

**UNITED STATES V. HARRIS: A HARD SELL FOR INVOLUNTARY
MEDICATION OF DEFENDANTS**

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In February 2020, police arrested Bryant Lamont Harris for threatening to assault a federal judge.¹ A court then ordered Mr. Harris to undergo an involuntary psychological examination.² The examination suggested that Mr. Harris has schizophrenia, delusional disorder, or schizoaffective disorder, and the district court deemed him [incompetent to stand trial](#).³ But Mr. Harris was not “off the hook”—quite the opposite, Mr. Harris remained detained without a trial for over three years (as of the last public filing in March 2023). And, until the Fifth Circuit decided in his favor in October 2023, he faced the threat of involuntary psychiatric medication by the government, despite his religious and substantive due process objections. Why? The government wanted to prosecute him.

But the government cannot prosecute a defendant deemed incompetent to stand trial without violating the defendant’s procedural due process rights. So, in [Sell v. United States](#) (2003), the Supreme Court laid out a framework for balancing two competing interests: 1) the government’s interest in forcibly medicating a defendant to “restore [his] competence” for prosecution; and 2) a defendant’s due process right to refuse medication. “Special circumstances” can alter the balance between these interests by diminishing the government’s interest in prosecution. Importantly, the *Sell* inquiry differs from the inquiry courts undertake when the government justifies forced medication on the defendant’s dangerousness.

While *Sell* covers due process rights, courts have had little experience administering the test when those due process concerns interact with First Amendment rights. Both the [Second Circuit](#), in a decision [reversed without explanation](#) by the Supreme Court, and some [legal scholarship](#) have considered First Amendment concerns—freedom of thought and speech—through the *Sell* balancing test. And only a few federal district court cases have treated a religious objection as a special circumstance. In [United States v. Rashid](#) (2023) and [United States v. Smith](#) (2007), district courts in Florida and Kansas,

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¹ Brief for Appellant at *2, *United States v. Harris*, 84 F.4th 596 (2023) (No. 23-30030), 2023 WL 2761447, at *2.

² *Id.* at *4.

³ *Id.* at *4.

respectively, held that the governmental interest in prosecution outweighed religious concerns. However, until recently, neither the Supreme Court nor any U.S. courts of appeals had deemed a substantial burden on a defendant's religious freedom a "special circumstance" that mitigates the importance of the government's interest in bringing a defendant to trial. In [United States v. Harris](#) (2023), the Fifth Circuit became the first to do so.

This Case Note offers some direction for handling competing interests in this developing body of law and other complex cases weighing intersecting constitutional rights against governmental interests. Parts I and II provide background information, describing the *Sell* test and the current state of constitutional and statutory religious protections. Part III critically analyzes how courts, including the Fifth Circuit, have considered religious objections in *Sell* determinations so far. Because such analysis remains underdeveloped in the courts, Part IV suggests frameworks for coherently integrating Free Exercise doctrine into *Sell* inquiries based on the "[hybrid theory](#)" of constitutional rights.

I. The *Sell* Test

In [Washington v. Harper](#) (1990), the Supreme Court held that a defendant deemed incompetent to stand trial "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." The Court then explained that the government can forcibly medicate an incarcerated person deemed dangerous under certain circumstances.

[Sell v. United States](#) (2003) later provided a test for weighing the defendant's liberty interest under the Due Process Clause against the government's interest in forcibly administering psychiatric medication to *nondangerous* defendants:

[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but *only if* the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

The government [must prove](#) each prong of this test by clear and convincing evidence, [meaning](#) “the fact finder must be convinced that the contention is highly probable.”

This test seems to fall somewhere between [strict](#) and [intermediate](#) scrutiny. While [strict scrutiny](#) typically requires the government to *narrowly tailor* its policy to a *compelling* governmental interest, intermediate scrutiny requires the government to *substantially relate* its policy to an *important* governmental interest. It is harder for a government action to survive strict scrutiny than intermediate scrutiny, and courts apply different levels of scrutiny depending on the nature of the right at stake. In other substantive due process cases, such as [Skinner v. Oklahoma](#) (1942), the Court has found that some rights based in due process protection of liberty are so important that they [demand strict scrutiny](#).

However, because the nature of the right at stake in this context depends on various circumstances, the *Sell* test builds flexibility into the first step of scrutiny applied to the plaintiff’s due process rights: the level of governmental interest required. In [Harper](#), the Court recognized the variable nature of a defendant’s liberty interest in resisting forced medication, writing that “[t]he extent of a prisoner’s right . . . must be defined in the context of the inmate’s confinement.” “[Special circumstances](#),” including the possibility of civil confinement and the length of time already served, can strengthen this liberty interest when weighed against the government’s interest in prosecuting the defendant. If these circumstances exist, the defendant’s right demands more exacting scrutiny from the government. On the other side of the ledger, the seriousness of a crime and the related length of an expected sentence can strengthen the government’s interest in prosecution, potentially even making an important interest a compelling one.

While this first part of scrutiny—the level of the governmental interest—can vary from intermediate (important) to strict (compelling), the closeness of the fit or “tailoring” between the governmental interest and forcibly administering medication seems more consistent. In fact, [Sell](#) seems to employ a *heightened* form of strict scrutiny, not only holding that “involuntary medication [must] significantly further” the government’s interest in prosecution, but also stating that the forcible administration of “medication [must be] *necessary* to further those interests.”

II. Free Exercise of Religion and Strict Scrutiny

Prior to [Employment Division v. Smith](#) (1990), strict scrutiny applied to laws that substantially burdened religion under the [Free Exercise Clause](#) of the First Amendment. In *Smith* (1990), the Supreme Court held that facially neutral, generally applicable laws that incidentally burden religion do not “offend[]” the First Amendment. So, strict scrutiny does not apply in these cases, and the laws are generally upheld under [rational basis review](#).

In response to *Smith* (1990), Congress enacted [the Religious Freedom Restoration Act \(RFRA\)](#), once again requiring generally applicable laws that substantially burden religious exercise to satisfy strict scrutiny. Though the Supreme Court [cabined](#) the application of RFRA to federal laws, many states subsequently enacted their own (basically identical) [versions](#). States that chose not to enact RFRA continue to follow *Smith* (1990).

However, the Supreme Court has recently changed course in analyzing religious burdens, making *Smith*’s (1990) longevity questionable. Some scholars have even argued that the Roberts Court’s jurisprudence on religious rights has gone so far as to create a “[structural preferentialism](#)” for religious groups over nonreligious ones. This is reflected in the Court’s narrowing understanding of neutral, generally applicable laws. In [Tandon v. Newsom](#) (2021), a nonprecedential emergency docket case, the Court indicated that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” Though the Court has not yet overruled *Smith* (1990), some [scholars](#) have predicted that its demise is near.

III. Current Attempts to Consider Religious Objections under *Sell*

Whatever weight religious objections have, no court has held that, alone, they sufficiently outweigh the importance of a government’s interest in prosecution. [When considered at all](#), religious liberties are only [one of many factors](#).

[Harris](#) heavily weighed the defendant’s religious liberties in its *Sell* balancing. The Fifth Circuit held that Mr. Harris’s religious liberty, potential civil confinement, and significant time detained constitute special circumstances. When combined, these circumstances “lessen the Government’s interests and necessitate reversal of the district court’s forcible-medication order.” However, the court indicated

that the special circumstance of religious liberty alone is not always sufficient to outweigh a governmental interest in prosecution.

Although the Fifth Circuit's first, [withdrawn opinion](#) discussed RFRA and First Amendment claims as separate from due process challenges, interestingly, its later analysis of religion as a special factor under the *Sell* framework did not. Instead, the court relied on [Tandon](#), the nonprecedential, per curiam Supreme Court opinion that suggested that any secular exceptions to a law necessitate comparable religious exceptions to that law. The Fifth Circuit reasoned that because *Sell* accounts for secular special circumstances—possible civil confinement and pre-trial detention time—religious liberty should also qualify as a special circumstance of equal or greater importance.

Coming to an opposite conclusion, the district court in [United States v. Smith](#) (2007) brushed aside the defendant's religious objections to forced medication. In merely a footnote, the court addressed the defendant's argument that his religious liberty should weigh against the government's interest in prosecution as a special circumstance. Instead, the court determined that other special circumstances raised the government's interest in prosecuting the defendant to such a high degree that it "outweigh[ed] any First Amendment interest that may exist."

The special circumstances included the seriousness of the crime and the expected length of the sentence. The crime for which the government wanted to prosecute the defendant was "serious"—determined not only by the nature of the charge but also by the maximum sentence available for the defendant's alleged crime. Combined with the fact that the expected sentence would exceed the length of the defendant's pre-trial detention, the court found that the government's interest in prosecution had elevated from an "important" one to a "compelling" one. Thus, the court implied that the defendant's religious liberty interests are not considered compelling, as the government's compelling interest in prosecuting a serious crime assuredly outweighs them. However, it does not necessarily follow that no religious liberty interest can outweigh the compelling governmental interest. The court could have interpreted the *Sell* factors differently from how the Fifth Circuit did in *Harris*, reading them as generally applicable law rather than secular exceptions to the general legal rule allowing forced medication.

But there is another concern with the court's balancing in *Smith* (2007): it creates perverse incentives. Allowing the government to define the charges that determine the seriousness of an alleged crime and, in turn, elevate the government's *important* interest in prosecution to a *compelling* one incentivizes the government to

overcharge defendants. Circuits have [split](#) over the degree to which potential sentence length indicates the seriousness of a crime under *Sell*. If more courts adopt the approach used in *Smith* (2007), the resulting overweighing of a charged crime's seriousness may skew judicial analysis at the expense of religious liberty and substantive due process claims.

IV. Reintegrating Free Exercise Inquiries into the *Sell* Analysis

Though some courts have taken a stab at weighing religious liberties against involuntary medication of defendants under *Sell*, they have done so without a well-developed framework. This Part suggests that courts should evaluate religious liberty claims based on (1) whether the religious liberty claim triggers heightened scrutiny and (2) whether the government's interest is important or compelling.

First, let's look at the framework for weighing different kinds of religious liberty claims against a compelling governmental interest. Recall that some free exercise claims (those covered by RFRA and its state-level equivalents or those not covered by *Smith* (1990)) trigger strict scrutiny. Conversely, other free exercise claims (those in states with no RFRA equivalent or those covered by *Smith* (1990)) receive deferential rational basis review. When the religious liberty claim triggers heightened scrutiny, that claim—combined with the general due process right to liberty—should always outweigh the importance of the governmental interest in prosecution. This bright-line rule flips the current *Sell* test's assumption on its head. Instead of assuming that the government's interest in prosecution is important unless special circumstances outweigh the justifications for prosecution, when serious religious liberties are at stake, the burden falls on the government. In contrast, when heightened scrutiny does not apply because, say, there are no secular exceptions to the law, the religious liberty interest would weigh less heavily and, therefore, need to combine with another special circumstance to outweigh a compelling governmental interest.

Second, let's look at the framework for weighing different kinds of religious liberty claims against an important governmental interest. Where a governmental interest does not include vindicating a serious crime through trial, a merely important governmental interest should never outweigh a defendant's combined due process interest in bodily autonomy and First Amendment interest in freedom of religion. This is because [part of the government's interest](#) rests on “assuring that the defendant's trial is a fair one” in which the defendant can competently defend themselves. It already makes little sense to argue that violating a defendant's due process liberty interest in refusing medication is

justified by vindicating that defendant's other due process rights. It makes even less sense to argue that the government's interest in protecting the defendant's right to a fair trial justifies violating two of the defendant's other rights stemming from two different parts of the Constitution—the Free Exercise Clause in the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Smith (1990) indicates that there may be more applications of strict scrutiny that would fall under the first framework than one might think. It provides guidance unique to cases that concern overlapping or [“hybrid” constitutional rights](#), such as *Harris*. *Smith* (1990) distinguishes a category of cases from the rule that facially neutral laws do not “offend” the First Amendment: those that involve “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.” Though *Smith* (1990) provides overlap with different First Amendment freedoms as examples, the opinion leaves open the possibility that another overlapping interest—such as substantive due process rights—could trigger strict scrutiny. In fact, one of the cases that *Smith* (1990) cites as an example of this distinction, [Pierce v. Society of Sisters](#) (1925), considered religious burdens on parents' substantive due process rights to choose their children's education. Thus, strict scrutiny should still apply under *Sell* analyses that implicate religious liberties because of the combined due process and First Amendment concerns.

The combination of due process and religious liberty is arguably stronger than the combination of religious liberty and free speech articulated in *Employment Division*. Religious liberties and free speech both have to do with expression or exercise of belief, as exemplified by the [overlap](#) between many free speech cases and religious liberties cases. But the right to due process is fundamentally different. Because of this difference, the violations by the government seem like unique intrusions on two distinct rights that have a greater combined impact.

Further support for this theory can be found in other contexts. In 2015, the Court explained that independent constitutional rights can compound the weight of an individual right in [Obergefell v. Hodges](#) (2015) when it found that the “interrelation of” the Equal Protection Clause and Due Process Clause “furthers our understanding of what freedom is and must become.” Professor [Kimberlé Crenshaw's](#) framework of intersectionality, discussing “those who are multiply-burdened,” also argues that the totality of the ways in which the law marginalizes individuals can weigh more heavily than each form of marginalization on its own. Similarly, the combined interest in the due process right to liberty and First Amendment right to free exercise of religion may be greater than their parts. While developing precedent

grapples with tensions between religious liberties and LGBTQIA+ rights, that issue also lies beyond the scope of this Case Note, which only endorses weighing compounded individual rights against *government* action. Because the *Sell* test applies to forced medication of defendants deemed not dangerous, these cases would not implicate others' interest in safety.

V. Conclusion

Defendants are people, presumably innocent people. If we curb their religious liberties or due process rights simply because they are accused of a crime and have a disability, how can our judicial system live up to its maxim that all people are “innocent until proven guilty?” When courts consider the fundamental constitutional rights of individuals facing criminal charges, they should do so in a methodical and reasoned manner. Consideration of such rights does not belong in a footnote or hand-waving analysis. If courts are going to approve forced medication of presumably innocent individuals—setting in motion a violation of not only bodily autonomy but also sincerely-held religious beliefs—they should do so carefully in a framework that fairly weighs those rights, not separately, but in combination with each other.

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