

IN SEARCH OF A STANDARD OF REVIEW: DECISIONS TO FORCIBLY MEDICATE PRE-TRIAL DETAINEES IN LIGHT OF *RIGGINS V. NEVADA*

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I. INTRODUCTION

A young man in his senior year of high school has recently been arrested for the third time this year. He is a top student, athletic, and popular; but he appears to have trouble behaving appropriately whenever alcohol and marijuana are involved. The young man's parents have him evaluated by a counselor to determine whether there may be a potential chemical addiction lurking at the root of his problems.

During his sessions with a counselor, the young man reveals he has experimented with LSD and MDMA in addition to regular use of alcohol and marijuana. Upon referral to a psychiatrist, he tells the doctor of a strange feeling he has been experiencing lately. He can hear others talking about him, even when they are in another room. He knows when people are looking at him, even if he cannot see them. The psychiatrist cannot come up with a firm diagnosis of what exactly he is suffering from but concludes it may be some type of paranoid delusional disorder without hallucinations. He gives the young man a prescription for Risperdal¹ and schedules a follow up visit.

After taking Risperdal for several months, there is a marked change in the young man's demeanor. He appears detached and has trouble concentrating. His ability to "feel" has been numbed. He begins to feel increasingly isolated. After further discussion with the psychiatrist, who urges the young man to continue the treatment with the hope that the side effects will subside, the young man discontinues the medication. Six months later he is on a full academic scholarship at a prestigious university, attending sessions with a counselor, and exhibiting minimal signs of a paranoid delusional disorder. The young man chose an alternative method of treating his mental illness.

He was fortunate. Had he been detained on formal charges following his arrest and expressed his symptoms to the jail

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1. Risperdal is an antipsychotic medication.

psychiatrist he may have been forcibly medicated with Risperdal for any number of reasons. And the decision to forcibly administer this medicine would not have to be justified by any compelling interest of the state.

Such is the state of the law today for mentally ill pre-trial detainees. A series of unclear opinions by both the Supreme Court and the circuit courts have resulted in the application of inconsistent standards of review to the decision to forcibly medicate detainees. One case, *Riggins v. Nevada*, has been interpreted by some courts to resolve this confusion when it actually does not resolve the issue. Part II of this Comment will explore decisions prior to *Riggins* and how the Court determined that forcible medication does not violate substantive due process under all circumstances. Part III will analyze the Supreme Court's holding in *Riggins*. Part IV will examine subsequent interpretations of the holding in *Riggins* by the Second, Sixth, Eighth, and D.C. Circuits. Part V and VI will conclude that *Riggins* does not provide a standard by which to review the forced medication of pre-trial detainees, particularly those that have not been proven a danger to themselves or others, and that the decision to forcibly medicate both dangerous and non-dangerous pre-trial detainees should be reviewed under strict scrutiny in the absence of an express opinion by the Supreme Court.

II. THE ROAD TO *RIGGINS*

Several pre-*Riggins* decisions explored some of the delicate issues surrounding the fundamental rights of prisoners and detainees and the role mental illness plays in a fundamental rights analysis. In two separate decisions, the Supreme Court addressed the scope of constitutional rights of detainees in general and the right of mentally ill prisoners to be free of forced medication, respectively.² The Tenth and Fourth Circuits

2. *Bell v. Wolfish*, 441 U.S. 520 (1979), addressed the scope of constitutional rights of detainees in general. *Washington v. Harper*, 494 U.S. 210 (1990), addressed the right of prisoners to be free of forced medication.

addressed specifically the right of pre-trial detainees to be free of forced medication.³

3. *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984); *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987).

In *Bell v. Wolfish*, the Supreme Court examined the scope of the constitutional rights of pre-trial detainees.⁴ *Bell* was a class action suit filed by pre-trial detainees challenging the constitutionality of numerous confinement conditions and practices in a federally operated short-term correctional facility.⁵ Among the challenged conditions and practices were the confinement of two inmates to a single occupancy room, a rule prohibiting hardcover books, a prohibition against receiving packages from outside the institution, a requirement that pre-trial detainees not be present while routine room inspections were performed, and the practice of conducting body-cavity searches.⁶

The district court enjoined a number of the practices and conditions. Based on the government's lack of "compelling necessity,"⁷ the court of appeals affirmed the decision and the Supreme Court granted certiorari.⁸ At the outset, the Court noted that while it did "not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detention. . . [it] provides no basis for application of a compelling-necessity standard to conditions of pre-trial confinement that are not alleged to infringe *any other, more specific guarantee of the Constitution*."⁹ The Court concluded that the detainees' desire to be free from discomfort did not constitute a fundamental right.¹⁰ It then determined that the appropriate inquiry when an aspect of detention is challenged that does not implicate a fundamental right is whether the challenged practice or condition constitutes punishment of the detainee.¹¹ The Court acknowledged the state's essential goals of maintaining institutional security and preserving internal order and discipline, and recognized that these goals may require limitation of the constitutional rights of both prisoners and detainees.¹² It noted that "prison officials must be free to take

4. *Bell v. Wolfish*, 441 U.S. 520 (1979).

5. *Id.* at 523.

6. *Id.* at 521-22.

7. *Id.* at 520.

8. *Id.*

9. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (emphasis added).

10. *Id.* at 534. "[T]he detainee's desire to be free from discomfort . . . [did] not rise to the fundamental liberty interests delineated in cases such as *Roe v. Wade*."

11. *Id.* "[W]hen an aspect of pre-trial detention that is not alleged to violate any *express guarantee* of the Constitution is challenged [the issue] is the detainee's right to be free from punishment." (Emphasis added).

12. *Id.* at 546. "Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of

appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry.”¹³ Thus, any practice that alleges to infringe upon a constitutional guarantee “must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.”¹⁴ The majority held that the challenged practices and conditions did not amount to punishment of pre-trial detainees and, in light of the essential goals of the state, did not violate the Due Process Clause.¹⁵

The decision in *Bell* established that some implied constitutional rights of pre-trial detainees may be abrogated under certain circumstances. Implicit in the Court’s focus on the state’s interest in maintaining safety and security is the premise that the abrogation of rights is acceptable when there is some risk of violence or of physical harm to the detainee or others. The Court did not address whether the limitation of constitutional rights is acceptable under any circumstances other than those delineated in the decision.

In 1984 the Tenth Circuit addressed the issue of whether forced medication of a pre-trial detainee was constitutionally permissible.¹⁶ *Bee v. Greaves* involved a pre-trial detainee who was forcibly medicated with Thorazine while he was detained.¹⁷ Bee was prescribed Thorazine by the jail psychiatrist after he reported hallucinations.¹⁸ He was subsequently sent to a state psychiatric facility to determine if he was competent to stand trial.¹⁹ The psychiatrist there diagnosed Bee as a schizophrenic, prescribed him Thorazine, and determined that Bee was competent to stand trial.²⁰ Approximately one month later Bee complained that he was beginning to have problems with the Thorazine and expressed his desire to discontinue the medication.²¹ When Bee refused to continue taking Thorazine, the jail psychiatrist ordered that Bee was to be forcibly

both convicted prisoners and pre-trial detainees.”

13. *Id.* at 547.

14. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

15. *Id.* at 560-561.

16. *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984).

17. *Id.* at 1389.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Bee v. Greaves*, 744 F.2d 1387, 1389 (10th Cir. 1984).

medicated.²² Bee subsequently filed suit for damages based on his constitutional right to refuse treatment with antipsychotic medication.²³

22. *Id.* at 1389-1390.

23. *Id.* at 1391.

The court began its analysis by determining whether the right to refuse medication is encompassed in the fundamental right to personal privacy.²⁴ It noted that in *Roe v. Wade*, the Supreme Court stated that “only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy. The determination of whether a right is fundamental begins with an examination of the teachings of history [and] solid recognition of the basic values that underlie our society.”²⁵ The court then pointed out that tort law has long recognized a person's interest in making decisions regarding one's body²⁶ and determined that deciding whether to accept treatment with antipsychotic medication falls within the “category of privacy interests” protected by the Constitution.²⁷ Aside from privacy implications, the court acknowledged that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”²⁸ According to the court, the mind-altering properties of antipsychotic medication and the forced administration of such medication also necessarily implicate the First Amendment because implicit in the communication of ideas is the capacity to produce ideas.²⁹ Based on these reasons, the court determined that a pre-trial detainee possesses a liberty interest in refusing unwanted treatment with antipsychotic medication.³⁰ However, it determined that “the protected interest is not absolute” and must be “balanced against competing state interests.”³¹

The state asserted three interests it claimed outweighed Bee's liberty interest: “(1) the right and duty of the jail to treat a mentally ill detainee; (2) the jail's interest in maintaining the detainee in a competent condition to stand trial; and (3) the jail's duty to maintain security and to prevent a violent and dangerous mentally ill prisoner from injuring himself and others.”³² In

24. *Id.* at 1392.

25. *Id.* (internal quotations and citations omitted).

26. *Bee v. Greaves*, 744 F.2d 1387, 1392 (10th Cir. 1984). The court cited *Davis v. Hubbard*, 506 F.Supp. 915 (1980), for this precedent.

27. *Bee*, 744 F.2d at 1393.

28. *Id.* (citing *Youngsberg v. Romeo*, 457 U.S. 307 (1982)).

29. *Id.* at 1393-1394. “The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas.”

30. *Id.* at 1394.

31. *Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984).

32. *Id.*

addressing the state's first asserted interest, the court, citing to *Bell*, noted that "[m]edical treatment is designed to ensure that the conditions of pretrial detention do not amount to the imposition of punishment."³³ There is a duty to provide medication based on the premise that when a detainee desires medical treatment the state may not deliberately fail to provide it.³⁴ The court concluded, however, that there is no converse duty to forcibly medicate a detainee.³⁵

33. *Id.* at 1395.

34. *Id.*

35. *Id.*

Although Bee was found competent to stand trial, the court did address the second of the state's asserted interests.³⁶ The court stated

[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. With their potentially dangerous side effects, such drugs may not be administered lightly. Generally speaking, a decision to administer antipsychotics should be based on the legitimate treatment needs of the individual, in accordance with accepted medical practice. A state interest unrelated to the well being of the individual or those around him simply has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned.³⁷

The third of the state's asserted interests, to ensure protection from a violent detainee, presented a legitimate concern to the court.³⁸ However, the court determined that forced medication would not be reasonably related to the state's goals of safety and security absent an emergency.³⁹

The *Bee* decision was the first to acknowledge that pre-trial detainees possess a fundamental liberty interest to be free of unwanted medication. Unfortunately, the court did not clearly advance what level of substantive review should be applied to any decisions involving forced medication of pre-trial detainees. Further, while the court expressed that competency to stand trial would not likely support forcible medication of a detainee, the facts of the case did not require expressly resolving the issue.

36. *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984).

37. *Id.*

38. *Id.*

39. *Id.*

The Fourth Circuit addressed the issue of whether a pre-trial detainee may be forcibly medicated to restore competency in 1987.⁴⁰ Michael Charters was indicted in 1983 for making threats against the President of the United States.⁴¹ In 1984 the district court found Charters incompetent to stand trial.⁴² The decision was reviewed five times; each time the court determined that Charters was incompetent and dangerous.⁴³ It also determined that Charters was incapable of making decisions concerning his medical care.⁴⁴ In 1986 the district court decided to allow forcible medication of Charters after weighing his liberty and privacy interests against the interests of the State.⁴⁵ The basis for the district court's ruling was that the state had a duty to treat the medical needs of pre-trial detainees.⁴⁶ The central question on appeal was "under what, if any, conditions a patient in a federal treatment facility may be forcibly and unwillingly medicated with antipsychotic drugs."⁴⁷

At the beginning of its analysis, the court recognized that the Supreme Court had not decided "what Constitutional protection is afforded a mentally ill patient who refuses treatment with antipsychotic medication."⁴⁸ The court considered that antipsychotic medication could affect an individual's freedom of thought.⁴⁹ It had "little doubt that if the medical treatment at issue . . . was psychosurgery, such as lobotomy, it would be readily apparent that very significant interests concerning freedom of thought were implicated."⁵⁰ The court saw "no principled distinction between the chemical invasion of drug therapy and the mechanical invasion of surgery."⁵¹ In addition to recognizing that forcible medication implicated Charters' freedom of thought, the court felt that it also affected the right to freedom from physical invasion and the right to privacy:

The right to be free of unwanted physical invasions has been recognized as an integral part of the individual's constitutional

40. *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987).

41. *Id.* at 482.

42. *Id.*

43. *Id.*

44. *Id.* at 483.

45. *United States v. Charters*, 829 F.2d 479, 483 (4th Cir. 1987).

46. *Id.*

47. *Id.* at 484.

48. *Id.* at 487.

49. *Id.* at 489.

50. *United States v. Charters*, 829 F.2d 479, 489 (4th Cir. 1987).

51. *Id.*

freedoms, whether termed a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights.⁵²

52. *Id.* at 491.

The state asserted three interests similar to those found in *Bee*.⁵³ The court found that forced medication could not be supported by "a mere supposition that at some future time the individual may become dangerous."⁵⁴ Before the government can justify forced medication, the threat to safety and security "must be manifest" and the detainee must present an "immediate threat of violence that cannot be avoided through the use of less restrictive alternatives."⁵⁵

The court was convinced that competence to stand trial was not a strong reason to forcibly medicate.⁵⁶ This was based in part on the fact that there was no certainty that Charters would become competent if treated with antipsychotic medication.⁵⁷ In light of the potential severe and permanent side effects of antipsychotic medication, the court felt "the mere possibility . . . that the government might realize its desire to try Charters can be given little weight against the countervailing considerations."⁵⁸ It also deemed questionable whether the government's interest in having a fair trial would be served by placing a heavily medicated defendant before a jury since it could potentially create a false impression of the defendant's mental state at the time of the crime.⁵⁹ The court distinguished legal competency (competency to stand trial) from medical competency (competency to make decisions concerning one's own medical care) and determined that if Charters was found medically competent he could not be

53. *Id.* at 492. ("First, the government claims that it has an interest in preventing violence. Second, the government claims an interest in maintaining the competence of an individual to stand trial. Finally, the government asserts a *parens patriae* interest in protecting the health and well-being of its citizens.")

54. *Id.* at 493 (emphasis added).

55. *Id.*

56. *United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1987).

57. *Id.*

58. *Id.*

59. *Id.* at 493-494.

forcibly medicated.⁶⁰ If he were found medically incompetent, then the court “should determine whether there is clear and convincing evidence of what Charters would do if he were competent[, and i]f a substituted judgment cannot be made, the court should order forcible medication only upon finding that it is in Charter’s best interests.”⁶¹

60. *Id.* at 495.

61. *United States v. Charters*, 829 F.2d 479, 500 (4th Cir. 1987).

The *Charters* decision reflected an acknowledgement that mentally ill detainees do not lose constitutional rights by virtue of their mental illness or incompetence to stand trial. The court recognized that mentally ill detainees are often forcibly medicated to maintain order in detention centers and to facilitate adjudication of guilt or innocence, often without appropriately considering the detainee's liberty interests and less invasive alternatives.⁶² While the court adopted "substituted judgment" and "best interest" rules for determining if forcible medication is appropriate, it did not define what standard of review should be employed when a decision to forcibly medicate is challenged.

In 1990 the Supreme Court determined that the Due Process Clause permits the state to forcibly medicate a prison inmate who has a serious mental illness and is a danger to himself and others.⁶³ Walter Harper was a prisoner who had a history of violent behavior.⁶⁴ From 1976 to 1980, Harper was incarcerated for robbery and was voluntarily medicated with several antipsychotic drugs including Trialafon, Haldol, Prolixin, Taractan, Loxitane, Mellaril, and Navane.⁶⁵ After being paroled in 1980, Harper assaulted two nurses and returned to prison.⁶⁶ Upon his return to prison, Harper was diagnosed with manic depression and initially voluntarily took medication.⁶⁷ In 1982, Harper

62. *Id.* at 499. "Antipsychotic medication is sometimes used as an instrument of maintaining institutional control. [It] may ease institutional budgets by making it easier to manage the patient population and allowing the institution to employ a smaller staff...Administrators may thus be caught between the desire to save maintain control and save money, and the desire to provide appropriate treatment for the patient, including respecting his constitutional rights."

63. *Washington v. Harper*, 494 U.S. 210 (1990).

64. *Id.* at 214.

65. *Id.* at n.1.

66. *Id.*

67. *Id.*

refused to continue taking the prescribed medication.⁶⁸ Harper was then forcibly medicated and in 1985 he filed suit seeking damages and declaratory and injunctive relief.⁶⁹ The Washington Supreme Court held that the state could forcibly administer antipsychotic medication to a competent inmate if the state proved by “clear, cogent, and convincing evidence that the administration of antipsychotic medication was both necessary and effective for furthering a compelling state interest.”⁷⁰ The Supreme Court granted certiorari.

68. *Washington v. Harper*, 494 U.S. 210, 214 (1990).

69. *Id.* at 217.

70. *Id.* at 218 (internal quotations and citations omitted).

The issue before the Court was “what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will.”⁷¹ At the outset the Court recognized that Harper possessed a “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”⁷²

This is because the forcible injection of medication into a nonconsenting person’s body substantially interferes with that person’s liberty.⁷³ Based on the Court’s decision in *Turner v. Safley*, it determined that the proper standard of review was to ask whether the regulation is reasonably related to a legitimate penological interest, even if the regulation infringes upon a fundamental constitutional right.⁷⁴ In deciding that the policy used to forcibly medicate Harper was indeed rational, the Court highlighted “[i]ts exclusive application . . . to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others.”⁷⁵

Justices Stevens, Brennan, and Marshall dissented from the majority’s holding.⁷⁶ In their view, the majority undervalued Harper’s liberty interest.⁷⁷ Avoiding forcible administration of antipsychotic medication implicated both physical and intellectual dimensions of Harper’s liberty interest.⁷⁸ In the dissent’s view,

[e]very violation of a person’s bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death And when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense.⁷⁹

The dissent felt that “[a] rule that allows prison administrators to address potential security risks by forcing psychotropic drugs on mentally ill inmates for prolonged periods is unquestionably an ‘exaggerated response’” to the state’s ongoing interests in

71. *Id.* at 220.

72. *Id.* at 221-22.

73. *Washington v. Harper*, 494 U.S. 210, 222 (1990).

74. *Id.* at 223.

75. *Id.* at 226.

76. *Id.* at 237.

77. *Id.*

78. *Washington v. Harper*, 494 U.S. 210, 237 (1990).

79. *Id.* at 237-238.

security and management, rather than restricting its use to emergency situations.⁸⁰ The dissent concluded that a competent individual's right to refuse treatment with antipsychotic medication requires the highest order of protection under the Fourteenth Amendment.⁸¹

While the *Harper* decision is cited to several times by the Court in *Riggins v. Nevada*, it did not appear to provide the majority with much guidance. The decision clearly established that forcible medication does not violate substantive due process, but the case involved a violent, mentally ill prisoner. The majority rightfully reviewed the decision to forcibly medicate under the rational basis test, but the holding has no practical application in determining what standard should be used to review forcible medication of pre-trial detainees.

After the decision in *Harper*, there were still several issues regarding the rights of pre-trial detainees to avoid forcible medication that had not been addressed. While the Court in *Bell* established that the constitutional rights of pre-trial detainees may be abrogated under certain circumstances, the rights claimed to have been infringed were not fundamental for purposes of a substantive due process analysis. While the dicta alluded to a strict scrutiny analysis for certain infringements, it was not necessary for the Court to decide what standard of review should be employed when a pre-trial detainee asserts that a fundamental right has been violated. The court in *Bee* determined that pre-trial detainees do possess a liberty interest in being free from forcible medication, but did not articulate a standard of review to be used when such decisions are challenged. The *Bee* court did not reach the issue of whether forcible medication was appropriate to render a pre-trial detainee competent to stand trial.

While the *Charters* court came the closest to developing a standard of review to be applied when decisions to forcibly medicate are challenged, the case involved a violent pre-trial detainee and held that a finding of medical incompetence would not justify forcible medication.

These cases simply did not answer many significant questions. May non-violent pre-trial detainees be forcibly medicated to restore competency, and if so, what standard should be utilized to

80. *Id.* at 246.

81. *Id.* at 258.

review such decisions? Is a state's interest in maintaining safety and preventing violence more significant than that in bringing a non-violent pre-trial detainee to trial, in terms of providing justification for forcible medication? What role, if any, does the presumption of innocence afforded to detainees factor into the decision to abrogate a detainee's fundamental rights? In 1992, the Supreme Court would be presented with a case that implicated these issues.

III. SETTING THE STANDARD FOR FORCED MEDICATION OF DETAINEES? *RIGGINS V. NEVADA*

In 1987, David Riggins was arrested for murder and robbery.⁸²

A few days after being taken into custody, Riggins complained of insomnia and of hearing voices in his head.⁸³ Riggins was voluntarily treated with Mellaril, an antipsychotic drug.⁸⁴ At a hearing in the district court, Riggins was found competent to stand trial.⁸⁵ He then moved to suspend the administration of Mellaril for the duration of the trial.⁸⁶ Riggins argued that the use of the Mellaril infringed upon his freedom, that its effect on his demeanor and mental state during trial would deny him due process, and that he had the right to show jurors his true mental state since he was offering an insanity defense.⁸⁷ The district court held an evidentiary hearing on Riggins' motion, where two psychiatrists testified that suspension of Mellaril would not noticeably alter his behavior and that he would likely be competent to stand trial without the use of Mellaril.⁸⁸ His motion was denied, based in part on a written report by another psychiatrist that without Mellaril, Riggins "would most likely regress to a manifest psychosis and become extremely difficult to

82. *Riggins v. Nevada*, 504 U.S. 127, 129 (1992).

83. *Id.*

84. *Id.* Common side effects of Mellaril include dry mouth, blurred vision, constipation, difficulty urinating, sedation, dizziness and low blood pressure. Possible side effects include continuous jerky or involuntary movements, especially of the face, lips, jaw and tongue, tremor of head and limbs, muscle rigidity, lack of facial expression, slow, inflexible movements and pacing or restlessness. Prolonged use may lead to tardive dyskinesia, the involuntary movement of jaws, lips, and tongue (chewing).

85. *Id.* at 130.

86. *Id.*

87. *Riggins v. Nevada*, 504 U.S. 127, 130 (1992).

88. *Id.*

manage.”⁸⁹ Riggins was subsequently sentenced to death at the close of the trial.⁹⁰

The Supreme Court granted certiorari to decide “whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments.”⁹¹ The Court began its analysis by citing to its decision in *Harper*, which established 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.”⁹² *Harper* established that forcible medication of a prisoner “is impermissible absent a finding of overriding justification and a determination of medical appropriateness.”⁹³ Because pre-trial detainees retain as least those constitutional rights possessed by convicted prisoners,⁹⁴ the State had an obligation to establish the need for and the medical appropriateness of Mellaril.⁹⁵

89. *Id.* at 131 (citation omitted).

90. *Id.*

91. *Id.* at 132-33.

92. *Riggins v. Nevada*, 504 U.S. 127, 134-5 (1992) (citing *Washington*, 494 U.S. at 227) (emphasis added).

93. *Id.*

94. See *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (“[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners”).

95. *Riggins*, 504 U.S. at 135.

The Court reversed Riggins's conviction because the district court allowed administration of Mellaril to continue without making any determination of the need for or any findings about reasonable alternatives to forced medication.⁹⁶ The Court did not clearly set forth a standard of review for forced medication, but instead stated that "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others."⁹⁷ The Court also suggested that "the State *might* have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means."⁹⁸ The Court then briefly discussed the issue of a defendant's competence to stand trial but clearly stated that it was not addressing "whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial."⁹⁹

Several jurisdictions have interpreted the holding in *Riggins* to apply a "heightened scrutiny" standard to forced medication of pre-trial detainees to restore competency before trial.¹⁰⁰ Some of these jurisdictions have relied on a statement of the Court that it was not "adopt[ing] a standard of strict scrutiny" in reviewing Nevada's decision to forcibly medicate Riggins.¹⁰¹ This interpretation is tenuous at best; particularly in light of the fact that the Court "[had] no occasion to prescribe . . . substantive standards" because Nevada presented no support for its decision to forcibly medicate Riggins.¹⁰² Additionally, while *Riggins* involved a violent pre-trial detainee, these jurisdictions have extended this "heightened scrutiny" standard to apply to forced medication of non-violent pre-trial detainees.

96. *Id.* at 136.

97. *Id.* at 135.

98. *Id.* (emphasis added).

99. *Id.* at 136.

100. See *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003); *United States v. Gomes*, 289 F.3d 71 (2d Cir. 2002), *vacated by* 123 S. Ct. 2605 (2003); *United States v. Weston*, 206 F.3d 9 (D.C. Cir. 2000).

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

102. *Id.*

IV. SUBSEQUENT INTERPRETATIONS OF *RIGGINS V. NEVADA*A. *The Sixth Circuit: United States v. Brandon*

In 1996, Ralph Brandon was indicted on the charge of sending threatening communication through the mail.¹⁰³ A forensic psychologist diagnosed Brandon as a paranoid schizophrenic and concluded he was unable to understand the nature and consequences of the proceedings against him and would be unable to assist in his own defense.¹⁰⁴ Based on the psychiatric report and agreement of counsel, the district court determined that Brandon was not competent to stand trial.¹⁰⁵ After a civil commitment hearing, Brandon was committed to a hospital where it was recommended that he be given antipsychotic medication.¹⁰⁶ Brandon immediately moved for a hearing to determine if the hospital could force him to take antipsychotic medication.¹⁰⁷

On appeal, the Sixth Circuit addressed the issue of “whether the Due Process clause of the Fifth Amendment requires a judicial hearing to determine whether a non-dangerous pretrial detainee can be forcibly medicated in order to render him competent to stand trial.”¹⁰⁸ The court began its analysis with the recognition that “the presumption of innocence afforded pretrial detainees does not immunize them from reasonable restraints related to their confinement.”¹⁰⁹ The court then determined that the decision in *Riggins* did not prescribe substantive standards by which to review the decision to forcibly medicate pre-trial

103. *United States v. Brandon*, 158 F.3d 947, 949-50 (6th Cir. 1998).

104. *Id.* at 950.

105. *Id.*

106. *Id.*

107. *Id.*

108. *United States v. Brandon*, 158 F.3d 947, 950 (6th Cir. 1998).

109. *Id.* at 951. The court cited *Bell* for this precedent.

detainees to restore competency.¹¹⁰ It did not find the Supreme Court's opinion in *Riggins* "determinative as to the appropriate standard of review to apply" since the majority "alluded to a strict-scrutiny approach" but clearly expressed it was not setting out any substantive standard of review.¹¹¹

110. *Id.* at 952.

111. *Id.* at 957.

The court recognized that a decision to forcibly medicate Brandon implicated several of his fundamental rights.¹¹² The court determined that Brandon had a First Amendment interest in avoiding forced medication, since the effects of the antipsychotic drugs could interfere with his ability to communicate ideas.¹¹³ Since the chemical balance in the brain is altered by the administration of antipsychotic drugs, often producing bizarre, uncontrollable, and irreversible side effects, forced medication implicated Brandon's Fifth Amendment liberty interest in being free from bodily intrusion.¹¹⁴ Finally, the court found that Brandon's Sixth Amendment right to a fair trial was involved because administration of the medication could "creat[e] a prejudicial negative demeanor in the defendant—making him look nervous and restless . . . or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive."¹¹⁵ Another concern addressed by the court was that "the medication may also impinge on a defendant's right to effective assistance of counsel by rendering him unable or unwilling to assist in the preparation of his own defense."¹¹⁶ While the court concluded the government had a substantial interest in bringing Brandon to trial, it reasoned that

the decision in the present case is whether to medicate a non-dangerous pretrial detainee in order to render him competent to stand trial, rather than to protect his safety or the safety of those around him while he is confined. The decision to be made here thus relates solely to *trial* administration rather than to *prison* administration. To forcibly medicate Brandon, therefore, the government must satisfy strict-scrutiny review and demonstrate that its proposed approach is narrowly tailored to a compelling interest.¹¹⁷

The court concluded that its decision to use strict scrutiny as the standard of review did not conflict with the rational basis review employed in *Harper*, since *Harper* involved forced medication in support of a legitimate penological interest.¹¹⁸

112. *Id.* at 953.

113. *United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998).

114. *Id.* at 953-54.

115. *Id.* at 954 (citation omitted).

116. *Id.*

117. *Id.* at 957.

118. *United States v. Brandon*, 158 F.3d 947, 961 (6th Cir. 1998).

B. The D.C. Circuit: United States v. Weston

Eugene Weston was indicted in 1998 for the murder of two federal police officers and the attempted murder of a third officer.¹¹⁹ He was diagnosed as a paranoid schizophrenic and a commitment hearing was conducted.¹²⁰ Following a determination that Weston was “dangerous to others, and potentially to [him]self, gravely disabled, and incompetent for trial,” the district court authorized forced medication to restore his competency.¹²¹ Weston claimed that forced medication would infringe upon his Sixth Amendment right to a fair trial and asserted that the Supreme Court’s holding in *Riggins* required that the decision to forcibly medicate him be reviewed under strict scrutiny.¹²²

119. *United States v. Weston*, 206 F.3d 9, 11 (D.C. Cir. 2000).

120. *Id.*

121. *Id.* at 12.

122. *Id.*

On appeal, the D.C. Circuit noted that “the *Riggins* Court recognized that decisions affecting a detainee’s trial rights may warrant closer scrutiny than those made for inmates who have already been tried and convicted.”¹²³ It acknowledged that the *Riggins* court made no mention of the applicable procedural standard for forcibly medicating detainees, nor did it prescribe a substantive standard of review for such decisions.¹²⁴ The court reasoned that because “trial competency and Sixth Amendment issues are legal rather than medical or penological issues” and because the record failed to support a finding that forced medication of Weston was medically appropriate and essential to safety that the case should be remanded to the district court.¹²⁵ The court ultimately declined to decide the issue of what standard of review is appropriate in reviewing involuntary medication of pre-trial detainees.¹²⁶

C. *The Second Circuit: United States v. Gomes*

123. *Id.*

124. *United States v. Weston*, 206 F.3d 9, 12 (D.C. Cir. 2000).

125. *Id.* at 14.

126. *Id.* at 12.

Aaron Gomes was indicted in 1998 on one count of felony possession of a firearm.¹²⁷ A forensic psychologist offered testimony on behalf of the government that Gomes suffered from an “undefined ‘psychotic disorder’” characterized by delusions of conspiracies and a lack of understanding of the proceedings pending against him.¹²⁸ According to the psychologist, “Gomes’s persecutory delusions rendered him unable to assist in his own defense because his efforts would be directed toward uncovering the supposed ‘conspiracy’ [against him] rather than defending against the actual charges.”¹²⁹ The district court determined that Gomes was not competent to stand trial and the government requested he be forcibly medicated to restore him to competency to stand trial.¹³⁰ Gomes argued that involuntary medication was not warranted unless it was proven he posed a danger to himself or others.¹³¹ The district court held that “it could order the involuntary medication of a non-dangerous defendant, but that the government must first show that the involuntary medication is necessary to accomplish an essential government interest.”¹³²

On appeal the Second Circuit was faced with the issue of determining the appropriate standard under which medication may be ordered to render a non-dangerous pre-trial detainee competent to stand trial.¹³³ The court acknowledged that “the Supreme Court has yet to articulate a standard for determining when a non-dangerous criminal defendant may be involuntarily medicated to render him competent to stand trial.”¹³⁴ However, the court then determined that *Riggins* “‘suggest[ed] that the governmental interest in restoring a pretrial detainee’s competence to stand trial could override his liberty interest,’ and that ‘the opinion’s language suggests some form of heightened scrutiny.’”¹³⁵ Upon this “suggestion,” the court determined that to justify forced medication of non-violent pre-trial detainees

127. *United States v. Gomes*, 289 F.3d 71, 75-76 (2d Cir. 2002), *vacated by* 123 S. Ct. 2605 (2003).

128. *Id.* at 76.

129. *Id.* at 77.

130. *Id.*

131. *Id.*

132. *United States v. Gomes*, 289 F.3d 71, 78 (2d Cir. 2002) (internal quotation and citation omitted), *vacated by* 123 S. Ct. 2605 (2003).

133. *Id.* at 78-9.

134. *Id.* at 79.

135. *Id.* at 82 (citing *Weston*, 255 F.3d at 79-80; *United States v. Sell*, 282 F.3d 560, 566-7 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003)).

the government must show, and the district court must explicitly find, by clear and convincing evidence (1) that the proposed treatment is medically appropriate, (2) that it is necessary to restore the defendant to trial competence, (3) that the defendant can be fairly tried while under medication, and (4) that trying the defendant will serve an essential government interest.¹³⁶

The court could have reviewed forced medication under a strict scrutiny standard, but declined to do so because “a strict scrutiny standard, such as that adopted by the Sixth Circuit, is unduly restrictive because strict scrutiny has come to be considered ‘fatal in fact.’”¹³⁷ Although the court acknowledged the *Brandon* court's concerns about the important interests of the defendant, it could not accept the proposition that involuntary medication should be limited to defendants who are prosecuted for only extremely violent crimes.¹³⁸

D. The Eighth Circuit: United States v. Sell

In 1996, Eugene Sell was charged with fifty-six counts of mail fraud, six counts of Medicaid fraud and one count of money laundering.¹³⁹ Sell had a history of mental illness and was diagnosed as having a “delusional disorder.”¹⁴⁰ The district court determined that Sell was incompetent to stand trial.¹⁴¹ In a subsequent hearing, the district court found that Sell did not pose a danger to himself or others but ordered that he could be forcibly medicated to restore his competency so he could stand trial.¹⁴²

On appeal, the Eighth Circuit agreed that Sell did not pose a danger to himself or others.¹⁴³ In its analysis of whether a pre-trial detainee may be forcibly medicated to restore competency, the court began by noting that in *Riggins* “[t]he Supreme Court did not have the opportunity to determine when involuntary medication could be used on a pre-trial detainee because the

136. *Id.*

137. *United States v. Gomes*, 289 F.3d 71, 82 (2d Cir. 2002) (citation omitted), *vacated by* 123 S. Ct. 2605 (2003).

138. *Id.*

139. *United States v. Sell*, 282 F.3d 560, 563 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003).

140. *Id.*

141. *Id.*

142. *Id.* at 565.

143. *Id.*

Nevada court offered the accused almost no protection against involuntary medication."¹⁴⁴ Based on the dicta in *Riggins* and in *Harper*, the court determined that the government may forcibly administer medication in order to render a detainee competent to stand trial.¹⁴⁵

Sell urged the court to adopt a strict scrutiny standard to review the district court's decision.¹⁴⁶ However, the court stated that the Supreme Court declined to adopt strict scrutiny in *Riggins* and instead held that to forcibly medicate an individual,

[f]irst, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication; [s]econd, the government must prove that there is no less intrusive way of fulfilling its essential interest; [and t]hird, the government must prove by clear and convincing evidence that the medication is medically appropriate.¹⁴⁷

144. *United States v. Sell*, 282 F.3d 560, 566 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003).

145. *Id.*

146. *Id.* at 567 (citations omitted).

147. *Id.*

This test, according to the court, was a form of “heightened scrutiny” like the test adopted by the D.C. Circuit in *Weston*.¹⁴⁸ The court went on to state that medication is medically appropriate when “ (1) it is likely to render the patient competent; (2) the likelihood and gravity of side effects do not overwhelm its benefits; and (3) it is in the best medical interests of the patient.”¹⁴⁹ After reviewing the record under this standard, the majority determined that Sell could be forcibly medicated to stand trial but expressed that its holding was limited.¹⁵⁰ It did not believe the standard would be met in all situations where the government wishes to restore competence.¹⁵¹ Further, the court noted that “an entirely different case is presented when the government wishes to medicate a prisoner in order to render him competent for execution.”¹⁵²

In his dissent, Judge Bye, proposed that the correct standard to adopt was strict scrutiny, as the Sixth Circuit did in *Brandon*.¹⁵³ According to Judge Bye, the charges against Dr. Sell were not serious enough to justify forcibly medicating him “on the chance” his competency would be restored.¹⁵⁴ His dissent focused on the government’s interest in prosecuting less serious crimes and proposed that

Weston and *Brandon* teach us that the forcible administration of antipsychotic medication may be warranted when the government seeks to prosecute incontestably serious crimes, but not when it seeks to prosecute crimes less so. Cases involving crimes of intermediate severity may present vexing questions, but Dr. Sell’s case poses no such challenge. The crimes with which he has been charged are comparable to those in *Brandon* and thoroughly distinct from those in *Weston*.

Dr. Sell is charged with making false representations in connection with the payment of health care services . . . and

148. *Id.* at n.7. That the court interpreted *Weston* as requiring the use of heightened scrutiny seems odd in light of the fact that the *Weston* court recognized that the Supreme Court did not set forth substantive standards in *Riggins* and expressed that “likewise [it] need not decide the issue at this point, given the lack of support for the district court’s medical/safety determination.” *Weston*, 206 F.3d at 12-13. Rather, the *Weston* court remanded the case to the district court, preferring to wait for its findings using the “guidance that *Riggins* provides”. *Id.* at 13.

149. *United States v. Sell*, 282 F.3d 560, 567 (8th Cir. 2002) (citations omitted), *vacated by* 123 S. Ct. 2174 (2003).

150. *Id.* at 571.

151. *Id.*

152. *Id.*

153. *Id.* at 572.

154. *United States v. Sell*, 282 F.3d 560, 572 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003).

money laundering The maximum penalty for these charges is five and ten years imprisonment, respectively. He cannot be put to death nor imprisoned for life if convicted of these crimes, as was the case in *Weston*. He is charged with crimes which are far less serious than the violent, heinous and deadly crimes with which Weston was charged. Indeed, they are nonviolent and purely economic.¹⁵⁵

155. *Id.* at 573.

He went on to determine that Sell should not be forcibly medicated since the state's interest in forcibly medicating an accused murderer may be essential, but its interest in forcibly medicating an accused thief could not be.¹⁵⁶ As such, the government failed the first prong of the three-part test articulated by the majority.¹⁵⁷

Judge Bye was convinced that the government's interest in forcing Sell to stand trial on charges that may result in limited punishment did not outweigh his substantial rights under the First, Fifth, and Sixth Amendments.¹⁵⁸ In his view, charges of fraud and money laundering were not "serious enough to warrant the forced medication of the defendant, who, we must not forget, is a non-dangerous pre-trial detainee cloaked with the presumption of innocence."¹⁵⁹

V. DEFINING THE APPLICABLE STANDARD OF REVIEW TO DECISIONS TO FORCIBLY MEDICATE DETAINEES

The application of the "heightened scrutiny" standard to decisions to forcibly medicate pre-trial detainees is inappropriate and weakly supported by existing case law. The standard is not supported by *Riggins* because the Court clearly expressed that it was not setting forth a substantive standard to review such decisions, whether they involve violent or non-violent pre-trial detainees. Using heightened scrutiny to evaluate involuntary medication of non-violent detainees receives even less support from *Riggins* because the Court did not address the issue of whether forcible medication is appropriate to restore competency for trial. Additionally, the application of the heightened scrutiny standard is completely unrelated to the decision in *Harper*. The appropriate standard of review to apply to forcible medication of detainees, both non-violent and violent, is strict scrutiny as the Sixth Circuit correctly held in *Brandon*. This standard is directly

156. *Id.* at 574.

157. *Id.*

158. *Id.*

159. *United States v. Sell*, 282 F.3d 560, 574 (8th Cir. 2002), *vacated by* 123 S. Ct. 2174 (2003).

supported by the language in *Bell* wherein the focus was the scope of constitutional rights of detainees. Because neither *Riggins* nor *Harper* provides a basis for heightened scrutiny, courts should look to the language in *Bell* and apply a traditional fundamental rights analysis to the decision to involuntarily medicate detainees.

The *Bell* court expressed that the Due Process Clause provides no basis for an application of compelling necessity to conditions of pre-trial confinement that do not infringe upon specific guarantees of the Constitution. Conversely, the clause supports the application of a compelling necessity standard to conditions that infringe upon fundamental liberty interests. It is clearly established that the right to privacy is fundamental and encompasses the right to be free from bodily intrusion. The courts have acknowledged through both tort and constitutional law that medical treatments and procedures administered without consent constitute bodily intrusion. In the absence of an express holding to the contrary by the Supreme Court, this line of reasoning provides the basis for applying strict scrutiny to the forcible medication of detainees.

The analysis of the violent detainee is less complex than that of the non-violent detainee. Forcible medication of this detainee can be justified by the state's paramount interest in maintaining the safety of its employees, other detainees, and the mentally ill detainee himself. There is not likely a more compelling interest the state could possess. While the decision to medicate under these circumstances will infringe upon a fundamental right, strict scrutiny will not prove "fatal in fact" if no less intrusive alternatives are available. While one could possibly argue that less intrusive alternatives, such as restraints, will always be available, there will almost certainly be cases, particularly those involving detainees that consistently demonstrate violent behavior, in which these alternatives do not achieve the state's goal of maintaining safety.

Forcible medication of non-violent detainees to restore competency presents more vexing questions. While the state's interest in bringing a competent detainee to trial is certainly an important or even significant goal, it most assuredly does not possess the compelling nature that protecting individuals from serious physical harm does. The goal of restoring competency simply does not contain the element of urgency associated with preventing an immediate, violent threat. Since more time is available for the state to meet its goal of restoring competency

there are likely several less intrusive alternatives available. One alternative, advocated by Judge Bye, is the commitment of the detainee to an appropriate facility until the detainee voluntarily agrees to take antipsychotic medication. Those who oppose this strategy may envision years of a mentally ill detainee refusing to take medication while rapidly deteriorating into a gravely disabled individual. What is likely to occur under these circumstances is that at some point the detainee will exhibit some risk of physical harm to himself or others that would then support forcible medication under a strict scrutiny analysis.

On the other hand, it must be acknowledged that both ethical and medical considerations weigh heavily against the decision not to forcibly medicate an individual who is deteriorating into a gravely mentally ill state. These considerations are particularly relevant in light of the advances made in the treatment of mental illness with antipsychotic medication. Thus for purposes of a legal analysis the Supreme Court has an obligation to clarify its position on the standard of review to be applied to involuntary medications of mentally ill detainees. One possible approach would be to adopt the *Charters* distinction and hold that only medically incompetent detainees may be forcibly medicated. In this analysis the deterioration into a severe mentally ill state resulting from the refusal to accept treatment may constitute an unacceptable risk of physical harm to the detainee that may justify involuntary medication.

Another difficult issue that must be addressed when evaluating the plight of the non-violent detainee is competency itself. If a detainee is capable of articulating concerns such as potential inability to participate in his own defense, the potential bias that could result from an altered demeanor caused by antipsychotic medication, and the inability to adequately communicate, one must ask whether this individual is truly incapable of understanding the nature of the charges against him or of the proceedings in which he is involved. The foregoing description provides tenuous support for a detainee so mentally disabled that he is incompetent to stand trial.

The application of strict scrutiny may indeed prove "fatal in fact" to decisions to medicate non-violent detainees simply to restore competency. Perhaps this is so because there is no adequate justification for such decisions. As aptly noted by the *Bee* court, the need of the *individual*, as opposed to the state, is paramount where involuntary medication is concerned. The right to be free

of bodily intrusion is fundamental. It is not simply the “right to be comfortable”, rather, it is the right to bodily autonomy, the right to control one’s thoughts and speech, the right to freely decide whether to accept medical treatment with unpredictable and potentially permanent side effects. It is a liberty that should be afforded the highest level of consideration, and should not be tossed aside for the sake of convenience and efficiency. It should not be affected because the individual who possesses it has a mental illness. Based on these considerations, it appears that restoring legal competency should not justify forcible medication absent a careful analysis and an express holding by the Supreme Court that it constitutes a compelling state interest.

Because of the inconsistency and lack of clarity evident in the various decisions involving forced medication, the courts have differed in what factors should be considered in a review of involuntary medication and what policy considerations justify such decisions. The presumption of innocence afforded to detainees as well as the nature of the crime the detainee has been charged with are two factors that have been mentioned. Use of these factors implies that the decision to forcibly medicate somehow incorporates an element of punishment, which is not only untrue but also unacceptable in light of the fact that a detainee has not been adjudicated guilty. However, if the decision to forcibly medicate a detainee turns on the presentation of the state’s compelling interest in preventing physical harm to the detainee or others the need to evaluate such factors becomes non-existent.

VI. CONCLUSION

The Supreme Court has never expressed what standard of review is applicable when a decision to forcibly medicate a detainee is challenged. The decision in *Riggins* did not set forth a substantive standard and the application of a heightened scrutiny standard is erroneous in light of the highly persuasive dicta in *Bell*. The *Bell* dicta as well as our historical recognition of the fundamental right to be free of forced medication requires that strict scrutiny be applied to decisions to involuntarily medicate detainees. Applying strict scrutiny will likely cause decisions to medicate to be overturned unless the state presents the compelling interest of preventing physical harm to the detainee or others. There is no express holding by the Supreme Court that grave mental disability constitutes a risk of physical harm or that

restoring competency for trial is a compelling state interest, thus, forcibly medicating non-violent detainees cannot be upheld under the Due Process Clause at this time. The conflicting and inconsistent approaches to reviewing forcible medication of detainees and the fundamental liberty interests at stake command that the Supreme Court clarify its position on this issue.

*Note: Since the publication of this article, the Supreme Court granted certiorari in *U.S. v. Sell*.¹⁶⁰ The issue before the court was “whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.”¹⁶¹ The court held that such forcible medication is permissible, “but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial related interests.”¹⁶² The Court appears to emphasize that the standard is to apply to situations in which the state seeks to render a defendant competent to stand trial.¹⁶³ Thus, it is not clear whether a court would have to apply this analysis if the state were justifying forced medication based on alternative grounds, *i.e.*, the detainee is a danger to himself or others or will deteriorate into a gravely disabled state without medication.¹⁶⁴ The Court acknowledged that instances where restoring competency justifies forced medication “may be rare” and recommends that states look for alternative grounds to justify forced medication.¹⁶⁵ The problem which presents itself with such an approach is twofold. First, the *Sell* opinion does not clearly provide a framework for constitutional analysis of forced medication based on dangerousness or grave mental disability. While almost every state has statutes governing the care of mentally incompetent individuals, if a detainee were to challenge a decision to forcibly medicate that was based on statutory authority, it is unclear how

160. *United States v. Sell*, 123 S.Ct. 2174 (2003).

161. *Id.* at 2179.

162. *Id.* at 2184.

163. *Id.* at 2185.

164. *Id.*

165. *Id.*

the constitutional ramifications of such a decision should be analyzed. Second, because forcible medication based on these alternative grounds is solely the province of the states, a state could medicate a detainee to restore trial competency by asserting the presence of one of these alternative reasons, thereby avoiding the stringent analysis set forth in the opinion. While the holding in *Sell* has answered several important questions, it appears that mentally ill detainees may now have even less constitutional protection from decisions to forcibly medicate while states may have found a loophole to avoid clearly defined constitutional scrutiny.