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# Compulsory Medication, Trial Competence, and Penal Theory

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## ABSTRACT

Due process requires that a criminal defendant must satisfy a number of minimal conditions with regard to his/her cognitive abilities, i.e. that the defendant possesses trial competence. But what if a defendant—for instance, as a result of a mental disorder—does not possess the requisite competence? Would it be morally acceptable for the state to forcibly subject a defendant to psychotropic medication in order to restore his/her competence to stand trial? In this article it is argued that the reason that has constituted the main argument in favor of forcible medication of defendants—namely, that the state has an essential interest in convicting and sentencing defendants who are guilty of crime—is not as strong as has been assumed and may even, under certain conditions, speak against the use of forcible medication of trial incompetent defendants.

**Keywords:** Forcible medication; mental disorder; punishment; retributivism; trial competence; utilitarianism.

## INTRODUCTION

Due process requires that a criminal defendant is fit to stand trial. To be fit, a defendant must satisfy a number of minimal conditions with regard to his cognitive abilities. For instance, he must be able to participate and assist in his own defense, to observe the judge, jury, witnesses and other courtroom participants, and—not least—to understand the course of the proceedings against him. In short, a defendant must possess *trial competence*.<sup>1</sup>

<sup>1</sup> For a review of the modern discussion of the legal definitions of competence to stand trial, see Fogel et al. (2013). Competence to stand trial is usually regarded as intrinsic to the fairness of a trial process. The main argument to this effect is that the lack of competence may imply that the defendant fails to communicate exculpatory information. See, for instance, Mossman et al. (2007).

But what if a defendant—for instance, as a result of a mental disorder—does not possess the requisite competence? What measures is the state justified in taking to ensure that a person, who may have committed a crime, is brought to trial? For instance, would it be acceptable for the state to forcibly subject a defendant to psychotropic medication in order to restore his/her competence to stand trial?

In contrast to other issues that are sometimes presented and discussed in legal philosophy, the question posed here is clearly not a purely hypothetical one dreamed up by imaginative legal philosophers. On the contrary, a number of criminal cases have in various ways directed attention to this question. The most significant case is undoubtedly that of *Sell v. United States*, in which a former dentist, Charles Sell, was indicted for Medicaid fraud and other offences. Sell had a long history of mental illness, and mental evaluations showed that he suffered from a delusional disorder (persecutory type). He was consequently held incompetent to stand trial. The case eventually found its way to the Supreme Court, which addressed the constitutional question as to whether the government was permitted to forcibly administer psychotropic medication solely to render a mentally ill defendant competent to stand trial for serious (but nonviolent) crimes. The court held that—under a set of strict conditions—the government was permitted to impose involuntary psychotropic (anti-psychotic) medication in order to bring a mentally ill defendant to trial.

Unsurprisingly, the case itself and the Supreme Court ruling have prompted numerous reactions and comprehensive legal discussions (see for instance, Baker 2003; Hilgers and Ramer 2004; Page 2005; Siegel 2008; Perlin 2009). The purpose here, however, is not to elaborate on the details of *Sell*, nor to contribute with considerations on the constitutionality of involuntary medication, but rather to address the overall question as to whether this method for establishing a defendant's trial competence should be seen as morally acceptable. That this question poses an ethical dilemma seems obvious. On the one hand, it is usually regarded as crucial that the state upholds justice, and the bringing of defendants to court is an important step in this process. On the other, the forcible imposition of medication on someone is standardly regarded as highly problematic. In fact, what makes this side of the dilemma particularly problematic is the contextual nature of the concept of competence (see Annas 2004). Being competent is task-specific, in the sense that a person may be competent to do one thing but not another. However, this means that, insofar as the standards of competence differ (are lower) when it comes to the acceptance or refusal of medication than when it comes to proper trial participation, there can be cases in which an attempt to medically deal with the trial

incompetence of a defendant not only involves involuntary medication but medication of someone who may be fully competent to refuse medical treatment. Thus, the question of the acceptability of the use of forcible medication as a means of restoring trial competence comprises cases which —at least from the perspective of standard health-care ethics — would be regarded as morally highly dubious.

The purpose in the following, it should be underlined, is not to make a case against forcible medication by definitively rejecting this method for the restoring of the trial competence of defendants. However, what I intend do is to direct attention to an aspect of the problem that has so far been ignored in the discussion and which has implications with regard to the ethical assessment of the matter. More precisely, it will be argued that the problem, which has usually been analyzed as a conflict between state interests, on the one hand, and the interests of the individual defendant, on the other, may on closer ethical scrutiny —involving both utilitarian and retributivist penal theoretical considerations —no longer constitute a genuine conflict; that is, that the reasons that have been presented as the main argument in favor of forcible medication of defendants are not as strong as has been assumed and may even, under certain conditions, speak against the use of forcible treatment of trial incompetent defendants.<sup>2</sup>

In order to reach this conclusion, the paper proceeds as follows. In section 1, the interests that are at stake in the apparent conflict between the state and the individual defendant will be outlined. Subsequently —in section 2 —it is argued that what is usually regarded as the main interests of the state, namely, that the competence of mentally ill defendants is restored so that they can be brought to trial, may not —when analyzed from a penal theoretical perspective —be morally desirable after all. In section 3, a few objections to this argument are rejected. Finally, section 4 summarizes and concludes.

Before embarking upon the discussion, a few conditions should be mentioned concerning the scope of the considerations. Firstly, I shall not discuss whether the use of psychotropic medication is acceptable or unacceptable. Critics have sometimes held that this kind of treatment in *itself* is problematic. However, in the following it will be assumed that the use of psychotropic medication as a treatment of disorders, such as those that may imply a loss of abilities required for trial competence, is not in

2 It is a fact that the state sometimes uses other compulsory methods in the way it deals with criminal defendants (e.g. pre-trial detention). Even though it would be interesting to consider what the arguments presented below imply with regard to other types of compulsory methods, this question clearly reaches far beyond what can possibly be discussed within the framework of this article. Thus, as mentioned, the focus here is placed exclusively on forcible medication of incompetent defendants.

itself unacceptable. I believe that, given the widespread use of this type of medication for mentally ill patients and the fact that few (I guess) would object to this treatment if a defendant were to ask for it himself in order to achieve trial competence, this is not a strong assumption.

Secondly, the imposition of involuntary medication for the purpose of restoring trial competence has in legal contexts been held to implicate that important individual and state interests have to be weighed against each other in order to determine whether this practice is constitutionally acceptable. For instance, in *Sell* the Supreme Court recognized the individual's basic liberty interest in avoiding unwanted medical treatment, but also held that his interests were insufficient to outweigh the state's interests in bringing someone to trial. In the following it will, as indicated, be argued that "state interests" do not provide as strong reasons in favor of forcible medication as is often assumed if seen from an ethical perspective. Thus, from the outset I shall assume that it is relevant to include what is usually regarded as the state-interests perspective in an adequate ethical evaluation. Clearly, not everyone will accept this. For instance, some might hold that forcible medication in itself violates a moral constraint and that such treatment, therefore, is morally wrong regardless of state interests, that is, independently of whatever moral reasons may point in the opposite direction. Since the point in the following is to show that there may be stronger reasons against forcible medication of trial incompetent defendants *even* if one accepts that the most plausible moral answer must be based on some sort of weighing of *pros* and *cons*, the constraint-based position will not itself be considered any further.<sup>3</sup>

Thirdly, given the context-dependent nature of the concept of competence, participation in the different processes of the work of the criminal justice system may require different sorts of competence. Thus, questions of competence have been raised not only in relation to fitness for trial participation —which itself has opened up a discussion of the distinction between being competent to stand trial and being competent enough to conduct trial proceedings oneself—but also in relation to both pre-trial settings (e.g. competence to make confessions or participate in line-ups) and post-trial settings (e.g. competence to motion new trials, parole, and —perhaps more bizarrely—to be executed).<sup>4</sup> However, even

<sup>3</sup> More precisely, what I am arguing assuming is that an absolutist interpretation of a constraint against forcible medication is not plausible. A threshold interpretation of such a constraint would still make it necessary to consider the weight of the reasons in favor of forcible medication in order to reach a conclusion on whether this practice is morally acceptable.

<sup>4</sup> For a discussion of the use of medication as an instrument to render people competent for execution, see e.g., Daugherty (2001) or Latzer (2003).

though the argument that will be advanced here may have implications with regard to several of these aspects of criminal justice competence, the ensuing discussion will be limited strictly to the question of competence to stand trial.

## 1. THE *PROS* AND *CONS* OF FORCIBLE MEDICATION

Whether it is acceptable to impose psychotropic medication for the purpose of restoring competence to stand trial is a question which, as indicated, has typically been analyzed in terms of a conflict between the interests of the individual and the interests of the state. Strictly speaking, this way of phrasing the conflict may not be adequate in an ethical analysis: There may be moral reasons that cannot be reduced to interests and there may be interests that are not morally relevant. Be that as it may, let us now start take a closer view on the arguments that have been advanced for and against forcible medication of trial incompetent defendants.

The arguments *against* the use of forcible medication of defendants fall into two categories: Either they concern the impact on the defendant or the possibility of obtaining a fair criminal process. Starting with the first class of arguments, the most obvious objection to forcible medication of incompetents is that this treatment constitutes an imposition of something against the will of the defendant. The appeal of this objection is probably most obvious in cases in which there is the above-mentioned combination of a defendant who, while trial incompetent, is still competent to refuse medical treatment. The shift in modern health-care ethics, from an earlier period dominated by a paternalist view on medical treatment to the view that favors competent individuals' right to self-determination, is often emphasized as one of the most significant changes in the ethical approach to treatment. Today, it is widely accepted that patients have a right to refuse medication, even if it would be in their own best overall interest, or in the interest of others, that they be medicated. As a recent medical theorist has pointed out that "... anyone who wishes to argue for forced or mandated treatment on the grounds that society will greatly benefit is working up a very steep ethical hill" (Caplan 2008). Whether the problem of imposing something on someone against his or her will is best described as a problem concerning lack of respect for autonomy (which constitutes the standard phrasing in medical ethics) or in other ways is not crucial here. It is sufficient to note that the imposition of medication against a defendant's will constitutes a first reason against this sort of practice.

Another reason that has frequently been presented in the debate concerns the undesirable effects of medication. Psychotropic medication,

for instance antipsychotic drugs, is known to have a number of side effects. In the *Amicus Curiae* Brief in relation to *Sell*, the American Psychological Association highlighted a number of both common and rare serious side effects (e.g. including “extrapyramidal” reactions —a family of disorders such as tardive dyskinesia, Parkinsonism, and dystonia —blurred vision, sedation, orthostatic hypotension, dizziness, etc.).<sup>5</sup> However, it should also be underlined that more recent antipsychotics have a more favorable side-effect profile than older classes of drugs and that attempts to restore trial competence may involve only temporary medication.

Leaving aside the possible medical side effects, there is another potentially very serious effect that forcible medication may have on a defendant: If the medication is successful and trial competence is restored this may imply that the defendant is convicted and ends up being punished perhaps serving a long prison sentence, depending of course on the nature of the crime. According to some commentators, it is reasonable to believe that this prospect contributed to *Sell*’s refusal of medication. Now, whether the risk of conviction and subsequent punishment should be regarded as an objection against forcible medication is controversial. It might be held that, since the whole point of initiating forcible medication is to make it possible to determine the guilt of a defendant and to punish him if he is convicted, the suffering of the punishment cannot plausibly constitute an objection against medication. However, the answer ultimately depends on penal theoretical considerations and, as we shall return to shortly, there may be reasons to regard the risk of punishment as a drawback in the evaluation of forcible medication.

So much for the set of reasons referring to the direct effects on the defendant who is made the subject of compulsory medical treatment. The other class of reasons that has been advanced against the use of forcible medication concerns the possibility of receiving a fair trial. The whole purpose of such medication is to make it possible for the defendant to stand trial. But, as several commentators have pointed out, the fact that trial competence is in this way restored does not imply that the trial will be fair. On the contrary, the side effects of medically induced trial competence may themselves turn out to compromise fairness. This could happen in various ways. First, depending upon how precisely the formal criteria for trial competence is put, it may be possible that a defendant’s abilities are restored to a level which satisfy the competence criteria, even though the medication itself implies that the defendant is still to some extent cognitively impaired (e.g. if his memory is affected). Second, and more

<sup>5</sup> Counsel for *Amicus Curiae*, American Psychological Association (2002: 20-25). See also Baker (2003).

importantly, several of the above-mentioned side effects (e.g. Parkinsonian tremors) may adversely affect a judge's or a jury's opinion of the defendant. In the same vein, a flattened emotional reaction of a defendant who, as a result of medication, appears bored, cold, or devoid of compassion and remorse, may prejudice jurors and thereby threaten basic fair-trial rights.<sup>6</sup> Finally, it has been underlined that medication may diminish a defendant's possibility of pleading insane at the moment of the crime. In a case in which a defendant appears too normal in the court this may affect, and in the worst case, undermine the persuasiveness of an insanity defense (see e.g. Graber 1979: 8ff). That this constitutes a genuine risk has been demonstrated in empirical studies which have found that jurors were more likely to hold a defendant not responsible on account of mental disorder if the defendant was psychotic *at the time of the trial* than if he or she appeared normal (see Whittemore and Ogloff 1995).

The above-outlined reasons concerning the direct impact of forcible medication on the defendant, and on the defendant's possibility of receiving a fair trial, roughly summarizes the main arguments that have been presented against this way of dealing with impaired trial competence. Let us now move on by turning to the argument that has typically been advanced in the opposite direction. What reasons could there possibly be in favor of subjecting defendants with impaired trial competence to compulsory medical treatment? As already indicated, the answer is simpler than the objections against this practice. The argument, unsurprisingly, amounts to the state's basic interest in bringing people who may have committed crimes to trial. That this interest is significant seems *prima facie* hard to dispute. A number of court decisions have addressed the state's interest in adjudicating guilt and innocence and have characterized this interest as "essential" (see Morse 2003: 320). Moreover, few would object to the fact that a comprehensive and costly system has been designed with the purpose of bringing people who may have committed a crime to trial. And several other ways in which this system works clearly indicate the significance usually attributed to the possibility of having a trial. For instance, as Morse has pointed out, the state may also take rather drastic initiatives —such as incarceration and perhaps even involuntary medication—of a material witness if the obtaining of a testimony of this witness constitutes the only effective means by which the state could try a defendant (Morse 2003: 321). If this treatment of a purely innocent witness is acceptable then the interest in bringing a defendant to trial must be significant.

<sup>6</sup> See Counsel for Amicus Curiae. American Psychological Association (2002: note 7: 25); or Morse (2003: 319).



But where does this presentation of the reasons that have been presented for and against the use of forcible medication on trial incompetent defendants lead us? Given the initial and generally accepted assumption that the moral legitimacy of the use of forcible medication cannot be settled merely by focusing on the reasons on the one side of the scale, the complicated question one is left with is how the outlined reasons should be weighed against each other. How should we balance the protection of the individual against the interest in bringing defendants to trial? On this point theorists have been split. However, the point is not to engage in considerations on the weighing of the *pros* and *cons* but rather to adopt a more cautious attitude by asking whether the depicted picture of the outlined reasons is apposite. More precisely, what we shall now see is that on closer scrutiny it is not so obvious that the *pro*-side of the scale carries the weight with which, as we have just seen, it is usually attributed.

## 2. THE MORAL SIGNIFICANCE OF A TRIAL

Why is it so important for the state to be able to bring a defendant to trial? Why does this constitute an essential interest? The obvious answer is that there are strong moral reasons in favor of punishing people who have violated the law and that the criminal trial constitutes a vital step in the process of identifying those who fall into this category, that is, those who are in fact guilty of a crime. Unsurprisingly, this is also the answer that has been given in several Supreme Court decisions. For instance, in *United States v. Weston* it was specifically underlined that part of the state interest consisted in “demonstrating that transgressions of society’s prohibition will be met with an appropriate response by punishing offenders”.<sup>7</sup> Correspondingly, both “retributive” and “deterrent” functions were enunciated as ultimate goals of the state’s trial interests.<sup>8</sup> However, further steps with regard to justificatory arguments are not usually taken. But this means that we are left with the basic question: How important is it that the state succeeds in punishing those individuals who have committed crimes but who belong to the group of defendants who are incompetent to stand trial? The answer to this question depends upon what constitutes the basic rationale behind state-inflicted punishment and, at this point, it is well known that there exists no theoretical consensus. Thus, let us now consider the question more thoroughly from the perspective of the two rival theories that have dominated penal theoretical thinking, that is, respectively from a utilitarian and a retributivist point of view.

<sup>7</sup> U.S. v. Weston, 255 F. 3d 873 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 670 (mem.) 2001: 880.

<sup>8</sup> Ibid. p. 881.

According to the utilitarian approach to punishment, the infliction of punishment on perpetrators is justified on the ground of future desirable consequences that will follow from this practice.<sup>9</sup> Though there may be different types of desirable consequences, the cardinal implication of punishment is usually held to be crime prevention. Thus, seen from the perspective of crime prevention is it important to ensure that those defendants who have committed crimes, but who are trial incompetent, are brought to trial and subsequently punished?

First, if the question is considered in terms of *general* prevention, then it is far from clear that the answer is in the affirmative. It is generally believed that the existence of a punishment system has a general crime-preventive effect (see e.g. Nagin 1998). That is, the possibility of being punished deters potential criminals from engaging in criminal activity. However, when it comes to the question as to how the severity and likelihood of punishment affect general prevention, the picture becomes more complicated.<sup>10</sup> The only way in which the punishment of more individuals—that is, those who are found guilty after being forcibly medicated to stand trial—can affect general crime prevention apparently is if this will have an impact on the perceived likelihood of potential criminals being caught and punished if they break the law. But is it reasonable to believe that there will be such an effect? There are several reasons to doubt this.

First, the number of people who do not satisfy standards for trial competence is obviously small compared to the total number of people who end up in a criminal trial.<sup>11</sup> Second, out of the group of defendants who are found trial incompetent, certainly not all would end up in court if forcible medication were accepted. Some may not be medicated because it is estimated that this would not have the desired effect, for instance, because from the outset they are simply too ill. In other cases defendants may be involuntarily medicated but may nevertheless not reach the level of cognitive ability required to make them trial competent. Third, even if mentally ill defendants become trial competent as a result of medication,

9 In the following, I consider the utilitarian approach rather than a more general consequentialist approach. As is well known, the utilitarian approach to punishment constitutes the traditional rival to retributivism (very few non-utilitarian consequentialist approaches have been developed in modern penal theory). Moreover, there is no reason to believe that a non-utilitarian consequentialist theory (e.g. favoring the existence to several intrinsic values) will significantly change the main argument advanced below.

10 For an overview and discussion of research findings, see Durlauf and Nagin (2011).

11 Though some figures suggest that around 50.000 defendants are evaluated each year in the US it is reasonable to believe that many are referred inappropriately (e.g. they may be referred for strategic reasons). The vast majority of those defendants who are evaluated for competence each year are found competent (in some jurisdictions the majority is as high as 96 percent); see e.g. Winick (2002).

this obviously does not imply that they end up being punished; some will be found not guilty.<sup>12</sup> Thus, in sum, there are reasons to believe that the use of forcible medication on trial incompetent defendants will only have a *relatively* very small impact on the total number of those who are punished in the criminal justice system. Furthermore, it should be noted that the perceived risk one faces if one engages in criminal activity is not only a result of one's view on the probability of punishment but also (perhaps even more so) on the expectation one has on the likelihood of being caught. But it should be kept in mind that what we are here considering is the medication of people who are in fact defendants, that is, who have been caught (or turned themselves in) and this is so irrespective of the fact that they, as a result of a mental disorder, may not in the end be punished. Thus, all in all, that the relatively insignificant increase in the number of people who will be punished, if forcible medication is implemented, should manifest itself in the general perception of potential criminals of the probability of being punished in such a way as to affect crime rates seems highly unlikely.

However, even if there is no general crime preventive effect following from the use of forcible medication, such a scheme may nevertheless have desirable effects from a utilitarian point of view. The desired effects might consist in *particular* prevention; that is, the punitive treatment of the criminal may influence him to desist from future engagement in criminal activity. Though the idea of particular prevention as caused by deterrence or reform of the criminal has (in relation to imprisonment) been heavily criticized by criminologists and, despite the fact that the reference to general prevention has constituted the traditional justification in the utilitarian approach to punishment, it might be held that there is another way of reaching a particular preventive effect which is relevant in the present context, namely, incapacitation. A defendant who has committed a crime but who is too mentally ill to be trial competent may commit new crimes that could have been prevented had he or she been medicated, convicted, and placed behind bars. However, once again there is reason to doubt the empirical soundness of this argument.<sup>13</sup> Given the fact that imprisonment may have a criminogenic effect, this would have to be weighed against whatever is gained in terms of crime prevention caused by temporary incapacitation.<sup>14</sup> Moreover, in the present context, that is, when we are considering the value of forcible medication of mentally ill

12 For instance, by reason of insanity.

13 For a general review of research showing that the crime preventive benefits of incapacitation are highly uncertain, see e.g. Nagin (1998).

14 For studies on the criminogenic effect of imprisonment, see e.g. Vieraitis (2007); or Camp and Gaes (2005).

defendants, there is a further reason that should be kept in mind with regard to the possibility of a particular crime preventive effect, namely, that the alternative to a conviction and punishment for a trial incompetent criminal who is not compulsorily medicated may well not be freedom. Insofar as the defendant is regarded as dangerous he may be civilly committed. And even if the defendant is not dangerous —such as in the case of Charles Sell—the alternative may be long periods of hospitalization (according to some commentators Sell ended up spending more time being hospitalized than he would have spent in prison had he been involuntarily medicated, convicted, and punished). When this is taken into account, it becomes even less obvious that there would be a particular crime-preventive effect supporting the use of forcible medication to stand trial.

Considering the utilitarian approach to punishment there is, however, another side to the discussion that should be emphasized. In the previous outline of the reasons against forcible medication, the suffering the defendant would experience if he, after having been involuntarily medicated, were to be punished, was presented as a reason against this sort of forcible treatment. However, as also mentioned, this contention has been viewed with skepticism. It could be held that the fact that a criminal ends up suffering from a punishment cannot constitute a counterargument against forcible medication. However, as underlined, the answer to this ultimately depends upon the penal theoretical view one holds. In the perspective of the utilitarian theory of punishment, there is no doubt that the suffering of the person who is being punished counts as a reason against punishment. It is only if this disvalue of the suffering is outweighed by the greater amount of suffering that is prevented, that the punishment is morally justified. In Bentham's original wording, the punishment, when considered in isolation, is "adding one evil to another" (Bentham 1962: 306). To this it might perhaps be objected that, if the alternative is that a mentally ill person is forcibly hospitalized instead, then there is no real major difference when it comes to the drawbacks of forcible medication. However, this is not correct. Numerous studies have shown that prison conditions are clearly detrimental to persons suffering from a mental disorder. For instance, as has been summarized in WHO's considerations on the consequences of imprisonment: "The impact on someone in good mental health would be negative; for people who arrive in a vulnerable state of mind, the damage can be irreparable".<sup>15</sup> Thus, that a person may end up by being punished—for instance, imprisoned for years or even

15 WHO seminar on mental health in prisons, "Prison Can Seriously Damage Your Mental Health": <http://www.prisonreformtrust.org.uk/uploads/documents/Mentalhealthsmall.pdf> (at p. 6).

decades —does provide a strong reason against the use of forcible medication of defendants.

In sum, what we have seen is that, from a utilitarian penal theoretical perspective, it is far from obvious that the clearing of the ground for the punishment of trial incompetent defendants by the use of involuntary medication is as morally important as has hitherto been assumed. There is reason to doubt whether punishment of this small group of people will have any effect in terms of general crime prevention or with regard to particular prevention.<sup>16</sup> But it is clear that there is a reason for not punishing this group *qua* the suffering that is inflicted on them. So much for the utilitarian view of punishment.

Let us now consider the question from the perspective of the retributivist view of punishment. As is often described, retributivism has dominated penal theoretical thinking for the last three or four decades and has been developing in various ways (see e.g. Duff and Garland 1994 or Ryberg 2004). However, in the present context it is not necessary to engage in considerations of the many different explanations that have been given as to why a perpetrator deserves punishment and of what precisely it is that the perpetrator deserves. Rather, what matters here are the penal distributional implications of retributivism. Thus, from a desert-theoretical perspective, how should we assess the moral significance of the fact that incompetent defendants who have committed crimes are brought to trial and subsequently punished?

In contrast to the utilitarian approach to punishment, which has often been accused of holding only a contingent relation between guilt and punishment —precisely what has led to a number of traditional objections against this approach —this is not the case with regard to retributivism. However, if it is crucial, from a retributivist perspective, that those who have committed crimes are in fact appropriately punished then there seems to be a strong reason in favor of initiating procedures to ensure the adjudication of guilt or innocence of those who, from the outset, are not competent to stand trial. However, as we shall now see, on closer inspection the answer is not so simple.

<sup>16</sup> As mentioned, there could also be other effects that ought to figure in the utilitarian calculus. For instance, it would be necessary to consider how it affects crime victims if some defendants are, as a result of mental disorders, held incompetent to stand trial. Though it is difficult to make general estimates on this effect (it probably varies significantly between different types of crime) it should be noted that a least some studies have indicated that the imposition of suffering on the criminal does not constitute the main interest of crime victims; see, for instance, Strang (2002: chapter 1). Moreover, even if a victim is affected, this is only one of the many consequences that should be taken into account by the utilitarian. Thus, it is far from clear that this would tip the scale in favor of compulsory medication.

The contention that retributivism provides a strong justice-based reason in favor of identifying those who are guilty of crime and, therefore, also in favor an imposition of involuntary medication on trial incompetent defendants, is based on one crucial presupposition, namely, that the punishments imposed on those who are guilty are in fact just. If criminals are punished in a way that violates the prescriptions of retributive penal distribution, the reason in favor of forcible treatment may well be undermined. Thus, the question is whether, in real life penal practice, there is reason to believe that criminals are punished in accordance with a retributivist view of punishment for different crimes. Obviously, for the simple reason that punishment levels vary between different jurisdictions, there is no universal answer to this question. However, interestingly, many theorists in the modern area of retributivism believe the answer to be in the negative. Two reasons have been presented in support of this.

The first reason follows from a view to which many recent theorists subscribe, namely, that there is, most markedly in the US but also in several other Western countries, a general problem of overcriminalization. A theorist in the retributivist camp such as Douglas Husak, who has comprehensively considered this issue, has even described overcriminalization as “the most pressing problem with the criminal law today” (Husak 2008: 3). What this simply means is that there are currently too many criminal laws on the books. But if this is correct, then it follows that there are cases in which the criminal sanction is being overused, that is, where people are being punished even when they do not deserve to be punished. In other words, one of the problems of overcriminalization is that it produces overpunishment.

The other reason is not concerned with the scope of legal prohibitions but with the penal levels themselves. Several retributivists have underlined that many criminals of today are being punished in ways out of proportion with the gravity of the crime committed. For instance, Richard Singer has underlined that it is a misconception to think of the desert model as a derivative of a “throw away the key” approach to punishment; he has suggested that, in contrast to what is current practice in many jurisdictions, confinement should be reserved only for the most serious crimes and, even then, the duration of this should be relatively short (Singer 1979: 44). In the same vein, another influential retributivist, Jeffrie Murphy, holds that if the desert theory were to be followed consistently one would punish less and in more decent ways than one actually does (Murphy 1979: 230). And Andrew von Hirsch, who has extensively elaborated the penal distributional implications of retributivism, regards the proportionality principle as a means to restricting punishment, suggesting more precisely that terms of imprisonment even for the most serious crimes should seldom exceed five years (see e.g. von Hirsch 1993: chapter 10).

Suppose all this to be correct, that is, that there exists, as a result of overpunishment and excessive penal levels, a discrepancy between actual penal practice and what ideally constitutes the deserved punishments for different crimes, what does this imply with regard to the desirability of taking compulsory steps to ensure that criminal incompetent defendants are brought to trial and punished? The answer is not straightforward, depending upon the view the retributivist more precisely holds on penal distribution.

Suppose, firstly, that one subscribes to a so-called *negative* retributivist view, according to which desert is a necessary condition for justified punishment in the sense that the proportionate punishment for different crimes is interpreted as setting upper limits for punishment.<sup>17</sup> In this view, it is morally prohibited to punish in a way that is excessive, that is, which is disproportionately severe given the gravity of the crime. However, it is not wrong, in terms of desert, to punish a criminal less severely. Thus, while this position restrains the imposition of punishment, it does not itself dictate how precisely a criminal should be punished. An answer to this question could be given by supplying the theory with further considerations; for instance, as has been suggested, by holding that below the proportionality levels the more precise severity of a punishment should be determined on utilitarian grounds. However, given this position, the answer concerning the desirability of ensuring that criminal defendants are medicated, brought to trial, and punished, becomes obvious. If there is a constraint against disproportionately severe punishing then, in a state of overpunishment, it will be wrong to punish these criminals. And since there is no constraint against disproportionately lenient punishing, it is all in all clear that, following a negative retributivist account, the punishment of the criminal defendants whose competence has been restored would not be desirable (in fact, it would be wrong).<sup>18</sup>

Suppose, alternatively, that one favors a traditional *positive* account of retributivism according to which justice implies that the proportionate levels of punishment for different crimes do not only set upper limits for acceptable punishment, but also set lower levels. That is, on this account the criminal should be punitively responded to with a punishment that is proportionate to the seriousness of the crime; both upward and downward deviations from this punishment would constitute violations of justice. Given this position, the picture becomes more complicated.

<sup>17</sup> The distinction between positive and negative retributivism was originally introduced by Mackie (1985: 207-8). See also Ryberg (2004).

<sup>18</sup> A negative retributivist might of course hold that there are consequentialist reasons in favor of punishment. However, what is important is that such consequentialist reasons do not justify a violation of the constraint against transgressing the upper level of proportionate punishment.

On the one hand, the moral significance of bringing incompetent defendants to trial cannot be justified in terms of the moral importance of imposing punishment on them, because—in a state of overpunishment—such punishment would, as we have just seen, be violating the proportionality constraint and would be morally wrong. On the other, if those defendants who are criminal are not convicted and punished, this will also violate the proportionality requirement. By being treated in a disproportionately lenient manner—that is, by not being punished—they will not get what they deserve. Confronted with these contradictory prescriptions, what should be regarded as retributively preferable: to punish too much or to abstain from punishing? In order to avoid being theoretically locked, that is, in order to be able to provide theoretical guidance with regard to what is preferable under these non-ideal conditions, one will have to engage in some sort of comparison of these two types of injustice. But it is fair to say that at this point retributivists have had very little to say. The modern retributivist discussion of penal distribution has been focused on clarifying what constitutes the proportionate punishments for different crimes—for instance, how should crimes be ranked in seriousness, how should punishments be scaled in severity, and how should these scales be anchored—not on the comparison and measurement of degrees of disproportionate punishments. However, it seems reasonable to hold that, if we wish to compare the two outlined states, then there are at least two aspects that must be taken into consideration.

The first aspect concerns the extent to which a punishment of someone who is respectively overpunished or underpunished (*in casu* not being punished) deviates from what constitutes the proportionate punishment. For instance, punishing a person who deserves five years in prison for one extra day may be considered a very slight deviation compared to not punishing this person at all. Correspondingly, punishing this person one day less than five years may constitute a minor deviation compared to locking this person up for a period of ten years.

The second aspect concerns the moral weight of the two types of deviation; that is, how should we theoretically compare upward and downward deviations from the proportionate punishment? No one seems to believe that downward deviations are generally morally more problematic than upward deviations. This leaves two possibilities. Either it might be held that—leaving aside the just-mentioned question concerning the size of deviations—both downward and upward deviations constitute violations of justice and should be regarded with equal concern. In this view, there is *symmetry* with regard to the moral significance of over- and underpunishment. Alternatively, it might be held that, even though both



downward and upward deviation from the proportionate punishment is cause for concern, overpunishment is nevertheless worse than underpunishment. This is the *asymmetry* view. Which is then the more plausible? As mentioned, retributivists have on this point usually been silent. However, a recent exception is Göran Duus-Otterström, who has argued in favor of accepting asymmetry. What he suggests is that, while overpunishment involves excessive suffering, which the retributivist along with every other reasonable person must regard as morally problematic, this is not the case with regard to underpunishment. Therefore, even though both types of deviation are morally problematic, overpunishment is *ceteris paribus* worse (Duus-Otterström 2013).

Where does all this lead with regard to what positive retributivism implies, when it comes to the assessment of the alternatives of either bringing trial incompetents to trial and overpunishing those who have committed crimes or abstaining from bringing them to trial in the first place? Given the theoretical deficiencies in the development of the retributivist view on penal distribution, there is no clear answer. There is no generally accepted answer with regard to what constitutes the proportionate punishment for different crimes; even those retributivists who agree that the existing penal order is clearly excessive do not agree upon precisely what constitutes the appropriate penal levels. Moreover, even though there are arguments in favor of adopting an attitude of asymmetry, the question about the relative weight of over- and underpunishment is not fully resolved (for instance, even if the asymmetry view is correct, it is still not clear how one should balance deviations of different sizes, that is, how an instance of minor overpunishment should be assessed relatively to an instance of severe underpunishment). Thus, all in all, it is fair to conclude that it is simply not clear what positive retributivism implies. However, this is tantamount to holding that it is not clear whether there actually exists a positive retributivist ground in favor of ensuring, with the necessary medical means, that incompetent defendants are brought to trial and punished for their possible crimes.

Summing up, the point of departure of the above discussion is the argument that there is a strong reason in favor of administering psychotropic forcible medication of incompetent defendants, because the bringing of defendants to trial is a vital step in ensuring that those who have committed crimes are appropriately punished. However, as we have now seen, it is far from obvious that the punishment of this group of people carries the moral weight that this argument presupposes. From a utilitarian point of view, it is unclear whether or not it would be desirable to punish these people. In fact, it seems most reasonable to believe that nothing

would be gained either in terms of general prevention or in particular prevention. Nor is it clear that punishment of these people would be of moral significance if seen from a retributivist point of view. If it is correct, as several retributivists have suggested, that the existing penal order involves punishments that are out of proportion to those which criminals deserve then, from a negative retributivist view, it would seem preferable not to punish them while, from a positive retributivist perspective it was left theoretically unclear whether this would be preferable. Thus, on closer scrutiny the main argument in favor of forcible medication of trial incompetent defendants, namely, that this practice is justified on penal theoretical grounds, seems far less convincing than has generally been assumed in debate.

### 3. A FEW OBJECTIONS

Some might find the above discussion premature. Thus, in the following I will try to present a little more support in favor of the conclusion by considering it in the light of a few possible objections.

A first objection is that the above considerations somehow rest on a confusion of the distinction between, on the one hand, the significance of establishing criminal guilt and, on the other, the sentencing of criminals. The guilt phase and the sentencing phase are separate parts in the work of the criminal court and this, it might be held, is precisely how it should be. Therefore, the discussion so far is defective by inappropriately drawing on penal theoretical considerations, that is, on considerations that are only relevant in relation to sentencing.

Now, it is of course correct that the establishment of guilt and the sentencing of someone who is found guilty are usually regarded as different phases of the work of the criminal court. However, obviously this does not show that the moral significance of adjudicating guilt or innocence is not provided by considerations of the moral importance of punishing criminals, that is, by penal theory. The argument, that it is important to be able to distinguish the guilty from the innocent because it is vital to punish those who are guilty, does not rest on confusion. However, though this answer is relatively straightforward, there may still be something to the objection. It could be held that the previous considerations have focused solely on penal theory, thereby ignoring the fact that the guilt phase of the criminal court could be valuable in itself. In other words, it might be suggested that one should not hold, what has been called, an instrumentalist view of the criminal trial.

Whether an instrumentalist or a non-instrumentalist view on the guilty phase of the criminal court is correct is not a question that will be discussed more comprehensively here; and, as indicated in the outline of the *pros* and *cons* in the previous section, an argument based on a non-instrumental view has not been presented in the debate. Given the purpose of this article it is sufficient to keep in mind that even if there exist non-instrumental reasons in favor of adjudicating guilt and innocence this obviously does not show that there are no instrumental reasons. In fact, a rejection of instrumental reasons would be conspicuously implausible. Therefore, it is still relevant to show, as has been argued above, that the instrumental reasons —i.e. the reasons based on the moral significance of punishing criminals—do not carry the weight that one might at first sight believe and which has been underlined by courts and legal theorists.

A second objection that may have struck some readers of the previous discussion concerns the scope of the outlined argument. The considerations have been presented as focusing on the question as to whether it is morally acceptable to forcibly medicate defendants who suffer from impairments of trial competence. However, it might seem as if the penal theoretical discussion has a wider scope. Put somewhat differently: If it is really correct to hold that there are no penal theoretical reasons in favor of bringing defendants to trial (or perhaps even reasons against doing so), does it not follow that there is no value in bringing *anyone* to trial? And if so, does this not seriously undermine the plausibility of the argument?

The answer to this objection is twofold. First, whether it is correct that the argument has a wider scope depends upon which penal theoretical view one is defending. From a utilitarian point of view, it is certainly not correct that the argument can be extrapolated to include all defendants. As we have seen, the argument was that curable trial incompetent defendants only constitute a very small fraction of all defendants, and that the fact that they are not punished will not have any effect in terms of crime prevention. The picture is obviously very different if the state decides to abstain from bringing all defendants to trial. As mentioned, it is generally agreed that this would have rather radical consequences for the general crime level.<sup>19</sup> Turning instead to the retributive view of punishment, the picture is a little different. If it is correct that in a state of overpunishment it would be preferable if trial incompetent defendants were not treated, brought to

19 It is correct, though, that the arguments presented here could perhaps be applied in relation to other small fractions of defendants. Whether this is likely depends upon a more precise analysis of the members of this sub-group. However, in my view this should be regarded simply as an implication of the utilitarian approach rather than an objection. After all, as we have seen, the basic idea of the utilitarian outlook is that a punishment in itself should be regarded as an “evil”.

trial, and subsequently punished —or if it is simply theoretically unclear whether this would be preferable —then this conclusion may be extrapolatable to other defendants. However, this brings us to the second answer. Even if this wider implication is correct, that is, if the argument in this way has implications for other groups of defendants, this does not show that my argument concerning trial incompetence is defective. All it shows is that, under certain non-ideal conditions, retributivism may have some radical and perhaps not yet fully acknowledged implications; which is obviously not the same as holding that the argument I have advanced is flawed.

This brings us to the third and final objection. It might strike some that the previous conclusion concerning the implications of retributivism is premature or even dubious precisely because it is based on considerations of what this penal theory implies under non-ideal circumstances. Would it not be more reasonable to consider whether trial incompetent defendants should be forcibly treated under ideal conditions? And even if one insists on adopting a non-ideal perspective, is all that follows not simply that the state should change the existing penal order in order to adapt to what justice requires? Moreover, would it not sound almost absurd if the state were to proclaim: “We do not take the requisite medical steps to ensure that trial incompetent defendants are brought to trial because we are already punishing in a way that is clearly excessive and hence unjust”?

The answer to the latter question is that this does not constitute an objection against the considerations that have been presented in this paper. What I have been considering is the overall question as to whether it is morally desirable to use compulsory measures to ensure that incompetent defendants end up in trial. However, the question as to what sort of (legal) justification the state should use if it decided not to accept forcible medication is another question. It is probably correct that the above proclamation would not only be highly unusual but might also have some undesirable consequences; however, this is fully consistent with the view defended here, namely, that it may not be morally desirable if the state medicates and punishes those who are trial incompetent.<sup>20</sup>

But what then of the first two questions? Why consider the implications of retributivism under non-ideal conditions? If one wishes to consider —as a purely philosophical exercise —whether forcible treatment of trial incompetent defendants is acceptable under ideal penal conditions, then this is of course quite all right. However, if the purpose is to try to clarify

<sup>20</sup> For instance, if it were held unconstitutional to forcibly medicate a defendant because this would violate certain legal rights, this would be fully consistent with the view presented here.

what we should do under the actual penal order when the criminal court is confronted with trial incompetent defendants —that is, if we wish to present guidance with regard to whether Charles Sell ought to be medicated against his will or, more generally, whether other people who are currently placed in corresponding situations should be made subject to compulsory treatment —then we have to engage in considerations under the actual existing penal order which, as we have seen, many modern retributivists themselves regard as non-ideal. And it is this practical, or for that sake, real-life approach to the question that has been taken in this article. Therefore, the answers to the above questions are: first, it is an ethical problem as to what we should actually do with trial incompetent defendants that drove the previous discussion and, second, even though retributivists should obviously try to change the existing penal order in accordance with the prescriptions of their theory, this does not alter the fact that the theory may also have implications in real-life circumstances under which the ideal has not yet been realized.

#### 4. CONCLUSION

The time has come to sum up the previous considerations. What we have seen is that the question as to whether it is acceptable for the state to administer forcible medication in order to restore the competence of defendants who do not possess the cognitive abilities to stand trial, has usually and understandably been framed as a dilemma between, on the one hand, the interest or protection of the individual and, on the other, the significance of the fact that defendants are brought to trial in order to ensure the punishing of those who have committed crimes. However, what I have argued is that, on closer scrutiny, it is far less obvious than has often been assumed that state punishment of criminals really constitutes a reason in favor of the forcible medication of defendants.

Following a utilitarian view of punishment, it was not clear that the imposition of punishment of this small group of criminals would contribute to anything in terms of crime prevention. And, without a gain in terms of crimes being prevented, it would actually be wrong to inflict punitive suffering on members of this fraction of defendants. From a retributivist point of view, things were a little more complicated. However, given the assumption —to which many modern retributivists subscribe —namely, that actual penal practice involves a problem of the overpunishment of criminals, it becomes much less obvious that there is a justice-based reason in favor of forcible treatment of incompetents. On a negative retributivist view, punishing these people under such conditions would be

wrong. While, from a positive retributivist point of view, it was not theoretically clear whether it would be desirable to punish these people. All in all—and as pointed out in the beginning—I do not believe these considerations warrant a strong case against the use of involuntary medication of trial incompetent defendants. Not all retributivists would accept the view of overpunishment, and the implications of positive retributivism under such conditions have not yet been theoretically satisfactorily developed. But I believe that the previous considerations justify the more modest conclusion, namely, that it is far less obvious than is usually assumed in the debate, that bringing about the punishment of criminals under the prevailing penal order constitutes a reason in favor of forcible medication of defendants who are not competent to stand trial. And that those theorists who have held that the scales should tip in favor of forcible medication, by taking for granted the state's interest in bringing criminals to justice, face serious penal theoretical challenges in order to underpin this conclusion.

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