

***SELL-ING YOUR SOUL TO THE COURTS: FORCED  
MEDICATION TO ACHIEVE TRIAL COMPETENCY IN THE  
WAKE OF SELL V. UNITED STATES.***<sup>1</sup>

“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?”<sup>2</sup>

I. INTRODUCTION

How far are we willing to go to prosecute a criminal defendant?<sup>3</sup> *Sell v. United States* is the most recent Supreme Court decision on the issue of forced medication for mentally ill defendants that addresses this very question.<sup>4</sup> The *Sell* Court faced two important, yet very different legal issues.<sup>5</sup> First, the Court had to determine procedurally whether it had jurisdiction over an appeal of a non-final order.<sup>6</sup> Second, the Court had to decide whether the Constitution permits the government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant charged with serious, yet nonviolent, crimes solely for trial competency purposes.<sup>7</sup>

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1. *Sell v. United States*, 539 U.S. 166 (2003) (holding that the appellate court was wrong to approve forced medication solely to render defendant competent to stand trial).

2. Transcript of Oral Argument, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), available in 2003 U.S. TRANS LEXIS 21, at 28 (Mar. 3, 2003) (question posed by Justice Anthony Kennedy).

3. See Brief of Petitioner at 35, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter Petitioner’s Brief]. “[T]his Court has never before allowed an intrusion this invasive solely for prosecutorial purposes.” *Id.* Attorneys for the Petitioner explain the *Sell* problem best as “[t]he government wants to medicate Dr. Sell because it *hopes* that doing so will bring Dr. Sell into an artificially induced, drug-dependant competence, so that the government can bring him to trial on charges involving alleged economic crimes of fraud and money laundering.” *Id.* at 23 (emphasis in original).

4. *Sell*, 539 U.S. 166.

5. *Id.*

6. *Id.* at 175.

7. *Id.* at 169. See also Warren Richey, *Forced medication: When does it violate rights?*, THE CHRISTIAN SCIENCE MONITOR (March 3, 2003), available at <http://www.csmonitor.com/2003/0303/p01s02-usju.html>. Richey articulates that one of the main concerns of the justices in the *Sell* Court was to determine whether the government’s interest in prosecuting Dr. Sell outweighed Sell’s interest in being free from forced medication. *Id.*

*Sell* involves issues of individual liberty that reach beyond the sphere of the mentally ill.<sup>8</sup> Although the Court ultimately decided in Dr. Sell's favor by applying the facts of the case to a heightened scrutiny test, the Court missed an opportunity to decide this case on broader, more protective constitutional grounds for other mentally ill defendants.<sup>9</sup>

This Note considers the effect that the decision in *Sell v. United States* has on mentally ill criminal defendants in both procedural and substantive arenas.<sup>10</sup> Section II gives a brief introduction to the collateral order doctrine and discusses forced medication for trial competency purposes.<sup>11</sup> Section III provides the statement of facts, the procedural history and the Supreme Court's decision in *Sell*.<sup>12</sup> Section IV analyzes the Court's decision in *Sell* and examines why the Court was correct in categorizing forced medication decisions under the collateral order doctrine.<sup>13</sup> It further discusses why the Court should have applied strict scrutiny to the issue of forced medication in order to protect Dr. Sell's constitutional rights.<sup>14</sup> Section IV also discusses specific problems with the heightened scrutiny test laid out by the Court.<sup>15</sup> Finally, Section V concludes the Note by reiterating the importance of strict, prompt review of important right violations such as in the field of forced medication.<sup>16</sup>

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8. Richey, *supra* note 7, at <http://www.csmonitor.com/2003/0303/p01s02-usju.html>. Richey explains:

The case holds major implications for individual liberty, should the justices grant the government broad powers to overrule personal decisions rejecting medical treatment. It could, for example, enable local boards of education to force problem schoolchildren to take Ritalin as a condition of attending public school, or empower health officials to mandate blanket anthrax vaccinations regardless of personal objections.

*Id.*

9. *See infra* notes 158-99 and accompanying text. *See also infra* notes 232-40 and accompanying text.

10. *See infra* Parts II-IV.

11. *See infra* notes 17-73 and accompanying text.

12. *See infra* notes 74-126 and accompanying text. The Procedural History and Statement of the Facts are combined in this Note due to the fact that the procedure intertwines with the important factual aspects of the case.

13. *See infra* notes 127-241 and accompanying text.

14. *See infra* notes 127-241 and accompanying text. *See also* Center for Cognitive Liberty Ethics, *U.S. Supreme Court Hears Oral Argument in Forced-Drugging Case: Does the Constitution Forbid Forcibly Drugging an Arrestee to Make Him Competent to Stand Trial? Justices Examine the Intersection of Freedom of Thought With New Mind-Altering Drugs* (March 3, 2003), available at [http://www.cognitiveliberty.org/news/Sell\\_Oral\\_Arguments.html](http://www.cognitiveliberty.org/news/Sell_Oral_Arguments.html). "Backed by a number of civil liberties organizations, Dr. Sell's lawyers told the Court that their client's right to bodily and mental integrity was guaranteed under the First, Fifth and Sixth Amendments to the Constitution." *Id.*

15. *See infra* notes 200-31 and accompanying text.

16. *See infra* note 242 and accompanying text.

## II. BACKGROUND

### A. *The Collateral Order Doctrine*

The Court's struggle over the jurisdiction issue in *Sell v. United States*<sup>17</sup> starts with the collateral order doctrine.<sup>18</sup> In 1949, the United States Supreme Court created the collateral order doctrine of federal appellate jurisdiction.<sup>19</sup>

#### 1. The Final Judgment Rule

Collateral order is a practical construction<sup>20</sup> of the final judgment rule<sup>21</sup> of 28 U.S.C. § 1291.<sup>22</sup> More specifically, the collateral order doctrine permits appeals from decisions that finally determine claims too important to deny review.<sup>23</sup> The collateral issue must also be too independent of the cause itself to require that appellate consideration be

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17. *Sell*, 539 U.S. at 166, syllabus point 1.

18. "Collateral order doctrine" is defined as "[a] doctrine allowing appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and effectively unreviewable on appeal from a final judgment." BLACK'S LAW DICTIONARY 256 (7th ed. 1999). Collateral order is also termed the *Cohen* doctrine, from *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (upholding the right to appeal from an order refusing to direct the plaintiff in a shareholder derivative action to comply with a state statute requiring the posting of security for costs). *Id.*

19. *Cohen*, 337 U.S. 541.

20. *Id.* at 546.

21. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (refusal to enforce a settlement agreement that was claimed to shelter the parties from breach of contract did not supply the basis for immediate appeal). The final judgment rule allows appeals only after all the issues involved in a particular lawsuit have been finally determined by the court. JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE § 13.1 (3d ed. 1999). A final decision is ordinarily a final judgment which "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945) (dismissing a motion to vacate and dismissing an order of condemnation of lands for military purposes are not final decisions warranting appeal). In criminal cases, this prohibits appellate review until after conviction and imposition of sentence. *Flanagan v. United States*, 465 U.S. 259, 263 (1984) (holding that a pretrial disqualification of criminal defense counsel is not immediately appealable). *See also Berman v. United States*, 302 U.S. 211, 212 (1937) (holding that determination of a sentence in a criminal case is a final judgment).

22. 28 U.S.C. § 1291 (2000) reads:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

*Id.*

23. *Cohen*, 337 U.S. at 546.

deferred until the whole case is adjudicated.<sup>24</sup> As courts cling to the policy behind the final judgment rule, they apply collateral order in only a small number of cases.<sup>25</sup> In the federal system, a litigant may only take an appeal outside of “final decision” in exceptional circumstances.<sup>26</sup>

## 2. The Birth of Collateral Order

In *Cohen v. Beneficial Industrial Loan Corp.*,<sup>27</sup> the Supreme Court interpreted 28 U.S.C. § 1291, the statute that sets out appellate court jurisdiction.<sup>28</sup> The Court noted that 28 U.S.C. § 1292 allows appeals from certain interlocutory orders, decrees and judgments.<sup>29</sup> Due to the

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24. *Id.* For examples of too much independence, see also *United States v. River Rouge Co.*, 269 U.S. 411, 414 (1926) (holding that a distinct controversy over gas lines had such finality and completeness that it may be reviewed under this writ of error as it had no bearing on the larger issue of land awards) and *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) (explaining that “finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all”).

25. See Lloyd Anderson, *The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals for Reform*, 46 *DRAKE L.REV.* 539, 542 (1998) (noting the four policies for the finality of judgment rule). According to Anderson:

First, [the final judgment rule] protects the authority of trial judges by forbidding piecemeal appeals of pretrial orders that would make a judge’s every ruling subject to immediate intervention by an appellate tribunal. Second, it protects the appellate courts from the intolerable burden of conducting immediate review of countless pretrial orders. Third, the final judgment rule protects litigants with meritorious claims and defenses from the harassment and expense of multiple appeals by an adversary keen to avoid a decision on the merits. Fourth, it protects society’s interest in having a legal system that resolves lawsuits as quickly and cheaply as possible.

*Id.*

26. 28 U.S.C. § 1292 (2000). See also Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It’s Time to Change the Rules*, 1 *J. APP. PRAC. & PROCESS* 285, 288-89 (1999) (suggesting that the current appellate system should be replaced with one in which the decision on whether to allow an interlocutory appeal in a civil case is left to the sound discretion of the courts of appeals), stating:

Congress has . . . expressly provided for an appeal as of right from orders granting, continuing, modifying, refusing, or dissolving injunctions (whether preliminary or otherwise); from certain orders relating to receivers and receiverships; from certain interlocutory decrees in admiralty cases; and from certain orders in arbitration cases. In addition, the Supreme Court in Rule 54(b) . . . has allowed appeals in cases in which there are multiple claims or multiple parties, and the district court enters a separate judgment as to one or more, but less than all, of the claims and/or parties and expressly determines that “there is no just reason for delay . . . for the entry of the judgment.”

*Id.*

27. *Cohen*, 337 U.S. at 541.

28. 28 U.S.C. § 1291, *supra* note 22.

29. 28 U.S.C. § 1292. For example, in §1292(a), interlocutory appeals are permitted in, but not limited to, the following:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals

significance of some issues which are not necessarily final on the merits, yet final and separate from the underlying question at hand, the Supreme Court gave a practical rather than technical construction of 28 U.S.C. § 1291.<sup>30</sup> The Court in *Cohen* decided that decisions “which finally determine claims of right separate from and collateral to rights asserted in the action” are too important to deny review.<sup>31</sup> The Court explained that these issues are “too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated,” even though they do not end the litigation on the merits.<sup>32</sup>

The Supreme Court in *Coopers & Lybrand v. Livesay*<sup>33</sup> formulated a stringent test in line with *Cohen*, requiring that collateral orders must: (1) be completely separate from the merits of the case;<sup>34</sup> (2) not be

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shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

*Id.*

30. *Cohen*, 337 U.S. at 546 (noting the need for the collateral order doctrine).

31. *Id.*

32. *Id.*

33. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (holding an order denying class certification is not appealable under the collateral order doctrine).

34. See CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* 3911, at 333 (2d ed. 1992).

The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending).

*Id.* at 333-34 (emphasis in original). See also *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding an attorney general immune from suit for authorization of warrantless domestic security wiretap prior to a decision clearly establishing the unconstitutionality of such a wiretap). The Court found qualified immunity to be completely separate from the merits of the action, because a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated. *Id.* at 527-28.

This “conceptual distinctness” made the immediately appealable issue “separate” from the merits of the plaintiff's claim, in part because

[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district

tentative, informal or incomplete, but conclusively determine the disputed question;<sup>35</sup> and (3) effectively unreviewable<sup>36</sup> on appeal from a final judgment.<sup>37</sup> Due to the stringent requirements of the doctrine, it is easy to see how courts confine the doctrine to very narrow circumstances and use it in relatively few cases.<sup>38</sup>

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court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

*Id.* at 528 (footnote omitted). An important issue completely separate from the merits of the case can be something such as a procedural or evidentiary question. *See, e.g., Exxon Chems. Am. v. Chao*, 298 F.3d 464 (5th Cir. 2002) (finding that the administrative review board's remand order was not a final agency action because it did not issue a decision definitively resolving the merits of the case). For example, discovery activity is typically related to the merits of the underlying litigation, but sanctioning instead is related to the district court's perception, wholly collateral to the merits of the case. *Gross v. G.D. Searle & Co.*, 738 F.2d 600, 602 (3d Cir. 1984) (holding that an order determining that the plaintiff had to comply with a subpoena was not an appealable order) (citing *DeMasi v. Weiss*, 669 F.2d 114, 121-22 (3d Cir. 1982)).

35. WRIGHT, *supra* note 34, at 333. The requirement that the district court's order "conclusively determine" the question means that appellate review is likely needed to avoid that harm. *Id.*

36. The general rule is that an order is effectively unreviewable only where the order at issue involves "an asserted right, the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (holding that a denial of a motion to dismiss indictment was not immediately appealable) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). The chance that a decision may be erroneous and may "impose additional litigation expense is not sufficient to set aside the finality requirement in 28 U.S.C.S. § 1291." *Id.* The Supreme Court has held in cases involving criminal prosecutions that "the deprivation of a right *not to be tried* is effectively unreviewable after final judgment and is immediately appealable." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499 (1989) (holding that denial of motion to dismiss on the basis of a contractual forum-selection clause was not immediately appealable) (citing *Helstoski v. Meanor*, 442 U.S. 500 (1979) (denial of motion to dismiss under the Speech or Debate Clause) and *Abney v. United States*, 431 U.S. 651 (1977) (denial of motion to dismiss on double jeopardy grounds)). *See Anderson, supra* note 25, at 615 n.407 (comparing *Midland Asphalt Corp.*, 489 U.S. at 801 to *Lauro Lines*, 490 U.S. at 500 which declined to hold the collateral order doctrine applicable where a district court has denied a claim, not that the defendant has a right not to be sued at all, but that the suit against the defendant is not properly before the particular court because it lacks jurisdiction).

37. *Coopers & Lybrand*, 437 U.S. at 468. *See Anderson, supra* note 25, at 542. Courts have interpreted the *Cohen* case in different ways. *Id.* at 556. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (allowing review of the issue of class action because the matter was collateral to the merits of the case), interpreted *Cohen* as having only two prongs, leaving out the third unreviewability prong. *Id.* at 555. In *Abney v. United States*, 431 U.S. 651 (1977), the Court interpreted *Cohen* as setting forth three requirements, not two. *Id.* at 556.

38. *See Jack W. Pirozzolo, The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity*, 59 U. CHI. L. REV. 1617, 1620-22 (1992) (discussing policies behind *Cohen* and the small number of cases that fall under the *Cohen* holding). The Supreme Court has noted that the purpose of the finality requirement "is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Cohen*, 337 U.S. at 546.

### 3. Limited Application of the Collateral Order Doctrine

The purpose of the “collateral order doctrine” is to provide review of an issue that would be effectively unreviewable on appeal from a final judgment.<sup>39</sup> An order is collateral and therefore appealable if it “involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.”<sup>40</sup> However, even if the issue is collateral, factual issues in dispute and necessary for determination of the question may still block the possibility of appeal.<sup>41</sup>

Since *Cohen*, the Supreme Court has only found three prejudgment orders in criminal cases appealable.<sup>42</sup> These prejudgment orders include denials of motions to reduce bail,<sup>43</sup> denials of motions to dismiss on double jeopardy grounds,<sup>44</sup> and denials of motions to dismiss under the

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39. FRIEDENTHAL, *supra* note 21, at § 13.2.

40. Keri L. Bowles, *Thirty-First Annual Review of Criminal Procedure: II. Preliminary Proceedings: Grand Jury*, 90 GEO. L.J. 1305, 1334 (2002) (discussing collateral order and criminal defendants). In *Midland Asphalt*, 489 U.S. at 798, the Court noted that, as a general policy, only final judgments of the federal district courts may be reviewed on appeal. *Id.* at 798. In criminal cases, final judgment does not occur until a defendant has been convicted and sentenced. *Id.* Denial of a motion to dismiss does not constitute a final judgment because the defendant has not yet been tried, convicted, or sentenced. *Id.* In addition, interlocutory appeal would not be available under the narrow exception to the final judgment rule found in the collateral order doctrine. *Id.* at 799.

41. Eisenberg & Morrison, *supra* note 26, at 289 (citing *Johnson v. Jones*, 515 U.S. 304, 305 (1995) (holding the district court’s summary judgment order not appealable)). See *Johnson*, 515 U.S. at 313. In *Johnson*, the district court’s determination that the summary judgment record raised a genuine issue of fact concerning petitioners’ involvement in the alleged beating of respondent was not a “final decision” within the meaning of the relevant statute. *Id.*

42. *Sell*, 539 U.S. at 190 (noting that in the 54 years since *Cohen*, only three prejudgment orders in criminal cases have been found appealable).

43. *Stack v. Boyle*, 342 U.S. 1, 7 (1951) (holding that the defendants’ bail was not fixed by proper methods). See Pamela Johns, *Interlocutory Appeals in Criminal Trials: Appellate Review of Vindictive Prosecution Claims*, 51 U. CIN. L. REV. 373, 374 (1982) (examining the policy issues involved in allowing prejudgment appeal of vindictive prosecution claims). Johns explains that in *Stack*, the Supreme Court considered an appeal from an order denying a motion for the reduction of bail:

The Court did not analyze the collateral order doctrine, but summarily stated that because the district court has no discretion and must reduce bail when it is excessive, the motion to reduce bail is appealable as a “final order.” The concurring opinion analyzed an order fixing bail in light of the collateral order doctrine and determined that such an order is immediately reviewable because the order is collateral to the trial issues, and that it must be reviewed before sentence or it “never can be reviewed at all.”

*Id.* at 374.

44. *Abney*, 431 U.S. at 662. See Johns, *supra* note 43, at 374-75. In *Abney*, the Court denied defendant’s motion to dismiss on double jeopardy grounds. *Id.* at 662. The Court went through the collateral order analysis to determine if defendant’s issue was worthy of collateral appeal. Johns, *supra* note 43, at 374-75.

The Supreme Court found that the first prong of the collateral order doctrine was satisfied because the district court made a complete and final rejection of the double

Speech or Debate Clause.<sup>45</sup>*B. Forced Medication for Trial Competency*1. The History of the Right to Refuse Antipsychotic Drugs<sup>46</sup>

Issues over involuntary administration of antipsychotic medication are not new to the United States Supreme Court.<sup>47</sup> Traditionally, courts have given institutional authorities the power to regulate supervision and

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jeopardy claim. The Court found that the second prong was met, because the double jeopardy claim did not challenge the merits of the case and therefore the claim was collateral. Instead of attacking evidence to be used at trial, defendant was challenging the “very authority of the Government to hale him into court.” In examining whether the third prong of the collateral order doctrine was satisfied, the Court stated that the policies underlying the double jeopardy clause would be “significantly undermined” if review of the claim was postponed until after conviction.

*Id.*

45. *Heltoski v. Meanor*, 442 U.S. 500, 508 (1979) (declining to issue a writ of mandamus directing the district court to dismiss an indictment). *See Johns, supra* note 43, at 374-75. In *Helstoski v. Meanor*, the Supreme Court found the denial of a motion to dismiss the indictment based on the speech and debate clause of the Constitution immediately appealable. *Id.* at 375 (citing *Heltoski*, 422 U.S. at 508). Again, the Court applied the collateral order test to the facts of the case.

*Id.*

The Court summarily concluded that the first two prongs of the collateral order doctrine were satisfied, relying on *Abney* to support its finding that the order was a final rejection of the matter by the district court and collateral to the triable issues. When considering whether the third prong of the collateral order doctrine was met, the Court found that the speech or debate clause protects congressmen from the burden of having to defend themselves for “any Speech or Debate in either House.” Because the Constitution protects congressmen from the burden of trial itself, interlocutory appeal is necessary for effective relief and the third prong of the collateral order doctrine was satisfied.

*Id.*

46. SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC INFORMATION, AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 129 (4th ed. 1975). Psychotropic drugs include any medications that affect mentation. *Id.* Antipsychotic drugs are any of the powerful tranquilizers (as the phenothiazines or butyrophenones) used especially to treat psychosis and believed to act by blocking dopamine nervous receptors—called also *neuroleptic*. MERRIAM-WEBSTER’S MEDICAL DICTIONARY (Electronic ed. 1997), at <http://www2.merriam-webster.com/cgi-bin/mwmednlm>. Psychosis is a serious mental disorder (such as schizophrenia) characterized by defective or lost contact with reality often with hallucinations or delusions. *Id.* Antipsychotic drugs alter the chemical balance in an individual’s brain, changing one’s cognitive processes. *Washington v. Harper*, 494 U.S. 210, 229 (1990) (recognizing that inmates have a Fourteenth Amendment right to refuse treatment). Antipsychotic medication is not a cure, but rather suppression for symptoms such as hallucinations, delusions, and paranoia. *Davis v. Hubbard*, 506 F. Supp. 915, 927 (N.D. Ohio 1980) (finding that prevalent use of psychotropic drugs was counter-therapeutic and was justifiable for the convenience of the staff and for punishment). *See also* Jessica Litman, Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1725 (1982) (explaining antipsychotic medication and the effects on patients).

47. *Sell*, 539 U.S. at 177-78.

treatment of involuntarily committed mental patients.<sup>48</sup> This trend changed in the middle of the twentieth century, as mental health became a hot topic for advocacy.<sup>49</sup>

The initial federal litigation over forced medication occurred in the late 1970s.<sup>50</sup> The U.S. District Court for the District of New Jersey granted involuntarily committed mental patients a legal right to refuse antipsychotic drugs in *Rennie v. Klein*.<sup>51</sup> One year after *Rennie*, the U.S. District Court for the District of Massachusetts issued a similar holding in *Rogers v. Okin*.<sup>52</sup> That court held that “whatever powers the Constitution has granted our government, involuntary mind control is

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48. See generally Litman, *supra* note 46, at 1725 (discussing mental institutions and antipsychotic medication in involuntary confinement).

49. Dennis E. Cichon, *The Right to “Just Say No”: A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 286 (1992) (examining the history of one’s right to refuse antipsychotic drugs). According to Cichon, “Litigated issues included the criteria for involuntary commitment, patient rights, institutional conditions, the interplay between the criminal process and the civil mental health systems, and the adequacy of treatment.” *Id.*

50. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (denying an injunction that would restrain officials from medicating the plaintiff without his consent in non-emergency circumstances), *modified by* 653 F.2d 836 (3d Cir. 1981), *vacated by* 458 U.S. 1119 (1982). See Kris W. Druhm, *A Welcome Return to Draconia: California Penal Law Code 645, The Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 310 (1997) (addressing the legal implications involved in castration laws). As the court in *Rennie v. Klein* explained:

[There is] a four-prong test to evaluate whether a specific drug therapy should be classified as treatment or punishment before applying the tests for cruel and unusual punishment. These prongs include: (1) does the drug possess any therapeutic value; (2) is the drug one that is accepted within the medical community as effective; (3) is the drug in question part of a continuous/ongoing therapy program; and (4) if negative long-term side effects result from the drug therapy, are they too harsh in light of the benefits received.

*Id.* (citing *Rennie*, 462 F. Supp. 1131).

51. *Rennie*, 462 F. Supp. 1131. In *Rennie*, the district court issued two different opinions. Cichon, *supra* note 49, at 426 n.12. “The first opinion was based on a motion for a preliminary injunction filed on behalf of John Rennie. The second opinion was generated by a class action filed on behalf of patients of five New Jersey state mental hospitals based on John Rennie’s amended complaint.” *Id.* (citing 476 F. Supp. 1294 (D.N.J. 1979), *aff’d in part, modified in part, and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983)). The federal district court held that the standard for determining whether forced medication was proper for mentally ill patients “turns on whether the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” *Rennie v. Klein*, 720 F.2d 266, 268 (3d Cir. 1983) (on remand following *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

52. *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979) (holding that a Massachusetts law created a presumption that a mental patient was competent and that the mental patients had a right to refuse medication in non-emergency situations), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.*, *Mills v. Rogers*, 457 U.S. 291 (1982). In *Rogers v. Okin*, a federal court prevented a hospital from administering psychotropic drugs through force, because such an action violated the inmates’ “freedom of individual thought.” Druhm, *supra* note 50, at 332.

not one of them, absent extraordinary circumstances.”<sup>53</sup>

## 2. Prior Supreme Court Decisions on Forced Medication

Before *Sell v. United States*, the Supreme Court considered two more recent cases involving forced medication.<sup>54</sup> In *Washington v. Harper*<sup>55</sup> and *Riggins v. Nevada*,<sup>56</sup> the Supreme Court decided that the

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53. *Rogers*, 478 F. Supp. at 1367. “The fact that mind control takes place in a mental institution in the form of medically sound treatment of mental disease is not, itself, an extraordinary circumstance warranting an unsanctioned intrusion on the integrity of a human being.” *Id.* Professor Dennis Cichon explains:

The court’s opinion [in *Rogers*] can possibly be interpreted as supporting the “unconditional” argument that First Amendment protections encompass the generation of even disordered thought. In finding First Amendment implications, the court made the broad statement that “psychotropic medication has the potential to affect and change a patient’s mood, attitude and *capacity to think*.” The court also stated that “[t]he right to produce a thought . . . is a fundamental element of freedom.” These statements, standing alone, could imply that any thought, even if psychotic, is entitled to First Amendment protection.

Cichon, *supra* note 49, at 426 n. 257 (emphasis in the original).

54. See *Washington v. Harper*, 494 U.S. 210 (1990) (acknowledging that prison inmates have, both by operation of the state prison policy and by the Fourteenth Amendment, a liberty interest in avoiding unwanted administration of antipsychotic medications); *Riggins v. Nevada*, 504 U.S. 127 (1992) (holding that forced medication may implicate an inmate’s right to a full and fair trial, and therefore defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial). See Elizabeth A. Schmidlein, *Notes: Riggins v. Nevada: The Accused’s Right to “Just Say No” to Antipsychotic Drugs?*, 10 J. CONTEMP. HEALTH L. & POL’Y 541, 542 (1994) (analyzing *Riggins*) for an analysis of the *Riggins* decision in light of forced medication.

55. *Harper*, 494 U.S. 210. In *Harper*, the Court reviewed the claim of whether a judicial hearing is necessary before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. *Id.* at 213. The Court was required in *Harper* to discuss the protections given to the prisoner under the Due Process Clause of the Fourteenth Amendment. *Id.* See T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 315 (1997) (arguing that there is no more complicated a problem within criminal justice than that posed by the needs of persons with severe mental disorders).

Under prison regulations that existed at the time, an unconsenting inmate could not be involuntarily medicated with antipsychotic drugs unless both (1) the inmate suffered from a “mental disorder” and, (2) the inmate was “gravely disabled” or posed a “likelihood of serious harm, to himself, others, or their property.” Any inmate who refused to take the antipsychotic medication was entitled to a hearing before a committee that consisted of a nontreating psychiatrist, a psychologist, and the Associate Superintendent of the treatment center for inmates with severe mental disorders.

*Id.*

56. *Riggins*, 504 U.S. 127. See *Medicolegal Reference Library: Selected Recent Court Decisions*, 18 AM. J. L. & MED. 277, 295 (1992) (analyzing 1992 decisions dealing with medicine and the law). In *Riggins*, while awaiting trial, defendant told a psychiatrist that he was having trouble sleeping and was hearing voices. *Id.* “Defendant was treated with sizeable doses of Mellaril, an antipsychotic medicine that often has outwardly discernible side effects.” *Id.* The doctors subsequently treated *Riggins* with Dilantin. *Id.* The District Court denied *Riggins*’ motion

Constitution permits the government to involuntarily administer antipsychotic medication to render a mentally ill defendant competent to stand trial on serious criminal charges.<sup>57</sup> The Court permitted the government to do so only if the treatment is medically appropriate,<sup>58</sup> is substantially unlikely to have side effects that may undermine the fairness of the trial,<sup>59</sup> and, taking account of less intrusive alternatives,<sup>60</sup>

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to suspend administration of Mellaril. *Id.* Riggins presented an insanity defense at trial and psychiatric experts subsequently testified that the side effects of the Mellaril might include drowsiness or confusion, severe enough to affect his thought processes. *Id.* Riggins was convicted of murder and sentenced to death. *Id.*

57. *Sell*, 539 U.S. at 178-79. “A criminal defendant’s ability to stand trial is measured by the capacity to understand the proceedings, to consult meaningfully with counsel, and to assist in the defense.” BLACK’S LAW DICTIONARY 278 (7th ed. 1999) (defining competency). Both Harper and Riggins were accused of “serious” crimes. Walter Harper was sentenced to prison in 1976 for robbery. *Harper*, 494 U.S. at 213. David Riggins was charged with murder and robbery. *Riggins*, 504 U.S. at 129.

58. See Lawrence O. Gostin, *Tuberculosis and the Power of the State: Toward the Development of Rational Standards for the Review of Compulsory Public Health Powers*, 2 U. CHI. L. SCH. ROUNDTABLE 219 n.289 (1995) (exploring rational standards for the exercise of compulsory public health powers). In the *Riggins* case, the Supreme Court held that forced antipsychotic medication for a defendant sentenced to death could satisfy due process if the state demonstrated that treatment was “medically appropriate and, considering less restrictive alternatives, essential for the sake of Riggins’ own safety or the safety of others.” *Id.* A medically appropriate treatment has a “reasonable possibility” of effects such as “prolongation of life that is currently meaningful to the patient, restoration of function, relief of pain and suffering.” Judith F. Daar, *Medical Futility and Implications for Physician Autonomy*, 21 AM. J. L. & MED. 221, 240 n.85 (1995) (suggesting that physicians and their sponsoring hospitals clearly define the limits of treatment they are willing to provide in any given circumstance). A treatment that lacks the “reasonable possibility” of reaching these goals is therefore considered medically inappropriate. *Id.*

59. *Riggins*, 504 U.S. at 137. See Vickie L. Feeman, *Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada*, 35 B.C. L. REV. 681, 688 (1994) (suggesting a comprehensive approach for reviewing challenges to the forced medication of criminal defendants). The Court in *Riggins* reviewed expert testimony offered at the hearing on Riggins’ motion requesting termination of the medication. *Id.* One expert testified that the level of Riggins’ medication “was within the toxic range and likely to make him anxious or nervous.” *Id.*

Another psychiatrist had claimed that Riggins was likely to suffer from drowsiness or confusion, and a brief from the American Psychiatric Association alleged that the level of medication administered to Riggins could have affected his thought processes. In light of this evidence, the Court concluded it was clearly possible that the drugs impacted not only the substance of Riggins’ testimony on direct or cross examination, but also his ability to communicate with counsel and to follow and participate in the proceedings.

*Id.*

60. Feeman, *supra* note 59, at 688. Less intrusive alternatives can include lowering the dosages of medication administered to the defendant. See also Steven Mintz, *The Nightmare of Forcible Medication: The New York Court of Appeals Protects the Rights of the Mentally Ill Under the State Constitution: Rivers v. Katz*, 53 BROOKLYN L. REV. 885, 910 (1987). According to Mintz, the theory of less intrusive alternatives provides:

[G]overnmental action should not intrude upon constitutionally protected interests to a degree greater than necessary to achieve a legitimate governmental purpose. The choice of proper treatment depends on medical and psychiatric opinion, and whether the

is necessary to further important governmental trial-related interests.<sup>61</sup>

In *Harper*, the Supreme Court recognized that an individual has a “significant” constitutionally protected “liberty interest” in “avoiding the unwanted administration of antipsychotic drugs.”<sup>62</sup> The Supreme Court did, however, uphold the State of Washington’s right to medicate a defendant against his will, as long as an independent decision-maker provides a thorough evaluation of the defendant.<sup>63</sup> The Court held that the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, as long as he is dangerous to himself or others and the treatment is in his medical interest.<sup>64</sup> Although *Harper* set a standard for forcibly

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treatment strikes a proper balance between efficacy and intrusiveness. Under this balancing process, the court would require the psychiatrist to determine whether a different drug, a smaller dosage, or a different therapy could serve the interests of the patient and the state.

*Id.* at 910-11.

61. *Harper*, 494 U.S. 210; *Riggins*, 504 U.S. 127.

62. *Harper*, 494 U.S. at 221.

63. *Id.* at 235-36. Walter Harper was sentenced to prison for robbery in 1976. *Id.* at 214. Until 1980, Harper was incarcerated at the Washington State Penitentiary. *Id.* During most of his time at the penitentiary, Harper was in the prison’s mental health unit. *Id.* While in the unit, he consented to the administration of antipsychotic drugs. *Id.* Harper earned parole in 1980, conditioned on his willingness to participate in psychiatric treatment. *Id.* While on parole, the Court ordered Harper to civil commitment at Western State Hospital. *Id.* In the winter of 1981, Harper assaulted two nurses at a hospital in Seattle, and his parole was subsequently revoked. *Id.* Once back in the prison system, Harper was sent to a special correctional institute for diagnosis and treatment for “convicted felons with serious behavior or mental disorders.” *Id.* Upon arrival at the facility, Harper voluntarily consented to treatment, but in November 1982, he stopped taking the prescribed medications. *Id.* The doctor in charge tried to medicate Harper against Harper’s protests. *Id.* The Supreme Court upheld Washington’s right to medicate Harper against his will, as long as a thorough examination was performed by an independent board. *Id.* at 218. As long as the board determined that the individual was a danger to himself or others, and received the approval of the inmate’s psychiatrist, forcible medication would be allowed. Jonathan Wilson, *Competent Through Medication to Stand Trial*, MEDILL NEWS SERVICE, March 2003, at 1. For an in-depth look at the *Harper* case’s procedure and fact development, see Brian Shagan, *Washington v. Harper: Forced Medication and Substantive Due Process*, 25 CONN. L. REV. 265, 279-83 (1992) (arguing that analysis of *Harper* must focus on the substantive due process issues).

64. *Harper*, 494 U.S. at 210, syllabus point 2. Although *Harper* has a liberty interest under the Due Process Clause in being free from the arbitrary administration of such medication, the Court held that:

The Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest. Although *Harper* has a liberty interest under the Clause in being free from the arbitrary administration of such medication, the Policy comports with substantive due process requirements, since it is reasonably related to the State’s legitimate interest in combating the danger posed by a violent, mentally ill inmate. The Policy is a rational means of furthering that interest, since it applies exclusively to mentally ill inmates who are gravely disabled or represent a significant danger to themselves or others; the drugs may be administered only for treatment and

medicating a prisoner, the case was not direct precedent for the *Sell* court because Dr. Sell was deemed non-dangerous and had not yet been convicted of a crime.<sup>65</sup>

In *Riggins*, the Supreme Court reiterated that an individual has a constitutionally protected liberty “interest in avoiding involuntary administration of antipsychotic drugs,” an interest that only an essential or overriding state interest might overcome.<sup>66</sup> The Nevada Supreme Court held that expert testimony presented at trial was sufficient to inform the jury of an antipsychotic medication’s<sup>67</sup> effect on Riggins’ demeanor and testimony.<sup>68</sup> Riggins, arrested for murder and robbery, was subsequently placed on the prescribed antipsychotic drug.<sup>69</sup> Riggins filed a motion to be taken off the drug until after trial, and the trial court denied the motion without explanation.<sup>70</sup> He was convicted of murder

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under the direction of a licensed psychiatrist; and there is little dispute in the psychiatric profession that the proper use of the drugs is an effective means of treating and controlling a mental illness likely to cause violent behavior.

*Id.* The Court reasoned that the right to be free of medication had to be balanced against the state’s duty to treat mentally ill inmates and run a safe prison. *Id.* The Court concluded the state’s procedures did not deprive inmates of the right to refuse treatment without adequate due process. *Id.*

65. *Sell*, 539 U.S. at 183. *See also* Wilson, *supra* note 63, at 1.

66. *Riggins*, 504 U.S. at 134-35.

67. *Id.* at 132. Riggins told the doctor that Mellaril had worked for him in the past. *Id.* at 129. The opinion in *Riggins* explained that “Mellaril is the trade name for thioridazine, an antipsychotic drug.” *Id.* After consultation, the doctor prescribed Mellaril at 100 milligrams per day. *Id.* However, the doctor increased the dosage incrementally, because Riggins complained of hearing voices and reoccurring sleep problems since beginning the medication. *Id.*

68. *Riggins*, 504 U.S. at 127. After Riggins was found competent to stand trial, Riggins made a motion to suspend administration of Mellaril until after his trial, arguing that “its use 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 when he offered an insanity defense.” *Id.* at 129. After testimony from doctors who had examined Riggins, the court denied Riggins’ motion, yet gave no explanation as to its rationale from deciding as such. *Id.* at 131. Once Riggins went to trial he claimed insanity, and his counsel unsuccessfully attempted an insanity defense. *Id.* Riggins was convicted and subsequently sentenced to death. *Id.*

69. *Riggins*, 504 U.S. at 129. The defendant was found competent to stand trial, although one psychiatrist testified that he was not competent. *Id.* at 130. The Clark County District Court determined that Riggins was legally sane and competent to stand trial, so preparations for trial went forward. *Id.*

70. *Riggins*, 504 U.S. at 131. The district court held an evidentiary hearing on Riggins’ motion, at which one doctor “guessed” as to whether taking the defendant off the forced medication would alter his behavior or render him incompetent to stand trial. *Id.* Another doctor testified that, in his opinion, Riggins “would be competent to stand trial even without the administration of the drug, but that the effects of drug would not be noticeable to jurors if medication continued.” *Id.* at 130-31. A third doctor told the court that the drug made the defendant “calmer and more relaxed,” but that too much medication could make the defendant appear tired and listless. *Id.* To the frustration of the defendant, the district court denied Riggins’ motion to terminate his forced medication. *Id.* at 131.

and robbery, and the State Supreme Court affirmed his convictions.<sup>71</sup> The U.S. Supreme Court reversed, holding that once Riggins filed a motion to terminate administration of antipsychotic medication, the State became obligated to establish the need for the drug and its medical appropriateness.<sup>72</sup> In light of the Court's opinion, the Nevada Supreme Court vacated Riggins' conviction and death sentence and remanded the case to the district court for a new trial.<sup>73</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts and Procedural History*

The Petitioner Charles Sell, a former dentist, suffered from mental illness for many years.<sup>74</sup> In May 1997, the United States charged Dr.

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71. *Riggins v. State*, 808 P.2d 535, 539 (Nev. 1991) (finding that the expert testimony regarding the effect of the medication upon defendant was sufficient to protect defendant's right to a full and fair trial). Once Riggins moved to terminate his treatment, the state became obligated to establish both the need for Mellaril and its medical appropriateness. See *Harper* 494 U.S. at 227; *infra* notes 54-55 and accompanying text. The state could have easily satisfied due process concerns if it had demonstrated that the treatment was "medically appropriate" and considered less intrusive alternatives "essential for Riggins' own safety or the safety of others." *Riggins*, 504 U.S. at 135. If found medically appropriate, the state might also have justified the treatment by demonstrating that an adjudication of guilt or innocence was not possible by using less intrusive means. *Id.* However, the trial court allowed the drug's administration to continue without providing "any determination of the need for this course or any findings about reasonable alternatives," and it failed to acknowledge Riggins' liberty interest in freedom from antipsychotic drugs. *Id.* at 136.

72. *Riggins*, 504 U.S. at 135. The Court found that it was possible that the side effects had an impact upon Riggins' outward appearance, "the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 137. Thus, Riggins' Sixth and Fourteenth Amendment rights were violated. *Id.*

73. *Riggins v. State*, 860 P.2d 705, 705 (Nev. 1993) (vacating the judgment of conviction and sentence of death and remanding the case for a new trial). The court held that Riggins' retrial would be conducted:

[W]ithout the involuntary administration of antipsychotic medications of any type, unless the district court shall find, following the cessation of all such medications, that the administration of antipsychotic medication is medically appropriate and essential, considering less intrusive alternatives, to ensure the safety of appellant or the safety of others, or that the administration of antipsychotic medication is medically appropriate and necessary in order to maintain Riggins' competence to stand trial, and that Riggins' competence cannot be maintained through the use of less intrusive means.

*Id.* at 705-706.

74. *Sell*, 539 U.S. at 169. In September 1982, Sell told doctors that "communists had contaminated the gold he used for fillings." *Id.* Dr. Sell was subsequently hospitalized, treated with antipsychotic medication, and thereafter discharged. *Id.* In June 1984, Dr. Sell called the police and told them that a leopard was outside his office boarding a bus, and then Sell asked the police to shoot him. *Id.* At this point, Dr. Sell was re-hospitalized and released shortly after. *Id.* at 169-70. Often, Dr. Sell complained that public officials, such as a state governor and a police chief, were

Sell with insurance fraud.<sup>75</sup> Also that month, the Government filed a motion requesting a psychological examination to determine Dr. Sell's competency to stand trial.<sup>76</sup> After ordering the examination, a federal Magistrate initially found Dr. Sell *currently* competent to stand trial for fraud.<sup>77</sup> Although the judge noted that Dr. Sell might experience "a psychotic episode" in the future, he released him on bail.<sup>78</sup> A grand jury later indicted Dr. Sell and his wife on fifty-six counts of mail fraud,<sup>79</sup> six

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trying to kill him. *Id.* at 170. In April 1997, he told law enforcement personnel that he "spoke to God last night," and that "God told me every [Federal Bureau of Investigation] person I kill, a soul will be saved." *Id.*

75. *Id.* Dr. Sell was charged with submitting fictitious insurance claims for payment. See 18 U.S.C. § 1035(a)(2) (2000) which reads:

Whoever, in any matter involving a health care benefit program, knowingly and willfully makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

*Id.*

76. Brief for the United States at 2, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter *United States Brief*]. See 18 U.S.C. § 4241(a) (2000) which reads:

At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

*Id.*

77. *Sell*, 539 U.S. at 170. The Magistrate ordered Dr. Sell to the U.S. Medical Center for Federal Prisoners at Springfield, Missouri, for an evaluation under 18 U.S.C. 4241(b) (2000). *United States Brief* at 2. See 18 U.S.C. § 4241(b). Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). *Id.*

78. *Sell*, 539 U.S. at 170.

79. See 18 U.S.C. § 1341 (2000):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to

counts of Medicaid fraud,<sup>80</sup> and one count of money laundering.<sup>81</sup>

The Magistrate in the case held a bail revocation hearing.<sup>82</sup> The judge described Dr. Sell's behavior at his initial appearance as "totally out of control."<sup>83</sup> A psychiatrist reported that Sell could not sleep because he expected the FBI to "come busting through the door," and concluded that Dr. Sell's condition had worsened.<sup>84</sup> After considering that report and other testimony, the Magistrate revoked Dr. Sell's bail.<sup>85</sup>

On April 23, 1998, the grand jury returned a new indictment charging Dr. Sell with conspiring to commit murder.<sup>86</sup> The court subsequently joined the attempted murder and fraud cases for trial.<sup>87</sup>

In February 1999, Dr. Sell asked the Magistrate for reconsideration regarding his competence to stand trial.<sup>88</sup> Both Dr. Sell's psychiatrist

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whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

*Id.*

80. *See* 42 U.S.C. § 1320a-7b(a)(1)(i) (2000):

Whoever knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a Federal health care program, shall in the case of such a statement, representation, concealment, failure, or conversion by any other person in connection with the furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony and upon conviction thereof fined not more than \$ 25,000 or imprisoned for not more than five years or both.

*Id.*

81. *Sell*, 539 U.S. at 170. *See* 18 U.S.C. § 1957(a) (2000):

Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$ 10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

*Id.*

82. *Sell*, 539 U.S. at 170. After another charge that Dr. Sell had attempted to intimidate a witness, the court held a bail hearing in which Dr. Sell's bond was revoked. *United States Brief* at 2.

83. *Sell*, 539 U.S. at 170. In 1998, Dr. Sell's behavior at his trial for attempting to intimidate a witness was "totally out of control," according to the judge. *Id.* Sell screamed and shouted, used personal and racial insults, and even spit in the judge's face. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Dr. Sell was arrested for the attempted murder of the FBI agent who had arrested him, and a former employee at his dental office who planned to testify against him in the fraud case. *Id.*

87. *Id.*

88. *Sell*, 539 U.S. at 170. The Magistrate sent Dr. Sell to the United States Medical Center for Federal Prisoners at Springfield, Missouri, for examination. *Id.* at 170-71. Subsequently the Magistrate found by a preponderance of the evidence that Dr. Sell was "mentally incompetent to stand trial." *United States Brief* at 3. He ordered Dr. Sell to undergo treatment at the Medical Center for up to four months, "to determine whether there was a substantial probability that [Dr.

and the government's psychiatrist determined that Dr. Sell suffered from a delusional disorder of the persecutory type.<sup>89</sup> The Magistrate ordered Dr. Sell hospitalized for a period of up to four months to determine if Dr. Sell would regain his competency.<sup>90</sup> Two months later, while at the U.S. Medical Center, staff members instructed Dr. Sell to take antipsychotic medication, which he consequently refused.<sup>91</sup> The reviewing psychiatrist then authorized the administration of the drugs.<sup>92</sup>

The Medical Center took up the decision on an administrative review.<sup>93</sup> The doctors requested an administrative hearing to authorize the administration of the medication against Dr. Sell's will.<sup>94</sup> At the June 1999 hearing, a Bureau of Prisons official upheld the officer's decision that Dr. Sell would benefit from the utilization of antipsychotic medication.<sup>95</sup>

In front of the Magistrate in July 1999, Dr. Sell disputed the order in a motion contesting the Medical Center's right to forcibly administer his medication.<sup>96</sup> The Magistrate permitted the administration of the forced medication for several reasons.<sup>97</sup> The government, however, did

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Sell] would attain the capacity to allow his trial to proceed." *Sell*, 539 U.S. at 171.

89. *Id.* Delusional disorder, as defined by the American Psychiatric Association, refers to a group of conditions in which the central feature is the presence of delusions in the absence of other symptomatology. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297.1 at 323 (4th ed. 2000). The most essential feature of Delusional Disorder is one or more nonbizarre (i.e., involving situations that could occur in real life) delusions, present for at least one month. *Id.* at 323. According to the American Psychiatric Association, the persecutory type of delusional disorder is the most common presentation of delusional disorder. *Id.* Patients are convinced that others are attempting to do them harm. *Id.* at 325. They often attempt to obtain legal recourse, and sometimes may resort to violence. *Id.*

90. *Sell*, 539 U.S. at 171.

91. *Id.* Sell had an administrative hearing to determine if antipsychotic drugs would be used in his treatment. *Id.* The doctors involved in the decision considered several past episodes, and the possibility of Dr. Sell's schizophrenia. United States Brief at 3. *See also* Petitioner's Brief at 15. In the Involuntary Medication Report prepared by the doctors, Sell indicated, "I do not want to take medicine. I do not want my chemistry altered. My brain is working well." *Id.*

92. *Sell*, 539 U.S. at 171. The psychiatrist made his decision based on several factors: the determination that Dr. Sell was mentally ill and dangerous, the decision that medication was necessary to treat the mental illness, and the hope that Dr. Sell would become competent to stand trial. *Id.* at 171-72.

93. *Id.* at 172.

94. *Id.* at 171. At the hearing, the government did not claim that Dr. Sell was dangerous. Petitioner's Brief at 15.

95. *Sell*, 539 U.S. at 172. The prison's official concluded that antipsychotic medication was the intervention most likely to lessen Dr. Sell's symptoms, as other methods would be unlikely to work. *Id.* The official also determined Dr. Sell was a potential safety issue to the prison community. *Id.*

96. *Id.* In September 1999, the magistrate who had committed Dr. Sell ordered a hearing regarding Sell's claim. *Id.*

97. *Sell*, 539 U.S. at 173. The court determined Dr. Sell was a danger to himself and others.

not specify the type or quantity of antipsychotic drugs it planned to use in medicating Dr. Sell.<sup>98</sup>

In April of 2001, the District Court affirmed the Magistrate's decision to medicate, but found the court's finding on dangerousness clearly erroneous.<sup>99</sup> Despite this disagreement, the District Court determined that involuntary medication was the best hope of rendering Dr. Sell competent to stand trial.<sup>100</sup>

In March 2002, the United States Court of Appeals for the Eighth Circuit granted certiorari to review the lower court judgment permitting involuntary administration of antipsychotic drugs to Dr. Sell in order to render him competent to stand trial for a serious, but nonviolent crime.<sup>101</sup> The Eighth Circuit affirmed the decision of the District Court, determining that the Government had a serious interest in the fraud charges looming over Sell, thus justifying the need for forced antipsychotic medication.<sup>102</sup>

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*Id.* The government based its decision on Sell's attempt to become familiar with a nurse at the Medical Center. *Id.* at 172-73. Dr. Sell told one of the nurses at the center that he was in love with her and that he "can't help it." *Id.* In light of this, the magistrate decided that the drugs make Dr. Sell less dangerous to himself and others, alleviate any serious side effects, benefit him more than put him at risk, and have the greatest chance at returning Dr. Sell to competency. *Id.* at 173.

98. Petitioner's Brief at 16 (explaining the abstract nature of the government's proposal to medicate Dr. Sell).

99. *Sell*, 539 U.S. at 173-74. See Petitioner's Brief at 17. "The record does not indicate that defendant has posed a danger to himself or others during the period of his institutionalization at the [Center], and the statements and conduct relied upon for a finding of dangerousness do not suggest, a threat of violence to the staff." *Id.*

100. *United States v. Sell*, No. 4:97CR290-DJS, 2000 U.S. Dist. LEXIS 22425, at \*1-2 (E.D. Mo. Aug. 23, 2000). The court held that the nature of the relief sought by the government counseled that the involuntary administration of drugs should be stayed pending the court's reconsideration proceedings. *Id.* The opinion left the question whether and on what terms the stay should be extended during any proceedings before it to the court of appeals. *Id.* See also Petitioner's Brief at 17. The district court held that competency restoration on its own is enough to forcibly medicate a defendant. *Id.* "The seriousness of the charges against Dr. Sell contributes greatly to the compelling strength of the government's interest in adjudicating defendant's guilt." *Id.*

101. *United States v. Sell*, 282 F.3d 560 (8th Cir. 2002).

102. *Id.* at 572. The Eighth Circuit relied on medical evidence that indicated a reasonable likelihood that medication would allowed Dr. Sell to be an active participant in his pending trial. *Id.* The court also noted the government's essential interest in bringing Dr. Sell to trial, in light of the lack of less intrusive means to accomplish this. *Id.*

## B. Supreme Court Decision

### 1. Majority Opinion

The United States Supreme Court first dealt with the issue of jurisdiction in the *Sell* case.<sup>103</sup> The Court questioned whether Dr. Sell could legally appeal the District Court's pretrial order.<sup>104</sup> If the order was considered a collateral order, the Eighth Circuit had jurisdiction to hear the appeal, and therefore the United States Supreme Court would have jurisdiction to hear the case.<sup>105</sup> The Court asked both Dr. Sell and the United States to provide briefs on the issue of jurisdiction.<sup>106</sup> Both parties agreed that the Court had proper jurisdiction to review the case.<sup>107</sup> The Court also agreed, determining that Sell's appeal was a collateral order, and therefore the Eighth Circuit had jurisdiction to hear the appeal.<sup>108</sup>

The United States Supreme Court, in a six-to-three decision on the issue of forced medication, vacated and remanded the decision of the Eighth Circuit.<sup>109</sup> In its decision, the Court assumed that Dr. Sell was not dangerous.<sup>110</sup> The majority opinion<sup>111</sup> held that, based on that

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103. *Sell*, 539 U.S. at 175-77. The court had to determine if the Eighth Circuit had jurisdiction to reach the substantive merits of Sell's case. *Id.* at 175.

104. *Id.* at 177. A defendant is normally required to wait until the end of the trial to obtain appellate review of a partial order. *Id.* See 28 U.S.C. § 1291; *supra* note 22 and accompanying text.

105. *Sell*, 539 U.S. at 177. The collateral order doctrine is an exception to the final appealable order rule. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen*, 337 U.S. at 541; *supra* note 18 and accompanying text.

106. Charles Lane, *Justices Debate Medicating Mentally Ill Man for Trial*, WASHINGTON POST, March 4, 2003, at A04. The justices asked both Dr. Sell and the government whether the original federal district court order authorizing forcible medication should have been appealable at all. *Id.*

107. In its Supplemental Brief, the Government submitted that the court of appeals had jurisdiction over the petitioner's appeal under 28 U.S.C. 1291 and the collateral order doctrine. Supplemental Brief for the United States at 1, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664). In its Supplemental Brief, Petitioner also submitted that the Court of Appeals had jurisdiction under 28 U.S.C. § 1291 pursuant to the collateral order doctrine and that the Supreme Court had jurisdiction under 28 U.S.C. § 1254(1) (2000). Supplemental Brief of Petitioner at 1, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664).

108. *Sell*, 539 U.S. at 177. The Supreme Court held that the order conclusively determined the disputed question of whether Dr. Sell has a legal right to reject forced medication. *Id.* at 176. The Court also held that the lower order fulfilled the second requirement of resolving an important issue, because involuntary medication "raises questions of clear constitutional importance." *Id.* Finally, the Court concluded that the issue of forced medication could not be effectively reviewed on appeal of final judgment, at that time, Dr. Sell would have already been subjected to the forced medication to which he strongly opposes. *Id.* at 176-77.

109. *Id.* at 186.

110. *Sell*, 539 U.S. at 185. The Court was required to assume that Dr. Sell is not dangerous,

assumption, the appellate court was wrong to approve forced medication solely to render a defendant competent to stand trial.<sup>112</sup> The Court deemed forced medication permissible if the treatment was medically appropriate, substantially unlikely to have side effects that may undermine the trial's fairness, necessary to further important government trial-related interests, and the least intrusive alternative.<sup>113</sup> The Court made note that the experts involved in the Magistrate's hearing focused mainly on the idea of dangerousness, while excluding other important issues.<sup>114</sup> As a result, there was not enough information to know whether the side effects of the antipsychotic medication were likely to undermine the fairness of the trial in Dr. Sell's case.<sup>115</sup>

In dicta, the majority noted that the standards laid out by the Court in the *Sell* decision are only to be used in determining whether involuntary administration of drugs is significantly necessary to render the defendant competent to stand trial.<sup>116</sup> If other grounds exist for

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merely because the Court of Appeals and District Courts found the magistrate's holding of dangerousness clearly erroneous. *Id.* at 184. The Supreme Court did add, however, "if anything, the record before us . . . suggests the contrary." *Id.* If the appellate court had found Sell dangerous, the standards set forth in *Harper* and *Riggins* could have been applied to Dr. Sell's forced medication. *Id.* at 185.

111. *Sell*, 539 U.S. at 166. The majority opinion was written by Justice Breyer, joined by Chief Justice Rehnquist, and Justices Stevens, Kennedy, Souter, and Ginsberg. *Id.*

112. *Id.* at 185.

113. *Id.* at 179. See *supra* notes 57-60 and accompanying text for analysis. The Court recognized that the public's interest in prosecuting a crime must be weighed against an individual's autonomy and, therefore, required the courts to go through a list of conditions that the government must satisfy in cases with nonviolent defendants. *Sell*, 539 U.S. at 180-81. According to Sell's attorney, Barry Short, "They have set a rather high bar for the government when it's seeking to medicate persons who are accused of serious nonviolent crimes." Charles Lane, *Court Sets Guidelines for Forced Medication*, WASHINGTON POST, June 17, 2003, at A01.

114. *Sell*, 539 U.S. at 171-73. The reviewing psychiatrist of the initial Medical Center decision authorized involuntary administration of drugs and added that he considered Dr. Sell dangerous based on threats and delusions. *Id.* at 172. The magistrate, in an August 2000 decision found that the government made a "substantial and very strong showing that Dr. Sell is dangerous to himself and others . . ." *Id.* at 173. Issues such as trial-related side effects and risks that could have helped determine whether trial competence grounds alone warranted forced medication were ignored in light of dangerousness considerations. *Id.* at 185.

115. *Sell*, 539 U.S. at 185-86. The District Court and the Eighth Circuit found the Magistrate's ruling on Dr. Sell's dangerousness clearly erroneous, and found based on trial competency alone. *Id.* at 184. However, the court did not take into account the correct factors such as trial-related side effects and risks. *Id.* at 184-85. The court looked to the holdings in *Harper* and *Riggins*, *supra*, to point out that courts have been historically permitted to administer these drugs only if the test for trial competency is satisfied. *Id.* at 179.

116. *Sell*, 539 U.S. at 180. The *Sell* majority noted that a court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for "a different purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely

forced medication, the court should seek those first.<sup>117</sup> Therefore, the Court instructed the Eighth Circuit on remand to allow the government to pursue its request for forced medication on grounds related to those discussed in the Court's opinion.<sup>118</sup>

## 2. Dissenting Opinion

The dissenting opinion, written by Justice Scalia and joined by Justices O'Connor and Thomas, focused its discussion on the issue of the collateral order.<sup>119</sup> The dissenters disagreed with the majority in its determination that all three prongs of the collateral order test were satisfied.<sup>120</sup> Justice Scalia reasoned that a decision to medicate failed the third requirement of the collateral order doctrine.<sup>121</sup> Justice Scalia emphasized that, until this case, the Court had interpreted the collateral order exception with the "utmost strictness" in criminal cases.<sup>122</sup> The dissent felt that the majority's narrow holding would allow criminal

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at risk." *Id.* at 182 (emphasis added). Strong reasons exist for a court's holding on whether forced administration can be justified "on these alternative grounds *before* turning to the trial competence question." *Id.* (emphasis added). In addition, the Court held:

We consequently believe that 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 grounds; and, if not, why not.

*Id.* at 183.

117. *Sell*, 539 U.S. at 183.

118. *Id.* at 186. The Court noted that the government may investigate dangerousness at that time, but in evaluating Dr. Sell's medical condition, the Government should do so under current circumstances. *Id.*

119. *Id.* at 186-93 (Scalia, J., dissenting).

120. *Sell*, 539 U.S. at 189. Scalia held that the District Court never entered a final judgment in the *Sell* case. *Id.* at 186. The District Court's April 4, 2001, order failed to satisfy the third requirement of this test, 'ineffective on review of final order.' *Id.* at 189.

121. *Id.* The Court decided in the earlier case, *Riggins v. Nevada*, that when forced medication is imposed incorrectly, the defendant is entitled to automatic vacatur of his conviction. *Riggins*, 504 U.S. at 138. *See supra* note 56 and accompanying text. The dissenters in *Sell* reasoned that because a defendant has right to vacate his conviction, his order is effectively reviewable on appeal from the final judgment. *Sell*, 539 U.S. at 189-90. Just because the defendant does not get the *kind* of relief he prefers, does not mean he cannot appeal the issue after final judgment. *Id.* at 190. Regardless of whether the defendant gets his "predeprivation injunction" or a "postdeprivation vacatur," it does not eliminate the possibility of effective final appeal. *Id.*

122. *Id.* *See also* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989); *Flanagan v. United States*, 465 U.S. 259, 265 (1984); *supra* notes 23-26 and accompanying text. *See generally* *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (holding that defendants have no immediate right to appeal from civil contempt citations imposed to gain compliance with a discovery order). These decisions, along with the numerous other decisions in which the court has declined interlocutory appeals, indicate a general proposition that the third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Id.*

defendants in a position like Dr. Sell to engage in unwanted, opportunistic behavior.<sup>123</sup> The dissenters asserted that if the majority's holding was applied in a faithful manner, any criminal defendant who asserts that a trial order will cause an immediate violation of his constitutional rights may immediately appeal.<sup>124</sup> The dissenting judges also pointed out that Dr. Sell did not exhaust his administrative remedies before filing this suit in the District Court.<sup>125</sup> Finally, the dissent believed that the Court should have vacated the judgment and remanded the case to the Court of Appeals with instructions to dismiss.<sup>126</sup>

#### IV. ANALYSIS

In *Sell*, the Supreme Court created another opportunity for a defendant to immediately appeal a decision, well before final adjudication.<sup>127</sup> In addition, the Court set down a heightened scrutiny standard for forcible medication to defendants who are found incompetent, but pose no danger.<sup>128</sup> This Section considers the impact of both the extension of the collateral order doctrine and the Court's test for forcible medication of a mentally incompetent defendant for trial competency purposes.<sup>129</sup>

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123. *Sell*, 539 U.S. at 191. Scalia described a situation in which a defendant can voluntarily take his medication until halfway through trial and then quit taking it in order to collaterally appeal the medication order. *Id.*

124. *Id.* Scalia points out that this defendant would be able to postpone a trial for months just by claiming that a post-judgment appeal regarding one violation or another would come too late to prevent injustice. *Id.* Scalia emphasized his point with an exaggerated example in which an order refusing to allow a defendant to wear a "Black Power" T-shirt could be attacked as a violation of the defendant's First Amendment Rights. *Id.* at 192.

125. *Id.* at 193. Dr. Sell could have filed for a pre-trial review of his medication order, by filing a suit under the Administrative Procedures Act, 5 U.S.C. §§ 551 et. seq., or a *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 338 (1971), action. *Id.*

126. *Sell*, 539 U.S. at 193.

127. *Id.* at 177. "We conclude that the District Court order from which Sell appealed was an appealable 'collateral order.' The Eighth Circuit had jurisdiction to hear the appeal. And we consequently have jurisdiction to decide the question presented, whether involuntary medication violates Sell's constitutional rights." *Id.*

128. *Id.* at 179-81. See Lane, *supra* note 113, at A01; *supra* note 113 and accompanying text (laying out the majority's test for forcible medication to render a defendant competent to stand trial). See also Robert B. Bluey, *The Supreme Court Makes It Tougher to Forcibly Drug Inmates*, CYBERCAST NEWS SERVICE (June 17, 2003), at <http://www.cnsnews.com/ViewNation.asp?Page=Nation\archive\200306\NAT20030617b.html> (quoting Dr. Sell's attorney, Barry Short, who said "[I]t's clear that the Supreme Court thinks it's highly unlikely that the government will ever be able to meet the burden.")

129. See *infra* notes 130-241 and accompanying text.

*A. Determining the Correct Application of the Collateral Order Doctrine*

Justice Breyer was correct in extending the *Cohen* test for collateral order to the issue of forcible medication.<sup>130</sup> The majority applied the Court's three-part test for appealable collateral orders,<sup>131</sup> holding that the district court's order "conclusively determined" Dr. Sell's legal right to avoid forced medication,<sup>132</sup> "resolved . . . questions of clear constitutional importance" distinct from Dr. Sell's culpability,<sup>133</sup> and was "effectively unreviewable on appeal from a final judgment" on the charges.<sup>134</sup>

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130. *Sell*, 539 U.S. at 177.

131. *See* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989); *supra* notes 33-37 and accompanying text (setting out the three prongs of the *Cohen* collateral order test). *See also* *Coopers & Lybrand*, 437 U.S. at 468 (also cited for its construction of the collateral order test).

132. *Sell*, 539 U.S. at 176. *See also* Supplemental Brief of the Petitioner at 4. Petitioner explains that the Supreme Court, in another case that determined that a claim regarding double jeopardy satisfied the 'conclusively determined' standard, held:

There can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee.

*Id.* *See also* *Abney*, 431 U.S. at 659-60 (finding a right to appeal a denial of a motion to dismiss on double jeopardy grounds); *Richardson v. United States*, 468 U.S. 317, 321-322 (1984) (finding a right to avoid forced medication). *Sell* is the same as *Abney*, in that once the Court determined that forcible medication was permissible, Dr. Sell had no other options to avoid the administration of the drugs. Supplemental Brief of the Petitioner at 4. Dr. Sell asserted a substantive due process right to resist medication. Supplemental Brief for the United States at 6. The Supreme Court recognized that an inmate housed in a prison mental health unit "possesses a significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Johnson v. Coto*, No. 88-7618, 1991 U.S. App. LEXIS 1485, at \*2, (4th Cir. Feb. 4, 1991) (citing *Harper*, 494 U.S. 210). The order by the district court allowing the forced medication "conclusively resolved" that the government's ability to override Dr. Sell's substantive due process rights and his First and Fifth Amendment rights to refuse medication. *See* Supplemental Brief for the United States at 6; Supplemental Brief of the Petitioner at 5 (both briefs arguing in favor of allowing the issue of forced medication on appeal without a final order in the case).

133. *Sell*, 539 U.S. at 176. The second requirement under the collateral order doctrine is that the order must "resolve an important issue completely separate from the merits of the action." *See* *Coopers & Lybrand*, 437 U.S. at 468 (finding the certification of a class under Fed. R. Civ. P. 23 "enmeshed in the factual and legal issues comprising the plaintiff's cause of action" and, therefore not sufficiently collateral to justify immediate appeal). In *Sell*, the merits of the indictments involve the guilt or innocence of the accused regarding mail fraud, healthcare fraud, and money-laundering. Supplemental Brief of the Petitioner at 6. The decision on forcible medication has "nothing whatsoever to do with the Dr. Sell's guilt or innocence." *Id.* at 6. Petitioner's claim that he may not be medicated does not dispute the government's charges such as fraud, and it in no way refutes the government's evidence against him. Supplemental Brief of the United States at 9. Dr. Sell's claim is instead a First Amendment claim refuting the government's right to force medication. *Id.*

134. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499 (1989) (citing *Midland Asphalt Corp.*, 489 U.S. at 798) (stating the general rule for effective unreviewability is that "where the order at

## 1. Forced Medication Orders Are Not Effectively Reviewable Upon Appeal

The most disputed aspect of the Court's three-prong analysis is the determination that the area of forced medication cannot be effectively reviewed on appeal.<sup>135</sup> The *Sell* Court correctly concluded that the approval of forced medication is effectively unreviewable on appeal from a final judgment.<sup>136</sup> Accordingly, "by the time of the actual trial, Dr. Sell would have undergone forced medication—the very harm that he sought to avoid."<sup>137</sup>

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issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial'). See also *The Supreme Court, 2002 Term: Leading Cases: I. Constitutional Law: 3. Involuntary Medication of Criminal Defendants*, 117 HARV. L. REV. 307, 310 (2003) (reviewing the *Sell* decision) [hereinafter *2002 Term: Leading Cases*]. Specifically, Justice Breyer distinguished Dr. Sell's appeal from examples that Justice Scalia raised in his dissent. See *Sell*, 539 U.S. at 191-92 (Scalia, J., dissenting). "This analysis effects a breathtaking expansion of appellate jurisdiction over interlocutory orders." *Id.* at 191. Justice Scalia felt that if lower court applied the majority's holding faithfully, any criminal defendant who claimed that a lower court order was a violation of his constitutional rights could seemingly appeal immediately. *Id.*

135. *Sell*, 59 U.S. at 189. "[T]he District Court's April 4, 2001, order fails to satisfy the third requirement of this test. The Court has held that an order is 'effectively unreviewable' only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *MacDonald*, 435 U.S. at 860.

136. *Sell*, 539 U.S. at 176-77. See generally Anderson, *supra* note 25 (explaining the policies behind the final judgment rule). Anderson explains that Congress recognized the Court must perform a balance between the policies for the final judgment rule and the potential harm to a party from an erroneous decision. *Id.* at 543 (citing *Doe v. Vill. of Crestwood*, 917 F.2d 1476, 1477 (7th Cir. 1990) (holding that the granting of a temporary injunction was appealable pursuant to 28 U.S.C. § 1292(a)(1))). Jurisdiction was especially appropriate given the "severity of the intrusion and corresponding importance of the constitutional issue." See *2002 Term: Leading Cases, supra* note 134, at 310.

137. *Sell*, 539 U.S. at 176-77. "[Dr. Sell] cannot undo that harm even if he is acquitted." *Id.* at 177. Other Courts have also found forced medication unreviewable on appeal. See Kristin B. Gerdy, Article: "Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine, 38 U.S.F.L. REV. 213, 245 (2004) (proposing a way that the collateral order doctrine could be applied in the involuntary medication setting while upholding the doctrine's narrow application) (citing *United States v. Gomes*, 289 F.3d 71, 79 (2d Cir. 2002) (holding that "if the defendant should prevail after he has been forcibly medicated, his right to refuse to be medicated would have been lost and his victory would be a hollow one") *vacated by* 539 U.S. 939 (2003)); *United States v. Morgan*, 193 F.3d 252, 259 (4th Cir. 1999) (holding that the district court's order would be effectively unreviewable on appeal from a final judgment of conviction, because once the defendant had been forcibly medicated pursuant to the order, "a determination of the procedural safeguards to which he was entitled prior thereto would amount to a purely academic exercise"). In developing the collateral order doctrine, the Court recognized that some interests are too fundamental to a person's rights and liberties to justify waiting until the end of the trial for appeal. *Lauro Lines*, 490 U.S. at 499 (citing *Midland Asphalt Corp.*, 489 U.S. at 798). In *Lauro Lines*, the Court reiterated that in the past they held the deprivation of the right not to be tried as effectively unreviewable after a final judgment is rendered in criminal prosecutions. S. Christian Mullgarat, *Settlement Agreements and the Collateral Order*

The dissent, however, disapproved of the majority's decision that forced medication is unreviewable.<sup>138</sup> The dissent incorrectly states that vacatur<sup>139</sup> is an appropriate remedy for forced medication on appeal, and therefore reviewable on appeal.<sup>140</sup> In making this determination, the dissent fails to distinguish between Dr. Sell's substantive due process and First Amendment claim, and his Fifth and Sixth Amendment right to

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*Doctrine: A Step in the Wrong Direction?*, 1995 J. DISP. RESOL. 155, 156 (1995) (analyzing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994)) (citing *Lauro Lines*, 490 U.S. at 599). See 2002 Term: *Leading Cases*, *supra* note 134, at 316. "Sell actually asserted a right not to be medicated for trial, a right that if upheld would prevent trial for the foreseeable future." *Id.* The government would never be able to prosecute Dr. Sell if he was deemed incompetent to stand trial. *Id.* Any determination of Dr. Sell's appeal would be indicative of whether any trial would occur at all. *Id.* Dr. Sell's attorney, Barry Short, explained in oral arguments, that forced medication cannot be effectively reviewed. Transcript of Oral Argument, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), available in 2003 U.S. TRANS LEXIS 21, at 6 (Mar. 3, 2003):

Once [Dr. Sell is] medicated with these drugs, whatever changes take place, these drugs are meant to cause changes to take place. That's the purpose of giving him these drugs.

In effect, the decision will have been made, his mind will have been altered, in whatever segment that is altered, and that cannot be undone.

*Id.* at 7.

138. *Sell*, 539 U.S. at 189 (Scalia, J., dissenting).

It is true that, if petitioner must wait until final judgment to appeal, he will not receive the type of remedy he would prefer—a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*. But that ground for interlocutory appeal is emphatically rejected by our cases.

*Id.* at 190. See, e.g., *Flanagan v. United States*, 465 U.S. 259 (1984) (disallowing interlocutory appeal of an order disqualifying defense counsel). See also *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266-67 (1982) (per curiam) (disallowing an interlocutory appeal of an order denying motion to dismiss indictment on grounds of prosecutorial vindictiveness); *Carroll v. United States*, 354 U.S. 394 (1957) (disallowing an interlocutory appeal of an order denying motion to suppress evidence). But see *Sell*, 539 U.S. at 177, for Justice Breyer's reply that several factors serve to limit the scope of the interlocutory appeal dimension of the decision, perhaps extending it no further than to appeals of this issue. *Id.* These factors include the "severity of the intrusion and corresponding importance of the constitutional issue," the fact that the involuntary administration issue is completely distinct from any questions of trial procedure, and the fact that a constitutional deprivation (administering the drug without sufficient justification) is impossible to undo once the drug has been administered. *Id.* at 176-77.

139. Vacatur is defined as either "the act of annulling or setting aside," or a "rule or order by which a proceeding is vacated." BLACK'S LAW DICTIONARY 1546 (7th ed. 1999).

140. *Sell*, 539 U.S. at 189-90 (Scalia, J., dissenting). The dissenters in *Sell* explained the Court's holding in *Riggins* in which the *Riggins* Court determined that forced medication of a criminal defendant that fails to comply with the *Harper* restrictions creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. *Riggins*, 504 U.S. at 135-138. Justice Scalia reasoned that "The Court is therefore wrong to say that 'an ordinary appeal comes too late for a defendant to enforce' this right . . . and appellate review of any substantive-due-process challenge to the District Court's April 4, 2001, order must wait until after conviction and sentence have been imposed." *Sell*, 539 U.S. at 189-90. This opinion is contrary to other cases the Court has seen regarding the doctrine. See *Lauro Lines*, 490 U.S. at 499 (discussing the criminal defendant's right to appeal regarding avoiding trial altogether).

a fair trial.<sup>141</sup> Although vacation of the court's decision on subsequent review would vindicate Dr. Sell's *trial* right, his due process and First Amendment claims would be forever lost.<sup>142</sup> If Dr. Sell is acquitted, he has no chance to appeal the forced medication directive, thus having suffered the harm with no recourse.<sup>143</sup>

## 2. Maintaining Narrow Access to Appeal Without Final Judgment

Contrary to the dissent's concern,<sup>144</sup> the decision in *Sell* will have a small effect on the area of appeals because, although it may expand the current exceptions to the final decision rule, forcible medication is one of those situations for which the doctrine was created to protect the defendant.<sup>145</sup> The dissent incorrectly feels this will make it easy for a

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141. Supplemental Brief for the United States at 13.

142. *Sell*, 539 U.S. at 176-77. The *Sell* Court explained, "He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review." *Id.* at 177. See also *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (holding that a denial of a motion to dismiss on the ground of immunity from civil process was not immediately appealable). The Court in *Van Cauwenberghe* held that the final judgment rule allows a litigant to appeal pre-final judgment in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal. *Id.* (citing *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985)). For more detail on the concept of "irretrievably lost," see Anderson, *supra* note 25, at 576.

143. Supplemental Brief for the United States at 14. "[T]he liberty interest in avoiding unwanted antipsychotic medication must be vindicated before the medication is administered, or not at all." *Id.* at 14-15. Cf. *Abney*, 431 U.S. at 662. In *Abney*, a double jeopardy case on collateral review, the Court held, "[E]ven if the accused is acquitted, or, if convicted, had his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* But see *Sell*, 539 U.S. at 192-93 (Scalia, J., dissenting). *Sell* could have obtained pretrial review of the forced medication order in other ways, such as a challenge to the Administrative Procedures Act or by filing a *Bivens* suit. *Id.* at 193. In these types of suits, "[Dr. Sell] could have obtained immediate appellate review of denial of relief." *Id.*

144. *Id.* at 191. The dissent expressed a concern that the majority created a new rule with respect to the collateral order doctrine, with strongly adverse effects. *Id.* Justice Scalia gives examples of extreme cases in which the majority's decision would create unnecessary expansion of the collateral order doctrine, such as "requiring the defendant to wear an electronic bracelet" or "an order refusing to allow the defendant to wear a T-shirt that says 'Black Power' in front of the jury" as violations of the defendant's First Amendment rights. *Id.* at 191-92. According to a Harvard Law Review article, jurisdiction in *Sell* was especially appropriate given the "severity of the intrusion and corresponding importance of the constitutional issue." *2002 Term: Leading Cases*, *supra* note 134, at 310. But see *Flanagan v. United States*, 465 U.S. 259 (1984); *Carroll v. United States*, 354 U.S. 394 (1957) (holding that appellate review of orders that *might* infringe on a defendant's constitutionally protected rights *still* had to wait until final judgment).

145. As previously explained, the collateral order doctrine has been interpreted "with the utmost strictness" in criminal cases in order to to maintain the finality of judgment rule. *Sell*, 539 U.S. at 190 (Scalia, J., dissenting) (emphasis added). See also John Paul Sellers, III, *Between a Writ and a Hard Place: Does Ohio Revised Code Section 2505.02 Adequately Safeguard a Person's Right Not to Be Tried?*, 28 OHIO N.U.L. REV. 285, 289 (2002) (exploring whether a defendant who asserts a right not to be tried can pursue the issue in an immediate appeal under § 2505.02 of the

defendant to take and then refuse medication to warrant a collateral appeal.<sup>146</sup> Regardless of the dissent's concerns about the majority's decision, the importance of protecting the personal liberty of a non-dangerous defendant significantly outweighs a concern for abuse of the rule.<sup>147</sup>

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Ohio Revised Code). Even though the third prong of the *Cohen* collateral order test is written generally, it has been narrowly applied. *Id.* Sellers explains that the Supreme Court in *Lauro Lines* held that “a contractual right to an Italian forum” would not be destroyed if the case commenced to trial in New York. Sellers, *supra* at 289. The forum selection clause did not permit the party to “avoid suit altogether,” and “while not perfectly secured by appeal after final judgment, the party’s right to have the case ultimately decided by a court in Naples was ‘adequately vindicable’ following an unnecessary trial in the wrong court.” *Id.* (citing *Lauro Lines*, 490 U.S. at 495). See also 2002 Term: *Leading Cases*, *supra* note 134, at 310. The *Sell* case is different from the cases of those defendants who, according to Justice Scalia’s examples, “appeal from orders regarding electronic bracelets, courtroom attire, or compelled testimony. Though this distinction would not seal future appellate jurisdiction at *Sell*’s four corners, neither would it license a massive ‘disruption of criminal proceedings.’” *Id.* But see Heidi Lypps, *Better Justice Through Chemistry: Does the new Court standard really protect our rights?*, RAGGED EDGE EXTRA! (2003), at <http://www.ragged-edge-mag.com/extra/sell-lypps.html>. “[I]t isn’t as if Sell is attempting to avoid trial; he’s been insisting he be brought to trial, unmedicated, all along. Though the decision allows him to avoid the indignity of having a needle filled with some very potent drugs shoved into his vein, too, he will likely remain incarcerated indefinitely.” *Id.* See also Joseph G. Matye, *Interlocutory Appeals of Rule 35 Medical Examination Orders*, 61 UMKC L. REV. 503, 528 (1993) (suggesting that the restrictive application of the interlocutory appeal doctrine is inconsistent with the recognized privacy interests related to medical examination and other discovery orders). Forced medication is different from other medical issues, such as discovery orders requiring compliance with a medical examination. *Id.* The collateral order doctrine is an unlikely review of a medical examination order. *Id.* “In addition to the Seventh Circuit, other courts have completely rejected use of the collateral order doctrine to provide jurisdiction to review discovery orders.” *Id.* (citing *Chase Manhattan Bank v. Turner & Newell*, 964 F.2d 159, 163 (2d Cir. 1992) and *FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990) (both showing that while the collateral order doctrine is an option for obtaining review, like the other methods, its applicability is very limited)).

146. *Sell*, 539 U.S. at 191. Justice Scalia explained:

Today’s narrow holding will allow criminal defendants in petitioner’s position to engage in opportunistic behavior. They can, for example, voluntarily take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis. This sort of concern for the disruption of criminal proceedings—strangely missing from the Court’s discussion today—is what has led us to state many times that we interpret the collateral-order exception narrowly in criminal cases.

*Id.* (citing *Midland Asphalt Corp.*, 489 U.S. at 799, and *Flanagan*, 465 U.S. at 264). According to Justice Scalia, because Dr. Sell did not follow the proper administrative methods and instead chose to challenge the order for forced medication through the criminal process, he is required to abide by the constraints of such a challenge. *Id.* at 193. These limitations include waiting until the end of the trial to challenge an issue such as forced medication. *Id.* “Petitioner’s mistaken litigation strategy, and this Court’s desire to decide an interesting constitutional issue, do not justify a disregard of the limits that Congress has imposed on courts of appeals’ (and our own) jurisdiction.” *Id.*

147. *Id.* at 177. According to the Majority, considerations such as the severity of the intrusion of unwanted medication and the corresponding constitutional issues involved readily distinguish [Dr.] Sell’s case from the examples raised by the dissent. *Id.*

*B. Analyzing the Constitutional Problems with the Court's Forced Medication Test*

Although the Court's decision ultimately prevented the government from forcibly medicating Dr. Sell personally, the heightened scrutiny test laid out by the Court is not strong enough to protect many other non-dangerous mentally ill criminal defendants' constitutional rights.<sup>148</sup>

*Sell* is the first Supreme Court case involving the mental health rights of a non-dangerous pre-trial defendant.<sup>149</sup> Unfortunately, the Court relied too heavily on two prior precedents, *Harper*<sup>150</sup> and *Riggins*,<sup>151</sup> which set forth the Court's framework for determining the answer to this issue.<sup>152</sup> The problem with using these two cases lays in the issues of dangerousness and seriousness of the offense charged.<sup>153</sup>

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148. See *Sell*, 539 U.S. at 179-81. The majority in *Sell* held: "This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare." *Id.* at 180. The problem with this statement is that some possibility still exists that at some point in the future, a mentally ill patient may still be required to succumb to unwanted medical treatment solely for the purposes of prosecuting him for a crime. Petitioner's Brief at 24. If this is permitted, "an individual will lose his right to refuse medication based solely upon the government's unproven assertion that the individual is guilty of a non-violent crime and may be rendered competent if non-specified, mind-altering drugs are administered to him." *Id.* According to the Petitioner, constitutionally, this should not be permitted. *Id.*

149. See *supra* note 65 and accompanying text.

150. *Harper*, 494 U.S. 210 (1990).

151. *Riggins*, 504 U.S. 127 (1992).

152. *Sell*, 539 U.S. at 177-78.

153. See *supra* note 99 and accompanying text. The district court found the Magistrate's decision on Dr. Sell's dangerousness "clearly erroneous," and the appellate court affirmed this holding. *Sell*, 539 U.S. at 184. In addition, the Court distinguished this case from those which involve forcibly medicating a dangerous defendant. *Id.* See JANE CAMPBELL MORIARTY, PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS § 4:6.4 (1st ed. 2003). When a defendant is deemed dangerous, the court should first explore dangerousness, before getting into an analysis regarding trial competency. *Id.* (citing *Sell*, 539 U.S. at 181-82). A court does not need to consider whether to allow forced medication under the *Sell* analysis, if the forced medication is "warranted for a different purpose." *Sell*, 539 U.S. at 181. According to the majority, such purposes include those:

set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. . . .

There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

*Id.* at 182. In addition, Dr. Sell was charged with nonviolent crimes, such as fraud and money laundering. *Id.* at 170. However, Harper was deemed a dangerous defendant and, therefore, the Court held that due to the prison environment,

the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest, where the prison's policy comports with due process requirements.

*Harper*, 494 U.S. at 227. In *Riggins*, the defendant was on trial for murder, a violent crime.

The *Harper* Court found that a state can forcibly treat an inmate who has a serious mental illness with antipsychotic drugs if he is dangerous to himself and the drugs are in his best interest.<sup>154</sup> *Riggins*, although a pretrial defendant like Dr. Sell, committed a serious crime like Harper and was labeled dangerous to himself and those around him.<sup>155</sup> Dr. Sell was not deemed dangerous, and the crimes before the Court were non-dangerous offenses.<sup>156</sup> In light of these considerations, the Court should have decided that such involuntary administration of antipsychotic medication is impermissible and in violation of the Constitution.<sup>157</sup>

### 1. Sell's First Amendment Right to Freedom of Thought

“Does forced administration of antipsychotic drugs to render [Dr.] Sell competent to stand trial unconstitutionally deprive him of his ‘liberty’ to reject medical treatment?”<sup>158</sup> The Supreme Court missed an opportunity to decide this issue on First Amendment grounds.<sup>159</sup>

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*Riggins*, 504 U.S. at 129. The *Riggins* Court repeated *Harper* by stating that “antipsychotic drugs are impermissible unless the inmate posed a danger to himself or others.” *Id.* at 135.

154. *Harper*, 494 U.S. at 227. See also MORIARTY, *supra* note 153, at §4:6.3 (explaining the holding in *Harper*).

155. *Riggins*, 504 U.S. at 135. See *supra* notes 53-55 and accompanying text (discussing the Court's view on Dr. Sell's dangerousness).

156. *Sell*, 539 U.S. at 173-74. According to an APA press release:

In *Sell*, the Court was asked to clarify the circumstances in which a court may order the involuntary administration of antipsychotic medication to a criminal defendant who is incompetent to stand trial, but who is competent to make medical decisions on his own behalf (including the decision to refuse antipsychotic medication) and who is not dangerous to himself or others.

*Court's Decision in Sell v. United States Reflects Psychology's Recommendation that Alternatives to Drug Therapy Should be Considered*, APA PRESS RELEASES (June 17, 2003), available at <http://www.apa.org/releases/sellvsus.html>.

157. *Sell*, 539 U.S. at 179. This assertion is made in opposition to the Court's decision that permits involuntary medication solely for trial competence purposes in certain instances although the defendant is deemed non-dangerous. *Id.*

158. *Id.* at 177. See also U.S. CONST. amend. V (stating that the Federal Government may not “deprive” any person of “liberty . . . without due process of law”).

159. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. See also Brief of Amici Curiae Center for Cognitive Liberty & Ethics at 3, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter Brief of CCL&E]. The Center for Cognitive Liberty & Ethics, a civil liberties nonprofit organization that filed a friend of the court brief on Dr. Sell's behalf, “saw an opportunity for the Supreme Court to uphold Dr. Sell's freedom of thought as a First Amendment right.” Lypps, *supra* note 145, at <http://www.ragged-edge-mag.com/extra/sell-lypps.html>. To the CCLE, interfering with Dr. Sell's brain chemistry is like mind control, and therefore, a restraint on freedom of speech. *Id.* See *Supreme Court Upholds Right to Refuse Mind-Altering Drugs: CCLE Amicus Brief Argues Forced Medication Infringes Fundamental Liberty*, INSTITUTE FOR HEALTH FREEDOM (June 16, 2003)

Mental health treatments that “coerce beliefs, attitudes, and mental processes” involve potential violations of First Amendment principles.<sup>160</sup> Despite the fact that the First Amendment only mentions speech specifically, the Supreme Court has “long recognized that its protection does not end at the spoken or written word.”<sup>161</sup> The Supreme Court has determined that several “corollary rights” are essential to the protections of First Amendment free speech, although these rights are not expressly provided in the Constitution.<sup>162</sup> Freedom of thought has been included

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available at [http://www.cognitiveliberty.org/news/US\\_v\\_Sell\\_decision.htm](http://www.cognitiveliberty.org/news/US_v_Sell_decision.htm).

The CCLE had urged the Court to consider this case on First Amendment Grounds. . . . [The Court] made a good ruling, but they missed a major opportunity to recognize that thought is, at least partly, rooted in brain chemistry and that giving the government broad powers to directly manipulate the brain chemistry of a non-violent citizen would go against our nation’s most cherished values. The court had a chance to update legal thinking about cognition in a way could have been very relevant now and in the coming decades.

*Id.*

160. Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 6 (1989) (analyzing whether the First Amendment should be read to provide constitutional protection against governmentally imposed treatment that interferes with mental processes) (citing *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984) (reasoning that because psychotropic drugs could affect the ability to think and communicate, their involuntary administration implicates the First Amendment, which implicitly protects the capacity to produce ideas); *Lojuk v. Quandt*, 706 F.2d 1456, 1465 (7th Cir. 1983) (finding that electroconvulsive therapy implicates a First Amendment interest “in being able to think and communicate freely”); *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976) (holding the “involuntary administration of drugs which effect mental processes . . . could amount . . . to an interference with . . . rights under the First Amendment”); *Girouard v. O’Brien*, No. 83-3316-O, 1988 U.S. Dist. LEXIS 4342, at \*10 (D. Kan. Apr. 4, 1988) (holding that antipsychotic drugs can affect the “ability to think and communicate” and therefore implicate the First Amendment); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979) (finding the “right to produce a thought—or refuse to do so” is protected by the First Amendment, and is implicated by antipsychotic drugs, which have “the potential to affect and change a patient’s mood, attitude and capacity to think”); *Kaimowitz v. Mich. Dep’t of Mental Health*, No. 73-19434-AW (Mich. Cir. Ct. July 10, 1973) (holding that psychosurgery implicates the First Amendment by “impairing the power to ‘generate ideas’”).

161. Brief of CCL&E at 4 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that the government’s interest in preserving the American flag as a symbol of nationhood did not justify a criminal conviction for engaging in political expression)). “This Court has repeatedly observed that there are derivative and corollary rights that are essential to effectuate the purpose of the First Amendment, or which are inherent in the rights expressly enumerated in the Amendment.” Brief of CCL&E at 4.

162. Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CALIF. L. REV. 1243, 1268-69 (1990) (demonstrating that a competent prisoner has the right to refuse psychotropic medication absent the threat of danger to the prison or to others). See JESSE CHOPPER, GILBERT LAW SUMMARIES: CONSTITUTIONAL LAW 163 (29th ed. 2004). According to Chopper, the constitutional scholar:

The freedoms of speech and association are quite broad. They include not only the freedom to speak and associate, but also the freedom to refrain from speaking and associating. And the freedoms extend not only to speaking and associating; they also

in these additional protections.<sup>163</sup> The Supreme Court has noted that “at the heart of the First Amendment is the notion that . . . one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”<sup>164</sup>

In *Sell*, the government sought to modify the way in which Dr. Sell thinks by directly altering the chemistry of his brain.<sup>165</sup> Despite the seriousness of the request, the government could not provide conclusive evidence that the medication would render Dr. Sell competent, let alone

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may extend to conduct related to speech and association.

*Id.* See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 866-67 (1982) (acknowledging the right to receive information and ideas); *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (approving of the right to make a monetary contribution for the purpose of spreading a political message); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing freedom of association).

163. See *Rogers*, 478 F. Supp. at 1367 (“The capacity to think and decide is a fundamental element of freedom . . . whatever powers the Constitution has granted our government, involuntary mind control is not one of them . . .”). See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (recognizing a freedom to believe, and subsequently a freedom to act); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (finding a person’s freedom to think however he wishes indispensable to the search and dissemination of truth), *overruled by Brandenburg v. Ohio*, 395 U.S. 444, 479 (1969) (finding that the *Whitney* court condemned syndicalism law in regards to free speech by an overly broad interpretation). See also Brief of CCL&E at 4 (“Repeatedly, this Court has recognized that freedom of thought is one of the most elementary and important rights inherent in the First Amendment.”).

164. *Floyd*, *supra* note 162, at 1268-69 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) and *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) (holding that “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control individuals’ minds . . . a right of the state to control the moral content of a person’s thoughts,” the Court noted, was “wholly inconsistent with the philosophy of the First Amendment”). See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (holding that “the right to think is the beginning of freedom”); *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (stating “the individual’s freedom of conscious [is] the central liberty that unifies the various clauses in the First Amendment”); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943) (stating that at the center of our American freedom, is the “freedom to be intellectually and spiritually diverse”). See also *Lypps*, *supra* note 145, at <http://www.ragged-edge-mag.com/extra/sell-lypps.html>.

The idea of an altered mental state forced on us against our will haunts our culture: the popularity of books like *1984* and *Brave New World*, not to mention films like *Jacob’s Ladder* and *The Matrix*, testify to this recurrent fear. Pharmacology and psychiatry are easy routes for this sort of abuse of power; in fact, in the former Soviet Union, dissidents were often declared insane, then drugged and imprisoned in psychiatric hospitals to keep them quiet.

*Id.*

165. *Sell*, 539 U.S. at 185. See *infra* notes 194, 196, 197 & 199 and accompanying text. See also *Riggins*, 504 U.S. at 134 (holding that antipsychotic drugs, by their very nature, work by altering the chemistry in the brain). See generally Aaron M. Nance, *Balking at Buying What the Eighth Circuit is Sell-ing: United States v. Sell and the Involuntary Medication of Incompetent, Non-Dangerous, Pretrial Detainees Cloaked with the Presumption of Innocence*, 71 UMKC L. REV. 685, 688 (2003) (incompetent pretrial detainees should be civilly committed until they regain competence by some means other than injection).

lack side effects that could cause him permanent harm.<sup>166</sup>

Although antipsychotic medications are often useful in assuaging the psychotic symptoms of mental disorders,<sup>167</sup> not all people with such problems have conditions that respond to these drugs.<sup>168</sup> In fact, Dr. Sell

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166. Petitioner's Brief at 29. *But see* Brief for the American Psychiatric Association and American Academy of Psychiatry and the Law at 25, *Sell v. United States*, 539 U.S. 166 (No. 02-5644). "The medications, when appropriate, aim to clear the hallucinations and delusions produced by psychosis, or to allow the patient to recognize and control their dominating influence." *Id.* In essence, these medications clear the mind and allow freer speech than the defendant would have in an unmedicated state. *Id.*

167. *See* PHILIP JANICAK, ET AL., PRINCIPLES AND PRACTICE OF PSYCHOPHARMACOTHERAPY 110-133 (2d ed. 1997). *See also* Michael L. Perlin, Keri K. Gould et al., *Article: Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxyoron or Path to Redemption*, 1 PSYCH. PUB. POL. & L. 80 (1995) (arguing that litigants representing mentally disabled individuals should look more closely to therapeutic jurisprudence as a source for their clients' legal rights). *Compare* Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461, 461 (1977) ("Despite almost four decades of research and clinical studies, however, there is still no generally accepted theory on how the drugs achieve their claimed effects on mental illness, nor is there agreement as to the precise mental conditions for which treatment with the drugs is effective."), *with* E. FULLER TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL FOR FAMILIES, CONSUMERS AND PROVIDERS 175 (3d ed. 1995) (explaining that antipsychotic drugs are effective, especially for patients with schizophrenia: nearly seventy percent of patients with schizophrenia experience clear improvement from the use of antipsychotic drugs, twenty-five percent of patients experience little or no improvement, and five percent get worse). *See generally* Thomas A. Bickers, *Comment: Psychiatry with a Conscience: A Survey of the Right to Control Psychotropic Medication and the Involuntarily Committed Mental Patient*, 54 TENN. L. REV. 85 (1986) (examining the right of involuntarily committed mental patients to control treatment with psychotropic medication, looking at both judicial and legislative responses); James A. King, *Comment: An Involuntary Mental Patient's Right to Refuse Treatment with Antipsychotic Drugs: A Reassessment*, 48 OHIO ST. L.J. 1135 (1987) (proposing a more limited right of an involuntary mental patient to refuse treatment with antipsychotic drugs). *But see* William T. Carpenter & Robert W. Buchanan, *Schizophrenia*, 330 NEW ENG. J. MED. 681, 686-87 (1994) (observing that antipsychotic drugs tend to be more dramatic and effective in the short and intermediate terms, and less so in the long term; suggesting that between 10 percent and 20 percent of patients have a poor response to antipsychotic drugs).

168. Brief for Amicus Curiae American Psychological Association at 16, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter American Psychological Associate Brief]. "[D]ifferent psychotic disorders respond differently to medication." *Id.* Dr. Sell had delusional disorder, persecutory type, which is in stark contrast to schizophrenia. *Id.* Hallucinations, although the primary symptom of schizophrenia, are not always found in a patient with delusional disorder. *Id.* Currently, no consensus exists as to whether delusional disorder, persecutory type responds positively to medication. *Id.* *See* Alan Felthous, *Are Persecutory Delusions Amenable to Treatment?*, 29 AM. ACAD. PSYCH. L. 461, 465 (2001) (discussing studies of delusional disorder and the implications for doctors concerned with the treatment and care of offenders suffering from these disorders). According to Felthous, pure persecutory delusions are "hopelessly resistant to treatment" and "there have been no controlled studies of specific agents in the treatment of delusional disorders." *Id.* *See also* Hernan Silva, *Effects of Primozide on the Psychopathology of Delusional Disorder*, 22 PROG. NEURO-PSYCHOPHARMACOL. & BIOL. PSYCHIATRY 331 (1998) (finding pimozide ineffective in treating delusional disorder).

had reacted negatively to antipsychotic medication in the past.<sup>169</sup> In light of the seriousness of the First Amendment right to freedom of thought at stake, the Court should have recognized that no governmental interest can outweigh a person's right to freedom of thought, especially when the defendant is non-dangerous and charged with non-violent crimes.

## 2. Sell's Fundamental Right to Privacy

Generally, "fundamental rights are those explicitly guaranteed by the *Bill of Rights* or otherwise implied but not expressly articulated in the Constitution's text."<sup>170</sup> In order to determine whether a right is constitutionally fundamental, the Supreme Court has used the tests laid out in two milestone decisions.<sup>171</sup> The first of these decisions, *Palko v. Connecticut*, described fundamental liberties as those "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."<sup>172</sup> The second decision, *Moore v. City of*

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169. Transcript of Oral Argument, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), available in 2003 U.S. TRANS LEXIS 21, at 22 (Mar. 3, 2003) (response of Attorney Barry Short).

[Sell] has had experience with antipsychotic drugs. He took Haldol in the 1980's. He had an attack of acute dystonia, which this Court has recognized as being a serious side effect in at least three cases, *Harper*, *Riggins*, and *Mills*. He also has a psychiatrist that has told him that antipsychotic drugs will not work on delusional disorders.

*Id.*

170. G. Steven Neeley, *The Constitutional Right to Suicide, The Quality of Life, and The "Slippery-Slope": An Explicit Reply To Lingering Concerns*, 28 AKRON L. REV. 53, 76 n.16 (1994) (contending that slippery slope arguments against recognizing a right to suicide are logically fallacious). For the various inquiries made when searching for substantive due process rights, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-4 (2d ed. 1988). For an excellent and comprehensive catalogue of various methods for discovering unenumerated fundamental rights, see generally David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 806 (1996) (describing how the Supreme Court seeks to identify unenumerated fundamental rights). Crump explains:

Textually, from the beginning, there was the Ninth Amendment. Then, too, there were the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments, as well as other parts of the Bill of Rights. And all along, there were structural arguments, as well as arguments based upon the nature of the entire document as a plan for limited government or protection of natural rights. There were the source documents from which ideas were borrowed, the debates by the Founders, and other interpretive writings. These and other sources ultimately ripened into judicial decisions recognizing interests of individuals strong enough to overcome otherwise legitimate actions by government, even absent explicit directions in the text. These are the sources of unenumerated fundamental rights.

*Id.*

171. *Neeley*, *supra* note 170, at 76.

172. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (holding that the Double

*East Cleveland*, characterized fundamental rights as those liberties that are “deeply rooted in this Nation’s history and tradition.”<sup>173</sup>

Regardless of the test used, a fundamental right is the highest benchmark of American liberty.<sup>174</sup> The Supreme Court has found that the right to privacy comes within the penumbra of the First, Fifth, and Fourteenth Amendments and is, therefore, considered fundamental.<sup>175</sup> Derived from the right to privacy is “the right to choose to undergo or terminate medical treatment, even if the treatment is life-sustaining.”<sup>176</sup>

The Sixth Circuit correctly decided *United States v. Brandon*, when it chose strict scrutiny as the applicable standard of review when the government sought to forcibly inject an incompetent, non-dangerous, pre-trial detainee charged with a non-violent crime.<sup>177</sup> The court found

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Jeopardy Clause applies only against the federal government)). *See also* Leslie A. Leatherwood, *Sanity in Alaska: A Constitutional Assessment of the Insanity Defense Statute*, 10 ALASKA L. REV. 65, 75 (1993) (arguing that Alaska’s insanity statute violates due process). In determining whether a doctrine is implicit in the concept of ordered liberty, “the proper focus . . . is the pervasiveness of the doctrine in the history of the common law.” *Id.*

173. *Neeley*, *supra* note 170, at 76 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (finding that the city’s housing ordinance, which categorized a second grandchild living in appellant’s home as an illegal occupant, violated the Due Process Clause)). *See also* *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (applying the ‘firmly rooted in the nation’s history’ test to a fundamental right and thus finding no fundamental right involved) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (detailing the firmly rooted test to determine a fundamental right)).

174. *See* *Nance*, *supra* note 165, at 688. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding fundamental right to procreate); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (finding fundamental right to procreate); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding fundamental right to marry); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (finding quasi-fundamental right to education); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (finding fundamental right to vote); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (finding fundamental right to marry); *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (finding fundamental right to interstate travel).

175. *Griswold*, 381 U.S. at 484-85 (finding a right of privacy implicit in “the Third Amendment’s prohibition against the quartering of soldiers, the Fourth Amendment’s right of people to be secure in their persons, the Fifth Amendment’s right against self-incrimination, and the Ninth Amendment’s right to retain rights not enumerated in the Constitution”). *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the First and Fourteenth Amendments prohibit making private possession of obscene material a crime, and that the States’ power to regulate obscenity does not extend to mere possession by the individual in the privacy of his own home).

176. William A. Kraus, *The Incompetent Developmentally Disabled Person’s Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J. L. & MED. 333, 347 (1989) (examining the procedural safeguards necessary to protect the constitutional rights of the developmentally disabled) (citing *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (“Presumably this right [of privacy] is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions”)).

177. *Brandon*, 158 F.3d 947 (6th Cir. 1998). On October 1, 1996, Brandon was indicted for violating federal law by sending a threatening communication through the mail. *Id.* at 949-50. Brandon was a pretrial detainee who sought a judicial hearing on the issue of whether he could be

the right to be free from bodily intrusion fundamental and determined that the forced medication was allowed only if it was “narrowly tailored to a compelling governmental interest.”<sup>178</sup> Therefore, when a state’s practice infringes on a fundamental right, the strict scrutiny analysis is applied.<sup>179</sup> The *Brandon* court held that an individual has a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs, a liberty that only an essential or overriding state interest might overcome.<sup>180</sup> This standard is more difficult to meet than the somewhat-heightened-scrutiny standard created by the *Sell* Court for such situations and should be applied to cases in which the defendant is found non-dangerous.<sup>181</sup> The *Sell* Court’s heightened scrutiny standard still permits *some* mentally ill defendants to

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“forcibly medicated with antipsychotic drugs to render him competent to stand trial.” *Id.* at 947. After much exploration into different approaches to standard of review, the court in *Brandon* held, “For all of the reasons stated above, we conclude that the decision to medicate a non-dangerous pretrial detainee must survive *strict scrutiny*.” *Id.* at 960 (emphasis added). The court went through an extensive analysis of past cases in making their determination for the standard of review. *Id.* at 957-61. This reasoning should have been followed by the Court in *Sell*. The appeals court in *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000), cited *Brandon* in stating that “government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest.” *Id.* See also Angelina N. McDonald, *In Search of a Standard of Review: Decisions to Forcibly Medicate Pre-Trial Detainees In Light of Riggins v. Nevada*, 72 U. CIN. L. REV. 285 (2003) (arguing that *Riggins* does not provide a standard by which to review the forced medication of pre-trial detainees) (citing *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir.1984) (adopting a strict-scrutiny test for decisions to medicate pretrial detainees and questioning whether the government’s interest in rendering them fit for trial alone is ever sufficient to support involuntary medication)).

178. Nance, *supra* note 165, at 716 n.62 (citing *Brandon*, 158 F.3d at 957).

179. See Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J. L. & MED. 117, 134 (1999) (recommending a revised constitutional standard for evaluating civil commitment laws). “Under traditional due process analysis, a court’s characterization of a right as fundamental should trigger strict scrutiny, requiring a law that deprives that right to be ‘narrowly tailored’ and to further a ‘compelling government interest.’” *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 976 (1996) (holding that the voting districts exhibited a level of racial manipulation that exceeded what was allowed under the Voting Rights Act)). The Fourteenth Amendment “forbids the government to infringe on certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” See also Nance, *supra* note 165, at 695. “In strict scrutiny analysis, according to *Brandon*, the State interest must be ‘sufficiently weighty to override a fundamental right in general, without attention to the specific fundamental right implicated.’” *Id.* To justify invading First Amendment rights, the state must have a compelling reason. *Id.*

180. Nance, *supra* note 165, at 695 (citing *Riggins*, 504 U.S. at 134). “The forcible injection of medication into a non-consenting person’s body . . . represents a substantial interference with that person’s liberty.” *Harper*, 494 U.S. at 229 (holding that when the interference deals with antipsychotic drugs, it is more severe).

181. *Sell*, 539 U.S. at 180-81.

be forcibly medicated, and thus violates their constitutional rights.<sup>182</sup>

### 3. Dr. Sell's Right to a Fair Trial

In addition to due process and First Amendment rights, Dr. Sell also has a right to a fair trial.<sup>183</sup> If the right to a fair trial had been the only argument made by the defense, the Court may have been justified in setting out the four-prong test for forcible medication. This subsection considers the Court's decision in light of the fair trial claims only, disregarding the previous two arguments.<sup>184</sup>

Due to modern technology and the advent of new kinds of medicine, the government is seemingly now able to "exercise control over a criminal defendant's mind at a critical time of his life: while on trial for a serious offense."<sup>185</sup> Legally, in addition to the potential for physical problems, the forcible injection puts a defendant's constitutional trial rights in jeopardy.<sup>186</sup> Simply put, Dr. Sell has four

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182. See *infra* notes 200-31 and accompanying text for a discussion on the problems with the heightened scrutiny standard of the *Sell* Court.

183. U.S. CONST. amends. V & VI. The Fifth Amendment reads:

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

U.S. CONST. amend V. The Sixth Amendment reads:

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

U.S. CONST. amend. VI.

184. See *infra* notes 182-99 and accompanying text for a discussion on constitutional issues missed by the Court.

185. Nance, *supra* note 165, at 711. Jami Floyd makes an interesting observation of the government's insistence on medicating these defendants: "With our nation immersed in 'the war on drugs,' it is ironic that . . . the Supreme Court heard a case in which a state government sought not to curtail an individual's drug use, but forcibly to administer drugs to that individual." Floyd, *supra* note 162, at 1243.

186. American Psychological Association Brief at 25. Dr. Sell's Fifth Amendment due process rights were also considered, because he did spend five years in jails and psychiatric hospitals without trial. *Sell*, 539 U.S. at 186. The decision says that Dr. Sell's liberty would be infringed by the prospect of forced medication; and that the government's "important" interest in bringing him to trial was compromised by Dr. Sell's lengthy confinement. *Id.* See also Lypps, *supra* note 145, at <http://www.ragged-edge-mag.com/extra/sell-lypps.html>. Lypps explains:

Justice Breyer's majority opinion takes this into account, suggesting that the time Sell

distinct trial rights under the Fifth and Sixth Amendments.<sup>187</sup> He has the right to present a defense,<sup>188</sup> not to have the government manipulate his appearance in a way that prejudices him before a jury,<sup>189</sup> to refrain from trial unless competent to consult and assist in his defense<sup>190</sup> and to testify in his defense in his own words.<sup>191</sup> Trying Dr. Sell in a state of compulsory medication would violate all of these rights.<sup>192</sup>

By administering medication, the State may be creating a prejudicial negative demeanor in the defendant making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. . . . That such effects may be subtle does not make them any less real or potentially influential.<sup>193</sup>

Physically, the effects may prejudice a jury, and mentally, he may not be able to communicate and act naturally.<sup>194</sup>

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has spent in the US Medical Center for Federal Prisoners would count as “time served,” and noting that Sell has already served more time than his maximum sentence for fraud ever would have been. But the thundering silence of the Court on the issue of a defendant’s freedom of thought frustrated those who had urged the court to hand down a decision protecting the mental autonomy of pre-trial defendants.

*Id.*

187. Petitioner’s Brief at 43.

188. *Id.* See FED. R. CRIM. P. 12.2(b) (setting forth rules for notice regarding expert evidence of a medical condition). The rule states:

If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk.

*Id.*

189. Petitioner’s Brief at 43 (citing *Illinois v. Allen*, 397 U.S. 337, 345 (1970) (discussing a defendant’s right to act like himself at trial)).

190. *Id.* (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”)).

191. *Id.* (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (holding that there is no current justification for a rule that denies an accused the opportunity to offer his own testimony)). The Court in *Rock* also pointed out that, in *Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that a state cannot constitutionally force a lawyer upon defendant who voluntarily exercised his right to self representation), the Sixth Amendment “grants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’” *Rock*, 483 U.S. 52 (emphasis added).

192. Petitioner’s Brief at 43.

193. *Riggins*, 504 U.S. at 143 (Kennedy, J., concurring) (quoting Brief for the American Psychiatric Association at 13, *Riggins v. Nevada*, 504 U.S. 127 (1992) (No. 90-8466)).

194. Nance, *supra* note 165, at 711. For an illustration of the effects of medicating a

Antipsychotic medications have the potential to impair a defendant's fair trial rights in at least three different ways.<sup>195</sup> First, antipsychotic drugs can have "a sedation-like effect and frequent side effects are drowsiness, apathy, and listlessness."<sup>196</sup> Second, "the drugs' physical manifestations, such as repetitive, involuntary tic-like movements of the face, eyelids, and mouth, undeniably would have a negative effect on a jury's perception of the defendant."<sup>197</sup> Finally, one of the most serious constitutional violations that may occur due to forcible medication is the denial of the defendant's right to present a defense to the charges against him.<sup>198</sup> Each of these symptoms may have a negative effect on Dr. Sell's defense and chances at prevailing at trial because they are prejudicial to his case.<sup>199</sup>

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defendant, see *id.*, at 712. There, Nance argues:

No one could seriously doubt that the right to a fair trial would be compromised if, for example, the prosecution chemically manipulated the very properties and operational structure of an "incompetent" DNA sample in order to render it "competent" evidence available for presentation to a jury. Such is the functional equivalent of what occurs when a defendant is injected with antipsychotic drugs before he is presented to a jury. Such State action manipulating the mind of its defendant opponent and his deeply ingrained trial rights could end the analysis as a matter of general legal principle.

*Id.*

195. *Id.*

196. Beth Braby, *Recent Developments: A Criminal Defendant's Right To Refuse Antipsychotic Medication*, 12 ST. LOUIS U. PUB. L. REV. 549 (1993) (arguing that a criminal defendant who may not be competent to stand trial without medication is allowed to waive his right to be competent when pleading the insanity defense) (citing *Riggins*, 504 U.S. at 143). See also Thomas R.E. Barnes & J. Guy Edwards, *The Side-Effects of Antipsychotic Drugs. I. CNS and Neuromuscular Effects*, ANTIPSYCHOTIC DRUGS AND THEIR SIDE-EFFECTS 213, 217 (1993) (explaining that conditions such as Parkinsonism which resembles the effects of Parkinson's disease with slowed motor skills and a mask-like face are caused by antipsychotic medications).

197. Nance, *supra* note 165, at 712. See American Psychological Association Brief at 25. Other conditions may result from taking antipsychotic medication, such as Akathisia, Dystonia, and Tardive Dyskinesia. *Id.* at 20. Akathisia is a restless feeling in which a person feels like he must be in constant motion. *Id.* at 21. People with Akathisia often pace repeatedly or tap their foot incessantly. *Id.* Dystonia involves more severe spasms of the head and neck, and often includes facial grimacing and eye rolling. *Id.* Tardive Dyskinesia is a potentially irreversible condition in which a person has facial, oral, lower extremity and trunk spasms. *Id.*

198. Linda C. Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1120 (1986) (arguing that the state's interest in assuring the defendant's competency must give way if the defendant chooses to waive the right to be tried while competent). See also *Riggins*, 504 U.S. at 138.

199. See *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (holding that Due Process requires the state to provide an indigent defendant with access to a psychiatrist to assist in the preparation of an insanity defense). In his brief to the Supreme Court, defendant Ake called into question the lower court's ruling on fitness. *Id.* He argued that the drug had rendered him unable and unwilling to assist his counsel and had altered his demeanor so as to prejudice him in the eyes of the jury. *Id.* The brief stressed his "subjective feeling of isolation and uninvolvedness" and "zombie-like

#### 4. Analyzing the Court's Heightened Scrutiny Standard

The Court determined that when a mentally incompetent defendant is not dangerous and the government wants to medicate him for the sole purpose of trial competency, four factors must be considered.<sup>200</sup> In light of all the factors laid out by the Court in *Sell*, the majority stated that it would still be difficult for the government to forcibly medicate a non-dangerous defendant.<sup>201</sup> This analysis would have been sufficient to justify forced medication in certain limited situations had the Court only been faced with the issues of fair trial; however, in light of the other constitutional issues at stake, this standard is sub par.

##### a. Necessary to further important government trial-related interests

The Court determined that the government must have *important* interests at stake in order to consider forcible medication solely on the

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appearance.” *Id.* Because the Court reversed Ake’s conviction on other grounds, it did not reach the issue of forced administration of antipsychotic drugs. *Id.* See also Steve Tomashefsky, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment*, 52 U. CHI. L. REV. 773, 787-88 (1985) (proposing a new framework for resolving the problems raised by the interplay between the fitness standard and the use of antipsychotic drugs).

Antipsychotic drugs may produce a markedly passive and apathetic or “zombie-like” appearance as a result of suppressed emotionalism. Antipsychotic drugs may also cause profuse sweating, muscular tics, difficulty in swallowing, a shuffling gait, and an extremely disquieting tendency toward spasmodic eye-rolling and neck-twisting. These effects are of special concern to criminal defendants to the extent that altered appearance, idiosyncratic movements, drowsiness, and unnatural rigidity may have a distracting or misleading effect on the trier of fact. They may also have an effect on witnesses: if a witness might be tempted to lie about an absent defendant, he might also be tempted to lie about an unusually placid or distant one.

*Id.*

200. *Sell*, 539 U.S. at 180-81. See also MORIARTY, *supra* note 153, at § 4:6.4 (discussing the four standards set out by the Court in *Sell*).

201. Patricia Gray, *Finding Middle Ground: Compelling the Use of Psychotropic Medications for Pretrial Detainees*, at <http://www.law.uh.edu/healthlawperspectives/Mental/030721.pdf>. According to Attorney Patricia Gray,

The Supreme Court ruled that although a criminal defendant may be involuntarily medicated under certain circumstances, those circumstances will be rare. The opinion further states that medication solely for the purpose of rendering a defendant competent to stand trial, absent the factors outlined by the majority, will not be sustained. In particular, the Court directs that there must first be an inquiry into why a specific defendant needs medication, especially if there is no finding that he represents a danger to himself or others. The Court also seemed loath to override a defendant’s refusal to accept medication if the term of confinement for treatment was near or equal to any sentence the defendant might receive if convicted.

*Id.*

grounds of trial competency.<sup>202</sup> By substituting the word “important” for “compelling,” the Court relaxed the strict scrutiny analysis that it should have used.<sup>203</sup> Compelling interests are higher and require a stronger showing on the part of the government.<sup>204</sup>

The Court insists on a balance of the government’s interest in timely prosecution<sup>205</sup> and protection of the defendant’s Sixth

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202. *Sell*, 539 U.S. at 180 (emphasis added). See also *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2003), *vacated by* 539 U.S. 939 (2003). “While the government has a strong interest in prosecuting all crime, some prosecutions are simply so minor that, in the absence of some unusual compelling reason, they ordinarily will not outweigh a defendant’s interests in avoiding involuntary medication.” *Id.*

203. Michael H. Shapiro, *Genes and the Just Society: Does Technological Enhancement of Human Traits Threaten Human Equality and Democracy?*, 39 SAN DIEGO L. REV. 769, 842 n.133 (2002) (outlining some of the moral, legal, and general policy difficulties that societies and individuals will face if technological enhancements via germ line and somatic mechanisms become possible). “Heightened scrutiny comes in several varieties that are not always so named. The most rigorous form is strict scrutiny, requiring governments to establish that their intrusions on fundamental liberty interests are necessary to promote compelling state interests (or at least those compelling interests in fact relied on by the government in enacting and implementing the measures in question).” *Id.* See *Shapiro v. Thompson*, 394 U.S. 618, 634-36 (1969). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 6.5 (1997) (finding lesser forms of scrutiny still require a showing that the government’s identified interests are important and that the means selected to further them are reasonably narrowed so as to promote them without undue impingement on the liberty interest, that is, efficiently). But Shapiro also points out that the Court is not always clear on what standard of review it is using, and it is sometimes affirmatively misleading: “For example, the U.S. Supreme Court has on several occasions invoked the language of the minimal rational basis test to strike down classifications it thought were particularly unfair to vulnerable groups, without holding that any suspect classification or fundamental liberty interest was involved.” *Id.* See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating a state constitutional amendment that prohibited all governmental action at any level intended to protect gay persons from discrimination, and subsequently applying the rational basis test); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 473 (1985) (striking down a refusal to grant a special use permit under local zoning law for a facility housing mentally retarded persons, purportedly applying the rational basis test); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (finding no rational basis for denying a free public education to “undocumented children”). For more on due process issues, see *Riggins*, 504 U.S. at 138 (granting a defendant a liberty interest in avoiding unwanted antipsychotic drugs and requiring that the state demonstrate that compelling concerns outweighed the interest in freedom from receiving unwanted antipsychotic drugs, and remanding the case for determination of whether there were reasonable alternatives to forced medication). Justice O’Connor denied that she applied strict scrutiny. *Id.* at 136. Justice Thomas complained that she had indeed improperly done so. *Id.* at 156 (Thomas, J., dissenting).

204. See *supra* note 177 and accompanying text. See also *YAHOO!, Inc., v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001) (explaining that the Constitution does not allow restrictions on speech unless there is a compelling government interest, for example avoiding a clear and present danger of imminent violence).

205. See also Brian P. Brooks, *A New Speedy Trial Standard for Barker v Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 598-599 (1994) (arguing for the revival of a constitutional speedy act remedy). Society has three distinct interests in ensuring that defendants receive a speedy trial. *Id.* The first interest is in the effective prosecution of criminal cases. *Id.* Second, society has an interest in preventing an accused who is not incarcerated

Amendment right to a fair and speedy trial.<sup>206</sup> The governmental interests in question include bringing a person accused of a serious crime to trial.<sup>207</sup> Never before has the Court allowed such an invasion merely to prosecute.<sup>208</sup> Only in the cases in which the mentally ill person is in danger or puts others in danger has the Court found a justification for forcible medication.<sup>209</sup> The government, in such cases, seeks to protect people's need for security.<sup>210</sup> The Court, however, states that the individual facts of each case must be considered in determining the government's interest in prosecution, therefore leaving open the opportunity to refuse administration of the medication.<sup>211</sup>

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from committing additional criminal acts while awaiting trial. *Id.* Society's third speedy trial interest lays in reducing the wasted cost of pretrial incarceration for defendants who will ultimately be acquitted. *Id.*

206. *Sell*, 539 U.S. at 180. After a significant passage of time, evidence may be lost which would aid the successful prosecution of the crime. *Id.* See also U.S. CONST. amend. VI.

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.

*Id.*

207. *Sell*, 539 U.S. at 180. In *Riggins*, the Court noted that the government has a compelling interest in bringing a defendant to trial after probable cause has been found to justify prosecution for a serious criminal offense. *Riggins*, 504 U.S. at 135-36.

208. *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001) (holding that an intrusion solely for prosecution has not been allowed).

209. *Riggins*, 504 U.S. at 135. See Petitioner's Brief at 37. "The safety interest present in *Riggins* is not present in Dr. Sell's case." *Id.* But see Transcript of Oral Argument, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), available in 2003 U.S. TRANS LEXIS 21 (Mar. 3, 2003) (discussing Dr. Sell's subsequent, yet non-included charges for attempted murder of an officer and former employee); *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. It is possible that Sell's threats after his first indictment were a manifestation of his delusional disorder and we decline to make a determination about whether those charges suffice to involuntarily medicate him.

*Id.* See also *Sell*, 539 U.S. at 183-84. "We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make the assumption *only* because the Government did not contest, and the parties have not argued, that particular matter. If anything, the record . . . suggests the contrary." *Id.* at 184.

210. *Id.* at 180 (citing *Riggins*, 504 U.S. at 135-36).

211. *Sell*, 539 U.S. at 180. The Court explained that "special circumstances" may weaken the Government's interest in prosecution. *Id.*

While the interest in prosecution of serious crimes is an important interest, a case by case inquiry is necessary to see if that interest is mitigated in any particular case by the prospect of long civil confinement for the psychiatric condition, or because of long periods of confinement already served, which would be subtracted from any eventual sentence.

The *Sell* Court noted that the government has a “constitutionally essential interest in assuring the defendant’s trial is a fair one.”<sup>212</sup> Because Dr. Sell correctly pointed out that forced medication would render his trial unfair, the government’s interest in this case can never be important enough to override the defendant’s constitutionally protected rights.<sup>213</sup> In addition, the Court submitted for consideration on remand that the government must take into account the fact that since Dr. Sell had been confined during the pendency of this case, and that since 18 U.S.C. § 3585(b) grants credit to a defendant for time served, Dr. Sell may have already paid the price for his crimes.<sup>214</sup>

b. Balance of significant government interests versus side effects that may undermine the trial’s fairness

As already noted, antipsychotic medications can have serious effects on a defendant’s right to a fair trial.<sup>215</sup> These medications are broken down into two categories: older conventional drugs and the more recent atypical medications.<sup>216</sup> The side effects of these categories of drugs are different in nature and severity.<sup>217</sup> In *Sell*, the dilemma of

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Christopher H. Schroeder, *Prisoners Can Be Forced To Take Anti-Psychotic Drugs: Commentary on Sell v. United States*, DUKE LAW, available at <http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/selvuni.html>. Schroeder notes that in Dr. Sell’s case, he had been confined for a longer period than the sentence he would receive from conviction on the original indictment at the time of the trial. *Id.*

212. *Sell*, 539 U.S. at 180.

213. *See supra* notes 183-99 and accompanying text on Dr. Sell’s right to a fair trial.

214. *Sell*, 539 U.S. at 186. *See also* Transcript of Oral Argument, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664), available in 2003 U.S. TRANS LEXIS 21, at 36-37 (Mar. 3, 2003). Justice Stevens asked the government “Is the amount of time he’s already been in custody, as compared to the potential sentence he might receive, relevant to the analysis?” *Id.* Attorney Dreeben replied, “It may be, Justice Stevens, relevant to the analysis to the extent that courts have held that the amount of time that a person can be held for treatment under 4241(d) cannot exceed the ultimate sentence that they would receive.” *Id.*

215. *See supra* notes 190, 194, 196-97, 199 and accompanying text.

216. American Psychological Association Brief at 20 n.17. “Conventional antipsychotic drugs include, among others, haloperidol (Haldol), thiothixene (Navane), chlorpromazine (Thorazine), and thioridazine (Mellaril). Atypical drugs include clozapine (Clozaril), risperidone (Risperdal), olanzapine (Zyprexa), quetiapine (Seroquel), and ziprasidone (Geodon).” *Id.* *See generally* PHYSICIAN’S DESK REFERENCE (54th ed. 2000).

217. *See supra* notes 190, 194, 196-97, 199 and accompanying text. In addition, the conventional antipsychotics can cause “sedation, blurred vision, dry mouth and throat, constipation, urine retention, orthostatic hypertension (low blood pressure when standing), tachycardia (rapid beating of the heart, weakness, and dizziness).” American Psychological Association Brief at 21. The traditional antipsychotic medications may also cause the fatal disorder, neuroleptic malignant syndrome. *Id.* at 21 n.20. To the contrary, the newer category of medications, although not completely risk-free, seem to have better results with side-effects. *Id.* Because they are still capable of creating a plethora of problems from the disappearance of white blood cells to cataracts, these

differing side effects was particularly problematic because the government refused to reveal the precise drug it intended to use to medicate Dr. Sell.<sup>218</sup>

Because the lower courts focused mostly on the dangerousness issue, the Supreme Court was unable to determine whether the side effects of antipsychotic medication were likely to undermine the fairness of Dr. Sell's trial.<sup>219</sup> This is problematic for future cases and mentally ill defendants because the issue of side effects must still be resolved.<sup>220</sup>

c. Less intrusive alternatives unavailable

Third, the court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.<sup>221</sup> Additionally, the court must reflect on less intrusive means for drug administration prior to considering more intrusive methods.<sup>222</sup> Due to the importance of the personal and constitutional concerns at stake for Dr. Sell, the court should not order involuntary administration of medication without first attempting non-drug based treatment methods.<sup>223</sup> These alternatives are important, when the aim is helping the person recover functional abilities such as assisting his attorney during trial.<sup>224</sup>

The Court should insist that the government prove by clear and convincing evidence that no other methods for restoring competency

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drugs are still risky for patients. *Id.* See John Gedes, *Atypical Antipsychotics in the Treatment of Schizophrenia: Systematic Overview and Meta-Regression Analysis*, 321 BRITISH MED. J. 1371, 1371 (2000). "There is no clear evidence that [the newer] atypical antipsychotics are more effective or are better tolerated than conventional antipsychotics [in treating symptoms of psychosis]." *Id.*

218. *United States v. Sell*, 282 F.3d 560, 569 (8th Cir. 2002). See also Nance, *supra* note 165. Dr. Sell argued that the lower court erred in finding medical appropriateness because the government failed to disclose which medication it would use on him. *Sell*, 282 F.3d at 570. Dr. Sell claimed that without knowing which drugs would be administered, he was incapable of making anything more than a generalized argument. *Id.* See *United States v. Sell*, No. 4:98CR177 at 7 (E.D. Mo. Apr. 4, 2001) (upholding Magistrate's order allowing the involuntarily medication of Dr. Sell and stating that Dr. Sell's arguments against medication were generalized). In response, Dr. Wolfson of the government stated that he did not want to be "pinned down" to a single drug because he hoped to leave some of the choice up to Dr. Sell. *Sell*, 282 F.3d at 570. He recommended that the drugs Quetiapine or Olanzapine be used. *Id.*

219. *Sell*, 539 U.S. at 185-86.

220. *Id.*

221. See APA PRESS RELEASES, *supra* note 156, available at <http://www.apa.org/releases/sellvsus.html>. According to Nathalie F. P. Gilfoyle, General Counsel for the APA, "The bottom line is that—thanks to APA's submission—the Court has specifically required that trial courts consider and rule out nondrug alternatives before ordering involuntary drug treatment." *Id.*

222. *Sell*, 539 U.S. at 181 (citing American Psychological Association Brief at 13-22).

223. American Psychological Association Brief at 10.

224. *Id.* at 12.

exist other than medication.<sup>225</sup> The *Sell* Court did not require the government to prove it had exhausted alternative methods of regaining competency by a *clear and convincing evidence standard* and, therefore, left too much discretion in the hands of the court.<sup>226</sup>

#### d. Medical appropriateness

The Court found that in order to forcibly medicate, the final obstacle is determining the patient's best interest.<sup>227</sup> To effectively determine whether the proposed treatment is medically appropriate, it is important for the trial court to consider the exact characteristics of the defendant's disorder.<sup>228</sup>

In *Sell*, however, "best interest" is hard to attain because the experts in the case did not agree on the possible success or potential side effects caused by the treatment;<sup>229</sup> nor did they determine the specific

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225. *Id.* at 10. "Moreover, where the expert testimony does not clearly eliminate the possibility that other non-drug approaches may be efficacious . . . they should be attempted in an effort to determine whether medication is truly necessary to maintain the defendant's competency." *Id.* The clear and convincing standard requires evidence indicating that the thing to be proved is highly probable or reasonably certain. BLACK'S LAW DICTIONARY 577 (7th ed. 1999). It requires a greater level of proof than preponderance of the evidence, but less so than proof beyond a reasonable doubt. *Id.*

226. *Sell*, 539 U.S. at 181.

227. *Id.* The Court defined "medically appropriate" as, "in the patient's best medical interest in light of his medical condition." *Id.*

228. Pat DeLeon, Ph.D., *Professional Maturation The Judicial Arena*, THE INDEPENDENT PRACTITIONER: BULLETIN OF THE PSYCHOLOGISTS IN INDEPENDENT PRACTICE (Fall 2003), at <http://www.division42.org/MembersArea/IPfiles/IPFall03/advocacy/maturation.html>. Also, the court should consider the exact medication that the government determines it will use, and not make assumptions that a medication used effectively for one disorder will work to alleviate the symptoms of another. *Id.* According to Dr. DeLeon, "Many mental disorders that bear some resemblance to one another respond very differently to medication. A court would not be justified in ordering that a defendant with one psychotic disorder be treated with antipsychotic drugs solely because those drugs benefit patients with a different disorder." *Id.* According to the 8th Circuit opinion in *Sell*, 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).

229. *Sell*, 282 F.3d at 568-69. Two government doctors testified that antipsychotic medication was the only way Dr. Sell's delusional disorder could be contained. *Id.* at 569. *But see* Nance, *supra* note 165, at 713. Dr. Sell produced a report from Dr. Greenstein, of the Federal Bureau of Prisons, stating that delusional disorders "do not typically respond to medication or psychotherapy." *Sell*, 282 F.3d at 570. Another psychologist testified that "there is no evidence that antipsychotic medications are beneficial for patients with Delusional Disorder." *Id.* at 569. Finally, a textbook published by the American Psychiatric Association "notes that there is a disagreement between experts on the effectiveness of treating delusional disorders with antipsychotic medications . . ." *Id.* at 569-70. In addition, the doctors who testified for the government did not experience any real success in medicating the disease. Nance, *supra* note 165, at 713. "Only three out of four such patients regained any level of competency, and Wolfson acknowledged that the medical literature

medication the government would administer to Dr. Sell.<sup>230</sup>

Thus, a review of the medical evidence reveals that: (1) the medical literature would place Dr. Sell's prospects for restored competency at 50 percent, at best; and (2) only one of the State's two testifying doctors had any relevant success restoring competency of any note in patients similar to Sell, and that success was based on a miniscule sample of four treated individuals.<sup>231</sup>

### *C. The Effect of Sell v. United States on Dr. Sell and Other Mentally Ill Defendants*

This case has more significance than just to Dr. Sell, as it may have an effect on any mentally ill person accused of a crime who might still be drugged in order to stand trial.<sup>232</sup> The "mental autonomy" of every citizen is also in jeopardy.<sup>233</sup> *Sell* has left lower courts with a test that seems to instruct them on forcible medication, yet ignores many of a non-dangerous defendant's constitutional rights.<sup>234</sup>

Changes in the kinds of antipsychotic medications available for the treatment of mental illness may also make it easier for the government to satisfy parts of the test laid out in *Sell*.<sup>235</sup> This is problematic because antipsychotic medication's side-effects were a strong reason the

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indicates that delusional patients respond less to medication than do patients with other forms of mental illness." *Id.* at 714.

230. *Sell*, 282 F.3d at 570 n.14. One of the government's experts, Dr. Wolfson, would not specify exactly which drugs they would use to medicate Dr. Sell. *Id.* Accordingly, Dr. Sell could only make "generalized medical arguments against the State's evidence." See Nance, *supra* note 165, at 713.

231. *Id.* at 714.

232. Lypps, *supra* note 145, at <http://www.ragged-edge-mag.com/extra/sell-lypps.html>.

233. *Id.* In *Sell*, the court noted the importance of the applicable constitutional issues raised by the case, but only concentrated on the Fifth Amendment question of "whether the Court violated Dr. Sell's right to due process of law?" *Id.* According to Lypps, CCLE attorney Julie Ruiz-Sierra put it this way: "they're not exactly saying that there's a constitutional right to avoid forced medication; they're saying there is a right not to be forcibly medicated without due process." *Id.*

234. See Jonathan Groner, *New Challenge Expected by Hill Shooter Ruling Could Reopen Question of Weston's Forced Medication*, LEGAL TIMES, June 23, 2003. "Says Barbara Van Gelder of Wiley, Rein & Fielding, a former longtime assistant U.S. attorney: 'The Sell case doesn't answer any questions. It just opens the door for continued wrangling with experts over what exactly is a side effect. It could be years, under this standard, before anyone gets medicated.'" *Id.*

235. Douglass Mossman, *Unbuckling the "Chemical Straitjacket": The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN. DIEGO L. REV. 1033, 1145 (2002) (discussing legal issues and policy problems involving the newer antipsychotic agents). "Advances in the primary antipsychotic medications and adjunct therapies make such side effects less likely." *Id.* Medications that help control side effects are becoming more available, and these antipsychotic medications are going to make a defendant's affect more appropriate. *Id.*

government was unable to meet the standard in *Sell*.<sup>236</sup> If newer medications create a greater possibility for the government to satisfy the test, the serious constitutional issues passed over by the *Sell* Court will be violated.

This problem is important for cases such as *Gomes v. United States*,<sup>237</sup> in which Gomes was charged with possession of a firearm.<sup>238</sup> In that case, the Court vacated the judgment and remanded the case to the United States Court of Appeals for the Second Circuit for further consideration in light of *Sell*.<sup>239</sup> Because of the indeterminate nature and weak scrutiny in the test from *Sell*, Gomes, another non-dangerous defendant, will be forced to suffer through his trial in a medicated state.<sup>240</sup> The court made its decision in the following passage from the

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236. *Sell*, 539 U.S. at 185-86.

237. *Gomes*, 539 U.S. 939 (2003) (Second Circuit decision vacated and the case remanded for reconsideration in light of the *Sell* decision). Gomes was charged with possession of a firearm by a convicted felon. *United States v. Gomes*, 289 F.3d 71, 75 (2d Cir. 2002), *vacated by* 539 U.S. 939 (2003). After he was found incompetent to stand trial, the United States District Court ordered involuntary medication to render him fit to stand trial. *Id.* at 78. Gomes subsequently appealed the court's decision. *Id.*

238. *Id.* at 75. 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. *Id.* at 76.

239. *Gomes v. United States*, 539 U.S. 939 (2003). See also Deborah F. Buckman, *Validity, Construction, and Operation of Protection and Advocacy For Mentally Ill Individuals Act, 42 U.S.C.A. §§ 10801 et seq.*, 191 A.L.R. FED. 205 (2004).

The judgment in [*United States v. Gomes*, 289 F.3d 71 (2d Cir. 2002)], was vacated and remanded by the Supreme Court in *Gomes v. United States*, 539 U.S. 939 (2003), in light of *Sell v. United States*, 539 U.S. 166 (2003)], a case not involving the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C.A. §§ 10801 et seq., in which the Supreme Court held that the Fifth Amendment Due Process Clause permits the government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges to render that defendant competent to stand trial, 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. On remand of the *Gomes* case to the Court of Appeals for the Second Circuit, that court in [*United States v. Gomes*, 69 Fed. Appx. 36 (2d Cir. 2003)], in turn ordered that the case be remanded to the District Court for the District of Connecticut for reconsideration and application of the standards for involuntary medication to render a defendant competent to stand trial set forth in the *Sell* case.

*Id.*

240. *United States v. Gomes*, 305 F. Supp. 2d 158, 169 (D. Conn. 2004) (holding that Gomes may be involuntarily medicated). Other recent cases have also applied the *Sell* factors in involuntary medication decisions. For example, see *United States v. Morris*, No. C.R.A.95-50-SLR, 2005 WL 348306, \*6 (D.Del. Feb. 8, 2005). In *Morris*, the court held:

After due consideration of the evidence and application of that evidence under the *Sell* analysis, the court finds that the government has met its burden and concludes that involuntary medical, psychological and psychiatric treatment, including the

remand:

Having considered the *Sell* factors and Mr. Gomes's current competency to stand trial, the Court concludes that Mr. Gomes may be involuntarily medicated. In light of the application of the *Sell* factors, including the efficacy, the side effects, the possible alternatives, and the medical appropriateness of antipsychotic drug treatment, the Government has shown by clear and convincing evidence a need for drug treatment sufficiently important to overcome Mr. Gomes's liberty interest in refusing it.<sup>241</sup>

## V. CONCLUSION

The Supreme Court correctly decided to hear the appeal of Dr. Sell on the issue of forced medication. Few rights are more precious than those included within the right to privacy. It is imperative that our courts make sure that mentally ill patients are treated in a most fair and constitutional manner throughout the judicial process.

Substantively, the Court should have applied strict scrutiny to forced medication criminal cases. When strong constitutional issues such as freedom to think, right to privacy, and right to a fair trial are all implicated, it is not enough for the Court to apply a heightened scrutiny test. Although the government has a strong interest in prosecution of criminal defendants, the individual has a stronger interest in protecting his individual liberty. Judge Bye of the Eighth Circuit aptly said:

Unlike the majority, I would apply the strict scrutiny standard of review for the reasons enunciated by the Sixth Circuit in *United States v. Brandon*, 158 F.3d 947, 956-61 (6th Cir. 1998). But even under the majority's three-part test, the charges 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. . . . However, the government's interest in forcing

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administration of antipsychotic medication for Stanley Morris should occur. The court further finds that the treatment proposed by Dr. Herbel at Butner is consistent with the second through fourth prongs under *Sell*. The court does not make this decision lightly and notes the efforts by counsel for the government and Morris to assure that the *Sell* factors were met.

*Id.*

<sup>241</sup> *Gomes*, 305 F. Supp. 2d at 169. See also *id.*, 163-67 for the court's detailed application of the *Sell* factors. The court goes through an extensive analysis of the *Sell* test in determining that Gomes should be medicated to stand trial. The remand decision was subsequently affirmed by the Second Circuit Court of Appeals. See *United States v. Gomes*, 387 F.3d 157, 163 (2d Cir. 2004), for more information on the appeal.

him to stand trial on charges that may result in such limited punishment does not outweigh his substantial rights under the First, Fifth and Sixth Amendments.<sup>242</sup>

For now, *Sell* is a good start towards protecting a non-dangerous, mentally ill defendant's rights, but it just does not go far enough. Hopefully the Supreme Court will have the opportunity in the future to align its views with a higher standard for forced medication, such as the one Judge Bye recommended.

*Elizabeth G. Schultz*

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242. *Sell*, 282 F.3d at 572 (Bye, J., dissenting). See *United States v. Brandon*, 158 F.3d 947, 956-61 (6th Cir. 1998) (enumerating an individual's rights in refusing antipsychotic medication).