Antipsychotic Medication and the Criminal Defendant: Problems Persist Despite a Dose of Due Process

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Riggins v. Nevada¹

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."²

I. INTRODUCTION

Medical treatment of severe mental illness was revolutionized in the mid-1950s when researchers introduced antipsychotic drugs.³ Antipsychotic drugs, also known as "neuroleptics" or "psychotropic drugs,"⁴ proved to be very effective for treating mental disorders such as schizophrenia.⁵ These drugs affect thought processes by altering the chemical balance in the brain. The drugs do not cure the illness but they do eliminate the most serious symptoms of schizophrenia, such as auditory and visual hallucinations, and they restore normal thought processes.⁶

Along with the benefits of antipsychotic drugs there can be hazardous side effects.⁷ The most common side effects are extra-pyramidal symptoms—temporary muscular reactions which only exist during treatment with antipsychotic drugs.⁸ These symptoms include dystonic reactions, akathesia,
and Parkinsonisms. Antipsychotic drugs can also cause nonmuscular side effects such as drowsiness, weakness, apathy, depression, and occasionally, sudden death. Arguably, the most dangerous side effect is tardive dyskinesia, which persists after the drugs are discontinued and has no known cure.

Despite their detrimental side effects, these drugs are widely used because of their effectiveness. However, the right of involuntarily committed mental patients to refuse forced treatment with these drugs has been an area of widespread litigation, showing that not every person who suffers from a mental illness wants to risk the side effects to enjoy the benefits of antipsychotic medication.

Involuntary administration of antipsychotic drugs also raises difficult legal issues within the domain of criminal law. Because antipsychotic drugs affect thought processes, when psychiatrists acting on behalf of the state administer these drugs to a criminal defendant, the state is controlling that defendant’s mind to some extent. In Riggins v. Nevada, the United States Supreme Court recognized constitutional protection against involuntarily treating pretrial detainees with antipsychotic drugs. This Note will analyze the Court’s decision and discuss unresolved problems concerning the effects of antipsychotic medication.

II. FACTS AND HOLDING

On November 20, 1987, David Riggins visited Paul Wade in Wade’s Las Vegas, Nevada apartment. Later that day, Wade was discovered dead from multiple stab wounds. Police later arrested Riggins for the murder of Wade.

9. Dystonic reactions are characterized by involuntary muscle movements of the neck, face, and arms, spasms of the eye muscles, and protrusion of the tongue. Id.; Blackburn, supra note 7, at 508-09. Akasthesia is characterized by restlessness and the inability to stay still. Plotkin, supra note 3, at 475. Parkinsonism is characterized by tremors, muscle stiffness, mask-like faces and drooling. Id.


11. Tardive dyskinesia is characterized by involuntary muscle movements of lips and tongue, difficulties with speech, swallowing, and breathing. Id. at 476-77.

12. Id. at 477; Blackburn, supra note 7, at 509.


16. Id.

17. Id.
Within a week of Riggins' incarceration, he complained to Dr. R. Edward Quass, a psychiatrist, that he was experiencing auditory hallucinations and insomnia. Dr. Quass prescribed the drug Mellaril at a level of 100 milligrams per day. Since that amount proved to be ineffective for eliminating Riggins' symptoms, the dosage of Mellaril was gradually increased over the next year to 800 milligrams per day.

After being judged competent to stand trial, Riggins moved for an order from the district court to terminate the treatment with Mellaril until the end of his trial. Riggins alleged that continued administration of the drug would deny him due process because the drug would affect his demeanor and mental state at trial. The State responded that because Nevada law prohibited trying an incompetent person, the court had the authority to force Riggins to take medication to insure his competence. After a July hearing, the court denied Riggins' motion to terminate medication, but gave no indication of its reasoning.

Riggins continued to receive Mellaril against his wishes. At trial, while receiving 800 milligrams of Mellaril per day, Riggins asserted the insanity defense and testified in his own defense. He claimed that during a fight with Wade, voices in his head convinced him that killing Wade was justifiable homicide. Because Riggins was not allowed to be taken off Mellaril and show his natural demeanor, Riggins presented expert

18. Riggins, 112 S. Ct. at 1812.
19. Mellaril is the trade name for the antipsychotic drug thioridazine. Id.
20. Id.
21. Id.
22. In February and March of 1988, Riggins was examined by three court-appointed psychiatrists. Id. Dr. William O'Gorman and Dr. Franklin Master found Riggins competent to stand trial. Id. Dr. Jack Jurasky found Riggins incompetent. Id. The Clark County District Court found Riggins legally sane and competent to stand trial. Id.
23. Id.
24. Id.
25. NEV. REV. STAT. § 178.400 (1989). This section reads:
   (1) A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent.
   (2) For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.
Id.
27. Id. at 1813.
28. Id.
29. Id.
30. Id.
testimony to inform the jury about the effects of Mellaril on Riggins' courtroom demeanor and testimony. The jury found Riggins guilty of murder and sentenced him to death.

Riggins appealed his conviction and death sentence to the Nevada Supreme Court. Riggins asserted that the involuntary treatment with Mellaril denied him a full and fair trial because it adversely affected his ability to assist in his own defense and to present his natural demeanor to the jury. The Nevada Supreme Court conceded that a defendant's demeanor at trial has probative value when sanity is at issue, but ruled that the medical testimony about the effects of the drug on Riggins' testimony and demeanor was an acceptable substitute for suspending the treatment with Mellaril. Thus, the court found that Riggins received a full and fair trial, and accordingly affirmed Riggins' conviction and sentence. Riggins appealed, and the United States Supreme Court granted certiorari. The Supreme Court reversed, holding that the Due Process Clause requires that a state show overriding justification for any intrusion into a criminal defendant's constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs.

III. LEGAL BACKGROUND

Tort law has long recognized that nonemergency medical treatment rendered by a physician without the patient's informed consent or which exceeded the consent given is actionable as a battery. When such medical treatment is given by physicians acting on behalf of the state, the constitutional protection of the Due Process Clause also becomes involved.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process..."
of law."

Ostensibly, this clause only addresses the procedures a state may employ to deprive persons of life, liberty, or property. However, the United States Supreme Court has recognized that the Due Process Clause protects substantive personal interests beyond the framework of the procedures used to infringe upon them.

Although the term "liberty" is ambiguous, the most familiar of the substantive liberty interests protected by the Due Process Clause are those embodied in the Bill of Rights. The Court has held that the Due Process Clause incorporates most of the substantive liberty interests protected by the Bill of Rights. Nevertheless, the full extent of due process protection is not limited to that found in the Bill of Rights. Also within the scope of liberty protected by the Due Process Clause is the liberty to make those choices which are "central to personal dignity and autonomy." Such constitutionally protected decisions include decisions involving marriage, procreation, contraception, family relationships, child rearing, and education.

Another personal decision the United States Supreme Court found worthy of due process protection is the decision to refuse medical treatment. Beginning with Jacobson v. Massachusetts, the Court recognized a constitutionally protected liberty interest in refusing unwanted medical treatment. However, the Court never explicitly addressed the right to refuse involuntary treatment with antipsychotic drugs until Washington v. Harper.

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41. U.S. CONST. amend. XIV, § 1.
42. Planned Parenthood of S.E. Penn. v. Casey, 112 S. Ct. 2791, 2804 (1992) ("Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, . . . the Clause has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’") (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
43. Id.
44. Id.; see, e.g., Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968). Only the Fifth Amendment’s requirement of a grand jury, and the Second, Third, and Seventh Amendments have not been incorporated by the Due Process Clause. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 784 (2d ed. 1991).
45. Casey, 112 S. Ct. at 2807.
46. Id. at 2797; see, e.g., id. (right to abortion); Moore v. East Cleveland, 431 U.S. 494 (1977) (right of family members to live together); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraception); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to direct upbringing and education of their child); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to acquire and teach useful knowledge).
47. 197 U.S. 11 (1905).
48. Id. at 24-30 (balancing individual’s liberty interest in refusing an unwanted smallpox vaccine against the State’s interest in preventing disease).
49. 494 U.S. 210 (1990). In Mills v. Rogers, 457 U.S. 291, 299 (1982), the Court assumed that such a liberty interest existed because both sides admitted it.
In *Harper*, the Court held that the Due Process Clause protects the right to be free from involuntary treatment with antipsychotic drugs.\(^{50}\) The Court recognized that involuntary medical treatment represents a "substantial interference with that person's liberty."\(^{51}\) Therefore, a person possesses "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."\(^{52}\)

However, merely determining that a person has a liberty interest in being free from involuntary treatment with antipsychotic drugs does not end the analysis under the Due Process Clause. To determine whether a person's constitutional rights have been violated, that person's liberty interest must be weighed against relevant state interests.\(^{53}\)

In *Harper*, the Court developed a constitutional standard for administering antipsychotic drugs to prisoners against their will. The Court held that any infringement on the prisoner's liberty interest in avoiding unwanted medical treatment could only be justified by showing that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."\(^{54}\) The Court noted that states have a legitimate penological interest in maintaining safety in the prison environment; this interest could outweigh a prisoner's liberty interest in being free from involuntary administration of antipsychotic drugs.\(^{55}\) The Court then ruled that the state procedures for administering involuntary medication were sufficient to insure that the prisoner's interest was balanced against the state interest.\(^{56}\)

However, the due process standards stated by the Court in *Harper* apply only to inmates who are involuntarily treated with antipsychotic drugs. According to *O'Lone v. Estate of Shabazz*,\(^{57}\) "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than the test ordinarily applied to alleged infringements of

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51. Id. at 229.
52. Id. at 221-22.
55. Id. at 225-26.
56. Id. at 227. The procedures for involuntary medication were a policy of the Special Offender Center (SOC), a center designed to treat convicted felons with serious mental disorders. Id. at 214. SOC Policy § 600.30 provided the regulations for involuntary medical treatment. Id. at 215. Section 600.30 provided for involuntary treatment only after a psychiatrist finds the inmate has a mental disorder and the inmate is gravely disabled or there is a likelihood of serious harm to himself, others, or their property. Id. An inmate who refused to voluntarily take the medication was entitled to a hearing, and treatment could continue only with periodic review. Id. at 215-16.

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fundamental constitutional rights.\textsuperscript{58} Therefore, those who have not been convicted of a crime may be entitled to higher standards of constitutional protection.

In \textit{Bell v. Wolfish},\textsuperscript{59} the Court addressed the constitutional rights of pretrial detainees—those persons who have been charged with a crime and incarcerated, but have not yet been tried for that crime.\textsuperscript{60} In \textit{Wolfish}, the Court rejected the notion that because the criminally accused are "innocent until proven guilty," pretrial detainees have the same constitutional rights as other citizens.\textsuperscript{61} The Court stated that the presumption of innocence is just a doctrine which "allocates the burden of proof in criminal trials."\textsuperscript{62} The presumption may be used to warn the jury to disregard any suspicions about the defendant from the defendant’s arrest and indictment so as to base their verdict only on the evidence produced at trial.\textsuperscript{63} This presumption, however, has no application in determining the rights of a pretrial detainee.\textsuperscript{64}

Although the \textit{Wolfish} Court refused to grant pretrial detainees the same constitutional protection as other citizens, the Court noted that even convicted prisoners retain some constitutional rights.\textsuperscript{65} Accordingly, the Court held that pretrial detainees retain at least the same constitutional rights enjoyed by convicted prisoners, but that these retained rights must be balanced against relevant state interests.\textsuperscript{66} The Court noted that the government has a strong interest in detaining the criminally accused to ensure his or her presence at trial.\textsuperscript{67} This detention necessarily brings about the withdrawal or limitation of rights to promote the "central objective of prison administration, safeguarding institutional security."\textsuperscript{68} Therefore, a pretrial detainee may be subject to the "restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment."\textsuperscript{69}

In \textit{Bee v. Greaves},\textsuperscript{70} the Court of Appeals for the Tenth Circuit followed the \textit{Wolfish} standard when it considered the involuntary administration of antipsychotic drugs to a pretrial detainee.\textsuperscript{71} The \textit{Bee} court noted that

\begin{thebibliography}{99}
\bibitem{58} Id. at 349.
\bibitem{59} 441 U.S. 520 (1979).
\bibitem{60} Id. at 523.
\bibitem{61} Id. at 531.
\bibitem{62} Id. at 533.
\bibitem{63} Id.
\bibitem{64} Id.
\bibitem{65} Id. at 545.
\bibitem{66} Id. at 545-46.
\bibitem{67} Id. at 534.
\bibitem{68} Id. at 547.
\bibitem{69} Id. at 536-37.
\bibitem{70} 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).
\bibitem{71} Id. at 1391.
\end{thebibliography}
although pretrial detainees do "not possess the full range of freedom of an unincarcerated individual," they retain at least those constitutional rights enjoyed by convicted prisoners. The court found that a pretrial detainee had a First Amendment liberty interest in avoiding antipsychotic medication. The court ruled that a criminal defendant's liberty interest in not being forcibly medicated with antipsychotic drugs should be weighed against the state's interest in treating the detainee's medical needs and protecting the safety of the detainee and others. However, the court added an additional factor not included in the standards announced in Harper. The court added that due to the serious possible side effects of antipsychotic drugs, involuntary administration of these drugs could be justified to control a detainee's behavior only after alternatives had been considered. Possible alternatives suggested by the court included the use of segregation or less controversial drugs such as tranquilizers or sedatives to protect the safety of the detainee and others.

IV. THE INSTANT DECISION

In Riggins v. Nevada, by a seven to two decision, the United States Supreme Court ruled that involuntary treatment by antipsychotic drugs violated a defendant's due process rights because the State did not show an overriding justification for intruding on a criminal defendant's liberty interest in freedom from unwanted medication.

The majority began its analysis by reviewing the Harper case, in which the Court held that the Due Process Clause protects an inmate's right to be free from involuntary medication with antipsychotic drugs. For an inmate to be administered antipsychotic drugs against his will, due process requires the state to show overriding justification, such as a showing that the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest. The Court then referred to the holding of Bell v. Wolfish that pretrial detainees retain at least the same constitutional rights

72. Id. at 1394 (quoting Bell, 441 U.S. at 546).
73. Id. at 1395.
74. Id.
75. See supra text accompanying notes 54-55.
76. Bee, 744 F.2d at 1396.
77. Id.
79. Id. at 1817.
81. Id. at 229.
82. Riggins, 112 S. Ct. at 1815.
83. 441 U.S. 520 (1979).
as those convicted of a crime. Therefore, the majority reasoned, in order to administer antipsychotic drugs to a pretrial detainee against his will, the Due Process Clause requires the state to show that the medication can be justified by an overriding state interest.

Although the Court stated that it did not have the opportunity to dictate substantive standards, the Court asserted that due process would be satisfied if a state shows that the detainee is a safety risk to himself and others and that after considering less intrusive means, treatment with antipsychotic drugs is medically appropriate. In addition, the Court proposed that due process could also be satisfied if a state shows that a determination of a defendant's guilt or innocence could not be achieved with means less intrusive than antipsychotic medication.

However, in the instant case, the majority could find no evidence that the district court balanced the relevant state interests against Riggins' liberty interest when it refused to suspend Riggins' treatment with Mellaril. Instead, the Court found that the district court weighed the risk that Riggins' defense would be prejudiced by Riggins' demeanor under the influence of Mellaril against the chance that Riggins would become incompetent if Mellaril was discontinued. The district court did not consider Riggins' right to be free from unwanted medication, which is guaranteed by the Due Process Clause; therefore, Riggins' due process rights were violated.

The Court further reasoned that this violation tainted Riggins' conviction because the drug may have adversely affected Riggins' right to a fair trial. The continued administration of Mellaril may have influenced Riggins' demeanor as well as his abilities to testify on his own behalf, to follow the proceedings, and to communicate effectively with counsel. On the basis of the record, the majority recognized the futility of determining the actual effect that continued treatment with Mellaril had on the outcome of Riggins' trial. However, from medical testimony, the Court concluded that a strong possibility of prejudice to Riggins' defense remained. Although the Court noted that sometimes prejudice can be justified by an essential state interest,

84. Riggins, 112 S. Ct. at 1815.
85. Id.
86. Id.
87. Id.
88. Id. at 1816.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
the Court could find no such interest here. Accordingly, the decision of the Nevada Supreme Court was reversed and the case remanded.

In a concurring opinion, Justice Kennedy agreed with the majority that Riggins' due process rights were violated by the involuntary administration of Mellaril. However, Kennedy concurred because he felt that the State's underlying purpose in forcibly administering antipsychotic drugs was to insure the defendant would be competent for trial. Kennedy expressed his concern that even if the State could satisfy due process by showing that involuntary treatment with antipsychotic drugs was medically appropriate and was necessary for the defendant's safety, trying a defendant who is under the influence of antipsychotic drugs may be improper.

Kennedy argued that in order to try a defendant who is under the influence of antipsychotic drugs, a state would have to show that there was no significant risk that the medication would prejudice the defendant's demeanor or capacity to assist counsel in his defense. But, due to the uncertain nature of the effects of these drugs, as well as the possibility of seriously harmful side effects, such a showing would be practically impossible. Therefore, until the nature of these drugs is better understood, a state should rely on civil commitment proceedings rather than tainting the integrity of the judicial process by chemically inducing competency.

The dissent argued that even if a violation of Riggins' due process rights had occurred, a reversal of Riggins' criminal conviction was not

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96. Id. at 1816-17.
97. Id. at 1817. On remand, the Nevada trial court will have to hold a hearing to determine if there is overriding justification to involuntarily medicate Riggins before and during trial. Id. at 1815. The Double Jeopardy Clause does not prevent retrying a defendant who succeeds in getting his first conviction set aside on appeal because of a legal error. Lockhart v. Nelson, 488 U.S. 33, 38 (1988).
98. Riggins, 112 S. Ct. at 1815 (Kennedy, J., concurring).
99. Id.
100. Id.
101. Id. at 1818.
102. Id.
103. Id. at 1820.
104. Id.
105. Id. at 1821 (Thomas, J., dissenting).
106. The dissent argued that no due process violation occurred because Riggins took the medication voluntarily. Id. at 1823. The dissent noted that the district court only refused to enjoin the further medication of Riggins, it did not order Riggins to be medicated. Id. at 1824 n.2. Therefore, the dissent asserted that Riggins could have voluntarily terminated the medication. Id. at 1824. Furthermore, the dissent found that Riggins could not raise the issue of any due process violation from involuntary medication before the United States Supreme Court because he did not raise it in the courts below. Id.
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warranted. The dissent first contended that there was no evidence that Riggins received anything less than a full and fair trial. Justice Thomas asserted that the majority reversed the conviction based only on a probability that the medication prejudiced Riggins at trial, but offered no explanation of how the trial was actually unfair. The dissent then stated that reversal of a criminal conviction is an improper remedy for this due process violation. The dissent argued that under Harper Riggins' remedy for such a violation should be a civil suit under 42 U.S.C. § 1983.

V. COMMENT

The precise holding of the Court in the instant case was only that the Due Process Clause protects individuals against involuntary treatment with antipsychotic drugs, unless the state shows the treatment is medically appropriate and there is overriding justification for the medication. Due to the narrow reach of this holding, the Court did not conclusively dictate the substantive standards for judging the constitutionality of forced medication. The majority suggested that the Due Process Clause would have been satisfied if the State had showed that antipsychotic medication was medically appropriate and that involuntary treatment with the drug was the only means to obtain an adjudication of the defendant's guilt or innocence. This suggestion is perhaps the most troubling aspect of the majority decision, because it could allow a state to forcibly administer antipsychotic medication to render an otherwise incompetent defendant competent to stand trial. Furthermore, the majority decision noted the detrimental effects that antipsychotic medication may have on a defendant's right to a fair trial, but failed to give a conclusive answer to how these effects

107. Id. at 1821.
108. Id.
109. Id. at 1822.
110. Id. at 1824-25.
112. Riggins, 112 S. Ct. at 1825 (Thomas, J., dissenting).
113. Id. at 1815.
114. Id.
115. Id.
116. The United States Supreme Court has held that the conviction of an accused while incompetent violates due process. Pate v. Robinson, 383 U.S. 375, 378 (1966). To be deemed competent to stand trial an accused must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). Many states have statutorily required the same level of competency using nearly identical language. See, e.g., Mo. Rev. Stat. § 552.020(1) (1986); Nev. Rev. Stat. § 178.400(2) (1989).
should be handled in a subsequent trial. As Justice Kennedy commented, the Court remanded the case, but failed to address what would have to be considered on remand.\footnote{117. Riggins, 112 S. Ct. at 1818 (Kennedy, J., concurring).}

This section will criticize the proposal that involuntary antipsychotic medication can be justified to establish competency to stand trial and propose how the effects of antipsychotic medication should be handled by courts.

### A. Competency To Stand Trial

In proposing the standard that involuntary antipsychotic drugs can be used only if there are no less intrusive means to adjudicate a defendant's guilt or innocence, the Court relied on the assertion that "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."\footnote{118. Id. at 1815 (quoting Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)).} This language could be interpreted in several different ways. The Court may have only approved the use of antipsychotic drugs as a kind of "psychological shackles and gag"\footnote{119. People v. Parsons, 371 N.Y.S.2d 840, 843 (Civ. Ct. 1975).} to calm a defendant whose disruptive behavior makes an orderly trial impractical. Indeed, the language the Court quoted was from \textit{Illinois v. Allen},\footnote{120. 397 U.S. 337 (1970).} where the Court addressed the rights of such a disruptive defendant.\footnote{121. Id. at 343-47.}

On the other hand, this language could be interpreted to allow forcible administration of antipsychotic drugs to an incompetent defendant to render the defendant competent to stand trial. Clearly, if a defendant were incompetent, there could be no adjudication of that defendant's guilt or innocence. Lower courts, relying on the same language, have held that a state's interest in rendering a defendant competent to stand trial outweighs any rights the defendant had to avoid unwanted medication.\footnote{122. See, e.g., Khiem v. United States, 612 A.2d 160 (D.C. 1992); People v. Hardesty, 362 N.W.2d 787 (Mich. Ct. App. 1985), appeal dismissed, 477 U.S. 902 (1986); State v. Law, 244 S.E.2d 302 (S.C. 1978); State v. Lover, 707 P.2d 1351 (Wash. Ct. App. 1985).} These courts reasoned that a state's interest in bringing the defendant to trial is essential to "the integrity of the criminal justice system" and stands at the very core of a state's police power.\footnote{123. Hardesty, 362 N.W.2d at 793 (quoting Bruce J. Winick, \textit{Psychotropic Medication and Competence to Stand Trial}, 1977 AM. B. FOUND. RES. J. 769, 812-13).} Thus, when weighed against a defendant's interest in avoiding unwanted medication, the balance favors the state.\footnote{124. Id.}
concludes that anything less would constitute an "atavistic repudiation of the advances made in the treatment of the mentally ill during the past two decades."125

However, it seems inconsistent with a "scheme of ordered liberty" that a defendant could possibly be found to be incompetent to decide what type of medical treatment is in his or her best interest and be forced to take potentially dangerous medication, but, as a result of that involuntary medical treatment, be rendered competent to stand trial and possibly be sentenced to death. Other courts have questioned whether using antipsychotic drugs to make an otherwise incompetent criminal defendant competent is an acceptable justification for involuntary medication.

For example, in *Bee v. Greaves*,126 the court doubted whether a state's interest in keeping a defendant competent to trial justified forcible medication.127 The court stated that due to the potentially dangerous side effects of antipsychotic drugs, any "state interest unrelated to the well being of the individual or those around him simply has no relevance. . . . The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned."128 Similarly, in *United States v. Charters*,129 the Court of Appeals for the Fourth Circuit gave three reasons for rejecting the notion that establishing competency through chemical means justifies forced medication. First, a state would be subjecting a defendant to the risk of harm from the effects of the drugs without any guarantee the drugs would make the defendant competent.130 Secondly, a state's interest encompasses more than bringing the defendant to trial—the state must conduct a "fair trial in which the accused's guilt or innocence is correctly determined."131 Due to the effects of the drugs on the defendant, a fair trial would be unlikely.132 Finally, although the government has an interest in determining the guilt or innocence of a particular defendant, "[that] interest does not permit . . . a draconian invasion of the individual's freedom and the risk of permanent physical injury."133

Unfortunately the *Riggins* Court failed to resolve whether rendering a defendant competent to stand trial justifies forcible medication. The Court

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126. 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).
127. *Id.* at 1395.
128. *Id.* at 1395.
130. *Id.* at 493.
131. *Id.* at 493-94.
132. *Id.* See infra notes 135-41 and accompanying text for a detailed examination of how the antipsychotic drugs may affect a defendant's right to a fair trial.
133. Charters, 829 F.2d at 494.
explicitly refused to answer whether a competent criminal defendant may refuse antipsychotic medication if termination of medication would render him incompetent at trial, because there was no evidence that Riggins would be incompetent without the medication.\(^{134}\) This hesitation may indicate an unwillingness to allow competency to be involuntarily established by medication. It remains unclear whether antipsychotic drugs can be justified by showing that the defendant would otherwise be incompetent to stand trial, but there are strong reasons for not giving a state this power.

### B. Effects of Antipsychotic Drugs at Trial

If involuntary medication is permitted to make a defendant competent to stand trial, antipsychotic drugs can substantially affect a defendant’s trial in many ways. Most significantly, this medication can affect the demeanor of the defendant at trial. Antipsychotic drugs may produce a defendant who is unable to remain still, maintains a mask-like face, does not respond to testimony, and cannot project his innocence to the jury.\(^{135}\)

In every criminal trial, but especially in one where the defendant raises the insanity defense, the accused’s demeanor is highly relevant to the jury’s eventual verdict. In *Riggins*, Justice Kennedy noted that "[a]t all stages of the proceedings, the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial."\(^{1136}\) If the defendant appears calm and controlled at trial due to the effects of the drugs, the jury may not find any indication of insanity.\(^{137}\) Additionally,

> [i]f the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the jury will see or not see of the defendant’s case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury’s consideration of his mental condition.\(^{138}\)

In addition to a defendant’s demeanor, antipsychotic drugs may also affect the defendant’s desire to defend himself appropriately. A defendant under the influence of drugs may be competent to stand trial, but may not care

\(^{134}\) *Riggins*, 112 S. Ct. at 1815.

\(^{135}\) 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, 1130-33 (1986).

\(^{136}\) *Riggins*, 112 S. Ct. at 1819 (Kennedy, J., concurring).


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about the outcome of the trial. These drugs may make a defendant apathetic and unconcerned about the criminal proceedings and therefore less likely to present a vigorous defense. As one commentator writes: "A defendant who is apathetic and distracted, whose defensive instincts are not keen, and who unquestioningly accepts the statements of the prosecution and the witnesses against him will not be able to exercise his right of presence and cross-examination in an effective manner."

Early decisions from courts which approved trying a defendant under the influence of antipsychotic drugs failed to recognize the possible effects of the drugs on a defendant during trial. However, in In re Pray, the Vermont Supreme Court reversed a defendant's conviction because the jury was not informed that the defendant was under the influence of antipsychotic medication. As a result, courts have considered several options to mitigate any prejudicial effects of antipsychotic drugs on a defendant at trial.

In State v. Law, the South Carolina Supreme Court held that medical testimony about the nature of antipsychotic drugs and their effect on the defendant was an acceptable substitute for the defendant's natural behavior without antipsychotic drugs. This procedure was approved by the Nevada Supreme Court in the instant case. However, other courts have noted that the effects of antipsychotic drugs cannot be adequately described through expert medical testimony or jury instructions. These courts have questioned whether medical testimony is an effective substitute for the defendant's natural demeanor without the influence of antipsychotic drugs.

Another defect of medical testimony is that there is no medical consensus about the effects of antipsychotic drugs on a particular defendant. This problem is perhaps best illustrated by the medical testimony in the Riggins

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139. Fentiman, supra note 135, at 1132-33.
140. Tomashefsky, supra note 3, at 784.
143. Id. at 177.
144. 244 S.E.2d 302 (S.C. 1978).
145. Id. at 306.
146. Riggins, 808 P.2d at 538.
148. Louraine, 453 N.E.2d at 442; see also Hayes, 389 A.2d at 1381 (defendant has right to request that the jury views him without medication).
One psychiatrist testified that "[i]f you take a lot of [antipsychotic medication] you become stoned for all practical purposes and can barely function." However, other testimony indicated that antipsychotic drugs "may have increased Riggins' cognitive ability."

An alternative to expert testimony would be a jury instruction to inform the jury about the nature of the drugs and their effect on the defendant's demeanor throughout trial. In fact, the Florida Rules of Criminal Procedure require that a jury be told of the possible effects of antipsychotic drugs on a defendant who is being administered them during trial. The Florida rules require such instruction both at the beginning of a trial and during the final charge to the jury. However, the mere use of a jury instruction raises serious questions whether the jury will adequately consider the effects of the drugs and not be prejudiced by the defendant's demeanor throughout trial.

Another alternative would be to show the jury a videotape of the defendant in an unmedicated state. This suggestion has been criticized because only "one small glimpse" of a defendant's natural demeanor would not outweigh the jury's view of the defendant in a medicated state for the vast majority of the trial.

A more drastic alternative would allow the defendant to be tried free from antipsychotic medication, provided that the defendant waives his right to not be tried while incompetent, if withdrawal of the medication would render the defendant incompetent to stand trial. This would seem to satisfy the state's interest in bringing a defendant to trial as well as allowing

149. In his concurrence, Justice Kennedy noted the lack of certain knowledge of antipsychotic drugs and their side effects. *Riggins*, 112 S. Ct. at 1820 (Kennedy, J., concurring).
150. *Id.* at 1819 (Kennedy, J., concurring).
151. *Id.* at 1823 (Thomas, J., dissenting) (quoting *Riggins v. Nevada*, 808 P.2d 535, 540 (Nev. 1991) (Rose, J., concurring)).
154. *Id.*
155. Fentiman, *supra* note 135, at 1134 ("The naive assumption that prejudicial effects can be overcome by instruction to the jury, ... all practicing lawyers know to be unmitigated fiction.") (quoting *Krulewitch v. United States*, 226 U.S. 440, 453 (1949) (Jackson, J., concurring)).
156. *Hardesty*, 362 N.W.2d at 798 (Borman, J., concurring).
158. *See id.* at 1164-69. This option was also considered, but rejected in Bruce J. Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769, 814. The possibility of such a waiver was also briefly mentioned in some case decisions. *See* Commonwealth v. Louraine, 453 N.E.2d 437, 444 n.13 (Mass. 1983); State v. Hayes, 389 A.2d 1379, 1382 (N.H. 1978); State v. Maryott, 492 P.2d 239, 243 (Wash. Ct. App. 1971).
the defendant to exhibit his unmedicated demeanor to the jury. While this proposal may ostensibly seem unconstitutional, it has also received some critical support.

While temporarily under the influence of medication before trial and therefore competent, the defendant can be instructed as to the nature of the charges against him, the nature of the trial proceedings, and the possible punishment involved. The defendant can also inform his attorney of any relevant exculpatory evidence so they can form an effective trial strategy. Then, great care would have to be taken to ensure the defendant knowingly and intelligently waives his right not to be tried while incompetent. Before the trial starts, the defendant can be taken off medication so the jury can observe the defendant in an unmedicated state.

However, waiving the right not to be tried while incompetent is fraught with perils. In his concurrence in Riggins, Justice Kennedy doubted that such a waiver could withstand scrutiny under the Due Process Clause. He stated, "A defendant's waiver of the right to be tried while competent would cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial." For example, an unmedicated defendant may not be able to follow or challenge opposing testimony. Also, an unmedicated defendant could become violent or disruptive during trial, thereby prejudicing the whole trial. While such behavior may support the insanity defense, the defendant is waiving important trial rights only to give the jury an opportunity to observe his unmedicated demeanor.

In addition to possibly violating the defendant's due process rights, permitting such a waiver may not be in the state's best interest. One commentator argues that "the state has its own interest in the accuracy, dignity, and apparent fairness of the criminal process—compelling state interests that might be jeopardized by the trial of a defendant deprived of

159. Fentiman, supra note 135, at 1167.
160. Id. at 1164-69. This kind of waiver was approved by the New Hampshire Supreme Court in Hayes, 389 A.2d at 1382. Both the Massachusetts Supreme Court and the Superior Court of New Jersey approved of this language from Hayes without comment. Louraine, 453 N.E.2d at 444 n.13; State v. Otero, 570 A.2d 503, 506 (N.J. Super. Ct. Law Div. 1989).
162. Id. at 1165.
163. See Hayes, 389 A.2d at 1382; Fentiman, supra note 135, at 1166-67 (both stressing the importance that the defendant fully understands the legal effect of waiving this right).
164. Riggins, 112 S. Ct. at 1817 (Kennedy, J., concurring).
165. Id. at 1817-18.
166. Id.
167. Fentiman, supra note 135, at 1167.
168. Winick, supra note 158, at 814.
competence by his decision to discontinue drugs.\(^\text{169}\) From both the defendant's and the state's perspective, the constitutionality of allowing a defendant to waive his or her right not to be tried if incompetent can be seriously questioned.

Unfortunately, none of these attempts to compensate defendants who are tried while forcibly medicated with antipsychotic drugs are satisfactory. The possibility of prejudice due to the effects of antipsychotic drugs cannot be completely removed. The Court stated in *Ake v. Oklahoma*\(^\text{170}\) that "[a] state may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."\(^\text{171}\) Accordingly, states must adopt stronger precautionary procedures to ensure that the effects of antipsychotic drugs do not adversely affect a defendant at trial.

One possible solution would be to change the standard for incompetency in the case of defendants under the influence of antipsychotic drugs.\(^\text{172}\) The requirement of competency can be attributed to the nature of the adversarial trial system.\(^\text{173}\) For the adversary system to operate effectively, one side must be able to oppose the other. An incompetent defendant is not capable of opposing the prosecution effectively. As one author writes:

> [incompetent persons] are not really present at trial; they may not be able properly to play the role of an accused person, to recall relevant events, to produce evidence and witnesses, to testify effectively on their own behalf, to help confront hostile witnesses, and to project to the trier of facts a sense of their innocence.\(^\text{174}\)

Similarly, a defendant who is forced to take antipsychotic drugs may face these kinds of inequities even though he is deemed competent under the traditional standard of competency.\(^\text{175}\) A defendant who is involuntarily under the influence of antipsychotic drugs may encounter the same problems in effectively opposing the prosecution as an incompetent defendant because of the effects of the medication during trial.\(^\text{176}\) Therefore, a different

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\(^{169}\) *Id.*


\(^{171}\) *Id.* at 79.

\(^{172}\) *See Tomaszefs sky, supra* note 3, at 790 (proposing that the standard for competency include the minimum level of cognition as well as a requirement that other mental processes must be restored before a defendant is deemed fit to stand trial).


\(^{174}\) *Norval Morris, Madness and the Criminal Law* 37 (1982).

\(^{175}\) *See supra* note 116 for the traditional standard of competency.

\(^{176}\) *See supra* notes 7-12, 135-40 and accompanying text.
standard of competency should be used when determining if a defendant who is medicated with antipsychotic drugs is competent to stand trial.

In his concurrence, Justice Kennedy suggested what amounts to a higher standard of competency for defendants taking antipsychotic drugs. He argued that a defendant under the influence of antipsychotic drugs could be tried only if there is "no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel." This standard is sufficient to protect defendants who are tried while involuntarily receiving antipsychotic medication, because it recognizes that antipsychotic medication can adversely affect a defendant at trial in addition to making that defendant competent. Because there is no medical consensus about the actual effects of antipsychotic drugs, Kennedy realized that a court can never be certain how significantly antipsychotic drugs affect a defendant's ability to assist in his own defense, and thus, that his proposed standard may never be satisfied. Until medical knowledge advances, Kennedy suggested that an incompetent defendant should be involuntarily committed rather than tainting the trial process by forcibly treating a defendant with antipsychotic drugs to render that defendant competent to stand trial.

Justice Kennedy's solution is the most attractive alternative because it recognizes that although the state has an interest in trying those accused of a crime, that interest is outweighed by the defendant's right to a fair trial. Neither jury instructions, expert testimony, nor a videotape of an unmedicated defendant are adequate protection against possible prejudice to the defendant because of the effects of antipsychotic medication. Similarly, trying an unmedicated defendant who has waived his right not to be tried if incompetent can prejudice the defense in other ways. Therefore, the only acceptable solution is to allow the use of antipsychotic medication at trial only if there is no risk that the drugs will affect the defendant's right to a fair trial.

VI. CONCLUSION

In Riggins v. Nevada the United States Supreme Court held that the Due Process Clause protects criminal defendants against involuntary administration of antipsychotic drugs unless a state can show an overriding justification for such medication. However, due to this narrow holding, the Court failed to answer other significant questions raised by the involuntary medication of a

177. Riggins, 112 S. Ct. at 1818 (Kennedy, J., concurring).
178. Id. at 1819.
179. Id. at 1820.
180. See supra notes 142-57 and accompanying text.
181. See supra notes 158-69 and accompanying text.
defendant. The Court did not discuss whether rendering an incompetent defendant competent to stand trial justifies involuntary medication. The Court also did not address how the effects of antipsychotic drugs on the demeanor of a defendant during trial should be dealt with procedurally. The Court remanded the case for further proceedings without addressing many of the complex problems that remain.

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