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Riggins v. Nevada: Toward a Standard for Medicating the Incompetent Defendant to Competence

*Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.*

"Well all you want to do is medicate me and you've been medicating me... [Y]ou are burning me out of my life... [Y]ou are burning me out of my freedom."

*Riggins v. Nevada,* a case involving a schizophrenic man who heard voices and killed his drug supplier because he believed the supplier was putting AIDS-infected blood on his cocaine, recently presented the United States Supreme Court with an intriguing question: Can the State force a defendant to take antipsychotic medications to make him competent to stand trial, even if those medications have side effects that will prejudice his defense? After considering the issue, the Court declined to answer, deciding that it need not reach that question. The Court did hold, however, that the State can compel an incompetent defendant to take antipsychotic drugs before trial in certain circumstances. Essentially, the State's interest in bringing alleged wrongdoers to trial must be balanced against the defendant's interest in personal autonomy and his right to a fair trial. The Court also shed some light on the factors that should be considered when balancing these two competing interests.

This Note assesses the Court's reasoning and the apparent limits it imposes on medicating incompetent defendants before trial and examines the direction the Court may be headed when it considers this question more fully.* The Note also analyzes the medical and legal considerations underlying decisions to medicate defendants.* The Note suggests that although the State's interest may be compelling, otherwise incompetent defendants are particularly likely to receive an unfair trial because of the forced administration of medication. Therefore, these defendants should be given substantial protections, such as imposing on the State the burden to disprove prejudice to the defendant by clear and convincing evi-

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4. See infra notes 81-99 and accompanying text.
5. See infra notes 46-56 and accompanying text.
Paul Wade was found dead in his Las Vegas apartment by his girlfriend at around 3:00 a.m. on November 20, 1987. He had been stabbed thirty-two times in the head, chest, and back. Two days later, police arrested David Riggins and charged him with the murder. After being jailed for a few days, Riggins complained that he was having trouble sleeping and that he had been hearing voices. A doctor prescribed Mellaril for Riggins, a common antipsychotic drug that Riggins said had been used successfully in the past to treat his condition.

In preparation for trial, Riggins's counsel moved for a determination of his client's competency. Psychiatrists examined Riggins in February and March of 1988. After reading their reports, the trial court found Riggins competent to stand trial. Riggins then filed notice that he would plead insanity and moved to have the Mellaril discontinued, arguing that the drug deprived him of his right to present his defense. The State opposed the motion, contending that Riggins needed medication in order to be competent for trial. A hearing on the motion was held at which three psychiatrists testified, none of whom stated that taking Riggins off the medication would make him incompetent to stand trial. In fact, two of the three psychiatrists speculated that Riggins

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6. See infra notes 107-38 and accompanying text.
8. Id.
10. Brief for Petitioner at 3, Riggins (No. 90-8466).
11. Id. at 4. Mellaril is the trade name for thioridazine, an antipsychotic drug often used in the treatment of acute and chronic schizophrenia. Id. at 4 n.2.
12. When examined, Riggins was taking 450 milligrams of Mellaril per day. His dosage was initially 100 milligrams per day, and was gradually increased to the maximum recommended dose of 800 milligrams per day by the time of his trial. Riggins, 112 S. Ct. at 1812.
13. In most jurisdictions, a defendant is competent to stand trial if he has the capacity to understand the nature of the proceedings and the capacity to assist in his own defense. See Steve Tomashefsky, Note, Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment, 52 U. Chi. L. Rev. 773, 780 (1985).
16. Brief for Petitioner at 5, Riggins (No. 90-8466). One of the psychiatrists, Dr. Master, concluded that terminating the medication probably would not have a noticeable effect on Riggins's behavior. Brief for Respondent at 6, Riggins (No. 90-8466). Dr. Quass, who prescribed the Mellaril when Riggins was arrested, believed that Riggins would remain competent even if the medication were terminated, although he thought it more prudent to continue the medication because Riggins continued to complain of hearing voices. Id. at 8. A third psychi-
might be faking his symptoms.17 Despite the consensus that taking Riggins off medication would not make him incompetent, the trial court denied Riggins's motion in a one-page order that included no findings of fact.18 As a result, the State continued to administer 800 milligrams of Mellaril per day to Riggins throughout his trial.19 At trial, Riggins testified in his own behalf in an effort to support his insanity defense.20 He was convicted and sentenced to death.

On appeal, the Nevada Supreme Court affirmed Riggins's conviction.21 The court decided that expert testimony describing the effect of the Mellaril on Riggins's demeanor and testimony was enough to overcome any possible prejudice.22 The United States Supreme Court granted certiorari.23

Riggins argued to the Supreme Court that being forced to take the medication violated his due process rights. In an opinion written by Justice O'Connor, the Court overturned the conviction because the trial

atrist, Dr. O'Gorman, had been Riggins's psychiatrist for several years. He was unsure whether Riggins would remain competent if the medication were stopped. Id. at 10. Although he was not taking the drug at the time of the murder, Riggins had been taking Mellaril for much of the past six years. Id. at 9.

17. Dr. Master said Riggins was manipulative and had the ability to fake psychosis in court. Brief for Respondent at 6, Riggins (No. 90-8466). Dr. O'Gorman believed Riggins made up the claim that he heard the voices of Satan and Satan's assistant to influence Dr. Jurasky, the only one of the four psychiatrists who did not attend Riggins's competency hearing. Id. at 9. Dr. Jurasky, who was away during the hearing, submitted a report to the court stating his opinion that Riggins would be incompetent for trial even with medication. Brief for Petitioner at 6 n.3, Riggins (No. 90-8466).

18. Brief for Petitioner at 6, Riggins (No. 90-8466). The Supreme Court described the trial judge's order as "laconic." Riggins, 112 S. Ct. at 1816.

19. Riggins, 112 S. Ct. at 1813. The daily dosage was the maximum recommended for the medication. While no question of the propriety of the dosage was raised, one of the psychiatrists stated that "[i]f you are dealing with someone very sick then you may prescribe up to 800 milligrams which is the dose he had been taking which is very, very high. I mean you can tranquilize an elephant with 800 milligrams." Id. at 1819 (Kennedy, J., concurring) (quoting Dr. Jurasky).

20. Riggins's bizarre testimony included the assertions that he was the son of John F. Kennedy and Marilyn Monroe, and that the Mafia was after him. Brief for Petitioner at 7, Riggins (No. 90-8466). He said he had heard the voices of "Satan and his assistant," who told him how to hurt or kill people and that he was hospitalized after wandering the streets in his underwear. Id. He said he killed Wade because Wade had tried to kill him by putting fiberglass in his water and squirting AIDS-infected blood on his cocaine. Id.


22. Id. at 181, 808 P.2d at 538. Three justices joined the majority opinion. Justice Rose concurred, but expressed reservations because the record failed to establish conclusively that Riggins needed to be taking Mellaril, and that he would not function adequately if taken off the drug. Id. at 184-85, 808 P.2d at 539 (Rose, J., concurring). Justice Springer was the sole dissenter. Id. at 185-90, 808 P.2d at 540-43 (Springer, J., dissenting).

judge failed to articulate adequately his assessment of the competing interests of the State and the defendant. According to the majority, Riggins had a significant due process interest in not being forced to take antipsychotic drugs. This interest stems from the Fourteenth Amendment's guarantee that a person will not be deprived of his liberty without due process of law. The Court explained that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness.

Justice O'Connor maintained that at a minimum, Riggins was entitled to as much procedural due process as the convicted inmate forced to take Mellaril in Washington v. Harper. In that case, the Court found that the inmate's due process interests guaranteed him the right to refuse medication unless the State showed that "the inmate [was] dangerous to himself or others and the treatment is in the inmate's medical interest." Harper involved the "unique circumstances of penal confinement," Justice O'Connor noted, and "pretrial detainees, [such as Riggins,] who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."

For Riggins, those due process rights included a requirement that the trial judge articulate the essential state policy that outweighed Riggins's constitutional right not to have medication administered over his objection. The Court did not require Riggins to show actual prejudice, but rather concluded that there was a "strong possibility" his defense

24. Riggins, 112 S. Ct. at 1817. In her opinion, Justice O'Connor significantly narrowed the issues presented by the case, disposing of Riggins's claim that having the drug forcibly administered denied him the opportunity to show jurors his true mental condition at the sentencing. Id. at 1814. Justice O'Connor explained that failure to raise this issue before the Nevada Supreme Court or in the petition for certiorari to the United States Supreme Court meant the Court would not address that portion of the argument. Id. She also assumed that Riggins's treatment was medically appropriate, and that he was given the drug against his will. Id. In contrast, Justice Thomas in his dissent argued that Riggins began taking the drug voluntarily, and although the trial court denied Riggins permission to stop taking the drug during trial, it never ordered him to take the medication. Id. at 1823 (Thomas, J., dissenting). While Justice Scalia, the only other dissenter, joined Justice Thomas's dissent, he did not join this portion of Justice Thomas's argument.

25. See id. at 1814.


27. Riggins, 112 S. Ct. at 1815. "In the case of antipsychotic drugs like Mellaril, that interference is particularly severe." Id. at 1814.

28. 494 U.S. 210 (1990); see Riggins, 112 S. Ct. at 1815.


30. Riggins, 112 S. Ct. at 1815.

31. Id. (quoting Bell v. Wolfish, 441 U.S. 520, 545 (1979)).

32. Id. at 1816-17.
was hurt by the administration of Mellaril.33 According to the Court, medical testimony showed that the drugs may have affected Riggins's outward appearance, the content of his testimony, and his ability to follow the proceedings and to communicate with his lawyer.34 "[T]rial prejudice can sometimes be justified by an essential state interest,"35 but because the record failed to show what that interest was, the Court reversed and remanded for an assessment of the competing interests.36

In his concurrence, Justice Kennedy sought to provide some guidance to the lower court when balancing the competing interests and emphasized the State's heavy burden.37 He compared the administration of medication to tampering with evidence.38 Although the State has a legitimate interest in bringing defendants to trial, he wrote, that interest is outweighed by the defendant's due process rights.

In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make that showing.39

Justice Kennedy saw the dangers of forced medication as twofold: That the drugs would affect the defendant's demeanor in court, thereby prejudicing his defense, and that they would make him unable or unwilling to assist his lawyer in his defense.40 In Justice Kennedy's view, when a defendant cannot become competent without compulsory medication, the State should try to commit him.41

Justice Thomas, in dissent, argued that the mere possibility of prejudice was not enough to overturn the verdict.42 Instead, Riggins needed to allege specific facts showing how he could not participate effectively in his defense.43 Justice Thomas believed that expert testimony and Riggins's own testimony about the effects of Mellaril mitigated the effect of

33. Id. at 1816.
34. Id. The Court also found that the possibility of prejudice was not sufficiently lessened by expert testimony that explained the effect of Mellaril. Id.
35. Id.
36. Id. at 1817.
37. Id. (Kennedy, J., concurring).
38. Id. (Kennedy, J., concurring).
39. Id. at 1818 (Kennedy, J., concurring).
40. Id. at 1818-19 (Kennedy, J., concurring).
41. Id. at 1820 (Kennedy, J., concurring).
42. Id. at 1822 (Thomas, J., dissenting).
43. Id. at 1823 (Thomas, J., dissenting).
any prejudicial changes in his demeanor during his trial. While Riggins might have a civil remedy for being medicated against his will, Justice Thomas stated, he had no constitutional due process claim because he failed to meet his burden of showing that his defense had been prejudiced as a result of the forced medication.

Some knowledge of antipsychotic drugs and their side effects is essential to an understanding of the issues raised by cases such as Riggins. Antipsychotic drugs like Mellaril work by altering the chemical balance in the patient's brain. Although mental processes are improved by the drugs, they also produce side effects, which can include acute dystonia, severe involuntary spasms of the upper body; akathesia, an inability to sit still; neuroleptic malignant syndrome, which can lead to cardiac arrest and death; and tardive dyskinesia, a neurological disorder characterized by facial twitches that can be irreversible. Other common side effects are drowsiness and a "stoned" feeling. A particularly strong version of this side effect, called akinesia, can leave the patient feeling "dead inside"—as if nothing matters. According to the American Psychiatric Association, "by administering [Mellaril], the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive."

The effects of antipsychotic drugs on criminal defendants have been considered by a number of courts. For example, courts sometimes have focused on whether the defendant's cognitive abilities will be impaired by the administration of a drug. In Bee v. Greaves, the Court of Appeals for the Tenth Circuit found that antipsychotic drugs infringed upon First

44. Id. at 1822 (Thomas, J., dissenting).
45. Id. at 1822-23 (Thomas, J., dissenting).
46. Antipsychotics are thought to restore the chemical balance of neurotransmitters found in the brain. In schizophrenics, a chemical imbalance is believed to overstimulate the brain in an unfocused way, causing hallucinations and delusions. Antipsychotics alter the neurotransmitters to reduce the symptoms. See Shari L. Kahn, Comment, *The Right to Adequate Treatment Versus the Right to Refuse Antipsychotic Drug Treatment: A Solution to the Dilemma of the Involuntarily Committed Psychiatric Patient*, 33 EMORY L.J. 441, 445 (1984).
47. Riggins, 112 S. Ct. at 1814-15. The American Psychiatric Association, however, warns against placing too much emphasis on the side effects. "Most of these side effects . . . may be controlled by lowering dosages or by adding another medication; such side effects ordinarily cease when antipsychotics are discontinued." Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 10, Riggins (No. 90-8466).
49. Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 13, Riggins (No. 90-8466).
50. 744 F.2d 1387 (10th Cir. 1984).
Amendment rights because the drugs “have the capacity to severely and even permanently affect an individual’s ability to think and communicate.”51 The American Psychiatric Association, however, has characterized the drugs as highly effective for eliminating the hallucinations and delusions produced by psychosis.52 “There is simply no clinical basis for a concern that antipsychotics impinge on protected interests in speech or thought: to the contrary, antipsychotic medication ... enhances the patient’s ability to concentrate, to read, to learn and to communicate.”53

States are divided as to whether defendants may be forced to take medication to make them competent for trial. Courts forbidding or restricting the practice have raised concerns about how the defendant’s medically altered demeanor in court would affect a jury’s decision regarding his sanity.54 They have also worried that the drugs may actually affect how the individual thinks and his ability to assist his counsel. Some courts have rejected suggestions that testimony from experts about

51. Id. at 1394. The dissenting justice for the Nevada Supreme Court in Riggins v. State labeled the drugs a form of “chemical lobotomy.” Riggins v. State, 107 Nev. 178, 185, 808 P.2d 535, 540 (1991) (Springer, J., dissenting). The roiling dissent denounced the practice of forced administration of drugs in the strongest of terms: “I am hoping that this kind of drug abuse, this kind of intrusion into the inner sancta of human personalities will be seen for what it is, oppressive and violative of the human dignity of those who are forced to submit to the demands of the white-coated syringe bearers.” Id. at 187, 808 P.2d at 541 (Springer, J., dissenting).

52. Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 8, Riggins (No. 90-8466).

53. Id. For a survey of the scientific literature on the effects of psychotropic drugs, see Thomas G. Gutheil & Paul S. Appelbaum, “Mind Control,” “Synthetic Sanity,” “Artificial Competence,” and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 Hofstra L. Rev. 77 (1983). Despite the application of the pejorative label of “synthetic sanity” to the resulting effect of psychotropic drugs, the American Psychiatric Association asserts that “[t]he mental health produced by antipsychotic medication is no different from, no more inauthentically alien to the patient than the physical health produced by other medications, such as penicillin for pneumonia (which might be labeled ‘synthetic fitness’ or ‘synthetic health.’)” Brief Amicus Curiae of the American Psychiatric Association Supporting Petitioner at 9, Riggins (No. 90-8466).

54. See Commonwealth v. Louraine, 390 Mass. 28, 35, 453 N.E.2d 437, 443 (1983) (holding that the state may not compel a defendant to take medication that affects his demeanor at trial); State v. Maryott, 492 P.2d 239, 242 (Wash. App. 1971); In re Pray, 133 Vt. 253, 257, 336 A.2d 174, 177 (1975) (stating that for the jurors, defendant’s “deportment, demeanor, and day-to-day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity”). The Maryott court found:

If the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the jury will see or not see of the defendant’s case by medically altering the attitude appearance and demeanor of the defendant, when they are relevant to the jury’s consideration of his mental condition.

Maryott, 492 P.2d at 242.
how the medication affects the defendant offsets the potential prejudice.\textsuperscript{55} Other state courts have reached contrary conclusions, emphasizing that antipsychotic medications enhance a defendant's ability to assist his counsel in his defense.\textsuperscript{56} These courts also emphasize that the State has a strong interest in bringing defendants to trial.

The \textit{Riggins} Court based much of its analysis on the 1990 Supreme Court decision in \textit{Washington v. Harper}.\textsuperscript{57} In that case, an inmate, after initially consenting to take antipsychotics, changed his mind and refused their administration.\textsuperscript{58} The \textit{Harper} Court had to determine the circumstances under which a convicted inmate could be forced to take medication.

The inmate claimed that the denial of a judicial hearing before the drugs were administered violated his due process rights.\textsuperscript{59} The Washington Supreme Court reversed a lower court decision to medicate the inmate forcibly\textsuperscript{60} and held that a full judicial hearing was required. At the hearing, the court said, the State would have to prove by "clear, cogent and convincing" evidence that the administration of the drug advanced a compelling state interest.\textsuperscript{61}

In a majority opinion written by Justice Kennedy,\textsuperscript{62} the United

\textsuperscript{55} See, e.g., \textit{Louraine}, 390 Mass. at 35, 453 N.E.2d at 442 ("The ability to present expert testimony describing the effect of medication on the defendant is not an adequate substitute" for the defendant's right to testify in an unmedicated state.).

\textsuperscript{56} See \textit{State v. Law}, 270 S.C. 664, 676, 244 S.E.2d 302, 306 (1978) ("While it is true the medications do affect cognitive and communicative processes, the effect is beneficial in that it enabled the appellant to effectively exercise the very rights he asserts he was denied.").

\textsuperscript{57} 494 U.S. 210 (1990).

\textsuperscript{58} \textit{Id.} at 213-14.

\textsuperscript{59} \textit{Id.} at 217. The process that was followed required a three-member committee, composed of a psychiatrist, a psychologist, and the associate superintendent of the prison, to review the initial decision to medicate the inmate, which was made by a prison psychiatrist. \textit{Id.} at 215. The final decision to medicate required a majority vote including the psychiatrist, who could not be involved in the inmate's treatment. \textit{Id.} at 215-16. The inmate was entitled to seek judicial review of the initial determination in state court and periodic review of the reasons for the involuntary medication. \textit{Id.} at 216.

\textsuperscript{60} \textit{Id.} at 218.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} Although he wrote the majority opinion in \textit{Harper}, Justice Kennedy was the only Justice in \textit{Riggins} to decide that \textit{Harper} and \textit{Riggins} were not analogous.

\textit{Riggins}, 112 S. Ct. at 1818 (Kennedy, J., concurring).
States Supreme Court reversed, even though it found that the inmate had “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause.” Justice Kennedy noted that the State had a legitimate interest in prison safety and security. In light of this interest, the Court held the Washington Supreme Court had erred in imposing a “clear and convincing” requirement on the State for determining the validity of a prison regulation allowing the forcible medication of the inmate. Instead, the test was whether the regulation was “reasonably related to legitimate penological interests.” The reasonableness standard “was based upon the need to reconcile [the Court’s] longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration.”

Although the Court found a reasonableness test sufficient to support forced medication of an inmate in Harper, in Addington v. Texas the Court adopted a “clear and convincing evidence test” for civil commitment of individuals who have not been incarcerated. Addington’s mother sought his commitment to a state mental hospital. In determining whether Addington was mentally ill and dangerous to himself or others—and therefore should be committed—the lower court merely required proof by a preponderance of the evidence. Addington argued that the “reasonable doubt” standard should apply.

The United States Supreme Court split the difference between the two standards. It considered the State’s legitimate interests both in providing for its citizens who are unable to take care of themselves and in protecting the community. But it found that the harm from any potential error was greater for the individual, and so a higher “clear and convincing” standard was required. The Court reasoned that “[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decisions and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.”

Supreme Court decisions regarding a state’s ability to infringe on a

63. Harper, 494 U.S. at 221.
64. Id. at 223.
65. Id.
66. Id. at 223-24.
68. Id. at 427.
69. Id. at 426.
70. Id. at 427, 431.
71. Id. at 427.
defendant's personal autonomy in order to bring him to trial also are helpful in analyzing the Riggins opinion. In Illinois v. Allen, for example, the Court held that a defendant who repeatedly disrupted a trial could be removed from the courtroom, threatened with contempt, or bound and gagged to keep him from interrupting the trial. The Court reached that conclusion despite the Constitution's guarantee in the Confrontation Clause of the Sixth Amendment that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." According to the Allen Court, even though courts must indulge every reasonable presumption against the loss of constitutional rights . . . we explicitly hold today that a defendant can lose his right to be present at trial if . . . he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

In his concurrence, Justice Brennan cited the strong state interest in bringing a defendant to justice as support for the Court's decision: "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." In Estelle v. Williams, the Court again discussed the conditions under which a defendant can be tried despite suffering some prejudice at his trial. The Estelle Court held that the Due Process Clause prohibits states from trying prisoners in prison garb over their objection. Unlike Allen, there was no essential state policy furthered by requiring defendants to wear prison clothing. The majority acknowledged that it was difficult to assess what harm, if any, might be experienced by prisoners in such a situation, but found that "the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. . . . Courts must do the best they can to evaluate the likely effect of a particular procedure,

73. Id. at 343-44. The Court noted that gagging the defendant was the least attractive of the options: "[O]ne of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." Id. at 344. Riggins's counsel made the argument that the drugs administered to him were the mental equivalent of the restraints discussed in Allen. Brief for Petitioner at 13, Riggins (No. 90-8466).
74. U.S. CONST. amend. VI.
75. Allen, 397 U.S. at 343.
76. Id. at 347 (Brennan, J., concurring). Justice O'Connor quoted this passage in Riggins to show one way the State might have justified administering the drug. Riggins, 112 S. Ct. at 1815.
78. Id. at 512.
79. Id. at 505.
based on reason, principle, and common human experience."  

The Riggins Court failed to reach many of the intriguing questions raised by Riggins's situation, but the Court's reasoning does provide some indication of where it may be heading and how it may decide similar cases in the future. Indeed, the Court's recognition of the tension between the defendant's interest in personal autonomy and the state's interest in bringing wrongdoers to justice raises two separate issues. The first question is under what circumstances a pretrial detainee can be forced to take drugs against his will. The second is what level of prejudice, resulting from the defendant's forced medication, will be tolerated during trial under the Due Process Clause.

With regard to the first question, individuals have a liberty interest in avoiding forced administration of medications. In Washington v. Harper, the Court explained that "[a] forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." 81 The majority in Riggins noted that "[i]n the case of antipsychotic drugs like Mellaril, that interference is particularly severe." 82 Despite this substantial interference, the Harper Court held that an inmate could be forced to take antipsychotic drugs against his will so long as the State could show that it was reasonably related to the State's interests.

The Riggins Court explained that, at a minimum, Riggins should receive the protection of the Harper standard. 83 Further, the Court left itself room to set a higher standard in the future: "Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." 84

In addition to showing that the drugs were medically appropriate and essential to the safety of Riggins or others, the Court suggested a second way that the State could have met its burden: "Similarly, the State might have been able to justify medically appropriate, 85 involuntary

80. Id. at 504.
82. Riggins, 112 S. Ct. at 1814.
83. Id. at 1815 ("The Fourteenth Amendment affords at least as much protection to persons the State detains for trial.").
84. Id. (emphasis added). Harper did not require a finding that the administration of the medication was essential to the inmate's safety.
85. Both of the standards suggested in Riggins include the requirement that the drugs that are sought to be given must be in the defendant's medical interest. That means that a physi-
treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means."  

6 The issue that this alternative raises is how much weight the State's interest in adjudication should be given. The Court's tone—particularly the use of the word "similarly" in referring to the alternative way that the State "certainly" could have administered the drugs against Riggins's will by showing medical appropriateness and that the drug was essential to protect the safety of Riggins or others—may hint that the majority considers the State's interest a trump card, always superior to the defendant's.  

8 The Riggins Court never reached this issue. Although the Riggins Court did not articulate the standard the State would have to meet to justify involuntary administration of drugs, its language prompted Justice Thomas to claim that the Court "appears to adopt a standard of strict scrutiny." To buttress that claim, he described the majority as criticizing the trial court "for failing to find either that the 'continued administration of Mellaril was required to ensure the defendant could be tried,' or that 'other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs.'"  

The majority disputed that interpretation, explaining:

Contrary to the dissent's understanding, we do not "adopt a standard of strict scrutiny." . . . We have no occasion to finally prescribe such substantive standards as mentioned above, since the District Court allowed administration of Mellaril to continue without making any determination of the need for this

cian must decide that the medication is appropriate for the defendant's treatment. See Washington v. Harper, 494 U.S. 210, 222 n.8 (1990) (upholding regulation that says "anti-psychotic medication can be administered only for treatment purposes"). This is not a difficult standard to meet, because it merely requires that physicians cannot "prescribe these drugs for reasons unrelated to the medical needs of the patients." Id. It does, however, prevent the State from administering medication for the sole purpose of making a defendant competent to stand trial.

86. Riggins, 112 S. Ct. at 1815.

87. Here are the two statements in context:

Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means. We note that during the July 14 hearing Riggins did not contend that he had the right to be tried without Mellaril if its discontinuation rendered him incompetent.

Id. (emphasis added) (citations omitted).

88. Id. at 1826 (Thomas, J., dissenting).

89. Id. (Thomas, J., dissenting) (emphasis added by Justice Thomas) (citations omitted).
course or any findings about reasonable alternatives.90

As previously noted, Riggins raised a second question: After the defendant is medicated to make him competent to stand trial, how much prejudice to the defendant's constitutional rights will be tolerated during that trial? The majority took two strides toward protecting the rights of defendants in Riggins's situation. First, it rejected the theory that expert testimony as to the effects of medication is adequate to overcome any prejudice.91 Justice O'Connor contended that expert testimony about the effect of the drugs on Riggins was inadequate to safeguard Riggins's due process rights: "[A]llowing Riggins to present expert testimony about the effect of Mellaril on his demeanor 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."92 The theory that such expert testimony is adequate to overcome any prejudicial effects of the drugs has several adherents among the states, and also was important to the dissent's reasoning.93

The Riggins majority also held that the defendant need not show actual prejudice to have his verdict overturned.94 Citing Estelle95 and Allen,96 the Court acknowledged that the prejudice to the defendant may be difficult to demonstrate with concrete examples. "[T]he precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril."97

90. Id. at 1815-16.
91. Id. at 1816. Some courts rely upon this justification to uphold verdicts against involuntarily medicated defendants. See, e.g., State v. Law, 270 S.C. 664, 673, 244 S.E.2d 302, 306-07 (1978) (finding that insanity defense was not undermined where "both the fact of medication and its effect upon the appellant were fully imparted to the jury by the testimony of the medical witnesses").
92. Riggins, 112 S. Ct. at 1816.
93. Id. at 1822 (Thomas, J., dissenting). Justice Thomas cited three cases in support of his view that expert testimony can overcome possible prejudice to the defendant: State v. Jojola, 89 N.M. 489, 493, 553 P.2d 1296, 1300 (1976); Law, 270 S.C. at 673, 244 S.E.2d at 306; and In re Pray, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975). In In re Pray the court asserted that expert testimony was required "at the very least" to explain the effect of the drugs on the defendant, Gary Pray. The court went on to say, in contrast to Justice Thomas's views, "it may well have been necessary, in view of the critical nature of the issue, to expose the jury to the undrugged, unsedated Gary Pray, at least, insofar as safety and trial progress might permit." Id. at 258, 336 A.2d at 177.
94. Riggins, 112 S. Ct. at 1816.
95. Estelle v. Williams, 425 U.S. 501 (1976); see supra notes 77-80 and accompanying text.
97. Riggins, 112 S. Ct. at 1816.
Justice O'Connor's assessment of the difficulty of establishing the prejudicial effect of Riggin's taking Mellaril is evidenced by Riggins's trial record. The trial transcript apparently showed little that related to Riggins's demeanor during trial. That prompted Riggins's attorneys to include statements in their brief that amounted to testimony by defense counsel, such as "[H]e was so heavily drugged by the State of Nevada that he appeared like a zombie during his trial."98 The State responded: "In light of the facts on the record, references in Petitioner's brief to his 'zombie-like appearance' at trial are pernicious and irresponsible. All references in Petitioner's brief to the 'apathetic,' 'flat,' and 'emotionless' state of Petitioner are simply not supported in the record."99 The difficulty of reviewing the record in these types of cases seems to necessitate either a system of review heavily weighted toward the trial judge's discretion, or a system in which the state is rarely, if ever, allowed to bring such medicated defendants to trial. If review is too difficult to undertake at the appellate level, the decisions must either be left to the trial judge or foregone completely by not trying the defendants.

While the majority did not detail the constitutional protections potentially affected by Riggins's forced medication, Justice Kennedy examined this issue fully in his concurrence.100 He stated that interference with the defendant's testimony implicates the Fifth Amendment's due process protections101 and the Compulsory Process Clause of the Sixth Amendment.102 Such interference with the defendant's testimony, according to Justice Kennedy, violates the principle announced in Rock v. Arkansas103 that the Fifth Amendment permits the accused to testify "in the unfettered exercise of his own will."104

98. Brief for Petitioner at 2, Riggins (No. 90-8466).
100. Id. at 1819 (Kennedy, J., concurring).
101. Id. at 1819 (Kennedy, J., concurring).
102. Id., 112 S. Ct. at 1817-20 (Kennedy, J., concurring). The majority in Riggins also expressed concern that the medication may have altered the content of Riggins's testimony, noting that in extreme cases, the soporific effects of antipsychotics can affect thought processes. Id. at 1816. In fact, there was some evidence that the Mellaril did affect the content of Riggins's testimony. Riggins planned to read a statement expressing his grief and remorse for the crime, but found himself unable to read the statement—as a result of the Mellaril, his attorney asserted. Brief for Petitioner at 21, Riggins (No. 90-8466). Instead, his attorney was forced to read the statement into the record, blunting its impact. Id.
Justice Kennedy's primary concern, however, was with the possible changes in demeanor Mellaril might cause. Sedating the defendant and allowing him to be seen by the jury as cold and uncaring raises questions under the Fifth and Sixth Amendments. Riggins's right to confront his accusers, his right not to be forced to be a witness against himself, and his right to a fair trial all may have been undermined. Ultimately, as the Riggins majority indicated, the analysis in such cases will consist of balancing the possible trial prejudice and the interest in personal autonomy against an essential state interest. But the Court has left undecided for the time being what showing will be required and what standard of review it will use to ensure that defendants' rights are not trampled.

Where should the Court go from here? In balancing the competing interests, the Court should be aware that the possibility of trial prejudice may be particularly strong in certain cases involving schizophrenic defendants who must be forcibly medicated with antipsychotic drugs to be competent to stand trial. Cases involving either the insanity defense or the death penalty are particularly susceptible to prejudice because of changes in the defendant's demeanor.

When a defendant pleads the insanity defense, the prejudice associated with medicated testimony arises because the defendant's demeanor is altered, and the jury may get a skewed view of what the defendant is like. Jurors typically are instructed to regard the demeanor of the witnesses as part of their consideration of how much weight to give the testimony. In fact, an instruction to consider "demeanor and manner while on the stand" was given in Riggins. Demeanor is a particularly important factor in insanity trials as jurors attempt to look beyond the often conflicting psychiatric testimony.

[I]t is an established and universally accepted rule that, when the defendant's sanity is at issue, the trier of fact is entitled to consider the defendant's demeanor in court. . . . Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

105. Riggins, 112 S. Ct. at 1819 (Kennedy, J., concurring).
106. Id. at 1816 ("To be sure, trial prejudice can sometimes be justified by an essential state interest.").
108. Record on Appeal at 226, Riggins (No. 90-8466).
In a death penalty case, the risk of prejudice is high because of the emphasis jurors place on demeanor during the sentencing phase. This view is borne out by a study of Florida cases in which the authors interviewed jurors about the reasons for their decisions in cases in which defendants were sentenced to death.\(^\text{110}\) Thirty-two percent of the jurors interviewed listed the demeanor of the defendant among their reasons for imposing the death penalty.\(^\text{111}\) Their comments about those they sentenced to death included: "'indifferent to the proceedings,' 'without regret or guilt,' 'passive,' 'unremorseful,' 'emotionless,' 'no remorse—no anything.'"\(^\text{112}\)

Those descriptive comments easily could apply to defendants who have taken antipsychotic drugs and are suffering their side effects. Akinesia, one of the known side effects of antipsychotic drugs, leaves the patient lifeless and apathetic, making him seem unconcerned about what goes on around him.\(^\text{113}\) Akinesia can even change the defendant's facial expressions "so that he appears in mild cases to lack spontaneity of expression, and in severe cases to have a wooden, 'mask-like' face."\(^\text{114}\) Due to these potential side effects, in cases involving insanity pleas or death penalty sentencing, the state should not put a defendant on trial if his demeanor is negatively and significantly affected by the state-administered drugs.

The same conclusion may be reached by use of either of the two formulas articulated by the Court for assessing procedural due process concerns. In considering cases in which rights protected by the Due Process Clause are infringed by government action, the Court has used a three-part test first articulated in *Mathews v. Eldridge*.\(^\text{115}\) That test requires courts to weigh (1) the private interest affected, (2) the risk to the constitutionally protected interest from an incorrect decision along with the value of any additional procedures, and (3) the government's interest.\(^\text{116}\)

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\(^\text{111}\) *Id.*

\(^\text{112}\) *Id.*

\(^\text{113}\) "The patient's disinclination to speak, while perhaps beneficial from a psychiatric point of view, is a definite liability to an effective criminal defense." Tomashesfky, *supra* note 13, at 785.

\(^\text{114}\) Fentiman, *supra* note 48, at 1129.


\(^\text{116}\) The *Mathews* Court stated that courts are to consider:
The Court also has applied a test first used in Patterson v. New York.\textsuperscript{117} Under that test, the state has the power to regulate criminal procedure, "and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"\textsuperscript{118}

In applying those tests to Riggins, a very strong, constitutionally protected interest of freedom from unwanted bodily intrusions can be identified.\textsuperscript{119} The Supreme Court has included "[a]mong the historic liberties . . . [the] right to be free from and to obtain judicial relief, for unjustified intrusions on personal security."\textsuperscript{120} Riggins also has a vital and fundamental interest in receiving a fair trial—an interest protected by the Due Process Clause.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

\textit{Id.} at 335.

\textsuperscript{117} 432 U.S. 197 (1977).

\textsuperscript{118} \textit{Id.} at 202. The Court has used both tests in criminal procedure cases, and which test it would select in a Riggins-like situation is an open question. In Medina v. California, 112 S. Ct. 2572 (1992), handed down a little more than a month after Riggins, the Court for the first time stated that the Mathews test was inappropriate for many criminal procedure cases. Justice Kennedy, writing for the majority, stated that the Mathews balancing test "does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." \textit{Id.} at 2576. Although the Court has used the Mathews test to assess criminal procedure in the past, in Medina it noted, "It is not at all clear that Mathews was essential to the results reached in those cases." \textit{Id.} at 2577. Other Justices, however, remain committed to Mathews. Justices O'Connor and Souter, who concurred in the Medina decision, suggested that "[t]he balancing of equities that Mathews v. Eldridge outlines remains a useful guide in due process cases." \textit{Id.} at 2582 (O'Connor, J., concurring). The dissent in Medina, written by Justice Blackmun and joined by Justice Stevens, stated, "[I]t is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the Mathews v. Eldridge test it earlier appears to forswear." \textit{Id.} at 2586 (Blackmun, J., dissenting). Whether the Court would view the issues in Riggins as significantly different from Medina, requiring the higher protections of the Mathews test, is uncertain. But Justice Kennedy, who wrote the majority opinion in Medina, appeared to consider the Riggins issues in a different category, stating:

"In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel."


\textsuperscript{119} See, e.g., Washington v. Harper, 494 U.S. 210, 221-22 (1990) (stating that an individual has a significant liberty interest in avoiding forced administration of antipsychotic drugs); Rochin v. California, 342 U.S. 165, 172-74 (1952) (holding that evidence gained from pumping the stomach of a defendant is not admissible).

\textsuperscript{120} Ingraham v. Wright, 430 U.S. 651, 673 (1977).
On the other hand, the government has a responsibility to protect its citizens from dangerous criminals. An assumption underlying the Constitution's individual protections is that the government nevertheless has the ability to bring a defendant to trial. The governmental interest in medicating a defendant in order to try him is diminished, however, by the option of civil commitment. A defendant accused of murder and suffering from serious mental illness requiring antipsychotic drugs will certainly qualify for civil commitment. Thus, society can be protected, at least initially, regardless of whether the defendant is forcibly medicated.

The private interest and the government interest seem roughly to balance each other out, or perhaps even tilt slightly in the defendant's favor. When the risk of wrongly depriving Riggins of his due process rights and of depriving him of a fair trial are considered, however, it is clear that the potential for harm is enormous. For Riggins, there was a very real possibility that he received an unfair trial as a result of the side effects of the medication. If the jury thought that Riggins seemed sane at trial, it may have concluded that he likely was sane at the time he committed the killing. If it decided that his demeanor was aloof and uncaring, it may have decided that he was an unfit candidate for mercy. Instead of finding Riggins not guilty by reason of insanity, followed by his commitment and treatment, Riggins was sentenced to death. For these reasons, the balance seems to fall clearly in Riggins's favor.

Under the Patterson test, the Due Process Clause does not restrict the state's decisions regarding criminal procedure unless there is a firm and consistent historical basis for a different procedure, or the state's rule


122. Ultimately, a decision restricting the states' ability to force incompetent defendants to take medication for trial may push more states toward the "guilty but mentally ill" standard. That standard allows states to continue to hold defendants even after they recover from the mental illness that originally led to the crime; in cases involving defendants who abused drugs, such a standard has significant implications. Psychiatrists attributed some of Riggins's mental problems to his drug use. Brief for Respondent at 10, Riggins (No. 90-8466). Dr. O'Gorman diagnosed Riggins's schizophrenic condition as secondary to his drug abuse, and he testified that Riggins's mental condition was common among drug abusers. Id. In Foucha v. Louisiana, 112 S. Ct. 1780 (1992), the Court considered whether a defendant who committed a crime in a drug-induced psychosis and who later was found not guilty by reason of insanity could continue to be held in a mental hospital simply because he remained dangerous. Id. at 1785-89. After the defendant was off drugs, the psychosis and other mental disease disappeared. Id. The Court held that he could not continue to be imprisoned. Id. Decisions such as this mean that defendants who commit crimes in a drug-induced psychosis and are acquitted by reason of insanity can be released if they stay off drugs and, consequently, the psychosis ends. The public outcry when these cases are publicized seems to pressure the courts toward adopting the "guilty but mentally ill" standard, allowing the state to continue to hold those who have committed crimes.
"transgresses any recognized principle of fundamental fairness." 123 While there is no firmly entrenched historical practice among the states, the drugging of a defendant, if it interferes with his ability to defend himself, would violate the principle of fundamental fairness. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons" 124 and so would appear to afford protection in the medicating-to-competence situation.

It remains to be decided to what additional process Riggins may be entitled. Because the interests and rights at stake are so fundamental, and the risk of erroneous deprivation so great, defendants in Riggins's situation should be entitled to a full adversarial hearing before trial. That hearing would be used to adduce whether, and to what extent, the medications administered by the State have interfered with the defendant's ability to assist his counsel or have altered his demeanor in a prejudicial fashion. 125

The question then arises as to the standard of proof the government must meet to justify intrusion on a defendant's liberty interest. In allocating the burden of proof, the Court should require the State to show by "clear and convincing evidence" that the defendant will not be significantly prejudiced in his defense by the administration of the drugs. 126 The standard of proof plays a fundamental role in whether due process has been given in a particular case.

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 127

The Court has already held in Addington v. Texas 128 that state commitment proceedings must be administered under a "clear and convincing"

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124. U.S. CONST. amend. IV.
125. See Riggins, 112 S. Ct. at 1818-19 (Kennedy, J., concurring) (stating that the effect on demeanor and on willingness to assist counsel are the two ways a defendant is likely to be prejudiced by the drugs).
126. This standard seems to be supported by the tone of Illinois v. Allen, 397 U.S. 337 (1970), in which the Court said it would "indulge every reasonable presumption against the loss of constitutional rights." Id. at 343. There, the obstreperous but sane inmate lost his right to be present at his trial because of his own actions. In Riggins, the defendant lost his right to participate fully in his defense through the actions of the State and actions of his own over which, arguably, he had no control.
The Court reasoned that a clear and convincing evidence standard should apply because the burden of mistake falls hardest on the individual: His freedom may be lost. In Riggins, too, the risk of mistake most seriously threatens the individual.

There is ample precedent for use of this standard. The Addington Court noted that "this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests." Under such a standard, the state would have to show before trial, by clear and convincing evidence, that the medication did not impair the defendant's cognitive functioning substantially, and that he did not suffer from side effects that would unfavorably impress the jury. A failure to make such a showing is a denial of due process because it denies the defendant his right to a "full and fair trial." If the State is unable to meet this standard, it must resort to its alternatives of trying the defendant without medication or attempting to commit civilly the defendant.

The clear and convincing evidence standard is particularly appropriate where the proof depends on psychiatric testimony. In Addington, the Court chose the clear and convincing standard for commitment proceedings, noting that much of psychiatry is based on the subjective impressions of the psychiatrist. The Addington Court asserted that "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is . . . mentally ill." A prohibition on trying defendants who must be medicated to become competent, as suggested by Justice Kennedy, is undesirable be-

129. Id. at 427.
130. Id.
131. Id. at 424. (citing various types of civil cases: Woodby v. INS, 385 U.S. 276, 285 (1966) (adopting the standard in a deportation case); Chaunt v. United States, 364 U.S. 350, 353-54 (1960) (using the standard in a denaturalization case); Schneiderman v. United States, 320 U.S. 118, 125, 158 (1943) (using the standard in a denaturalization case)); see also Santosky v. Kramer, 455 U.S. 745, 769 (1982) (finding that the interest of a parent in custody of her child is so strong that the state must show by "clear and convincing" evidence that statutory criteria for termination of parental rights have been met). In Santosky the Court said, "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.'" Id. at 756 (quoting Addington, 441 U.S. at 424).
132. Of course, if a defendant later became competent without the use of medication, he could be tried for the crime.
133. Addington, 441 U.S. at 430.
134. Id. at 429.
135. Riggins, 112 S. Ct. at 1817 (Kennedy, J., concurring).
cause it fails to recognize that the side effects can be mitigated by lowering dosages or treating the defendant with other medications, and that not every defendant experiences side effects that would impair his ability to testify on his own behalf and to assist his counsel. While the standard proposed by Justice Kennedy would protect the defendant's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment," it also would negate the State's considerable interest in bringing the accused to trial. Alternatively, lowering the standard to a preponderance of the evidence would fail to protect adequately the defendant's constitutional rights and would not be consistent with the Supreme Court's traditional strict scrutiny of State actions that potentially interfere with the defendant's fundamental constitutional rights. The "clear and convincing evidence" standard best accounts for the interests of the defendant and of the State. It protects society's interest in bringing wrongdoers to trial without sanctioning trials that would abrogate the defendant's constitutional rights.

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136. See supra note 47.
138. See supra note 80 and accompanying text.