

NOTES

REASSESSING FORCED MEDICATION OF CRIMINAL DEFENDANTS IN LIGHT OF *RIGGINS V. NEVADA*

In 1989, David Riggins was convicted of murder by a jury and sentenced to death.¹ During his trial, Riggins was administered extremely large doses of antipsychotic medication against his will and over the objections of his counsel.² According to several psychiatrists testifying at the trial, the doses administered to Riggins were "within the toxic range"³ and sufficient to "tranquilize an elephant."⁴ These psychiatrists agreed that such large doses of medication were likely to have affected Riggins' thought processes during trial.⁵ Depending on how his system reacted to the medication, it could have made him drowsy, confused, inattentive, ambivalent or even agitated and anxious.⁶ It was also likely that the medication administered to Riggins affected his appearance and mannerisms before the court.⁷ High levels of antipsychotic drugs are known to depress a person's psychomotor functions, slowing their movements and speech.⁸ The drugs may also alter a person's range of facial expressions and cause tremors, muscle spasms, twitching and other involuntary movements.⁹ These and the many other side effects of antipsychotic medication—dehydration, congestion, constipation, blurred vision, drooling, fatigue, weight gain, skin disorders and sexual dysfunction—may cause discomfort, distress or embarrassment.¹⁰

¹ *Riggins v. Nevada*, 112 S. Ct. 1810, 1813 (1992).

² *See id.*

³ *Id.* at 1816.

⁴ *Id.* at 1819 (Kennedy, J., concurring).

⁵ *Id.* at 1816.

⁶ *Riggins*, 112 S. Ct. at 1816.

⁷ *Id.* at 1819 (Kennedy, J., concurring).

⁸ *Id.* at 1816.

⁹ *Id.* at 1819 (Kennedy, J., concurring).

¹⁰ *See infra* notes 175–85 and accompanying text. Moreover, several of the more severe side

Despite the substantial possibility that Riggins suffered from many of these side effects, the State of Nevada claimed that it was justified in medicating Riggins against his will to maintain his competency to stand trial.¹¹ Neither the State nor the trial court, however, had determined that Riggins would be incompetent if he was not medicated.¹² Instead, the court evaluated Riggins while he was under the influence of substantial antipsychotic medication and concluded that he was competent to stand trial.¹³ Riggins subsequently requested that the court terminate the medication, contending that the State could not forcibly medicate him because it had not demonstrated that the drugs were necessary to maintain his competency.¹⁴ Riggins also demanded that the medication be ceased because it interfered with his ability to present an insanity defense by making him appear sane.¹⁵ The court, however, denied Riggins' request and permitted the State to continue medicating him throughout his trial.¹⁶

During the eight months between Riggins' competency hearing and his trial, the State increased the dosage of medication they were giving to Riggins to almost twice the amount administered during the hearing.¹⁷ Although the risk of side effects from antipsychotic medication increases significantly—and unpredictably—as the dosage is increased,¹⁸ the court proceeded with Riggins' trial without evaluating whether the new level of drugs altered the content of his testimony or impaired his ability to assist in his defense.¹⁹ At trial, Riggins presented an insanity defense and testified on his own behalf.²⁰ He admitted to killing the victim, but claimed that the victim was trying to kill him and that voices in his head told him killing the victim would be justifiable homicide.²¹ After listening to this testimony from an "artificially sane" Riggins, the jury rejected his plea of insanity, found him guilty of murder with the use of a deadly weapon and sentenced him to death.²²

effects may result in irreversible neurological or cardiac dysfunction, which in turn could lead to death. *Id.*

¹¹ See *Riggins*, 112 S. Ct. at 1812–13.

¹² See *id.* at 1815.

¹³ *Id.* at 1812.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *Riggins*, 112 S. Ct. at 1812–13.

¹⁷ *Id.* at 1813.

¹⁸ See *infra* notes 166, 180 and accompanying text.

¹⁹ See *Riggins*, 112 S. Ct. at 1812–13.

²⁰ *Id.* at 1813.

²¹ *Id.*

²² *Id.*

Compelling Riggins and other insanity defendants to take antipsychotic medication during trial raises three distinct concerns that will be the focus of this Note. First, it interferes with defendants' liberty interest in avoiding unwanted antipsychotic medication—an interest which the United States Supreme Court recently recognized as substantial and retained by all individuals, including convicted criminals.²³ The other two concerns arise because the state owes criminal defendants a full and fair trial before it can deprive them of their life and liberty. Forcibly administering antipsychotic drugs to criminal defendants threatens their ability to get a fair trial in two ways. The medication may affect their willingness or capacity to understand and participate in the proceedings against them.²⁴ It may also undermine their insanity defense by denying their right to present the most reliable evidence of their true mental state—their unmedicated self—to the jury.²⁵

In part I of this Note, I will examine the United States Supreme Court's review of compelled medication in *Riggins v. Nevada*.²⁶ The *Riggins* Court reversed the defendant's conviction, concluding that the State had not justified overriding Riggins' liberty interest in avoiding antipsychotic drugs.²⁷ Concluding that this error might have prejudiced the original proceedings, the Court granted Riggins a new trial but gave little indication of what the Nevada court should consider on remand.²⁸ Justice Kennedy's concurring opinion notes the lack of guidance the majority's decision provides lower courts faced with balancing a defendant's interests in refusing antipsychotic medication against a state's interests in compelling it, and it provides a closer look at the effects of medication on the defendant's right to a fair trial.²⁹ The limitations of the Court's opinion are further illustrated by the Supreme Court of Nevada's decision on remand.³⁰ The Nevada court interpreted *Riggins* as permitting the State to forcibly medicate the defendant during his trial, without review of the impact of the drugs on the proceedings, provided the State establish that medication is essential to either maintaining Riggins' competence or to protecting his safety or the safety of others.³¹

²³ *Washington v. Harper*, 494 U.S. 210, 221–22 (1990).

²⁴ See *Riggins*, 112 S. Ct. at 1818 (Kennedy, J., concurring).

²⁵ *Id.* at 1819 (Kennedy, J., concurring).

²⁶ See *infra* notes 47–77 and accompanying text.

²⁷ *Riggins*, 112 S. Ct. at 1815–16.

²⁸ *Id.* at 1812.

²⁹ See *infra* notes 78–85 and accompanying text.

³⁰ See *Riggins v. State*, 860 P.2d 705 (Nev. 1993) [hereinafter *Riggins v. State II*].

³¹ See *id.* at 706.

Part II of the Note reviews challenges to the forced medication of criminal defendants in the state courts.³² These courts have, as a rule, failed to acknowledge a defendant's liberty interest in refusing unwanted medication, and instead, turned directly to the impact of the medication on the defendant's right to a full and fair trial.³³ Most have further focused their attention on the effect of antipsychotic drugs on an insanity defendant's right to present a defense, rather than the impact of the drugs on his or her ability to understand and participate in the proceedings.³⁴

To make the concerns of forced medication concrete, part III discusses the use of antipsychotic medication in treating psychiatric disorders, and focuses on the difficulties psychiatrists face in predicting the effectiveness of a given treatment and the frequent and severe side effects associated with these drugs.³⁵ Part IV of the Note explores the possible impact of these side effects on a criminal defendant's constitutional right to a full and fair trial.³⁶ Part V explores situations in which the courts have upheld the compelled medication of mentally ill persons in state mental and correctional institutions, despite the grave risk that the patients or inmates will suffer from at least some of the side effects of these drugs.³⁷

Part VI of the Note suggests a comprehensive approach for reviewing challenges to the forced medication of criminal defendants.³⁸ In light of the Supreme Court's decision in *Riggins*, this review must necessarily begin with an acknowledgment of the defendant's fundamental interest in avoiding antipsychotic drugs.³⁹ Next, because the states typically allege that they are justified in medicating the defendant to restore his competence to stand trial, an interest which has not yet been recognized as outweighing an individual's liberty interest in refusing the medication, the courts must strictly scrutinize this inter-

³² See *infra* notes 90-154 and accompanying text.

³³ See, e.g., *People v. Hardesty*, 362 N.W.2d 787, 797 (Mich. Ct. App. 1984) (upholding State's right to medicate incompetent defendants); *State v. Law*, 244 S.E.2d 302, 307 (S.C. 1978) (same); *Commonwealth v. Louraine*, 453 N.E.2d 437, 443 (Mass. 1983) (upholding defendant's right to be tried drug free); *State v. Maryott*, 492 P.2d 239, 243 (Wash. Ct. App. 1971) (same).

³⁴ See, e.g., *Law*, 244 S.E.2d at 307 (holding that testimony on effect of medication on defendant substitutes adequately for defendant's true demeanor); *Maryott*, 492 P.2d at 243 (holding that testimony on effect of medication did not substitute adequately for defendant's true demeanor).

³⁵ See *infra* notes 155-88 and accompanying text.

³⁶ See *infra* notes 189-238 and accompanying text.

³⁷ See *infra* notes 239-93 and accompanying text.

³⁸ See *infra* notes 294-319 and accompanying text.

³⁹ See *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992).

est.⁴⁰ Whether forcibly medicating defendants substantially furthers the state's interest in trying them necessarily encompasses a review of the impact of the medication on their right to a fair trial.⁴¹

I. *RIGGINS v. NEVADA*: THE SUPREME COURT REVIEWS FORCED MEDICATION OF A CRIMINAL DEFENDANT

In 1992, in *Riggins v. Nevada*, the United States Supreme Court addressed whether forcibly administering antipsychotic medication to a defendant during trial violated his Sixth and Fourteenth Amendment rights.⁴² Nevada alleged that the State's need to maintain the defendant in a competent mental state during his trial justified forcibly medicating him.⁴³ The Supreme Court, however, held that the trial court erred in permitting the medication of Riggins because the State had not demonstrated that he would be incompetent to stand trial in an unmedicated state.⁴⁴ Concluding there was a substantial probability that this unwarranted administration of antipsychotic drugs prejudiced the defendant's trial, the Court remanded the case for further proceedings.⁴⁵

In November 1987, David Riggins was arrested and charged with murder.⁴⁶ Within a week of being incarcerated, Riggins complained of hearing voices and was voluntarily administered Mellaril, an antipsychotic drug.⁴⁷ During February and March of 1988, when Riggins was examined and found competent to stand trial, he was medicated with 450 milligrams of Mellaril.⁴⁸ Subsequently, his counsel filed a motion to terminate the medication, arguing that it impermissibly infringed upon Riggins' freedom because the State had not determined that the medication was necessary, nor had it considered less intrusive measures.⁴⁹ Riggins also contended that the medication would compromise his right to present an insanity defense by altering his demeanor during his trial.⁵⁰ The court held an evidentiary hearing on the motion and listened to the testimony of the three court-appointed psychiatrists

⁴⁰ See *infra* notes 299-301 and accompanying text.

⁴¹ See *infra* notes 312-14 and accompanying text.

⁴² *Riggins*, 112 S. Ct. at 1814.

⁴³ *Id.* at 1812-13.

⁴⁴ *Id.* at 1815-16.

⁴⁵ *Id.* at 1816-17.

⁴⁶ *Id.* at 1812.

⁴⁷ *Riggins*, 112 S. Ct. at 1812.

⁴⁸ *Id.*

⁴⁹ *Riggins v. State*, 808 P.2d 535, 537 (Nev. 1991) [hereinafter *Riggins v. State I.*].

⁵⁰ *Riggins*, 112 S. Ct. at 1812.

who had examined Riggins for his competency hearing.⁵¹ One expert testified that it was his belief that Riggins would be competent to stand trial even without medication.⁵² A second expert would not predict how Riggins would react if removed from the medication but questioned the need for such high dosages.⁵³ The third stated his belief that Riggins was not competent to stand trial with or without the medication.⁵⁴ Following the hearing, the court denied Riggins' motion to discontinue the medication without giving any rationale for doing so.⁵⁵ Subsequently, the State continued to increase his medication until, by the time of his trial, Riggins was being administered 800 milligrams per day.⁵⁶ At trial, Riggins entered a plea of not guilty by reason of insanity, testified on his own behalf and was convicted and sentenced to death.⁵⁷

On appeal, the Supreme Court of Nevada affirmed Riggins' conviction and death sentence.⁵⁸ Although Riggins had briefed the issue, the Nevada court failed to even mention Riggins' liberty interest in avoiding the forced administration of antipsychotic drugs.⁵⁹ Moreover, although the court recognized that Riggins' demeanor was probative evidence of his insanity, it concluded that expert testimony had sufficiently informed the jury of the effect of the medication on Riggins' attitude and demeanor.⁶⁰

In contrast, the United States Supreme Court, reviewing the Nevada court's decision, focused on Riggins' right to refuse medication. According to the Court, once Riggins requested termination of his medication, the State became obligated to establish that continued administration was necessary to accomplish a compelling state interest, and that the dosage administered was medically appropriate.⁶¹ The

⁵¹ *Id.* at 1813.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Riggins*, 112 S. Ct. at 1813.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Riggins v. State I*, 808 P.2d 537, 538 (Nev. 1991).

⁵⁹ *Riggins*, 112 S. Ct. at 1813, 1816.

⁶⁰ *Riggins v. State I*, 808 P.2d at 538.

⁶¹ *Riggins*, 112 S. Ct. at 1815. The United States Supreme Court has long held that a state may infringe upon the fundamental rights of an individual to accomplish a compelling state interest. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); *McLaughlin v. Florida*, 370 U.S. 184, 196 (1964); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). To afford a certain level of judicial protection to individual rights, however, the intrusion not only must substantially advance the state's interest, but also must be the least intrusive or

Supreme Court had recently recognized, in *Washington v. Harper*, that all individuals, including convicted criminals, have a significant liberty interest in avoiding the unwanted administration of antipsychotic medication.⁶² The *Harper* Court found that this interest is encompassed in the core of individual liberties that are protected from arbitrary governmental action by the Due Process Clause of the Fourteenth Amendment.⁶³ Forcibly injecting antipsychotic medication is highly intrusive of this interest, the Court noted, not only because it physically invades a person's body, but also because the medication alters the chemical balance of their brain and presents a risk of serious and possibly even fatal side effects.⁶⁴

The Supreme Court concluded that the trial court's silence regarding Riggins' liberty interest in avoiding medication and the State's need to override this interest should not be interpreted as an adoption of the State's view that medication was necessary to insure his competence to stand trial.⁶⁵ Not only had the State failed to demonstrate that Riggins would be incompetent if not medicated, the testimony presented at the hearing on his motion to terminate the medication cast substantial doubt on the State's assertion.⁶⁶ Moreover, even if Riggins would be incompetent absent medication, the Court reasoned that the State erred in not considering reasonable, less intrusive alternatives, including lowering the dosages of medication administered to Riggins.⁶⁷ Concluding that a state interest sufficient to override Riggins' substantial interest in avoiding antipsychotic medication could not be inferred from these facts, the Supreme Court held that the trial court erred in permitting continued administration of the drugs during Riggins' trial.⁶⁸

restrictive means of doing so. *E.g.*, *Griswold*, 381 U.S. at 504 (White, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁶² *Riggins*, 112 S. Ct. at 1814; *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

⁶³ *Riggins*, 112 S. Ct. at 1814; *Harper*, 494 U.S. at 221-22.

⁶⁴ *Riggins*, 112 S. Ct. at 1814 (quoting *Harper*). The Supreme Court had previously recognized in *Winston v. Lee* that individuals have an interest in bodily integrity that is protected by the Fourteenth Amendment. 470 U.S. 753, 755 (1985). The *Winston* Court held that a state could not force a suspect to undergo surgery to remove a bullet from the suspect's body because the bullet was not essential to the prosecution's case. *Id.* at 766. According to the Court, compelled surgery was particularly intrusive of a person's bodily integrity because it created a risk of injury to his muscles, nerves, blood vessels and other tissue. *Id.* at 764. Moreover, because the examination required the use of a general anesthesia, it interfered with his thought processes. *Id.* at 765.

⁶⁵ *Riggins*, 112 S. Ct. at 1816.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1815-16.

⁶⁸ *Id.* at 1816.

Recognizing that efforts to prove or disprove whether this error actually prejudiced Riggins' trial would be futile, the Court focused on the possible effects of the medication on Riggins' constitutionally protected trial rights to determine whether a new trial was warranted.⁶⁹ Accordingly, the Court reviewed expert testimony offered at the hearing on Riggins' motion to terminate the medication.⁷⁰ One of the experts had testified that the dosage of medication administered to Riggins was within the toxic range and likely to make him anxious or nervous.⁷¹ 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.⁷² 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.⁷³ Moreover, the Court reasoned that it was not necessary to decide whether the Nevada Supreme Court was correct in holding that expert testimony had adequately informed the jury of the effect of medication on Riggins' demeanor during trial, because it did not cure the possible effects of the drugs on Riggins' ability to effectuate his right to a fair trial.⁷⁴

The *Riggins* Court avoided the question of whether Nevada's need to maintain Riggins' competency could outweigh his interest in avoiding involuntary medication during his trial and, if so, under what circumstances.⁷⁵ Although the Court suggested that "the State *might* have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means,"⁷⁶ it rea-

⁶⁹ *Id.*

⁷⁰ *Riggins*, 112 S. Ct. at 1816.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *Riggins*, 112 S. Ct. at 1815.

⁷⁶ *Id.* The Supreme Court cited its decision in *Illinois v. Allen* as support for this proposition, quoting Justice Brennan's concurring statement that "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to a social justice and peace." *Id.*; see also *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring). The *Allen* Court had permitted a defendant to be removed from the courtroom during his trial where, despite repeated warnings from the judge, he persisted in disrupting his own trial. *Allen*, 397 U.S.

soned that the issue was not before the Court because the lower court had not determined that the antipsychotic medication was necessary to maintain Riggins' competency.⁷⁷

Justice Kennedy, noting that the Court remanded the case to the lower court with little guidance of what it should consider at those proceedings, focused his concurring opinion on the serious threat that antipsychotic medication poses to a defendant's right to a full and fair trial.⁷⁸ According to Justice Kennedy, a state should not be permitted to medicate a defendant for the avowed purpose of rendering him competent to stand trial, unless it can demonstrate that the medication will not impair or alter the defendant's willingness or ability to assist in his own defense.⁷⁹ Justice Kennedy further expressed doubt that a state could make such a showing, given the unpredictability of a particular individual's reaction to treatment with antipsychotic drugs.⁸⁰

Justice Kennedy agreed that the serious due process concerns raised by forced administration of antipsychotic drugs were not overcome by expert testimony about the possible side effects of the medication.⁸¹ In addition to not curing possible defects in Riggins' ability and desire to assist in his own defense, Justice Kennedy reasoned that expert testimony did not eliminate the risk of prejudice created by the State's manipulation of Riggins' demeanor throughout his trial.⁸² Justice Kennedy noted that the jury observes an accused throughout the entire proceedings and uses these observations to make judgments about both his credibility and culpability.⁸³ The defendant's appearance and behavior, including facial expressions, mannerisms and emotional responses combine to create an overall impression that may have

at 343. According to the Court, tolerating Allen's extreme and aggravated behavior would essentially permit him to escape being tried through his own misconduct. *Id.* at 346. To maintain the integrity of the judicial process, the Court reasoned, a trial judge must be given sufficient discretion to handle disruptive and stubbornly defiant defendants—whether by removal, physical restraint or contempt charges. *Id.* at 343–44.

⁷⁷ *Riggins*, 112 S. Ct. at 1815. The six member majority also noted that "Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." *Id.*

⁷⁸ *Id.* at 1817 (Kennedy, J., concurring).

⁷⁹ *Id.* at 1818.

⁸⁰ *Id.*

⁸¹ *See id.* at 1819–20.

⁸² *See Riggins*, 112 S. Ct. at 1819.

⁸³ *Id.* at 1819–20.

a powerful influence on his ultimate fate.⁸⁴ Indeed, an accused's ability to react and respond to the proceedings and his capacity to demonstrate compassion and remorse during his trial may be determinative of whether he lives or dies.⁸⁵

On remand, the Supreme Court of Nevada ordered the lower court to cease medicating Riggins in order to assess his competency to stand trial in an unmedicated state.⁸⁶ However, it permitted medication to resume if the trial court found that antipsychotic drugs were necessary and medically appropriate to maintain Riggins' competency.⁸⁷ The Nevada Supreme Court also ordered that Riggins could be forcibly medicated and tried under the influence of medication if the trial court found medication necessary and appropriate to ensure the safety of Riggins or the safety of others.⁸⁸ One member of the Nevada panel strenuously objected to these rulings, reasoning that Riggins should not be medicated during his trial unless the court also established that the drugs would not impair Riggins' ability to present a defense.⁸⁹

In summary, the United States Supreme Court failed to define the circumstances under which a state may compel criminal defendants to submit to antipsychotic medication during their trial. Without further definition or guidance, the Court simply required trial courts to recognize the defendant's liberty interest in avoiding medication and to establish that such medication is sufficiently "necessary" to override that interest. The Nevada Supreme Court interpreted the *Riggins* decision broadly, permitting the State to compel medication if "necessary" to maintain Riggins' competence or "necessary" to maintain the safety of the defendant or those around him. Once the medication is deemed necessary for either purpose, neither the Supreme Court nor the Nevada court deemed it appropriate to consider the impact of Riggins' medicated state on his second trial. Rather, the Nevada court apparently assumed that the State's interest in maintaining Riggins' competence to stand trial outweighed his interests in being tried in an unmedicated state. The Nevada court's holding likewise assumed that Riggins' interests in being tried drug free, including his interest in a full and fair trial, were outweighed by the State's interest in preventing him from harming himself or others. Finally, the court's order also suggested that the State's need to adjudicate Riggins' guilt or inno-

⁸⁴ *Id.*

⁸⁵ *Id.* at 1820.

⁸⁶ *Riggins v. State II*, 860 P.2d 705, 706 (Nev. 1993).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 723 (Springer, J., dissenting).

cence outweighed his liberty interest in avoiding antipsychotic medication.

II. PRE-RIGGINS CHALLENGES OF FORCED MEDICATION OF CRIMINAL DEFENDANTS

Several state courts have addressed the impact of compelled medication on a defendant's ability to get a fair trial.⁹⁰ Some have held that the influence of the medication on a defendant's attitude, appearance and demeanor impermissibly violates her right to present a defense and to testify on her own behalf.⁹¹ At least one court has also expressed concern that forced administration of antipsychotic drugs may sufficiently affect a defendant's mind to compromise her Fifth and Sixth Amendment guarantees.⁹² Courts upholding the medication of defendants against their will, on the other hand, have concluded that the drugs actually help the defendants understand and participate in the court proceedings.⁹³ Some of these courts further recognize that prejudice caused by the medication may be removed by presenting expert testimony regarding the side effects of the medication at trial.⁹⁴ Other courts have reasoned that although the state may try a defendant in a medicated state, a defendant's insanity defense may require presenting the defendant to the jury in an unmedicated state at some point in the proceedings.⁹⁵

A. Upholding a Defendant's Right to be Tried Drug-Free

In 1960, in *State v. Murphy*, the Supreme Court of Washington held that a defendant has the right to appear before a court in an unmedicated condition if his culpability is relevant to the jury's determination of his fate.⁹⁶ In particular, the court reasoned that a jury is likely to consider a defendant's attitude and display of remorse, or lack thereof, when deciding whether to impose a death sentence.⁹⁷ To fully

⁹⁰ See *infra* notes 96-154 and accompanying text.

⁹¹ See, e.g., *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); *State v. Maryott*, 492 P.2d 239, 243 (Wash. Ct. App. 1971); *State v. Murphy*, 355 P.2d 323, 327 (Wash. 1960).

⁹² See, e.g., *Maryott*, 492 P.2d at 242.

⁹³ See, e.g., *People v. Hardesty*, 362 N.W.2d 787, 793 (Mich. Ct. App. 1984); *State v. Law*, 244 S.E.2d 302, 306 (S.C. 1978); *State v. Hayes*, 389 A.2d 1379, 1381 (N.H. 1978); *In re Pray*, 336 A.2d 174, 177 (Vt. 1975).

⁹⁴ *Law*, 244 S.E.2d at 306-07.

⁹⁵ See, e.g., *Hayes*, 389 A.2d at 1382; *In re Pray*, 336 A.2d at 174.

⁹⁶ See *Murphy*, 355 P.2d at 327.

⁹⁷ *Id.* at 326.

defend himself, a defendant facing a death sentence must thus be permitted to present his true demeanor to the jury during his trial.⁹⁸

The defendant, Murphy, was charged with first degree murder by the State of Washington.⁹⁹ The morning of his trial, Murphy complained of a severe cold and was administered medication containing a strong tranquilizing drug.¹⁰⁰ Unaware of the possible effects of the medication, Murphy proceeded to trial under the influence of the tranquilizer and entered alternative pleas of not guilty and not guilty by reason of insanity.¹⁰¹ At his trial, Murphy testified on his own behalf and calmly admitted both to committing the crime and to being aware that his actions were wrongful.¹⁰² Following Murphy's testimony and the testimony of two medical experts who claimed Murphy was able to distinguish between right and wrong, the jury rejected Murphy's insanity plea, convicted him of first degree murder and sentenced him to death.¹⁰³

Murphy appealed his sentence, alleging that the State denied him a fair trial by administering drugs which altered his appearance and conduct during the proceedings.¹⁰⁴ In particular, Murphy argued that the jury might not have imposed the death sentence if they had witnessed his true demeanor.¹⁰⁵ According to the undisputed testimony of Murphy's counsel, Murphy's appearance, demeanor and manner of speaking while on the witness stand were markedly different from what they had been during pretrial interrogations.¹⁰⁶ During the trial, Murphy appeared casual, cool and not at all perturbed by his criminal acts.¹⁰⁷ In contrast, Murphy's attorney testified that before the trial Murphy was extremely distraught, nervous, agitated and reluctant to talk about the crime.¹⁰⁸

The Supreme Court of Washington agreed that Murphy's seemingly callous attitude towards the crime he had committed may have been relevant to the jury's decision to sentence him to death.¹⁰⁹ Fur-

⁹⁸ *Id.* at 327.

⁹⁹ *Id.* at 324.

¹⁰⁰ *Id.* at 325.

¹⁰¹ *Murphy*, 355 P.2d at 324.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 326. Murphy did not claim that the tranquilizing drugs affected the content of his testimony nor that the influence of the drugs had any bearing on the jury's guilty verdict. *Id.*

¹⁰⁶ *Murphy*, 355 P.2d at 326.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

thermore, because Murphy's right to a fair trial required the jury to consider all relevant evidence when making this life and death decision, the court reasoned that it was not necessary for Murphy to demonstrate that a drug induced change in his demeanor actually impacted the jury's decision.¹¹⁰ Rather, a new trial was justified because the State's administration of tranquilizing drugs to Murphy without his awareness of their possible effects created a reasonable possibility that Murphy's demeanor was substantially influenced by circumstances beyond his control.¹¹¹

In 1971, in *State v. Maryott*, the Washington Court of Appeals recognized that a defendant's right to be tried in an unmedicated state is particularly compelling where the defendant's mental capacity to commit the crime is at issue.¹¹² The court reasoned that when a defendant claims he was not responsible for his actions by reason of insanity, his attitude and demeanor may be the most significant evidence he could present to the jury.¹¹³ Permitting the State to alter this evidence by medicating him could thus seriously compromise his ability to present his defense.¹¹⁴

Maryott was forcibly administered substantial doses of various sedatives and a weak antipsychotic throughout his trial, despite significant evidence that the medication affected his mental ability.¹¹⁵ Expert testimony presented at his trial indicated that the dosages of medication administered to Maryott were sufficient to effect his thought processes, expression and mannerisms before the court.¹¹⁶ This evidence was supported by a friend's testimony that Maryott was dull and listless and unlike his usual self during trial.¹¹⁷ Other evidence indicated that he sat hunched over, staring vacantly ahead throughout the proceedings, and, according to his attorney, he was "suspicious and uncommunicative and refused to assist in his own defense."¹¹⁸ Regardless, Maryott was tried while under the influence of the medication and convicted of robbery and first-degree murder.¹¹⁹

¹¹⁰ *Id.* at 327.

¹¹¹ *Murphy*, 355 P.2d at 326.

¹¹² *State v. Maryott*, 492 P.2d 239, 240, 242 (Wash. Ct. App. 1971).

¹¹³ *Id.* at 242.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 240. Although the court noted that the drugs could have affected Maryott's thought processes, it concluded there was sufficient evidence that Maryott was capable of understanding the proceedings. *Id.* at 244.

¹¹⁶ *Id.* at 240.

¹¹⁷ *Maryott*, 492 P.2d at 240.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

The Washington Court of Appeals reversed Maryott's conviction, concluding that the Fourteenth Amendment guaranteed him the right to be tried with his mental faculties unfettered.¹²⁰ According to the court, freedom from state control of one's mind during trial is essential to the adversary process "whereby the state and the defendant, by contending vigorously but fairly against each other, are able to present the total factual and legal issues from which a trier of fact may arrive at a decision."¹²¹ Permitting the State to control the judgment and capacity of its own adversary by administering him mind-altering drugs would substantially undermine this process.¹²²

The court reasoned that, when a defendant is offering an insanity defense, state control of a defendant's mental capacity is particularly offensive because it also enables the state to manipulate and control evidence which is crucial to that defendant's case.¹²³ According to the court, the defendant's demeanor, attitude and appearance during his trial were probative evidence of his mental state at the time of the crime and could not be replaced by expert testimony that it was altered by medication.¹²⁴ The State could not exclude the most reliable evidence of Maryott's true mental state and then compensate for this loss by explaining to the jury what it refused to let them witness firsthand.¹²⁵

In 1983, in *Commonwealth v. Louraine*, the Supreme Judicial Court of Massachusetts also recognized that a defendant pleading not guilty by reason of insanity has the right to be tried in an unmedicated state.¹²⁶ Louraine was given large doses of antipsychotic medication to control symptoms of schizophrenia throughout both his pretrial detention and his trial for murder.¹²⁷ Prior to his trial, Louraine asked the court to terminate the medication so that he could present his true demeanor to the jury as part of his insanity defense.¹²⁸ Although the trial judge found that the medication administered to Louraine reduced his alertness and ability to concentrate, he ruled that the defendant was not entitled to be tried in an unmedicated condition, reasoning instead that expert testimony could adequately inform the jury

¹²⁰ See *id.* at 242.

¹²¹ *Id.* at 241.

¹²² See *Maryott*, 492 P.2d at 241.

¹²³ *Id.* at 242.

¹²⁴ *Id.* at 243.

¹²⁵ *Id.*

¹²⁶ *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983).

¹²⁷ *Id.* at 441.

¹²⁸ *Id.*

of the effects of the medication on his demeanor.¹²⁹ Subsequently, Louraine proceeded through trial under the influence of medication and was convicted of first degree murder.¹³⁰

Louraine appealed his conviction to the Supreme Judicial Court of Massachusetts, alleging the trial court deprived him of the opportunity to present his version of the facts by medicating him against his will during the trial.¹³¹ The Supreme Judicial Court agreed with the defendant, reasoning that expert testimony regarding the effects of medication neither eliminated prejudice caused by the defendant's altered demeanor nor replaced the probative value that his true demeanor might provide to his insanity defense.¹³² According to the court, the jury was likely to assess any evidence Louraine put before it with reference to his attitude and conduct in court, regardless of expert testimony that it was altered by medication.¹³³ For example, if Louraine appeared calm and controlled at the trial, the jury would likely reject testimony that he lacked the capacity to understand the wrongfulness of his conduct during the crime.¹³⁴ Allowing the State to forcibly medicate the defendant thus enabled the State to manipulate and control the evidence presented to the jury, compromising the jury's role as the sole judge of the credibility and weight of the evidence.¹³⁵

B. *Upholding a State's Right to Medicate Incompetent Defendants*

In contrast to the Washington and Massachusetts courts, in 1978, the Supreme Court of South Carolina upheld the compelled medication of a defendant whose only defense was a plea of insanity.¹³⁶ The defendant in *State v. Law* was administered antipsychotic drugs solely for the purpose of rendering him competent to stand trial.¹³⁷ He was then tried in this medicated state, convicted of murder and sentenced to death.¹³⁸

The Supreme Court of South Carolina upheld his conviction on appeal, concluding that the medication neither undermined his insan-

¹²⁹ *Id.* at 441 n.7.

¹³⁰ *Id.* at 439.

¹³¹ See *Louraine*, 453 N.E.2d at 441.

¹³² *Id.* at 442.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *State v. Law*, 244 S.E.2d 302, 308 (S.C. 1978). See also *supra* notes 96-135 and accompanying text.

¹³⁷ See *Law*, 244 S.E.2d at 305.

¹³⁸ *Id.* at 303.

ity defense nor violated his due process guarantees.¹³⁹ The South Carolina court distinguished the *Maryott* decision based on the effects of the medication administered to the defendant.¹⁴⁰ In contrast to Maryott's dull, listless and uncommunicative demeanor, the court found the medication administered to Law countered the effects of his mental illness, calming him and improving his ability to comprehend and participate in the proceedings against him.¹⁴¹ The court thus reasoned that the medication enabled Law to exercise the very rights which he asserted he had been denied.¹⁴²

The court also rejected Law's contention that the effect of the medication on his demeanor denied him the right to fully present his insanity defense.¹⁴³ The court reasoned that expert testimony sufficiently informed the jury that Law's calm demeanor during trial was the result of medication and not reflective of his state of mind at the time of the crime.¹⁴⁴ Moreover, any remaining prejudice was eliminated by instructing the jury that Law's criminal responsibility was governed by his mental state at the time of the alleged criminal acts, not his present condition.¹⁴⁵

In 1984, in *People v. Hardesty*, the Court of Appeals of Michigan also upheld the compelled medication of a defendant.¹⁴⁶ Like the South Carolina court, the Michigan court found that the drugs enhanced the defendant's ability to assist his counsel at trial.¹⁴⁷ In contrast, however, the *Hardesty* court concluded that a court must examine the probative value of the defendant's true demeanor before determining whether expert testimony is an adequate substitute.¹⁴⁸ In the instant case, because Hardesty had been under the influence of antipsychotic drugs when he committed the crime, the court reasoned that his unmedicated demeanor was of little probative value to the jury.¹⁴⁹ Therefore, the court concluded that Michigan had lawfully and justifiably medicated Hardesty during his trial.¹⁵⁰

¹³⁹ *Id.* at 306.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Law*, 244 S.E.2d at 306.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *People v. Hardesty*, 362 N.W.2d 787, 797 (Mich. Ct. App. 1984).

¹⁴⁷ *Id.* at 793.

¹⁴⁸ *Id.* at 797.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 798.

The courts in New Hampshire and Vermont, although permitting the State to try defendants under the influence of unwanted medication, both recognize that a defendant's insanity defense may require exposing him to the jury drug-free.¹⁵¹ Like the South Carolina court, these courts have found that compelled medication can have a beneficial effect on defendants' ability to function during their trials.¹⁵² In contrast, however, they do not agree that expert testimony could replace the probative value of a defendant's unmedicated demeanor.¹⁵³ Instead, these courts have held that a defendant's right to present a defense includes the right to permit the jury to view him in the same condition he was in when he committed the crime.¹⁵⁴

In conclusion, the state courts disagree about whether the compelled medication of defendants impermissibly violates their right to a full and fair trial. Several courts have recognized that an insanity defendant's attitude and conduct in court are so crucial to her right to present a defense that a defendant pleading not guilty by reason of insanity has an absolute right to be tried in an unmedicated state. Other courts, although not recognizing a defendant's right to be tried while unmedicated, have still reasoned that a defendant's insanity defense may require presenting her to the jury in an unmedicated state. At the very least, the courts addressing the compelled medication of defendants have agreed that their demeanor at trial is probative evidence of their mental state at the time of committing the crime, and that the jury must therefore be informed of a defendant's medication and its possible effects on her behavior.

III. EFFECTS OF ANTIPSYCHOTIC MEDICATION

Any rational discussion of the impact of forced medication on either a defendant's liberty interests or her right to obtain a fair trial must address both the desired and undesired effects of antipsychotic medication. The beneficial aspects of these drugs and the degree to which both their useful and harmful effects can be predicted bears heavily on their effectiveness at furthering the state's interests in forcing medication.¹⁵⁵ The toxic side effects, particularly those causing

¹⁵¹ See, e.g., *State v. Hayes*, 389 A.2d 1379, 1382 (N.H. 1978); *In re Pray*, 336 A.2d 174, 174 (Vt. 1975).

¹⁵² See, e.g., *Hayes*, 389 A.2d at 1381; *In re Pray*, 336 A.2d at 177.

¹⁵³ See, e.g., *Hayes*, 389 A.2d at 1382; *In re Pray*, 336 A.2d at 177.

¹⁵⁴ See, e.g., *Hayes*, 389 A.2d at 1382; *In re Pray*, 336 A.2d at 174.

¹⁵⁵ See *infra* notes 309-10 and accompanying text.

severe discomfort, distress or risk of permanent injury establish the intrusiveness of the drug on the defendant's liberty interest.¹⁵⁶ Complications affecting the defendant's thought processes, appearance and attitude are particularly relevant to her right to receive a fair trial, as is the predictability and consistency of any beneficial effects.¹⁵⁷

The use of antipsychotic medication to "treat" psychiatric disorders increased rapidly in the 1950s and has remained steady to this day.¹⁵⁸ 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,¹⁵⁹ nor is there agreement as to the precise mental conditions for which treatment with the drugs is effective.¹⁶⁰ What psychiatrists and clinicians do agree on is that antipsychotic drugs do not cure mental illness, and, indeed, provide no beneficial effect upon patients beyond the time they are in the blood stream.¹⁶¹

Although there is evidence that antipsychotic drugs alleviate the symptoms of certain psychiatric conditions, their effectiveness varies from condition to condition, symptom to symptom and patient to patient.¹⁶² Because these variations often appear idiosyncratic and even paradoxical, psychiatrists are unable to predict the effectiveness of a particular drug on a particular patient.¹⁶³ Thus, they generally prescribe antipsychotic medication based on "custom and rumored repute" rather than specific knowledge, or even belief, that the drug will benefit the patient.¹⁶⁴ The proper dosage of the medication is likewise a product of guess work; the amount administered to a patient is adjusted upwards until he or she either responds or develops toxic symptoms.¹⁶⁵ Although this trial and error method of choosing medication may eventually produce desired results, any success is likely to

¹⁵⁶ *Riggins v. Nevada*, 112 S. Ct. 1810, 1814 (1992).

¹⁵⁷ See *infra* notes 225-38 and accompanying text.

¹⁵⁸ Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U. L. REV. 461, 461 (1977); see also Lawrence D. Gaughan & Lewis H. LaRue, *The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution*, 4 LAW & PSYCH. REV. 43, 47 (1978).

¹⁵⁹ E.g., Gaughan & LaRue, *supra* note 158, at 47 (1978); *Davis v. Hubbard*, 506 F. Supp. 915, 927 (N.D. Ohio 1980).

¹⁶⁰ E.g., Plotkin, *supra* note 158, at 475; Gaughan & LaRue, *supra* note 158, at 48.

¹⁶¹ E.g., Gaughan & LaRue, *supra* note 158, at 47-48; *State v. Law*, 244 S.E.2d 302, 305 (S.C. 1978); see also Plotkin, *supra* note 158, at 478.

¹⁶² E.g., Plotkin, *supra* note 158, at 474-75; Gaughan & LaRue, *supra* note 158, at 49, 51.

¹⁶³ E.g., Plotkin, *supra* note 158, at 474-75; Gaughan & LaRue, *supra* note 158, at 49.

¹⁶⁴ E.g., Plotkin, *supra* note 158, at 475; Gaughan & LaRue, *supra* note 158, at 54.

¹⁶⁵ E.g., Plotkin, *supra* note 158, at 475; Gaughan & LaRue, *supra* note 158, at 54.

be short lived, because an individual's response to a particular drug tends to vary over time.¹⁶⁶

One of the most frequent effects of antipsychotic drugs, also commonly known as major tranquilizers, is pronounced sedation.¹⁶⁷ The drugs reduce patients' psychotic symptoms by chemically dulling their thought processes and flattening their emotional responses.¹⁶⁸ Highly agitated and excited patients become docile and apathetic; ranting and raving is replaced by apparent peace and tranquility.¹⁶⁹ While many psychiatrists may view such control of a patient's psychological disturbances as beneficial,¹⁷⁰ many opponents of the medication consider it a "chemical lobotomy."¹⁷¹ Indeed, the medical literature frequently uses the term "zombie" to describe the behavior and appearance of patients under the influence of antipsychotic drugs.¹⁷² Commentators likewise describe "synthetically sane" patients as bored, lethargic and indifferent to what is going on around them.¹⁷³ The patients themselves complain of being drowsy, confused and unable to stay awake or think clearly.¹⁷⁴

While the benefit a patient will gain from antipsychotic medication is difficult to predict, it is almost certain that she will suffer from some of the unpleasant "toxic" effects of the drugs.¹⁷⁵ According to commentators, the side effects of antipsychotic drugs are as varied and serious as any drug approved for use in the United States.¹⁷⁶ Medicated patients frequently complain of dizziness, blurred vision, dry mouth and throat, nasal congestion, urinary retention, constipation, sexual dysfunction and other painful or distressing minor reactions to the drugs.¹⁷⁷ Other common side effects include temporary muscular dis-

¹⁶⁶ Gaughan & LaRue, *supra* note 158, at 53.

¹⁶⁷ *E.g.*, Plotkin, *supra* note 158, at 474 n.75; Gaughan & LaRue, *supra* note 158, at 51.

¹⁶⁸ Gaughan & LaRue, *supra* note 158, at 46; *Riggins v. State I*, 808 P.2d 535, 540 (Nev. 1991) (Springer, J., dissenting); *see also* Plotkin, *supra* note 158, at 474 n.75.

¹⁶⁹ *Riggins v. State I*, 808 P.2d at 540 (Springer, J., dissenting); *see also* Plotkin, *supra* note 158, at 474 n.75.

¹⁷⁰ *See* Gaughan & LaRue, *supra* note 158, at 51; Plotkin, *supra* note 158, at 477.

¹⁷¹ *Riggins v. State I*, 808 P.2d at 540 (Springer, J., dissenting).

¹⁷² *Id.*

¹⁷³ *See* Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 512 (1980).

¹⁷⁴ *E.g.*, Plotkin, *supra* note 158, at 474 n.75; Gaughan & LaRue, *supra* note 158, at 51.

¹⁷⁵ *Washington v. Harper*, 494 U.S. 210, 239 n.5 (1990) (Stevens, J., dissenting); *see also* Plotkin, *supra* note 158, at 475; Gaughan & LaRue, *supra* note 158, at 48.

¹⁷⁶ Gaughan & LaRue, *supra* note 158, at 48.

¹⁷⁷ *E.g.*, Plotkin, *supra* note 158, at 476; Gaughan & LaRue, *supra* note 158, at 51-52; *Harper*, 494 U.S. at 240 (Stevens, J., dissenting).

turbances such as a rigid gait, motor retardation, tremors or a mask-like face, and certain dystonic reactions such as irregular writhing and grimacing or involuntary spasms of the upper body, tongue, throat or eyes, and symptoms of akathisia, including restlessness, agitation and non-rhythmic motion of the hands and feet.¹⁷⁸ Because many of these involuntary movements and behaviors are grotesque or socially objectionable, they cause embarrassment and distress for both the patient and her family.¹⁷⁹

The side effects of antipsychotic drugs increase in frequency and severity if the medication is administered for an extensive length of time.¹⁸⁰ Among the more serious and distressful side effects is tardive dyskinesia, a condition characterized by involuntary movement of a patient's jaw, mouth and facial muscles.¹⁸¹ In some cases, tardive dyskinesia also causes the involuntary movement of a person's extremities and pelvic area, and, in its most progressive state, it interferes with all motor activity,¹⁸² making speech incomprehensible and breathing difficult.¹⁸³ In the most extreme cases, antipsychotic drugs have induced catatonic-like states, brain swelling,¹⁸⁴ and neuroleptic malignant syndrome, a cardiac dysfunction which can lead to death.¹⁸⁵

In conclusion, while there is disagreement over the severity of some of the minor side effects and the frequency of the more severe disturbances, it is not disputed that a long list of possible complications accompanies the use of antipsychotic medication.¹⁸⁶ While many of the

¹⁷⁸ E.g., Plotkin, *supra* note 158, at 475; Gaughan & LaRue, *supra* note 158, at 52.

¹⁷⁹ Plotkin, *supra* note 158, at 477. An even better understanding of the effects of antipsychotic drugs on patients can be gained from the statements of persons forced to submit to these drugs. For example, during hearings to compel medication to the defendant in *Harper*, the defendant stated that he "would rather die th[a]n take medication." 494 U.S. at 239 (Stevens, J., dissenting). Other trial testimony quoted Harper as saying: "well all you want to do is medicate me and you've been medicating me . . . Haldol paral[y]zed my right side of my body . . . [Y]ou are burning me out of my life . . . [Y]ou are burning me out of my freedom." *Id.* at 239 n.4 (Stevens, J., dissenting). Commentators Gaughan and LaRue quote a patient at Western State Hospital as follows: "Medication makes me weak, tired, hard to swallow, blurry vision, dry mouth and throat, AFRAID to getting addicted to medicine, AFRAID of withdrawal symptoms, needs to go to school, have been a good patient, haven't been any trouble, well behaved." Gaughan & LaRue, *supra* note 158, at 51 n.30.

¹⁸⁰ E.g., *Harper*, 494 U.S. at 240; Plotkin, *supra* note 158, at 477; see also Gaughan & LaRue, *supra* note 158, at 52, 53.

¹⁸¹ E.g., *Harper*, 494 U.S. at 229-30; Plotkin, *supra* note 158, at 476; Gaughan & LaRue, *supra* note 158, at 52.

¹⁸² *Davis v. Hubbard*, 506 F. Supp. 915, 929 (N.D. Ohio 1980).

¹⁸³ E.g., *Davis*, 506 F. Supp. at 929; Plotkin, *supra* note 158, at 477.

¹⁸⁴ See *Harper*, 494 U.S. at 240 (Stevens, J., dissenting).

¹⁸⁵ *Id.* at 229-30.

¹⁸⁶ Plotkin, *supra* note 158, at 478; see also Gaughan & LaRue, *supra* note 158, at 48, 51.

minor side effects may be controllable with other medication and tend to disappear soon after the antipsychotic drugs are discontinued, the more severe effects have resisted curative measures and often persist for years after the medication is stopped.¹⁸⁷ Moreover, although the more severe effects generally result after an extended period of medication, ceasing medication before the side effect develops does not ensure that a patient is free from risk, because symptoms of tardive dyskinesia have been known to appear some time after medication has been discontinued.¹⁸⁸

IV. CRIMINAL DEFENDANT'S FUNDAMENTAL RIGHT TO A FULL AND FAIR TRIAL

Forceful administration of mind-altering drugs can prejudice a defendant's trial in two principal ways. First, it may render him unable or unwilling to assist in his own defense. Second, the medication may compromise his ability to present an insanity defense by altering his reactions and presentation in the courtroom.

A. *The Right to Present a Defense*

In 1947, in *In re Oliver*, the United States Supreme Court held that the Fourteenth Amendment Due Process Clause guarantees defendants the right to be heard in their own defense.¹⁸⁹ *Oliver* involved the immediate conviction and sentencing of a witness charged with contempt during a secret investigation of gambling and corruption in a Michigan court.¹⁹⁰ After *Oliver* testified, the judge concluded that *Oliver's* story was false because it conflicted with the testimony of another secret witness.¹⁹¹ Based on this conclusion, the judge charged *Oliver* with contempt of court and immediately convicted and sentenced him to two months in jail.¹⁹² Due to the secrecy and haste of the proceedings, *Oliver* had neither the opportunity to obtain counsel, to prepare a defense, to cross-examine the other witness or to summon witnesses in his own behalf.¹⁹³

On petition for a writ of habeas corpus, the United States Supreme Court reversed *Oliver's* conviction, holding that the Michigan court

¹⁸⁷ Plotkin, *supra* note 158, at 477; Gaughan & LaRue, *supra* note 158, at 52.

¹⁸⁸ Plotkin, *supra* note 158, at 476.

¹⁸⁹ *In re Oliver*, 333 U.S. 257, 273 (1948).

¹⁹⁰ *Id.* at 259.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

deprived Oliver of his liberty without providing him due process of law.¹⁹⁴ According to the Court, a person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense are basic to our system of jurisprudence.¹⁹⁵ At a minimum, the Michigan court should have granted Oliver the opportunity to examine the witness against him, to confer with counsel and to offer testimony in his own behalf.¹⁹⁶

In 1985, in *Rock v. Arkansas*, the United States Supreme Court held that a defendant's right to testify was essential to her right to present a defense.¹⁹⁷ The defendant in *Rock* was charged with manslaughter in the death of her husband.¹⁹⁸ Although the defendant admitted that she and her husband had been arguing on the night of the alleged shooting and that she had picked up a gun, she could not recall any additional details.¹⁹⁹ At the suggestion of her attorney, the defendant submitted to hypnosis to refresh her memory and subsequently recalled that her thumb was on the hammer of the gun at the time of the incident, but that she had not touched the trigger.²⁰⁰ Rather, the gun had discharged accidentally when her husband grabbed her arm.²⁰¹

At trial, the Arkansas court granted the prosecution's motion to exclude Rock's hypnotically refreshed testimony and ordered the defendant to limit her testimony to statements made prior to hypnosis.²⁰² At the close of her trial, the jury convicted Rock of manslaughter.²⁰³ On appeal, the Supreme Court of Arkansas upheld Rock's conviction, concluding the trial court properly excluded her hypnotically refreshed testimony because of its inherent unreliability.²⁰⁴

The United States Supreme Court reversed the Arkansas court's ruling, holding that Rock had a protected right to state her own

¹⁹⁴ *Oliver*, 333 U.S. at 273.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Since then, the Supreme Court has extended a criminal defendant's Sixth Amendment protections to trials in state courts through the Due Process Clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 18 (1966). The Sixth Amendment grants criminal defendants the right 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.

¹⁹⁷ *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1986).

¹⁹⁸ *Id.* at 45.

¹⁹⁹ *Id.* at 46.

²⁰⁰ *Id.* at 46-47.

²⁰¹ *Id.* at 47.

²⁰² *Rock*, 483 U.S. at 47.

²⁰³ *Id.* at 48.

²⁰⁴ See *Rock v. Arkansas*, 708 S.W.2d 78, 81 (1986).

version of the facts, regardless of the possibility that her testimony might be unreliable.²⁰⁵ The Court found this right encompassed in several constitutional provisions.²⁰⁶ First, Rock's ability to testify was essential to her Sixth Amendment right to present witnesses in her own behalf.²⁰⁷ Rock was undoubtedly the most important witness for the defense; she was the only one present at the alleged crime, and thus, the only one with testimony which was both material and favorable to her side of the dispute.²⁰⁸ Rock's right to confront her accusers and to defend herself likewise required that she be permitted to fully testify about the events surrounding the crime of which she was accused.²⁰⁹ Her refreshed memory that the gun discharged accidentally was her only defense against accusations that she had murdered her husband.²¹⁰

Silencing this testimony also violated Rock's Fifth Amendment guarantee against compelled self incrimination.²¹¹ Rock admitted to arguing with her husband and picking up the murder weapon, admissions which would necessarily implicate her in his murder absent some valid defense or exculpatory evidence.²¹² The *Rock* Court reasoned that the importance of Rock's right to fully testify about the events surrounding her husband's death was not lessened simply because her hypnotically refreshed testimony risked being untrustworthy.²¹³ Rather, judging the credibility of a witness' testimony is a traditional function of the jury, and any lack of trustworthiness goes to the weight of the evidence rather than its admissibility.²¹⁴

B. *The Right to Understand and Participate in the Proceedings*

The United States Supreme Court has repeatedly recognized that a defendant's right to a fair trial requires that she have the mental capacity to understand and participate in the proceedings against her.²¹⁵ A state may not try or punish a defendant absent this capacity, because she would not be able to confront her accusers in a meaningful man-

²⁰⁵ See *Rock*, 483 U.S. at 61.

²⁰⁶ See *id.* at 51-52.

²⁰⁷ *Id.* at 52.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *Rock*, 483 U.S. at 52.

²¹¹ *Id.*

²¹² See *id.*

²¹³ *Id.* at 61.

²¹⁴ *Id.*

²¹⁵ *Drope v. Missouri*, 420 U.S. 162, 171 (1974) (defendant's right to a fair trial includes

ner, coherently present her own version of the facts or otherwise adequately defend herself.²¹⁶ In 1960, in *Dusky v. United States*, the Court defined the inquiry for sufficient mental capacity, or competency, as whether a defendant could consult rationally with his attorney and whether he had a rational as well as a factual understanding of the proceedings.²¹⁷ The court below had determined that the defendant was competent to stand trial because he was reasonably oriented to time and place and had some recollection of past events.²¹⁸ The Supreme Court overturned his subsequent conviction, reasoning that the trial court's findings did not adequately ensure that the defendant had sufficient mental capacity to effectuate his constitutional protections.²¹⁹

Commentators suggest that proceeding against individuals who cannot defend themselves damages society's perception of the fairness of the criminal system,²²⁰ thereby hindering its effectiveness in deterring crime.²²¹ Because the criminal defendant's life and liberty are at stake, the apparent fairness of a proceeding depends largely on the defendant's ability to control the nature of her defense.²²² Thus, it is imperative that she be able to consult with an attorney, choose how to plead and assist in basic strategic decisions.²²³ To make such decisions

having the mental capacity to consult with counsel and assist in one's defense); *Pate v. Robinson*, 383 U.S. 374, 377 (1966) (same); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (same).

²¹⁶ See *Riggins v. Nevada*, 112 S. Ct. 1810, 1817 (1992) (Kennedy, J., concurring). Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967) [hereinafter *Harvard Note*]. This prohibition against the trial and punishment of incompetent defendants was well established in eighteenth century English jurisprudence and transformed almost verbatim into American common law during the nineteenth century. Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Problem*, 17 CAL. W. L. REV. 365, 367 n.9 (1981). Since then the doctrine has been codified in federal and state statutes. 18 U.S.C. § 4241 (Supp. 1984). See 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, 1115 (1986) for a compilation of state competency statutes. It has also been encompassed in the Due Process Clause of the Constitution. See *Pate*, 383 U.S. at 388. This prohibition has survived nearly intact for over two hundred years because it is firmly rooted in principles of fundamental fairness and humanity. Not only is it senseless to punish individuals who cannot understand what they have done wrong or why they are being punished, it is inherently unfair to try them if they are mentally incapable of defending themselves. *Harvard Note*, *supra* at 454.

²¹⁷ *Dusky*, 362 U.S. at 402.

²¹⁸ *Id.*

²¹⁹ See *id.* at 403.

²²⁰ See, e.g., *Harvard Note*, *supra* note 216, at 458.

²²¹ See Mickenberg, *supra* note 216, at 369; ABA STANDARDS FOR CRIMINAL JUSTICE 7.4.1, commentary 170, at 161 (1984) [hereinafter *ABA Standards*].

²²² See *Harvard Note*, *supra* note 216, at 458.

²²³ See *id.*

rationally, the defendant must be able to understand the charges against her, as well as the defenses available and the possible consequences of those defenses.²²⁴

C. *The Impact of Antipsychotic Medication*

The threat that antipsychotic drugs pose to a defendant's ability to defend herself is substantial. As discussed earlier, although the medication may reduce the symptoms of a defendant's psychosis, it does not restore "normal" lucidity. Rather, a medicated defendant is likely to be drowsy, confused and unable to concentrate or think clearly. Such mental impairment could not only affect a defendant's ability to follow and understand the proceedings against her, it could also compromise her interactions with her attorney.²²⁵

Even if we assume that this impairment is insufficient to violate a defendant's due process guarantees, and that medication instead restores a sufficient level of competency to enable a defendant to stand trial,²²⁶ the possible effect of the medication on her will to think and fend for herself is alarming. Common sense alone dictates that a heavily sedated, zombie-like defendant will lack the will power and tenacity to vigorously confront her accusers. This lackadaisical attitude is particularly troubling when it is induced by the state and approved by the court. In *In re Pray*, the Supreme Court of Vermont found that antipsychotic medication was beneficial because it rendered the defendant "quiet and tractable."²²⁷ It is difficult to understand how the court could find that rendering one's adversary "easily led," "manageable," "governable" or "malleable"²²⁸ comports with due process notions of justice.

State manipulation and control of a defendant's behavior is even more disturbing when the defendant is pleading not guilty by reason of insanity.²²⁹ An insanity defendant often admits to committing the crime, but claims that she lacked the requisite mental capacity to be

²²⁴ See *id.*

²²⁵ *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992).

²²⁶ This also requires an assumption that the effect of medication on a defendant's ability to understand and participate in the proceedings can be maintained throughout her trial. See *supra* note 166 and accompanying text.

²²⁷ *In re Pray*, 336 A.2d 174, 177 (Vt. 1975).

²²⁸ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2421 (3rd ed. 1986) (defining tractable).

²²⁹ See, e.g., *Riggins*, 112 S. Ct. at 1818 (Kennedy, J., concurring); *Commonwealth v. Lorraine*, 453 N.E.2d 437, 442 (Mass. 1983); *State v. Maryott*, 492 P.2d 239, 242 (Wash. Ct. App. 1971).

held responsible for her actions.²³⁰ Thus, because her guilt or innocence depends solely on the jury's determination of her mental state at the time of the crime, it is essential that she present all relevant evidence of her mental capacity. Most courts reviewing compelled medication have recognized that a defendant's present mental state is probative of her state of mind at the time of committing the crime.²³¹ Moreover, many have noted that it is likely to be the most reliable evidence available.²³²

When the state forcibly medicates a defendant, it does not simply manipulate this evidence, it literally destroys it. The avowed purpose of antipsychotic drugs is to make a person look and act sane.²³³ An artificially sane defendant cannot present herself to the jury as probative evidence of her insanity at the time of committing the crime—that mental state no longer exists.

Forcefully administering mind-altering drugs likewise prevents the defendant from testifying in her own words. Rather, any testimony she presents will be a byproduct of her chemically-controlled mental processes. Even if the substance of her testimony remains unchanged, the context and impact of her words will be altered. The outward signs of her insanity, as well as any emotional displays of grief, compassion or remorse may be deleted from her testimony.²³⁴ Her apparent sanity in the courtroom might also affect the credibility and weight the jury attaches to her testimony, particularly any statements regarding her capacity to understand the wrongfulness of her actions.²³⁵

Altering an insanity defendant's mental state also risks violating her right against self incrimination in the same manner that excluding hypnotically refreshed testimony violated Rock's Fifth Amendment rights.²³⁶ Like Rock's refreshed testimony, an insanity defendant's present mental state might be the only evidence both material and favorable to her defense. Destroying this evidence would thus cause any admissions she had made to necessarily implicate her in committing the crime.

²³⁰ See, e.g., *Riggins*, 112 S. Ct. at 1813; *Maryott*, 492 P.2d at 240.

²³¹ See, e.g., *People v. Hardesty*, 362 N.W.2d 787, 795 (Mich. Ct. App. 1984); *Maryott*, 492 P.2d at 242.

²³² See, e.g., *Maryott*, 492 P.2d at 243; *Louraine*, 453 N.E.2d at 442.

²³³ See *Gaughan & LaRue*, *supra* note 158, at 48.

²³⁴ See *supra* notes 167–74 and accompanying text.

²³⁵ See, e.g., *Riggins*, 112 S. Ct. at 1819 (Kennedy, J., concurring); *Louraine*, 453 N.E.2d at 442.

²³⁶ See *supra* notes 211–14 and accompanying text.

Because the insanity defendant's unmedicated demeanor is the most direct evidence of her mental capacity to commit the crime, it is essential that the jury view this evidence for themselves.²³⁷ Although a psychiatrist may be able to give his opinion of a defendant's mental state and her capacity to distinguish right from wrong, it cannot replace the jury's evaluation of the defendant's true mental state. It is the jury, not the psychiatrist, who need to judge the credibility of witnesses and the weight of evidence.

Although evidence of the defendant's true mental capacity could be provided by temporarily presenting the defendant to the jury in an unmedicated state, this measure would not replace the value of permitting the jury to view the defendant's true demeanor throughout her trial.²³⁸ After viewing a calm, apparently sane defendant day after day, the jury is likely to view the defendant's bizarre unmedicated demeanor as merely an act concocted by the defendant as a means of escaping responsibility for her actions. The defendant's lack of compassion, remorse or other emotional response during the trial might also prejudice the jury's assessment of her guilt, regardless of their knowledge that it is medically induced. Moreover, temporarily presenting an unmedicated defendant to the jury does not cure the other major concern raised by the compelled medication of a defendant during trial, namely that the state is still controlling the mind and will of its adversary.

Finally, proceeding against an insanity defendant whose competence to stand trial has been restored by forceful administration of antipsychotic medication presents at least as grave a risk to society's perception of the criminal justice system as trying her in an incompetent state. The threat the drugs pose to her ability to fully and fairly defend herself is, in itself, substantial. Moreover, because this threat is induced by the state, it raises serious concerns of misconduct and overreaching by the state. Likewise, because this threat to the defendant's due process guarantees is approved by the court, it creates, at a minimum, the appearance of complicity between the judiciary and the state prosecutors. Our judicial system long ago concluded that it could not tolerate the degradation of respect for the system which would result from trying incompetent defendants. The wisdom and foresight

²³⁷ See *Louraine*, 453 N.E.2d at 442-43; *Maryott*, 492 P.2d at 242-43.

²³⁸ See, e.g., *Riggins*, 112 S. Ct. at 1819 (Kennedy, J., concurring); *Louraine*, 453 N.E.2d at 442.

of this intolerance is equally applicable to the trial of their forcefully medicated counterparts.

V. OVERRIDING AN INDIVIDUAL'S LIBERTY INTEREST IN AVOIDING UNWANTED MEDICATION

Regardless of the impact of antipsychotic drugs on a defendant's trial, forceful administration of the medication is an intrusion on her substantial liberty interest in avoiding potentially harmful, mind-altering drugs.²³⁹ Whether the state may override her right to be free from unwanted medication can be determined only after identifying the legitimate interests of the state and balancing those interests against the defendant's interests in avoiding the drugs.²⁴⁰ The courts have generally only recognized two state interests that may, in limited circumstances, be sufficiently compelling to justify the forced medication of mentally ill persons involuntarily committed to state institutions.²⁴¹ The first justification, the state's *parens patriae* right and duty to treat individuals committed to its care, is premised on the benefit of the medication to the mentally ill person.²⁴² The second justification, the state's duty to prevent mentally ill persons from injuring themselves and others, arises out of the state's police power.²⁴³ Moreover, where the state is seeking to medicate an inmate committed to a state correctional facility, the United States Supreme Court has held that the state's interest in maintaining safety and security in the prison setting is sufficiently compelling to outweigh even substantial interests of inmates.²⁴⁴

A. *Involuntarily Committed Mentally Ill Patients: Parens Patriae and Police Power Justifications*

In 1980, in *Davis v. Hubbard*, the United States District Court for the Northern District of Ohio reviewed the forceful administration of antipsychotic drugs to involuntarily committed mentally ill patients and concluded that patients retain a limited right to refuse the medication.²⁴⁵ The district court reasoned that the forced administration of

²³⁹ See *Davis v. Hubbard*, 506 F. Supp. 915, 934 (N.D. Ohio 1980); see also *Riggins*, 112 S. Ct. at 1814-15; *Washington v. Harper*, 494 U.S. 210, 221 (1990).

²⁴⁰ *Davis*, 506 F. Supp. at 934; see also *Riggins*, 112 S. Ct. at 1815-16.

²⁴¹ E.g., *Davis*, 506 F. Supp. at 934-35; *Rogers v. Commissioner*, 390 Mass. 489, 510-12 (1983).

²⁴² *Davis*, 506 F. Supp. at 935; *Rogers*, 390 Mass. at 511-12.

²⁴³ *Davis*, 506 F. Supp. at 934; *Rogers*, 390 Mass. at 510-11.

²⁴⁴ *Harper*, 494 U.S. at 223-24, 236.

²⁴⁵ *Davis*, 506 F. Supp. at 938.

antipsychotic drugs not only represents an extreme invasion of the patients' significant liberty interests in avoiding unwanted medication,²⁴⁶ it also denies their right to make their own treatment decisions and implicates their interest in being able to think and communicate freely.²⁴⁷ According to the court, a state's interest in medicating a patient is sufficiently compelling to override these substantial interests only if the patient presents an immediate danger to herself or others in the institution.²⁴⁸

The plaintiffs in *Davis* were mental patients at Lima State Hospital ("LSH"), an Ohio mental institution.²⁴⁹ LSH had a policy of liberally medicating patients with antipsychotic drugs; approximately 73% of the hospital's patients received antipsychotic medication on a daily basis.²⁵⁰ Dissatisfied with the hospital's policy, a group of LSH patients challenged it in the district court, claiming that compelled medication violated their right to refuse unwanted medication.²⁵¹

The State of Ohio sought to justify its compulsory treatment of patients under its *parens patriae* powers.²⁵² Although the court agreed that the State had a legitimate interest in "providing care to its citizens who are unable because of emotional disorders to care for themselves," it did not agree that this interest justified the wholesale medication of mentally ill persons confined in state institutions.²⁵³ Rather, the court concluded that a state's *parens patriae* powers are, by definition, conditioned on the patient's ability to care for himself and to make his own decisions about whether to accept or reject treatment.²⁵⁴ Because commitment to a state mental institution did not automatically imply incompetence to make treatment decisions,²⁵⁵ the State could not forc-

²⁴⁶ *Id.* at 929, 934.

²⁴⁷ *Id.* at 930.

²⁴⁸ *Id.* at 938.

²⁴⁹ *Id.* at 926.

²⁵⁰ *Davis*, 506 F. Supp. at 926. This widespread administration of medication was not necessarily related to treatment purposes; the drugs were often prescribed solely to control or punish the patients. *Id.* Moreover, LSH patients who were medicated with antipsychotic drugs were rarely informed of the type of drugs administered, the reason they were prescribed or the possible risks of the drug, nor were they given the opportunity to refuse treatment. *Id.* at 927.

²⁵¹ *Id.* at 925.

²⁵² *Id.* at 935.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Davis*, 506 F. Supp. at 935. The court concluded that Ohio law did not equate commitment with incompetence to make treatment decisions because the Ohio code provides involuntarily committed patients the right to refuse other forms of treatment. *Id.* at 935 n.26. The commitment laws of most other states similarly recognize that institutionalization does not represent a determination of incompetency. Plotkin, *supra* note 158, at 496.

ibly medicate patients for treatment purposes absent a finding that the patient is incapable of deciding what is good for him or herself.²⁵⁶

The district court expressed doubt that the State could justify compelling antipsychotic drugs for treatment purposes even if the patient was deemed incompetent to make her own medical decisions.²⁵⁷ To override a patient's fundamental right to refuse antipsychotic medication, a state must demonstrate that the drugs substantially further the state's alleged treatment goal.²⁵⁸ Because antipsychotic drugs lack any curative effect and because their ability to alleviate symptoms is uncertain, the court concluded that a state would have difficulty establishing such a connection.²⁵⁹ Moreover, the court noted that the hostile environment created by the forced administration of drugs further reduced their therapeutic value by destroying the relationship of trust between psychiatrist and patient.²⁶⁰

The State of Ohio also suggested that forced medication may sometimes be necessary to prevent a patient from harming himself or others.²⁶¹ Although the court agreed that this was a legitimate interest, it reasoned that it is only sufficiently compelling to override a patient's significant interest in refusing the antipsychotic drugs under narrow circumstances.²⁶² Wholesale medication of patients based on past violent behavior or possible violent tendencies would sweep too broadly, the court concluded, because many, if not most, patients in mental hospitals have exhibited violent tendencies at some point in time.²⁶³ Rather, at a minimum, a state must have probable cause to believe that the patient presents an imminent threat of danger to himself, other patients or the institution's staff, before it may disregard the patient's interests in refusing treatment.²⁶⁴

In 1984, in *Rogers v. Commissioner*, the Supreme Judicial Court of Massachusetts also recognized that involuntarily committed patients retain a qualified right to refuse treatment.²⁶⁵ *Rogers* involved a class action challenge of a state hospital's policy of administering antipsy-

²⁵⁶ *Davis*, 506 F. Supp. at 936. Other courts have similarly recognized an involuntary psychiatric patient's right to refuse treatment absent a finding of incompetency. *E.g.*, *Scott v. Plante*, 532 F.2d 939, 946 (3rd Cir. 1976); *Rogers v. Commissioner*, 390 Mass. 489, 494-97 (1983).

²⁵⁷ *Davis*, 506 F. Supp. at 936-37.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 936.

²⁶¹ *Id.* at 934.

²⁶² *Davis*, 506 F. Supp. at 934.

²⁶³ *Id.* at 935.

²⁶⁴ *Id.*

²⁶⁵ *Rogers v. Commissioner*, 390 Mass. 489, 491 (1983).

chotic medication to patients against their will.²⁶⁶ Like the Ohio district court, the Massachusetts court held that the State's police powers only justified forceful medication if the patient posed an immediate threat of harm to herself or others.²⁶⁷ Additionally, the Massachusetts court required that the State consider less intrusive alternatives of controlling a patient before forcibly injecting medication over her objections.²⁶⁸

The *Rogers* court also recognized that an involuntary civil commitment to a state mental institution did not constitute a determination of a patient's incompetency to make treatment decisions.²⁶⁹ The Massachusetts court, however, held that the State's *parens patriae* power might justify forced treatment even in the absence of a finding of incompetence "to prevent the 'immediate, substantial, and irreversible deterioration of a serious mental illness,' . . . in cases in which 'even the smallest of avoidable delays would be intolerable.'"²⁷⁰ To continue treatment beyond the immediate emergency, the treating doctors must obtain a judicial determination of incompetency.²⁷¹ Moreover, even where the patient has been adjudicated incompetent, Massachusetts law only permits forced treatment if a judge determines that medication is in the patient's best interest.²⁷²

B. Prison Inmates: Heightened Police Power Justification

In 1990, in *Washington v. Harper*, the United States Supreme Court held that a state's interest in maintaining the safety and security of its prisons justified forced medication of the inmates if it reasonably furthered this goal.²⁷³ Although the Court recognized that Harper's liberty interest in avoiding antipsychotic drugs was substantial,²⁷⁴ it reasoned that the complexity of prison administration required deference to the decisions of prison officials.²⁷⁵

In 1975, Walter Harper was convicted of robbery and sentenced to prison.²⁷⁶ During much of his incarceration, he was housed in the

²⁶⁶ *Id.* at 491-92.

²⁶⁷ *Id.* at 509-11.

²⁶⁸ *Id.* at 510.

²⁶⁹ *Id.* at 494-95.

²⁷⁰ *Rogers*, 390 Mass. at 511-12 (quoting *In re Guardianship of Roe*, 421 N.E.2d 40, 55 (1981)).

²⁷¹ *Id.* at 512.

²⁷² *Id.* at 504-06.

²⁷³ *Washington v. Harper*, 494 U.S. 210, 223, 236 (1990).

²⁷⁴ See *supra* notes 62-64 and accompanying text.

²⁷⁵ *Harper*, 494 U.S. at 223-24.

²⁷⁶ *Id.* at 213.

prison's mental health unit, where he voluntarily received antipsychotic drugs.²⁷⁷ In 1982, Harper complained of side effects from the medication and refused continued treatment.²⁷⁸ The treatment staff initiated proceedings to compel medication, pursuant to the State's policy, which provides that an inmate may only be involuntarily treated if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself or others.²⁷⁹ Moreover, an inmate who refuses medication is entitled to a hearing before an independent committee comprised of individuals not currently involved in the inmate's diagnosis or treatment, as well as the right to appeal from the committee's decision.²⁸⁰

Harper succumbed to forced medication for several years before challenging the State's actions under the federal Civil Rights Act.²⁸¹ In 1985, Harper brought a § 1983²⁸² action in state court, claiming that the State of Washington had violated the Due Process, Equal Protection and Free Speech Clauses of the federal and state constitutions by involuntarily administering medication without first providing a judicial hearing.²⁸³ The state court, however, upheld the prison's decision to forcibly medicate Harper, concluding that the independent hearing and statutory right of appeal, protected Harper's interest in not being arbitrarily subjected to unwanted medication.²⁸⁴

On appeal, the Washington Supreme Court reversed the lower court's decision, holding that the State's procedures did not adequately protect inmates' liberty interests.²⁸⁵ Given the highly intrusive nature of treatment with antipsychotic medication, the court reasoned that a full judicial hearing was required to provide sufficient protection.²⁸⁶ According to the Washington Court, before the State could administer unwanted medication it must demonstrate that the treatment was both essential and effective in furthering a compelling state interest.²⁸⁷

²⁷⁷ *Id.*

²⁷⁸ See *id.* at 214, 239 n.4 (Stevens, J., dissenting). The institution's records indicate that Harper exhibited dystonia (acute muscle spasms) and akathisia (physical-emotional agitation). *Id.* at 240 n.8 (Stevens, J., dissenting).

²⁷⁹ *Id.* at 215.

²⁸⁰ *Harper*, 494 U.S. at 215-16.

²⁸¹ See *id.* at 217.

²⁸² 42 U.S.C. § 1983 (1982).

²⁸³ *Harper*, 494 U.S. at 217.

²⁸⁴ *Id.* at 217-18.

²⁸⁵ *Harper v. State*, 759 P.2d 358, 360 (Wash. 1988).

²⁸⁶ *Id.* at 363.

²⁸⁷ *Id.* at 364-65.

The United States Supreme Court reversed the Washington court's decision, upholding the prison's policy of forcibly medicating inmates, concluding that the State's interest in medicating dangerous mentally ill inmates outweighed the possible health and safety risks to the individual.²⁸⁸ Recognizing that many inmates have a "demonstrated proclivity for antisocial criminal, and often violent conduct," the Court reasoned that the State had a compelling interest in controlling inmate behavior.²⁸⁹ Moreover, the State's policy of forcibly medicating potentially violent inmates was narrowly tailored towards achieving this interest; it only allowed medication of mentally ill inmates who, as a result of their illness, presented a significant danger to themselves or others.²⁹⁰

The *Harper* dissent, on the other hand, argued that the majority improperly weighed this balance by ignoring several dimensions of Harper's liberty interest in avoiding antipsychotic medication.²⁹¹ In addition to violating Harper's bodily integrity, the dissent reasoned that forceful medication with potentially harmful, mind-altering drugs implicated Harper's right to reject medical treatment and his interest in being free from governmental control of his mental processes.²⁹² Moreover, the dissent alleged that the *Harper* Court underestimated the intrusiveness of antipsychotic drugs by erroneously discounting the frequency and severity of the medication's side effects.²⁹³

In sum, courts have recognized that all persons retain a limited right to refuse antipsychotic medication. Generally, a state's *parens patriae* or police power interests have been held sufficient to override that right only where the medication substantially furthers the state's interest and where the classification of persons medicated is sufficiently tailored towards achieving that goal. Moreover, if forced medication is permitted beyond an emergency situation, the decision to medicate must be made by an independent entity whose interests are not served by the compelled medication.

²⁸⁸ *Harper*, 494 U.S. at 236.

²⁸⁹ *Id.* at 225-26.

²⁹⁰ *Id.* at 227-28.

²⁹¹ See *id.* at 237 (Stevens, J., dissenting). Justices Brennan and Marshall joined in Stevens' opinion.

²⁹² *Id.* at 237-38.

²⁹³ See *Harper*, 494 U.S. at 237 (Stevens, J., dissenting). According to the dissent, the Court relied on an inaccurate, outdated and biased brief written by the American Psychiatric Association. *Id.* at 239 n.5. Psychologists, claiming that the risk of side effects are severe, charge that the psychiatrists minimize the risks associated with antipsychotic drugs out of fear of an explosion in litigation involving the medicated patients. *Id.*

VI. A COMPREHENSIVE APPROACH TO REVIEWING CHALLENGES TO FORCED MEDICATION OF CRIMINAL DEFENDANTS

In the past, state courts reviewing challenges to forced medication of criminal defendants did not generally acknowledge their liberty interest in avoiding the medication. After *Riggins*, however, courts that have upheld a state's right to medicate defendants will need to reassess their earlier holdings in light of this substantial interest. It should not be presumed that these courts implicitly recognized that the state's interest in adjudicating a defendant's guilt or innocence outweighed her interest in avoiding antipsychotic medication when they permitted the state to forcibly medicate her. The *Riggins* Court rejected such an argument, directing the lower courts to acknowledge a defendant's liberty interest and to affirmatively establish a state interest sufficiently compelling to override it before permitting forced medication.²⁹⁴ As noted earlier, however, the *Riggins* Court did not provide guidance on how courts should strike this balance, nor did it establish the standard of review that courts should apply.²⁹⁵ The following discussion is aimed at aiding courts reviewing the forced medication of criminal defendants by suggesting a comprehensive approach to balancing the state's interests in compelling medication against the defendant's interests in avoiding it.

Courts reviewing forced administration of antipsychotic medication must begin by acknowledging that criminal defendants have a substantial liberty interest in avoiding unwanted drugs, which is protected from arbitrary government action by the Fourteenth Amendment. Moreover, the courts must recognize that the forceful administration of antipsychotic medication is highly intrusive of this right because of the many uncomfortable, distressing and potentially dangerous side effects associated with these drugs. Because the Supreme Court has established a floor rather than a ceiling for the level of protection a state must provide individual rights, a court reviewing forced medication need not limit its inquiry into the intrusiveness of the drugs to the *Harper* Court's findings.²⁹⁶ There is sufficient documentation to support an argument that the threat of injurious side effects from antipsychotic medication is significantly greater than the Supreme Court recognized.²⁹⁷ A court may also want to consider other

²⁹⁴ *Riggins v. Nevada*, 112 S. Ct. 1810, 1815-16 (1990).

²⁹⁵ See *supra* notes 75-77 and accompanying text.

²⁹⁶ See *supra* note 293 and accompanying text.

²⁹⁷ See *supra* notes 155-58 and accompanying text.

dimensions of an individual's interest in avoiding medication. The *Harper* dissent and the Ohio district court in *Davis v. Hubbard* both recognized that compelled antipsychotic medication implicates a person's ability to think and communicate freely as well as their right to make their own treatment decisions.²⁹⁸

Because a defendant's interest in avoiding antipsychotic drugs is substantial, the state cannot medicate her absent an overriding justification. States do not, however, typically attempt to justify forced medication of defendants under their traditional *parens patriae* or police power interests;²⁹⁹ they neither demonstrate that a defendant is incapable of making her own treatment decisions nor that she is a danger to herself or others. Rather, the states allege that they are justified in medicating criminal defendants to restore their competency to stand trial so that the state can adjudicate their guilt or innocence.³⁰⁰ Whether the state's interest in trying criminal defendants outweighs their liberty interest in avoiding medication has not yet been fully addressed by the courts.

Before a court can inquire into the sufficiency of a state's interest in adjudicating the guilt or innocence of criminal defendants, it must decide what standard of review it will apply. A court should not apply the reduced standard of *Harper*, simply because the defendant is being held in a state correctional institution. The *Harper* standard has its origins in a state's heightened police power interest in maintaining safety and security in its prisons.³⁰¹ This heightened state interest, requiring deference to the operational decisions of prison officials, is clearly not relevant to the restoration of a criminal defendant's competency to stand trial. Not only is the justification unrelated to safety, the defendants have only been accused of a crime, and thus, the state has not yet established that they have a "proclivity for antisocial criminal and often violent conduct."³⁰² Rather, because a defendant's inter-

²⁹⁸ *Harper*, 494 U.S. at 237-38 (Stevens, J., dissenting); *Davis v. Hubbard*, 506 F. Supp. 915, 930 (N.D. Ohio 1980).

²⁹⁹ If a state medicates a criminal defendant for traditional *parens patriae* or police power reasons, it should not automatically try her while she is under the influence of the medication. Rather, a court must still consider the impact of the medication on her ability to get a fair trial. Moreover, consideration of less intrusive means of controlling a mentally ill individual may weigh differently for a defendant who could be temporarily isolated or restrained physically during her trial. Likewise, any determination that treatment is in a defendant's best interest must necessarily include consideration of the effect of medication on her trial.

³⁰⁰ See *supra* notes 90-154 and accompanying text.

³⁰¹ *Harper*, 494 U.S. at 223-24.

³⁰² See *id.* at 225-26 (reduced standard of review for convicted prisoners because of established proclivity for criminal and violent conduct).

est in avoiding antipsychotic medication is fundamental, the court should strictly scrutinize forced medication. In other words, the state must demonstrate that the need to try the defendant was compelling, that medicating her substantially furthered this goal, and that there were no less intrusive alternatives.

States obviously have an interest in trying and punishing individuals that violate state laws. Moreover, because the state is prohibited from trying incompetent defendants, it has a significant interest in restoring a sufficient level of competency to enable them to stand trial. Whether this interest is sufficiently compelling to override a defendant's interest in avoiding potentially harmful, mind-altering drugs, however, is unclear. The *Riggins* Court suggested that it *might* be, citing *Illinois v. Allen*, a case in which the need to try an obstreperous defendant was held sufficiently compelling to justify overriding his right to be present in the courtroom.³⁰³ Use of *Allen* to support the overriding of a defendant's right to refuse antipsychotic medication, however, is grossly misplaced. *Allen* involved neither an incompetent individual nor forced administration of drugs; rather, removing Allen from the courtroom burdened his constitutional trial protections.³⁰⁴ Moreover, the defendant in *Allen* deliberately interfered with the state's ability to adjudicate his guilt or innocence.³⁰⁵ There is a significant distinction between an unruly defendant attempting to avoid trial through his own misconduct and an incompetent defendant exercising his constitutional right to refuse unwanted medication.

Because there is no precedent for holding that a state's interest in trying defendants is sufficiently compelling to justify forced medication, the courts should consider this interest in conjunction with the traditional *parens patriae* and police power justifications. Clearly, the state's interest in adjudicating a person's guilt or innocence cannot be encompassed under either of these justifications; the state is not trying an individual for her own benefit, nor is it protecting her or others from an immediate risk of harm. Although imprisoning potentially violent criminals protects society, the courts have found that a state's interest in protecting its citizens sufficiently compelling only where the medicated person presents an identifiable risk of harm.³⁰⁶ According to the courts, the risk presented by mentally ill patients' proclivity for

³⁰³ See *supra* note 76 and accompanying text.

³⁰⁴ See *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

³⁰⁵ *Id.*

³⁰⁶ *Davis v. Hubbard*, 506 F. Supp. 915, 935 (N.D. Ohio 1980); *Rogers v. Commissioner*, 390 Mass. 489, 510-11 (1983).

dangerous behavior is too vague to justify medication.³⁰⁷ Likewise, the risk of danger an accused presents to society should be regarded as too tenuous a basis for overriding her substantial liberty interest in avoiding potentially harmful, mind-altering drugs. Not only has the state not yet proven that she is guilty of committing the violent act, the possibility that she may commit future violence is too uncertain to create an imminent threat. Moreover, even if an incompetent defendant is actually dangerous, the threat to society is not imminent because she will not be released into the community. Rather she will be civilly committed until she regains sufficient competency to stand trial.³⁰⁸

An alleged victim's interest in retribution and the state's interest in punishing criminals also seem too remote to justify the forceful medication of an individual who is only accused of a crime. Whether the state has a need to punish a defendant cannot possibly be determined until after her guilt or innocence is established, or, in other words, after it has medicated her. Moreover, the courts have long agreed that the state cannot medicate patients or inmates for the avowed, or even apparent, purpose of punishing them. Nor is it permitted to carry out a death sentence on an "artificially sane" defendant.³⁰⁹ In sum, forcefully medicating a criminal defendant to restore her competency to stand trial cannot be justified through any traditional means. Thus, if a court wants to permit the state to administer unwanted antipsychotic drugs, it must recognize the state's need to adjudicate an incompetent defendant's guilt or innocence as a new justification. In light of the apparent reluctance of courts to expand the traditional *parens patriae* or police power justifications, as well as the long standing abhorrence against trying incompetent defendants, courts must ask themselves whether this interest should ever justify overriding a defendant's substantial liberty interest in avoiding antipsychotic drugs.

Even if a court concludes that the state's need to try defendants is compelling, the state must establish that administering antipsychotic drugs to a defendant substantially furthers this goal before it will be permitted to forcefully medicate her. Thus, before the state administers potentially hazardous drugs to a defendant, it must be able to demonstrate that the medication will restore sufficient competency to enable the defendant to stand trial. Given the uncertainty of predicting a particular defendant's reaction to a particular antipsychotic drug, it is

³⁰⁷ *Davis*, 506 F. Supp. at 935; *Rogers*, 390 Mass. at 510-11.

³⁰⁸ *Riggins v. Nevada*, 112 S. Ct. 1810, 1820 (1990) (Kennedy, J., concurring).

³⁰⁹ *Louisiana v. Perry*, 610 So.2d 746, 747 (La. 1992).

unlikely that the state can meet this requirement.³¹⁰ Moreover, it is doubtful that the state could accurately predict whether the medication could sustain the defendant's mental capacity throughout her trial.³¹¹

The state's interest in trying defendants necessarily encompasses an interest in ensuring that defendants receive a full and fair trial.³¹² Otherwise, defendants' constitutional trial protections and the prohibition against trying incompetent defendants would be meaningless. A state could simply override these rights based on its need to adjudicate defendants. Accordingly, the forceful administration of antipsychotic drugs during a defendant's trial cannot be said to substantially further the state's interest in trying her, absent a substantial showing that the medication will not prejudice her ability to get a full and fair trial. Given the serious risk that antipsychotic drugs pose to a defendant's ability and willingness to defend herself, as well as the unpredictability of her reaction to the drugs, it is again difficult to imagine how a state could make such a determination prior to medicating the defendant.³¹³ Indeed, the *Riggins* Court reasoned that it would be too difficult to even determine *actual* prejudice, after a trial was over.³¹⁴

When a defendant pleads not guilty by reason of insanity, the state must also demonstrate that the jury will not be influenced by the defendant's altered demeanor. This is undoubtedly the most difficult hurdle the state faces; not only must it predict the impact of the medication on the defendant's appearance and attitude, but it must also look into the minds of potential jurors and judge their potential reactions.³¹⁵ Providing expert testimony about the possible effects of the medication does not resolve this inquiry. Rather, it adds one more unknown; the state must also predict the impact expert testimony will have on the jury.³¹⁶

Examining the outcome of the trial of "artificially sane" defendants helps clarify whether forcibly medicating them substantially achieves the state's goals. Many, if not most, of these defendants contend that they are not guilty by reason of insanity. If the state tries them and finds that they were insane when they committed the crime, then

³¹⁰ See *supra* notes 162-66, 225 and accompanying text.

³¹¹ *Id.*

³¹² See *supra* notes 225-38 and accompanying text.

³¹³ See *supra* notes 226-28 and accompanying text.

³¹⁴ *Riggins v. Nevada*, 112 S. Ct. 1810, 1816 (1992).

³¹⁵ See *supra* notes 229-38 and accompanying text.

³¹⁶ *Id.*

it must enter a finding of not guilty and resort to civil commitment. Subsequently, if the defendant's sanity is restored, she will be free to leave the institution. If the defendant instead is not medicated and remains incompetent to stand trial, she will be civilly committed. If she eventually regains sufficient competency, she will be tried. Then, if found not guilty by reason of insanity at the time of committing the crime, she will be civilly committed until she regains sufficient sanity to be released. Either way, a defendant who is eventually found innocent will be civilly committed until it is believed she can safely be returned to the community.

On the other hand, a medicated defendant found guilty of a crime will be immediately sentenced and incarcerated in a detention facility. Because trying a defendant who is found not guilty by reason of insanity ultimately achieves the same outcome as not trying her, medicating her only furthers a state's interest if she is found guilty. Thus, in reality, forcibly medicating a defendant does not serve a state's interest in determining her guilt *or* innocence. Rather, it furthers a state's interest in punishing those it finds guilty of violating its laws.

Courts reviewing the compelled medication of defendants should thus consider whether the state's actions are tailored to achieving its interest in trying and punishing individuals who have violated its laws. The courts have traditionally abhorred any type of wholesale medication.³¹⁷ In *Davis*, the Ohio district court concluded that the State could not medicate mentally ill patients based solely on the possibility that they might be dangerous, because it reached too broadly; most patients in a mental hospital are likely to have demonstrated violence at some time in their lives.³¹⁸ Likewise, forcibly medicating all incompetent defendants is not sufficiently tailored to achieving the state's goal because it entails medicating the innocent as well as the guilty.

Finally, if a court chooses to permit the state to medicate criminal defendants, it must consider who will decide when medication is appropriate. Under the *parens patriae* and police power rationale, the courts have generally required an independent decision maker who does not have a stake in medicating the individual.³¹⁹ It is unclear who would be both independent and qualified to make this decision for purposes of restoring a defendant's competency. Neither the state nor

³¹⁷ See *Davis v. Hubbard*, 506 F. Supp. 915, 935 (N.D. Ohio 1980); *Rogers v. Commissioner*, 390 Mass. 489, 499-500 (1983).

³¹⁸ *Davis*, 506 F. Supp. at 935.

³¹⁹ *Rogers v. Commissioner*, 390 Mass. 489, 512-13 (1983); *Washington v. Harper*, 494 U.S. 210, 215 (1990).

the court should be regarded as independent; both have a strong interest in trying and punishing defendants. Although an independent psychiatrist might be able to make a determination about a defendant's ability to understand the proceedings and to communicate with her attorney, he is unlikely to be qualified to make a judgment about the effect of medication on a defendant's ability to get a fair trial. Furthermore, the disagreement between psychiatrists and psychologists concerning the severity of the side effects of antipsychotic drugs, raises doubt about the impartiality of psychiatrists. Possibly the state or court could create an independent decision making body, composed of different members of the psychiatric and legal professions. However, given the unpredictability of the effectiveness and side effects of antipsychotic medication, it is questionable whether a committee could ever reach agreement on whether it would be appropriate to forcibly medicate a particular defendant during her trial.

VII. CONCLUSION

Because forced medication of criminal defendants implicates their liberty interest in avoiding potentially harmful, mind-altering drugs and creates a substantial risk to their ability to get a fair trial, challenges to forced medication should be reviewed prior to defendants' trials. When viewed from this perspective, it is apparent that a state will have to overcome a nearly insurmountable set of obstacles before it should be permitted to forcibly administer antipsychotic drugs to a defendant. First, because the state's avowed purpose is to restore a defendant's competency to stand trial, to allow the state to administer the drugs, a court must significantly expand the current limitations on an individual's right to refuse medication. In deciding whether to take this leap, the court should recognize that the interest actually accomplished by forcibly medicating defendants is the punishment of those defendants who are ultimately found guilty by the court.

If a court decides this interest may override defendants' interests in refusing medication, the court should require that an impartial decision maker—one who understands all of the concerns created by antipsychotic drugs—determine whether medication is permissible in a particular case. This decision maker must establish that the type and dosage of drug prescribed for a defendant is both appropriate and necessary to restore her competency and that the medication will maintain her competency throughout her trial. Likewise, it must determine, with substantial certainty, that the medication will not impact

the defendant's ability to obtain a full and fair trial. Accordingly, the decision maker must not only establish that the drugs do not interfere with the defendant's willingness or ability to understand and participate in the proceedings against her, it must also demonstrate that the impact of the drugs on the defendant's demeanor will not affect the jury's decision.

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