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Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant

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I. INTRODUCTION

Imagine, if you will, the following scenario:[1] The defendant is charged with the violent stabbing death of another. Testimony at trial reveals that the defendant, who has been diagnosed as a chronic schizophrenic, suffers from frequent auditory and visual hallucinations. He believes that he is a prophet of God and must defend himself against demons, one of whom had taken over the body of the victim. Despite his attorney's strenuous objection, the judge orders that the

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1. This scenario is drawn from Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983).

defendant be tried while receiving heavy doses of Stelazine and other antipsychotic medications.[2] This medication, while controlling to some extent the defendant's behavior and other overt symptoms of his mental illness, also reduces the defendant's mental alertness and his ability to concentrate, and dramatically changes his demeanor in front of the jury.[3] At trial, the defendant concedes that he stabbed the victim, but asserts that he is not guilty by reason of insanity. The jury,

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2. Antipsychotics are one of four major classes of psychotropic drugs; i.e., drugs used in the treatment of mental illness. The others are the antidepressants (such as Tofranil and Elavil), the antimania drugs (such as Lithium), and the anti-anxiety drugs (such as Librium and Valium). *See* Eisenberg, *Psychiatric Intervention*, 229 SCI. AM. 116, 121-25 (1973); Klerman, *Psychotropic Drugs as Therapeutic Agents*, 2 HASTINGS CENTER STUD. 81, 83-87 (1974). The antipsychotics, in turn, are broken into five major sub-groups: the phenothiazines, whose most prominent member, chlorpromazine, is perhaps better known as thorazine; the thioxanthines; the rauwolfia derivatives; the benzoquinolines; and the butyrophenones. Klerman, *supra*, at 83-84. The effectiveness of these drugs in reducing the most overt symptoms of mental illness was discovered through research which followed the serendipitous finding by a French anaesthesiologist in 1951 that prospective surgical patients whom he treated with chlorpromazine displayed little anxiety in regard to their pending surgery although they were otherwise apparently alert and aware of their surroundings. Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. FORENSIC SCI. 568, 570 (1972).

Following the introduction of chlorpromazine into the United States in 1953, psychiatrists made widespread use of both it and related phenothiazine compounds. Physicians found the antipsychotic drugs to be tremendously useful in temporarily reducing or eliminating the overt symptoms of psychosis, particularly schizophrenia, thus making it possible for a number of patients to benefit from more traditional forms of psychotherapy. In addition, drug therapy allowed large numbers of institutionalized mental patients to be released outright from state mental hospitals. *See* Gutheil & Applebaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 100 (1983); Haddox, Gross, & Pollack, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 LOY. L.A.L. REV. 425, 448 n.138 (1974). The broad ranging use of antipsychotic and other psychotropic drugs in the 1960's and 1970's, combined with an emerging patients' rights movement, occasioned the phenomenon known as "deinstitutionalization"—the massive decrease in the number of patients in state mental hospitals. The nationwide census in state institutions fell from a high of 559,000 patients in 1955 to 132,000 patients in 1983. Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, in AMERICAN PSYCHIATRIC ASSOCIATION, TASK FORCE REPORT, THE HOMELESS MENTALLY ILL (1984).

While psychotropic drug therapy has had a positive effect on the numbers of people institutionalized due to mental illness, the drugs have been widely criticized. Critics allege that physicians frequently overprescribe or otherwise improperly administer these drugs as a means of permitting an inadequate staff to control a number of difficult and seriously disturbed patients. Critics also argue that use of these drugs is accompanied by a number of discomforting, extremely debilitating, and potentially irreversible side effects. *See infra* text accompanying notes 115-20. This article will focus on these side effects to the extent that they may impair an insane defendant's right to conduct and present a defense, and to the extent they may impinge upon his constitutional and common law right to privacy and right to refuse unwanted medical treatment.

3. Commonwealth v. Louraine, 390 Mass. 28, 32-33, 453 N.E.2d 437, 441 (1983).

however, rejects his defense, and convicts the defendant of first degree murder.

In a small but significant group of cases such as this one,[4] the defendant's constitutional right not to incriminate himself, to present a defense to a criminal charge, and to privacy are on an apparent collision course with the constitutional prohibition against the trial of incompetent defendants. Where the defendant is a mentally ill individual who may only be restored to competency through the use of psychotropic drugs, the very fact of this pharmaceutical restoration may significantly undercut his primary defense—that he was insane at the time of the offense. The defendant's "synthetic sanity," achieved through the taking of antipsychotics or other psychoactive drugs, precludes the jury from seeing the defendant as he was at the time of the crime, the moment for which the jury's assessment of his mental state is critical. The defendant's synthetic sanity may also interfere with his ability to assist his counsel in mounting a defense by impairing his cognitive functioning and diminishing his sense of trial reality to the point that he loses his will to fight the charges against him.[5] In addition, the state's insistence that the defendant stand trial while medicated violates the fundamental fifth amendment principle that the state must independently establish its case against the defendant, rather than by forcing him to speak against himself. Finally, com-

4. For cases addressing the question of whether the state may compel a defendant who raises a defense of insanity to take psychotropic medication, see Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983); People v. Hardesty, 139 Mich. App. 124, 362 N.W.2d 787 (1984); State v. Hayes, 118 N.H. 458, 389 A.2d 1379 (1978); State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978); *In re* Pray, 133 Vt. 253, 336 A.2d 174 (1975); State v. Murphy, 56 Wash. 2d 761, 355 P.2d 323 (1960); State v. Maryott, 6 Wash. App. 96, 492 P.2d 239 (1971). In *Louraine*, the Massachusetts Supreme Judical Court denied that it was deciding "whether the Commonwealth may administer medication to criminal defendants involuntarily to ensure their competence to stand trial," 390 Mass. at 38 n.13, 453 N.E.2d at 444 n.13, but surely that was the result of the court's conclusion that the defendant Louraine was denied due process of law by his involuntary medication. The courts in *Murphy*, *Maryott*, and *Pray* found similar due process violations. The *Hardesty*, *Hayes*, and *Law* courts found that the state's interests in bringing a competent defendant to trial outweighed the defendant's interest in being free from such synthetic sanity. The *Hayes* court relied primarily on the fact that the defendant had been off medication only one day prior to his commission of the offense, and therefore held that he might refrain from taking medication for one day during trial, so that the jury could observe his demeanor under such circumstances. *Hayes*, 118 N.H. at 462, 389 A.2d at 1381.

In State v. Lover, the court held that a defendant asserting an insanity defense could be tried while medicated against his will, although in that case the defendant had been improperly prevented from asserting that defense. 41 Wash. App. 685, 694, 707 P. 2d 1351, 1351 (1985). In State v. Cooper, the court held that a defendant asserting an insanity defense was competent to stand trial even if his competence was obtained through psychotropic medication. 286 N.C. 549, 566, 213 S.E.2d 305, 317 (1975). Neither the defendant nor the court discussed the question of whether the state could insist on such medication as the price of a trial.

5. *See infra* text accompanying notes 121-26.

pelling the defendant to be medicated against his will infringes upon his common law and constitutional rights to privacy and bodily integrity.

Due to the extreme infrequency of cases in which the insanity defense is raised,[6] the precise issue framed here rarely arises. Nevertheless, an analysis of this issue provides an ideal occasion for the reexamination of much of the conventional wisdom about incompetent defendants and the nature of the incompetency plea. A brief historical overview and a look at more current practices will show that the principle that a mentally incompetent individual might not be tried was originally premised largely on moral and humanitarian concerns for the defendant. Today, however, the decision not to try an incompetent defendant, or conversely, to insist on pharmacological restoration of the defendant's mental health as the price of his being

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6. One commentator has quipped that "the incidence of cases in which the insanity defense is raised is lower than the annual incidence of poisonous snakebites on the island of Manhattan." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 860 (1974) (citing Cohen, Book Review, 13 CONTEMPORARY PSYCHOLOGY 8 (1968) (reviewing A. GOLDSTEIN, THE INSANITY DEFENSE (1967))) [hereinafter cited as GAP Report].

One of the most striking things about the current public outcry over the "abuse" of the insanity defense is the dearth of evidence to support that charge. Although aggregate national statistics are impossible to obtain, data from those individual states that do maintain records on the use of the insanity defense show that it is rarely invoked, and even more rarely successful. For example, in New York it is estimated that only 17%, or 220, of the 127,068 felony arrests made in 1978 resulted in insanity pleas, and of these, only 25%, or 55, were successful. *Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 367 (1982) (statement of Henry J. Steadman). *See also* Steadman, Monahan, Hartstone, Davis & Robbins, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 LAW & HUM. BEHAV. 31, 37 (1982).

In Michigan, in 1977, defendants raised the insanity plea in .11% of all major felony arrests, and were successful in about 8% of those cases. Criss & Racine, *Impact of Change in Legal Standard for those Adjudicated Not Guilty By Reason of Insanity 1975-79*, 8 BULL. AM. ACAD. PSYCHIATRY L. 261, 264, 271 (1980). Similarly, statistics from California show that the 259 insanity acquittals in 1980 represented only .6% of all felony dispositions in that year (the rest were convictions) and were only .1% of all felony arrests made in that year. Turner & Ornstein, *Distinguishing the Wicked from the Mentally Ill*, CAL. LAW., March, 1982, at 40, 42.

Statistics from New Jersey also support the proposition that the insanity defense is rarely employed or successful:

> In fiscal year 1982 (July 1, 1981 through June 30, 1982), of the more than 32,500 adult cases handled by the New Jersey Office of the Public Defender, insanity pleas were entered in only fifty-two cases [less than one-sixth of one percent of all cases. Further, the insanity plea] was successful in only fifteen cases. That figure represents . . . one-twentieth of one percent of all cases handled in the course of a year . . . .

Letter to the Editor from Joseph H. Rodrigues, Public Advocate for the State of New Jersey, 69 A.B.A. J. 560 (1983). *See also* Fentiman, *"Guilty But Mentally Ill": The Real Verdict is Guilty*, 26 B.C.L. REV. 601 n.2 (1985).

tried reflects a simplistic equating of mental illness with incompetency, and frequently benefits the state, not the defendant. Accordingly, a reevaluation of the purposes and functions of the incompetency plea is required in order to consider the state's legitimate interest in not trying defendants who cannot understand or meaningfully participate in their trials and in protecting the defendant's criminal trial rights and his interest in individual autonomy and self-determination.

This article's thesis is that given the magnitude of the insanity defendant's fundamental constitutional liberties—his constitutional right to present and conduct his defense, his privilege against self-incrimination, his constitutional right to privacy and bodily integrity, and his common law right to give informed consent to medical treatment—the state's interest in assuring the defendant's competency must give way if he chooses to waive his right to be tried while competent. Most, if not all, of the purposes of the prohibition against trying an incompetent defendant can be met even if the defendant is tried without psychotropic medication as long as he *is* competent to consult with his counsel at some point before trial. After such consultation, the court must permit the insanity defendant to waive his right not to be tried while incompetent, so long as adequate procedural safeguards are provided.

A. *The Incompetency Plea at Common Law*

It has long been accepted as axiomatic that the trial of an incompetent defendant violates due process[7] because such a defendant cannot make rational decisions about trial strategy and cannot assist his counsel in preparing an effective defense.[8] Nevertheless, some hostility toward the incompetency plea has existed since early common law. For example, in cases where the defendant refused to enter a plea upon arraignment, perhaps because of mental incompetency, it was

7. Pate v. Robinson, 383 U.S. 375, 378 (1966).

8. As Lord Hale stated:

> If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment. . . . And if such person of nonsane memory after his plea, and before his trial become of nonsane memory, he shall not be tried; or, if, after his trial, he becomes of nonsane memory, he shall not receive judgment, or, if after judgment he becomes of nonsane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.

Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899) (citing 1 M. HALE, PLEAS OF THE CROWN 34, 35 (1678)).

the courts' task to determine "whether the defendant was 'mute by visitation of God,' " in which case his refusal to enter a plea was entitled to judicial respect, "or 'mute of malice,' " in which case it was not.[9] In order to make this determination, the defendant would be subjected to *peine forte et dure*, where he would be gradually crushed with heavier and heavier weights so as to make it increasingly attractive to him to enter a plea.[10]

The common law prohibition against the trial and conviction of an incompetent defendant was premised on a number of related factors, most of which stemmed from the Anglo-American model of the adversarial trial system,[11] in which competing parties, aided by their counsel, would strive to establish and ascertain the truth.[12] Out of this adversarial model grew the notion that a defendant who was not mentally or physically present at trial was unable to carry on the role of the defendant.[13] A defendant who did not understand the nature and purpose of the proceedings against him, who could not recall or otherwise provide his attorney with facts that might exonerate him, who could not interact with counsel, who could not comprehend or comment upon the testimony of adverse witnesses, and who could not intelligently make strategic trial decisions, was not only a defendant who might be unfairly found guilty, but was also simply not the type of defendant whom our system of adjudication of guilt seeks to convict.[14] Such a defendant was thus deemed incompetent to stand trial.

This emphasis on the accused's ability to function *as a defendant* is reflected in the two-pronged test for competency which the Supreme Court announced in *Dusky v. United States*.[15] The test provides: "(1) whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and (2)

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9. GAP Report, *supra* note 6, at 887 (citing A. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND, EDWARD I TO HENRY I (1925)). *See also* Hale, *supra* note 8, at 225-27.

10. GAP Report, *supra* note 6, at 887 (citing 1 WALKER, CRIME AND INSANITY IN ENGLAND (1968)).

11. It has been baldly stated that "the prohibition [against trying an incompetent defendant] is fundamental to an adversary system of justice." Drope v. Missouri, 420 U.S. 162, 171-72 (1975).

12. It has also been suggested that the incompetency plea is compelled out of consideration for individual human dignity, which cannot be maintained in the face of a defendant's manifest insensibility to the proceedings going on around him. Graber & Marsh, *Ought a Defendant Be Drugged to Stand Trial*, HASTINGS CTR. RPT., Feb., 1970, at 8.

13. Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960). *Accord* Slovenko, *The Developing Law on Competency to Stand Trial*, 5 J. PSYCHIATRY & L. 165, 166 (1977).

14. People v. Lang, 26 Ill. App. 3d 648, 656, 325 N.E.2d 305, 310 (1975); GAP Report, *supra* note 6, at 888-89; Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 455, 457-58 (1967).

15. 362 U.S. 402 (1960) (per curiam).

whether he has a rational as well as a factual understanding of the proceedings against him."[16] State and federal statutes, as well as state and federal courts, have generally followed *Dusky* when addressing the competency question, focusing on the defendant's ability to understand the proceedings against him and to assist his counsel in presenting a defense.[17] However, several jurisdictions have adopted more detailed statements of those abilities and understandings a defendant must display in order to meet a minimal standard of competency.[18]

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16. *Id.*

17. Some state competency statutes quote *Dusky* verbatim. *See* FLA. R. CRIM. P. 3.211; TEX. STAT. ANN. art. 46.02(1) (Vernon 1979). Most, however, parallel the *Dusky* language, by focusing on the defendant's capacity to understand the proceedings against him and to assist in his own defense. *See, e.g.,* ALASKA STAT. § 12.47.100(a) (1962): "A defendant who . . . lacks capacity to understand the proceedings against the defendant or to assist in the defendant's own defense may not be tried, convicted, or sentenced for the commission of a crime so long as the incapacity exists." *See also* 18 U.S.C. § 4241 (Supp. 1984); ARIZ. R. CRIM. P. 11.1; ARK. STAT. ANN. § 41-603 (1977); CAL. PENAL CODE § 1367 (West 1982); COLO. REV. STAT. § 16-8-102(3) (1985); CONN. GEN. STAT. ANN. § 54-56(d) (West 1985); DEL. CODE ANN. tit. 11, § 404(a) (1979); D.C. CODE ANN. § 24-301(a) (1981); HAWAII REV. STAT. § 704-403 (1976); IDAHO CODE § 18-210 (1979); ILL. REV. STAT. ch. 38, § 104-10 (1980); IND. CODE ANN. § 35-36-3-1 (Burns 1986); IOWA CODE ANN. § 812.3 (West 1979); KAN. STAT. ANN. § 22-3301 (1981); KY. REV. STAT. ANN. § 504.040 (Bobbs-Merill 1983); KY. R. CRIM. P. 8.06; LA. CODE CRIM. PROC. ANN. art. 641 (West 1981); MD. HEALTH-GEN. CODE ANN. § 12-101(d) (1982 & Supp. 1985); MICH. STAT. ANN. § 14.800(1020)(1) (Callaghan 1980); MICH. COMP. LAWS ANN. § 330.2020(1) (West 1980); MINN. R. CRIM. P. 20.01(1); MO. STAT. ANN. § 552.020(1) (Vernon 1986); MONT. CODE ANN. § 46-14-103 (1984); NEV. REV. STAT. § 178.400 (1985); N.J. STAT. ANN. § 2C: 4-4(a) (West 1982); N.Y. CRIM. PROC. LAW § 730.10 (Consol. 1984); N.C. GEN. STAT. § 15A-1001(a) (1983); N.D. CENT. CODE § 12.1-04-04 (1985); OHIO REV. CODE ANN. § 2945.37(A) (Page 1982); OKLA. STAT. ANN. tit. 22, § 1175.1(1) & (2) (West 1986); OR. REV. STAT. § 161.360(2) (1985); PA. STAT. ANN. tit. 50, § 7402(a) (Purdon Supp. 1986); R.I. GEN. LAWS § 40.1-5.3-3(a)(3) (1984); S.C. CODE ANN. § 44-23-410 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-10A-1 (Supp. 1986); UTAH CODE ANN. § 77-15-2 (1982); VA. CODE ANN. § 19.2-169.1(A) (Supp. 1986); WASH. REV. CODE ANN. § 10.77.010(6) (1986); W. VA. CODE § 27-6A-1 (1980); WIS. STAT. ANN. § 971.13(1) (West 1985); WYO. STAT. § 7-11-302(a) (1977).

The remainder of state statutes fail to articulate a test for incompetency to stand trial. ALA. CODE § 15-16-21 (1982 & Supp. 1986); GA. CODE ANN. § 27-1504 (Harrison 1983); ME. REV. STAT. ANN. tit. 15, § 101 (1980 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 123, § 15 (West 1986); MISS. CODE ANN. § 99-13-11 (1973); NEB. REV. STAT. §§ 29-1822 to -1823 (1985); N.H. REV. STAT. ANN. §§ 135:17-:18 (1978 & Supp. 1985); N.M. STAT. ANN. § 31-9-1 (1984); TENN. CODE ANN. § 33-7-301 (1984 & Supp. 1986); VT. STAT. ANN. tit. 13, § 4817 (1974). In several of these states, however, there has been a judicial definition of incompetency to stand trial, again following *Dusky*. Bailey v. State, 421 So. 2d 1364 (Ala. Crim. App. 1982); Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960); Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979); State v. Ledger, 444 A.2d 404 (Me. 1982); Thursby v. State, 223 A.2d 61 (Me. 1966); Commonwealth v. Chubbuck, 384 Mass. 746, 429 N.E.2d 1002 (1981); Emanuel v. State, 412 So. 2d 1187 (Miss. 1982); State v. Johnson, 673 S.W.2d 877, 880 (Tenn. 1984).

18. Wieter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961). In *Wieter*, the court provided the following test of trial competency:

> (1) that [the defendant] has mental capacity to appreciate his presence in relation to time, place and things; (2) that his elementary mental processes are such that he apprehends (i.e., seizes and grasps with what mind he has) that he is in a

Like many constitutional rights, the prohibition against the trial of incompetent defendants stemmed not only from a need to protect the individual defendant against an unfair and inaccurate trial verdict,[19] but also from a desire to assure society that justice was being done. The incompetency defense was a means of increasing social cohesion and respect for the criminal justice system[20] because it insured that the criminal sanction would only be imposed on those

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> Court of Justice, charged with a criminal offense; (3) that there is a Judge on the Bench; (4) a Prosecutor present who will try to convict him of a criminal charge; (5) that he has a lawyer (self-employed or Court-appointed) who will undertake to defend him against that charge; (6) that he will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed; (7) that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; and (8) he has memory sufficient to relate those things in his own personal manner.

Id. at 321-22.

The *Wieter* decision has had some influence on other courts, perhaps because the Medical Center for Federal Prisoners is located at Springfield, Missouri and the federal district court there has had numerous occasions to make competency determinations in habeas corpus proceedings. *See, e.g.*, United States v. Adams, 297 F. Supp. 596, 598 (S.D.N.Y. 1969); State v. Guatney, 207 Neb. 501, 512-13, 299 N.W.2d 538, 545 (1980) (Krivosha, C.J., concurring). The New Jersey legislature has also adopted the *Wieter* criteria virtually verbatim, while Florida has adopted the detailed incompetency factors which the Harvard Medical School's Laboratory of Community Psychology proposed in 1973. N.J. STAT. ANN. § 2C:4-4 (West 1982); FLA. R. CRIM. P. 3.211(b)(1). *See infra* note 33. Such a detailed enumeration of competency criteria has been criticized as "counterproductive," however, to the extent that it substitutes "particularized judgments on superficial aspects of the defendant's mental state for the more important, ultimate conclusion of competence." ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

19. *See, e.g.*, John Frith's Case, 22 Howell's St. Tr. 307 (1790). Frith was accused of high treason for throwing a stone at King George III's coach. The court continued the trial to the next session, despite the defendant's objections, because of his delusion that he possessed the powers of Christ and St. Paul. The court relied upon the general principle that the defendant's mental illness would prevent him from being tried, declaring:

> [T]he humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing; for, however guilty he may be, the inquiring into his guilt must be postponed to that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law . . . .

Id. at 318. The authors of the ABA Standards for Criminal Justice declared that "the fundamental purpose of the rule [against trying incompetent defendants] is that of promoting the accuracy of the factual guilt or innocence determination by enabling the attorney to evaluate and present available defenses to the fact finder . . . ." ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

20. Graber & Marsh, *supra* note 12 at 8; *see also In re* Winship, 397 U.S. 358, 363-64 (1970); Duncan v. Louisiana, 391 U.S 145, 155-56 (1968); Tehan v. Schott, 382 U.S. 406, 415-16 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-56 n.5 (1964); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

who were aware of and could participate in the criminal process. Not only was it necessary for the defendant to be competent in order for her attorney to be able to present the best available defense,[21] but it was also deemed unseemly to try an individual who was not a "conscious and intelligent participant" in that trial,[22] as the resulting litigation would "lose . . . its character as a reasoned interaction between an individual and his community and would become an invective against an insensible object."[23] It was believed that if courtroom observers perceived that the defendant was incapable of understanding and making fundamental trial decisions or that he was engaging in bizarre and inappropriate behavior, public confidence in, and support for, the justice system would be undermined.[24]

A related concern was the idea that the trial of an incompetent defendant undercuts the purposes of punishment because an essential element of the philosophy of punishment is that defendants know why they are being punished.[25] This argument is implicit in the principle of moral blameworthiness which underlies Anglo-American criminal law[26]—that punishment is only appropriate when one has consciously chosen to do wrong.[27] It is also central to any utilitarian theory of punishment because the conviction of an incompetent defendant would fail to achieve either general or specific deterrence.[28]

B. *The Incompetency Determination in Practice*

If one examines the development of the law governing incompetency to stand trial, it becomes clear that the multifaceted, functional

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21. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

22. Note, *supra* note 14, at 458.

23. *Id.*

24. *Id.*

25. *Id.*

26. In Lambert v. California, Justice Frankfurter quoted Justice Holmes on "blameworthiness":

> It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.

355 U.S. 225, 231-32 (1957) (Frankfurter, J., dissenting) (quoting O. HOLMES, THE COMMON LAW 49-50 (1881)).

27. "The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morrisette v. United States, 342 U.S. 246, 250 (1952) (rejecting the government's contention that strict liability ought to be imposed for a theft crime merely because the applicable statute was silent on the question of mens rea).

28. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

approach to the incompetency question, which historically underlay the prohibition against the trial of incompetent defendants, has now become one-dimensional. Today, most courts focus solely on the question of whether the defendant is mentally ill, however that elusive concept may be defined.[29] In many states, the equation of incompetency with mental illness has been accomplished by statute.[30] But even where the governing statute provides a test for incompetency that is related to the defendant's ability to function at trial,[31] in a large number of cases the focus of both the court and the examining psychiatrist has been on the presence or absence of mental illness in the defendant.[32] In part, this stems from a failure on the part of judges to provide adequate guidance to the examining psychiatrist as to what question they want answered.[33] Many psychiatrists performing competency examinations are uncertain or confused about the test for competency to stand trial in their jurisdiction, and thus, often apply the test for criminal responsibility to determine incompetency.[34] Further, even when they are aware of the appropriate standard, psychiatrists often find it difficult to reformulate their clinical findings into a legal conclusion regarding competency.[35] In part, this focus on mental illness, as opposed to competency, also stems from the psychiatrist's understandable inclination to look at the defendant from a medical perspective, as an object of possible cure.[36] Judges also may

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29. Just what constitutes "mental illness" or indeed, whether it even exists as a medical entity, has been the source of intense debate ever since Thomas Szasz first wrote *The Myth of Mental Illness*. 15 AM. PSYCHOLOGY 113 (1960). *See also* A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 58-88 (1974).

30. Note, *supra* note 14, at 459. *See also supra* note 17.

31. *Id.*

32. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4 introduction (1984); Schulman, *Determination of Competency—Burial at the Crossroad,* II LAW PSYCHIATRY AND THE MENTALLY DISORDERED OFFENDER 37, 44 (1973); Note, *supra* note 14, at 460.

33. Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. C.R.-C.L. L. REV. 379, 388-91 (1969); Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Limits*, 119 AM. J. PSYCHIATRY 713, 715 (1963); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616 (1965); Vann & Morganroth, *Psychiatrists and the Competence to Stand Trial*, 42 U. DET. L. REV. 75, 84-85 (1964); *see also* United States v. Gundelfinger, 98 F. Supp. 630, 631 (W.D. Pa. 1951).

Courts as well have confused the test for competency with the criteria for criminal responsibility. Hess & Thomas, *supra*, at 715. *See generally*, LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (1973).

34. "In an attempt to translate clinical diagnostic findings into the legal conclusions required by the test for legal competence, mental health professionals have often taken one of two roads: either they have translated diagnostic labels into conclusory legal findings or have attempted to construct their own diagnostic criteria to permit application of clinical findings to legal requirements." ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

35. *Id.*

36. *See* Schulman, *supra* note 32, at 44, 46-47; Note, *supra* note 14, at 470. The tensions

determine that a particular defendant is incompetent to stand trial out of a desire to provide her with compulsory psychiatric treatment.[37] Finally, the focus on mental illness as the sine qua non of incompetency is reflected in the common practice of both defense and prosecution attorneys of using the incompetency plea and incompetency examination as a means of finding out more about the defendant's mental condition at the time of the crime, to determine if an insanity plea would be warranted, or to obtain information relevant to sentencing.[38]

The consequences of this simplistic equation of incompetency with mental illness can be serious, both for the defendant and the state. If the trial is delayed for any significant amount of time as a result of a finding that the defendant is incompetent, it may become impossible (due to the death or relocation of critical witnesses or their fading or changed memories) either for the state to prove its case against the defendant or for the defendant to establish his innocence.[39] Historically, defendants have borne this burden much more heavily than the state. Indeed, for every defendant acquitted on grounds of insanity, there are a hundred defendants committed to state mental hospitals as incompetent to stand trial.[40] In practice, many prosecutors and judges have apparently not cared if the defendant is brought to trial, particularly if the state has a weak case, because the interests of public protection are achieved just as well by the accused's indefinite commitment to a hospital for the criminally insane as they would be by conviction.[41]

The automatic treatment of mental illness as synonymous with incompetency has equally serious consequences in the case of the insanity defendant who is forcibly medicated in order to attain "competency" to stand trial. Such medication, by altering the defendant's courtroom behavior and demeanor, deprives him of the opportunity

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between the medical model, which focuses on helping, treating, and curing a possibly sick individual, and the legal model, which focuses on personal liberty and individual autonomy as paramount goals, are pervasive not only in the area of competency to stand trial, but throughout the field of law and psychiatry.

37. *See* Note, *supra* note 14, at 460.

38. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.2(d) & (e) commentary (1984); Schulman, *supra* note 32, at 44-45.

39. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.2(d) & (e) commentary (1984); Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 83 (1972); Janis, *Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme*, 23 CATH. U.L. REV. 720, 723 (1974).

40. A. Brooks, *supra* note 29, at 332 (citing Bacon, *Incompetency to Stand Trial: Commitment to an Inclusive Test*, 42 S. CAL. L. REV. 444 (1969)).

41. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 719 (1972); Foote, *supra* note 13, at 833, 835; Note, *supra* note 14, at 455.

to present the best evidence available of his lack of criminal responsibility—the opportunity to have the jury view him in court as he was at the time of the offense. At the same time, involuntary medication permits the state, rather than the defendant, to choose what evidence he will offer at trial. This medication of the insanity defendant is also violative of a number of the defendant's rights: his constitutional right to present a defense to a criminal charge, his privilege against self-incrimination, his constitutional right to privacy, and his common law right to give informed consent to all medical treatment.

II. THE COMPELLED MEDICATION OF THE INSANITY DEFENDANT IN ORDER TO ACHIEVE COMPETENCE IS UNCONSTITUTIONAL

A. *The Undercutting of the Defendant's Right to Present a Defense*

Perhaps the most serious of all the constitutional violations occasioned by forcible medication of the insanity defendant is the denial of his right to present a defense to the charges against him. American law has long acknowledged the right to defend. Both the exact nature of its constitutional underpinnings and the precise parameters of the right, however, have not always been clear.

Even before the adoption of the federal Constitution, a number of state constitutions provided that a criminal defendant had a constitutional right to offer a defense. As early as 1776, the Virginia Declaration of Human Rights provided:

> [I]n all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with accusers and witnesses, *to call for evidence in his favour*, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.[42]

Massachusetts adopted a parallel provision in its Declaration of Rights of 1780:

> No subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. *And every subject shall have a right to produce all proofs, that may be favorable to him*; to meet the witnesses against him face to

42. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 728 (1976) (quoting VIRGINIA BILL OF RIGHTS § 8 (1776) (current version in VA. CODE art. I § 6 (1982))) (emphasis added).

face, and to be *fully heard in his defense* by himself, or his council, at his election.[43]

These state constitutional provisions served as models for the fifth and sixth amendments to the United States Constitution enumerating a number of trial safeguards for the criminal defendant.[44] The question which cannot be answered unequivocally, given the sparse legislative history surrounding the adoption of the fifth and sixth amendments,[45] is whether the Framers intended, by choosing language which more closely paralleled the Virginia Declaration of Rights than the Massachusetts Declaration of Rights, to exclude a specific guarantee that a criminal defendant had the right to produce all evidence in his behalf and to be fully heard in his defense. A strong argument could be made that such a guarantee was implicitly included as the underlying unifying principle of the specifically enumerated rights of the fifth and sixth amendments.[46]

Notwithstanding this lack of historical certainty, the Supreme Court has rendered numerous decisions premised on the importance of the right to be heard in one's own defense as an essential element of the fundamental fairness and due process requirements which are central to our adversarial system. Although a number of these early decisions were in the civil area,[47] in the twentieth century the Court began to explicitly stress the primary importance of the right to be heard in one's own defense in criminal proceedings. In a criminal contempt case, *In re Oliver*,[48] the Court declared that the failure to provide the

43. *Id.* at 730.

44. The fifth amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

45. Clinton, *supra* note 42, at 732-39.

46. *Id.* at 731-39.

47. *Id.* at 747-49.

48. 333 U.S. 257 (1948).

defendant with "a reasonable opportunity to defend himself" constituted a denial of due process.[49] The Court held that "a person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence."[50]

Oliver and other early right to defend cases involved situations of a total denial of the defendant's right to present his defense.[51] In more recent years, however, the Supreme Court has recognized that even a partial deprivation of a defendant's right to present a defense can constitute a denial of his constitutional right to a fair trial. The Court has condemned a number of state evidentiary and procedural rules that impermissibly limited the defendant's ability to mount an effective defense.

Thus, in *Washington v. Texas*,[52] Washington, the defendant in a murder case, sought to introduce the testimony of Fuller, an individual charged with the same crime, to prove that he, rather than Washington, had fired the fatal shot, that Washington had not been present at the time of the killing, and that Washington had unsuccessfully tried to persuade him to leave before he fired at the decedent. The trial judge refused to admit this testimony, relying on two Texas statutes which provided that a person charged with or convicted of the same offense as the defendant could not testify on his behalf, unless called by the prosecution.[53] The Supreme Court reversed Washington's conviction, declaring:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms *the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.*[54]

In *Webb v. Texas*,[55] the Court also found that the defendant had been denied the opportunity to present critical evidence. The trial judge had given a lengthy sua sponte lecture to the defendant's sole witness about the consequences of perjury, which resulted in the witness's refusal to testify. The Court found that this judicial action had effectively deprived the defendant of his only opportunity to present a

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49. *Id.* at 273.

50. *Id.*

51. Clinton, *supra* note 42, at 748-51.

52. 388 U.S. 14 (1967).

53. *Id.* at 16. The accomplice had already been convicted and sentenced to fifty years imprisonment for the murder.

54. *Id.* at 19 (emphasis added).

55. 409 U.S. 95 (1972).

defense, and thus denied him due process of law.[56]

In *Chambers v. Mississippi*,[57] the Supreme Court reviewed the application of two state rules of evidence that prevented the defendant from either cross-examining or otherwise impeaching the testimony of a witness who had previously admitted to the killing with which defendant was charged, but who later denied his participation. The Supreme Court held that denying the defendant the opportunity either to adequately confront and cross-examine this key witness or to call other witnesses who would testify as to the key witness's previous confession was a denial of due process. The Supreme Court defined due process in this context as "the right to a fair opportunity to defend against the State's accusations."[58]

Most recently, in *Ake v. Oklahoma*,[59] the Supreme Court declared that a state's refusal to provide an indigent defendant with the assistance of a psychiatrist to explore the merits of an insanity defense was also a denial of due process. In reaching this conclusion, the Court relied on the fundamental principle that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."[60] The Court recognized the critical importance of an expert psychiatric witness in assisting the jury to understand the nature of the defendant's mental illness and how it might bear on his criminal responsibility. The Court held that the state's interest in saving money paled beside the interest of the defendant—and the public—in obtaining a fair and accurate adjudication of the insanity issue, explaining that "a criminal trial is fundamentally unfair if the State proceeds against . . . an indigent defendant without making certain that he has access to the raw material integral to the building of an effective defense."[61] The Court emphasized that an adequate opportunity for the defendant to present his defense was a critical component of the truth-ascertaining function of our adversary system declaring, "[a] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."[62]

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56. *Id.* at 98.

57. 410 U.S. 284 (1973).

58. *Id.* at 294.

59. 105 S. Ct. 1087 (1985).

60. *Id.* at 1093.

61. *Id.* at 1094.

62. *Id.* at 1095. *See generally id.* at 1095-97 (Court discusses role and value of psychiatric assistance at trial).

In addition to the series of cases, culminating in *Ake*, in which the Supreme Court expressly based its ruling on the constitutional right to present a defense, the Court has also implicitly affirmed the defendant's right to present a defense and to control trial strategy in a number of other decisions. For example, in *Brady v. Maryland*,[63] the Court reversed a murder conviction because at trial the state refused, despite the defendant's request, to provide the defense with critical exculpatory evidence, to wit, a co-defendant's confession to the murder. The Court found that the state's withholding of this evidence violated due process declaring that by his action the prosecutor had become, even if unwittingly, the "architect of a proceeding that does not comport with standards of justice."[64]

In *Brooks v. Tennessee*,[65] the Court struck down a Tennessee statute that required a defendant who wished to testify on his own behalf to take the stand at the beginning of the defense case or not at all. The Court found the statute constitutionally invalid on two grounds. First, the statute violated the defendant's privilege against self-incrimination. By limiting the defendant's ability to decide whether or not to exercise the privilege to a time before he had heard other defense witnesses testify and could thus evaluate the value of their testimony, the state made the assertion of the privilege against self incrimination costly.[66] Second, the statute impermissibly infringed on the defendant's right to counsel, as it limited counsel's ability to offer advice, in terms of trial strategy, as to whether it would be in the defendant's best interest to testify.[67]

Finally, in *Specht v. Patterson*,[68] the Court reaffirmed the importance of providing a defendant with a meaningful opportunity to be heard in his own defense as an essential element of due process. In *Specht*, the defendant, who had been convicted of the offense of taking indecent liberties, which carried a maximum penalty of ten years imprisonment, was sentenced under a Colorado law that permitted an indeterminate commitment as a sex offender.[69] The Court held that the defendant had been denied due process of law because this commitment was accomplished at a sentencing hearing where the judge considered psychiatric reports, but no psychiatric testimony, without giving the defendant an opportunity either to confront and cross-

63. 373 U.S. 83 (1963).
64. *Id.* at 88.
65. 406 U.S. 605 (1972).
66. *Id.* at 611-12.
67. *Id.* at 612-13.
68. 386 U.S. 605 (1967).
69. *Id.* at 607.

examine the state's witnesses or to offer evidence of his own.[70]

In sum, the conclusion that emerges from these cases is that a defendant in our adversary system has a due process right to present a defense: a constitutional right to an opportunity to have access to, and to present all relevant evidence to the trier of fact, and to make, in consultation with counsel and without interference from the state, important decisions concerning trial strategy. A trial in which the defendant is prevented from presenting key defense evidence is a trial in contravention of due process.

In cases in which the defendant is asserting an insanity defense, evidence of his mental state at the time of the offense is critical. The Supreme Court's decision in *Ake v. Oklahoma* is perhaps the best illustration of this premise. The lynchpin of the decision was that the state's refusal to afford an indigent insanity defendant access to a qualified psychiatrist, who could assist him in evaluating the merits of his insanity defense and in presenting that defense to the jury, constituted a denial of due process.[71] The Court emphasized the importance of expert psychiatric testimony in helping the jury understand the defendant's mental state at the time of the crime, and how it might have shaped his behavior.[72] Stressing that evidence of the defendant's psychological state was crucial to an accurate resolution of the sole issue in the case, his sanity, the Court declared that it was essential that the defendant be able to present all relevant evidence bearing on this point. Finally, the Court placed great emphasis on truth as a paramount goal of the adversary system, declaring that the government had no interest in denying the defendant the ability to present all pertinent evidence because the goal of the adversarial process was an accurate verdict, not victory for the state.[73]

Lower courts have reached similar conclusions in numerous cases in which they have underscored the critical importance of the defendant's ability to present all relevant evidence pertaining to a mental state defense. In *Blake v. Kemp*,[74] the defendant was charged with the murder of the two-year-old daughter of his girl friend. Although the defendant was examined by a psychiatrist in regard to his mental state at the time of the killing, the police failed to provide the psychiatrist with the defendant's taped confession made shortly after the homicide or a suicide note written several days later, both of

70. *Id.* at 610-11.
71. *Ake*, 105 S. Ct. at 1093-97.
72. *Id.* at 1095-96.
73. *Id.* at 1095-97.
74. 758 F.2d 523 (11th Cir. 1985).

which tended to support the defendant's defense of insanity. Nor were these documents provided to defense counsel until the day before the trial. The court granted the defendant's petition for writ of habeas corpus, holding that the withholding of this crucial evidence from the psychiatrist and counsel denied the defendant his right, articulated in *Ake*, to a "psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information,"[75] and consequentially, his right to the effective assistance of counsel. Without an adequate psychiatric evaluation, the court reasoned, defendant's counsel was unable to render adequate assistance on the insanity issue, by subjecting the prosecution's case to "meaningful adversarial testing."[76]

In *Ronson v. Commissioner of Corrections*,[77] the court held that the trial judge's refusal to permit the defendant's expert psychiatric witness to testify because the defendant had failed to satisfy the statute requiring notice of his intent to raise an insanity defense violated the defendant's sixth amendment right to compulsory process for witnesses on his behalf. The court emphasized that the state interests in fair notice of the defense and in an orderly trial procedure must be closely scrutinized when they would restrict the defendant's ability to introduce relevant evidence—here, crucial evidence supporting the defendant's insanity defense.[78] In addition, the court noted that the defendant's lawyer had effectively given notice of his intent to call the psychiatric expert, although not in the precise form required by statute. The court stated that "maximum 'truth gathering,' rather than arbitrary limitation, is the favored goal."[79]

Similarly, in *Hughes v. Mathews*,[80] the defendant did not assert an insanity defense but contended that because of his psychopathy, he was unable to form the specific intent to kill necessary for a conviction of first degree murder under Wisconsin law.[81] The court held that it was a denial of due process for the trial court to refuse to admit psychiatric testimony bearing on his ability to form that specific intent. Such evidence was both relevant and competent, and the state had no legitimate justification for refusing to admit it.[82]

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75. *Id.* at 528.

76. *Id.* at 532 (quoting United States v. Cronic, 104 S. Ct. 2039, 2047 (1984)).

77. 604 F.2d 176 (2d Cir. 1979).

78. *Id.* at 178-79.

79. *Id.* at 178.

80. 576 F.2d 1250 (7th Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

81. *Id.* at 1259.

82. *Id.* at 1255-59. Other courts have similarly recognized the importance of permitting defendants to offer all relevant evidence of their mental state when it bears on a key trial defense. *See, e.g.*, State v. Woods, 20 Ohio Misc. 2d 1, 484 N.E.2d 773 (C.P. Clermont County

In the case of the "synthetically sane" insanity defendant, the evidence that the defendant typically seeks to offer is that of his own courtroom demeanor. Although such evidence does not take the same form as that of an expert psychiatric witness testifying as to the defendant's mental state at the time of the offense, it is no less critical than such testimony, and indeed may be even more so, because it comes directly from the defendant, rather than through the filter of an outside observer.

A number of courts have recognized the critical importance of the defendant's demeanor in an insanity case.[83] The defendant is the key player in his trial, whether or not he takes the stand. Throughout the proceedings, the jury will be evaluating his manner and conduct, searching for hints as to his character and clues as to whether and why he committed the crime.[84] Although this is always true in a criminal trial, it is especially important in a case where the defendant raises an insanity defense because the defendant concedes that he committed the physical act constituting the crime, but argues that he ought not be convicted because he lacked the guilty mind—the conscious choice to do evil—which is an essential element of the crime.[85] Often the only way that the defendant can establish his insanity defense, and put his conduct in a context the jury can understand, is to emphasize the crime's horror, its violence, and hence, its irrationality.[86] To paint such a picture for the jury, stressing that the terrible act with which the defendant is charged was a product of an abnormal and diseased mind, it is essential that the defendant be able to present to the jury a courtroom demeanor which is as close as possible to that which existed at the time of the offense.[87] Furthermore, in cases in which the defendant takes the stand, it is obviously critical for the defendant to be perceived as a truthful witness. To the extent that psychotropic medication gives a false impression of his veracity, it severely undercuts his ability to present a defense.[88]

It is virtually unavoidable that jurors will use their perceptions of

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1984) (psychiatric testimony admissible to support defendant's claim at trial that she was not predisposed to sell a controlled substance due to her extreme susceptibility to suggestion by others, and was thus entrapped by police officers into making the sale).

83. *E.g.*, Commonwealth v. Louraine, 390 Mass. 28, 34-35, 453 N.E.2d 437, 442 (1983); People v. Hardesty, 139 Mich. App. 124, 140, 362 N.W.2d 787, 795 (1984); People v. Van Diver, 79 Mich. App. 539, 541-42, 261 N.W.2d 78, 79 (1977); *In re* Pray, 133 Vt. 253, 257, 336 A.2d 174, 177 (1975); State v. Maryott, 6 Wash. App. 96, 101, 492 P.2d 239, 242 (1977).

84. *See In re* Pray, 133 Vt. at 257-58, 366 A.2d at 177.

85. *See supra* text accompanying notes 26-27.

86. *In re* Pray, 133 Vt. at 254, 336 A.2d at 175.

87. *Hardesty*, 139 Mich. App. at 254, 362 N.W.2d at 797.

88. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 commentary (1984).

the defendant's present mental state, as demonstrated by his courtroom demeanor, as evidence of his prior mental state.[89] Jurors will consider other evidence adduced at trial, including the testimony of the defendant himself, in light of that demeanor.[90] In *Walker v. Butterworth*,[91] for example, the prosecutor was permitted to comment to the jury on the insanity defendant's personal exercise of his preemptory challenges, citing it as evidence of both the defendant's present sanity and his sanity at the time of the offense. On an appeal from the denial of the defendant's petition for a writ of habeas corpus, the court held that this compulsory exercise of his preemptory challenges, combined with the prosecutor's repeated comments thereon, violated the defendant's privilege against self-incrimination, as the state was requiring him to be a witness against himself on the question of his sanity at the time of the offense.[92]

Similarly, in the case of the insanity defendant who has been declared "competent" to stand trial only if he takes psychotropic medication, the defendant's chemically-induced demeanor can have a significant and devastating effect on his ability to persuade the jury of the merits of his insanity defense. The effects of psychotropic medication on the defendant's demeanor may make it difficult, if not impossible, for him to persuasively offer evidence of his insanity at the time of the offense. The drugs may also have a negative effect on his ability to cooperate with and assist his attorney in preparing a defense.

The effects of psychotropic medication on an insanity defendant's ability to present a defense are most clearly seen in the case of schizophrenic patients who are forcibly medicated with antipsychotic drugs such as thorazine,[93] although they are also apparent in the case of defendants with other types of mental illness.[94] While the precise etiology of schizophrenia is unknown, physicians have theorized that the disease is caused by inappropriate amounts of two chemical neurotransmitters in the brain, dopamine and norepinephrine.[95] This leads to a situation where brain activity is highly stimulated, but not focused, which results in thought disorders, hallucinations, delusions,

89. Walker v. Butterworth, 599 F.2d 1074, 1084 (lst Cir.), *cert. denied*, 444 U.S. 937 (1979).

90. *Louraine*, 390 Mass. at 34-35, 453 N.E.2d at 442.

91. 599 F.2d 1074 (lst Cir. 1979).

92. *Id.* at 1077, 1082-84.

93. *See supra* note 2.

94. *Cf.* Hollister, *Psychotropic Drugs and Court Competence*, in LAW, PSYCHIATRY AND THE MENTALLY DISORDERED OFFENDER 14, 17-18 (1972).

95. Comment, *The Right to Adequate Treatment Versus the Right to Refuse Antipsychotic Drug Treatment: A Solution to the Dilemma of the Involuntarily Committed Psychiatric Patient*, 33 EMORY L.J. 441, 445 (1984).

and paranoid ideation.[96] The antipsychotics alter the relative proportions of dopamine and norepinephrine to reduce or eliminate the overt symptoms of schizophrenia, thus diminishing the defendant's violent and disruptive behavior.[97]

A variety of side effects, however, often accompany the use of antipsychotics. One of these, akinesia, causes the defendant to feel a lack of energy and to complain of being "dead inside,"[98] to feel that everything is dull and boring, and that nothing matters.[99] Externally, akinesia may alter the defendant's facial expression, so that he appears in mild cases to lack spontaneity of expression, and in severe cases to have a wooden, "mask-like" face.[100]

A different, but also common, side effect of the administration of psychotropic drugs is akathisia,[101] an emotional state of inner restlessness and agitation, in which the defendant feels "all nerved up," or "squirmy inside," so that he is unable to be comfortable in any position, and, in extreme cases, will suffer inner feelings of panic. These internal symptoms are externally manifested by a constant crossing and uncrossing of the legs and an inability to sit still, even for a few minutes.[102]

Finally, the most frequent and predictable side effect is tardive dyskinesia.[103] This condition, which results from lengthy and high dosage treatment with antipsychotic drugs, is irreversible. A patient suffering from tardive dyskinesia exhibits grotesque involuntary movements of the tongue, lips, and jaws, which may in some cases extend to the trunk and bodily extremities. Unfortunately, the medication often masks the symptoms of tardive dyskinesia and thus, they become apparent only after the patient has discontinued use of the drugs.[104]

The result of the compelled administration of antipsychotic

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96. *Id.* at 445-46.

97. *Id.* at 446; Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107, 110 (1985).

98. Van Putten, *Why do Schizophrenic Patients Refuse To Take Their Drugs?*, 31 ARCHIVES GEN. PSYCHIATRY 67, 69 (1974).

99. Note, *Antipsychotic Drugs: Regulating Their Use in the Private Practice of Medicine*, 15 GOLDEN GATE U.L. REV. 331, 348 (1984).

100. Van Putten, *supra* note 98, at 69. Such a rigid, "mask-like" face may also be a result of one of the other side effects of antipsychotic drugs, parkonsonism, which is also characterized by "drooling, muscle stiffness and rigidity, a shuffling gait [often referred to colloquially as the Stellazine Shuffle], and tremors." Kemna, *supra* note 97, at 112.

101. Kemna, *supra* note 97, at 112.

102. Gutheil & Applebaum, *supra* note 2, at 108; Van Putten, *supra* note 98, at 68-69.

103. R. BALDESSARINI, CHEMOTHERAPY IN PSYCHIATRY 46-48 (1977); Rhoden, *The Right to Refuse Antipsychotic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363, 381 (1980).

104. *Id.*

drugs, with its elimination of overt symptoms of serious mental illness and the concomitant presence of misleading and distracting side effects, is that the jury is presented with a totally false picture of the defendant's mental processes. The use of psychotropic drugs precludes the jury from catching even a glimpse of the defendant's true mental state,[105] which is characterized by violent delusions, paranoid hallucinations, and other types of thought disorders.[106] Instead, the jury sees a defendant who appears either calm, rational, and blasé in regard to the crime he is accused of committing,[107] or one who is so restless and jumpy that his fidgeting itself can easily be taken as evidence of his consciousness of guilt. The defendant's altered demeanor

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105. In commentary, the authors to the ABA Standards for Criminal Justice noted that the proferred defense of insanity "is undermined by the picture of the docile defendant seated at counsel table." ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 commentary (1984).

106. Evidence of the defendant's mental illness is obviously crucial to the successful presentation of an insanity defense. The defendant must show that he was suffering from a mental disease or defect, at the time of the crime, that resulted in either a cognitive or volitional impairment causally related to his commission of the crime. For example, the M'Naghten rule, followed in England and many American jurisdictions, states:

> [E]very man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved . . . and . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843) (cited in J. BIGGS, THE GUILTY MIND 105 (1955)).

Similarly, the American Law Institute (ALI) definition of insanity provides that:

> 1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
> 2. The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal and otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (The second paragraph has been adopted in some, but not all, of the jurisdictions that have adopted the ALI test of insanity.).

For a discussion of the now discredited Durham rule, followed only in New Hampshire, see State v. Jones, 50 N.H. 369, 398 (1871) ("[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect."); *see also* Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

Most recently, in response to the public outcry over John Hinckley's aquittal on grounds of insanity, Congress enacted a new test of insanity applicable to federal prosecutions. 18 U.S.C. § 20(a) (1984).

> It is an affirmative defense to prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Id.

107. Mynatt, *Artificial Competence*, 22(3) HOSP. & COMMUNITY PSYCHIATRY 96 (1971).

thus prevents the jury from seeing or relating to him either as he was at the time of the crime or as he was at the time that a psychiatrist examined him. These factors seriously undermine the effectiveness of favorable psychiatric and lay testimony supporting his defense of insanity.[108] If the defendant takes the stand, this problem is exacerbated, because "[a] defendant whose emotions are dulled, and whose responses are not appropriate to the emotional message conveyed by his testimony, may present a false impression of his veracity . . . ."[109]

At least one study has shown that the trier of fact is most likely to disagree with the clinician's assessment of the defendant's legal insanity when the defendant in fact *has* a history of schizophrenia and treatment with psychoactive medication.[110] The study showed that juries seemed to be most influenced by these defendants' relatively moderate psychopathology and cognitive and behavioral impairment, and declined to defer to a clinical judgment of insanity which appeared to have some objective, verifiable indicia of support.[111]

It can therefore be inferred that when an insanity defendant with a history of schizophrenia and psychotropic drug treatment appears, due to such treatment, to be calm, in control, and capable of understanding the proceedings against him, a jury may be strongly inclined to ignore the expert witness's assessment of psychiatric impairment. Such a jury will be much more likely to find the defendant guilty, rather than acquitting him on grounds of insanity. Instead of seeing a violent, extremely disturbed individual, careening out of control because of his abnormal thought processes, the jury may easily perceive the defendant as a "calculating, merciless criminal,"[112] unmoved by trial testimony relating to the grotesque and terrifying conduct in which he is alleged to have engaged.

This was the situation in *State v. Murphy*,[113] where a defendant countering a charge of first degree murder with an insanity defense[114] was given powerful tranquilizers immediately prior to trial as treatment for a severe cold.[115] When the defendant took the stand in his

108. Turner & Ornstein, *supra* note 6, at 43; GAP Report, *supra* note 6, at 904.

109. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 commentary (1984).

110. Rogers, Cavanaugh, Seman & Harris, *Legal Outcome and Clinical Findings: A Study of Insanity Evaluations*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 75, 80 (1984).

111. *Id.* at 81.

112. Burt & Morris, *supra* note 39, at 85-86 (1972).

113. 56 Wash. 2d 761, 355 P.2d 323 (1960) (en banc).

114. Although the defendant entered a plea of not guilty by reason of insanity, his own psychiatric witnesses testified that the defendant was able to distinguish between right and wrong (the test for insanity under the M'Naghten rule) and thus the trial court withdrew the insanity issue from the jury's consideration. *Id.* at 762-63, 355 P.2d at 324.

115. *Id.* at 765, 355 P.2d at 325-26.

own defense and admitted committing the crime charged he appeared "casual, cool, not at all perturbed and showed a lackadaisical attitude."[116] The Supreme Court of Washington reversed his conviction, on the ground that his chemically-altered demeanor may have significantly affected the jury's decision to impose the death penalty.[117]

Similarly, in *In re Pray*,[118] a defendant charged with murder and asserting an insanity defense was heavily medicated with antipsychotics and barbituates, apparently in an effort to control his violent courtroom outbursts. These drugs caused the defendant to appear "quiet and tractable, . . . rational, . . . well oriented, [and] . . . cooperative,"[119] seemingly aware of what was going on during trial, and able to answer questions clearly. The Supreme Court of Vermont reversed the defendant's conviction, declaring that his forcible medication may well have been devastating to the defendant's insanity defense:

> [T]he jury never looked upon an unaltered, undrugged Gary Pray at any time during the trial. Yet his deportment, demeanor, and day-to-day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity. [It therefore] may . . . have been necessary, in view of the critical nature of the issue, to expose the jury to the undrugged, unsedated Gary Pray, at least in so far as safety and trial progress might permit.[120]

A second vice of psychotropic medication lies in its impairment of the defendant's ability to effectively consult with counsel in presenting his insanity defense. While the antipsychotics remove the most violent and bizarre aspects of the defendant's behavior, making it possible for him to communicate in an apparently more rational manner,[121] they also generate some "cognitive dampening," an impairment of the defendant's "ability to remember, reason, or func-

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116. *Id.* at 766, 355 P.2d at 326.

117. The court declared:

> [W]here the defendant appears as a witness and admits commiting the criminal acts charged constituting first degree murder, a significant consideration in the minds of the members of the jury respecting the penalty to be imposed may well be their evaluation of defendant's attitude in regard to the crime he has committed.

Id. at 767, 355 P.2d at 326.

118. 133 Vt. 253, 336 A.2d 174 (1975).

119. *Id.* at 256, 336 A.2d at 177.

120. *Id.* at 257-58, 336 A.2d at 177. The court left open the question of whether such an instruction would be adequate to protect the defendant's right to present a defense of insanity.

121. *See* State v. Jojola, 89 N.M. 489, 553 P.2d 1296 (1976) (rejecting defendant's claim that his forcible restoration to competency through the use of thorazine violated due process). The court found that "Thorazine allows the cognitive part of the brain to come back into play," reasoning that "a person being dosed with Thorazine is sedated emotionally more than cognitively." *Id.* at 491, 553 P.2d at 1298-99.

tion effectively in any complex learning situation."[122] This may have a devastating impact on the defendant's ability to assist his attorney in investigating and preparing a defense. The chemical dampening or flattening of a person's will can also lead to a suicidal depression, reflective of the defendant's "loss of a sense of self-determination," seriously undermining the desire for self-preservation which is so necessary to productive dialogue with counsel.[123] Even if the defendant is not suicidal, the same drugs which result in a flattening of affect may also cause the defendant to have a lessened appreciation of the realities of his situation as a criminal defendant including a reduction in normal, healthy anxiety, producing a " 'don't care' mental status rather than responses based on self-protection."[124] Such a defendant may "agree to less effective measures in the preparation of his trial defense than would a truly competent and anxious person charged with a crime."[125]

Thus, while the forcible administration of psychotropic drugs would appear to benefit the defendant by diminishing the overt symptoms of his mental illness and making him more rational and better able to cooperate with his attorney in preparing a defense, the reality may be that as a result of these drugs the defendant can neither recall nor understand facts which are crucial to his defense nor appreciate the seriousness of his predicament. Because he is therefore unable to aggressively assist his counsel in asserting a defense, he is simply not in a position to function as a defendant. This is particularly so where the defense attorney is unsophisticated in dealing with medicated defendants, and the defendant's misleading symptomology may go unrecognized.[126] Thus, the combined effects of compelled pharmacological treatment of the defendant's mental illness both on the defendant's demeanor (on and off the witness stand) and on his ability to effectively consult with his attorney may severely impair his ability to present an insanity defense.[127]

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122. Note, *supra* note 99, at 347. Such cognitive impairment can also occur with the administration of antidepressant medication, which may cause mental confusions or delirium. *See generally* Hollister, *supra* note 94.

123. Note, *supra* note 99, at 348.

124. Mynatt, *supra* note 107, at 96.

125. *Id.*

126. *In re* Pray, 133 Vt. at 256-57, 336 A.2d at 177; *cf.* State v. Murphy, 56 Wash. at 766, 355 P.2d at 326.

127. The Supreme Court has never considered the question of whether the insanity defense itself is constitutionally required. Of the six state courts that have addressed this issue, five have held that the defense is constitutionally required under either the due process or equal protection clauses. For a detailed analysis of the constitutional underpinnings of the insanity defense, see Fentiman, *supra* note 6, at 641-46. Of course, if the Supreme Court were to hold that the Constitution mandates the insanity defense, then the forcible medication of an insanity

A number of courts and commentators have suggested that the appropriate remedy under these circumstances is to require the defendant to be tried while synthetically sane, while giving cautionary instructions to the jury that his trial demeanor is chemically induced and may not be reflective of his state of mind at the time of the offense.[128] Such measures, however, would be woefully inadequate. Cautionary instructions are notoriously insufficient to protect a defendant against the damaging impact of inadmissible evidence. As Justice Jackson once wrote: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."[129] Indeed, in the particular case posed here, where the inadmissible evidence is not simply an isolated bit of testimony, but the defendant's demeanor throughout the trial, any cautionary instruction which could be framed[130] would, by

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defendant and the consequent undercutting of the insanity defense would be a separate constitutional violation.

128. *See, e.g.*, People v. Hardesty, 139 Mich. App. 124, 145-46, 362 N.W.2d 787, 797 (1984); ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 commentary (1984); Burt & Morris, *supra* note 38, at 86; Note, *Compelling Competence Through the Use of Psychotropic Drugs: A Due Process Analysis*, 62 N.C.L. REV. 1271, 1276-77 (1984). The ABA Standards for Criminal Justice regarding trial competency permit the trial of a defendant whose competence is maintained by psychotropic medication as long as there is adequate explication of the drugs' effects to the jury. The relevant standard provides:

> (a) A defendant should not be considered incompetent to stand trial because the defendant's present mental competence is dependent upon continuation of treatment or habilitation which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.
>
> (b) If the defendant proceeds to trial with the aid of treatment or habilitation which may affect demeanor, either party should have the right to introduce evidence regarding the treatment or habilitation and its effects and the jury be instructed accordingly.

ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 (1984).

129. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citations omitted).

130. In *Pray*, the court declared:

> At the very least [the jurors] should have been informed that [the defendant] was under heavy, sedative medication, that his behavior in their presence was strongly conditioned by drugs administered to him at the direction of the State, and that his defense of insanity was to be applied to a basic behavior pattern that was not the one they were observing.

In re Pray, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975). The court admitted, however, that such a limiting instruction might be inadequate, and that it might be necessary for the defendant to be tried in an unmedicated state. *Id. See also* State v. Law, 270 S.C. 664, 671-72, 244 S.E.2d 302, 306 (1978).

The ABA Standards for Criminal Justice on competency attained through psychotropic medication follows *In re Pray*, concluding:

> Adverse effects on the defendant will be sufficiently ameliorated if the jurors are given sufficient explanation of the fact that the defendant is on medication and a description of the effects of that medication on the defendant. The description of

the very nature of the prejudice sought to be avoided, be inadequate. Equally inadequate would be the receipt of expert testimony on the dosage and effects of the medication given the defendant.[131] At best, such testimony only mitigates the unfair prejudice which may result as a consequence of his controlled outward appearance. It cannot compensate for the positive value to the defendant's case of the jury viewing his demeanor in an unmedicated condition.[132] Further, such testimony would simply expand the arena for the "battle of the experts" usually present in insanity defense cases. Psychiatric experts for the prosecution would testify that the dosage level was minimal, and sufficient only to enhance the defendant's abilities to participate in trial. Defense psychiatrists, on the other hand, would declare that the dosages were high, severely distorting the defendant's personality as well as his cognitive abilities. Thus, the only way for the jury to accurately assess the defendant's mental state when unmedicated is to permit him to stand trial in that condition.

As the defendant's demeanor provides a backdrop to all the testimony that the jury hears and interprets,[133] it is impossible to expect that either a limiting instruction or extended testimony concerning drug effects on the defendant could cause the jury to discard its impressions of the defendant's demeanor throughout trial in determining whether he was criminally responsible at the time of the offense. As the Supreme Court has stated: "Discrimination so subtle is a feat beyond the compass of ordinary minds [but] [i]t is for ordinary minds, and not psychoanalysts, that our rules of evidence are framed. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence . . . [must go] out."[134]

Another suggested alternative is showing the jury a videotape of the defendant in an unmedicated state.[135] This alternative is similarly inadequate. While such a tape would give the trier of fact a more

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> the medication's effects should include an explanation of the type and the dosage of the medication upon the mental state of the defendant, including his appearance, attitude and verbal style. In this way, although the jury will not have observed the unmedicated defendant, they will have available the facts necessary to enable them to make an accurate assessment of the defendant's undrugged mental state, realizing that they are observing appearance and demeanor significantly altered by the medication.

ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.14 commentary (1984).

131. *Id.*

132. Commonwealth v. Louraine, 390 Mass. 28, 35, 453 N.E.2d 437, 442 (1983).

133. Walker v. Butterworth, 599 F.2d 1074, 1084 (lst Cir. 1979); *Louraine*, 390 Mass. at 34-35, 453 N.E.2d at 442.

134. Shepard v. United States, 290 U.S. 96, 104 (1933).

135. People v. Hardesty, 139 Mich. App. 124, 147, 362 N.W.2d 787, 798 (1984) (Borman, J., concurring).

accurate picture of the defendant while he was not under the influence of psychotropic drugs, and thus would arguably provide the factfinder with some standard of comparison to use in deciding whether or not the defendant was insane at the time of the offense, the videotape would provide only one small glimpse of the defendant in his unmedicated state. Its impact would be minimal when compared with the persistent and cumulative effects of the jury's daily viewing of a defendant with a wholly different demeanor at trial. It is thus highly unlikely that a videotape of the unmedicated defendant could overcome the subtle and immeasurable impact on the jury of viewing a medicated defendant throughout the remainder of the trial.

To find that either a videotape, cautionary instructions, or expert testimony on the psychotropic medication issue could cure the prejudicial effects of exposing the jury throughout the trial to the defendant's forcibly altered and misleading demeanor would effectively repeal a fundamental principle of our criminal justice system—that some violations of constitutional rights are so serious that they inevitably deny the defendant his right to a fair trial, and thus can never be harmless error.[136]

Finally, none of these alternatives address the problem of psychotropic medication's interference with the defendant's ability to confer and cooperate with his counsel in preparing his defense. As noted earlier, these effects may be extremely insidious. The defendant may appear to be calm, rational, and capable of organized and directed behavior, all vitally necessary to recalling key facts pertinent to the defense, discovering witnesses, and intelligently planning trial strategy.[137] However, he may be simultaneously suffering from an easily overlooked cognitive impairment and may also lack the critical instinct for self-preservation which must be present if he is to mount a successful defense: he must care enough to do his very best. Thus, the synthetically sane defendant may go through the motions of assisting his counsel in preparing a defense, and may in fact appear, to an attorney unsophisticated about psychiatric issues, to be doing just that. Yet, the defendant's cognitive and emotional ability to actively participate in the marshalling of evidence and shaping of trial strategy—in short, to present a defense—may be seriously impaired.

Thus, the forcible medication of an insanity defendant with

136. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1962) (denial of counsel to indigent defendant constituted a denial of due process); Payne v. Arkansas, 356 U.S. 560 (1958) (use of a confession that resulted from denial of counsel, coercion, and other infringements of the defendant's rights, deprives him of "that fundamental fairness essential to the very concept of justice").

137. *See supra* text accompanying notes 121-26.

psychotropic drugs in order to eliminate the most overt symptoms of his mental illness and make him "competent" to stand trial violates his fundamental due process right to present a defense, because of its impact on both his trial demeanor and his ability to actively participate in the planning of trial strategy.

B. *The Infringement of the Defendant's Privilege Against Self-Incrimination*

The forcible administration of psychotropic drugs to the insanity defendant in order to render him "competent" to stand trial also violates his privilege against self-incrimination, guaranteed by the fifth and fourteenth amendments to the United States Constitution,[138] as well as by numerous state constitutional provisions.[139] This is true whether or not the defendant chooses to testify. The vice of the forcible medication of the defendant lies both in the fact of state compulsion and in the fact that it leads to the jury's consideration of misleading and inaccurate information concerning the defendant's mental state at trial and, inferentially, at the time of the offense. Further, the state's drugging of the insanity defendant into a misleading persona permits the government to undercut the presumption of innocence with which every defendant is clothed at the commencement of trial as a requirement of due process. This undercutting of the presumption of innocence is a separate constitutional violation. By making it easier for the state to rebut the evidence proffered by the defendant on the question of his insanity, this compulsory medication undermines one of the essential purposes of the fifth amendment—to insure that in the contest between the state and the individual, the

138. For the text of the fifth amendment, see *supra* note 44. The fourteenth amendment provides that no "State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

139. ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 18; CONN. CONST. art I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § I, para. XIII; HAWAII CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; KAN. CONST. § 10; KY. CONST. § 11; LA. CONST. art. I, §§ 13, 16; ME. CONST. art. I, § 6; MD. CONST. art. 22; MASS. CONST. art. 12; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.H. CONST. part I, art. 15; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; N.D. CONST. art I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 13; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 8; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 11.

state shoulders the entire load.[140]

In order to fully understand the nature of the fifth amendment violation that the compulsory psychotropic medication of the insanity defendant occasions, one must examine the policies and purposes of that amendment. Although its aims are many and varied, a few are especially pertinent here. The Supreme Court has articulated the first goal, which has already been noted: that "our preference for an accusatorial rather than an inquisitorial system of criminal justice" reflects a belief that fundamental fairness requires "a fair individual-state balance," in which "the government in its contest with the individual [is required] to shoulder the entire load."[141] In practice, this allocation of responsibilities means that the state must produce all the evidence against the defendant on its own, not by the simple cruel expedient of forcing it from his own lips.[142] Particularly where the defendant is insane or otherwise mentally infirm, it is imperative that the defendant not be made the deluded instrument of his own conviction.[143] In part, this reflects a concern that coerced confessions are more likely to be unreliable.[144] But it also grows out of a fundamental belief that in our democratic system, any self-incriminating statement must be given freely, rationally, and voluntarily.[145] The state must be prevented from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether or not to assist the state in securing his conviction.[146] To twist the body or the mind of the accused until he breaks is inimical to the values that the fifth amendment seeks to protect.[147]

In order to insure that the numerous values that the Framers designed the amendment to protect are in fact adequately safeguarded, it is imperative that its privilege be as "broad as the mischief against which it seeks to guard."[148] Thus, just as the rack and the screw were objected to as unjust methods of obtaining a confession from an accused at the time of the Inquisition and the Star Chamber,[149] so today we must also object to the state using psychotropic drugs to force a defendant to effectively admit his guilt by compelling him to present to the jury evidence of his apparent sanity at the time

140. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
141. *Id.*
142. Culombe v. Connecticut, 367 U.S. 568, 582 (1961).
143. *Id.* at 581.
144. *In re* Gault, 387 U.S. 1, 47 (1966).
145. *Culombe*, 367 U.S. at 583, 602; Blackburn v. Alabama, 361 U.S. 199, 207-08 (1960).
146. *Gault*, 387 U.S. at 47.
147. *Culombe*, 367 U.S. at 584.
148. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
149. *See Culombe*, 367 U.S. at 581; *Blackburn*, 361 U.S. at 206.

of the trial and, by implication, at the time of his offense. In each case, it is the defendant who is communicating this incriminating information to the trier of fact, and it is the state which has commanded the result, without the defendant exercising a free choice.

By thus compelling the defendant to present evidence of his own sanity through his demeanor, the state is permitted to substantially lighten its burden of proof at trial. Forcible medication of the defendant enables the state to rebut his defense of insanity, not by offering independent evidence of his sanity at the time of the offense (e.g. through psychiatric experts, medical records, or lay witnesses), but by resorting to the cruel expedient of injecting the defendant with a chemical that so alters his demeanor that he becomes the vehicle of his own conviction.[150] As the court noted in *In re Pray*,[151] "the jury never looked upon an unaltered, undrugged [defendant] at any time during the trial. Yet his deportment, demeanor, and behavior . . . before their eyes, was a part of the basis of their judgment with respect to . . . the justifiability of his defense of insanity."[152] To permit the state to force a defendant to assume such a misleading demeanor, and then to use it as evidence against him, is as reprehensible an act of state compulsion as were the primitive instruments of state torture used nearly four hundred years ago.

One might object, however, that the privilege against self-incrimination is inapplicable to this situation because it protects only against state-compelled testimonial or communicative evidence, and that at least where the defendant does not testify, the mere exhibition of his body to the jury cannot be considered to be within the ambit of the constitutional prohibition.[153] In the landmark case of *Schmerber v. California*,[154] the Supreme Court did indeed draw a distinction between "real" or "physical" evidence, which was not protected against compulsory state production, and "testimonial" or "communicative" evidence, which was protected.[155] The Supreme Court rec-

150. *See Culombe*, 367 U.S. at 581.

151. *In re* Pray, 133 Vt. 253, 336 A.2d 174 (1975).

152. *Id.* at 257, 336 A.2d at 177.

153. State v. Bottomly, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), *aff'd*, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986). In *Bottomly*, the court held that a videotape of the defendant made shortly after his arrest for driving under the influence of alcohol was admissible at his trial on that charge. The court reasoned that the evidence in the videotape concerning the "defendant's manner, speech, gestures and general demeanor [was relevant to] show the physical manifestations of intoxication," and was "no more testimonial than the taking of still pictures, blood or urine samples held to be outside the privilege [against self-incrimination]." *Id.* at 87-88, 504 A.2d at 1226 (citing Schmerber v. California, 384 U.S. 757 (1966)).

154. 384 U.S. 757 (1966).

155. In *Schmerber*, the defendant contended that the taking of a blood sample against his

ognized the difficulty, however, of drawing a clear line between the two, and indicated that the distinction was not based simply on the question of whether it was the body, rather than the voice, of the defendant that was the source of the incriminating evidence. Using the illustration of polygraph tests, the Court stated:

> There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, *whether willed or not*, is to evoke the spirit and history of the Fifth Amendment.[156]

Thus, the court recognized that the test of "testimonial" vs. "physical" evidence is not whether or not words are spoken, but rather whether the defendant is being asked to communicate his thoughts or ideas. For example, the court noted, that "[a] nod or head-shake is as much a 'testimonial' or 'communicative' act in a sense as are spoken words."[157] Somewhat similarly, with a polygraph, it is not the defendant's consciously chosen verbal responses to questions that are viewed as telling evidence against him, but rather his involuntary bodily responses to those questions.

More recent cases following *Schmerber* have emphasized this same point. In *Serratore v. People*,[158] the court reversed a defendant's burglary conviction on the ground that the prosecution had improperly attempted to insist that the very short defendant participate in a courtroom demonstration of his reaching ability, which would show that his fingerprints could only have been placed in a certain inaccessible spot if he had in fact unlawfully entered the burglarized property. The Colorado Supreme Court held that despite the fact that the defendant had not been asked to testify, a clear violation of his privilege against self-incrimination was established. The court stated,

> [H]e was being asked to participate in a contrived experiment . . . concerning his physical abilities to perform a particular act. Clearly, the purpose of the demonstration was to *communicate* to the jury the defendant's physical abilities to perform an act that the

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will violated his privilege against self-incrimination. In rejecting this argument, the Supreme Court noted, "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764.

156. *Id.* (emphasis added).

157. *Id.* at 761 n.5.

158. Serratore v. People, 178 Colo. 341, 497 P.2d 1018, 1022 (1972).

> prosecution believed him unable to perform. The prosecutor was requesting the same communication from the defendant that he obviously could not have compelled the defendant to explain from the witness stand. . . . This kind of evidence is prohibited by . . . *Schmerber*.[159]

Similarly, in *Walker v. Butterworth*,[160] the court held that the defendant's compulsory personal exercise of his preemptory challenges to the jury, which the prosecutor subsequently used as evidence of the defendant's sanity, violated his privilege against self-incrimination. Although in that case the defendant actually did speak words, it was not the words themselves—"I am [or am not] content with this juror"—which were incriminating, but rather, the testimonial inference to be drawn from them: "I am presently sane [and arguably therefore sane at the time of the offense] because I am able to personally exercise my right to challenge these prospective jurors."[161]

In the case of the defendant who is medicated with psychotropic drugs, the effect of the drugs is to communicate to the jury the defendant's apparent mental processes, even if he does not utter a word. Throughout the course of a lengthy insanity trial, the jury will have numerous opportunities to observe the defendant's reactions to testimony concerning the crime and his participation therein, and will develop a picture of the defendant's mental state at the time of the offense just as surely as if the state compelled the defendant to take the stand and testify directly about his thought processes. The state cannot do this without running afoul of the privilege against self-incrimination.[162]

The second vice of the compulsory administration of psychotropic drugs to the defendant inheres in the great unreliability of the demeanor which it creates. The forcible extraction of a confession from the accused during the Inquisition was objectionable not only because the state was compelling the accused to make a statement against his will, but also because the veracity of a statement made under such circumstances was suspect.[163] The statement made about

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159. *Id.* at 347-48, 497 P.2d at 1022. In People v. Ramirez, a defendant challenged the constitutionality of a roadside sobriety check point. 199 Colo. 367, 609 P.2d 616 (1980) (en banc). The Supreme Court of Colorado clarified the holding in *Serratore*, stating that the primary concern in that case was preventing prejudice that might result from compelled communicative acts performed before the jury, and that this concern is not present outside of the courtroom. *Id.* at 375 n.9, 609 P.2d at 621 n.9.

160. 599 F.2d 1074, 1083-84 (1st Cir. 1979).

161. *Id.* at 1084. The court emphasized that the prosecutor's comments at trial insured that the defendant's utterances would convey the message of his sanity to the jury. *Id.*

162. *See* Serratore v. People, 178 Colo. 341, 497 P.2d 1018 (1972).

163. *In re* Gault, 387 U.S. 1, 47 (1966).

the defendant's sanity by his compulsory psychotropic medication is equally suspect in its accuracy. The cool, calm demeanor and apparent rationality that is superimposed on the defendant by the administration of antipsychotic drugs stands in marked contrast to the turbulent, disordered, and often violent thought processes that would be communicated to the jury if he were not medicated. Thus, the compulsory medication of the defendant undermines a fundamental goal of the adversary trial process: to ascertain the truth. Because the state has no interest in obtaining a resolution of a case that is inconsistent with the truth,[164] it is highly inappropriate for it to achieve an inaccurate resolution of the question of the defendant's sanity by offering the persuasive but unreliable evidence of the defendant's altered trial demeanor.

The fifth amendment stands as an important bulwark between the individual and the state. It was aimed at ensuring that in the contest between the government and the citizen, the government shoulder the entire load. The forcible administration of psychotropic drugs to the insanity defendant, which compels him to communicate misleading and inaccurate information concerning his sanity to the jury, undermines the presumption of innocence with which he must be clothed at the beginning of trial as a matter of due process, and allows the state to more easily make its case against him through the cruel device of proving his sanity from his own demeanor.

C. *The Denial of the Defendant's Constitutional and Common Law Privacy Rights*

The forcible medication of the insanity defendant in order to render him "competent" to stand trial also violates his common law and constitutional rights to be free from nonconsensual invasions of his bodily integrity. Specifically, such compulsory medication constitutes the tort of battery—an intentional touching without consent[165]—and is also an independent violation of the tort principle that an individual must give his "informed consent" before receiving nonemergency medical treatment.[166] In addition, in a number of recent decisions, both state and federal courts have recognized that state compelled medication of the mentally ill violates their constitutional right to privacy[167] as well as their first amendment rights of freedom

164. Ake v. Oklahoma, 105 S. Ct. 1087, 1095 (1985).

165. PROSSER AND KEETON ON THE LAW OF TORTS 39-40 (W. Keeton ed. 1984); Stone, *The Right to Refuse Treatment: Why Psychiatrists Should and Can Make It Work*, 38 ARCHIVES GEN. PSYCHIATRY 358 (1981).

166. Davis v. Hubbard, 506 F. Supp. 915, 931 (N.D. Ohio 1980).

167. *See, e.g.*, Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458

of expression and religion.[168]

The tort of battery is of ancient origin. In the thirteenth century, English law recognized nonconsensual touching as a form of harm compensable through the writ of trespass vi et armis.[169] This tort evolved over the next several centuries into what we today call "battery," and is aimed at the protection and vindication of the individual's interest in his own bodily integrity.[170]

In the last twenty-five years, the related tort doctrine of informed consent has developed into a principle which protects not only the interest in bodily integrity, but also the individual's interest in making his own choices about the most desirable course of medical treatment.[171] Violation of this principle in the context of nonemergency medical treatment will give rise either to a cause of action for battery, if the failure to obtain informed consent was intentional, or negligent medical malpractice, if the failure to obtain such consent was negligent.[172] In order for the patient's consent to be deemed informed, it must be knowledgeable, competent,[173] and voluntary.[174] The require-

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U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983); Rogers v. Okin, 634 F.2d 650 (lst Cir. 1980), *vacated and remanded sub. nom.* Mills v. Rogers, 457 U.S. 291 (1982), *on remand*, Rogers v. Okin, 738 F.2d l (lst Cir. 1984); *In re* Boyd, 403 A.2d 744 (D.C. 1979); *In re* Richard Roe III, 383 Mass. 415, 421 N.E.2d 40 (1981).

168. *Boyd*, 403 A.2d at 748.

169. Davis v. Hubbard, 506 F. Supp. 915, 930 (N.D. Ohio 1980).

170. *Id.*; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 165, at 39-40.

171. Davis v. Hubbard, 506 F. Supp. 915, 931-32 (N.D. Ohio 1980).

172. *Id.* at 931.

173. Rivers of ink have been spent debating just what competency is. This is manifestly a question of great import when the person attempting to assert a right to give informed consent to a proposed course of psychiatric treatment is either alleged to be mentally ill or has been civilly committed. In a seminal article, Professors Roth, Meisel, and Lidz suggest four tests for competency, ranging from "evidencing a choice" to "the ability to understand," which might be applied in evaluating whether an individual is capable of giving informed consent to a proposed treatment. Roth, Meisel, & Lidz, *Test of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 280 (1979). Empirical data cannot demonstrate which of these tests is the "best" or "most accurate" standard for determining competence to make treatment decisions, including a decision to refuse treatment. Rather, each reflects a fundamental value judgment about the deference which should be given to personal choice and medical opinion. As Laurence Tancredi noted:

> Competency, a legal concept, is viewed differently by the various professions involved in the care of mental patients. The physician or psychiatrist operates under the assumption that the mere existence of disease or illness requires treatment whenever possible. Hence, there is a philosophical or value bias in the direction of questioning the competency of an individual who would not want to treat his disease conditions. From the viewpoint of the legal profession, competency is more a mental process. . . .
>
> . . . Tests of competency have been devised, though they seem to provide minimal assistance for establishing the appropriate level for an individual to enter into a meaningful informed consent. . . . Each of these tests is used to

ment of informed consent reflects a fundamental belief that the individual who will be affected by a proposed course of treatment must be able, not only to weigh the risks and benefits of that treatment, but also to decide for himself whether it is a treatment that he wishes to undergo:[175]

> The very foundation of the doctrine of [informed consent] is every man's right to forego treatment or even cure if it entails what *for him* are intolerable consequences or risks, however warped or perverted his sense of values may be in the eyes of the medical profession, or even of the community, so long as any distortion falls short of what the law regards as incompetency. Individual freedom here is guaranteed only if people are given the right to make choices which would generally be regarded as foolish.[176]

This same interest in being free from compelled intrusions on bodily integrity and in having a sphere of personal autonomy within which to make choices for oneself has been given constitutional significance in several Supreme Court decisions involving the constitutional right to privacy.[177] Drawing variously upon the first amendment's protections of freedom of thought, expression, and religion, the

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justify decisions based on a cost/benefit analysis or trade-off of the treatments being proposed as they balance against the individual's rights that are affected.

Tancredi, *The Rights of Mental Patients: Weighing The Interests*, 5 J. HEALTH POL., POL'Y & L. 199, 200-01 (1980).

174. Rhoden, *supra* note 103. Informed consent necessarily excludes any choice obtained through "undue inducement . . . [including] force, fraud, deceit, duress, or other forms of constraint or coercion." GREENWALD, INFORMED CONSENT, in HUMAN SUBJECTS RESEARCH: A HANDBOOK FOR INSTITUTIONAL REVIEW BOARDS 79 (1982). In the research context, he identified the following criteria as critical in securing informed consent:

> 1. A fair and complete explanation of the procedures to be followed and their purposes, including identification of any procedures that are experimental.
> 2. A complete description of any attendant discomfort and risk reasonably to be expected.
> 3. A full description of any benefits reasonably to be expected.
> 4. A complete disclosure of any appropriate alternative procedure that might be advantageous for the subject.
> 5. An offer to answer inquiries concerning the procedures, risks, benefits, and any matter concerning the research and patient's treatment.
> 6. An assurance that the person is free to withdraw his consent at any time and to discontinue participation in the project or activity without prejudice to his care or treatment.
> . . . .

Id. at 81-82.

175. Davis v. Hubbard, 506 F. Supp. 915, 932 (N.D. Ohio 1980); Macklin, *Some Problems in Gaining Informed Consent from Psychiatric Patients*, 31 EMORY L.J. 345, 349-50 (1982); Rhoden, *supra* note 103, at 382-83.

176. Davis v. Hubbard, 506 F. Supp. at 932 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS 61 (Supp. 1968)).

177. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1964).

fourth amendment's prohibition against unreasonable searches and seizures, the ninth amendment's penumbra of rights, and the fourteenth amendment's due process protection of liberty and autonomy, the Court has declared that a fundamental constitutional right to privacy does exist. The state may only infringe upon this right if necessary to serve a compelling state interest.[178]

In recent years, a number of federal and state courts have found this constitutional right to privacy to specifically encompass the right of the mentally ill, both institutionalized and noninstitutionalized, to refuse unwanted medical treatment, including treatment with psychotropic drugs. In two landmark cases, federal appellate courts found that the institutionalized mentally ill had a constitutional right to refuse treatment, although the courts differed as to the means of implementing that right. In *Rogers v. Okin*,[179] the Court of Appeals for the First Circuit found that institutionalized mental patients in Massachusetts had the right to refuse unwanted psychiatric treatment, specifically the forcible administration of psychotropic drugs.[180] The majority held that this right could be overcome only by the state's need to respond to an emergency, defined as a situation requiring action to prevent injury to the patient or others or in which the patient's health would significantly deteriorate without such medication.[181]

In *Rennie v. Klein*,[182] the Court of Appeals for the Third Circuit also held that institutionalized mental patients had a constitutional right to refuse antipsychotic drugs. The state might override this right in order to prevent injury to the patient or others,[183] but only by means that represented the least restrictive alternative possible[184] and that comported with the requirements of procedural due process.[185] The court found that the administrative procedures that New Jersey had established for its mental patients were sufficient to meet minimum standards of procedural due process. These procedures provided first, for an informed discussion with the patient of the risks and benefits of the proposed treatment, and then, if the patient refused the treatment, serial review of the case by the patient's "treatment team,"

178. Roe v. Wade, 410 U.S. at 152-56.

179. 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub. nom.* Mills v. Rogers, 457 U.S. 291 (1982).

180. *Id.* at 653.

181. *Id.* at 653-59.

182. 653 F.2d 836 (3rd Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982).

183. *Id.* at 838.

184. *Id.* at 845-47.

185. *Id.* at 848-52.

the institution's director, and finally, by an outside psychiatrist.[186]

In both *Rogers* and *Rennie*, the state appealed to the Supreme Court and in both cases the Court remanded for further appellate action.[187] The Court remanded *Rogers* in light of the intervening decision of the Massachusetts Supreme Judicial Court in *In re Richard Roe III*,[188] with an eye to a possible state law resolution of the issue of a mental patient's right to refuse treatment. *Rennie* was remanded in light of the Supreme Court's decision in *Youngberg v. Romeo*,[189] which held inter alia that while an institutionalized mentally retarded person had a fourteenth amendment liberty interest in being free from unreasonable bodily restraints, the test for determining whether the state had adequately safeguarded that right was whether professional judgment had been exercised, with the judgments of professionals being presumptively valid.[190]

On remand, the court in *Rogers v. Okin*[191] placed heavy reliance on the decision of the Massachusetts Supreme Judicial Court in *Rogers v. Commissioner*.[192] That court concluded, in response to the court of appeals' questions regarding the scope of an institutionalized mental patient's right to refuse treatment, that before a state may forcibly medicate a patient against his will, he must first be adjudicated mentally incompetent to make a treatment decision, and second, be a subject of a judicial proceeding to determine what the patient would have chosen if he *were* competent.[193] If the court concluded in the substituted judgment proceeding that this patient would, if competent, elect to receive psychotropic medication, then he could be so treated.[194]

In comparison, the court in *Rennie v. Klein*[195] held that while an institutionalized mental patient did have a constitutional right to refuse treatment, he could be forcibly medicated against his will if medical professionals determined that such medication was necessary in order for the patient to have a chance of improving his mental

186. *Id.*

187. *See, e.g.*, Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983); Rogers v. Okin, 634 F.2d 650 (lst Cir. 1980), *vacated and remanded sub. nom.* Mills v. Rogers, 457 U.S. 291 (1982), *on remand*, Rogers v. Okin, 738 F.2d 1 (lst Cir. 1984).

188. 383 Mass. 415, 421 N.E.2d 40 (1981).

189. 457 U.S. 307 (1982).

190. *Id.* at 319, 322-24.

191. 738 F.2d 1 (lst Cir. 1984).

192. 390 Mass. 489, 458 N.E.2d 308 (1983).

193. Rogers v. Okin, 738 F.2d at 8.

194. *Id.* at 7.

195. 720 F.2d 266 (3d Cir. 1983).

condition.[196] The court effectively reached the same result under *Youngberg v. Romeo* as it had before, with the majority declaring that the New Jersey administrative procedures satisfied the requirements of procedural due process because they provided for the exercise of professional judgment.[197]

In contrast with the voluminous litigation raising the question of the right of the institutionalized mentally ill to refuse treatment with psychotropic medication, only a handful of cases, apart from those discussing the synthetically sane insanity defendant,[198] have addressed the question of whether a noninstitutionalized mentally ill individual has a similar right. In those cases where this issue has been raised, however, courts have decided unanimously in favor of the individual's right to refuse treatment.

In *In re Richard Roe III*,[199] the Massachusetts Supreme Judicial Court held that in order for a noninstitutionalized individual to be forced to accept psychotropic medication in the absence of an emergency, he must first be adjudicated incompetent and then be the subject of a substituted judgment proceeding to determine whether he would have accepted such treatment if he were in fact competent.[200] The court based its decision on the fundamental right to privacy, which it found to have both constitutional and common law underpinnings, noting that such a right is "an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life."[201] The court declared that "[a]bsent an overwhelming State interest," both competent and incompetent individuals had the right to refuse unwanted medical treatment.[202] As a result, the court refused to order the involuntary medication of Richard Roe, emphasizing the absence of an emergency,[203] the long-term adverse side effects of psychotropic drug treatment,[204] and the intrusiveness that

196. *Id.* at 269.

197. *Id.* at 269-70. Several members of the *en banc* panel interpreted Youngberg v. Romeo as rejecting the least restrictive alternative analysis of the earlier *Rennie* decision. *Id.* at 268. Other judges, however, did not so read *Youngberg*, and filed various opinions asserting the correctness of the "least restrictive alternative" approach. *Id.* at 270 (Adams, J., concurring); *id.* at 272 (Seitz, C.J., concurring).

198. *See supra* note 4. None of these cases have analyzed the right of a defendant to refuse treatment.

199. 383 Mass. 415, 421 N.E.2d 40 (1981).

200. *Id.* at 417, 432-33, 421 N.E.2d at 50-51.

201. *Id.* at 433 n.9, 415 N.E.2d at 51 n.9 (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 426 (1977)).

202. *Id.* at 434-35, 421 N.E.2d at 51.

203. *Id.* at 440-42, 421 N.E.2d at 54-55.

204. *Id.* at 438-40, 421 N.E.2d at 53-54.

such treatment involved.[205] Further, the court stated that "[w]hile the actual invasion involved in the administration of these drugs amounts to no more than an injection, the impact of the chemicals upon the brain is sufficient to undermine the foundations of personality,"[206] and therefore, such treatment should not be permitted absent a compelling state interest.

In *Bee v. Greaves*,[207] the court held that a schizophrenic pretrial detainee, who had been forcibly medicated with thorazine in order to prevent him from "decompensating" while awaiting trial, had a constitutional right to refuse such medication. The decision was grounded both in the detainee's first amendment right to be free from state interference with the production and communication of ideas and in his fourteenth amendment right to privacy and right to be free from bodily restraints. The court emphasized that the constitutional right to privacy encompassed "the right to make one's own decisions about fundamental matters, the right to personal dignity and bodily integrity, and the right to communicate ideas freely."[208] The court also noted the serious potential side effects of antipsychotic drugs, and drew upon the Supreme Court's decision in *Youngberg v. Romeo*[209] reasoning that "[i]f incarcerated individuals retain a liberty interest in freedom from *bodily* restraints of the kind in *Romeo* then a fortiori they have a liberty interest in freedom from *physical and mental restraint* of the kind potentially imposed by antipsychotic drugs."[210] Finally, the court declared that in order to medicate a pretrial detainee against his will, the state must demonstrate a compelling state interest in such medication and show that that interest cannot be satisfied through less intrusive means. The court, recognizing that the Supreme Court had rejected a less intrusive means approach in *Youngberg v. Romeo*, distinguished that case on two grounds. First, the restraints in *Romeo* were only temporary, while the restraints that psychotropic drugs impose could be permanent. Second, although Romeo was institutionalized after a judicial proceeding in which he was declared severely retarded and unable to care for himself, in this case the pretrial detainee had not been adjudicated incompetent to make a treatment decision.[211]

There are compelling reasons why, in the case of an insanity

205. *Id.* at 436-38, 421 N.E.2d at 52-53.
206. *Id.* at 437, 421 N.E.2d at 53.
207. 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985).
208. *Id.* at 1391.
209. 457 U.S. 307 (1982).
210. Bee v. Greaves, 744 F.2d 1387, 1393 (10th Cir. 1984) (latter emphasis added).
211. *Id.* at 1396 n.7.

defendant asserting his constitutional right to privacy and his common law rights to be free from battery and to give informed consent to medical treatment, these rights must be respected. Foremost among these reasons is that psychotropic drugs are extremely powerful. They are specifically designed to cause significant changes in the recipient's mental processes and often result in a number of uncomfortable, undesired, and irreversible side effects, including extremes of activity levels, a misleading, wooden demeanor, and tardive dyskinesia.[212] Both the defendant's interest in refusing nonconsensual invasions of his bodily integrity and in making his own decisions about what happens to his body support his right to reject the forcible administration of psychotropic drugs as a precondition to standing trial.

The recent decision of the Supreme Court in *Winston v. Lee*, [213] as well as the decisions in *Rennie*, *Rogers*, *Richard Roe III*, and *Bee*, support this conclusion. In *Winston*, the Court held that proposed surgery on a defendant to remove a bullet which the victim of his crime allegedly fired was an unreasonable search and seizure, violative of the fourth and fourteenth amendments, even though the state had probable cause to perform the search.[214] The Court stressed that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State,"[215] concluding that given the magnitude of the proposed surgical invasion and its potential health risks, the state had not made out a compelling case for the surgery. The Court declared that to authorize this surgery would permit the state to " 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbituates into a state of unconsciousness' . . . and then search beneath his skin for evidence of a crime," forcing the defendant to totally abdicate control over his body.[216] The Court also found that the state had not convincingly established a need for the bullet in order to successfully prosecute the defendant, noting that the very facts which were sufficient to establish probable cause for the surgical search and seizure constituted substantial independent evidence of the defendant's guilt. Additionally, the Court found that there was some doubt about the bullet's reliability as evidence even if it were removed.[217]

The forcible medication of the insanity defendant during trial in

212. *See supra* text accompanying notes 97-104.
213. 105 S. Ct. 1611 (1985).
214. *Id.* at 1616.
215. *Id.* (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)).
216. *Id.* at 1619.
217. *Id.* at 1619 n.10.

order to insure his "competence" shows a striking parallel to *Winston* in terms of its invasiveness, risk, and lack of justification. Because the defendant is not institutionalized, there is no state interest in maintaining order and protecting other individuals from possible violence from the defendant—the justification most commonly offered as necessitating the forcible administration of drugs to institutionalized patients. While it may be necessary in some cases to medicate the defendant in order to insure decorum in the courtroom, such medication should take place, if at all, only if the actual behavior of the defendant during trial compels such action.[218] Further, if there has been no adjudication of incompetency to make treatment decisions, there are in fact no grounds to deprive the defendant of his right to make the decision to accept or reject the medication himself. Nor can there be any "treatment" rationale advanced to justify his forcible medication, because the defendant has not been adjudicated incompetent or civilly committed.

Finally, the defendant has important countervailing interests at stake: his due process right to present a defense to the criminal charge against him and his fifth amendment privilege against self-incrimination. The protection of these rights is vital to his presentation of an insanity defense and to the jury's ability to comprehend and appreciate the merits of that defense. As the state has no interest in an inaccurate resolution of the insanity issue, it has no interest in insisting on the defendant's forcible medication, which can only lead to a misleading view of his mental state at the time of the offense. Considering all these circumstances, the defendant's common law and constitutional interests in refusing unwanted medical treatment must be held to outweigh the state's interest in insisting on his medication as the price of standing trial.

D. *Waiver of the Defendant's Right to be Tried While Competent*

While the principle of fundamental fairness incorporated within the due process clause protects a defendant from being tried while incompetent, this same notion of fundamental fairness must also permit the defendant to waive his right if he concludes that it is in his interest to do so. The courts have long recognized that a criminal defendant can waive a number of his constitutional rights, both before and during trial, as long as that waiver is knowing and intelligent[219]

218. *See* Illinois v. Allen, 397 U.S. 337, 347 (1970); Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 953-54 (1985).

219. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

and made with adequate awareness of its consequences.[220] Thus, the defendant may waive his privilege against self-incrimination,[221] his right to counsel,[222] his right to be present at trial,[223] his right to jury trial,[224] his right to confront the witnesses against him,[225] his right to a speedy trial,[226] and his right to present an insanity defense.[227]

The reasons for permitting waiver are twofold. First, the courts allow waiver because it may be tactically advantageous to the defendant. Second, waiver of fundamental constitutional rights is permitted, and indeed, mandated under certain circumstances, out of " 'that respect for the individual which is the lifeblood of the law.' "[228] The numerous constitutional protections and safeguards afforded a criminal defendant are necessary to ensure that he receives the fairest possible adjudication of his guilt or innocence.[229] These defense tools are only provided to enhance the defendant's chances of successfully answering a criminal charge, not to circumscribe his choices about the best available means of conducting his defense.[230] As the Supreme Court stated:

> "What were contrived as protections for the accused should not be turned into fetters. . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution."[231]

Thus, waiver is generally permitted when it will allow the defendant to achieve a desired litigation end. For example, in order for a defendant to plead guilty rather than go to trial, he must waive his right to jury trial, his right to confront the witnesses against him,

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220. Brady v. United States, 397 U.S. 742, 748 (1970).

221. Brady v. United States, 397 U.S. 742 (1970); Miranda v. Arizona, 384 U.S. 436 (1966).

222. The defendant may waive his right to any counsel at all, or his right to conflict-free counsel. Faretta v. California, 422 U.S. 806 (1975); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975).

223. Taylor v. United States, 414 U.S. 17, 19 (1973); Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

224. Boykin v. Alabama, 395 U.S. 238, 243 (1969). *But see* Singer v. United States, 380 U.S. 24, 26, 34-38 (1965) (holding that a defendant has no constitutional right to waive a jury trial, and that the judge and prosecutor must concur in the defendant's waiver).

225. *Boykin*, 395 U.S. at 243.

226. Barker v. Wingo, 407 U.S. 514 (1972).

227. United States v. Frendak, 408 A.2d 364 (D.C. 1979).

228. Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1969) (Brennan, J., concurring)).

229. *Id.* at 820.

230. *Id.* at 815, 818, 820.

231. *Id.* at 815 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942)).

and his privilege against self-incrimination.[232] The courts allow waiver because the defendant may then achieve a result that he desires: the certainty of a lesser sentence in exchange for the unknown results of a jury trial.[233] Similarly, a defendant may waive the right to present an insanity defense if she prefers a finite prison sentence to the stigma of an acquittal on grounds of insanity and its accompanying potentially indefinite commitment to a mental hospital.[234]

Waiver must also be permitted out of the same respect for individual autonomy and freedom of choice that underlies the right to refuse treatment: the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law.[235] This principle was reflected in the decision in *Faretta v. California*,[236] that all criminal defendants may waive their constitutional right to counsel, even though the assistance of counsel usually enhances a defendant's chances of being acquitted.[237] In *Faretta*, the Supreme Court noted, "implicit . . . in the Sixth Amendment's guarantee of a right to the assistance of counsel, is '*the right of the accused personally to manage and conduct his own defense in a criminal case*,' "[238] and held that, "[t]o thrust counsel upon the accused, against his considered wish . . . violates the logic of the [Sixth] Amendment."[239] Because it is the "defendant, and not the lawyer or the State, [who] will bear the personal consequences of a conviction, [i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."[240]

Courts have applied the reasoning of *Faretta* in cases where a defendant wished to waive his right to conflict-free counsel, out of a belief that a particular lawyer, even with a possible conflict of interest, was more advantageous to his defense.[241] This reasoning has also supported a decision in a case in which the defendant wished to waive

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232. *Boykin*, 395 U.S. at 243.

233. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742, 748 (1970). For an extensive discussion of the merits and shortcomings of plea bargaining, see Altschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

234. United States v. Frendak, 408 A.2d 364, 376-77 (D.C. 1979).

235. Chapman v. United States, 553 F.2d 886, 891 (5th Cir. 1977).

236. 422 U.S. 806 (1974).

237. *Id.* at 832-34; *see also* Gideon v. Wainwright, 372 U.S. 335 (1962).

238. *Faretta*, 422 U.S. at 817 (quoting United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964) (emphasis added)).

239. *Id.* at 820.

240. *Id.* at 834.

241. United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

her right to present an insanity defense, even though that defense was likely to be successful on the merits.[242] Each of these decisions, like *Faretta*, reflects a belief that in order to fully implement a criminal defendant's basic right to present and manage his own defense,[243] he must be permitted to waive a constitutional right designed for his protection. The state may not, by acting with the defendant's purported "best interests" in mind, object to such a waiver.[244]

In order to be upheld, a waiver of a federal constitutional right must reflect an intentional relinquishment or abandonment of a known right.[245] Further, to insure that a waiver is knowingly and intelligently made, it must be done with sufficient awareness of the relevant circumstances.[246] In practice, this requires active judicial involvement, and a comprehensive and penetrating questioning of the defendant. This insures that his decision to waive a constitutional right has been carefully considered and freely made, with full awareness of the possible consequences.[247] At least one court has suggested following a procedure analogous to that mandated by Federal Rule of Criminal Procedure 11, governing the taking of guilty pleas, in order that the court may satisfy itself that the waiver is indeed knowing and voluntary.[248]

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242. United States v. Frendak, 408 A.2d 364, 378 (D.C. 1979). The District of Columbia is one of the few jurisdictions in the United States in which trial courts have a duty to raise the insanity defense *sua sponte* when it appears appropriate under the particular facts of a case.

243. *Armedo-Sarmiento*, 524 F.2d at 592-93.

244. *Garcia*, 517 F.2d at 276-77.

245. Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

246. Brady v. United States, 397 U.S. 742, 748 (1970).

247. *Garcia*, 517 F.2d at 277-78; *Frendak*, 408 A.2d at 380.

248. *Garcia*, 517 F.2d at 278. The Supreme Court's decision in Von Moltkee v. Gillies supports this conclusion. 332 U.S. 708 (1948). In *Von Moltkee*, the defendant, a German citizen charged with espionage during World War II, was held incommunicado for more than six weeks before she pleaded guilty. The Court held that before the defendant could waive her right to counsel, the trial court was required to undertake a searching and comprehensive examination in order to insure that the defendant understood the nature and consequences of her action. The Court held:

> [I]n light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Id. at 723-24.

Only a few courts have addressed the question of whether a defendant may waive his right to be tried while competent, although a number of commentators have suggested that such a course is often appropriate. In *People ex rel. Myers v. Briggs*,[249] the Illinois Supreme Court held that an illiterate deaf-mute defendant, who had been committed as incompetent to stand trial, must be given an opportunity to be tried, despite his handicaps, to avoid what would otherwise be a lifetime confinement due to his incompetence. The court held that the defendant's deficiencies in fitness for trial should be accommodated as would those of any other handicapped defendant. Accordingly, the court should afford the defendant "such . . . reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit. . . . The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial."[250]

In a more limited decision, in *State v. McCredden*,[251] the Wisconsin Supreme Court held that before a defendant could be adjudicated incompetent to stand trial, he must be afforded a hearing to determine whether it was probable that he had committed the crime charged. At such a hearing, he must be represented by counsel, who would cross-examine prosecution witnesses and call witnesses on his behalf.[252] Similarly, in *Jackson v. Indiana*,[253] the Supreme Court of the United States suggested that an incompetent defendant could at least litigate certain issues even if he could not be deemed an appropriate subject for trial. The *Jackson* Court did not read the "Court's previous decisions to preclude the States from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or to make certain pretrial motions through counsel."[254]

Most recently, in *State v. Hayes*,[255] the New Hampshire Supreme Court held that a defendant, who was competent to stand trial only when taking psychotropic drugs, could waive his right not to be tried while incompetent. Such a waiver would require a careful explanation to the defendant of this right, and the consequences of its waiver, while he was synthetically competent.[256] In *Commonwealth v.*

249. 46 Ill. 2d 281, 263 N.E.2d 109 (1970).
250. *Id.* at 287, 263 N.E.2d at 113.
251. 33 Wis. 2d 661, 148 N.W.2d 33 (1967).
252. *Id.* at 669, 148 N.W.2d at 37-38.
253. Jackson v. Indiana, 406 U.S. 715, 741 (1972).
254. *Id.*; *see also* Winick, *supra* note 218, at 968-69.
255. 111 N.H. 458, 389 A.2d 1379 (1978).
256. The court stated:

Louraine,[257] the Massachusetts Supreme Judicial Court endorsed the *Hayes* decision, specifically holding that a defendant *can* waive his right to be tried while competent.[258]

A number of commentators have suggested that, at a minimum, an incompetent defendant ought to be able to insist on a limited adjudication of legal issues that do not require his active participation.[259] These would include jurisdictional and speedy trial issues,[260] questions regarding search and seizure and the admissibility of confessions, and other issues of a strictly legal nature. In addition, there may be other issues, such as erroneous identification, that could be fully litigated without the defendant's assistance.[261] Such a procedure for limited adjudication would often resolve, in the defendant's favor, the question of whether he can be held for trial, and would prevent his indeterminate commitment as incompetent.[262] Both the ABA Standards for Criminal Justice and the Model Penal Code have endorsed such procedures. Model Penal Code section 4.06(3) provides that "[t]he fact that the defendant is unable to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant."[263] Similarly, ABA Standard for Criminal Justice 7-4.12 declares: "The fact that the defendant has been determined to be incompetent to stand trial should not preclude further judicial action, defense motions or discovery proceedings which may fairly be con-

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> If the defendant by his own voluntary choice, made while competent, becomes incompetent to stand trial because he withdraws from the medication, he may be deemed to have waived his right to be tried while competent. . . . The trial court should however carefully examine the defendant on the record, while competent, to establish the following: that the defendant understands that if he is taken off the psychotropic medication he may become legally incompetent to stand trial; that he understands that he has a constitutional right not to be tried while legally incompetent; that the defendant voluntarily gives up this right by requesting that he be taken off the psychotropic medication; and that he understands that the trial will continue whatever his condition may be.

Id. at 462-63, 389 A.2d at 1382.

257. 390 Mass. 28, 453 N.E.2d 437 (1983).

258. *Id.* at 38, 453 N.E.2d at 437.

259. DEL. CODE ANN. tit. 11, § 404(a) (1979); N.C. GEN. STAT. § 15A-1001(b) (1983); S.C. CODE ANN. § 44-23-440 (Law. Co-op. 1985); WASH. REV. CODE ANN. § 10.77.090(1) (1980); WIS. STAT. ANN. §§ 971.13(3), 971.14(1)(c) (1985).

260. S.C. CODE ANN. § 44-23-440 (Law. Co-op. 1985).

261. MODEL PENAL CODE § 4.06(3) (Proposed Official Draft 1962); Foote, *supra* note 13, at 841; *see infra* note 268.

262. Foote, *supra* note 13, at 841-43, 845.

263. *Id.* at 841. Professor Foote suggested, "[i]n a robbery prosecution based on identification evidence, for example, counsel may be able to establish from employment records and the testimony of third parties that the defendant was at work in another city at the time of the crime." *Id.*

ducted without the personal participation of the defendant."[264] A few states have followed the lead of the Model Penal Code and the ABA Standards for Criminal Justice, and have enacted statutes permitting some limited defense challenges to the prosecution case.[265] Of these statutes, South Carolina's is the most sweeping, authorizing incompetent defendants to offer a defense on the merits, except for an insanity defense, in a court trial.[266]

Each of these approaches, although a step in the right direction, is inadequate to protect the rights of an insanity defendant whom the state insists will only be competent if maintained on psychotropic

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264. Of course, after Jackson v. Indiana, the spectre of indefinite commitment of a defendant found incompetent to stand trial ought to have faded. 406 U.S. 715 (1972). In *Jackson*, the Supreme Court held that a severely retarded deaf-mute defendant could not be indefinitely committed as incompetent to stand trial when it was highly unlikely that he could ever beome competent and also unlikely that the state could successfully obtain his civil commitment. Since *Jackson*, however, courts have upheld a number of lengthy commitments of defendants said to be "progressing" toward competency. Brooks, *supra* note 29, at 381. Further, a study in 1979 found that nearly one-half of the states continued to allow the lengthy and indefinite commitment of incompetent defendants without periodic review of their present capacity to stand trial. Winick, *supra* note 218, at 927, 940 (citing Roesch and Golding, *Treatment and Disposition of Defendants Found Incompetent to Stand Trial: A Review and a Proposal*, 2 INT'L. J.L. & PSYCHIATRY 349 (1979)).

265. MODEL PENAL CODE § 4.06(3) (Proposed Official Draft 1962). The Code also provides an alternative post-commitment hearing as a means of raising strictly legal objections to the charges against a defendant, as follows:

> Alternative: (3) At any time within ninety days after commitment as provided in Subsection (2) of this Section, or at any later time with permission of the Court granted for good cause, the defendant or his counsel or the Commissioner of Mental Hygiene [Public Health or Correction] may apply for a special post-commitment hearing. If the application is made by or on behalf of a defendant not represented by counsel, he shall be afforded a reasonable opportunity to obtain counsel, and if he lacks funds to do so, counsel shall be assigned by the Court. The application shall be granted only if counsel for the defendant satisfies the Court by affidavit or otherwise that as an attorney he has reasonable grounds for a good faith belief that his client has, on the facts and the law, a defense to the charge other than mental disease or defect excluding responsibility.
>
> (4) If the motion for a special post-commitment hearing is granted, the hearing shall be by the Court without a jury. No evidence shall be offered at the hearing by either party on the issue of mental disease or defect as a defense to, or in mitigation of, the crime charged. After hearing, the Court may in an appropriate case quash the indictment or other charge, or find it to be defective or insufficient, or determine that it is not proved beyond a reasonable doubt by the evidence, or otherwise terminate the proceedings on the evidence or the law. In any such case, unless all defects in the proceedings are promptly cured, the Court shall terminate the commitment ordered under Subsection (2) of this Section and order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Health].

Id. at § 4.06(3), (4) (alternative provisions).

266. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.12 commentary (1984).

medication throughout the trial. For such a defendant, it is critically important that he be able to insist on being tried even if, due to mental illness, he meets the traditional criteria of incompetence, because his most successful defense is likely to be that he was not criminally responsible at the time of the crime.[267] Thus, as the courts held in *Hayes* and *Louraine*,[268] the insanity defendant must be permitted to waive the due process protections that the prohibition against trying an incompetent defendant encompasses,[269] and appear at trial in an unmedicated state. This approach comports with the twin rationales of *Faretta* and the other waiver of constitutional rights cases: first, that a defendant has the constitutional right to personally manage and conduct his defense because of our profound respect for individual autonomy and freedom of choice, and second, that the various constitutional protections are designed for the defendant's benefit, to make him a more likely winner on the merits. Thus, if a defendant knowingly and intelligently chooses to give up the protections that a particular constitutional guarantee affords[270]—for example, the right not to be tried while incompetent—the state must respect that decision. Permitting the insanity defendant to be tried in an unmedicated state effectuates his constitutional right to personally manage and present

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267. For various tests of lack of criminal responsibility, see *supra* note 106. It is important for the defendant considering whether or not to raise an insanity defense to recognize that the consequences of a successful assertion of that defense may be lifelong confinement. *See* United States v. Jones, 463 U.S. 354, 368-70 (1983). Depending on the crime with which he is charged, the defendant may be confined for a much shorter period if he elects not to raise an insanity defense. *Id.* at 369. For a discussion of *Jones*, see Fentiman, *supra* note 6, at 612-13. A defendant must be competent when he makes the decision to waive or assert an insanity defense. *See* United States v. Frendak, 408 A.2d 364 (D.C. 1979).

268. *See supra* notes 255-58 and accompanying text.

269. *But see* Pate v. Robinson, 383 U.S. 375, 384 (1966). In *Pate*, the Supreme Court declared that an incompetent defendant is unable to knowingly or intelligently waive his right to have the trial court make a determination of his competency. The ABA adopted somewhat uncritically the *Pate* rule, noting that "[t]he pragmatic consequences which result from a rule of absolute nontriability [due to incompetence] are not entirely satisfactory. Nonetheless, the standards adopt that position as constitutionally mandated." ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.12 commentary (1984). In contrast, Bruce Winick has suggested that the Court's statement in *Pate* is merely dicta because the state had conceded that "the conviction of an accused person while he is legally incompetent violates due process," and instead the Court was arguing that the defendant had waived the competency issue by failing to request a hearing. Winick, *supra* note 218, at 968-69. Professor Winick argued:

> [I]t was the denial of the defendant's right to a competency hearing that was the focus of the holding in *Pate*. A procedural due process right to a determination of competency is not the equivalent of a substantive due process right to be immune from trial while incompetent, nor of a rule of law barring a defendant from electing to go to trial even if his competency is impaired.

Id. at 968.

270. For a more detailed discussion of waiver, see *infra* text accompanying notes 275 and 315-16.

his own defense, promotes the state's and the defendant's interest in accuracy of adjudication by providing the jury with the most trustworthy picture of the defendant's mental state at the time of the crime, and maximizes the defendant's right to self-determination and personal autonomy, a hallmark of our legal system.

Further, to permit a mentally ill insanity defendant to be tried without medication comports with the fundamental principles underlying the prohibition against trying an incompetent defendant. As noted earlier,[271] this proscription stemmed from both moral and legal concerns for the defendant. It was believed to be inhumane and unfair to try an individual who was incapable of understanding the charges and proceedings against him. This defendant would be severely handicapped in presenting a successful defense, and, if convicted, would not know why he was being punished. This concern was well-founded because, at the time the incompetency doctrine was developed, there was an absolute prohibition in many cases against counsel representing a defendant.[272] Under these circumstances, it was vitally necessary that the defendant be competent if he was to have any chance of successfully meeting the state's case.[273] But today, with the insanity defendant represented by counsel, it is both feasible and necessary for the defendant to be able to waive his right to be tried while competent, in order to achieve his desired litigation end—an acquittal by reason of insanity.

If such a waiver is to comport with due process, it might be appropriate for the defendant to be medicated before trial,[274] in order to consult with his attorney as to significant facts and witnesses and to otherwise map out trial strategy, and knowingly and intelligently waive his right to be tried while competent.[275] Then, at an appropri-

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271. *See supra* text accompanying notes 13-28.

272. Winick, *supra* note 218, at 952.

273. *Id.* at 953.

274. This is so despite the disadvantages of cognitive dampening, depression, and a diminished survival instinct adverted to previously. *See supra* text accompanying notes 120-25. Medicating the defendant before trial permits him to maximize the benefits of psychotropic medication in terms of his trial strategy, while taking him off medication during trial permits him to receive the maximum benefits of nonmedication as well.

275. To ensure the protection of the incompetent defendant, such a waiver would have to be on the record and follow a detailed colloquy between the defendant and the trial judge regarding all possible consequences of the decision, including the range of punishments to which the defendant could be subjected if convicted. *See* Commonwealth v. Lorraine, 390 Mass. 28, 453 N.E.2d 437 (1983); State v. Hayes, 118 N.H. 458, 389 A.2d 1379 (1978); *supra* notes 249-252 and accompanying text; *cf.* United States v. Frendak, 408 A.2d 364, 380 (D.C. 1979) (stating that "the trial judge must conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the defense, and freely chooses to raise or waive [it]"); United States v.

ate interval prior to trial, the defendant could elect to stop taking psychotropic medication,[276] in order to minimize the long-term risk of tardive dyskinesia and eliminate the other negative side effects of these drugs, such as akinesia and akathisia, and thus present a demeanor to the jury which accurately reflects his mental state at the time of the offense.[277] Such a defendant would be acting in accordance with the essential purposes of the incompetency prohibition. He would be able to function as a defendant in terms of active and comprehending pretrial preparation, and he would be able to understand why he was charged and why he might be punished. He would be able to recall pertinent facts, identify potential witnesses, and discuss with his attorney alternative trial strategies. As a result, the defendant would be able to persuasively mount the best defense available to him—that he was insane at the time of the offense. Such a waiver comports with the fundamental purpose of the incompetency prohibition—"promoting the accuracy of the factual guilt or innocence determination."[278] At the same time, this waiver enables the defendant to assert his constitutional rights to present a defense, to be free from the invasion of his privacy occasioned by forcible medication with psychotropic drugs, and to be free from compulsory self-incrimination.

III. No Compelling State Interest Justifies the Compulsory Medication of the Insanity Defendant as a Condition of His Standing Trial

As has been demonstrated at length above, medication of an insanity defendant in order to render him competent to stand trial violates his due process right to present a defense, his fifth amendment privilege against self-incrimination, and his constitutional and common law rights to privacy and bodily integrity. Although the justification advanced for compulsory medication of the insanity defendant is the need for him to be competent to stand trial, this justification is both unfounded and insufficient to outweigh the defendant's multiple constitutional interests in being tried without drugs. This justification is unfounded because it naively equates the medical determination of mental illness with the legal judgment of incompetence, without

Garcia, 517 F.2d 272, 278 (5th Cir. 1975) (stating that "the district court should address each defendant personally and forthrightly advise of potential danger").

276. The effects of psychotropic medication may be long-term; in some cases lasting as long as several months. R. BALDESSARINI, *supra* note 103, at 23.

277. *See supra* text accompanying notes 93-126.

278. ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

examining why we believe it unjust to subject incompetent defendants to trial. It is also insufficient because a number of societal interests can only be advanced by permitting the defendant to be tried in an unmedicated state.

Consideration of the competing interests of the state and the insanity defendant regarding forcible medication must begin with an examination of the nature of the constitutional guarantees that state-compelled medication violates. Each of these—the right to present a defense, the privilege against self-incrimination, and the right to privacy and bodily integrity—are fundamental constitutional rights, whose infringement must be zealously guarded against, and thus, may be overridden only by a compelling state interest.

The right to present a defense—to meet the state's case with the best evidence available—is fundamental.[279] Once the state has made the insanity defense available to the defendant, placing his mental state at issue, it is vitally important that the defendant be able to provide evidence of insanity, by offering his demeanor in an unmedicated state. This is critical to demonstrate convincingly his delusions, hallucinations, and lack of rationality and self-control. As the Supreme Court stated in *Ake v. Oklahoma*, "a criminal trial is fundamentally unfair if the [s]tate proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[280] Because the impact of the defendant's demeanor pervades the entire trial and provides the context for the jury's receipt of other evidence concerning his insanity defense,[281] it is critical that the jury be able to see the insanity defendant while he is not medicated.

Courts have seldom addressed the question of whether reversal is automatically required when the state denies the defendant the right to present a defense.[282] Nevertheless, it seems reasonable that, at the very least, a standard of harmless error[283] ought to be applied.[284]

279. Washington v. Texas, 388 U.S. 14, 17-19 (1967).

280. Ake v. Oklahoma, 105 S. Ct. 1087, 1094 (1985).

281. *See supra* text accompanying notes 83-120.

282. For examples of cases in which the Supreme Court required reversal of the defendant's conviction without any explanation of the standard used in determining the necessity for reversal, see Chambers v. Mississippi, 410 U.S. 284, 298 (1973); Washington v. Texas, 388 U.S. 14, 17-19 (1967).

283. In Chapman v. California, the Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1966).

284. In United State *ex rel.* Enoch v. Lane, the court applied the "harmless beyond a reasonable doubt" standard of *Chapman* to determine the appropriate disposition of a case in which the defendant was denied his right to present critical exculpatory evidence. 581 F. Supp. 423, 432 (N.D. Ill. 1984). The recent Supreme Court decision in Delaware v. Van Arsdall

Involuntarily medicating an insanity defendant with psychotropic drugs prevents him from offering critical evidence of his insanity at the time of the offense,[285] and thus, cannot be said to be harmless beyond a reasonable doubt.

Similarly, the multiple violations of the fifth amendment occasioned by compelled medication of the insanity defendant are so serious that the state could advance no interest that would outweigh them. There are at least two separate fifth amendment violations that inhere in a state decision to compel the insanity defendant to be medicated in order to stand trial. First, such medication and the altered demeanor that accompanies it compel the defendant to be the instrument of his own conviction, thus violating the privilege against self-incrimination.[286] Second, by effectively mandating the presentation of this altered demeanor, the state considerably lightens its own burden at trial, violating the fundamental precept of our adversarial system of justice that the state must shoulder the entire burden of proving its case against the individual.[287] As one court stated:

> The nature of our legal system has, at its heart, the adversary process whereby the state and the defendant, by contending vigorously but fairly against each other, are able to present the total factual and legal issues from which a trier of fact may arrive at a decision. When the state is allowed, during the time of trial, to administer drugs to a defendant, contrary to his will, it is able to affect the judgment and capacity of its own adversary.[288]

Further, such forcible medication undercuts the presumption of the defendant's innocence, making it easier for the state to prove its case.

Although not all fifth amendment violations require automatic reversal of the defendant's conviction, a coerced confession does,[289] presumably because of the magnified harm occasioned by the compelled extraction of a confession from a criminal suspect and the unre-

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emphasized that violation of a sixth amendment right sometimes requires automatic reversal and other times must be judged by the "harmless beyond a reasonable doubt" standard. 105 S. Ct. 1431, 1438 (1986) (holding that a violation of the sixth amendment's confrontation clause must be judged by the "harmless beyond a reasonable doubt" standard). In United States v. Powell, however, the court held that where the government's policy on obtaining visas to visit the Republic of China prevented defense counsel from travelling there to interview key defense witnesses, the charges against the defendants would have to be dismissed. 156 F. Supp. 526, 531 (N.D. Cal. 1957).

285. *See supra* text accompanying notes 83-135.

286. *See supra* text accompanying notes 142-50.

287. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); *see also supra* text accompanying notes 141-152.

288. State v. Maryott, 6 Wash. App. 96, 98, 492 P.2d 239, 241 (1971).

289. Payne v. Arkansas, 356 U.S. 560, 568 (1958).

liability of such an admission of guilt.[290] A strong argument can be made that the compulsory medication of the insanity defendant suffers from the same two vices because it involves the application of state power to a person unwilling to assist the state in securing his conviction and yields evidence that is extremely incriminating, but unreliable. Even if a court judged this fifth amendment violation by the lesser, harmless beyond a reasonable doubt, standard applied to prosecutorial or judicial comment upon a defendant's failure to testify,[291] the fifth amendment violations involved here could never be deemed harmless because of the significant impact the defendant's chemically altered demeanor has on the jury's ability to fairly consider his defense of insanity.

Finally, the state must also show a compelling interest before violating the defendant's fundamental right to privacy and the right to autonomy in making decisions relating to one's bodily integrity,[292] particularly when these rights are accompanied, as here, by a first amendment interest in freedom of expression.[293] Forcible administration of psychotropic medication unquestionably contravenes the individual's right to privacy and autonomy in decision-making, his freedom of expression at trial, and his common law right to be free from battery and his right to insist on informed consent to nonemergency medical treatment.[294] Consequently, we must examine those interests that the state might assert to outweigh these rights.

To counterbalance these fundamental defense interests, the state can offer only two justifications. The first is the prohibition against the trial of incompetent defendants and the second is the state's interest in assuring that persons accused of committing a crime have the question of their guilt or innocence adjudicated, and, if found guilty, in punishing them appropriately. Forced psychotropic medication, which results in violations of the insanity defendant's basic constitutional liberties, is not necessitated by a concern for his incompetency, nor does it advance the state's interest in bringing a suspected criminal to trial.

The prohibition against the trial of an incompetent defendant was designed to achieve several socially desirable ends. First, it was aimed at protecting the incompetent accused from the unfairness of being tried in a condition in which he could not recall important facts,

290. *Id.*; *In re* Gault, 387 U.S. 1, 47 (1966).

291. Chapman v. California, 386 U.S. 18, 24 (1966).

292. Roe v. Wade, 410 U.S. 113, 154-55 (1973).

293. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963); *In re* Boyd, 403 A.2d 744, 748 (D.C. 1974).

294. *See supra* text accompanying notes 165-218.

identify helpful witnesses, or otherwise work to mount the strongest defense possible. The broad public interest in an accurate adjudication of the defendant's guilt required that he be given a meaningful opportunity to plan and prepare a defense. Second, in accordance with a basic concern for human dignity, the incompetency prohibition was designed to ensure that the criminal trial was a rational exchange between the accused and his community, rather than an empty ritual in which the accused was a noncomprehending vegetable. Third, it was important that if he was convicted, the accused understand why he was being punished, so that the essential purposes of punishment—retribution, deterrence, and rehabilitation—could be accomplished.[295]

In practice, the forcible medication of the insanity defendant in order to render him "competent" does not achieve the goals of the incompetency prohibition. First and foremost, it does not achieve an accurate resolution of the issue of the defendant's criminal responsibility. Psychotropic medication actually makes it much more likely than if the defendant was unmedicated, that the trier of fact will reach an inaccurate, incorrect conclusion as to the defendant's guilt or innocence,[296] due to the misleading demeanor and lessened instinct for self-preservation created by the drugs. Second, although the medicated insanity defendant may appear to be calm, rational, and "normal," he may in fact be just as much a vegetable as a wildly raving lunatic. The quiet zombie sitting in the courtroom may, because of the debilitating and distracting side effects of psychotropic drugs, be unable to comprehend and participate in the proceedings against him, except in a superficial way. Third, although the forcibly medicated insanity defendant may, if convicted, understand why he is being punished, the method of gaining that understanding is indeed cruel. If he had been permitted to be tried in an unmedicated state, the defendant probably would have been found not guilty by reason of insanity. The consequence of such an insanity acquittal would most likely be a short-term commitment for evaluation of his present mental state followed, if deemed appropriate, by commitment to a state mental hospital for psychiatric treatment.[297] In contrast, the forcibly medicated insanity defendant is likely to be found guilty and sent to prison, where he will receive little, if any, psychiatric treatment.[298]

Forcibly medicating an insanity defendant does not further the

295. *See supra* text accompanying notes 11-27; ABA STANDARDS FOR CRIMINAL JUSTICE 7-4.1 commentary (1984).

296. *See supra* text accompanying notes 93-119. A fourth goal of punishment, incapacitation, is accomplished whether or not the defendant knows why he is being punished.

297. *Id.*

298. Fentiman, *supra* note 6, at 614.

legitimate state interest in adjudicating the guilt or innocence of a person accused of a criminal violation. Indeed, it is axiomatic that once the defendant is brought to trial, both he and the state must have access to all relevant evidence.[299] As the Supreme Court has declared: "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."[300] The state simply has no interest in an inaccurate determination of the defendant's guilt or innocence, and therefore, may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.[301] This, however, is precisely what the compulsory medication of a defendant with a meritorious defense of insanity does, by inducing his misleading trial demeanor and a decreased will to win at trial.

In contrast, the author's proposal that an insanity defendant be permitted to waive his right to be tried while competent in order to be free from medication during trial has much to recommend it. By voluntarily receiving medication prior to trial, the defendant can in fact meet the majority of criteria that psychiatrists working in the area of competency suggest are essential to a defendant's ability to function as a defendant.[302] He can be educated as to the nature of court proceedings and the role of the key players in those proceed-

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299. United States v. Nixon, 418 U.S. 683, 709 (1974); Brady v. Maryland, 373 U.S. 83, 87 (1963).

300. United States v. Nixon, 418 U.S. at 709.

301. Ake v. Oklahoma, 105 S. Ct. 1087, 1095 (1985); *see also* United States v. Nixon, 418 U.S. at 709.

302. For two of the most widely recognized competency checklists, see Robey, *Criteria For Competence to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616 (1965); LABORATORY OF COMMUNITY PSYCHIATRY, *supra* note 33. The Commentary to the ABA Standards for Criminal Justice also suggests five major aspects of the competency determination:

> 1) The defendant should have a perception of the [trial] process which is not distorted by mental illness or disability. . . .
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> 2) The defendant should have the capacity to maintain the attorney-client relationship. . . . [including] the ability to discuss the facts of the case with the attorney "without paranoid distrust", to advise and accept advice from the attorney, to decide upon his plea and to approve the legal strategy of the trial. . . .
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> 3) [The defendant must be] able to recall and to relate factual information . . . to reveal to his attorney exonerating circumstances . . . [and] . . . to listen to witnesses and to "inform his lawyer of distortions or misstatements."
>
> 4) [T]he defendant should have the necessary ability to testify in his own defense, in the event that should be appropriate.
>
> 5) A final factor to be considered is the relationship of the defendant's abilities to meet the criteria in the light of the particular charge, the extent of participation required of the defendant and the complexity of the case.

ABA STANDARDS FOR CRIMINAL JUSTICE 4.1 commentary (1984).

ings—the defense attorney, prosecutor, judge, jurors, witnesses, and the defendant himself, the specific charges against him, and the potential penalties if he is convicted, including the reasons why he would be punished, as well as the alternative dispositions available if he were to be acquitted on the grounds of insanity.[303] A temporarily medicated defendant can advise his attorney of potential exculpatory information concerning his conduct and mental state at the time of the offense, his past psychiatric history, and possible defense witnesses. He can also consult with his attorney regarding alternative trial strategies, including insanity and other defenses he might want to raise, the option of testifying in his own behalf, and the possibility of waiving constitutional rights designed for his protection.[304]

There are a few areas, however, in which such a defendant might not be deemed competent if he later elected to be tried without psychotropic medication. For instance, the defendant might encounter problems at trial if he attempted to challenge the testimony of prosecution witnesses. He might have difficulty knowing if they were lying or otherwise distorting the facts. Similarly, the defendant would be limited in his ability to testify in his own behalf. In this latter case, however, it might actually be advantageous to his defense of insanity for him to be less than completely lucid, as long as the jury perceived him as a truthful witness. Finally, there is always the possibility that the unmedicated defendant will begin to decompensate at trial. It has been suggested that this is a relatively minor risk,[305] however, and one which the judge can closely monitor during the course of the trial, when the stresses of the trial experience can be more accurately evaluated.[306]

To permit an arguably incompetent insanity defendant to waive his right to be tried only when competent is consistent with a number of similar instances in which the state has *insisted* on the trial of such a defendant, even though his competency to stand trial, in the sense of having access to relevant evidence and being able to consult with his attorney regarding the most appropriate trial strategy, was severely impaired. Thus, the courts have often compelled a defendant to stand trial even though he may be suffering from permanent amnesia con-

303. *See supra* note 302.

304. *See* Robey, *supra* note 302, at 621.

305. *See* Ennis & Hansen, *Memorandum of Law: Competency to Stand Trial*, in COMPETENCY TO STAND TRIAL 491, 498.

306. *Id.*; *see* Winick, *supra* note 218, at 953-54; *cf.* Drope v. Missouri, 420 U.S. 162, 179-81 (1975).

cerning the events of the offense in question,[307] or may have been so drunk at the time of the alleged crime that he cannot recall anything helpful to his defense,[308] or may be unable to locate a key witness.[309] Similarly, even the constitutional right to a speedy trial,[310] which is aimed in part at " 'limit[ing] the possibilities that long delay will impair the ability of the accused to defend himself' "[311] due to a lack of evidence, is not an absolute guarantee, but one that must be balanced against the state's strong interest in having the defendant's guilt or innocence adjudicated at some time.[312]

Thus, it is unreasonable to insist on the apparent absence of mental illness as the sine qua non of competency to stand trial or to require every criminal defendant to have a high degree of performance capacity.[313] Simply put, competency is not a black or white phenomenon. There are degrees of competency falling along a continuum, and competency is almost always in flux.[314] Thus, even when the defendant is suffering from mental illness, he ought to be able to elect to be tried without psychotropic medication, after the trial judge conducts a detailed and searching inquiry into the defendant's awareness of what he is doing and his understanding of the consequences of his actions.

Nothing less than a knowing and intelligent waiver can be

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307. *See, e.g.*, State v. McClendon, 103 Ariz. 105, 106-09, 437 P.2d 421, 422-25 (1968); Parsons v. State, 275 A.2d 777, 786-89 (Del. 1971).

308. Note, *supra* note 14, at 457.

309. Burt & Morris, *supra* note 39, at 81-82.

310. The sixth amendment to the Constitution provides, in pertinent part: "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ." U.S. CONST. amend. VI.

311. Smith v. Hooey, 393 U.S. 374, 378 (1969) (quoting United States v. Ewell, 383 U.S. 116, 120 (1968)).

312. Barker v. Wingo, 407 U.S. 514, 519 (1972).

313. Note, *supra* note 14, at 459.

314. Winick, *supra* note 218, at 966. As Professor Winick explains:

> The differences between "crazy" and "normal" people are not as great as commonly is supposed. Mentally ill people have a significant capacity for normal and rational thought and behavior, and "normal" people frequently lose contact with reality and lack the ability to think straight, to pay attention, to process information, and to perform at least some key social tasks. Even in the midst of a psychotic episode, mentally ill people function normally some of the time. . . . "Normal" defendants in our criminal courts frequently suffer from linguistic, educational, and social problems that severely impair their ability to function competently, particularly during the stress of a criminal trial or after a period of oppressive pretrial incarceration.
>
> In short, incompetent defendants are not very different from "normal" defendants. All defendants tend to have difficulty understanding the nature of the proceedings and assisting their counsel, and many defendants feel totally lost in the "Alice in Wonderland" world of the criminal process.

Id. *See also* State v. Hayes, 118 N.H. 458, 389 A.2d 1379 (1978).

accepted. It is important for the trial judge to establish, on the record, that the defendant fully understands the import of his decision, including its irrevocability.[315] Thus, it would not do, as one commentator has suggested, to permit counsel to waive the defendant's right not be tried while incompetent.[316] Such a procedure ignores the reality of crowded criminal court calendars, overworked and underpaid defense lawyers, and the pressures inherent in the attorney-client relationship on the defendant to accede to his counsel's suggestions. More importantly, it would violate the defendant's right to autonomy in decision-making. In order to fully protect this right, scrupulous judicial scrutiny of the waiver decision is required, including a more detailed inquiry than might normally be necessary for the waiver of a constitutional right.[317] Should the defendant become obviously and seriously disturbed at trial, or engage in violent and disruptive behavior, the court could then take steps to remedy the situation. One such step could be to hold a midtrial competency evaluation, or perhaps require the defendant to be excused from the courtroom,[318] or even declare a mistrial with the understanding that the state could try the defendant again.[319] Given the tiny fraction of criminal cases in which the insanity defense is raised,[320] this procedure would protect the defendant's constitutional rights and insure a more accurate adjudication of his guilt or innocence, without seriously interfering with the orderly administration of justice.

Permitting the insanity defendant to knowingly and intelligently waive his right not to be tried while incompetent vindicates both his fundamental constitutional rights and the legitimate interests of the state in bringing an alleged criminal to account. Most significantly, by choosing to forego psychotropic medication during trial, such a defendant is assured a more accurate determination of his criminal responsibility. Further, by taking these drugs *prior* to trial, a defendant will be able to consult effectively with counsel regarding the fac-

315. Winick, *supra* note 218, at 970-71.

316. *Id.* at 951, 976-79.

317. *See* Von Moltke v. Gillies, 332 U.S. 708 (1948); *supra* text accompanying notes 239-242.

318. *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970).

319. Winick, *supra* note 218, at 953 (citing Hamm v. Jabe, 706 F.2d 765, 767 (6th Cir. 1983)). In *Hamm*, the court held that there was a "manifest necessity" for a mistrial where a defendant, who had been found "barely competent" to stand trial, suddenly, on the fourth day of the proceedings, hurled a chair at the prosecutor. The court therefore found that the defendant's retrial did not violate the constitional prohibition against double jeopardy, despite the fact that the defendant had objected to the mistrial, and had urged that he merely be excused from the courtroom for the remainder of the trial. *Id.*

320. *See supra* note 6.

tual and legal merits of his defense, and to plan effectively the trial strategy most likely to be successful. Although he may not fully comprehend all aspects of his defense at the trial stage, he will at least have been in a position prior to trial to understand the nature of the proceedings against him. Medicating the insanity defendant prior to trial also meets the historic concern of the incompetency prohibition, that the defendant know why he is being charged and why he may be punished, because his attorney may explain the likely alternative dispositions of his case while he is in a position to comprehend and evaluate them. Finally, this preserves respect for the dignity of the individual, a primary goal of both the incompetency prohibition and the constitutional rights of the defendant which would otherwise be violated. It gives the defendant an opportunity to decide that it is in his own best interest not to be medicated during the trial itself, while also receiving the benefits of psychotropic drugs.

IV. CONCLUSION

The compulsory medication of a criminal defendant asserting an insanity defense violates three major constitutional rights— his right to privacy, his privilege against self-incrimination, and his right to present and manage a defense to the charges against him. Similarly, mandatory drug treatment violates his common law rights to be free from battery and to give informed consent to all nonemergency medical treatment. Although these rights, and the values they seek to protect, might seem to be separate and discrete, they are, in truth, closely related. Each of these constitutional rights reflects a judgment that in our society great deference and respect must be given the individual. Underlying each is a judgment in favor of personal autonomy—the right to be let alone and the right to make one's own life decisions. As they are applied in the criminal litigation context, each of these rights reflects the importance of the state shouldering the entire burden in its contest with the individual, of not allowing the state to use that individual as the source of its case against him, of permitting the defendant access to both the tools and the information he needs to fight the state's case, and of letting him be the architect of his own defense.

When the state insists on the medication of the insanity defendant as a condition of his being "competent" to stand trial, each of these goals is compromised. Such compulsory medication lightens the state's evidentiary burden at trial, making it easier for the state to rebut the defendant's contention that he was insane at the time of the offense—by using the cruel device of using the defendant's own mind

and body as the vehicle for this rebuttal. This medication denies the defendant the evidence he needs to demonstrate convincingly his insanity, and deprives him of his right to be the master of his own fate, violating the basic constitutional precept of deference to personal autonomy. Neither the state's paternalistic desire to protect a mentally ill individual from the rigors of a trial that he may not fully comprehend, nor the state's police power goal of insuring that all those accused of a crime are properly held accountable for their actions can justify the infringement of these fundamental liberties. Accordingly, an insanity defendant must be able to waive his right not to be tried while incompetent, and elect to proceed to trial without psychotropic medication.