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CONSTITUTIONAL LAW — SUBSTANTIVE DUE PROCESS —  
PENNSYLVANIA SUPREME COURT HOLDS THAT CRIMINAL DE-  
FENDANT’S BEST INTERESTS JUSTIFY FORCIBLE MEDICATION.  
— *Commonwealth v. Sam*, 952 A.2d 565 (Pa. 2008).

When deciding if the government may force a mentally ill individual to take antipsychotic drugs, courts must strike a delicate balance between important governmental interests and an individual’s right to bodily integrity.<sup>1</sup> The Supreme Court held in *Washington v. Harper*<sup>2</sup> that antipsychotic medication could be administered against an inmate’s wishes “to reduce the danger that [he] represents to himself or others.”<sup>3</sup> In *Sell v. United States*,<sup>4</sup> the Court widened the set of governmental interests that can be used to justify forcible medication of an individual to include rendering a criminal defendant competent to stand trial.<sup>5</sup> Recently, in the companion cases of *Commonwealth v. Sam*<sup>6</sup> and *Commonwealth v. Watson*,<sup>7</sup> the Pennsylvania Supreme Court expanded this set of interests even further by holding that Pennsylvania could forcibly medicate incompetent prisoners in order to render them competent to decide whether to pursue relief under the Pennsylvania Post Conviction Relief Act<sup>8</sup> (PCRA).<sup>9</sup> In so holding, the court decided that forcible medication is justified if it furthers the defendant’s best interests — and assumed that it could choose among the defendant’s competing interests in being free from unwanted medication, in making a competent litigation choice, and in avoiding death. Courts should not decide what defendants’ best interests are when they cannot be objectively established; rather, courts should generally defer to the defense counsel’s formulation of those interests.

In 1991, Thavirak Sam was convicted of murdering his mother-in-law, brother-in-law, and two-year-old niece and was sentenced to death for each conviction.<sup>10</sup> In 1997, Sam’s right to petition for post-conviction relief under the PCRA<sup>11</sup> was about to expire, but Sam was

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<sup>1</sup> See, e.g., *Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005).

<sup>2</sup> 494 U.S. 210.

<sup>3</sup> *Id.* at 236.

<sup>4</sup> 539 U.S. 166.

<sup>5</sup> *Id.* at 180–81.

<sup>6</sup> 952 A.2d 565 (Pa. 2008).

<sup>7</sup> 952 A.2d 541 (Pa. 2008).

<sup>8</sup> 42 PA. CONS. STAT. ANN. §§ 9541–9546 (West 2007).

<sup>9</sup> *Sam*, 952 A.2d at 567–68; *Watson*, 952 A.2d at 544.

<sup>10</sup> *Commonwealth v. Sam*, 635 A.2d 603, 604–05 (Pa. 1993). Sam’s conviction was upheld by the Pennsylvania Supreme Court. *Id.* at 612.

<sup>11</sup> The PCRA gives convicted criminals the right to petition for collateral relief for reasons including a constitutional violation during his or her trial, ineffective assistance of counsel, and the emergence of exculpatory evidence after the trial. 42 PA. CONS. STAT. ANN. § 9543.

mentally ill and unable to comprehend his rights.<sup>12</sup> In order to prevent Sam from unknowingly waiving his rights, a nonprofit attorney filed a PCRA petition on Sam's behalf, without authorization from Sam or a court appointment.<sup>13</sup> The Court of Common Pleas in Philadelphia County ("PCRA court") agreed to hear the case and appointed Sam a new lawyer for the PCRA proceedings.<sup>14</sup> Sam was subsequently examined by mental health professionals for both parties, and based on the professionals' determinations, all parties agreed that Sam was incompetent to proceed with his PCRA petition.<sup>15</sup> In response, the Commonwealth filed a Motion to Compel Psychiatric Medication in order to render him competent to decide whether to proceed.<sup>16</sup>

The PCRA court denied the Commonwealth's motion.<sup>17</sup> First, the court determined that Sam was not a danger to himself or others.<sup>18</sup> The court then laid out the four-factor *Sell* test, explaining that in order to medicate a defendant, the government must establish that (1) an important governmental interest is at stake, (2) "the proposed treatment is substantially likely to render [the] Defendant competent and is substantially unlikely to have side effects that may undermine the fairness of the proceedings,"<sup>19</sup> (3) involuntary medication is necessary to further the governmental interest and alternative treatments "are unlikely to achieve the same results,"<sup>20</sup> and (4) the treatment is "medically appropriate."<sup>21</sup> The PCRA court found that the Commonwealth failed to meet its burden under three of the four factors.<sup>22</sup> To begin with, the government's interest in finalizing Sam's conviction was not sufficiently important to override his due process right to bodily integrity.<sup>23</sup> Furthermore, the Commonwealth had not provided a sufficiently concrete plan of treatment and therefore could not prove that medication was substantially likely to render Sam competent or that the treatment was medically appropriate.<sup>24</sup>

<sup>12</sup> *Sam*, 952 A.2d at 568 & n.2.

<sup>13</sup> *Id.* at 568. The attorney worked for the Center for Legal Education, Advocacy and Defense Assistance. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 569.

<sup>16</sup> *Id.* at 568.

<sup>17</sup> *Commonwealth v. Sam*, No. 4359 (Pa. Ct. Com. Pl. Oct. 20, 2005) (order denying motion to compel psychiatric medication).

<sup>18</sup> *Id.*, slip op. at 12.

<sup>19</sup> *Id.*, slip op. at 13.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (quoting *Sell v. United States*, 539 U.S. 166, 179 (2003)) (internal quotation marks omitted).

<sup>22</sup> The court did not consider the third factor. *Sam*, 952 A.2d at 572.

<sup>23</sup> *Sam*, No. 4359, slip op. at 14-15.

<sup>24</sup> *Id.*, slip op. at 19-20, 23-25. In *Watson*, the companion case to *Sam*, the defendant filed a pro se petition for PCRA relief, but later attempted to withdraw the petition, claiming that he would prefer to die. *Commonwealth v. Watson*, 952 A.2d 541, 545-47 (Pa. 2008). When the

The Pennsylvania Supreme Court reversed in a 4–2 decision.<sup>25</sup> Writing for the majority, Chief Justice Castille<sup>26</sup> began by discussing what he termed the “*Sell* caveat.”<sup>27</sup> In *Sell*, the Supreme Court wrote that the factors set forth applied when the government’s interest was “in rendering the defendant competent to stand trial,”<sup>28</sup> but that the factors may not be necessary when medication is warranted by another governmental purpose, such as reducing the defendant’s dangerousness.<sup>29</sup> The court in *Sam* determined that the interest in rendering the defendant competent to decide whether to pursue relief under the PCRA was stronger than the interest in *Sell* because the government was “not seeking an end that is against [the] appellee’s interest.”<sup>30</sup> Therefore, the *Sell* caveat applied, and the court held that forcible medication is justified if it is in the defendant’s best interests. Because the court determined that medication was in Sam’s best interests, the government was able to override his substantive due process right to bodily integrity.

Even though the court found that Sam could be forcibly medicated under the *Sell* caveat, it applied the *Sell* factors because both parties assumed they were determinative.<sup>31</sup> First, the court concluded that there were important governmental interests in ensuring the finality of criminal litigation and the implementation of verdicts<sup>32</sup> and in furthering the “appellee’s interest in exercising his personal right to statutory collateral review — should he so choose.”<sup>33</sup> Next, the court determined that the administration of antipsychotic drugs would significantly further these interests because “concrete details” about the treatment plan were unnecessary to determine whether treatment was substantially likely to render the defendant competent and substan-

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prosecution asked the court to forcibly medicate Watson in order to render him competent to decide whether to pursue the petition, the court appointed Watson’s mother his “next friend” for the purpose of determining Watson’s interests. *Id.* at 545. Since both *Watson* and *Sam* involved the question of whether medication could be involuntarily administered to render a defendant competent to decide whether to pursue PCRA relief, the cases were argued together before the Pennsylvania Supreme Court. *Id.* at 551.

<sup>25</sup> *Sam*, 952 A.2d at 589.

<sup>26</sup> Chief Justice Castille was joined by Justices Saylor, Eakin, and McCaffery.

<sup>27</sup> *Sam*, 952 A.2d at 575.

<sup>28</sup> *Sell v. United States*, 539 U.S. 166, 181 (2003) (emphasis omitted).

<sup>29</sup> *Id.* at 181–82.

<sup>30</sup> *Sam*, 952 A.2d at 575.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 576–77. The court noted that the interest in finality was especially strong in this case because it was a capital case, where “delay is often an end in itself.” *Id.* at 577 (quoting *Commonwealth v. Haag*, 809 A.2d 271, 286 (Pa. 2002) (Castille, J., concurring)) (internal quotation marks omitted).

<sup>33</sup> *Id.* at 579. These interests could be seen as overlapping, if the court had determined that the governmental interest was in ensuring finality *in a full and fair trial*. However, the court treated these as two distinct interests. *See id.* at 576–79.

tially unlikely to have side effects that would undermine fairness.<sup>34</sup> In applying the third factor, the court found that treatment was necessary because the Commonwealth's psychiatrist testified that antipsychotic medication was the least intrusive means of reducing Sam's symptoms.<sup>35</sup> Testimony from the defense on the potentially intrusive side effects was not allowed by the PCRA court,<sup>36</sup> so the court also deferred to the judgment of the Commonwealth's psychiatrist in concluding that the proposed treatment was medically appropriate.<sup>37</sup>

Because the Commonwealth satisfied all four prongs of the *Sell* test, the court held that forcibly medicating Sam was acceptable under the Due Process Clause of the U.S. Constitution even if the *Sell* caveat did not apply.<sup>38</sup> In addition, the court rejected Sam's assertions that compelled medication was prohibited under the Pennsylvania Mental Health Procedures Act<sup>39</sup> and that compelled medication constituted a violation of his rights under the Pennsylvania Constitution.<sup>40</sup>

Justice Eakin filed a concurring opinion, writing separately to say that he did not believe the PCRA court should have entertained the original PCRA petition, since the lawyer who filed it was neither retained by Sam nor appointed by a court to represent him.<sup>41</sup>

Justice Baer, writing in dissent,<sup>42</sup> agreed with Justice Eakin that the PCRA court should have dismissed the petition "for want of a party-defendant."<sup>43</sup> He recognized that this may have eliminated Sam's opportunity to bring a PCRA petition<sup>44</sup> but deemed dismissal necessary to "maintain[] the integrity of the courts."<sup>45</sup> Despite his belief that

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<sup>34</sup> *Id.* at 580–81 (internal quotation marks omitted). In doing so, the Pennsylvania Supreme Court expressly rejected the reasoning of the Fourth Circuit in *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005). *Sam*, 952 A.2d at 580.

<sup>35</sup> *Sam*, 952 A.2d at 581–82.

<sup>36</sup> *Id.* at 571.

<sup>37</sup> *Id.* at 583.

<sup>38</sup> *Id.*

<sup>39</sup> The court noted that the Mental Health Procedures Act, 50 PA. STAT. ANN. §§ 7101–7503 (West 2001), applies only to civil commitments and only "during the trial, conviction, and imposition of sentence." *Sam*, 952 A.2d at 584 (quoting *Commonwealth v. Jermyn*, 652 A.2d 821, 823 (Pa. 1995)) (internal quotation mark omitted).

<sup>40</sup> *Sam*, 952 A.2d at 585–88. The court denied the claim because Sam's attorney's interpretation of the state constitution differed significantly from doctrine regarding similar text in the U.S. Constitution's Fourth Amendment, the text of the state constitution did not directly support Sam's interpretation, and the history of the provision did not indicate that such an understanding was intended. *Id.*; see PA. CONST. art. I, § 8. Compare *id.*, with U.S. CONST. amend. IV.

<sup>41</sup> *Sam*, 952 A.2d at 589 (Eakin, J., concurring).

<sup>42</sup> Justice Baer was joined by Justice Todd.

<sup>43</sup> *Sam*, 952 A.2d at 589 (Baer, J., dissenting).

<sup>44</sup> However, Justice Baer noted that Sam "could potentially raise a constitutional equal protection or due process argument that as an incompetent defendant he was prevented from either waiving or exercising his PCRA rights, while similarly situated competent defendants were permitted to decide their own strategy." *Id.* at 590 n.2.

<sup>45</sup> *Id.* at 590.

the case should not have been considered at all, Justice Baer addressed the merits of the case in response to the majority's opinion. He argued that the government's purported interest in finality was really just a cover for "the Commonwealth's desire to put Sam to death"<sup>46</sup> and that this interest was weaker than the government's interest in trying a defendant since Sam was already confined in prison.<sup>47</sup> Therefore, the prosecution did not meet its burden under the first *Sell* factor. Justice Baer also criticized the majority for its interpretation of the *Sell* caveat, which he said was intended to be limited to those situations where the defendant was a danger to himself or others.<sup>48</sup>

The court in *Sam* determined that the pursuit of Sam's best interests could justify forcibly medicating him.<sup>49</sup> In so concluding, the court was forced to decide what Sam's best interests were. Underlying much of the disagreement in this case, then, was the fact that no one was able to determine what was actually in Sam's best interests. Sam himself was seriously mentally ill and could neither decide his own interests nor relay them to others. The first attorney associated with the case initiated PCRA proceedings without Sam's authorization, Sam's attorney was appointed for him by the court, and neither of them knew Sam when he was mentally competent. Sam had no remaining friends or family members who were willing to stand up for his interests as a "next friend,"<sup>50</sup> in large part because the few people he still knew in the United States were intimately related to the victims of his crimes.<sup>51</sup> Finally, neither the Commonwealth nor the court had any special insight into what was in Sam's best interests.

Sam's best interests may have been grounded in making his own decision about whether to vindicate his rights under the PCRA, as the prosecution argued and the court decided.<sup>52</sup> However, his best interests may have been based instead in upholding his bodily integrity and avoiding the imposition of unwanted medications.<sup>53</sup> Furthermore, the

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<sup>46</sup> *Id.* at 592.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 593.

<sup>49</sup> *Id.* at 574–75 (majority opinion). The court concluded that because "compelled medication in a case like this would vindicate the inmate's interests," forcible medication was constitutionally acceptable. *Id.* at 575.

<sup>50</sup> A next friend is "[a] person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian." BLACK'S LAW DICTIONARY 1065 (7th ed. 1999).

<sup>51</sup> *Sam*, 952 A.2d. at 578.

<sup>52</sup> See *id.* at 575 ("An inmate who is entitled to relief should not be arbitrarily denied the prospect of collateral review."); Reply Brief for Appellant at 16, *Sam*, 952 A.2d 565 (Pa. 2008) (No. 49 EAP 2005), 2005 WL 5178641 (emphasizing the right of criminal defendants "to make their own decisions regarding the litigation of their appeals").

<sup>53</sup> Cf. *Washington v. Harper*, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's lib-

most probable result of any reassessment of Sam's case was fulfillment of his death sentence,<sup>54</sup> so his most important interest may have been in simply staying alive. The court in *Sam* took it upon itself to decide which of these interests should prevail, but the court failed to give any convincing reason why it found that vindicating Sam's PCRA rights should override the interests set forth by Sam's attorney. Allowing courts to make such decisions undermines two of the main purposes of our adversary system: respecting individual autonomy and upholding the rights of citizens against the potentially oppressive power of the government. To remain faithful to these purposes, a court should assume that a defendant's interests are in line with the course of action advocated by the defense, unless the court can articulate a clear reason to decide otherwise.<sup>55</sup>

As an adversary system, the legal system of the United States is based on the ideal of advocates for two sides of a dispute arguing their case in front of a neutral factfinder.<sup>56</sup> By giving every individual the right to argue on behalf of his or her own rights, the adversary system emphasizes human dignity<sup>57</sup> and individual rights.<sup>58</sup> Furthermore, the system is premised on the belief that the best way to reach the truth, or at least a just outcome, is to have a passive decisionmaker who

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erty."); Lawrence D. Gaughan & Lewis H. LaRue, *The Right of a Mental Patient To Refuse Antipsychotic Drugs in an Institution*, 4 LAW & PSYCHOL. REV. 43, 51 (1978) ("Rationally based objections to [antipsychotic] medication may be based on a philosophical or religious antipathy to drugs, or on an aversion to one or more of the side effects of antipsychotic drugs.").

<sup>54</sup> Sam had little realistic chance of having his convictions overturned through PCRA proceedings — his three murder convictions were already unanimously affirmed by the Pennsylvania Supreme Court in *Commonwealth v. Sam*, 635 A.2d 603 (Pa. 1993), there were multiple eyewitnesses, and the police apprehended Sam with the murder weapon, *id.* at 605.

<sup>55</sup> Of course, the situation is different when there is a "next friend" willing to act on behalf of the defendant, as there was in *Watson*, the companion case to *Sam*. If the next friend clearly has the best interests of the defendant in mind and has reason to know the defendant's wishes, the question of how to define those interests should be much easier. However, the motives of the potential next friend may not be clear — for example, in *Watson*, the court questioned whether the defendant's mother was pursuing Watson's interests or only her own interest in keeping her son alive. See *Commonwealth v. Watson*, 952 A.2d 541, 546–47, 550, 560 (Pa. 2008). These situations add another layer of complexity beyond the scope of this comment.

<sup>56</sup> See, e.g., *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) ("In our adversary system, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *Gardner v. Florida*, 430 U.S. 349, 360 (1977) ("[D]ebate between adversaries is often essential to the truth-seeking function of trials."); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998).

<sup>57</sup> Freedman, *supra* note 56, at 59–61. However, Professor David Luban argues in response that this argument only supports a system with some form of advocate for each side, which would include many inquisitorial systems. DAVID LUBAN, *LAWYERS AND JUSTICE* 85–87 (1988).

<sup>58</sup> Freedman, *supra* note 56, at 61–62; see also Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 739 (1983). Luban again has an answer: "Any system whatsoever would defend legal rights equally well" because the legal system itself defines those rights. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83, 100 (David Luban ed., 1983).

hears testimony from interested advocates.<sup>59</sup> In the criminal context, the adversary system is especially important because it not only emphasizes the individual defendant's rights, but also serves the public purpose of protecting citizens from "governmental overreaching."<sup>60</sup>

When the court takes it upon itself to decide the best interests of one party, it is in effect telling that party what it should have argued. This practice undermines the individual autonomy purpose of the adversary system by failing to allow one party to present an argument from its own perspective. The definition of a party's interests by the court leaves no room for the "debate between adversaries"<sup>61</sup> that is so "essential"<sup>62</sup> to the workings of our justice system. In addition, such a result fails to protect citizens from governmental overreaching because the court — itself a part of the government — is deciding for that party where its interests lie.

There have been other situations in which courts have attempted to impose their own view of a defendant's best interests on a defendant who is (or may be) incapacitated. These attempts have often been unsuccessful. For example, trial judges in Washington, D.C., were formerly required to raise the insanity defense *sua sponte* if the judge thought that such a defense was warranted.<sup>63</sup> However, when courts realized that "[a] judge's loyalties are not to the defendant, and the judge may be motivated by considerations other than the defendant's best interests,"<sup>64</sup> this requirement was overturned.<sup>65</sup>

Sometimes, though, as in *Sam*, courts are unable to avoid making some decision about the best representation of the defendant's inter-

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<sup>59</sup> See, e.g., John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 397 (1972). For an overview of research on the efficacy of different systems of adjudication, see E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 7-40 (1988).

<sup>60</sup> Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" To Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 143 (1987); see also LUBAN, *supra* note 57, at 59-60, 63; Luban, *supra* note 58, at 91-92.

<sup>61</sup> *Gardner*, 430 U.S. at 360.

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965). Judicial insertion of an insanity defense was most common in D.C., but was not limited to that jurisdiction. See, e.g., *State v. Pautz*, 217 N.W.2d 190, 192 (Minn. 1974); see also David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295 (1988); Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980).

<sup>64</sup> *Phenis v. United States*, 909 A.2d 138, 165 (D.C. 2006) (Glickman, J., concurring).

<sup>65</sup> See *United States v. Marble*, 940 F.2d 1543, 1548 (D.C. Cir. 1991). Decisions such as this were encouraged by the Supreme Court's decisions in *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Faretta v. California*, 422 U.S. 806 (1975), which made it clear that the defendant should be in control of his own defense whenever possible. See Note, *The Right and Responsibility of a Court To Impose the Insanity Defense over the Defendant's Objection*, 65 MINN. L. REV. 927, 932-34 (1981).

ests. Other courts confronted with such a situation have mitigated the attendant problems by heavily weighting the advice of defense counsel. For example, one appellate court held that where the defendant's attorney advised a plea of not guilty by reason of insanity but the defendant attempted to withdraw the plea, the trial court was required to consider the plea regardless.<sup>66</sup> Such an approach is preferable both because it minimizes interference with the purposes of the American adversary system and because it recognizes the special role of the defense counsel in that system.

Unlike the court, the defense counsel has a reason to advocate for the defendant's interests that is inherent in the structure of an adversary system. The adversary system provides a first layer of procedural protection by placing the defense attorney in the role of an advocate for the defendant. The preamble to the ABA's Model Rules of Professional Conduct states that "a lawyer zealously asserts the client's position under the rules of the adversary system" and "seeks a result advantageous to the client."<sup>67</sup> In his or her role as an advocate, the defense attorney is under a strict ethical duty to represent the defendant competently and diligently.<sup>68</sup> Attorneys who fail to fulfill their ethical duties when representing a client may be subject to sanctions as severe as disbarment by the disciplinary board of their jurisdiction.<sup>69</sup> These ethical safeguards — combined with the structural position of the defendant's attorney — put the defense counsel in a much better position than the court to define the defendant's best interests when those interests cannot be objectively determined.

If the court in *Sam* had not taken it upon itself to define Sam's best interests, it probably would not have changed the final outcome of the case — the court also found that the government had satisfied its burden of proof on all of the *Sell* factors.<sup>70</sup> However, the reasoning in *Sam* creates a precedent that courts can decide where a defendant's most important interests lie and use those interests to justify forcible medication. This method could be used even in future cases that do not involve the same unusual circumstances as *Sam* — cases in which a defendant's real wishes are easier to determine. Such a precedent unjustifiably limits the rights of individual defendants and defies the goals of the adversary system.

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<sup>66</sup> *People v. Merkouris*, 297 P.2d 999, 1008–09 (Cal. 1956).

<sup>67</sup> MODEL RULES OF PROF'L CONDUCT pmb. (1983).

<sup>68</sup> *Id.* R. 1.1 (competence); *id.* R. 1.3 (diligence).

<sup>69</sup> In Pennsylvania, where *Sam* was decided, attorneys are subject to disbarment upon a finding of misconduct by the Disciplinary Board. PA. RULES OF DISCIPLINARY ENFORCEMENT R. 204 (types of discipline); *id.* R. 203 (grounds for discipline). *But see* Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 739 (2001) ("Few lawyers . . . are ever brought before disciplinary boards.").

<sup>70</sup> *Sam*, 952 A.2d at 583.