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Valuing the Vulnerable: A Proposed Approach to Cyclical Competency

Kirsten Pryde

NOTE

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United States v. Mitchell, 11 F.4th 668 (8th Cir. 2021).

Kirsten Pryde[*]

I. INTRODUCTION

The competency evaluation system in the United States is in crisis.[1] The criminal justice system has long recognized that a criminal defendant has a right to a fair trial, and being competent to stand trial is a necessary component of that right.[2] Mental illness is increasingly prevalent in our inmate population,[3] and while mental illness and incompetence are not

[*]B.A., Vanderbilt University, 2020; J.D. Candidate, University of Missouri School of Law, 2023; Associate Member, *Missouri Law Review*, 2021-2022; Associate Managing Editor, 2022-2023. I am extremely grateful to Professor Erika Lietzan for her support and help in narrowing the scope of this project. I am also very grateful to the *Missouri Law Review*, Jim Pryde, and Professor Michelle Cecil for their emotional, mental, and physical labor to help get this piece from a conceptual mustard seed to this.

[1] Barry Wall & Ruby Lee, *Assessing Competency to Stand Trial*, 37 PSYCHIATRIC TIMES 14, 14 (Oct. 29, 2020) (citing W.N. Gowensmith, *Resolution or resignation: the role of forensic mental health professionals amidst the competency services crisis*, 25 PSYCH. PUB. POL'Y & L. 1-14 (2019)).

[2] Drope v. Missouri, 420 U.S. 162, 173–74 (1975); *see also* Wall & Lee, *supra* note 1, at 14–15; Grant H. Morris et al., *Competency to Stand Trial on Trial*, 19 U. SAN DIEGO PUB. L. & LEGAL THEORY RSCH. PAPER SERIES 1, 1 (2004).

[3] This is part of a social phenomenon, called the criminalization of mental illness, which began in the United States just after the deinstitutionalization movement in the 1970s. Joel A. Dvoskin et al., *A Brief History of the Criminalization of Mental Illness*, 25 CNS SPECTRUMS 638, 641 (2020). While deinstitutionalization was a rational reaction to the horrible conditions of state psychiatric hospitals at the time, when these facilities disappeared, promised community mental health resources did not take their place. Kelan Lyons, *Competency Exams are Being Used in More Criminal Cases, Even as Criminal Court Dockets Shrink*, CT MIRROR (Sept. 10, 2020), https://ctmirror.org/2020/09/10/competency-exams-increasing-number-of-criminal-cases-even-as-criminal-court-dockets-shrink/ [https://perma.cc/N7BT-SHGE]. Today, individuals with serious mental illnesses "are overrepresented in correctional settings." Dvoskin et al., *supra* note 3, at 641.

synonymous, the two are often correlated.[4] Unsurprisingly then, competency evaluation requests have skyrocketed in recent years.[5] But importantly, competency is not static.[6] Cycles of compensation and decompensation may require a defendant to go through the competency evaluation system multiple times before they are ever brought to trial.[7] Defendants presenting with this cyclical competency are not uncommon, and Jonathan Mitchell is a prime example.[8] Mitchell's competency to stand trial has been evaluated at least three different times at three different facilities located all around the United States.[9] When a defendant is deemed incompetent to stand trial, the government may involuntarily medicate that defendant for the purpose of rendering defendant competent to stand trial when the interests of the government outweigh the defendant's.[10] While involuntarily medicating a criminal defendant is – surprisingly – nothing new in the United States, this case marks the first time that a competent defendant has been so ordered.[11]

From 1990 to 2003, the Supreme Court of the United States shifted from a high standard for allowing involuntary medication, which required a showing that the defendant posed a danger to fellow prison inmates and prison staff, to a more permissive standard.[12] This standard allows involuntary medication even in circumstances where the government's

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[4] T. Szasz, *"Idiots, Infants, and the Insane": Mental Illness and Legal Incompetence*, 31 J. OF MED. ETHICS 78, 79 (2005).

[5] Academics cannot agree as to the actual number of competency evaluations which occur each year – recent estimates range between 25,000 and 94,000 – but all agree that the numbers have risen significantly over the last decade. *Compare* DORIS A. FULLER ET AL., OFF. OF RSCH. & PUB. AFF., EMPTYING THE "NEW ASYLUMS": A BEDS CAPACITY MODEL TO REDUCE METAL ILLNESS BEHIND BARS, 1, 1–2 (Jan. 2017); *with* Nathaniel P. Morris et al., *Estimating Annual Numbers of Competency to Stand Trial Evaluations across the United States*, 49 J. AM. ACAD. PSYCH. L. 530 (2021); *with* Michael J. Finkle et al., *Competency Courts: A Creative Solution for Restoring Competency to the Competency Process*, 27 BEHAV. SCI. & L. 767, 768 (2009); *with* Wall & Lee, *supra* note 1, at 14.

[6] United States v. Ghane, 593 F.3d 775, 779 (8th Cir. 2010) (citing Lyons v. Luebbers, 403 F.3d 585, 593 (8th Cir. 2005)).

[7] M.W. Smith, *Restore, Revert, Repeat: Examining the Decompensation Cycle and the Due Process Limitations on the Treatment of Incompetent Defendants*, 71 VAND. L. REV. 319, 329 (2018). Note: This article will use gender neutral and inclusive pronouns unless in reference to an individual with an expressed gender preference. *See* Nat'l Couns. of Tchr. of Eng., *Statement on Gender and Language*, NCTE (Oct. 25, 2018), https://ncte.org/statement/genderfairuseoflang/ [https://perma.cc/AZ49-R96E].

[8] Smith, *supra* note 7, at 322–23.

[9] *See* United States v. Mitchell, 11 F.4th 668, 670–71 (8th Cir. 2021).

[10] Hollybeth G. Hakes, *Forcible Administration of Antipsychotic Medication to Pretrial Detainees–Federal Cases*, 188 A.L.R. FED. 285, 285 (2003).

[11] *Id.* at 673–74.

[12] *Compare* Washington v. Harper, 494 U.S. 210,236 (1990); *with* Sell v. United States, 539 U.S. 166, 185–86 (2003).

only interest is in a defendant's fair trial.[13] Nonetheless, this additional authority was only available where the defendant was deemed incompetent to stand trial or sufficiently dangerous at the time of the hearing.[14] Jurisprudence regarding the constitutional right of an incompetent individual to refuse unwanted medical treatment generally is murky, and the right of an incompetent prisoner to do so is even more suspect.[15] Courts have never diminished or overruled the constitutional right of a competent individual, however – even when that individual is a prisoner or detainee – to refuse unwanted medical treatment.[16] Nevertheless, in *United States v. Mitchell*, the United States Court of Appeals for the Eighth Circuit permitted the involuntary medication of a defendant who was competent at the time of the relevant hearing.[17] This holding defeats the rationale expressed in the governing precedent of *Sell v. United States* and impermissibly intrudes on the defendant's right, protected by the Due Process Clause of the Fifth Amendment, to be free from bodily intrusion by the government.[18]

Part II of this note introduces the case of Johnathan Mitchell, a man currently awaiting trial on a robbery charge in an Iowa prison. Part III analyzes information from several academic disciplines to present the complex framework associated with involuntary medication administration. Part IV breaks down the Eighth Circuit's decision in the instant case. Finally, Part V proposes a new procedure for courts to

[13] For a more complete discussion of Sell proceedings see for example, Elizabeth Bennion, *A Right to Remain Psychotic? A New Standard for Involuntary Treatment in Light of Current Science*, 47 LOY. L.A. L. REV. 251 (2013); John D. Burrow & Rhys Hester, *Dazed and Confused: Judiciary's Role in Sell-ing Psychotropic Drugs to Inmates and Detainees*, 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 3 (2010); Emily C. Lieberman, *Forced Medication and the Need to Protect the Rights of the Mentally Ill Criminal Defendant*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 479 (2007); Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants after Sell v. United States*, 13 Wm. & Mary Bill Rts. J. 897 (2005); Aaron R. Dias, *Just Say Yes: Sell v. United States and Inadequate Limitations on the Forced Medication of Defendants in Order to Render Competence for Trial*, 55 S.C. L. REV. 517 (2004); Cameron J. Jones, *Fit to be Tried: Bypassing Procedural Safeguards to Involuntarily Medicate Incompetent Defendants to Death*, 10 ROGER WILLIAMS U. L. REV. 165 (2004). When the government seeks to compel involuntary medication for the purpose of bringing a defendant to trial, however, there is no guarantee that such a trial would be, in fact, fair. Unfortunately, enumeration of this analysis is beyond the scope of this article.

[14] *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 136 (1992); *Harper*, 494 U.S. at 236.

[15] *See* Douglas S. Stransky, *Civil Commitment and The Right to Refuse Treatment: Resolving Disputes from a Due Process Perspective*, 50 U. MIAMI L. REV. 413, 425–26 (1996).

[16] *Id.* at 424–25.

[17] *Mitchell*, 11 F.4th at 674.

[18] *See* Sell v. United States, 539 U.S. 166, 169 (2003); U.S. CONST. amend. V.

undertake in such a circumstance that is more narrowly tailored to the interests at stake.

II. FACTS AND HOLDING

Jonathan Dewayne Mitchell has spent the last eleven years of his life moving through the criminal justice system because of a single incident.[19] Six of those years have been spent in cycles of competency and decompensation.[20] Due to the complex procedural history in this case, Section A will discuss the facts giving rise to the charged offense, and Section B will discuss the case's lengthy procedural history, leading to the Eighth Circuit's decision.

A. The Underlying Incident

Catherine Stickley was driving a cab through the dark streets of Cedar Rapids, Iowa, on April 29, 2011.[21] That night would be Stickley's last.[22] Johnathan Dewayne Mitchell, out on bond on an unrelated assault charge, was the only named suspect in Stickley's homicide and was quickly charged in state court for first-degree murder and first-degree robbery.[23] According to Mitchell's testimony, he came upon Stickley's body lying outside her cab.[24] At trial, he admitted that he did take money from the scene to buy crack cocaine but insisted that she was already dead when he found her.[25] The prosecution told a very different story, claiming that Mitchell needed money for drugs, and he killed Stickley to get it.[26] According to their version of events, Mitchell brutally stabbed Stickley eighteen times in the neck and head, then stole money from her, leaving behind a bloody fingerprint inside the cab.[27] Ultimately, Mitchell was acquitted of both charges in 2013.[28]

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[19] Trish Mehaffey, *Johnathan Mitchell Ruled Competent to Stand Trial in 2011 Cabdriver Robbery Case*, THE GAZETTE (Aug. 31, 2017, 6:19 pm) https://www.thegazette.com/news/johnathan-mitchell-ruled-competent-to-stand-trial-in-2011-cabdriver-robbery-case/ [https://perma.cc/CQS9-MTN2].

[20] *Mitchell*, 11 F.4th, at 670.

[21] Mehaffrey, *supra* note 18.

[22] Tristh Mehaffrey, *After Acquittal in Death of Cab Driver, Johnathan Mitchell Indicted in Cab Robbery*, THE GAZETTE (Apr. 26, 2016, 6:10 PM), https://www.thegazette.com/news/after-acquittal-in-death-of-cab-driver-johnathan-mitchell-indicted-in-cab-robbery/ [https://perma.cc/ZEG8-KH43].

[23] Mehaffey, *supra* note 18.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

In 2016, however, federal prosecutors brought new charges relating to the same series of events. A grand jury indicted Johnathan Mitchell for "robbery affecting commerce" in the United States District Court for the Northern District of Iowa.[29] If convicted, Mitchell could serve up to twenty years in prison.[30]

B. History of (In)Competence

Though federal prosecutors first charged Mitchell in 2016, he has not yet had his day in court.[31] Still, he has remained in custody due to persistent questions regarding his competency to stand trial.[32] Johnathan Mitchell has a history of challenges associated with mental illness.[33] He carries a dual diagnosis of Antisocial Personality Disorder and Schizophrenia; his long prison stay has exacerbated both of these conditions.[34] Getting a clear picture of the procedural record regarding Mitchell's competence is difficult because many of the court orders and transcripts are sealed pending a decision on Mitchell's petition for certiorari to the Supreme Court.[35] What is known, however, reveals the complicated logistical path the court has laid for Johnathan Mitchell in the five years since his indictment.

Mitchell's defense counsel first moved to have Mitchell's competency evaluated three months after his indictment in July 2016.[36] After a thirty-day evaluation period, Judge John Stuart Scoles, a magistrate judge on the United States District Court for the Northern District of Iowa, found Mitchell incompetent to stand trial, and Mitchell was taken to the

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[29] United States v. Mitchell, 11 F.4th 668, 670 (8th Cir. 2021). The Hobbs Act criminalizes robbery or extortion which affects or interferes with commerce. 18 U.S.C.A. §1951. It is founded on Congress's plenary power to regulate interstate commerce. Michael Munoz, *Taylor v. United States: In Federal Criminal Law, "Commerce Becomes Everything"*, 15 GEO. J.L. & PUB. POL'Y 475, 475 (2017). Mr. Mitchell is charged with Hobbs Act Robbery; thus the government must prove that: (1) "the defendant coerced the victim to part with property;" (2) the defendant wrongfully used "actual or threatened force, violence, or fear;" and (3) the coercion adversely affected interstate commerce. Elizabeth Williams, *Litigation of Hobbs Act*, 151 AM. JUR. TRIALS 231 §§ 3, 8 (originally published in 2017) (Oct. 2021 update). If convicted on this charge, Mitchell faces up to twenty years in prison. 18 U.S.C. § 1951(a).

[30] Williams, *supra* note 28, at § 29.

[31] *See Offender Information*, IOWA DEP'T CORR., https://doc.iowa.gov/offender/view/1106249 (last visited Mar. 30, 2022) [https://perma.cc/2CVT-BYG] (information current as of March 30, 2022).

[32] *Mitchell*, 11 F.4th at 670.

[33] *Id.*

[34] *Id.* at 670–72.

[35] Order Granting Motion to Seal the Record, United States v. Mitchell, No. 16-CR-0029-LTS-KEM (N.D. Iowa Nov. 15, 2021).

[36] *Mitchell*, 11 F.4th at 670.

Bureau of Prisons' ("BOP") medical facility in Springfield, Missouri, for competency restoration.[37] In July 2017, a psychologist at that facility reported to the court that Mitchell's competency had been restored, and. Judge Scoles deemed Mitchell competent to stand trial in September 2017.[38] Two months later, however, defense counsel again moved to have Mitchell's competency evaluated, reporting that Mitchell had begun engaging in "unusual behavior" at his new prison facility.[39] After another evaluation period, during which Mitchell was moved between various facilities within the BOP, in February of 2018, Judge Scoles again found Mitchell incompetent to stand trial.[40] A BOP psychologist opined that the time in transit between these facilities had contributed to Mitchell's further decompensation during this evaluation period.[41] After being deemed incompetent for a second time, Mitchell was committed to a different BOP medical facility in Butner, North Carolina, for competency restoration.[42] In July and October of 2018, BOP-Butner psychiatrists submitted reports to the court regarding Mitchell's status, finding that Mitchell remained incompetent throughout 2018.[43] In March 2019, the federal prosecutor in Mitchell's case requested a hearing under *Sell v. United States* to determine whether the court would authorize the involuntary administration of medication to restore Mitchell's competency.[44] On June 25, 2019, Judge Scoles held a competency hearing in which, upon hearing the evidence, he recommended that the United States' motion to involuntarily medicate Mitchell be denied because the Government had failed to prove it was necessary.[45] The District Court adopted Judge Scoles's recommendation in October 2019.[46]

In November 2019, the court received another report from a psychiatrist at BOP-Butner claiming that Mitchell was competent to stand trial but that his continued competency was contingent on his willingness to take his prescribed medications.[47] Mitchell's voluntary compliance level at the November 2019 report was approximately 60–65%.[48] On December 18, 2019, Michell was transferred from Butner, North Carolina, to the Linn County jail in Iowa, in one continuous fifteen-and-a-half-hour

[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 670–71.
[41] *Id.* at 670.
[42] *Id.* at 671.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

drive to attend a competency hearing.[49] On January 2, 2020, Mitchell was deemed competent to stand trial based on the November 2019 psychologist's report.[50]

Soon after, however, Mitchell's defense counsel requested a third competency hearing, as Mitchell's condition had rapidly deteriorated during his stay in the Linn County Jail.[51] On February 6, 2020, Mitchell was moved from the jail in Iowa to a federal detention facility in Seattle, Washington, for another thirty-day evaluation period.[52] In March, one of the psychologists at the facility reported to the court that Mitchell was still experiencing psychotic symptoms, evidenced by his poor hygiene, fluctuating medication compliance, and hoarding tendencies.[53] During this stay, Mitchell was voluntarily compliant with the administration of his daily medications sixty-two percent of the time.[54] Based on this report and "past forensic evaluations," Judge Scoles once again found Mitchell incompetent to stand trial on April 17, 2020, and Mitchell returned to BOP-Butner for competency restoration on July 28, 2019.[55] By September 2020, Mitchell had attained an overall compliance rate of 76.6% at the facility, and, on October 19, 2020, Judge Scoles found Mitchell competent to proceed.[56]

That same month, the Government filed its second motion for involuntary medication under *Sell*.[57] In November of 2020, a magistrate judge in Cedar Rapids, Iowa,[58] held the requested *Sell* hearing and, in late December of 2020, recommended the government's motion to involuntarily medicate Mitchell.[59] In late January of 2021, the District Court accepted the magistrate's recommendation.[60] The District Court then authorized and directed the BOP to involuntarily administer antipsychotic medication as deemed appropriate by Mitchell's treating psychiatrist until and during Mitchell's trial.[61] The order directed that

[49] *Id.*; GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "Butner, NC" and search destination field for "Linn County Correctional Center").

[50] *Mitchell*, 11 F.4th at 671.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Mitchell*, 11 F.4th at 672. Because the records in this case are sealed, it is unclear whether Judge Scoles presided on this matter.

[59] *Id.*

[60] *Id.*

[61] *Id.*

Mitchell's compliance rate not be permitted to fall below seventy-six percent per month.[62]

Mitchell appealed the order to the Eighth Circuit.[63] He also filed a motion to stay the trial court's order while he appealed the case. The trial court granted the stay.[64] Thus, Mitchell has not yet been medicated against his will.[65] Mitchell argued that the District Court had improperly applied the *Sell* test to this case because *Sell* was intended to apply to defendants deemed *incompetent* to stand trial on the date of the *Sell* hearing, but, on the date of the second Sell hearing, the judge had deemed Mitchell *competent* to stand trial.[66] However, the appellate court affirmed the trial court's decision and, as an issue of first impression, adopted the *Sell* analysis as to currently competent defendants when considering whether involuntary medication is necessary and appropriate to force a defendant to remain competent for trial.[67]

III. SOCIAL AND LEGAL BACKGROUND

The involuntary medication of criminal defendants exists at a crossroads of medicine and law and thus requires analysis of these two fields in concert.[68] Section A discusses due process generally, and Section B discusses due process in the context of prisoners and detainees; the right to refuse medication generally; and the rights of prisoners and detainees to refuse medication. Finally, Section C compares medical capacity and legal competency.

A. Due Process

Competency requirements for a defendant to stand trial are derived from constitutional due process standards.[69] Due process guarantees freedom from governmental intrusion on individual interests absent an

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[62] *Id.* at 670.

[63] United States v. Mitchell, No. CR16-0029-LTS (N.D. Iowa Jan. 22, 2021) (order granting stay of prior authorization to involuntarily medicate).

[64] *Id.*

[65] *Id.*

[66] *Mitchell*, 11 F.4th at 673.

[67] *Id.* at 673–74.

[68] *See, e.g.*, Kirk Heibrun & Greg M. Kramer, *Involuntary Medication, Trial Competence, and Clinical Dilemmas: Implications of* Sell v. United States *for Psychological Practice*, 36:5 PRO. PSYCH. RSCH. & PRAC. 459, 459 (2005).

[69] Drope v. Missouri, 420 U.S. 162, 172 (1975); *see also* Wayne R. LaFave et al., *Regulation by procedural due process after selective incorporation*, 1 CRIM. PROC. § 2.7(a) (4th ed. Nov. 2021 Update) ("Constitutional standards governing defendant's competence to stand trial, including the test for competency, the necessity for a competency hearing, and applicable standard of proof on that issue, also are a product of due process.").

established legal process.[70] This guarantee is found in the Due Process Clauses of the Fifth and Fourteenth Amendments, both of which "prohibit deprivation of 'life, liberty, or property, without due process of law.'"[71] Due process is a facially simple doctrine consisting of a two-step framework, evaluating first the applicability of the Due Process Clause and second, the adequacy of the process compared to what due process requires.[72] Whether and how much process is due will depend on the nature of the interest at stake.[73]

Procedural due process requirements protect liberty and property interests.[74] The requirements of procedural due process in civil cases – notice and an opportunity to be heard – ensure that the deprivation of a protected interest will not occur "unless the provided procedures are adequate to ensure that [the deprivation] will not be affected arbitrarily."[75] This determination focuses on the "appropriate level of procedural safeguards that must accompany governmental deprivation of the recognized interest."[76]

In *Mathews v. Eldrige*, the Supreme Court developed an practical test applicable to procedural due process claims to evaluate the adequacy of a given process in the civil context.[77] The test established three factors to which a court should look: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

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[70] RICHARD D. FRIEDMAN & JULIAN DAVIS MORTENSON, CONSTITUTIONAL LAW: AN INTEGRATED APPROACH 1267 (Found. Press, Doctrine & Prac. Series, 2021).

[71] *Id.* (citing U.S. CONST. amend. V, XIV).

[72] *See* Sandin v. Conner, 515 U.S. 472, 478 (1995) (citing Wolff v. McDonnell, 418 U.S. 539 (1974)) ("Much of Wolff's contribution to the landscape of prisoners' due process derived not from its description of liberty interests, but rather from its intricate balancing of prison management concerns with prisoners' liberty in determining the amount of process due.").

[73] Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

[74] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 (1972). "While this court has not attempted to define with exactness the liberty guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[75] Francis C. Amendola et al., *Procedural Due Process*, 16C C.J.S. CONST. L. § 1822 (Oct. 2021 update).

[76] John K. Edwards, *A Prisoner's Threshold for Procedural Due Process After* Sandin v. Conner*: Conservative Activism or Legitimate Compromise*, 33 HOUS. L. REV. 1521, 1532 (1997).

[77] Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 641 (2000).

additional or substitute procedural safeguards"; and (3) "the Government's interest," which will include an analysis of the "fiscal and administrative burdens" required by the additional or substitute procedures.[78]

The doctrinal approach to due process in the criminal context, however, is less clear.[79] The dominant approach, if one exists, requires that procedural due process requirements be "heavily influenced by historic tradition."[80] But precedent also reflects that, while historic tradition can give a procedure "a presumption of constitutionality…the presumption must surely be rebuttable."[81] Further complicating the matter, the Court has applied due process requirements differently at different stages of criminal proceedings.[82] While defendants are highly protected in trial settings, pretrial proceedings "are virtually unregulated constitutionally."[83]

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[78] *Mathews*, 424 U.S. at 335. It is a matter of debate whether *Mathews* can be applied in the criminal context. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 575–76 (2004) (Scalia, J., dissenting) ("It claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer."). The *Medina* majority concluded that due process challenges to state criminal prosecutions require a narrower inquiry. *Medina v. California*, 505 U.S. 437, 445–46 (1992). Because *U.S. v. Mitchell* is a federal criminal prosecution, however, it is not clear whether an evaluation of the *Mathews* factors would be appropriate. Writing in concurrence to *Medina*, Justice O'Connor wrote that "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases." Medina v. Massachusetts, 505 U.S. 437, 453 (1992) (O'Connor, J., concurring) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985), where the Court applied the Mathews balancing test in a case concerning criminal procedure). Since *Mathews* is the only practical guidance the Court has given to evaluate whether a procedure affords sufficient due process, this article will use it as a reference point.

[79] Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 14 (2006) ("In criminal cases, by contract, there is no clear or uniform doctrinal approach to procedural due process claims.").

[80] *Id.* at 15; *see* Medina v. California, 505 U.S. 437, 446 (1992); Montana v. Egelhoff, 518 U.S. 37, 43–44 (1996); Cooper v. Oklahoma, 517 U.S. 348, 355–56 (1996); Herrera v. Collins, 506 U.S. 390, 407–08 (1993).

[81] *Medina*, 505 U.S. at 454 (O'Connor, J., concurring) ("Against the historical status quo, I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, consideration much like those we evaluated in *Mathews*. Any less charitable reading of the Corut's opinion would put it at odds with many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the test of the Constitution.").

[82] Kuckes, *supra* note 78, at 17.

[83] "The net result of the Court's criminal due process doctrines, as relevant here, is that the pretrial stages of a criminal proceeding are virtually unregulated constitutionally, even though serious deprivations may be involved, while the criminal trial itself is attended by extensive procedural protections, even though criminal trials

As to state criminal trials, the Court adopted the *Patterson* approach, holding that a procedure does not violate due process requirements "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[84] Apart from historical practice, a court may also consider "fundamental fairness" in determining whether a procedure violates due process.[85] This alternate pathway reflects the Court's modern conception of due process requirements as being flexible and evolving.[86]

Substantive due process affords additional protection to certain fundamental rights, such that no amount of procedure can justify their deprivation. This doctrine reflects the line of Supreme Court precedent that arose in the late twentieth century holding that the Due Process Clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."[87] Substantive due process, then, asks a different question: is "there is a sufficient substantive justification" for such a deprivation of a person's life, liberty, or property?[88]

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are rarely held. For litigants who go to trial, the criminal model is highly protective. But for those who do not, the criminal model is decidedly lacking in constitutional protections when compared with comparable stages of civil litigation." *Id.* Zina Makar argues that this is a direct result of the Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). There, the Court took an absolutist approach to procedural protections at trial which had the unintended effect of placing trials on due process pedestals. *Melendez-Diaz*, 557 U.S. at 325; Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425, 435 (2018). "Counterintuitively, it had the effect of watering down procedural protections at the stages surrounding the trial in an effort to keep costs down based on the assumption that a trial would commence." Makar, *supra* note 82.

[84] *Medina*, 505 U.S. at 445 (citing Patterson v. New York, 432 U.S. 197 (1977)). The holding was primarily dependent on federalism concerns since "the States have considerable expertise in matters of criminal procedure and the criminal process . . . ." *Id.*; *see also* Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952).

[85] Dowling v. United States, 493 U.S. 342, 352 (1990); *see also Medina*, 505 U.S. at 448 ("Discerning no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process, we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation.").

[86] Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 361–62 (2001) ("This conception of a flexible, evolving due process meant that history did not invariably establish either a floor or a ceiling for due process.").

[87] Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986); Reno v. Flores, 507 U.S. 292, 301–02 (1993); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[88] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

B. Due Process in Context

Due process rights must be evaluated in context. The content and extent of due process rights can depend on numerous factors, including a person's status as either a prisoner or a detainee.[89] The first subsection compares detainees and prisoners. The second subsection discusses the general population's right to refuse medical treatment. The third subsection details a detainee's right to refuse medical treatment and includes a specific look at their right to refuse unwanted antipsychotic medication.

1. A Detainee is Not a Prisoner

Incarcerated individuals maintain some, though not all, of their Constitutional rights.[90] While prisoners and detainees undoubtedly maintain their rights to procedural due process, substantive due process rights are not as clearly preserved.[91] The Supreme Court has held that convicted prisoners "enjoy freedom of speech and religion under the First and Fourteenth Amendments[;]… are protected against invidious discrimination based on race[;]… and may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law."[92] The Court has maintained, however, that these rights may be subject to restrictions and limitations to preserve a prison institution's security and "internal order."[93]

The Court has also identified a potential difference between convicted prisoners and pretrial detainees.[94] At a minimum, pretrial

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[89] *Matthews*, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) ("'Due process is flexible and calls for such procedural protections as the particular situation demands.'").

[90] *See* Hudson v. Palmer, 468 U.S. 517, 524 (1984) ("However, while persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights."); *see also* Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("We have held that convicted prisoners do not forfeit all constitutional protects by reason of their conviction and confinement in prison.").

[91] The Court has addressed prisoner's rights in what can be classified as four categories: (1) right to access the courts; (2) cruel and unusual punishment; (3) procedural due process issues; and (4) individual rights (which can include evaluation of the liberty interests prisoners maintain which could become the subject of a substantive due process violation). Jack E. Call, *The Supreme Court and Prisoner's Rights*, 59 FED. PROB. 36, 41–42 (1995). Courts have been least protective of prisoners in cases decided under the fourth category. *Id.*

[92] *Bell*, 441 U.S. at 545 (first citing Meachum v. Fano, 427 U.S. 215 (1976); then citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

[93] *Bell*, 441 U.S. at 546.

[94] *See id.* at 523 (pretrial detainees are "those persons who have been charged with a crime but who have not yet been tried on the charge").

detainees "retain at least those constitutional rights that… are enjoyed by convicted prisoners."[95] The Court has gone further, however, finding that "pretrial detainees, unlike convicted prisoners, cannot be punished at all."[96]

2. The Right to Refuse Treatment Generally

The Supreme Court has recognized that a competent individual has a fundamental right to refuse unwanted medical treatment.[97] This right is protected by the collection of: (1) "religious freedom protected by the First Amendment;" (2) right to privacy jurisprudence;[98] and (3) an individual's liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[99] For competent individuals, this right to refuse unwanted care is "virtually unlimited," even when the care

[95] *Id.* at 545.

[96] Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015) (first citing Ingraham v. Wright, 430 U.S. 651, 654 n.40, 671–72, (1977); then citing Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)); *see also* Nelson v. Colorado, 137 S.Ct. 1249, 1255 n. 8 (2017) (citing *Bell*, 441 U.S. at 535–37) ("Our opinion in that case recognized that under the Due Process Clause, a detainee who "has not been adjudged guilty of any crime may not be punished. *Wolfish* held only that the presumption does not prevent the government from detaining a defendant to ensure his presence at trial so long as the conditions and restrictions of his detention do not amount to punishment, or otherwise violate the Constitution.").

[97] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law."); *see also* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 278 (1990); Thor v. Super. Ct., 5 Cal.4th 725, 735 (1993) (emphasizing that the right to refuse treatment is predicated on "the long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination").

[98] "Courts have cast this right in various terms, often depending on the type of proposed governmental action, including a liberty interest in bodily integrity, freedom from restraint, personal security, or as an aspect of the right to privacy." Stransky, *supra* note 14. Whether the right to privacy does in fact support a right to bodily integrity and whether a right to privacy even exists is beyond the scope of this article. *See, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007); Christopher Quinn, *The Right to Refuse Medical Treatment or to Direct the Course of Medical Treatment: Where Should Inmate Autonomy Begin and End?*, 35 NEW ENGLAND J. CRIM. & CIV. CONFINEMENT 453 (2009); Eugene McCarthy, *In Defense of* Griswold v. Connecticut*: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLIAMETTE L. REV. 335 (2018).

[99] Peter Wood, *The Right to Refuse Medical Treatment: Courts' Disparate Treatment of Incarcerated Patients*, 112 PENN. ST. L. REV. 1167, 1167–68 (2008).

"would be medically effective and indeed even lifesaving."[100] From the perspective of biomedical ethics, however, both competent and incompetent individuals retain their right of refusal for medical treatment.[101]

In the context of private medical treatment decisions, "the legal counterpart to autonomy is informed consent."[102] Informed consent originated from the notion that a physician committed an actionable assault when performing medical treatment on a patient without the patient's consent.[103] The doctrine of informed consent imposes a duty on physicians to inform their patients of all material information about the treatment to be performed, the risks involved, and the alternatives to the contemplated treatment.[104]

3. Meet in the Middle?: A Detainee's Right to Refuse Treatment

Prisoners and detainees retain their constitutional rights to due process.[105] In *Washington v. Harper*, the Court explicitly addressed the involuntary administration of antipsychotics to a currently competent prisoner.[106] The Court determined that Harper had a "fundamental liberty interest deserving the highest order of protection."[107] That interest was outweighed in this case only by the physical danger Harper posed in the prison setting.[108]

Thirteen years later, in *Sell v. United States*, the Supreme Court determined when, if ever, the state could involuntarily medicate a pretrial detainee for the sole purpose of rendering that defendant competent to

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[100] Robert D. Truog, M.D., *Patients and Doctors – The Evolution of a Relationship*, 366 NEW ENG. J. MED. 581, 582 (2012).

[101] Kathleen Knepper, *The Importance of Establishing Competence in Cases Involving the Involuntary Administration of Psychotropic Medications*, 20 L. & PSYCHOLOGY REV. 97, 104 (1996). This article is limited in scope and thus will not address the right of incompetent individuals to refuse medical treatment. Because Mr. Mitchell was currently competent, only the rights of competent individuals are relevant for purposes of this article. This statement is noted due to the cyclical nature of Mr. Mitchell's competency.

[102] Samantha Weyrauch, *Decision Making for Incompetent Patients: Who Decides and by What Standards?*, 35 TULSA L.J. 765, 769 (2000).

[103] Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129–30 (1914) (Justice Cardozo carved out an exception "in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.").

[104] Paul Jerome McLaughlin, Jr., *Can They Do That?: The Limits of Governmental Power Over Medical Treatment*, 37 J. LEGAL MED. 371, 378 (2017).

[105] *Your Rights in Prison*, JAILHOUSE LAWS. HANDBOOK, https://www.jailhouselaw.org/your-rights-prison [https://perma.cc/LPQ9-U6ZS] (last visited Mar. 30, 2022).

[106] Washington v. Harper, 494 U.S. 210, 213 (1990).

[107] *Id.* at 241 (1990) (Stevens, J., concurring).

[108] *Id.* at 236 (majority opinion).

stand trial.[109] Finding that the defendant, Charles Sell, was not dangerous, the Court, nevertheless, held that the state may authorize the involuntary medication of a non-dangerous inmate under some circumstances.[110] The Court held that such an order was permissible only in rare circumstances,[111] and formulated a four-pronged test for determining when such circumstances exist.[112] The court must first determine that important government interests are at stake, including the government's interest in bringing a serious crime to trial.[113] Second, the proposed medication must be both substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere with the defendant's right to a fair trial.[114] Third, the court must evaluate any less-intrusive treatments and determine that these alternatives are unlikely to achieve substantially similar results.[115] Fourth and finally, the involuntary administration of the proposed medication(s) must be medically appropriate, which includes a consideration of whether such involuntary administration is in the defendant's own best interest in their role as a patient and in light of their medical condition.[116]

C. The Complicated Concept of Competence

"Competency" requires that an individual possess "the requisite natural or legal qualifications to engage in a given endeavor."[117] Whether an individual is sufficiently competent in a given circumstance is a question for the relevant court.[118] Determinations of competency "are typically situation specific, pertaining to only a single issue or decision."[119] Subsection one will detail the subtle distinction between competency and

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[109] Sell v. United States, 539 U.S. 166, 169 (2003).

[110] *Id.* at 185–86.

[111] *Id.* at 169.

[112] *Id.* at 180–81. The Court noted that a court need not apply this standard if involuntary medication could be authorized by another purpose, "such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's interests where refusal to take drugs puts his health gravely at risk. *Id.* at 181–82.

[113] *Id.* at 180; Ari U. Etheridge & John R. Chamberlain, *Application of Sell v. United States*, 34 J. AM. ACAD. PSYCHIATRY & L. 248, 248 (2006) (summarizing the factors enumerated in *Sell*).

[114] *Sell*, 539 U.S. at 181; Etheridge & Chamberlain, *supra* note 112, at 248.

[115] *Sell*, 539 U.S. at 181; Etheridge & Chamberlain, *supra* note 112, at 248.

[116] *Sell*, 539 U.S. at 181–82; Etheridge & Chamberlain, *supra* note 112, at 248.

[117] Raphael J. Leo, M.D., *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, 1 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 131, 131 (1999) (internal quotations omitted).

[118] *Id.*

[119] Barry Rosenfeld, *The Psychology of Competence and Informed Consent: Understanding Decision-Making with Regard to Clinical Research*, 30 FORDHAM URBAN L.J. 173, 176 (2002).

capacity. Subsection two will discuss the various competency evaluations and their standards.

1. Competency and Capacity Compared

Competence is a legal term of art employed and determined by a court.[120] These legal conclusions are only partially based on clinical input.[121] Indeed, competency determinations are ultimately value-based, balancing values of paternalism, autonomy, and nondiscrimination to draw a line between "those who may exercise autonomous choices and those on behalf of whom… decisions will be made."[122] On the other hand, capacity is determined entirely by a physician in the clinical context.[123] While the legal system takes extreme precautions to protect individuals deemed incompetent,[124] "[p]hysicians tend to underdiagnose lack of capacity in their patients."[125]

2. Standards of Competence

A criminal defendant is deemed competent to stand trial if they have: (1) a "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding," and (2) a rational and factual understanding of the proceedings against them.[126] A defendant must communicate with their lawyer to assist in mounting a defense.[127] This requires an understanding of trial-related concepts, like the nature of the charges against them, the possible outcomes of the prosecution, and the risks associated with actions like testifying in their own defense.[128]

Competence to make medical decisions is different from competence to stand trial.[129] Indeed, courts have ruled that a finding that a defendant

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[120] Craig Barstow, MD et al., *Evaluating Medical Decision-Making Capacity in Practice*, 98:1 AM. ACAD. OF FAM. PHYSICIANS 40, 40 (2018).

[121] Rosenfeld, *supra* note 118, at 176.

[122] Elyn R. Saks & Stephen H. Behnke, *Competency to Decide on Treatment and Research: Macarthur and Beyond*, 10 J. CONTEMP. LEGAL ISSUES 103, 104–05 (1999).

[123] Barstow et al., *supra* note 119, at 40.

[124] Competency, in the context of this article, refers to the competency to stand trial.

[125] Barstow et al., *supra* note 119, at 41.

[126] Dusky v. United States, 362 U.S. 402, 402 (1960) (internal citations omitted).

[127] Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 264–65 (2009).

[128] *Id.*

[129] United States v. Charters, 829 F.2d 479, 495 (4th Cir. 1987) ("The court equated legal competence…with medical competence…It is plain that these two capabilities are not the same."); *see also* Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561, 579 (2012) ("Tests to determine

is incompetent to stand trial is not dispositive of their medical competency.[130] There is no uniform approach to determining competency to make medical decisions, but most jurisdictions use some combination of these four factors:[131] (1) communicating a choice;[132] (2) understanding relevant information;[133] (3) appreciating attendant consequences and implications;[134] and (4) rationally manipulating information.[135] These standards, however, paint competence in black and white, drawing a sharp line in the sand. In reality, many patients will exist "on the borderline of mental competence."[136]

IV. INSTANT DECISION

Judges Loken, Kelly, and Erickson of the Eighth Circuit affirmed the District Court's order authorizing the involuntary medication of defendant Johnathan Mitchell.[137] The court held that the four-part *Sell* standard applied in all cases where the government seeks involuntary medication of a criminal defendant,[138] regardless of whether that defendant is deemed competent or incompetent to stand trial.[139]

Mitchell argued that *Sell* is inapplicable in this case because the *Sell* standard was intended to be constrained to situations in which the defendant is currently incompetent.[140] Mitchell emphasized the use of

competence to make medical treatment decisions assess an individual's capacity for rational decision making.").

[130] *See, e.g.*, *Charters*, 829 F.2d at 495.

[131] Jessica Wilen Berg, J.D. et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 351 (1996) ("[These] components are actually reflected in, and in fact drawn from the law.").

[132] *Id.* at 352. Inability to reach or communicate a decision "is demonstrated by a patient who simply cannot make up [their] mind or vacillates to such a degree that it is impossible to implement a treatment choice." *Id.*

[133] *Id.* at 353–54. Understanding, as separated from appreciation, "is simply the ability to comprehend the concepts involved . . . it does not require the patient to comprehend the situation as a whole." *Id.*

[134] *Id.* at 355–57. Appreciation involves applying this understood information to one's own circumstances. *Id.* at 355. The patient must be able to "appreciate the nature of the situation and the likely effect of treatment." *Id.*

[135] *Id.* at 357. The rational manipulation criterion "addresses the patient's reasoning capacity or ability to employ logical thought processes to compare the risks and benefits of treatment options;" it is concerned more with the decision making process than with the particular outcome reached. *Id.*

[136] Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 IND. L.J. 1619, 1622 (2008).

[137] United States v. Mitchell, 11 F.4th 668, 670 (8th Cir. 2021).

[138] *Id.* at 673–74.

[139] *Id.* at 673.

[140] *Id.*

"render" in the standard, arguing that incompetence was a necessary precondition to applying the *Sell* test.[141] The court, however, took a different approach to the word "render," holding that the governmental interest of "rendering the defendant competent to stand trial" may include the involuntary administration of medication to maintain the defendant's competency.[142]

The judges were concerned with preventing a situation like Mitchell's, describing him as "a defendant who cycles in and out of competency indefinitely and who may never be able to stand trial if the cycle continues."[143] They rationalized that adopting a rule otherwise would allow a defendant who "has regained competency for some period of time, but who is unable to maintain it, [to] frustrate… an important governmental interest."[144] The opinion holds, on an issue of first impression, that the District Court had the authority, pursuant to *Sell*, to order the involuntary administration of antipsychotic medications to Mitchell to "render and maintain his competency for trial," even though he was deemed competent at the time that the relevant *Sell* hearing took place.[145]

The opinion then applied the *Sell* standard to the case at bar.[146] Mitchell argued that the District Court had erred in finding that the involuntary medication is necessary to further the State's interests in the case.[147] The court emphasized the testimony of a psychiatrist, Dr. Graddy, who testified that therapy and supportive housing are beneficial in treating schizophrenia but deemed antipsychotic medication the "best" treatment.[148] In analyzing whether such intrusive steps are necessary, the court rejected the threat of a contempt order as a viable less-intrusive alternative to involuntary medication, basing their determination on Mitchell's financially impoverished state and his continued stay in federal custody regardless of such an order.[149] The court then implicitly determined that Mitchell would not continue to take his medication voluntarily under any circumstances, and thus found that the order was necessary.[150]

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 673.
[145] *Id.*
[146] *Id.* at 674.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *See id.* ("Mitchell's sporadic compliance also supports the district court's finding that 'Mitchell has demonstrated a pattern of failing to voluntarily maintain a medication regiment upon becoming competent.'").

The court ultimately held that the *Sell* standard broadly applied to all cases, determining the circumstances in which the government may obtain a court order to involuntarily administer medication to a defendant where competency for trial is the sole governmental interest at stake.[151] Applying the *Sell* standard, the court held that the District Court correctly found that involuntary administration of antipsychotic medications to Johnathan Mitchell was "necessary to further the government's interests."[152]

V. COMMENT

Sell v. United States has been cited at least 662 times since the opinion was handed down in 2003,[153] despite the justices' stated intent that the test be used only in certain, rare instances.[154] The Eighth Circuit's decision in *U.S. v. Mitchell* would have courts apply the *Sell* standard in even more circumstances than the Supreme Court originally predicted or intended.[155] This expansion is impermissible for defendants like Mitchell, who have been deemed competent to stand trial. The state and the court, however, point to an important justification to use *Sell*: the desire not to waste judicial resources by playing a timing game with cyclically competent defendants.[156] Nevertheless, this interest could be better served by using a different procedure and a different competency standard. The *Sell* standard did not provide Mitchell due process of law in this case. In cases involving cyclically competent defendants, courts should alter their core inquiry from whether the defendant is competent to stand trial to whether the defendant is competent to refuse medication.

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[151] *Id.* at 673–74.

[152] *Id.* at 674.

[153] Westlaw citing references of cases citing *Sell v. U.S.* for at least one of seven relevant headnotes: (1) constitutional law, administration of drugs; (2) mental health, forced medication is an irreversible harm; (3) mental health, must weigh the facts against the government's interest in prosecution; (4) mental health, *Sell*'s standard for allowing involuntary medication; (5) mental health, no less intrusive means; (6) mental health, drugs must be in defendant's medical interest; (7) mental health, unless defendant is dangerous the court must weigh the *Sell* factors. Sell v. U.S., 539 U.S. 166 (2003).

[154] *Sell*, 539 U.S. at 180 ("This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare.").

[155] *Id.*; *Mitchell*, 11 F.4th at 668.

[156] *Mitchell*, 11 F.4th at 674.

A. Mitchell Did Not Receive Due Process of Law

Due process is a two-step inquiry.[157] Testing its sufficiency requires a court to weigh the individual's private interests against the government's interest.[158] Here, the Eighth Circuit found that Mitchell's private interest in bodily autonomy did not outweigh the government's interest in bringing criminal defendants to trial.[159] The court, however, did not give Mitchell's private interest in being free of bodily intrusion sufficient analytical weight, which allowed the state's interest to prevail. Alternatively, even if the court did give proper weight to Mitchell's interest, the procedure itself did not meet procedural due process requirements.

1. The Court Undervalued Mitchell's Interest in Bodily Autonomy

The United States has long recognized the extreme importance of the right to bodily integrity and autonomy.[160] Whether recognized under right-to-privacy jurisprudence or as a significant liberty interest, the right to refuse unwanted medical treatment is a constitutionally protected interest.[161] This right, however, is not the same in both competent and incompetent persons and has only been recognized in competent individuals.[162] In *Mitchell*, the Eighth Circuit glossed over this distinction, pointing straight to the government interest at stake.[163] By pointing to the government interest, the court did not consider the weightiness of the private interest at stake – a competent criminal defendant's right to bodily autonomy.[164] Law treats competent individuals and incompetent

[157] Cruzan by Cruzan v. Dir. Mo. Dept. of Health, 497 U.S. 261, 279 (1990) ("But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'") (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

[158] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) ("'(D)ue process is flexible and calls for such procedural protections as the particular situation demands.'").

[159] *Mitchell*, 11 F.4th at 674.

[160] *See, e.g.*, Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). This right is arguably so deeply rooted in this nation's jurisprudence that the right has become fundamental. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). This argument, however, is beyond the scope of this article.

[161] "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Cruzan by Cruzan v. Dir. Mo. Dept. of Health, 497 U.S. 261, 278 (1990).

[162] *See id.* at 279–80.

[163] *Mitchell*, 11 F.4th at 673.

[164] *Id.*; *see Cruzan*, 497 U.S. at 279.

individuals differently – more willingly overriding decisions made by incompetent persons and treating as absolute decisions made by competent persons.[165] Medical practice, too, does not extend "the principle of autonomy" to incompetent persons.[166] The *Sell* standard was created to weigh the interests of a currently incompetent individual.[167] It seems likely, then, that a currently competent individual's decision would be granted more weight in a *Sell*-like balancing act.

2. Alternatively, More Process is Due

Even if the court did accurately value the interest at stake, however, the existing procedures are insufficient to protect to the due process rights of a defendant like Mitchell.[168] The court seemed especially hesitant to adopt a bright-line rule disallowing *Sell*'s application when the defendant has been deemed competent.[169] If historical precedent is the controlling standard, as the *Medina* court suggested, a *Sell* hearing has never allowed the State to medicate a currently competent defendant.[170] Indeed, a currently competent individual's decision to refuse medical treatment has historically been respected as part of the common law right against bodily intrusions.[171] This historical tradition alone should be sufficient, then, to show that more procedural protections are required.

Defendants like Mitchell are not uncommon, however.[172] And the State's contention that getting the timing "just right" to hold a proper *Sell*

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[165] Leo, *supra* note 116 ("…an adjudication of incompetency effectively denies an individual autonomy to make decisions…"); *see also* Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILLINOIS L. REV. 1059, 1126 (2014) ("Forced bodily intrusions most commonly occur in three contexts: when the recipient is sick, mentally incompetent, or suspected of a crime.").

[166] If a person is deemed incompetent to make medical decisions, a surrogate decision maker is appointed. B. Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 MED. PRINCIPLES & PRAC. 17, 19 (2021).

[167] The Court's reasoning is predicated on the fact that Dr. Sell was in fact incompetent to stand trial at the time of the proceedings. If Dr. Sell had been competent to stand trial at the time, the State would have no interest to justify involuntary medication since Sell's guilt or innocence could be adjudicated. *See* Sell v. United States, 539 U.S. 166, 180–81 (2003).

[168] This section responds to the potential counterargument that the criminal context, as opposed to the civil context, creates a sufficiently compelling government interest.

[169] *See Mitchell*, 11 F.4th at 674.

[170] *See* Transcript of Oral Argument, *Mitchell*, 11 F.4th 668 (No. 21-1174), 2021 WL 3619937.

[171] Borgmann, *supra* note 164 (The Court declared, "No right is held more sacred, or is more carefully guarded by the common than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891)).

[172] *See* Transcript of Oral Argument, *Mitchell*, *supra* note 169.

hearing would waste already-limited judicial resources is a valid one.[173] So if a *Sell* hearing does not provide adequate due process protections, what would?

Additional procedures are justified by the practical test announced in *Mathews*.[174] The affected private interest is certainly significant, if not fundamental. Additional procedures are, in fact, necessary in cases of cyclical competency since these cases are more likely to involve individuals with marginal competency.[175] Even *Sell* points toward using additional procedures since a less restrictive alternative offers more narrowly tailored results: applying a cognitive model to competency in the criminal context.[176]

B. In the Case of Cyclical Competency: A Proposed Standard

Where a defendant is currently deemed competent to stand trial, the government should be required to establish by clear and convincing evidence that the defendant, more likely than not, will decompensate without continued use of antipsychotic medication if the government

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[173] *Id.*

[174] *Mathews* requires a court to consider three factors: "(1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[175] Lawyers and clinicians need to be more cautious with marginally competent individuals to adequately safeguard their constitutional rights. *See* Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 IND. L.J. 1619, 1626 (2008). "Some individuals will have their decision-making authority unjustly restricted while others will not receive adequate protections." Andrew Peterson et al., *Supported Decision Making with People at the Margins of Autonomy*, 21 AM. J. BIOETHICS 4, 6 (2021).

[176] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 98 (2012) ("With changes in medical practice, psychology, and a burgeoning legal framework of civil rights and procedural due process, we have moved to a functional, cognitive understanding of incapacity. This current paradigm leads to 'tailored' or limited guardianships, which represent the least restrictive means of protection, the promotion of greater autonomy for the incapacitated person, and robust procedural protections in the determination of incapacity . . .."). A cognitive model focuses on an individual's ability to make certain discrete decisions. Relevant here is the defendant's ability to competently refuse medication. If *Sell* continues to apply, then whether a defendant has the right to refuse unwanted medication is tied to a determination of whether that defendant is competent to stand trial. A cognitive model, on the other hand, considers competency to refuse medication as a different evaluation than competency to stand trial. *See id.* at 94–95, 98.

wishes to pursue a court order authorizing involuntary medication.[177] If the Government meets this burden, the court should order an evaluation of the defendant's capacity to make an informed judgment about the proposed medical treatment.[178] Based on the capacity evaluation and other relevant evidence, the court would determine whether the defendant is competent to make an informed judgment regarding the proposed medical treatment. This determination should be made considering three elements, requiring that the defendant be able to: (1) communicate their treatment choice; (2) understand and appreciate the relevant circumstances; and (3) rationally relate their choice to the circumstances.[179]

If the court decides that the defendant is competent for this purpose, and so long as the defendant, being fully informed, wishes to reaffirm their refusal of the antipsychotic medication, the court should be required to respect the defendant's choice to refuse antipsychotic medication.[180] This would respect the right promulgated in *Cruzan* preserving a competent individual's right to refuse unwanted medical treatment.[181] This would also respect the distinction between prisoners and detainees which allows detainees to invoke Due Process Clause protections to prevent further infringement on their rights to life and liberty.[182] Since Mitchell is currently competent and his guilt or innocence has not yet been determined for the crime for which he is being detained, Mitchell's decisions for his own medical treatment should be given the utmost respect.

If, on the other hand, the court determines that the defendant is incompetent to make such decisions, the court should proceed to appoint a guardian ad litem to represent the defendant's interests as a potential

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[177] This initial standard serves a gatekeeping role to protect unwarranted attempts by the government to obtain such an order. It is not an onerous burden on the government, however, and remains in line with cases like *Cooper v. Oklahoma*, which assert that standards in determining competency in the criminal context ought to be more protective of the defendant's rights. 517 U.S. 348, 362 (1996); *see also* Barstow et al., *supra* note 119, at 45 ("Determining that a patient lacks capacity and restricting [their] autonomy require clear and convincing evidence that the patient's decision will cause unintended and irreparable harm. If there is uncertainty after conducting a full capacity evaluation, the final judgment should err on the patient's side."). "This court has mandated an intermediate standard of proof– 'clear and convincing evidence'– when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

[178] This has also been called the competency to refuse medical treatment. Barstow, *supra* note 119, at 40. This is different than a capacity determination, since it would be done by a court rather than a clinician. *Id.*

[179] *See supra* Part III (C)(2). Here, the second and third elements from the above section are combined into a single element for simplicity.

[180] Cruzan by Cruzan v. Dir. Mo. Dept. of Health, 497 U.S. 261, 279 (1990).

[181] *Id.*

[182] Bell v. Wolfish, 441 U.S. 520, 545 (1979).

patient.[183] The guardian ad litem would investigate and report their findings to the court.[184] Using arguments by the defense counsel and the recommendation of the guardian ad litem, the court would then decide whether or not to authorize involuntary medication on a "best interests" standard.[185]

This proposed approach meets the procedural due process requirements laid out in *Mathews v. Eldridge*. *Mathews* requires evaluation of additional procedures by considering three factors: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of other procedural safeguards; and (3) the government's interest, which includes fiscal and administrative concerns.[186] Courts should follow two additional procedures: holding a hearing to legally determine the defendant's competency to refuse medication and, if necessary, the appointment of a guardian ad litem to serve as a surrogate decision-maker.

Mitchell's private interest has not changed and remains a significant liberty interest.[187] The risk that the *Sell* standard could erroneously deprive him of this liberty interest is significant since the *Sell* standard was never intended to allow the involuntary medication of a competent defendant.[188] These proposed procedures give the private interest additional protection in a different evaluation of competency. At the same time, they consider the government's interests in bringing defendants to trial and conserving judicial resources by allowing involuntary medication to be administered in some, although scarce, circumstances. The cyclical nature of the defendant's competency history even weighs in favor of these additional procedures since they promise a definite end to the defendant's journey

[183] Fredrick E. Vars, *The Value of a Guardian Ad Litem in a Sell Proceeding*, 43 THE CHAMPION 16 (2019).

[184] *See* United States v. Weston, 255 F.3d 878 (D.C. Cir. 2001); Vars, *supra* note 182 and Sarah E. Wolf, *The Mentally Incompetent Criminal Defendant: United States v. Weston and the Need for a Guardian Ad Litem*, 10 GEO. MASON L. REV. 1071 (2002), for a more thorough discussion of the role of a guardian ad litem in this type of context.

[185] This means that the court will authorize involuntary medication if the medication is, all things considered, in the defendant's best interest. *See* Donna S. Harkness, *"Whenever Justice Requires": Examining the Elusive Role of Guardian ad Litem for Adults with Diminished Capacity*, 8 MARQUETTE ELDER'S ADVISOR 1, 27 (2006).

[186] Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

[187] *See supra* Part V (A)(1). For further discussion of the importance of this liberty interest, including its potential and probable effects on the defendant's right to a fair trial see for example, Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 SAN DIEGO L. REV. 161, 191–96 (2009) and Brenda A. Likavec, *Unforeseen Side Effects: The Impact of Forcibly Medicating Criminal Defendants on Sixth Amendment Rights*, 41 VAL. U. L. REV. 455, 484–91 (2006).

[188] *See* Sell v. United States, 539 U.S. 166, 180–81 (2003).

through the overburdened competency evaluation system. And the use of a guardian ad litem specifically is not unduly burdensome here since their use should be relatively rare, and the probate courts already regularly employ these individuals.[189] Therefore, the proposed procedures are likely sufficient to satisfy due process requirements.

VI. CONCLUSION

Johnathan Mitchell had been deemed competent to stand trial when a judge ordered that he be involuntarily medicated.[190] The circuit court, in this case, nevertheless properly applied the standard enumerated in *Sell v. United States*, a case in which a court had determined that the defendant was incompetent to stand trial at the time of medication.[191] The *Sell* standard, however, was erroneously applied in Mr. Mitchell's case at the appellate level because the court did not, and cannot feasibly, take into account the full scope of the liberty interests at stake.[192]

Even if the government did establish a sufficiently compelling state interest, more process was due in this case. The court should employ two additional procedures to help solve the problems created by continuous cycles of decompensation in criminal defendants: a hearing to determine competency to refuse medication and, if a defendant is deemed incompetent to do so, appointment of a guardian ad litem to act as a surrogate decisionmaker. Criminal defendants' rights warrant the utmost protection in our justice system, and these additional procedures are needed to safeguard the rights of those defendants.

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[189] *See, e.g.*, John D. Kershman, *What is a guardian ad litem in Missouri? And, what is the role of the guardian ad litem?*, AHEARN KERSHMAN LLC BLOG (July 13, 2021), https://www.ak-stl.com/what-is-a-guardian-ad-litem-in-missouri--what-is-the-role-of-the-guardian-ad-litem [https://perma.cc/27BG-LZGE].

[190] United States v. Mitchell, 11 F.4th 668, 671–72 (2021).

[191] *Id.* at 673–74; *see* Sell v. United States, 539 U.S. 166, 180–81 (2003).

[192] *See generally Mitchell*, 11 F.4th 668, 673–74 (2021).