BYU Law Review

Volume 2012 | Issue 2 Article 7

5-1-2012

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I. INTRODUCTION

In light of the "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs,"[1] the Ninth Circuit joined several other circuits[2] in requiring the government to meet the higher standard of clear and convincing evidence when it wants to forcibly medicate criminal defendants to make them competent to stand trial.[3]

If the government wants to medicate a criminal defendant against his will, it must proceed in one of two ways, depending on whether the defendant is dangerous. First, the government can seek to medicate a dangerous defendant in what is called a *Harper*[4] hearing. This is the simpler method because "the inquiry . . . is usually more 'objective and manageable,'"[5] and the Supreme Court has held that an elevated standard is not needed in this kind of inquiry.[6] Second, the government can seek to forcibly medicate a nondangerous defendant for the sole purpose of restoring competency to stand trial. This second situation is called a *Sell*[7] inquiry and is the focus of the *Ruiz-Gaxiola* case.

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1. Washington v. Harper, 494 U.S. 210, 221 (1990).

2. "[E]very circuit to address the issue has concluded that the government must bear the burden of proving the relevant facts [in a *Sell* inquiry] by clear and convincing evidence." United States v. Ruiz-Gaxiola, 623 F.3d 684, 692 (9th Cir. 2010) (citing United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); United States v. Grape, 549 F.3d 591, 598 (3d Cir. 2008); United States v. Payne, 539 F.3d 505, 508–09 (6th Cir. 2008); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004)).

3. *Ruiz-Gaxiola*, 623 F.3d at 691–92.

4. *Id.* at 689. A *Harper* hearing is an analysis that revolves around a balancing of the interests in protecting the public and the defendant from the danger that the defendant poses in his unmedicated state. The Supreme Court believes this to be an easier, more concrete test than that of a *Sell* hearing, which involves more abstract and metaphysical concepts like trial fairness and competence. Sell v. United States, 539 U.S. 166, 182 (2003).

5. *Sell*, 539 U.S. at 182 (quoting Riggins v. Nevada, 504 U.S. 127, 140 (1992) (Kennedy, J., concurring in judgment)).

6. *Harper*, 494 U.S. at 235.

7. *Ruiz-Gaxiola*, 623 F.3d at 700.

In *United States v. Ruiz-Gaxiola*, defendant Vincente Ruiz-Gaxiola was charged with unlawful reentry and was found to be incompetent to stand trial due to a rare mental disorder.[8] He refused medication that was intended to restore his competency, and the district court ordered that he be forcibly medicated.[9] On review, the Ninth Circuit held that the government had not proven by clear and convincing evidence that the proposed treatment was medically appropriate or that it would significantly further the government's prosecutorial interest.[10]

The court's decision was correct, but it missed an opportunity to simplify applying these decisions by closing the door on *Sell* inquiries in situations in which defendants are accused of nonserious crimes. The court should have determined that the government never has an important enough interest in prosecuting nonviolent individuals to justify forcible medication; the goals of prosecution and punishment either cannot be accomplished with these types of defendants or will be accomplished better by some other means that do not require forced administration of antipsychotic drugs.

Part II of this Note gives a short background on the law of forced medication, followed by a discussion of the facts and analysis of the *Ruiz-Gaxiola* case. Part III explains the retributivist and utilitarian rationales for punishment and discusses why these justifications may not apply to defendants who are found to be incompetent. Part IV discusses the more humane alternatives that can accomplish these utilitarian goals. Part V concludes.

II. *RUIZ-GAXIOLA* AND THE LAW OF FORCED MEDICATION

A. The Cases Up Through Sell

It is a violation of due process to convict a mentally incompetent person.[11] The standard for competency to stand trial requires that a person have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [that] he [have]

8. *Id.* at 687.
9. *Id.* at 687–88.
10. *Id.* at 706–07.
11. *See* Pate v. Robinson, 383 U.S. 375, 378 (1966).

a rational as well as factual understanding of the proceedings against him."[12]

Prosecutors and courts have adopted different methods of restoring a defendant to a level of competency that would allow him to stand trial. In some cases, they have attempted to commit the defendant to a mental health ward, even though the defendant was not dangerous, in an effort to restore him to competency.[13] These commitments were often indefinite and would sometimes extend well beyond the statutory-maximum sentence of the alleged crime.[14] The Supreme Court invalidated these indefinite commitments because they were based solely on a defendant's incompetence to stand trial.[15] If a defendant is held in an institution to restore him to competency, he can only be held for a reasonable period of time necessary to determine "whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future."[16] If the state does not determine that a person would regain competence, then it must undertake a standard civil commitment to continue to hold the defendant.[17]

With the advent and increased efficacy of antipsychotic medication, it became simpler to restore defendants to competency by administering these drugs. Most early cases held that it was permissible to medicate criminal defendants to make them competent to stand trial.[18] This trend is explained somewhat by a common perception among courts that "the administ[ration] of drugs under proper medical supervision has effectively restored many mentally ill citizens to a useful life in which they can function as normally as other citizens not so impaired."[19] This misperception ran

12. Dusky v. United States, 362 U.S. 402, 402 (1960).

13. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 719 (1972).

14. *See id.* at 717–19. In *Jackson v. Indiana*, the defendant had been indicted on two counts of robbery involving less than $10, and he spent three-and-a-half years in involuntary institutionalization. MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 60–61 (2008).

15. *Jackson*, 406 U.S. at 720.

16. *Id.* at 733.

17. *Id.* at 738.

18. *See, e.g.*, People v. Hardesty, 362 N.W.2d 787, 794 (Mich. Ct. App. 1984); State v. Hayes, 389 A.2d 1379, 1382 (N.H. 1978); State v. Law, 244 S.E.2d 302, 307 (S.C. 1978); State v. Stacy, 556 S.W.2d 552, 553 (Tenn. Crim. App. 1977); Craig v. State, 704 S.W.2d 948, 950 (Tex. Ct. App. 1986); State v. Lover, 707 P.2d 1351, 1353 (Wash. Ct. App. 1985).

19. PERLIN ET AL., *supra* note 14, at 34 (quoting *Stacy*, 556 S.W.2d at 557–58) (internal quotation marks omitted).

contrary to the understanding that common side effects of these drugs turned defendants into drooling, sedated shells of their former selves.[20]

Courts eventually grew into the understanding that defendants had a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."[21] The Supreme Court began its major development of the law of forced administration in *Washington v. Harper*[22] and *Riggins v. Nevada*.[23] In *Harper*, the Court approved forced administration on prison inmates that were mentally ill and either were severely disabled or posed "a likelihood of serious harm" to themselves, others, or their property.[24] In *Riggins*, the Court reversed the defendant's capital conviction because the state court had refused to allow him to discontinue his use of antipsychotic medication during his trial.[25] The Court found that without an "overriding justification" for forcible medication, the government could not overcome the liberty interest in avoiding unwanted medication—an interest that requires at least as much protection in pretrial detainees as in inmates.[26] The Court did not reach the question whether forcible medication could be continued if discontinuation would result in the defendant's incompetence.[27]

The Court first reached this question in *Sell v. United States*.[28] Charles Sell, a dentist who had a history of mental illness, was accused of insurance fraud.[29] After Sell was found to be incompetent to stand trial, he was hospitalized for treatment but refused antipsychotic medications against the staff's recommendation.[30] After several hearings in different judicial and quasi-judicial venues, the Supreme Court agreed to consider whether the government could forcibly medicate Sell to restore his competency to stand trial.[31]

20. *Id.* at 150.

21. Washington v. Harper, 494 U.S. 210, 221 (1990).

22. *Id.*

23. Riggins v. Nevada, 504 U.S. 127 (1992).

24. *Harper*, 494 U.S. at 210, 215.

25. *Riggins*, 504 U.S. at 129.

26. *Id.* at 135.

27. *Id.* at 136.

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

29. *Id.* at 169–70.

30. *Id.* at 171.

31. *Id.* at 171–75. The decision passed first from a reviewing psychiatrist that approved forcible medication because of Sell's dangerousness and incompetence, to the Medical Center's

The Court held that "the Constitution allows the Government to administer [antipsychotic] drugs, even against the defendant's will, in limited circumstances."[32] The Court reasoned that the government can administer antipsychotic drugs against the defendant's will if four conditions are satisfied.[33] A court must conclude that (1) "*important* governmental interests are at stake;"[34] (2) "involuntary medication will *significantly further* those concomitant state interests;"[35] (3) "involuntary medication is *necessary* to further those interests;"[36] (4) "administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition."[37] The Court indicated that this inquiry was intended for situations in which the government is seeking forced medication solely to render the defendant competent to stand trial.[38] A different inquiry would apply in situations in which the defendant either is dangerous to himself or others, or he is at risk of suffering grave health problems.[39]

Since 2003, the framework established in the *Sell* decision has been the guiding analysis used in cases regarding nondangerous criminal defendants who refuse antipsychotic medication.[40]

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administrative review that found that Sell was dangerous and that medical intervention was the strategy most likely to restore Sell to competency. Next, the federal magistrate reviewed the findings of the administrative review board and found that Sell was a danger to himself and others, and that antipsychotic medication was the only way to make him less dangerous. This decision was then reviewed by the district court, which found that Sell was not dangerous but upheld the order to forcibly medicate him to serve the government's compelling interest in prosecuting him. Finally, a divided panel of the court of appeals affirmed the district court's holding. The court of appeals also found that Sell was not dangerous but that the government's interest in prosecution was sufficient to overcome Sell's interest in avoiding unwanted medication.

32. *Id.* at 169.

33. *Id.* at 169, 179–81.

34. *Id.* at 180.

35. *Id.* at 181.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 182.

40. *See* United States v. Ruiz-Gaxiola, 623 F.3d 684, 692 (9th Cir. 2010); United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); United States v. Grape, 549 F.3d 591, 598 (3d Cir. 2008); United States v. Payne, 539 F.3d 505, 508–09 (6th Cir. 2008); United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004).

B. United States v. Ruiz-Gaxiola[41]

Ruiz was arrested for unlawful reentry, and before trial he was diagnosed with a rare mental illness that rendered him incompetent to stand trial.[42] Under the admonition in *Sell*,[43] the magistrate judge first conducted a *Harper* hearing to see whether forcible medication was justified because of grave health risk or dangerousness.[44] Finding that Ruiz did not meet either of these criteria, the federal magistrate conducted a *Sell* inquiry to see whether the defendant met the four requirements for forcible medication.[45] With the help of expert witnesses who testified in opposite directions about every *Sell* factor, the federal magistrate concluded that Ruiz's situation met all four of the *Sell* requirements and recommended that Ruiz be forcibly medicated, despite Ruiz's objections.[46] The district court adopted the federal magistrate's recommendation, and Ruiz appealed to the Ninth Circuit.[47]

Before moving to the merits of the case, the court of appeals discussed the language in the governing Supreme Court cases calling for an "overriding justification,"[48] requiring protection of a "significant liberty interest,"[49] and allowing forcible medication only in "limited circumstances."[50] Additionally, the court of appeals considered relevant precedent from its jurisdiction reasoning that this language demonstrated a "reluctance to permit involuntary medication except in rare circumstances"[51] because of the "error-prone analysis"[52] of a *Sell* inquiry.[53] The Ninth Circuit ultimately

41. *Ruiz-Gaxiola*, 623 F.3d at 691–92.

42. *Id.* at 688–89.

43. *See Sell*, 539 U.S. at 182.

44. *Ruiz-Gaxiola*, 623 F.3d at 689.

45. *Id.*

46. *Id.* at 690.

47. *Id.*

48. Riggins v. Nevada, 504 U.S. 127, 135 (1992).

49. Washington v. Harper, 494 U.S. 210, 221 (1990).

50. Sell v. United States, 539 U.S. 166, 169 (2003); *see Ruiz-Gaxiola*, 623 F.3d at 691–92.

51. *Ruiz-Gaxiola*, 623 F.3d at 691 (quoting United States v. Rivera-Guerrero, 426 F.3d 1130, 1138 (9th Cir. 2005)) (internal quotation marks omitted).

52. *Id.* at 692 (quoting United States v. Hernandez-Vasquez, 513 F.3d 908, 915 (9th Cir. 2008)) (internal quotation marks omitted).

53. *Id.*

decided to require the government to meet a "clear and convincing evidence" standard to satisfy each of the *Sell* requirements.[54]

Moving on to the merits, the Ninth Circuit considered the first *Sell* requirement "that *important* governmental interests are at stake."[55] The court reasoned that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important."[56] As the Supreme Court had stated, this serious crime could be either "a serious crime against the person or a serious crime against property."[57] In addition to the "seriousness" of the crime, the court of appeals weighed "the specific circumstances" of Ruiz's case, including the following: the guideline range for the crime of which he was accused; the likelihood that he would commit this crime again; the length of time he had already been confined; and the possibility that he would be committed if unable to proceed to trial.[58] Applying these factors, the court of appeals held that the lower court did not err in determining that the government had an important interest in prosecuting Ruiz for his crime of unlawful reentry.[59] The court of appeals reached this conclusion, despite the fact that this "crime is neither against persons nor property," and that Ruiz had already been confined for forty-seven months.[60]

The second *Sell* requirement is that the government must establish that "involuntary medication will *significantly further* its interest in prosecuting the defendant for the charged offense."[61] To demonstrate this, the government must prove that the drugs are "substantially likely to render the defendant competent to stand trial," and that the drugs are "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense."[62] The court of appeals criticized the federal magistrate and the district court for concluding that this requirement was satisfied; they based their conclusion on

54. *Id.*

55. *Id.* at 691 (quoting Sell v. United States, 539 U.S. 166, 180 (2003)) (internal quotation marks omitted).

56. *Id.* at 693 (quoting *Sell*, 539 U.S. at 180) (internal quotation marks omitted).

57. *Sell*, 539 U.S. at 180.

58. *Ruiz-Gaxiola*, 623 F.3d at 693–95.

59. *Id.* at 695.

60. *Id.*

61. *Id.* (quoting *Sell*, 539 U.S. at 181) (internal quotation marks omitted).

62. *Id.* (quoting *Sell*, 539 U.S. at 181) (internal quotation marks omitted).

the treating physician stating that the proposed medical regimen was "designed" to satisfy the second *Sell* prong.[63] Because enhanced factual findings were unlikely to be made on remand, the Ninth Circuit chose to resolve the question with what was available in the record.[64] The court delved into the testimony and evidence offered by both sides about these factors.[65] On the one hand, the government had presented only two studies and a practice guideline that were either effectively discredited or contained inapplicable extrapolations.[66] On the other hand, the defense had presented "multiple scientific studies" that the government did not even attempt to discredit.[67] The court stated that the government could not meet its burden of clear and convincing evidence by "rely[ing] on generalities and fail[ing] to apply [its] views to Ruiz's condition with specificity."[68] The court of appeals held that the government failed to satisfy the second *Sell* factor.[69]

The third *Sell* requirement is that "the government must establish 'that involuntary medication is *necessary* to further' its interest in prosecuting the defendant."[70] This requirement depends upon a positive finding of the second *Sell* requirement because a proposed treatment cannot be *necessary* to further the government's interest unless it *significantly furthers* the government's interest in the first place.[71] This failing alone was sufficient to lead the court of appeals to hold that the district court clearly erred in finding that the government had fulfilled the third *Sell* factor.[72] Still, the court went to the trouble to draw attention to some "extremely troubling" reasoning on the part of the district court.[73] The district court rejected the defense expert's proposed alternative treatment solely because the expert had spent less time observing and interviewing the defendant than the government had.[74] This was disturbing

63. *Id.* at 696.
64. *Id.*
65. *See id.* at 696–700.
66. *Id.* at 700.
67. *Id.*
68. *Id.*
69. *Id.* at 701.
70. *Id.* (quoting Sell v. United States, 539 U.S. 166, 181 (2003)).
71. *Id.*
72. *Id.* at 701, 703.
73. *Id.* at 702.
74. *Id.*

because it is common for a government expert to have much more access to the defendant than a defense expert because the government is housing the defendant and providing his ongoing medical treatment.[75]

The fourth part of the *Sell* test allows a court to authorize involuntary medication only if "administration of the drugs is *medically appropriate*."[76] This requires that the drugs be "in the *patient's* best medical interest in light of his medical condition."[77] The court of appeals explained that this inquiry is similar to that of the second requirement, except that it is expanded to include "those consequences [of the treatment] that may not affect the defendant's trial in any way."[78] This focus on the overall welfare of the defendant-patient "reflects the importance of the liberty interests at stake in an involuntary medication order."[79] The court of appeals considered the same evidence it used to analyze the second requirement and held that the government had failed to fulfill this fourth *Sell* requirement.[80]

The court of appeals reversed the order for forced administration of antipsychotic medication because the district court erred in finding that the government had met the last three *Sell* factors.[81]

III. WHY THE COURTS DO NOT NEED TO UNDERTAKE THE EXTENSIVE *SELL* INQUIRY

The *Sell* test was designed to apply to incompetent defendants accused of "serious, but nonviolent, crimes."[82] Being incompetent typically means that the defendant fails to understand even the nature of the proceedings against him.[83] If the defendant's mental capacity is diminished to that extent, the goals of prosecution and punishment will not be satisfied. Section A discusses how, under retributive theory, a defendant with diminished mental capacity is

75. *Id.*

76. *Id.* at 703 (quoting Sell v. United States, 539 U.S. 166, 181 (2003)) (internal quotation marks omitted).

77. *Id.* (quoting *Sell*, 539 U.S. at 181) (internal quotation marks omitted).

78. *Id.* at 704.

79. *Id.* at 703.

80. *Id.* at 705–07.

81. *Id.* at 707.

82. *Sell*, 539 U.S. at 169.

83. See the discussion of the *Dusky* standard, *supra* Part II.A.

not "culpable" and therefore not deserving of punishment. Section B discusses how, under utilitarian theory, none of the usual "greater goods" that punishment accomplishes can be achieved with incompetent criminal defendants. Accordingly, if incompetent criminal defendants refuse antipsychotic medication, courts should be able to dispose of their cases without the detailed, fact-specific inquiry required by the *Sell* test.

A. The Failure of the Retributivist Rationale in Punishing Incompetent Defendants

"The retributive theory of justice holds that 'the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment.'"[84] According to retributivists, people "should be punished in proportion to their blameworthiness."[85] Blameworthiness is composed of two factors: the seriousness of the crime and the culpability of the offender.[86] Culpability is made up of an actor's intent and capacity to conform to the law.[87] These factors help to explain why so little societal blame is attached to adults failing to use turn signals (nonserious crime), adults getting into auto accidents (no intent), and minors committing offenses (reduced capacity).

As far as the seriousness of the crime, the other ingredient of blameworthiness, the *Sell* analysis applies only to incompetent defendants accused of "serious, but nonviolent, crimes."[88] Though the Supreme Court has stated that bringing a person accused of a serious crime to trial is an important interest,[89] the justifications for

84. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1228 (2001) (quoting Stanley I. Benn, *Punishment*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 30 (Paul Edwards ed., 1967)).

85. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005).

86. *Id.*

87. *Id.* W.H. Walsh interprets Hegel to mean that an offender deserves punishment only if he "knows what he is doing and so commits himself to accepting the consequences of his act, including punishment if his crime is detected." W. H. WALSH, HEGELIAN ETHICS 68 (1969).

88. Sell v. United States, 539 U.S. 166, 169 (2003).

89. *Id.* at 180. What constitutes a "serious crime" is a much-disputed question. Some look to sentencing guidelines, which are used to determine what a "serious crime" is for purposes of mandating a jury trial. Others look to the language in *Sell* concerning crimes against property and crimes against the person. This topic is ably covered in Stewart B. Harman, *Restoration of Competency Through Involuntary Medication: Applying the* Sell *Factors*,

forgoing a *Sell* inquiry do not depend on whether the defendant is accused of a serious crime.[90]

The measures of culpability for the mentally incompetent are all necessarily reduced. First, the formation of intent requires an understanding of consequences and an idea of desired outcomes.[91] The failure of the mentally incompetent to meet this requirement of culpability is at the heart of the justification for the insanity defense.[92] This inability to form the requisite intent is also linked to the second factor: capacity to conform to the law. As with intent, a mentally incompetent person has a reduced capacity to conform to the law because he is not rational.[93] Because the mentally incompetent defendant has a reduced capacity to conform to the law and to form a requisite intent, he is less culpable and less blameworthy in the eyes of retributivists.

The retributivist rationale for punishment does not support punishing mentally incompetent defendants. Unless the government can find other justifications for its "important" interest in prosecuting and punishing nondangerous, mentally incompetent defendants, the *Sell* test is unnecessary.

B. The Failure of the Several Utilitarian Rationales in Punishing Incompetent Defendants

Utilitarianism seeks the overall maximization of good or pleasure, and justifies the use of punishment (a bad) to accomplish

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4 APPALACHIAN J.L. 127, 133–38 (2005).

90. Seriousness of a crime is necessary for blameworthiness, but it is not sufficient. Because an incompetent defendant cannot meet the other necessary requirement, culpability, it does not matter whether he is accused of a serious crime. For the purposes of this article, I assume that incompetent defendants face a *Sell* hearing only if they have committed a serious crime.

91. 1 GEORGE DALE COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOTES MENTIS 671 (London, W. Reed, 1812) ("Such a man, so destitute of all power of judgment, could have no intention at all.").

92. S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 109 (1927) ("The defense of criminal irresponsibility by reason of insanity is . . . but a specific instance of the more general legal proposition, that no person can be held criminally liable and punishable for an illegal act, unless he has, as it is sometimes put, 'sufficient mental capacity' to 'entertain a criminal intent,' or to have a *mens rea*, or 'guilty mind.'" (footnote omitted)).

93. *See* IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 79 (1989) (describing rationality as a fundamental trait of humans that is necessary for culpability because a person that lacks rationality is a slave to his animal-like impulses rather than a conscious being choosing his own path).

greater good.[94] This greater good is most frequently accomplished through one of five possible mechanisms: "rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation."[95] Each of these is either entirely ineffective with mentally incompetent offenders or is better accomplished through other available methods aside from a criminal conviction.

Rehabilitation is likely to be more effective with mentally incompetent individuals than with sane criminals who have intentionally and freely committed antisocial acts.[96] However, the condemnatory and antagonistic approach of a criminal trial and conviction followed by incarceration is not an effective means of rehabilitation, regardless of the mental state of the accused.[97] It would be more effective to enroll the accused in a treatment program that does not require medication or to pursue commitment.[98]

Incapacitation is accomplished by keeping the offender from general society and preventing him from harming society with his criminal acts.[99] This method of crime prevention is just as effective with the mentally ill as with the mentally well; both can be "kept away" in the same manner. One difference is that the mentally ill can be removed from society by civil commitment in order to protect the person, to protect society, or to care for a person that is severely disabled.[100] This incapacitation through commitment is preferable to incarceration because of the benefits of possible rehabilitation and more humane treatment of defendants who refuse medication.[101]

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94. *Id.* at 15–18 (describing the utilitarian judgment of actions based solely on the consequences of pleasure or suffering they bring about).

95. Frase, *supra* note 85, at 70.

96. *See id.* ("Rehabilitation . . . assumes that the offender has identifiable and treatable problems which cause him to commit crimes.").

97. See Helen M. Annis, *Treatment in Corrections: Martinson Was Right*, 22 CAN. PSYCHOL. 321, 321–22, 325 (1981) for a survey of studies concluding that incarceration of defendants is an ineffective means of rehabilitation.

98. *See* Crystal Mueller & A. Michael Wylie, *Examining the Effectiveness of an Intervention Designed for the Restoration of Competency to Stand Trial*, 25 BEHAV. SCI. & L. 891, 892–94 (2007) (identifying the strengths and weaknesses of studies used to support the use of medication to restore competency and outlining alternative competency restoration methods).

99. PRIMORATZ, *supra* note 93, at 19–20.

100. PERLIN ET AL., *supra* note 14, at 134–35.

101. PRIMORATZ, *supra* note 93, at 24–25 (noting that one of the four limits of punishment that utilitarians subscribe to is needlessness, and that this is a limiting factor when

Mentally incompetent persons have such a reduced rational capacity that it makes the possibility of specific deterrence entirely nonexistent.[102] Not only are a mentally incompetent defendant's motivations not influenced by experiencing his own punishment, but also he is not affected by seeing other mentally ill defendants punished. Thus, general deterrence is as ineffective as specific deterrence. Denunciation involves broad societal enforcement through means of societal cues and social norms.[103] An inability to perceive, let alone understand, social norms is a characteristic of incompetence,[104] which would make the effort of reducing crime commissions by the mentally ill by means of denunciation completely ineffective.

Like the retributivist rationale, the utilitarian rationale for punishment fails to justify punishment of mentally incompetent defendants. Without an underlying justification or purpose, the government cannot demonstrate that it has an "important" interest in prosecuting and punishing nondangerous mentally incompetent defendants.

IV. ALTERNATIVES TO FORCIBLE MEDICATION

Undoubtedly the government has an interest in accomplishing the purposes behind prosecution and punishment of criminal defendants.[105] When an incompetent defendant refuses medication that would possibly restore his competence, the prosecution and punishment of this defendant is hindered. The purposes behind prosecution and punishment, however, can be accomplished by means that do not require forced medication of the incompetent

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the goals of the punishment can be accomplished by other means that are either more effective or less costly).

102. *Id.* at 24 ("[I]nsane persons ought not to be punished . . . . [The punishment] cannot efficiently prevent future offenses.").

103. Frase, *supra* note 85, at 72.

104. According to the *Dusky* standard, an incompetent defendant lacks a rational understanding of the proceedings against him that would allow him to assist in his defense. If a person is incapable of rational understanding of such an important event as a criminal proceeding against him, then he is unlikely to have a significant appreciation of something as subtle as social norms. Also, for many mental illnesses that contribute to incompetence, an inability to perceive and conform to social norms is a diagnostic feature. *E.g.*, AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 285 (4th ed. 1994) (listing the diagnostic characteristics of schizophrenia).

105. *See* Sell v. United States, 539 U.S. 166, 180 (2003).

defendant. Among the available options, two will be discussed below: imputed election of a nonmedication treatment plan and civil commitment.

A. Imputed Election of a Nonmedication Treatment Plan

Suppose an incompetent defendant has been lawfully arrested and is legally being held in anticipation of his pending criminal trial. When he is found to be incompetent, his trial will be postponed pending restoration of his competence. Medication is often favored by the courts, the government, and the defendant because it can restore competence more quickly than other forms of treatment[106] and facilitate a speedy trial. If a defendant chooses to avoid the side effects of antipsychotic pharmaceuticals by refusing medication, then he could be deemed to have chosen to undergo an alternative program designed to restore competency without medication.[107] Though it may take longer,[108] such an alternative program may be equally effective in restoring the defendant to competency to stand trial.[109]

If the defendant's refusal of medication were imputed to him as by election, it would accomplish the same objectives as pursuing a forcible medication order and proceeding with prosecution. If the defendant is not restored to competency, this treatment and holding period incapacitate the defendant, provide a means of rehabilitation, and act as a specific or general deterrent (insofar as deterrents can be effective with the mentally incompetent) against refusing medication because of the longer pretrial incarceration. If the defendant's competency is restored, the government would be able to proceed with the trial just as it would if it forcibly medicated the defendant. The main difference is that with the treatment and holding period, the government does not have to deprive the defendant of his significant liberty interest in avoiding unwanted medication.

106. Stephen J. Morse, *Involuntary Competence*, 21 BEHAV. SCI. & L. 311, 316 (2003) ("[A]ntipsychotic medication . . . [provides] the most efficient means to restore a psychotic defendant's competence, although not the only means.").

107. These alternative methods include legal-concept teaching with a cognitive-problem-solving approach and other therapies focused on restoring rationality and increased sense of reality. Mueller & Wylie, *supra* note 98, at 894.

108. *See* Morse, *supra* note 106.

109. *See* Mueller & Wylie, *supra* note 98, at 893–94. The literature is a bit thin on studies testing the effectiveness of alternative methods in restoring competency.

B. Civil Commitment

In addition to being a fallback for defendants that foreseeably cannot be restored to competency,[110] the government could pursue civil commitment in cases in which incompetent defendants refuse medication. Civil commitment would accomplish all the goals that a traditional punishment accomplishes with the mentally ill. As discussed above,[111] traditional punishment is only effective at incapacitation of mentally ill defendants. Civil commitment is equally effective at incapacitation, and it has the added benefit of promoting rehabilitation better than incarceration.[112] One wrinkle in this option is that most states require that a person be dangerous to be committed.[113] And if a defendant is dangerous, a court will never reach a *Sell* inquiry.[114] However, many states also allow commitment for people who are unable to care for themselves.[115] Competence to stand trial is such a low standard of capacity that incompetent defendants could well meet the standard for commitment due to inability to care for oneself.[116] This commitment would accomplish the goal of incapacitation, and perhaps rehabilitation, without the government needing to deprive the defendant of the significant liberty interest in avoiding unwanted medication.

V. CONCLUSION

Because the objectives behind prosecution and punishment are not met with nondangerous, mentally incompetent criminal defendants, the government cannot be said to have an "important" interest in bringing the defendant to trial. The government should employ more humane means—means that do not require forced medication—to reach these objectives. Because the government cannot show that it has an "important" interest in prosecuting these

110. *Id.* at 738.

111. *Supra* Part III.B.

112. *See* Annis, *supra* note 97; Mueller & Wylie, *supra* note 98, at 893–94.

113. PERLIN ET AL., *supra* note 14, at 139–42. The issue of dangerousness is troublesome because of its inconsistent and broadly divergent interpretation within and among different states. It is beyond the scope of this Note to discuss this issue further, but this is an area in need of much thought, reform, and a consistent standard.

114. Sell v. United States 539 U.S. 166, 181–82 (2003).

115. PERLIN ET AL., *supra* note 14, at 143–47.

116. See discussion of the *Dusky* standard for competence in Part II.A.

defendants, the *Sell* test cannot be met and the courts should no longer authorize forced medication of nondangerous, mentally incompetent defendants.

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