Due Process and Serious Crime
The Vague Term that Promotes the Forcible Medication of Countless Incompetent Defendants, Trumping Their Fundamental Liberty

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Introduction

Vague terms are impermissible when they promote arbitrary outcomes in the law.[1] The Supreme Court strikes down criminal statutes as unconstitutional when their vague terms lead to arbitrary and erratic enforcement.[2] Vague terms are constitutionally impermissible, because their vagueness promotes erratic results that violate the Fifth Amendment's guarantee of due process.[3] Whereas the Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary treatment of similarly situated individuals in state courts,[4] in federal courts, the Fifth Amendment's guarantee of due process ensures due process and equal protection under the law.[5] Thus, the Fifth Amendment prohibits vague terms that promote arbitrariness in federal cases.[6]

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1 The void-for-vagueness doctrine holds that vague statutes are unconstitutional when they promote arbitrary results. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 148-149 (2007) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983))).

2 *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 390 (1979) ("[A]s a matter of due process, a criminal statute that . . . encourages arbitrary and erratic arrests and convictions, is void for vagueness.").

3 *See id.*

4 Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (holding that "[t]he federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.").

5 *See id.*

6 *See Colautti*, 439 U.S. at 390 (explaining that due process forbids erratic arrests and convictions).

This Article focuses on one vague term in a leading Supreme Court case, *Sell v. United States*.[7] In *Sell*, the Court addressed the forcible medication of non-dangerous incompetent defendants.[8] The term "serious crime" in this constitutional decision led federal circuits to devise varying assessments that promote different outcomes for similarly situated defendants.[9] When deciding *Sell* in 2003, the Court announced a test that balances the fundamental liberty interests of incompetent defendants in refusing unwanted treatment with psychotropics[10] on the one hand, and, on the other hand, the government's prosecutorial interests.[11] The *Sell* test, however, hinges on the amorphous term "serious crime."[12] The Court provided no guidance as to what constitutes a serious crime for the purposes of forcible medication, leaving the federal circuits to devise various measures to assess seriousness of crime,[13] in *Sell* inquiries.[14]

To assess seriousness of crime in *Sell* inquiries, the federal circuit courts have developed an array of different measures.[15] Some circuits rely on the statutory maximum sentence to gauge seriousness of crime,[16] whereas one circuit relies on the statutory minimum.[17] Some

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7 Sell v. United States, 539 U.S. 166, 179-180 (2003).

8 *Id.* at 169.

9 *Id.* at 180; *see infra* Part II.A.

10 *See* Washington v. Harper, 494 U.S. 210, 213-14 (1990) (explaining that "[a]ntipsychotic drugs, sometimes called neuroleptics or psychotropic drugs, are medications commonly used in treating mental disorders such as schizophrenia") (internal quotation marks omitted). The U.S. National Institute of Mental Health (NIH) defines psychotropics stating that: "Psychotropic medications are substances that affect brain chemicals related to mood and behavior." NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH & HUMAN SERVS., TREATMENT OF CHILDREN WITH MENTAL ILLNESS: WHAT ARE PSYCHOTROPIC MEDICATIONS? (rev. 2009), *available at* http://www.nimh.nih.gov/health/publications/treatment-of-children-with-mental-illness-fact-sheet/index.shtml.

11 *See Sell*, 539 U.S. at 180.

12 *Id.* ("The Government's interest in bringing to trial an individual accused of a *serious crime* is important.") (emphasis not in original); *see infra* Part I.C.

13 United States v. Evans, 293 F. Supp. 2d 668, 673 (W.D. Va. 2003) (explaining that "the Supreme Court's opinion in *Sell* gives no guidance as to what crimes should be considered as 'serious' for the purpose of the forcible administration of medication to restore competency.").

14 A *Sell* inquiry is a term of art courts use to describe the process of determining whether to grant the government's request to forcibly medicate an incompetent defendant for the sole purpose of restoring competency to bring the defendant to trial. *See* United States v. Hernandez-Vasquez, 513 F .3d 908, 919 (9th Cir. 2008).

15 *See infra* Part II.A.

16 *See, e.g.,* United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (holding that "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes.").

circuits favor bright line rules, whereas others avoid abstractions and take on case-by-case approaches to assess seriousness of crime.[18] Yet, other circuit courts rely on the sentencing guidelines to measure seriousness of crime.[19] Consequently, with the potential to promote inconsistent results, the federal courts use different measures to determine seriousness of crime in *Sell* inquiries.[20]

As applied, *Sell* inquiries prompt due process issues under the Fifth Amendment, as a result of various federal circuit courts assessing the seriousness of crime differently.[21] The different standards ultimately promote different results for similarly situated defendants.[22] Defendants may or may not undergo forcible medication for prosecutorial purposes depending on the circuit in which their cases arise, because of these varying measures for assessing seriousness of crime.[23] Although unintended, the resulting arbitrariness in outcomes violates the Fifth Amendment and awaits vindication through a substantive due process challenge.[24]

This Article focuses on the application of *Sell* inquires in federal courts and identifies several approaches these courts use to assess seriousness of crime.[25] To homogenize determinations of seriousness of

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17 *See* United States v. Gomes, 387 F.3d 157, 159-160 (2d Cir. 2004) (explaining that a possible statutory minimum of fifteen years' imprisonment shows that the defendant's alleged crime was serious for the purposes of *Sell*).

18 *Compare* United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007) (refraining from applying a generic test to determine seriousness of crime), *with Evans*, 404 F. 3d at 237 (explaining that statutory maximum sentences provide courts with an "objective standard to apply.").

19 *See generally Hernandez-Vasquez*, 513 F.3d at 919 (explaining that the sentencing guidelines are "the best available predictor of the length of a defendant's incarceration[,]" and therefore they best reflect seriousness of crime).

20 *See id.* at 918.

21 The Fifth Amendment provides that "No person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

22 This author found no case in the Second or Tenth Circuit that resembles *United States v. Evans*, the Fourth Circuit case this article uses as illustration in its argument. But, there is one case in the Ninth Circuit that revolves around the same criminal charge and a *Sell* order. The cases, nonetheless, had opposite holdings. The Ninth Circuit case is not a binding precedent because the appellate court chose to not publish its opinion. *See* United States v. Steward, 343 F. App'x 252, 1 (9th Cir. 2009).

23 *See infra* Part II.A.

24 Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (explaining that the "concept of equal justice under law is served by the Fifth Amendment's guarantee of due process.").

25 *Sell v. United States* is a United States Supreme Court case concerning rights afforded to mentally ill defendants by the Federal Constitution. *See* Sell v. United States, 539 U.S. 166 (2003). Supreme Court decisions interpretating Constitutional rights apply to the states and

crime, this Article proposes the adoption of one bright line rule that comports with the spirit of *Sell* and that ensures uniformity across federal courts consistent with procedural due process. Part I is a background section that explains the concept of incompetency. It also provides summaries of the leading Supreme Court precedents and an illustrative case of *Sell* inquiries. Part II enumerates several measures of seriousness of crime in *Sell* inquiries that a number of federal circuits devised. It exposes the difference in outcome that stem from those differing measures of seriousness of crime by testing the facts of the illustrative case in various circuits. Part III proposes a bright line rule for assessing seriousness of crime that comports with the spirit of *Sell* and ensures uniformity across federal courts consistent with procedural due process. It offers arguments for the adoption of this rule, and addresses counterarguments. The article concludes by emphasizing the importance of consistency in the federal courts, and encourages the adoption of a unanimous rule to assess seriousness of crime in *Sell* inquiries.

I. BACKGROUND: INCOMPETENCY AND FORCIBLE MEDICATION IN CRIMINAL JUSTICE

A. *No Trial Unless Competent to Stand Trial*

Historically at common law,[26] incompetent defendants did not face trial for the same reasons absentee defendants were not tried in their absence.[27] Like an absentee, a mentally incompetent defendant

affect state courts rulings. *See, e.g.*, Pennekamp v. Florida, 328 U.S. 331, 335 (1946). The application of the *Sell* inquiry in state courts is not addressed in this Article. *See, e.g.*, People v. Coleman, 208 Cal. App. 4th 627, 633 (Cal. Ct. App. 2012).

[26] In the 1760's, Blackstone wrote in his *Commentaries*:

> If a man . . . before arraignment for [his offense], he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced: and, if after judgment he becomes of nonsane memory, execution shall be stayed.

SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, vol. 4, 24 (London 1809), *available at* http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-402/.

[27] Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) ("The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials in absentia . . . . ").

is incapable of raising a defense despite his physical presence in the courtroom.[28] A defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational and factual understanding of the proceedings against him."[29] Mentally ill defendants, like those who suffer from schizophrenia, may not have sufficient present ability to understand the charges against them, or to assist their counsel in raising a defense.[30] When courts find mentally ill defendants to lack sufficient present ability, they declare those defendants Incompetent to Stand Trial (IST).[31]

Courts order hearings to determine the competency of a defendant to stand trial whenever there is reasonable cause to believe that a defendant has a mental defect that makes him IST.[32] Courts hold these hearings to ensure that only competent defendants stand trial.[33] A finding of incompetency to stand trial postpones trial until the defendant's competence is restored.[34] Competency to stand trial may

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[28] *Id.* ("The mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.").

[29] *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that the test of defendant's competency to stand trial is first whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and second whether he has rational as well as factual understanding of proceeding against him. The Court also held that it is not enough that a defendant is oriented to time and place and has some recollection of events). *See also Competency to Stand Trial*, 43 GEO. L.J. ANN. REV. CRIM. PROC. 478, 478-79 (2014).

[30] The NIH explains the effects of schizophrenia, stating that:

> Schizophrenia is a serious brain illness. Many people with schizophrenia are disabled by their symptoms. People with schizophrenia may hear voices other people don't hear. They may think other people are trying to hurt them. Sometimes they don't make any sense when they talk. The disorder makes it hard for them to keep a job or take care of themselves.

NAT'L INST. OF MENTAL HEALTH, DEP'T OF HEALTH & HUMAN SERVS., WHAT IS SCHIZOPHRENIA? (n.d), *available at* http://www.nimh.nih.gov/health/publications/schizophrenia-easy-to-read/index.shtml.

[31] *See Competency to Stand Trial*, *supra* note 29, at 486-87.

[32] Indiana v. Edwards, 554 U.S. 164, 177-78 (2008) (explaining that the Constitution "permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so."); *see* Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990) (explaining that where a defendant exhibits bizarre behavior, the defendant's counsel must make reasonable investigation into the behavior rather than relying on personal beliefs about that defendant's mental condition).

[33] *See* Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that "[a] criminal defendant may not be tried unless he is competent.").

[34] *Id.* (citing Drope v. Missouri, 420 U.S. 162, 171 (1975)) (a defendant "whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

be restored through the use of antipsychotic drugs when incompetency is due to mental illness.[35] Sometimes, incompetency is permanent and that precludes a trial.[36] Accused individuals with permanent incompetency may be civilly committed, but they may never be tried for criminal conduct.[37] Due Process forbids the trial or conviction of an incompetent defendant.[38] It is a constitutional safeguard that protects the rights and liberty interests of incompetent defendants.[39] Incompetent defendants are protected from trial because of the fundamental notion of justice that no one faces trial unless he understands the nature of the proceedings against him.[40] Accordingly, courts order hearings on competency to prevent due process[41] violations.[42]

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35 Sell v. United States, 539 U.S. 166, 181 (2003) (in deciding whether to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial, a court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial.").

36 *See* Jackson v. Indiana, 406 U.S. 715, 741 (1972) (explaining that if courts conclude that a defendant was "almost certainly not capable of criminal responsibility when the offenses were committed, dismissal of the charges might be warranted.").

37 *See Sell*, 539 U.S. at 180 (explaining that a court should consider the possibility of civil commitment when weighing prosecutorial interests against an incompetent defendant); *see also Godinez*, 509 U.S. at 396 (explaining that incompetent defendants may not be subjected to a trial).

38 Medina v. California, 505 U.S. 437, 439 (1992) (noting that it is "well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."). *See also* Commonwealth v. Hill, 375 Mass. 50, 51 (1978) ("[t]he trial, conviction or sentencing of a person charged with a criminal offense while he is legally incompetent violates his constitutional rights of due process.").

39 *See Medina*, 505 U.S. at 439.

40 *See* Drope v. Missouri, 420 U.S. 162, 172 (1975) (explaining that the Constitution prohibits trial of incompetent defendants because trial of only competent defendant is fundamental to an adversarial system of justice). *See also* Dusky v. United States, 362 U.S. 402, 402 (1960) (explaining that unless defendant exhibits the ability to consult with his lawyer and a rational as well as factual understanding of proceeding against him, he is not fit to face trial).

41 This Comment addresses both procedural and substantive due process issues raised in a hearing to determine whether to forcibly medicate an inmate or defendant. Procedural due process refers to whether the hearing contains sufficient notice requirements and that the specified hearing rights satisfy the defendant's constitutional right of having a meaningful opportunity to be heard. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 228-236 (1990). Substantive due process refers to the defendant's right to be free from the arbitrary administration of antipsychotics. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 136 (1992).

42 *See, e.g.*, *Drope*, 420 U.S. at 172 (holding it is a violation of due process to try an incompetent defendant). *See also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (explaining that the "rights implicit in the concept of ordered liberty or deeply rooted in this Nation's history and tradition" deserve heightened judicial protection under the Due Process Clause).

B. *Three Leading Supreme Court Precedents on Forcible Medication*

To address forcible medication with psychotropics in the criminal justice context, three seminal Supreme Court cases laid down tests that guide trial courts in balancing the interests of incompetent individuals against governmental interests.[43] *Washington v. Harper* focused on the forcible medication of dangerous prisoners;[44] *Riggins v. Nevada* addressed the forcible medication of defendants during trial;[45] and *Sell v. United States* addressed forcible medication to restore competency and bring a defendant to trial.[46] Courts rely on the *Harper* inquiry[47] or the *Sell* inquiry[48] to adjudicate the forcible medication of mentally ill convicts or defendants.

In 1990, the Supreme Court decided *Washington v. Harper*, which presented two issues.[49] First, the Court decided whether it was constitutionally permissible to medicate an incompetent dangerous prisoner against his will with antipsychotic drugs.[50] Second, the Court addressed whether a state's non-judicial administrative procedures that review forcible medication orders comported with procedural requirements of due process.[51] Harper was an inmate in a state penitentiary,[52] and "the state's interests in safety and security [were]

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43 These seminal cases are *Sell v. United States*, 539 U.S. 166 (2003), *Riggins v. Nevada*, 504 U.S. 127 (1992); and *Washington v. Harper*, 494 U.S. 210 (1990).

44 *Harper*, 494 U.S. at 213.

45 *Riggins*, 504 U.S. at 133.

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

47 The *Harper* inquiry allows forcible medication with psychotropic drugs when: (1) an inmate suffers from a mental disorder and poses a danger to himself, others, or their property; and (2) adjudication of the need for medication ensures that inmates who refuse treatment are afforded a hearing. *Harper*, 494 U.S. at 227. In *Riggins*, the Court modified the *Harper* inquiry. Specifically, the Court established that for the purposes of the defendant's Sixth Amendment right to a jury trial, the government must demonstrate that the psychotropic drug was medically appropriate and that the medication is the least intrusive compared to alternatives before forcibly administering the medication. *Riggins*, 504 U.S. at 135.

48 The *Sell* inquiry allows the government to forcibly medicate a non-dangerous defendant to prosecute him for a criminal or civil offense, if the government establishes that (1) its prosecutorial interest is substantially important because defendant committed a serious crime, and no other alternative to prosecution exists; (2) the medication is substantially likely to restore competence to stand trial; (3) the medication is necessary for that purpose; and (4) medically appropriate. *Sell*, 539 U.S. at 180-81.

49 *Harper*, 494 U.S. at 220.

50 *Id*.

51 *Id*.

52 *Id*. at 213.

strong" in the penal context of a prison.[53] The Court ruled that due process permitted forcible medication of dangerous prisoners, holding that the state had a compelling interest to forcibly medicate Harper because of his dangerousness to himself and others.[54] The Court also recognized that Harper had a significant liberty interest in refusing treatment, but his interest was outweighed by the compelling state interest of prison safety and security.[55] The *Harper* decision permits forcible medication of prisoners with antipsychotics when they present a danger to themselves or others, so long as the treatment is in the prisoner's best medical interest.[56] *Harper* also permits state administrative protocols to review forcible medication decisions instead of judges,[57] because the prisoner's interests are "perhaps better served by allowing medical professionals to decide to medicate instead of the judge."[58]

Two years after *Harper*, the Court revisited its holding in *Riggins v. Nevada*.[59] In *Riggins*, the Court decided whether Riggins's forcible medication deprived him of a fair trial by impairing his defense.[60] Throughout his trial, Riggins receivied a high dose of antipsychotics that one doctor qualified "enough to tranquilize an elephant,"[61] and another doctor described as "within the toxic range."[62] This, Riggins argued, deprived him of his right to a fair trial, because his medicated state made him appear "rational, cool, and unemotional" as he testified to the jury, undermining his insanity defense.[63] Indeed, the jurors

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53 Jeffery J. Coe, Comment, *Seeking a Sane Solution: Reevaluating Interests in Forcibly Medicating Criminal Defendants to Trial Competency*, 54 ARIZ. L. REV. 1073, 1080 (2012).

54 *Id*. at 1080 (citing Washington v. Harper, 494 U.S. 210, 221-22, 227 (1990)).

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

56 *Id.* at 227.

57 *Id.* at 231.

58 Coe, *supra* note 53, at 1080 (quoting Washington v. Harper, 494 U.S. 210, 231 (1990)) (internal quotation marks omitted).

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

60 *Id.* at 132-133.

61 Riggins v. Nevada, 1991 WL 527609 (U.S.), 6 (U.S. Nev. Pet. Brief, 1991) (noting that "Riggins received 800 milligrams of Mellaril each day throughout his trial.") [hereinafter Petitioner's Brief for Riggins].

62 *Riggins*, 504 U.S. at 137.

63 *Id*. ("It is clearly possible that such side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel."); Petitioner's Brief for Riggins, *supra* note 61, at 2, 7.

convicted Riggins of first-degree murder and sentenced him to death.[64]

The Supreme Court agreed with Riggins and held that a state may forcibly medicate a pretrial defendant so long as it satisfies constitutional requirements.[65] To forcibly medicate a pretrial defendant, courts must first make some finding regarding the government's interest in forcible medication.[66] For example, medicating a dangerous defendant with necessary and medically appropriate antipsychotic drugs would satisfy those constitutional requirements.[67] Yet, the Court's decision was "vague about what such finding must include,"[68] and consequently, lower courts arrived at contradictory conclusions about when governmental interests permit forcible medication.[69]

Riggins left some questions unanswered.[70] In his concurring opinion, Justice Kennedy emphasized that antipsychotics can prejudice a defendant "by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom."[71] For example, "[a] jury might decide that a defendant who looks drowsy or disinterested is coldhearted or that a defendant who is experiencing motor tremors is nervous or not telling the truth."[72] Nevertheless, *Riggins* demands judicial review to ensure that medication is necessary because medication could affect a defendant's right to a fair trial.[73] That requirement extended *Harper*'s application to pretrial defendants, and to date, the *Harper-Riggins* analysis guides the courts when the government seeks to forcibly medicate violent or dangerous defendants and prisoners.[74] After *Riggins*, however, courts were unsure whether restoring a non-dangerous defendant's competence to stand trial could justify forcible medication.[75]

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64 *Riggins*, 504 US at 131.

65 *Id.* at 135-36.

66 *Id*. at 138.

67 *Id.* at 135-36.

68 Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After* Sell v. United States, 13 WM. & MARY BILL RTS. J. 897, 905 (2005).

69 *Id*. at 905-06.

70 *Id*. at 906.

71 Riggins v. Nevada, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring).

72 Klein, *supra* note 68, at 900.

73 *See Riggins*, 504 U.S. at 135.

74 Sell v. United States, 539 U.S. 166, 179 (2003).

75 Klein, *supra* note 68, at 906.

A decade later, *Sell v. United States* answered that question in the affirmative.[76] Unlike *Harper*, which focused on dangerousness, safety and other custodial interests, *Sell* served only prosecutorial interests.[77] This is why the Supreme Court disfavors the *Sell* inquiry, and instructs trial courts to first exhaust the possibility of forcible medication using a *Harper* inquiry.[78] When *Harper* is not applicable because the incompetent defendant is neither dangerous to himself nor to others, only then can a court proceed to a *Sell* inquiry.[79] In some circumstances, *Sell* permits the forcible medication of non-dangerous defendants to restore their competency and bring them to trial.[80]

The *Sell* inquiry is a four-prong test.[81] First, a court must find a compelling prosecutorial interest to overcome a defendant's fundamental liberty interest in avoiding unwanted treatment with psychotropics.[82] Second, taking account of less intrusive alternatives, that court must find the treatment significantly likely to restore competency to stand trial.[83] Third, it must find the treatment necessary to achieve that end.[84] Fourth, the court must find the treatment medi-

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76 *Sell*, 539 U.S. 166.

77 *Id*. at 180. *See also* Morrison v. United States, 415 F.3d 1180, 1185-86 (10th Cir. 2005) (when evidence of dangerousness exists, a court must inquire into dangerousness – i.e. conduct a *Harper* inquiry, before undertaking the *Sell* inquiry).

78 *See Sell*, 539 U.S. at 182 ("There are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.") (emphasis in the original); United States v. Rivera-Guerrero, 426 F.3d 1130, 1137 (9th Cir. 2005) ("*Sell* orders are disfavored. The Supreme Court clearly intends courts to explore other procedures, such as *Harper* hearings (which are to be employed in the case of dangerousness) before considering involuntary medication orders under *Sell.*").

79 United States v. Hernandez-Vasquez, 513 F.3d 908, 914 (9th Cir. 2008) (explaining that prior to undertaking a *Sell* inquiry, a district court ordinarily should make a specific determination on the record that no other basis for forcibly administering medication is reasonably available); *Morrison*, 415 F.3d at 1186 (noting that when evidence of dangerousness exists, a court must inquire into dangerousness before undertaking the *Sell* inquiry).

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

81 *Id.* at 180-81.

82 *Id.* at 180 ("First, a court must find that important governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important."). *Cf.* Anglin v. City of Aspen, Colo., 552 F. Supp. 2d 1205, 1218 (D. Colo. 2008) ("[T]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty, thus, triggering the protections of the Due Process Clause.") (quoting Washington v. Harper, 494 U.S. 210, 229 (1990)).

83 *Sell*, 539 U.S. at 181.

84 *Id*.

cally appropriate.[85] Lastly, the *Sell* four-prong test permits forcible medication only in rare instances.[86]

A standard measure of seriousness of crime is crucial to *Sell* inquiries, because to proceed a court must first "find that important governmental interests are at stake."[87] To meet this first prong, an alleged crime must be sufficiently serious to make prosecutorial interests compelling to overcome a defendant's fundamental liberty interest in avoiding unwanted medication.[88] Once a court finds an alleged crime serious, it proceeds to the second step of the inquiry, otherwise, its inquiry stops,[89] because "an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs."[90] Consequently, the standard or measure used to assess seriousness of crime in *Sell* inquiries is crucial.[91]

Although the Court in *Sell* rejected that only violent crimes can be serious,[92] it offered no further explanation as to what constitutes a serious crime for the purposes of forcible medication to restore competency.[93] With no further narrowing of the term "serious crime," the federal circuits had to devise their own methods to assess seriousness of crime in *Sell* inquiries.[94] The methods that emerged differ considerably, and in some circuits, the measure of seriousness of crime permits

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85 *Id*.

86 *Id*. at 180 ("This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare.").

87 *See id.* (explaining that a governmental interest in prosecuting an offense is important when the crime is serious); United States v. Cruz, 757 F.3d 372, 386 (3d Cir. 2014) (noting that "seriousness of a defendant's crimes is, of course, the yardstick against which the court will measure the governmental interests that are at stake.").

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

89 *See id.* (explaining that *Sell* only permits forced medication in rare instances where prosecutorial interests are important).

90 *See id*. at 178 (citing *Washington v. Harper*, 494 U.S. 210, 258 (1990)).

91 A low threshold of seriousness erodes the defendant's right to refuse treatment; a high threshold elevates the bar the government must meet to show a compelling interest, and may equate a finding of IST to a bar on prosecution when the detainee is not dangerous to himself or others. Dangerousness, under *Riggins*, justifies the forcible medication of pretrial detainees. *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992).

92 Klein, *supra* note 68, at 909.

93 *See* United States v. Evans, 293 F. Supp. 2d 668, 673 (W.D. Va. 2003) (explaining that the *Sell* opinion "did not, however, offer any definition or explanation of what it considered to be a 'serious' crime.").

94 *See* United States v. Ruark, No. 1:10–CR–160–ODE–GGB, 2014 WL 4966913, at *7 (N.D. Ga. Oct. 2, 2014) ("*Sell* gives scant guidance for determining the seriousness of a crime.").

forcible medication as a norm rather than in rare circumstances.[95] Because the Court provided no explanation or definition of the term "serious crime," the vague term led to differing methods of assessing seriousness of crime.[96]

C. *An Illustrative Application of* Sell *in* United States v. Evans[97]

At the time of his arrest in 2002, Herbert Evans was a 74-year-old veteran who had suffered from paranoid schizophrenia for over 40 years.[98] Evans challenged the district court orders of his forcible medication to restore his competency.[99] He appealed twice to the Fourth Circuit Court of Appeals and once to the Supreme Court,[100] but the Supreme Court denied certiorari.[101] Evans's efforts to avoid injections with psychotropics were unsuccessful, and after four years of pretrial detention and interlocutory appeals, his forcible medication began.[102]

Evans was charged with a misdemeanor under a federal statute.[103] A federal employee complained that while disputing a past due notice at the Rural Development Administration (RDA), Evans yelled at her and uttered threats.[104] Evans was arrested and charged with a misdemeanor under federal law for "forcibly intimidating and interfering with an employee of the United States while engaged in the performance of her official duties" pursuant to 18 U.S.C. § 111(a)(1).[105] While in custody, a court ordered psychological evaluation revealed that

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95 *See, e.g.*, *Evans*, 293 F. Supp. 2d at 674 (explaining that "[i]n light of the Supreme Court's Sixth Amendment precedent defining a serious offense as any offense for which the defendant may be sentenced to more than six months' imprisonment, I find that the offense with which Evans is charged is a serious offense."). In the Fourth Circuit, this rule permits the government to forcibly medicate a defendant in almost all circumstances, including if he is only accused of committing a misdemeanor crime. *See id.*

96 *See infra* Part II.A.

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

98 *Id.* at 241 (noting the doctor's conclusion that "Evans's delusions of governmental conspiracies that have persisted longer than 40 years will resist involuntary medication precisely because the government administers the medication"); *Evans*, 293 F. Supp. 2d at 670.

99 *See* Evans v. United States, 549 U.S. 1186, 1186 (2007); United States v. Evans, 199 F. App'x 290, 291 (4th Cir. 2006); *Evans*, 404 F.3d at 232.

100 *See Evans*, 199 F. App'x at 290; *Evans*, 404 F.3d at 227.

101 *Evans*, 549 U.S. at 1186.

102 *See* United States v. Evans, Nos. 1:02CR00136, 1:04MJ00014, 2006 WL 2872723, at *1 (W.D. Va. Oct. 9, 2006).

103 *Evans*, 293 F. Supp. 2d at 670.

104 *Id*. at 669-70.

105 *Id*. at 670.

Evans was deluded with persecutory beliefs, and the judge pronounced him IST.[106] When the government sought to forcibly medicate Evans to bring him to trial, the judge denied the government's request because Evans had nearly twelve months of pretrial confinement, and his alleged offense carried a maximum of one-year imprisonment.[107] The judge reasoned, even if Evans were "convicted and sentenced to the maximum term of imprisonment for the crime charged, he would not serve any additional term of imprisonment because he would receive credit for the time he has remained in custody since his arrest."[108] While awaiting a subsequent hearing, Evans was charged with a felony[109] when two jailhouse inmates alleged that Evans made threats against the life of his judge.[110]

Based on the felony charge, the new judge found the prosecutorial interests sufficiently compelling to permit Evans's forcible medication under *Sell*.[111] The felony charge of threatening a federal judge entailed a ten-year maximum sentence, and the judge ruled that this statutory maximum demonstrated the seriousness of Evans's alleged crime.[112] Thus, the judge issued a *Sell* order to forcibly medicate Evans to bring him to trial, reasoning that Evans' serious crime weighed in favor of governmental interests to prosecute.[113]

On appeal, the Fourth Circuit agreed with the district court's determination of seriousness.[114] The court stated, "it is appropriate to focus on the maximum penalty authorized by statute in determining if

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106 *Id*.

107 *Id*. at 674.

108 *Id.*

109 United States v. Evans, No. 102CR00136, 104M00014, 2004 WL 533473, at *1 (W.D. Va. Mar. 18, 2004), *vacated*, 404 F.3d 227 (4th Cir. 2005) (noting that Evans was charged with threatening to murder Judge Sargent under 18 U.S.C.A. § 115(a)(1)(B)), *remanded to* 427 F. Supp. 2d 696 (W.D. Va. 2006).

110 Evans was charged with making threats against the life of the judge who found in his favor; this judge recused herself consequently. *Evans*, 2004 WL 533473, at *1. As stated in Evans's appellate brief:

> [Evans's] second charge was based on statements from certain inmates at the New River Valley Regional Jail. According to these inmates . . . Evans made threats against the life of Magistrate Judge Sargent. Judge Sargent of course had previously ruled in Evans' favor, holding that the government could not forcibly medicate him.

Brief for Appellant at *7, United States v. Evans, 199 F. App'x 290 (4th Cir. 2006) (No. 06-4480), 2006 WL 1911776, at *7 [hereinafter Brief for Appellant Evans].

111 *Evans,* 2004 WL 533473, at *2.

112 *Id*.

113 *Id.*

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

a crime is 'serious' for involuntary medication purposes."[115] The court reasoned that "[s]uch an approach respects legislative judgments regarding the severity of the crime . . . while at the same time giving courts an objective standard to apply."[116] However, the Fourth Circuit found error and remanded the case to ensure that treatment with psychotropics was medically appropriate because Evans was 76 years old with preexisting medical conditions.[117] Further, the court instructed the lower court to consider all alternatives to forcible medication prior to issuing a *Sell* order.[118]

On remand, the district court reissued the *Sell* order to forcibly medicate Evans, finding the treatment medically appropriate and no other alternative to forcible medication and prosecution of Evans.[119] Again, Evans appealed the order, but this time, the Fourth Circuit affirmed without further comment about seriousness of crime or governmental interests to prosecute.[120] Notably, by the time of his second appeal, Evans had spent almost four years in pretrial detention, a lengthier confinement period than his likely sentencing range of 14-20 months imprisonment if he were convicted.[121] Evans appealed the Fourth Circuit's decision to the Supreme Court, but the district court denied his motion to stay execution of its order to medicate him, and thus Evans underwent forcible medication four years after his arrest.[122] Later, the Supreme Court denied certiorari putting an end to this interlocutory dispute.[123]

II. ANALYSIS: DIFFERING MEASURES PROMOTE DIFFERING RESULTS

Evans illustrates one method of assessing seriousness of crime, but there are other methods of assessing seriousness of crime in *Sell*

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115 *Id*. (citations omitted).

116 *Id*.

117 *Id*. at 241 (noting that the medical "report never addressed why it concluded that Evans, an elderly man with diabetes, hypertension, and asthma who takes a number of medications to treat these conditions, would not experience side effects that would interfere with his ability to assist counsel.").

118 *Id*. at 241-43.

119 United States v. Evans, 427 F. Supp. 2d 696, 706 (W.D. Va. 2006).

120 United States v. Evans, 199 F. App'x 290, 291 (4th Cir. 2006).

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

122 United States v. Evans, Nos. 1:02CR00136, 1:04MJ00014, 2006 WL 2872723, at *1 (W.D. Va. Oct. 9, 2006) (finding no adequate grounds to stay the order to forcibly medicate Evans).

123 Evans v. United States, 549 U.S. 1186, 1186 (2007).

inquiries. Although, the Supreme Court suggested that serious crime was a high bar to overcome a defendant's fundamental liberty interest in refusing unwanted medication,[124] some courts assess seriousness of crime in a way that permits forcible medication as a norm.[125] Worse yet, the differing methods that circuits devised to assess seriousness of crime in *Sell* inquiries promote different results between circuits for similarly situated defendants.[126] There are at least five different methods of determining seriousness of crime that the circuits devised for the purposes of *Sell*.[127]

A. *The Differing Measures of Seriousness of Crime that Some Circuit Courts Devised for* Sell *Inquiries*

In *Evans*, the Fourth Circuit ruled that the maximum statutory sentence of ten years demonstrated Evans's alleged crime was serious.[128] Citing *Duncan v. State of Louisiana*, a Supreme Court case that held that a crime punishable by a maximum of two years was serious and thus warranted a jury trial,[129] the Fourth Circuit found the maximum statutory sentence a reliable and objective standard for *Sell* purposes.[130] Emphasizing the value of a bright line rule, the Fourth Circuit rejected the contention that the sentencing guidelines offer a better gauge of seriousness of crime.[131] The court explained that focusing on "the probable guideline range as the barometer of seriousness would shift th[e] fact-finding to a time before the defendant's trial or plea."[132] The Fourth Circuit reasoned that the Guidelines are an unworkable standard because the pertinent facts that affect the guideline range are not yet uncovered during a pretrial *Sell* inquiry.[133]

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124 Sell v. United States, 539 U.S. 166, 180 (2003) (explaining that involuntary administration of drugs to restore competence to stand trial is permissible in rare instances).

125 *See, e.g.,* United States v. Evans, 293 F. Supp. 2d 668, 673-74 (W.D. Va. 2003) (explaining that a serious crime is any crime with a sentence of more than six months' imprisonment).

126 *See infra* Part II.B.

127 *See infra* Part II.A.

128 United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005) (reasoning that "in light of *Duncan* and its progeny, it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes. Such an approach respects legislative judgments regarding the severity of the crime.").

129 Duncan v. Louisiana, 391 U.S. 145, 162 (1968).

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

131 *Id.*

132 *Id*. at 238.

133 *Id.*

The Fourth Circuit favored the statutory maximum sentence as a bright line rule, because at the pretrial stage, "there is no way of accurately predicting what [the sentencing guideline] range will be."[134]

Worthy of note, even with the bright line rule adopted by this circuit in *Evans*, there appears to be inconsistencies.[135] In *United States v. Bush*, the Fourth Circuit opined, "the very fact that the government is prosecuting Bush for this conduct conveys a message about [the] seriousness [of Bush's crime] and its consequences."[136] This statement conflicts with *Evans*'s bright line rule suggesting a deference to prosecutorial discretion.[137] Whereas *Evans* presents a standard that "respects legislative judgments regarding the severity of the crime,"[138] *Bush* seems to simply adopt the prosecutor's judgment.[139] Also, in *United States v. White*, the Fourth Circuit distinguished *Evans*, and decided the prosecutorial interests were offset by the amount of time White spent in pretrial detention.[140] The court reasoned that because White was likely to receive credit for the time she spent in detention, a period that exceeded the sentence she may receive if convicted, prosecutorial interests could not overcome her interest in refusing unwanted psychotropics.[141] *White* is inconsistent with *Evans*, because in *White* the court took into consideration the

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134 *Id.*

135 *Compare* United States v. Bush, 585 F.3d 806, 815 (4th Cir. 2009) ("Even though Bush can make a serious argument that the time she has already served in prison is sufficiently long to cover . . . any sentence that reasonably could be anticipated, this fact alone does not defeat the government's interest.") (internal quotation marks omitted), *with* United States v. White, 620 F.3d 401, 419 (4th Cir. 2010) ("White has clearly served more than a 'significant' amount of time in light of her likely sentence.") (emphasis in the original).

136 *Bush*, 585 F.3d at 815.

137 *See id.* at 815.

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

139 *Bush*, 585 F.3d at 815. Also, consider that the *Bush* court deferred to prosecutorial discretion after it determined that "if Bush were found guilty, she would likely be sentenced to only time served." *Id.* at 814. The court also considered that "the Sentencing Guidelines call for a sentence of 24 to 30 months' imprisonment, and Bush has already been held 18 months in pretrial custody and more than 12 months in home confinement." *Id.* In contrast, the *Evans* court expressly refuted that sentencing guidelines range and Evans's pretrial confinement diminished the prosecutorial interest against him. *See Evans*, 404 F.3d at 237, 239 (disagreeing with defendant Evans's argument that "the proper focus should be on the sentence he was most likely to receive under the Sentencing Guidelines.").

140 United States v. White, 620 F.3d 401, 419 (4th Cir. 2010) (explaining that whereas White was charged with nonviolent crimes, Evans was charged with violent crimes for "allegedly assaulting a United States agricultural employee and allegedly threatening to murder a federal judge.").

141 *Id.* at 414.

likely sentence White may receive when balancing her interest in avoiding forcible medication against prosecutorial interests, rather than referencing the statutory maximum as in *Evans*.[142] Especially significant, in *Evans*, the court refused to consider Evans's likely sentence, an estimated range of 14-20 months' imprisonment, and ruled that Evans's lengthy pretrial detention did not diminish the governmental interest to bring him to trial.[143] Highlighting the inconsistency in methodology and outcome, *White* and *Evans* are similar in that the defendants White and Evans spent "more than a significant amount of time" detained in light of their likely sentences.[144] Considering several court opinions from other circuits, there is no consensus on the *Evans* decision as some courts cite it favorably,[145] and others criticize it.[146] It is not clear that the Fourth Circuit has abandoned *Evans*; however it is clear that there are inconsistent outcomes in two similar cases.[147]

In contrast to *Evans*, the Ninth Circuit adopted a different measure of seriousness for *Sell* inquiries.[148] In *United States v. Hernandez-Vasquez*, the Ninth Circuit adopted the sentencing guidelines to assess the seriousness of the crime Hernandez-Vasquez allegedly committed.[149] The Ninth Circuit reasoned that the Guidelines were a better starting point to assess seriousness of crime compared to statutory maximums.[150] Further, the court must take account of the facts of individual cases: "because the sentencing guidelines do not reflect the

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142 *Id.*; *see also White*, 620 F.3d at 430 (Neimeyer, J., dissenting) (citing *Evans* and noting that "the seriousness of a crime for determining the government's interest is determined not by judges' intuitive evaluations but by the maximum sentence established by Congress for the crime.").

143 *Evans*, 404 F.3d at 239.

144 *White*, 620 F.3d at 414, 419 (majority) (internal quotation marks omitted); *see Evans*, 404 F.3d at 234, 239.

145 *See, e.g.,* United States v. Green*,* 532 F.3d 538, 547 (6th Cir. 2008) (agreeing with the Fourth Circuit's determination of seriousness in *Evans*).

146 *See, e.g.,* United States v. Hernandez-Vasquez, 513 F.3d 908 (9th Cir. 2008) (disagreeing with the Fourth Circuit and concluding that "the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness.").

147 *White*, 620 F.3d at 422 (refusing forcible medication request to bring to trial defendant charged with felonies carrying 39 years statutory maximum sentence); *Evans*, 404 F.3d at 238 (agreeing that forcible medication is permissible because government has an important interest to prosecute for a charge carrying 10 year statutory maximum sentence).

148 *Hernandez-Vasquez*, 513 F.3d at 918 ("reasoning that '[w]hether a crime is "serious" relates to the possible penalty the defendant faces if convicted.'" (quoting United States v. Valenzuela–Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007))).

149 *Id*. at 919.

150 *Id*.

full universe of relevant circumstances two indictments alleging crimes with equal likely guideline ranges will not always be equally serious within the meaning of *Sell*."[151] As the Supreme Court pointed out in *Sell*, "the facts of the individual case" are important in evaluating the first prong of the *Sell* inquiry,[152] because "the fact that a defendant's mental disorder contributed to his offense may weaken the government's interest in prosecuting him."[153] Also, the amount of time spent in pretrial confinement that would be credited toward any sentence ultimately imposed weakens the prosecutorial interests.[154] Thus, the Ninth Circuit adopted a different standard to assess seriousness of crime and openly disagreed with the statutory maximum in *Evans.*[155]

Also in contrast to Evans, a district court in the Eighth Circuit found that the Guidelines were a better starting point to measure the seriousness of crime in a *Sell* inquiry.[156] In *United States v. Thrasher*, a Western District of Missouri judge disagreed with *Evans* stating that courts should "evalua[te] the governmental interest, not some abstraction like the statutory maximum."[157] In *Sell* inquiries, the prosecutorial interest is "much better measured by a Guidelines estimate than by a statutory maximum."[158] Additionally, "other known factors bearing on the likely sentence need to be weighed" to determine whether the governmental interest to prosecute is sufficiently compelling to overcome a defendant's fundamental interest in refusing treatment.[159] This disagreement with *Evans* illustrates the diverging views of federal courts.

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151 *Id*. (agreeing that consideration of "the closeness in time of the prior offenses to the current prosecution" as a factor in the seriousness inquiry).

152 Sell v. United States, 539 U.S. 166, 180 (2003) (instructing that courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution.").

153 United States v. Gillenwater, 749 F.3d 1094, 1102 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 222 (2014), *reh'g denied*, 135 S. Ct. 888 (2014), and *cert. denied*, 135 S. Ct. 504 (2014).

154 United States v. Ruiz-Gaxiola, 623 F.3d 684, 693 (9th Cir. 2010) (noting that "[the] government has a reduced interest in prosecuting a defendant who 'has already been confined for a significant amount of time.'").

155 United States v. Hernandez-Vasquez, 513 F.3d 908, 919 (9th Cir. 2008) (disagreeing with the Fourth Circuit and concluding that "the likely guideline range is the appropriate starting point for the analysis of a crime's seriousness.").

156 *See* United States v. Thrasher, 503 F. Supp. 2d 1233, 1237 (W.D. Mo. 2007).

157 *Id*.

158 *Id.*

159 *Id.*

Still, some circuits looked to *Evans* and decided that the statutory maximum reflected the seriousness of crime.[160] In *United States v. Green*, the Sixth Circuit explained that courts needed "to fashion appropriate, and presumably objective parameters by which to assess seriousness," and that the statutory maximum is a bright line rule that defers to the legislative process for seriousness determination.[161] In addition to the statutory maximum for the crime charged, the Sixth Circuit also considered possible sentencing enhancements that drastically increased the sentence that Green's alleged crime entailed and concluded that Green's crime was serious.[162] Further, contrary to other courts' decisions, the Sixth Circuit rejected the contention that serious crimes for the purposes of *Sell* are only those crimes against a person or property.[163] Although there is some agreement with *Evans*, there is no agreement as to what constitutes a serious crime in *Sell* inquiries.[164]

In *United States v. Gomes*, the Second Circuit used the statutory minimum to demonstrate seriousness.[165] The court found Gomes's alleged crime sufficiently serious to compel his forced medication and bring him to trial, reasoning that Gomes's crime was serious because if convicted he faced a statutory minimum of fifteen years' imprisonment.[166] This gauge of seriousness of crime drastically differs from the methods of the Fourth and Sixth Circuits.[167] Still, the statutory mini-

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160 *See* United States v. Green, 532 F.3d 538, 547 (6th Cir. 2008) (citing to *Evans* for an example where a sister circuit court similarly found that the statutory maximum reflects seriousness of crime); United States v. Palmer, 507 F.3d 300, 304 (5th Cir. 2007) (citing to the Fourth Circuit's decision in *Evans* that "crimes authorizing punishments of over six months are 'serious.'").

161 *Green*, 532 F.3d at 547.

162 *Id*. at 546 (explaining that presence of firearm in defendant's home increased his potential sentencing range to between 210 and 262 months (17.5 years to 21.8 years)).

163 *Id*. at 550. *Contra* United States v. Barajas-Torres, No. CRIM.EP-03-CR-2011KC, 2004 WL 1598914, at *3 (W.D. Tex. July 1, 2004) (ruling that a charge of illegal reentry is neither a crime against persons nor property and therefore does not warrant forcible medication).

164 *Compare* Sell v. United States, 539 U.S. 166, 180 (2003) (noting that government's interest in prosecution is important when the offense is a serious crime against the person or against property), *with Green*, 532 F.3d at 550 ("We do not read *Sell* to impose a requirement that the crime at issue be against 'person' or 'property' to be 'serious.'"), *and* Barajas-Torres, 2004 WL 1598914, at *3 (ruling that a charge of illegal reentry is neither a crime against persons nor property and therefore does not warrant forcible medication).

165 United States v. Gomes, 387 F.3d 157, 160-61 (2d Cir. 2004).

166 *Id.*at 160.

167 *See, e.g.*, United States v. Green, 532 F.3d 538, 547 (6th Cir. 2008); United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005). The Second Circuit is the only circuit to determine the

mum is not the only measure of seriousness this circuit uses.[168] *Gomes* shows however that the federal courts relied on opposite starting points—statutory maximum and minimum—in their assessments of seriousness of crime.[169]

Unlike other circuits, the Tenth Circuit refrained from establishing a generic test of seriousness of crime in its *Sell* inquiries.[170] In *Unites States v. Valenzuela-Puentes*, the court focused on the nature and effect of the offense, and on "the possible penalty the defendant faces if convicted."[171] The court adopted neither the statutory maximum nor the likely guidelines range in its analysis in *Sell* inquiries.[172] Unlike the Fourth and Sixth Circuits that favored bright line rules, the Tenth Circuit devised no generic test of seriousness preferring a case-by-case approach.[173] Illustrating the array of methods the federal courts devised to assess seriousness of crime, bright line rules occupy one extreme, the case-by-case approach occupies the other, and the sentencing guideline standard falls somewhere between these two extremes.[174]

B. *Differing Measures of Seriousness Promote Different Outcomes for Similarly Situated Defendants in* Sell *Inquiries*

Based on the various methods the federal circuits devised, it is unlikely that the outcome in *Evans* would be achieved consistently in

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seriousness of crime based on the statutory minimum. *See* United States v. Hardy, 724 F.3d 280, 296 (2d Cir. 2013) (adopting the standard of review announced in *Gomes*).

168 *See* United States v. Lindauer, 448 F. Supp. 2d 558, 571 (S.D.N.Y. 2006) (rejecting the prosecution's argument based on the statutory maximum to show seriousness of crime and looking rather to the facts of individual case to gauge whether or not crime was serious).

169 *Compare Evans*, 404 F.3d at 237 (statutory maximum reflects seriousness of crime), *with* United States v. Gomes, 387 F.3d 157, 160-61 (2d Cir. 2004) (statutory minimum reflects seriousness of crime).

170 *See* United States v. Valenzuela-Puentes, 479 F.3d 1220, 1226 (10th Cir. 2007); *see also* United States v. Hernandez-Vasquez, 513 F.3d 908, 918 (9th Cir. 2008) (explaining that the Tenth Circuit refrained from establishing a generic test for seriousness).

171 *See Valenzuela-Puentes,* 479 F.3d at 1226 (reasoning that seriousness of crime "relates to the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he was charged").

172 *Hernandez-Vasquez*, 513 F.3d at 918.

173 *See id.* (explaining that the Tenth Circuit refrained from establishing a generic test for seriousness).

174 *See* Klein, *supra* note 68, at 909 (stating that "federal courts since *Sell* have used a myriad of conflicting criteria to determine whether a particular offense is serious") (internal quotation marks omitted).

all circuits considering *Gomes*, *Hernandez-Vasquez*, and *Valenzuela–Puentes*.[175] Also, courts accord varying degrees of emphasis to the facts of individual cases in *Sell* inquiries, even within the same circuit.[176] Based on the array of measures of seriousness of crime, and the difference in emphasis on the facts of the individual case, a defendant similar to Evans may or may not be forcibly medicated based on where his case arises.

To illustrate, if the Second Circuit applied *Gomes* to gauge seriousness of crime by the statutory minimum in a case factually similar to *Evans*, it is unlikely that its conclusion would resemble the Fourth Circuit decision.[177] The statutory minimum for Evans's alleged crime was a one-year sentence.[178] Assessing seriousness of crime by this statutory minimum, leads to the conclusion that it is not as serious a crime as one that entails a ten year sentence. Also, considering that *Sell* inquiries arise after defendants spend as much as a year or longer in pretrial detention,[179] and the fundamental liberty interest at stake,[180] a possible sentence for time served does not reflect a compel-

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175 *See Hernandez-Vasquez*, 513 F.3d at 918 (explaining that Statutory Guidelines reflect seriousness of crime and facts of case must also be considered); *Valenzuela-Puentes,* 479 F.3d at 1226 (refraining from applying a bright-line test of seriousness and instead assessing each case on the merits); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004) (noting that the statutory minimum demonstrated seriousness of crime). *Contra* United States v. Evans, 404 F.3d 227, 239 (4th Cir. 2005) (concluding that the statutory maximum demonstrates seriousness of crime).

176 *Compare* United States v. Lindauer, 448 F. Supp. 2d 558, 572 (S.D.N.Y. 2006) (declaring that although the statutory maximum was ten years, the government's interest in prosecuting was significantly weak, and "it would be a denial of reality-of the facts of the individual case-to find otherwise.") (internal quotation marks omitted), *with Evans*, 404 F.3d at 239 (ruling that the statutory maximum of ten years demonstrated seriousness of crime).

177 *Contrast Evans*, 404 F.3d at 239 (agreeing that the statutory maximum demonstrated seriousness of crime), *with Gomes*, 387 F.3d at 160 (noting that the statutory minimum demonstrated seriousness of crime).

178 *See* 18 U.S.C. § 115 (2012).

179 *See generally Competency to Stand Trial*, *supra* note 29, at 486-87 (when a court finds that the defendant is presently incompetent to stand trial, it must commit the defendant to the custody of the Attorney General for treatment in a suitable psychiatric facility).

180 *See Lindauer*, 448 F. Supp. 2d at 567. In *Lindauer*, a district court judge in the Second Circuit denied the government's request to forcibly medicate. In the opinion, the judge explained how the fundamental liberty interest at stake influenced his determination, stating:

> Although the Court's discussion of a defendant's interest in avoiding forced psychotropic medication seems at times curiously anodyne, I think it is not inappropriate to recall in plain terms what the government seeks to do here, which necessarily involves physically restraining defendant so that she can be injected with mind-altering drugs. *Id.*

ling governmental interest.[181] Should a similar case to *Evans* arise in the Second Circuit, its outcome may well be the opposite of the decision in *Evans* proving that different starting points in the assessment of seriousness of crime lead to different outcomes in similar cases.

Considering that the Ninth Circuit consistently relies on the sentencing guidelines and the facts of the individual case to gauge seriousness of crime in *Sell* inquiries,[182] in a case factually similar to *Evans*, it may decide against forcible medication. In a *Sell* inquiry, the amount of time antipsychotic treatment requires to restore a defendant to competence educates courts.[183] Similarly, the amount of time a defendant has already spent in detention is pertinent.[184] In a case like *Evans*, the Ninth Circuit may conclude that the amount of time already spent in detention, which exceeded the guidelines estimate, diminished the government's prosecutorial interests.[185] Because pretrial detention counts as credit toward any sentence a defendant ultimately receives,[186] courts may deny the government's request to forcibly medicate because its prosecutorial interests do not justify this deprivation of rights.[187] If a case similar to *Evans* were to arise in the Ninth Circuit,[188] it is unlikely that its outcome would match that of

181 United States v. Steward, 343 F. App'x 252, 254 (9th Cir. 2009) (recognizing that the amount of time spent in pre-trial detention is a factor which weighs against the government interest in prosecution).

182 United States v. Gillenwater, 749 F.3d 1094, 1101 (9th Cir.) ("To determine whether a crime is 'serious' enough to satisfy the first *Sell* factor, we first consider the likely Sentencing Guidelines range applicable to the defendant and then consider other relevant factors."), *cert. denied*, 135 S. Ct. 222 (2014), *reh'g denied*, 135 S. Ct. 888 (2014), and *cert. denied*, 135 S. Ct. 504 (2014).

183 *See* United States v. Hernandez-Vasquez, 513 F.3d 908, 918 (9th Cir. 2008).

184 *Id.* (explaining that "relevant circumstances include the time a defendant has served while awaiting trial.").

185 *See* United States v. Ruiz-Gaxiola, 623 F.3d 684, 694 (9th Cir. 2010) (holding "the long duration of confinement . . . which would be credited towards any sentence ultimately imposed, weakens the government's interest in prosecution."); *Steward*, 343 F. App'x at 254 (recognizing that the amount of time spent in pre-trial detention is a factor which weighs against the government interest in prosecution).

186 Sell v. United States, 539 U.S. 166, 180 (2003). *See also* United States v. White, 620 F.3d 401, 414 (2010) (explaining that pretrial confinement is credited to sentence defendant receives if convicted).

187 *See Hernandez-Vasquez*, 513 F.3d at 915 (explaining that the "liberty interests in avoiding unnecessary involuntary medication [are] too important" to permit forcible medication unless outweighed by compelling governmental interests).

188 A Ninth Circuit district court held: "The crime of threatening judges in violation of 18 U.S.C. § 115(a) (1)(B) and (b)(4) is sufficiently serious, and the government's interest in prosecuting this crime is sufficiently important, that the involuntary administration of medication to

Evans, because this circuit uses the sentencing guidelines as a starting point and takes into consideration the facts of the case to assess seriousness of crime.[189]

In the Tenth Circuit, it is difficult to predict whether a factually similar case to *Evans* could lead to a decision similar to or different from *Evans*.[190] The Tenth Circuit takes a case-by-case approach to assess seriousness of crime.[191] Because the court did not adopt a generic standard in assessing seriousness of crime, it is difficult to predict based on its precedents whether the court would issue a *Sell* order in a case like *Evans.* The court could find favorable the fact that a defendant in his late seventies has no prior felony convictions.[192] Also, a Tenth Circuit court could consider favorable the fact that a defendant spent a lengthy period of time in pre-trial confinement,[193] especially if that period exceeded the guidelines estimate of his likely sentence.[194] Emphasizing that defendants have a "constitutionally protected liberty interest,"[195] a Tenth Circuit court could conclude that the governmental interest in bringing a defendant like Evans to trial is not sufficiently compelling to issue a *Sell* order.[196] However, the

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restore competency is warranted." United States v. Steward, No. 06-864-MRH, 2009 WL 4839529, at *5 (C.D. Cal. Dec. 14, 2009). But in *Steward*, unlike in *Evans*, the Guidelines estimate was 33-41 months. *See id.* at *4.

189 *Ruiz-Gaxiola*, 623 F.3d at 694 (noting that sentencing guideline range is not "the only factor that should be considered," because "the sentencing guidelines do not reflect the full universe of relevant circumstances.").

190 *See* United States v. Valenzuela-Puentes, 479 F.3d 1220, 1227 (10th Cir. 2007) (noting that although defendant faced 16 years maximum sentence, his likely sentence was 2-4 years and therefore government must aggressively pursue its interest to prosecute or face possibility of dismissal of its charges). *Cf.* United States v. Archuleta, 218 F. App'x 754, 758 (10th Cir. 2007) (finding no error in the issue of a *Sell* order although the sentencing guidelines range was 6-16 months and the defendant had already spent 12 months in pretrial confinement).

191 *See Valenzuela-Puentes*, 479 F.3d at 1226.

192 *See* United States v. Evans, 293 F. Supp. 2d 668, 672 (W.D.Va. 2003) (noting that the doctor who had been treating Evans during the pretrial confinement "stated that, while it was very difficult for a psychiatrist to predict future behavior, she believed that Evans's past behavior was the best indication of how he could be expected to act in the future.").

193 Unites States v. Evans, 404 F.3d 227, 239 (4th Cir. 2005).

194 *Id.* at 237.

195 United States v. Bradley, 417 F.3d 1107, 1113 (10th Cir. 2005) (quoting Sell v. United States, 539 U.S. 166, 178-79 (2003)). In *Bradley*, the Court noted that an individual has a constitutionally protected interest in avoiding involuntary administration of antipsychotic drugs that only an essential state interest might overcome. *Id*.

196 *See Valenzuela-Puentes*, 479 F.3d at 1227 (noting that defendant faced 16 years maximum sentence but that his likely sentence was 2-4 years and therefore it urged the government "to aggressively pursue its interest or risk having it diminish to the point where dismissal of the charges is the only reasonable option.").

Tenth Circuit's opinion in *United States v. Archuleta* indicates that it could also reach the opposite decision and conclude in favor of forcible medication.[197] It is difficult to predict the outcome of a case identical to *Evans*, based on the differing standards between circuits and their applications within circuits;[198] forcible medication orders are meted out inconsistently across federal courts.

The unpredictable outcomes in *Sell* inquiries underscore an arbitrary treatment of a fundamental liberty interest. Differing measures of seriousness of crime ultimately lead to inconsistent results for similarly situated individuals.[199] As applied, *Sell* orders could be quashed under the Fifth Amendment,[200] because the varying outcomes and the methodologies that promote them are inconsistent with substantive and procedural due process.[201] In the absence of a Supreme Court decision that clarifies what constitutes a "serious crime" for the purpose of *Sell*, the federal courts need to adopt a unified method of determining seriousness of crime, to avoid inconsistent results between and within circuits.

III. ANALYSIS: FEDERAL COURTS MUST ADOPT THE SAME MEASURE OF COMPORT WITH DUE PROCESS, AND ENSURE THE PROTECTION OF FUNDAMENTAL LIBERTY IN *SELL* INQUIRIES

A consensus is difficult in the absence of a Supreme Court pronouncement defining what constitutes a serious crime for the purposes of *Sell*. Yet, the federal courts must devise a reliably consistent measure of seriousness of crime to protect the fundamental rights of

197 *See* United States v. Archuleta, 218 F. App'x 754, 758 (10th Cir. 2007) (finding no error in issuing a Sell order although the sentencing guidelines range was 6-16 months and the defendant had already spent 12 months in pretrial confinement).

198 *See supra* Part II.B.

199 *Compare* United States v. Dumeny, 295 F. Supp. 2d 131, 132 (D. Me. 2004) (possession of firearm charge does not justify forcible medication to restore competency), *with* United States v. Gomes, 305 F. Supp. 2d 158, 164, *aff'd,* 387 F.3d 157 (2d Cir. 2004) (possession of a firearm justifies forcible medication to restore competency).

200 *Cf.* United States v. Antelope, 430 U.S. 641, 649-70 (1977) ("The Federal Government treated respondents in the same manner as all other persons within federal jurisdiction . . . hence, no violation of the Due Process Clause [occurred].").

201 *See* Schneider v. Rusk, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'").

incompetent defendants.[202] Also, this measure must comport with the emphasis in *Sell* that forcible medication for prosecutorial purposes is only permissible in rare instances.[203] *Sell* permits forcible medication only in rare instances, which implies that only in unusual circumstances do prosecutorial interests outweigh a non-dangerous defendant's interest in avoiding unwanted psychotropic treatment.[204] Considering the various tests devised by the federal circuits and the emphasis in *Sell*, one unique measure for assessing seriousness of crime rises above the others. Although a consensus is difficult, adopting one rule to assess seriousness in *Sell* inquiries is advisable as well as necessary.

A. *All Federal Circuits Should Adopt the Statutory Minimum as a Measure of Seriousness of Crime in* Sell *Inquiries*

Measuring seriousness of crime by statutory minimum sentences is a bright line rule that offers many advantages in *Sell* inquiries. Bright line rules avoid arbitrary determination of seriousness of crime stemming from the breadth of potential criminal charges.[205] They avoid reliance on subjective factors such as prevailing attitudes of a particular community toward a specific crime that result in disparity among the courts about what constitutes a serious crime.[206] Although measuring seriousness with statutory maximums also constitutes a bright line rule, statutory maximums are an inadequate measure for *Sell* inquiries.

Despite several Supreme Court cases relying on statutory maximum sentences in assessing the seriousness of crime,[207] statutory maximums are not adequate for *Sell* purposes because the issue in *Sell* inquiries is whether a deprivation of the right to refuse treatment is justifiable.[208] Supreme Court cases that relied on statutory maximums

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202 *See, e.g.*, *Antelope*, 430 U.S. at 647 ("[T]he National Government does not violate equal protection when its own body of law is evenhanded.").

203 Sell v. United States, 539 U.S. 166, 180 (2003).

204 *See id.*

205 United States v. Green, 532 F.3d 538, 548 (6th Cir. 2008).

206 *Id.*

207 *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 542-45 (1989); Baldwin v. New York, 399 U.S. 66, 73-74 (1970); Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968).

208 Compare a *Sell* inquiry, in which the government, based on a substantially important interest, seeks to forcibly medicate and deprive a defendant of his fundamental right to refuse treatment, *Sell*, 539 U.S. at 180-83, with *Duncan v. Louisiana* and its progeny, in which the Court protected a defendant's right to a jury trial. The issue in those cases was not whether depriving a

to assess seriousness of crime were Sixth Amendment cases in which defendants sought to assert their right to a trial by jury.[209] In those cases, the Court looked at the authorized prison terms to determine whether a defendant was entitled to a jury trial.[210] Considering the statutory maximum in assessing seriousness of crime in those cases affords the utmost protection of a defendant's Sixth Amendment right to a jury trial. On the other hand, a focus on the statutory maximum for the purposes of *Sell* affords the least amount of protection to a defendant's right to refuse unwanted treatment. This shows that statutory maximums are an inadequate measure of seriousness for *Sell* purposes.

Statutory maximum sentences are inadequate in determining seriousness of crime whereas the sentence that a convict ultimately receives reflects the seriousness of his conduct.[211] Congress's intent was for the sentencing guidelines to reflect the relationship between actual sentences and real conduct,[212] which makes them a better reflection of seriousness of crime.[213] The advantage that the statutory maximum sentences had over the sentencing guidelines was to educate courts about the stakes when the issue presented a deprivation of the Sixth Amendment right to a trial by jury.[214] Thus, in *Duncan v. State of Louisiana*, *even* though Duncan only received a two-month

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defendant's right was justifiable, but rather whether a defendant's right to a jury trial ought to be protected if facing an imprisonment term greater than six months. *See, e.g.*, *Duncan*, 391 U.S. at 159-162.

209 *Blanton*, 489 U.S. at 541 (explaining that the statutory penalties are not so severe that DUI must be deemed a "serious" offense for purposes of the Sixth Amendment in Nevada); *Baldwin*, 399 U.S. at 68 (explaining that in Sixth Amendment cases the most relevant criteria to assess seriousness of crime is the severity of the maximum authorized penalty); *Duncan*, 391 U.S. at 161-62 (focusing on whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial).

210 *Blanton*, 489 U.S. at 542; *Baldwin*, 399 U.S. at 72-73; *Duncan*, 391 U.S. at 157-58.

211 *See* United States v. Booker, 543 U.S. 220, 253-54 (2005) (explaining that uniformity in sentencing does not consist simply of "similar sentences for those convicted of violations of the same statute" but rather it consists of "similar relationships between sentences and real conduct . . . .").

212 *Id.*

213 United States v. Vue, 865 F. Supp. 1353, 1360 (D. Neb. 1994) (noting that the sentencing guidelines attempt to implement the principle of just deserts).

214 *Duncan*, 391 U.S. at 159 (explaining that crimes with possible penalties up to six months do not require a jury trial as they are mere petty offense (citing Cheff v. Schnackenberg, 384 U.S. 373 (1966))). *Cf.* United States v. Evans, 293 F. Supp. 2d 668, 674 (W.D. Va. 2003) (reasoning that in light of *Duncan v. Louisiana* that defined a serious offense as any offense for which the defendant may be sentenced to more than six months imprisonment, any crime requiring a sentence of more than six months is a serious crime for *Sell* purposes).

sentence, the Court found that his bench trial violated his constitutional right to a jury trial because the charge against Duncan entailed a maximum sentence of two years, and was therefore a serious charge.[215] While appropriate for this purpose, statutory maximum are not always adequate in assessing seriousness of crime.

Following the reasoning in *Duncan* points to statutory minimums as the proper measure of seriousness of crime in *Sell* inquiries, because this measure affords the widest protection of a fundamental liberty interest.[216] By considering the statutory minimum to assess seriousness in a *Sell* inquiry, courts ensure the protection of fundamental liberty by preventing gratuitous forcible medication with psychotropics. In contrast, when courts consider the maximum sentences in *Sell* inquiries, they afford the least protection to an incompetent defendant's fundamental interest in refusing unwanted medication. Additionally, at the pretrial stage, courts have little information because fact-finding takes place at trial.[217] Pretrial orders take no account of potentially-mitigating facts that could appear later at trial. It is therefore crucial to afford the utmost protection of fundamental liberty interests and rights at the pretrial stage. *Duncan* leads to the opposite decision of the Fourth Circuit in *Evans*, because following the method in *Duncan* points to statutory minimums as a gauge of seriousness of crime in *Sell* inquiries.[218]

Because fundamental liberties enjoy the greatest protection under the Constitution, specifically under the substantive due process of the Fifth Amendment, overcoming them necessitates a compelling government interest.[219] Relying on statutory minimum sentences in

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215 *Duncan*, 391 U.S. at 159-60.

216 The Court in *Duncan* stated that to determine whether a right afforded by the Fifth and Sixth Amendments in federal courts was also protected against state action by the Fourteenth Amendment the Court asked whether that right was among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 148. The Court held that Duncan was entitled to a jury trial, having concluded that the crime was sufficiently serious given that if convicted, Duncan would be sentenced to two years in prison. *Id.* at 161-62.

217 *See* United States v. Green, 532 F.3d 538, 550 (6th Cir. 2008) (noting that the Guideline range is not accurately determined until after conviction when presentence investigation report is complete; that report relies on many variables that are appear once fact finding is complete).

218 *See* United States v. Gomes, 387 F.3d 157, 160 (2nd Cir. 2004).

219 *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (explaining that "to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.") (citations omitted); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that the fundamental right to

Sell inquiries comport with constitutional precedents, because it affords utmost protection of a fundamental liberty interest and permits taking into account the facts of the individual case as *Sell* dictates.[220] Failure to consider specifics in a case leads to arbitrary treatment, like in *Evans*, and the ensuing deprivation of a fundamental liberty interest will not survive strict scrutiny.[221] The deprivation of liberty interests at stake in *Sell* orders triggers substantive due process protections,[222] and requires strict scrutiny when challenged for arbitrariness.[223] Even if mentally ill incompetent defendants were not a recognized class, they are not without remedy,[224] and a challenge under the Fifth Amendment's guarantee of due process may well vindicate them.[225] *Sell* highlights the importance of this fundamental liberty by first requiring a substantially important prosecutorial interest, and emphasizing that only in rare instance that interest overcomes this fundamental liberty.[226]

B. *The Other Measures of Seriousness of Crime Are Inadequate for* Sell *Inquiries*

Statutory maximum sentences are inadequate for *Sell* purposes for many reasons. *Sell* emphasizes that the circumstances of each case must be considered in *Sell* inquiries,[227] but deference to a statutory maximum necessarily does not account for the facts of the individual case, and is therefore incompatible with an express instruction in

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reproduce was infringed by a statute allowing sterilization of persons convicted of certain crimes requires strict scrutiny).

220 John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 673-74 (1996) (noting that greater scrutiny is consistent with massive curtailment of liberty).

221 *See* Addington v. Texas, 441 U.S. 418, 425 (1979) (explaining that significant deprivation of liberty triggers due process protection).

222 *See* Sell v. United States, 539 U.S. 166, 178 (2003) (recognizing that an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs); *Addington*, 441 U.S. at 425 (explaining that significant deprivation of liberty triggers due process protection).

223 *Skinner*, 316 U.S. at 541.

224 *See City of Cleburne*, 473 U.S. at 445-47 (noting that the Court's "refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination . . . .").

225 *See Skinner*, 316 U.S. at 541.

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

227 *Id*.

Sell.[228] Also, statutory maximums are abstract limits that can expand and retract at any time, even drastically sometimes.[229] To illustrate, when two individuals commit the same crime under similar circumstances, their crimes are identical in terms of seriousness.[230] However, assessing the seriousness of their crimes by a statutory maximum sentence can lead to erratic results when subsequent legislative enactments affect that statutory maximum sentence.[231] Considering the fundamental liberty interests at stake in *Sell* inquiries, it is crucial that the measure of seriousness assess the gravity of the alleged crime rather than reflect an abstraction.[232] Furthermore, statutory maximums conflict with the notion of just deserts, which means that punishment must counterbalance the offender's culpability and the resulting harm to the defendant.[233] A statutory maximum by definition is no just desert because it counterbalances neither the culpability of the offender nor the harm that results from his offense. A statutory maximum is the severest sentence permissible for a crime, and for that reason it only reflects that crime's severity in extreme circumstances. In a *Sell* inquiry, statutory maximums are inadequate for all those reasons.

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228 *See id*. (instructing trial courts to consider each case's facts in evaluating the governmental interest because special circumstances may lessen its importance).

229 *See* Dorsey v. United States, 132 S. Ct. 2321, 2331 (2012) (explaining the ramifications of the Fair Sentencing Act on previous convictions and ongoing sentences noting that "because statutes enacted by one Congress cannot bind a later Congress," they can be repealed, exempted, modified, or disregarded).

230 *See, e.g.*, *id.* at 2335 (noting that similar offenders received drastically different sentences because of a change in the laws governing sentencing and those "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences.").

231 The Court confronted this very issue under the Fair Sentencing Act in *Dorsey v. United States* which reduced the crack to powder cocaine disparity, and explained:

> Two individuals with the same number of prior offenses who each engaged in the same criminal conduct involving the same amount of crack and were sentenced at the same time would receive radically different sentences. For example, a first-time post-Act offender with five grams of crack, subject to a Guidelines range of 21 to 27 months, could receive two years of imprisonment, while an otherwise identical pre-Act offender would have to receive the 5–year mandatory minimum.

Id. at 2333.

232 *See* United States v. Thrasher, 503 F. Supp. 2d 1233, 1237 (W.D. Mo., 2007) ("other known factors bearing on the likely sentence need to be weighed. The court should place itself in the position of a prosecutor who is fair-minded and objective. That should allow evaluation of the 'governmental interest', not some abstraction like the statutory maximum.").

233 United States v. Vue, 865 F. Supp. 1353, 1360 (D. Neb. 1994).

As to the sentencing guidelines, despite their "attempt to implement the principle of just deserts,"[234] they too are inadequate in *Sell* inquiries. Even though at sentencing the guidelines reflect seriousness of crime better than a statutory maximum,[235] guidelines estimates are ranges, not definite numbers. Guidelines are no bright line rule even if adopted by all courts.[236] Also, the guidelines' accuracy requires facts, and fact-finding takes place at trial.[237] *Sell* inquiries are held during the pretrial stage when many facts are unknown, and therefore the guidelines estimate is an inadequate reflection of seriousness of crime in *Sell* inquiries.[238] Additionally, judges have departed from the guidelines to dispense lesser sentences when circumstances so dictated,[239] even when the guidelines were mandatory.[240] Now that the guidelines are merely advisory,[241] in a case warranting departure from the guidelines range and meting out a lesser penalty, to measure crime's seriousness by the guidelines may result in granting a forcible medication order that is not justified. The guidelines could permit unjustified deprivation of fundamental liberty interests especially because until fact-finding occurs judges have no way of knowing about pertinent mitigating facts.[242] Further, the guidelines do not reflect the judgment of the legislature unlike statu-

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234 *Id*.

235 United States v. Hernandez-Vasquez, 513 F.3d 908, 918 (9th Cir. 2008) (reasoning that seriousness relates to "the possible penalty the defendant faces if convicted, as well as the nature or effect of the underlying conduct for which he was charged," and analyzing seriousness in light of both the statutory maximum and the likely guideline sentence); United States v. Gomes, 387 F.3d 157, 160 (2nd Cir. 2004) (concluding that the minimum statutory sentence of 15 years reflect seriousness of defendant's crime), *cert. denied*, 543 U.S. 1128 (2005).

236 *See* United States v. Green, 532 F.3d 538, 550 (2nd Cir. 2008) ("[I]t would be impossible for a district court to adequately utilize the Guideline range in making an objective decision as to the seriousness of a particular crime.").

237 *See id*. (noting that the guideline range is not accurately determined until after conviction when presentence investigation report is complete; that report relies on many variables that are appear once fact finding is complete).

238 *See id*. ("[C]onsiderations weigh against relying on the Sentencing Guidelines to determine whether a crime is "serious" for purposes of a *Sell* order . . . .").

239 United States v. Booker, 543 U.S. 220, 234 (2005).

240 *Id.* at 245-246 (holding that sentencing guidelines became advisory and no longer mandatory); *Green*, 532 F.3d at 549 ("[T]he Sentencing Guidelines are now advisory and a district court is not required to impose a particular sentence in accordance with the projected range.").

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

242 United States v. Evans, 404 F.3d 227, 238 (4th Cir. 2005) (explaining that the facts that influence sentencing are adduced from testimony at trial and from detailed investigation of defendant).

tory maximums and minimums.[243] They reflect the views of the Sentencing Commission, a select handful of individuals, not a duly elected body of the people.[244] Considering judges' broad discretion in sentencing evidenced by the wide statutory range, deference to advisory guidelines promulgated by a non-elected body is inconsistent with judicial tradition,[245] and noting the scarcity of facts at the pretrial stage, deference to guidelines estimates may also prove unwise.[246] For those reasons, the sentencing guidelines are inadequate as a measure of seriousness of crime in *Sell* inquiries, albeit they reflect seriousness of crime once fact-finding has occurred.[247]

As demonstrated previously, the federal courts devised many measures of seriousness in *Sell* inquiries but none comports with *Sell* better than to measure seriousness of crime by the statutory minimum.[248] Unlike a case-by-case approach, which by its very nature promotes inconsistency, which leads to arbitrariness,[249] a statutory minimum is a bright line rule. Unlike the guidelines range at the pretrial stage, which lacks pertinent factual knowledge of the case to be accurate, a statutory minimum rule is a bright line measure of seriousness that reflects the legislative judgment. Also, a statutory minimum best protects the fundamental liberty interests of incompetent defendants and coheres with *Sell*. Because competency determination and

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243 *Green*, 532 F.3d at 550 ("[T]he Guideline ranges reflect the views of the Sentencing Commission rather than Congress as a duly elected body of the people.").

244 *Id.*

245 *See* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (noting that history suggests it is permissible for judges to exercise discretion when imposing a sentence within the prescribed statutory range); Williams v. New York, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

246 *Green*, 532 F.3d at 550 (explaining that many variables impact guidelines estimated range such as enhancements and reductions depending on the facts of the case—none of which is available to a court at the time it must decide the seriousness determination on a forcible medication request).

247 *See id*.

248 *See supra* Part II.A.

249 *See* United States v. Valenzuela-Puentes, 479 F.3d 1220, 1227 (10th Cir. 2007) (noting that defendant faced 16 years maximum sentence but that his likely sentence was 2-4 years and therefore it urged the government "to aggressively pursue its interest or risk having it diminish to the point where dismissal of the charges is the only reasonable option."). *But see* United States v. Archuleta, 218 F. App'x 754, 758 (10th Cir. 2007) (finding no error in issuing a *Sell* order although the sentencing guidelines range was 6-16 months and the defendant had already spent 12 months in pretrial confinement).

restoration takes on average several months, a statutory minimum equal to that period could serve as a threshold to guide judges in determining whether prosecutorial interests warrant forcible medication in specific cases. The statutory minimum rule will limit the instances in which forcible medication is permissible,[250] and is therefore the best measure of seriousness for *Sell* inquiries, as it aligns with the spirit of *Sell*.[251]

C. *The Stakes Are High in* Sell *Inquiries and Greater Protection Is Necessary*

Even when involuntary medication orders are "sometimes . . . necessary, they carry an unsavory pedigree."[252] Side effects of antipsychotics include: "akathesia (motor restlessness often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition that can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs."[253] It is a neurological disorder, often irreversible, and "characterized by involuntary, uncontrollable movements of various muscles, especially around the face."[254] Therefore, courts must proceed with caution in *Sell* orders, because of the grave and potentially dangerous side effects of forcibly administered psychotropics.

Although the Supreme Court took many strides to protect the rights of mentally ill defendants, there is a need for greater protection

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250 *Cf.* Sell v. United States, 539 U.S. 166, 180 (2003) (noting that instances in which forcible medication of non-dangerous defendant for the sole purpose to restore their competency and bring them to trial "may be rare.").

251 *See id.* at 178-79 ("[A]n individual has a constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs—an interest that only an "essential" or "overriding" state interest might overcome." (citing Riggins v. Nevada, 504 U.S. 127, 134 (1992))).

252 United States v. Chatmon, 718 F.3d 369, 374 (4th Cir. 2013). *See also* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (describing how forced administration of antipsychotic medication can have "serious, even fatal side effects," such as cardiac dysfunction and tardive dyskinesia, a neurological disorder in 10% to 25% of patients characterized by "uncontrollable movements of various muscles.").

253 *Harper*, 494 U.S. at 230 (citing Brief for the Am. Psychiatric Ass'n, et al. as Amici Curiae Supporting Respondents, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599), 1989 WL 1127132, at * 6-9).

254 *Harper*, 494 U.S. at 230.

for these vulnerable defendants.[255] Over the years, the Court afforded increasing due process protection to the mentally ill by striking down unconstitutional status offenses that promoted sweeping incarcerations of vagrants; the majority of whom were mentally ill.[256] The Court scrutinized the knowing and voluntary nature of confessions by mentally ill defendants, as well as their waivers of rights.[257] Most importantly, incompetent defendants no longer face indefinite detention for being permanently IST.[258] At the same time, the forcible medication of mentally ill defendants continues even in the absence of dangerousness or exigent prosecutorial interests, in complete disregard of the fundamental notion of informed consent to medical treatment,[259] and the right to remain free of bodily intrusion.[260] This "right to refuse medical treatment has been specifically recognized as a subject of constitutional protection."[261] Yet, incompetent defendants continue to suffer the imposition against their will of psychotropics that are detrimental to their health, and to their potential social rehabilitation.[262] The side effects of these medications include sudden death,

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255 *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 731 (1972) (holding that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial violates his guarantee of due process).

256 Thomas L. Hafemeister & John Petrila, *Treating the Mentally Disordered Offender: Society's Uncertain, Conflicted, and Changing Views*, 21 FLA. ST. U. L. REV. 729, 734 n.7 (1994) (the Court struck down a statute that made it a crime if a person had a narcotic addiction (citing Robinson v. California, 370 U.S. 660, 666 (1962))). *See also* Powell v. Texas, 392 U.S. 514, 533 (1968) (Marshall, J., plurality) (holding that "criminal penalties may be inflicted only if the accused has committed some act, or behavior, that society has criminalized.").

257 *See* Hafemeister & Petrila, *supra* note 256, at 734 n.10 (noting *Miranda v. Arizona* as an example).

258 *Jackson*, 406 U.S. at 731.

259 The doctrine of informed consent, in the common law, defends the right to refuse treatment and to seek redress when medical treatment is performed without informed consent. *See, e.g.*, Mohr v. Williams, 104 N.W. 12, 14-15 (Minn. 1905) (explaining that even a successful surgery amounted to unlawful and unauthorized touching because the patient did not consent to it, and no circumstances justified its performance without the patient's consent).

260 The right to refuse treatment is rooted in the common law right to be free from unwanted bodily intrusion. Coe, *supra* note 53, at 1078 n.25. *See also* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .").

261 United States v. Charters, 829 F.2d 479, 491 (4th Cir. 1987), *reh'g granted*, 863 F.2d 302 (4th Cir. 1988).

262 *See* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (describing how forced administration of antipsychotic medication can have "serious, even fatal side effects," such as cardiac dysfunction and tardive dyskinesia, a neurological disorder in 10% to 25% of patients characterized by "uncontrollable movements of various muscles.") (alteration in original).

and permanent uncontrollable facial movements,[263] which may aggravate a mentally ill individual's maladaptive tendencies, and undermine any chance of his integration in a society that stigmatizes mental illness.[264] There is much need of more protection for these vulnerable defendants.

Stigma is not the only problem facing the mentally ill. In his dissenting opinion in *Sell v. United States*, "Justice Scalia never expressed a view on the issue of forcible medication."[265] Rather, he contended the appealability of forcible medication orders as a collateral matter.[266] He "would vacate the Court of Appeals' decision and remand with instructions to dismiss" the appeal.[267] Forcing a defendant to submit to forcible medication and only appeal after final judgment is an inadequate remedy.[268] It is unlikely that any justice would propose a *Bivens* suit instead of an injunction in an appeal that involves a forcible amputation.[269] It is true that, unlike the severance of a limb, the alteration of a mind leaves the body intact, but it is also true that forcible medication with psychotropics could be experienced no differently from an amputation by those who suffer it.[270] Due to societal and personal biases or preferences of decision makers, pretextual

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263 *Id.*

264 MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 19 (Ashgate Publ'g Co. 2013) [hereinafter A PRESCRIPTION FOR DIGNITY].

265 Dina E. Klepner, Note, Sell v. United States*: Is the Supreme Court Giving a Dose of Bad Medicine?: The Constitutionality of the Right to Forcibly Medicate Mentally Ill Defendants for Purposes of Trial Competence*, 32 PEPP. L. REV. 727, 753 (2005) (citing Sell v. United States, 539 U.S. 166, 187 (2003) (Scalia, J., dissenting)).

266 *See* Sell v. United States, 539 U.S. 166, 187 (2003) (Scalia, J., dissenting).

267 *Id.*

268 *See id.* at 187-90 (majority).

269 *See* State Dep't of Human Servs. v. Northern, 563 S.W.2d 197, 206 (Tenn. Ct. App. 1978) (noting that "[a]ffirmative steps producing an injury or irreversible condition (such as amputation) would not lie within the inherent powers of equity for preliminary relief.").

270 Advocating for the right to bodily and personal integrity, Nicholas Kittrie comments on the therapeutic power of the state, noting:

> In his altered state, the patient is pleasant and happy; he has no recollection of his prior condition and is therefore incapable of asserting any objections. . . But where did the old "soul" or personality gone . . . .? Has it not in a very real way been executed? Is the death of the body the only criteria for the destruction of a man? Does not personality of man need protection as much as the life of man?

NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY, 388 (John Hopkins Press 1973). *See also* Washington v. Harper, 494 U.S. 210, 229-30 (1990) (describing how forced administration of antipsychotic medication can have "serious, even fatal side effects.").

legal decisions that affect the rights of mentally ill defendants self-perpetuate.[271]

Misconceptions about the mentally ill prove influential in the courtroom.[272] Despite empirical evidence that mental illness accounts for a minute portion of violence,[273] irrational prejudice toward the mentally ill pervades in the civil and criminal law.[274] Vague legal definitions make matters worse for the mentally ill by veiling sanism and pretextuality.[275] For example, a finding of dangerousness diminishes a mentally ill person's liberty interest, and yet dangerousness is a vague legal concept.[276] Ill-defined terminology renders expert testimony problematic, and any prediction experts make based on vague legal terms is unlikely to be reliable.[277] Consequently, because of vague terminology and pervasive biases toward the mentally ill, the law deprives many of them of their fundamental liberties.[278]

The term "serious crime" is no different from other vague terms in its pernicious effect on fundamental liberties,[279] but it is possible to remedy its vagueness by adopting a uniform approach to assessing

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271 *See* A PRESCRIPTION FOR DIGNITY, *supra* note 264, at 33-34 (noting that judges "unconsciously reflect the public feelings . . . community attitudes and biases" toward the insanity defense).

272 MICHAEL L PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD, 34 (Oxford Univ. Press 2012) [hereinafter WHEN THE SILENCED ARE HEARD].

273 JOHN PARRY & ERIC DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES, AND MENTAL DISABILITY PROFESSIONALS 15 (2007) (citing John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 19 PSYCHIATRIC REHAB. J. 67, 70 (1996)).

274 *See* WHEN THE SILENCED ARE HEARD, *supra* note 272, at 34.

275 A PRESCRIPTION FOR DIGNITY, *supra* note 264, at 17, 19, 24-25 (defining "sanism" as an irrational prejudice towards mentally ill persons. The author defines "pretextuality" as "the ways in which courts accept. . . testimonial dishonesty" and engage in dishonest decision making).

276 *See* PARRY & DROGIN, *supra* note 273, at 15.

277 *Id.*

278 *Id.*

279 In addition to the various ways in which seriousness of crime is assessed by various federal circuits, courts also disagree on whether a serious crime for the purposes of *Sell* must be a crime against persons or property. *See* United States v. Barajas-Torres, No. CRIM.EP-03-CR-2011KC, 2004 WL 1598914, at 3 (W.D. Tex. July 1, 2004) (ruling that a charge of illegal reentry is neither a crime against persons nor property and does not warrant forcible medication); *see also* United States v. Dumeny, 295 F. Supp. 2d 131, 132 (D. Me. 2004) (holding a charge of possession of firearm by person previously committed in mental hospital, despite its significant penalties, does not justify forcible medication to restore competence). *Contra* United States v. Gomes, 305 F. Supp. 2d 15, 164, *aff'd*, 387 F.3d 157 (2d Cir. 2004) (possession of a firearm by a felon justifies

seriousness of crime across federal circuits. By uniformly measuring seriousness of crime by minimum statutory sentences and taking into consideration the facts of the individual case as *Sell* dictates, courts will promote due process of the law, as well as respect for the law. Research demonstrates that arbitrary treatment leads to "social malaise and decreases people's willingness to be integrated into the polity, accepting its authorities and following its rules."[280] Conversely, due process of the law fosters respect for the law. By adopting the proposed measure of seriousness of crime in *Sell* inquiries, courts will protect incompetent defendants and their fundamental liberty interests from the pernicious effect of a vague term, ensuring due process and promoting respect for the law.

CONCLUSION

It is important that federal courts be consistent. To achieve that courts should adopt one measure of seriousness of crime in *Sell* inquiries, the statutory minimums, to protect the constitutional rights of non-dangerous incompetent defendants and their fundamental liberty interests in refusing unwanted medication. Because fundamental liberty interests are at stake in *Sell* inquiries,[281] unless the federal courts adopt one measure, they will continue to promote outcomes incompatible with the Fifth Amendment Guarantee of Due Process.[282] A good measure in assessing seriousness of crime for the purposes of *Sell* is to assess seriousness by the statutory minimum, because this measure affords utmost protection to the fundamental liberty interests of incompetent defendants, and because "[the American] constitutional heritage rebels at the thought of giving government the power to control men's minds."[283] The statutory minimum rule is a bright line rule that protects fundamental liberty interests unlike other meth-

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forcible medication because it is serious crime that carries a minimum of 15 years imprisonment).

[280] *See* WHEN THE SILENCED ARE HEARD, *supra* note 272, at 39.

[281] Sell v. United States, 539 U.S. 166, 178 (2003) (recognizing that an individual has a "significant" constitutionally protected "liberty interest" in avoiding the unwanted administration of antipsychotic drugs).

[282] *Cf.* Klein, *supra* note 68, at 915 (explaining that an "incompetent defendant who is dangerous and an incompetent defendant who is not dangerous have exactly the same interest in receiving a fair trial — or in the language of equal protection jurisprudence, they are similarly situated with regard to the right to a fair trial.").

[283] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

ods devised by the federal circuits. Its adoption comports with the spirit of *Sell* and ensures due process by promoting uniformity across federal courts.