (West 2002 & Supp. 2004)).

⁵⁷See ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (West 2003) (enacted originally by 1995 Ariz. Sess. Laws ch. 257); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 1998 & Supp. 2004) (enacted originally by 1995 Cal. Stat. ch. 763, § 3); KAN. STAT. ANN. §§ 59-29a01 to 21 (1994 & Supp. 2003) (enacted originally by 1994 Kan. Sess. Laws ch. 316); MINN. STAT. ANN. § 253B.185 (West 2003) (enacted originally by 1994 Minn. Laws, 1st Sp. Sess., ch. 1, art. 1, § 3, which defined “sexually dangerous person” in § 253B.02 (18c)); WIS. STAT. ANN. §§ 980.01-13 (West 1998 & Supp. 2003) (enacted originally by 1993 Wis. Laws 479, § 40). After the United States Supreme Court upheld the constitutionality of SVP legislation in *Kansas v. Hendricks*, 521 U.S. 346 (1997), several more states enacted SVP legislation. See *infra* note 85.

⁵⁸Forty years ago, sexual psychopath legislation had been enacted in more than half the states. Weiner, *supra* note 22, at 739. Through such legislation, criminal defendants charged with or convicted of sex crimes and facing a determinate sentence could be detained indefinitely for treatment until they were no longer dangerous. See *id.* at 740-41. Sexual psychopath legislation was discredited, however, by the inability of psychiatrists and other mental health professionals to identify a specific mental disorder experienced by individuals who should be included within the targeted group and by the lack of successful treatment methodologies to improve their condition. *Id.* at 741-43. The absence of treatment destroyed any valid basis for distinguishing sexual psychopath prisoners from other prisoners in order to subject them to indeterminate commitment. *Millard v. Cameron*, 373 F.2d 468, 473 (D.C. Cir. 1968).

Sexual psychopath legislation was also challenged as violating procedural due process. For example, in *Specht v. Patterson*, 386 U.S. 605 (1967), a unanimous Supreme Court ruled that the possibility of indeterminate confinement based on a new finding of fact—that the person constitutes a threat of bodily harm to the public, or is a habitual offender and mentally ill—entitled the person subjected to commitment under Colorado’s Sex Offenders Act to the full panoply of due process protections, including the right to counsel, to have an opportunity to be heard, to be confronted with witnesses, to cross-examine, to offer evidence of his own, and to have findings adequate to make a meaningful appeal. *Specht*, 386 U.S. at 609-10.

determinate punishment in a prison; rather, it *added* indeterminate confinement upon completion of the offender’s criminal sentence.

In 1997, the Supreme Court upheld the constitutionality of Kansas’s SVP Act⁵⁹ against three claims of constitutional infirmity.⁶⁰ Under the Kansas statute, a sentence-expiring convict could be civilly committed as an SVP if he had a “mental abnormality” or a “personality disorder” that made him “likely to engage in predatory acts of sexual violence.”⁶¹ In *Kansas v. Hendricks*,⁶² the Court held that the Act satisfied substantive due process requirements.⁶³ Justice Thomas, writing for the Court’s five-justice majority, noted that civil commitment statutes have been sustained when they limit the class of persons eligible for confinement to those who, because of mental illness, are dangerous and who are unable to control their dangerousness.⁶⁴ Although the Kansas statute used the term “mental abnormality” rather than “mental illness,” Justice Thomas dismissed the

⁵⁹KAN. STAT. ANN. §§ 59-29a01 to 21 (1994 & Supp. 2003) (enacted originally by 1994 Kan. Sess. Laws ch. 316).

⁶⁰*Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

⁶¹KAN. STAT. ANN. §§ 59-29a02(a) & 59-29a07 (Supp. 2003). As originally enacted, and as interpreted by the Supreme Court in *Hendricks*, the statute defining SVPs referred to “predatory act of sexual violence.” Act of May 19, 1994, ch. 316, § 2, 1994 Kan. Sess. Laws 316 . The statute has been amended and now refers to “repeat acts of sexual violence.” KAN. STAT. ANN. § 59-29a02(a) (Supp. 2003).

⁶²521 U.S. 346, 356-60 (1997).

⁶³*Id.* at 356-60. U.S. CONST. amend. XIV provides that no state “shall deprive any person of . . . liberty without due process of law.”

⁶⁴*Hendricks*, 521 U.S. at 358.

importance of the distinction, declaring that “the term ‘mental illness’ is devoid of any talismanic significance.”⁶⁵ The legislature may define terms of a medical nature for legal purposes and need not mirror the definitions of the medical profession.⁶⁶

The majority also found that the Act did not violate the Constitution’s prohibition against double jeopardy⁶⁷ or *ex post facto* lawmaking.⁶⁸ The Court accepted as true the legislature’s stated intention to create a new civil commitment scheme for SVPs, rather than to inflict additional punishment for past criminal acts.⁶⁹ Hendricks failed to prove that the legislation was punitive either in purpose or effect.⁷⁰ Incapacitation⁷¹—depriving the

⁶⁵*Id.* at 359. Justice Thomas used, without attribution, language employed by the Supreme Court of Wisconsin two years earlier. In a decision upholding the constitutionality of Wisconsin’s SVP statutes, that court stated: “[T]here is no talismanic significance that should be given to the term ‘mental illness.’” *State v. Post*, 541 N.W.2d 115, 122 (1995), *cert. denied*, *Post v. Wisconsin*, 521 U.S. 1118 (1997).

⁶⁶*Hendricks*, 521 U.S. at 359.

⁶⁷*Id.* at 360-70. U.S. CONST. amend. V, made applicable to the states through U.S. CONST. amend. XIV, provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”

⁶⁸*Hendricks*, 521 U.S. at 370-71. U.S. CONST. art. 1, § 9, cl. 3, made applicable to the states through U.S. CONST. amend. XIV, provides that no “*ex post facto* Law shall be passed.”

⁶⁹*Hendricks*, 521 U.S. at 361. *But see* *State v. Post*, 541 N.W.2d 115, 135 (1995) (Abrahamson, J., dissenting), *cert. denied*, *Post v. Wisconsin*, 521 U.S. 1118 (1997). In dissenting from a pre-*Hendricks* Wisconsin Supreme court decision upholding the constitutionality of that state’s SVP statutes, Justice Shirley Abrahamson asserted, “If reference to treatment were sufficient to render a statute civil, [Wisconsin’s statutes that govern] prisons and jails, would be transmogrified into a civil statute.” *Id.* at 137.

⁷⁰*Hendricks*, 521 U.S. at 361. In finding that the SVP Act was not proven to have a punitive purpose, the majority noted that, unlike a criminal statute, the Act did “not affix

dangerously mentally ill of their freedom—is a “legitimate nonpunitive governmental objective.”⁷² Thus, even if SVPs suffer from an untreatable condition, they may be detained so long as they pose a danger to others.⁷³ If treatment is possible, the fact that the state provides treatment only incidentally to its primary incapacitation objective, does not render the statutes punitive.⁷⁴ Because the Act was found to have a nonpunitive purpose, neither a double jeopardy nor an *ex post facto* claim could be sustained.⁷⁵ Hendricks was not subjected to multiple punishments because SVP civil commitment is neither punishment that follows a second prosecution for the same crime for which he served a criminal sentence,⁷⁶ nor punishment for conduct that was legal before the statutes were enacted.⁷⁷

culpability for prior criminal conduct,” *id.* at 362, and did not require scienter for commitment. *Id.* The Act did not function as a deterrent because those committed as SVPs are unable to exercise control over their behavior and are “unlikely to be deterred by the threat of confinement.” *Id.* at 362-63. Additionally, SVPs experience essentially the same conditions experienced by other civilly committed persons, not the more restrictive conditions experienced by prisoners. *Id.* at 363. The Act’s use of criminal process-type procedural safeguards to identify those who are civilly committable did not convert the proceedings into criminal proceedings. *Id.* at 363.

⁷¹*Id.* at 365.

⁷²*Id.* at 363.

⁷³*Id.* at 365-66.

⁷⁴*Id.* at 366-67.

⁷⁵*Id.* at 369.

⁷⁶*Hendricks*, 521 U.S. at 369.

⁷⁷*Id.* at 371. Although Justice Kennedy joined in the Court’s majority, he wrote a short concurring opinion expressing his concern about the use of civil commitment laws to confine those who have already been punished through the criminal process. *Id.* at 371-72

Justice Breyer wrote a dissenting opinion. Three of the four dissenting justices agreed with the majority that a state may enact separate civil commitment statutes applicable to different categories of committable individuals.⁷⁸ Hendricks could be civilly committed as an SVP because he suffered from a mental disorder—pedophilia—and lacked the ability to control his dangerous actions.⁷⁹ Without considering separately whether substantive due process requires the state “to provide treatment that it concedes is potentially available to a person whom it concedes is treatable,”⁸⁰ the four dissenters focused on the *ex post facto* claim that posed the same issue.⁸¹ In their view, the statutes impermissibly imposed punishment by delaying treatment until Hendricks completed his prison sentence.⁸² Under the Act, diagnosis, evaluation, and commitment proceedings—prerequisites for treatment—did not occur until the convict’s criminal sentence was about to expire. Additionally, when commitment proceedings were

(Kennedy, J., concurring). He cautioned that if civil confinement is used to achieve retribution or general deterrence rather than mere incapacitation, it cannot be validated. *Id.* at 373. If “mental abnormality” proves too uncertain a category to justify civil commitment, its use cannot be condoned. *Id.*

⁷⁸*Id.* at 377 (Breyer, J., dissenting). Justice Ginsberg did not join in this portion of Justice Breyer’s opinion and wrote no separate opinion expressing the reasons for her decision. *Id.* at 373.

⁷⁹*Hendricks*, 521 U.S. at 374-77.

⁸⁰*Id.* at 378 (Breyer, J., dissenting).

⁸¹*Id.* at 378.

⁸²*Id.* at 381.

conducted, the decision maker was not required to consider less restrictive alternatives to confinement.⁸³ And when Hendricks was civilly committed as an SVP, the record supported the Kansas Supreme Court's finding that the state did not provide treatment.⁸⁴

Although the United States Supreme Court upheld the constitutionality of SVP legislation by the narrowest of margins, many states responded quickly to the *Hendricks* decision by enacting SVP legislation.⁸⁵ More can be expected to join them.⁸⁶ To avoid

⁸³*Id.* at 387.

⁸⁴*Id.* at 390 (noting that the Kansas Supreme Court found that Hendricks was untreated, not that he was untreatable). *See also id.* at 392 (finding that “Kansas was *not* providing treatment to Hendricks.”). Under such circumstances, the dissenters agreed with the Kansas Supreme Court's finding that the treatment provisions of the statutes were “somewhat disingenuous.” *Id.* at 393, *citing In re Hendricks*, 912 P.2d 129, 136 (Kan. 1966).

⁸⁵*See, e.g.*, FLA. STAT. ANN. §§ 394.910–.931 (West 2002 & Supp. 2004); 725 ILL. COMP. STAT. ANN. §§ 207/1-207/99 (West 2002 & Supp. 2004); IOWA CODE ANN. §§ 229A.1–16 (West 2000 & Supp. 2004); MO. REV. STAT. §§ 632.483–.513 (Vernon 2000 & Supp. 2004); N.J. STAT. ANN. §§ 30:4-27.24 to .38 (West Supp. 2004); S.C. CODE ANN. §§ 44-48-10 to -170 (Law. Co-op. 2002); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.150 (West 2003 & Supp. 2004); VA. CODE ANN. §§ 37.1-70.1 to .19 (Michie Supp. 2003). The Illinois statutes were enacted one week after *Hendricks* was decided. 1997 Ill. Laws 90-40 (approved June 30, 1997, effective Jan. 1, 1998). North Dakota enacted its SVP statutes on April 8, 1997, two months prior to the *Hendricks* decision, although the statutes became effective more than a month after *Hendricks* was decided. 1997 N.D. Laws ch. 243, § 1 (approved and filed Apr. 8, 1997, effective Aug. 1, 1997, and codified as N.D. CENT. CODE §§ 25-03.3-01 to -23 (2002)).

⁸⁶In *Hendricks*, thirty-eight states, the District of Columbia, and three territories joined in an amicus brief supporting Kansas's position that SVP legislation is an appropriate and constitutional method to protect citizens from sexually dangerous persons. Amicus Curie Brief of the States of Washington et al. at 2, *Hendricks* (No. 95-1649). The brief addressed the substantive due process issue. The state of Wisconsin wrote a separate amicus brief addressing *ex post facto* and double jeopardy issues. Amicus Curie Brief of Wisconsin, *Hendricks* (No. 95-1649 & 95-9075). The multi-state brief expressed its

constitutional problems, the legislation typically mimics the Kansas model.⁸⁷ SVP statutes

approval of, and expressly adopted, Wisconsin's arguments. Amicus Curie Brief of the States of Washington et al. at 2, *Hendricks* (No. 95-1649).

⁸⁷For example, many of the statutes begin with a declaration borrowed, nearly verbatim, from the Washington and Kansas models:

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for [the existing involuntary civil commitment law], which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment . . . , sexually violent predators generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent behavior. The legislature further finds that [SVPs'] likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment [laws are] inadequate to address the risk [of reoffense]. The legislature further finds that the prognosis for curing [SVPs] is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under [the existing involuntary civil commitment law].

WASH. REV. CODE ANN. § 71.09.010 (West 2002). *See also* KAN. STAT. ANN. § 59-29a01 (Supp. 2003). States that begin their SVP Acts with a similar statement of legislative findings include: 1995 Ariz. Sess. Laws ch. 257, § 10 (the legislature's findings are found in the notes to ARIZ. REV. STAT. ANN. § 36-3701 (West 2003)); 1995 Cal. Stat. ch. 763, § 3 (the legislature's findings are found in the historical and statutory notes to CAL. WELF. & INST. CODE § 6600 (West 1998)); FLA. STAT. ANN. § 394.910 (West 2002); IOWA CODE ANN. § 229A.1 (West Supp. 2004); N.J. STAT. ANN. § 30:4-27.25 (West Supp. 2004); S.C. CODE ANN. § 44-48-20 (Law. Co-op. 2002); TEX. HEALTH & SAFETY CODE ANN. § 841.001 (West 2003).

have joined lengthened criminal sentences and sex offender registration laws⁸⁸ as politically expedient controls on those who have committed violent sexual offenses and who might do so again in the future.

In *Hendricks*, the Supreme Court did not consider whether special civil commitment legislation for SVPs violates the equal protection clause. In fact, the words “equal protection” do not appear even once in Justice Thomas’s majority opinion, in Justice Kennedy’s concurring opinion, or in Justice Breyer’s dissenting opinion.⁸⁹ But given the Court’s rejection of Hendricks’s substantive due process argument, it is unlikely that the

⁸⁸*See, e.g.*, N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 2003).

⁸⁹Leroy Hendricks did raise an equal protection claim in his cross-petition to the Supreme Court. Conditional Cross-Petition, *Kansas v. Hendricks* (No. 95-9075), available in microfiche format. However, his brief as cross-petitioner did not argue the equal protection claim. In a footnote, the cross-petitioner stated: “Mr. Hendricks’ cross-petition also sought review of his equal protection challenge to the statute. This claim will be subsumed in his substantive due process argument, and will not be separately briefed.” Brief for Leroy Hendricks Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), available at 1996 WL 450661, at *2 n.1. In the brief submitted by Kansas as cross-respondent, Kansas asserted that Hendricks abandoned his equal protection claim by failing to argue its merits in his cross-petitioner’s brief and requested that the Court so rule. Brief of Cross-Respondent, *Hendricks* (No. 95-9075), available at 1996 WL 509502, at *4, 39-40. The state characterized this failure as an apparent attempt to evade the page-limit requirements established by Supreme Court rule “or to manipulate the briefing process” by forcing the state either to address first the equal protection claim that Hendricks alone had raised or to wait until the state’s final reply brief to respond. Brief of Cross-Respondent, *Hendricks* (No. 95-9075), available at 1996 WL 509502, at *40. In his reply brief for cross-petitioner, Hendricks did not address the state’s argument. *See* Reply Brief for Cross-Petitioner, *Hendricks* (Nos. 95-1649, 95-9075), available at 1996 WL 593579.

The Supreme Court did not discuss the question of whether Hendricks’s equal protection claim could be appropriately subsumed within his substantive due process argument or comment on the state’s request for a ruling that Hendricks had abandoned his equal protection claim. The Court merely noted that Hendricks’s cross-petition asserted double jeopardy and *ex post facto* claims. *Hendricks*, 521 U.S. at 350.

Court would have accepted an equal protection argument that equated SVPs with other civilly committed mental patients.⁹⁰ The *Hendricks* majority found that the legislature may identify for civil commitment purposes “a limited subclass of dangerous persons.”⁹¹ The Kansas SVP Act met that requirement by restricting SVP commitment to individuals who have a mental abnormality or personality disorder that they are unable to control and that renders them likely to engage in predatory⁹² acts of sexual violence.⁹³ SVPs *are* more dangerous as a group than are other civilly committed mental patients. An equal protection argument that SVPs are no more dangerous than, and therefore are similarly situated with, other civilly committed patients is likely to fail.⁹⁴

Nevertheless, because SVP legislation is applicable, not to all persons who can be categorized as SVPs, but only to some, such legislation may be vulnerable to an equal

⁹⁰See Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1213-17 (asserting that an equal protection argument that SVPs are similarly situated with other civilly committed patients will not succeed).

⁹¹*Kansas v. Hendricks*, 521 U.S. 346, 357 (1997).

⁹²After the decision in *Hendricks*, the Kansas legislature amended the statute to require a likelihood of “repeat” acts of sexual violence instead of “predatory” acts of sexual violence. See *supra* note 61.

⁹³*Id.* at 358.

⁹⁴Even three of the four dissenting justices agreed that Kansas was not constitutionally prohibited from adopting two separate civil commitment statutes “each covering somewhat different classes of committable individuals.” *Id.* at 377 (Breyer, J., dissenting).

protection attack.⁹⁵ Typically, SVP legislation does not authorize civil commitment of all those who suffer from a mental disorder, no matter how narrowly or broadly defined, and who are likely to engage in predatory acts of sexual violence. Rather, SVP commitment is limited only to persons who fit within one of three groups and who are about to be released from confinement: sentence-expiring convicts, persons found mentally incompetent to stand trial, and insanity acquittees.⁹⁶

Individuals who do not fit into one of these three categories are not subject to SVP commitment even if they are equally likely to engage in sexually violent conduct and are unable to control their dangerousness due to mental abnormality or personality disorder. Thus, for example, ex-convicts who were punished for sexually violent crimes and who could be predicted to commit additional sexually violent crimes are not subject to SVP commitment if they already served their criminal sentences and were released from confinement before the SVP Act was enacted. Criminal defendants who are charged with, but not yet convicted of, sexually violent crimes and who could be predicted to commit additional sexually violent crimes are not subject to SVP commitment. Criminal defendants who are charged with violent crimes, but not sexually violent crimes, are not subject to SVP commitment. Individuals who have not yet been charged with sexually

⁹⁵See Morris, *supra* note 90, at 1217-27 (asserting that an equal protection claim may be successful if it demonstrates that sentence-expiring convicts and others who may be identified as SVPs and subjected to SVP commitment are similarly situated with other persons identifiable as SVPs but not subject to SVP commitment).

⁹⁶See KAN. STAT. ANN. §§ 59-29a03, -29a04 (Supp.2003).

violent crimes, and indeed, individuals who have not yet committed such crimes, are not subject to SVP commitment. And yet, in each case, their mental abnormalities or personality disorders and their difficulty in controlling their sexual urges may make them equally dangerous with those who are about to be released from confinement and who have been legislatively targeted for special SVP commitment.⁹⁷ Although the Supreme Court permits the legislature “to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest,”⁹⁸ the equal protection clause prohibits the legislature from discriminating between individuals when the danger that they pose is equal. The state has no compelling interest to so discriminate.

⁹⁷Consider, for example, the case of *In re Diestelhorst*, 716 N.E.2d 823 (Ill. Ct. App. 1999). A pedophile, who was released after serving a ten-year prison term for sexually molesting children, attempted to lure a young girl into his car. He was apprehended and pled guilty to the crime of child abduction. *Id.* at 824. As his sentence was expiring, the state petitioned for SVP commitment. *Id.* at 825. Despite expert testimony that he had a “lingering penchant for children,” *id.*, the appellate court dismissed the petition. Child abduction is not a sexually violent offense, and under Illinois law, only those who are completing confinement for a sexually violent offense are subject to SVP commitment. *Id.* at 827. The court rejected the state’s argument that SVP commitment is appropriate because the crime, although not specifically defined as violent, was sexually motivated. *Id.* at 827-29. The perpetrator, according to the state, sought to gratify “an aberrant sexual preference. He wanted to sexually molest his prey.” *Id.* at 826. If, as the court assumed, the state correctly assessed the criminal’s motivation, would anyone believe that this individual is less sexually dangerous than another pedophile who was not apprehended until after he sexually molested a child and who was therefore subject to SVP commitment?

⁹⁸*Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 275 (1940).

*Baxstrom v. Herold*⁹⁹ and *Jackson v. Indiana*¹⁰⁰ tell us that sentence-expiring convicts and permanently incompetent criminal defendants cannot be specially classified for civil commitment purposes. SVP legislation, however, separately categorizes these individuals for SVP commitment. *Baxstrom* and *Jackson* tell us that the same civil commitment standards and procedures must be applied to sentence-expiring convicts and permanently incompetent defendants that are applied to any other nonconvicts. SVP legislation, however, applies different commitment standards and procedures to these individuals for SVP commitment. If sentence-expiring convicts and permanently incompetent defendants can only be involuntarily confined as are other civilly committed patients, then they *are* civilly committed patients, and cannot be morphed into SVPs or another special hybrid class of patient with “criminal” as well as “civil” features.

Although *Jones v. United States*¹⁰¹ tells us that insanity acquittees can be specially classified for post-criminal trial confinement without undergoing the civil commitment process,¹⁰² their special classification for SVP commitment purposes can not be justified. Insanity acquittees are not subject to SVP commitment immediately after their criminal trials, but rather, only after they are about to be released from confinement as insanity

⁹⁹383 U.S. 107 (1966). *See supra* text accompanying notes 8-19.

¹⁰⁰405 U.S. 715 (1972). *See supra* text accompanying notes 25-32.

¹⁰¹463 U.S. 354 (1983).

¹⁰²*See supra* text accompanying notes 39-47.

acquittees.¹⁰³ Such release does not occur until the acquittee is no longer dangerous, i.e., is not likely to cause harm to himself or others.¹⁰⁴ Thus, an insanity acquittee who currently suffers from a mental abnormality or personality disorder that makes him likely to engage in repeat acts of sexual violence—the definitional criteria for SVP adjudication¹⁰⁵—is unlikely to be released from insanity acquittee commitment as not dangerous. In reality, insanity acquittees who are not too dangerous to be released from insanity acquittee confinement but who are dangerous enough to be confined as SVPs do not exist. Insanity acquittees, therefore, are not a special category for SVP commitment purposes; they are a noncategory.

Although the *Hendricks* Court did not consider or resolve an equal protection challenge, it was well aware of the *Baxstrom* decision. *Baxstrom* was discussed and specifically cited in briefs submitted by the State of Kansas¹⁰⁶ and in amicus briefs

¹⁰³See, e.g., KAN. STAT. ANN. §§ 59-29a03(a)(3), 04(a) (Supp. 2003).

¹⁰⁴*Id.* §§ 22-3428(3) (authorizing transfer to a less restrictive hospital environment, conditional release, or discharge) & 22-3428(7)(a), (b)(B) (defining “mentally ill person” as one who “is likely to cause harm to self or others” and defining “likely to cause harm to self or others” as “likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another’s property”). In many states, insanity acquittees may not be released until a court finds that they are no longer dangerous to others. See, e.g., CAL. PENAL CODE § 1026.2(c) (West Supp. 2004).

¹⁰⁵KAN. STAT. ANN. § 59-29a02(a) (Supp. 2003).

¹⁰⁶Brief for Respondent at 46-47, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (No. 95-1649) (asserting that adequate procedural rights are provided in the SVP civil commitment process).

supporting Kansas’s position.¹⁰⁷ *Baxstrom* was discussed and specifically cited by Carla Stovall, Attorney General of the State of Kansas, in her oral argument to the Court.¹⁰⁸ And when Thomas Weilert began his oral argument on behalf of Leroy Hendricks, he completed only five sentences before he was interrupted by a question asking about the applicability of *Baxstrom* to the case then before the Court.¹⁰⁹ A justice asked: “Well, didn’t the Court in *Baxstrom* uphold essentially the notion that the State could commit people after they were released from prison in a civil commitment proceeding?”¹¹⁰ Mr. Weilert answered: “I believe the Court upheld that they could commit after a—pardon me. After a criminal sentence if they were mentally ill, yes, Your Honor.”¹¹¹ The answer was unfortunate and unilluminating.

Baxstrom was discussed and specifically cited by Justice Thomas in his majority opinion in *Hendricks*¹¹² and by Justice Kennedy in his concurring opinion.¹¹³ But in each

¹⁰⁷Amicus Brief for the State of Wisconsin at 8 n.4, *id.* (Nos. 95-1649 & 95-9075) (asserting that adequate procedural rights are provided in the SVP civil commitment process); Amicus Brief for the Menninger Foundation at 21, *id.* (No. 95-1649) (asserting that *Baxstrom* permits civil commitment of sentence-expiring convicts).

¹⁰⁸Record at 7, *id.* (Nos. 95-1649 & 95-9075) (asserting that *Baxstrom* permits civil commitment of sentence-expiring convicts).

¹⁰⁹Record at 33, *id.*

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Hendricks*, 521 U.S. at 369.

¹¹³*Id.* at 372 (Kennedy, J., concurring).

instance, *Baxstrom* was misused; its precedent distorted. Justice Thomas, for example, asserted that in *Baxstrom*, “we expressly recognized that civil commitment could follow the expiration of a prison term.”¹¹⁴ Justice Thomas neglected to mention, however, that *Baxstrom* prohibits the commitment process for sentence-expiring convicts to be distinguished from the process used for all others undergoing civil commitment. In *Baxstrom*, the Court specifically held that “no conceivable basis [exists] for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”¹¹⁵

Would Justice Thomas also apply his revisionist analysis to *Brown v. Board of Education* to assert that public schools may be racially segregated so long as they provide equal education, ignoring the Supreme Court’s finding that “[s]eparate educational facilities are inherently unequal”?¹¹⁶ If Topeka, Kansas was not permitted to discriminate against similarly situated persons in 1954, the state of Kansas should not have been permitted to do so in 1997.

Separate categorization of sentence-expiring convicts for civil commitment purposes could not withstand even the lowest level, rational basis equal protection scrutiny

¹¹⁴*Id.* at 369. Justice Kennedy made the same point. *Id.* at 372 (Kennedy, J., concurring).

¹¹⁵*Baxstrom v. Herold*, 383 U.S. 107, 111-12 (1966).

¹¹⁶*Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

in 1966. It should not be able to withstand a heightened level of scrutiny today.¹¹⁷ In *Foucha v. Louisiana*,¹¹⁸ decided three years before *Hendricks*, The Supreme Court identified freedom from physical restraint as *the* core liberty interest protected by the Constitution from arbitrary governmental action.¹¹⁹ It is difficult to understand how the core liberty interest protected by the Constitution could be characterized as anything less than fundamental.¹²⁰

¹¹⁷Strict scrutiny equal protection analysis was first articulated in 1942. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Intermediate or mid-level scrutiny, which some authors have suggested is appropriate for SVP commitment legislation, was first recognized in 1976, ten years after *Baxstrom* was decided. *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (noting that “the relatively deferential ‘rational basis’ standard of review normally applied takes on a sharper focus when [the Court addresses] a gender-based classification.”).

¹¹⁸504 U.S. 71 (1992).

¹¹⁹*Id.* at 80. The Supreme Court has ruled that even sentence-serving convicts have a liberty interest that protects them against unwarranted administrative transfer from a prison, where they are punished, to a mental hospital, where they are treated involuntarily for their psychiatric condition. *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980).

¹²⁰In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), the Supreme Court noted that whenever “legislation . . . involves one of the basic civil rights of man, . . . strict scrutiny of the classification . . . is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.” *Id.* at 541.

Despite such pronouncements, one critic of Supreme Court equal protection analysis described it as a “crazy quilt approach” that “lack[s] coherence and consistency.” John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1192-93 (1999). He noted that “the Court seems to observe some of its rules of equal protection analysis more in the breach than otherwise.” *Id.* at 1193. The Court’s equal protection decision making has been strongly criticized, not just by numerous scholars, *id.* at 1194 n.12 (citing authorities), but also by the justices themselves. *Id.* at 1194 n.13 (quoting statements of Justice Scalia, Justice Stevens, Justice Marshall, and Chief Justice Burger).

In *Foucha*, the Supreme Court held: “Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason . . . for such discrimination”¹²¹ And yet, in *Hendricks*, Justice Thomas did not consider whether Kansas’s SVP commitment statutes deprived Hendricks of a fundamental right,¹²² and if so,

Some authors believe that Supreme Court decisions support application of an intermediate level review of laws permitting involuntary civil commitment of insanity acquittees, criminal defendants found permanently mentally incompetent to stand trial, and SVPs. See, e.g., John Kip Cornwall, *Confining Mentally Disordered “Super Criminals”*: *A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 669-81 (1996)[hereinafter Cornwall, “*Super Criminals*”]; John Kip Cornwall, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1316-19 (1996)[hereinafter Cornwall, *Protection and Treatment*]. Cornwall proposes use of a “particularly exacting standard” for such cases. Cornwall, “*Super Criminals*” at 679; Cornwall, *Protection and Treatment* at 1317-18. See also Brian G. Bodine, Comment, *Washington’s New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 136 (1990) (asserting that courts should apply mid-level, heightened scrutiny to SVP equal protection claims because SVPs are a quasi-suspect group.). But see *In re Samuelson*, 727 N.E.2d 228, 236 (Ill. 2000) (applying a rational basis test to an SVP equal protection claim).

¹²¹*Id.* at 86 (White, J., plurality opinion). Justice White wrote the majority opinion for Parts I and II of *Foucha*, and a plurality opinion for Part III. The quotation is from Part III. This language departs from the “strict scrutiny”/“rational basis” dichotomy traditionally employed to review substantive due process and equal protection claims.

¹²²The Supreme Court has acknowledged that confinement for compulsory psychiatric treatment is “a massive curtailment of liberty.” *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Those who are involuntarily hospitalized are categorized as “mental patients” and are subjected to psychiatric treatment that probes their innermost thoughts and to antipsychotic medication that dulls and alters those thoughts. *Heller v. Doe*, 509 U.S. 312, 324-25 (1993). Forced administration of antipsychotic medication during trial may violate a criminal defendant’s constitutional right to a fair trial. *Riggins v. Nevada*, 504 U.S. 127, 133-38 (1992). Indeed, the Supreme Court has acknowledged that under the due process clause, even sentence-serving convicts possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.” *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). “The forcible injection of medication into a nonconsenting

whether such deprivation satisfies the test of strict scrutiny. Justice Thomas simply accepted, at face value, the state's categorization of SVP commitment as "civil" and imposed upon Hendricks the heavy, if not impossible, burden of establishing by the clearest proof, that the legislative scheme was punitive.¹²³

VI. The 2000s: *Sell v. United States*¹²⁴—What Promise?

Sell v. United States, decided in 2003, is the most recent Supreme Court case considering mental disorder and the civil/criminal distinction. Unlike the cases previously discussed in this article, the *Sell* case did not involve the classification of individuals for involuntary commitment, but rather, involved the right of certain involuntarily committed individuals to refuse treatment. Specifically, the Court in *Sell* considered whether the government may administer antipsychotic medication to an incompetent criminal defendant against his or her will in order to render the defendant competent to stand trial for a nonviolent crime or whether forced administration of antipsychotic medication unconstitutionally deprives the defendant of his or her liberty interest to reject medical

person's body represents a substantial interference with that person's liberty." *Id.* at 229. Involuntarily confined patients may also be subjected to mandatory behavior modification programs. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980). People who are involuntarily hospitalized because they are dangerous are stigmatized by that finding. *See Addington v. Texas*, 441 U.S. 418, 425-26 (1979). Such stigma "can have a very significant impact on the individual." *Id.* at 426.

¹²³*Hendricks*, 521 U.S. 346, 361 (1997).

¹²⁴539 U.S. 166 (2003).

treatment.¹²⁵

The Court upheld the involuntary administration of antipsychotic medication provided the treatment was medically appropriate, was substantially unlikely to have side effects that could undermine the fairness of the trial, and was necessary to significantly further important governmental, trial-related interests.¹²⁶ Justice Breyer, writing for the Court's six-judge majority,¹²⁷ discussed these requirements in detail¹²⁸ and opined that instances of permissible forced medication solely to restore trial competence "may be rare."¹²⁹ Nevertheless, the *Sell* majority held that the requirements that limit forced medication to restore trial competence need not be considered if forced medication is warranted for a different purpose—such as when the defendant is dangerous either to others

¹²⁵*See id.* at 169, 177.

¹²⁶*Id.* at 179.

¹²⁷*Id.* at 168. Justice Scalia, in a dissenting opinion joined by Justice O'Connor and Justice Thomas, *id.* at 186, asserted that the Supreme Court lacked jurisdiction because the District Court's order was neither a final decision nor an interlocutory order specified by statute that would permit an appeal and a decision on the merits. *Id.* at 186-87 (Scalia, J., dissenting). The dissenters expressed concern that by allowing the appeal, the majority would enable criminal defendant's "to engage in opportunistic behavior" by voluntarily taking medication until partway through trial and then abruptly refusing it while demanding an interlocutory appeal from an order that the medication be continued on an involuntary basis. *Id.* at 191 (Scalia, J., dissenting).

¹²⁸*Id.* at 180-81.

¹²⁹*Id.* at 180.

or to himself or herself.¹³⁰ At two separate places in his opinion,¹³¹ Justice Breyer emphasized that these alternative grounds should be considered before the issue of forced medication to restore trial competence is considered.¹³²

The *Sell* majority asserted that two prior Supreme Court precedents—*Riggins v. Nevada*¹³³ and *Washington v. Harper*¹³⁴—“set forth the framework” for the *Sell* decision.¹³⁵ Justice Breyer, however, misstated and misapplied those cases, perverting their precedential value. In *Riggins*, the Court reversed the conviction of a mentally *competent* defendant who was involuntarily medicated during his criminal trial. The record failed to establish that the administration of antipsychotic medication was necessary to accomplish an essential state policy that would permit the state to override the defendant’s liberty interest in freedom from unwanted medication¹³⁶ and his Sixth and Fourteenth Amendment rights to a fair trial.¹³⁷

Because *Riggins* did not involve an incompetent defendant, the case did not

¹³⁰*Id.* at 181-82.

¹³¹*Id.* at 181-82, 183.

¹³²*Id.*

¹³³504 U.S. 127 (1992).

¹³⁴494 U.S. 210 (1990).

¹³⁵*Sell*, 123 S. Ct. at 177-78.

¹³⁶*Riggins*, 504 U.S. at 137-38.

¹³⁷*Id.* at 138.

establish the substantive standards that govern the forced medication of incompetent defendants. In fact, the *Riggins* majority specifically acknowledged that “we have not had occasion to develop substantive standards for judging forced administration of [antipsychotic] drugs in the trial or pretrial settings.”¹³⁸ The *Riggins* majority did, however, suggest a standard that, in its words, “certainly would satisf[y] due process.”¹³⁹ Due process would be satisfied if the trial court finds that the compelled treatment is “medically appropriate and, considering less intrusive alternatives, essential for the sake of [the defendant’s] own safety or the safety of others.”¹⁴⁰ Additionally, the *Riggins* majority opined that due process “might” be satisfied if the compelled treatment is medically appropriate and an adjudication of guilt or innocence cannot be obtained using less intrusive means.¹⁴¹ These gratuitous comments involved speculation on a question that was not before the Court for decision, and thus, were purely dicta. Nevertheless, with little more consideration of the issue, the *Sell* majority adopted these comments as its holding for incompetent defendants.

The *Sell* majority’s reliance on *Washington v. Harper*¹⁴² is even more dubious.

¹³⁸*Id.* at 136. In his dissenting opinion, Justice Thomas asserted that the *Riggins*’ majority “appears to adopt a standard of strict scrutiny.” *Id.* at 156 (Thomas, J., dissenting). The majority denied the assertion. *Id.* at 136.

¹³⁹*Id.* at 135.

¹⁴⁰*Id.*

¹⁴¹*Id.*

¹⁴²494 U.S. 210 (1990).

Harper involved a sentence-serving convict, not an incompetent defendant awaiting trial. The *Harper* Court held: “[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.”¹⁴³ Further, the *Harper* Court ruled that the prisoner was not entitled to a judicial hearing to determine whether he was competent to refuse medication¹⁴⁴ and upheld administrative hearing procedures in which a hearing committee, composed of a psychiatrist, psychologist, and the associate superintendent of the facility,¹⁴⁵ reviews the medical treatment decision.¹⁴⁶

The *Harper* Court, relying upon the state’s legitimate interest in reducing danger posed by prisoners in the prison environment,¹⁴⁷ specifically distinguished sentence-

¹⁴³*Id.* at 227 (emphasis added).

¹⁴⁴*Id.* at 222, 226, 228.

¹⁴⁵*Id.* at 215. Harper was confined in the Special Offender Center, a Department of Corrections correctional institute established “to diagnose and treat convicted felons with serious mental disorders.” *Id.* at 214.

¹⁴⁶*Id.* at 232-33. The committee reviews the medical decision that the prisoner has a mental disorder that is likely to cause harm if not treated and that treatment is in the prisoner’s medical interests given the legitimate need of the prisoner’s institutional confinement. *See id.* at 222.

¹⁴⁷*Id.* at 225. Less than a year after its *Harper* decision, however, the Court hinted that its *Harper* precedent might be applicable to a treatment refusal situation that did not involve prison security. In *Perry v. Louisiana*, 498 U.S. 38 (1990) (per curiam), the Court vacated a Louisiana trial court decision that had ordered a death row inmate to be treated involuntarily with antipsychotic medication to restore him to competency to be executed. *See State v. Perry*, 610 So. 2d 746, 747 (La. 1992). The Supreme Court ordered

serving prisoner mental patients from all other involuntarily confined mental patients.

“There are few cases,” wrote Justice Kennedy for the majority, “in which the State’s interest in combating the danger posed by a person to both himself and others is greater than in a prison environment.”¹⁴⁸ Because prisoners have “a demonstrated proclivity for antisocial criminal, and often violent, conduct,”¹⁴⁹ the state’s interest in combating danger posed by prisoners—both to themselves and to others—is greater in the prison environment than elsewhere.¹⁵⁰

reconsideration in light of *Harper*. *Perry v. Louisiana*, 498 U.S. at 38. Although Perry was a prisoner, there was no proof that without medication he was dangerous to himself or others. Was the Court suggesting that mentally disordered prisoners cannot be treated involuntarily if they are not dangerous? Was the Court suggesting that dangerousness is not the only justification for treatment of mentally disordered prisoners? Was the Court suggesting that proof of dangerousness may justify involuntary treatment of mentally disordered nonprisoners? On remand, the trial court reinstated its order, but the Louisiana Supreme Court reversed. *State v. Perry*, 610 So. 2d at 747, 771. The Louisiana Supreme Court distinguished *Harper*, holding that the involuntary administration of antipsychotic medication for the purpose of restoring competence for execution “does not constitute medical treatment, but forms part of the capital punishment sought to be executed by the state.” *Id.* at 753. The court found violations of both the state and federal constitutions. *Id.* at 755.

¹⁴⁸*Harper*, 494 U.S. at 225.

¹⁴⁹*Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)).

¹⁵⁰*Id.* A prison regulation that is reasonably related to legitimate penological interests will be upheld as valid even if it infringes on prisoners’ constitutional rights. *Id.* at 223 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The validity of a prison regulation will be measured by the “reasonable relationship” standard even when the infringed constitutional right is fundamental and a more rigorous standard of review would have been required in nonprison settings. *Id.* (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

Harper asserted that the state’s failure to provide him with a judicial hearing on his competence to refuse medication before administering antipsychotic medication over his

Two years after *Harper*, Justice O'Connor, writing for the Court's majority in *Riggins*, explained that "the unique circumstances of penal confinement"¹⁵¹ were crucial to the *Harper* Court's decision to allow the state to involuntarily administer antipsychotic medication to dangerous, mentally disordered, sentence-serving prisoners. Charles Sell, however, was not a sentence-serving prisoner. This dentist was an incompetent criminal defendant charged with mail fraud, Medicaid fraud, and money laundering.¹⁵² Because he had not yet been convicted of those crimes, he could not be subjected to the unique circumstances of penal confinement. He may be innocent of those crimes, and, in fact, the law presumes his innocence.¹⁵³ For the *Sell* majority to rule that *Harper's* holding and

objection violated the due process, equal protection, and free speech clauses of both the federal and state constitutions, as well as state tort law which requires informed consent to treatment. *Id.* at 217. The Supreme court's *Harper* opinion addressed only the due process issue. Nevertheless, if due process can be satisfied by a prison regulation that is reasonably related to the state's legitimate penological interest in prison safety and security even when it infringes on a prisoner's fundamental constitutional rights, it is unlikely that equal protection and free speech claims, even if independently and fully considered by the Court, would have succeeded.

¹⁵¹*Riggins v. Nevada*, 504 U.S. 127, 134 (1992).

¹⁵²*Sell v. United States*, 539 U.S. 166, 170 (2003).

¹⁵³Because the incompetent defendant has not been tried for the crime charged against him or her, the defendant retains the status of any accused, but not convicted, criminal defendant. Criminal defendants are presumed innocent until they are convicted. As Justice Stevens noted: "Prior to conviction every individual is entitled to the benefit of a presumption . . . that he is innocent of prior criminal conduct . . ." *Bell v. Wolfish*, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting). *See Estelle v. Williams*, 425 U.S. 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."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement

rationale for forced medication of sentence-serving prisoners is equally applicable to Charles Sell and to other criminal defendants is ludicrous.

If *Riggins*, which involved a competent criminal defendant, and *Harper*, which involved a sentence-serving convict, provide an inadequate framework for analyzing the right of incompetent criminal defendants to refuse antipsychotic medication, are there other Supreme Court precedents that provide a better analytic framework? The answer is: “yes,” and the cases are *Baxstrom* and *Jackson*. Although neither case involved a patient’s right to refuse treatment, both involved the question of the patient’s status, a question that must be resolved before the patient’s rights as a patient can be considered. In *Baxstrom*, the Court held that when a prisoner’s sentence expires, he or she is no longer a sentence-serving convict. If the sentence-expiring prisoner’s mental disorder necessitates involuntary hospitalization, he or she can not be distinguished from any other person undergoing the civil commitment process.¹⁵⁴ If the sentence-expiring prisoner is committed, he or she is a civil patient. In *Jackson*, the Court applied its *Baxstrom* precedent to permanently incompetent criminal defendants. They, too, cannot be separately categorized for commitment purposes. The civil commitment process used to involuntarily detain any other citizen must be used to involuntarily detain a permanently incompetent

lies at the foundation of the administration of our criminal law.”).

¹⁵⁴*Baxstrom v. Herold*, 383 U.S. 107, 110-12 (1966). *See supra* text accompanying notes 8-16.

criminal defendant.¹⁵⁵ If the incompetent defendant is committed, he or she is a civil patient. These two decisions maintain the civil/criminal distinction; the *Sell* decision does not.

If permanently incompetent criminal defendants are civil patients, then criminal defendants whose competence is not permanent are also civil patients. Both are accused, but not convicted, of crime. Though their potential for restoration to trial competence may differ, their nonconvict, nonprisoner status is identical.

The *Sell* Court did not consider the implications of the *Baxstrom* and *Jackson* precedents on the patient status of incompetent criminal defendants. Neither *Baxstrom* nor *Jackson* were discussed or even cited. In 1999, Charles Sell was institutionalized in the United States Medical Center for Federal Prisoners at Springfield, Missouri, as incompetent to stand trial.¹⁵⁶ He remained in that institution and in that patient status in 2003, when the Supreme Court decided the *Sell* case. Although *Jackson* forbids the lengthy confinement of an incompetent defendant as an incompetent defendant,¹⁵⁷ the *Sell* Court did not question the propriety of Charles Sell's four-year confinement as an incompetent defendant and his continued confinement in that patient status.¹⁵⁸ The *Sell*

¹⁵⁵*Jackson v. Indiana*, 406 U.S. 715, 724, 730, 738 (1972). *See supra* text accompanying notes 25-32.

¹⁵⁶*Sell*, 539 U.S. at 170-71.

¹⁵⁷*Jackson*, 406 U.S. at 738. *See supra* text accompanying note 31.

¹⁵⁸A review of legislation in the fifty states and the District of Columbia, conducted twenty years after *Jackson* was decided, revealed that the Supreme Court's decision has

majority simply acknowledged that Sell had already been confined “for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement”¹⁵⁹—factors that would diminish the importance of the government’s interest in prosecuting Sell.¹⁶⁰ One might well ask whether *Jackson* has been overruled *sub silencio*.¹⁶¹

been ignored or circumvented in a majority of jurisdictions. *See* Morris and Meloy, *supra* note 24, at 13-33. Some states ignore *Jackson* by continuing to allow incompetent defendants to be detained until their competence has been restored. *Id.* at 13. Others evade *Jackson* by imposing a lengthy period of treatment before acknowledging that the defendant is permanently incompetent, i.e., that there is no substantial probability that the defendant will become competent to stand trial in the foreseeable future. *Id.* at 15-18. Several states tie the maximum length of the treatment period to the maximum sentence that could have been imposed if the defendant was convicted of the crime charged. *Id.* at 17-18. In California, permanently incompetent criminal defendants can be placed on mental health conservatorships using different criteria than are used to establish mental health conservatorships for all other mentally disordered people. CAL. WELF. & INST. CODE §§ 5350, 5008(h)(1)(A)-(B) (West 1998). By law, other conservatees must be placed in the least restrictive placement. CAL. WELF. & INST. CODE § 5358(a)(1)(A). In contrast, by law, permanently incompetent criminal defendant conservatees must be placed in a facility “that achieves the purposes of treatment of the conservatee and protection of the public.” CAL. WELF. & INST. CODE § 5358(a)(1)(B).

The failure to individualize placement may violate a patient’s right to placement in the least restrictive appropriate treatment setting. *See* Perlin, *supra* note 53, at 231-34 (asserting that the Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), interpreting the Americans with Disabilities Act, may require individualized placement decisionmaking for permanently incompetent criminal defendants and other forensic patients, rather than uniform placement in maximum security institutions).

¹⁵⁹*Sell*, 539 U.S. at 186.

¹⁶⁰*See id.* at 180 (requiring that important governmental interests be at stake), 186 (suggesting that lengthy pretrial detention diminishes the importance of the government’s interest in prosecuting the defendant).

¹⁶¹In mentioning the possibility that Sell might be subjected to “further lengthy confinement,” perhaps the majority only meant to suggest that if Sell was not medicated, he

If incompetent criminal defendants are civil patients, then they are entitled to the same right to medical self-determination that other civil patients possess. In many states, courts have held that civilly committed patients have a right to refuse treatment with antipsychotic medication unless they lack the capacity to make treatment decisions—i.e., to weigh the risks, benefits, and alternatives to the proposed medication.¹⁶² Civilly committed patients—including incompetent criminal defendants—are not similarly situated with mentally disordered, sentence-serving prisoners whose right to refuse treatment is governed by their danger to themselves and others, not their capacity to

would be found permanently incompetent to stand trial, and, pursuant to *Jackson*, could be confined thereafter through the civil commitment process. Nevertheless, the majority failed to consider: (1) whether detention for four years as an incompetent criminal defendant is permissible under *Jackson*, and (2) whether detention beyond four years as an incompetent criminal defendant is permissible under *Jackson*.

¹⁶²*See, e.g.,* *Riese v. St. Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 201, 210 (Cal. Ct. App. 1987) (holding that in nonemergency situations, antipsychotic medication cannot be administered to involuntarily committed civil patients without their consent absent a judicial determination of their incapacity to make treatment decisions); *Rogers v. Comm'r*, 458 N.E.2d 308, 314 (Mass. 1983) (holding that involuntarily committed civil patients do not lose the right to make treatment decisions unless they are adjudicated incompetent by a judge in incompetency proceedings); *Rivers v. Katz*, 495 N.E.2d 337, 342, 342-44 (N.Y. 1986) (holding that involuntary civil commitment, without more, does not establish that the committed person lacks the mental capacity to comprehend the consequences of medication refusal decisions and that a judicial determination that the patient lacks that capacity is required before the state may administer antipsychotic drugs over the patient's objection). Utilizing the informed consent doctrine, "virtually every court that has considered the matter now recognizes a 'right to refuse' psychotropic medication for institutionalized populations." RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 923 (4th ed. 2004).

understand the consequences of the proposed therapy.¹⁶³

In fact, because civilly committed patients have been confined without a criminal trial and without a criminal conviction, special deference should be paid to their decisions to refuse treatment. The state has exercised its authority to detain them because of their predicted dangerousness or inability to provide for themselves. The state's legitimate interest in protecting them, and in protecting others from them, is achieved by the confinement itself—without coerced treatment. 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 interest¹⁶⁴—should outweigh any claimed governmental interest in coercing treatment.

One cannot assume that a criminal defendant who is incompetent to stand trial is necessarily incompetent to make treatment decisions. The issue for competence to stand

¹⁶³Washington v. Harper, 494 U.S. 210, 225 (1990). *See supra* text accompanying notes 147-51. *But see* Morris, *Confusion of Confinement*, *supra* note 19, at 661-63 (asserting that when a mentally disordered prisoner is transferred from a prison to a mental hospital for treatment of his or her mental disorder, punishment for the crime that led to imprisonment is suspended, and therefore, the prisoner should not be distinguished from any other patient treated in that hospital. Security measures should depend on the pathology and severity of the individual's mental disorder, not on the individual's status as a prisoner.).

¹⁶⁴*Harper*, 494 U.S. at 221-22 (holding that under the Due Process Clause of the Fourteenth Amendment, a mentally ill prisoner “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs”); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (holding that the Fourteenth Amendment prohibits the forcing of antipsychotic drugs on criminal defendants held for trial “absent a finding of overriding justification and a determination of medical appropriateness”).

trial is whether the defendant is able to understand the criminal proceedings and to assist in his or her defense. The issue for competence to refuse antipsychotic medication is whether the individual can weigh the risks, benefits, and alternatives to the proposed medication. Because the issues are different, a defendant who is incompetent for one purpose may be competent for another.¹⁶⁵

Competent civil patients, however, do not have an absolute right to refuse antipsychotic medication. The state does have a legitimate interest in protecting other patients and staff from dangerous mental patients. This danger, however, is far less in a mental hospital than it is in a prison.¹⁶⁶ Unlike prisons, mental hospitals have professional and support staff trained in dealing with problems of potential violence. Hospital staff may respond to threatening situations using alternative approaches such as segregation, physical restraints, psychotherapy, and behavior therapy.¹⁶⁷ At most, all that is needed is authority to involuntarily sedate the patient in an emergency situation, when the patient presents an immediate danger to himself or herself or to others.¹⁶⁸ Nevertheless, this exercise of the

¹⁶⁵See *Godinez v. Moran*, 509 U.S. 389, 413 (1993) (Blackmun, J., dissenting) (asserting: “A person who who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin. . . . Competency for one purpose does not necessarily translate to competency for another purpose.”).

¹⁶⁶See Bruce J. Winick, *New Directions in the Right to Refuse Mental Health Treatment: The Implications of Riggins v. Nevada*, 2 WM. & MARY BILL OF RTS. J. 205, 228-29 (1993).

¹⁶⁷*Id.*

¹⁶⁸See, e.g., CAL. WELF. & INST. CODE § 5332(e) (West Supp. 2004) (authorizing coerced treatment in an emergency). Another California statute defines an emergency as “a

state's police power must end when the emergency that warranted this exercise of authority ends. If a person's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs"¹⁶⁹ is to have any meaning at all, a claim that the patient was committed as being too dangerous to live in society, or that he or she presents a generalized danger to other patients or staff in the institution, should not be useable as an excuse to authorize nonemergency, coerced treatment of a competent civil patient.

In *Sell*, however, the Supreme Court eschews this analysis. Justice Breyer correctly notes that involuntary medical treatment is typically addressed as a civil matter, and that every state provides for the appointment of a guardian who may make a medication decision for a patient who has been found incompetent to make that decision.¹⁷⁰ But then

situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent." *Id.* § 5008(m) (West 1998).

¹⁶⁹See *Harper*, 494 U.S. at 221-22 (holding that under the Due Process Clause of the Fourteenth Amendment, even a mentally ill prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs").

¹⁷⁰*Sell v. United States*, 539 U.S. 166, 182 (2003). The Court also asserts, far more questionably, that the guardian decides to authorize treatment when to do so is in the patient's best interests. *Id.* Several courts, however, have held that the guardian's responsibility is to decide the question of acceptability of treatment on the basis of how the patient would have decided that question if the patient was competent. In other words, the guardian is to apply a "substituted judgment" model, not a "best interest" model. See, e.g., *In re Boyd*, 403 A.2d 744, 750 (D.C. 1979); *In re Roe*, 421 N.E.2d 40, 51-52 (Mass. 1981). Thus, for example, if the patient is a practicing Christian Scientist, the incompetent patient, if competent, would refuse treatment even if it was in his or her best interest to accept it, and under a "substituted judgment" model, the guardian should not consent to its imposition upon the patient.

he adds that “courts, in civil proceedings, may authorize involuntary medication where the patient’s failure to accept treatment threatens injury to the patient or others.”¹⁷¹ As authority for this proposition, Justice Breyer does not cite any state statutes or state court decisions. Rather, he cites a federal regulation that implements a federal statute.¹⁷² The statute is a federal civil commitment law, authorizing the detention of dangerous, sentence-expiring prisoners and dangerous, incompetent criminal defendants against whom all criminal charges have been dismissed.¹⁷³ The statute, which establishes a special civil commitment process solely for these two patient categories, appears to contravene *Baxstrom* and *Jackson*. It was not applicable to Charles Sell because the criminal charges against him had not been dismissed. Even if the statute was valid and was applicable to Sell, the statute says nothing about the government’s authority to coerce treatment on those who are confined.

The federal regulation cited as authority by Justice Breyer does not implement or even pertain to the special commitment process established by the cited statute, but rather, to forced medication of patients after they have been committed. The regulation provides for a hearing by a psychiatrist to determine whether coerced treatment “is necessary because the inmate is dangerous to self or others.” And yet, the *Sell* majority uncritically

¹⁷¹*Sell*, 539 U.S. at 182.

¹⁷²*Id.*, citing 28 C.F.R. § 549.43 (2003); 18 U.S.C. § 4246 (2000).

¹⁷³18 U.S.C. § 4246(a)(2000). The statute authorizes federal commitment only when suitable arrangements for state custody are not available. *Id.*

accepts this arguably inappropriate regulation as its sole authority to support its ruling that a court may grant permission, on “*Harper*-type grounds”¹⁷⁴ to forcibly medicate dangerous criminal defendants who are competent to make treatment decisions in nonemergency situations.

Ignoring the criminal defendant’s liberty interest in refusing medication, the majority simply notes that “the inquiry into whether medication is permissible . . . to render an individual nondangerous is usually more ‘objective and manageable’ than the inquiry into whether medication is permissible to render a defendant competent.”¹⁷⁵ The majority adds that “medical experts may find it easier” to express an informed opinion on whether particular medications “are medically appropriate and necessary to control a patient’s potentially dangerous behavior . . . than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.”¹⁷⁶ Through the *Sell* decision, a nonconvict’s significant liberty interest in refusing antipsychotic medication is lost as the distinction between civil and criminal evaporates; the line between the mad and the bad disappears. Objectivity and manageability of the inquiry plus ease of adjudication—in other words, expediency—trumps an individual’s supposedly

¹⁷⁴*Sell*, 539 U.S. at 183.

¹⁷⁵*Id.* at 182.

¹⁷⁶*Id.*

constitutionally protected liberty interest.¹⁷⁷

VII. Conclusion: Us v. Them

In an address to Congress a few days after the September 11, 2001 terrorist attack, President Bush informed the world: “Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists.”¹⁷⁸ We are at war, we were informed, and any nation that harbors or supports terrorism will be regarded as a hostile regime.¹⁷⁹ It is us versus them.

In this fight against a concept—terrorism—instead of a country, we have changed the rules of war. We claim a right to make preemptive strikes against foreign dictators who might harbor weapons of mass destruction that might be used against us. Regime change, at our discretion, is a viable foreign policy option. American citizens have been designated as “enemy combatants” and held in secret military custody without any criminal charges filed

¹⁷⁷Ironically, Justice Stevens, joined by Justices Brennan and Marshall, wrote a concurring and dissenting opinion in the *Harper* case, criticizing the majority for authorizing the forced medication of mentally disordered, sentence-serving convicts. Imposing psychotropic medication on prisoners to serve institutional concerns and “institutional convenience eviscerates the inmate’s substantive liberty interest in the integrity of his body and mind.” *Washington v. Harper*, 494 U.S. 210, 249-50 (1990) (Stevens, J., concurring and dissenting).

¹⁷⁸*Transcript of President Bush’s Address to a Joint Session of Congress on Thursday Night, September 20, 2001, at* <http://www.cnn.com/2001/US/09/20/gen.bush.transcript>.

¹⁷⁹*Id.*

against them and without any trials to determine their guilt or innocence.¹⁸⁰ Non-Americans, captured in the fighting in Afghanistan, have been imprisoned indefinitely at Guantanamo, without being accorded prisoner-of-war status.

Our war against terrorism is a war against those who commit violent acts. In our quest for security against violence, it is easy to include as enemies mentally disordered sentence-expiring convicts, mentally incompetent criminal defendants, and persons acquitted of crime by reason of insanity. Although they do not qualify as religiously inspired, foreign terrorists, nevertheless, we perceive them as dangerous, and can easily qualify them as domestic terrorists. We are told that these individuals cannot be punished. Sentence-expiring convicts have served their criminal sentences; incompetent criminal defendants have not been tried, insanity acquittees have not been convicted. But we do not accept what we are told. Although traditional civil commitment might enable us to treat their mental disorder and their danger, we believe the time constraints typically placed on such commitments make such an option inadequate. And so we substitute special civil commitment for these individuals, a post-incarceration incarceration,¹⁸¹ cloaking our

¹⁸⁰*But see* Padilla v. Rumsfeld, 352 F.3d 695, 698-99 (2d Cir. 2003), *cert. granted*, 124 S.Ct. 1353 (Feb. 20, 2004) (No. 03-1027) (holding that the President lacked inherent constitutional authority as Commander-in-Chief to detain an American citizen on American soil outside a zone of combat, and that absent specific congressional authorization, the Non-Detention Act prohibited the President's detention of an American citizen on American soil as an "enemy combatant," and that Congress's Authorization for Use of Military Force Joint Resolution, passed shortly after the attacks of September 11, 2001, was not such an authorization).

¹⁸¹The term "post incarceration incarceration" appears in a speech presented by George Alexander in a symposium celebrating the eightieth birthday of Thomas S. Szasz,

punishment agenda in long-term treatment garb.¹⁸² Does it surprise you to learn that only two of the more than 500 California SVPs committed to Atascadero State Hospital since the SVP law was enacted nine years ago have been conditionally released to the community?¹⁸³ And both of those patients underwent surgical castration before they were released.¹⁸⁴ Despite California's multibillion dollar budget deficit, the state is currently spending \$377 million to construct a new facility at Coalinga in order to accommodate an expanded SVP population of 1,500 when that facility opens in 2005.¹⁸⁵

In the fifty years since the University of San Diego School of Law was established, we have seen Supreme Court jurisprudence shift from the Warren Court's liberal

M.D. George J. Alexander, *The State's Insatiable Need to Incarcerate Those Who Frighten It*, at <http://www.szasz.com/alexanderremarks.html>.

¹⁸²For example, Michael Perlin asserts that sexually violent predator legislation "blur[s] the borderline between civil and criminal . . . [by enforcing] social control in punitive ways under the guise of the beneficence of civil commitment." The Supreme Court's *Hendricks* decision upholding the constitutionality of SVP legislation "has the potential of transforming psychiatric treatment facilities into *de facto* prisons." Michael L. Perlin, "On Desolation Row": *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, keynote address presented at the annual meeting of the American Association of Psychiatry and the Law (Newport Beach, CA, Oct.. 2002) (manuscript of address available from the author). See also Note, *Involuntary Commitment of Violent Sexual Predators*, 111 HARV. L. REV. 259, 266 (1997) (asserting that after *Hendricks*, "the risk increases that a potentially lifelong deprivation of liberty via the civil system will be imposed to serve goals traditionally and rightfully reserved for the criminal system—retribution and deterrence").

¹⁸³Telephone interview with Barrie Haffler, Public Relations Officer, Atascadero State Hospital (Jan. 15, 2004).

¹⁸⁴*Id.*

¹⁸⁵*Id.*

application of the Constitution to prohibit the special categorization of sentence-expiring prisoners¹⁸⁶ and permanently incompetent criminal defendants¹⁸⁷ for civil commitment, to the Burger and Rehnquist Court's conservative application of the Constitution to permit the special categorization of insanity acquittees¹⁸⁸ and SVPs¹⁸⁹ for civil commitment, and to permit the coerced treatment of competent, though dangerous, criminal defendants.¹⁹⁰ In a post-September 11, 2001 America, at a time when we are obsessed with our desire for security from potentially violent people, this trend away from protection of individual rights is not likely to be reversed.¹⁹¹

Benjamin Franklin once observed, "He who sacrifices freedom for security is neither free nor secure."¹⁹² But to us, our founding father's prescience seems passe. We

¹⁸⁶Baxstrom v. Herold, 383 U.S. 107 (1966). *See supra* text accompanying notes 8-20.

¹⁸⁷Jackson v. Indiana, 406 U.S. 715 (1972). *See supra* text accompanying notes 25-33.

¹⁸⁸Jones v. United States, 463 U.S. 354 (1983). *See supra* text accompanying notes 39-52.

¹⁸⁹Kansas v. Hendricks, 521 U.S. 346 (1997). *See supra* text accompanying notes 59-84, 89-123.

¹⁹⁰Sell v. United States, 539 U.S. 166 (2003). *See supra* text accompanying notes 124-77.

¹⁹¹For example, the California Supreme Court recently held that a sentence-expiring convict who has been civilly committed under California's Mentally Disordered Offender law may be forcibly medicated with antipsychotic drugs even if he or she is competent to refuse it, provided a court determines that the individual is dangerous within the meaning of the state's regular civil commitment statutes. *In re Qawi*, 81 P.3d 224, 240 (Cal. 2004).

¹⁹²*See* <http://alcuweb.best.vwh.net> /911/, quoting Benjamin Franklin.

are not adversely affected by laws that specially categorize mentally disordered people who have been involved in some way in the criminal process and whose release into society we fear. Those laws protect us. After all, we know that we are not mentally disordered, dangerous, or involved in the criminal process. And in today's world, it is us versus them. We fail to consider that when any person's rights are lost, our Constitutional rule of law is undermined. To the extent that the Supreme Court allows that to happen, the shepherd is asleep. The distance between right and wrong has broken down.