# The Right to Refuse Treatment in Oregon's State Hospitals

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# Outline of Presentation

- **Introduction**
- **What is the Right to Refuse Treatment**
- **Oregon's Treatment Refusal Rule**
- **Addition of Administration Law Judge (2008)**
- **Additional Criteria -- IST (2010)**
- **Administration Law Judge**
- **Case Law**
- **Discussion and Recommendations.**
- **Criteria for Involutary Treatment of Individuals IST**
- **Case Law:**
- **Discussion and Recommendations**

# Background

- Controversial Law-Mental Health Issue dating back at least 30 Years
- For Example: Special Section in AJP 1980 entitled “Life Liberty and the Pursuit of Madness”.
- “Rotting with Your Rights On” (“The Right to Rot”)– Gutheil & Applebaum
- “Dying with your Rights on” -- Hoffman

# Summary of 30 Years of Controversy

- There is a limited right to refuse treatment for involuntarily committed psychiatric patients based on:
- Constitutional rights (free speech and freedom from cruel and unusual treatment, i.e. psychiatric meds and tardive dyskinesia)
- Civil Commitment statutes which separate civil commitment from civil competency (ORS – 1965)

# Summary - 2

- The right is limited by emergency situations in which the physician may act to protect the person or others in the person's immediate hospital environment (patients and staff)
- Recent issues in California's hospitals link patient and staff injury to delay in treatment.

# Summary - 3

- Once a person has exercised his/her treatment refusal right, and the physician believes the person should be treated, the person must be granted due process to review the refusal.

# Summary - 4

- Two types of procedures have been recognized as sufficient to meet due process determinations
- 1. Separate Judicial Hearing
- 2. Administrative Review Process using outside reviewers. (Oregon chose this route: Administrative Rule: Good Cause to Administer a Significant Procedure)
- Why is the administration of medications become a “significant procedure” – (think TD or Metabolic Syndrome)

# Summary - 5

- Competency to Make Treatment Decisions is the legal issue.
- Over time incompetent assent has also become an important issue.

# Good Cause Rule

- Early 1980's Oregon developed an Administrative Rule defining its approach to tx refusal based on a section of civil commitment statute dealing with the rights of civil commitment patients

# Rights of Committed Patients ORS 426:385 (3)

- “Mentally ill persons committed to the authority (mental health division) shall have the right to be free from potentially unusual or hazardous treatment procedures, including convulsant therapy, unless they have given their express and informed consent…This right may be denied to such persons for good cause as defined in administrative rule only by the director of the facility in which the person is confined, but only after consultation with and approval of an independent examining physician.”

# Legislative Authority

- What is an Administrative Rule: "Rule means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency" ORS 183.310 (9)
- It is very important that the "Good Cause Rule" was based on a statute. (a law).

# Elements of the Good Cause Rule

- Original Rule – a 3-step model outlined in the statute: (patient's psychiatrist, outside psychiatrist, chief medical officer)
- 2008 – Rule amended to allow the refusing patient to appeal the decision of the hospital superintendant through an administrative hearing before an administrative law judge
- To date no empirical study of this addition and no explanation of why this was necessary except for threat of lawsuit by DRO.

# 2010 Amendment of Good Cause Rule

- Before “Good Cause can be found there are criteria which must be addressed by the outside psychiatrist. These criteria are based on a U.S. Supreme Ct. Case, *Sell v. U.S.*
- For those sent to the hospital for competency restoration (IST) additional criteria were added to the list as follows:

# Additional Criteria for patients IST

- “Because of the preliminary nature of their commitment, the following additional findings must be made for patients under ORS 161.370 (IST) jurisdiction.
- Medication is not requested for the sole purpose of restoring trial competency,
- The patient is being medicated because of the patient’s dangerousness or to treat the patient’s grave disability.”

# *Does Case Law Mandate A Judicial Hearing For Involuntary Treatment?*

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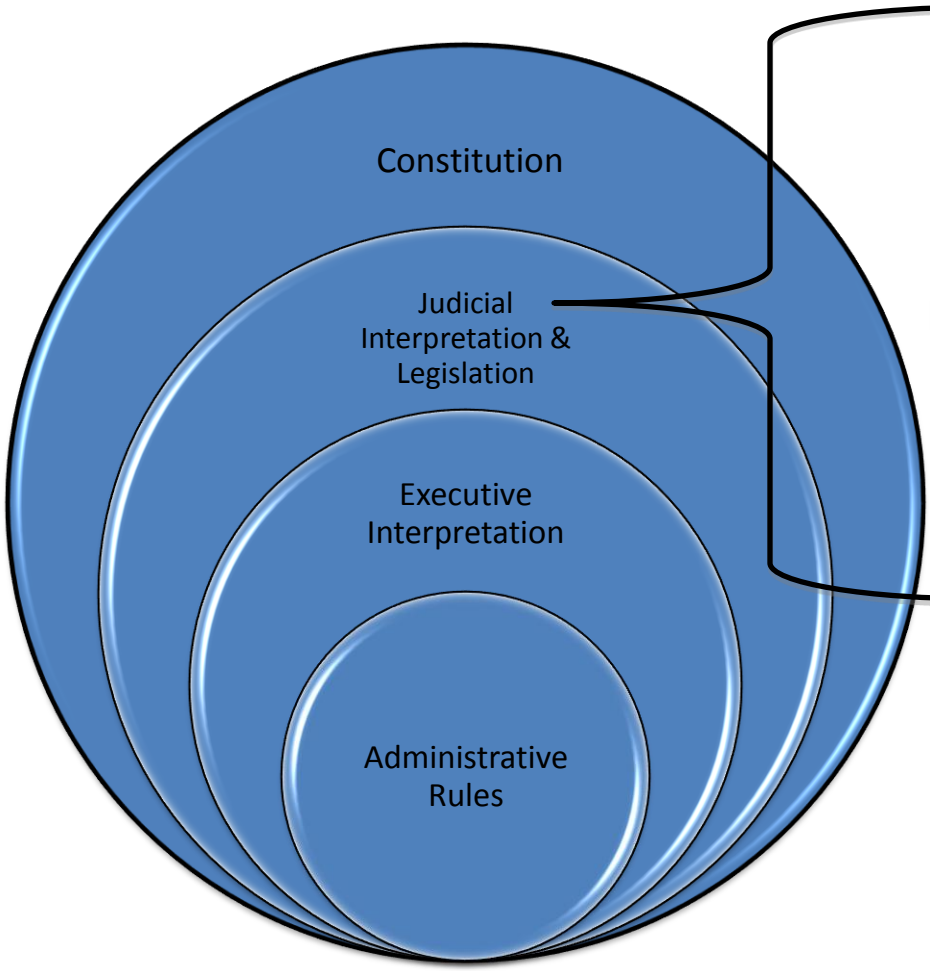
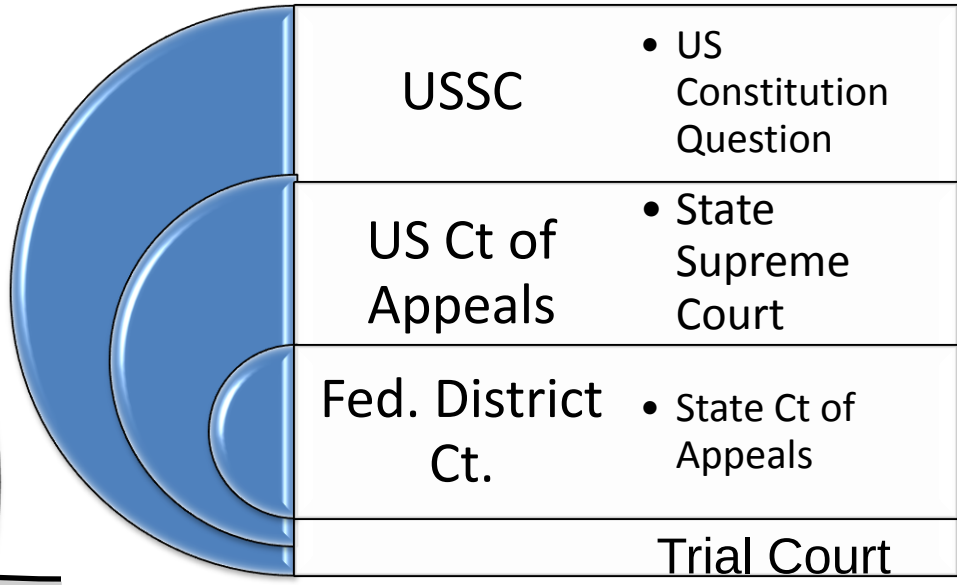
# Hierarchy of Legal Interpretation



# *Rennie v. Klein, 3rd Circuit (1983), 720 F.2d 266*
# *"Professional/Treatment-Driven Model"*

- **Facts:**
  - John Rennie filed lawsuit in New Jersey. His case invoked the constitutional right of involuntarily committed mentally ill patients to refuse antipsychotic drugs.
- **Legal Hx:**
  - District Court: A constitutional right to refuse treatment and a liberty interest entitled to due process through hearings to determine dangerousness, competency, and less restrictive treatment choices.
  - 3rd Circuit: Adopted a "least intrusive means" analysis which allowed for forcibly medicating patients in non-emergency situations without a judicial hearing if that is least restrictive treatment.
  - Supreme Ct: Vacated majority judgment of 3rd circuit, declined to adopt a "least intrusive means" analysis, and remanded to 3rd circuit to reconsider in view of *Youngberg v. Romeo* (1982) in which USSC adopted a "professional judgment" rule.

# *Rennie v. Klein, 3rd Circuit (1983), 720 F.2d 266*
# *"Professional/Treatment-Driven Model"*

- **Holding:**
  - On remand, 3rd Circuit ruled that "antipsychotic drugs may be constitutionally administered to an involuntarily committed mentally ill patient whenever, in the exercise of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others." *Id.* at 269.
  - Professional judgment may be exercised as long as it meets the due process requirements specified in *Youngberg*.
  - Due Process protections:
    - written consent forms,
    - encouraging patient to seek advice from family and friends,
    - informal review by an independent psychiatrist,
    - required meetings with a "treatment team",
    - provision of patient advocates to serve as "informal counsel,"
    - Review and approval of entire case by the medical director,
    - Weekly review of plan of medication once begun. *Id.* at 270.

# *Rogers v. Commissioner, Mass. SJC (1983), 390 Mass. 489*
# *"Judicial/Rights-Driven Model"*

- This case represents the major alternate model to Professional Model.
- **Facts:**
  - 7 plaintiffs at Boston State Hospital were persuaded by on-site legal services staff to file a class action lawsuit on behalf of all present and future patients secluded or medicated against their will.
- **Holding:**
  - "The involuntary commitment of a mental patient is not a determination that he is incompetent to make treatment decisions," and "incompetence must be determined by a judge." *Id.* at 489.
  - "A substituted judgment treatment decision must be made" by a judge, based on what the incompetent patient would have wanted if competent, and the judge should also approve a treatment plan before involuntary treatment can begin. The guardian monitors the treatment plan and competency status but does not serve as a decision maker. *Id.* at 489.

# *Rogers v. Commissioner, Mass. SJC (1983), 390 Mass. 489*
# *"Judicial/Rights-Driven Model"*

- **Holding (continued):**
  - "No state interest is sufficiently compelling in a nonemergency situation" to supersede a patient's right to refuse treatment. *Id.* at 489.
  - Antipsychotic drugs can be forcibly administered in an emergency, narrowly defined as likely harm to self or others or "the immediate, substantial, and irreversible deterioration of a serious mental illness." Clinicians seeking to continue medication should "seek an adjudication of incompetency." *Id.* at 489.

# *Washington v. Harper, USSC (1990), 494 U.S. 210 "Professional Model with Enhanced Due Process"*

- **Facts:**
  - Walter Harper was a prisoner in Washington state since his 1976 robbery conviction and had a history of receiving antipsychotic medication while in prison or on parole. He was transferred to the SOC (Special Offender Center), a state institute for convicted felons with serious mental illness. He filed a section 1983 civil rights action claiming that his civil rights were being violated as a result of being forcibly administered antipsychotic medication.
- **Legal Hx:**
  - WA trial court rejected Harper's claim that a failure to provide a judicial hearing before the forcible administration of antipsychotic drugs violated the Due Process Clause of the 14th Amendment (14th Amendment, Section1, of U.S. Constitution states that "nor shall any state deprive any person of life, liberty, or property, without due process of law").
  - WA supreme ct reversed and ruled that the State could forcibly medicate a competent, non-consenting inmate only if, in a judicial hearing with full

# *Washington v. Harper, USSC (1990), 494 U.S. 210 "Professional Model with Enhanced Due Process"*

- **Legal Hx (continued):**
  - adversarial procedural protections, the State proved by "clear, cogent, and convincing" evidence that the medication was both necessary and effective for furthering a compelling state interest.
- **Holding:**
  - USSC reversed and held that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest." *Id.* at 211.
  - Harper has a "liberty interest in being free from the arbitrary administration" of antipsychotic drugs, which can be superseded by a compelling state interest. *Id.* at 211.
  - SOC policy "comports with substantive due process requirements, since it is reasonably related to the State's legitimate interest in combating the danger posed by a violent, mentally ill inmate," and also comports with procedural due process in part because "Due Process Clause does not

# *Washington v. Harper, USSC (1990), 494 U.S. 210 "Professional Model with Enhanced Due Process"*

- **Holding (continued):**

  require a judicial hearing" before forcible administration of antipsychotic drugs.

  - Moreover, "Harper's not insubstantial liberty interest, when considered with the government interests involved and the efficacy of the particular procedural requirements, is adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge." *Id.* at 211-212.

- **SOC Policy's Administrative Hearing Procedures:**
  - An "inmate may be involuntarily treated only if he (1) suffers from a 'mental disorder' **and** (2) is 'gravely disabled' **or** poses a 'likelihood of serious harm' to himself or others,"
  - "A special committee consisting of a psychiatrist, a psychologist, and a Center official, none of whom may be currently involved in the inmate's diagnosis or treatment, may order involuntary medication if the psychiatrist is in the majority." *Id.* at 210.

# *Washington v. Harper, USSC (1990), 494 U.S. 210*
# *"Professional Model with Enhanced Due Process"*

- **SOC Policy's Administrative Hearing Procedures (continued):**
- The "inmate has the right to
  - notice of the hearing,
  - the right to attend,
  - present evidence, and
  - cross-examine witnesses,
  - the right to representation by a disinterested lay adviser versed in the psychological issues,
  - the right to appeal to the Center's Superintendent, and
  - the right to periodic review of any involuntary medication ordered." *Id.* at 210.
- "In addition, state law gives him the right to state-court review of the committee's decision." *Id.* at 210.

# *Professional/Treatment-Driven Model Vs. Judicial/Rights-Driven Model*

- Federal courts have tended to adhere to the *Youngberg* deference to professionals as adopted in *Rennie* and later mandated by *Washington v. Harper* (1990). In contrast, state courts have tended to make rulings based on state law favoring the *Rogers* model of substitute decision makers. Most states (29/50) now require a judge's ruling for involuntary medication in a non-emergency situation.
- Some states use a judicial decision maker but use a "best interest" rather than a "substituted judgment" model.
- Oregon's 3 step model mirrors *Rennie* and *Harper*.

# *A.E. & R.R. v. Mitchell, 10th Circuit (1983), 724 F.2d 864*
# *"Commitment-Related Model"*

- **An Alternative Treatment Refusal Model**
- **Facts:**
  - Plaintiffs were involuntarily hospitalized in mental health institutions in Utah and medicated without their consent, and filed suit to enjoin defendants from medicating them against their will absent a prior hearing to establish their incompetence to consent to treatment.
- **Legal Hx:**
  - In response, the Utah legislature amended the involuntary commitment statute, stating that a Utah court could order hospitalization only if there is "clear and convincing evidence" that the patient has a mental illness, the mental illness results in patient posing an immediate danger to self or others, the patient lacks competency to make treatment decisions, and "there is no appropriate less restrictive alternative," **and** the hospital or mental health facility can provide the needed treatment.

# *A.E. & R.R. v. Mitchell, 10th Circuit (1983), 724 F.2d 864*
# *"Commitment-Related Model"*

- **Holding:**
  - Both the Federal District Court and the 10th Circuit ruled that the amended Utah statute ensured adequate due process before involuntarily hospitalized patient could be forcibly medicated.
- **Comment:**
  - This model, adopted in Kansas and Iowa, is similar to the APA Model Civil Commitment Law and minimizes the economic costs, treatment delays, increased morbidity and length of stay, and increased dangerousness that is more likely to occur with the ***Rogers*** Model.

# *Disability Rights New Jersey v. Velez, Filed 8/3/11*

- New Jersey is the state where ***Rennie*** was filed and the procedural steps for treatment refusal was similar to Oregon's until Administrative Law Judge was added in Oregon in 2008.
- There is speculation that Disability Rights New Jersey (DRNJ) might have influenced Oregon in its adoption of Administrative Law Judge.
- DRNJ filed the suit on behalf of psychiatric patients who either are or will be treated at psychiatric hospitals in New Jersey. Plaintiff alleges that the Administrative Bulletin governing involuntary administration of psychotropic drugs is routinely violated.
- DRNJ also argues that the "**Three Step**" process (treating physician, concurrence of treatment team, independent examination and review by Medical Director) by which patients are involuntarily medicated is constitutionally inadequate.
- On 7/20/11, the District Court rendered a decision denying most of the defendant's motion to dismiss.

# *Disability Rights New Jersey v. Velez, Filed 8/3/11*

- The District Court also held that ***Rennie*** does not mandate dismissal of plaintiff's claim.
- The due process protections of ***Harper***, also reflected in NJ statutory law regarding involuntarily medicating prisoners, were seen to dwarf those available to hospitalized patients.
- The court also seemed to favor, unlike ***Rennie***, the "least intrusive means" analysis as a factor in determining whether the forcible administration of medication is medically appropriate.

# *Recommendations*

- Case law does not mandate an Administrative Law Judge or a judicial hearing. Administrative hearing procedures outlined in ***Harper*** were deemed to be constitutionally adequate.
- ***Harper Model*** does best in terms of balancing the sometimes incongruent goals of protecting patient's constitutional rights, promoting state's interest in combating dangerousness, and the professional duty to do what is most medically appropriate, least restrictive, and with the least side-effects.
- The process can be streamlined by addressing the issue of forced medication at the commitment stage. Oregon statute already requires presence of "dangerousness" or "grave disability" at the commitment stage. At the commitment stage, the court can also rule on whether there is a compelling state interest in combating dangerousness. It would be left to professional staff to decide on treatment that is medically appropriate and consider side-effects and less restrictive alternatives.

# Criteria for Involuntary Treatment of Individuals Found Incompetent to Stand Trial (IST)

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# *9th Circuit Court of Appeals: United States v. Jared Loughner*

- Loughner was committed as incompetent to stand trial and sent to the Federal Forensic Psychiatric Center in Springfield, MO.
- Hospital staff recommended treatment with antipsychotic medications. His attorneys objected based on several arguments including interference with fairness of trial and that alternative treatments should be considered.
- The 9th circuit court held that he should be treated under Harper criteria.
- APA submitted an *amicus* brief supporting treatment.

# OAR: Involuntary Medication

- OAR 309-114-0020 Good Cause for the Involuntary Administration of Significant Procedures.
  - Determine if able to weigh the risks/benefits
  - Likely to restore health, alleviate suffering, or save life
  - Most appropriate treatment
  - Conscientious effort made to obtain informed consent
  - Additional requirements for ORS 161.370
    - Medications is because of dangerousness or grave disability
    - Medication is not solely for restoring trial competency

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*Sell criteria*

*Harper criteria*

# *Sell v. United States,* 539 U.S. 166 (2003)

**History:** Charles Sell practiced as a dentist but had a history of psychotic symptoms. He was charged with Medicaid and mail fraud, and money laundering.

- He was later charged with attempted murder of FBI agent who arrested him and a former employee who was going to testify against him.
- Sell was found incompetent to stand trial and sent to Federal Forensic Psychiatric prison hospital in Missouri. He refused to take medication and there were conflicting findings of **dangerousness**.

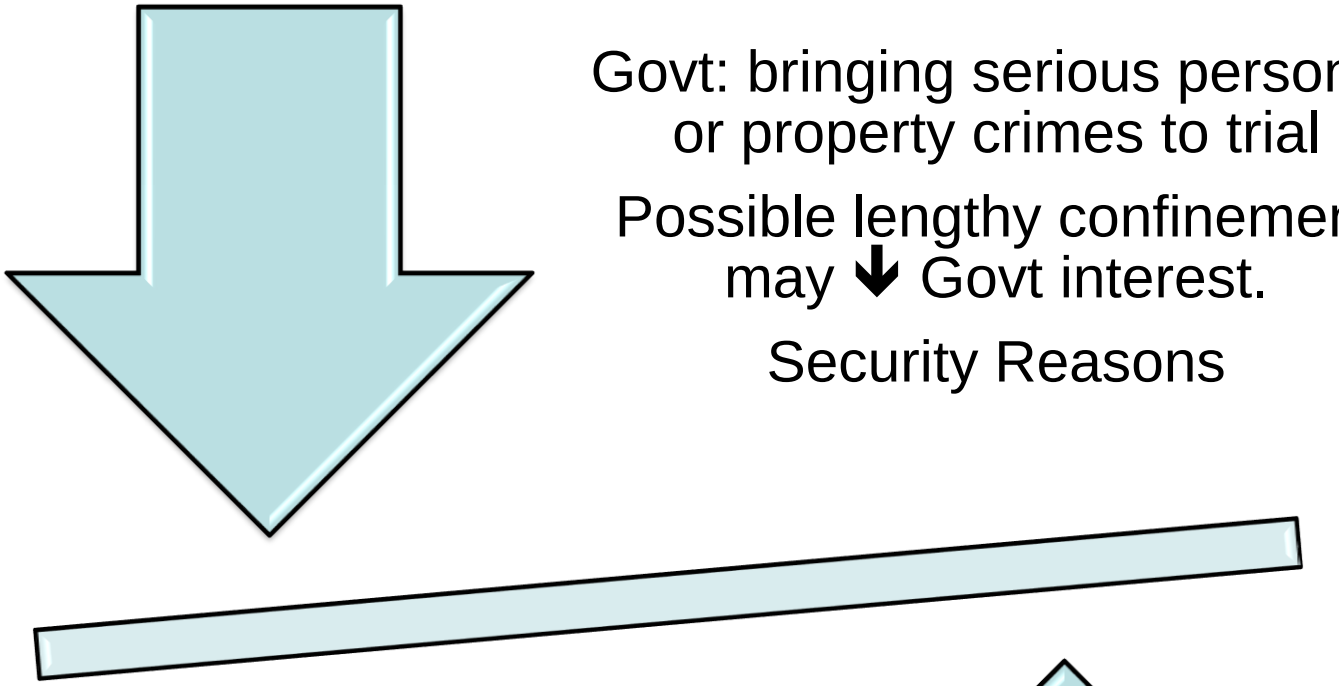
**Legal Question:**

- Can the government administer antipsychotic medication against someone **solely** to render them competent to stand trial for **non-violent offenses** (in the absence of clear finding of dangerousness)?

# *Supreme Court Holding*

- Under framework of *Harper* and *Riggins* (Govt must acknowledge a liberty interest) it is constitutional to "involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if":
    1. Important governmental interests,
    2. Involuntary medication will further Govt interests
    3. Involuntary medication is necessary while considering less intrusive alternatives
    4. Medically appropriate

# *Sell*'s "Important Government Interest"



Govt: bringing serious personal or property crimes to trial

Possible lengthy confinement may ↓ Govt interest.

Security Reasons

Court must consider facts of each case

Fair and timely trial

Lost evidence

Faded memory

Occurrences that affect trial outcome

# *9th Circuit Court: US v. Vasquez-Hernandez*

**Holding:** A *Sell* order must have limitations on medications. At a minimum under *Sell*:

(1) Must specify medication dose or range of medications permitted

(2) Maximum dosages

(3) Duration of involuntary treatment before a required report to court

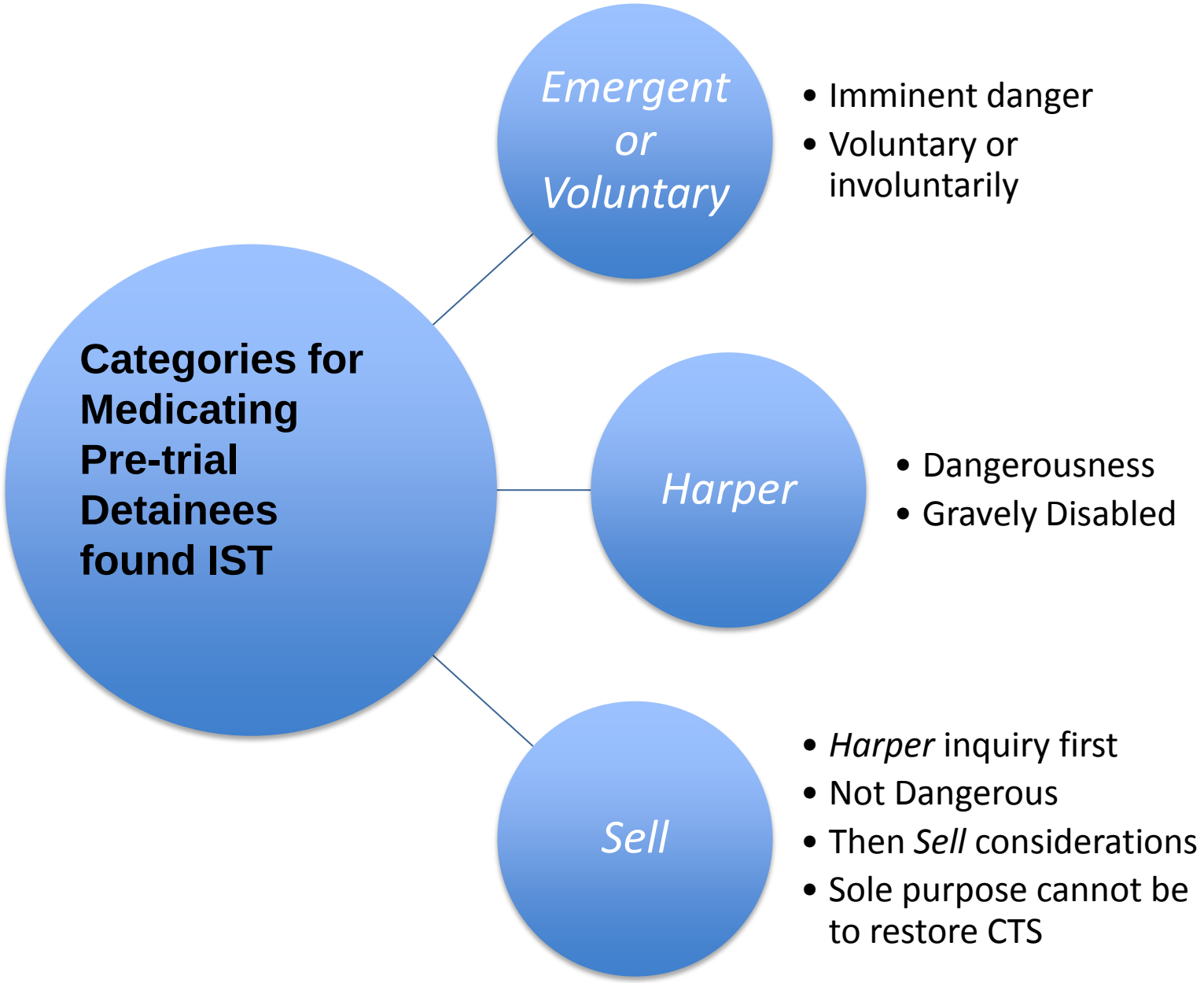
- Either side may move to alter the court's order as the circumstances change and more becomes known about the defendant's response to the medication.

# Vasquez-Hernandez

- **Prior** to *Sell* inquiry the court must carry out a determination of dangerousness or grave disability based on *Washington v. Harper.*
- The hierarchy is *Harper* inquiry, then if necessary – a *Sell* inquiry.

# Why should a *Harper* inquiry be first?

- *Sell's* Reasoning
  - "The inquiry into whether medication is permissible to render an individual nondangerous is usually *more objective and manageable* than the inquiry into whether medication is permissible to render a defendant competent." *Id* at 167.




**IST = Incompetent to Stand Trial; CST = Competent to Stand Trial**

# Conclusions & Recommendations

1. The 2010 addition to the OAR procedures which required additional criteria before instituting involuntary medication collapsed *Harper* and *Sell* criteria into a single inquiry.
2. We recommend making some decisions regarding involuntary medication at the commitment stage as part of the judicial inquiry.

# Recommendations

3. Apply the *Harper* inquiry at the initial judicial hearing – to determine whether the individual should be treated based on "dangerousness" or grave disability.

4. For the non-dangerous person found IST – make the finding of the first *Sell* criteria ("important government interest") at the initial judicial hearing. Remaining *Sell* criteria considered in the Three-Step process at the hospital.

5. HB 3100 changes the commitment criteria for ORS 161.370 to include finding of dangerousness (becomes law January 1, 2012).

# Recommendations

6. Finally, we recommend that a new statute be proposed that would link the finding of dangerousness in HB 3100 to our recommendations (2, 3, & 4).