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FORCED MEDICATION OF CRIMINAL DEFENDANTS AND THE UNINTENDED CONSEQUENCES OF *SELL V. UNITED STATES*

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INTRODUCTION

This Note seeks to analyze the evolution of a criminal defendant's right to refuse mental health medication, beginning with the expansion of that right in two of the Supreme Court's seminal decisions in the area, *Washington v. Harper*[1] and *Riggins v. Nevada.*[2] The recent Supreme Court ruling in *Sell v. United States*[3] will be analyzed in depth, both with regard to its effect on precedent and its impact on future cases, as the new criteria established by its holding will influence the behavior of governmental prosecutors seeking involuntary medication. The Note will explain how the *Sell* decision strengthened the civil rights of criminal defendants but also created unintended consequences for those same persons. For example, allowing a nondangerous, mentally ill criminal defendant to refuse mental health medication will often cause him to be incarcerated by the government for a longer period than if he had been medicated, tried, and found guilty.[4] Although no clear answer exists to resolve this issue, any

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1. Washington v. Harper, 494 U.S. 210 (1989).
2. Riggins v. Nevada, 504 U.S. 127 (1992).
3. Sell v. United States, 539 U.S. 166 (2003).
4. *See infra* Part IV.

future Supreme Court decisions in this area must consider this unintended consequence.

In May 1997 Dr. Charles Sell, a Missouri dentist, was charged in federal court with making false representations in connection with payments for health care in violation of federal law.[5] Sell and his wife were alleged to have submitted false Medicaid claims in connection with his dental practice, including false documentation and X-rays.[6] Based on these facts, this case appears to be a typical white-collar crime. However, this case was very different, as Dr. Charles Sell had a long history of mental illness.[7]

Shortly after his arrest, Sell was sent for a psychiatric evaluation at the United States Medical Center for Federal Prisoners in Springfield, Missouri.[8] After his evaluation, the district court determined that Sell was competent to stand trial.[9] The evaluation report that had been compiled, however, stated that it was possible Sell would develop a psychotic episode in the future.[10] The diagnosis was proven correct less than six months after Sell was released, when the government sought to revoke Sell's bond, alleging that he had tried to intimidate a witness.[11] A warrant was issued for his arrest, and at his initial appearance before a magistrate judge, Sell's behavior was "out of control."[12] A revocation hearing was held shortly thereafter in which Sell's bond was revoked, and he was taken back into custody.[13]

For the next few months, Sell's trial date was delayed on several occasions at the request of one party or the other.[14] In February 1999 Sell's counsel filed a request for a trial competency hearing, and a round of examinations followed.[15] By this time Sell's condition had

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5. United States v. Sell, 282 F.3d 560, 562 (8th Cir. 2002). Dr. Sell was charged with violating 18 U.S.C. § 1035(a)(2). *Id.*

6. *Id.*

7. *Sell*, 539 U.S. at 169. Sell had been hospitalized for mental illness as far back as 1982. *Id.*

8. *Sell*, 282 F.3d at 562.

9. *Id.*

10. *Id.*

11. *Id.* at 563.

12. *Id.* Sell "screamed, shouted, and used racial epithets" and when the judge attempted to proceed despite his behavior, he spit in the judge's face. *Id.*

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

14. *Sell*, 282 F.3d at 563.

15. *Id.*

deteriorated greatly; a diagnosis of delusional disorder[16] was given by both Sell's psychologist and the government psychologist.[17] Using this information, the district court concluded that Sell was incompetent to stand trial and ordered that he be hospitalized to determine if there was a substantial probability that Sell would gain the capacity to stand trial.[18]

While Sell was hospitalized he was under the care of two psychiatrists who both determined that he needed anti-psychotic medication.[19] Their diagnoses were put forth at an administrative hearing to determine if Sell should be medicated. During that hearing, Sell stated his desire to the contrary.[20] The medical hearing officer concluded that anti-psychotic medicine was the appropriate treatment but delayed the administration of the medication until Sell had the opportunity to appeal.[21]

Sell did appeal the administrative ruling that he be involuntarily medicated to gain trial competency—from the federal magistrate judge to the federal district court, to the Eighth Circuit Court of Appeals,[22] and finally to the United States Supreme Court.[23] The Supreme Court granted certiorari,[24] ostensibly to clarify its previous rulings on the right of criminal defendants to refuse anti-psychotic medication under the Fifth Amendment to the Constitution.

Part I below will analyze the two Supreme Court decisions that paved the way with regard to the issue of forcible medication of

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16. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – FOURTH EDITION 296-301 (1994). Delusional disorder is characterized by the presence of one or more nonbizarre delusions that persist for at least one month. *Id.*

17. *Sell,* 282 F.3d at 563.

18. *Id.*

19. *Id.*

20. *Id.* at 564. Sell testified that he did not want his "chemistry altered." His personal psychiatrist also stated that anti-psychotic drugs would not help Sell's condition. *Id.*

21. *Id.*

22. *Sell,* 282 F.3d at 563.

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

24. *See* Sell v. United States, 537 U.S. 999 (2002). The Court granted a writ of certiorari but limited the question to "[w]hether the Court of Appeals erred in rejecting petitioner's argument that allowing the government to administer anti-psychotic medication against his will solely to render him competent to stand trial for non-violent offenses would violate his right under the First, *Fifth,* and Sixth Amendments" (emphasis added). *Id.*

mentally ill criminal defendants. Part II will analyze the holding in *Sell v. United States*, explicating the rule announced by the Court as well as synthesizing that rule with those found in the earlier two decisions. Part III will use existing Law and Economics scholarship to identify the goals of the actors involved in the decision to forcibly medicate a mentally ill criminal defendant. That information will then be applied to the existing options by which forcible medication can take place, creating a model to hypothesize the potential effects of the *Sell* decision on criminal defendants who are refusing mental health medication. Part III will then review cases that have used the *Sell* rule to determine what its actual effects have been to this point. Finally, Part IV will explore the unintended consequence of *Sell*, questioning a civil rights ruling that may leave many mentally ill criminal defendants incarcerated for longer than they would have been had they been medicated, brought to trial, and convicted.

I. EVOLUTION OF THE RIGHT OF CRIMINAL DEFENDANTS TO REFUSE MENTAL HEALTH MEDICATION

We start with first premises: the Due Process Clauses of the Fifth Amendment (as applied to the federal government)[25] and the Fourteenth Amendment (as applied to the states)[26] prohibit the government from depriving any person of "life, liberty, or property without due process of law . . . ."[27] The word "liberty" and the rights associated with it have been held to have both procedural and substantive aspects.[28] Through the years, the Supreme Court has recognized that the Due Process Clause protects a range of activities from governmental restraint[29] to, most importantly for present purposes, an individual's rights to bodily integrity[30] and mental

25. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

26. "[N]or shall any State deprive . . . ," U.S. CONST. amends. V, XIV § 1.

27. *Id.*

28. *See* WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 137-39 (1992) ("The former [substantive due process] limits the legal standards or requirements that government may establish in its laws . . . whereas the latter [procedural due process] limits the methods or procedures by which government enforces its laws . . . .").

29. *Id.* at 140.

30. *See* Rochin v. California, 342 U.S. 165, 172 (1952) ("This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . .").

privacy.[31] These concepts were applied to two cases which dealt with involuntary medication of government detainees and created the framework through which we can more clearly analyze the case of *Sell v. United States.*

A. Washington v. Harper

In the case of *Washington v. Harper,*[32] Harper, a mentally ill state prisoner, filed an action challenging a prison policy that authorized his involuntary treatment with anti-psychotic drugs without judicial hearing.[33] The Supreme Court held that the policy satisfied both the procedural and substantive aspects of the Due Process Clause and allowed the State of Washington to forcibly medicate Harper.[34] Although the prisoner's claim seeking to avoid involuntary medication for mental illness was denied, Justice Kennedy's opinion laid the foundation for future claims of this type. The opinion explicitly granted "liberty interest" status to Harper's interest in "avoiding the unwanted administration of anti-psychotic drugs under the Due Process Clause of the Fourteenth Amendment."[35] By granting this "liberty interest," the Court assured that any government procedure challenged on these grounds must be justified under some level of judicial scrutiny. However, the Court held the standard for review for prison regulations to be a "reasonableness standard," a low level of judicial review,[36] which it easily satisfied.[37] This lower level of scrutiny was deemed to be compelled by the Court's previous decisions concerning convicted prisoners[38] holding that an administrative hearing satisfied procedural due process requirements.[39]

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31. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

32. Washington v. Harper, 494 U.S. 210 (1989).

33. *Id.* at 210.

34. *Id.* at 236.

35. *Id.* at 221.

36. *Id.* at 226. The court used terms such as "rational" government actions which "further . . . legitimate objectives." *Id.*

37. "SOC Policy 600.30 [the prison's policy] is a rational means of furthering the State's legitimate objectives." *Harper,* 494 U.S. at 226.

38. "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 224 (quoting Turner v. Safley, 482 U.S. 78, 89 (1974)).

39. *Id.* at 225.

Although the recognition of this new "liberty interest" seems like a small step, its existence would also change the government procedures with regard to all mentally ill persons detained by the state. If a convicted prisoner had a recognized "liberty interest," *a fortiori* it must also extend to all other citizens, including pretrial detainees such as Dr. Sell. It was not long before the Court was presented the chance to extend the case law under this "liberty interest" to other areas.

B. Riggins v. Nevada

The case of *Riggins v. Nevada*[40] allowed the Court to refine its understanding of the "liberty interest" in the refusal of anti-psychotic medication. This time the plaintiff was not a convicted prisoner, but rather a detainee who wished to stop taking anti-psychotic medication during his trial.[41] The Court granted certiorari to "decide whether forced administration of anti-psychotic medication during trial violated rights guaranteed by the . . . Fourteenth Amendment."[42]

The Court discussed the rationale behind its decision in *Harper,* deciding first that persons detained for trial have at least the same constitutional protections as convicted criminals.[43] Moreover, it raised *Harper's* "reasonableness" standard,[44] holding instead that the State of Nevada would have satisfied substantive due process only "if the prosecution had demonstrated, and the District Court had found, that treatment with anti-psychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others."[45] Although some authors have decried the Court's lack of specific analysis as to the level of scrutiny[46] that was being applied,[47] the language quoted clearly increased the protection of the "liberty interest" at issue for persons who are merely criminal defendants and thus not convicted criminals already in the state's care.[48]

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40. Riggins v. Nevada, 504 U.S. 127 (1992).

41. *Id.* at 129.

42. *Id.* at 133.

43. *Id.* at 133-34.

44. *See supra* notes 34-36 and accompanying text.

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

46. *Id.* at 136.

47. BRUCE J.WINICK, AM. PSYCHOLOGICAL ASS'N, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 201 (1997).

48. *Harper,* 494 U.S. at 226.

The *Riggins* case extended the rule set forth in *Harper.* However, strictly speaking, the standard announced in *Riggins* was couched in terms that indicate dictum rather than controlling precedent.[49] The issue of forced medication for trial competency purposes was avoided[50] in spite of the fact Riggins had argued that he opposed the anti-psychotic medication because he believed it would adversely affect his trial.[51] Over ten years would pass before the Court directly addressed the question of forced medication of nondangerous criminal defendants in *Sell v. United States.*[52]

II. *SELL V. UNITED STATES* EXTENDS THE RIGHTS OF CRIMINAL DEFENDANTS TO REFUSE ANTI-PSYCHOTIC MEDICATION

Dr. Sell's challenge against the administrative order requiring him to take anti-psychotic medication was granted certiorari by the Supreme Court.[53] On its face, the case looked very similar to *Harper* as both the administrative order and the affirmance of that order by the magistrate referred to Sell's dangerousness to himself or others as the basis for involuntary medication.[54] Despite these similarities, the Court quickly distinguished Dr. Sell's case from *Harper.*

The Court began its analysis by identifying *Harper* and *Riggins* as the controlling cases in this matter.[55] However, the majority immediately distinguished the instant case from *Harper* by declaring that Sell's case was not based on "dangerousness"[56] but rather on whether the government should be allowed to involuntarily medicate a criminal defendant for the purpose of "render[ing] that defendant

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49. "*Although we have not had occasion* to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada *certainly would have satisfied due process if* the prosecution had demonstrated . . . ." *Riggins,* 504 U.S. at 135 (emphasis added).

50. "The question whether a competent criminal defendant may refuse anti-psychotic medication if cessation of medication would render him incompetent at trial is not before us." *Id.* at 136.

51. *Id.* at 131.

52. Sell v. United States, 539 U.S. 166 (2003).

53. Sell v. United States, 537 U.S. 999 (2002).

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

55. *Id.* at 177-78.

56. The dangerousness issue was ignored by the High Court for a procedural reason, due to the fact that both the district court and the court of appeals held that the magistrate's order to forcibly medicate Sell based on a determination of "dangerousness" was clearly erroneous. *Id.* at 184.

competent to stand trial."[57] Despite the dismissal of the dangerousness charge, the court of appeals had upheld the order to medicate Sell for trial competency purposes based on a three-part test derived from the *Riggins* dictum.[58] The Supreme Court also focused on the trial competency issue and addressed what it felt was the proper method for the government to authorize such involuntary medication.[59] In doing so, it created a test and came to a conclusion, both of which have an impact on the ability of the government to forcibly medicate criminal defendants.

A. The Rule of Sell v. United States

The Supreme Court held that the government had in fact violated Mr. Sell's constitutional right to refuse the administration of anti-psychotic medication.[60] In its evaluation of the Eighth Circuit's decision, Justice Breyer drew from *Harper* and *Riggins* the standard by which all decisions of this type are to be made by governmental entities seeking to forcibly medicate criminal defendants for trial competency purposes:[61]

> These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer anti-psychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important government trial-related interests.[62]

Justice Breyer wrote further to explain what the new standard "says or fairly implies,"[63] perhaps as a guide to future decisions by federal or state governments in this area. We will examine each of his points in turn.

He first turned to the notion that a court must find important governmental interests at stake before it can decide to involuntarily

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57. *Id.* at 179 (emphasis added).
58. *Sell,* 282 F.3d at 567.
59. *Sell,* 539 U.S. at 179.
60. *See id.* at 180.
61. *Id.* at 179.
62. *Id.*
63. *Id.*

medicate a criminal defendant for trial competency.[64] Important interests can be shown when the offense is a "serious crime," either against persons or property.[65] The type and kind of crime will clearly make a difference when a defendant refuses anti-psychotic medication.

Next, a future court in the same situation must determine that involuntary medication "will *significantly further* . . . state interests."[66] In Justice Breyer's words, the court must find that the medication is "substantially likely to render the defendant competent to stand trial."[67] The reviewing court must also find that the medication is "unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair."[68]

Third, a reviewing court must determine that involuntary medication is *necessary* to further the state's interest.[69] This means that any possible alternative treatments are unlikely to achieve the same results as anti-psychotic medication.[70] This part of the test will exacerbate a continuing debate among mental health professionals, spotlighted by the amicus briefs filed in the *Sell* case by the American Psychological Association and the American Psychiatric Association. In addition to playing a significant part in the *Sell* case, the split that exists between these two mental health associations will affect the way in which the *Sell* decision will be implemented in the future.[71]

Finally, a reviewing court must decide that the proposed involuntary medication is medically appropriate, defined as "in the patient's best interest in light of his medical condition."[72] This was further clarified to mean that side effects of various drugs be considered, as well as their relative levels of success.[73]

The Court's opinion went a long way to clarify, in a factual circumstance it had not dealt with previously, the amount of protection granted the "liberty interest" in a criminal defendant's refusal to take anti-psychotic medication. It set up a detailed test by which future

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

65. *Id.*

66. *Id.* at 180.

67. *Id.*

68. *Id. See also Riggins,* 504 U.S. at 140-42 (Kennedy, J., concurring in judgment).

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

70. *Id.*

71. *See infra* Parts III.A.1., III.A.2.b.

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

73. *Id.*

courts can determine whether the government has met its due process burden when it decides to forcibly medicate a defendant.[74] However, many loose ends still remain. Can the three cases of *Harper*, *Riggins*, and *Sell* be reconciled? If so, is the result logical and coherent? The next section seeks to answer those very questions.

B. Judicial Scrutiny of Forced Medication Questions

Harper, *Riggins*, and *Sell* are now the benchmarks for determining the constitutionality of involuntary medication of mentally ill criminal defendants.[75] The three cases each acknowledge the "liberty interest" of a criminal defendant or inmate in refusing to be medicated with anti-psychotic drugs; but, the level of judicial scrutiny changes from case to case. After analysis, however, these changes can be logically explained. The Court seeks to grant this liberty interest in the same proportion that it grants other due process rights, depending on the factual situation of the person alleging their rights have been impinged.[76]

When a court is called to determine whether or not an *inmate* should receive anti-psychotic medication involuntarily, the government must show the medication bears a rational relationship to important governmental objectives.[77] When the person refusing is a *criminal defendant* that has not been convicted, they can be forcibly medicated on either of two grounds: that they are a danger to themselves or others[78] or to restore them to competency for trial.[79]

The standard by which a "dangerousness" ruling can be defended was explained in *Riggins'* dictum, and is probably the best use of the *Riggins* ruling in light of the *Sell* decision. It is that the state "would . . . satisf[y] due process if the prosecution had demonstrated . . . that treatment with anti-psychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' *own safety or the safety of others.*"[80] The Court declined in

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74. *See supra* Part II.A.

75. *See* Kathy Swedlow, *Forced Medication of Legally Incompetent Prisoners: A Primer,* 30 SPG HUM. RTS. 3 (Spring 2003).

76. *See Harper,* 494 U.S. at 222.

77. *Id.* at 226 (finding the state prison policy to be a "rational means of furthering the State's legitimate objectives").

78. *See Riggins*, 504 U.S. at 135.

79. *See Sell*, 539 U.S. at 166.

80. *Riggins*, 504 U.S. at 135 (emphasis added).

Riggins to attach a substantive label to the level of scrutiny applied,[81] but lower courts have interpreted its standard to be at least "heightened" scrutiny.[82]

The rule announced in *Sell* to allow forced medication of a criminal defendant for trial competency purposes bears many similarities to the *Riggins* test. Justice Breyer used much of the same terminology as was used in *Riggins* to determine the dangerousness standard, but certain phrases in the case distinguish it. The opinion refers to the notion that a dangerousness determination is more easily managed than one involving trial competency.[83] Also, forced medication due to dangerousness must be "essential for the sake of [his] own safety or the safety of others,"[84] where for trial competency it must be "substantially likely to render the defendant competent to stand trial" as well as "substantially unlikely to have side effects that will interfere significantly with the defendants' ability to assist counsel."[85] This shows a higher level of scrutiny in cases of trial competency than in dangerousness cases because the government must show that the medication is not only necessary to reach trial competency[86] (similar to the "dangerousness" standard), but also that the use of anti-psychotic medication is not overinclusive.[87]

III. EFFECTS OF THE *SELL* DECISION

As described earlier, the Supreme Court has established levels of judicial scrutiny for forced medication cases. Depending on the factual situation, the government must clear a different-sized hurdle to satisfy due process concerns.[88] The level of scrutiny to justify a dangerousness classification is lower than the *Sell* standard, but is that difference significant enough to create incentives for prosecutors to classify a

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81. *Id.* at 136.

82. *See* United States v. Weston, 255 F.3d 873, 880 (D.C. Cir. 2001).

83. *See Sell*, 539 U.S. at 182. "The inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more 'objective and manageable' than the inquiry into whether medication is permissible to render a defendant competent." *Id.* (citing *Riggins*, 504 U.S. at 140).

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

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

86. The medication must be "substantially likely to render the defendant competent to stand trial." *Id.*

87. By requiring that the medication be "substantially *unlikely* to have side effects . . ." the Court is creating a requirement that its use is not overinclusive.

88. *See supra* Part II.B.

defendant differently or take another route to seek forcible medication? In his majority opinion in *Sell*, Justice Breyer repeatedly acknowledged there were "alternative grounds" by which a person could be forcibly medicated apart from the trial competency issue.[89] The first example given was based on an individual's dangerousness.[90] The second was that of civil commitment and appointment of a guardian.[91]

A. Potential Effects

According to the *Sell* majority opinion, "If a court authorizes medication on these alternative grounds, dangerousness determination or civil commitment, the need to consider authorization on trial competence grounds will likely disappear."[92] It is unclear whether this statement is simply a tautology, or an indication that the Court wishes the government to pursue administrative rather than judicial solutions to justify forced medication. Clearly, the identification of "alternative grounds" by Justice Breyer makes *Sell* more than a civil rights decision. Not only does it define a civil right of mentally ill criminal defendants, it also will affect the way in which the government is required to treat those defendants.[93] Will it result in increased attempts to classify mentally ill criminal defendants as a danger to themselves or others, allowing medication on *Harper*-style grounds? Alternately, will it result in increased use of the "alternative ground" of civil commitment? Simple rational choice models, used in Law and Economics analysis and extended by Public Choice Theory to nonmarket situations, can help to hypothesize the future effects of the *Sell* ruling.

1. Identifying the Incentives of Forced Medication Decision Makers

To use Law and Economics modeling to determine the effects *Sell* will have on future cases requires identification of the goals of the three groups of actors involved in the process: prosecutors, mental health professionals, and judges. Law and Economics literature is

89. *Sell*, 539 U.S. at 182.

90. *Id.*

91. *Id.*

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

93. *See* David L. Hudson, Jr., *Rules Tightened on Forcibly Medicating Defendants*, 2 NO. 24 A.B.A. J. E-REPORT 4 (June 20, 2003) (on file with author).

replete with analysis of the criminal courts[94] and such analysis can be applied to the prosecutors and judges making a decision whether to forcibly medicate a criminal defendant. Briefs filed in the *Sell* case provide a glimpse into the goals of a mental health professional charged with helping make the determination. After discerning the goals of each party, we can hypothesize the potential effects of *Sell*.

Public Choice Theory[95] assumes that the three groups are rational decision makers who seek to maximize their utility.[96] With regard to criminal prosecutors, Judge Easterbrook[97] describes their goals as "select[ing] the appropriate probability of conviction to complement existing sentences in order to achieve optimal deterrence and reduce expenditures in prosecution."[98] These goals of optimal deterrence and reduced expenditures play a role in the prosecution of mentally ill criminal defendants. The level of deterrence via prosecution is difficult to pinpoint for the mentally ill as there is always a question of whether they can truly be deterred from criminal acts by punishment, and the prosecution of the mentally ill creates higher costs in the form of competency hearings and the use of mental health professionals.[99]

Judges have an interest in achieving the maximum deterrence at the lowest possible cost.[100] They also operate under time constraints due to increased criminal dockets and pressure from legislators to hasten the resolution of criminal trials.[101] It has been suggested that judges

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94. *See generally* William M. Landes, *An Economic Analysis of the Courts,* 14 J.L. & ECON. 61 (1971); Frank H. Easterbrook, *Criminal Procedure As a Market System,* 12 J. OF LEGAL STUDIES 289 (1983); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21 (6th ed. 2003); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 388-444 (4th ed. 2004).

95. Public Choice Theory, a branch of Law and Economics, is defined as "the economic analysis of non-market decision making." NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 85 (1997).

96. *Id.*

97. Circuit Judge Frank H. Easterbrook sits on the U.S. Circuit Court of Appeals, Seventh Circuit, and is a prominent Law and Economics scholar.

98. Easterbrook, *supra* note 94, at 305.

99. *See, e.g.,* 18 U.S.C. §§ 4241-4247 (2000) (requiring use of one or more psychologists or psychiatrists for competency hearing).

100. Easterbrook, *supra* note 94, at 331.

101. POSNER, *supra* note 94, at 580; *see, e.g.,* 18 U.S.C. §§ 3161-3174 (2000) (known as the Speedy Trial Act). The Act establishes time limits for completing the various stages of a federal criminal prosecution. The information or indictment must be filed within thirty days from the date of arrest or service of the summons. *Id.* § 3161(b). The trial must commence within seventy days from the

"consciously adopt efficiency as a goal,"[102] and seek the use of clear rules in order to reduce cases overturned on appeal and to expend less time and energy deciding cases.[103]

Mental health professionals also play a large role in the decision to forcibly medicate a criminal defendant. Both psychologists and psychiatrists can provide judges with information in a competency hearing as to the defendant's mental status.[104] The primary goal of both groups is appropriate treatment of the mentally ill,[105] but their briefs in the *Sell* case indicate that they differ strongly on the appropriate methods of treatment.

The American Psychiatric Association fell squarely on the side of the government in the *Sell* case.[106] It is their view that anti-psychotic medications, especially the newer types, have a low risk of adverse affects and are very effective in restoring competency for trial purposes.[107] The American Psychological Association, on the other hand, did not claim to support either party but clearly shaded towards Dr. Sell's defense.[108] Its view is that nondrug therapies should be

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date the information or indictment was filed, or from the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. *Id.* § 3161(c)(1).

102. COOTER & ULEN, *supra* note 94, at 440 ("It can be argued, for example, that judges should allocate legal entitlements fairly and that the fair allocation has no systematic connection to an efficient allocation. In spite of such arguments, judges often prefer more efficient rules, but their own descriptions employ terms other than 'efficiency.'").

103. Cooter and Ulen posit that inefficient laws are litigated more than efficient ones. *Id.* at 437.

104. *See* 18 U.S.C. § 4247 (2002) ("A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner.").

105. *See* Brief of Amicus Curiae American Psychological Association at 1 ("APA . . . has a broader ethical and professional interest in ensuring that persons with mental illness are treated in a humane and beneficial manner."); Brief for the American Psychiatric Association and the American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondent at cover (members are "dedicated to excellence in practice, teaching . . ."), Sell v. United States, 539 U.S. 166 (2003) (No. 02-5664).

106. Their brief was listed as "Supporting Respondent." Brief for American Psychiatric Association at 1, *Sell* (No. 02-5664).

107. *See id.* at 16-19.

108. *See* Brief for Amicus Curiae American Psychological Association, *Sell* (No. 02-5664).

exhausted before involuntary administration of drugs is imposed on a criminal defendant.[109] As described in the analysis below, whether a psychiatrist or a psychologist is providing the expert testimony will likely affect the ruling of a judge under the *Sell* standard.

Now that the goals of each of the decision makers have been identified, they can be applied to the options by which the government prosecutors can attempt to forcibly medicate a criminal defendant. The first is from a determination of dangerousness. The second is under the trial competency standard of *Sell*. The third is the use of alternate grounds explained by Justice Breyer in *Sell*.[110] Given these options by which to achieve forced medication, are prosecutors likely to seek such a ruling in the courts in cases of mentally ill criminal defendants?

2. *Analysis of the Options for Forcible Medication*

a. *Dangerousness*

If, as has been posited,[111] the *Sell* decision creates greater due process protection for nondangerous criminal defendants than it does for dangerous criminal defendants, prosecutors will seek to classify many more defendants as dangerous in the hopes of bringing a greater number of defendants to trial. Some critics have already opined that the use of dangerousness as a basis for forcibly medicating individuals can be problematic.[112] The *Sell* decision, described as a significant step in the evolution of civil rights of the mentally ill,[113] may change the way prosecutors classify a defendant's mental state with dangerousness becoming the focus instead of trial competency.

When presented with an incarcerated criminal defendant incompetent to stand trial that is refusing anti-psychotic medication, a prosecutor may call for another competency hearing in the hopes that the defendant may be declared dangerous, and forcibly medicated under the *Riggins* standard. As described previously,[114] the secondary

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109. *Id.* at 3.

110. *See supra* note 92 and accompanying text.

111. *See supra* Part II.B.

112. Paul F. Stavis, *Involuntary Hospitalization in the Modern Era: Is "Dangerousness" Ambiguous or Obsolete?* 41 NEW YORK QUALITY OF CARE NEWSLETTER (N.Y. State Comm. on Quality of Care for the Mentally Disabled, Schenectady, N.Y.), Aug.-Sep. 1989, *available at* http://www.cqc.state.ny.us/counsels_corner/cc41.htm. (last visited Feb. 1, 2004) (hard copy on file with author).

113. *See* Hudson, *supra* note 93.

114. *See supra* note 92 and accompanying text.

effect of trial competency can be achieved. A review of *Sell* and other cases indicates, however, that once the defendant is incarcerated, both judges and mental health professionals are hesitant to make a dangerousness determination.[115] Knowledge of this fact will discourage a prosecutor from seeking an additional hearing in hopes of a dangerousness ruling, as the probability of success is low and additional costs certain. When adding to this the fact that deterrence, at least in the present case, is being effected (the defendant is already incarcerated), there seems little incentive for a prosecutor to ask for an additional competency hearing.

However, if the crime is a very serious one, there is a greater incentive to deter future crimes of that sort. If a dangerousness ruling does not seem feasible the prosecutor's only other choice is to seek forcible medication under the standard set forth in *Sell*.

b. Forcible Medication Using the Sell *Standard*

When faced with a nondangerous (or presumed nondangerous) mentally ill criminal defendant, a prosecutor now knows that he will need to invoke the *Sell* standard to forcibly medicate. To determine if he should pursue this end, a rational prosecutor will weigh the amount of resources that the motion to medicate will require against the probability that the motion will be successful. The costs of bringing the motion and participating in the hearing are well known to the prosecutor, but the probability of success is more difficult to calculate. By examining the parts of the *Sell* test described earlier[116] in light of who will contribute to that decision-making process (mental health professionals and judges), the probability of success in an individual case will become clearer.

Although a judge will be applying the *Sell* test to the facts in a given case, those facts will be supplied by the mental health professionals that have examined the defendant.[117] Judges rely heavily on the opinions of these experts to help them understand a field that is not

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115. *See, e.g.*, United States v. Weston, 255 F.3d 873, 878-79 (D.C. Cir. 2001) ("There appears no basis to believe that Weston's worsening condition renders him more dangerous given his near-total incapacitation."); *see also* Sell v. United States, 539 U.S. at 172 ("The reviewing psychiatrist added that he considered Sell 'dangerous based on threats and delusions if outside, but not necessarily in[side] prison.'") (quoting from the district court record).

116. *See supra* Part II.A.

117. *See, e.g.*, 18 U.S.C. § 4247(c) (2000) (describing the contents of the psychological or psychiatric reports to be submitted to a judge as part of a competency hearing).

their forte,[118] and they play an especially large role in a *Sell* determination.

Three of the prongs of the *Sell* test pertain to conditions that are to be gauged by mental health professionals. Whether the involuntary medication is "medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary . . ."[119] are questions that will be answered by the experts. At this point a prosecutor would be well suited to know whether the expert testifying will be a psychiatrist or a psychologist, due to their different stances on anti-psychotic medication.[120] It is clear that a psychiatrist is more likely to see anti-psychotic medication as "necessary" than a psychologist. So, the rational prosecutor will need to find out which profession the person examining the defendant belongs to in order to more accurately determine the probability of success.

Even if a prosecutor feels confident that the expert will testify that three prongs of the *Sell* test will be met with anti-psychotic medication, there is one last hurdle to overcome: the judge must find important governmental interests are at stake.[121] The *Sell* opinion was not specific as to the exact crimes that created an important interest.[122] That will be determined by the judiciary as more *Sell* motions are heard. Until this is clarified, prosecutors will be less able to calculate their chances of success and thus less likely to bring a forcible medication motion under the rule of *Sell*.

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118. A psychiatrist who has testified at numerous trial competency hearings explained that, at a great number of them, a judge would ask "Doc, what do I do?" Telephone Interview with J. Rahn Sherman, M.D., Former Assistant Secretary of Health and Human Services, State of Louisiana (Feb. 19, 2004) (on file with author).

119. *Sell*, 539 U.S. at 179.

120. *See supra* Part III.A.1.

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

122. Important interests can be shown when the offense is a "serious crime," either against persons or property. *Id.*; *see also supra* Part II.A.

3. Is Civil Commitment Now Preferable for Forced Medication Situations?

Justice Breyer's opinion also mentioned civil commitment[123] as another option for a government body seeking to forcibly medicate a criminal defendant:

> For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, Harper-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication—when in the best interests of a patient who lacks the mental competence to make such a decision.[124]

a. Traditional Civil Commitment

Traditional involuntary civil commitment laws for persons with mental illness exist in all states in the United States.[125] A comparison of the states of Idaho[126] and Alabama[127] indicate similar statutory forms. The prominent requirement in each is that the person who may be committed must pose a danger to himself or others.[128] Judging from this, there is little difference between civil commitment and a judicial determination of dangerousness. The fact that dangerousness is required for civil commitment leaves us in the same position as with a judicial dangerousness determination: both judges and mental health professionals have been hesitant to declare an incarcerated mentally ill defendant a danger to himself or others.[129] Could there have been an additional alternative to which Justice Breyer was referring?

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123. Civil commitment is defined as "the authority of the state to civilly commit an individual for care." *Civil Commitment: Past, Present, Future,* 64 NEW YORK QUALITY OF CARE NEWSLETTER (N.Y. State Comm. on Quality of Care for the Mentally Disabled, Schenectady, N.Y.), Aug.-Sep. 1995, *available at* http://www.cqc.state.ny.us/counsels_corner/cc64.htm. (last visited Feb. 1, 2004) (hard copy on file with author).

124. *Sell,* 539 U.S. at 182.

125. *See Civil Commitment: Past, Present, Future, supra* note 123.

126. IDAHO CODE § 66-329 (2004).

127. ALA. CODE § 22-52-37 (2004).

128. *See* ALA. CODE § 66-329(2); *see also* ALA. CODE § 22-52-37(a)(7).

129. *See supra* Part III.A.2.b.

b. Outpatient Commitment

Recently, another type of civil commitment has come to the fore. State lawmakers in more than thirty-seven states and the District of Columbia have created another means to medicate the mentally ill.[130] Outpatient commitment differs from traditional civil commitment because it is directed not only towards currently dangerous persons, but also potentially dangerous persons. [131] Rather than confining a mentally ill person, these laws require that the person in question take anti-psychotic medication or face involuntary commitment.[132]

While the early reviews of these laws were mixed,[133] a recent report on the status of New York's version of outpatient commitment, known as Kendra's Law[134] has been mostly positive.[135] Increased participation in case management as well as reduced incidence of hospitalization, homelessness, arrest, and incarceration are cited as benefits of outpatient commitment.[136] In the opinion of the New York State Office of Mental Heath, this preventative method of medicating the mentally ill is a less restrictive and more efficient way to reduce both the costs of the mentally ill on society and the harm to liberty interests caused by forcibly medicating citizens.[137] Although not directly addressed by the *Sell* court, the use of outpatient commitment could serve to prevent many of these issues from arising by addressing mental health before a crime is committed, therefore leaving the judge out of the issue.

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130. *Involuntary Commitment Laws Controversial*, CNN.com (May 20, 1999), *available at* http://www.cnn.com/HEALTH/9905/20/outpatient.

commitment/index.html (last visited Feb. 1, 2004) (hard copy on file with author).

131. N.Y. MENTAL HYG. LAW § 9.60 (2004) (also known as Kendra's Law).

132. *Id.*

133. *See* National Alliance for the Mentally Ill, *Policy on Involuntary Commitment and Court-ordered Treatment* (October 7, 1995), *available at* http://.www.nami.org/Content/ContentGroups/Policy/Updates/Involuntary_Comm itment_ And_Court_Ordered_Treatment.htm (last visited Feb. 1, 2004)(hard copy on file with author).

134. Kendra Smith was a girl pushed in front of the subway by a mentally ill man who had not taken his medication. *See Involuntary Commitment Laws Controversial, supra* note 130.

135. New York State Office of Mental Health, *Kendra's Law: Interim Report on the Status of Assisted Outpatient Treatment* (Jan. 1, 2003), *available at* http://www.omh.state.ny.us/omhweb/Kendra_web/interimreport/Outcomes.htm (last visited May 11, 2005).

136. *See id.*

137. *Id.*

B. Present Effects of the Sell *Decision*

Of the cases citing *Sell* thus far, two in particular discussed the *Sell* decision, but only to distinguish the facts of the case at hand. In *United States v. Morin,*[138] the Eighth Circuit Court of Appeals held the *Sell* rule to be inapplicable in that specific case.[139] The court ruled that the continued provision of anti-psychotic medication to a criminal defendant was not a violation of the defendant's due process rights.[140] Moreover, the detaining entity did not have an "affirmative duty to repeatedly remind Morin of his right to refuse the medication that his own doctor prescribed."[141]

In the case of *United States v. Kourey,*[142] the district court found the *Sell* rule to be inapplicable but used the reasoning of the *Sell* court to guide its decision.[143] Because the record did not indicate an administrative effort was used to attempt to medicate the defendant, review of the case under the *Sell* standard was unnecessary.[144]

There are other cases, however, that relied on the *Sell* rule to make their determination. In *United States v. Miller,*[145] the government sought to involuntarily medicate the defendant for trial competency purposes.[146] The district court, employing the *Sell* criteria, held that the defendant, who had been arrested on federal weapons charges outside the Bush family estate in Maine,[147] could not be forcibly medicated because he presented no danger to the public and the government had not shown an "important" interest in bringing the defendant to trial.[148] The lack of a "serious crime," which under the *Sell* standard would implicate an important interest,[149] seems to be the guiding factor in

138. United States v. Morin, 338 F.3d 838 (8th Cir. 2003).

139. *Id.* at 843.

140. *Id.*

141. *Id.*

142. United States v. Kourey, 276 F. Supp. 2d 580 (S.D.W.Va. 2003).

143. *Id.* at 581.

144. *Id.* at 585.

145. United States v. Miller, 292 F. Supp. 2d 163 (D. Me. 2003).

146. *Id.* at 164.

147. Norra MacReady, *High Court Ruling Garners Praise,* CLINICAL PSYCHIATRIC NEWS, VOL.31, ISSUE 7 (July 1, 2003), *available at* 2003 WL 15387184.

148. *Miller,* 292 F. Supp. 2d at 165.

149. *See supra* note 63 and accompanying text.

most decisions which denied the government's requests to forcibly medicate criminal defendants for trial competency.[150]

In cases in which courts have authorized involuntary medication, the seriousness of the alleged crime has also been the determinative factor. *United States v. Evans*[151] provides a fitting example. The defendant, who was alleged to have threatened a federal officer,[152] was jailed and found incompetent to stand trial.[153] At the hearing to involuntarily medicate the defendant the court found that he was not currently a danger to himself or others. The government alternatively sought to medicate the defendant for trial competency purposes. The court then found that although the crime alleged to have been committed was "serious,"[154] the "defendant's refusal to take medication voluntarily could lead to a lengthy confinement in a mental institution . . . ."[155] This led to the court's conclusion that even though the crime was serious, there was not an "important governmental interest" in prosecution.[156] However, at a second *Sell* competency hearing, the court reversed the earlier decision, noting that since the defendant had been charged in the interim with a felony, a serious crime had been implicated and involuntary medication could now be administered.[157] The other cases since *Sell* in which involuntary medication was authorized have made the seriousness of the crime the focal point of the determination.[158]

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150. *See* United States v. Barajas-Torres, Crim. No. EP-03-CR-2011(KC), 2004 U.S. Dist. LEXIS 13232, at *10 (W.D. Tex. July 1, 2004) (holding that the charge of illegal reentry is not a serious crime for *Sell* purposes); United States v. Dumeny, 295 F. Supp. 2d 131, 133 (D. Me. 2004) (finding a firearms possession charge is not a serious crime for *Sell* purposes); *see also* United States v. Ghane, 392 F.3d 317, 320 (8th Cir. 2004) (using another *Sell* factor, likelihood of restoring competence, to deny a request to involuntarily medicate).

151. United States v. Evans, 293 F. Supp. 2d 668 (W.D. Va. 2003), *overruled by* United States v. Evans, Case No. 1:02CR00136, 1:04M00014, 2004 U.S. Dist. LEXIS 4204 (W.D. Va. March 18, 2004).

152. *Evans,* 293 F. Supp. at 670.

153. *Id.*

154. *Id.* at 674. The judge used the Supreme Court's Sixth Amendment "serious crime" reasoning for jury trial determinations to determine what a serious crime was in a *Sell* determination. *Id.*

155. *Id.* at 674.

156. *Evans*, 293 F. Supp. 2d at 674.

157. United States v. Evans, Case No. 1:02CR00136, 1:04M00014, 2004 U.S. Dist. LEXIS 4204, at *5-6 (W.D. Va. March 18, 2004).

158. See United States v. Gomes, 387 F.3d 157 (2d Cir. 2004) (holding possession of firearms by convicted felon is serious crime); United States v.

IV. THE UNINTENDED CONSEQUENCES OF *SELL V. UNITED STATES*

Now the possibilities are laid out for the government when seeking to forcibly medicate an incarcerated criminal defendant who is incompetent to stand trial and is refusing anti-psychotic medication. They may seek a dangerousness determination, but when the defendant is already incarcerated that ruling is unlikely to occur.[159] They may seek medication of the nondangerous criminal defendant under the *Sell* standard, but if the crime committed is not serious enough for prosecution to be an important governmental interest, or even if it is a close call,[160] the costs of pursuing the medication likely outweigh the probability of winning the motion.[161] The civil commitment standard referred to in *Sell* also requires a finding of dangerousness,[162] and outpatient commitment seems to serve a prophylactic function rather than one to restore trial competency.[163]

Sell has been read as many things: from a victory for the civil rights of the mentally ill[164] to a means for criminal defendants to delay their trials by accepting, then refusing, mental health medication.[165] Viewpoints aside, the decision creates an unintended consequence that may have been overlooked by the Supreme Court. By creating a tangible distinction between forcible medication for dangerousness and for trial competency, the Court widened an existing gap and left many incarcerated mentally ill criminal defendants in a difficult situation. For those who do not meet the dangerousness standard of *Harper* and *Riggins,* and are alleged to have committed a crime for which there is not an important governmental interest in prosecution,[166] this right to refuse medication can backfire. While the altruistic goal of protecting the rights of the mentally ill to such a degree that they can refuse medication to make them competent to stand trial has been achieved, it could result in situations in which a defendant will be

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Mackie, No. 40-4392, 2004 U.S. App. LEXIS 25151 (December 7, 2004) (federal firearms offense is serious crime); United States v. Kimball, No. CR03-1025, 2004 U.S. Dist. LEXIS 26586 (March 23, 2004) (threatened attack on mass transportation facility is serious crime).

159. *See supra* Part III.A.2.a.

160. Economists presume that most people (prosecutors included) are risk averse. COOTER & ULEN, *supra* note 94, at 53.

161. *See supra* Part III.A.2.b.

162. *See supra* Part III.A.3.a.

163. *See supra* Part III.A.3.b.

164. *See* Hudson, *supra* note 93.

165. *Sell,* 539 U.S. at 191 (Scalia, J., dissenting).

166. *See* United States v. Miller, 292 F. Supp. 2d 163, 164-65 (D. Me. 2003).

incarcerated longer by refusing the medication than he would have had he been brought to trial and convicted.[167] Sell himself[168] and quite probably the defendant in the *Miller* case[169] find themselves examples of this unintended consequence.

CONCLUSION

When viewed as a whole, one can see the evolution of the "liberty interest" in the right to refuse involuntary medication. *Harper* defined the "liberty interest."[170] *Riggins* furthered those rights by acknowledging that whether using a dangerousness argument or a trial competency argument, the government was required to meet some level of due process review.[171] *Sell* raised the standard of review for trial competency cases above those governing dangerousness determinations.[172]

What is the effect of this line of cases? Collectively, they have clearly defined the burden the state bears in an attempt to medicate mentally ill criminal defendants against their wishes, and have attempted to guide those seeking such involuntary medication towards "alternative grounds." The alternative ground of dangerousness is a means to circumvent the standard set forth in *Sell* for involuntary medication of nondangerous, mentally ill criminal defendants for trial competency purposes, but it is unlikely that an incarcerated defendant will be found dangerous.[173] The alternative ground of civil commitment is another option. Each state has laws that allow for involuntary commitment, but the person at issue must pose a danger to himself or others, as the *Riggins* standard requires.[174] The notion of

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167. Brief for American Psychiatric Association at 25, *Sell* (No. 02-5664).

168. "Dr. Sell has been incarcerated for more than 4 years. That is longer than the severest penalty he would have received had he gone to trial and been found guilty." MacReady, *supra* note 147.

169. "If found guilty of possessing a firearm after being committed to a mental institution, Miller would face only 18 months to two years in prison, said his lawyer, Bruce Merrill. He has already been in custody since Sep[tember] 30, 2002." *Judge Says Defendant Can't Be Forced to Take Medication,* ASSOCIATED PRESS WIRES (Nov. 12, 2003) (on file with author).

170. *See supra* Part I.A.

171. *See supra* Part I.B.

172. *See supra* Part II.B.

173. *See supra* Part III.A.2.a.

174. *Id.*

outpatient commitment can now be considered another alternative.[175] While ostensibly to be used for prevention of societal problems caused by those with mental illness, outpatient commitment could be used to medicate those released on bail between their arrest and trial.

It appears that *Sell* and its progeny do reflect an effort to protect the civil rights of the mentally ill when they choose to decline anti-psychotic medication. And, the less dangerous a person is, the better his chances of being allowed to refuse that medication. However, the unintended consequence created by recognition of this "liberty interest" cannot go unnoticed.[176]

Perhaps the best way to view the *Sell* decision is not as a civil rights decision but rather as an issue that the Court sees as a medical and societal, rather than a judicial, problem. By creating rules which make it more difficult to forcibly medicate nondangerous mentally ill criminal defendants, the Supreme Court has created incentives to use alternative grounds, reducing the role of judge as mental health professional.

Does the *Sell* ruling increase the civil rights of nondangerous, mentally ill criminal defendants? Yes. Will this decision lead to the increased use by the government of the dangerousness tag? Law and Economics modeling, as well as previous judicial dangerousness determinations, seem to indicate not.[177] The *Sell* ruling extended a gap between medication for dangerousness and medication for trial competency into which many mentally ill criminal defendants that refuse mental health medication will fall. Will this decision lead to the increased use of civil commitment? It will not under the traditional form of civil commitment, but there is hope that outpatient commitment will have a prophylactic effect.[178] Unfortunately, it seems that granting the right to refuse mental health medication to mentally ill criminal defendants may mean longer incarceration, and a net loss, for those who opt to invoke it. Clearly, this is an unintended, and unfortunate, consequence of *Sell v. United States*.

175. *See supra* Part III.A.3.b.

176. *See supra* Part IV.

177. *See supra* Part III.A.2.a.

178. *See supra* Part III.A.3.b.