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U.S. v. Cruz: Human Security for Who? Over-Securitizing Threats Post Sell

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NOTE

U.S. V. CRUZ: HUMAN SECURITY FOR WHO? OVER-SECURITIZING THREATS POST *SELL*

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I. INTRODUCTION

"The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values,"[1] because "when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense."[2] The fear of losing free will cuts deep into the American psyche—a psyche rooted in liberty and autonomy.[3]

It is possible that the potential for the infringement of personal autonomy informs the Court's reticence to freely allow forcible medication on incompetent prisoners with mind altering drugs lest "sufficient governmental interest" and "medical interest" become buzzwords, justifying a slide toward prisoner mind control and behavior modification.

To safeguard an incompetent prisoner's rights, in *Washington v. Harper*, the Supreme Court held that if the decision to administer antipsychotic drugs involuntarily is "reasonably related to legitimate penological interests" then "the Due Process Clause permits the State to treat a prison inmate that has a

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1. Washington v. Harper, 494 U.S. 210, 238 (1990) (Stevens, J., concurring).

2. *Id.* at 237-238. *See also* United States v. Ruiz-Gaxiola, 623 F.3d 684, 691 (9th Cir. 2010) (indicating that antipsychotic medications are designed to cause a personality change that, "if unwanted, interferes with a person's self-autonomy, and can impair his or her ability to function in particular contexts. In addition to the intended changes in cognition and behavior, the drugs can have serious, even fatal, side effects.") (internal quotations omitted).

3. In recent decades, mind altering drugs that override the will of a person have been explored in science fiction movies and TV episodes underscoring the cultural fascination with the loss of free will. *See Star Trek: This Side of Paradise*, IMDB.COM, http://www.imdb.com/title/tt0708483 (last visited August 25, 2015) (describing an episode where the crew of the Enterprise is dosed with a mind altering "happy" drug from the spores of an alien plant); *Equilibrium*, IMDB.COM, http://www.imdb.com/find?ref_=nv_sr_fn&q=equilibrium&s=all (last visited August 25, 2015) (describing the movie, *Equilibrium,* which portrays a fascist regime that has eliminated war through the suppression of emotions through the use of the mind altering drug "prozium").

serious mental illness with antipsychotic drugs against his will . . . ."[4] The *Harper* standard required that the inmate be "dangerous to himself or others," and that proposed treatment be "in the inmate's medical interest."[5]

However, as Justice Stevens foresaw, the "reasonably related" standard set the bar too low to protect the liberty interest of a defendant from interference with his personal autonomy—interference with his mind and will.[6] In some cases, courts have found a defendant to be "dangerous" based on the nature of the illness rather than based on any imminent, specific threat.[7]

On June 16, 2003, in *Sell v. United States,* the Supreme Court raised the bar.[8] In *Sell*, the Court established that the government must meet a four-part test in order to administer psychiatric drugs to a prisoner against his will: (1) the governmental interest must be sufficient; (2) the state's interest must be significantly furthered; (3) less intrusive methods of furthering the interest must not be feasible; and (4) the administration of the medication must be

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4. *Harper*, 494 U.S. at 227. The standard for a forced medication to be "legitimately related to penological interest" originated from the Supreme Court's opinion in Turner v. Safley, 482 U.S. 78 (1987).

5. *Id.*

6. Jeffrey J. Coe, *Seeking A Sane Solution: Reevaluating Interests in Forcibly Medicating Criminal Defendants to Trial Competency*, 54 ARIZ. L. REV. 1073, 1091-92 (2012).

> Forcibly medicating a detainee under the Harper standard will likely be easier than under the heightened standard of Sell. A detention facility seeking to medicate a defendant under Harper can do so if he is dangerous to himself or others and the treatment is in his medical interests. If the defendant objects, the government need only prove its decision is reasonably related to legitimate penological interests. A finding of dangerousness obviates the need for balancing the government's interest in bringing the accused to trial against the defendant's significant liberty interest in being free from unwanted medication.

Id.

7. *Id*. at 1092, n.175; *see* United States v. Muhammad, 165 F.3d 327, 336 (5th Cir. 1999) (finding defendant dangerous because her future physical or medical problems may not be detected or diagnosed); United States v. S.A., 129 F.3d 995, 1001 (8th Cir. 1997) (finding that the defendant's violent hallucinations and prior violent behavior are enough to support finding of dangerousness); United States v. Steil, 916 F.2d 485, 486-88 (8th Cir. 1990) (finding violent delusions and threats sufficient to prove dangerousness even though detainee never had opportunity to act on them).

8. Sell v. United States, 539 U.S. 166 (2003) (departing from *Harper*'s rational basis, minimal scrutiny test, and imposing an intermediate level of scrutiny. This heightened level of scrutiny is more appropriate for the kind of individual liberty at risk.).

medically appropriate.[9] The government must prove each of the four prongs by clear and convincing evidence.[10]

In the years since *Sell* was decided, the circuits have responded by further refining the first prong of the test.[11] Specifically, a "sufficient governmental interest" is determined by weighing the seriousness of the crime against case specific "special circumstances."[12]

The focus of this article is on the Third Circuit's recent interpretation of "sufficient government interest," specifically its method for interpreting what can be classified as a serious crime. In *United States* v. *Cruz,* the Third Circuit found that threatening a federal officer was serious enough for the government to have an important interest in pursuing forced medication.[13]

The court examined whether to use the maximum penalty provided in the statute or the sentencing guidelines to determine the seriousness of the crime. Because Cruz's crime would be considered serious under either rubric, however, the Court chose to apply neither.[14] Instead, the Court satisfied the

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9. *Id.* at 167.

10. United States v. Ruiz-Gaxiola, 623 F.3d 684, 692 (9th Cir. 2010) (quoting *United States v. Hernandez-Vasquez,* 513 F.3d 908, 913 (9th Cir.2008) (stating that the *Sell* factors do not represent a balancing test, but rather a set of independent requirements, each of which must be found to be true before the forcible administration of psychotropic drugs may be considered constitutionally permissible).

11. Christopher Slobogin, *The Supreme Court's Recent Criminal Mental Health Cases: Rulings of Questionable Competence*, 22 CRIM. JUST. 8, 9 (2007) (regarding the first prong in *Sell*, in order for a sufficient governmental interest to exist, the crime must be serious and the governmental interest must not be lessened by the prolonged confinement of the prisoner). The Fourth, Sixth, and Seventh Circuits have determined a serious crime by using statutory maximum penalties. *See* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005); United States v. Green, 532 F.3d 538 (6th Cir. 2008); United States v. Breedlove, 756 F.3d 1036, 1041 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 466 (2014). The Ninth and Fifth Circuits determined a serious crime by using sentencing guidelines. *See* United States v. Hernandez-Vasquez, 513 F.3d 908 (9th Cir. 2008); *United States v. Palmer,* 507 F.3d 300, 301, 303–04 (5th Cir. 2007).

12. United States v. Cruz, 757 F.3d 372, 376 (3rd Cir. 2014) ("It noted that *Sell* identified two examples of such special circumstances: '(1) when the defendant has already been incarcerated for a significant period of time; or (2) whether there is a possibility of future civil commitment.'") (internal citations omitted). "Sufficient government interest" is the same as "important governmental interest." *See* United States v. Sell, 539 U.S. 180 (2003).

13. *Cruz*, 757 F.3d at 386-87.

14. *Id.* at 386 ("[The District Court] concluded that, under either rubric, [Cruz's] crimes were serious. We agree, and . . . need not decide here whether the seriousness of an offense should be measured against either the statutory maximum associated with an offense or the likely Guidelines range.").

first prong of *Sell* by finding that Cruz's actions posed a threat to "human security" and the "very integrity of our system of government."[15]

The purpose of this article is not to contest that Cruz's crime was serious. Under both the statutory maximum and the sentencing guideline rubrics, Cruz's crime would be classified as serious.[16] This article proposes, rather, that the Third Circuit erred in using a vague standard of "human security," which could lead to arbitrary rulings, "over-securitizing threats," and prejudicing the rights of incompetent prisoners.[17]

When faced with a mentally ill prisoner that refuses medical treatment, the Court should adopt a threshold approach, first determining whether a defendant is legally competent to make a decision to refuse medical treatment, then proceeding to a *Sell* hearing, using the maximum penalty available on the face of the applicable statute to determine seriousness.[18]

II. BACKGROUND

There are two pathways to forcible medication: dangerousness and non-dangerousness.[19] In taking the first pathway, dangerousness, a federal court is not required to apply the *Sell* test to forcibly medicate a defendant if there are "strong reasons for a court to determine whether forced administration of drugs can be justified on . . . alternative grounds[20] before turning to the trial competence questions."[21]

Thus, if a Court finds that a defendant is dangerous, the Court may use the *Washington v. Harper* standard,[22] which is a lower bar, to judge whether

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15. *Id.* at 387.

16. *Id.* at 376.

17. Yaniv Roznai, *The Insecurity of Human Security*, 32 WIS. INT'L L.J. 95, 122 (2014) ("The concept's analytical weakness is especially manifested in three major challenges: the analytically ambiguity of the concept; risks in over-securitizing threats; and the concept's illusory nature.").

18. Coe, *supra* note 6, at 1073 (evaluating the legal competence of a defendant to make a decision to refuse medication and proceeding to a *Sell* hearing has the intended effect of abolishing the lower *Harper* standard where the government can avoid heightened scrutiny under *Sell* by declaring that a defendant is a danger to himself for refusing medication).

19. *Id.*

20. *Sell*, 539 U.S. at 182 ("A court need not consider whether to allow forced medication for [the particular governmental interest of rendering the defendant competent to stand trial], if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* elated to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk.").

21. *Id.* (emphasis omitted).

22. Washington v. Harper, 494 U.S. 210, 224 (1990).

forcible medication is appropriate.[23] Under the *Harper* standard, a Court may authorize the forcible medication of a detainee if he is "dangerous to himself or others and the treatment is in [his] medical interest[s]."[24]

This low threshold is concerning. In *United States v. Muhammad*, a schizophrenic defendant was found to be a danger to herself because she refused to take medicine.[25] This interpretation could lead to many mentally ill defendants being considered "dangerous" to themselves, and thus allow the courts to avoid the stricter scrutiny of a *Sell* hearing.[26] With conflicting reports from the medical staff in Abraham Cruz's case, the district court found uncertainty as to whether, in the future, Cruz would be a danger to himself and others, and the Third Circuit accepted that finding.[27] Thus, the issue of Cruz's forced medication was properly analyzed under the *Sell* standard, the second, more difficult path, to forcible medication.

This second pathway for forcibly medicating an incompetent prisoner applies in situations where the defendant is not a danger to himself or others. In these cases the matter goes to a *Sell* hearing.[28] The first prong of *Sell's* test, "governmental importance," is a critical point in the analysis. Governmental importance is comprised of two components: (a) a serious crime, and (b) the absence of mitigating special circumstances that would lessen the governmental interest.[29]

The Third Circuit's recent interpretation of "serious crime" under the *Sell* criteria opens the door for arbitrary rulings.

A. Raising the Bar: United States v. Sell

To understand the context for the Third Circuit's decision in *United States v. Cruz* and its impact on the legal landscape, it is helpful to place it against the backdrop of the Supreme Court's landmark decision in *United States v. Sell*, which burdened the government with proving four elements by clear and convincing evidence in order to administer psychiatric medication to an non-dangerous, incompetent patient without their consent.[30]

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23. Coe, *supra* note 6, at 1091.
24. *Harper*, 494 U.S. at 227.
25. United States v. Muhammad, 165 F.3d 327, 335-36 (5th Cir. 1999).
26. Coe, *supra* note 6, at 1093.
27. United States v. Cruz, 757 F.3d 372, 387 (3rd Cir. 2014).
28. Coe, *supra* note 6, at 1100.
29. Sell v. United States, 539 U.S. 166, 180 (2003).
30. *Id.* at 180-81.

In *Sell*, defendant Charles Thomas Sell was indicted for health care fraud and attempted murder.[31] At the time of his indictment, the magistrate found him competent to stand trial for fraud.[32] During the pendency of his trial his mental condition worsened, requiring hospitalization.[33] After determining Sell was no longer competent to stand trial, the medical staff at the federal hospital recommended administering anti-psychotic medication.[34] Sell refused consent.[35]

Undeterred, the medical staff proceeded with administering the drugs under authorization by the Magistrate.[36] The district court "affirmed the Magistrate's order permitting Sell's involuntary medication" finding that the government had such a significant interest in bringing Sell to trial that involuntary medication was warranted.[37] The Eighth Circuit Court of Appeals affirmed.[38]

On appeal, the Supreme Court affirmed the circuit court's decision and established four elements for involuntary medication of incompetent prisoners:[39] (1) "important governmental interests are at stake;"[40] (2) "forced medication will *significantly further* those concomitant state interests;"[41] (3) the medication is "necessary to further those interests" and "any alternative, less intrusive treatments are unlikely to achieve substantially the same results;"[42] and (4) "administering the drugs is *medically appropriate*."[43]

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31. *Id.* at 170.

32. *Id.*

33. *Id.* at 171.

34. *Id.*

35. *Id.* at 171.

36. *Id.* at 174 (finding the government's interest in bringing Sell to trial was "essential," there were "no less intrusive means," the "antipsychotic drug treatment [was] medically appropriate," and there was a "reasonable probability that Sell will fairly be able to participate in his trial.").

37. *Id.*

38. *Id.* (finding the government's interest in bringing Sell to trial was "essential," there were "no less intrusive means," the "antipsychotic drug treatment [was] medically appropriate," and there was a "reasonable probability that Sell will fairly be able to participate in his trial.").

39. *Id.* at 180-81.

40. *Id.* (emphasis removed).

41. *Id.* at 181.

42. *Id.* (emphasis removed).

43. *Id.* at 167. Notably, the last three elements of the *Sell* test had already been introduced in *Riggins v. Nevada. Id.*; *see* Riggins v. Nevada, 504 U.S. 127, 135 (1992). The *Sell* court adopted a new element, "important governmental interest" as the first prong of their test,

The *Sell* decision—specifically the inclusion of "important governmental interest"—has had an ever-widening ripple effect across the circuits, resulting in different resolutions.[44] Seven circuits have directly quoted *Sell*'s nebulous definition for a serious crime under governmental interest as protecting "the basic need for human security."[45] Other circuits have either resolved the matter by looking to the maximum statutory penalty available or by adhering to sentencing guidelines.[46] Scholars have opined that *Sell*'s overly broad definitions may have actually encouraged an uptick in the incidents of involuntary medication and posturing by both the government and the defendant.[47]

B. United States v. Cruz*: A Case of First Impression*

On August 8, 2011, Abraham Cruz ran an errand to the Social Security Administration Office in order to discuss his benefits.[48] At the office, Cruz learned that he would not receive social security benefits until "a medical

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modifying the previous standard. *Sell*, 539 U.S. at 180; *see also* Christopher Slobogin, *supra* note 11, at 8, 9.

44. *See* Slobogin *supra* note 11 and accompanying text.

45. *Sell*, 539 U.S. at 180; United States v. Breedlove, 756 F.3d 1036, 1040 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 466 (2014); United States v. Gillenwater, 749 F.3d 1094, 1101 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 222 (2014), *reh'g denied*, No. 14-5266, 2014 WL 7010721 (U.S. Dec. 15, 2014), *cert. denied*, 135 S. Ct. 504 (2014). United States v. Cruz, 757 F.3d 372, 387 (3d Cir. 2014); United States v. Gutierrez, 704 F.3d 442, 449 (5th Cir. 2013), *cert. denied*, 133 S. Ct. 2380, 185 L. Ed. 2d 1094 (2013); United States v. Chatmon, 718 F.3d 369, 373 (4th Cir. 2013); United States v. Mikulich, 732 F.3d 692, 696 (6th Cir. 2013); United States v. Archuleta, 218 F. App'x 754, 758 (10th Cir. 2007).

46. Coe, *supra* note 6, at 1084-85.

47. Slobogin, *supra* note 11, at 10.

> Now that the circumstances under which forcible medication solely for the purpose of competency restoration "may be rare," defense lawyers and defendants are more likely to claim incompetency, and defendants are more likely to refuse treatment. In response, courts, prosecutors, and forensic clinicians are more likely to take advantage of the *Harper/Riggins* exception to the right to refuse and find that "dangerousness" exists in a greater number of cases, and prosecutors are more likely to bring the highest possible charge to ensure it is considered "serious." In short, all parties are more likely to act pretextually, with no deserved gain for anyone, since refusing defendants either will still be detained (illegitimately) or will be released without adjudication merely because they have refused treatment.

Id.

48. United States v. Cruz, No. 1:11-CR-00242, 2012 WL 3027809, at *1 (M.D. Pa. July 24, 2012).

decision" had been made.[49] He became agitated and yelled, "You're going to need toe tags!" as he exited the office.[50]

An officer on duty reported the incident to Agent Ryan in the Department of Homeland Security.[51] Agent Ryan called Abraham Cruz and asked about his visit to the social security office.[52] Cruz became increasingly agitated during the call and "told Agent Ryan that he was going to 'take [his] ticket book, take [his] gun, take his doughnut and beat [his] ass.'"[53]

Agent Ryan reported the conversation to Assistant U.S. Attorney Kim Daniel.[54] With authorization, Ryan called Cruz back, recording the phone conversation.[55] Cruz made statements such as, "There gonna be a war about this; you should be concerned about yourself . . . If I'm gonna tell you I'm gonna kill you, I ain't gonna tell you I'm gonna kill you, I'm gonna swing at you, all I gotta do is hit you one time," and "why don't you come see me in person so we can talk and see whatever, so I can see what I'm talking to. Give me a target, you have one."[56] Based on that phone conversation, Special Agent Ryan obtained an arrest warrant.[57] Then Agent Ryan, along with eight armed inspectors and police officers, arrested Cruz.[58]

Cruz had "'previously received Social Security benefits based on a diagnosis of affective/mood disorders and personality disorders.'"[59] His sister, Yvette, testified that he "had been talking to himself leading up to the August 8, 2011, incidents because he had not been taking any medication."[60]

The jury found Cruz guilty of two counts of threatening to assault and kill a federal agent in violation of 18 U.S.C. § 115.[61] The three elements of a violation of 18 U.S.C. § 115 are: (1) communication of an actual threat to assault, kidnap, or murder, (2) someone who is a federal official, (3) with the specific intent to impede, intimidate, or interfere with that official while

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49. *Id.* at *1.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* (internal brackets removed).
57. *Id.* at *2.
58. *Id.*
59. *Id.* (citation omitted).
60. *Id.*
61. *Id.* at *1-2.

engaged in the performance of his official duties or to retaliate against that official on account of the performance of his official duties.[62]

After the jury found Cruz guilty, the government moved for a determination of Cruz's competency.[63] Dr. William J. Ryan, psychologist for the Federal Bureau of Prisons, concluded that Cruz "suffered from schizophrenic disorder, bipolar type."[64] After a hearing, the court found Cruz to be incompetent; he could not proceed with sentencing.[65]

Nine months later, a second competency evaluation, prepared by Doctors Weaver and Luking, concurred with Dr. Ryan's report.[66] The evaluation revealed that Cruz refused to take anti-psychotic medication.[67] The evaluation stated there was "a substantial probability that [Cruz's] competency [could] be restored with a period of forced medication."[68]

The United States District Court for the Middle District of Pennsylvania entered an order authorizing forcible medication of defendant Cruz to restore his mental competency in order to proceed with sentencing.[69] In a hearing pursuant to *Sell*, the court acknowledged that whether the government has advanced sufficiently important interests to justify forcible medication is a question of law.[70] The court then found that all four of the *Sell* criteria had been met by the circumstances of Cruz's case.[71] Cruz appealed the court's decision, taking issue with the court's two-step analysis under the first prong of *Sell*: governmental interest.[72]

The court first found that administering medicine in order to make a defendant competent for sentencing enabled the government "to ensure that the defendant receiv[ed] a sentence that accurately reflects the nature of his offense and his individual circumstances."[73] Second, the court found that no special circumstances existed to lessen the importance of the government's

62. *Id.* at *3; 18 U.S.C. § 115 (2008).
63. United States v. Cruz, 757 F.3d 372, 374 (3d Cir. 2014).
64. *Id.* at 374.
65. *Id.* at 374.
66. *Id.* at 374-375.
67. *Id.*
68. *Id.* at 375.
69. *Id.* at 375-376.
70. *Id.* at 375.
71. *Id.* at 376.
72. *Id.*
73. *Id.* at 376 (citing United States v. Wood, 459 F.Supp.2d 451, 457–60 (E.D.Va.2006)).

interest.[74] According to *Sell,* examples of special circumstances include the length of incarceration and the likelihood of civil commitment.[75]

On appeal, Cruz had five arguments in response to the court's findings.[76] First, Cruz contended that the government's interest in sentencing a defendant was less than its interest in trying a defendant.[77] Second, that violations of 18 U.S.C. § 115 were "less serious than crimes . . . at issue in [*United States v.*] *Grape* and *Sell*."[78] Third, Cruz contended that the court's reliance on the pre-sentence investigation report[79] (hereinafter "PSR") was "misplaced" because he did not have an opportunity to object to the guidelines.[80] Fourth, the PSR did not account for his mental health status, which he argued "could serve as a basis for either a downward departure or variance."[81] Finally, he argued that the likelihood of his civil commitment constituted a special circumstance undermining the governmental interest.[82]

In its analysis of these arguments, the appellate court elected to review the lower court's decision in accord with *Mikulich* and *Dillon*."[83] The court then examined the standard for "governmental interest" under *Sell.* "A court's conclusions regarding the importance of the government's interest necessarily involve balancing the seriousness of the crimes at issue with case-specific '[s]pecial circumstances' that 'may lessen the importance of that

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74. *Id.* at 376.

75. *Id.*

76. *Id.* at 377-378.

77. *Id.*

78. *Id.*; United States v. Grape, 549 F.3d 591 (3d Cir. 2008); Sell v. United States, 539 U.S. 166, 166 (2003).

79. *Cruz*, 757 F.3d at 378 (noting that the guidelines had been calculated based off career offender enhancement).

80. *Id.*

81. *Id.* at 378.

82. *Id.*

83. *Id.* (reiterating the Second and Fifth Circuits' stance for reviewing governmental interest is *de novo* and explaining the rules from *Dillon* and *Mikulich*); *see also* United States v. Mikulich, 732 F.3d 692, 699 (6th Cir. 2013); United States v. Dillon, 738 F.3d 284 (D.C. Cir. 2013). The Fifth Circuit gave a clear statement of the standard:

> [W]hether the government's asserted interests are sufficiently important [for purposes of determining whether involuntary medication to render a defendant competent to stand trial violates the defendant's due process rights,] is a legal issue subject to *de novo* review, while the other *Sell* factors for making such determination involve factual findings which are reviewed for clear error . . . .

United States v. Palmer, 507 F.3d 300, 303 (5th Cir. 2007) (citing United States v. Gomes, 387 F.3d 157,160 (2d Cir. 2004)).

interest.'"[84] In Cruz's case, the court created a patchwork from other circuits to fashion a new standard.[85]

The Court relied on persuasive authority from another circuit regarding the government's interest in sentencing, refusing to "parse sentencing proceedings from . . . substantive trial proceedings."[86] The Court effectively side-stepped Cruz's argument that he should be held in civil commitment until he regained competence for sentencing under 18 U.S.C. § 4244(d).[87] Thus, the court put the governmental interest in having a defendant stand trial on par with competency for sentencing.[88]

Prior to Cruz, the Third Circuit had not established a rubric for determining a "serious crime."[89] Thus, the *Cruz* court looked to two other circuit court opinions, which found that violations of 18 U.S.C. § 115 constituted serious crimes.[90] The Third Circuit also relied on the opinion of the Ninth Circuit in *United States v. Gillenwater*,[91] which found that violations of 18 U.S.C. § 115 should be regarded as serious crimes in order "to protect the very integrity of our system of government."[92]

In the plain error analysis under Fed. R. Crim. P. 52(b), the *Cruz* court gave passing notice to the gravity of violating a person's right to individual liberty in a footnote.[93] The court mentioned the rights of the defendant, but

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84. *Cruz*, 757 F.3d at 381 (quoting *Sell,* 539 U.S. at 180).

85. *Id.* at 382 ("We will thus adopt both the *Mikulich* burden-shifting standard and the mixed standard of review set forth in *Dillon.* Such adoption builds on the standard set forth by the *Grape* court and clarifies the extent to which defendants bear responsibility for proving the existence of special circumstances.").

86. *Id.* at 384 (citing *United States v. Wood*, 459 F. Supp. 2d 451, 459 (E.D. Va. 2006)).

87. *Cruz*, 757 F.3d at 384 (citing 18 U.S.C. § 4244(d) (2015) which provides for the hospitalization in lieu of incarceration of a convicted person suffering from mental disease or defect)).

88. *Id.* at 385.

89. *Id.* at 376, 386 ("Neither the Supreme Court nor the Third Circuit ha[s] promulgated a test to determine the seriousness of a crime, but other circuits have looked to the statutory maximum mandated for the offense or the applicable guidelines range.") (quoting the district court).

90. *Id.* at 386; *see United States v. Palmer,* 507 F.3d 300, 301, 303-04 (5th Cir. 2007); *United States v. Evans,* 404 F.3d 227, 238 (4th Cir. 2005) (concluding that violation of 18 U.S.C. § 115 is a serious crime "under any reasonable standard").

91. United States v. Gillenwater, 749 F.3d 1094 (9th Cir. 2014).

92. *Cruz*, 757 F.3d at 387 (quoting *Gillenwater*, 749 F.3d at 1101).

93. *Id.* at 379.

ultimately concluded that the "order authorizing the [Bureau of Prisons] to forcibly medicate Cruz plainly meets [the plan error analysis] test."[94]

III. DID THE GOVERNMENT HAVE A SUFFICIENT INTEREST IN CRUZ'S SENTENCING?

In order for the government to have a sufficiently important interest, the crime must be serious, and there must not be present any factors that would lessen the government interest, including the length of the defendant's confinement.[95]

A. The "Serious Crime" Standard

The *Sell* court addressed the criteria for a serious crime by stating:

> The Government's interest in bringing to trial an individual accused of a *serious* crime is *important*. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law *the basic human need for security*.[96]

"Serious crime" is not defined. The guiding language for future application is "protecting the 'basic human need for security.'"[97] This ambiguous language left the circuits without a clear standard to apply, and many turned

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94. *Id.* at 379 n.4.

> We are sensitive to the fact that this appeal concerns Cruz's "substantial rights," in the colloquial sense. Indeed, we are sensitive to the significant liberty interest at stake: Cruz's interest in avoiding the unwanted administration of antipsychotropic drugs. There are several dimensions to that liberty, which are both physical and intellectual. Every violation of a person's bodily integrity is an invasion of his or her liberty.... And when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense. . . . The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values.

Id. (internal citations omitted) (internal quotation marks omitted).

95. *Id.* at 376.

96. United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (quoting Sell v. United States, 539 U.S. 166, 180 (2003)) (emphasis added).

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

to using either the maximum sentence available under the statute or the sentencing guidelines as a rubric.[98]

The *Cruz* court declined to take a stand on which rubric the Third Circuit would use, claiming the case did not require a decision on a standard.[99] It did, however, acknowledge that "the seriousness of a defendant's crimes is . . . the yardstick against which the court will measure the governmental interests that are at stake."[100]

Because the Third Circuit had not yet established a standard for a "serious crime," the court addressed the district court's discussion of the two options for evaluating the seriousness of the crime: (1) using the maximum penalty prescribed in the statute, or (2) using the sentencing guidelines set forth in the government's pre-sentence investigation report.[101] Under either formula, the court acknowledged it had to account for special circumstances in Cruz's case to comply with *Sell*, which could lessen the weight given to the seriousness of the crime.[102]

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98. Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After Sell v. United States*, 13 WM. & MARY BILL OF RTS. J. 897, 909-10 (2005).

> Left largely on their own, federal courts since *Sell* have used a myriad of conflicting criteria to determine whether a particular offense is "serious." In *United States v. Evans*, for example, the Western District of Virginia held that a serious crime is one that carries a maximum sentence of more than six months imprisonment. The Western District of Texas rejected this six-month standard in *United States v. Barajas-Torres*, ruling that under *Sell* only crimes against persons or property can be serious, and denying the government's request to administer involuntary medications to an incompetent defendant charged with illegal reentry into the United States. Also in conflict are *United States v. Gomes*, in which the District of Connecticut allowed involuntary medications because, in light of the potential mandatory minimum sentence of fifteen years, possession of a firearm by a convicted felon is a serious offense, and *United States v. Dumeny*, in which the District of Maine denied involuntary medications because even though it "carries significant potential penalties," possession of a firearm by a person previously committed to a mental health institute is not a serious offense.

Id.

99. *Cruz*, 757 F.3d at 386.

100. *Id.* at 386; *see also Sell*, 539 U.S. at 180 (explaining that courts must consider the facts of an individual case to determine the importance of a governmental interest, and by using a balancing test, must weigh the seriousness of the crime against case specific "special circumstances.").

101. *Cruz*, 757 F.3d at 376.

102. *Id.*

The punishment for violating 18 U.S.C. § 115 is "a fine under this title or imprisonment for a term of not more than *10 years*, or both . . . ."[103] Thus, under 18 U.S.C. § 115, the maximum penalty was ten years, and Cruz's pre-sentence investigation report contained guidelines recommending imprisonment of 100 to 125 months.[104] The *Cruz* court found that "under either rubric, his crimes were serious."[105] Thus, the court did not need to determine whether the "seriousness of an offense should be measured against either the statutory maximum associated with an offense or the likely [g]uidelines range."[106] Effectively, the court punted on deciding which formula the Third Circuit would use.

To support its assertion that the crimes were serious using either rubric, the court cited opinions from the Fourth and Fifth Circuits.[107] In *United States v. Palmer* and *United States v. Evans*, the respective courts found that 18 U.S.C. § 115's provision for a maximum penalty of ten years qualified a violation as a "serious crime."[108] However, aside from a statutory provision, the courts also found the sentencing guidelines prepared for the case did not have to reach ten years in order for a crime to be serious.[109] In fact, the *Palmer* court asserted that a crime with guidelines beginning at just over six months in jail could be deemed serious.[110]

A jury evaluated the evidence and the applicable law and found Abraham Cruz guilty.[111] Thus, for the purposes of this article, it is not contested that Cruz's crime was serious—but rather that the Court's method of determining that seriousness was flawed.

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103. 18 U.S.C. § 115(b)(4) (2008) (emphasis added). One hundred months is equivalent to 8.3 years, and 125 months is equivalent to 10.4 years.

104. *Cruz*, 757 F.3d at 376.

105. *Id.* at 386.

106. *Id.*

107. *Id.*

108. United States v. Palmer, 507 F.3d 300, 301-04 (5th Cir. 2007); United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) ("We believe . . . it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes.").

109. *Palmer*, 507 F.3d at 303-04; *Evans*, 404 F.3d at 238.

110. *Palmer*, 507 F.3d at 304.

111. *Cruz*, 757 F.3d at 374.

B. *Did* Cruz *Have Any Mitigating Factors Lessening the Governmental Interest?*

Once a *Sell* defendant stands accused of a serious crime, the defendant has the burden to demonstrate that the special circumstances of his case undermine the government's interest.[112] After settling the issue of whether threatening a federal agent was a "serious crime," the court then had to weigh the special circumstances of Cruz's case that could mitigate the governmental interest.[113] In *Sell,* the court identified the following mitigating factors: (1) lengthy confinement in a mental institution, (2) the possibility of future civil commitment, and (3) time served in prison.[114]

The *Cruz* court agreed with Cruz that the special circumstances of his case, namely that he had already been incarcerated for a significant amount of time and he had a high likelihood of future civil commitment, were factors that could lessen the governmental interest.[115] But the Court found that even though Cruz had been in prison for two years, because his violation had the potential of a maximum penalty of ten years, there was still a possibility that he would have to serve the majority of his sentence.[116] Thus, the district court concluded as a matter of law that Cruz had not been incarcerated for a significant amount of time.[117]

Regarding the possibility of Cruz's future civil commitment, the district court looked to 18 U.S.C. § 4246 and 50 P.S. § 7301, which provide prerequisites for civil confinement.[118] 18 U.S.C. § 4246 requires "a substantial risk of bodily injury to another person or serious damage to property of another,"[119] and 50 P.S. § 7301 requires a showing of "clear and present danger of harm to others or to himself."[120]

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112. United States v. Mikulich, 732 F.3d 692, 698-99 (6th Cir. 2013).

113. Sell v. United States, 539 U.S. 166, 180 (2003) ("Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest.").

114. *Id.* at 180.

115. *Cruz*, 757 F.3d at 377.

116. *Id.* at 376-77.

117. *Id.*

118. *Id.* at 377.

119. 18 U.S.C. § 4246 (2013).

120. 50 P.S. § 7301(a) (1978) ("A person is severely mentally disabled when, as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so lessened that he poses a *clear and present danger of harm* to others or to himself." (emphasis added)).

Even though Cruz's record showed a history of violence and threats of violence, a competency evaluation in May of 2013 explicitly stated that "Cruz ha[d] not posed a threat to himself or others."[121] The court found it unclear whether or not he would be civilly confined, and that uncertainty did not diminish the governmental interest in sentencing Cruz.[122]

In so finding, the district court had to walk a fine line. It found that Cruz was dangerous enough to require involuntary medication, but not so dangerous that he would clearly qualify for civil commitment in the future.[123] The court stated that the likelihood of Cruz's future civil commitment was a fact-specific inquiry, which would not be reviewed on a clear error basis.[124]

Thus, no argument Cruz made for mitigating the governmental interest succeeded. The court found that neither the amount of time he served in prison, nor his likelihood of future civil commitment lessened the governmental interest in having him forcibly medicated.[125]

As for the differences between the government's interest in medicating an incompetent prisoner so that he can stand trial, versus medicating so that he can be sentenced, the *Cruz* court punted again. It did not wish to parse the differences between the two.[126] The court emphasized the government's important interest in sentencing the defendant, but did not acknowledge that the defendant's liberty interest in remaining unmedicated during the sentencing phase may be of equal or greater significance than the same interest during the course of a trial.[127] Ultimately, the *Cruz* court leaned on

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121. *Cruz*, 757 F.3d at 377.

122. *Id.* at 377.

123. *Id.* at 388-89.

124. *Id.* at 388. ("[T]his Court should review the District Court's related legal conclusions *de novo* and its fact finding for clear error." (citing *Dillon,* 738 F.3d at 291)).

125. *Cruz*, 757 F.3d at 377-78.

126. *Id.* at 386.

127. *Id.* at 385-86. Donna Lee Elm & Douglas Passon, *Forced Medication After United States v. Sell: Fighting A Client's 'War on Drugs'—Part One*, THE CHAMPION 26-27 (May/June 2008), https://www.fd.org/docs/select-topics/mental-health/forced-medication-after-u-s-v-sell-fighting-your-clients-war-on-drugs.pdf?sfvrsn=6 ("When the medication's side effects interfere with the defendant's assistance of counsel or even talking to counsel (i.e., when it renders the defendant a 'zombie,' sedates the defendant, or makes the defendant withdraw), it impacts the Sixth Amendment . . . right to assistance of counsel."). *See also* Riggins v. Nevada, 504 U.S. 127, 143-44 (1992) (quoting William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-53 (1987-1988)):

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the

the broadly worded standard from *Sell* to satisfy the serious crime requirement to establish a governmental interest, finding that the governmental interest in human security was sufficient.[128]

III. WHAT IS A SERIOUS CRIME?

Due to the lack of direction from the Supreme Court in *Sell* on what constitutes a serious crime, the circuits are currently split on the rubric they apply. The three criteria used to determine the seriousness of a crime as discussed by the *Cruz* court include human security, maximum sentencing, and statutory guidelines.[129]

A. Human Security

The origins of *Sell*'s "human security" standard are not clear. It's possible that it is either based upon a misconstrued concept of "ordered liberties," or upon an emerging global philosophy.[130] But regardless of its origin, "human security" is ill-suited to become a legal standard for measuring governmental interest.[131]

"Human security" lacks a clear definition.[132] The phrase is amorphous and broad. When the *Sell* court discussed the "important governmental interest" prong of its four-prong test, it stated that, "Government seeks to protect through application of the criminal law the basic human need for security."[133] Then Justice Breyer quoted Justice Brennan, "[The][p]ower to bring an

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> sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

128. *Cruz*, 757 F.3d at 387 ("[Cruz's] statements demonstrate the reasonableness of concluding that the Government's interest in preserving "human security" is as great here as it was in both *Sell* and *Gillenwater*. *See Sell*, 539 U.S. at 180 (recognizing the Government's need "to protect through application of the criminal law the basic human need for security"); *Gillenwater*, 749 F.3d at 1101 (recognizing the Government's need "to protect the very integrity of our system of government")).

129. *Cruz*, 757 F.3d at 386.

130. *Sell*, 539 U.S. at 180 (quoting Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)); Roznai, *supra* note 17, at 96.

131. Roznai, *supra* note 17, at 96. ("[A]lthough human security is normatively appealing, it suffers from numerous analytical shortcomings.").

132. *Id.* at 121.

133. *Sell*, 539 U.S. at 180 (quoting *Allen,* 397 U.S. at 347 (Brennan, J., concurring)).

accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."[134]

However, Justice Brennan also mentioned abuses to individual liberty caused by governmental over-reach, specifically mentioning the plight of "innocent men convicted by . . . irrational or arbitrary procedures."[135] This omission by Justice Breyer is ironic, because the vague standard of "human security" itself opens the door for arbitrary proceedings. Basically, any crime could qualify.[136] Thus, for incompetency proceedings, a standard derived from the phrase "ordered liberty" and "social justice and peace" leaves much to be desired.

It is possible that the language adopted by Justice Breyer is an appeal to the emerging philosophy of human security in the international community.[137] Human security can be used to describe international humanitarian interests, national security, or individual rights.[138] But for purposes of a *Sell* hearing, the concept of "human security" is too vague to be a viable standard for determining whether a crime is serious.[139] At a

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134. *Id.*

135. *Allen*, 397 U.S. at 348.

> Down the corridors of history have echoed the cries of innocent men convicted by other irrational or arbitrary procedures. These are some of the alternatives history offers to the procedure adopted by our Constitution. The right of a defendant to trial—to trial by jury—has long been cherished by our people as a vital restraint on the penal authority of government.

Id.

136. Klein, *supra* note 98, at 909.

> The [*Sell*] Court also did not discuss any objective criteria, such as potential minimum or maximum sentence, that future courts—including the *Sell* district court on remand—might look to in deciding whether a particular alleged offense is "serious." Certainly, every crime is in some measure a violation of, in the words of the Court in *Sell*, "the basic human need for security." Further, the Court quoted with approval from *Illinois v. Allen* that the "power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and a prerequisite to social justice and peace." This statement suggests that the power to bring *any* defendant to trial is a fundamental governmental interest.

Id. (citations omitted).

137. Roznai, *supra* note 17, at 121.

138. *Id.* at 113.

139. *Id.* at 121-22 ("The threats that endanger human security are indeed grave but seemingly endless: wars, drugs, organized crime, diseases, hunger, crime, terror, traffic accidents, environmental crises, economic crises, and many others, all of which are covered by the concept of human security. This wide and vague definition has lead critics . . . to ask: what is not included within human security?"). Judge Pollak called the phrase "human

minimum, the "human security" language shows the Court has a low threshold for what constitutes a serious crime, indicating unwillingness by the Court to dismiss petty offenses.[140]

The *Cruz* court did not recognize this problem. It effectively dodged adopting a certain standard for defining a "serious crime," and reasoned by analogy to other cases where "no less [serious]" crimes had been adjudged as "lurid and distressing" enough to "protect through application of the criminal law the basic human need for security."[141]

B. *Maximum Sentencing*

The majority of circuits and the Supreme Court lean toward using the statutory maximum penalty when evaluating a serious crime.[142] In *United States v. Green*, the court found that using the statutory maximum was the most "objective means of determining the seriousness of a crime," and thus adopted that standard.[143] In 1989, fourteen years before *Sell* was decided, the Supreme Court in *Blanton v. City of North Las Vegas* used the statutory maximum to determine seriousness of crimes.[144]

In *United States v. Evans*, the defendant was arrested for "assaulting, resisting, or impeding" an employee of the USDA under 18 U.S.C. §

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security" a "vague aspiration[]." Louis H. Pollak, *"Original Intention" and the Crucible of Litigation*, 57 U. CIN. L. REV. 867, 881 (1989).

140. Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1979 (2004).

141. United States v. Cruz, 757 F.3d 372, 386-87 (3d Cir. 2014) (citations omitted); *see also* Mills v. Rogers, 457 U.S. 291, 303 (1982) (stating there must be sufficient safeguards against infringing on individual autonomy when administering a mind altering drug is at issue).

142. United States v. Breedlove, 756 F.3d 1036, 1041 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 466 (2014); United States v. Green, 532 F.3d 538, 549 (6th Cir. 2008) ("Moreover, the Supreme Court has spoken on this very point in other jurisprudence. Whether a crime is 'serious' should be determined by its maximum statutory penalty.") (citing Lewis v. United States, 518 U.S. 322, 326 (1996)).

143. *Green*, 532 F.3d at 549.

144. *Blanton v. City of North Las Vegas,* 489 U.S. 538, 541-42 (1989).

> In recent years, however, we have sought more objective indications of the seriousness with which society regards the offense. [W]e have found the most relevant such criteria in the severity of the maximum authorized penalty. In fixing the maximum penalty for a crime, a legislature include[s] within the definition of the crime itself a judgment about the seriousness of the offense. The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.

Id. (citations omitted) (internal quotation marks omitted).

111(a)(1).[145] Then, in the following months, the defendant was also charged with violating 18 U.S.C. § 115(a)(1)(B), threating to murder a federal judge.[146] The defendant was adjudicated incompetent to stand trial and subsequently given antipsychotic medication against his will, pursuant to a *Sell* proceeding, to restore his competency.[147]

When faced with determining a rubric to evaluate the seriousness of his crime, the Fourth Circuit elected to apply the statutory maximum rubric.[148] The court found this standard beneficial because it "respect[ed] legislative judgments regarding the severity of the crime," and gave courts "an objective standard to apply."[149] The court avoided setting out a "rigid rule as to what the statutory maximum must be for a crime to be a serious one," finding that "it [was] beyond dispute that the Government does have an important interest in trying a defendant charged with a felony carrying a maximum punishment of ten years imprisonment."[150]

Using the statutory maximum standard did not prohibit the *Evans* court from complying with *Sell's* direction to "consider the facts of the individual case in evaluating the Government's interest."[151] The court still evaluated whether the defendant had circumstances that would lessen the importance of the governmental interest.[152]

A drawback to using the statutory maximum rubric would be apparent in a situation where the government brings charges against a mentally incompetent person, who cannot actually execute a threat. The wooden

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145. United States v. Evans, 404 F.3d 227, 233 (4th Cir. 2005).

146. *Id.* at 234.

147. *Id.* at 235 ("[T]he charge under § 115(a)(1)(B), a felony that carried with it a maximum imprisonment term of 10 years, made the Government's interest in bringing Evans to trial an important one.").

148. *Id.* at 237.

> Although the Court in *Sell* offered no guidance on how to determine the seriousness of an offense, the Supreme Court has described 'serious' crimes in other contexts. In *Duncan v. Louisiana,* [391 U.S. 145 (1968)], for example, the Supreme Court observed that the Sixth Amendment's right to trial by jury exists only in 'serious' criminal cases. *Id.* at 158. It admonished that 'the penalty *authorized* for a particular crime is of major relevance in determining whether it is serious.' *Id.* at 159. . . . More recent right-to-jury cases have explicitly found that the primary measure of seriousness is 'the maximum penalty attached to the offense.' *See, e.g., Lewis v. United States,* [518 U.S. 322 (1996)].

Id.

149. *Id.*

150. *Id.*

151. *Id.* at 235. *See also* Sell v. United States, 539 U.S. 166, 180 (2003).

152. *Evans*, 404 F.3d at 239-40.

application of the maximum statutory approach may result in finding his crime to be "serious." The biggest criticism of the statutory maximum penalty approach is that it does not consider "the specific circumstances of individual defendants."[153] As stated above, the *Evans* court obviated this concern by evaluating the specific circumstances of the defendant.[154]

Another drawback is that state statutory schemes, which allow a judge to sentence at minimum, mean, and maximum ranges, depending on aggravating or mitigating facts. These schemes have come under criticism by the Supreme Court because they may unjustly infringe on a defendant's right to a jury trial by virtue of judge-made-fact-findings that determine the defendant's ultimate sentence.[155] However, judicial findings such as these are equally if not more rampant in schemes that follow the sentencing guidelines.

C Sentencing Guidelines

The statutory guidelines provide a clearly defined and flexible standard to apply to cases involving involuntary medication of incompetent prisoners. Initially promulgated as a mandatory sentencing guide in 1984, the now advisory guide for sentencing is 18 U.S.C. § 3553(a).[156]

> The factors courts must consider in crafting a sentence are: (1) the "nature and circumstances of the offense" and the defendant's "history and characteristics"; (2) the general purposes of the Sentencing Reform Act; (3) the "kinds of sentences available"; (4)

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153. United States v. Ruiz-Gaxiola, 623 F.3d 684, 691, 694 (9th Cir. 2010) (quoting United States v. Hernandez–Vasquez, 513 F.3d 908, 913 (9th Cir.2008)).

154. *Evans*, 404 F.3d at 237.

155. Cunningham v. California, 549 U.S. 270, 307 (2007):

> [T]he California regime runs afoul of the Sixth Amendment. The Court reasons as follows: (1) California requires that some aggravating fact, apart from the elements of the offense found by the jury, must support an upper term sentence; (2) *Blakely* defined the "statutory maximum" to be "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*" 542 U.S. at 303, 124 S. Ct. 2531 (emphasis in original); and therefore (3) the California regime violates "*Apprendi's* bright-line rule," *id.,* at 308, 124 S. Ct. 2531, that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[.]"

Id.; see Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

156. *Sentencing Guidelines*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 745, 745-46 (2014); 18 U.S.C.A. § 3553 (West 2010) (invalidated by United States v. Booker, 543 U.S. 220 (2005) however, is still followed by judges as an advisory recommendation for an appropriate sentence.)

> the "pertinent policy statements issued by the U.S. Sentencing Commission"; (5) the "need to avoid unwarranted sentence disparities" between defendants convicted of similar conduct; (6) the "need to provide restitution to any victims"; and (7) the applicable sentence range recommended by the Guidelines.[157]

After a jury returns a conviction, the judge makes "multifarious findings of fact and [must] correctly apply . . . voluminous rules to those facts to determine a guideline range," before then applying the factors from 18 U.S.C. § 3553(a) to yield the final sentence.[158] In 2005, in *United States v. Booker*, the Supreme Court held that application of the guidelines in a mandatory capacity was unconstitutional.[159] However, despite the ruling in *Booker*, courts still turn to the guidelines to inform their decision. In fact, failing to consult the guidelines can result in an appellate reversal.[160]

In *United States v. Hernandez-Vasquez*, the Court indicated that sentencing guidelines were "the best available predictor of the length of a defendant's incarceration," and that using only the statutory maximum would risk "ignor[ing] *Sell*'s direction that courts should consider the specific circumstances of individual defendants in determining the seriousness of a crime."[161] Even the *Evans* court that adopted the statutory maximum rubric admitted that sentencing guidelines show proper respect to the legislative process in determining which crimes deserve greater punishment.[162]

The sentencing guidelines are a flexible vehicle to assess the seriousness of a defendant's crime.[163] This flexibility is particularly useful when considering

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157. *Id.* at 746-47 (citations omitted).

158. Frank O. Bowman, III, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. R. 356, 356 (2012).

159. United States v. Booker, 543 U.S. 220 (2005); *see also* Dillon v. United States, 560 U.S. 817, 820 (2010) ("We held in *Booker* that treating the Guidelines as mandatory in these circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt.").

160. Bowman, *supra* note 158, at 356.

161. United States v. Hernandez-Vasquez, 513 F.3d 908, 919 (9th Cir. 2008).

162. United States v. Evans, 404 F.3d 227, 237 (2005) ("A focus on a defendant's probable guideline range to determine an offense's seriousness would . . . respect legislative judgments . . . ."). *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 (1989) ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude . . . .'" (quoting Landry v. Hoepfner, 840 F2d 1201, 1209 (5th Cir. 1988)) (alteration in original)).

163. *Sentencing Guidelines*, *supra* note 156, at 748.

a crime such as threatening a federal officer in violation of 18 U.S.C. § 115,

where the conduct of the defendant may be merely an empty threat, or instead a serious threat where the defendant has the motive, means, and intent to cause actual harm.

One criticism of the sentencing guidelines is that subjective considerations lead to disparity among the circuits.[164] The guidelines lack the level of objectivity the statutory maximum rubric provides. Another criticism is that the flexibility the guidelines purport to offer is predominately illusory.[165] Further, critics have pointed out that the guidelines are not as deferent to the legislative branch as a simple application of the maximum sentence available on the face of the statute.[166] Other scholars opine that *Booker*'s ruling did not resolve the problems inherent in the sentencing guidelines.[167] In fact, they contend it may have opened the door for arbitrary sentencing.[168]

The rationale behind abolishing mandatory sentencing was that the fact-finding accomplished by the judge during the sentencing phase was of equal or greater importance in some instances than the fact-finding done by the jury during the trial phase.[169] This "absence of jury participation" created a

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164. United States v. Breedlove, 756 F.3d 1036, 1041 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 466 (2014) (quoting *Green,* 532 F.3d at 548) (indicating concern that subjective determinations of seriousness lead to disparity among the circuits).

165. Bowman, *supra* note 158, at 356 ("The . . . guidelines were criticized because their many factual findings fed into a grid that subdivided the universe of possible sentences into 258 boxes, which critics said served largely to create a reassuring illusion of rationally calibrated allocations of punishment.").

166. Marvin G. Pickholz et al., *Constitutionality of the United States Sentencing Guidelines*—Blakely *and its aftermath*, 21 SEC. CRIMES § 10:4 (Nov. 2014); Brief for the United States at 12, United States v. Fanfan, 149 F. App'x 517 (2004) (Nos. 04-104, 04-105) 2004 WL 1967056, at *12 ("The Guidelines do not create statutory maximums. Rather, they are the product of the Sentencing Commission, a body in the judicial branch. The Commission is not a legislature and does not perform legislative functions.").

167. Bowman, *supra* note 158, at 360.

168. *Id.* ("And the question of who gets the guidelines sentence and who does not will be based far more on the personal predilections of the judge assigned the case than the particular characteristics of the defendant.").

169. Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 378, 418 (2010).

> But the more factually specific and legally binding a structured system becomes, the more judicially found facts will begin to rival the elements of the crime itself in their impact on a defendant's actual sentence. This phenomenon, which in its extreme form has been characterized by the Supreme Court as the "tail which wags the dog," was felt by some to be suspect and perhaps illegitimate. Some critics complained that according judicially found facts so much sentencing

due process procedural deficiency *Booker* sought to remedy, but arguably made worse.[170] Because the guidelines are now only advisory, "trial and appellate judges may become less and less concerned about accuracy [in their findings.]"[171] In the wake of *Booker*, the statutory maximum standard is the only remaining standard that constrains punishment, putting a boundary on the highest penalty a court can sentence.[172]

The sentencing guidelines have also been criticized as "inappropriate."[173] It is true that where finding a "serious" crime is the issue, the sentencing guidelines seem capricious. Courts using sentencing guidelines have found "serious" crimes in situations where the guidelines have recommended incarceration for thirty-three to forty-one months (for transmitting threatening communications by mail),[174] and fifteen to twenty-one months (for possession of a firearm by a person found to be mentally defective and committed to a mental institution).[175] If a defendant's crime can be considered "serious" when the sentencing guidelines recommend twenty-one months, thirty-three months, or one hundred and five months, then it is not automatically apparent from the length of the incarceration whether the crime is serious or not.

The *Evans* court criticized the guidelines for causing logistical difficulties in the trial process.[176] The court stated that the sentencing guidelines would be an unpredictable indicator of the actual sentence a defendant would face

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> weight denigrated the constitutionally guaranteed role of the jury. . . . the Federal Guidelines era conditioned federal judges to associate structured sentencing with legislative and executive assaults on judicial power, acute manifestations of the "tail wags the dog" problem, and very high sentences.

Id. at 378 (internal citations omitted).

170. Bowman, *supra* note 158, at 357.

171. Bowman, *supra* note 169, at 468.

172. Jeffrey Standen, *The New Importance of Maximum Penalties*, 53 DRAKE L. REV. 575, 576 (2005).

173. United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005).

> A focus on the probable guideline range as the barometer of seriousness would shift this fact-finding to a time before the defendant's trial or plea, before the Probation Office prepares its report, and at a time when the district court has already ruled that the defendant himself is incompetent. Fact-finding under these circumstances—with no PSR and with the defendant unable to testify or render other assistance to counsel—would be uniquely inappropriate.

Id.

174. United States v. Cruz, 757 F.3d 372, 386 (3d Cir. 2014); United States v. Gillenwater, 749 F.3d 1094, 1101 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 222 (2014).

175. United States v. Palmer, 507 F.3d 300, 302 (5th Cir. 2007).

176. *Evans*, 404 F.3d at 238.

and thus the guidelines were an "unworkable" rubric to determine the seriousness of a crime.[177]

Despite the drawbacks of using sentencing guidelines, it is at least a valid approach; particularly for determining seriousness for defendants who have already been through trial and face involuntary medication in order to be sentenced. At the sentencing phase the pre-sentencing report should be complete. Thus, many of the logistical concerns regarding the amount of information available to the court in order to evaluate a defendant's circumstances against the applicable guidelines would be moot at the sentencing stage.

Under § 2A6.1 of the United States Sentencing Guidelines, the prosecutor can prescribe an increase in the base offense if the offense involves conduct evidencing an intention to carry out the threat.[178] In other words, by applying sentencing guidelines, a court could determine which statements are merely empty threats, and which statements are threats the defendant actually could carry out. The critics of the sentencing guidelines would argue that this sort of determination belongs to the province of the jury as the finders of fact.

Simply put, although the advisory sentencing guidelines are a valid means of determining seriousness, they have too many problems for the courts to rely on them in the long term. In the future, a revision of the guidelines which cures the failings of the pre-*Booker* system may be more appropriate to measure a crime's seriousness for purposes of *Sell* hearings.

V. PROPOSAL

Some mentally incompetent individuals are powerless to carry out their verbalized threats. How should the court evaluate the seriousness of an empty threat? Should those individuals be subjected to involuntary psychotropic medication?

First, as a minimal scrutiny standard, the *Harper* analysis is inadequate to protect the interests of mentally ill defendants, such as those who suffer from schizophrenia.[179] Accordingly, all forcible medication should be scrutinized under the heightened standard provided in *Sell*—regardless of whether the defendant is considered to be a danger to himself or others.[180]

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177. *Id.* at 238 n.7.

178. Andrew M. Campbell, Annotation, *Construction and Application of § 2A6.1 of United States Sentencing Guidelines*, U.S.S.G. § 2A6.1, 148 A.L.R. FED. 501(1998).

179. Coe, *supra* note 6, at 1093.

180. Kristin L. Henrichs, *Forcible Antipsychotic Medication: Should the Mentally Ill Criminal Defendant Celebrate or Fear Sell v. United States*, 90 IOWA L. REV. 733, 764 (2005).

Admittedly, this would make it more difficult for the government to medicate defendants—even if that is the best solution for a mentally ill patient. A person suffering from schizophrenia is not likely to have an accurate picture of reality, or the ability to make sound medical decisions that are in his best interest.[181] There is also potential for fraud and abuse: prisoners could refuse medication to delay the trial or for other tactical legal reasons.[182]

A necessary preliminary step, then, is a test for legal competency to refuse medication. Such a test, proposed by Jeffrey Coe, is "whether the individual is a danger to himself or others and whether he is able to make rational and informed treatment decisions."[183] There is a line where a schizophrenic patient may not be legally competent to refuse treatment—in those situations, the state's interest in preserving and extending life should outweigh an abdicated liberty interest by one under severe affliction by mental disease.[184] In sum, before a traditional *Sell* hearing is conducted, those defendants suspected of being a danger to themselves or others who refuse treatment should be evaluated to determine if they are legally competent to make that decision.

Second, under the first prong in *Sell*, the U.S. Supreme Court and the circuits should establish a set standard for determining the seriousness of a crime. As noted above, the U.S. Supreme Court in cases not involving forcible medication recommended using the statutory maximum as the guide for seriousness. Currently, the majority of circuits use statutory maximum to

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> Both Harper and civil commitment analysis use a rational relation standard, not taking into consideration many factors that the Sell test requires. This makes it easy for the government to achieve its goals of forcible medication and adjudication by stating alternative justifications. But the outcome is the same; the government forcibly medicates the defendant and possibly infringes upon his Sixth Amendment rights. If the Sell Court really wanted to make it harder for the government to forcibly medicate a criminal defendant for trial competency purposes, it should have applied the Sell test to all governmental interests.

Id.

181. Coe, *supra* note 6, at 1096, 1098.

> The liberty interest in allowing an individual to make choices about his person cannot be evaluated without looking at what choices are made. The decision to refuse medication is a choice to suffer with terrible, though treatable, symptoms of a disease the individual most likely does not realize he has.

Id. at 1098.

182. *Id.* at 1095.

183. *Id.* at 1097.

184. *Id.* at 1097-98 (indicating it is a good thing that the right to refuse medical treatment is not absolute—the government has a valid interest in "preserving life, (1) protecting innocent third parties, (2) preventing suicide, and (3) maintaining the ethical integrity of the medical profession . . . .").

evaluate the seriousness of a crime.[185] This shows deference to the legislature in defining what the people consider serious.[186]

The remaining circuits that have either applied the statutory guidelines or "human security" should follow the model set forth by the court in *United States v. Evans*. The *Evans* court struck the appropriate balance. It used the statutory maximum penalty rubric to find the defendant's crime was serious, but it also evaluated the defendant's special circumstances, which were the length of confinement and likelihood of civil commitment, to determine if the state's important interest had been lessened.[187]

Nonetheless, this solution falls short of accounting for additional special circumstances that could lessen the governmental interest, such as a defendant's medical history and the likelihood of the defendant actually carrying out a threat. These factors could be more easily assessed by well-drafted sentencing guidelines. Until the problems with the guidelines can be overcome, the statutory maximum coupled with an objective evaluation of special circumstances is the best yardstick for measuring the seriousness of a crime. It is far less arbitrary than "human security."

VI. CONCLUSION

There is an ongoing tension between the interests of "human security," the "integrity of the system of government," and the liberty of individual citizens. In *Cruz*, the Third Circuit Court of Appeals refused to apply a solid standard for finding Cruz's crime serious.[188] Instead, the court reasoned by analogy and determined that Cruz's crime violated the government's important interest in human security.[189] Should this vague standard persist as the measuring stick for governmental interest, all manner of conduct could soon be deemed a threat to "human security."[190]

What kind of conduct is sufficient to trigger a violation of 18 U.S.C. § 115? The ramblings of a man off his medication for a few weeks or the hardened threats of a career criminal? One kind of threat should be deemed more serious than the other. A revised set of sentencing guidelines balancing legislative, judicial, executive, and "citizen-jury control" affords the best opportunity for courts to apply discretionary standards while avoiding the

185. *See supra* note 11.

186. United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005).

187. *Id.* at 239.

188. United States v. Cruz, 757 F.3d 372, 376 (3rd Cir. 2014).

189. *Id.* at 386-87.

190. Klein, *supra* note 98, at 909.

vague and arbitrary analytical problems presented by "human security."[191] However, until such a system is enacted, using the maximum penalty authorized by statute is the best method to objectively determine the seriousness of a crime. Ultimately, using either the statutory maximum penalty or the sentencing guidelines would be far better than the nebulous "human security" standard.

As Justice Stevens said, the freedom "to resist the administration of mind altering drugs arises from our Nation's most basic values."[192] Underlying this

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191. Bowman, *supra* note 169, at 472-73.

> As will doubtless be clear by now, I believe that the solution to the sentencing problems that have vexed the Court requires a combination of Sixth Amendment jury trial and procedural due process principles. The Court should adopt essentially the following rules:
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> 1. An "element" of a crime is a fact that, when proven alone or in combination with other facts: (a) exposes the defendant to criminal liability; (b) sets hard limits on judicial sentencing discretion; and (c) increases the defendant's punishment in the sense that it increases either the penalty a court may impose or the penalty it must impose.
>
> 2. An "element" must either be proven beyond a reasonable doubt to a jury or, if the defendant waives jury trial, be proven beyond a reasonable doubt to a judge, or admitted by the defendant.
>
> 3. Within the impermeable upper and lower limits on judicial sentencing discretion created by proof of elements, legislatures may create rules that channel or guide, but do not eliminate, judicial sentencing discretion. Such rules may be either voluntary, advisory, or presumptive. However, presumptive limits on judicial sentencing discretion must be genuinely rebuttable and must provide reasonable leeway for the exercise of judicial discretion to vary from the presumptive limits, so long as the variation remains within the hard limits created by proof of elements.
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> 4. Flexible constitutional due process protections should apply to the proof of the facts used in the application of guidelines. The precise constitutionally required procedures for proof of such facts will be determined by the Supreme Court and will, in general, depend on the degree to which the guidelines constrain judicial sentencing discretion. Facts necessary to application of purely voluntary guidelines (such as those in Virginia that judges are at liberty to ignore completely) should probably be subject to minimal procedural requirements. Advisory guidelines should probably be subject to requirements akin to those now applicable to the Federal Guidelines. Presumptive guidelines should probably trigger enhanced procedural protections in areas such as discovery and confrontation rights, and perhaps burden of proof.
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> 5. Federal Guidelines that trigger excessively narrow restrictions of judicial sentencing discretion upon the proof of specified facts would be deemed to violate the Sixth Amendment inasmuch as the guidelines facts in such a system would too closely approximate true "elements."

Id.

192. Washington v. Harper, 494 U.S. 210, 238 (1990) (Stevens, J., concurring).

discussion is the concern about government overreach. In cases where the crime is non-violent "words-only" conduct, the government must be held to a high standard to protect the liberty interest of Americans. It is disturbing to think that a man with a history of schizophrenia could go off his medication for a little while, go to the social security office to discuss his benefit check, yell at the clerk, yell at an agent, and then find himself later strapped down and drugged against his will. If this same sick man had yelled at the customer service representatives at Verizon Wireless, or nurses at the hospital, it is unlikely that he would have been criminally charged. It is more likely he would have been involuntarily committed.

Are a few insults enough for the government's interest to be important? This is a burning question that must be given due consideration. Abraham Cruz's threats of beating Agent Ryan with a doughnut clearly falls below what reasonable people would consider a serious threat, while his more volatile language of "toe tags" and "target" and "kill[ing]" do appropriately raise red flags.[193]

Of course, under either the statutory maximum or the statutory guidelines rubrics, Cruz would have been found guilty.[194] Therefore, questions as to whether his violation *should* have been prosecuted as a serious crime under federal statute is best reserved for a discussion on over-criminalization and prosecutorial discretion.

Ultimately, the government should not have so much power that they are able to forcibly administer mind altering drugs without first proving that it is absolutely necessary and that it comports with the provisions of the Fourteenth Amendment. The standard must be more than a violation of an interest in "human security." Otherwise, liberty will suffer a heavy blow.

193. United States v. Cruz, No. 1:11-CR-00242, 2012 WL 3027809, at *1 (M.D. Pa. July 24, 2012).

194. United States v. Cruz, 757 F.3d 372, 376 (3d Cir. 2014).