

# HOW THE STATES CAN FIX *SELL*: FORCED MEDICATION OF MENTALLY ILL CRIMINAL DEFENDANTS IN STATE COURTS

NICK KATZ<sup>†</sup>

## ABSTRACT

*In Sell v. United States, the Supreme Court announced a constitutional standard permitting involuntary medication of mentally ill criminal defendants to render them competent to stand trial. Lower federal courts have struggled to apply the Court's balancing test, reading the same Sell language to impose different requirements.*

*While much ink has been spilled debating whether the Sell standard is sufficiently rights-protective, less attention has been devoted to the state court implementations of Sell. But because many more criminal prosecutions take place in state court than in federal court, it stands to reason that significantly more Sell requests should arise in state court. This Note provides the first comprehensive review of Sell in the states.*

*That review reveals that state courts have largely been forced to choose among conflicting federal approaches to Sell. Therefore, fixing Sell in the states requires assessing those interpretations to determine which one state courts should follow—namely, the approach most faithful to the balance struck by the Sell Court. After making that assessment, this Note proceeds to consider state-specific sources of law as alternative paths to Sell reform.*

*State constitutional law has yet to play a meaningful role in Sell cases and is unlikely to do so in the future. Instead, state legislatures can and should act to give structure to the Sell regime in their states, give guidance to the state courts, and, if desired, create additional protections for defendants. Providing such a comprehensive regime would free state courts from what is essentially a policy decision—picking between the various Sell approaches and determining how Sell should be applied in the states.*

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## INTRODUCTION

In a pivotal scene in the classic film *One Flew Over the Cuckoo's Nest*, grim orderlies lead the protagonist into a sterile white room and strap him to a gurney for involuntary treatment of his mental illness.<sup>1</sup> They stick electrodes to his skull and jolt his brain with electricity.<sup>2</sup> For thirty painful seconds he convulses.<sup>3</sup> This scene has been credited with “irreparably tarnishing the image of electroconvulsive therapy” and “quickening its departure from mainstream mental health care.”<sup>4</sup> Yet involuntary treatment of the mentally ill continues.

Indeed, the Supreme Court held in *Sell v. United States*<sup>5</sup> that forced administration of antipsychotic medication is constitutional in certain contexts, including for the sole purpose of restoring a mentally ill criminal defendant to competency<sup>6</sup> to stand trial<sup>7</sup>—even for capital cases.<sup>8</sup> Instead of electroconvulsive therapy, involuntary mental health treatment now means forced pill ingestion or a needle in the arm of an unwillingly restrained patient.<sup>9</sup>

Although the normative concerns of forced medication need to be acknowledged,<sup>10</sup> this Note focuses on the legal framework announced by the *Sell* Court. That framework is derived from the Constitution, as the physical intrusion of forced medication implicates a “significant

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1. ONE FLEW OVER THE CUCKOO'S NEST (Fantasy Films 1975).

2. *Id.*

3. *Id.*

4. Jon Swaine, *How 'One Flew Over the Cuckoo's Nest' Changed Psychiatry*, TELEGRAPH (Feb. 1, 2011), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/8296954/How-One-Flew-Over-the-Cuckoos-Nest-changed-psychiatry.html> [<https://perma.cc/FFD7-YUSG>].

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

6. “The test for competenc[y] . . . is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel.” *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996).

7. *Sell*, 539 U.S. at 179.

8. *See, e.g.*, Eyder Peralta, *Jared Loughner Pleads Guilty to Arizona Shootings*, NPR (Aug. 7, 2012, 3:31 PM), <https://www.npr.org/sections/thetwo-way/2012/08/07/158376830/jared-loughner-arizona-shooting-suspect-pleads-guilty-to-killing-6> [<https://perma.cc/HX9S-YMYU>] (describing the case of Jared Loughner, a mass shooter who was involuntarily medicated at trial and avoided the death penalty by pleading guilty).

9. Robert E. Cochrane, Bryon L. Herbel, Maureen L. Reardon & Kristina P. Lloyd, *The Sell Effect: Involuntary Medication Treatment Is a “Clear and Convincing” Success*, 37 LAW & HUM. BEHAV. 107, 110 (2013).

10. Specifically, forced medication can be criticized as violating the bodily integrity of the mentally ill. *See* ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL 96 (2002) (describing the many reasons for refusing medication, including “profound fears of the effects, side effects, and risks of the medication—both physical and mental”).

constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs.”<sup>11</sup> In such cases, courts weigh the individual’s liberty interest against the societal interest in involuntary medication.<sup>12</sup>

The *Sell* Court justified forced medication for competency restoration by invoking the important government interest in the prosecution of serious crimes.<sup>13</sup> Along the way, it declared a four-pronged test for balancing the relevant interests in five concise paragraphs.<sup>14</sup> The *Sell* standard requires that (1) the government’s interest be “important,” meaning that a “serious crime” is involved and “[s]pecial circumstances” do not lessen the interest; (2) forced medication will “significantly further” that interest; (3) less intrusive but similarly effective alternatives are not available; and (4) medication is “medically appropriate.”<sup>15</sup> If each prong is satisfied, the balance weighs in favor of the government and involuntary medication is permissible;<sup>16</sup> otherwise, forced medication is unconstitutional.<sup>17</sup>

Unfortunately, the Supreme Court’s articulation of that balancing test is more a model of judicial brevity than of clarity.<sup>18</sup> And in the fifteen years since, the lower federal courts have struggled with its application, reading the same *Sell* language to require different things.<sup>19</sup> Moreover, some courts evince a hostility toward *Sell* orders that threatens to undermine the constitutional balance set by the Supreme Court by skewing that balance in favor of defendants.<sup>20</sup> Indeed, despite their efforts to remain faithful to the law announced by the Supreme Court, certain courts have gone even further to impose

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11. *Sell*, 539 U.S. at 178 (quotations omitted) (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)).

12. *Harper*, 494 U.S. at 227 (upholding involuntary medication when a mentally ill prison inmate poses a danger to himself or others and the treatment is in the inmate’s medical interest).

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

14. *Id.* at 180–81.

15. *Id.* (emphases omitted).

16. *Id.*

17. *Id.*

18. See Dora W. Klein, *Curiouser and Curiouser: Involuntary Medications and Incompetent Criminal Defendants After Sell v. United States*, 13 WM. & MARY BILL RTS. J. 897, 901–03 (2005) (pointing out what *Sell* left out).

19. See *infra* Part II.

20. See *infra* Part IV.A.4.

new *Sell* requirements, effectively raising the constitutional floor beyond that set by the *Sell* Court.<sup>21</sup>

While much ink has been spilled debating whether the *Sell* standard is sufficiently rights-protective,<sup>22</sup> less attention has been devoted to the state court implementations of *Sell*.<sup>23</sup> But because many more criminal prosecutions take place in state court than in federal court, it stands to reason that significantly more *Sell* requests should arise in state court.<sup>24</sup> Despite this, state high courts have been slow to engage with this issue—only seven state high courts have decided a *Sell* case to date.<sup>25</sup> And while academic commentary exists for individual states and cases,<sup>26</sup> no treatment has comprehensively reviewed how the state courts have handled *Sell* in light of the competing federal circuit interpretations.

This Note finds that state courts have largely been forced to choose among those conflicting federal approaches to *Sell*. Therefore, fixing *Sell* in the states requires assessing those interpretations to

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21. See *infra* Part IV.A.

22. See, e.g., Klein, *supra* note 18; Christopher Slobogin, *Sell's Conundrums: The Right of Incompetent Defendants To Refuse Anti-Psychotic Medication*, 89 WASH. U. L. REV. 1523 (2012).

23. Much of the academic literature in the state context consists of student pieces. See, e.g., Emily Ryan, Note, *Involuntary Administration of Anti-Psychotic Medication to Prisoners for Trial and Post-Conviction Relief Competence: The Denial of a Protected Liberty Interest Without Due Process*, 23 TEMP. POL. & CIV. RTS. L. REV. 549 (2014). While many of these pieces focus on whether *Sell* is sufficiently rights-protective, this Note accepts *Sell* as the law and looks instead to how it has been applied.

24. In 2005, 92,226 defendants were brought before federal district courts on criminal charges. U.S. COURTS, TABLE 5.1 U.S. DISTRICT COURTS, CRIMINAL CASES AND DEFENDANTS FILED, TERMINATED, PENDING (INCLUDING TRANSFERS), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/Table501\\_0.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/Table501_0.pdf) [<https://perma.cc/AM44-C9R2>] (covering 1990, 1995, 2000, and 2002 through 2006). A year later, an estimated 2.6 million felony cases were filed in state court and 1.1 million defendants received felony convictions. See State Court Caseload Statistics: Criminal – Felony Trend in General Jurisdiction Courts, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> [<https://perma.cc/ZL42-W7MU>] (tabulating felony caseloads from each state); BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1 (revised 2010), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/9P2M-28LA>] (estimating felony convictions in state courts). From 2003 to 2009, 287 requests were made to federal courts for involuntary-medication orders. Cochrane et al., *supra* note 9, at 109. Extrapolating that same rate of involuntary-medication requests to the states means that approximately one thousand such requests would be sought each year in state court, as opposed to the fifty or so sought each year in federal court.

25. See *infra* note 95 (citing nine *Sell* cases decided by the high courts of Connecticut, Georgia, Oregon, Nevada, New Mexico, Pennsylvania, and Utah).

26. See, e.g., J.W. Looney, *The Arkansas Approach to Competency To Stand Trial: "Nailing Jelly to a Tree,"* 62 ARK. L. REV. 683 (2009); Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to Sell v. United States*, 41 ST. MARY'S L.J. 309 (2009).

determine which one state courts should follow—namely, the approach most faithful to the balance struck by the *Sell* Court. The cases reveal that some state courts have followed the federal circuits that have strayed from *Sell*, leading to further divergence.

The different approaches to implementing *Sell* are problematic,<sup>27</sup> yet this Note cannot resolve the divergence problem and does not attempt to. It does not argue that the *Sell* standard is perfect—though it has proved effective<sup>28</sup>—only that it is the law and that courts must faithfully implement it. *Sell*'s four-pronged standard strikes a careful balance, one which is upset by further tinkering. While other scholars may be correct that riffs on *Sell* are justified as a matter of policy, judges should not be the ones creating policy. Ultimately, unless state courts find additional protections as a matter of state constitutional law—which is unlikely<sup>29</sup>—they should hew closely to the *Sell* Court's careful balancing.

To the extent that restructuring *Sell* is desired to further protect state criminal defendants, state legislatures are more competent to implement that restructuring. And while courts would ultimately be responsible for weighing the constitutionality of involuntary medication, legislatures are better suited to establish the detailed framework of that decision-making process. States could pass constitutional amendments providing for absolute constitutional rights to bodily integrity or privacy, or they could enact statutes clarifying the requisite procedures and findings necessary for involuntary medication.

Of course, this solution would only exacerbate the problem of disuniformity of the *Sell* regime in the states. But that disuniformity has already arisen thanks to various states following divergent federal circuit interpretations. Under the approach this Note advocates for, the

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27. First, the divergence means that despite a constitutionally protected interest being at stake, criminal defendants will be treated differently in different courts. Second, it means that some courts are just getting this wrong by either applying *Sell* too laxly and allowing forced medication or imposing additional requirements not justified by *Sell* that undermine the government's important interests in prosecution. Finally, the issue is compounded for state courts, which must now sift through *Sell*'s conflicting progeny from the federal circuits, leading to even more divergence.

28. "Effective" here refers to success rates in restoring defendants to competence to stand trial. See Cochrane et al., *supra* note 9, at 113 ("Following a judicial hearing and authorization to treat these federal criminal defendants, the majority (79%) [of defendants treated involuntarily under *Sell* from 2003–2009] demonstrated significant improvement and were considered to be restored to competency.").

29. See *infra* Part IV.B.

resulting disuniformity would be more tolerable because it would come from state legislatures or state voters. After all, while federal constitutional law should be consistent across the country,<sup>30</sup> the states are expected to serve as laboratories of democracy.<sup>31</sup> In sum, this Note's proposal is simple: state courts should remain faithful to the *Sell* balance, and any changes to that balance should come from state legislatures.

This Note proceeds in five parts. Part I describes *Sell*, its constitutional basis, and the four-pronged *Sell* inquiry. Part II looks to the last fifteen years of *Sell*'s implementation in the federal circuits, categorizing the conflicting interpretations into a "Basic Approach" that simply mirrors the four prongs and an "Elaborative Approach" that imposes additional constraints.<sup>32</sup> Part III then turns to the state court cases, finding that the state courts have generally split between the Basic and Elaborative Approaches of the federal circuit courts, while also introducing even greater divergence into the *Sell* regime.

Part IV goes on to describe how that regime should be implemented in the state courts. As a matter of federal constitutional law, the state high courts are likely to follow in the divergent footsteps of the federal circuits, potentially leading to additional confusion. This Note advocates for a different approach: apply only those requirements that are clearly grounded in *Sell*, without imposing additional constraints that upset the balance, and leave to state legislatures whether to provide additional protections for state defendants.

Part V considers alternative sources of reform for the *Sell* regime for states who consider *Sell* inadequate. Although state courts could find additional protections for mentally ill criminal defendants in their state constitution, this has yet to occur and is unlikely to do so. This Note concludes that the better avenue for reform lies in the state legislatures, who have the political mandate to make policy and the

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30. See, e.g., *Carlson v. Green*, 446 U.S. 14, 24 (1980) (providing that application of federal constitutional law "should not depend upon where the [constitutional] violation occurred" (quoting *Green v. Carlson*, 581 F.2d 669, 675 (7th Cir. 1978))).

31. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

32. The Basic–Elaborative dichotomy is this Note's attempt to categorize the different *Sell* interpretations. These terms have no genesis in the case law.

legislative resources to determine which reforms are needed to improve upon *Sell*.

### I. THE *SELL* STANDARD

This Note addresses a very specific situation: involuntary medication of criminal defendants to restore them to competency to stand trial. Any discussion of such involuntary medication must begin with *Sell*. And any actors—judicial or otherwise—must consider the constitutional balance struck by the *Sell* Court in formulating a governing legal regime. Accordingly, this Note begins by reviewing *Sell*, its constitutional basis, and the four-pronged *Sell* inquiry.

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>33</sup> In *Washington v. Harper*,<sup>34</sup> the Supreme Court recognized a “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.”<sup>35</sup> There, the Court considered whether a mentally ill prison inmate could be involuntarily medicated without a judicial hearing.<sup>36</sup> After weighing the individual’s protected liberty interest against the state’s interest in prison safety and security, the Court held that the Due Process Clause<sup>37</sup> permits involuntary medication of mentally ill prison inmates “if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.”<sup>38</sup> However, the Court concluded that that determination need not be made by a judge, as administrative review conducted by medical professionals was more appropriate and effective.<sup>39</sup> Two years later, in *Riggins v. Nevada*,<sup>40</sup> the Court reaffirmed the *Harper* test as applied in the trial setting and held that involuntary medication is constitutional if medically appropriate and essential for the safety of the defendant

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33. U.S. CONST. amend. V.

34. *Washington v. Harper*, 494 U.S. 210 (1990).

35. *Id.* at 221 (recognizing a liberty interest under the Due Process Clause of the Fourteenth Amendment).

36. *Id.* at 213.

37. While *Harper* involved Fourteenth Amendment Due Process, the analysis is identical under Fifth Amendment Due Process. *Cf. Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement . . .”).

38. *Harper*, 494 U.S. at 227.

39. *Id.* at 233.

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

or others.<sup>41</sup> However, neither *Harper* nor *Riggins* addressed medication for the sole purpose of restoring a mentally ill criminal defendant to competence to stand trial.

A decade passed before the Court addressed that issue. In *Sell*, the Court reversed an involuntary-medication order for a nondangerous criminal defendant and in doing so, created a broad scheme for involuntary medication in the pretrial context.<sup>42</sup> First, the Court again reaffirmed the balance struck in *Harper*, weighing the government's interest (in trying the defendant) against the defendant's constitutionally protected liberty interest in being free from unwanted antipsychotic drugs.<sup>43</sup> With that in mind, the Court announced four prongs, each of which must be satisfied to permit involuntary medication:

- (1) The Government-Interest Prong: whether “*important* governmental interests are at stake,” such as the interest in prosecution of a “serious crime,” and whether there are any “[s]pecial circumstances [that] may lessen the importance of that interest.”<sup>44</sup>
- (2) The Defendant-Interest Prong: whether “involuntary medication will *significantly further*” the government’s interest, meaning that medication is “substantially likely to render the defendant competent to stand trial” and “substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel.”<sup>45</sup>
- (3) The Least-Invasive-Means Prong: whether “involuntary medication is *necessary* to further” the government’s interest, meaning that there are no “alternative, less intrusive treatments” or “less intrusive means for administering the drugs” that are likely to “achieve substantially the same results.”<sup>46</sup>
- (4) The Medically Appropriate Prong: whether “administration of the drugs is *medically appropriate*, *i.e.*, in the patient’s best medical interest in light of his medical condition.”<sup>47</sup>

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41. *Id.* at 135.

42. *Sell v. United States*, 539 U.S. 166, 186 (2003).

43. *Id.* at 178–79.

44. *Id.* at 180.

45. *Id.* at 181.

46. *Id.*

47. *Id.*

At bottom, the test encapsulates a single question: “Has the Government . . . shown a need for [involuntary] treatment sufficiently important to overcome the individual’s protected interest in refusing it?”<sup>48</sup> Yet the Court spent little time addressing the practical implications of the four-pronged test it announced to answer that question. Since then, the Court has let the federal circuits define “important government interests,” “serious crimes,” “special circumstances,” “substantially likely,” “substantially unlikely,” “significantly further,” “necessary to further,” and “medically appropriate.”<sup>49</sup> Nevertheless, those courts’ obligation is clear: they must faithfully adhere to the constitutional balance set forth by the Supreme Court.

## II. *SELL* IN THE LOWER FEDERAL COURTS

State court *Sell* opinions rely exclusively on federal case law. Thus, the federal interpretations of *Sell* are a necessary backdrop for analyzing the implementation of *Sell* in the state courts. From *Sell*’s issuance in 2003 to 2018, the federal courts of appeals issued sixty-one opinions directly applying the *Sell* standard.<sup>50</sup> The disparity in *Sell* outcomes among the circuits is striking. For example, the Second, Third, Fifth, Eleventh, and District of Columbia Circuits have green-lighted involuntary medication in every *Sell* case that came before them.<sup>51</sup> In contrast, the Fourth and Ninth Circuits have halted forced medication in twelve of twenty-six *Sell* cases.<sup>52</sup> This disparity in

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48. *Id.* at 183.

49. *See Slobogin, supra* note 22, at 1542 (“*Sell* raises many more questions than it answers.”).

50. These cases were identified by filtering all Westlaw case references to *Sell* by circuit court, then reviewing each of those decisions to determine which ones directly apply the *Sell* standard.

51. *See United States v. Clafflin*, 670 F. App’x 372 (5th Cir. 2016); *United States v. Pfeifer*, 661 F. App’x 618 (11th Cir. 2016); *United States v. Ruark*, 611 F. App’x 591 (11th Cir. 2015); *United States v. Cruz*, 757 F.3d 372 (3d Cir. 2014); *United States v. Dillon*, 738 F.3d 284 (D.C. Cir. 2014); *United States v. Fuller*, 581 F. App’x 835 (11th Cir. 2014); *United States v. Hardy*, 724 F.3d 280 (2d Cir. 2013); *United States v. Gutierrez*, 704 F.3d 442 (5th Cir. 2013); *United States v. Mann*, 532 F. App’x 481 (5th Cir. 2013); *United States v. Diaz*, 630 F.3d 1314 (11th Cir. 2011); *United States v. Muhammad*, 398 F. App’x 848 (3d Cir. 2010); *United States v. Grape*, 549 F.3d 591 (3d Cir. 2008); *United States v. Palmer*, 507 F.3d 300 (5th Cir. 2007); *United States v. White*, 431 F.3d 431 (5th Cir. 2005); *United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004).

52. *See United States v. Onuoha*, 820 F.3d 1049 (9th Cir. 2016); *United States v. Watson*, 793 F.3d 416 (4th Cir. 2015); *United States v. Brooks*, 750 F.3d 1090 (9th Cir. 2014); *United States v. Chatmon*, 718 F.3d 369 (4th Cir. 2013); *United States v. Ruiz-Gaxiola*, 623 F.3d 684 (9th Cir. 2010); *United States v. White*, 620 F.3d 401 (4th Cir. 2010); *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009); *United States v. Casillas*, 298 F. App’x 675 (9th Cir. 2008); *United States v. Curtis*,

outcomes follows from different approaches to reviewing *Sell* orders.<sup>53</sup> The remainder of this Part explores these differences by examining how these courts interpret the more contentious *Sell* prongs.

#### A. *The Government-Interest Prong*

The *Sell* Court explained that the Government-Interest Prong required the prosecution of a “serious crime”<sup>54</sup> but “offered no guidance on how to determine the seriousness of an offense.”<sup>55</sup> Circuits generally look to the potential penalty for the crime charged but disagree on which formulation to use.<sup>56</sup> Options include the statutory minimum<sup>57</sup> and maximum punishments,<sup>58</sup> the probable sentencing

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269 F. App'x 662 (9th Cir. 2008); *United States v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008); *United States v. Espinoza-Pareda*, 226 F. App'x 730 (9th Cir. 2007); *United States v. Evans*, 404 F.3d 227 (4th Cir. 2005).

53. A consensus exists on some threshold *Sell* issues. For example, the circuits have uniformly held that the government bears the burden of satisfying *Sell* by clear and convincing evidence. *See, e.g.*, *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004) (basing this decision on a reading of *Riggins v. Nevada*, 504 U.S. 127 (1992)). Most circuits also agree that the Government-Interest Prong is a question of law, while the remaining prongs are questions of fact. *See, e.g., id.* at 160. *But see* *United States v. Bradley*, 417 F.3d 1107, 1113–14 (10th Cir. 2005) (holding that the Defendant-Interest Prong is a question of law, reviewed de novo).

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

55. *Evans*, 404 F.3d at 237; *accord* *United States v. Green*, 532 F.3d 538, 547 (6th Cir. 2008) (“Without more specific guidance or a rigid test, courts are left to fashion appropriate, and presumably objective parameters by which to assess seriousness.”).

56. Mounia Rhoulam, Comment, *Due Process and Serious Crime: The Vague Term that Promotes the Forcible Medication of Countless Incompetent Defendants, Trumping Their Fundamental Liberty*, 26 GEO. MASON U. C.R. L.J. 255, 269–74 (2016).

57. *See, e.g., Gomes*, 387 F.3d at 160 (“[T]he seriousness of the crime . . . [is] evident from the substantial sentence Gomes faces if convicted. . . . Gomes faces a possible statutory minimum of fifteen years’ imprisonment.” (quoting *United States v. Gomes*, 289 F.3d 71, 86 (2d Cir. 2002))).

58. *See, e.g., Green*, 532 F.3d at 548 (looking to the statutory maximum in “both a recognition of and respect for the fundamental role of the legislative process in making these seriousness determinations, as well as an effort to find some objective standard by which to analyze the first *Sell* factor”); *Evans*, 404 F.3d at 237 (looking to the Supreme Court’s jurisprudence on the right to trial by jury, which exists only in “serious” criminal cases, and thus concluding that the maximum statutory penalty is the “primary measure of seriousness”).

range under sentencing guidelines,<sup>59</sup> or a combination of both.<sup>60</sup> *Sell*'s silence essentially forces courts to make a policy choice—framed as a legal determination—of what constitutes the best objective measure of a “serious crime.”

Yet identifying a “serious crime” is only half of the work. The court must then determine whether “special circumstances . . . lessen the importance of [the government’s] interest.”<sup>61</sup> The *Sell* Court suggested considering the length of civil confinement that might result absent forced medication.<sup>62</sup> Prosecution is presumably less imperative if the defendant already faces a period of lengthy confinement—even if that confinement is in a psychiatric facility rather than in prison.<sup>63</sup> However, the Court quickly cabined this consideration by affirming that “civil commitment is [not] a substitute for a criminal trial.”<sup>64</sup> Other than civil confinement, courts cannot agree on how many “special circumstances” the Court identified.<sup>65</sup> As a result, courts have understandably struggled to apply the special-circumstances inquiry and weigh those circumstances against the government’s interest in prosecution.<sup>66</sup>

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59. See, e.g., *United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008) (“While the statutory maximum may be more readily ascertainable, any difficulty in estimating the likely guideline range exactly is an insufficient reason to ignore *Sell*'s direction that courts should consider the specific circumstances of individual defendants in determining the seriousness of a crime.”). *But see Evans*, 404 F.3d at 238 (rejecting the sentencing-guidelines approach as unworkable due to the impossibility of accurately predicting the probable sentence at the involuntary-medication stage of the trial).

60. *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007) (considering both the statutory maximum and the likely guideline sentence, as well as the defendant’s criminal history in general and recidivism for the specific crime charged).

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

62. *Id.*

63. *Id.*

64. *Id.* (“The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution.”).

65. Compare *United States v. Onuoha*, 820 F.3d 1049, 1054 (9th Cir. 2016) (identifying five circumstances), with *United States v. Grigsby*, 712 F.3d 964, 969–70 (6th Cir. 2013) (identifying three circumstances), and *United States v. Sanderson*, 521 F. App’x 232, 235 (4th Cir. 2013) (identifying a different set of three circumstances).

66. See, e.g., *Slobogin*, *supra* note 22, at 1536 (criticizing the “‘special circumstances’ caveat to the serious crimes exception” as incoherent).

*B. The Defendant-Interest Prong and the Medically Appropriate Prong*

Each circuit engages in an overlapping analysis for the Defendant-Interest Prong and the Medically Appropriate Prong,<sup>67</sup> as both involve factual findings regarding the efficacy and appropriateness of involuntary medication.<sup>68</sup> But while the circuits generally agree that these prongs involve factual questions reviewed for clear error, not all circuits implement that standard in the same way. This Note identifies two distinct categories amongst these conflicting approaches: the “Basic” and “Elaborative” Approaches.

1. *The Basic Approach.* Under the “Basic Approach” to *Sell* orders, the prongs expressly laid out in *Sell* are the sole requirements for involuntary medication. Courts following this approach—specifically, the Second, Third, Eighth, Eleventh, and D.C. Circuits—accept the basic *Sell* framework as is and take seriously the deferential standard of review for factual findings.<sup>69</sup> If a government expert testifies that the four *Sell* prongs are satisfied and the district court agrees, the reviewing circuit defers to the district court’s judgment of the expert’s credibility.<sup>70</sup> Challenges to those findings are generally rejected, as “[t]he district court . . . is entitled to resolve such evidentiary conflicts given the conflicting expert testimony.”<sup>71</sup> This approach is predicated on the notion that these are factual findings dependent on disputes between medical experts. Because the district court heard the experts and weighed credibility, the reviewing court will not second-guess that determination absent clear error.<sup>72</sup>

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67. The Least-Invasive-Means Prong has engendered minimal controversy and will not be discussed.

68. See, e.g., *United States v. Chavez*, 734 F.3d 1247, 1252–53 (10th Cir. 2013) (explaining that a violation of prong two for lack of specific information also results in a violation of prong four). The circuits often find violations of these two prongs in tandem. Of the twenty-one federal cases reversing *Sell* orders, eight found error on the Government-Interest Prong, eleven on the Defendant-Interest Prong, two on the Least-Invasive-Means Prong, and nine on the Medically Appropriate Prong.

69. See, e.g., *United States v. Dillon*, 738 F.3d 284, 297–98 (D.C. Cir. 2013) (upholding the district court’s findings as not “clearly erroneous”); *United States v. Diaz*, 630 F.3d 1314, 1332–36 (11th Cir. 2011) (same); *United States v. Fazio*, 599 F.3d 835, 840–41 (8th Cir. 2010) (same); *United States v. Gomes*, 387 F.3d 157, 159–63 (2d Cir. 2004) (same).

70. See *supra* note 69 (citing cases in which circuit courts affirmed the lower courts’ *Sell* analyses by deferring to the lower courts’ credibility judgments).

71. *Fazio*, 599 F.3d at 841.

72. See *id.*

For example, in *United States v. Fazio*,<sup>73</sup> the Eighth Circuit affirmed a medication order, holding that once the district court has accepted the testimony of the government’s medical expert, “the government has met it[s] burden.”<sup>74</sup> The affirmed medication order merely repeated each *Sell* prong verbatim and concluded that each was satisfied.<sup>75</sup> As the next Subsection shows, this type of order would not survive review in other circuits.<sup>76</sup>

2. *The Elaborative Approach.* In contrast to the Basic Approach, the Fourth and Ninth Circuit’s “Elaborative Approach” goes beyond *Sell*’s four express prongs to impose additional requirements for involuntary-medication orders.<sup>77</sup> These supplementary showings—not expressly articulated in *Sell*—include individualized evidence of medication efficacy, specificity in medication, and elaborately detailed treatment plans. This approach is also characterized by a general hostility toward *Sell* orders, evinced by statements such as “*Sell* orders are disfavored”<sup>78</sup> and “involuntary medication orders may sometimes be necessary, [but] they carry an unsavory pedigree.”<sup>79</sup> This reluctance to grant *Sell* orders shapes this approach, turning clear error review into something with more of a bite.<sup>80</sup>

Much of the Elaborative Approach analysis is focused on the Defendant-Interest Prong. This prong requires that forced medication be “substantially likely to render the defendant competent to stand trial” and “substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense.”<sup>81</sup> The *Sell* Court did not define “substantially likely” or “substantially unlikely” or explain how that determination should

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73. *United States v. Fazio*, 599 F.3d 835 (8th Cir. 2010).

74. *Id.* at 841.

75. *Id.* at 838.

76. *Compare id.* (bare-bones review), *with United States v. Evans*, 404 F.3d 227, 241–42 (4th Cir. 2005) (more stringent review).

77. For prime examples, see generally *United States v. Rivera-Guerrero*, 426 F.3d 1130 (9th Cir. 2005) and *Evans*, 404 F.3d 227.

78. *Rivera-Guerrero*, 426 F.3d at 1137.

79. *United States v. Chatmon*, 718 F.3d 369, 374 (4th Cir. 2013).

80. *Id.* (“[*Sell* orders] carry an unsavory pedigree. With this understanding of the legal framework, we now turn to the application of the *Sell* test . . .” (citation omitted)). The court cited *Harper*’s reference to the serious side effects of antipsychotic medications as support for the “unsavory pedigree” label. *Id.* (citing *Washington v. Harper*, 494 U.S. 210, 229–30 (1990)).

81. *Sell v. United States*, 539 U.S. 166, 181 (2003).

be made.<sup>82</sup> Circuits following this approach have held that it requires “an exacting focus on the personal characteristics of the individual defendant.”<sup>83</sup> These personal characteristics include the defendant’s specific diagnosis, the duration of their disorder, other health conditions and medications, and any other “factors [that] may be ‘relevant’ under *Sell*.”<sup>84</sup> These circuits distinguish between the general efficacy of antipsychotic medication and the likelihood that it will work on the particular defendant, requiring the government to prove the latter, not just the former.<sup>85</sup> This approach rejects the “syllogism” that medication effective in general is likely to be effective in the particular case:

To hold that this type of analysis satisfies *Sell*’s [Defendant-Interest] and [Medically Appropriate Prongs] would be to find the government necessarily meets its burden in every case it wishes to use atypical antipsychotic medication. We do not believe that *Sell*’s analysis permits such deference.<sup>86</sup>

In addition to the exacting focus on the specific defendant, these circuits require similar focus on the specific medications that are to be approved. This debate centers on whether a *Sell* order generally approving of antipsychotic medication can be upheld<sup>87</sup> or whether *Sell* requires the court to consider the specific drugs that are to be administered.<sup>88</sup> The Ninth Circuit held the latter, acknowledging that “*Sell* does not identify a requisite degree of specificity concerning the drugs to be used for involuntary medication,”<sup>89</sup> but nonetheless finding an implied requirement that the medication order include the “type of

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82. See, e.g., Lea Ann Preston Baecht, *Federal Courts’ Interpretations of Sell v. U.S.*, 37 J. PSYCHIATRY & L. 413, 423–24 (2009) (“[The Court] failed to define [substantially likely] or provide any guidance regarding the application of this standard.”).

83. *United States v. Baldovinos*, 434 F.3d 233, 240 n.5 (4th Cir. 2006).

84. *United States v. Evans*, 404 F.3d 227, 242 n.12 (4th Cir. 2005).

85. *United States v. Bush*, 585 F.3d 806, 816 (4th Cir. 2009) (“Thus, in order to satisfy [the Defendant-Interest Prong], the government must not only show that a treatment plan works on a defendant’s type of mental disease *in general*, but that it is likely to work on this defendant *in particular*.”).

86. *Evans*, 404 F.3d at 241.

87. See, e.g., *United States v. Bradley*, 417 F.3d 1107 (10th Cir. 2005); *United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004).

88. *United States v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008); *Evans*, 404 F.3d 227.

89. *Hernandez-Vasquez*, 513 F.3d at 916.

drugs proposed, their dosage, and the expected duration of a person's exposure."<sup>90</sup>

Emphasizing the need for even greater specificity, the Fourth Circuit has imposed a more detailed treatment-plan requirement:

[T]he government must spell out why it proposed the particular course of treatment, provide the estimated time the proposed treatment plan will take to restore the defendant's competence and the criteria it will apply when deciding when to discontinue the treatment, describe the plan's probable benefits and side effect risks for the defendant's particular medical condition, show how it will deal with the plan's probable side effects, and explain why . . . the benefits of the treatment plan outweigh the costs of its side effects.<sup>91</sup>

Thus, while a district court employing the Basic Approach need satisfy only the four prongs and enjoys a deferential standard of review, a court in an Elaborative Approach jurisdiction is subject to more exacting scrutiny that assesses both the substantive content of the *Sell* order and evidence supporting it.

This disparity in federal approaches has repercussions extending beyond the federal courts, as *Sell* is a constitutional standard that applies to the states as well,<sup>92</sup> and states hear the vast majority of criminal cases.<sup>93</sup> Yet even though state courts have also wrestled with *Sell*, their approaches have received little academic attention. This next Part explores how state high courts have picked and chosen amongst the conflicting federal approaches to decide what *Sell* means in the states.

### III. *SELL* IN THE STATE COURTS

Compared to the federal circuits, the state high courts have been slower to engage with *Sell*, likely due to the availability of state intermediate appellate review and the discretionary nature of most

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90. *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2005) (quoting *United States v. Williams*, 356 F.3d 1045, 1056 (9th Cir. 2004)). This requirement can be traced back to "the unique nature of involuntary antipsychotic medication and the attendant liberty interest." *Williams*, 356 F.3d at 1056.

91. *Evans*, 404 F.3d at 242 (footnote and citations omitted).

92. State judges must apply federal constitutional law under the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

93. *See supra* note 24.

state-high-court dockets.<sup>94</sup> Thus, while the federal circuits must confront *Sell*'s dilemmas thanks to their embrace of appeal as a right, the state high courts have been able to allow the field to further develop in the lower state courts. In the fifteen years since *Sell*, only seven state high courts have issued an opinion directly applying *Sell*.<sup>95</sup> Perhaps unsurprisingly, these decisions reveal that the state high courts have largely followed the lead of the federal circuits, picking between the various federal approaches and finding new avenues of disagreement.

#### A. *The Government-Interest Prong*

Few state high courts have comprehensively addressed the complicated balancing inherent in *Sell*'s Government-Interest Prong. Most of these cases have involved defendants facing murder charges, where the important government interest—prosecution of the ultimate crime—is never really at issue.<sup>96</sup> In the few noncapital cases where the court had to determine whether the crime was “serious,” the Utah Supreme Court utilized the statutory maximum sentence to determine seriousness,<sup>97</sup> the Oregon Supreme Court utilized both the statutory maximum and likely imposed sentence,<sup>98</sup> and the Connecticut Supreme Court looked to both the statutory maximum and statutory minimum and concluded that the court did not have to settle on one approach because the crime was serious under either.<sup>99</sup>

In considering whether “special circumstances” undermine the government’s interest, the state high courts have employed a uniform

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94. See Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63, 84 (2010) (“[I]n state supreme courts, appeals are more often subject to discretionary review than not . . .”). This would suggest that state intermediate courts are doing the work—where those courts exist—in the states where the state high court has yet to address *Sell*. See *infra* Part III.C.

95. See *State v. Wang*, 145 A.3d 906 (Conn. 2016); *State v. Seekins*, 8 A.3d 491 (Conn. 2010); *Warren v. State*, 778 S.E.2d 749 (Ga. 2015); *Lake v. Second Judicial Dist. Court, ex rel. Cty. of Washoe*, 281 P.3d 1193 (Nev. 2009) (unpublished table decision); *State v. Cantrell*, 179 P.3d 1214 (N.M. 2008); *State v. Lopes*, 322 P.3d 512 (Or. 2014); *Commonwealth v. Sam*, 952 A.2d 565 (Pa. 2008); *Commonwealth v. Watson*, 952 A.2d 541 (Pa. 2008); *State v. Barzee*, 177 P.3d 48 (Utah 2007). This list was current as of January 2019. Two more state high court *Sell* opinions were issued after this Note was written. See *State v. Fitzgerald*, 929 N.W.2d 165 (Wisc. 2019); *In re Linda M.*, 440 P.3d 168 (Alaska 2019).

96. See, e.g., *Warren*, 778 S.E.2d at 762 (Government-Interest Prong satisfied); *Cantrell*, 179 P.3d at 1221 (Government-Interest Prong uncontested).

97. *Barzee*, 177 P.3d at 59.

98. *Lopes*, 322 P.3d at 525–27.

99. *Seekins*, 8 A.3d at 502–03.

approach. In each case, the defendant claimed that a lengthy period of confinement while incompetent to stand trial mitigated the interest in prosecution.<sup>100</sup> Each court compared the length of time the defendant had already spent confined against the potential sentence the defendant faced if convicted. In three of the four cases, the defendant faced significant additional prison time, thus supporting the state's interest in prosecution.<sup>101</sup> In the fourth case, the defendant had already spent more time in confinement awaiting restoration than he would have spent in prison if convicted.<sup>102</sup> Accordingly, the court held that those special circumstances undermined the state's interest in prosecution, and thus, the Government-Interest Prong was not satisfied.<sup>103</sup> No other state high court has found that special circumstances diminish the importance of a government interest.

### *B. The Defendant-Interest Prong and the Medically Appropriate Prong*

The Defendant-Interest Prong has resulted in the greatest divergence between the state high courts. In fact, the state high courts have found even more areas of disagreement than the federal courts, further expanding the number of *Sell* interpretations. This stands in contrast with the Medically Appropriate Prong, which has received little attention.

To start, several courts have adopted requirements consistent with the Elaborative Approach. The Oregon Supreme Court approvingly cited Fourth and Ninth Circuit cases for the propositions that “the government must make the required showing with respect to the particular defendant it seeks to medicate and that evidence that antipsychotic medication generally reduces mentally ill patients’

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100. *Id.* at 505–07; *Warren*, 778 S.E.2d at 761–62; *Lopes*, 322 P.3d at 527–28; *Barzee*, 177 P.3d at 59; *see Sell v. United States*, 539 U.S. 166, 180 (2003) (instructing that whether “the defendant has already been confined for a significant amount of time” may affect “the strength of the need for prosecution”).

101. *Seekins*, 8 A.3d at 505–07; *Warren*, 778 S.E.2d at 761–62; *Barzee*, 177 P.3d at 59.

102. *Lopes*, 322 P.3d at 527.

103. *Id.* at 528. In a footnote, the court suggested a new approach to the *Sell* analysis, in which the fifth step after assessing each of the prongs is to “evaluate all of the *Sell* factors in combination” to determine if the government’s need to medicate overcomes the defendant’s interest in avoiding unwanted medication. *Id.* at 528 n.28. The court declared that it would have invalidated the *Sell* order under this combination-analysis step even if the Government-Interest Prong had been satisfied. *Id.* While this looks similar to Justice Kennedy’s summation of the standard in *Sell*, *see supra* note 48 and accompanying text, no other court has applied it as a separate step of the analysis.

delusional thought processes [is] insufficient to meet the ‘clear and convincing’ standard.”<sup>104</sup> The Georgia Supreme Court similarly looked to the Fourth Circuit in requiring an individualized and specific medication plan.<sup>105</sup> The failure of the trial court to identify such a plan led to invalidation under the second, third, and fourth *Sell* prongs.<sup>106</sup>

Other state high courts have embraced the Basic Approach. For example, the Pennsylvania Supreme Court refused to require a specific medication plan, finding that the federal support for that argument was unpersuasive.<sup>107</sup> The court declined to address the “requisite level of specificity” for medication plans, as there was no need “to provide ‘concrete details’ of particular medications and dosages.”<sup>108</sup> Relatedly, the Connecticut Supreme Court rejected the need for individualized evidence of medication efficacy, holding that “courts simply have no choice but to rely on generalized studies when making such predictive judgments.”<sup>109</sup> Similarly, the Utah Supreme Court upheld the use of generalized reports and statistics when referenced by a doctor who personally examined the defendant, rejecting the dissent’s position that such analysis was insufficiently individualized.<sup>110</sup>

Besides disagreeing about what it takes to satisfy the test, the state high courts also disagree on what the “substantially likely” and “substantially unlikely” standards mean. The Connecticut Supreme Court concluded that “‘substantially likely’ means more likely than not, or a greater than 50 percent probability.”<sup>111</sup> The Utah Supreme Court disagreed, concluding that “[t]o the extent that such a likelihood

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104. *Lopes*, 322 P.3d at 529 (citing *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 700 (9th Cir. 2010) and *United States v. Bush*, 585 F.3d 806, 816–17 (4th Cir. 2009)).

105. *Warren*, 778 S.E.2d at 765 (citing, among others, *United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005)). The Nevada Supreme Court also approvingly referenced a specific medication plan in an order denying a petition for a writ of mandamus against a *Sell* order, though the court did not engage in any real analysis of the *Sell* prongs. *Lake v. Second Judicial Dist. Court, ex rel. Cty. of Washoe*, 281 P.3d 1193, at \*1 (Nev. 2009) (unpublished table decision).

106. *Warren*, 778 S.E.2d at 762–69.

107. *Commonwealth v. Sam*, 952 A.2d 565, 580–81 (Pa. 2008) (rejecting an argument based on *Evans*).

108. *Id.* at 580.

109. *State v. Wang*, 145 A.3d 906, 920 (Conn. 2016) (“[I]f [general] studies do not bear on [the defendant’s] particular medical condition, it seems unlikely that any academic literature short of a paper devoted entirely to the treatment of the actual defendant in question would meet the majority’s unexplained standard for ‘bearing’ on an incompetent defendant’s particular medical condition.” (first alteration added) (quoting *United States v. Watson*, 793 F.3d 416, 441 (4th Cir. 2015) (Traxler, C.J., dissenting))).

110. *State v. Barzee*, 177 P.3d 48, 78 (Utah 2007).

111. *Wang*, 145 A.3d at 920.

can be quantified, it should reflect a probability of more than seventy percent.”<sup>112</sup> In contrast, the New Mexico Supreme Court refused to set a numeric definition at all in order to avoid tempting “tailored expert testimonies.”<sup>113</sup> Although the New Mexico court acknowledged that a quantified approach provides objectivity and predictability, it found these benefits outweighed by the risk of experts improperly adjusting their testimony to meet the requirement.<sup>114</sup> Instead, the court “prefer[red] that judges interpret meaningful medical testimony in the context of the applicable legal standards.”<sup>115</sup>

The Medically Appropriate Prong has engendered little controversy in the state high courts.<sup>116</sup> The courts that have considered this prong have found it satisfied based on deference to the trial court’s determination of medical-expert credibility.<sup>117</sup> The only exception is the Georgia Supreme Court, which found this prong unsatisfied in a case where no specific medication plan had been requested.<sup>118</sup> No other state high court has elaborated on the requirements under the Medically Appropriate Prong.<sup>119</sup>

### C. *State Intermediate Appellate Courts and Beyond*

Given the minimal engagement of the state high courts, it is worth looking to the state intermediate appellate courts to see if they are the true tip of the spear for state action on *Sell*. Unsurprisingly, the overall pattern confirms that the state intermediate appellate courts are engaging with the issue—at least under federal constitutional law. In those states where the state high court has not yet addressed *Sell*, the state intermediate appellate courts look to the federal circuit in which

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112. *Barzee*, 177 P.3d at 61. After defining “substantially likely” as greater than 70 percent, the court defined “substantially unlikely” as “a very low rate of occurrence.” *Id.*

113. *State v. Cantrell*, 179 P.3d 1214, 1221–22 (N.M. 2008).

114. *Id.*

115. *Id.* at 1222.

116. The same is true of the Least-Invasive-Means Prong.

117. *See, e.g., Wang*, 145 A.3d at 922–23 (agreeing with the trial court’s reliance on the government’s expert); *Commonwealth v. Sam*, 952 A.2d 565, 581–83 (Pa. 2008) (same).

118. *Warren v. State*, 778 S.E.2d, 768 (Ga. 2015).

119. The state courts have also generally followed the federal court consensus on the standard of review and burden of proof. *See, e.g., Wang*, 145 A.3d at 915 (holding that the Government-Interest Prong is a question of law and the remaining prongs are questions of fact); *Warren*, 778 S.E.2d at 753 (holding that the government bears the burden of proof by clear and convincing evidence).

they sit as persuasive authority<sup>120</sup> and usually end up applying *Sell* as implemented by that circuit.<sup>121</sup> This has led to the same disparate approaches as seen in the federal circuits. These courts do not appear to be adding additional novel requirements to what *Sell* requires but instead are picking among existing federal interpretations.<sup>122</sup>

This brief survey reveals two points. First, it is likely that more state high courts will, as a practical matter, be forced to grapple with these questions as they continue to develop in the lower state courts. Second, because the state courts have largely adopted the divergent federal approaches to *Sell*, this divide will only deepen as more state courts take up this issue. Fixing this mess at the state level therefore requires answering two related and important questions: Who is getting *Sell* right as a matter of federal constitutional law, and how can states do better?

#### IV. GETTING *SELL* RIGHT

Criticisms of the *Sell* regime are prevalent. Yet most are focused on the adequacy of the *Sell* standard for protecting individual rights.<sup>123</sup> This Note identifies a different issue—namely, how faithful *Sell*'s interpreters are to the original decision. This question is important for two reasons. First, when courts fail to follow *Sell*'s mandate, divergent approaches result. This should raise fears of courts straying from the constitutional balance set forth by the Supreme Court. The other

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120. See, e.g., *People v. Hodges*, No. F068297, 2015 WL 9260576, at \*4–5 (Cal. Ct. App. Dec. 17, 2015) (vacating a medication order because the medical expert's recommendation was "too generic" to satisfy *Sell*, citing a Ninth Circuit case); *City of Cleveland v. Tarver*, No. 105522, 2017 WL 1179956, at \*2–3 (Ohio Ct. App. Mar. 30, 2017) (reversing a *Sell* order due to the lack of an important government interest in the prosecution of a defendant who stole a pack of cigarettes); *State v. Brewer*, No. CA2008-04-040, 2008 WL 5053322, at \*1–6 (Ohio Ct. App. Dec. 1, 2008) (upholding a medication order by referencing Second, Fourth, and Sixth Circuit cases).

121. See, e.g., *Cotner v. Liwski*, 403 P.3d 600, 604–08 (Ariz. Ct. App. 2017) (looking primarily to Ninth Circuit cases for *Sell* guidance); *People ex rel. Hardesty*, 410 P.3d 553, 556–57 (Colo. App. 2014) (looking primarily to Tenth Circuit cases for *Sell* guidance).

122. Compare *Cotner*, 403 P.3d at 604–08 (employing the "rigorous analysis" of the Elaborative Approach based on Ninth and Fourth Circuit cases), with *State ex rel. K.M.E.*, No. 12-11-00188-CV, 2011 WL 6000702, at \*4–6 (Tex. App. Nov. 23, 2011) (applying only the basic language of the four *Sell* prongs and deferring to expert testimony on each prong).

123. See, e.g., Susan A. McMahon, *It Doesn't Pass the Sell Test: Focusing on "The Facts of the Individual Case" in Involuntary Medication Inquiries*, 50 AM. CRIM. L. REV. 387, 388 (2013) (criticizing *Sell* as allowing involuntary medication to "become routine"); Elizabeth G. Schultz, Note, *Sell-ing Your Soul to the Courts: Forced Medication To Achieve Trial Competency in the Wake of Sell v. United States*, 38 AKRON L. REV. 503, 530–49 (2005) (attributing constitutional and normative problems to *Sell*).

obvious problem with this divergence—disuniformity in the law—is one without a ready solution, or at least one that is unlikely to materialize anytime soon. The easy solution is, of course, another Supreme Court case, answering all questions and resolving disputes between the divergent approaches. But the Court has repeatedly declined opportunities to do so.<sup>124</sup> Although this could previously be justified as waiting for further development of the law and the issues, it is no longer clear what the Court is waiting for.

Second, the different federal interpretations raise questions about the proper judicial role in the involuntary-medication regime. If the Basic Approach is wrong, it essentially constitutes abdication of courts' constitutional role as protectors of individual rights. That would mean these courts are undermining defendants' constitutionally protected liberty interests by failing to enforce constitutional constraints. If the Elaborative Approach is wrong, its additional requirements constitute improper judicial policymaking that inappropriately impedes the government's important interest in prosecution. That policymaking raises institutional competence concerns, as judges are ill-suited to second-guess medical opinions. Moreover, the decision to impose additional protections not required by *Sell* should be one made by the branch with a political mandate for policymaking, not by judges.<sup>125</sup>

Assuming that the Court will not soon resolve these issues, this Note addresses the more difficult issue of how to proceed with *Sell* until the Court steps back in. This Part deciphers *Sell* and recommends the interpretation that the state courts should be following.

#### A. *Why It Matters*

If the question is “who is getting *Sell* right?” the answer cannot be “everyone.” As the *Sell* framework is based on interest balancing, any change to that framework upsets the balance that the Supreme Court has mandated as required by the Constitution. *Sell* is thus exclusive of all additional elaboration. That means that either the Basic Approach or the Elaborative Approach courts (or both) are getting *Sell* wrong.

The main distinction between the Basic and Elaborative Approaches is that the latter imposes certain requirements that go

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124. See *United States v. Claflin*, 670 F. App'x 372 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1361 (2017); *United States v. Pfeifer*, 661 F. App'x 618 (11th Cir.), *cert. denied*, 137 S. Ct. 412 (2016).

125. Although many state judges are elected and thus more politically accountable than federal judges, that is not the case for all state judges. And even elected judges are not charged with express policymaking.

beyond what is required by a plain-text reading of *Sell*. These additional flourishes are likely judicial divinations of implied requirements or policy judgments of what the *Sell* standard should be. This Note does not fault the courts for their varying interpretations of *Sell*, as each is likely doing its best to implement an admittedly vague standard. But even if all courts are trying to faithfully implement *Sell* as they interpret it, additional requirements that are not rooted in *Sell* are inappropriate for courts to impose and threaten to undermine *Sell*'s constitutional balance.

Courts implementing *Sell*—whether they be lower federal courts or state courts applying federal law under the Supremacy Clause—must apply the law as set forth by the Supreme Court. The *Sell* Court announced what the Due Process Clause requires in this context, and lower courts have no authority to change that standard. This is especially important where the Court's standard is a balancing test, where new requirements imposed on one side will upset the balance the Court found to be required by the Constitution. Ultimately, ignoring *Sell* requirements—or adding new ones—contravenes the Supreme Court's guidance.

Discerning the precise balance that the *Sell* Court struck is the focus of this Part, which begins by examining the three requirements imposed under the Elaborative Approach: the specific medication plan, the “exacting focus” on the particular defendant, and the detailed treatment plan.<sup>126</sup> Comparing the Elaborative Approach requirements to the *Sell* opinion itself reveals that while the specific medication plan has support in the basis and reasoning of *Sell*, the latter two requirements do not and thus should not be grafted onto the *Sell* framework.

### *B. The Specific Medication Plan*

The specific-medication-plan requirement provides that the proposed *Sell* order must include the type of drugs to be used, their dosage, and the expected duration of the defendant's exposure. The debate over this requirement arises because *Sell* does not directly speak to the level of specificity required in the treatment plan.<sup>127</sup> However, the *Sell* opinion sufficiently indicates that the Court found

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126. *See supra* Part II.B.2.

127. *United States v. Hernandez-Vasquez*, 513 F.3d 908, 916 (9th Cir. 2008).

that Due Process does require such specificity in the identification of medications.

Unlike most *Sell* dilemmas, the Court's opinion resolves this question. The Court confirmed the need for specific medication identification while setting out the Medically Appropriate Prong: "The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success."<sup>128</sup> The Court reaffirmed that emphasis elsewhere in the opinion, referencing "the medical appropriateness of a *particular* course of antipsychotic drug treatment"<sup>129</sup> and "[w]hether a *particular* drug" will interfere with the defendant's ability to participate in his own defense.<sup>130</sup> Thus, the specific-medication-plan requirement is not just consistent with the *Sell* opinion but mandated by it.

Moreover, requiring this specificity is necessary as a matter of common sense. Unless the court is aware of which drugs are to be given to the defendant, it would be impossible to make the factual findings required by the Defendant-Interest and Medically Appropriate Prongs.<sup>131</sup> Reviewing involuntary medication in general would focus the judicial inquiry at a level of abstraction that would render such review meaningless.<sup>132</sup> And while the specificity requirement imposes a constraint on the government, it is one that is easy to satisfy. Most mentally ill criminal defendants are treated from a small suite of antipsychotic drugs determined by their particular condition.<sup>133</sup> Further, this requirement still allows for needed flexibility, as doctors can return to the court for an updated order if particular medications are unsuccessful at restoration.<sup>134</sup> In sum, uniformly imposing this requirement will not constitute an undue constraint on the government but will only inform the court's decision and ensure that the *Sell*

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128. *Sell v. United States*, 539 U.S. 166, 181 (2003).

129. *Id.* at 183 (emphasis added).

130. *Id.* at 185 (emphasis added).

131. *United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005).

132. *Id.*

133. *Cochrane et al.*, *supra* note 9, at 110 & tbl.2 (finding only eight medication options were used to treat 132 defendants, and further noting that four medication options were used to treat all but fifteen of these defendants).

134. *See Evans*, 404 F.3d at 241 ("We believe that this approach best balances the need for effective judicial review with the need to give prison medical staff the flexibility subtly to modify their proposed course of treatment to fit the defendant's individual medical condition if the treatment does not work exactly as initially expected.").

standard is truly satisfied.<sup>135</sup> Thus, the specific medication plan comports both with the general goals of *Sell* and with the language of the opinion.

C. *An Exacting Focus on the Particular Defendant*

While specific medication plans may be required by *Sell*, other portions of the Elaborative Approach are not, starting with the exacting-focus requirement. Although necessary to a certain extent, this requirement has been taken too far by certain courts. This emphasis originated in *United States v. Evans*,<sup>136</sup> in which the Fourth Circuit vacated a medication order in part for failing to focus on the defendant as an individual.<sup>137</sup> The court found data on a medication's general efficacy alone insufficient to demonstrate its likelihood of success in treating the particular defendant.<sup>138</sup> This reasoning is uncontroversial as applied to the facts in *Evans*, where the government made no reference at all to the individual conditions of the defendant and how medication might affect him specifically.<sup>139</sup> This is a clear violation of *Sell*, as the Medically Appropriate Prong requires a determination that medication be "in the patient's best medical interest *in light of his medical condition.*"<sup>140</sup>

However, when read broadly, the *Evans* language can be used to raise the *Sell* bar to a point where it is impossible to satisfy for certain defendants. This argument combines the exacting focus on the defendant and *Evans*' rejection of the syllogism that medication effective in general is likely to be effective on the particular defendant.<sup>141</sup> Specifically, defendants can successfully argue that absent specific, individualized evidence that medication is substantially likely to be effective on the particular defendant—such as his past successful medication—the government fails to satisfy its burden under

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135. As the *Evans* court explained:

To approve of a treatment plan without knowing the proposed medication and dose range would give prison medical staff carte blanche to experiment with what might even be dangerous drugs or dangerously high dosages of otherwise safe drugs and would not give defense counsel and experts a meaningful ability to challenge the propriety of the proposed treatment.

*Id.*

136. *Id.* at 227.

137. *Id.* at 242.

138. *Id.* at 241.

139. *Id.*

140. *Sell v. United States*, 539 U.S. 166, 181 (2003) (emphasis added).

141. *See supra* note 86 and accompanying text.

the Defendant-Interest Prong.<sup>142</sup> This raises the question of how specific such evidence must be.

For some courts, even personal examination of a defendant by a medical expert may not suffice. For example, in *United States v. Bush*,<sup>143</sup> the Fourth Circuit reviewed a medication order that was partly based on a study which found a high restoration rate for individuals with the defendant's rare mental disorder.<sup>144</sup> The district court had approved medication based on a medical expert's recommendation which relied partly on the study and partly on his personal interaction with the defendant and review of her previous psychiatric care.<sup>145</sup> On review, the Fourth Circuit decided that only some individuals in the study were truly relevant—those who had suffered similar periods of untreated psychosis as the defendant.<sup>146</sup> Because the cited study included only four such individuals, the court questioned the sufficiency of the expert's testimony.<sup>147</sup> Examples like these raise concerns of micromanagement by appellate courts and a focus on evidence that may not exist.

*Sell* does mandate consideration of the particular defendant and the impact that medication will have on him via the Medically Appropriate Prong's reference to the defendant's medical condition.<sup>148</sup> But to extrapolate from this a rejection of generalized evidence would take *Evans* too far and risk turning prior successful medication of the defendant into a necessary condition. Such an artificial prerequisite would categorically preclude medication for many defendants that *Sell* itself would otherwise allow.

This approach suffers from additional flaws. First, it is hard to imagine how any individualized assessment would not be based at least partly on science that speaks only in generalities. For many defendants who have never been previously treated, the only evidence that a drug is likely to work on them is the syllogism—rejected in *Evans*—that

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142. See *State v. Lopes*, 322 P.3d 512, 529–30 (Or. 2014) (expressing concern about the trial court's finding that the Defendant-Interest Prong was satisfied in part based on a general study of medication efficacy).

143. *United States v. Bush*, 585 F.3d 806 (4th Cir. 2009).

144. *Id.* at 816.

145. *Id.* at 812.

146. *Id.* at 816.

147. *Id.* at 812, 816.

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

generally effective medication is likely to be effective for them.<sup>149</sup> As long as an expert's personal examination is sufficient to identify any individualized reason that the general efficacy would be inapplicable to a particular defendant—such as a physiological condition that might make the medication dangerous or ineffective—personal examination and generalized medication-efficacy evidence should be sufficient. If that is enough for a medical expert to conclude that restoration is substantially likely, and the trial court concurs, appellate courts should defer to that judgment under the clear error standard of review.

Second, the exacting focus may be much ado about nothing. One statistical study on *Sell* orders quantified characteristics predictive of restoration.<sup>150</sup> The study found that the individual characteristics considered so vital by the Elaborative Approach—primary diagnosis, drug type, route of administration, age, and race—were not statistically relevant predictors of the success of restoration-to-competence treatments.<sup>151</sup> In fact, the study found that “it took less time for symptom relief and competency restoration for older versus younger defendants,”<sup>152</sup> which refutes the importance that the *Bush* court placed on duration of the disorder.<sup>153</sup> Across the cases studied, antipsychotics were generally effective in restoring competency (79 percent success rate), notwithstanding individual characteristics.<sup>154</sup> This not only supports a more generalized reading of the required focus on the defendant's medical condition, consistent with the basic language of *Sell*, but also allows for expert reliance on general medication effectiveness.

#### D. *The Detailed Treatment Plan*

The Elaborative Approach's detailed treatment plan requires that the government: estimate restoration time, probable benefits, and side effects; justify its proposed course of treatment; and conduct a cost-

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149. See, e.g., *United States v. Diaz*, 630 F.3d 1314, 1333 (11th Cir. 2011) (rejecting the defendant's argument that the government could not meet its burden of proof because the defendant has no “history of responding to anti-psychotic medication”).

150. Cochrane et al., *supra* note 9.

151. *Id.* at 113.

152. *Id.* The authors did note, however, that they had insufficient data on the duration of the disorder as opposed to age and that it was “possible that the older defendants in the treatment cohort had a more recent acute-onset type of psychotic disorder or had more complete histories of past medication treatment responses to guide current effective treatment interventions.” *Id.* at 113–14.

153. See *supra* notes 143–46 and accompanying text.

154. Cochrane et al., *supra* note 9, at 113.

benefit analysis for medication.<sup>155</sup> These requirements are the byproduct of a legal regime where judges are forced to decide an issue—whether medication is medically appropriate—that is better left to medical experts.

Further, these requirements do not have support in the holding or reasoning of *Sell*. Although this treatment information might be helpful to the reviewing court and a good idea as a policy matter, it requires interpreting “medically appropriate” to mean a lot more than it says. In effect, these enhanced requirements call for the reviewing court to dictate what is “medically appropriate” to the medical expert. But *Sell* itself only defines “medically appropriate” to mean “in the patient’s best medical interest in light of his medical condition.”<sup>156</sup> The Supreme Court could have set out more detailed and elaborate criteria but instead chose to leave this determination to the medical experts and the trial court. Accordingly, it is inappropriate for appellate courts to impose their own views that go beyond the announced standard.

And while some of this information is already encompassed within other parts of the *Sell* standard—such as consideration of side-effect risks—other information just might not be available, such as estimated restoration time.<sup>157</sup> It is unclear how an expert is supposed to provide information that might not exist and whether the reviewing court is supposed to reject all medication requests if any piece of information is missing. While an appellate court has a role in reviewing these judgments, that role involves clear error review only, which is hard to comport with these additional requirements.

It is understandable for courts to want to require specifics to be able to review expert judgments. To some extent, requiring specifics is permissible under *Sell*: the trial court ultimately bears responsibility for gauging whether medication is “medically appropriate” and must assess the credibility of medical expert witnesses. But the Supreme Court has already recognized in this context that rigorous judicial scrutiny of medical judgments is not constitutionally required and not always desirable.<sup>158</sup> In *Harper*, the Court held that “[n]otwithstanding

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155. See *supra* Part II.B.2.

156. *Sell v. United States*, 539 U.S. 166, 181 (2003).

157. In a study of all federal criminal defendants involuntarily medicated under *Sell* between 2003 and 2009, the only significant predictor of treatment duration was age, with older patients requiring shorter periods of medication before restoration to competency. The median restoration period was 126 days, but some defendants were restored to competency in less than a month and others took more than a year. Cochrane et al., *supra* note 9, at 113.

158. *Washington v. Harper*, 494 U.S. 210, 231 (1990).

the risks” of involuntary medication, an individual’s “interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge.”<sup>159</sup>

Overall, these requirements involve appellate courts taking it upon themselves to determine what it means to be “medically appropriate,” but that is a determination better left to the discretion of medical experts and the trial judges who hear their testimony. What was true in *Harper* is true in *Sell*: medical professionals are better judges of “medical appropriateness” than judges.<sup>160</sup> The imposition of the detailed treatment plan in all cases morphs the Medically Appropriate Prong into something else, changing the *Sell* balance.

*E. The Bigger Issue: “Unsavory” and “Disfavored” Sell Orders*

The Elaborative Approach is not just a different reading of *Sell*. Instead, it is symptomatic of a hostility toward *Sell* orders that originated in the federal courts and is spreading to the state courts.<sup>161</sup> This hostility is best summed up by the courts themselves, who proclaim that “*Sell* orders are disfavored”<sup>162</sup> and “carry an unsavory pedigree.”<sup>163</sup> Certain circuits have internalized this antipathy and infused it throughout the *Sell* inquiry, imposing stricter scrutiny of expert testimony than would otherwise be called for by clear error review.<sup>164</sup> But while *Sell* orders might be “unsavory” in certain circuits, the Supreme Court showed no such animosity in its own opinion.

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159. *Id.*

160. Not everyone agrees with this point. See generally Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. SOC. JUST. 647 (2012) (arguing that judicial deference to psychiatric expert witnesses is “incompatible with broader due process and civil rights concerns”).

161. See *Warren v. State*, 778 S.E.2d 749, 764 (Ga. 2015) (“We would hope that the State’s physicians, as healthcare professionals, would not misuse such unfettered authority, but history teaches that involuntary medical treatment, especially of the poor, the outcast, and the incarcerated, is worthy of close and independent oversight.” (citing *United States v. Watson*, 793 F.3d 416, 419 (4th Cir. 2015) for the proposition that *Sell* orders “carry an unsavory pedigree”).

162. *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005).

163. *United States v. Chatmon*, 718 F.3d 369, 374 (4th Cir. 2013).

164. See, e.g., *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010) (“There is a compelling need . . . for the district court to make factual findings so that the defendant may be assured that the trial court has conducted the stringent review mandated in light of the substantial infringement on his liberty interests . . . .”); *United States v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (“While the [trial court’s accepted] report does indeed state that involuntary medication would ‘significantly further’ the Government’s interests and be ‘medically appropriate’ for Evans, it failed to explain how it reached its conclusions . . . .”); see also *State v. Lopes*, 322 P.3d 512, 524

The courts that have followed this approach often reference two phrases in *Sell* for support. The first is that *Sell* orders should be or will be “rare.”<sup>165</sup> But the *Sell* Court actually said, “[t]his standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare. That is because the standard [requires] . . . .”<sup>166</sup> The Court then announced the four-pronged test.<sup>167</sup> What reads more as a prediction—“may be rare”—has been turned into more of a command—“should be rare.” That is a misreading of *Sell*. The *Sell* Court approved of involuntary medication so long as the four prongs are satisfied. If they are, *Sell* orders are constitutionally approved, as they strike the appropriate balance of government interest against individual rights. While the defendant’s liberty interest is important, the Court also recognized that the societal “need for prosecution” of “an individual accused of a serious crime is important” and “substantial,” based on “the basic human need for security.”<sup>168</sup> Therefore, courts that disfavor *Sell* orders favor the individual defendant at the expense of society.

Moreover, the Court’s prediction of “rarity” is accurate, without the need for increased judicial policing. “Of roughly 90,000 criminal defendants processed through the federal court system each year . . . only 287 requests for involuntary treatment were made over a 6-year period of time (approximately 60 per year).”<sup>169</sup> Thus, even if every single request had been approved, *Sell* orders would only occur in one out of every 1500 cases (0.06 percent). In reality, more than half of requests were denied over that time period, such that only about twenty-five defendants were forcibly medicated each year, or approximately one in every 3600 cases (0.03 percent).<sup>170</sup> “Rare” does not mean that courts should be hostile to those cases that do pass the *Sell* test.

The second phrase that these courts reference to justify *Sell*’s “disfavored” status is the *Sell* Court’s reference to *Harper*. According

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(Or. 2014) (emphasizing the need for “thorough consideration and justification” and “especially careful scrutiny” (quoting *Ruiz-Gaxiola*, 623 F.3d at 692)).

165. *United States v. White*, 620 F.3d 401, 422 (4th Cir. 2010) (concluding that medication was inappropriate where it would “would risk making ‘routine’ the kind of drastic resort to forced medication for restoring competency that the Supreme Court gave no hint of approving in *Sell*”).

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

167. *Id.* at 180–83.

168. *Id.* at 180.

169. *Cochrane et al.*, *supra* note 9, at 114.

170. *Id.* There is no reason to expect these rates to differ significantly in state courts.

to the Court, the *Harper* inquiry—which asks whether involuntary medication is justified by the danger posed by the mentally ill criminal defendant—should usually come before *Sell*, as the *Harper* analysis is “usually more ‘objective and manageable’” than the *Sell* test.<sup>171</sup> But again, that does not mean that *Sell* is “disfavored”—*Sell* is perfectly appropriate when the *Harper* analysis fails and the *Sell* balance is satisfied. The Court also suggested undertaking the *Harper* analysis first because it would help *inform* the *Sell* analysis.<sup>172</sup> Therefore, that reasoning should not be distorted to “disfavor” *Sell*.

This judicial hostility may reflect doubt about the soundness of the balance struck by the *Sell* Court—concerns which are echoed in the academic literature.<sup>173</sup> The increased scrutiny and additional requirements of the Elaborative Approach might best be explained as courts trying to give potency to the Defendant-Interest, Least-Invasive-Means, and Medically Appropriate Prongs, which have been criticized for “overemphasiz[ing] the questions surrounding the efficacy of the medication and its side effects, which will almost always be decided in the government’s favor.”<sup>174</sup> Because the current generation of antipsychotic medications is generally effective and has less risky side effects than similar drugs in the *Sell* era, a straightforward application of these prongs might turn *Sell* into a rubber-stamp so long as the defendant committed a serious crime.<sup>175</sup>

While these are legitimate concerns, the federal circuits are not the right institutions to be judging the continued appropriateness of the Supreme Court’s standard. Nor are the state courts, so long as they are analyzing the *Sell* inquiry as a matter of federal constitutional law. However, if the states determine that *Sell* no longer provides an adequate balance, state high courts and state legislatures could look to state-specific alternative paths to reform *Sell*. The next Part explores those paths.

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

172. *Id.* at 183 (“Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes.”).

173. *See supra* note 123.

174. McMahan, *supra* note 123, at 405.

175. *See id.* at 405–07 (finding that ten years after *Sell*, “medications generally work and generally are not accompanied by uncontrollable side effects”).

## V. STATE-SPECIFIC ALTERNATIVE PATHS TO *SELL* REFORM

So far, we have seen that state courts have followed—and are likely to continue to follow—in the paths of the federal circuits, imposing requirements on involuntary-medication orders not mandated by *Sell*. Courts have applied *Sell* inconsistently, and some courts and many commentators consider *Sell* inadequate protection for defendants' rights. The following sections consider how, rather than continued judicial divergence within the *Sell* interpretations, state constitutions and state statutes might provide alternative paths to *Sell* reform.

Unlike in the federal circuits, state courts have other sources of law they can look to in *Sell* cases: state constitutional law and state statutes. Getting *Sell* right in the states thus requires looking to how those state-specific sources of law have played a role so far and whether that might—or should—change in the future. The first Section reveals that state constitutions have yet to serve as a source of additional protections for *Sell* defendants. It then concludes that change in that field is unlikely. But that does not mean that the states are helpless. The second Section proposes a better avenue for progress in the *Sell* regime: state legislative action.

### A. *The Likely Inapplicability of State Constitutional Law*

In addition to the Basic and Elaborative approaches, state high courts may choose a third option: finding additional protections as a matter of state constitutional law. While lower federal courts are bound by *Sell* as both a floor *and* a ceiling for the analysis of involuntary-medication orders,<sup>176</sup> the state high courts are less restricted—at least in principle. Although the states may not *lessen* federal constitutional protections, they can and do find additional civil rights protections in state constitutions.<sup>177</sup>

Unfortunately for criminal defendants, state courts have yet to turn to state constitutional law to expand protections beyond the *Sell* regime. Most of the state cases make no mention of their respective state constitutions. Two use footnotes to dispose of the defendants'

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176. As noted above, however, federal courts have not uniformly respected the bounds laid down by the Supreme Court.

177. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (describing the important role state constitutional law has played in protecting individual rights).

state constitutional claims.<sup>178</sup> Getting a little closer to the issue, the Utah Supreme Court recognized a defendant's state constitutional argument as a prelude to the *Sell* analysis but declined to address it due to the defendant's failure to preserve the argument.<sup>179</sup> Although the court acknowledged the possibility that the state constitution provides additional protections, it concluded that it must "wait for another day to determine whether Utah's constitution forbids" *Sell* orders.<sup>180</sup> The Pennsylvania Supreme Court has been the sole state high court to engage substantially with the *Sell* standard as a matter of state constitutional law, and it concluded that the state constitution did not provide any additional protection.<sup>181</sup>

So why might states be hesitant to engage in state constitutional analysis in this context? Previous movements in state constitutional law were in large part motivated by "a trend in recent opinions of the United States Supreme Court to pull back from . . . the enforcement . . . of the federal Bill of Rights and the restraints of the due process and equal protection clauses."<sup>182</sup> Facing that lack of federal protection, state courts could fill the void with state constitutional protections.<sup>183</sup> But here, the Supreme Court has already acted and has provided a level of constitutional protection. Thus, rather than a void for state courts to fill, there is an affirmative action by the Supreme Court setting forth a balancing test to protect individual interests.

In the absence of federal constitutional protections, state high courts might have felt compelled to provide state constitutional protections for criminal defendants.<sup>184</sup> But the Court's prior entry into the field will likely preclude divergent state constitutional action, as state courts will conclude either that the *Sell* standard is the appropriate balance, or that even if it is not the right balance, the Supreme Court has spoken and it would be inappropriate for the state

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178. *Warren v. State*, 778 S.E.2d 749, 752 n.3 (Ga. 2015) (declining to address the defendant's arguments under the Georgia Constitution because they were not sufficiently raised at trial); *State v. Lopes*, 322 P.3d 512, 528 n.29 (Or. 2014) (noting that because it was vacating under the federal *Sell* standard, it did not need to "reach or discuss" an amicus argument based on the Oregon Constitution).

179. *State v. Barzee*, 177 P.3d 48, 55 (Utah 2007).

180. *Id.*

181. *Commonwealth v. Sam*, 952 A.2d 565, 585–88 (Pa. 2008).

182. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

183. *Id.*

184. *See, e.g., SUTTON, supra* note 177, at 22–42 (describing state court action to protect education rights after the Supreme Court declined to recognize a fundamental right to education).

high court to contradict the Court. To do otherwise would expose the state court to criticism that it essentially “adopt[ed] the dissenting view in [*Sell*] and label[ed] it state constitutional law.”<sup>185</sup>

But even where the Supreme Court has directly spoken on an issue, certain objective considerations might compel a state court to diverge from federal law. These considerations can rationalize and justify this divergence and mitigate legitimacy concerns.<sup>186</sup> As only one state has fully considered the state constitution in this context,<sup>187</sup> this is a wide-open area of law. It is thus worthwhile to consider application of these considerations to *Sell* to determine the likelihood of future action on this front. While these criteria vary by state, they may include some variation on the Pennsylvania Supreme Court’s consideration of (1) state constitutional text, (2) state constitutional history, (3) related case law from other jurisdictions, and (4) policy considerations and unique local concerns.<sup>188</sup> While this Note cannot address the likelihood of successfully finding additional protections in any particular state constitution, these criteria suggest that state constitutions are unlikely to provide much in the way of additional protection.

First, a critical part of the state constitutional analysis will be identifying any textual hook that might allow divergence from *Sell*. Although *Sell* was based on the Fifth Amendment’s Due Process Clause, defendants could also claim protection under state analogs to the Fourth Amendment<sup>189</sup> or Sixth Amendment.<sup>190</sup> While a Fourth Amendment analog claim was unsuccessful in *Commonwealth v. Sam*,<sup>191</sup> the Pennsylvania Supreme Court noted that the state constitutional provision was “materially identical” to the federal provision.<sup>192</sup> In contrast, in a related context, Louisiana and South Carolina recognized state constitutional prohibitions on forced

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185. Goodwin Liu, *Brennan Lecture: State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1316 (2017); *accord id.* (“The problem is not that state court decisions departing from federal precedent are unreasoned or results-oriented. It is that the reasons for departing [may] seem illegitimate . . .”).

186. *See id.* at 1314 (describing how state courts have justified divergence).

187. *See supra* notes 178–80 and accompanying text.

188. *Commonwealth v. Sam*, 952 A.2d 565, 585 (Pa. 2008).

189. *Id.* at 585–86.

190. *State v. Maryott*, 492 P.2d 239, 240, 242–45 (Wash. Ct. App. 1971) (reversing a conviction based on a finding that the state’s forcible administration of drugs affected the defendant’s ability to participate in his defense at trial, thus violating his Sixth Amendment right to confront witnesses against him).

191. *Sam*, 952 A.2d at 565.

192. *Id.* at 585–86.

medication to render competence for execution, based in part on language that explicitly protects against unreasonable invasions of privacy.<sup>193</sup> Thus, a state with such a constitutional provision might have a textual justification for divergence from *Sell*.

The second critical consideration focuses on state-specific history and tradition which might justify divergence.<sup>194</sup> This may be an uphill battle for a criminal defendant. The *Sell* Court made no mention of the history or tradition of refusing unwanted medication, despite having done so in related contexts.<sup>195</sup> Finding such material for a particular state would be difficult, if not impossible.<sup>196</sup> Moreover, for better or worse, involuntary treatment of the mentally ill is a part of this country's history,<sup>197</sup> and *Sell* has further legitimized it in at least one context. As states continue to implement the *Sell* doctrine and develop a tradition of involuntary medication, it will become even harder for a state high court to override *Sell* as a matter of state constitutional law.<sup>198</sup> If a state high court was committed to a prohibition against forced medication in the trial-competence context, the best time to prohibit it as a matter of state constitutional law would have been immediately after *Sell*. Logically, the longer states operate under *Sell*, the more acceptable the practice becomes as a matter of tradition and the less likely it is to be completely overridden.<sup>199</sup>

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193. *Louisiana v. Perry*, 610 So. 2d 746, 755 (La. 1992) (quoting LA. CONST. art. I, § 5); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993) (quoting S.C. CONST. art I, § 10).

194. SUTTON, *supra* note 177, at 16–18.

195. *See* *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (referring to “this Nation’s history and constitutional traditions” and discussing “the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment”).

196. What are the state-specific historical roots of forced medication of criminal defendants? Are there any? Will they be possible to find? What would the writers of the state constitution think of forced medication? Is there a meaningful way to engage with that question? *See* Liu, *supra* note 185, at 1321 (“[M]any provisions of state constitutions do not lend themselves to state-specific understandings.”).

197. *See, e.g.*, Elizabeth Bennion, *A Right To Remain Psychotic? A New Standard for Involuntary Treatment in Light of Current Science*, 47 LOY. L.A. L. REV. 251, 266–71 (2013) (describing the legal battles over involuntary treatment between the 1960s and 1980s).

198. Of course, while a tradition of involuntary medication cuts against state constitutional divergence under this framework, not all courts adhere to this framework, and there are plenty of modern examples of courts contradicting long-standing traditions. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (becoming the first state high court to recognize a state constitutional right to same-sex marriage).

199. *Cf. Andersen v. King Cty.*, 138 P.3d 963, 978, 985 (Wash. 2006) (rejecting a claimed state constitutional right to same-sex marriage, based in part on the lack of a history or tradition for recognizing that right in the state).

Finally, practical considerations also decrease the likelihood of a state high court recognizing constitutional protections beyond *Sell*. As a matter of administrability, it is much easier for a state court to simply look to federal law and apply it: the *Sell* standard is well developed and the various existing interpretations allow a state high court to mold *Sell* as it sees fit without having to take the drastic step of crafting a new standard or identifying a complete prohibition in the state constitution.<sup>200</sup> Thus, the diversity of federal interpretations means the states do not have to look to state constitutional law to change the test—they can just change it by reference to federal law. Ultimately, the Supreme Court has already announced a largely satisfactory standard that adequately balances the government’s interest in prosecution against the individual’s interest in avoiding forced medication.<sup>201</sup>

### B. A Better Way

Absent Supreme Court intervention, there is little hope for a uniform *Sell* standard across federal circuits. And with various federal circuit interpretations to choose from, state high courts have only increased the divergence in their interpretation and implementation of *Sell*. However, all is not lost. While uniformity is a forlorn hope, improvements to the *Sell* regime can be made in the states. But those improvements should come not from the judicial improvisation that led courts astray in the first place, but instead from state legislatures.

While this approach will not result in uniformity across states, it would result in a more structured and meaningful *Sell* regime in each state, as legislatures can resolve any perceived failings of *Sell* and determine if additional protections are needed as a matter of policy. Although the ultimate determination of whether involuntary medication is constitutional resides with the courts, the legislatures are better suited to establish the detailed framework of the decision-making process. Of course, state legislatures could not reduce protections below *Sell*, but they could turn the *Sell* standard into a more structured regime, clarifying the prongs and what is required of the government to satisfy them. Moreover, if such changes are the product

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200. See Liu, *supra* note 185, at 1315 (“In practice, it is common for state courts, in deciding a state constitutional issue involving equal protection, due process, or search and seizure, to center the analysis primarily on federal law.”).

201. See, e.g., Cochrane et al., *supra* note 9, at 115 (noting the high restoration rate in *Sell* cases and concluding that “the *Sell* criteria can be considered a ‘clear and convincing’ success”).

of political pressures, state legislatures are the proper policymaking branch to make those decisions.

As a threshold matter, the state high courts should faithfully adhere to *Sell* and should avoid following the Elaborative Approach aspects that have imposed additional requirements not supported by *Sell*.<sup>202</sup> This means imposing the basic *Sell* prongs as described, as well as the specific medication plan of particular medications, dosage ranges, and duration of medication.<sup>203</sup> Overall, the *Sell* opinion sets forth what is constitutionally required, and statistics show that forced medication is effective at restoring competency.<sup>204</sup> Lower courts might disagree with forced medication as a policy matter, but the Supreme Court has announced that it is constitutional and appropriate when the *Sell* standard is satisfied: state high courts should honor that by giving effect to *Sell*, not disfavoring it. Instead of judicial elaborations, state legislatures should be the source of any additional requirements or protections imposed on involuntary-medication orders.

Several states have already attempted to do so but have failed to meaningfully alter the *Sell* paradigm. For example, California has enacted a statute authorizing state courts to order involuntary medication of criminal defendants, but in doing so, it merely repeated the *Sell* prongs almost verbatim.<sup>205</sup> This sort of statute provides no guidance, forcing state courts to turn to the complicated federal *Sell* regime for answers.<sup>206</sup> This missed opportunity is also reflected in the state case law, where state statutes have yet to play a meaningful role in the state high courts' *Sell* cases.<sup>207</sup>

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202. See *supra* Part IV.A.

203. *Id.*

204. See Cochrane et al., *supra* note 9, at 115 (finding that a data set “provides empirical evidence of favorable outcomes following involuntary treatment for restoration of competency”).

205. CAL. PENAL CODE § 1370(a)(2)(B)(i)(III) (West 2018).

206. See generally, e.g., State v. Seekins, 8 A.3d 491 (Conn. 2010) (hearing a case pursuant to state statute on involuntary medication but deciding the case solely by reference to federal case law).

207. Most state high courts considering *Sell* have barely engaged with state statutes. See State v. Lopes, 322 P.3d 512, 517 (Or. 2014) (“Unlike many states, Oregon has not enacted statutes that explicitly grant trial courts authority to enter *Sell* orders or that implement the Court’s decision in *Sell*.”); Commonwealth v. Sam, 952 A.2d 565, 583–85 (Pa. 2008) (rejecting an application of the mental-health statute in the postconviction context and thus not addressing how it might affect the court’s *Sell* analysis); see also Warren v. State, 778 S.E.2d 749 (Ga. 2015) (making no mention of any applicable state statute); State v. Cantrell, 179 P.3d 1214 (N.M. 2008) (same); State v. Barzee, 177 P.3d 48 (Utah 2007) (same). Connecticut does have legislation authorizing medication in this context, but it was enacted before *Sell* was decided. State v. Wang, 145 A.3d 906, 915 n.7 (Conn. 2016). The Connecticut Supreme Court has looked to *Sell* and its progeny to

Instead of simply codifying the existing vague standard, state legislatures should embrace the opportunity to provide guidance to the courts. For example, courts assess *Sell*'s Government-Interest Prong by looking to penal codes in various ways to measure the “seriousness” of a crime, under the rationale that “the substantial sentences attached to the charged offenses reflects a policy decision by [the legislature] that the crimes are serious ones.”<sup>208</sup> This reasoning supports a greater role for state legislatures in developing the *Sell* regime, as the courts have acknowledged “a recognition of and respect for the fundamental role of the legislative process in making these seriousness determinations, as well as an effort to find some objective standard by which to analyze the first *Sell* factor.”<sup>209</sup>

Yet merely having penal codes does not provide sufficient guidance for the courts, as judges must still make subjective decisions about how to measure “seriousness” within the penal codes.<sup>210</sup> Instead, state legislatures should articulate what they consider to be a “serious crime” in this context.<sup>211</sup> While the first *Sell* prong would still act as a floor on what the government could claim as an important interest, the government could effectively identify its interests by statute. Such interests should receive deference, which would make the analysis more objective. This would avoid one of the most taxing and frequently challenged parts of *Sell*<sup>212</sup>—determining what constitutes a “serious crime.”

After the Government-Interest Prong, the remaining prongs involve a fact-heavy analysis that depends on determinations made by medical professionals.<sup>213</sup> As a matter of institutional competence, state

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drive the analysis, even where the challenge was brought solely under the state statute. *See Seekins*, 8 A.3d at 500–07 (looking to the *Sell* cases when determining the importance of the state’s interest as referenced by the state statute). This is likely because the statute mirrors the language of *Sell* and provides no independent guidance. *See* CONN. GEN. STAT. § 54-56d (2018).

208. *United States v. Green*, 532 F.3d 538, 547 (6th Cir. 2008) (quoting the district court’s order).

209. *Id.* at 548.

210. *See, e.g., Seekins*, 8 A.3d at 501–03 (reviewing the debates over measuring “seriousness”).

211. *See, e.g.,* WASH. REV. CODE § 10.77.092(1) (2018) (“For purposes of [restoration], a pending charge involving any one or more of the following crimes is a serious offense per se . . .”).

212. Stewart B. Harman, Note, *Restoration of Competency Through Involuntary Medication: Applying the Sell Factors*, 4 APPALACHIAN J.L. 127, 133 (2005) (identifying the “failure to provide a definition of what constitutes a serious crime” as one of the “essential flaws” of *Sell*).

213. *See, e.g., United States v. Fazio*, 599 F.3d 835, 841 (8th Cir. 2010) (rejecting the defendant’s appeal because the “district court . . . is entitled to resolve such evidentiary conflicts given the conflicting expert testimony”).

legislatures are better suited to make judgments about factual-finding requirements, levels of specificity and individualization, procedures, and so on.<sup>214</sup> This would give courts an objective basis for requirements not imposed by *Sell* and would keep the courts—especially appellate courts—from getting too involved with second-guessing medical decisions and procedures. For example, a Maryland statute regarding involuntary treatment in the civil-commitment context lays out the procedures required to obtain an involuntary-medication order, including notice requirements, pre-approval procedures, procedures required for the approving tribunal, written-decision requirements, post-approval procedures, appeals, renewal of treatment, and documentation.<sup>215</sup>

This new approach would provide sorely needed guidance to state courts, alleviating their need to look to the divergent federal interpretations or add other new requirements to the *Sell* test. Instead of repeating the federal circuits' mistakes, state courts should apply the basic *Sell* standard as a baseline and, based on considerations of judicial restraint and institutional competence, let the state legislatures elaborate on *Sell*.

#### CONCLUSION

This Note intends to shift the dialogue on *Sell*. *Sell* is a federal constitutional standard and much of the academic attention paid to it has been focused solely on whether it adequately protects the rights of criminal defendants in federal courts. Yet the federal courts order involuntary medication for only twenty-five defendants or so each year. The greater impact of *Sell* is in the state courts, which hear many more cases than the federal courts and thus are likely to deal with many more *Sell* requests. The muddled state of the federal *Sell* regime has left the state high courts picking between conflicting federal interpretations when implementing *Sell* in the states. Worse, some of the interpretations are unfaithful to *Sell*, upsetting the balance created by the Supreme Court. Unfortunately, state high courts are likely to repeat the same mistakes and further entrench these divergent and flawed interpretations.

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214. See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1538 (1998) (criticizing legal systems which use decision-making procedures “in which nonexpert judges . . . are called upon and authorized to evaluate expert scientific testimony”).

215. MD. CODE ANN., HEALTH-GEN. § 10-708 (West 2018).

But while *Sell* is not perfect, it is a workable standard that is reasonably effective at balancing the relevant interests. More importantly, it is federal law and state courts cannot change it. And while they could augment the *Sell* regime via state constitutional law, they have yet to do so and appear unlikely to. Instead, state legislatures can and should act to give structure to the *Sell* regime in their states, give guidance to the state courts, and, if desired, create additional protections for criminal defendants. Providing such a comprehensive regime would free state courts from what is essentially a policy decision—picking between the various *Sell* approaches and determining how *Sell* should be applied in the states.