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CURIOUSER AND CURIOUSER: INVOLUNTARY MEDICATIONS AND INCOMPETENT CRIMINAL DEFENDANTS AFTER *SELL V. UNITED STATES*

Dora W. Klein*

INTRODUCTION

In constitutional law, the gold standard of individual liberties is the specific pronouncements found in the Bill of Rights,¹ the first ten amendments adopted to protect against abuses of power by government officials.² While all of us benefit from the balance of power that these protections ensure, many of the amendments' limits on governmental overreaching are particularly important to those of us the government suspects of committing a crime. The Fifth Amendment, for example, provides for indictment by a grand jury, and prohibits the government from holding

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¹ For example, courts are especially careful to protect enumerated rights from unjustified government infringement. *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("Much of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard. . . . [F]reedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."); *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (proposing a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments"). Also, courts generally presume that the rights listed in the first eight amendments apply to the states through the Fourteenth Amendment. *See* Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 971 (2002) ("Enumeration in the Bill of Rights creates a rebuttable presumption that a right applies against the states, and lack of enumeration creates a rebuttable presumption against recognizing a proposed right against state or federal action.").

² *See* *Weems v. United States*, 217 U.S. 349, 372 (1910) (noting that the "predominant political impulse" of proponents of the Bill of Rights "was distrust of power, and they insisted on constitutional limitations against its abuse"); *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 249 (1833) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended."); *see also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1220 n.633 (2001) ("The procedural protections in the Bill of Rights are grounded in significant part in concerns about abuse of power.").

a person in jeopardy twice for the same offense, from compelling a defendant to testify against himself, and from depriving anyone of life, liberty, or property without due process.³ The Sixth Amendment guarantees a criminal defendant a lengthy list of trial rights, from the right to a speedy trial to the right to assistance of counsel.⁴ And the Eighth Amendment prohibits excessive bail, along with cruel and unusual punishments.⁵

In addition to these specific rights, the Supreme Court has read the Sixth Amendment to include a right to be present to defend against the government's charges.⁶ This right means not only that the defendant must be given the opportunity to be physically present, but also that he must possess the mental ability both to understand the charges against him and to consult with his lawyer in preparing a defense.⁷ A defendant who lacks this mental ability is incompetent to stand trial.⁸

Some defendants are incompetent to stand trial because of disorders that are essentially untreatable, such as mental retardation; these defendants are unlikely ever to become competent. Other defendants, who are incompetent because of a treatable mental illness such as schizophrenia, might become competent if they receive

³ U.S. CONST. amend. V.

⁴ The Sixth Amendment provides that:

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

U.S. CONST. amend. VI.

⁵ U.S. CONST. amend. VIII.

⁶ See *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934).

⁷ The Due Process Clause prohibits the conviction of a defendant who is incompetent to stand trial. See *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (“The State concedes that the conviction of an accused person while he is legally incompetent violates due process, and that state procedures must be adequate to protect this right.” (citing *Bishop v. United States*, 350 U.S. 961 (1956))). The test for competence to stand trial is whether a 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.” *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁸ The law recognizes various kinds of competence, from competence to consent to medical treatment, to competence to make a will. As used in this Article, the term “competence” only refers to competence to stand trial, unless otherwise indicated. See *supra* note 7 (discussing test for competence to stand trial). An additional note on terminology: this Article refers to the government’s interest in *rendering* a defendant competent to stand trial. Some cases refer to the interest as one of “restoring” competence, suggesting, perhaps erroneously, that the defendant has been competent at some time in the past. See, e.g., *United States v. Weston*, 255 F.3d 873, 879 (D.C. Cir. 2001) (referring to “the governmental interest in restoring a pretrial detainee’s competence to stand trial”), *cert. denied*, 534 U.S. 1067 (2001).

treatment — usually antipsychotic or other psychotropic medications that can potentially alleviate, although not cure, the symptoms of schizophrenia and other psychotic disorders.⁹ But a defendant who, because of his mental illness, believes that his doctors, or the FBI, or the special beings that communicate with him through his radio, are trying to poison him, or are taking thoughts out of his head, or are otherwise out to get him, can be difficult to convince that taking psychotropic medications is in his best medical interest.¹⁰ If a defendant refuses to take these medications, the government is left to decide whether to seek a court order allowing for the administration of the medications over the defendant's objections.¹¹

Several difficult issues arise, however, when the government requests such an order. The first issue, common to all cases in which the government seeks to administer involuntary medications, is that administering the medications must serve a government interest — such as preventing a mentally ill person from harming himself or others — that justifies abridging the person's interest in refusing unwanted medical treatments.¹² An additional issue, unique to cases in which the government seeks to administer involuntary medications to a criminal defendant for the purpose of rendering him competent to stand trial, is that the medications will threaten many of the defendant's trial rights. Any medication that succeeds in rendering the defendant competent to stand trial is likely to alter his mental functioning and physical appearance in myriad ways, thereby potentially compromising the fairness of his trial.¹³ For example, a medicated defendant can have

⁹ See *infra* notes 90–91 and accompanying text.

¹⁰ As one leading abnormal psychology text explains:

A major problem with *any* kind of treatment for schizophrenia is that many patients with schizophrenia lack insight into their impaired condition and refuse any treatment at all. As they don't believe they have an illness, they don't see the need for professional intervention, particularly when it includes hospitalization or drugs. This is especially true of those with paranoid schizophrenia, who may regard any therapy as a threatening intrusion from hostile outside forces.

GERALD C. DAVISON & JOHN M. NEALE, *ABNORMAL PSYCHOLOGY* 304 (8th ed. 2003) (citation omitted).

¹¹ See *infra* note 92 and accompanying text.

¹² See *infra* notes 41–42 and accompanying text.

¹³ See *Riggins v. Nevada*, 504 U.S. 127, 138 (1992) (Kennedy, J., concurring) (“[I]nvoluntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial.”); *United States v. Gomes*, 289 F.3d 71, 80 (2d Cir. 2002) (“[A]ntipsychotic drugs can affect a defendant's in-court demeanor as well as his willingness and ability to assist in his defense, thereby implicating Sixth Amendment rights to a fair trial.”), *vacated by* 539 U.S. 939 (2003); *United States v. Weston*, 206 F.3d 9, 14 (D.C. Cir. 2000) (per curiam) (“Involuntary antipsychotic medication has the potential to adversely affect the defendant's ability to obtain a fair trial as guaranteed under the Sixth Amendment.”).

If successful in rendering a previously incompetent defendant competent to stand trial, medications have necessarily altered the defendant's mental functioning in some ways. It is

difficulty concentrating,¹⁴ and thus he might have problems consulting with his attorney or testifying on his own behalf. Medications can also unfairly prejudice a jury's perception of a defendant's character or credibility. A jury might decide that a defendant who looks drowsy or disinterested¹⁵ is coldhearted or that a defendant who is experiencing motor tremors¹⁶ is nervous or not telling the truth.

implausible to believe that such medications would alter only those particular mental processes that enable a defendant to understand the nature of the charges against him and to assist his attorney in preparing a defense, *see supra* note 7 (discussing criteria for competence to stand trial), leaving every other aspect of the defendant's mental functioning unaltered.

Some courts have suggested that these additional changes will increase, at least in some ways, the fairness of a defendant's trial. *See, e.g., Weston*, 255 F.3d at 883 (asserting that medications will "enhance some of Weston's trial rights"). Even if this is true, though, a government action that enhances a trial's fairness in one way does not thereby make up for diminishing the trial's fairness in other ways. The government must allow the defendant the opportunity to exercise all the rights guaranteed under the Constitution.

¹⁴ *See* ROBERT M. JULIEN, A PRIMER OF DRUG ACTION 508 (9th ed. 2001) (stating that antipsychotic medications such as Haldol, as well as all of the phenothiazines, "produce[] sedation and an indifference to external stimuli and reduce[] initiative, anxiety, and activity"). These traditional antipsychotic medications also can exacerbate the cognitive impairments associated with some psychotic disorders. *See id.* at 507 (citing research indicating that antipsychotic medications generally do not improve the cognitive functioning of people with schizophrenia, and that "[p]henothiazines with anticholinergic and/or sedative side effects may even have additional detriments"). Even the newer antipsychotics cause sedation. *See id.* at 514 ("Sedation occurs in about 40 percent of patients taking clozapine; it may be dose-limiting and have a negative impact on compliance.") (emphasis omitted); *id.* at 517 (noting that "[c]ommon side effects of risperidone include somnolence"); *id.* at 520 (stating that "[t]he major side effects induced by olanzapine" include "sedation"). The atypicals also cause other side effects that can interfere with the ability to concentrate. *See id.* at 514 (stating that clozapine can cause "hypotension" and "excessive drooling"); *id.* at 517 (explaining that agitation and anxiety are common side effects of risperidone); *id.* at 520 (noting that olanzapine's major side effects include dizziness).

¹⁵ *See supra* note 14 (indicating that antipsychotic medications can cause side effects that include sedation).

Courts might try to minimize the risk that medication effects will deprive a defendant of a fair trial by informing the jury about the medication or allowing experts to testify about the medication. *See, e.g., Weston*, 206 F.3d at 15 (Henderson, J., concurring) ("[T]he testimony of both lay and expert witnesses, whether on direct or cross, will suffice to address any differences in Weston's appearance."). If a jury convicts a defendant to whom the government is administering involuntary medications, however, there is no way to determine whether the jury found the defendant guilty because of the evidence against him or because the government, by administering the medications, prevented the defendant from being able to focus on his attorney's advice, to express his thoughts to the jury, or even to sit still or stay awake during the trial. *Cf. Riggins*, 504 U.S. at 137 ("Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion [to discontinue antipsychotic medications] had been granted would be purely speculative.").

¹⁶ Motor disturbances are the most significant side effects produced by the traditional

Given the importance of the right to a fair trial, and the threat to this right posed by administering involuntary medications, the Supreme Court understandably cautions in its recent decision in the case of *Sell v. United States*¹⁷ that the instances in which the government will be justified in administering such medications for the purpose of rendering a defendant competent to stand trial “may be rare.”¹⁸ Under the test the Court sets forth in *Sell*, however, what instead might be rare are instances in which a court decides that involuntary medications are *not* justified.

In discussing why the *Sell* test likely will result in the administration of involuntary medications to incompetent defendants in more than rare instances, this Article considers both what the Court’s opinion in *Sell* says and what it fails to say. One thing the *Sell* opinion does address is the factors that courts must consider when deciding whether the government may administer involuntary medications to render a defendant competent to stand trial.¹⁹ Under the *Sell* test, the government may administer involuntary medication that is (1) “medically appropriate,” (2) “substantially unlikely to have side effects that may undermine the fairness of the trial,” (3) decided upon after “taking account of less intrusive alternatives,” and (4) “necessary significantly to further important governmental trial-related interests.”²⁰

As discussed in Part I, this test favors allowing the government to administer involuntary medications, at the expense of protecting the defendant’s trial rights, because in many, if not almost all, cases it is likely that the government will easily meet the first three criteria of the *Sell* test. The first criterion requires only that

antipsychotic medications:

Neuroleptic drugs produce two main kinds of motor disturbances, which comprise both the most bothersome and the most serious side effects associated with the use of these agents. The two syndromes are (1) acute extrapyramidal reactions, which develop early in treatment in up to 90 percent of patients, and (2) tardive (late) dyskinesia, which occurs much later, during and even after cessation of chronic neuroleptic therapy.

JULIEN, *supra* note 14, at 504. Although newer drugs are less likely to produce motor disturbances, this advantage of atypical antipsychotics appears to exist only at lower doses, and perhaps only for patients who have previously taken traditional antipsychotics:

Extrapyramidal symptoms are minimal at doses below 8 mg/day and increase with doses above 8 mg/day. However, in newly diagnosed patients with schizophrenia with no previous exposure to antipsychotic drugs, extrapyramidal symptoms were identical to those produced by haloperidol, even at low doses of risperidol (mean daily dose was 3.2 mg).

Id. at 517–18.

¹⁷ 539 U.S. 166 (2003).

¹⁸ *Id.* at 180.

¹⁹ *Id.* at 179.

²⁰ *Id.*

treatment be medically appropriate, an in general, antipsychotic medications are medically appropriate for the treatment of serious psychotic disorders.²¹ Also, because these medications are usually the only type of treatment capable of alleviating the symptoms of such disorders and possibly rendering a defendant competent to stand trial,²² courts are likely to find that no less intrusive alternatives exist, satisfying the third criterion. Moreover, although all antipsychotic medications are likely to cause some side effects, no way presently exists for predicting the particular side effects a defendant will experience if administered a particular medication.²³ As a result, most courts will lack a sufficient basis for finding that, if administered involuntary medications, a defendant will likely experience side effects that will undermine the fairness of his trial.²⁴ Involuntary medications, therefore, are likely, in at least some cases, to cause side effects that will undermine a trial's fairness, but courts are unlikely in any given case to decide that the defendant will experience such side effects — and also unlikely to rule against involuntary medications because of the second criterion. The only real limiting factor in the *Sell* test is the last criterion, which requires courts to decide whether the government's interests are "important" — a concept that the Court in *Sell* leaves undefined and that since *Sell*, lower courts have defined in a variety of ways.

The Court's opinion in *Sell* also instructs trial courts that, whenever possible, they should decide whether to allow the government to administer involuntary medications on the basis of the government's interest in preventing an incompetent defendant from harming himself or others rather than on the basis of its interest in rendering the defendant competent to stand trial.²⁵ The criteria for determining whether to allow the government to administer involuntary medications to diminish the defendant's dangerousness, however, provide for no consideration of trial rights.²⁶ Yet a defendant who not only is incompetent to stand trial, but also is a danger to himself or others, has the same interest in receiving a fair trial as does an incompetent defendant who is not a danger to himself or others. Given that no sufficiently important government interest justifies this disparate treatment with respect to incompetent defendants' trial rights,²⁷ the Court's instruction raises the possibility that mentally ill defendants who are both incompetent and dangerous will

²¹ See DAVISON & NEALE, *supra* note 10, at 308 ("Antipsychotic drugs are an indispensable part of treatment for schizophrenia and will undoubtedly continue to be an important component.").

²² See *infra* notes 89–92 and accompanying text.

²³ See *infra* notes 84–86 and accompanying text.

²⁴ See *infra* notes 84–86 and accompanying text.

²⁵ See *infra* notes 96–97 and accompanying text.

²⁶ See *infra* Part I.C.1.

²⁷ See *infra* Part I.C.2.

suffer violations of not only their right to a fair trial but also their right to the equal protection of the laws.

Part II discusses what the Court's opinion in *Sell* does not say. First, the Court's opinion does not acknowledge that the lower courts in *Sell* were far from alone in their efforts to determine when the government may administer involuntary medications to render a defendant competent to stand trial.²⁸ Many other courts, most notably the D.C. District Court and the D.C. Circuit Court of Appeals in the case of *United States v. Weston*,²⁹ have considered the same question and have reached the same conclusion — to allow involuntary medications — as did the lower courts in *Sell*.³⁰ Also, disappointingly absent from the Court's *Sell* decision is an opinion authored by Justice Kennedy, whose opinions in previous involuntary medication cases have been especially discerning.³¹

I. CURIOUS: WHAT THE *SELL* OPINION DOES SAY

A. Supreme Court Precedents and the Facts of *Sell*

Charles Thomas Sell, a St. Louis dentist, faces multiple counts of falsifying insurance claims.³² The charges were filed in 1997, nearly six years before the Supreme Court heard Sell's case.³³ The government has been delayed in bringing this case to trial because Sell, diagnosed with a delusional disorder that has rendered him unable to understand the nature of the charges brought against him and unable to assist his attorney in preparing a defense, has been ruled incompetent to stand trial.³⁴ The government believes that treating Sell with antipsychotic medications might sufficiently alleviate the symptoms of his mental illness so that he would become competent to stand trial.³⁵ Sell believes that the insurance fraud charges are part of a larger conspiracy against him and has refused to take any of the

²⁸ See *infra* note 117 and accompanying text.

²⁹ See *United States v. Weston*, 69 F. Supp. 2d 99 (D.D.C. 1999), *rev'd*, 206 F.3d 9 (D.C. Cir. 2000); *United States v. Weston*, 134 F. Supp. 2d 115 (D.D.C.), *aff'd*, 255 F.3d 873 (D.C. Cir.), *cert. denied*, 534 U.S. 1067 (2001).

³⁰ See *infra* notes 117–23 and accompanying text.

³¹ See *infra* notes 130–34 and accompanying text.

³² *Sell*, 539 U.S. at 170. Sell has been charged with additional offenses that were not the subject of the appeal. See *United States v. Sell*, 282 F.3d 560, 568 n.8 (8th Cir. 2002) (“Although Sell is also charged with conspiring to murder an FBI officer and a witness, we base our reasoning solely on the seriousness of the fraud charges.”) *vacated*, 539 U.S. 166 (2003).

³³ *Sell*, 539 U.S. at 170 (indicating that charges were filed in May 1997).

³⁴ See *id.*

³⁵ See *id.*

medications the government wants him to take.³⁶ The question presented to the Court was whether the government could administer these medications to Sell despite his desire not to take them.³⁷

When the government first sought to administer involuntary medications to Sell, it argued that the medications were necessary not only to render Sell competent to stand trial but also to prevent him from harming himself or others.³⁸ It is well-established that an individual's interest in refusing medications³⁹ can be outweighed by the government's interest in protecting the health and safety of the public and also, although in more limited circumstances,⁴⁰ by the government's interest in protecting the health and safety of the individual himself.⁴¹ Thus, the government could probably administer involuntary treatment to Sell if he were so seriously mentally ill that he posed a danger to himself or others.⁴²

³⁶ *Id.* at 171 (quoting a medical report noting “the persistence of Dr. Sell’s belief that the Courts, FBI and federal government in general are against him”); *see also* Transcript of Oral Argument at 11–12, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664):

Question: As I take it, . . . he thinks that’s why he is being prosecuted, is that it, that the FBI is behind this?

Mr. Short [Sell’s attorney]: Justice Souter, that’s absolutely true.

Id.

³⁷ *Sell*, 539 U.S. at 171; *see also* *Sell v. United States*, 537 U.S. 999, 999–1000 (2002) (granting certiorari).

³⁸ *Sell*, 539 U.S. at 172–73.

³⁹ *See* *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (“We have no doubt that . . . respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”).

⁴⁰ *See infra* note 42.

⁴¹ *See* *Addington v. Texas*, 441 U.S. 418 (1979). The Court wrote:

The state has a legitimate interest under its *parens patriae* powers . . . in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Id. at 426.

⁴² If Sell were a danger to his own safety, but not to others’ safety, then the government might be allowed to administer involuntary medications only if Sell were also incompetent to make his own treatment decisions. *See* *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (“The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”). *But see* *Harper*, 494 U.S. at 222. The Court allowed the government to administer involuntary medications to a prison inmate even when he was competent to make his own treatment decisions:

Respondent contends that the State, under the mandate of the Due Process Clause, may not override his choice to refuse antipsychotic drugs unless he has been found to be incompetent . . . We disagree. The extent of a prisoner’s right under the Clause to avoid the unwanted

A magistrate judge agreed with the government that medications were necessary to prevent Sell from injuring himself or others.⁴³ The district court disagreed with the magistrate judge's finding,⁴⁴ however, and by the time the case reached the Supreme Court, the only government interest that might have justified administering involuntary medications to Sell was the possibility that the medications would render him competent to stand trial.⁴⁵

Prior to *Sell*, the Court had never directly addressed the question of what governmental interests can justify overriding an incompetent criminal defendant's interest in refusing medication; the closest the Court had come was to state, in the 1992 case of *Riggins v. Nevada*, that one prerequisite to administering involuntary medications is that a court must find that the governmental interests at stake justify the medications.⁴⁶ The Nevada trial court in *Riggins* had not required the government to offer any reason for its decision to administer involuntary medications to Riggins before and during his trial for first-degree murder.⁴⁷ A jury convicted Riggins and sentenced him to death; the Nevada Supreme Court affirmed.⁴⁸ The U.S. Supreme Court reversed the Nevada Supreme Court's affirmance, establishing that before allowing involuntary medications, a trial court must make some finding regarding the government's interests.⁴⁹ As Justice Kennedy observed in a concurring opinion, however, the Court's decision was vague about what such a finding must include.⁵⁰ Not surprisingly, after *Riggins*, lower courts reached an

administration of antipsychotic drugs must be defined in the context of the inmate's confinement.

Id. Additionally, even if the government could administer medications to diminish Sell's dangerousness, the question would — or at least should — still remain whether the government could both administer involuntary medications for the purpose of diminishing dangerousness and also continue to prosecute Sell without violating Sell's right to a fair trial. See *infra* Part I.C.

⁴³ *Sell*, 539 U.S. at 173 (stating that the magistrate judge concluded that the government had proven that "anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial").

⁴⁴ *Id.* at 174.

⁴⁵ *Id.* at 175.

⁴⁶ *Riggins v. Nevada*, 504 U.S. 127, 138 (1992) ("[T]he record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy . . .").

⁴⁷ *Id.* at 131 ("The District Court denied Riggins's motion to terminate medication with a one-page order that gave no indication of the court's rationale.").

⁴⁸ See *id.* at 132 (discussing procedural history).

⁴⁹ *Id.* at 138.

⁵⁰ See *id.* at 140 (Kennedy, J., concurring) ("The Court's opinion will require further proceedings on remand, but there seems to be little discussion about what is to be considered.").

array of contradictory conclusions about when the government may administer involuntary medications to incompetent defendants.⁵¹

The Court's decision in *Sell* clarifies a few of the broad questions that *Riggins* left unanswered. For example, after *Riggins* it was unclear whether rendering a defendant competent to stand trial could ever justify administering involuntary medications when the medications were not also justified by the defendant's dangerousness to himself or others.⁵² *Sell* makes clear that the answer is yes.⁵³ But the Supreme Court could not determine whether the government's interest in bringing *Sell* to trial justified administering involuntary medications to him because, as in *Riggins*, the Court concluded that the trial court had erred in allowing for the administration of involuntary medications without first making all of the necessary findings.⁵⁴

B. The Not-So-Limited "Limited" Sell Standard

The Supreme Court suggested that the standard it adopted in *Sell* will result in the administration of involuntary medications to incompetent criminal defendants "in limited circumstances."⁵⁵ The particular questions that the Court indicated that trial courts must ask, however, are essentially the same questions that these courts, including the lower courts in *Sell*, have been asking, with most deciding to allow

⁵¹ Compare *United States v. Brandon*, 158 F.3d 947, 960 (6th Cir. 1998) (concluding that "the decision to medicate a non-dangerous pretrial detainee must survive strict scrutiny"), with *United States v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001) (requiring "heightened scrutiny" rather than strict scrutiny). Recent decisions have overwhelmingly followed *Weston* rather than *Brandon*. See, e.g., *United States v. Gomes*, 289 F.3d 71, 82 (2d Cir. 2002). The court wrote:

In accord with *Riggins*, *Sell*, and *Weston*, we hold that heightened, but not strict, scrutiny is the appropriate standard Although we are not unmindful of *Brandon*'s concerns about the important interests of the defendant, we cannot accept the proposition that involuntary medication should be limited to defendants who are prosecuted for only the most heinous crimes.

Id. (citations omitted).

⁵² See *United States v. Weston*, 69 F. Supp. 2d 99, 111 (D.D.C. 1999) ("[T]he case law does not clearly indicate whether the government can forcibly medicate a defendant solely to render him competent to stand trial."), *rev'd*, 206 F.3d 9 (D.C. Cir. 2000); cf. *Riggins*, 504 U.S. at 135 ("The question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us."). Notably, the trial court had not found *Riggins* incompetent to stand trial but nonetheless refused *Riggins*'s request to discontinue psychotropic medications during his trial. *Id.* at 130–31.

⁵³ *Sell v. United States*, 539 U.S. 166, 179 (2003).

⁵⁴ *Id.* at 185.

⁵⁵ *Id.* at 169.

involuntary medications.⁵⁶ After *Sell*, courts' discussions can be expected to be more thorough; nothing in the Supreme Court's opinion, however, provides a basis for believing that these courts' conclusions will be any different.

According to *Sell*, the first question a trial court must consider before allowing the government to administer involuntary medications to an incompetent defendant for the purpose of rendering the defendant competent to stand trial is whether the medications are "medically appropriate."⁵⁷ The Court in *Sell* imported this requirement from the 1990 decision in *Washington v. Harper*, a case in which a prison inmate argued that he was constitutionally entitled to a judicial hearing to determine whether the government could compel him to take psychotropic medications.⁵⁸ In the prison setting, antipsychotic medications are sometimes used as a "chemical straightjacket"⁵⁹ to sedate unruly inmates; this practice led the *Harper* Court to adopt the requirement that medications must be medically appropriate in order to ensure that antipsychotics were administered only to treat psychotic symptoms and not to manage behavior problems.⁶⁰

But while administering antipsychotic medications to an unruly, mentally retarded prison inmate, for example, might effectively diminish his unruliness, administering antipsychotic medications to an incompetent, mentally retarded

⁵⁶ The standard applied by the Eighth Circuit in *Sell*:

First, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication. Second, the government must prove that there is no less intrusive way of fulfilling its essential interest. Third, the government must prove by clear and convincing evidence that the medication is medically appropriate. Medication is medically appropriate if: (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.

United States v. *Sell*, 282 F.3d 560, 567 (8th Cir. 2002) (citations omitted), *vacated*, 539 U.S. 166 (2003).

⁵⁷ *Id.* A medication is medically appropriate if it is "in the best medical interests of the patient" in light of his medical condition. *Id.*

⁵⁸ *Washington v. Harper*, 494 U.S. 210, 217 (1990).

⁵⁹ See generally Douglas Mossman, *Unbuckling the "Chemical Straightjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033 (2002).

⁶⁰ *Harper*, 494 U.S. at 244-45 (Stevens, J., concurring in part and dissenting in part) ("Use of psychotropic drugs, the State readily admits, serves to ease the institutional and administrative burdens of maintaining prison security and provides a means of managing an unruly prison population and preventing property damage."); *id.* at 226 (indicating that the Court upheld the constitutionality of a state statute governing the administration of involuntary medications to prison inmates in part because under the statute "[t]he drugs may be administered for no purpose other than treatment").

defendant will not be effective in rendering him competent.⁶¹ When a defendant is incompetent to stand trial, administering medically inappropriate medications will not achieve anything the government wants — a sedated incompetent defendant can no more be brought to trial than a non-sedated incompetent defendant. Thus, the government seems unlikely to seek to administer medically inappropriate medications to an incompetent pretrial defendant.

Although it continues to be cited by almost every court that considers the question of administering involuntary medications to incompetent defendants,⁶² *Harper* is factually not at all similar to these cases. *Harper*'s "medically appropriate" requirement therefore is not very likely to limit the number of cases in which a court approves the government's request to administer involuntary medications for the purpose of rendering a defendant competent to stand trial.

The part of the *Sell* test most likely to cause courts to deny the government's petition to administer involuntary medications is the requirement that "important governmental interests [must be] at stake."⁶³ The Court stated that bringing to trial a defendant accused of "serious" crimes is an important government interest.⁶⁴ The Court did not, however, offer any details about how courts should distinguish between serious and nonserious crimes. The Eighth Circuit panel that reviewed the district court's decision to allow involuntary medications in *Sell* was divided over this issue, with two judges deciding that the insurance fraud charges were sufficiently serious and one judge arguing that they were not.⁶⁵

⁶¹ Medical appropriateness is still a useful criteria to have, however, to protect against potential abuse, such as the tactics suggested by Justice Kennedy during oral argument in *Sell*: "Could you send your guy out there with a needle the day before the trial . . . so that he behaves the way the government wants him to at trial?" *Online NewsHour Update: Supreme Court Hears Court-Ordered Medication Case, Public Broadcasting Service* (Mar. 3, 2003) (quoting Justice Kennedy's question to a government lawyer), at http://www.pbs.org/newshour/updates/scotus_03-03-03.html [hereinafter *PBS NewsHour Update*]. Additionally, a particular antipsychotic might be medically inappropriate for a particular defendant. For example, an atypical antipsychotic that tends to cause weight gain might be medically inappropriate for a defendant who suffers from diabetes. See Brief of Amicus Curiae American Psychiatric Association and American Academy of Psychiatry and the Law Supporting Respondent at 18, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter *APA Brief*] (noting "a risk of weight gain and, from long-term use, a risk of diabetes" associated with newer antipsychotics). It seems unlikely, though, that antipsychotics as a whole would be medically inappropriate, so long as they were being administered to treat a psychotic disorder.

⁶² See, e.g., *Sell*, 282 F.3d at 567; *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2002).

⁶³ *Sell*, 539 U.S. at 180.

⁶⁴ *Id.* ("The Government's interest in bringing to trial an individual accused of a serious crime is important.").

⁶⁵ Compare *Sell*, 282 F.3d at 568 ("[T]he sixty-two charges of fraud and the single charge of money-laundering are serious."), with *id.* at 572 (Bye, J., dissenting) ("[T]he charges

The Supreme Court did reject the position that only violent crimes can be serious,⁶⁶ stating that “[t]he Government’s interest in bringing to trial an individual accused of a serious crime is important . . . whether the offense is a serious crime against the person or a serious crime against property.”⁶⁷ But the Court did not decide whether the insurance fraud alleged in *Sell* is sufficiently serious to justify involuntary medications. The Court also did not discuss any objective criteria, such as potential minimum or maximum sentence,⁶⁸ that future courts — including the *Sell* district court on remand — might look to in deciding whether a particular alleged offense is “serious.”⁶⁹ Certainly, every crime is in some measure a violation of, in the words of the Court in *Sell*, “the basic human need for security.”⁷⁰ Further, the Court quoted with approval from *Illinois v. Allen* that the “[p]ower to bring an accused to trial is fundamental to a scheme of ‘ordered liberty’ and a prerequisite to social justice and peace.”⁷¹ This statement suggests that the power to bring any defendant to trial is a fundamental governmental interest.⁷²

Left largely on their own, federal courts since *Sell* have used a myriad of conflicting criteria to determine whether a particular offense is “serious.” In *United*

against Dr. Sell are not sufficiently serious to forcibly inject him with antipsychotic drugs on the chance it will make him competent to stand trial.”).

⁶⁶ *Sell*, 539 U.S. at 180; cf. *Sell v. United States*, 537 U.S. 999, 999–1000 (2002) (granting certiorari on question whether “the Court of Appeals erred in rejecting petitioner’s argument that allowing the Government to administer antipsychotic medications against his will solely to render him competent to stand trial for *non-violent* offenses would violate his rights under the First, Fifth, and Sixth Amendments”) (emphasis added).

⁶⁷ *Sell*, 539 U.S. at 180.

⁶⁸ Cf. *Sell*, 282 F.3d at 573 (Bye, J., dissenting). Judge Bye wrote:

An overly generous estimation of Dr. Sell’s alleged illegal activity would place the value of his fraud within the range of \$400,000 to \$1,000,000. Applying this estimate, his base offense level would be 20 and (assuming he has no prior criminal history) his sentencing range would be 33–41 months. This sentencing range demonstrates the charges against him are not serious enough to justify forcible medication.

Id. (citation omitted); *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2002) (indicating that alleged possession of a gun by a felon is serious enough to justify involuntary medications, because it is a felony offense and, under the facts of the case, would carry a statutory minimum sentence of fifteen years).

⁶⁹ *Sell*, 539 U.S. at 180 (discussing “serious” crimes). For a broader discussion of the difficulties involved in judging the seriousness of various crimes, see generally Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

⁷⁰ *Sell*, 539 U.S. at 180.

⁷¹ *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).

⁷² It is unlikely, perhaps, that the government would choose to expend the necessary resources to obtain an order allowing involuntary medication when an incompetent defendant has been charged with jaywalking, for example. But such pragmatic, contingent constraints are a poor substitute for the enforcement of constitutional guarantees.

States v. Evans, for example, the Western District of Virginia held that a serious crime is one that carries a maximum sentence of more than six months imprisonment.⁷³ The Western District of Texas rejected this six-month standard in *United States v. Barajas-Torres*, ruling that under *Sell* only crimes against persons or property can be serious, and denying the government's request to administer involuntary medications to an incompetent defendant charged with illegal reentry into the United States.⁷⁴ Also in conflict are *United States v. Gomes*, in which the District of Connecticut allowed involuntary medications because, in light of the potential mandatory minimum sentence of fifteen years, possession of a firearm by a convicted felon is a serious offense,⁷⁵ and *United States v. Dumeny*, in which the District of Maine denied involuntary medications because even though it "carries significant potential penalties," possession of a firearm by a person previously committed to a mental health institute is not a serious offense.⁷⁶

Once a trial court decides that the government's interest is "important",⁷⁷ it must then ask whether "involuntary medication will *significantly further*" that interest.⁷⁸ This question — which concerns the likelihood that medications will render the defendant competent to stand trial, balanced against the likelihood that the medications will cause side effects that will compromise the fairness of the defendant's trial⁷⁹ — is unlikely to limit the instances in which trial courts allow involuntary medications. Given the current state of knowledge about the treatment of mental illnesses, courts presently have no choice but to base their decisions on generalized, rather than individualized, information about the likelihood that involuntary medications will render defendants competent to stand trial or infringe their right to a fair trial. For example, antipsychotic medications are effective in alleviating at least some symptoms of the most common psychotic disorder, schizophrenia, in eighty to ninety percent of cases.⁸⁰ Additionally, a few variables, such as late onset of the disorder and good premorbid functioning, are associated with a better response to medications, but even these factors are far from perfect predictors of how a defendant will respond to antipsychotic medications.⁸¹ For

⁷³ 293 F. Supp. 2d 668, 674 (W.D. Va. 2003).

⁷⁴ 2004 WL 1598914, at *2–4 (W.D. Tex. July 1, 2004).

⁷⁵ 305 F. Supp. 2d 158, 164, *aff'd*, 387 F.3d 157 (2d Cir. 2004).

⁷⁶ 295 F. Supp. 2d 131, 132 (2004).

⁷⁷ *Sell v. United States*, 539 U.S. 166, 180 (2003).

⁷⁸ *Id.* at 181.

⁷⁹ *Id.*

⁸⁰ See JULIEN, *supra* note 14, at 588 ("A substantial proportion of schizophrenic patients — about 10 to 20 percent — fail to demonstrate substantial improvement when they are treated with neuroleptics." (quoting S.R. Marder et al., *Schizophrenia*, 16 PSYCHIATRIC CLINICS N. AM., 567, 588 (1993))).

⁸¹ See Godfrey D. Pearson et al., *A Chart Review Study of Late-Onset and Early-Onset Schizophrenia*, 146 AM. J. PSYCHIATRY 1568, 1568–74 (1989).

disorders less common than schizophrenia, reliable data regarding the effectiveness of psychotropic medications are more difficult to obtain.⁸² In most cases, then, unless a defendant has taken psychotropic medications in the past, a court will be unable to do more than offer a best guess as to which — if any — medications will render a defendant competent to stand trial.⁸³

Statistical data can also indicate the general likelihood that antipsychotic medications will produce various side effects, but again, absent a defendant's previous experience with a particular medication, no method exists for making an individualized prediction about the side effects that the defendant will experience. For example, approximately twenty percent of people who take one of the newer, atypical antipsychotic drugs will experience acute extrapyramidal side effects⁸⁴ such as akathisia, "a syndrome of the subjective feeling of anxiety, accompanied by restlessness, pacing, constant rocking back and forth, and other repetitive, purposeless actions,"⁸⁵ or dystonia, "characterized by involuntary muscle spasms and sustained abnormal, bizarre postures of the limbs, trunk, face and tongue."⁸⁶ In most cases, though, a court will have no way to determine whether a defendant will be part of the twenty percent of individuals who experience such effects or part of the eighty percent who do not.

The impossibility of predicting how a particular defendant will respond to antipsychotic medications has prompted several courts to adopt a "medicate now, evaluate later" approach.⁸⁷ The alternative, as the D.C. District Court recognized in

⁸² See APA Brief, *supra* note 61, at 19–20 ("[T]he evidence respecting treatment of delusional disorder is less definitive than for schizophrenia and other more common psychotic illnesses (which also are less resistant to collecting systematic data).").

⁸³ See *United States v. Weston*, 134 F. Supp. 2d 115, 136 (D.D.C.) ("[T]he reaction to medication is unique to each patient."), *aff'd*, 255 F.3d 873 (D.C. Cir.), *cert. denied*, 534 U.S. 1067 (2001).

⁸⁴ See Robert R. Conley & Raney Mahmoud, *A Randomized Double-Blind Study of Risperidone and Olanzapine in the Treatment of Schizophrenia or Schizoaffective Disorder*, 158 AM. J. PSYCHIATRY 765 (2001) ("Similar proportions of the risperidone and olanzapine groups reported extrapyramidal symptoms (24% and 20%, respectively).").

⁸⁵ JULIEN, *supra* note 14, at 504.

⁸⁶ *Id.* at 505.

⁸⁷ See *United States v. Sell*, 282 F.3d 560, 572 (8th Cir. 2002) ("[W]e believe that the effects of the medication on Sell's competency and demeanor may properly be considered once the medication is administered."); *United States v. Weston*, 255 F.3d 873, 883 (D.C. Cir. 2001) ("We agree with the district court that '[t]here is no reason to conclude, at this time, that involuntary medication would preclude Weston from receiving a fair trial.'" (quoting *Weston*, 134 F. Supp. 2d at 137)) (alteration in original).

The problem with this wait-and-see approach is the difficulty a court would face in determining whether the medication's side effects would cause a trial to be unfair, even when the court has the benefit of observing the defendant and assessing the actual side effects. How will a court determine whether the defendant's experience of moderate or even slight akathisia, for example, will violate the right to a fair trial? How distracted must the defendant

United States v. Weston, is never to allow involuntary medications for the purpose of rendering a defendant competent to stand trial:

There are many uncertainties regarding the effects that medication will have on [the defendant's] demeanor and thought processes because the reaction to medication is unique to each patient. However, the Court rejects [the defendant's] attorneys' contention that this uncertainty precludes the use of medication in this context at this time. To interpret "clear and convincing" evidence as the defense suggests would effectively preclude involuntary medication in every case, since the government could never establish that a given individual would respond in a predictable manner, no matter how high the statistical probabilities.⁸⁸

Because of both the probability that antipsychotic medications will alleviate at least some symptoms of a defendant's psychotic disorder, and the impossibility of predicting either the type or the severity of the side effects the defendant will experience, trial courts are likely to conclude that administering involuntary medications is substantially likely to further the government's interest in bringing a defendant to trial without causing side effects that will undermine the trial's fairness.

A trial court must also decide whether involuntary medications are "necessary" for achieving the government's interests.⁸⁹ In discussing this requirement, the Court

be before a court determines that the defendant cannot communicate with counsel or confront witnesses or testify in his own words? How can a court determine that even a minor motor tremor will not have a determinative effect on the jury's assessment of the defendant's character or credibility, and ultimately of his guilt or innocence? Of course, courts confront somewhat similar questions in determining competence to stand trial. *See supra* note 7 (discussing the test for competence). But determining whether a defendant understands the nature of the charges against him or is capable of assisting his attorney is very different from predicting how a defendant's mental functioning and physical appearance will impact a jury's verdict. Additionally, an assessment of the defendant's competence to stand trial does not require a court to approve any government action, whereas the question raised by involuntary medications is how much government-induced prejudice a court should allow. *Cf. United States v. Weston*, 206 F.3d 9, 21–22 (D.C. Cir. 2000) (Tatel, J., concurring) ("Here the question is whether due process permits the *government* through involuntary administration of psychotropic drugs to alter the defendant so that it becomes impossible for him to appear before the jury as he was when he committed the crime.").

⁸⁸ *Weston*, 134 F. Supp. 2d at 136.

⁸⁹ Somewhat perplexing is the *Sell* Court's instruction to trial courts to consider not only the intrusiveness of medications as compared to other kinds of treatments, but also the intrusiveness of different methods of administering medications. *Sell v. United States*, 539

in *Sell* considered the suggestion of the American Psychological Association that some nondrug treatments might render a psychotic defendant competent to stand trial.⁹⁰ Even the American Psychological Association acknowledged, however, that “such [alternative behavioral and psychosocial] therapies are often not adequate by themselves to treat acute psychotic disorders.”⁹¹ *Sell*’s own attorney conceded that

U.S. 166, 181 (2003). In formulating this least intrusive route of administration requirement, the Court seems to have in mind that some ways of forcing a defendant to take involuntary medications, such as issuing a court order (the preferred way of the Court in *Sell*), are less unpleasant than some other ways, such as injecting the medications or administering them through a nasal tube. *See id.* What the Court does not discuss, however, is why medication that a defendant cooperatively takes, but only because of a court order, is constitutionally preferable to the same medication that is injected or administered through a nasal tube. The defendant’s liberty interest in refusing medical treatment is equally compromised, regardless of how involuntary medications are administered. And involuntary medications that a defendant takes cooperatively are not any less likely to compromise the fairness of the defendant’s trial. Thus, whether a defendant cooperates in response to a court order does not seem to change the constitutional equation:

[A]n improper court order with which the defendant complies is no less an invasion of his rights than physically forcing compliance with such an improper order [W]e see no basis, therefore, for distinguishing between forced medication, whereby the defendant is restrained and injected, and medication pursuant to a court order with which the defendant complies.

State v. Garcia, 658 A.2d 947, 952 n.8 (Conn. 1995).

Additionally, the Court in *Sell* does not indicate how a trial court should balance administering involuntary medications in the least intrusive way possible with other concerns, such as effectiveness in alleviating psychotic symptoms or severity of side effects. What if, as happens to be true, medications that can be injected are likely to cause more serious side effects than medications that can be administered to an uncooperative defendant only through a nasal tube? For example, several older, traditional antipsychotic medications, which are most likely to cause the most severe extrapyramidal side effects, are available in injectible forms, while almost all of the newer, atypical antipsychotics, which are less likely to cause such side effects, are available only in forms that must be ingested. Given that the Court in *Sell* does not address these details, it is unlikely that trial courts, in deciding that no means less intrusive than antipsychotic medications exist for rendering an incompetent, psychotic defendant competent to stand trial, will look further than the American Psychological Association’s statement that nondrug “therapies are often not adequate by themselves to treat acute psychotic disorders,” Brief of American Psychological Association at 12, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), or the American Psychiatric Association’s statement that “[g]iven the dearth of comparably effective alternatives to antipsychotic medication, a defendant may remain incompetent to stand trial indefinitely,” APA Brief, *supra* note 61, at 25.

⁹⁰ *Sell*, 539 U.S. at 181.

⁹¹ Brief of Amicus Curiae American Psychological Association at 12, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664).

without the ability to administer psychotropic medications, the government's only choices would be to hold Sell under a civil commitment statute or to release him.⁹²

Given that antipsychotic medications are the standard treatment for psychotic disorders, and that a defendant who does not receive antipsychotic medications might well remain psychotic indefinitely, trial courts are unlikely to pause for very long over the requirement that the medications must be "necessary" for achieving the government's interest in bringing a defendant to trial.⁹³ Similarly, courts are apt to have little trouble with the related requirement that they consider less intrusive alternatives,⁹⁴ given that *no* alternatives — less intrusive or otherwise — are as likely as antipsychotic medications to reduce psychotic symptoms and render a defendant competent to stand trial.

In sum, the test outlined in *Sell* is unlikely to result in the administration of involuntary medications to incompetent defendants in only rare instances. More likely, it will continue to be rare that a trial court determines that administering involuntary medications is *not* "medically appropriate, . . . substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, . . . necessary significantly to further important governmental trial-related interests."⁹⁵

C. An Equal Protection Challenge Waiting to Happen

In addition to setting out the test that courts must apply before allowing the government to administer involuntary medications for the purpose of rendering a defendant competent to stand trial, the *Sell* decision instructs trial courts to first consider whether involuntary medications may be justified on the basis of an incompetent defendant's dangerousness to self or others.⁹⁶ Only if involuntary medications cannot be justified on the basis of a defendant's dangerousness should a court consider whether involuntary medications are justified on the basis of the defendant's incompetence to stand trial.⁹⁷

⁹² See Transcript of Oral Argument at 23–25, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664); see also *Sell*, 282 F.3d at 568 (noting that Sell's expert "did not suggest any alternative means [to antipsychotic medications] of restoring competency").

⁹³ *Sell*, 539 U.S. at 181.

⁹⁴ *Id.* (indicating courts must consider less intrusive alternatives).

⁹⁵ *Id.* at 179.

⁹⁶ *Id.* at 183 ("[A] court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type [dangerousness] grounds.").

⁹⁷ *Id.* ("If a court authorizes medication on those alternative [dangerousness] grounds, the need to consider authorization on trial competence grounds will likely disappear.").

The Supreme Court explained that trial courts should first determine whether involuntary medications may be justified on the basis of dangerousness because “the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more ‘objective and manageable’ than the inquiry into whether medication is permissible to render a defendant competent.”⁹⁸ It is hard to imagine, however, a more forthright invitation to violations of the constitutional guarantee of “equal protection of the laws.”⁹⁹ Under this provision of *Sell*, the criteria that courts must use to determine whether the government can administer involuntary medications — with the accompanying possibility of compromised trial rights — will vary depending upon whether an incompetent defendant is also a danger to himself or others. But both an incompetent defendant who is dangerous and an incompetent defendant who is not dangerous have exactly the same interest in receiving a fair trial — or in the language of equal protection jurisprudence, they are similarly situated with regard to the right to a fair trial.¹⁰⁰ Further, no sufficiently important government interest justifies treating incompetent defendants unequally with respect to trial rights on the basis of dangerousness to self or others.

⁹⁸ *Id.* at 182 (quoting *Riggins v. Nevada*, 504 U.S. 127, 140 (1992) (Kennedy, J., concurring)). As Justice Kennedy explained, though, immediately following the sentence in his concurrence observing that determining whether to allow involuntary medications for the purpose of diminishing dangerousness is “objective and manageable,” the question for the Court is more difficult when the government seeks to administer involuntary medications for the purpose of rendering a defendant competent to stand trial because the potential consequences for the defendant are more serious: “It is . . . medicating the person for the purpose of bringing him to trial, that causes most serious concern.” *Riggins*, 504 U.S. at 140–41 (Kennedy, J., concurring). Justice Kennedy could not have meant that a court can sidestep an issue merely because it is difficult, if the result will be the unequal protection of defendants’ right to a fair trial. Other courts have recognized that in deciding whether to allow the government to administer involuntary medications to an incompetent defendant, regardless of the purpose for administering the medications, a court must take into account the pretrial status of the defendant:

To the extent that Weston is in custody by reason of his incompetency to stand trial, the relevant issues are at least his dangerousness to himself and others, and the government’s ability to bring him to trial. But until he is convicted, Weston’s rights and the relevant issues must be viewed through a somewhat different prism than those for a convicted prisoner. Weston’s custodial status does not entail the relinquishment of all rights that a person facing trial possesses, and *Riggins’* departure from *Harper* signals as much. In other words, the issue raised by Weston was not settled in *Harper*.

United States v. Weston, 206 F.3d 9, 17 (D.C. Cir. 2000) (Rogers, J., concurring).

⁹⁹ U.S. CONST. amend. XIV.

¹⁰⁰ *See, e.g., Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)) (indicating that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

1. Unequal Protection of Trial Rights

As the Court in *Sell* recognized, tests for determining whether to allow involuntary medications for the purpose of diminishing a defendant's dangerousness are substantially different from the test for determining whether to allow involuntary medications for the purpose of rendering a defendant competent to stand trial.¹⁰¹ And while the criteria for allowing involuntary medications on the basis of incompetence to stand trial might provide inadequate protection of an incompetent defendant's trial rights,¹⁰² the criteria for allowing involuntary medications on the basis of dangerousness afford these rights no protection at all.

The specific statutory provisions governing the administration of involuntary medications for the purpose of diminishing dangerousness vary from state to state, although all states allow involuntary treatment when a person is, because of a mental illness, an imminent threat to the physical safety of himself or someone else.¹⁰³ Some states also allow involuntary treatment when a mentally ill person is "gravely disabled," meaning that he is unable to meet his basic needs such as the need for food or shelter, or has a long history of deteriorating when not taking medications.¹⁰⁴ But legislatures have developed these criteria with the goal of furthering the government's interest in ensuring citizens' safety while also protecting the liberty interest in refusing medical treatment of those who are potentially subject to civil commitment — not while also protecting the trial rights of those who are potentially subject to criminal prosecution.¹⁰⁵ The Court in *Sell* acknowledges as much in explaining that the lower courts failed to consider adequately the potential of involuntary medications to infringe *Sell*'s right to a fair trial:

The failure to focus upon trial competence could well have mattered. Whether a particular drug will tend to sedate a

¹⁰¹ See *supra* note 98 and accompanying text.

¹⁰² See *supra* notes 87–88 and accompanying text.

¹⁰³ The Supreme Court stated in *Addington v. Texas* that "the initial inquiry in a civil commitment proceeding" is "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy." 441 U.S. 418, 429 (1979).

¹⁰⁴ See, e.g., *Washington v. Harper*, 494 U.S. 210, 215 n.3 (1990).

Under Washington law, a person is "gravely disabled," and may therefore be administered involuntary treatment, if: as a result of a mental disorder [the individual]: (a) [i]s in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

Id. (second alteration in original).

¹⁰⁵ *Id.*

defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence, but not necessarily relevant when dangerousness is primarily at issue. We cannot tell whether the side effects of antipsychotic medication were likely to undermine the fairness of a trial in Sell's case.¹⁰⁶

Does the Court mean that these trial rights would have been less important to Sell if the government could have administered involuntary medications to him because he was dangerous? This clearly cannot be the case: a defendant who is a danger to himself or others is no less in need of a fair trial than is a defendant who is not a danger to himself or others. Yet the exact same concerns about the right to a fair trial are raised when medications are administered to a dangerous defendant as when administered to a nondangerous defendant. If, for example, involuntary medications cause a defendant to be unable to pay attention to what prosecution witnesses are saying, the resulting infringement of the right of confrontation would be no less of a Sixth Amendment violation simply because the medications were administered for the purpose of diminishing the defendant's dangerousness rather than for the purpose of rendering the defendant competent to stand trial.¹⁰⁷

2. Inadequate Justification

The Equal Protection Clause allows the government to treat similarly situated people differently if such treatment is justified by an adequate governmental interest.¹⁰⁸ Whether a governmental interest is adequate depends upon the nature of the individual interest involved.¹⁰⁹ Unequal treatment involving a non-fundamental interest requires only "that the classification at issue bears some fair relationship to a legitimate public purpose."¹¹⁰ Unequal treatment involving a fundamental interest, however, requires a "classification [that] has been precisely tailored to serve a compelling governmental interest."¹¹¹ The right to a fair trial is among the most fundamental of individual interests.¹¹² Yet the only governmental interest the Court

¹⁰⁶ *Sell*, 539 U.S. at 185–86 (citation omitted) (finding the lower court failed to consider adequately the potential infringement of Sell's fair trial rights).

¹⁰⁷ The Sixth Amendment guarantees the right of a defendant "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

¹⁰⁸ *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 217.

¹¹² *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitution and laws have laid great emphasis on procedural and

in *Sell* identifies as possibly justifying the unequal protection of incompetent defendants' trial rights is that the criteria for deciding whether to allow involuntary medications for the purpose of diminishing a defendant's dangerousness are more "objective and manageable" than the criteria for deciding whether to allow involuntary medications for the purpose of rendering a defendant competent to stand trial.¹¹³ The interest in applying a less cumbersome standard can hardly be considered compelling, however, in light of how rarely the Court finds a government interest to be compelling¹¹⁴ and in comparison with the particular interests that the Court has found to be compelling.¹¹⁵

Courts may indeed find it easier to decide whether to allow the government to administer involuntary medications for the purpose of diminishing a defendant's dangerousness than to decide whether to allow the government to administer involuntary medications for the purpose of rendering a defendant competent to stand trial.¹¹⁶ But allowing courts to avoid, on the basis of a defendant's dangerousness, the more difficult questions is contrary to the mandates of equal protection, given that (1) any medications a court decides to allow will pose exactly the same threat to the defendant's trial rights, regardless of why they are administered, and (2) the government lacks any interest sufficiently important to justify the disparate protection of trial rights on the basis of whether an incompetent defendant is a danger to himself or others. Thus, the Court's directive that a trial court ought first to determine whether a defendant may be administered involuntary medications on diminishing dangerousness grounds before (and perhaps instead of) considering whether he may be administered involuntary medications on rendering competent to stand trial grounds creates a curious hole in the protection afforded the trial rights

substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'").

¹¹³ See *supra* note 98 and accompanying text.

¹¹⁴ See Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 73 (1989) ("If a fundamental right or a suspect class is involved, the Court will exercise strict scrutiny, and the government rarely succeeds.").

¹¹⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (finding racial diversity to be a compelling interest); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (finding "a compelling interest in protecting the physical and psychological well-being of minors"); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) (finding that a school district's voluntary maintenance of a desegregated school system was a compelling state interest).

¹¹⁶ See *supra* note 98 and accompanying text (indicating that the question whether to allow the government to administer involuntary medications for the purpose of diminishing dangerousness is more "objective and manageable" than the question whether to allow the government to administer involuntary medications for the purpose of rendering a defendant competent to stand trial).

of mentally ill defendants who are both dangerous and incompetent to stand trial, as compared to those who are incompetent to stand trial but not dangerous.

II. AND CURIUSER: WHAT THE COURT DOES NOT SAY IN *SELL*

Along with the several curious things the Court does say in its *Sell* decision are several curiosities by omission. The first is that the Court did not consider — or at least offers no evidence that it did consider — the recent experiences of the federal courts in the District of Columbia as they decided whether to allow the government to administer involuntary medications to Russell Weston, who like *Sell*, was found incompetent to stand trial and has refused to take voluntarily the medications that might render him competent.¹¹⁷

In 1998, Weston entered the U.S. Capitol building and shot three police officers, killing two of them.¹¹⁸ Three years later, the second appellate panel to review the case affirmed the district court's second decision allowing the government to compel Weston to take psychotropic medications for the purpose of rendering him competent to stand trial.¹¹⁹ Before deciding to allow the government to administer involuntary medications, the *Weston* district court considered (and reconsidered) every question that the Court has now stated in *Sell* should be considered. For example, the Supreme Court in *Sell* found that the lower courts had failed to consider sufficiently the "trial-related side effects and risks" posed by involuntary medications.¹²⁰ The final district court opinion in *Weston*, though, contains page after page on the issue of side effects and risks relating to trials,¹²¹ yet still comes to the same conclusion as the lower courts in *Sell*: that the court could not predict whether antipsychotic medications would cause side effects that would compromise the right to a fair trial.¹²² Instead, the district court decided that it would allow the government to administer involuntary medications to Weston and

¹¹⁷ *Weston*, 134 F. Supp. 2d 115 (D.D.C.), *aff'd*, 255 F.3d 873 (D.C. Cir.), *cert. denied*, 534 U.S. 1067 (2001). Although the Supreme Court can only decide the particular case or controversy before it, the Court is nonetheless free to comment on decisions of lower courts in other cases, and often does so, especially when — as here — disagreement exists among the lower courts. For example, in another of the 2003 Term's attention-attracting cases, *Grutter v. Bollinger*, the Court referred, in discussing the Court's *Bakke* opinion, to "divergent opinions of the lower courts," and then cited several. 539 U.S. 306, 325 (2003).

¹¹⁸ *Weston*, 134 F. Supp. 2d at 117.

¹¹⁹ *United States v. Weston*, 255 F.3d 873 (D.C. Cir.), *cert. denied*, 534 U.S. 1067 (2001).

¹²⁰ *Sell*, 539 U.S. at 185.

¹²¹ *See Weston*, 134 F. Supp. 2d at 132–38.

¹²² *Id.* at 136–37 ("It is difficult for the Court to determine at this point whether unacceptable trial prejudice would result from the medication."); *Sell*, 282 F.3d at 572 ("[W]e believe that the effects of the medication on *Sell*'s competency and demeanor may properly be considered once the medication is administered. The district court noted its willingness to re-examine *Sell*'s Sixth Amendment claim after the medication regimen has begun.").

would revisit the issue of trial rights once his response to the medications could be observed.¹²³

The Supreme Court declined to review *Weston*,¹²⁴ which evidences only that fewer than four Justices voted to grant certiorari.¹²⁵ But given that the *Sell* Court must have been aware of the extensive record in *Weston*,¹²⁶ and perhaps also the extent to which other lower courts,¹²⁷ including those in *Sell*,¹²⁸ have relied on the *Weston* cases, the absence of a single citation to *Weston* is curious, like the proverbial elephant in the room that everyone sees but no one mentions.¹²⁹

A final curiosity is the absence of an opinion authored by Justice Kennedy. Perhaps all the citations to his concurring opinion in *Riggins*¹³⁰ were sufficient to persuade him to sign on to the majority's opinion. In previous involuntary medication cases, though, Justice Kennedy has been the voice of insight and reason, authoring the Court's opinion in *Harper*,¹³¹ and then recognizing — in a concurring opinion not joined at the time by any other member of the Court¹³² — that *Riggins* was “not a case like *Washington v. Harper*.”¹³³ During oral argument in *Sell*, Justice Kennedy alone pressed the basic question of why the government thought it was

¹²³ *Weston*, 134 F. Supp. 2d at 137 (“The Court will reassess, upon request, its determination regarding the prejudice to Weston’s fair trial rights resulting from medication when testimony about the actual, not hypothetical, impact of the medication is available.”). For a discussion of some of the problems with this approach, see *supra* note 87.

¹²⁴ *United States v. Weston*, 534 U.S. 1067 (2001) (denying certiorari).

¹²⁵ See *Brown v. Allen*, 344 U.S. 443, 492 (1953) (Frankfurter, J., concurring). Justice Frankfurter wrote:

We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Id.

¹²⁶ For example, the amicus brief submitted by the American Psychiatric Association, and cited by the Court in its opinion, cited “passim” *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001). APA Brief, *supra* note 61, at ii.

¹²⁷ See, e.g., *United States v. Gomes*, 289 F.3d 71, 79–82, 85–88 (2d Cir. 2002) (citing *Weston* cases).

¹²⁸ *Sell*, 282 F.3d at 565, 567 n.7 (citing *Weston* cases).

¹²⁹ If the Court in *Sell* had stated that the government could not administer involuntary medications to *Sell* because he was charged with nonviolent offenses, then *Sell* and *Weston* could be distinguished. But the Court instead stated that crimes against property, like those against people, can be serious. See *supra* note 64 and accompanying text.

¹³⁰ *Sell*, 539 U.S. at 179, 181, 185 (citing Justice Kennedy’s *Riggins* concurrence).

¹³¹ *Washington v. Harper*, 494 U.S. 210, 213 (1990).

¹³² The majority in *Sell* now seems to be in full accord with Justice Kennedy’s concurrence. See *supra* note 130 and accompanying text.

¹³³ *Riggins v. Nevada*, 504 U.S. 127, 140 (1992) (Kennedy, J., concurring).

entitled “at all” to simultaneously prosecute a defendant and compel him to take psychotropic medications.¹³⁴

CONCLUSION

It is doubtful that *Sell* will be the Court’s last word on involuntary medications and incompetent criminal defendants. Eventually, involuntary medications will render a defendant competent to stand trial,¹³⁵ in a case in which the defendant chooses to go to trial rather than to accept a plea bargain. Thus eventually, the question before the Court will be whether the government really can, without violating a whole host of constitutionally protected trial rights,¹³⁶ place in front of a jury a defendant to whom it is administering involuntary medications. Perhaps then Justice Kennedy will write an opinion that cures all of *Sell*’s other curiosities.

¹³⁴ “I do not understand your basic authority to do this at all.” *PBS NewsHour, Update*, *supra* note 61 (quoting Justice Kennedy’s question to a government lawyer).

¹³⁵ The government has, for example, administered involuntary medications to Weston from early 2002 until at least November 19, 2003. *Weston*, 260 F. Supp. 2d at 148–49 (authorizing the government to continue administering involuntary medications until November 19, 2003).

¹³⁶ *See supra* notes 3–8 and accompanying text.