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United States v. Sell: Involuntary Administration of Antipsychotic Medication - Are You Dangerous or Not

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UNITED STATES v. SELL: INVOLUNTARY ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION. ARE YOU DANGEROUS OR NOT?

I. INTRODUCTION

Antipsychotic drugs "alter the chemical balance in a patient's brain and can cause irreversible and fatal side effects."[1] Furthermore, they "act at all levels of the central nervous system as well as on multiple organ systems. [They] can induce catatonic-like states, alter electroencephalographic tracings, and cause swelling of the brain. Adverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms."[2] As well as these symptoms, they can also cause "tardive dyskinesia, an often irreversible syndrome of uncontrollable movements that can prevent a person from exercising basic functions such as driving an automobile, and neuroleptic malignant syndrome, which is 30% fatal for those who suffer from it. The risk of side effects increases over time."[3] In light of these daunting risks, it is no

[1]Washington v. Harper, 494 U.S. 210, 239 (1990) (Stevens, J., concurring in part and dissenting in part).

[2]*Id.* at 239-40.

[3]*Id.*

surprise that the person faced with the risk of forced administration of these drugs stated that he would rather die than take them.[4]

The Supreme Court of the United States recently decided whether the state act of forcibly administering these antipsychotic drugs to criminal defendants solely for trial competency purposes is constitutional.[5] The Court previously held that the government could do so under certain circumstances, the most essential of which being that the person in custody pose a danger to himself or others.[6] This present case, however, marked the first time the Court ruled on whether the government could administer the drugs solely to render the defendant competent to stand trial.[7]

In the decision, the Court crafted a 4-prong test which the government would have to pass in order to forcibly administer the drugs.[8] However, practically speaking, absent a showing of dangerousness, the delineated test will be difficult, if not impossible, to meet. Unfortunately, since this question of dangerousness is the dispositive issue and the Court has continually failed to outline a clear standard of scrutiny to be applied, the individuals fundamental right to be free from unwanted antipsychotic medication remains in jeopardy, subject to less fundamental and compelling state interests.

Part II of this note reviews the substance of the *Sell* decision, including the test it delineates. It also reviews the paramount cases upon which *Sell* was decided. Part III focuses on the different standards of scrutiny applied in each of those cases at the Supreme Court level, as well as the lower court's invoked standards of scrutiny. Part IV analyzes where the Court has left this doctrine in light of the *Sell* decision and why its effectiveness as a safeguard for an individual's significant liberty interest in remaining free from unwanted antipsychotic medication is in serious jeopardy.

II. HISTORY OF CASES INVOLVING FORCED ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION ON INDIVIDUALS

A. Sell v. United States

The *Sell* decision dealt with a former dentist charged with submitting fictitious insurance claims for payment, which resulted in a grand jury indictment charging him with fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering. A few months later, the grand jury issued another indictment charging Sell with attempted murder of an FBI agent and a former employee at his dental practice. However, for purposes of his case in front of the Supreme Court, the charges of attempted murder were not an issue since they were not part of the original case. This was significant in that it could have potentially weakened the

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[4] *Id.* at 239.

[5] Sell v. United States, 539 U.S. 166 (2003).

[6] *Harper*, 494 U.S. at 226.

[7] In a related case to *Sell*, the Court was presented with a question of whether it was constitutional to forcibly administer antipsychotic drugs to a defendant to render him competent to stand trial. However, the Court overturned the lower court's conviction due to a lack of findings showing the defendant fell within the contours of the *Harper* test, not on the grounds of the practice being unconstitutional. Riggins v. Nevada, 504 U.S. 127 (1992).

[8] *Sell*, 539 U.S. at 180-81.

government interest in prosecuting him, since fraud charges are traditionally viewed as less serious than attempted murder charges and a finding of dangerousness is less likely.

The first prong of the *Sell* test requires a court to "find that *important* governmental interests are at stake."[9] Generally speaking, this is always satisfied when the government is seeking to administer drugs to a criminal defendant. By prosecuting him, the government is serving its role of protecting society's basic need for human security.[10]

While this interest in adjudication of the charges is always present, it can be mitigated by other factors. For instance, an incompetent defendant who refuses to take medication voluntarily will be confined for a significant period of time.[11] While this effect will not provide the per se equivalent benefit on society that adjudication of criminal charges would, it nonetheless confers some benefit to society by keeping potentially-criminal individuals off the streets. Also, the government interest can be dissipated by the length of confinement a defendant will have already experienced as a result of refusing the drugs.[12] Lastly, the government's interest in adjudication is not an absolute one, as the government itself has a "concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one."[13] Therefore, while the government always has a certified interest in adjudication of the charges against the defendant, that interest can be reduced by other factors.

The second prong of the *Sell* test requires "the court [to] conclude that involuntary medication will *significantly further* those concomitant state interests."[14] To satisfy this prong, the government must prove two things. First, it must show that medication is "substantially likely to render the defendant competent to stand trial."[15] Second, it must show that the medication is "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair."[16] Justice Kennedy pointed out the possible detrimental effects of the drugs on a defendant's ability to receive a fair trial by altering his demeanor in the courtroom, thus prejudicing the presentation of his defense or leaving him unable or unwilling to assist his counsel in presenting a defense.[17] Therefore, any administration of antipsychotic medication must avoid either of these side effects to pass this prong.

The third prong of the *Sell* test requires the "court to conclude that involuntary medication is *necessary* to further those interests."[18] This requires the court to

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[9] *Id.* at 180 [emphasis in original].

[10] *Id.* (citing Riggins v. Nevada, 504 U.S. 127, 135-36 (1992)).

[11] *Sell*, 539 U.S. at 179; *see also* 18 U.S.C. § 4241(d).

[12] *Sell*, 539 U.S. at 179.

[13] *Id.*

[14] *Id.* at 181 [emphasis in original].

[15] *Id.*

[16] *Id.*; *see also Riggins*, 504 U.S. at 142-45.

[17] *Riggins*, 504 U.S. at 142.

[18] *Sell*, 539 U.S. at 181 [emphasis in original].

consider alternatives, both substantive and procedural, to forcible administration of the drugs. For substantive alternatives, while there is no consensus among the scientific community as to the effectiveness of alternatives to medication, the court must still consider them.[19] Also, the court must consider procedural alternatives to forcible medication, such as court orders backed with the threat of a contempt finding.[20] After consideration of these alternatives, the court must find that forcible medication is the only means by which the government can achieve its interests.

The fourth prong of the *Sell* test requires that "the court must conclude that administration of the drugs is *medically appropriate*."[21] To satisfy this prong, the government must show that administration of the drugs is medically appropriate for each individual defendant and, moreover, his specific symptoms.[22] This prong seeks to ensure that whatever side effects the defendant may suffer (and considering the available medications, dangerous side effects are very possible), they will be outweighed by the benefits available to the defendant.

The *Sell* decision came more than a decade after the Court gave permission to the government to forcibly administer drugs to inmates who were found to be dangerous to themselves or others.[23] However, *Sell* is distinguishable from these earlier cases because of the government interest involved: making the defendant competent to stand trial.[24] This asserted government interest can be differentiated from the earlier cases authorizing forced medication because it lacks a characteristic which was a focal point of those earlier decisions: a finding that the defendant was dangerous.

B. Washington v. Harper

In *Harper*, the Court was confronted with the question of whether the government could forcibly administer antipsychotic drugs to a prison inmate and under what circumstances it would be constitutional to do so.[25] In resolving the issue, the Court held that an inmate's right to be free from forced medication had to be viewed in light of "the State's interest in prison safety and security."[26]

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[19]*Id*. (comparing "Brief for American Psychological Association as Amicus Curiae 10-14 (finding nondrug therapies may be effective in restoring psychotic defendants to competence); *but cf*. Brief for American Psychiatric Association et al. as *Amici Curiae* 13-22 (alternative treatments for psychosis commonly not as effective as medication)").

[20]*Id*.

[21]*Id*. [emphasis added].

[22]*Id*.

[23]*Harper*, 494 U.S. 210.

[24]Issue of *Sell* presented as "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant in order to render that defendant competent to stand trial for serious, but nonviolent crimes." *Sell*, 539 U.S. at 170. Issue of Harper presented as "whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drug against his will." *Harper*, 494 U.S. at 213.

[25]*Harper*, 494 U.S. at 213.

[26]*Id*. at 223.

Harper dealt with a prison inmate who was originally convicted of robbery in 1976. Until 1980, he spent most of his time in the mental health unit of the Washington State Penitentiary, where he voluntarily took the prescribed antipsychotic medication, but eventually refused to continue taking it.[27] His treating physician then sought to forcibly administer the drugs pursuant to state policy.[28] The policy required that a psychiatrist determine whether an inmate should be medicated with antipsychotic drugs. If the inmate refused to consent, he could only be "subjected to involuntary treatment with the drugs if he (1) suffers from a 'mental disorder' and (2) is 'gravely disabled' or poses a 'likelihood of serious harm' to himself, others, or their property."[29]

Under the state policy, "gravely disabled" was summarily defined as a condition in which a person was in danger of harming himself due to an inability to care for his health and safety, or manifested serious deterioration in either cognitive or volitional functioning and was a threat to lose control of the ability to care for himself as a result. More importantly, likelihood of serious harm was defined as a

> substantial risk that harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, a substantial risk that physical harm will be inflicted by an individual upon others, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or a substantial risk that physical harm will be inflicted by an individual upon property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others.[30]

Under this standard, the lower courts found that Harper posed a threat to himself or to others,[31] and the Court agreed with their findings.

The Court recognized that the inmate had a "right to be free from the arbitrary administration of antipsychotic medication."[32] Further, the Court recognized that the inmate possessed this right under both state law and the Due Process Clause of the Fourteenth Amendment.[33] However, in regard to the inmate's right under state law, this interest against unwanted medication was not absolute, and could be violated in

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[27]*Id*. at 214.

[28]*Id*. The physician sought the medication under state policy SOC [Special Offender Center]. SOC Policy 600.30.

[29]*Harper*, 494 U.S. at 215.

[30]*Id*. at 216 (*quoting* WASH. REV. CODE §71.05.020(3)).

[31]*Harper*, 494 U.S. at 217-18. The district court held that the procedures contained in the state policy met the requirements previously prescribed by the Court in Vitek v. Jones, 445 U.S. 480 (1980), and therefore could be implemented despite the petitioner's recognized liberty interest.

[32]*Harper*, 494 U.S. at 221.

[33]*Id*. at 221-22.

furtherance of a state interest.[34] In the context of his right to avoid unwanted medication under the Due Process Clause, the right was again found non-absolute, and it could be violated if a state met the rigors of due process, which the Washington Policy was found to do.[35]

In formulating its decision, the Court relied heavily on the state interest involved: the interest in prison safety and security.[36] It found that this specific interest carried with it vast significance.[37] With the magnitude of the state interest involved in mind, the Court found that, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[38] The Court found that by only treating dangerous inmates and only under circumstances in which it was in their medical interests did the Washington State Policy meet these requirements.[39] Retrospectively, it is reasonable to conclude that the two most important facets of this decision were the setting a prison environment and the fact that the inmate was adjudged 'dangerous'. In the line of cases that follows, these characteristics serve to distinguish *Harper*.

C. Riggins v. Nevada

The Court again faced the issue of forcible administration of antipsychotic drugs two years after *Harper* was decided.[40] The posture of this case is more closely analogous to that of *Sell* because the government sought to medicate forcibly the

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[34]"By permitting a psychiatrist to treat an inmate with antipsychotic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the policy creates a justifiable expectation on the part of the inmate that the drugs will not be administered [arbitrarily]." *Id*. at 221.

[35]The policy under review requires the state to establish, by a medical finding, that a mental disorder exists which is likely to cause harm if not treated.

> Moreover, the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement. These standards, which recognize both the prisoner's medical interests and the State's interests, meet the demands of the Due Process Clause.

Id. at 222-23.

[36]*Id*. at 223 (citing Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).

[37]"There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here. There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" *Harper*, 494 U.S. at 225 (quoting Hudson v. Palmer, 468 U.S. 517 (1984)).

[38]*Harper*, 494 U.S. at 227.

[39]*Id*.

[40]Riggins v. Nevada, 504 U.S. 127 (1992).

defendant for purposes of rendering him competent to stand trial.[41] However, contrary to *Sell*, the Nevada Supreme Court authorized forced medication before the defendant's appeal was heard, and he was convicted as a result of his medicated competence. In resolving the issue, the Court held that the conviction was tainted, but not because any of the defendant's liberty interests were violated, but because the Nevada State Courts failed to make findings sufficient to support that conclusion.[42]

David Riggins was arrested and charged with murder in late 1987. Soon after being arrested, it was apparent to treating physicians that he was suffering from mental health problems. He was treated with antipsychotic medications for the next few months at gradually increasing dosages.[43] Finally, in early 1988, Riggins successfully moved for a competence hearing. Riggins was interviewed by three court-appointed psychiatrists, two of whom found him competent to stand trial, and the District Court ruled him so competent.

The defendant further moved the District Court to suspend administration of the drugs, claiming they interfered with his ability to present an insanity defense and they would further interfere with his ability to assist counsel under the Sixth and Fourteenth Amendments.[44] The District Court heard testimony from three different psychiatrists in deciding Riggins' motion. Of the three, two predicted that Riggins would likely be competent to stand trial without medication. The third testified that he could not predict what the effects of taking the defendant off medication would produce, but added that the medication actually put him in a more relaxed state (however, the excessive dosage he was currently on may not have been necessary).[45] A fourth psychiatrist submitted an affidavit stating his belief that Riggins was incompetent to stand trial even with the current medication and that taking him off of it would likely lead him back to his "manifest psychosis and [make him] extremely difficult to manage."[46]

Subsequently, the District Court ruled against Riggins' motion to terminate his medication in a one-page order that "gave no indication of the court's rationale."[47] Afterwards, Riggins continued on this high dosage[48] of medication through trial, where he was convicted of murder after presenting his insanity defense. Riggins appealed his conviction and sentencing to the Nevada Supreme Court, but was denied relief. The Court held that expert testimony to the jury adequately informed it

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[41] *Id.* at 133 (stating issue as "whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments").

[42] *Id.* at 129.

[43] *Id.*

[44] *Id.* at 130.

[45] *Id.* at 130-31.

[46] *Id.* at 131.

[47] *Id.*

[48] "Dr. O'Gorman suggested that the dosage administered to Riggins was within the toxic range and could make him 'uptight.' Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion." *Id.* at 137 (citations omitted).

of the potential prejudicial effects of Mellaril, curing any possibility of error in the judgment.[49]

In overturning the conviction, the Nevada Supreme Court primarily relied on the lack of adequate findings by the District Court regarding the necessity of forced administration. "Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, we have no basis for saying that the substantial probability of trial prejudice in this case was justified."[50] Although it framed the issue as whether the forced administration of medication violated Riggins' right to a fair trial, the Court ostensibly avoided the question. Instead, the Court held that the State had simply not met its burden of proof to show that the medication was necessary, in light of the violation of Riggins liberty interest to be free from unwanted medication.

In reaching its decision, the Court found that the State "certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." [51] While the Court found that Riggins' liberty interest in being free of unwanted medication could have been permissibly violated under due process with a showing by the State similar to that required in *Harper*, it also intimated that weaker state interests could lead to non-voluntary medication, such as lack of alternatives for adjudication of criminal charges[52] (i.e., to render the defendant competent to stand trial to face his charges). However, this statement is properly viewed as *dicta* since the Court held for the defendant based on the inadequate findings of the Nevada courts. Nonetheless, although merely *dicta*, the Court's intimation of lower standards by which to allow forced medication comports with its ultimately imperfect treatment of the issue in *Sell*, which asks when it is permissible for lower courts to authorize such forced medication and what standard should be applied to claims against the medication.

III. STANDARD OF REVIEW AND LEVEL OF SCRUTINY APPLIED BY VARYING COURTS

Substantive due process claims have traditionally received varied levels of scrutiny when Courts decide if State actions are justified in light of the right implicated. In theory, most substantive due process liberty claims come under one of two levels of review: strict scrutiny or rational basis review.[53] The application of

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[49] *Id*. at 132.

[50] *Id*. at 138.

[51] *Id*. at 135.

[52] "Similarly, the state might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means. *See* Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J. concurring)." *Id*.

[53] *See* Sheldon Gelman, '*Life' and 'Liberty': Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 693 (1994) (noting that most substantive due process liberties receive rational basis review, while a few receive strict scrutiny).

either test usually depends on the nature of the right advanced. If the right is found to be a fundamental one, it will receive strict scrutiny, but most non-fundamental rights receive the tempered rational review test. However, some rights, which come under the purview of being fundamental, still receive a lower treatment than strict scrutiny.[54] This standard of review is commonly referred to as intermediate, or heightened, scrutiny.

Under the different standards, the importance of the state interest involved necessarily must vary with the scrutiny applied. If the right is not a fundamental right, courts are usually very deferential because the basic requirement of the state action in that context is that it rationally reflect some public policy.[55] However, if the right is a fundamental one, courts will tolerate only very little interference with the right, and the interference must be necessary to meet a compelling state interest.[56] In fact, classification as a fundamental right and implementation of the strict scrutiny test is sometimes referred to as "fatal in fact."[57] Furthermore, in the space between these two levels lies the intermediate scrutiny test, whose requirements continue to evolve and typically vary depending on the right and the state interest. In this intermediate zone, essential state interests, that would normally be rejected under the strict scrutiny standard when in conflict with an individual's fundamental liberty right, are able to find intermittent justification.[58]

To resolve properly the issue of whether a state practice conflicts with an asserted liberty right of an individual, then, two preliminary questions must be answered: what exactly is the protected right asserted by the individual, and what is the state interest sought to be advanced through the government conduct? While in theory, once the question of whether a right is fundamental is resolved (i.e., if it is found to be fundamental, the government conduct must meet the strict scrutiny standard and will likely fail to do so), in practice the state interest involved can sometimes work to assuage the importance of the fundamental right asserted by the defendant. Therefore, defining these two variables helps shape what level of scrutiny must be

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[54]*See* Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 315 (1993) ("not every restriction of a right classified as fundamental incurs 'strict' scrutiny"). Fallon notes that fundamental rights such as marriage (Zablocki v. Redhail, (434 U.S. 374 (1978)), and the right to an abortion (Planned Parenthood v. Casey, (505 U.S. 883 (1992)), have been protected by levels of scrutiny less than strict. This transpiration is seen across a wide spectrum of constitutional liberties when the state manifests some act to infringe those liberties.

[55]*Id.*

[56]*Id.*

[57]Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 691, 694 (1998) (citing Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972)).

[58]*See* Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 317 (1993) (listing the various cases involving impinged liberty rights wherein "the Supreme Court has appeared to engage in an ad hoc balancing of 'the liberty [interest] of the individual' against 'the demands of an organized society'". Such cases include confinement in mental institutions and the right to travel).

applied and whether the government interest is legitimate in light of the individual's right sought to be protected.[59]

A. U.S. Supreme Court in Harper

The Court in *Harper* reviewed the state conduct in question under a reasonable relation standard. In doing so, the Court afforded considerable weight to the fact that the conduct in question was related to state penological interests. By framing the issue[60] in terms of the State's legitimate interests in penological affairs, though, the Court significantly downplayed what is an accepted liberty interest of the prisoner.[61] While this test is not of the traditional reasonable relation standard,[62] and could be considered more closely tailored to a rational relation with bite test, it is far from a strict scrutiny or heightened scrutiny standard traditionally afforded to fundamental liberty interests. The overriding justification and reason for the outcome of the holding is the state interest invoked: the penological system.

The Court's focus on the particular state interest involved stems from its treatment of cases involving prisoner's rights that face serious jeopardy in light of prison regulations enacted by the State.[63] "The legitimacy, and the necessity, of considering the State's interests in prison safety and security are well established by our cases. In *Turner v. Safley*, and *O'Lone v. Estate of Shabazz*, we held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'"[64] Furthermore, the Court wrote that this is the proper test to apply "even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review."[65] Therefore, the Court used precedent from cases in which non-fundamental rights are implicated (which would involve rationally related standards of review) to analyze cases in which fundamental rights are implicated[66] (which, presumably, should

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[59]*Harper*, 494 U.S. at 220 ("'The substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.'") (quoting Mills v. Rogers, 457 U.S. 291, 299 (1982)).

[60]"The central question before us is whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs against his will." *Harper*, 494 U.S at 213 (working on the assumption that the State's entitlement to administer such drugs in the first place necessarily downplays the significance of the liberty right asserted).

[61]*Id.* at 221-22 (recognizing a prisoner's significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under both state law and the Due Process Clause). *See generally* Mills v. Rogers, 457 U.S. 291 (1982) (assuming that individuals have a constitutional liberty interest in avoiding unwanted medication and exploring the case law history of that assumption).

[62]*See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (reasonable relation essentially means any government interest will justify the action).

[63]*See* Turner v. Safley, 482 U.S. 78 (1987).

[64]*Harper*, 494 U.S. at 223 (citations omitted).

[65]*Id.*

[66]*See* note 68, *infra*.

invoke a more stringent standard of review). By focusing on the state interests involved (penological interests) as opposed to the defendant's interest (liberty interest in being free of forced medication), the Court invoked a non-fundamental right standard of review.

In articulating the scrutiny applied in matters involving penological interests, the Court reviewed the precedent from which this standard arose. This review served to reinforce the history of reasonable relation with bite standard, but in making such a review, the Court again failed to consider exactly the right implicated, focusing instead on the state interests advanced. Many of the rights, though certainly important, should not be put on a par with the right to be free from unwanted medication since that medication can fundamentally alter the composition of the person given the drugs.[67]

The cases relied on by the Court to substantiate its reasonable relation with bite standard invoked important rights, but none involved an alteration of that prisoner's being.[68] In fact, the Washington Supreme Court refused to apply the reasonable relation standard of review and distinguished the *Turner* line of cases because Harper's interest was distinguishable from the First Amendment rights asserted in those earlier cases. It is, of course, somewhat speculative to try and determine which rights are more important, but the Court in *Harper* brushed off any consideration of the issue and lumped all the rights together.

Instead of adopting a rule tailored to the individual rights asserted, the Court grouped all constitutionally asserted rights under one heading when in the face of penological state interests.[69] In doing so, the Court concerned itself more with the possibility of a procedural due process violation, as opposed to a substantive due process violation, effectively glossing over the issue. "[T]he substantive issue is what factual circumstances must exist before the state may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the state's nonjudicial mechanisms used to determine the facts in a particular caser are sufficient."[70] Couching the substantive issue in terms of what facts must exist before it is permissible to administer forcibly the drugs ignores the possibility of such administration being violative of the recipient's right to bodily integrity.

B. Nevada Supreme Court in Riggins

The Nevada Supreme Court, in reviewing Riggins' appeal, held that the trial court did not abuse its discretion in continuing the forced administration of the

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[67] *See* INTRODUCTION, *supra*, and note 68, *infra.*

[68] *See Turner*, 482 U.S. 78 (prisoner's right to marry); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (right of prisoners' union to organize and self-govern); Pell v. Procunier, 417 U.S. 817 (1974) (right to be interviewed by media and selection process imposed in media selections); Bell v. Wolfish, 441 U.S. 520 (1979) (right to single rooms, receive mail, procedures of shakedowns); Procunier v. Martinez, 416 U.S. 396 (1974) (right to uncensored mail and access to law students); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (right to exercise religious acts).

[69] "We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Harper*, 494 U.S. at 224.

[70] *Id*. at 220.

antipsychotic drugs.[71] Riggins claimed that the District Court abused its discretion since continuing administration of the drugs would prohibit Riggins from properly presenting his insanity defense.[72] However, the Nevada Supreme Court held that administration of the drugs was not an abuse of discretion since Riggins could present expert testimony at trial to instruct the jury as to possible side effects of the drugs, and doing so would cure any prejudice. By reaching this conclusion, the court implicitly adopted the reasonable relation standard because it never discussed the possibility that Riggins had some fundamental right against forced administration of the drugs which the State could only violate to meet some compelling consideration.

In making these findings, the court relied on the findings of the District Court judge, which were embodied in "a one-page order that gave no indication of the court's rationale."[73] In fact, the Supreme Court decision speculated that the District Court ordered the continued medication solely for fear that Riggins would otherwise become incompetent. "Were we to divine the District Court's logic from the hearing transcript, we would have to conclude that the court simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the balance in favor of involuntary medication."[74] The Court's review of the Nevada Supreme Court decision confirmed the lower court's application of the reasonable relation standard, since it approved administration of the drugs solely in order to try Riggins. Although the Supreme Court itself speculated that this justification may be a sufficient enough reason to stick with the forced administration,[75] it ultimately decided, as opposed to the Nevada Supreme Court, that the present findings are not compelling enough to continue the forced administration.

One Nevada Supreme Court judge concurred in the decision, although he wrote separately to note that, in the future, criminal defendants in Riggins' shoes should be taken off medication before trial to determine whether they would remain competent. If they reverted to incompetency, then-and only then-would re-administration of the drugs be appropriate.[76] It appears this judge was comfortable with the reasonable relation standard but wished to add some bite to the procedural protections that come with it.

Also, one Nevada Supreme Court Justice dissented, arguing that forced administration of antipsychotic drugs against criminal defendants was never appropriate to meet the State interest of adjudication of criminal charges.[77] While it is unclear what level of review this Justice wished to implement, it is clear the reasonable relation standard was not sufficient.

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[71]Riggins v. State, 808 P.2d 535 (Nev. 1991).

[72]*Id.* at 537-38.

[73]Riggins v. Nevada, 504 U.S. 127, 131 (1992).

[74]*Id.* at 137 (citing Record 502 ("[T]hat he was nervous and so forth . . . can all be brought out [through expert testimony]. And when you start weighing the consequences of taking him off his medication and possibly have him revert into an incompetent situation, I don't think that that is a good experiment").

[75]*See* note 84, *infra.*

[76]Riggins v. State, 808 P.2d at 539-40 (Rose, J., concurring).

[77]*Id.* at 540-43 (Springer, J., dissenting).

C. U.S. Supreme Court in Riggins

The Court in *Riggins* failed to explicitly proscribe a substantive test.[78] Based on that, it is unclear whether the Court would advocate a reasonable relation test or a heightened scrutiny test. The Court essentially compared Riggins' case to Harper's, equating pretrial detainees with convicted prisoners.[79] Based on that comparison, it would appear as though a rational relation with bite test would be invoked.[80] However, based on the language the Court used,[81] such as "less intrusive alternatives" and 'overriding justification', the Court sketched a test more closely analogous to that of heightened scrutiny.[82]

To pass the prescribed test, the State had to at least meet the test laid out in *Harper* in order to administer forcibly antipsychotic drugs to Riggins. "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others."[83] Nevada would have been able to administer the drugs if it had shown that Riggins presented a danger, or could have been coined a "dangerous" person (assuming the government could have met the threshold requirement of showing the medical appropriateness of the drugs. Riggins never challenged its appropriateness in court). Under the reasonably related standard, this governmental interest sufficiently outweighed Riggins' interest in freedom from bodily intrusion to make it constitutionally permissible to administer the drugs forcibly.

Also significant was the next justification, which the Court suggested would have allowed Nevada to forcibly administer the drugs. "Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by

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[78]*Riggins*, 504 U.S. at 133-36.

[79]*Id.* at 135 ("Under Harper, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial"); s*ee also*, Bell v. Wolfish, 441 U.S. 520 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners").

[80]As contrasted with note 62, *supra*, the traditional "anything goes" rational relation test.

[81]*See Riggins*, 504 U.S. 135 (using language such as "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness"; also commenting that Nevada may have satisfied their burden of proof had the District Court found "that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others").

[82]*See* Comment, *Balking at Buying What the Eighth Circuit is Sell-ing: United States v. Sell, and the Involuntary Medication of Incompetent, Non-Dangerous, Pretrial Detainees Cloaked with the Presumption of Innocence*, 71 UMKC L. REV. 685, 690-94 (2003).

[83]*Riggins*, 504 U.S. at 135.

using less intrusive means."[84] This justification would move away from the previously accepted ones outlined in *Harper* (dangerousness of defendant or danger posed to those around him), because it would allow administration of drugs solely based on the government's interest in adjudication of the case.

Even assuming that some degree of scrutiny beyond reasonable relation is employed in these challenges, the Court's *dicta* here adds strength to the state's argument that it should be allowed to forcibly medicate individual's in Riggins' position, and would thus prevail under some form of heightened scrutiny. The chief "less intrusive means" would likely be to stop medicating Riggins and try him, whether he is competent or not. However, neither Riggins nor the State argued that he could be tried after cessation of the medication,[85] if it rendered him incompetent, and the Supreme Court's jurisprudence of prosecuting incompetents casts doubt on that possibility.[86] Therefore, this *dicta* adds credence to the State's argument for forced medication because no "less intrusive means" will result in adjudication of the case.

The Court also took explicit exception to the dissent's contention that it was adapting a strict scrutiny standard.[87] Rather, it justified its holding on the grounds that the lower courts in Nevada failed to make *any* findings sufficient to meet the reasonable relation standard. The Court noted that it did not have "occasion to finally prescribe such substantive standards as mentioned above, since the District Court allowed administration of Mellaril to continue without making any determination of the need for this course or any findings about reasonable alternatives."[88]

Rather than outlining the correct legal standard for forced administration of antipsychotic drugs to criminal defendants, the Court used the bare minimum requirements of the reasonable relation test in *Harper* (in which the defendant's inmate status was so heavily relied upon), to establish that Nevada had not met those standards in the present case. Essentially, the Court held that whatever the true standard may be, Nevada did not meet it here. The Court overturned the Nevada decision because of a lack of findings as to what governmental interest was being submitted that would outweigh the defendant's liberty interest.[89] More, the Court

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[84]*Id.* (citing Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace")).

[85]The Court noted that Riggins did not argue that he should have been allowed to refuse the medication and be tried, even if by refusal he was incompetent to stand trial. *Riggins*, 504 U.S. at 136.

[86]"[C]onviction of an incompetent defendant violates due process." *Id.* at 139 (Kennedy, J., concurring) (citing Pate v. Robinson, 383 U.S. 375 (1966)).

[87]"Contrary to the dissent's understanding, we do not 'adopt a standard of strict scrutiny.'" *Riggins*, 504 U.S. at 136.

[88]*Id.*

[89]"[W]e would have to conclude that the court simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the balance in favor of involuntary medication." *Id.* at 136.

noted that the lower court "did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs."[90] Rather than clearly putting any teeth into the appropriate standard of review in forced antipsychotic administration cases, the Court found that Nevada simply failed to meet the toothless reasonable relation standard already in existence.[91]

Justice Kennedy, author of the Court's opinion in *Harper*, wrote a separate opinion concurring in the judgment in *Riggins*.[92] Justice Kennedy's primary concern with this case was his belief that antipsychotic drugs "pose[d] a serious threat to a defendant's right to a fair trial."[93] He further noted his belief that "absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial . . . and [I] doubt that showing can be made in most cases."[94]

Justice Kennedy's reference to an "extraordinary showing" alludes to his acceptance of a higher standard than the reasonable relation standard that he authored in *Harper*. He later distinguished *Harper* in his concurrence,[95] noting that different rights were implicated. What is unclear is whether Justice Kennedy's reservations about the present administration of drugs stem more from the absence of a 'dangerousness' element in *Riggins*, or whether it is because this case implicates the rights of pre-trial criminal defendants, as opposed to already incarcerated individuals. Whatever the motivating factor behind Justice Kennedy's vote, it is clear that he advocates a higher standard of review in cases of forced administration of antipsychotic drugs to pre-trial criminal defendants when that defendant is not considered 'dangerous'.

D. Eighth Circuit Court of Appeals in Sell

In reviewing Sell's appeal, the Eighth Circuit purported to adopt a heightened scrutiny standard of review but declined to accept Sell's recommended strict scrutiny approach.[96] While rejecting the magistrate's findings that Sell was dangerous, both

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[90]*Id*. at 137.

[91]Throughout its opinion, the Court emphasized the fact that the District Court denied Riggins' motion to terminate the medication in a one-page order which did not explain the court's rationale whatsoever. It was more this lack of explanation and findings that doomed Nevada, not the eventual impropriety of forced administration of antipsychotic drugs.

[92]*Riggins*, 504 U.S. at 138-45.

[93]*Id*. at 138.

[94]*Id*. at 139.

[95]"This is not a case like *Washington v. Harper* in which the purpose of the involuntary medication was to ensure that the incarcerated person ceased to be a physical danger to himself or others . . . . Here the purpose of the medication is not merely to treat a person with grave psychiatric disorders and enable that person to function and behave in a way not dangerous to himself or others, but rather to render the person competent to stand trial." *Id*. at 140 (citations omitted).

[96]United States v. Sell, 282 F.3d 560, 567 (8th Cir. 2002) ("Like our sister courts, we believe that we must apply some sort of heightened standard of review, but unlike the Sixth

the district and appellate courts still came to the conclusion that forcible administration of drugs was appropriate because the state fulfilled the alluded-to criteria in the *Riggins*' decision. In so deciding, the Eighth Circuit relied heavily on the *dicta* in the *Riggins* decision, as the two were factually similar in so far as neither defendant was considered to be dangerous. However, by adopting the *dicta* in *Riggins* as its holding, the Eighth Circuit ignored an essential element of the Court's jurisprudence in forcible administration of medication; either the existence of a dangerous propensity in the defendant or a state interest in penological institutions.

In framing the issue before it, the Eighth Circuit asked whether the district court was correct in authorizing forced administration of drugs simply for trial competence purposes.[97] To answer this question, the court framed a three-prong test for the government to pass in order to forcibly administer the medication.

> Based on the Supreme Court decisions in *Riggins* and *Harper* . . . we hold that the government must meet the following test in order for the government to forcibly medicate an individual. First, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication. *See Riggins,* 504 U.S. at 135 (noting that the government must prove an overriding state interest). Second, the government must prove that there is no less intrusive way of fulfilling its essential interest. *See id.* Third, the government must prove by clear and convincing evidence that the medication is medically appropriate. *See id.* Medication is medically appropriate if: (1) it is likely to render the patient competent, *see Weston,* 255 F.3d at 876; (2) the likelihood and gravity of side effects do not overwhelm its benefits, *see id.;* and (3) it is in the best medical interests of the patient. *See Harper,* 494 U.S. at 227 (noting that the court should consider the petitioner's medical interest).[98]

Further, the court stated that the district court failed to analyze the case under this test, so it would review the court's findings to determine if the government had fulfilled its burden of proof.[99]

Under the first prong, the court held that the government had a significant interest in adjudication of the charges against Sell.[100] The court recognized, however, that not all charges would be serious enough to justify such an intrusion of one's liberty. Rather, the charges must be serious in nature.[101] Then, in a cursory manner, the court

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Circuit, we do not adopt the strict scrutiny standard") (citing United States v. Weston, 255 F.3d 873, 888 (D.C. Cir. 2001) and United States v. Brandon, 158 F.3d 947 (6th Cir. 1998)).

[97]*Sell*, 282 F.3d at 562.

[98]*Id*. at 567.

[99]*Id*. at 567-68.

[100]*Id*. at 568 ("The government has an essential interest in brining a defendant to trial") (citing Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

[101]The seriousness of the charges that would qualify a defendant for forced administration of drugs is the principal point of dissent by Judge Bye. Charges of a more serious nature, such as murder or attempted murder (*e.g.*, *Weston*, 225 F.3d at 881) are what that Judge thought the Supreme Court was alluding to when it outlined the test to which the present court was

decided that Sell's present charges were serious enough to override his significant liberty interest in being free of medication.[102]

In deciding whether there were any less intrusive means by which to meet the essential government interest outlined above, the court found that without restoring Sell to competence, the government could not try him on these serious charges.[103] The court further noted that Sell's psychiatrist even admitted that no remedy for returning Sell to competence existed outside administration of the drugs.[104] Although this conclusion is not wholly unreasonable, the court failed to consider other alternatives available to the government, for instance court orders to take the medication backed by a threat of contempt.[105] Perhaps if the court had followed this course, Sell would have eventually consented to the medication, thus providing the state the opportunity to prosecute him and at the same time allowing Sell to retain some dignity by not having these powerful drugs injected forcibly, but rather injected by way of a conscious choice. Instead, though, the court makes another cursory conclusion that the only way to adjudicate Sell is to administer drugs, forcibly or not.

The third prong required the government to prove by clear and convincing evidence that the medication was medically appropriate, by ensuring that it would likely restore competence, that the side effects likely would not outweigh the benefits, and that it was in the best medical interests of the patient.[106] In deciding this issue, the court noted that both parties presented considerable expert testimony at trial supporting each one's view.[107] Despite the differing points of view, though, the

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purporting to adhere. Money laundering and fraud charges are not what he thought the Court had in mind.

[102]*Sell* 282 F.3d at 568. The court stated its belief that not all charges would be serious enough to warrant forced medication. However, it stated that the present charges are serious enough. It is unclear from the opinion whether the court reached this conclusion based on the nature of the charges (fraud and money-laundering) or whether the court relied on the quantity of the charges (62 charges of fraud and one charge of money-laundering). While it's possible the court could have viewed fraud and money-laundering as serious enough to merit forced medication, the more reasonable conclusion is that the court viewed the volume of the charges as the dispositive factor. Without more elaboration, though, it's impossible to tell. Reliance on such a factor sets a dangerous precedent for future overly-zealous prosecutors seeking to create a synthetically competent defendant and to give him every incentive to 'throw the book' at the person in custody. The more charges they can eventually add, the better chance the government would have of medicating a defendant forcibly, even absent a dangerousness element in the person's character.

[103]*Id.*

[104]*Id.* ("Even Dr. Cloninger, who submitted an affidavit on behalf of Sell and stated that antipsychotic drugs are not a proven treatment, did not suggest any alternative means of restoring competency").

[105]Perhaps this idea was not proposed prior to the Supreme Court *Sell* decision, but it is one specifically adopted by the Court upon review.

[106]*Id.* at 567.

[107]The government presented two witnesses to show the medication to be appropriate. The first, Dr. DeMier, was Sell's treating psychologist. He stated that antipsychotic medication was the only means by which to restore Sell to competency and that he previously treated two patients with such medication, one of whom was effectively restored (with the other not regaining competence, but "improving"). Dr. DeMier also acknowledged that serious side

court stated "we do not believe that the district court committed clear error in finding that the government proved medical appropriateness by clear and convincing evidence."[108] Rather than submitting its own belief on the appropriateness of the medication under its prescribed test, the court relied on a deferential view that the lower court did not commit reversible error,[109] reminiscent of the *Riggins* holding where the Court found that Nevada simply hadn't met their burden of proof. Instead of relying on this deferential review, the court could have performed a more exacting review of the record to determine whether the medication was in fact appropriate.

In sum, the Eighth Circuit facially applied a heightened scrutiny test. The test it outlines would be one of heightened scrutiny, yet Sell lost his appeal. In reaching its conclusion, the court relied heavily on the lack of any reasonable alternatives towards adjudication of the case against Sell. Due to its heavy reliance on the state interest of adjudication of the case against Sell, the court underestimated the significance of Sell's liberty interest to be free from unwanted medication; this approach is similar to the Court's tunneled-view in *Harper* of the overriding need for penological safety, when compared to the inmate's fundamental right to be free from unwanted medication.

A true heightened scrutiny standard would accord greater weight to the defendant's interest to be free from medication, and require more state interest than the dire need of the government to adjudicate such serious charges as fraud and money-laundering. Furthermore, it would require a far greater showing by the government of the third prong of its own test: that the medication was truly appropriate. While it creates a number of sub-categories through which the government could carry its clear and convincing burden of proof, a generous reading of the record shows that both sides presented credible evidence from which a conclusion supporting Sell's, or the government's, argument could legitimately be drawn. Therefore, while called a heightened scrutiny standard, the Eighth Circuit's test should be viewed more as a reasonably related with bite standard.

E. U.S. Supreme Court in Sell

The Court in *Sell* effectively adopted a heightened scrutiny standard of review for forced administration of antipsychotic drugs for pre-trial criminal defendants who are not dangerous. Without explicitly adopting this standard, the Court in effect did so. Reviewing the history of both *Harper* and *Riggins*, the Court stated that it would

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effects could occur as a result of the medication (*see* INTRODUCTION, *supra*). Dr. Wolfson, a psychiatrist who treated Sell, also testified that three out of four patients he had treated with antipsychotic medication were restored to competency. Dr. Wolfson too acknowledged that patients could develop serious side effects from the medication, namely sedation, neuroleptic malignant syndrome, tardive dyskinesia, and dystonic reaction. In response, Sell presented two witnesses who testified that there existed no evidence that use of antipsychotic medication was effective for treatment of Sell's symptoms. Both witnesses admitted, though, that they could not recommend any better forms of medication, which the Eighth Circuit stressed in its ruling.

[108] *Id.* at 570.

[109] *Id.* at 570-71.

be constitutionally permissible to administer psychotropic drugs forcibly, but only in limited circumstances.[110]

The Court found that forced administration of the drugs would be appropriate only if: (1) important governmental interests are at stake; (2) involuntary medication will significantly further those government interests; (3) involuntary medication is necessary to further those governmental interests; and (4) administration of the drugs is medically appropriate.[111]

The Court emphasized that this test should only be employed when the State is seeking to forcibly medicate the defendant solely for trial competence purposes.[112] The Court encouraged lower courts [before administering this *Sell*-test] to administer different tests for forced administration, namely *Harper*-type tests to render a dangerous person non-dangerous.[113] If nothing else, the Court held, the findings of these different tests will provide answers on the ultimate 'administration solely for competence' test the Court presently advocates.[114] Further, by requiring lower courts to consider alternatives, the Court is sending a message that less intrusive means should at least be considered.

In deciding the present case, the Court relied heavily on the District Court findings, and the ultimate agreement with those findings by the Appellate Court, that Sell was not dangerous.[115] Grudgingly accepting these findings, the Court found that forced administration solely for trial competence purposes was impermissible. However, this holding is more analogous to the *Riggins* decision, where the Court found a lack of justifiable lower court findings to administer the drugs, rather than an outright violation of Sell's liberty interest.

> [W]e must assume that Sell was not dangerous. And on that hypothetical assumption, we find that the Court of Appeals was wrong to approve forced medication solely to render Sell competent to stand trial. For one thing, the Magistrate's opinion makes clear that he did *not* find forced

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[110]*Sell*, 539 U.S. at 180 ("This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare").

[111]*Id*. at 180-81.

[112]*Id*. at 181-82.

[113]*Id*. ("A court need not consider whether to allow forced medication for [trial competence only], if forced medication is warranted for a *different* purpose such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. There are often strong reasons for a court to determine whether the forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question") (emphasis in original).

[114]*Id*. at 183 ("Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes").

[115]*Sell*, 539 U.S. at 184 ("We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make that assumption *only* because the Government did not contest, and the parties have not argued, that particular matter. If anything the record before us, described in Part I, suggests the contrary.") (emphasis in original).

> medication legally justified on trial competence grounds alone. Rather, the Magistrate concluded that Sell *was* dangerous, and he wrote that forced medication was "the only way to render the defendant *not dangerous* and competent to stand trial."[116]

The Court in *Sell* did adopt a heightened scrutiny standard, making it more difficult for the State to forcibly administer antipsychotic drugs. It creates a narrow window of forced administration, but only when the defendant in question is not a dangerous person. Further, by painstakingly pointing out that for purposes of the present case, the Court was acting on the 'hypothetical assumption' that Sell was not a dangerous person, the Court weakens its resolve in forbidding this practice.

Of these five different cases in five different courts, only the most recent case at the Supreme Court applied anything that truly resembled a heightened scrutiny standard. With that being said, the shame of *Sell* is that heightened scrutiny applies very narrowly, with a group of loopholes allowing the government to get back closer to the rational review with bite standards.

IV. ANALYSIS

A. Dangerousness as the Dispositive Element and Chief Loophole

While the Supreme Court's opinion in *Sell* facially makes it more difficult for the government to administer drugs forcibly to a certain class of individuals, the practical effect of the ruling will be limited.[117] In fact, the effect of the opinion will be just that: provide protection to a narrow group of individuals (non-dangerous, pre-trial detainees refusing to accept medication who are not charged with a violent crime) under a narrow set of circumstances. The main impetus for this phenomenon of limited protection is the Court's distinction between dangerous and non-dangerous individuals.[118] Furthermore, the Court does not proscribe any test for lower courts to use when trying to decide a person's dangerousness.[119] Inapposite to such a standard, the Court leaves it within the discretion of the lower courts to decide whether a person is dangerous.[120]

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[116] *Id.* at 185 (emphasis in original) (citations omitted).

[117] The Court itself acknowledged this will be the case since it carefully framed the issue as "Whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." *Sell*, 539 U.S. at 169. In fact, the Court answered this question affirmatively, albeit with pretty strict limitations. More significant than the affirmative response, though, is the narrowness of the rule. Government agencies should be able to distinguish easily this fact pattern by showing that a defendant is in fact dangerous, or maybe even simply by showing that the charges the individual faces are more serious than money laundering and fraud. Unfortunately, it is not clear to what extent this effective prohibition will stretch to.

[118] *Harper*, 494 U.S. at 216.

[119] Each jurisdiction will have a different test or measurement to determine a person's "dangerousness," but a typical example can be seen in note 30, *supra*. Moreover, a federal test would eventually have to be prescribed, at least to be applied in federal jurisdictions.

[120] "We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make that assumption only because the Government did not contest, and the

The importance of this dangerousness question cannot be overstated. Much as application of strict scrutiny is often 'fatal in fact,'[121] the question of whether a person is found dangerous will also likely be dispositive of the adjudication of a case. First, the Court notes that before adjudication of forced administration on the grounds presented in *Sell* whether to forcibly medicate a person solely for trial competence purposes is presented, the Court advised that lower courts should ask whether forced medication can be justified on other grounds.[122] Only after finding that the individual cannot justifiably be medicated due to his 'dangerousness' should the court consider whether it be permissible it to medicate for trial competence purposes. Therefore, faced with a gaping loophole in the Court's heightened scrutiny against forcible medication, government agencies will likely do all they can to show that a defendant is in fact 'dangerous,' thereby circumventing the Court's stricter version of the test and forcibly medicating the individual on these "alternative grounds."[123] To gauge properly the variety by which future lower courts may reach this dispositive dangerousness question, a review of applicable lower court findings is appropriate.

The dangerousness findings in *Sell* resulted from his relationship with a nurse at the hospital he was confined in. Essentially, Sell fell in love with the nurse and became infatuated with her.[124] There were further facts about Sell making threats against witnesses who planned to testify against him, but this became a moot point once Sell was confined in the medical center. Therefore, all dangerousness findings presented to the courts were based on this infatuation with a nurse.

Throughout the litigative course of *Sell*, a total of fourteen judges reviewed the case.[125] Of these judges, at least three clearly found that Sell was not dangerous; the district court judge and two of the appellate court judges stated so.[126] On the other

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parties have not argued, that particular matter. If anything, the record before us, described in Part I, suggests the contrary." *Sell*, 539 U.S. at 184. Justice Breyer's reluctance to accept the dangerousness findings of the district and appellate courts will only muddy the waters for future determination of 'dangerousness' findings.

[121]Fallon, *supra* note 58.

[122]"A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a different purpose such as the purposes set out in *Harper* related to individual's dangerousness, or purposes related to the individual's own interests where refusal to take drug puts his health gravely at risk. There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds before turning to the trial competence question." *Sell*, 539 U.S. at 181-82.

[123]*Id*. at 182.

[124]*Id*. at 172-73 ("In July 1999, Sell had approached one of the Medical Center's nurses, suggested that he was in love with her, criticized her for having nothing to do with him, and when told that his behavior was inappropriate, added, 'I can't help it.'") (citations omitted). Doctors testifying about this incident concluded that it was unlikely that behavior like Sells' in this instance would stop anytime soon and, on that basis, decided he was 'dangerous' even within the institution.

[125]*Id*.; United States v. Sell, 282 F.3d 560 (8th Cir. 2002).

[126]*Sell*, 539 U.S. at 174 ("The majority [of the Court of Appeals] affirmed the District Court's determination that Sell was not dangerous. The majority noted that, according to the

hand, at least two, and ostensibly seven, judges found Sell to be dangerous. The magistrate judge originally authorizing the forced medication clearly stated so,[127] and Justice Breyer wrote that "the record before us, described in Part I, suggests that [Sell was dangerous]."[128] The fact that Justice Breyer wrote the opinion of the Court, in which Justices Kennedy, Ginsburg, Souter, Rehnquist, and Stevens silently agreed, suggests that all those Justices would have found Sell to be dangerous. Furthermore, Justices Scalia, O'Connor, and Thomas dissented in the opinion[129] (albeit on jurisdictional grounds), but one must suspect they would be inclined to give great deference to a dangerousness finding by lower courts. Therefore, even under the announced requirements of *Sell* authorizing forced administration of drugs on non-dangerous individuals, the Justices writing the opinion would have applied it differently in their own case, finding him dangerous and forcibly medicating him on those grounds.[130]

In *Harper*, the Court found that the defendant was in fact dangerous. The defendant in that case had previously assaulted two nurses.[131] All judges reviewing the case in the Washington judicial system agreed that Harper was in fact dangerous. On the Supreme Court, a majority agreed that Harper was dangerous. This finding is more reasonable than that reached in *Sell* since it involved physical acts of violence. However, even under this holding, review of the particular acts of violence leading to the "dangerous" designation should be reviewed carefully.

In *Riggins*, the issue of Riggins' level of dangerousness was not directly litigated and was in fact the reason for the Nevada Court reversal.[132] Had the State brought any evidence to show that Riggins was in fact dangerous or posed a threat of danger,[133] he would likely have been forcibly medicated.[134] If nothing else, this

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District Court, Sell's behavior at the Medical Center amounted at most to an 'inappropriate familiarity and even an infatuation with a nurse'. The Court of Appeals agreed, '[u]pon review,' that 'the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center.") (citations omitted).

[127]*Id.* at 185 ("[T]he Magistrate's opinion makes clear that he did not find forced medication legally justified on trial competence grounds alone. Rather, the Magistrate concluded that Sell was dangerous, and he wrote that forced medication was 'the only way to render the defendant not dangerous and competent to stand trial'") (citations omitted).

[128]*Id.* at 184.

[129]*Id.* at 186-93.

[130]The equivalent of Sell's dangerous conduct would be asking someone out on a date. *Cf.* note 124. While it may have made the nurse uncomfortable and certainly could be described as inappropriate, basing a finding of a person being 'dangerous' which ultimately results in that person being forcibly administered antipsychotic medication with a (albeit slim) chance of death, hardly seems justified.

[131]*Harper*, 494 U.S. at 214.

[132]*Riggins*, 504 U.S. at 127.

[133]For instance, becoming infatuated with a prison guard.

[134]*Riggins*, 504 U.S. at 138 ("Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified").

highlights the dispositive effect of a dangerousness determination. Justice O'Connor's opinion does not rule out that Riggins could have been medicated had he been found dangerous or if the charges against him were serious enough to warrant it.[135] Further, Justice Kennedy specifically distinguished *Harper*, where he found that the forced administration was primarily justified due to dangerousness, and left that standing in good form.[136] Since *Sell*, though, now someone in Riggins' situation faces a possibility of being forcibly medicated even absent a showing of present dangerousness if they committed a "violent crime."[137]

In cases decided since *Sell* was handed down, the murky waters haven't appeared to clear up yet. In *United States v. Kourey,*[138] a court found that grounds existed to forcibly medicate the defendant on *Harper*-type grounds,[139] as he posed a threat. The court reached these findings based on the physical appearance of the defendant at a competency hearing and the testimony of a psychiatrist who cursorily found the defendant to pose a threat. Similarly, in *United States v. Colon*,[140] a court relied on the findings of a psychiatrist who found the defendant dangerous. The psychiatrist based these findings on the nature of the defendant's mental illness, but not on any specific instances of violence or acts presenting dangerous tendencies.[141]

That these two lower court opinions failed to authorize forced medication highlights the uncertainty of this area of law. Even though the courts found justifiable reasons for forcibly medicating the respective defendants, they declined to take such action. Instead, they relied on *Sell*'s recommendation that other courses of action be taken before the government may forcibly medicate. Whether these holdings ultimately result in the defendant being medicated or not is unclear, and is in fact one of the problems with *Sell*. It leaves lower courts and government agencies with alternatives to forced medication,[142] but many government agencies

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[135]*Id*. at 127-28 ("Due process certainly would have been satisfied had the State shown that the treatment was medically appropriate and, considering less intrusive alternatives, essential for Riggins' own safety or the safety of others . . . . However, the trial court allowed the drug's administration to continue without making any determination of the need for this course or any findings about reasonable alternatives, and it failed to acknowledge Riggins' liberty interest in freedom from antipsychotic drugs.")

[136]*Id*. at 138-45 (Kennedy, J., concurring).

[137]Riggins was convicted of murder and robbery, and *Sell* specifically applies to non-violent offenses only.

[138]United States v. Kourey, 276 F. Supp. 2d 580 (S.D.W.Va. 2003).

[139]Even though the court found these grounds to exist, the court deferred such administration on procedural grounds, rather than on substantive due process grounds. *Id*.

[140]United States v. Colon, 2003 WL 21730603 (S.D.N.Y. Jul. 21, 2003).

[141]Even though this court found the defendant to be dangerous, it ordered the parties in the case to proceed down other avenues before it would consent to forcibly medicating the individual. *Id*.

[142]When the government is trying to forcibly medicate an individual, the court can first threaten the defendant with a finding of contempt if he refuses to take voluntarily the medication; the court can also formally commit the defendant (which, in Justice Blackmun's opinion, was the proper thing to do. *See Harper*, 494 U.S. at 236-37 (Blackmun, J., concurring)).

and lower courts will not want to deal with these delays. Instead, to save time, these agencies and courts may go right for adjudication of the case through obtaining synthetic competence of the defendant, which, after *Sell*, they are permitted to do once they establish an individual's dangerousness.

Based on the holding in *Sell*, and the substantial *dicta* evidencing the Court's opinion that Sell was in fact a "dangerous" person, and the subsequent lower court treatments of the dangerous issue, it is clear that whether a person is considered dangerous will be fatal in fact to that person's liberty interest to stay free of unwanted administration of antipsychotic drugs.[143]

B. State Interest Provides Second Loophole

One of the most glaring questions to be answered in subsequent litigation, then, is whether the *Harper* rational review with bite test or *Sell*'s heightened scrutiny test is the proper one to apply. As shown earlier, the presence of a dangerousness element in the defendant could likely render this point moot, but beyond that assumption, an argument could be made that the determining factor for the court to weigh is what the state interest is. *Harper* involved penological interests, which have been said to override even fundamental liberty interests.[144] When, like in *Sell*, the state is simply trying to administer the drugs to meet the state interest of adjudication of a non-violent criminal case, the importance of their interest may diminish. Conversely, if the state seeks to prosecute an individual for the commission of violent felonies, its interest in adjudication may grow with stature.

This distinction in classes or seriousness of crimes ultimately provides another loophole for forced administration of antipsychotic medications, one that goes around an absence of dangerousness finding. This difference in state interest gives further weight to the possibility of the state administering antipsychotic medication to a defendant based on the severity of his charges. *Sell* specifically applied only to non-violent offenses, but it is easy to conceive how the government may in the future seek to administer antipsychotic medication to an individual who poses no threat or danger, but is being charged with a violent offense, such as murder, burglary, or rape. Under the analysis applied in *Riggins* and *Sell*, adjudication of this serious offense would be a much more important governmental interest than would adjudication of fraud and money laundering charges.[145] This distinction between

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[143]In the case of the two lower court opinions cited (*see Kourey*, 276 F.Supp.2d 580, and *Colon*, 2003 WL 21730603), the fact that administration of the drugs did not happen does not contradict this conclusion, since both courts found that administration of the drugs was permissible based on the fact that each individual was dangerous. Therefore, even though the defendant's liberty interests were not immediately violated, the circumstances could very well change in each case, if more extensive findings were gathered or the person failed to comply with all the details of the court's instructions for accepting the medication. In either instance, it is easy to conceive how the person's liberty interest can be violated, and, therefore, that interest has no greater protection before *Sell* than it does after, once that dangerous finding has been made.

[144]*Harper*, 494 U.S. at 223 (citing the progeny of penological interests cases).

[145]*See Riggins*, 504 U.S. at 135-36 ("[T]he State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means") (citing Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

violent and non-violent offenses simply draws another line in the sand by which the state may be able to deprive the individual of his significant liberty interest. It is easy to imagine that such a case will find its way on to the Court's docket soon enough.

V. CONCLUSION

In *Sell*, the Supreme Court added a layer of protection for individuals faced with a serious threat to their significant liberty interest in remaining free of unwanted medication. However, the layer is thin at best. By distinguishing between dangerous and non-dangerous individuals, the Court leaves a gaping loophole through which the government will be able to violate protected interests. Upon a mere showing of dangerousness, lower courts will apply the comparatively deferential *Harper* test instead of the articulated *Sell* test. Moreover, the definition of "dangerousness" includes those who pose a threat to others or themselves. This leads to the risk that a showing of dangerousness may easily be met because the government, by definition, would not be seeking to forcibly administer the antipsychotic medication absent some mental disease, and those individuals may easily be found to pose a threat to themselves. Once this showing has been made, lower courts will be free to order forced administration of the antipsychotic drugs in violation of the defendant's significant liberty interest to remain free of those drugs.

Further, even if this showing cannot be made, the Court leaves open the question whether such forced administration may even be constitutionally permissible to meet a more significant government interest than adjudication of fraud charges, such as adjudication of a violent offense, such as murder. Instead of leaving these answers uncertain and providing only a thin layer of protection, the Court should have adopted the clear-cut strict scrutiny standard in all forcible administration of antipsychotic medication cases. Absent the adoption of this standard in all instances, certainly the Court should have adopted that standard when penological interests are not involved. Instead, the Court's treatment of these issue leaves open many questions which will have to be addressed another day, while in the meantime scores of defendants' significant liberty interests in remaining free from unwanted antipsychotic medication will be violated.

GREGG SINGLE