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**INSANE IN THE MEMBRANE: ARGUING AGAINST THE  
FORCIBLE MEDICATION OF MENTALLY ILL  
PRE-TRIAL DEFENDANTS**

*Tobias Schad\**

*Our nation's mental illness epidemic has wreaked havoc on the lives of millions of families across the socio-economic spectrum, and has spawned an industry devoted to developing anti-psychotic drugs to combat these cognitive diseases. While mental illness pervades all strata of American society, it is particularly widespread among criminal defendants. The Government's practice of forcibly administering antipsychotic drugs to criminal defendants in order to render them competent for trial places these defendants' constitutional rights at serious risk. In 2003, the United States Supreme Court upheld this controversial practice in its landmark decision *Sell v. United States*.*

*This Note argues that *Sell* was decided at a time in which the dangers of antipsychotic drugs were poorly understood, and thus fails to properly balance the rights of criminal defendants with the Government's desire for prosecution. The Court should not have overturned its precedent, which required evidence that the defendant posed a danger to himself or others before the Government could forcibly medicate him and thus strip him of his right to bodily autonomy. *Sell* also left lower courts with an unworkable test regarding when forcible medication should be allowed, which has led to an increase in the number of defendants who are forcibly medicated.*

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\* J.D. Candidate, Brooklyn Law School, 2015; B.A., University of Pittsburgh, 2011. Many thanks to the entire Journal staff for their thoughtful editing and hard work. I would also like to thank my friends and family for their support, patience and encouragement.

What this case really gets down to is whether we are going to allow our courts, *for any reason*, to conjure a chemically-induced form of synthetic sanity in an incompetent accused by forcing the accused to put unwanted, mind-altering drugs in her or his brain. For my part, I think it is a violation of the due process clause of our state constitution to force drugs upon a person just because the person is accused of a crime, and we want to be done with it.<sup>1</sup>

## INTRODUCTION

The United States is in the midst of a crisis as millions of Americans, from all walks of life, cope with mental illness.<sup>2</sup> In 2005, about one in four Americans suffered from a “diagnosable mental disorder.”<sup>3</sup> The number of Americans deemed disabled for the purposes of Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) grew by almost 250% between 1987 and 2007.<sup>4</sup> The alarming rise of these disorders has

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<sup>1</sup> Riggins v. State, 860 P.2d 705, 708 (Nev. 1993) (Springer, J., dissenting).

<sup>2</sup> U.S. Dep’t of Health and Human Services, *Mental Health: A Report of the Surgeon General*, NAT’L LIBRARY OF MED., NAT’L INST. HEALTH (1999), profiles.nlm.nih.gov/ps/access/NNBBHS.pdf; *Depression in Older Persons Fact Sheet*, NAT’L ALLIANCE ON MENTAL ILLNESS (October 2009), [http://www.nami.org/Template.cfm?Section=By\\_Illness&template=/ContentManagement/ContentDisplay.cfm&ContentID=7515](http://www.nami.org/Template.cfm?Section=By_Illness&template=/ContentManagement/ContentDisplay.cfm&ContentID=7515) (“Depression affects more than 6.5 million of the 35 million Americans aged 65 years or older.”).

<sup>3</sup> *Mental Illness Statistics*, THE KIM FOUND., [http://www.thekimfoundation.org/html/about\\_mental\\_ill/statistics.html](http://www.thekimfoundation.org/html/about_mental_ill/statistics.html) (last visited Oct. 8, 2014) (“An estimated 26.2 percent of Americans ages 18 and older or about one in four adults suffer from a diagnosable mental disorder in a given year. When applied to the 2004 U.S. Census residential population estimate for ages 18 and older, this figure translates to 57.7 million people.”).

<sup>4</sup> Marcia Angell, *The Epidemic of Mental Illness: Why?*, THE NEW YORK REVIEW OF BOOKS (Jun. 23, 2011), <http://www.nybooks.com/articles/archives/2011/jun/23/epidemic-mental-illness-why/?page=1> (“The tally of those who are so disabled by mental disorders that they qualify for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) increased nearly two and a half times between 1987 and 2007—from one in 184 Americans to one in seventy-six. For children, the rise is even more startling—a thirty-five-fold increase in the same two decades.”). As a point of reference, the

led many institutions to rethink the way they interact with people who suffer from mental illness: both our nation's education system and many private employers have improved relations with their mentally ill constituents.<sup>5</sup> Despite their illnesses—and especially because of their illnesses—these Americans deserve to be afforded the same rights as their unimpaired fellow citizens.

The criminal justice system leaves mentally ill persons particularly vulnerable to human rights abuses. Judicial safeguarding of those who suffer from mental illness is crucial because criminal defendants suffer from mental illness at a much higher rate compared to the general population.<sup>6</sup> Furthermore, defendants who suffer from mental illness are significantly more likely to be jailed than hospitalized—a decision that often rests in the hands of judges.<sup>7</sup> A Department of Justice investigation found

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entire U.S. population increased around 30% during this same time period. *US Population by Year*, MULTPL, (2014), <http://www.mtpl.com/united-states-population/table>.

<sup>5</sup> *Guidelines For School Assemblies on Mental Health Awareness*, NAT'L ASS'N OF SCH. PSYCHOLOGISTS, <http://www.nasponline.org/resources/mental-health/mental-health-assemblies.aspx> (last visited Oct. 8, 2014) (“Our goals in promoting school-based assemblies on mental health are to . . . educate students and teachers about mental health and mental illness.”); *National Disability Employment Awareness Month - October 2013*, GOGEBIC COMMUNITY MENTAL HEALTH (Nov. 20, 2013), <http://www.gccmh.org/?p=498> (“Held each October, National Disability Employment Awareness Month . . . is a national campaign that raises awareness about disability employment issues and celebrates the many and varied contributions of America’s workers with disabilities.”).

<sup>6</sup> See *A Guide to Mental Illness and the Criminal Justice System: A Systems Guide for Families and Consumers*, NAT'L ALLIANCE ON MENTAL ILLNESS, [www.nami.org/Content/ContentGroups/Policy/Issues\\_Spotlights/Criminalization/Guide\\_to\\_Mental\\_Illness\\_and\\_the\\_Criminal\\_Justice\\_System.pdf](http://www.nami.org/Content/ContentGroups/Policy/Issues_Spotlights/Criminalization/Guide_to_Mental_Illness_and_the_Criminal_Justice_System.pdf) (last visited Oct. 8, 2014) (“Among the general population in the United States, only 2.8 percent of adults have a serious mental illness. However, among the population in U.S. jails, 7.2 percent have a serious mental illness.”).

<sup>7</sup> Karen J. Cusack et al., *Criminal Justice Involvement, Behavioral Health Service Use, and Costs of Forensic Assertive Community Treatment: A Randomized Trial*, 46:4 COMMUNITY MENTAL HEALTH J. 356, 356 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2895013> (“Individuals displaying symptoms characteristic of mental illness were found to have a 67% higher probability of being arrested than individuals not displaying such symptoms.”).

that “[o]ver half of inmates with mental health problems never received treatment prior to incarceration.”<sup>8</sup> This pervasive lack of treatment is due in part to the \$4.35 billion reduction in mental illness funds among state budgets from 2011 through 2013.<sup>9</sup>

The staggering numbers of untreated mentally ill defendants present enormous challenges for the judicial system. On the one hand, courts are obligated to sanction defendants when the law so demands. However, the judiciary is also tasked with protecting the constitutional rights of those who suffer from mental illness as they move through the criminal justice system. While the violation of constitutional rights is a concern for all defendants, the mentally ill are especially vulnerable given their cognitive deficiencies and the terrifying possibility of forcible medication.

Just over ten years ago in *Sell v. United States*,<sup>10</sup> the Supreme Court had an opportunity to enhance judicial protection of criminal defendants afflicted with mental disorders. *Sell* centered on whether the government could force Dr. Charles Sell, a pre-trial detainee defendant, to ingest antipsychotic drugs after he had once before been deemed incompetent to stand trial.<sup>11</sup> Dr. Sell had first appealed to a magistrate to overturn the order requiring him to be forcibly medicated.<sup>12</sup> His appeal eventually went up to the Eighth Circuit Court of Appeals, which held that while “the evidence does

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<sup>8</sup> Alana Horowitz, *Mental Illness Soars In Prisons, Jails While Inmates Suffer*, HUFFINGTON POST (Feb. 4, 2013 3:33 PM), [http://www.huffingtonpost.com/2013/02/04/mental-illness-prisons-jails-inmates\\_n\\_2610062.html](http://www.huffingtonpost.com/2013/02/04/mental-illness-prisons-jails-inmates_n_2610062.html); *Inmate Mental Health*, NAT'L INST. ON MENTAL HEALTH <http://www.nimh.nih.gov/statistics/1DOJ.shtml> (last visited Oct. 8, 2014).

<sup>9</sup> Horowitz, *supra* note 8 (“In the past three years, \$4.35 billion in funding for mental health services has been cut from state budgets across the nation, according to a recent report. Because of the cuts, treatment centers have had to trim services and turn away patients.”); Robert W. Glover et al., *Proceeding on the State Budget Crisis and the Behavioral Health Treatment Gap: The Impact on Public Substance Abuse and Mental Health Treatment Systems*, NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRECTORS (Mar. 22, 2012), available at [http://www.nasmhpd.org/docs/Policy/SummaryCongressional%20Briefing\\_2012.pdf](http://www.nasmhpd.org/docs/Policy/SummaryCongressional%20Briefing_2012.pdf).

<sup>10</sup> *Sell v. United States*, 539 U.S. 166 (2003).

<sup>11</sup> *Id.* at 169–71.

<sup>12</sup> *Sell v. United States*, No. 4:97 CR 290 DJS, 4:98 CR 177 DJS, 2001 WL 35838455, at \*1 (E.D. Mo. April 4, 2001).

not support a finding that Sell posed a danger to himself or others,” the order mandating medication was sound.<sup>13</sup> Thus, absent a finding that he was a safety risk, the government’s motivation for forcing Dr. Sell to ingest these antipsychotic drugs was to ensure that he might regain his competency in order to stand trial.<sup>14</sup>

The case then came before the Supreme Court, which ruled that the government’s use of forcible medication to render a pre-trial defendant mentally competent is constitutional as long as the trial court finds that: (1) there are “*important* governmental interests at stake”;<sup>15</sup> (2) “administration of the [involuntary medication] is substantially likely to render the defendant competent to stand trial . . . [and] substantially unlikely to have side effects that will . . . render the trial unfair”;<sup>16</sup> (3) “any alternative, less intrusive treatments are unlikely to achieve substantially the same results” as the forcible medication must be “necessary to further the government interests”;<sup>17</sup> and (4) the antipsychotic drugs are “*medically appropriate* . . . [and] in the patient’s best medical interest.”<sup>18</sup>

When the government decides to forcibly medicate a criminal defendant who suffers from mental illness, the defendant’s Constitutional rights clash with the government’s interest in prosecution. Constitutional rights are of utmost concern for all defendants, but mentally ill defendants are at an even greater risk due to the possibility that they may be forcibly medicated with antipsychotics. The mentally ill defendant’s rights include the right to a fair trial,<sup>19</sup> the right to bodily integrity,<sup>20</sup> and the right to make certain decisions fundamental to his or her liberty.<sup>21</sup> Forcible

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<sup>13</sup> United States v. Sell 282 F.3d 560, 565, 572 (8th Cir. 2002) *vacated*, 539 U.S. 166 (2003).

<sup>14</sup> Sell v. United States, 539 U.S. 166, 180 (2003).

<sup>15</sup> *Id.* at 180.

<sup>16</sup> *Id.* at 181.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> U.S. CONST. amend. VI.

<sup>20</sup> Albright v. Oliver, 510 U.S. 266, 272 (1994).

<sup>21</sup> See, e.g., Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 342 (1990) (holding that people have a liberty interest in making some decisions free from governmental intrusion); Ramie v. Hedwig Vill., Tex., 765 F.2d 490, 492 (5th

medication is likely to jeopardize these rights in two ways: first, the pronounced side effects that often accompany the administration of antipsychotic drugs make a defendant incoherent, and effectively incapable of making decisions; and second, the unreliability of the drugs makes them woefully ineffective in producing the state's desired outcome (i.e., restoring the defendant's competency to stand trial). Moreover, irrespective of the drugs' side effects or efficacy, the act itself of forcing these drugs into the defendant's body is a constitutional violation.

*Sell* presented the Supreme Court with an opportunity to advise and guide trial courts on how to properly balance the rights of the exorbitant number of criminal defendants who suffer from mental illness<sup>22</sup> with the interests of the government. Unfortunately for millions of mentally ill defendants, the Supreme Court let this opportunity pass them by and left these defendants even more vulnerable to constitutional violations.

In anticipation of the *Sell* decision, both the American Civil Liberties Union ("ACLU") and the National Association of Criminal Defense Lawyers ("NACDL") submitted briefs imploring the Court to give proper weight to Dr. Sell's constitutional rights as a mentally ill defendant.<sup>23</sup> Specifically, the ACLU focused on Dr. Sell's "liberty interest in bodily integrity," while the NADCL's brief centered on the effects of the drugs on Sell's ability to present an effective defense.<sup>24</sup> The Court did provide some protection to

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Cir. 1985) ("[T]he liberty interest in privacy encompasses . . . the freedom to make certain kinds of decisions without government interference.").

<sup>22</sup> *Grading the States 2009: A Report on America's Health Care System for Adults with Serious Mental Illness*, NAT'L ALLIANCE OF MENTAL ILLNESS 42, <http://www.namiga.org/GTS/Full%20Report.pdf> (last visited Oct. 8, 2014 Sep. 23, 2014) [hereinafter *Grading the States*] ("[M]ore than 450,000 Americans with a recent history of mental illness are incarcerated in U.S. jails and prisons.").

<sup>23</sup> Brief of American Civil Liberties Union Of Eastern Missouri as Amicus Curiae in Support of Petitioner, *Sell v. United States* 539 U.S. 166 (2003) (No. 02-5664), 2002 WL 31898296 [hereinafter "ACLU Brief, *Sell v. United States*"]; Brief of The National Association Of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Sell v. United States* 539 U.S. 166 (2003) (No. 02-5664), 2002 WL 31898312 [hereinafter "NADCL Brief, *Sell v. United States*"].

<sup>24</sup> ACLU Brief, *Sell v. United States*, *supra* note 23, at \*3; NADCL Brief,

criminal defendants afflicted with mental illness by setting a four-factor test, all of which must be met before the government can forcibly administer antipsychotic medication.<sup>25</sup> The abovementioned four-factor test may seem like a high bar, but the Court ultimately ratified the government's power to forcibly medicate non-violent, mentally ill criminal defendants.

The Court failed to afford adequate weight to a mentally ill defendant's right to make significant personal decisions,<sup>26</sup> and his right to bodily integrity.<sup>27</sup> The Court also failed to adequately address the effect of these antipsychotics on a defendant's constitutional right to a fair trial.<sup>28</sup> Had the Court properly accounted for the true risk of the drugs' inefficacy,<sup>29</sup> their potentially destructive side effects, and the inherent personal invasion associated with forcible medication, it likely would have concluded that the government's sole interest in a trial is never enough to forcibly medicate non-dangerous, pre-trial defendants.<sup>30</sup>

This Note argues that the Supreme Court's ruling in *Sell* is based on a misleading picture of drugs that have since been proven ineffective and dangerous, failed to properly balance rights, and provided courts with an unworkable test. Ultimately, defendants

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*Sell v. United States*, *supra* note 23, at \*2.

<sup>25</sup> *Sell*, 539 U.S. at 180–81.

<sup>26</sup> *See, e.g., Cruzan*, 497 U.S. at 342–43 (upholding the right of a patient in a persistent vegetative state to refuse life-sustaining medical treatment on the grounds that “[t]he sanctity, and individual privacy, of the human body is obviously fundamental to liberty”). *But see Ramie*, 765 F.2d at 492 (dismissing a civil rights action brought against police officers who questioned a suspect about her gender because gender is “generally not such [an] intimate matter”).

<sup>27</sup> *Cf., e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847–49 (1992) (cataloging cases in which substantive due process rights have been recognized).

<sup>28</sup> *Cf., e.g., Washington v. Harper*, 494 U.S. 210, 221 (1990) (holding that the Due Process Clause guarantees “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs”).

<sup>29</sup> *See, e.g., Jeffrey Lieberman et al., Effectiveness of Antipsychotic Drugs in Patients with Chronic Schizophrenia*, 353 *NEW ENG. J. MED.* 1209, 1209 (2005).

<sup>30</sup> Anne Harding, *Antipsychotic Drugs Linked to Sudden Cardiac Death*, CNN (Jan. 15, 2009, 9:30 AM), <http://www.cnn.com/2009/HEALTH/01/15/healthmag.antipsychotic.sudden.death>.



who have not been deemed a danger to themselves or anyone in their facility should not be medicated with antipsychotics against their will. Part I of this Note examines how antipsychotic drugs have been used in the United States since their introduction several decades ago. Part II gives a brief background of the law regarding competency. Part III explains why forcible medication violates a defendant's fundamental liberty interest in bodily autonomy, along with her constitutional right to a fair trial. Part IV dissects the Government's interest in forcibly medicating pre-trial detainees and argues that the government's sole interest in a trial is never important enough to outweigh the defendant's constitutional rights. Part V focuses on an analysis of the issues with which trial courts have been confronted in the wake of *Sell*, specifically the lack of clarity the *Sell* test has afforded lower courts. Part VI concludes, with a hope that the Supreme Court revisits this troubled opinion.

#### I. EVOLUTION OF ANTIPSYCHOTICS

The term "antipsychotic" covers a wide range of drugs, each with its own side effects and levels of efficacy.<sup>31</sup> Due to a multitude of factors—the insurance industry's inadequate coverage of other forms of mental illness,<sup>32</sup> a dearth of effective mental health facilities,<sup>33</sup> and the political power of Big Pharma<sup>34</sup> to name

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<sup>31</sup> *Antipsychotics*, MEDLINE PLUS, <http://www.Merriam-Webster.Com/Medlineplus/ANTIPSYCHOTICS> (last visited Oct. 8, 2014); *see also* *Sell v. United States*, 539 U.S. 166, 181 (2003) (employing a similar definition). Antipsychotics differ from antidepressants as the former is used to "block specific dopamine receptors in the brain" while the latter is used to treat depression. *Psychotropic Drugs: What Are They*, ABCNEWS, <http://abcnews.go.com/blogs/health/2011/12/02/what-you-need-to-know-about-psychotropic-drugs/> (last visited Oct. 8, 2014).

<sup>32</sup> Gennyfer Johnson, *The Stigma Of Mental Illness and How it Directly Relates to The Lack of Insurance Equity Coverage 1* (Nov. 14, 2009) (unpublished seminar paper, University of Wisconsin-Platteville) (on file with *Journal of Law and Policy*) ("Mental illness is often seen as a fabricated disease, and is rarely treated in accordance with procedure for other major illnesses; such as heart disease, diabetes or cancer.").

<sup>33</sup> *See Grading the States*, *supra* note 22, at 44 ("Across the states, this report finds that there are not enough services and supports for those who need them. Further, the services that are provided are neither routinely comprehensive

a few—the most common method of treating mental illness is through the administration of antipsychotic drugs.<sup>35</sup> The development of antipsychotics has certainly been an improvement over the highly intrusive, draconian methods popular in the beginning of the 20th century.<sup>36</sup> However, this modest improvement is not a cause for celebration. The government's forcible administration of these drugs to mentally ill criminal defendants only adds another layer of inhumanity to an already questionable method of treatment.<sup>37</sup>

Antipsychotics fall into two general categories: first-generation (conventional) and second-generation (atypical).<sup>38</sup> First-generation antipsychotics rose to popularity in the 1950s and have been

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in scope nor provably effective.”).

<sup>34</sup> See Alison Bass, *The Troubling Link Between Big Pharma and the American Psychiatric Association*, THE FASTER TIMES (Mar. 30, 2010), <http://thefastertimes.com/healthinvestigations/2010/03/30/the-troubling-link-between-big-pharma-and-the-american-psychiatric-association> (“[T]he National Alliance for the Mentally Ill (NAMI), the most powerful advocacy group for people with mental illness, received millions of dollars in funding from drug companies for years— a payola that no doubt spurred this group’s embrace of potent psychoactive drugs over alternative methods of treating mental illness.”).

<sup>35</sup> See *Treatment and Services*, NAT’L ALLIANCE OF MENTAL ILLNESS, [http://www.nami.org/template.cfm?section=About\\_Treatments\\_and\\_Supports](http://www.nami.org/template.cfm?section=About_Treatments_and_Supports) (last visited Oct. 8, 2014 Sep. 23, 2014) (“Mental health medications . . . significantly improve symptoms and help promote recovery and are recognized as first-line treatment for most individuals.”).

<sup>36</sup> Kathleen Knepper, *The Importance of Establishing Competence in Cases Involving the Involuntary Administration of Psychotropic Medications*, 20 LAW & PSYCHOL. REV. 97, 98 (1996).

<sup>37</sup> See Lieberman et al., *supra* note 29, at 1218 (discussing how patients discontinue their antipsychotic drugs because of a lack of efficacy); see also *Antipsychotics for Treating Schizophrenia*, WEBMD, <http://www.webmd.com/schizophrenia/first-generation-antipsychotics-for-treating-schizophrenia#abk1290> (last modified August 31, 2012) (stating that the side effects of taking antipsychotics may include high cholesterol, high blood pressure, Neuroleptic Malignant Syndrome, and agranulocytosis).

<sup>38</sup> MARIAN McDONAGH ET AL., DRUG CLASS REVIEW: ATYPICAL ANTIPSYCHOTIC DRUGS: FINAL UPDATE 3 REPORT (3<sup>rd</sup> ed. 2010), available at <http://www.ncbi.nlm.nih.gov/books/NBK50583>; Miranda Chakos et al., *Second-Generation Antipsychotics in Patients With Treatment-Resistant Schizophrenia: A Review and Meta-Analysis of Randomized Trials*, 2 J. LIFELONG LEARNING PSYCHIATRY 111, 111 (2004).

moderately successful in reducing psychotic symptoms of high-risk patients.<sup>39</sup> A new class of antipsychotic drugs, dubbed the “second-generation,” was introduced in the 1990s in an attempt to both lower the side-effect problem and to offer greater efficacy in treating mental illness.<sup>40</sup> These drugs differed from their predecessors based on “the timeline of their development, their pharmacology, and their adverse effects profiles.”<sup>41</sup> Due in large part to these promises, one second-generation antipsychotic named Abilify had the highest sales of any medication in the United States in 2014.<sup>42</sup> In 2011, 3.1 million Americans spent \$18 billion on prescriptions for antipsychotics.<sup>43</sup>

The use of conventional antipsychotics has been accompanied by disastrous side effects, including cardiac arrest and death.<sup>44</sup> Today, proponents of antipsychotic medication argue that these dire side effects and the drugs’ oft-reported ineffectiveness were simply characteristics of the older versions of these medications.<sup>45</sup> Considering the pervasive use of these drugs, and the companies’

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<sup>39</sup> *Schizophrenia Medications*, WEBMD, <http://www.webmd.com/schizophrenia/guide/schizophrenia-medications> (last reviewed February 20, 2014).

<sup>40</sup> Stefan Leucht et al., *A Meta-Analysis of Head-to-Head Comparisons of Second-Generation Antipsychotics in the Treatment of Schizophrenia*, 166 AM. J. PSYCHIATRY 152, 152 (2009).

<sup>41</sup> *First-Generation Versus Second-Generation Antipsychotics in Adults: Comparative Effectiveness*, EFFECTIVE HEALTH CARE PROGRAM, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://effectivehealthcare.ahrq.gov/search-for-guides-reviews-and-reports/?pageaction=displayproduct&productID=1054> (last visited Oct. 8, 2014).

<sup>42</sup> Megan Brooks, *Top 100 Most Prescribed, Top Selling Drugs*, MEDSCAPE (May 13, 2014) available at <http://www.medscape.com/viewarticle/825053>.

<sup>43</sup> Richard A. Friedman, *A Call for Caution on Antipsychotic Drugs*, N.Y. TIMES (Sep. 25, 2012), [http://www.nytimes.com/2012/09/25/health/a-call-for-caution-in-the-use-of-antipsychotic-drugs.html?\\_r=0](http://www.nytimes.com/2012/09/25/health/a-call-for-caution-in-the-use-of-antipsychotic-drugs.html?_r=0).

<sup>44</sup> Serge Sicouri & Charles Antzelevitch, *Sudden Cardiac Death Secondary to Antidepressant and Antipsychotic Drugs 4–5* (March 1, 2009) (unpublished manuscript) (on file with PubMed Central), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2365731/>.

<sup>45</sup> *United States v. Hardy*, 724 F.3d 280, 286 (2d Cir. 2013) (“[F]irst-generation injections...are ‘the group most likely to cause the more serious adverse effects’ . . . .”) (citation omitted).

touting of their efficacy and minimal side effects, the lack of data regarding second-generation antipsychotics is surprising.<sup>46</sup> The studies that have been published suggest that the “claims of superiority for the [newer drugs] were greatly exaggerated.”<sup>47</sup> One recent study revealed that many second-generation antipsychotics “were not significantly different from first-generation antipsychotic drugs on overall symptoms.”<sup>48</sup> Additionally, a study published in the *New England Journal of Medicine* found that “[c]urrent users of [first-generation] and of [second-generation] antipsychotic drugs had a similar, dose-related increased risk of sudden cardiac death.”<sup>49</sup>

These studies reveal that the government, when it forces defendants to ingest antipsychotics, is knowingly exposing them to a real risk of significant side effects.<sup>50</sup> This risk is coupled with the reality that there is no guarantee the drugs will be effective in carrying out their ultimate objective: rendering the defendant competent to stand trial.<sup>51</sup> Despite the known risks, studies identifying these risks, and doubts about these drugs’ effectiveness,

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<sup>46</sup> David Fraguas, et al., *Efficacy and safety of second-generation antipsychotics in children and adolescents with psychotic and bipolar spectrum disorders*, 21 EUR. NEUROPSYCHOPHARMACOLOGY, 621, 642 (2011) (“More research is needed to evaluate mechanisms and predictors of antipsychotic efficacy . . .”).

<sup>47</sup> Shankar Vedantam, *In Antipsychotics, Newer Isn’t Better*, WASH. POST (Oct. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/02/AR2006100201378.html> (“The claims of superiority for the [newer drugs] were greatly exaggerated.”) (quoting Columbia University psychiatrist Jeffrey Lieberman).

<sup>48</sup> Stefan Leucht et al., *Second-Generation Versus First-Generation Antipsychotic Drugs for Schizophrenia: a Meta-Analysis*, 373 LANCET 31, 34 (2009).

<sup>49</sup> Wayne A. Ray et al., *Atypical Antipsychotic Drugs and the Risk of Sudden Cardiac Death*, 360:3 NEW ENGL. J. MED. 225, 225 (2009). The majority in *Sell* even conceded that “[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.” *Sell v. United States*, 539 U.S. 166, 181 (2003).

<sup>50</sup> Assuming, optimistically, that the government is fully aware of the research discussed above.

<sup>51</sup> “The purpose of an order of involuntary medication is to restore a defendant’s competence to stand trial.” Brief for the United States, *Sell v. United States* 539 U.S. 166 (2003) (No. 02–5664), 2003 WL 193605, at \*37.

duplicitous marketing has convinced the Supreme Court and millions of Americans that antipsychotic medications are the panacea for mental illness. The Supreme Court thus signed off on the violation of the rights of non-violent defendants who suffer from mental illness in exchange for the mere possibility the drugs would increase the probability the defendant would become competent to stand trial.

## II. COMPETENCY & THE LAW

The government's purpose in violating these defendants' constitutional rights is to render them competent to stand trial. Competency traditionally entails "the ability to do something successfully or efficiently."<sup>52</sup> This Note focuses on defendants who are competent enough to make medical decisions, but have been deemed by a court of law to lack the competency to stand trial. That one could be competent to make medical decisions, but not to stand trial, may seem counterintuitive. Yet, competence "varies with time and with situation."<sup>53</sup> Thus, "[a] person may be competent to make *some* decisions but not others."<sup>54</sup> The commonly held belief that "competence is a fixed or stable state" has proved inaccurate.<sup>55</sup> Consequently, a determination that a defendant is competent to make medical decisions does not automatically render such a person competent to stand trial as well. As a result of this fluidity, the legal community has struggled to determine a standard definition of competency as courts employ distinct language across various areas of the law—be they criminal, mental health law, etc.<sup>56</sup>

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<sup>52</sup> *Competency*, MERRIAM-WEBSTER, (Mar. 25, 2014 3:33 P.M.), <http://www.merriam-webster.com/dictionary/competency>

<sup>53</sup> Norman G. Poythress & Patricia A. Zapf, *Controversies in Evaluating Competence to Stand Trial*, in *PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY* 309, 324 (Jennifer L. Skeem et al. eds. 2009).

<sup>54</sup> *Rogers v. Comm'r of the Dep't of Mental Health*, 458 N.E.2d 308, 313 (Mass. 1983) (emphasis added) (citations omitted).

<sup>55</sup> Poythress & Zapf, *supra* note 53.

<sup>56</sup> MICHEAL L. PERLIN ET AL., *COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION* 1 (2008) ("Developments in very relevant areas of the law – criminal law, mental disability law, private law – have

Federal criminal law allows either party to file a motion to determine the defendant's mental competency to stand trial at any point after a prosecution has commenced and before a defendant has been sentenced.<sup>57</sup> The federal statute specifies that the court shall grant this motion if there is "reasonable cause to believe" the defendant is suffering from a mental disease rendering him unable to "understand the nature and consequences of the proceedings against him or to assist properly in his defense."<sup>58</sup> The Supreme Court in *Dusky v. United States* essentially ratified this standard.<sup>59</sup> In *Dusky*, the Court held that a perfunctory mental exam was not sufficient to establish a criminal defendant's competency to stand trial.<sup>60</sup> A court must conduct a more extensive review in order to find a defendant competent. The court must determine that the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>61</sup> While this standard represents how a defendant may exhibit competence, neither the Supreme Court nor the legislature has defined exactly how a defendant *regains* competence after a finding that she lacks it.

If a defendant is held to be incompetent, federal law requires the defendant to be transferred to the custody of the Attorney General.<sup>62</sup> The Attorney General is then authorized to confine the defendant in an effort "to determine whether there is a substantial probability" that the defendant will regain competency.<sup>63</sup> After "a reasonable amount of time, not to exceed four months,"<sup>64</sup> the defendant must be brought before a court to decide if she is "presently suffering from a mental disease or defect as a result of which her release would create a substantial risk of bodily injury to

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yielded multiple definitions and meanings of competency.").

<sup>57</sup> 18 U.S.C. § 4241 (a) (2014).

<sup>58</sup> *Id.* § 4241(a).

<sup>59</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 18 U.S.C. § 4241(d) (2014).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

another person or serious damage to property of another.”<sup>65</sup> In the event that the defendant “no longer create[s] a substantial risk of bodily injury to another person or serious damage to property of another,” she shall be released.<sup>66</sup> Pursuant to the statute, when the defendant is no longer a danger, the government’s interest in confining her does not override her interest in freedom from incarceration.

This subordination of the government’s interest makes *Sell* even more puzzling. According to *Sell*, when the Government attempts to forcibly medicate a defendant, the government’s interest in prosecution supersedes the non-violent defendant’s interest in freedom from the antipsychotic drugs.<sup>67</sup> The Court is thus implying that a defendant’s right to freedom from being forcibly administered dangerous antipsychotic drugs is somehow less valuable than her right to freedom from incarceration.

### III. THE DEFENDANT’S RIGHTS AGAINST FORCIBLE MEDICATION

When the government compels a defendant to take antipsychotics, “[t]he needs of the individual, not the requirements of the prosecutor, must be paramount.”<sup>68</sup> This section explores how forcible medication violates the defendant’s constitutional right to a fair trial and her liberty interest in being free from forcible medication.

#### *A. Antipsychotics Disrupt a Defendant’s Right to a Fair Trial*

The right to a fair trial is essential for a criminal defendant. At its core, “[t]he idea of a fair trial is central . . . because without this one right, all others are at risk.”<sup>69</sup> In light of this, the judicial system must place a high value not only on making sure the guilty are brought to justice, but also on *ensuring fair proceedings along*

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<sup>65</sup> *Id.* § 4246(a).

<sup>66</sup> *Id.* § 4246(e).

<sup>67</sup> *Sell v. United States*, 538 U.S. 166, 179 (2003).

<sup>68</sup> *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984).

<sup>69</sup> DAVID ROBERTSON, *A DICTIONARY OF HUMAN RIGHTS* 77 (1997).

*the way.*<sup>70</sup> The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense.*”<sup>71</sup> The Sixth Amendment exists to protect criminal defendants, as its “purpose and essential aim” is “providing effective advocacy and a fair trial.”<sup>72</sup> Antipsychotics affect a defendant’s mental state in such a manner as to obstruct her right to be cognizant of the crimes alleged, and to adequately consult with her counsel. Moreover, drugs may so negatively affect the outward demeanor of the defendant as to remove the possibility of the jury remaining “impartial.”<sup>73</sup>

Antipsychotic drugs considerably impede this right to a fair trial.<sup>74</sup> The Supreme Court in *Sell* declared that drugs may be forcibly administered if the trial court finds the medication “is substantially unlikely to have side effects that may undermine the fairness of the trial.”<sup>75</sup> This requirement inadequately protects the defendant’s Sixth Amendment rights for two reasons. First, the *Sell* holding is not fully informed regarding the true repercussions of forcible antipsychotics on a defendant’s ability to assist in her own defense. Specifically, the Court did not adequately evaluate the effect of these drugs on a defendant’s right to testify. This holding affects those defendants whose mental state is so depleted that they have already been deemed incompetent to stand trial.<sup>76</sup> As a result, there is a serious risk that the compelled administration of

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<sup>70</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”).

<sup>71</sup> U.S. CONST. amend. VI (emphasis added).

<sup>72</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140, 156 n.3 (2006) (Alito, J., dissenting) (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)) (internal quotation marks omitted).

<sup>73</sup> *See* U.S. CONST. amend. VI.

<sup>74</sup> *See, e.g., United States v. Weston*, 206 F.3d 9, 14 (D.C. Cir. 2000) (“Involuntary antipsychotic medication has the potential to adversely affect the defendant’s ability to obtain a fair trial as guaranteed under the Sixth Amendment.”).

<sup>75</sup> *Sell v. United States*, 539 U.S. 166, 179 (2003).

<sup>76</sup> *See id.* at 171.



antipsychotic drugs, which may simply “mask” the psychosis,<sup>77</sup> will not have a strong enough impact on the defendant’s dwindling competency to render him “informed of the nature and cause of the accusations against [him].”<sup>78</sup> Second, and more significantly, *Sell* fails to account for the defendant’s other Sixth Amendment rights that are put at risk when the government forcibly medicates him. For instance, the *Sell* standard does not require trial courts to weigh the risk that a jury may make impermissible inferences regarding the defendant’s guilt based on the defendant’s outward demeanor—a demeanor in all likelihood perverted by the side effects of antipsychotic drugs. The drugs forced on these non-violent pre-trial defendants result in an impermissible restriction not only on their Sixth Amendment right to a fair trial, but also on their right to an impartial jury, and their right to testify.<sup>79</sup>

#### 1. Antipsychotics’ Effect on a Defendant’s Right to Assist in Her Own Defense

The side effects of antipsychotic medication can have a tremendous impact on the defendant’s constitutional right to assist in her own defense.<sup>80</sup> Supreme Court jurisprudence has consistently recognized the importance of a defendant’s involvement in her own trial.<sup>81</sup> Even a century ago, courts were prohibited from trying a defendant who was “disabled . . . from intelligently making his defense.”<sup>82</sup> In the eighteenth century, Sir William Blackstone remarked, “if a man in his sound memory

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<sup>77</sup> Singleton v. Norris, 319 F.3d 1018, 1030 (8th Cir. 2003) (Heaney, J., dissenting).

<sup>78</sup> U.S. CONST. amend. VI.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See, e.g., Bounds v. Smith, 430 U.S. 817, 821 (1977) (“It is now established beyond doubt that prisoners have a constitutional right of access to the court.”); Faretta v. California, 422 U.S. 806, 813 (1975) (“With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case.”).

<sup>82</sup> Jordan v. State, 135 S.W. 327, 328 (Tenn. 1911).

commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought.”<sup>83</sup> Today, the American Bar Association’s (ABA) Criminal Justice Standards lists five decisions that a defendant must ultimately make after “full consultation with counsel.”<sup>84</sup> Three of the more significant decisions are: “(i) what pleas to enter; (ii) whether to accept a plea agreement and (iii) whether to testify in his or her own behalf.”<sup>85</sup> Medication may jeopardize a defendant’s ability to make all three of these essential decisions.

Plea bargaining is vastly important to criminal defendants as more than 90% of criminal cases are disposed of by the defendant accepting a plea agreement.<sup>86</sup> Critically, if a defendant is impaired as a result of antipsychotic drugs, she may not be truly cognizant of the implications of a plea decision. When a defendant enters into a plea agreement, she is pleading guilty to the crime charged. As a guilty plea “is itself a conviction,” the plea agreement authorizes the court to proceed to the sentencing phase.<sup>87</sup> Thus, entering into a plea agreement requires that the defendant be aware of “the nature of each charge” she is pleading guilty to and “any maximum possible penalty” that may be imposed.<sup>88</sup> Furthermore, the defendant must be cognizant of all the constitutional rights she is sacrificing by pleading guilty, including the right to a jury trial and the right to testify.<sup>89</sup> Acceptance of a plea agreement is an extremely important decision that results in essential rights being relinquished. A forcibly medicated defendant may not truly know the repercussions of her decision.

Some defendants do in fact have success with antipsychotics

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<sup>83</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES (J.W. Jones trans. 1823) (1765–1769), available at <http://www.lonang.com/exlibris/bla-402.htm>.

<sup>84</sup> ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 199 (3d ed. 1993).

<sup>85</sup> *Id.* at 200.

<sup>86</sup> NEIL P. COHEN ET AL., CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS; CASES AND MATERIALS 353 (3rd ed. 2008).

<sup>87</sup> *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

<sup>88</sup> FED. R. CRIM. P. 11(b)(1)(G)–(H).

<sup>89</sup> FED. R. CRIM. P. 11(b)(1)(F).

and likely regain true competence. The drugs are certainly effective for some people and some defendants. Thus, this Note does not argue that these drugs provide no value to society, when the choice to take them is voluntary. However, when a defendant is forcibly medicated with antipsychotics, there is also a distinct possibility her cognitive processes will be altered for the worse and thus will not be truly cognizant of the implications of entering into a plea. These drugs can cause defendants to suffer side effects such as memory loss, “catatonic-like” lethargy, and general unawareness of the events occurring around her.<sup>90</sup> Antipsychotics affect thought, behavior, and perception in such significant ways that some patients “can barely function” after a dosage.<sup>91</sup> Forcing a person who suffers from mental illness and who has been compelled to ingest such mind-altering drugs to accept, deny, or even negotiate a plea agreement is not only unjust, it is also incompatible with our criminal justice system.<sup>92</sup> The unavoidable symptoms of these drugs are completely antithetical to the purposes of plea agreements, which are meant to avoid lengthy trials when a defendant has indeed committed a crime. But with a heavily medicated defendant, there is a serious risk that she will simply be incapable of both recognizing the rights she is sacrificing and understanding the profound ramifications of entering into the plea agreement, especially if she has not committed the crime alleged.

Forcible medication also presents a risk that the defendant will not be able to effectively communicate with her counsel. The side effects from antipsychotics affect a defendant’s “ability to think

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<sup>90</sup> United States v. Brandon, 158 F.3d. 947, 954 (6th Cir. 1998); Harrison B. & Therrien B., Abstract, *Effect of Antipsychotic Medication Use on Memory in Patients with Alzheimer’s Disease*, J. GERONTOLOGICAL NURSING, June 2007, at 11 (2007) (“Patients who were taking antipsychotics scored significantly worse on a recent autobiographical memory measure compared with patients who were not taking antipsychotics.”).

<sup>91</sup> Riggins v. Nevada, 504 U.S. 127, 143 (1992); see also Washington v. Harper, 494 U.S. 210, 230 (1990) (“While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects.”).

<sup>92</sup> Riggins v. State, 860 P.2d 705, 708 (Nev. 1993) (Springer, J., dissenting).

and communicate” and thus to effectively articulate to her lawyer her opinions on the case.<sup>93</sup> These side effects jeopardize the defendant’s constitutional right to have effective assistance of counsel.<sup>94</sup> In his concurring opinion in *Riggins*, Justice Kennedy expressed fear that the side effects of antipsychotic medications may in effect render moot a defendant’s ability to assist her lawyer.<sup>95</sup> The defendant in many instances is the only person in possession of the essential facts of her case, particularly when a defendant intends to use an alibi defense. In such a situation, “there may be circumstances lying in [her] private knowledge which would prove [her] innocent.”<sup>96</sup> However, when the defendant is forcibly administered antipsychotics, there is a risk that she will not be able to take advantage of such outcome-determinative facts “because they are not known to persons who undertake [her] defense.”<sup>97</sup> To make matters worse, the defendant must attempt to effectively relate these crucial facts to her counsel despite the extremely unpredictable effect these drugs may have on speech, thought, and memory.<sup>98</sup> This is especially so considering “the drugs may affect the same individual differently each time they are administered.”<sup>99</sup> A defendant’s right to effective assistance of counsel is at grave risk of being violated due to the drugs’ effect on her communicative abilities.

Irrespective of any side effects the defendant may suffer, there is still a risk that she will not have regained enough competence to be “informed of the nature and cause of the accusation” as required by the Sixth Amendment.<sup>100</sup> It is worth noting that these drugs are

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<sup>93</sup> *Bee v. Greaves*, 744 F.2d 1387, 1393–94 (10th Cir. 1984).

<sup>94</sup> U.S. CONST. amend. VI.

<sup>95</sup> *Riggins*, 504 U.S. at 141 (Kennedy, J., concurring) (“In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant’s capacity or willingness to react to the testimony at trial or to assist his counsel.”).

<sup>96</sup> *United States v. Chisolm*, 149 F. 284, 287 (C.C.S.D. Ala. 1906).

<sup>97</sup> *Id.*

<sup>98</sup> Rhonda K. Jenkins, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 170 (1995).

<sup>99</sup> *Id.*

<sup>100</sup> U.S. CONST. amend. VI.

forcibly administered to mentally ill defendants who have already been declared incompetent to stand trial. Each of these defendants has previously been found “unable to understand the proceedings against [her].”<sup>101</sup> A handful of dissenting judges have voiced concern that a defendant who can only regain competency through medication is rendered merely “synthetically sane”—not truly competent—when drugs are administered.<sup>102</sup> Even proponents of forcible medication do not argue that antipsychotic drugs *cure* mental illness—the goal of the drugs is simply to achieve “control of the symptoms of severe mental disorders, not the permanent removal of the causes of severe mental disorders.”<sup>103</sup> Thus, the defendant still may be so mentally disabled as to not comprehend the gravity of her alleged crimes or the possible punishment that she will face. As Judge Heaney of the Eighth Circuit artfully noted in his dissent in *Singleton v. Norris*, the defendant is no more competent after receiving medication than she was before taking the medication.<sup>104</sup> The only difference is that the mental illness is simply “mask[ed].”<sup>105</sup> The medication may only result in the *appearance* of competence and not the actual ability to understand the proceedings or to be “informed of the nature and cause of the accusation.”<sup>106</sup> Underneath this medicated façade, the defendant remains incompetent to stand trial.

## 2. Antipsychotics’ Effect on the Jury

Forcible medication also presents a risk that the jury will draw

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<sup>101</sup> 18 U.S.C. § 4241(a) (2014).

<sup>102</sup> See, e.g., *Singleton v. Norris*, 319 F.3d 1018, 1030 (8th Cir. 2003) (Heaney, J., dissenting) (discussing the barbarity of executing a mentally ill individual); *State v. Collins*, 381 So. 2d 449, 452 (La. 1980) (Marcus, J., dissenting) (considering the defendant’s “synthetic sanity”). See also *State v. Perry*, 610 So. 2d 746, 759 (La. 1992) (finding that antipsychotics “merely calm and mask the psychotic symptoms which usually return to debilitate the patient when medication is discontinued”).

<sup>103</sup> T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 304–05 (1997).

<sup>104</sup> *Singleton*, 319 F.3d at 1030 (Heaney, J., dissenting).

<sup>105</sup> *Id.*

<sup>106</sup> U.S. CONST. amend. VI.

impermissible inferences about the defendant's mental state as a result of certain side effects, thus eliminating the possibility of a fair trial for the presumptively innocent defendant. Juries inevitably dissect the defendant—her demeanor, presence, and appearance—in all stages of a criminal trial.<sup>107</sup> The jury scrutinizes everything the defendant does, or fails to do.<sup>108</sup> These actions and omissions allow the jury to form an impression of the defendant, an “impression that can have a powerful influence on the outcome of the trial.”<sup>109</sup> A jury's guilty decision may hinge on perceptions of behavior resulting from these side effects.

This is particularly disconcerting in the case of the medicated defendant who wishes to exercise her constitutional right to testify. It is common knowledge that a defendant's behavior can have a significant impact on a jury's ultimate decision. A defendant's demeanor can be substantially affected by two common side effects of conventional antipsychotics: akinesia and akathisia.<sup>110</sup> Akinesia “makes the defendant apathetic and unemotional,” while akathisia makes her “agitated and restless.”<sup>111</sup> In one study on the popular antipsychotic Risperidone, twenty-four percent of patients suffered from akathisia.<sup>112</sup>

A jury deciding to assess a defendant's case not on the merits, but on the defendant's medically-induced “outward appearance,” illustrates another way that forcible medication results in an impermissible restriction on the defendant's right to a fair trial. If the defendant suffers from akinesia, the jury may perceive her as apathetic, and surmise that she lacks any respect for the victim, the crime, or the judicial proceeding. A jury in a murder trial may

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<sup>107</sup> *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (“It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table.”).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> John Muench & Ann M. Hamer, *Adverse Effects of Antipsychotic Medications*, 81:5 AM. FAM. PHYSICIAN 617, 619 (2010).

<sup>111</sup> *United States v. Charters*, 829 F.2d 479, 494 (4th Cir. 1987).

<sup>112</sup> Saxena S., Wang D., Bystritsky A., Baxter L.R., *Risperidone augmentation of SRI treatment for refractory obsessive-compulsive disorder*, 57(7) J. CLINICAL PSYCH. 303 (1996).

observe the defendant's medically-induced demeanor and conclude the defendant has a "not at all perturbed, lackadaisical attitude;" in other words, that she cannot—or worse, refuses to—show any emotion.<sup>113</sup> Thus, the jury may convict a defendant based on its desire to put an immoral and dangerous person in jail, rather than on the merits of the case.<sup>114</sup> The jury may be tempted to conclude that the defendant's lack of emotion makes it *more probable* that the defendant committed the crime.

Conversely, if the defendant suffers from akathisia, the jury may view her restless and agitated symptoms as signs of nervousness and consciousness of guilt. In this instance, the jury may be persuaded to resolve that the defendant's restless nature makes it *more likely* that the defendant committed the crime. Either way, forcible medication of these antipsychotic drugs produces a "prejudicial negative demeanor in the defendant."<sup>115</sup> The jury may ultimately discredit the defendant's testimony and convict her based on her altered appearance caused by these drugs. A trial at which a defendant is only able to exercise her constitutional right to testify in such a potentially prejudicial manner is hardly a *fair* trial by an *impartial* jury.<sup>116</sup>

Antipsychotic medication can also have a profoundly negative impact on a defendant who is entering a plea of not guilty by reason of insanity ("NGRI"). For an NGRI defense to be successful, the defendant must prove he was "unable to appreciate the nature and quality or the wrongfulness of his acts" at the commission of the crime.<sup>117</sup> However, antipsychotic drugs "tinker[] with the mental processes"<sup>118</sup> and subsequently "produce

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<sup>113</sup> State v. Murphy, 355 P.2d 323, 326 (Wash. 1960).

<sup>114</sup> *Id.* at 327 (Where a defendant took tranquilizing drugs before trial, finding a "reasonable probability" that "the attitude, appearance, and demeanor [of the defendant], as observed by the jury, ha[d] been substantially influenced or affected by circumstances over which he had no real control.").

<sup>115</sup> Riggins v. Nevada, 504 U.S. 127, 143 (Kennedy, J., concurring) (quoting the brief of the American Psychiatric Association).

<sup>116</sup> See U.S. CONST. amend. VI.

<sup>117</sup> 18 U.S.C. § 17(a) (2014).

<sup>118</sup> Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973).

structural brain changes.”<sup>119</sup> The goal of these drugs essentially “is to alter the chemical balance in [a patient’s] brain.”<sup>120</sup> The alterations from these drugs increase the likelihood that the mental makeup of the defendant at trial will be significantly different from that at the commission of the crime.<sup>121</sup> There is thus a risk that antipsychotic medication will “create misimpressions about the defendant’s sanity at the time of the crime.”<sup>122</sup> Studies of juror behavior show that—unsurprisingly—a jury is more likely to acquit by reason of insanity a defendant who is manifesting signs of psychosis at trial, rather than a defendant who *appears* to be free of psychotic symptoms at trial.<sup>123</sup> Such decision making does not bode well for the defendant who is sedated and suffering from akinesia.<sup>124</sup> Forcible medication may affect the jury in such a way—by making the defendant appear too sedated, too nervous, or (in the case of an NGRI defense) not mentally incapacitated enough—as to remove the possibility of a fair trial.

The side effects that can accompany antipsychotics may cause the defendant to lack the “requisite mental capacity”<sup>125</sup> to assist counsel in her defense. Moreover, compelling defendants to ingest antipsychotics creates the risk that the jury will make impermissible inferences about the defendant, thus restricting the defendant’s right to testify and plead an NGRI defense. This risk

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<sup>119</sup> Paul J. Harrison, *Review: the Neuropathological Effects of Antipsychotic Drugs*, 40 SCHIZOPHRENIA RESEARCH 87, 87–88 (1999), available at <https://www.madinamerica.com/wp-content/uploads/2010/04/NeurolepticNeuro-pathologyPHarrison.pdf>.

<sup>120</sup> *Washington v. Harper*, 494 U.S. 210, 214 (1990).

<sup>121</sup> *State v. Law*, 244 S.E.2d 302, 306 (S.C. 1978) (citing *State v. Murphy*, 355 P.2d 323 (Wash. 1960)) (“[D]efendant was given tranquilizing drugs by the trusty and when he took the stand he was[] in marked contrast to his normal demeanor.”).

<sup>122</sup> *United States v. Charters*, 829 F.2d 479, 494 (4th Cir. 1987).

<sup>123</sup> Stephen J. Morse, *Involuntary Competence*, 21 BEHAV. SCI. & L. 311, 319 (“Some empirical research demonstrates that juries that believe the defendant is manifesting psychotic symptoms at trial are more likely to acquit by reason of insanity than jurors who believe the defendant is free of symptoms at trial.”) (citation omitted).

<sup>124</sup> *Id.* at 319–20.

<sup>125</sup> Keith R. Cruise & Richard Rogers, *An Analysis of Competency to Stand Trial: An Integration of Case Law and Clinical Knowledge*, 16 BEHAV. SCI. & LAW, 35, 36 (1998).



places mentally ill defendants in a frightening position and threatens the virtues of the criminal justice system, in which a jury weighs evidence, not appearance. Given the significant implications for defendants' rights, and considering the danger that antipsychotics may produce "synthetic sanity," these "drugs may result in it being impossible for the State to *fairly and accurately* try [the defendant]." <sup>126</sup>

*B. Forcible Medication Violates a Defendant's Right to Refuse Antipsychotic Drug*

The Fifth and Fourteenth Amendments of the United States Constitution guarantee that criminal defendants will not be "deprived of . . . liberty . . . without due process of law."<sup>127</sup> While the Government has broad power to maintain public safety especially in the exercise of the police power, the due process clause prohibits state action that violates liberty interests so "rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>128</sup> The Supreme Court in *Washington v. Harper* held that incarcerated individuals have a substantial interest in freedom from forcible antipsychotics.<sup>129</sup> However, the Court did not examine exactly what the nature of that liberty interest was.

In *Sell*, the Court had the opportunity to clarify and solidify this liberty interest, but failed to seize it. The Court could have, for example, included this interest as one such factor that a court must assess before permitting forcible medication. Regardless of this omission, established jurisprudence dictates that criminal defendants who suffer from mental illness have a constitutional right to refuse antipsychotics. This right stems from both a liberty interest in making certain fundamental decisions without

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<sup>126</sup> *Woodland v. Angus*, 820 F. Supp. 1497, 1513 (D. Utah 1993) (emphasis added).

<sup>127</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>128</sup> *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934); *see also Palko v. Connecticut*, 302 U.S. 319, 324–26 (1937) (applying this due process analysis against the states).

<sup>129</sup> *Washington v. Harper*, 494 U.S. 210, 229–31 (1990).

intervention,<sup>130</sup> and the right to bodily integrity.<sup>131</sup> The government violates both of these when it forcibly medicates a defendant. The purpose of antipsychotics is “to alter the will and the mind of the subject;” the government’s compulsory administration of antipsychotics therefore “constitutes a deprivation of liberty in the most . . . fundamental sense.”<sup>132</sup>

1. Forcible Medication Violates a Defendant’s Fundamental Liberty Interest in Making Important Decisions Without Intervention

Immanuel Kant once characterized “autonomous decision making in matters affecting the body and mind [as] one of the most valued liberties in civil society.”<sup>133</sup> Kant was certainly not alone in his interpretation, as autonomy has long been a principle of political theory, philosophical discourse, and theological debate.<sup>134</sup> The political theorist Jean-Jacques Burlamaqui declared that a person, “as a free and intelligent being,” should be able to carry out her own lives as she sees fit.<sup>135</sup> Time and again, the Supreme Court has cemented autonomy in its constitutional jurisprudence.<sup>136</sup> In *Griswold v. Connecticut*, the Supreme Court recognized that the right to personal privacy is a guaranteed right firmly rooted in tradition.<sup>137</sup> The vital right to privacy encompasses an individual’s autonomy to “make certain kinds of decisions without Government interference.”<sup>138</sup> This right to private autonomy is so important that

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<sup>130</sup> *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 342 (1990); *Ramie v. Hedwig Vil., Tex.*, 765 F.2d 490, 492 (5th Cir. 1985).

<sup>131</sup> *Albright v. Oliver*, 510 U.S. 266, 272 (1994).

<sup>132</sup> *Harper*, 494 U.S. at 237–38 (Stevens, J., concurring in part and dissenting in part).

<sup>133</sup> Dennis E. Cichon, *The Right to “Just Say No”: A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 284, 314–15 (1992).

<sup>134</sup> See, e.g., JOHN STUART MILL, ON LIBERTY (Harvard Classics ed., 1909) (1860).

<sup>135</sup> 1 JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW Ch. 4, para. XI (Nugent trans., Cambridge Univ. Press 1807) (1748).

<sup>136</sup> Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1715–53 (1992).

<sup>137</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>138</sup> *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

the Court is determined to offer it Constitutional protection, even though the due process clause provides it no direct textual support.<sup>139</sup> The decision facing mentally ill criminal defendants—whether or not to ingest antipsychotic drugs—is one such fundamental decision.<sup>140</sup>

This notion of “choice”—a person’s choice to make certain fundamental decisions—has permeated Supreme Court opinions since 1897, when the Court held that the definition of liberty, as interpreted through due process, encompasses the right to choose one’s occupation.<sup>141</sup> In *Eisenstadt v. Baird*, the Court ruled that a person’s decision concerning whether or not to use contraceptives was of such magnitude that it “fundamentally affect[ed]” her life.<sup>142</sup> The Court in *Planned Parenthood v. Casey* declared “matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>143</sup> Justice Stevens elegantly conveyed the judiciary’s respect for a person’s choice in such fundamental matters when he noted that “it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny.”<sup>144</sup>

Criminal defendants have a constitutionally protected right to refuse antipsychotics because this decision is “intrinsically personal” and can “profoundly affect . . . development or life.”<sup>145</sup> The Court first acknowledged this “right to refuse” in the seminal *Cruzan v. Director of Missouri Department of Health* case, where

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<sup>139</sup> *Griswold*, 381 U.S. at 479; see also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the “right to liberty under the Due Process Clause gives . . . the full right to engage in [private] conduct without intervention of the government.”).

<sup>140</sup> See, e.g., *Davis v. Hubbard*, 506 F. Supp. 915, 929-30 (N.D. Ohio 1980) (noting that forcible medication inhibits a defendant’s fundamental right to privacy).

<sup>141</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

<sup>142</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>143</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

<sup>144</sup> *Thornburgh v. Am. Coll. of Obstetricians*, 476 U.S. 747, 781 (1986) (Stevens, J., concurring), *overruled by Casey*, 505 U.S. 833.

<sup>145</sup> *State v. Perry*, 610 So. 2d 746, 756 (La. 1992).

the Court held that the right to refuse medical care is constitutionally protected.<sup>146</sup> The *Cruzan* Court noted “the right to refuse any medical treatment emerged from the doctrines of trespass and battery.”<sup>147</sup> The Court followed *Cruzan* with *Washington v. Glucksberg*, in which the Court held that while people have a right to refuse medical treatment, this right does not extend to physician-assisted suicide.<sup>148</sup> The Court distinguished assisted suicide from the right to refuse medical treatment on the grounds that the latter involves “the assistance of another” and thus does not enjoy the same constitutional protections.<sup>149</sup> In the case of refusing forcible medication, there is no “other person” implicated; refusing antipsychotics is a personal choice made by the defendant, akin to the right to refuse medical treatment affirmed in *Cruzan*.<sup>150</sup> As “[t]he . . . individual privacy of the human body is obviously fundamental to liberty . . . [e]very violation of a person’s bodily integrity is an invasion of his or her liberty”; the criminal defendant faced with forcible medication has a fundamental right to refuse these drugs.<sup>151</sup>

Forcible medication is such an invasion in part due to the catastrophic and “potentially permanent” side effects that come with it.<sup>152</sup> Some of these “serious[,] direct, often debilitating, and unwanted side effects” can result in cardiac arrest or even death.<sup>153</sup> Another such permanent side effect is tardive dyskinesia.<sup>154</sup> Tardive dyskinesia “is a neurological disorder . . . that is characterized by involuntary, uncontrollable movements of various

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<sup>146</sup> *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>147</sup> *Id.* at 305. (Brennan, J., dissenting) (quoting *Mills v. Rogers*, 457 U.S. 291, 294, n.4 (1982)).

<sup>148</sup> *Washington v. Glucksberg*, 521 U.S. 702, 724–28 (1997).

<sup>149</sup> *Id.* at 725.

<sup>150</sup> *Cruzan*, 497 U.S. at 261.

<sup>151</sup> *Cruzan*, 497 U.S. at 342 (Stevens, J., dissenting) (quoting *Washington v. Harper*, 494 U.S. 210, 237 (1990) (Stevens, J., concurring in part and dissenting in part)).

<sup>152</sup> *In re Qawi*, 81 P.3d 224, 231 (Cal. 2004).

<sup>153</sup> 1 BRIAN CUTLER, *ENCYCLOPEDIA OF PSYCHOLOGY AND LAW* 325 (2008).

<sup>154</sup> *Tardive Dyskinesia*, U.S. NAT’L LIBRARY OF MED., <http://www.nlm.nih.gov/medlineplus/ency/article/000685.htm> (last visited Oct. 8, 2014).

muscles, especially around the face.”<sup>155</sup> According to a “fair reading of the evidence” by the Supreme Court, this disorder affects between ten and twenty-five percent of first-generation antipsychotic users.<sup>156</sup>

Aside from neurological disorders, antipsychotic medications can have immediate physical ramifications as well, such as a significant loss of white blood cells.<sup>157</sup> People with low white blood cell counts are more likely to contract serious infections; thus, when the state forces these medications upon defendants, it is effectively putting their health at serious risk.<sup>158</sup> These drugs and their side effects can also cause lasting psychological trauma, including suicidal or homicidal thoughts.<sup>159</sup> The psychological effects from these drugs are so pronounced that mentally ill defendants are routinely prescribed benztriofine, a “drug used to treat side effects generated by other drugs.”<sup>160</sup> Ironically, the side effects of benztriofine may magnify the very side effects it is designed to treat. Benztriofine’s side effects include, non-exclusively, such horrors as “confusion, disorientation, agitation, excitation, memory impairment, delusions . . . hallucinations . . . aggression or violent behavior, and suicidal tendencies.”<sup>161</sup> As all of these side effects indicate, taking antipsychotics is a serious decision. These side effects are so severe that one scholar characterized them as “distortions [that] transform medication from a source of healing into a source of punishment that inflicts

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<sup>155</sup> *Washington v. Harper*, 494 U.S. 210, 230 (1990) (citing *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982)); see also *Tardive Dyskinesia*, *supra* note 167.

<sup>156</sup> *Harper*, 494 U.S. at 230.

<sup>157</sup> Cichon, *supra* note 133, at 297–99.

<sup>158</sup> *Low Blood Cell Counts: Side Effect Of Cancer Treatment*, MAYO CLINIC (Sep.17, 2011), <http://www.mayoclinic.com/health/cancer-treatment/CA00066>.

<sup>159</sup> Cichon, *supra* note 133, at 302 (“An increasing body of recent medical research has connected severe akathisia to both suicidal and homicidal behavior.”).

<sup>160</sup> *Benzotropine (Oral Route)*, MAYO CLINIC, <http://www.mayoclinic.org/drugs-supplements/benzotropine-oral-route/description/drg-20072652> (last updated Aug. 1, 2014).

<sup>161</sup> *Benzotropine Side Effects in Detail*, DRUGS.COM, <http://www.drugs.com/sfx/benzotropine-side-effects.html> (last visited Oct. 8, 2014).

acute psychological distress and suffering.”<sup>162</sup>

Beyond the physical ramifications of antipsychotics, the drugs also “reset the brain’s chemical balance, and affect the way a person perceives and interacts with the world.”<sup>163</sup> It is manifest that the decision to ingest such drugs is a fundamental choice because it is “central to [the defendant’s] personal dignity and autonomy.”<sup>164</sup> It is the criminal defendant “who is the subject of [the] medical decision.”<sup>165</sup> Thus, the defendant’s liberty interest in refusing such mind-changing antipsychotics must be given the utmost respect.

## 2. Forcible Medication Violates a Defendant’s Fundamental Liberty Interest in Bodily Integrity

The Supreme Court has suggested that the fundamental right to privacy includes “the right to bodily integrity”<sup>166</sup>—and also noted that “the Constitution places limits on a State’s right to interfere with a person’s most basic decisions . . . about bodily integrity.”<sup>167</sup> When a defendant is compelled to ingest antipsychotics, his right to bodily integrity is violated. The origins of this right can be traced back as far as the thirteenth century, when the tort of battery came about as a safeguard for the “individual’s interest in bodily integrity.”<sup>168</sup> It is because of this history that the title of the Second Chapter of the Restatement (Second) of Torts is “Intentional Invasions of Interests in Personality.”<sup>169</sup> In its seminal 1891 *Union Pacific* holding, the Supreme Court noted the “inviolability of a person,” the invasion of which was “an assault, [and] a

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<sup>162</sup> Michaela P. Sewall, *Pushing Execution over the Constitutional Line: Forcible Medication of Condemned Inmates and the Eighth and Fourteenth Amendments*, 51 B.C. L. REV. 1279, 1317 (2010).

<sup>163</sup> *United States v. White*, 620 F.3d 401, 422 (4th Cir. 2010).

<sup>164</sup> *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (explaining that “[a]t the heart of liberty is the right to define one’s own concept of existence . . .”).

<sup>165</sup> *In re Ericson v. Dilgard*, 252 N.Y.S. 2d 705, 706 (N.Y. Sup. Ct. 1962).

<sup>166</sup> *Cruzan v. Dir., Missouri Dep’t. of Health*, 497 U.S. 261, 342–43 (1990); *see also Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Casey*, 505 U.S. at 851.

<sup>167</sup> *Casey*, 505 U.S. at 849 (citations omitted).

<sup>168</sup> RESTATEMENT (SECOND) OF TORTS §§ 13, 18 cmt. c, g, 19 (1965).

<sup>169</sup> *Id.* §§ 13–36.

trespass.”<sup>170</sup> The Supreme Court has also demonstrated that the Fourth Amendment is an avenue through which the Constitution voices clear support for the right to bodily integrity.<sup>171</sup> The text of the Fourth Amendment itself confirms this right to bodily integrity, as it protects “the right of the people to be secure in their persons.”<sup>172</sup> The purpose of the Fourth Amendment, in the eyes of the Supreme Court, is to “protect personal privacy . . . against unwarranted intrusion by the State.”<sup>173</sup> As Judge Cardozo once famously opined, every person “has a right to determine what shall be done with his own body.”<sup>174</sup>

It is obvious that criminal defendants do not enjoy the same right to bodily integrity as ordinary citizens who have yet to be charged with a crime. The Fourth Amendment details that “upon probable cause,” an ordinary citizen may be searched or seized, thus depriving the citizen of his ordinary sense of personal privacy.<sup>175</sup> This starts a chain of events (that culminate in detention) that separate criminal defendants from the rest of society and inhibits their liberty interest in bodily integrity. Nonetheless, the Supreme Court has enshrined the notion that a person is entitled to a liberty interest in bodily integrity, regardless of her status as a defendant.<sup>176</sup> *Winston v. Lee* involved a criminal suspect who had refused a surgical operation to remove a bullet from his body that the government wanted to excise as a piece of “evidence.”<sup>177</sup> Recognizing that the suspect’s “dignitary interests in personal privacy and bodily integrity” were at issue, the Supreme Court struck down the government’s attempt to compel

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<sup>170</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891).

<sup>171</sup> *See Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013); *Winston v. Lee*, 470 U.S. 753, 760–61 (1985).

<sup>172</sup> U.S. CONST. amend. IV.

<sup>173</sup> *Schmerber v. California*, 384 U.S. 757, 767 (1966).

<sup>174</sup> *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). In this case, the plaintiff consented to an examination of a tumor, but not its removal. *Id.* The doctor went against the plaintiff’s wishes anyway and removed the tumor. *Id.* The plaintiff then sued and the court found that this constituted medical battery. *Id.*

<sup>175</sup> U.S. CONST. amend. IV.

<sup>176</sup> *Winston*, 470 U.S. at 759–67.

<sup>177</sup> *Id.* at 755.

the surgery.<sup>178</sup> The Supreme Court affirmed the lower court's ruling that the Government may not "take control of respondent's body, to drug this citizen . . . not yet convicted of a criminal offense."<sup>179</sup> However, in *Schmerber v. California*, the Supreme Court held that the Fourth Amendment does not prohibit the government from compelling a "driving while intoxicated" (DWI) suspect to take a blood test.<sup>180</sup> However, the Court focused on the lack of any "risk, trauma or pain" involved in a blood test—unlike the major surgery at issue in *Winston*—when it rejected the petitioner's claim.<sup>181</sup>

The bodily intrusions that occur when defendants are forcibly medicated are similar to those found in *Winston*. Forcible medication involves a non-consensual procedure that invades a defendant's right to bodily integrity and brings with it the possibility of severe side effects. Thus, the Court should have granted defendants similar protection as it afforded to *Winston*. To establish a true understanding of this violation of bodily integrity, the intrusiveness of forcible medication must be examined because "the individual's right to privacy grows as the degree of bodily invasion increases."<sup>182</sup>

To understand the nature of the invasion, it is worthwhile to analyze how forcible administration proceeds from the defendant's point of view. The medical staff must, at times, go through great pains to force a defendant to ultimately ingest the drugs.<sup>183</sup> A few times a month, as many as five nurses may enter the defendant's area where he is kept and first, immobilize him.<sup>184</sup> The nurses then restrain the defendant, and proceed to administer potentially

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<sup>178</sup> *Id.* at 761–66.

<sup>179</sup> *Id.* at 765–66 (quoting *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983)) (internal quotation marks omitted).

<sup>180</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>181</sup> *Id.* at 771.

<sup>182</sup> *Matter of Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

<sup>183</sup> See, e.g., Aimee Green, *Oregon Judges Can Force Mentally Incompetent Defendants to Take Antipsychotic Meds*, *Oregon Supreme Court Says*, OREGON LIVE (Mar. 20, 2014, 8:01 PM), [http://www.oregonlive.com/portland/index.ssf/2014/03/oregon\\_judges\\_can\\_force\\_mental.html](http://www.oregonlive.com/portland/index.ssf/2014/03/oregon_judges_can_force_mental.html) (describing a recent Oregon Supreme Court decision allowing forcible medication).

<sup>184</sup> *United States v. White*, 620 F.3d 401, 422 (4th Cir. 2010) (Keenan, J., concurring).



“mind-altering drugs.”<sup>185</sup> Nurses often have to “pull down [a defendant’s] pants and [insert] a needle in[to] [his] buttocks.”<sup>186</sup> The “physical violence inherent in forcible medication”<sup>187</sup> results in a “substantial and degrading intrusion of the body.”<sup>188</sup>

This forcible administration of antipsychotics is distinguishable from a minor procedure, like the blood test in *Schmerber*. In *Schmerber*, the defendant was free of “risk, trauma or pain.”<sup>189</sup> Moreover, blood tests are a routine procedure—many Americans subject to blood tests every day. The forced injection of mind-altering drugs,, however, is not only rare, it is also painful. Forcible medication involves “strugg[ling] to open [the defendant’s] mouth” and shoving these drugs into his body.<sup>190</sup> The administration of these drugs “illegally break[s] into the privacy” of the defendant, a practice “bound to offend even hardened sensibilities.”<sup>191</sup> The physical intrusion inherent in forcibly medicating a defendant violates the defendant’s right to bodily integrity. As the Association of American Physicians & Surgeons argued in its brief supporting Dr. Sell, defendants who are “[n]ever found guilty of any crime and [who] pos[e] no threat to others” should not be compelled to endure “forced injection of mind-altering drugs unlimited in quantity and type.”<sup>192</sup> Yet, the method of administering these drugs is but one factor in the analysis. Even if the methods were to improve, say through an intravenous injection, there would still be a significant concern for the practice upheld in *Sell*. The defendant would still be subject to the dangerous (and sometimes permanent) side effects of the drugs, which inhibit his right to a fair trial, his right to bodily integrity,

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<sup>185</sup> United States v. Lindauer, 448 F. Supp. 2d 558, 567 (S.D.N.Y. 2006).

<sup>186</sup> Green, *supra* note 183.

<sup>187</sup> *White*, 620 F.3d at 422 (Keenan, J., concurring).

<sup>188</sup> *Id.*

<sup>189</sup> *Schmerber v. California*, 384 U.S. 757, 771 (1966).

<sup>190</sup> Compare this forceful procedure with *Rochin v. California*, 342 U.S. 165 (1952). There the Court held that “strugg[ling] to open [the defendant’s] mouth” and pump his stomach to get at drugs was an unconstitutional violation of due process. *Id.* at 172.

<sup>191</sup> *Id.*

<sup>192</sup> Brief for the Association of American Physicians & Surgeons, Inc. et al. as Amici Curiae Supporting Petitioner at \*2, *Sell v. United States* 539 U.S. 166 (2003) (No. 02–5664).

and his right to make certain personal decisions. Moreover, to date, this Note found no available cases, studies or news on the use of intravenous forcible medication on criminal defendants.

#### IV. THE GOVERNMENT'S INTEREST IN A TRIAL DOES NOT OUTWEIGH THE DEFENDANT'S RIGHT AGAINST FORCIBLE MEDICATION

While forcible medication does infringe upon the defendant's fundamental right to be free from unwanted antipsychotics and her constitutional right to a fair trial, these rights are "not absolute and must be balanced with the interests of the government."<sup>193</sup> *Sell* concluded that the precedents of *Riggins* and *Harper* controlled, and thus the forcible medication of a pre-trial defendant is permissible if the State presents "important governmental trial-related interests."<sup>194</sup> While the Court did not define such interests, it declared that the "Government's interest in . . . trial" is sufficiently important to justify forcible medication.<sup>195</sup> Clearly, this was hardly a victory for those fighting for the rights of defendants suffering from mental illness.

*Sell* relied on *Harper* and *Riggins* in formulating its analysis of the government's trial-related interests in forcibly medicating a non-dangerous pre-trial detainee. However, *Sell* failed to account for two other significant government interests discussed in *Harper* and *Riggins*. First, *Harper* involved forcible medication of an inmate who had already been found guilty;<sup>196</sup> thus the government had an interest in the correction of the inmate.<sup>197</sup> The government has no such interest in pre-trial defendants whose guilt has not yet been determined. Second, both *Harper* and *Riggins* narrowly upheld the government's ability to forcibly medicate *only* those *convicted* defendants who had been deemed a danger to themselves

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<sup>193</sup> United States v. Santonio, No. 2:00-CR-90C, 2001 WL 670932, at \*2 (D. Utah May 3, 2001).

<sup>194</sup> *Sell* v. United States, 539 U.S. 166, 179 (2003).

<sup>195</sup> *Id.* at 180–81.

<sup>196</sup> *Washington v. Harper*, 494 U.S. 210, 213–14 (1990).

<sup>197</sup> Alan Felthous, *The Involuntary Medication of Jared Loughner and Pretrial Jail Detainees in Nonmedical Correctional Facilities*, 40 J. AM. ACAD. PSYCHIATRY 98, 100 (2012).

or others.<sup>198</sup> In *Riggins*, the Court explicitly reflected upon the *Harper* decision, acknowledging this limitation. The Court noted that *Harper* stood for the proposition:

Taking account of the unique circumstances of penal confinement, however, we determined that due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that ‘the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.’<sup>199</sup>

Dr. Sell, on the other hand, was found not to be a danger to himself or others.<sup>200</sup> Thus, the government could only purport to forcibly medicate Dr. Sell for the purpose of his regaining competency to proceed with a trial.<sup>201</sup> Competency for trial is a significantly less important interest than the dangerousness issue that drove the court’s decisions in *Riggins* and *Harper*.<sup>202</sup> The government’s duty to maintain the safety of its facilities from dangerous mentally ill defendants is a sufficiently important interest – enough to override a defendant’s rights against being forcibly medicated. The Court in *Harper* acknowledged such when it relied on “the needs of the institution” to justify involuntary medication.<sup>203</sup> In the case of a dangerous convict, the government has an incentive to forcibly medicate in an effort to protect other people—prison staff and inmates. However, in the absence of dangerousness, the government’s interest simply becomes to secure a trial—an interest that is much less immediate and one that does not directly protect the safety of others. Moreover, the Supreme Court in *Riggins*

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<sup>198</sup> *Riggins v. Nevada*, 504 U.S. 127, 134–35 (1992); *Harper*, 494 U.S. at 227.

<sup>199</sup> *Riggins*, 504 U.S. at 134–35 (quoting *Harper*, 494 U.S. at 227).

<sup>200</sup> *Sell*, 539 U.S. at 174, 184. The magistrate judge had found Dr. Sell to be dangerous. *Id.* at 174. The District Court held that this finding was clearly erroneous. *Id.* The Court of Appeals affirmed this aspect of the District Court’s holding. *Id.* For the purpose of appeal, the Supreme Court, in turn, assumed that the Court of Appeals finding that Sell was not dangerous was correct. *Id.* at 184.

<sup>201</sup> *Id.* at 179.

<sup>202</sup> In *Riggins*, the defendant had murdered someone and reported to hear voices. *Riggins*, 504 U.S. at 129. In *Harper* the defendant had a long history of psychiatric problems and had assaulted two nurses. *Harper*, 494 U.S. at 213–14.

<sup>203</sup> *Harper*, 494 U.S. at 225.

explicitly stated it was not setting “substantive standards for judging forced administration of such drugs in the trial or pretrial settings.”<sup>204</sup> Thus, *Sell’s* reliance on *Harper* and *Riggins* was wholly misguided. Given the inefficacy of antipsychotics and the likelihood that they will not result in the defendant regaining competency<sup>205</sup> (and thus his ability to stand trial),<sup>206</sup> the government’s interest in a trial is simply never sufficient to override a non-violent defendant’s constitutional rights against forcible medication.

For both convicted inmates and pretrial detainees, the government has a general interest in “maintaining institutional security and preserving internal order.”<sup>207</sup> The moment a pretrial detainee is convicted, the government’s interest increases significantly.<sup>208</sup> Thereafter, the government has an interest in the correction of the convicted inmate, a “legitimate aim[] of a criminal sentence imposed as punishment.”<sup>209</sup> The government’s correctional interests include: punishment of the inmate, deterring the inmate from committing future crimes, and rehabilitation.<sup>210</sup>

However, “the government’s interest is lesser in the pretrial context than in the post conviction, correctional context.”<sup>211</sup> In the absence of a conviction, the government cannot claim any interest in correction. Pretrial detainees have “not been adjudged guilty of any crime,” and thus may not be deterred, punished, or rehabilitated “prior to an adjudication of guilt.”<sup>212</sup> The Ninth Circuit recently summarized this reasoning nicely: “[p]enological considerations [such as] punishment, deterrence and rehabilitation

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<sup>204</sup> *Riggins*, 504 U.S. at 135.

<sup>205</sup> Bryon L. Herbel & Hans Selmach, *Involuntary Medication Treatment for Competency Restoration of 22 Defendants With Delusional Disorder*; 35 J. AM. ACAD. PSYCHIATRY 47, 47–59 (2007) (finding that 23% of defendants who were forcibly medicated did not regain sufficient competency to stand trial).

<sup>206</sup> See Lieberman et al., *supra* note 29, at 1218.

<sup>207</sup> *Bell v. Wolfish*, 441 U.S. 520, 546 (1979).

<sup>208</sup> Felthous, *supra* note 197, at 100.

<sup>209</sup> Appellant’s Reply Brief at 9, *United States v. Loughner*, 672 F.3d 731 (9th Cir. 2012) (No. 11–10339), 2011 WL 3568921, at \*9 (internal quotation and citation omitted).

<sup>210</sup> *Benjamin v. Fraser*, 264 F.3d 175, 187 n. 10 (2d Cir. 2001).

<sup>211</sup> Felthous, *supra* note 197, at 100.

<sup>212</sup> *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979).

have no relevance to detainees who have not been convicted of any crime.”<sup>213</sup> *Sell* did not account for this important distinction when it analyzed the Government interest at stake.

*Sell* also did not adequately consider the possibility that these defendants would ultimately be cleared of their alleged crimes, and only be detained pre-trial. The Court in *Sell* stated that if the defendant sustains a “lengthy confinement in an institution for the mentally ill . . . that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime.”<sup>214</sup> Here, the Court is referring to defendants who refuse to take the medication and are subsequently placed in civil confinement until they regain competency. The Court does not seem to identify the possibility that a defendant will regain competency without forcible medication, and be cleared of his alleged crimes. The Court’s choice of language—in words such as “confinement”<sup>215</sup>—implies that it was considering the forcible medication of defendants who had been convicted, and thus deserved punishment. Nevertheless, the Court deviated from its prior holdings, and extended the reasoning of *Harper* and *Riggins* to authorize forcible medication of non-dangerous pretrial detainees.<sup>216</sup> With respect to pretrial detainees, the government’s interests are limited to: (1) “assur[ing] the detainees’ presence at trial” and (2) “maintain[ing] the security and order of the detention facility.”<sup>217</sup> Pretrial detention “is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be [treated] with the utmost humanity.”<sup>218</sup> There is a distinct difference in the government’s interests in these two stages, as pretrial defendants have not been convicted; there is no interest in correction and the defendant may even be cleared of the charges.

Forcible medication for the sole purpose of regaining competency is a separate issue from the practice of forcible medication after a finding of dangerousness. The Court in *Sell*

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<sup>213</sup> *Bull v. San Francisco*, 595 F.3d 964, 996 (9th Cir. 2010).

<sup>214</sup> *Sell v. United States*, 539 U.S. 166, 180 (2003).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 179.

<sup>217</sup> *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998).

<sup>218</sup> BLACKSTONE, *supra* note 83.

alluded to safety as one of the government's purposes behind forcible medication when it declared protecting "the basic need for human security" a factor in weighing the importance of the government's interest.<sup>219</sup> However, for safety to be a legitimate Government interest in forcibly medicating a pretrial detainee, the detainee must pose some sort of danger. In *Riggins* and *Harper*, the Court held that forcible medication after a finding of danger was constitutional.<sup>220</sup> The Government's interest in containing dangerous persons is obvious, in order to "combat[] the danger posed by a person to both himself and others."<sup>221</sup> The safety of the public and prison facilities is an essential goal of the state's police power.<sup>222</sup> Forcibly medicating a violent, mentally ill defendant falls within this power, as there is a serious safety risk to both the defendant and to others in the prison. The Supreme Court has held that community safety concerns can, and routinely do, override individual constitutional rights.<sup>223</sup> In the case of a dangerous pretrial detainee, the security of the penal institution is important; thus the decision to forcibly medicate is permissible.<sup>224</sup> However, when the need to control a dangerous defendant no longer exists,

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<sup>219</sup> Sell, 539 U.S. at 180 (discussing the "Government's interest in bringing to trial an individual accused of a serious crime . . .").

<sup>220</sup> *Riggins v. Nevada*, 504 U.S. 127, 134–35 (1992); *Washington v. Harper*, 494 U.S. 210, 227 (1990).

<sup>221</sup> *Harper*, 494 U.S. at 225.

<sup>222</sup> See Jorge Galva et al., *Public Health Strategy and the Police Powers of the State*, 120 PUB. HEALTH REP. 20, 20 (Supp. 1 2005) ("The application of police power has traditionally implied a capacity to . . . promote the public health, morals, or safety, and the general well-being of the community . . .").

<sup>223</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 28–29 (1905) ("This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.'" (quoting *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 150 (Vt. 1854))).

<sup>224</sup> *Harper*, 494 U.S. at 225 ("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.'" (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("[E]ven when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.")).

the only purpose behind forcible medication is assuring the defendant's presence at trial.<sup>225</sup> Thus, the Court's reference to "protect[ing] . . . the basic human need for security"<sup>226</sup> as a purpose behind forcibly medicating a non-dangerous defendant is misguided.

In *Sell*, absent a finding that the defendant posed a danger to himself or others, the only government interest was in bringing him to trial.<sup>227</sup> While this is a legitimate interest, the government also has an obligation to ensure a fair trial.<sup>228</sup> As a result of the Government's duty to seek justice, its "interest in . . . trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."<sup>229</sup> "The government's interest is in a fair trial in which the accused's guilt or innocence is correctly determined."<sup>230</sup> As noted in Part III, the side effects of antipsychotics risk jettisoning the possibility of a fair trial for the forcibly medicated defendant.<sup>231</sup> Therefore, the government's argument that forcible medication is justified by its interest in a trial is suspect, as the only trial would likely be unfair. Without a "reasonably accurate disposition of the criminal charges,"<sup>232</sup> the Government's interest in a trial is not enough to override the non-violent defendant's constitutional rights.<sup>233</sup>

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<sup>225</sup> See *Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998).

<sup>226</sup> *Sell v. United States*, 539 U.S. 166, 180 (2003).

<sup>227</sup> Brief Amicus Curiae of The Rutherford Institute In Support of Petitioner, *Sell*, 539 U.S. 166 (No. 02-5664), 2002 WL 31898316, at \* 13 ("The interest of the state is not in merely subjecting a person to the machination of the court system and achieving a verdict. The state itself, no less than the criminal Defendant, has an interest in a fair and impartial trial.").

<sup>228</sup> *Sell*, 539 U.S. at 180 ("Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.").

<sup>229</sup> *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

<sup>230</sup> *United States v. Charters*, 829 F.2d 479, 493–94 (4th Cir. 1987); *Woodland v. Angus* 820 F. Supp. 1497, 1513 (D. Utah 1993) ("State's interest is not in trying plaintiff under any circumstances, but in trying plaintiff fairly and accurately.").

<sup>231</sup> See *supra* Part III.A.

<sup>232</sup> BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* 298 (1997).

<sup>233</sup> *Charters*, 829 F.2d at 494 ("[T]here is good reason to question whether the government's interest in a fair trial will be well served by placing a heavily medicated defendant before a jury.").

Moreover, the government's interest in forcibly medicating these defendants depends on the medication having enough of a cognitive impact on the defendant as to render them competent for trial. However, the medical data behind the efficacy of antipsychotics are, at best, spotty.<sup>234</sup> In one study conducted two years after *Sell*, seventy-four percent of patients stopped taking their antipsychotic medication within eighteen months, the majority of which was due to the medication's inefficacy or because of "intolerable side effects" among other reasons.<sup>235</sup> As the Fourth Circuit noted in *U.S. v. Charters*, trial courts are in a position such that they will never be certain that these drugs will in fact cognitively impact the defendant sufficiently to declare her competent to stand trial.<sup>236</sup> Because of this uncertainty, the government's sole purpose in administering these medications—to ensure the defendant is brought to a fairly adjudicated trial—may never be attained. However, the forcible medication of a defendant violates her rights regardless of the drug's efficacy. Due to the intrusive and sometimes permanent nature of the drugs' side effects, even an acquittal "would not affect the deprivation of liberty that occurred."<sup>237</sup> In *United States v. Evans*, the District Court for the Western District of Virginia recognized that the defendant was not competent to stand trial.<sup>238</sup> When the government attempted to forcibly medicate Evans, he appealed to the Fourth Circuit, which then authorized forced medication for his schizophrenia.<sup>239</sup> In a twist of fate, at the subsequent trial Evans was acquitted.<sup>240</sup>

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<sup>234</sup> Fraguas, *supra* note 46 ("More research is needed to evaluate mechanisms and predictors of antipsychotic efficacy.").

<sup>235</sup> Lieberman et al., *supra* note 29, 1209.

<sup>236</sup> *Charters*, 829 F.2d at 493 ("The district court acknowledged that 'there is no way of knowing' whether the medication would render Charters competent.").

<sup>237</sup> See *U.S. v. Howard*, 429 F.3d 843, 850 (9th Cir. 2005) (discussing a similar deprivation of liberty when a defendant is unnecessarily forced to appear before a judge wearing leg shackles) *opinion withdrawn on denial of reh'g*, 480 F.3d 1180 (9th Cir. 2007).

<sup>238</sup> *United States v. Evans*, 427 F. Supp. 2d 696, 697 (W.D. Va. 2006).

<sup>239</sup> *United States v. Evans*, 199 Fed. Appx. 290, 291 (4th Cir. 2006).

<sup>240</sup> *United States v. White*, 620 F.3d 401, 418 (4th Cir. 2010) (citing Judgment of Acquittal, at 1, *United States v. Evans*, No. 1:07CR00043 (W.D.Va. Nov. 15, 2007)).



Evans's situation is one that proponents of forcible medication may cite as a victory. Those in favor of forcible medication may point to Evans's case and surmise that the drugs did exactly what they were supposed to do—make Evans “competent.” Moreover, one could argue that the drugs served their ultimate purpose—Evans's competency—while his rights went undisturbed. While Evans was forcibly medicated, the antipsychotics presumably affected neither his right to assistance of counsel, nor his right to have an unbiased jury determine his fate, as he was acquitted. Ultimately, Evans was cleared of all charges,<sup>241</sup> so one might posit that there truly was no harm done in this case. This line of reasoning may conclude that the government had obtained its goal—a fair trial—while there was only a minimal violation of Evans's rights, akin to the blood test in *Schmerber*.

However, this argument ignores the most personal rights violated in forcible medication—the right to bodily integrity and the right to make certain fundamental decisions. The difference between these rights and the right to a fair trial is that forcible medication places the right to a fair trial *at risk*. There is a possibility that the jury may make impermissible inferences regarding the defendant's outward appearance, while there is also a chance that the defendant will not be able to adequately assist in his own defense as a result of the medication. There are many factors that may prevent the defendant's right to a fair trial from being violated—from the effect of the drugs themselves to the possibility the jury does not make any impermissible inferences.

This is completely unlike the impact of forcible medication on the right to bodily integrity and the right to make fundamental decisions. The right to bodily integrity and the right to make fundamental decisions are not at risk simply as a result of forcible medication. The government *automatically and immediately violates* these rights when it forces a defendant to take antipsychotics against her will. The moment the government injects the defendant with these mind-altering drugs, it has violated these rights. A defendant's right to refuse unwanted medical treatment is, at that instant, damaged forever. Similarly, the

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<sup>241</sup> *Id.*

moment antipsychotic drugs enter the defendant's body, her right to bodily integrity is lost.

Additionally, there are ways to mitigate the effect of these drugs on a fair trial—for example, instructions to the jury to ignore the defendant's demeanor. However, there is no way to mitigate the effect of these drugs on the defendant's right to bodily integrity or on her right to make fundamental decisions. Once the medication has been forced on her, the violation has as well. Thus, even though Evans was acquitted of all charges, by that time that he had lost the fight, having “undergone forced medication—the very harm that he [sought] to avoid.”<sup>242</sup> Considering the constitutional rights that forcible medication violates, the risk that the government will never even achieve its sole purpose becomes a significant factor that weighs against government intrusion into a defendant's body.

In the absence of any risk that a defendant poses a danger to herself or others, the government's only interest in forcible medication is in securing a trial. When faced with balancing the constitutionality of this government interest against the defendant's constitutional rights, the *Sell* Court erroneously relied on *Harper* and *Riggins*.<sup>243</sup> The holdings in *Harper* and *Riggins* were limited to ratifying forcible medication after a finding of dangerousness, or to persons already convicted: neither of which applied to the *Sell* defendant.<sup>244</sup> Given the inefficacy of these medications and the subsequent likelihood that they will fail to produce competency for the defendant,<sup>245</sup> along with their aggregate—often permanent side effects<sup>246</sup>—the Government's interest in a trial is not important enough to override the non-violent defendant's constitutional right to a fair trial, to be free from bodily invasion, and to make certain fundamental decisions.

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<sup>242</sup> See *Sell v. United States*, 539 U.S. 166, 176–77 (2003).

<sup>243</sup> *Id.* at 179.

<sup>244</sup> *Riggins v. Nevada*, 504 U.S. 127, 129 (1992); *Washington v. Harper*, 494 U.S. 210, 227 (1990).

<sup>245</sup> See Lieberman et al., *supra* note 29, at 1209–10.

<sup>246</sup> *Singleton v. Norris*, 319 F.3d 1018, 1035 (8th Cir. 2003) (Heaney, J., dissenting).

## V. THE SELL TEST HAS PROVED UNWORKABLE FOR LOWER COURTS

The repercussions of the landmark *Sell* ruling have led to more, not less, tolerance of forcible medication by trial courts for two reasons. First, the uncertainty surrounding *Sell* has led lower courts to rely more and more on questionable medical testimony. Second, *Sell* failed to provide *any* standard for how “serious” a defendant’s crime must be in order to subject him to forcible medication. Simply put, these ambiguities have not been resolved in favor of defendants. Together, these two problems demonstrate *Sell*’s inherent promotion of an increase in the use of forcible medication—yet another reason why it should be revisited.

### A. Reliance on Questionable Medical Testimony after *Sell*

*Sell*, in effect, left lower courts with the task of figuring out the messy specifics of its four-factor test.<sup>247</sup> Because of this uncertainty, courts are now relying on government-funded medical experts more than ever in *Sell*-controlled cases, specifically in regard to whether the medication is “necessary to regain competence.”<sup>248</sup> Medical experts who play such a substantial role in these cases not only make medical determinations—assessments obviously within their expertise—but also draw conclusions upon which courts impermissibly rely in making their legal determinations.<sup>249</sup> In *Sell*, the Supreme Court acknowledged that it would be difficult for these medical experts to “try to balance harms and benefits related to the more quintessentially legal

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<sup>247</sup> *Sell*, 539 U.S. at 179.

<sup>248</sup> See Karen Franklin, *Loughner Case Shines Spotlight On Forced Meds Practices*, IN THE NEWS: FORENSIC PSYCHOLOGY, CRIMINOLOGY AND PSYCHOLOGY-LAW (July 10, 2011), <http://forensicpsychologist.blogspot.com/2011/07/loughner-case-shines-spotlight-on.html> (“I defer to medical doctors,” U.S. District Judge Larry A. Burns said at an emergency hearing requested by the defense. “I have no reason to disagree with doctors. I didn’t go to medical school.”).

<sup>249</sup> *Cf.* *People v. Doan*, 366 N.W.2d 593, 598 (Mich. Ct. App. 1985) (“We have indicated that the prosecution expert’s testimony was inadmissible since it impermissibly defined the meaning of legal terms the definition of which is the proper function of the court.”).

questions of trial fairness and competence.”<sup>250</sup> While medical experts can certainly assess the effect of certain mental illnesses, they lack “the expertise to testify that the drug is *necessary* in order to maintain [the defendant’s] competence to stand trial.”<sup>251</sup> These determinations “are legal policy decisions appropriately within the province of the judge.”<sup>252</sup>

This increased reliance on experts has led to forcible medication being upheld in cases where the data does not indicate the medication will likely result in the defendant regaining competency. In *United States v. Ghane*, the Eighth Circuit reversed a trial court ruling that the medication was “substantially likely to render Ghane competent to stand trial.”<sup>253</sup> The trial court had authorized the forcible use of antipsychotics despite the testimony of four psychiatrists that “[n]inety percent of delusional disorder patients do not experience improvement with treatment.”<sup>254</sup> A “glimmer of hope” that the defendant would regain competency was enough for the trial court to conclude the defendant could be forcibly medicated.<sup>255</sup> The fact that defendants are being put through the horrors of forcible medication based on specious expert medical testimony downplays the significant constitutional violations inherent in this process and shows again why *Sell* must be revisited.

### B. “Serious” Crimes After *Sell*

The Court in *Sell* held that for a criminal defendant to be forcibly medicated, a “serious crime” must be at issue.<sup>256</sup> However, the Court did not provide a definition of what constituted a serious crime. As one lower court noted, the Court “has not defined which crimes are ‘serious,’ nor has it outlined considerations a court

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<sup>250</sup> *Sell*, 539 U.S. at 183.

<sup>251</sup> *Riggins v. State*, 860 P.2d 705, 709 (Nev. 1993) (Springer, J., dissenting) (emphasis added).

<sup>252</sup> Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL’Y 193, 235 (2004).

<sup>253</sup> *United States v. Ghane*, 392 F.3d 317, 320 (8th Cir. 2004).

<sup>254</sup> *Id.* (emphasis omitted) (quoting *United States v. Ghane*, No. 03-00171-01-CR-W-ODS, slip op. at \*5 (D.Mo. Feb. 12, 2004)).

<sup>255</sup> *Id.*

<sup>256</sup> *Sell v. United States*, 539 U.S. 166, 179 (2003).

should take into account when determining whether the crime involved is serious.”<sup>257</sup> A month after *Sell* was decided, the government—in an effort to interpret the bounds of “serious crimes” rather loosely—attempted to forcibly medicate a defendant “charged with violating the terms and conditions of his supervised release imposed for his admitted commission of a Class A misdemeanor of Malicious Mischief—the defendant broke a glass door.”<sup>258</sup> Despite the Court’s silence on consideration of a defendant’s prior history, lower courts have unilaterally decided to factor in a defendant’s “long criminal history” in assessing the seriousness of the crime charged.<sup>259</sup> Because of the numerous unresolved issues from *Sell* that trial courts must rectify, the *Sell* ruling has resulted in *more* leniency for the government to forcibly medicate defendants, not less. These practices are in direct violation of *Sell*’s requirement that this practice occur only in “limited circumstances.”<sup>260</sup>

## VI. CONCLUSION

The *Sell* Court reached its decision in the halcyon days during which second-generation antipsychotics were seen as revolutionary breakthroughs for mental illness.<sup>261</sup> The sense of faith in antipsychotics as true saviors of the mentally ill has subsided—largely due to a consensus in the medical community of their inefficacy and danger.<sup>262</sup> These drugs were the foundation of the *Sell* ruling, which permitted the government to violate the constitutional rights of non-violent defendants who suffer from mental illness. Just as the medical field has revisited the impact of

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<sup>257</sup> *Ohio v. Hicks*, No. 2011 CR 0683, 2011 WL 9348700, \*2 (M.D.Fla. Nov. 18, 2011).

<sup>258</sup> *See United States v. Kourey*, 276 F. Supp. 2d 580, 585 (S.D.W. Va. 2003).

<sup>259</sup> *See, e.g., United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007).

<sup>260</sup> *Sell*, 539 U.S. at 169.

<sup>261</sup> Vedantam, *supra* note 47 (“‘The claims of superiority for the [newer drugs] were greatly exaggerated,’ wrote Columbia University psychiatrist Jeffrey Lieberman.”).

<sup>262</sup> *Id.*

antipsychotics, so too should the Supreme Court with its *Sell* ruling.

The Supreme Court in *Sell* simply did not go far enough in protecting the mentally ill from forcible medication. When a mentally ill defendant is not a danger to himself or anyone else, the government's only purpose in forcible medication is to secure a trial against the defendant. Simply put, this is not a sufficiently important interest to overcome the rights of a non-dangerous pre-trial detainee against forcible medication—the right to a fair trial, the right to be free from unwanted bodily intrusions, and the right to make certain fundamental, personal decisions. As the Fourth Circuit in *United States v. Charters* so succinctly stated, “[a]lthough we do not intend to downplay the importance of the Government’s obvious interest in resolving the guilt or innocence of a particular defendant, the interest does not permit such a draconian invasion of the individual’s freedom.”<sup>263</sup>

Moreover, *Sell* has not provided adequate guidance to trial courts and has led to the forcible medication of an increasing number of non-violent defendants. In the wake of *Sell*, lower courts have increasingly been relying on questionable medical expert testimony and have also been unclear as to how serious a defendant’s crime must be to allow for the possibility of forcible medication. As research has awoken the medical community to the damaging and potentially irreversible side effects of antipsychotics, as well as their ineffectiveness in achieving regained competency, it is time for *Sell* to be revisited, and the rights of mentally ill defendants to be truly protected. One can only hope that the Supreme Court is soon presented with an opportunity to revisit *Sell* and that this time the Court will do more than pay lip service to the constitutional rights of defendants suffering from mental illness.

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<sup>263</sup> U.S. v. Charters, 829 F.2d 479, 494 (4th Cir. 1987); see also *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (“[A]lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant’s interest in not being forcibly medicated with antipsychotic drugs.”).