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Sixth Amendment--Due Process on Drugs: The Implications of Forcibly Medicating Pretrial Detainees with Antipsychotic Drugs

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SIXTH AMENDMENT—DUE PROCESS ON DRUGS: THE IMPLICATIONS OF FORCIBLY MEDICATING PRETRIAL DETAINEES WITH ANTIPSYCHOTIC DRUGS

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

> Your brain is your own. Intelligent, open collaboration can expand your mind—with words and with drugs. Only ignorance and misinformation can allow someone else to control it—with their own words or with their own drugs or with their imaginary fears.
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> —TIMOTHY LEARY, THE POLITICS OF ECSTASY 63 (1965)

I. INTRODUCTION

In *Riggins v. Nevada*,[1] the United States Supreme Court held that a person detained for trial has a liberty interest under the Due Process Clause of the Fourteenth Amendment in being free from the unwanted administration of antipsychotic drugs.[2] The Court held that Riggins was denied due process of law when Nevada compelled him to take medication prior to trial without first balancing Riggins' liberty interest against the State's interests in medicating its detainee.[3] The Court concluded that a strong possibility existed that this error prejudiced Riggins' trial since the effects of antipsychotic drugs may have impacted Riggins' outward appearance, his testimony, and his ability to follow the proceedings and communicate with his attorney.[4]

This Note examines the development of the liberty interest in freedom from forced medication and the Court's extension of that interest in *Riggins v. Nevada*. This Note argues that although the Court ruled correctly, it provided little guidance as to how competing personal and state interests should be balanced in future cases. This Note concludes that the Court's opinion should be interpreted

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1 Riggins v. Nevada, 112 S. Ct. 1810 (1992).
2 *Id.* at 1815.
3 *Id.* at 1815-16.
4 *Id.* at 1816.

as requiring strict scrutiny of any governmental act which involves the administration of unwanted antipsychotic drugs to pretrial detainees. Furthermore, the Court should have required a showing of actual prejudice, instead of merely a strong possibility of an unfair trial, before reversing Riggins' criminal conviction.

II. BACKGROUND

Since their introduction in the 1950s, antipsychotic drugs have become the preferred treatment for schizophrenia and other acute and chronic psychoses.[5] These powerful mind-affecting drugs continue to pose novel questions to a legal system that is accustomed to viewing mental competence and incompetence in absolute terms.[6] A brief review of the medical effects of antipsychotic drugs is necessary before the legal implications of the drugs can be fully understood.

A. THE EFFECTS OF ANTIPSYCHOTIC DRUGS

Antipsychotic drugs are highly effective for treating the symptoms of psychoses.[7] Although the drugs do not cure psychoses, they clear the hallucinations and delusions that may produce disruptive behavior and interfere with other types of treatment.[8] Antipsychotics thus facilitate more humane treatment of patients by alleviating the need for physical restraints and reduce institutionalization by

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[5] *See* Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 6, Riggins v. Nevada, 112 S. Ct. 1810 (1992) (No. 90-8466) [hereinafter Brief of American Psychiatric Association]; *see also* HAROLD I. KAPLAN & BENJAMIN J. SADOCK, SYNOPSIS OF PSYCHIATRY 492 (5th ed. 1988).

Antipsychotic drugs are sometimes called neuroleptic drugs or major tranquilizers. KAPLAN & SADOCK, *supra*, at 498. Antipsychotic drugs are a subset of psychotropic, or mind-affecting, drugs which include antipsychotics, antidepressants, mood stabilizers, and antianxiety agents. *Id.* at 493.

[6] Terms such as "synthetic sanity" and "artificial competence" have developed to describe the state induced by antipsychotic drugs. *See, e.g.*, State v. Hampton, 218 So. 2d 311, 312 (La. 1969); *cf.* Thomas G. Gutheil & Paul S. Applebaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 78 (1983) (Antipsychotics are merely therapeutic, not "mind-altering" or "thought-controlling.").

[7] *See, e.g.*, Donald J. Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107, 109 (1985). Antipsychotic drugs are used to treat schizophrenia, organic psychoses, and mania, as well as certain nonpsychotic mental illnesses. *Id.* at 109-10.

"Psychosis" is defined as "a mental disorder causing gross distortion or disorganization of a person's mental capacity, affective response, and capacity to recognize reality, communicate, and relate to others to the degree of interfering with his capacity to cope with the ordinary demands of everyday life." STEDMAN'S MEDICAL DICTIONARY 1286 (25th ed. 1990).

[8] Brief of American Psychiatric Association, *supra* note 5, at 7-8.

making it possible for the mentally ill to function in the community.[9] The maximal effects of antipsychotic drugs will generally be evident after four to six weeks of treatment following an acute exacerbation of a schizophrenic illness.[10] For patients with chronic psychosis, maintenance doses of antipsychotic medication may be administered indefinitely to prevent future exacerbations.[11] Since no single substitute can provide the advantages of antipsychotic drugs, "[d]enying . . . patients the benefit of the neuroleptic action without offering any suitable alternative may be considered a clinical error."[12] However, the clear benefits of antipsycotic drugs must be considered in light of their potentially serious side effects.[13]

Although all available antipsychotic drugs are equally effective in treating schizophrenia and have the same set of possible side effects, the potency of individual compounds varies widely.[14] For example, Mellaril, the drug at issue in *Riggins v. Nevada*, and Thorazine are the least potent antipsychotics.[15] Recommended adult doses for these drugs is 200-400 milligrams per day,[16] although physicians generally prescribe a lower dose initially and increase it as needed.[17] The maximum daily dose is 800 milligrams.[18] Highly potent antipsychotics such as Prolixin and Haldol require much smaller doses to attain the same effects.[19] Even when properly prescribed, all antip-

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9 *See* Kemna, *supra* note 7, at 110.

10 *See, e.g.*, KAPLAN & SADOCK, *supra* note 5, at 503. An exacerbation is an "increase in the severity of a disease or any of its signs or symptoms." STEDMAN'S MEDICAL DICTIONARY, *supra* note 7, at 546. Improvement may continue beyond the four to six week interval. Brief of American Psychiatric Association, *supra* note 5, at 7.

11 *See* KAPLAN & SADOCK, *supra* note 5, at 503-04. Dosage will generally be reduced in the maintenance stage, beginning about six months after the initial improvement following an acute exacerbation. *Id.*

12 Dilip V. Jeste & Richard J. Wyatt, *Changing Epidemiology of Tardive Dyskinesia: An Overview*, 138 AM. J. PSYCHIATRY 297, 306 (1981).

13 Kemna, *supra* note 7, at 111. *See infra* notes 14-39 and accompanying text.

14 *See* KAPLAN & SADOCK, *supra* note 5, at 500. Most courts and commentators speak in general about antipsychotic drugs and neglect the distinctions between the various antipsychotic agents. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 214 n.1 (1990) (holding applies to all antipsychotic drugs); Riggins v. Nevada, 112 S. Ct. 1810, 1812 (1992) (same); Steve Tomashefsky, Comment, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment*, 52 U. CHI. L. REV. 773 n.3 (1985). A focus on the possible effects of antipsychotic drugs in general should not replace a focus on the actual effects of the specific drugs(s) involved in a given case. *See infra* part V.

15 KAPLAN & SADOCK, *supra* note 5, at 500-02. Thorazine is the trade name for chlorpromazine, the first antipsychotic drug to be introduced. *Id.* at 492. Mellaril is the trade name for thioridazine. *Id.* at 502.

16 KAPLAN & SADOCK, *supra* note 5, at 502 tbl. 2.

17 *Id.* at 503.

18 PHYSICIANS' DESK REFERENCE 2013 (46th ed. 1992).

19 KAPLAN & SADOCK, *supra* note 5, at 502 tbl. 2. Prolixin is the trade name for fluphenazine; Haldol, for haloperidol. *Id.* To determine potency, drugs are generally

sychotic drugs can cause both neurological and non-neurological side effects.[20] However, "one generalization about the adverse effects from antipsychotics is that low-potency drugs [like Mellaril] cause more non-neurological adverse effects and that high-potency drugs cause more neurological adverse effects."[21]

One of the common non-neurological side effects of antipsychotic drugs is sedation or somnolence.[22] Sedation can be avoided by giving the entire daily dose at bedtime until the patient develops a tolerance to the sedative effect of the drug.[23] Orthostatic hypotension, which causes fainting and falling, also generally occurs at the onset of antipsychotic treatment before the patient develops a tolerance for the drugs.[24] Other possible non-neurological side effects include decreased libido in both sexes and impotence in males; peripheral anticholinergic effects such as dry mouth, constipation, urinary retention, nausea, and vomiting; central anticholinergic effects such as agitation, disorientation, hallucinations, seizures, and coma; retinal pigmentation which may result in blindness; agranulocytosis, a potentially fatal blood condition; lethal cardiotoxicity; allergic dermatitis; and weight gain.[25] Many of these effects can be controlled by reducing dosages, adding other medicine, or changing to a different antipsychotic drug.[26] These side effects generally cease when the drugs are discontinued, although chronically ill patients on maintenance doses of antipsychotic drugs may suffer permanent side effects.[27]

Neurological side effects include dystonias, parkinsonian symptoms, akathisia, tardive dyskinesia, neuroleptic malignant syndrome, and seizures.[28] Dystonic movements involve muscle spasms in the eyes, neck, face, tongue, and arms.[29] Parkinsonian symptoms in-

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compared to 100 milligrams of Thorazine; for example, less than 5 milligrams of Prolixin is as efficacious as 100 milligrams of Thorazine. *Id.* There are numerous other antipsychotic compounds with potencies between these extremes. *Id.*

20 *See* Brief of American Psychiatric Association, *supra* note 5, at 8; KAPLAN & SADOCK, *supra* note 5, at 504-08.

21 KAPLAN & SADOCK, *supra* note 5, at 504.

22 Kemna, *supra* note 7, at 111. Sedation is a calming effect, whereas somnolence is a condition of drowsiness or semiconsciousness. *See* STEDMAN'S MEDICAL DICTIONARY, *supra* note 7, at 1399, 1486.

23 KAPLAN & SADOCK, *supra* note 5, at 504-05.

24 *Id.* at 505.

25 *Id.* at 504-06.

26 *See generally* Brief of American Psychiatric Association, *supra* note 5, at 8; Alexander D. Brooks, *The Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY L. 179, 186 (1980).

27 *See, e.g.*, Brooks, *supra* note 26, at 186-87.

28 KAPLAN & SADOCK, *supra* note 5, at 506-08.

29 Kemna, *supra* note 7, at 112.

clude muscle stiffness, stooped posture, a mask-like face, tremors, and drooling.[30] Akathisia is muscular discomfort that causes restlessness and agitation.[31] Both dystonic and parkinsonian effects occur relatively often, although less so when Mellaril is used.[32] Other drugs may be used to treat the symptoms of these side effects until a patient develops a tolerance to the antipsychotic.[33] Even when the adverse effects persist, they are not particularly serious and can be eliminated by reducing the dosage or ceasing antipsychotic medication.[34]

The remaining neurological effects are of greater concern, however. Tardive dyskinesia causes abnormal and involuntary movements of the face, mouth, tongue, jaw, and extremities.[35] "Both the risk of developing [tardive dyskinesia] and the likelihood that it will become irreversible are believed to increase as the duration of treatment and the total cumulative dose of neuroleptic drugs administered to the patient increase."[36] There is no known treatment for tardive dyskinesia; prevention is best achieved by minimizing dosages.[37] Neuroleptic malignant syndrome is a potentially fatal side effect manifested by elevated fever and pulse, muscular rigidity, and altered mental states that requires the immediate discontinuation of antipsychotic drugs and intensive medical treatment.[38] Finally, the risk of seizure must be considered when medicating patients who are susceptible to seizures.[39]

The extraordinary mind-affecting benefits of antipsychotic drugs, as well as their potentially devastating side effects, are of greatest concern when the drugs are administered without a patient's consent. The forcible administration of these powerful drugs intrudes on a person's bodily autonomy and, hence, presents important legal issues.

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30 *Id.*

31 *See* KAPLAN & SADOCK, *supra* note 5, at 507.

32 *Id.* at 506-07. Approximately ten percent of patients will suffer from dystonias; parkinsonian effects are slightly more common. *Id.* These effects generally occur soon after treatment begins. *Id.*

33 *See* KAPLAN & SADOCK, *supra* note 5, at 506-07. In some cases, akathisia cannot be treated and dosages must be reduced or eliminated. *Id.* at 507; *see also* Kemna, *supra* note 7, at 112 n.34.

34 *See, e.g.*, Kemna, *supra* note 7, at 112.

35 *Id.* at 113.

36 PHYSICIANS' DESK REFERENCE, *supra* note 18, at 2012. Fifty to sixty percent of chronically institutionalized patients suffer from tardive dyskinesia. KAPLAN & SADOCK, *supra* note 5, at 507.

37 KAPLAN & SADOCK, *supra* note 5, at 507.

38 PHYSICIANS' DESK REFERENCE, *supra* note 18, at 2012.

39 KAPLAN & SADOCK, *supra* note 5, at 506.

B. JUDICIAL CONSIDERATION OF ANTIPSYCHOTIC DRUGS

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving "any person of life, liberty, or property, without due process of law."[40] This Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[41] The Fourteenth Amendment thus incorporates and applies to the states those provisions of the Bill of Rights which prevent federal encroachment on basic rights.[42] The due process guarantee, however, is not limited to freedoms enumerated in the Constitution; rather, it applies to all freedoms "implicit in the concept of ordered liberty."[43] To apply the Due Process Clause, then, the Supreme Court must first decide whether an asserted interest falls within the scope of the Clause before determining whether that right was adequately protected.[44] To determine whether a substantive right was unjustly violated, due process requires the Court to balance "the liberty of the individual" against "the demands of an organized society."[45] Both the substantive freedoms recognized by the Due Process Clause and the specific Sixth Amendment rights incorporated by the Clause are of import here.

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40 U.S. CONST. amend. XIV, § 1.

41 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see also* Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

42 *See, e.g.*, Planned Parenthood of Southeast Pennsylvania v. Casey, 112 S. Ct. 2791, 2804 (1992) (Due Process Clause incorporates most of the Bill of Rights against the states). The first ten amendments were initially held to restrict only the federal government. Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). When the Fourteenth Amendment was passed to prevent the states from restricting individual rights, the provisions of the Bill of Rights were selectively incorporated into the Due Process Clause to prevent their infringement by states, as well as the federal government. *See generally* CRAIG R. DUCAT & HAROLD W. CHASE, CONSTITUTIONAL INTERPRETATION 841-46 (4th ed. 1988) (list of incorporated provisions of Bill of Rights and relevant cases). For a brief discussion of the process of incorporation, *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 11-1 to -4 (2d ed. 1988).

43 Palko v. Connecticut, 302 U.S. 319, 325 (1937). *See also Casey*, 112 S. Ct. at 2805 (substantive liberty interests protected by Fourteenth Amendment are not limited to Bill of Rights); Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring) (same). *Cf.* Medina v. California, 112 S. Ct. 2572, 2576 (1992) (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)) (since Bill of Rights specifically provides for many aspects of criminal procedure, Due Process Clause "has limited operation" beyond incorporating Bill of Rights).

44 *See, e.g.*, Mills v. Rogers, 457 U.S. 291, 299 (1982) ("the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it"); Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (same).

45 *Youngberg*, 457 U.S. at 320 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); *see also, e.g.*, *Mills*, 457 U.S. at 299.

1. *Substantive Due Process Implications*

The Supreme Court has recognized a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause.[46] In *Washington v. Harper*, the Court concluded that "the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."[47] *Harper* involved a schizophrenic prisoner with a history of violence.[48] The State of Washington sought to administer antipsychotics against Harper's will, pursuant to a prison policy that allowed forced medication in certain circumstances.[49] In defining

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[46] Washington v. Harper, 494 U.S. 210, 221-22 (1990).

Prior to *Harper*, the Supreme Court assumed, but did not decide, that "the Constitution recognizes a liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Mills*, 457 U.S. at 299. Both the trial court and the court of appeals in *Mills* held that such a right is protected by the Due Process Clause. Rogers v. Okin, 478 F. Supp. 1342, 1366 (D. Mass. 1979), *aff'd in relevant part*, 634 F.2d 650, 653 (1st Cir. 1980). Before the Supreme Court could rule in *Mills*, the Supreme Judicial Court of Massachusetts held that the right to refuse antipsychotic drugs could be outweighed only by "an overwhelming state interest." *In re* Guardianship of Roe, 421 N.E.2d 40, 51 (Mass. 1981). Since "[s]tate law may recognize liberty interests more extensive than those independently protected by the Federal Constitution," *Mills*, 457 U.S. at 300, the Court remanded the case for consideration in light of *Roe*. *Id.* at 306.

Before *Harper*, several courts interpreted the Supreme Court's holding in *Rogers* as a tacit approval of a liberty interest in freedom from unwanted antipsychotic drugs. *See, e.g.*, United States v. Watson, 893 F.2d 970, 976-77 (8th Cir. 1990), *reh'g granted in part, vacated in part sub nom.* United States v. Holmes, 900 F.2d 1322 (8th Cir. 1990), *cert. denied sub nom.* Watson v. United States, 497 U.S. 1006 (1990); Bee v. Greaves, 744 F.2d 1387, 1392 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). Other courts recognized such an interest without relying on *Mills*. *See, e.g.*, United States v. Charters, 829 F.2d 479, 490-92 (4th Cir. 1984) (unwanted antipsychotic medication implicates constitutional rights of incompetent accused), *rev'd on reh'g*, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990); Johnson v. Silvers, 742 F.2d 823, 824-25 (4th Cir. 1984) (unwanted antipsychotic medication implicates constitutional rights of involuntarily committed mental patient); Rennie v. Klein, 653 F.2d 836, 843 (3d Cir. 1981) (unwanted antipsychotic medication implicates a mental patient's constitutional rights), *vacated*, 458 U.S. 1119 (1982); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (unwanted antipsychotic medication implicates constitutional rights of prisoner).

[47] *Harper*, 494 U.S. at 229. The Supreme Court compared this intrusion to compelled surgery. *See* Winston v. Lee, 470 U.S. 753, 766 (1985) (compelled surgery to remove bullet for evidentiary purposes is substantial interference with protected liberties). *See also* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990) (competent person has liberty interest in refusing unwanted medical treatment).

[48] *Harper*, 494 U.S. at 214 & n.2.

[49] *Id.* at 215 & n.3. As explained by the Court, the policy of the Special Offender Center, in which Harper was held, was to subject an inmate to unwanted medication only if he suffered from a mental disorder and was gravely disabled or likely to harm himself or others. *Id.* The inmate was granted several procedural protections, including a hearing before a psychiatrist, psychologist, and the associate superintendent of the Center to decide whether medication should be compelled. *Id.* at 215. The inmate, with assistance from a lay advisor, could present evidence, call witnesses, and cross-examine staff witnesses. *Id.* If a majority of the committee, including the psychiatrist, voted to

Harper's liberty interest, the Supreme Court extensively reviewed the effects of antipsychotic drugs and concluded that "the drugs can have serious, even fatal, side effects."[50]

The Court ruled against Harper, however, because his admittedly substantial interest in avoiding forced medication was outweighed by the state's interests in prescribing antipsychotic drugs.[51] Two state interests were served by medicating Harper: the police power interest in controlling violent behavior in prisons, and the *parens patriae* duty to provide for prisoners' health and safety.[52] Since "[t]here are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment,"[53] the Court applied a standard of review that was deferential to the prison authorities "best equipped to make difficult decisions regarding prison administration."[54] An intrusive prison regulation will be upheld if it is "reasonably related to legitimate penological interests."[55] The *Harper* Court deferred to the medical and penal experts, who decided to medicate Harper since antipsychotic medicine was both reasonably related to the security of the prison and the appropriate medical treatment for Harper's disorder.[56]

Although the *Harper* holding was limited by its facts to convicted prisoners, it seems reasonable to expect that unconvicted persons detained by a state would enjoy at least as much liberty as

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compel medication, such medication would proceed subject to periodic review. *Id.* at 215-16.

50 *Id.* at 229-30. The Court particularly emphasized the risk of acute dystonia, akathisia, neuroleptic malignant syndrome, and tardive dyskinesia. *Id.* However, the majority noted the medical uncertainty about the frequency and severity of the side effects and emphasized the need to defer to medical judgments about the benefits of the drugs in individual cases. *Id.* at 230-31 n.12. *See supra* part II.A.

51 *Harper*, 494 U.S. at 236.

52 *Id.* at 225-26. *See also* Jami Floyd, Comment, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1257-59 (1990).

53 *Harper*, 494 U.S. at 225.

54 *Id.* at 223-24. *See also* Turner v. Safley, 482 U.S. 78, 84-85 (1987).

55 *See Harper*, 494 U.S. at 223-25; *Turner*, 482 U.S. at 89. This deferential standard of review applies in prison settings even when the right asserted is so fundamental that a higher standard of review would be required in other circumstances. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987) (prison regulations restricting free exercise of religion subject only to reasonable relationship test). The Court outlined three factors relevant to determining the reasonableness of a regulation: 1) a rational connection between the regulation and the governmental interest it seeks to further; 2) the impact of the asserted right on guards, other inmates, and prison resources; 3) the absence of ready alternatives to the regulation. *Harper*, 494 U.S. at 225.

56 *Harper*, 494 U.S. at 227. *See supra* note 49 regarding the prison procedures used to decide whether to medicate Harper against his will.

convicted criminals. The Court has so held.[57] A state's interest in secure facilities and healthy inmates is the same whether the inmate is a pretrial detainee or a convicted prisoner.[58] However, since detainees await trial, they arguably have greater interests at stake than convicted prisoners, for they are adversely affected by any act which influences the fairness of their trial.

Accordingly, in cases prior to *Harper* involving the forcible medication of pretrial detainees, two lower courts applied a stricter standard of review than the one adopted by the *Harper* Court. In *Bee v. Greaves*,[59] the Tenth Circuit held that, absent an emergency, compelling a detainee to take antipsychotic drugs is not reasonably related to the goal of prison security.[60] Under *Bee*, a state's interest in medicating would outweigh an individual's right to refuse that medication only in a prison emergency *and* if the medicine was medically appropriate and the least intrusive means available.[61]

Relying in part on *Bee*, the Fourth Circuit, in *United States v. Charters*,[62] initially refused to defer to medical professionals and held that a competent detainee's liberty interest outweighs any governmental interests in preventing violence, protecting health, and rendering the accused competent to stand trial.[63] For an incompetent detainee, the trial court would have to determine "what treatment the patient would, if competent, select for himself," rather than defer to attending medical experts.[64] On rehearing, however, the Fourth Circuit reversed *Charters* and held that due process is fulfilled if the decision to medicate is based on the responsible judgment of appropriate professionals.[65] This reversal left the circuits at odds as to whether the decision to medicate pretrial detainees warrants stricter scrutiny than the decision to medicate convicted prisoners.

In *Riggins v. Nevada*, the Supreme Court had the opportunity to

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57 Bell v. Wolfish, 441 U.S. 520, 545 (1979) (pretrial detainees retain at least those constitutional rights enjoyed by convicted prisoners). Non-criminal mental patients obviously are not as subject to a state's police power as criminals, but their interests may still be weighed against other state interests, such as *parens patriae*. *See generally* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990).

58 *Bell*, 441 U.S. at 546-47.

59 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

60 *Id.* at 1395.

61 *Id.* at 1395-96.

62 829 F.2d 479 (4th Cir. 1987), *rev'd on reh'g*, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990).

63 *Id.* at 484.

64 *Id.* If it cannot be determined what course the patient would have selected, the court would have to act in the patient's best interest; the judgment of the experts at the facility would not suffice. *Id.* at 497-98.

65 United States v. Charters, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 494 U.S. 1016 (1990).

determine the appropriate standard of review in cases involving the forcible medication of pretrial detainees. The Court could have chosen to apply *Harper's* deferential reasonableness standard, or it could have agreed with the Tenth Circuit that increased scrutiny is warranted by the patient's status as a pretrial detainee. Since the effects of antipsychotic drugs administered before trial will often linger into trial, both the State and the detainee have interests which are not present when the rights of convicted prisoners are at issue. Thus, in addition to the issues presented in *Harper*, the *Riggins* Court had to consider the specific guarantees of the Sixth Amendment.

2. *Sixth Amendment Implications*

The Sixth Amendment guarantees to the accused in all criminal prosecutions the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."[66] The Due Process Clause of the Fourteenth Amendment guarantees "the fundamental elements of fairness in a criminal trial" to defendants in state courts.[67] This guarantee incorporates, but is not limited to, the rights enumerated in the Sixth Amendment.[68]

It has long been accepted that the conviction of an incompetent defendant violates due process.[69] Competency hearings are now held prior to trial, at which courts make two inquiries about the defendant's cognitive abilities: whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[70]

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66 U.S. CONST. amend. VI.

67 Spencer v. Texas, 385 U.S. 554, 563-64 (1967); *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976) (right to fair trial is a fundamental liberty secured by Fourteenth Amendment).

68 The Court selectively incorporated provisions of the Sixth Amendment into the Due Process Clause. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process). Rights that are "essential to due process of law in a fair adversary process" are protected by the Due Process Clause even if not enumerated in the Constitution. *See* Faretta v. California, 422 U.S. 806, 819 & n.15 (1975).

69 *See, e.g.*, Medina v. California, 112 S. Ct. 2572, 2574 (1992); Drope v. Missouri, 420 U.S. 162, 171-73 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966). For a general discussion of the competency issue, *see* Michelle K. Bachand, Comment, *Antipsychotic Drugs and the Incompetent Defendant: A Perspective on the Treatment and Prosecution of Incompetent Defendants*, 47 WASH. & LEE L. REV. 1059, 1074-79 (1990).

70 *Drope*, 420 U.S. at 172 (quoting Dusky v. United States, 362 U.S. 402 (1960) (per curiam)). *Accord* MODEL PENAL CODE § 4.04 (1962) ("No person who as a result of

While a determination of competency under this test is not sufficient to prove that a defendant received a fair trial, such a determination is necessary because the elements of a fair trial presuppose, and depend upon, mental competence.[71] The rights enumerated in the Sixth Amendment thus presume the competence of a defendant but may, of course, be violated even if the defendant is competent.

The Sixth Amendment specifically provides that defendants have the right to the assistance of counsel for their defense.[72] The defendant has a right to give advice to his lawyer and make suggestions regarding his defense, as well as "to supercede his lawyer altogether and conduct the trial himself."[73] Of course, in order to decide whether to exercise these rights, the defendant must be able to understand the proceedings against him,[74] must not be excluded from the proceedings,[75] and must not be precluded from consulting with his attorney.[76]

The Sixth Amendment also grants an accused the right to confront the witnesses who testify against him and to have compulsory process for obtaining witnesses to assist in his defense.[77] Derived from these rights is the due process requirement that the defendant be allowed to testify, since he is often "the most important witness for the defense."[78] The exercise of "duress on [a] witness' mind

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mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such capacity endures.").

71 Blackstone wrote long ago that a "mad" offender should not be arraigned "because he is not able to plead to it with that advice and caution that he ought." 4 WILLIAM BLACKSTONE, COMMENTARIES *24. *See also Drope*, 420 U.S. at 171. One could also question whether an incompetent defendant's mind is truly "in" the courtroom even if the defendant is physically present to defend himself. *See Medina*, 112 S. Ct. at 2584 (Blackmun, J., dissenting); Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1963). Further, it is argued that a defendant cannot be deterred by, or understand the retributive force of, criminal sanctions if a defendant lacks an understanding of the nature and consequences of his acts. *See generally* Ford v. Wainwright, 477 U.S. 399 (1986) (upholding rule that the insane cannot be executed and discussing various rationales for the ancient rule).

72 U.S. CONST. amend. VI. *See supra* text accompanying note 66.

73 *See* Faretta v. California, 422 U.S. 806, 816 (1975) (quoting Synder v. Massachusetts, 291 U.S. 97, 106 (1934)).

74 *See supra* note 70 and accompanying text.

75 *See* Illinois v. Allen, 397 U.S. 337, 338 (1970) (one of the most basic rights is to be present at every stage of trial).

76 *See* Geders v. United States, 425 U.S. 80 (1976) (precluding defendant from communicating with counsel during overnight recess violated Sixth Amendment); Massiah v. United States, 377 U.S. 201 (1964) (statements elicited in absence of attorney deprived accused of right to counsel). *See also* Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1963) (mental, as well as physical, presence is required at trial).

77 U.S. CONST. amend. VI. *See supra* text accompanying note 66.

78 Rock v. Arkansas, 483 U.S. 44, 52 (1987).

[so] as to preclude him from making a free and voluntary choice" regarding his testimony is an infringement on a defendant's right to a fair trial.[79]

Moreover, a defendant's Sixth Amendment right to confrontation can be violated even if the defendant's choice as to whether to testify is unimpaired. Since the defendant is always present at trial, her demeanor and appearance may affect a juror's judgment regardless of whether or not the defendant testifies.[80] Jurors may be especially conscious of the defendant's demeanor at trial when her sanity is at issue.[81] Further, evidence of mental problems can be relevant as a mitigating factor in the sentencing stage of capital crimes.[82]

Due process does not guarantee the unfettered enjoyment of these Sixth Amendment rights, however. The Court has indeed "recognized that certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.' "[83] However, even this close scrutiny has not precluded the Court from finding essential state interests which justify trial prejudice. In *Illinois v. Allen*,[84] the Court held that the State's interest in maintaining courtroom decorum allowed an obstreperous defendant to be bound and gagged, despite the "significant effect on the jury's feelings about the defendant" which such treatment might have.[85] In *Estelle v. Williams*,[86] however, the Court held that a state cannot compel a defendant to be tried while wearing jail clothes.[87] The Court found no essential state interest to weigh against the effects the clothes may have on a jury's perception of the defendant.[88] The Court acknowledged in *Estelle* that "the actual impact of a particular practice on the judgment of jurors cannot always be fully determined" but concluded that, in balancing interests, courts "must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common

79 Webb v. Texas, 409 U.S. 95, 98 (1972).

80 Estelle v. Williams, 425 U.S. 501, 505 (1976). Likewise, witnesses may be affected for better or worse by the demeanor and appearance of the defendant who confronts them. *See* Coy v. Iowa, 487 U.S. 1012 (1988).

81 *See* Pate v. Robinson, 383 U.S. 375, 386 (1966).

82 *See* Penry v. Lynaugh, 492 U.S. 302, 314 (1989).

83 Holbrook v. Flynn, 475 U.S. 560 (1986) (quoting *Estelle*, 425 U.S. at 503-04).

84 397 U.S. 337 (1970).

85 *Id.* at 343-44. The Court saw binding and gagging as a last resort, to be used only after contempt citations and removal from the courtroom failed to convince the defendant to behave properly. *Id.* at 344-45.

86 425 U.S. 501 (1976).

87 *Id.* at 512. The Court did not uphold petitioner's claim, however, since he was found to have waived his right to be tried in civilian clothes. *Id.* at 512-13.

88 *Id.* at 504-05.

human experience."[89]

Until *Riggins*, the Supreme Court had never considered the effects of antipsychotic drugs on a defendant's right to a fair trial. As a general matter, the Court had held that a state has an interest in bringing an accused to trial, but that interest is "necessarily tempered by its interest in the fair and accurate adjudication of criminal cases."[90] Lower courts were split on the issue of whether a state's interest in using antipsychotics to render an accused competent to stand trial justified compelled medication.[91] Most courts focused on the ability of the drugs to enhance cognitive thought processes and concluded that the drugs may be administered at trial as long as the drugged defendant retains the cognitive capacity to pass the competency test.[92] To offset any prejudice caused by the effects of the drugs on the defendants' outward appearance and demeanor, these courts relied on testimony by experts and the defendants themselves to inform jurors about the effects of the drugs.[93] Other courts stressed the undesirable effects of antipsychotic drugs and held that testimony cannot adequately substitute for a showing of the defendant in an unmedicated condition.[94] In *Riggins v. Nevada*, the Supreme Court addressed the effects of antipsychotic drugs on

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89 *Id.* at 504.

90 Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (state's interest in fair trial requires that it provide indigent defendant with psychiatric assistance when defendant's sanity is in question even if, as result of that assistance, state cannot bring defendant to trial because he is found incompetent); *see also* Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring).

91 *See* Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (questioning whether state interest could ever outweigh defendant's liberty interest); State v. Maryott, 492 P.2d 239, 240-41 (Wash. App. 1971) (administering drugs allows state to control defendant, thus destroying adversary process). *Cf.* State v. Law, 244 S.E.2d 302, 307 (S.C. 1978) (state interest in rendering accused competent to stand trial justifies intrusion on bodily integrity).

92 *See Law*, 244 S.E.2d 305-07 (defendant's sanity not undermined by antipsychotic drugs); State v. Hayes, 389 A.2d 1379, 1381 (N.H. 1978) (drugs enhanced cognitive part of defendant's brain); State v. Jojola, 553 P.2d 1296, 1298-99 (N.M. Ct. App. 1976) (drugs made defendant competent for trial by enhancing cognitive function); *In re* Pray, 336 A.2d 174, 177 (Vt. 1975) (drug-induced competence sufficient to support finding of competency).

93 *See Law*, 244 S.E.2d at 306 (jury knew defendant's calm demeanor was due to drugs and was told of his mental state at time crime was committed); *Jojola*, 553 P.2d at 1300 (defendant who waived chance to present evidence of drug's effect on his demeanor was granted due process); *Pray*, 336 A.2d at 177 (failure to inform jury that defendant's behavior was affected by drugs denied due process).

94 *See* Commonwealth v. Louraine, 453 N.E.2d 437, 442 (Mass. 1983) (testimony can only offset negative influence of drugged appearance; it cannot compensate for positive value of showing defendant's unmedicated behavior); *Hayes*, 389 A.2d at 1381-82 (defendant entitled to show jury the state he was in when crime occurred).

both a defendant's due process liberty interest and his right to a fair trial.

III. FACTS AND PROCEDURAL HISTORY

On November 20, 1987, David Riggins entered Paul Wade's apartment and remained inside for about thirty minutes.[95] Shortly after Riggins left, Wade's girlfriend found Wade's body on the floor of his apartment.[96] An autopsy showed that Wade died from multiple stab wounds to his head, chest, and back.[97] Riggins was arrested the next evening and charged with first-degree murder and robbery, both with use of a deadly weapon.[98]

A few days after his incarceration, Riggins complained of hearing voices in his head and having trouble sleeping.[99] Riggins told Dr. R. Edward Quass, a private psychiatrist who treated inmates at the Clark County Jail, that Mellaril had successfully treated his symptoms in the past.[100] Dr. Quass initially prescribed 100 milligrams of Mellaril per day.[101] However, since Riggins' symptoms persisted, Dr. Quass incrementally increased the dosage to 800 milligrams per day.[102]

In January 1988, Riggins sought a determination of his competence to stand trial.[103] Three court-appointed psychiatrists examined Riggins during February and March, while he was receiving 450 milligrams of Mellaril per day.[104] Dr. William O'Gorman and Dr. Franklin Master stated that Riggins was competent to stand trial, while Dr. Jack Jurasky determined that Riggins was incompetent.[105] The Clark County District Court concluded that Riggins was legally sane and competent to stand trial.[106]

In June 1988, the defense filed a motion to terminate the administration of Mellaril during Riggins' trial.[107] Riggins' twofold argument relied on the due process guarantees of the Fourteenth

95 Riggins v. State, 808 P.2d 535, 537 (Nev. 1991).
96 *Id.*
97 Riggins v. Nevada, 112 S. Ct. 1810, 1812 (1992).
98 *Riggins*, 808 P.2d at 537.
99 *Riggins*, 112 S. Ct. at 1812.
100 *Id.*
101 *Id.*
102 *Id.* Riggins also took Dilantin, an anti-epileptic drug. *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* Riggins also moved to be taken off Dilantin. *Id.*

Amendment and the Nevada Constitution.[108] Riggins initially argued that the effects of the drugs on his demeanor and mental state during trial would infringe upon his freedom and deny him due process.[109] Riggins' second argument was that he had a right to show jurors his true mental state in support of his insanity defense at trial.[110] The state responded that since Nevada law prohibits the trial of incompetent defendants,[111] the court could order Riggins to take whatever medicine was necessary to ensure his competence.[112]

An evidentiary hearing on Riggins' motion was held on July 14, 1988.[113] By this time, Riggins was receiving the maximum dose of 800 milligrams of Mellaril each day.[114] At this hearing, each of the four psychiatrists who had examined Riggins held a different opinion as to the effects of withdrawing the medication. Dr. Master believed that Riggins would be competent to stand trial even without Mellaril, and his behavior would not noticeably be altered.[115] Dr. Quass agreed that Riggins would be competent without Mellaril, but he testified that jurors would not notice the effects of the drug if it were continued.[116] Dr. O'Gorman, however, stated that Mellaril made Riggins calmer and more relaxed and that the high dose he was receiving could make him drowsy; Dr. O'Gorman was unable to predict the effects of withdrawing Mellaril.[117] Dr. Jurasky again concluded that Riggins was incompetent even while on Mellaril and warned the court that taking Riggins off the drug would cause him to regress into a manifest psychosis.[118]

The district court denied Riggins' motion without explaining its rationale or resolving the conflicting expert testimony.[119] Riggins continued to receive the maximum dosage of Mellaril each day through the end of his trial in November 1988.[120]

At his trial Riggins presented an insanity defense.[121] Testifying on his own behalf, Riggins admitted that he used cocaine prior to

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108 *Id.* *See* U.S. CONST. amend. XIV, § 1; NEV. CONST. art. I, § 8. *See also supra* part II.B. (discussing due process analysis).
109 Riggins v. Nevada, 112 S. Ct. 1810, 1812 (1992).
110 *Id.*
111 NEV. REV. STAT. § 178.400 (1989).
112 *Riggins*, 112 S. Ct. at 1812-13.
113 *Id.* at 1813.
114 *Id.* at 1812-13. *See supra* notes 16-18 and accompanying text.
115 *Riggins*, 112 S. Ct. at 1813.
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*

entering Wade's apartment and that he fought with Wade.[122] However, Riggins testified that Wade was trying to kill him and that voices in his head told him that killing Wade would be justifiable homicide.[123] A jury found Riggins guilty of murder and robbery, both with use of a deadly weapon, and sentenced Riggins to death.[124]

On appeal to the Nevada Supreme Court, Riggins claimed, among other things, that the forced administration of Mellaril violated his Sixth Amendment right to a full and fair trial by preventing him from assisting in his own defense and by prejudicially affecting his attitude, appearance, and demeanor at trial.[125] Riggins argued that this prejudice was unjustified since the state never demonstrated a need to have Riggins on Mellaril and never explored less intrusive alternatives to administering the maximum dose of 800 milligram per day.[126]

The Nevada Supreme Court affirmed Riggins' conviction and sentence.[127] The court concluded that Riggins' demeanor was relevant to his insanity defense, but found that there was sufficient expert testimony at trial to inform the jury of the effects Mellaril had on Riggins' demeanor.[128] Thus, the court held that the denial of Riggins' motion to terminate his medication was neither an abuse of the trial court's discretion nor a violation of Riggins' Sixth Amendment rights.[129] In a concurring opinion, Justice Rose stated that prior to forcing Riggins to take the drug, the lower court should have determined whether Riggins truly needed to be on Mellaril and whether he could function adequately without the drug.[130] Nevertheless, Justice Rose concluded, based on the entire record, that Riggins received a fair trial.[131] Justice Springer argued vigorously in dissent that a defendant may never be forced to take antipsychotic drugs simply so the state can bring him to trial.[132]

The Supreme Court of the United States granted certiorari[133] to determine whether the forced administration of antipsychotic

122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*; *see also* Riggins v. State, 808 P.2d 535, 537 (Nev. 1991).
126 *Riggins*, 112 S. Ct. at 1813.
127 *Riggins*, 808 P.2d at 539.
128 *Id.* at 537-38.
129 *Id.* at 538.
130 *Id.* at 539-40 (Rose, J., concurring).
131 *Id.* at 539-40 (Rose, J., concurring).
132 *Id.* at 541 (Springer, J., dissenting).
133 Riggins v. Nevada, 112 S. Ct. 49 (1991).

drugs during trial violates rights guaranteed by the Sixth and Fourteenth Amendments.[134]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

The Supreme Court of the United States reversed the decision of the Nevada Supreme Court and remanded the case for further consideration.[135] Writing for the majority, Justice O'Connor[136] held that the lower courts erroneously failed to consider Riggins' liberty interest in freedom from antipsychotic drugs when deciding to medicate him against his will.[137] The majority concluded that since this error may have unjustly prejudiced Riggins' trial, his conviction should be reversed and reconsidered.[138]

The key part of the majority's opinion is the Court's decision to extend the holding in *Washington v. Harper* to pretrial detainees.[139] Justice O'Connor quoted at length from the *Harper* opinion in cataloging the potential side effects of antipsychotic drugs and reiterated that the forced administration of the drugs is a "particularly severe" interference with a person's liberty.[140] The Court then held that "[t]he Fourteenth Amendment affords at least as much protection to persons the state detains for trial" as it does to convicted prisoners.[141]

The majority never decided how much more protection, if any, detainees are entitled to than prisoners because Nevada failed to provide even the minimum protections prescribed by *Harper*. As Justice O'Connor stated, "Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriate-

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134 *Riggins*, 112 S. Ct. at 1814.

135 *Id.* at 1817.

136 Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices White, Blackmun, Stevens, and Souter joined.

137 *Riggins*, 112 S. Ct. at 1816. Both parties indicated that after Riggins' motion to terminate the use of Mellaril was denied, further administration of the drug was involuntary. *Id.* at 1816. Unlike Justice Thomas, the majority accepted this assumption and did not address whether the medication was truly forced on Riggins. *See infra* note 198 for Justice Thomas' dissenting view.

138 *Riggins*, 112 S. Ct. at 1816-17.

139 *Id.* at 1814-15. *See supra* notes 46-56 and accompanying text for a discussion of *Washington v. Harper*.

140 *Riggins*, 112 S. Ct. at 1814 (citing Washington v. Harper, 494 U.S. 210, 229 (1990)).

141 *Id.* at 1815 (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).

ness."[142] Thus, even under the standard used for prisoners, "once Riggins moved to terminate . . . medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug."[143] The majority presumed that Mellaril was medically appropriate since Riggins never argued otherwise, although they noted that Riggins received a very high dose.[144] Riggins' rights were unjustifiably violated, though, when the trial court "allowed administration of Mellaril to continue without making *any* determination of the need for this course."[145]

Since there was no finding that any State need outweighed Riggins' liberty, the majority did not have to decide what substantive standards should be used for judging cases involving forcibly medicated pretrial detainees or defendants.[146] The majority did conclude that due process would have been satisfied if Nevada had shown that Mellaril was medically appropriate, essential for Riggins' safety or the safety of others, and the least intrusive means to achieve these state interests.[147] The majority also acknowledged that "other compelling concerns," besides safety, could be found to outweigh the interest of an accused.[148] The majority rejected the dissent's assertion that, by mentioning a compelling state interest and the least intrusive means to achieve that interest, they had abandoned *Harper's* standard of asking only whether a restriction is reasonably related to a legitimate state interest.[149] Justice O'Connor explicitly denied adopting a standard of strict scrutiny and stated that there was simply "no occasion to finally prescribe such substantive standards."[150] The majority held only that the trial court erred by failing to consider Riggins' liberty interest; hence, the Nevada Supreme Court should have overturned the verdict.[151]

The majority concluded that this was reversible error since there was a strong possibility that Mellaril influenced the outcome of Riggins' trial. Justice O'Connor cited the testimony of Dr.

142 *Id.* at 1815.
143 *Id.*
144 *Id.* at 1814, 1816.
145 *Id.* at 1815-16.
146 *Id.* at 1815.
147 *Id.*
148 *Id.* at 1816.
149 *See id.* at 1826 (Thomas, J., dissenting). Justice Thomas argued that the majority's use of terms such as "compelling state interest," and "less intrusive alternatives" imposes a greater burden on states than *Harper's* reasonableness standard. *See infra* notes 207-12 and accompanying text (discussing Justice Thomas' opinion). *See also supra* text accompanying note 56 (summarizing the standard of review used in *Harper*).
150 *Riggins*, 112 S. Ct. at 1815.
151 *Id.* at 1816-17.

O'Gorman and Dr. Master, who agreed that the high dose of Mellaril given to Riggins could cause side effects such as tension, drowsiness, or confusion.[152] She concluded that "[i]t is clearly possible that such side effects impacted not just Riggins' outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel."[153] The majority held that Riggins did not have to prove actual prejudice because the precise effects of the drugs on Riggins and the jury are "purely speculative."[154] Rather, once Riggins proved a "strong possibility" of prejudice, the State assumed the burden of proving either that this prejudice did not exist or that it was justified by "an essential state interest."[155]

The majority held that Nevada failed to prove either the lack of prejudice or an essential state interest. Justice O'Connor believed that even if the Nevada Supreme Court was correct in its belief that expert testimony allowed the jurors to assess fairly Riggins' demeanor at trial, an unacceptable risk of prejudice remained.[156] Expert testimony "did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril."[157] Justice O'Connor did recognize a state interest in bringing an accused to trial.[158] However, the trial court never found that Mellaril was necessary to ensure Riggins' competence, and the testimony did not support such a conclusion.[159] The majority refused to speculate whether a defendant's interests would still outweigh the state's if the medicine is needed to render the defendant competent for trial.[160] The majority concluded that since the record revealed nothing to prove that essential state interests required the forced administration of Mellaril, the potential for prejudice caused by the drug was unjustified.[161]

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy concurred with the majority's holding but criti-

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152 *Id.* at 1816.
153 *Id.*
154 *Id.*
155 *Id.* at 1816-17 (citing Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986); Illinois v. Allen, 397 U.S. 337, 344 (1970); Estelle v. Williams, 425 U.S. 501, 505 (1976)).
156 *Id.* at 1816.
157 *Id.*
158 *Id.* at 1815 (citing *Allen*, 397 U.S. at 347 (Brennan, J., concurring)).
159 *Id.* at 1815-16.
160 *Id.* at 1815.
161 *Id.* at 1817.

cized Justice O'Connor for failing to prescribe substantive standards to guide the trial court when it considered the case on remand.[162] Justice Kennedy agreed that Riggins had a liberty interest in being free from antipsychotic drugs.[163] Justice Kennedy would have proceeded, however, to establish standards which afford greater protection to pretrial detainees than to convicted prisoners.

Justice Kennedy saw a fundamental difference between *Harper* and *Riggins*. He distinguished between a prison situation, in which medicine is given to ensure that a prisoner functions in a non-violent way, and a trial situation, where "the avowed purpose of the medication is not functional competence, but competence to stand trial."[164] In prison situations, an objective determination can be made as to whether an inmate's behavior complies with minimum standards.[165] When competency to stand trial is at issue, however, a subjective determination of a defendant's capacity must be made.[166] Given the interests at stake in a criminal proceeding, Justice Kennedy would "require the State in every case to make a showing that there is no significant risk that the mediction will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."[167]

Justice Kennedy expressed skepticism that a state could ever make a showing that would justify forced medication because of the inherent risks of antipsychotic drugs.[168] He identified two principal ways in which the drugs prejudice the accused. Initially, the accused's rights under the Confrontation Clause of the Sixth Amendment are implicated because the drugs affect the accused's demeanor both on the witness stand and in the courtroom.[169] Justice Kennedy reviewed the potential side effects of antipsychotic drugs and concluded that the drugs "may alter demeanor in a way that will prejudice all facets of the defense."[170] He noted that the prejudice can be especially acute during sentencing, when the jury "must attempt to know the heart and mind of the offender and judge his character."[171] In a capital case, the jury's character assess-

162 *Id.* at 1818 (Kennedy, J., concurring).
163 *Id.* at 1817 (Kennedy, J., concurring).
164 *Id.* at 1818 (Kennedy, J., concurring).
165 *Id.* (Kennedy, J., concurring).
166 *Id.* (Kennedy, J., concurring).
167 *Id.* (Kennedy, J., concurring).
168 *Id.* (Kennedy, J., concurring). Justice Kennedy noted that determining the effects of antipsychotic drugs is itself an elusive inquiry since experts may not be able to discern a baseline normality for each defendant. *Id.*
169 *Id.* at 1819 (Kennedy, J., concurring).
170 *Id.* (Kennedy, J., concurring).
171 *Id.* (Kennedy, J., concurring).

ment may determine whether the defendant lives or dies.[172]

Justice Kennedy also argued that antispychotic drugs can prejudice the accused by interfering with the attorney-client relationship. The side effects of the drugs can prevent "effective communication" and make the defendant "less able or willing to take part in his defense."[173] Justice Kennedy believed antipsychotic drugs could be prescribed "for the very purpose of imposing constraints on the defendant's own will."[174] He observed that it is the accused, rather than her attorney, who has the right to conduct her own defense.[175] Any interference with the accused's ability or will to defend herself, or the manner in which she does so, is comparable to the manipulation of evidence by the State.[176] Thus, Justice Kennedy concluded that "absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines."[177]

According to Justice Kennedy, if a state cannot make such a showing, it must resort to civil commitment unless the accused is competent to stand trial without the drugs. Justice Kennedy recognized that a state has an interest in rendering the accused competent to stand trial,[178] but "[i]f the defendant cannot be tried without his demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost [of civil commitment]."[179] Justice Kennedy left open the possibility that scientific advances would eventually produce "effective" drugs that have "only minimal side effects."[180] Until such drugs evolve, however, Justice Kennedy would permit compulsory drugging "only when the State can show that involuntary treatment does not cause alterations raising the concerns enumerated in this separate opinion."[181]

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172 *Id.* at 1819-20 (Kennedy, J., concurring).
173 *Id.* at 1820 (Kennedy, J., concurring).
174 *Id.* (Kennedy, J., concurring) (quoting Rock v. Arkansas, 483 U.S. 44, 53 (1975)).
175 *Id.* (Kennedy, J., concurring).
176 *Id.* at 1817-18 (Kennedy, J., concurring) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963) (suppression of evidence favorable to accused by prosecution violates due process)).
177 *Id.* at 1817 (Kennedy, J., concurring).
178 *Id.* (Kennedy, J., concurring).
179 *Id.* at 1820 (Kennedy, J., concurring).
180 *Id.* (Kennedy, J., concurring).
181 *Id.* (Kennedy, J., concurring).

C. THE DISSENTING OPINION

Writing for the dissent, Justice Thomas[182] argued that the majority conflated two distinct questions. Justice Thomas thought the question of whether the forced administration of Mellaril deprived Riggins of a protected liberty interest is distinct from the question of whether Riggins had a fundamentally fair trial.[183] In a criminal case, Riggins can ask only that his conviction and sentence be overturned; he may not seek civil damages or an injunction to remedy an interference with his personal liberty.[184] The dissent concluded that since Riggins' trial was fundamentally fair, his conviction should not be overturned.[185] Justice Thomas would have held that the Nevada Supreme Court properly rejected both Riggins' arguments as to why his cause was prejudiced.

Riggins first claimed that he was wrongly precluded at trial from presenting relevant evidence of his demeanor at the time he killed Wade.[186] Justice Thomas noted that the Supreme Court cannot determine the admissibility of evidence in state courts and may reverse a trial judge's evidentiary ruling only if it "so infuses the trial with unfairness as to deny due process of law."[187] Since the majority only speculated, and never actually found, that Riggins suffered side effects which would be noticeable to a jury, it was improper for them to reverse the trial court's judgment.[188]

Justice Thomas argued further that even if Riggins' demeanor was noticeably altered by the drug, his trial was not inherently unfair. Justice Thomas noted that the trial court allowed Riggins "to prove his mental condition as it existed at the time of the crime through testimony instead of his appearance in court in an unmedicated condition."[189] Riggins testified himself about the effects of Mellaril on his demeanor and called Dr. Jurasky to testify about his mental state prior to medication.[190] Since several state courts have agreed that testimony at trial suffices to inform the jury of the effects of antipsychotic drugs, Justice Thomas saw no reason why excluding evidence of Riggins' unmedicated demeanor rendered the trial fun-

182 Justice Scalia joined Justice Thomas' opinion except as to Part II-A, the portion of the dissent that argues Mellaril was not forced on Riggins.

183 *Riggins,*, 112 S. Ct. at 1821 (Thomas, J., dissenting).

184 *Id.* (Thomas, J., dissenting).

185 *Id.* (Thomas, J., dissenting).

186 *Id.* (Thomas, J., dissenting).

187 *Id.* (Thomas, J., dissenting) (quoting Lisenba v. California, 314 U.S. 219, 228 (1941)).

188 *Id.* at 1822 (Thomas, J., dissenting).

189 *Id.* (Thomas, J., dissenting).

190 *Id.* (Thomas, J., dissenting).

damentally unfair.[191]

Justice Thomas also rejected Riggins' claim that his trial was prejudiced because Mellaril interfered with his ability to participate in his defense. Justice Thomas recognized that the conviction of a legally incompetent person violates due process.[192] However, Justice Thomas stressed that the trial court had specifically found Riggins competent while he was taking Mellaril under a statute requiring him to have the mental capacity to aid in his defense and understand the nature of the charges against him.[193] This finding of competence created a presumption that Riggins could have a fair trial, which Riggins failed to overcome by showing specific ways in which he could not participate in his defense.[194] Moreover, argued Justice Thomas, Dr. Quass, and Dr. O'Gorman both believed Mellaril helped Riggins by increasing his cognitive capacity.[195] The dissent concluded that the record "does not even support [Riggins'] assertion that Mellaril made him worse off" at trial.[196]

The dissent next argued that Riggins' liberty interest in avoiding unwanted antipsychotic drugs is an improper basis for reversing Riggins' criminal conviction. In the portion of his opinion in which Justice Scalia did not join, Justice Thomas identified three reasons why the Court should never have considered the question of whether Riggins had a substantive liberty interest under *Washington v. Harper*.[197]

Initially, Justice Thomas expressed doubt that Riggins was medicated against his will. Riggins took Mellaril voluntarily after his arrest and, although the court refused to enjoin further treatment in response to Riggins' motion, "it did not order him to take any medication."[198] Justice Thomas next stated that Riggins cannot com-

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191 *Id.* (Thomas, J., dissenting) (citing State v. Law, 244 S.E.2d 302, 306 (S.C. 1978); State v. Jojola, 553 P.2d 1296, 1300 (N.M. 1976); *In re* Pray, 336 A.2d 174, 177 (Vt. 1975)).

192 *Id.* (Thomas, J., dissenting) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966)).

193 *Id.* at 1822-23 (Thomas, J., dissenting). *See* NEV. REV. STAT. § 178.400(2) (1989). This statute requires the same elements to prove competence as the Supreme Court required in *Dusky v. United States*. *See supra* note 71 and accompanying text.

194 *Riggins*, 112 S. Ct. at 1823 (Thomas, J., dissenting) (citing *Jojola*, 553 P.2d at 1299).

195 *Id.* (Thomas, J., dissenting).

196 *Id.* (Thomas, J., dissenting).

197 *Id.* at 1823-24 (Thomas, J., dissenting).

198 *Id.* (Thomas, J., dissenting). Justice Thomas criticized the majority for assuming, simply because the Nevada Supreme Court did, that State physicians forcibly drugged Riggins. "The Nevada Supreme Court . . . may have made its assumption [that the medication was involuntary] for the purpose of argument; the assumption, in its view, did not change the result of the case. The Court cannot make the same assumption if it requires reversal of Riggins' conviction." *Id.* at 1824 (Thomas, J., dissenting). *See supra* note 137 for Justice O'Connor's response to this argument.

plain about a violation of his liberty because he argued below for reversal of his conviction only on the ground that he was denied a fair trial.[199] Finally, Justice Thomas would not have considered the *Harper* issue because the Court granted certiorari to decide whether Riggins was denied a fair trial, and not to determine whether Riggins had a liberty interest in being free from unwanted antipsychotic drugs.[200] Justice Thomas noted that the Court does not ordinarily consider issues that were not raised below or were not included in the petition for certiorari.[201]

Justice Scalia joined in Justice Thomas' further conclusion that even if the *Harper* issue is considered, it did not warrant the reversal of Riggins' conviction. The dissent agreed that a pretrial detainee has at least the same liberty as the inmate in *Harper*.[202] However, the dissent pointed out that Harper sought only civil damages and injunctive relief against future medication.[203] "Even if Nevada failed to make the findings necessary to support forced administration of Mellaril, this failure, without more, would not constitute a trial error or a flaw in the trial mechanism."[204] Thus, the dissent argued, even if Riggins' liberty was unjustly violated, he was limited to civil remedies unless he showed that his trial was actually prejudiced.[205] Justice Thomas demonstrated the need for actual prejudice through an analogy: "[T]he Court surely would not reverse a criminal conviction for a *Harper* violation involving medications such as penicillin," yet "we have no indication in this case . . . that Mellaril unfairly prejudiced Riggins."[206]

Since the dissent believed Riggins received a fair trial, it was not necessary for Justice Thomas to define the precise standards to be used in judging when medication may be compelled. However, the Court's discussion of these standards troubled Justice Thomas. The dissent chastised the majority for purporting to rely on *Harper* while applying standards that differed substantially from *Harper's*.[207] Justice Thomas conceded that "the standards for forcibly medicating inmates may well differ from those for persons awaiting trial."[208]

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199 *Riggins*, 112 S. Ct. at 1824 (Thomas, J., dissenting).
200 *Id.* at 1824 (Thomas, J., dissenting).
201 *Id.* at 1824 (Thomas, J., dissenting) (citing Yee v. Escondido, 112 S. Ct. 1522, 1531-32 (1992)).
202 *Id.* at 1824-25 (Thomas, J., dissenting).
203 *Id.* at 1825 (Thomas, J., dissenting). *See also* Washington v. Harper, 494 U.S. 210, 217 (1990).
204 *Riggins*, 112 S. Ct. at 1825 (Thomas, J., dissenting).
205 *Id.* (Thomas, J., dissenting).
206 *Id.* at 1825-26 (Thomas, J., dissenting).
207 *Id.* at 1826 (Thomas, J., dissenting).
208 *Id.* (Thomas, J., dissenting).

He stressed, though, that the *Harper* Court struck down the lower court's holding that a compelling state interest was required to justify involuntary medication.[209] Instead, the Supreme Court in *Harper* held that the standard of reasonableness should apply and that the existence of less intrusive means of accommodating the state's interest does not invalidate the state's policy.[210] Since the *Riggins'* majority faulted the trial court for failing to find that "*compelling* concerns" outweighed Riggins' liberty interest and for not contemplating "less intrusive alternatives,"[211] the dissent concluded that the majority adopted "a standard of strict scrutiny."[212]

V. ANALYSIS

According to this Note, the *Riggins* Court correctly recognized that a pretrial detainee has a liberty interest in freedom from unwanted antipsychotic drugs. While the Court's restraint prevented it from dictating the degree of protection that this liberty interest deserves, this Note argues that the Court's opinion should be interpreted as requiring strict scrutiny of any decision to administer antipsychotic drugs against a detainee's will. This Note also argues that the Court erroneously equated the risk of harmful side effects with the risk of trial prejudice. While the potential adverse effects of antipsychotic drugs certainly must be considered when prospectively deciding to medicate a pretrial detainee, the risk alone of side effects that never manifest themselves at trial has no effect on the fairness of a verdict. A careful assessment of the effects of these drugs should have led the Court to require a showing that the drugs actually prejudiced a defendant's trial before reversing a criminal conviction.

A. THE RISKS OF ANTIPSYCHOTIC DRUGS JUSTIFY STRICT SCRUTINY

All nine Justices agreed in *Riggins* that the liberty interest recognized in *Washington v. Harper* extends to pretrial detainees and must be considered when a state seeks to compel antipsychotic medication.[213] This holding was clearly mandated by *Bell v. Wolfish*, in which the Court held that pretrial detainees enjoy at least as many

209 *Id.* (Thomas, J., dissenting) (citing Washington v. Harper, 494 U.S. 210, 218 (1990)).

210 *Id.* (Thomas, J., dissenting) (citing *Harper*, 494 U.S. at 223, 226).

211 *Id.* (Thomas, J., dissenting) (emphasis added by Justice Thomas) (quoting the majority opinion at 1815-16).

212 *Id.* (Thomas, J., dissenting).

213 *Id.* at 1815; *Id.* at 1817 (Kennedy, J., concurring); *Id.* at 1826 (Thomas, J., dissenting).

rights as convicted prisoners.[214] Since the trial court never considered this interest, the Supreme Court could have decided the case on these narrow grounds and left it to the trial court to consider on remand how much protection Riggins' liberty interest deserved.[215] Although the Court explicitly declined to adopt a standard of strict scrutiny, Justice Thomas correctly perceived that the effect of the majority's analysis was to do just that.[216]

There are many indications that if the Supreme Court had decided the issue in *Riggins*, it would have required strict scrutiny in cases involving pretrial detainees. As Justice Thomas argued, the majority used the terms of strict scrutiny which were rejected in *Harper*.[217] The only substantive standard announced by Justice O'Connor was that due process would have been satisfied if the drugs were medically appropriate and "*the least intrusive means*" possible to protect the safety of Riggins or other inmates.[218] Justice O'Connor also stated that the trial court could weigh safety or "*other compelling concerns*" against Riggins' liberty interest.[219] Justice O'Connor made no attempt to apply the terms of the reasonableness standard, or any other, to facts involving pretrial detainees, and she explicitly noted that the "unique circumstances of penal confinement" involved in *Harper* were not present in *Riggins*.[220]

Further, Justice Kennedy, the author of the *Harper* opinion, insisted that Riggins "is not a case like *Washington v. Harper*" and doubted whether a state could show a compelling enough interest to justify medicating a pretrial detainee.[221] Indeed, a standard requiring strict scrutiny of a decision to medicate pretrial detainees is not at all inconsistent with *Harper*. The *Harper* Court rejected the compelling state interest requirement only because of the unique state interests involved in prison situtions.[222] The *Harper* Court stressed that these state interests often justify the reasonableness standard even when the regulation infringes on interests that are protected by strict scrutiny in non-prison settings.[223]

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214 441 U.S. 520, 545 (1979). *See supra* notes 57-58 and accompanying text.

215 *See supra* notes 142-51 and accompanying text.

216 *See supra* notes 207-12 and accompanying text.

217 *See supra* notes 207-12 and accompanying text.

218 Riggins v. Nevada, 112 S. Ct. 1810, 1815 (1992) (emphasis added).

219 *Id.* at 1816 (emphasis added).

220 *Id.* at 1815.

221 *Id.* at 1818 (Kennedy, J., concurring).

222 Washington v. Harper, 494 U.S. 210, 225 (1990) (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)). *See also supra* notes 52-54 and accompanying text.

223 *Harper*, 494 U.S. at 223 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)). *See also supra* note 55.

Finally, even Justice Thomas never advocated the application of *Harper's* reasonableness standard to persons awaiting trial. Indeed, he faulted the Court only for failing to announce and justify what he saw as a clear departure from *Harper*.[224] The fact that the majority did not adopt this strict standard of review is more an indication of the Court's judicial restraint than of their disagreement with the standard.[225] One lower court judge has already agreed with this analysis and concluded that "[t]here is no principled way, after *Riggins*, that the trial court on remand can revert to *Harper's* 'reasonableness' test."[226]

To the extent that the Court's opinion can be interpreted as requiring strict scrutiny, the Court properly judged the intrusiveness of unwanted antipsychotic drugs on a person's liberty. The Court correctly based its assessment of Riggins' liberty interest on the risks posed by antipsychotics at the time the decision to medicate was made, rather than on the effects that Riggins actually suffered after medication began. Justice O'Connor quoted *Harper's* conclusion that the risks of acute dystonia, akathisia, neuroleptic malignant syndrome, and tardive dyskinesia represent a "substantial interference with a person's liberty."[227] The Court failed to note that Mellaril is the antipsychotic agent least likely to cause these neurological side effects.[228] As the *Harper* opinion pointed out, however, even if an operation is very likely to be successful, a state cannot compel a person to undergo surgery against her will.[229] The forcible administration of even a harmless drug like aspirin intrudes upon a person's liberty and bodily autonomy,[230] but her interest in protecting that liberty increases in proportion to the adverse effects that intrusion could have on her well-being. A person should not have to suffer serious side effects or death from a medication before being able to assert her interest in avoiding those risks. In *Riggins*, the Court properly concluded that the risks alone of antipsychotic

224 *Riggins*, 112 S. Ct. at 1826 (Thomas, J., dissenting). *See also supra* notes 207-12 and accompanying text.

225 *See* Kheim v. United States, 612 A.2d 160, 175 (D.C. 1992) (Ferren, J., dissenting from decision to deny rehearing en banc).

226 *Id.*

227 *Riggins*, 112 S. Ct. at 1814-15 (quoting *Harper*, 494 U.S. at 229-30). *See supra* text accompanying notes 28-38 for a discussion of these side effects.

228 *See supra* notes 21, 28-38 and accompanying text.

229 Washingon v. Harper, 494 U.S. 210, 229 (1990) (citing Winston v. Lee, 470 U.S. 753 (1985)).

230 *See Riggins*, 112 S. Ct. at 1826 (Thomas, J., dissenting). *See also* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990) (general liberty interest in refusing medical treatment).

drugs to a patient's health were great enough to warrant substantial due process protection, arguably even strict scrutiny.

B. ACTUAL PREJUDICE SHOULD BE REQUIRED TO IMPLICATE SIXTH AMENDMENT RIGHTS

The *Riggins* Court correctly recognized that antipsychotic drugs can interfere with a defendant's right to a fair trial. The Court focused not on the threshold issue of competency to stand trial, but on the effects of Mellaril on Riggins' demeanor and appearance at trial and on his ability to assist in his defense.[231] The majority worried that the high dosage Riggins was taking would make him "uptight" and that the sedation effect of Mellaril could be "severe enough to affect thought processes."[232] The majority concluded that these effects could have impacted Riggins' appearance, as well as the content of his testimony and his ability to assist his lawyer in his defense.[233] Justice Kennedy agreed that the symptoms of akathisia, parkinsonism, and sedation may prejudice a defendant's trial by altering his demeanor and rendering him unable or unwilling to assist his attorney in his defense.[234]

While these side effects certainly have the potential to prejudice a trial, the risk that the drugs will cause an unfair trial is not a harm in and of itself. Unlike the act of forcing a person to consume drugs, which is inherently a violation of that person's liberty even if no adverse effects occur,[235] trial prejudice may be proven and remedied if, and when, it occurs. There is a risk that any trial will be prejudiced by any number of factors. For example, a defendant forced to take antihistamines may feel drowsy, but the risk of trial prejudice from that intrusion on the defendant's liberty is negligible.[236] If unwanted antipsychotic drugs could help, or at least not impair, a person's defense, his interest in a fair trial would not be infringed.

Nevertheless, the majority held that a showing of a strong possibility of prejudice is sufficient to justify the reversal of a criminal conviction.[237] Justice O'Connor cited *Estelle v. Williams* in support of the proposition that the risk of trial prejudice is enough to justify

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231 *See supra* notes 69-82 and accompanying text.

232 *Riggins*, 112 S. Ct. at 1816.

233 *Id.*

234 *Id.* at 1818-19 (Kennedy, J., concurring). *See supra* text accompanying notes 22-34 for a discussion of these side effects.

235 *See supra* note 230 and accompanying text.

236 Justice Thomas made a similar analogy to penicillin and aspirin in his dissent. *Riggins*, 112 S. Ct. at 1825-26.

237 *Id.* at 1816.

reversal.[238] In *Williams*, the Court held that even though the precise consequences of compelling a defendant to wear prison clothes at trial could not be determined, there was enough probability of unfair prejudice that a reversal was justified.[239] The Court failed, however, to notice the distinction between *Riggins* and *Williams*. In *Williams*, there was no doubt that the defendant was wearing prison clothes, and the only uncertainty was the effect the clothes would have on jurors' perceptions; in *Riggins*, the existence of the potentially biasing influence was uncertain, as well as the effect that influence might have on the jury's verdict. When there is an inherent risk of the existence of a biasing influence, this holding places an impossibly high, and needless, burden on the states to disprove the risk of prejudice in order to justify forced medication.

Indeed, substantial doubt existed as to whether Riggins suffered from any side effects during his trial. Riggins claimed he was drowsy during trial, and some of the psychiatric evidence supported that contention.[240] As Justice Thomas pointed out, however, Dr. Quass and Dr. O'Gorman both testified that Mellaril was helpful to Riggins and may have increased his cognitive capacity.[241] Justice O'Connor's opinion all but ignores the very real possibility that Mellaril performed as intended and enhanced Riggins' cognitive abilities by clearing his delusions.[242] The majority also ignored the fact that there are many ways of ensuring the fairness of a trial, even if the defendant suffers from some of the side effects of antipsychotic drugs.

First, the Court failed to emphasize that harmful side effects are relatively rare and, even when they do occur, can often be cured or treated to reduce the adverse effects.[243] In addition, patients often develop tolerances to the sedative effect of the drugs.[244]

Second, since most side effects can be objectively diagnosed, a defendant will be able either to demonstrate the effects or have them diagnosed by an expert. Once such a side effect manifests itself, its potential effect on the fairness of the trial can be considered by the court.[245] It must be presumed that Riggins suffered only

238 *Id.*

239 Estelle v. Williams, 425 U.S. 501, 504-05 (1976).

240 *See Riggins*, 112 S. Ct. at 1819 (Kennedy, J., concurring). One of Riggins' doctors testified that Riggins' dose of 800 milligrams was enough to "tranquilize an elephant." *Id.* (Kennedy, J., concurring). *See supra* notes 117-18 and accompanying text.

241 *Riggins*, 112 S. Ct. at 1822-23 (Thomas, J., dissenting).

242 *See supra* notes 91-92 and accompanying text.

243 *See supra* part II.A for a discussion of the side effects of antipsychotic drugs.

244 *See supra* part II.A.

245 *See supra* notes 189-91 and accompanying text.

from less obvious effects than, for example, tardive dyskinesia or seizures, since he based his appeal only on drowsiness.

Third, experts and the defendant himself can inform the jury about the more subtle effects of antipsychotic drugs.[246] Justice Thomas agreed with the Nevada Supreme Court and several other courts that have considered the issue that expert testimony suffices to clarify the effects of the drug for the jury.[247] The majority did not deny that such testimony may allow jurors to properly assess the drug's impact on a defendant's outward appearance and behavior. The only reason the majority gave for rejecting the notion that testimony can correct for the effects of antipsychotic drugs at trial was that such testimony cannot offset the effects on the defendant's cognitive processes.[248] The majority is certainly correct that testimony alone cannot account for all the effects of antipsychotic drugs.

The majority's conclusion, however, ignored the fact that a defendant on antipsychotic drugs must still be found competent to stand trial.[249] The test to determine competency specifically determines if the defendant has the cognitive capability to consult with her lawyer and follow the proceedings against her—the very abilities the Court believed could be affected by antipsychotic drugs.[250] The majority never mentioned that Riggins was receiving the maximum dose of 800 milligrams of Mellaril during his trial, despite the fact that he had been found competent to stand trial while taking only 450 milligrams per day.[251] If Justice O'Connor's speculation is correct that large doses caused drowsiness to the extent of inhibiting cognitive functions,[252] Riggins' interests could have been protected by requesting a competency determination at the time of trial. If Riggins had been found competent while taking 800 milligrams, he should have been presumed to have sufficient cognitive capacity to consult with counsel and testify in his own behalf. Expert testimony, as well as the testimony of Riggins himself, could have informed the jury of any changes in Riggins' demeanor as a result of the drug, and the potential for bias would have been eliminated.

As the dissent argued, the Court should have required a showing of actual prejudice before reversing Riggins' conviction.[253]

246 Several courts have so held. *See supra* note 93.

247 Riggins v. Nevada, 112 S. Ct. 1810, 1822 (1992) (Thomas, J., dissenting) (quoting cases cited *supra* note 93).

248 *Id.* at 1816.

249 *See supra* notes 69-71 and accompanying text.

250 *See supra* text accompanying note 70.

251 *See supra* text accompanying notes 104, 114.

252 *See supra* notes 152-53 and accompanying text.

253 Riggins v. Nevada, 112 S. Ct. 1810, 1825 (1992) (Thomas, J., dissenting).

Under *Williams*, if Riggins proved the drugs actually affected his demeanor at trial, a reversal would be justified even if the exact effect of the prejudice to Riggins' demeanor on the jury could not be determined.[254] The Court purported to follow *Williams*, but it did not find that Riggins actually suffered adverse effects from the drugs at trial.[255] Since the majority may well have been willing to make such a finding, it is not apparent that this standard would have led to a different outcome in *Riggins*. However, it would have provided better guidance to lower courts in similar cases in the future.

A state's compelling interests in medicating a pretrial detainee can best be protected by the actual prejudice standard. This Note argues that, after *Riggins*, a state must demonstrate a compelling state interest in administering antipsychotic medication before infringing on a detainee's liberty interest.[256] If a state makes a strong enough case for medication to survive strict scrutiny, it should not later have the nearly impossible burden of disproving the existence of all the possible side effects of antipsychotic drugs. If the state has the burden of proof, a defendant could allege that she suffered from side effects that really never occurred, or at least which she could not prove if she had the burden of proof. Instead, a state should only have to demonstrate that the defendant had a fair trial. A standard that requires defendants to prove they were actually prejudiced by the effects of an unwanted drug encourages defendants to specify the side effects from which they suffer. Treatment can then be obtained, or testimony offered, to mitigate the effects of the drugs on a defendant's trial. Once a state shows an interest compelling enough to justify forcible medication, the state should be entitled to the benefits of antipsychotic drugs unless the defendant is incompetent or so afflicted by side effects that her trial cannot be made fair.

VI. CONCLUSION

It remains to be determined what degree of protection courts will afford to the liberty interest of a pretrial detainee in being free from unwanted antipsychotic drugs. If courts apply a standard of strict scrutiny, as this Note argues they should, the question after *Riggins* becomes: What state interests are sufficiently compelling to outweigh a detainee's liberty interest? Since the Court mentioned prison safety and security concerns as compelling state interests, the key issue left to be determined is whether a state's interest in ren-

254 *See supra* note 239 and accompanying text.
255 *See supra* notes 152-55 and accompanying text.
256 *See supra* part V.A.

dering an accused competent to stand trial is sufficient to justify the forcible administration of antipsychotic drugs.[257]

The prime value of antipsychotic drugs to states in criminal proceedings is their ability to render an otherwise incompetent defendant competent to stand trial. However, if a defendant's competence depends on continued antipsychotic medication, the state's interest in bringing the accused to trial comes into direct conflict with the accused's liberty interest. After *Riggins*, the Court would probably hold that a detainee's liberty interest outweighs the state's desire to medicate. The State's true interest is not just in a trial, but in a fair trial.[258] Given the majority's fear of the risks of antipsychotic drugs and Justice Kennedy's desire to hold that the the drugs are inherently prejudicial at trial, it seems likely that the Court would not allow an accused to be rendered "artificially competent"[259] to stand trial unless an outstanding, and maybe impossible, showing of need and the lack of prejudice were made by the State. Since there are many non-prejudicial ways to account for the effects of antipsychotic drugs at trial, this Note concludes that such a holding would unjustifiably prevent states from realizing the remarkable benefits of antipsychotic drugs.

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257 Justice O'Connor acknowledged that this question was posed, but not answered, by the Court's holding in *Riggins*. *See Riggins*, 112 S. Ct. at 1815.

258 *See supra* note 90 and accompanying text.

259 *See supra* note 6 and accompanying text.