U.C. DAVIS LAW REVIEW

University of California Davis

VOLUME 27 FALL 1993 NUMBER 1

ARTICLES

Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants

Grant H. Morris & J. Reid Meloy, Ph.D.***

TABLE OF CONTENTS

* Professor of Law, University of San Diego School of Law; Clinical Professor, Department of Psychiatry, School of Medicine, University of California, San Diego.

** Chief, Court Services, Forensic Mental Health Division, Mental Health Services, San Diego County Department of Health Services; Adjunct Professor, University of San Diego School of Law; Assistant Clinical Professor, Department of Psychiatry, School of Medicine, University of California, San Diego.

The authors wish to acknowledge the contribution of Ms. Sarah Overton who ably gathered data from the court and hospital files of the 28 individuals who were the subjects in this study.

INTRODUCTION

In 1901, a nineteen-year-old youth accused of burglary was found mentally incompetent to stand trial and committed to Matteawan State Hospital, a maximum security institution administered by the New York State Department of Correction.[1] In 1965, a study of that facility revealed that the individual, then eighty-three years old, was still a patient. Theoretically, he was still awaiting restoration to competence so that he could undergo criminal prosecution. His sixty-four-year confinement distinguished him as the patient longest in residence at Matteawan.[2] His tragedy was not unique, however. In 1896, a twenty-four-year-old man charged with vagrancy was found incompetent to stand trial and committed to Bridgewater State Hospital, a maximum security institution administered by the Massachusetts Department of Corrections.[3] There he remained until his death in 1959 at the age of eighty-seven. He was confined for sixty-three years without any criminal trial.[4]

Lengthy periods of confinement were not the exception; they were the rule for mentally incompetent criminal defendants. For example, a 1965 study of Matteawan revealed that 645 of the 1,062 mentally incompetent defendants at that facility had been detained for at least five years. Two hundred eight had been there for at least twenty years.[5] Similar reports from maximum security hospi-

---

1 SPECIAL COMM. ON THE STUDY OF COMMITMENT PROCEDURES AND THE LAW RELATING TO INCOMPETENTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT 72 (1968).

2 *Id.*

3 Stephen L. Engelberg, *Pre-Trial Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms*, 17 CATH. U. L. REV. 163, 164 (1967) (discussing D. Bright, Pre-Trial Commitment in Massachusetts 30 (June 1, 1961) (unpublished thesis in Boston University Law-Medicine Institute Library)).

4 *Id.* Reports of other mentally incompetent criminal defendants confined for lengthy periods include: Grant H. Morris, *The Confusion of Confinement Syndrome* Extended*: The Treatment of Mentally Ill "Non-criminal Criminals" in New York*, 18 BUFF. L. REV. 393, app. D at 439 (1969) (41 years—defendant charged with burglary, third degree); John H. Hess et al., Comment, *Criminal Law—Insane Persons—Competency to Stand Trial*, 59 MICH. L. REV. 1078, 1089 n.32 (1961) (34 years—defendant charged with gross indecency); Comment, *Commitment to Farview: Incompetency to Stand Trial in Pennsylvania*, 117 U. PA. L. REV. 1164, 1167 (1969) (32 years—defendant indicted for robbery).

5 SPECIAL COMM. ON THE STUDY OF COMMITMENT PROCEDURES AND THE LAW RELATING TO INCOMPETENTS, *supra* note 1, at 73.

tals in Massachusetts,[6] Michigan,[7] and Pennsylvania[8] revealed that a finding of incompetence to stand trial was tantamount to a life sentence for many criminal defendants.

If a defendant is suspected of being incompetent to stand trial, the court suspends criminal proceedings until the defendant's condition is evaluated. If the defendant is determined to be competent, the trial proceeds. If the defendant is determined to be incompetent, the trial is delayed until the defendant's competence has been restored. In fact, the United States Supreme Court has ruled that the prohibition against conducting a criminal trial of an incompetent defendant "is fundamental to an adversary system of justice."[9] To assure that an incompetent defendant is not deprived of the due process right to a fair trial,[10] the defense attorney, the prosecutor, and the court all have an obligation to raise the compe-

---

6 A. Louis McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U. L. REV. 46, 50 n.20 (1969) (reporting that more men committed as incompetent to stand trial "had left Bridgewater as a result of death than all other avenues combined").

7 John H. Hess, Jr. & Herbert E. Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCHIATRY 713, 717-18 (1963) (reporting "that well over one-half of the individuals committed as incompetent will spend the rest of their lives confined to [Ionia State] hospital").

8 Comment, *Commitment to Farview: Incompetency to Stand Trial in Pennsylvania*, *supra* note 4, at 1167 (reporting "that almost as many people leave Farview in a pine box as are formally discharged").

9 Drope v. Missouri, 420 U.S. 162, 172 (1975).

10 The suspension of criminal proceedings is warranted in order to assure the accuracy, fairness, and dignity of the trial process and to justify the imposition of punishment if the defendant is convicted. In many cases, the accused may be the only individual who has knowledge of the facts underlying the criminal charge, and, thus, an accurate assessment of guilt requires the defendant's assistance. To assure fairness in the criminal process, the accused must have the basic capacity to assist counsel in presenting a defense. The dignity of the criminal process would be undermined by the spectacle of an incompetent defendant's trial. The objective of punishment requires that a convicted defendant comprehend the reasons why the court is imposing punishment. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-59 (1967); AMERICAN BAR FOUND., THE MENTALLY DISABLED AND THE LAW 694 (Samuel J. Brakel et al. eds., 3d ed. 1985). The suspension of criminal proceedings against incompetent defendants is "a by-product of the ban against trial *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960).

tence issue whenever reasonable cause exists to believe that the accused is incompetent.[11]

Although due process concerns justify an inquiry into the defendant's competency, over the years prosecutors and defense attorneys raised the issue for unrelated strategic reasons. Prosecutors raised the issue to detain preventively defendants who would otherwise be eligible for pre-trial release or against whom the prosecutor had only a weak case.[12] Defense attorneys sought competency evaluations to obtain information that could be used in plea negotiations, to mitigate sentences, or even for potential insanity defenses.[13] But whether the competency assessment resulted from a genuine doubt as to the defendant's competence or whether it resulted from questionable strategic practices, defendants found incompetent to stand trial were confined for an indeterminate period until their competence was restored. For those defendants whose competence could not be restored, the confinement period could be, and sometimes was, a lifetime.

Indeterminate confinement of permanently incompetent criminal defendants was challenged in *Jackson v. Indiana*.[14] Theon Jackson was a developmentally disabled deaf-mute adult with a mental capacity of a pre-school child.[15] He was unable to read or write and could communicate only through limited sign lan-

---

11 18 U.S.C. § 4241(a) (1988) authorizes the defendant or the government attorney to file a motion for a hearing to determine the defendant's mental competency. The statute requires the court to grant the motion, or to order a hearing on its own motion, if reasonable cause exists to believe the defendant is incompetent to stand trial. The reasonable cause requirement is an adaptation of the Supreme Court's language in Pate v. Robinson, 383 U.S. 375 (1966): "Where the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing . . . ." *Id.* at 385.

12 *See* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 163-64 (American Bar Ass'n 1989) [hereafter ABA STANDARDS] (citing sources).

13 *Id.* at 163. If the defendant was charged with a minor offense, the defense attorney might seek an incompetency evaluation to pressure the prosecutor to dismiss the criminal charge in exchange for the defendant's agreement to undergo psychiatric treatment. Alternatively, if the defendant was accused of serious criminal conduct that was the subject of extensive media attention, the defense attorney might initiate incompetency proceedings to delay the trial and reduce societal pressure for severe punishment. *Id. See also* AMERICAN BAR FOUND., *supra* note 10, at 696.

14 406 U.S. 715 (1972).

15 *Id.* at 717.

guage.[16] In 1968, when he was twenty-seven years old, Jackson was charged with committing two acts of robbery, one involving property worth $4.00, the other involving property worth $5.00.[17] After he pleaded not guilty, the trial court ordered an assessment of Jackson's competency to stand trial.[18] The two examining psychiatrists concluded that Jackson was incompetent to stand trial because of his almost nonexistent communication skills, his lack of hearing, and his mental deficiency.[19] Jackson was unlikely ever to become competent because of his multiple disabilities and the lack of state resources to teach him the necessary communication skills.[20] In accordance with Indiana law, the trial court found Jackson incompetent to stand trial and committed him to the jurisdiction of the Indiana Department of Mental Health until his competence was restored.[21] A motion for a new trial was denied, and the Supreme Court of Indiana affirmed.[22] The United States Supreme Court granted certiorari.[23]

---

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 718.

20 *Id.* at 719.

21 *Id.* at 717-19. At the time Jackson was committed, the Indiana statute, quoted in full by the United States Supreme Court, required that the incompetent defendant be confined until his "restoration to sanity." *Id.* at 717 n.1. Use of the word "sanity" in the competency statute tends to confuse the competency issue with the insanity defense. The two inquiries focus on the defendant's mental state at different times and for different purposes. Incompetency to stand trial focuses on the defendant's current ability to understand the criminal trial process that he or she is undergoing and to assist the defense attorney in defending against the criminal charge. The insanity defense focuses on the defendant's mental state at the time of the alleged crime and asks whether the defendant should be absolved from criminal responsibility.

Following the *Jackson* decision, the Indiana statute was repealed, Act of Feb. 18, 1974, Pub. L. No. 148, § 4, 1974 Ind. Acts 630, 633, and a new statute was added. The 1974 statute required that the incompetent defendant be confined until his "attainment of comprehension sufficient to understand the proceedings and make his defense." *Id.* § 1, 1974 Ind. Acts 630, 631. The statute was revised in 1981 and 1992 and currently provides for the incompetent defendant's confinement until "the defendant's attainment of the ability to understand the proceedings and assist in the preparation of the defendant's defense." IND. CODE ANN. § 35-36-3-2 (West Supp. 1992).

22 Jackson v. State, 255 N.E.2d 515 (1970).

23 Jackson v. State, 255 N.E.2d 515 (1970), *cert. granted sub nom.* Jackson v. Indiana, 401 U.S. 973 (1971).

In 1972, three and one-half years after Jackson's confinement began, the Supreme Court reversed the judgment of the Indiana Supreme Court, holding that Indiana could not constitutionally commit Jackson for an indeterminate period simply because he was incompetent to stand trial.[24] Justice Blackmun, writing for a unanimous Court,[25] found both an equal protection and a due process violation. The Court ruled that Indiana had deprived Jackson of equal protection of the laws by subjecting him to a more lenient commitment standard (i.e., incompetence to stand criminal trial) and to a more stringent release standard (i.e., restoration of trial competence) than was applicable to all other persons who were not charged with crimes and who could only be detained under the state's civil commitment laws.[26]

The Court also ruled that Indiana had deprived Jackson of due process of the laws by authorizing his indeterminate commitment without considering whether any of the articulated bases for indeterminate civil commitment existed in Jackson's case.[27] Although a finding of incompetence to stand trial could justify a brief period of detention designed to restore the defendant's competence, only the customary civil commitment proceedings could be used to achieve the indeterminate confinement of the state's mentally ill or developmentally disabled citizens, including citizens charged with crimes.[28]

The Court's repudiation of indeterminate commitment was unequivocal:

> We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State

---

[24] Jackson v. Indiana, 406 U.S. 715, 720 (1972).

[25] Justices Powell and Rehnquist did not participate in the case. *Id.* at 741.

[26] *Id.* at 730. At the time Jackson was detained as incompetent to stand trial, civil commitment in Indiana required proof that the individual was either: (1) mentally ill and in need of "care, treatment, training, or detention" or (2) feebleminded and "unable properly to care for [himself]." *Id.* at 727-28. A civilly committed individual was eligible for release when he or she no longer required custodial care, treatment, training, or detention or when the Department of Mental Health determined that release was in the individual's best interest. *Id.* at 729.

[27] *Id.* at 737-38.

[28] *Id.* at 738.

> must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.[29]

The Court declined to specify a time limit for the reasonable period of treatment for incompetent defendants.[30] The Court merely noted that commitment of defendants who "probably soon will be able to stand trial . . . must be justified by progress toward that goal."[31] Jackson's three-and-one-half-year confinement with no substantial probability of restoration to competence exceeded the constitutional limit.[32]

Jackson is "an enormously important decision."[33] For twenty years, *Jackson* has been the Court's final word on dispositional issues involving mentally incompetent criminal defendants. Despite changes in the Court's personnel, the case also has been cited repeatedly as authority to support Supreme Court decision making in cases involving other mentally disordered individuals.[34]

This article assesses the impact of *Jackson* on decisions involving mentally incompetent criminal defendants. It does so in two ways. Part I analyzes the legislative response of the fifty states and the District of Columbia to three questions posed by the *Jackson* decision. At the completion of the article, the Appendix provides a jurisdiction by jurisdiction review of, and citation to, this legislation.

A survey of legislation, however comprehensive, paints an incomplete picture. The full impact of a Supreme Court decision can be measured only by considering the individuals who were the subject of the Court's ruling. How have their lives been changed by the Court's decision? To address this question, Part II reports on an

---

29 *Id.*

30 *Id.*

31 *Id.*

32 The Court did not indicate whether three and one-half years was itself a presumptively unreasonable time period, or whether it was unreasonable only within the factual context of the *Jackson* case. James J. Gobert, *Competency to Stand Trial: A Pre- and Post-*Jackson *Analysis*, 40 TENN. L. REV. 659, 683-84 (1973).

33 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14.16, at 254 (1989).

34 *See, e.g.*, Foucha v. Louisiana, 112 S. Ct. 1780, 1785, 1787 n.6, 1788 (1992) (insanity acquittees); Jones v. United States, 463 U.S. 354, 364 n.12 (1983) (insanity acquittees); Youngberg v. Romeo, 457 U.S. 307, 320 n.27 (1982) (civilly committed mentally retarded patients); Vitek v. Jones, 445 U.S. 480, 493 (1980) (mentally ill convicts); O'Connor v. Donaldson, 422 U.S. 563, 574 & n.10 (1975) (civilly committed mentally ill patients); McNeil v. Director, Patuxent Inst., 407 U.S. 245, 249 (1972) (defective delinquents).

empirical study of a sample group of permanently incompetent criminal defendants who were processed under legislation enacted in response to *Jackson.*

The article concludes by summarizing the findings of the legislative survey and the empirical study. Stated simply, many states have not fully implemented *Jackson.* This article describes how *Jackson* has been ignored or circumvented and reveals the consequences to the individuals *Jackson* explicitly protects.

I. THE LEGISLATIVE RESPONSE TO *JACKSON V. INDIANA*

A. *Detention to Evaluate Whether Defendant Will Become Competent*

Jackson limited the commitment of an incompetent defendant to "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[35] What is the reasonable period of time necessary to evaluate the incompetent defendant's condition and to predict whether he or she will become competent in the near future?[36] Although more than twenty years have passed since the Court decided *Jackson,* this question has not been answered by the statutes of thirty states and the District of Columbia. Of this number, twenty-three jurisdictions do not address the issue at all.[37] Eight states address the issue but do not specify the length of the evaluation detention period.[38] Typically, these statutes merely parrot the *Jackson* language allowing the incompetent defendant's detention for a "reasonable" period. Of the twenty states that spec-

---

[35] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[36] Although the evaluation determines whether the incompetent defendant will become competent "in the foreseeable future," the Court clarified this language by noting that the evaluation determines whether "the defendant *probably soon* will be able to stand trial." *Id.* (emphasis added).

[37] Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Oregon, Rhode Island, Tennessee, Utah, Vermont, and the District of Columbia. In four of the states listed above—New Hampshire, North Carolina, Tennessee, and Vermont—incompetent defendants are not detained as incompetent defendants and treated to restore their competency. Thus, in these states, incompetent defendants are not subjected to an evaluation detention to determine whether they will attain trial competency in the foreseeable future. Detention occurs, if at all, only through the civil commitment process. *See infra* text accompanying notes 59-60.

[38] Hawaii, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, and Wyoming.

ify the length of the detention period, ninety days is the most frequent period specified,[39] with the shortest period being thirty days[40] and the longest being twelve months.[41]

In some situations, an evaluation of restorability to competence may be unnecessary and, therefore, inappropriate. Cases involving severely developmentally disabled defendants or defendants suffering from an organic mental disorder involving a permanent dysfunction of the brain are examples. In such cases, at the time the defendant is found mentally incompetent, the trial judge should be authorized to find the defendant permanently incompetent without the necessity of further detention for evaluation. Surprisingly, the statutes of only seven states have addressed this issue. In four of these states, the court determines whether the defendant is likely to become competent within the legislatively prescribed evaluation period;[42] in two states, the court determines whether the defendant is likely to become competent in the foreseeable future.[43] In Texas, the jury that found the defendant incompetent determines whether the defendant will become competent in the foreseeable future.[44]

B. Periodic Review of Progress Toward Restoring Competence

If, as a result of the evaluation detention, the defendant was found restorable to competence in the near future, *Jackson* allows a commitment for treatment to restore competence but requires progress toward that goal to justify the detention.[45] Although the lan-

---

[39] Eight states specify a 90-day evaluation period: California, Connecticut, Georgia, Idaho, Indiana, Kansas, Louisiana, and Montana. Four states specify a six-month evaluation period: Iowa, Missouri, Virginia, and West Virginia. The state of Washington specifies a 90-day evaluation period but authorizes the court to order a second 90-day period. Nevada specifies a three-month evaluation period for defendants charged with a misdemeanor and a six-month period for defendants charged with a felony. NEV. REV. STAT. § 178.450(2) (1992). Because the evaluation focuses solely on measuring the probability that the defendant will attain trial competency in the foreseeable future, a longer evaluation period for felony-charged defendants than misdemeanor-charged defendants may be inappropriate.

[40] Illinois and New Mexico.

[41] Ohio (one year) and Wisconsin.

[42] Louisiana, Ohio, West Virginia, and Wisconsin.

[43] North Dakota and South Carolina.

[44] As for those defendants who are found to be restorable to competency, only three of the seven states—Ohio, Texas, and Wisconsin—impose a continuing obligation on the court to monitor defendants' progress toward that goal.

[45] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

guage of *Jackson* does not impose a duty of judicial oversight, such a duty is implicit. By its decision to commit a defendant for treatment to restore competence, the committing court becomes responsible for monitoring the progress of that treatment which serves as the sole legal justification for continued confinement.[46]

Is the court that ordered the incompetent defendant's treatment statutorily obligated to review periodically the defendant's progress toward attaining competence? Although more than twenty years have passed since the Court decided *Jackson*, the question has not been answered by the statutes of thirty-two states and the District of Columbia. Of this number, twenty jurisdictions do not address the issue at all.[47] Thirteen states mandate a clinical review of the defendant's condition but do not require a court hearing.[48] In four of

---

[46] ABA STANDARDS, *supra* note 12, at standard 7-4.11 commentary at 233. The American Bar Association (ABA) in its Criminal Justice Mental Health Standards supports a requirement of judicial oversight and periodic redetermination of the defendant's continuing incompetence. Although the facility or person responsible for treatment is required periodically to report to the court on the defendant's current status, the ABA standard requires the court to redetermine the issue of competence every 90 days. *Id.* at standard 7-4.11. Under the ABA standard, both the prosecuting attorney and defense counsel receive a copy of the report. While either may request and obtain a court hearing, in the absence of such request, the court independently reviews the report and either enters an appropriate order based on the report's recommendations, or orders an independent reevaluation of the defendant and conducts a hearing on the issues addressed in the report. *Id.* at standard 7-4.11(c)-(d).

[47] Alabama, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Carolina, Utah, Vermont, West Virginia, and the District of Columbia. The only Mississippi statute dealing with incompetency to stand trial simply authorizes the trial court judge to appoint a psychiatrist to examine a criminal defendant whose competence is in question and to pay for the cost of the examination from county funds. MISS. CODE ANN. § 99-13-11 (1973). Thus, unlike the other 49 states and the District of Columbia, Mississippi uses court rules rather than statutes to deal with incompetency to stand trial issues. *See infra* note 48 (discussing Mississippi court rule governing periodic review). Although West Virginia does not specify any periodic review while the defendant is being treated as an incompetent defendant, if the defendant is civilly committed following treatment as an incompetent defendant, the defendant's competency is clinically reviewed and reported to the court every six months.

[48] Arizona, Arkansas, Connecticut, Maryland, Massachusetts, Minnesota, Nevada, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, and Wyoming. Although Nevada is included as a state that mandates only a clinical review, the Nevada statute requires a court hearing if the defendant is

the thirteen states, the frequency of clinical review is not specified.[49] In the ten states that do specify frequency of clinical review, a ninety-day interval is most typically mandated.[50]

Of the eighteen states whose statutes mandate judicial oversight,[51] eight states require a hearing at the end of ninety days and subsequent hearings after an additional ninety days or some lengthier period of time.[52] The statutes of six states mandate an initial court review after six months.[53] Maine requires a court review after thirty days, the shortest period specified.[54] California requires a court review after eighteen months, the longest period specified.[55]

---

reported to be either competent or permanently incompetent, but it does not otherwise require judicial oversight of a defendant's progress toward attaining competence. NEV. REV. STAT. §§ 178.455, .460 (1992). By court rule, Mississippi requires a clinical review, and if the defendant is reported to be competent, also requires a court hearing. MISS. UNIF. CRIM. R. CIR. CT. PRAC. 4.08(1).

49 Arizona, Connecticut, Massachusetts, and Oklahoma.

50 Pennsylvania, Texas, and Wyoming (three months). North Carolina only subjects incompetent defendants to civil commitment and requires a clinical review at 90 days, 180 days, then annually thereafter, as is required for other civilly committed patients. N.C. GEN. STAT. §§ 15A-1004(d) (1988), 122C-271(b), -276(e) to (f) (1989).

51 In South Dakota, if the incompetent defendant was charged with a crime punishable by death or life imprisonment, the state will continue to detain the defendant for treatment as an incompetent defendant even if the court determines that no reasonable likelihood exists that the defendant will become competent within the next year. S.D. CODIFIED LAWS ANN. § 23A-10A-15 (Supp. 1993). By allowing the continued detention of permanently incompetent defendants without use of the customary civil commitment proceedings, the South Dakota statute appears to be in conflict with *Jackson*. Perhaps the legislation merely reflects a judgment that if a defendant is charged with a serious crime, more than one year is required to determine whether he or she will attain trial competence in the foreseeable future.

52 Alaska, Idaho, Illinois, Michigan, New Mexico, Ohio, Washington, and Wisconsin (three months).

53 Colorado, Florida, Missouri, New Jersey, Rhode Island, and Virginia.

54 Although Maine mandates an initial court review after 30 days, subsequent reviews are conducted after 60 days and one year. ME. REV. STAT. ANN. tit. 15, § 101-B(4)(A) (West Supp. 1992).

55 Although California does not require a court review until 18 months have passed, clinical reports are submitted to the court at six-month intervals. CAL. PENAL CODE § 1370(b)(2)-(3) (West Supp. 1993).

C. Limitation on Treatment of Incompetent Defendant

The very essence of *Jackson* is the Court's prohibition against indeterminately confining incompetent defendants. Although an incompetent defendant may be treated for a limited period in an attempt to restore his or her competence, treatment toward that end must cease if there is no substantial probability that the defendant will regain trial competence in the near future. At that time, the state can only justify further detention through the use of its regular civil commitment proceedings.[56] The incompetent defendant is then viewed as permanently incompetent, not as potentially restorable.

How long may an incompetent defendant be treated to restore trial competence before the state must institute civil commitment proceedings to justify further detention? Although more than twenty years have passed since the Court decided *Jackson*, the statutes of thirteen states and the District of Columbia ignore *Jackson* by continuing to allow indeterminate commitment until the defendant has been restored to competence.[57] In some of these jurisdictions, court decisions interpreting the statutes have applied *Jackson* to limit the incompetent defendant's treatment to a reasonable period of time.[58] These decisions, however, have not further delineated the acceptable length of that period.

Statutes in the thirty-seven states that have acknowledged the *Jackson* directive reflect a diversity of legislative judgment. Nevertheless, for purposes of discussion, these statutes can be grouped into various categories. Four states avoid the *Jackson* problem entirely.[59] In these states, incompetent defendants are not committed as

---

[56] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[57] Alabama, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, Oklahoma, Utah, Wyoming, and the District of Columbia. Although Massachusetts imposes no time limit to the incompetent defendant's commitment, the statute does require a finding that his or her discharge would create a likelihood of serious harm. MASS. GEN. LAWS ANN. ch. 123, §§ 8(a)-(b), 16(b)-(c) (West Supp. 1993). Similarly, Maryland allows the defendant's detention until he or she is no longer incompetent, or no longer a danger to self or others. MD. CODE ANN., HEALTH-GEN. § 12-105(b) (Supp. 1992). Mississippi has no statute imposing a time limit on an incompetent defendant's commitment. However, a Mississippi court rule limits commitment to "a reasonable period of time." MISS. UNIF. CRIM. R. CIR. CT. PRAC. 4.08(1). The court rule does not further define the length of that period.

[58] *See, e.g., infra* notes 334-36, 341 (discussing cases).

[59] New Hampshire, North Carolina, Tennessee, and Vermont.

incompetent defendants and treated to restore their competency. Rather, incompetent defendants are committed, if at all, only through the civil commitment process.[60]

Eighteen states have established a short treatment period for incompetent defendants.[61] These states apply *Jackson* in good faith. The maximum detention period ranges from a low of sixty days in two states[62] to a high of eighteen months in two others.[63] The most

---

60 The New Hampshire statute authorizes a 90-day detention to evaluate whether the incompetent defendant is an appropriate candidate for civil commitment and to initiate civil commitment proceedings. N.H. REV. STAT. ANN. § 135:17-a (Supp. 1992).

61 Alaska (180 days, plus an additional 6 months if the defendant was charged with a crime of force against another), Arizona (6 months), Arkansas (1 year), Connecticut (18 months or the maximum sentence, whichever is less), Georgia (9 months), Idaho (180 days), Indiana (6 months), Kansas (6 months), Kentucky (60 days), Maine (1 year), Michigan (15 months or 1/3 of the maximum sentence, whichever is less), Missouri (12 months), Ohio (15 months or 1/3 of the maximum sentence, whichever is less), South Carolina (60 days), Texas (18 months), Washington (90 days for developmentally disabled defendants, 180 days for other defendants; commitment may be extended for an additional 6 months), West Virginia (6 months, may be extended by 3 months on medical officer's request), and Wisconsin (12 months or the maximum sentence, whichever is less).

62 Kentucky and South Carolina. The Kentucky statute, KY. REV. STAT. ANN. § 504.110 (Baldwin 1984), as amended by 1988 Ky. Rev. Stat. & R. Serv. ch. 139, § 17 (Baldwin), is inartfully worded. Within 10 days after the 60-day treatment period, the court conducts a hearing to determine whether the defendant is competent to stand trial. KY. REV. STAT. ANN. § 504.110(1) (Baldwin 1984). If the defendant is found to be competent, proceedings are resumed. *Id.* § 504.110(3). If the defendant is found to be incompetent and there is no substantial probability that he or she will attain competency in the foreseeable future, civil commitment proceedings are conducted. *Id.* § 504.110(2). The statute, however, is silent on what happens if the court finds the defendant incompetent but restorable to competence in the foreseeable future. The Kentucky statutes contain no provision for any further detention of the incompetent defendant for treatment to restore competency.

Although the South Carolina statute limits the incompetent defendant's treatment to 60 days, S.C. CODE ANN. § 44-23-430 (Law. Co-op. 1985), if the incompetent defendant is civilly committed thereafter, he or she is subject to a special discharge statute. *Id.* § 44-23-460. Before the civilly committed incompetent defendant can be released, the superintendent notifies the court that the defendant no longer requires hospitalization, the court conducts a hearing and orders release only if the defendant remains incompetent or has been hospitalized for a period exceeding the maximum period of imprisonment to which the defendant could have been sentenced if convicted as charged. *Id.*

frequently mandated treatment period is either six months (four states)[64] or one year (four states).[65] By adding the four states that utilize the civil commitment process exclusively to the eighteen states with a short commitment period, one can assert that twenty-two states have responded appropriately to this *Jackson* issue.

In deciding what treatment period is reasonable for incompetent defendants, states are not required to make a uniform judgment. However, statutes that allow treatment to extend beyond eighteen months may well conflict with *Jackson*'s treatment limitation. *Jackson* required the duration of treatment to be reasonably related to the purpose of that treatment, i.e., to restore the defendant's competence to stand trial in the near future.[66] To be found competent, the defendant need only understand the proceedings and be able to assist his or her attorney in presenting the defense's case.[67] These criteria for restoration to trial competence are far lower than the criteria for release of civilly committed patients into the community. Typically, a civilly committed patient is released only if he or she is not a danger to himself or herself or to others and can

---

[63] Connecticut and Texas. In Connecticut, if the maximum sentence that the defendant could have received on conviction of the charges is less than 18 months, commitment cannot exceed that maximum. CONN. GEN. STAT. ANN. § 54-56d(i) (West 1985).

[64] Arizona, Idaho (180 days), Indiana, and Kansas.

[65] Arkansas, Maine, Missouri (12 months), and Wisconsin (12 months or the maximum sentence for the most serious offense charged, whichever is less). Additionally, Alaska establishes a 180-day commitment period which may be extended by the court for six months if the defendant is charged with a crime of force against another, defendant presents a substantial danger to others, and there is a substantial probability that the defendant will regain competency within a reasonable period. ALASKA STAT. § 12.47.110(b) (1990).

[66] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[67] In Dusky v. United States, 362 U.S. 402 (1960) (per curiam), the Supreme Court announced a competency standard for use in federal prosecutions. Quoting approvingly from the brief submitted by the Solicitor General, the Court ruled that the test of competency to stand trial "'must be whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Id.* (quoting Solicitor General). The *Dusky* test has been adopted, with little variation, in most states and has been codified in 18 U.S.C. § 4241(d) (1988). The federal statute provides that a defendant is mentally incompetent to stand trial if he "is presently suffering from a mental disease or defect . . . to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." *Id.*

provide for food, clothing, and shelter.[68] Nevertheless, at the time of the *Jackson* decision, the average length of stay for civilly committed patients was far less than eighteen months.[69]

In a major study of competency to stand trial issues, Ronald Roesch and Stephen Golding discussed twelve proposals to establish durational limits on the treatment of incompetent defendants.[70] Most of the proposals, from whatever source, recommended a six-month limitation with a possible six-month extension if a substantial probability existed that competence would be restored.[71] Ten of the twelve proposals limited treatment to fifteen months or less. One of the two proposals that allowed treatment beyond fifteen months came from a Canadian source;[72] the other came from a conference that preceded the *Jackson* decision.[73]

Fifteen states have enacted statutes that in one way or another circumvent *Jackson*'s treatment limitation requirement. The Florida statute, for example, establishes a five-year treatment period for any incompetent defendant charged with a felony.[74] This treatment period is more than three times longer than the eighteen-month period prescribed in the most conservative states identified as applying *Jackson* in good faith.

---

68 *See, e.g.*, CAL. WELF. & INST. CODE §§ 5256.5 (West 1984) (administrative certification review hearing), 5276 (West Supp. 1993) (judicial review through habeas corpus); *see generally* AMERICAN BAR FOUND., *supra* note 10, at 208-13.

69 For example, in California, the average length of civil commitment in state hospitals was 71 days. California Dep't of Health, Table on Average Length of Stay, California State Hospitals for Mentally Ill, Fiscal Years 1960 Through 1973 (on file with authors). Civil commitment in public or private acute care facilities rarely exceeded 17 days.

70 RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 116-20 (1980).

71 *Id.* at 116.

72 *Id.* at 118 (discussing LAW REFORM COMM'N OF CAN., MENTAL DISORDER IN THE CRIMINAL PROCESS (1976), which recommended maximum initial hospitalization of six months, renewable for subsequent one-year periods). The Canadian Law Reform Commission proposal clearly contravenes *Jackson* by permitting indeterminate commitment.

73 JUDICIAL CONFERENCE OF THE D.C. CIRCUIT, REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL (1968), *reprinted in* READINGS IN LAW AND PSYCHIATRY 643-46 (Richard C. Allen et al. eds., rev. and expanded ed. 1975). The report recommended a two-year treatment limitation with a possible six-month extension. *Id.* at 646.

74 FLA. R. CRIM. P. 3.213 (West Supp. 1993). A one-year treatment period is specified for an incompetent defendant charged with a misdemeanor. *Id.*

Of the fifteen states resisting *Jackson*, ten do so by tying the maximum length of the treatment period to the maximum sentence, or to some portion of the maximum sentence, that could be imposed if the defendant was convicted of the crime charged. In four of these states, the maximum length of treatment is the maximum possible sentence.[75] In two states, the maximum length of treatment is two-thirds of the maximum possible sentence for the most serious crime charged.[76] In another two states, the maximum length of treatment is the maximum possible sentence or ten years, whichever is less.[77] In the remaining two states, the maximum length of treatment is the maximum possible sentence or five years, whichever is less.[78]

The more serious the crime charged, the greater is the state's interest in prosecuting the defendant.[79] Thus, one commentator has asserted that the state's interest justifies statutes that tie the duration of an incompetent defendant's treatment to the maxi-

---

[75] Colorado, Louisiana, North Dakota, and South Dakota. The Colorado statute subtracts "earned time" from the maximum term of confinement. COLO. REV. STAT. ANN. § 16-8-114.5(1) (West Supp. 1992). Although the North Dakota statute does not specify the length of the treatment period, the statute requires the charges against the defendant to be dismissed at the expiration of the maximum period for which the defendant could have been sentenced if convicted. N.D. CENT. CODE § 12.1-04-08(1) (Supp. 1991).

[76] New York and Rhode Island. The New York statute applies only to an incompetent defendant charged with a felony. N.Y. CRIM. PROC. LAW § 730.50(3) (McKinney 1984). An incompetent defendant charged with a misdemeanor is subject only to a 90-day evaluation and civil commitment thereafter. *Id.* §§ 730.40(1), .50(1). In Rhode Island, if the incompetent defendant is charged with an offense punishable by life imprisonment or death, the maximum treatment period is 20 years. R.I. GEN. LAWS § 40.1-5.3-3(g) (1990).

[77] Nevada and Pennsylvania. In Pennsylvania, if the incompetent defendant is charged with first or second degree murder, no limit is placed on the length of treatment so long as the probability exists that the defendant will attain competence in the foreseeable future. PA. STAT. ANN. tit. 50, § 7403(d), (f) (Supp. 1993).

[78] Oregon and Virginia. Although the Virginia statute does not specify the length of the treatment period, the statute requires the charges against the defendant to be dismissed at the expiration of the maximum period for which the defendant could have been sentenced if convicted, or five years from the date of arrest, whichever is sooner. VA. CODE ANN. § 19.2-169.3(C) (Michie 1990).

[79] Marjory W. Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L.J. 484, 494 (1975).

mum possible sentence.[80] This assertion, however, is unfounded. In *Jackson*, the Court conditioned an incompetent defendant's treatment on progress toward the goal of restoration to competence.[81] A defendant charged with a serious crime is not by that fact more difficult to treat or less responsive to treatment than a defendant charged with a less serious crime.[82] Because progress in treatment cannot be measured by the seriousness of the criminal charge, statutes authorizing treatment for the maximum possible sentence are not compatible with the Court's progress requirement. The state violates the defendant's due process right because the nature and duration of the commitment are not reasonably related to the purpose for which the defendant was committed.[83]

Additionally, the *Jackson* Court authorized treatment only of those incompetent defendants who "probably soon will be able to stand trial."[84] Statutes authorizing treatment for the maximum period that defendants could be sentenced do not appropriately limit treatment only to those who probably soon will be able to stand trial. In reality, statutes tying treatment to the maximum sentence attempt to assure that incompetent defendants are punished sufficiently for their alleged crimes.[85]

Two states establish a one-year treatment period for an incompetent defendant but provide for an evidentiary hearing thereafter on the question of the defendant's guilt of the crime charged.[86] If the defendant is found to have committed a crime, he or she undergoes further treatment. In New Mexico, this extended treatment period may equal the maximum sentence that could have been imposed if the defendant had been convicted in a criminal pro-

---

80 *Id.*

81 Jackson v. Indiana, 406 U.S. 715, 738 (1972).

82 ROESCH & GOLDING, *supra* note 70, at 127.

83 In *Jackson*, the Court stated, "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738.

84 *Id.*

85 ROESCH & GOLDING, *supra* note 70, at 127. The authors also state that treatment of incompetent defendants for a period equal to the maximum possible sentence results in lengthier confinement than if the defendants had been convicted. Defendants convicted of crimes often receive less than maximum sentences and are eligible for parole before serving their full sentences. Additionally, through plea bargaining, many defendants are not convicted of the most serious crime with which they were initially charged. *Id.*

86 Illinois and New Mexico.

ceeding.[87] In Illinois, the extended treatment period may last for a maximum of five years if the court finds that the defendant committed first degree murder, two years for major felonies, and fifteen months for other felonies.[88] Thereafter, the Illinois statute places the incompetent defendant into a hybrid status. He or she is subject to civil commitment and is treated in the same manner as a civilly committed patient. However, the court must approve any conditional release or discharge for a period equal to the maximum sentence that could have been imposed if the defendant had been convicted in a criminal proceeding.[89] Additionally, the statute requires that the civilly committed incompetent defendant be placed in a secure setting unless the court determines that such placement is not necessary.[90]

In standard 7-4.13 of its Criminal Justice Mental Health Standards, the American Bar Association (ABA) proposed that permanently incompetent defendants charged with felonies involving serious bodily harm be subjected to hearings on factual guilt similar to those conducted in Illinois and New Mexico.[91] In the Commentary to this standard, the ABA expressed its belief that the *Jackson* alternatives of civil commitment or release inadequately addressed the problem of permanently incompetent criminal defendants.[92] According to the ABA, a factual guilt hearing "is a functional counterpart to a criminal trial" warranting extended commitment if the court does not acquit the incompetent defendant.[93] The ABA observed that language in the *Jackson* dictum recognized that a court could conduct some proceedings despite the defendant's incompetence.[94]

---

87 N.M. STAT. ANN. § 31-9-1.5(D)(4)(b) (Michie Supp. 1992). The order for extended treatment also requires a *previous* finding that the defendant is dangerous. *Id.* § 31-9-1.5(C). The trial court is required to review the issues of trial competency and dangerousness at least every two years. *Id.* § 31-9-1.5(D)(4).

88 ILL. ANN. STAT. ch. 38, para. 104-25(d) (Smith-Hurd Supp. 1992).

89 *Id.*

90 *Id.* ch. 38, para. 104-25(g)(2).

91 ABA STANDARDS, *supra* note 12, at standard 7-4.13(b).

92 *Id.* at commentary at 241-42. The Commentary discusses various scholarly proposals to deal with the problem presented by permanently incompetent criminal defendants. *Id.* at 243-46. The ABA proposal "borrows selectively" from several of those proposals. *Id.* at 247.

93 *Id.* at 250.

94 *Id.* at 242-43. *See* Jackson v. Indiana, 406 U.S. 715, 740-41 (1972).

Jackson, however, does not support the ABA proposal. Although the *Jackson* dictum discussed the desirability of permitting a court to conduct some proceedings despite the defendant's incompetence, the Court did not intimate that a factual guilt hearing could justify an extended commitment period for incompetent defendants who are not progressing towards restoration of competence. To the contrary, the Court viewed these proceedings as an opportunity for an incompetent defendant to establish his or her innocence so that special commitment as an incompetent defendant would terminate.[95]

Support for a factual guilt hearing approach may be found in *Jones v. United States*,[96] a 1983 Supreme Court decision concerning a defendant acquitted of a crime by reason of insanity. The Court identified insanity acquittees as a special class who could be confined without the procedural protections available to other candidates for commitment.[97] The Court ruled that the finding of insanity at the criminal trial was sufficiently probative of the defendant's continuing mental illness and dangerousness to justify commitment without resort to civil commitment proceedings.[98] In a footnote, the Court distinguished insanity acquittees from incompetent defendants observing that, in *Jackson*, there was no affirmative proof that the incompetent defendant had committed a criminal act or was otherwise dangerous.[99] Thus, one could assert that if a court conducts a hearing on factual guilt and the prosecutor supplies affirmative proof that the incompetent defendant committed a criminal act, an extended treatment period is justified.

---

95 The ABA has identified a number of pretrial matters that could be conducted without any prejudice to the incompetent defendant. Permitted proceedings might include the following motions: to suppress illegally seized evidence; to dismiss a prosecution based on entrapment if the defendant's personal testimony is not needed to resolve factual issues; to dismiss the indictment on purely legal grounds including double jeopardy, denial of a speedy trial or expiration of the statute of limitations. ABA STANDARDS, *supra* note 12, at standard 7-4.12 commentary at 237-38.

96 463 U.S. 354 (1983).

97 *Id.* at 370.

98 *Id.* at 363-66. The Court noted that the insanity verdict established beyond a reasonable doubt that the defendant committed a criminal act and that the act was committed because of mental illness. Congress may determine that such findings are adequate in and of themselves to confine the insanity acquittee as a dangerous and mentally ill person. *Id.*

99 *Id.* at 364 n.12.

This assertion, however, is unfounded. In *Foucha v. Louisiana*,[100] the Supreme Court ruled that the state may commit insanity acquittees as long as they are both mentally ill and dangerous, but no longer.[101] Thus, even if an insanity acquittee remains dangerous, commitment of the individual as an insanity acquittee must end if he or she is no longer mentally ill. Thereafter, if commitment can occur at all, the state must achieve it through the civil commitment process applicable to all other citizens. As authority to support this 1992 decision, the Court repeatedly cited *Jackson* and reiterated *Jackson*'s finding that due process requires the commitment to bear some reasonable relation to the purpose for which the state committed the individual.[102]

In *Jackson*, the Court declared that the purpose of an incompetent defendant's commitment is to determine whether the individual will be restored to competency in the near future, and if so, to treat the individual toward that end. No other purpose was identified by the Court in *Jackson*, and no other purpose has been identified by the Court since it decided *Jackson*. Because a factual finding of guilt is not related to progress in treatment to restore competence, a factual guilt hearing cannot justify an extended period of treatment. Even if the factual guilt finding could justify placement of incompetent defendants into a special class for commitment purposes initially, the special commitment must end when the justification for that commitment ends. If the incompetent defendant has not progressed toward restoration of competence, he or she can no longer be committed as an incompetent defendant. Subsequent commitment of the permanently incompetent defendant, if it is to occur at all, must be achieved through the civil commitment process.

Concern that the civil commitment process may be inadequate to deal with permanently incompetent criminal defendants appears exaggerated. As discussed above, four states use only the civil commitment process to confine any incompetent defendant.[103] An additional eighteen states use the civil commitment process for permanently incompetent criminal defendants.[104] Although their experience has not been systematically analyzed, the absence of leg-

---

100 112 S. Ct. 1780 (1992).

101 *Id.* at 1784.

102 *Id.* at 1785.

103 *See supra* text accompanying notes 59-60.

104 *See supra* text accompanying notes 61-65.

islative activity to replace the civil commitment approach suggests that it is being used successfully.

Throughout the United States, a mentally disordered person who is dangerous to others is subject to civil commitment.[105] In a civil commitment proceeding, proof that a permanently incompetent defendant recently engaged in serious activity endangering others should suffice for an order of commitment. But unlike permanently incompetent defendants in Illinois and New Mexico whose extended treatment is for the limited purpose of restoring trial competency, civilly committed incompetent defendants are treated as are all other civilly committed patients. The goal of treatment is to eliminate the dangerous condition so that these patients may be returned to the community. If in the course of the treatment process a defendant's competence is restored, the state is not precluded from renewing the criminal prosecution if criminal charges have not been dismissed.[106]

Even if factual guilt hearings could justify extended commitment of incompetent defendants, the Illinois and New Mexico statutes are deficient for yet another reason. Unlike the ABA standard that affords the incompetent defendant the procedural safeguards of a criminal trial,[107] the Illinois and New Mexico statutes are far less protective. In both states, the hearing is conducted by the court without a jury, and hearsay evidence is admissible.[108] In New Mexico, the statute authorizes an extended commitment upon proof by a preponderance of the evidence that the defendant committed a crime.[109] In 1990, an appellate court found that when the New Mexico legislature used the word "crime," it meant commission of a criminal act, without regard to the mental competence of

---

105 AMERICAN BAR FOUND., *supra* note 10, at 34. The American Bar Foundation lists 47 states in which dangerousness to self or others is a criterion for a court-ordered civil commitment. *Id.* at 114-19 (Table 2.6).

106 Approximately half the states have enacted statutes requiring that criminal charges against incompetent defendants be dismissed. Some states require dismissal when the defendant has been subjected to treatment for a specified period, or when it appears that defendant will not be restored to competence, or when so much time has elapsed that holding a trial is not in the interest of justice. *See id.* at 755-58 (Table 12.2); ROESCH & GOLDING, *supra* note 70, at 121-26 (Table 5.2), 130.

107 ABA STANDARDS, *supra* note 12, at standard 7-4.13(b).

108 ILL. ANN. STAT. ch. 38, para. 104-25(a) (Smith-Hurd Supp. 1992); N.M. STAT. ANN. § 31-9-1.5(A) (Michie Supp. 1992).

109 N.M. STAT. ANN. § 31-9-1.5(D) (Michie Supp. 1992).

the defendant at the time of the act.[110] Thus, the court held that at the hearing to extend the incompetent defendant's commitment, the defendant may not assert either an insanity defense[111] or a defense based on the defendant's inability to form a specific intent required for a finding of guilt.[112] By statute, the permanently incompetent defendant is confined in a secure, locked facility maintained by the Department of Health.[113] Ironically, the Illinois statute requires the defendant to be placed in a secure setting after he or she has been civilly committed following the expiration of an extended period of treatment as an incompetent defendant.[114]

The Minnesota statutes reflect a profoundly ambivalent attitude toward incompetent defendants. The basic statute authorizes commitment of incompetent defendants only through the civil commitment process.[115] Thus, Minnesota appears to be in that small group of states that appropriately avoids the *Jackson* problem entirely by precluding commitment of incompetent defendants for the limited purpose of restoring their competency. However, a Minnesota statute enacted in 1985 provides that if an incompetent defendant is found to have homicidal tendencies, he or she shall be committed "to the Minnesota Security Hospital for safekeeping and treatment . . . until recovery."[116] Thus, Minnesota appears to be in that group of states that ignores *Jackson* by continuing to allow indeterminate commitment of some incompetent defendants until their competence has been restored. Moreover, if the Minnesota statute is construed to require recovery from the defendant's homicidal tendencies as well as the defendant's incompetence, then the statute also offends the recent Supreme Court decision in *Foucha*.[117]

---

110 State v. Werner, 796 P.2d 610, 612 (N.M. Ct. App. 1990).

111 *Id.* at 613.

112 *Id.*

113 N.M. STAT. ANN. § 31-9-1.5(D)(1) (Michie Supp. 1992).

114 ILL. ANN. STAT. ch. 38, para. 104-25(g)(2) (Smith-Hurd Supp. 1992). Additionally, the court that ordered the civil commitment must approve any conditional release or discharge of the patient for the period of commitment equal to the maximum sentence that could have been imposed if the defendant had been convicted in a criminal proceeding. *Id.* In apparent violation of *Jackson*, this provision distinguishes civilly committed permanent incompetent defendants from all other civilly committed patients who may be released or discharged without court review.

115 MINN. R. CRIM. P. 20.01(5).

116 MINN. STAT. ANN. § 253.25 (West Supp. 1993).

117 Foucha v. Louisiana, 112 S. Ct. 1780 (1992). *See supra* text accompanying notes 100-02 (discussing *Foucha*).

An incompetent defendant is committed for treatment to restore competence to stand trial. Once competence has been restored, the defendant is entitled to a speedy trial without any delay necessitated by treatment to eliminate his or her homicidal tendencies.

California's resistance to *Jackson* is twofold. First, the California statute permits incompetent defendants to be treated for up to three years before they are processed as permanently incompetent.[118] This treatment period is twice the eighteen-month period prescribed in the most conservative states identified above as applying *Jackson* in good faith.[119] Second, even if the three-year treatment period were acceptable, a California statute authorizes the civil commitment of permanently incompetent criminal defendants using different criteria than are used for other civilly committed patients.[120]

Prior to the *Jackson* decision, incompetent defendants in California were committed to state hospitals until they became "sane," that is, competent.[121] As a result of *Jackson* and a 1973 California Supreme Court decision applying *Jackson*,[122] permanently incompetent defendants could only be confined through the state's customary civil commitment proceedings. A few years prior to *Jackson*, however, the California Legislature had enacted reform legislation limiting civil commitment to a series of short confinement periods:

---

118 CAL. PENAL CODE § 1370(c)(1) (West Supp. 1993) authorizes commitment for up to three years "or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged . . . , whichever is shorter." The statute requires the medical director of the treatment facility to submit a written report on the defendant's competence within 90 days of the commitment and at six-month intervals thereafter. *Id.* § 1370(b)(1). After 18 months, a court hearing is conducted to determine whether the defendant is competent to stand trial. *Id.* § 1370(b)(2).

119 *See supra* text accompanying notes 61-63.

120 CAL. PENAL CODE § 1370(c)(2) (West Supp. 1993).

121 Act of Aug. 16, 1968, ch. 1374, § 2, 1968 Cal. Stat. 2634, 2637.

122 *In re* Davis, 505 P.2d 1018 (Cal.), *cert. denied*, 414 U.S. 870 (1973). In *Davis*, the California Supreme Court ruled that the incompetent defendant petitioners, who had been accused of misdemeanors, adjudged incompetent to stand trial, and hospitalized for several months, were entitled to an immediate hearing on the question of their progress toward competence. 505 P.2d at 1027. If no reasonable likelihood existed that the petitioners would recover their competence, the trial court was required to order their release from confinement or to initiate civil commitment proceedings. *Id.* at 1025.

seventy-two hours, fourteen days, and ninety days.[123] The initial seventy-two-hour evaluation and treatment detention[124] and a subsequent fourteen-day intensive treatment certification[125] are authorized if the person, as a result of mental disorder, is a danger to others, to himself or herself, or gravely disabled. At the time *Jackson* was decided, a ninety-day postcertification treatment detention could be ordered if the person had either (a) threatened, attempted, or inflicted physical harm upon another after having been taken into custody for evaluation and treatment, or (b) had attempted or inflicted physical harm upon another, that act having resulted in the person being taken into custody, and who in addition, as a result of mental disorder, presents an imminent threat of substantial physical harm to others.[126] Subsequent ninety-day detentions could be ordered if the person threatened, attempted, or inflicted physical harm on another during the postcertification

---

123 California Mental Health (Lanterman-Petris-Short) Act of 1967, ch. 1667, § 36, 1967 Cal. Stat. 4053, 4074 (codified as amended at CAL. WELF. & INST. CODE §§ 5000-5772 (West Supp. 1993). The statutes became effective on July 1, 1969. Because of its emphasis on voluntary, community-based treatment and its limitations on preventive detention, the California legislation has been commended by scholars and judges, and has been copied by other state legislatures. *See* Grant H. Morris, *Conservatorship for the "Gravely Disabled": California's Nondeclaration of Nonindependence*, 15 SAN DIEGO L. REV. 201, 204-05 n.21-26 (1978) (citing sources); R.K. Schwitzgebel, *Survey of State Civil Commitment Statutes, in* U.S. DEP'T OF HEALTH AND HUMAN SERVS., CIVIL COMMITMENT AND SOCIAL POLICY: AN EVALUATION OF THE MASSACHUSETTS MENTAL HEALTH REFORM ACT OF 1970, at 47, 49 (1981).

124 CAL. WELF. & INST. CODE §§ 5150 (West 1984) (72-hour evaluation without court intervention), 5206 (West 1984) (court-ordered 72-hour evaluation), 5230 (West 1984) (court-ordered 72-hour evaluation for persons impaired by chronic alcoholism or drug abuse).

125 *Id.* § 5250 (West Supp. 1993) (certification for 14 days of intensive treatment). At the expiration of the 14-day intensive treatment period, a person who is imminently suicidal may be certified for an additional 14-day intensive treatment period. *Id.* § 5260 (West 1984).

126 Act of Aug. 16, 1968, ch. 1374, § 41, 1968 Cal. Stat. 2634, 2655 (codified as amended at CAL. WELF. & INST. CODE § 5300 (West 1984)). The 1968 statute, which became operative on July 1, 1969, amended a statute enacted in 1967 that never became operative. California Mental Health Act of 1967, *supra* note 123, at 4089. The 1968 amendment broadened the scope of the postcertification order by authorizing detention of persons who had engaged in assaultive conduct that led to their initial commitment, but who had not engaged in any assaultive conduct or threat of assaultive conduct while in custody for evaluation and treatment.

period and continued to be imminently dangerous because of mental disorder.[127]

At the time *Jackson* was decided, "gravely disabled" was defined as "a condition in which a person as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter."[128] Under the California statutes, the court may establish a mental health conservatorship for a person who is gravely disabled.[129] The court may grant the conservator the authority to place the conservatee in a state hospital or other mental treatment facility[130] and to require the conservatee to undergo treatment to remedy the condition of grave disability.[131] A conservatorship terminates after one year but may be renewed annually.[132]

Participants in legislative hearings expressed concern that potentially violent permanently incompetent defendants would not be subject to detention under California's civil commitment statutes. A defendant who did not act violently during a ninety-day postcertification commitment might not constitute an "imminent threat" necessary to renew that commitment. A defendant who was able to provide for basic personal needs was not subject to a mental health conservatorship that could result in detention for a one-year period.[133]

In 1974, the California Legislature enacted emergency legislation[134] and declared the statutes an urgency measure "necessary for the immediate preservation of the public peace, health, or safety" and the elimination of uncertainty regarding court procedures.[135] One statute added an alternative definition of "gravely disabled" to

---

127 Act of Nov. 22, 1971, ch. 1593, § 374, 1971 Cal. Stat. 3209, 3340 (codified as amended at CAL. WELF. & INST. CODE § 5304 (West 1984)).

128 Act of Nov. 22, 1971, ch. 1593, § 366, 1971 Cal. Stat. 3209, 3336 (codified as amended at CAL. WELF. & INST. CODE § 5008(h)(1)(A) (West Supp. 1993).

129 CAL. WELF. & INST. CODE § 5350 (West Supp. 1993).

130 *Id.* § 5358(a).

131 *Id.* § 5358(b). The California statutes declare the admission of the conservatee to be a "voluntary" admission and deem the conservatee to be a "voluntary" patient. *Id.* §§ 6000, 6002 (West 1984). For a critique of California's conservatorship statutes, *see* Morris, *supra* note 123.

132 CAL. WELF. & INST. CODE § 5361 (West 1984).

133 Conservatorship of Hofferber, 616 P.2d 836, 846 (Cal. 1980) (citing hearings conducted by California Assembly Select Committee on Mentally Disordered Criminal Offenders, December 13-14, 1973).

134 Act of Sept. 26, 1974, ch. 1511, 1974 Cal. Stat. 3316.

135 Act of Sept. 26, 1974, ch. 1511, § 16, 1974 Cal. Stat. 3316, 3323-24.

the existing one. Under this new definition, "gravely disabled" also means a condition in which a person has been found mentally incompetent to stand trial and all of the following facts exist: (1) the indictment or information charges a felony involving death, great bodily injury, or a serious threat to the physical well-being of another; (2) the indictment or information has not been dismissed; and (3) the person is incompetent to stand trial.[136] Another statute applied this alternative definition only to permanently incompetent defendants, distinguishing them from all other persons.[137] For the permanently incompetent defendant, a finding of "grave disability" is not dependent upon proof of a functional inability to provide for food, clothing, and shelter. And yet, as with other gravely disabled persons, a permanently incompetent defendant who is gravely disabled under this alternative definition may be placed on a conservatorship and subjected to inpatient commitment at the direction of the conservator.[138]

In *Conservatorship of Hofferber*,[139] the California Supreme Court upheld the validity of the 1974 legislation. Although recognizing that *Jackson* prohibited civil commitment of permanently incompetent defendants using arbitrary and discriminatory standards, the court opined that *Jackson* did not preclude use of permanent

---

136 Act of Sept. 26, 1974, ch. 1511, § 12, 1974 Cal. Stat. 3316, 3322. As renumbered, and with some minor technical amendments, the statute has been codified as CAL. WELF. & INST. CODE § 5008(h)(1)(B) (West Supp. 1993).

137 Act of Sept. 26, 1974, ch. 1511, § 6, 1974 Cal. Stat. 3316, 3318-20 (codified as amended at CAL. PENAL CODE § 1370(c)(2) (West Supp. 1993).

A North Dakota statute specifically authorizes the appointment of a guardian or conservator for a permanently incompetent defendant in lieu of civil commitment. N.D. CENT. CODE § 12.1-04-08(3)(a) (Supp. 1991). Unlike California, however, the North Dakota statute uses the same criteria for appointment of the guardian or conservator as is used for all other persons. *Id.*

138 CAL. PENAL CODE § 1370(c)(2) (West Supp. 1993) refers specifically to a person who is gravely disabled as defined in CAL. WELF. & INST. CODE § 5008(h)(2). Section 5008(h) was amended in 1991, and § 5008(h)(2) was renumbered § 5008(h)(1)(B). A newly renumbered § 5008(h)(2) defines "gravely disabled" as a condition in which a person, as a result of chronic alcoholism, is unable to provide for basic personal needs of food, clothing or shelter. Act of Oct. 7, 1991, ch. 681, § 1, 1991 Cal. Stat. —, —. Ironically, permanently incompetent defendants are not included within the purview of the revised § 5008(h)(2).

139 616 P.2d 836 (Cal. 1980).

incompetency as a basis for involuntary civil commitment.[140] The court asserted that to further its interests in public safety and humane treatment of the mentally disturbed the state "may adopt more than one procedure for isolating, treating, and restraining dangerous persons."[141] Thus, the legislature may establish a short-term civil commitment process for an imminently dangerous person who has not been adjudicated under the criminal justice system. However, relying upon a magistrate's probable cause finding that an individual has committed a violent felony, the legislature may also establish a separate, longer-term civil commitment process for a permanently incompetent defendant.[142]

Although the California legislation did not expressly require proof of continuing dangerousness to establish a conservatorship for permanently incompetent criminal defendants, the court imposed this requirement in order to preserve the statute's constitutionality. Thus, before a conservatorship for a permanently incompetent defendant can be created or renewed, the court must find that, by reason of a mental disorder, the person represents a substantial danger of physical harm to others.[143] Although the requirement of continuing incompetence may be established by a preponderance of the evidence, the incompetent defendant's dangerous mental condition must be established by proof beyond a reasonable doubt and, if requested, by a unanimous jury.[144]

In an angry dissent, Chief Justice Bird denounced the court's decision:

> It is with considerable bewilderment that one reads today's majority opinion. Explicit words—not to mention fundamental premises—of a United States Supreme Court decision are ignored, as if they do not exist. Firmly established methods of equal protection analysis are fleetingly alluded to and then forgotten. Plain

---

140 *Id.* at 843-44.

141 *Id.* at 844.

142 *Id.* at 844-46.

143 *Id.* at 846-47.

144 *Id.* at 848-49. In Conservatorship of Roulet, 590 P.2d 1, 11 (Cal. 1979), the California Supreme Court ruled that the condition of "grave disability" necessary for a traditional conservatorship must be established by proof beyond a reasonable doubt to a unanimous jury. Because dangerous mental condition is the sole basis for continued confinement of permanently incompetent defendants under the legislative expansion of "grave disability," the Court required proof beyond a reasonable doubt and jury unanimity. Conservatorship of Hofferber, 616 P.2d 836, 848 (Cal. 1980).

> truths that this court has heretofore openly embraced are now somehow repealed.[145]

The *Hofferber* majority's analysis of *Jackson* is dubious indeed. *Jackson* specifically prohibited use of a more lenient commitment standard and a more stringent release standard for permanently incompetent defendants than for other persons not charged with crimes.[146] If a defendant is permanently incompetent, *Jackson* obligates the state either to "institute the *customary* civil commitment proceeding that would be required to commit indefinitely *any other citizen*, or release the defendant."[147] California's customary civil commitment proceedings protect the public against imminently dangerous persons. The statutes authorizing a ninety-day postcertification detention, and potential renewals of that detention,[148] embodied the California Legislature's expressed intent to "guarantee and protect public safety."[149] The *Hofferber* majority failed to explain why separate commitment proceedings were necessary[150] to provide protection against permanently incompetent defendants who may or may not be imminently dangerous.

The *Hofferber* majority relied on the probable cause determination to justify a separate commitment track for permanently incom-

---

145 *Hofferber*, 616 P.2d at 852 (Bird, C.J., dissenting).

146 Jackson v. Indiana, 406 U.S. 715, 730 (1972).

147 *Id.* at 738 (emphasis added).

148 Act of Aug. 16, 1968, ch. 1374, § 41, 1968 Cal. Stat. 2634, 2655 (codified as amended at CAL. WELF. & INST. CODE § 5300 (West 1984)); Act of Nov. 22, 1971, ch. 1593, § 374, 1971 Cal. Stat. 3209, 3340 (codified as amended at CAL. WELF. & INST. CODE § 5304 (West 1984)). *See supra* text accompanying notes 126-27.

149 CAL. WELF. & INST. CODE § 5001(c) (West 1984). A legislative subcommittee's report, upon which the civil commitment reforms were predicated, stated that "an involuntary system [of civil commitment was required] for identifying and separating dangerous persons from the community, with full due process of law, and providing them with such treatment and custody as may be required." SUBCOMMITTEE ON MENTAL HEALTH SERVS., ASSEMBLY INTERIM COMM. ON WAYS AND MEANS, CAL. LEGISLATURE, THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA—A BACKGROUND DOCUMENT 20 (1966).

150 Because involuntary confinement involves a fundamental liberty interest, even the *Hofferber* majority recognized that strict scrutiny was the correct standard to review the statutes' constitutionality. Conservatorship of Hofferber, 616 P.2d 836, 843 n.8 (Cal. 1980). Under that standard, the court must determine whether the statutory disparities between permanently incompetent defendants and other unconvicted, dangerous, mentally disordered persons are necessary to protect the public. *Id.* at 855 (Bird, C.J., dissenting).

petent defendants. Such reliance is unwarranted. The state's burden to establish probable cause at a preliminary examination is less than its burden to establish guilt at a criminal trial. Therefore, a judicial determination that an accused should be held for trial is a less reliable indicator of the defendant's guilt than is a conviction. And if the accused is incompetent at the preliminary hearing, the missed opportunity for effective cross-examination or presentation of a defense renders the probable cause determination even less reliable.[151] The majority identified three other groups of persons for whom long-term commitment proceedings have been authorized: insanity acquittees, mentally disordered sex offenders, and dangerous persons committed to the Youth Authority.[152] However, unlike incompetent defendants, no individual in these three groups can be subjected to long-term commitment proceedings until a court has determined beyond a reasonable doubt that the individual is guilty of a crime.[153] Try as it might, the majority simply cannot equate accusation of a crime with a finding of guilt.

For yet another reason, the state's compelling interest in public safety cannot justify disparate treatment of permanently incompetent defendants. The public's safety is threatened by an individual's present dangerousness, not by past criminal activity or accusations of past criminal activity. Under California law, proceedings to establish a conservatorship for a permanently incompetent defendant are normally brought more than three years after the alleged crime was committed.[154] Even the *Hofferber* majority acknowledged that the mere passage of time diminishes the validity of an assumption that the incompetent defendant's dangerousness continues unabated.[155] By requiring a hearing on the permanently incompetent defendant's present dangerousness, the *Hofferber* court avoided a significant due process problem; however, the court did not overcome the equal protection barrier posed by *Jackson.*

---

151 *Id.* at 856 (Bird, C.J., dissenting).

152 *Id.* at 844. The special long-term commitment statutes are found at CAL. PENAL CODE § 1026 (West Supp. 1993) (insanity acquittees); Act of July 16, 1980, ch. 547, § 19, 1980 Cal. Stat. 1504, 1525 (codified at CAL. WELF. & INST. CODE § 6316 (West 1984), repealed by Act of Sept. 27, 1981, ch. 928, § 2, 1981 Cal. Stat. 3484, 3485) (mentally disordered sex offenders); CAL. WELF. & INST. CODE § 1800 (West Supp. 1993) (dangerous persons committed to Youth Authority).

153 *Hofferber*, 616 P.2d at 857 (Bird, C.J., dissenting).

154 *Id.* at 855 (Bird, C.J., dissenting).

155 *Id.* at 847.

The requirement of a hearing on the permanently incompetent defendant's present dangerousness does not eliminate all due process concerns. May an individual who has never been proven beyond a reasonable doubt to have committed any violent criminal act be involuntarily committed, potentially for the remainder of his or her life, based on a finding of present dangerousness?[156] May such an individual be placed in an institution that the California Supreme Court has repeatedly cited as not differing appreciably from a prison and in which the individual receives no treatment for his or her dangerous mental condition?[157] Chief Justice Bird raised both issues in her dissenting opinion. She was not persuaded by the majority's assertion that Hofferber's confinement was not penal in nature and imposed no punishment. To so assert, she contended, was "to exalt form over substance."[158] Even the majority conceded that permanently incompetent defendant conservatees, including Hofferber himself, "often are confined at Patton and Atascadero State Hospitals, prisonlike institutions that also house [individuals] convicted of crime[s]."[159]

The goal of protecting the public from potentially dangerous permanently incompetent defendants can be achieved appropriately without creating equal protection and due process problems. Rather than assuming that incompetent defendants are more dangerous than even "imminently dangerous" civil patients, the easy and obvious solution is to lengthen the period of commitment for all dangerously mentally ill persons who are subject to civil commitment. Ironically, two years after the *Hofferber* decision, the California Legislature enacted legislation doubling the commitment period for dangerous civilly committed patients.[160] Thus, following the initial 72-hour evaluation and treatment detention and a subsequent 14-day intensive treatment certification, a 180-day postcertification treatment detention can be ordered for a civilly

---

156 *Id.* at 857 (Bird, C.J., dissenting).

157 *Id.* at 858 (Bird, C.J., dissenting). Based on his familiarity with Patton State Hospital and Atascadero State Hospital, Dr. Meloy disagrees with the court's characterization of these facilities. *But see* Grant H. Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L.J. 855, 866-68 (discussing prison-like physical characteristics of Atascadero State Hospital and security orientation of its staff).

158 *Hofferber*, 616 P.2d at 858 (Bird, C.J., dissenting).

159 *Id.* at 850 n.18.

160 Act of Sept. 30, 1982, ch. 1563, § 1, 1982 Cal. Stat. 6167. With minor technical amendments, the statute has been codified as CAL. WELF. & INST. CODE § 5300 (West 1984).

committed patient who is dangerous. In defining dangerous, the statute substituted a requirement that the individual present "a demonstrated danger of inflicting substantial physical harm upon others" for the "imminent threat of substantial physical harm to others" language previously required for a ninety-day detention.[161] Subsequent 180-day detentions can be ordered if the individual threatened, attempted, or inflicted physical harm on another during the postcertification period and continues to be a demonstrated danger because of mental disorder.[162] This legislation was not enacted in response to concerns about the appropriate handling of permanently incompetent criminal defendants,[163] and the legislation does not affect the special conservatorship statute applicable only to permanently incompetent defendants. We can only speculate as to whether the emergency legislation creating those conservatorships would have been deemed necessary if the 180-day postcertification commitment period had been in existence at the time the special conservatorship statute was enacted.[164]

In summary, the statutes of fifteen states circumvent *Jackson* by: imposing a lengthy treatment period (Florida and California),[165] tying the maximum length of the treatment period to the maximum sentence that could have been imposed if the defendant were convicted of the crime charged (ten states),[166] authorizing an extended treatment period following an evidentiary hearing on the defendant's guilt of the crime charged (Illinois and New Mexico),[167] authorizing indeterminate commitment if the incompetent defendant is found to have homicidal tendencies (Minne-

---

161 *Id.*

162 CAL. WELF. & INST. CODE § 5304(b) (West 1984).

163 This legislation was designed to increase public protection from civilly committed, potentially dangerous mental patients. Specifically, the legislation extended the postcertification treatment period from 90 days to 180 days, allowed the court to consider the individual's past behavior in assessing his or her present mental condition, provided for a supervised outpatient program, and specified procedures for revoking outpatient status. *Review of Selected California Legislation*, 14 PAC. L.J. 357, 659 (1982).

164 In the last 20 years, indeterminate civil commitment statutes have been replaced throughout the United States by statutes authorizing civil commitment for definite periods only. Typically the statutes permit detention for up to six months, with a new hearing required if continued commitment is sought. Recommitment is usually limited to a period equal to or no more than double the original length. AMERICAN BAR FOUND., *supra* note 10, at 72.

165 *See supra* text accompanying notes 74, 118-19.

166 *See supra* text accompanying notes 75-85.

167 *See supra* text accompanying notes 86-114.

sota),[168] or authorizing civil commitment using different criteria than are used for any other civilly committed patient (California).[169] Additionally, the statutes of thirteen states and the District of Columbia ignore *Jackson* and continue to allow indeterminate commitment of permanently incompetent defendants.[170] By combining the jurisdictions that circumvent *Jackson* with those that ignore it, we conclude that twenty-eight states and the District of Columbia have responded inappropriately to this *Jackson* issue.

II. Conservatorships for Dangerous, Permanently Incompetent Defendants: An Empirical Study of the California Experience

Recently, David Wexler and Bruce Winick decried the paucity of empirical research examining the treatment process for criminal defendants found incompetent to stand trial.[171] They questioned whether treatment is focused appropriately on the short-term goal of restoring trial competence rather than the long-term goal of alleviating psychopathology.[172] Even less is known about permanently incompetent criminal defendants. What are the demographic characteristics of these individuals? What mental disorders signal an increased likelihood of permanent incompetence? Are permanently incompetent defendants charged with similar crimes? Are decisions to categorize individuals as permanently incompetent made in accordance with the statutory criteria? Are the treatment goals for these patients clearly identified and appropriate? To begin answering these questions, Part II analyzes statistical data on individuals classified as permanently incompetent criminal defendants in California. After briefly presenting statewide data, Part II focuses on a sample population, analyzing their hospital and court records.

A. Statewide Data

The California Department of Mental Health provided the authors with data on all permanently incompetent criminal defen-

168 *See supra* text accompanying notes 115-17.

169 *See supra* text accompanying notes 120-64.

170 *See supra* text accompanying notes 57-58.

171 David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. Miami L. Rev. 979, 997 (1991).

172 *Id.*

dants confined in state mental hospitals on September 29, 1992.[173] There were ninety-seven such patients. Of this total, eighty-eight (90.7%) were men and nine (9.3%) were women.

TABLE 1: STATEWIDE DATA ON CALIFORNIA'S PERMANENTLY INCOMPETENT CRIMINAL DEFENDANTS (N=97)

A. County of Origin

County	Number	Percent	Ratio of Patients to Population of County (Statewide 1:306,804)
Los Angeles	22	22.7	1:402,872
San Diego	10	10.3	1:249,802
Sacramento	9	9.3	1:115,691
Santa Clara	9	9.3	1:166,397
Alameda	6	6.2	1:213,197
Orange	6	6.2	1:401,759
Placer	4	4.1	1:43,199
Tulare	4	4.1	1:77,980
Napa	3	3.1	1:36,922
San Joaquin	3	3.1	1:160,209
Santa Barbara	3	3.1	1:123,203
San Francisco	2	2.1	1:361,980
San Mateo	2	2.1	1:324,812
Stanislaus	2	2.1	1:185,261
Ventura	2	2.1	1:334,508
Contra Costa	1	1.0	1:803,732
Fresno	1	1.0	1:667,490
Kern	1	1.0	1:543,477
Kings	1	1.0	1:101,469
Marin	1	1.0	1:230,096
Monterey	1	1.0	1:355,660
Riverside	1	1.0	1:1,170,413
San Luis Obispo	1	1.0	1:217,162
Solano	1	1.0	1:340,421
Tehama	1	1.0	1:49,625

B. State Hospital in Which Patients Confined

Hospital	Number	Percent
Patton	54	55.7
Atascadero	24	24.7
Napa	15	15.5
Camarillo	3	3.1
Metropolitan	1	1.0

[173] Data received from Ms. Anna Bruff, Statistics & Data Analysis Section, Cal. Dep't of Mental Health, November 13, 1992 (data on file with authors). Because the data identifies patients by name, it is confidential patient information. CAL. WELF. & INST. CODE § 5328 (West Supp. 1992).

C. Length of Confinement as Permanently Incompetent
(As of September 29, 1992)

Years	Number	Percent
Less than 1	5	5.2
1-2	19	19.6
2-3	16	16.5
3-4	14	14.4
4-5	6	6.2
5-6	9	9.3
6-7	8	8.2
7-8	7	7.2
8-9	5	5.2
9-10	2	2.1
10-11	1	1.0
11-12	5	5.2

TABLE 1A reports the number of patients who were admitted into the state system from each county. Permanently incompetent criminal defendant patients were admitted from twenty-five of California's fifty-eight counties. As would be expected, Los Angeles County, the most populous county in the state,[174] dominated the number of admissions, with more than twice the number of any other county. Thirty-eight patients, constituting 39.2% of the total, originated from California's three most heavily populated counties—Los Angeles, San Diego, and Orange.[175] Although counties with larger populations generally accounted for more patients, there were some notable exceptions.[176] For example, no patients were admitted from San Bernardino County despite its population of 1,418,380. At the other extreme, three patients were admitted from Napa County, whose population is only 110,765.[177]

TABLE 1B identifies the state hospitals in which permanently incompetent criminal defendants have been placed. More than half are housed in Patton State Hospital, a facility located east of Los Angeles. Although Patton receives patients from counties

---

[174] According to the 1990 United States Census, Los Angeles County's population is 8,863,052. Thus, 29.8% of California's 29,760,021 people live in Los Angeles County. 1993 THE WORLD ALMANAC AND BOOK OF FACTS 430 (Mark S. Hoffman ed., 125th ed. 1992).

[175] According to the 1990 United States Census, 13,771,736 people live in Los Angeles (8,863,052), San Diego (2,498,016), and Orange (2,410,668) counties combined. This three-county total constitutes 46.3% of the state's 29,760,021 population. *Id.*

[176] Twenty-four of California's 58 counties have a population of under 100,000. Alpine County, with 1,113 people, has the smallest population. *Id.* Only one of the 97 patients was admitted from a county (Tehama County) with a population under 100,000.

[177] *Id.*

throughout the state, thirty-three of its fifty-four patients (61.1%) originated from four populous southern California counties.[178] Atascadero State Hospital, located in central California, and Napa State Hospital, located in northern California, are the other facilities housing significant numbers of permanently incompetent criminal defendants.[179]

California's special conservatorship statute is not being used as a final dispositional device for large numbers of permanently incompetent criminal defendants. California's ninety-seven-patient total is only a fraction of the number who, prior to the *Jackson* decision, were confined indeterminately in some states with far smaller populations.[180] However, TABLE 1C reveals that lengthy periods of confinement can and often do result for those incompetent defendants who have been processed through California's special conservatorship statute. Thirty-seven patients, constituting 38.1% of the total, have been confined for at least five years. Through September 29, 1992, the average length of confinement for the ninety-seven patients was four years and five months. Because these patients continued to be detained after September 29, 1992, the average length of confinement is undoubtedly longer.[181] Further, in calculating a patient's total length of confinement, one must add the period of treatment as an incompetent defendant—in California up to three years—before the individual was adjudicated permanently incompetent. Based on the available data, the authors estimate that the total length of confinement for incompetent

---

178 Of Patton's 54 patients, 17 (31.5%) originated from Los Angeles, 9 (16.7%) from San Diego, 6 (11.1%) from Orange and 1 (1.9%) from Riverside counties. Ironically, although Patton State Hospital is located in San Bernardino County, none of the patients were admitted from that county.

179 Atascadero State Hospital is located in San Luis Obispo County and received one of its 24 patients from that county. Napa State Hospital is located in Napa County and received one of its 15 patients from that county. On a per capita basis, more permanently incompetent defendants originated from Napa County than any other county. Ironically, however, two of the three patients from Napa County are housed in Patton State Hospital, not Napa State Hospital.

180 *See supra* text accompanying notes 5-8 (citing authorities).

181 Additionally, when patients were transferred from one state hospital to another, the data reported length of confinement beginning with the date of admission to the second hospital.

defendants processed through the special conservatorship statute averages a minimum of eight years.[182]

B. Southern California Sample Data

The authors undertook a study of all permanently incompetent criminal defendants confined in Patton State Hospital in 1990 who originated from California's six southernmost counties. TABLE 2 reports the number of patients who were admitted into Patton from each county.

TABLE 2: SOUTHERN CALIFORNIA SAMPLE (N=28)

	County of Origin	
County	Number	Percent
Los Angeles	16	57.1
San Diego	8	28.6
Orange	3	10.7
Riverside	1	3.6
Imperial	0	0.0
San Bernardino	0	0.0

In order to examine the patient records at Patton State Hospital, the authors developed a research protocol and obtained the approval of various human subjects committees and the Department of Mental Health.[183] Additionally, because forensic evaluation reports were sealed documents in the court records of Los Angeles and Orange Counties, the authors obtained the courts' approval to access those reports.[184] Data on the demographic composition of these patients, clinical issues, and legal issues are presented in TABLES 3 through 7.

---

182 The eight-year total includes an estimate of three years as an incompetent defendant plus an estimate of five years as a permanently incompetent defendant.

183 Approvals were obtained from: State of California Health and Welfare Agency Committee for the Protection of Human Subjects, San Diego County Mental Health Research Committee, Patton State Hospital Human Subjects Committee, University of San Diego Committee on the Protection of Human Subjects, and State of California Department of Mental Health.

184 Approvals were obtained from: The Honorable Ricardo A. Torres, Presiding Judge, Superior Court, Los Angeles County; the Honorable Harold E. Shabo, Supervising Judge, Mental Health Departments, Superior Court, Los Angeles County; and Leonard Goldstein, Presiding Judge, Superior Court, Orange County.

In analyzing these tables, the authors focus on the extent to which the data support or refute a finding of dangerousness. As discussed above,[185] to create a special conservatorship, or to renew one at its annual review, the court must find that, by reason of a mental disorder, the person presents a substantial danger of physical harm to others. Researchers have identified individual and situational factors that correlate with violent behavior.[186] By applying these factors to the sample group of patients, we may consider whether decision making is statistically supportable for the twenty-eight patients within the group. We urge caution, however. Use of demographic factors from group data to predict an individual's dangerousness has been challenged on constitutional grounds and for policy reasons.[187] At best, the research suggests that members of a group with certain characteristics have increased probabilities of engaging in violent behavior, but the research does not permit an absolute prediction that a particular individual within the reference group will do so.

(1) Assessment of Demographic Issues

Demographic data on the twenty-eight patients are presented in TABLE 3.

---

185 *See supra* text accompanying notes 143-44.

186 *See generally* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981). Dr. Monahan identified the following individual correlates of violence: past violence, age, gender, race, socioeconomic status and opiate or alcohol abuse. *Id.* at 89. More recent studies led Dr. Monahan to conclude that mental disorder is a modest risk factor for violence. John Monahan, *Mental Disorder and Violent Behavior*, 47 AM. PSYCHOLOGIST 511 (1992). *See infra* text accompanying notes 278-84. Dr. Monahan identified the following situational correlates of violence: disturbances or deficits in family, peer, and job support systems and the easy availability of victims, weapons, and alcohol. JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 100 (1981). *See also* DAVID A. BRIZER & MARTHA CROWNER, CURRENT APPROACHES TO THE PREDICTION OF VIOLENCE (1989); JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE (1985); George B. Palermo et al., *On the Predictability of Violent Behavior: Considerations and Guidelines*, 36 J. FORENSIC SCI. 1435 (1992).

187 *See, e.g.*, Daniel S. Goodman, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499, 508-27 (1987). *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 281-319 (2d ed. 1990).

TABLE 3: SOUTHERN CALIFORNIA SAMPLE: DEMOGRAPHIC DATA (N=28)

A. Age When Conservatorship Established

Age	Number	Percent
20-29	10	35.7
30-39	6	21.4
40-49	7	25.0
50-59	4	14.3
60-69	1	3.6

B. Age on October 30, 1990

Age	Number	Percent
20-29	4	14.3
30-39	9	32.1
40-49	8	28.6
50-59	6	21.4
60-69	0	0.0
70-79	1	3.6

C. Sex

Sex	Number	Percent
Male	24	85.7
Female	4	14.3

D. Race/Ethnic Origin

Race	Number	Percent
White/Caucasian	12	42.9
African-American	11	39.3
Hispanic	3	10.7
Asian	1	3.6
Missing Data	1	3.6

E. Education

Education (Highest level attained)	Number	Percent
Elementary	5	17.9
Attended high school	12	42.9
Graduated high school	5	17.9
Attended college	4	14.3
Graduated college	0	0.0
Missing data	2	7.1

F. Employment History

Employment	Number	Percent
No known employment	12	42.9
Employment unstable	7	25.0
Employment stable	9	32.1

G. Marital Status

Status	Number	Percent
Never married	15	53.6
Divorced	8	28.6
Married	1	3.6
Missing Data	4	14.3

TABLE 3A identifies, in ten-year increments, the ages of patients at the time they were found to be permanently incompetent and special conservatorships were established. Patients ranged from twenty-one to sixty-nine years, with an average age of 37.6 years. TABLE 3B updates the information to October 30, 1990, when our study of these patients began. At that time, patients ranged from twenty-four to seventy-one years, with an average age of 41.4 years. Fifteen patients, constituting 53.6% of the sample group, were over age forty on October 30, 1990. The median age of the patients, forty-two, is more than ten years older than the median age of residents in any of California's six southernmost counties.[188]

Research has confirmed a significant statistical correlation between youth and violence-proneness.[189] Specifically, violent behavior increases in frequency during adolescence and decreases substantially during the middle of the third decade of life.[190] 1991 FBI Uniform Crime Reports' arrest data disclose that persons under age forty account for 88.8% of violent crime arrests.[191] Although, surely, some individuals in their forties, fifties, and even seventies, may be dangerous, the large number of older patients in the sample group warrants concern. Perhaps, as will be explored more fully below,[192] evaluations of a person's present dangerousness are unduly affected by a finding of dangerousness in the past or by a belief that the person engaged in serious criminal activity—a belief that resulted in an indictment or information but no trial and no conviction.

As indicated in TABLE 3C, male patients outnumbered female patients by a ratio of six to one. The gender disparity of the south-

---

188 According to the 1990 United States Census, the median age of residents in California's six southernmost counties is:

Imperial	28.8 years
Los Angeles	30.7 years
Orange	31.4 years
Riverside	31.5 years
San Bernardino	29.3 years
San Diego	30.9 years

CALIFORNIA CITIES, TOWNS, & COUNTIES 475, 481, 492, 495, 498-99 (Edith R. Hornor, ed. 1992).

189 WILSON & HERRNSTEIN, *supra* note 186, at 126-48.

190 *Id.* at 129.

191 1991 FBI UNIFORM CRIME REP., CRIME IN THE UNITED STATES 224 [hereafter FBI].

192 *See infra* text accompanying notes 227-46, 266-71.

ern California sample population is consistent with the gender disparity in the statewide population[193] and with research correlating male gender to violent behavior.[194] Nationally, 88.4% of the individuals arrested for violent crimes in 1991 were men.[195]

Research also has identified lower socioeconomic status as a factor that correlates with an increased risk of violence.[196] Data on three potentially contributing causes of lower socioeconomic status are produced in TABLES 3D, 3E, and 3F. Researchers have found that African-Americans are significantly overrepresented among persons arrested, convicted, and imprisoned for street crimes.[197] For example, although African-Americans constitute only 12.1% of the population of the United States,[198] in 1991, African-Americans accounted for 54.8% of arrests for homicide, 43.5% of arrests for forcible rape, and 61.1% of arrests for robbery.[199] African-Americans were also overrepresented in our sample patient population.

---

193 *See supra* text following note 173.

194 WILSON & HERRNSTEIN, *supra* note 186, at 104-25.

195 FBI, *supra* note 191, at 230.

196 *See generally* Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption*, 93 AM. J. SOC. 348 (1987); Ira Sommers & Deborah Baskin, *Sex, Race, Aging and Violent Offending*, 7 VIOLENCE & VICTIMS 191 (1992).

197 Although African-Americans are significantly overrepresented in the criminal population, their overrepresentation may be attributable to structural linkages among unemployment (especially African-American male joblessness), economic deprivation, and family disruption. Sampson, *supra* note 196, at 376-78. When researchers compared people in the same socioeconomic level, they found that racial differences were not a significant risk factor for violent behavior. Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence From the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 764 (1990). For example, one recent study found that regardless of race, women who lived in areas characterized by high concentrations of poverty were involved disproportionately in violent crime. Because African-American women were significantly more likely to reside in those neighborhoods, it was not surprising to find higher levels of violent crime involvement by African-American women than by Hispanic or white/Caucasian women. Sommers & Baskin, *supra* note 196, at 199.

198 According to the 1990 United States Census, there are 29,986,060 African-Americans in the total population of 248,709,873. 1993 THE WORLD ALMANAC AND BOOK OF FACTS, *supra* note 174, at 388.

199 FBI, *supra* note 191, at 231. Researchers using similar 1980 census data found that even when adjustments were made for other demographic factors such as age and urban environment, African-Americans were overrepresented by a factor of four to one among persons arrested for violent crimes. WILSON & HERRNSTEIN, *supra* note 186, at 461.

Although African-Americans comprise less than 10% of the population in the six southern California counties from which the patients originated, 39.3% of the patients were identified as African-American. In contrast, persons identified as Hispanic in origin and Caucasian were underrepresented in the patient population.[200]

TABLE 3E reveals that patients did not achieve a high level of success in their educational endeavors. None of the twenty-six patients on whom data were obtained graduated from college. Seventeen of the twenty-six (65.4%) did not graduate from high school. TABLE 3F discloses a similar lack of success with employment. Nineteen of the twenty-eight patients (67.9%) either had no known employment or no stable employment. Included in this latter category were individuals who had not been employed for several years prior to their hospitalization, or who had worked sporadically as day laborers.[201]

As reported in TABLE 3G, only one of the twenty-four patients (4.2%) on whom data were obtained was currently married. Although unmarried status does not in and of itself correlate with

---

[200] Using data reported in the 1990 United States census, the racial/ethnic origin composition of California's six southernmost counties is:

White/Caucasian	10,805,662
Hispanic	5,184,882
Asian	1,446,409
African-American	1,376,108

Although these figures total 18,813,061, some individuals were double counted. The census data reported a six-county population total of 16,469,832. CALIFORNIA CITIES, TOWNS, & COUNTIES, *supra* note 188, at 475, 481, 492, 495, 498-99.

In the sample patient population, race or ethnic origin was reported in 27 cases. *See* TABLE 3D. If the patients' race or ethnic origin had conformed to the 1990 census data, then the number of patients in each category would have been as follows:

Race	*Number*
White/Caucasian	15.5
Hispanic	7.5
Asian	2
African-American	2

[201] Patient employment was not reported consistently. Some records contained specific assertions by the hospital staff as to the patient's employment prior to admission; others merely noted that the patient reported to have been employed in a certain capacity. The authors did not attempt to ascertain whether patient reports of employment were verified in some or all cases by the hospital or whether staff assertions of patient employment were verified independently or whether they were based solely on patient reports.

violence, research discloses that normative attachments tend to correlate with emotional and mental health and may have a reciprocal cause and effect relationship with it.[202] To the extent the marital status data imply that many of these patients lived alone and may have avoided or have been unable to sustain human contact, they suggest abnormal attachment histories and, perhaps, mental disorder.

(2) Assessment of Clinical Issues

Data on clinical issues concerning the twenty-eight patients are presented in TABLE 4.

TABLE 4: SOUTHERN CALIFORNIA SAMPLE: CLINICAL ISSUES (N=28)

A. Mental Disorders Reported in Patton State Hospital Patient Records

Diagnosis	Number	Percent
Axis I		
Schizophrenia (total)	18	64.3
undifferentiated	10	35.7
paranoid	7	25.0
simple	1	3.6
Psychoactive substance abuse disorder (total)	11	39.3
mixed substance/polysubstance abuse (not otherwise specified)	6	21.4
alcohol abuse	2	7.1
cannabis abuse	2	7.1
amphetamine abuse	1	3.6
Schizoaffective disorder	8	28.6
Pedophilia	2	7.1
Bipolar disorder	1	3.6
Dementia	1	3.6
Mixed organic brain syndrome	1	3.6
Axis II		
Personality disorders (total)	2	7.1
dependent personality disorder	1	3.6
inadequate (avoidant) personality disorder	1	3.6
Mental limitation IQ (borderline intellectual functioning)	1	3.6
Other		
Adult antisocial behavior	1	3.6
Missing data	1	3.6

202 *See* J. REID MELOY, VIOLENT ATTACHMENTS 3-18 (1992) (summarizing research).

B. Prior Psychiatric Hospitalizations

Hospitalizations	Number	Percent
8 or more	8	28.6
6-7	4	14.3
4-5	8	28.6
2-3	5	17.9
1	1	3.6
0	2	7.1

C. Drug/Alcohol Abuse

Reported History	Number	Percent
Polydrug/alcohol abuse	14	50.0
Single drug/alcohol abuse	4	14.3
No reported drug/alcohol abuse	10	35.7

D. Most Frequently Abused Substances

Substance	Number	Percent
Alcohol	11	39.3
Marijuana	9	32.1
Drugs with hallucinogenic properties (total)	7	25.0
phencyclidine (PCP)	5	17.9
d lysergic acid diethylanide (LSD)	1	3.6
psilocin/psilocybin (mushroom)	1	3.6
Central nervous system stimulants (total)	5	17.9
cocaine	3	10.7
methamphetamine hydrochloride (speed)	2	7.1
Central nervous system depressants (downers)	1	3.6
Narcotic analgesic: heroin	1	3.6
Volatile solvent: tolene (glue)	1	3.6
Antianxiety psychotropic medication: valium	1	3.6

TABLE 4A lists the mental disorders diagnosed in the sample patient population. The twenty-seven patients on whom data were obtained received a total of forty-five diagnoses.[203] The most frequent diagnosis was schizophrenia, diagnosed in eighteen of the twenty-seven cases (66.7%). Psychoactive substance abuse disorders—either individual substances such as alcohol, cannabis, or amphetamine—or polysubstance abuse were diagnosed in eleven cases (40.7%). Schizoaffective disorder was diagnosed in eight cases (29.6%).

In comparison, data from the California Department of Mental Health reveal that schizophrenia was also the most common diagnosis among all patients in California state hospitals, accounting for 48.3% of the patient population.[204] Although schizoaffective disor-

[203] One patient's file did not contain diagnostic information. Several patients received multiple diagnoses.

[204] California Dep't of Mental Health, Inpatient Population at State Hospitals for the Mentally Disabled as of February 28, 1993 (on file with authors). Of the 4520 patients, 2183 were diagnosed with schizophrenia. Of the patients diagnosed with schizophrenia, 1195 (26.4% of the total patient

der was not listed separately in the data, 20.4% of state hospital patients were diagnosed with other psychotic disorders not otherwise classified,[205] a diagnostic classification that includes schizoaffective disorder. Thus, for schizophrenia and schizoaffective disorder, the state hospital patient population data appear relatively consistent with the sample patient population data. Psychoactive substance use disorders, however, were extremely uncommon in the state hospital patient population, accounting for only 1.5% of the total patient population.[206]

The sample patient population diagnostic data are remarkable for the infrequency or complete absence of certain diagnoses. California's special conservatorship status requires a finding of permanent incompetence and continuing dangerousness. One would anticipate that a significant number of patients would have been diagnosed with an organic mental disorder or a developmental disorder, such as mental retardation, which are regarded as permanent conditions.[207] However, only one patient (3.7%) was diagnosed with an organic brain syndrome and only one patient (3.7%) was diagnosed with borderline mental retardation. Personality disorders, which are difficult to treat, were also conspicuous by their infrequence.[208] Only two patients (7.4%) were diagnosed with personality disorders. Additionally, the personality disorders with which these two patients were diagnosed are not suggestive of dangerous behavior. According to the American Psychiatric Association (APA), the essential feature of the avoidant personality disorder "is a pervasive pattern of social discomfort, fear of negative

---

population) were diagnosed with schizophrenia, paranoid type, and 864 (19.2% of the total patient population) were diagnosed with schizophrenia, undifferentiated type. *Id.*

205 Of the 4520 patients, 923 were diagnosed with other psychotic disorders, not otherwise specified. *Id.*

206 Of the 4520 patients, only 68 were diagnosed with psychoactive substance use disorders. *Id.*

207 Noted psychiatrist Alan Stone, M.D., expressed his belief that after only six months of treatment, "the vast majority of the alleged incompetents will be in one of two categories: those who are competent to stand trial, and those who are suffering from mental disabilities, such as mental retardation, brain damage, or chronic deteriorated states such that restoration to competency, ever, is unlikely." ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 212 (1975).

208 Based on his experience with permanently incompetent criminal defendants, Dr. Meloy believes that personality disorder diagnoses may have been underreported in the hospital setting.

evaluation, and timidity."[209] The essential feature of the dependent personality disorder "is a pervasive pattern of dependent and submissive behavior."[210] None of the patients was diagnosed with any personality disorder that implies a potential for current or future dangerousness. For example, no patient was diagnosed with an antisocial personality disorder whose essential feature "is a pattern of irresponsible and antisocial behavior."[211]

TABLE 4B provides information on the extent to which patients in the sample population were hospitalized for a mental condition prior to the present hospitalization at Patton. Although data in the patients' records were sketchy and incomplete,[212] most patients were hospitalized on numerous occasions prior to their present hospitalization. Twenty of the twenty-eight (71.4%) had been hospitalized for treatment of their mental condition on at least four previous occasions; only two (7.1%) had not undergone any previous hospitalization.[213]

As disclosed in TABLE 4C, eighteen of the twenty-eight patients (64.3%) had a history of drug or alcohol abuse.[214] Fourteen of the eighteen patients who had abused drugs (77.8%) were reported to have abused more than one substance. This high rate of polydrug use is consistent with polydrug use by most drug users in society.

---

209 AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) 351 (3d ed. rev. 1987).

210 *Id.* at 353. We note, however, that a person with a dependent personality disorder may be violent. A recent study of offenders who killed police officers revealed that the second most common personality disorder in the offender sample was dependent personality disorder (23%). The most common was antisocial personality disorder (56%). *See* FBI, U.S. DEP'T OF JUSTICE, KILLED IN THE LINE OF DUTY 17 (1992).

211 AMERICAN PSYCHIATRIC ASS'N, *supra* note 209, at 342.

212 For example, some patient records merely noted that the patient was hospitalized several times since *(year)*; or was hospitalized several times in *(name of state)*; or was hospitalized previously in various hospitals, including *(names of hospitals)*. No further details or specific dates of these hospitalizations were provided. The figures utilized in TABLE 4B are the minimum number of prior hospitalizations based on the data in the patients' records.

213 In one of the cases, the patient's record noted that there was no psychiatric history. The other patient's record contained no affirmative statement but merely failed to contain information reporting on any previous hospitalization.

214 In 10 of the 28 cases (35.7%), the patients' records contained no reports of drug or alcohol abuse. In several of these cases, however, it was impossible to determine whether the hospital had made an affirmative assessment that the patient did not abuse drugs or alcohol or whether the hospital simply lacked information about the patient's drug or alcohol history.

TABLE 4D identifies the substances that were abused by the sample patient population. The most frequently abused substance was alcohol, abused by eleven patients (39.3% of the total patient population and 61.1% of the substance abusing population). Marijuana was a close second, abused by nine patients (32.1% of the total patient population and 50.0% of the substance abusing population).

The statistical correlation between alcohol use and crime has been described as "overwhelming."[215] Alcohol and psychostimulant drugs produce biological changes in the central nervous system that predispose aggression and may directly contribute to violent criminal activity.[216] Other drugs may indirectly contribute to criminal behavior. For example, although heroin's direct biological effect is to sedate the user and make him or her less active and less aggressive, the addict's need to secure money to maintain the drug habit provides an incentive to commit crimes.[217]

(3) Assessment of Legal Issues

Data on legal issues concerning the twenty-eight patients are presented in TABLE 5.

TABLE 5: SOUTHERN CALIFORNIA SAMPLE: LEGAL ISSUES (N=28)

A. Qualifications of Court Evaluators

Qualifications	Number	Percent
College graduate or equivalent	16	57.1
Psychiatrist (M.D.)	6	21.4
Clinical Psychologist (Ph.D.)	5	17.9
Lawyer (J.D.)	2	7.1
Licensed Clinical Social Worker (L.C.S.W.)	1	3.6
Unknown	1	3.6

215 WILSON & HERRNSTEIN, *supra* note 186, at 356. One early study of 588 homicides revealed that alcohol had been used by the assailant, victim, or both in nearly two-thirds of the cases. MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 137 (1958). Most of the studies of the relationship between alcohol use and sexual offenses found that alcohol had been used in at least 40% of the cases. Stephanie W. Greenberg, *Alcohol and Crime: A Methodological Critique of the Literature, in* DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR 70, 81 (James J. Collins, Jr., ed. 1981).

216 The use of alcohol or psychostimulants produces a decrease in circulating serotonin, a neurotransmitter that inhibits aggression.

217 WILSON & HERRNSTEIN, *supra* note 186, at 367-68.

B. Mental Disorders Reported By Court Evaluators in Special Conservatorship Proceedings

Diagnosis	Number	Percent
Axis I		
Schizophrenia (total)	16	57.1
undifferentiated	10	35.7
paranoid	6	21.4
Schizoaffective disorder	7	25.0
Psychoactive substance abuse disorder (total)	6	21.4
mixed substance abuse	2	7.1
alcohol abuse	1	3.6
amphetamine abuse	1	3.6
cannabis abuse	1	3.6
psychoactive substance abuse (not otherwise specified)	1	3.6
Bipolar disorder	1	3.6
Dementia associated with alcoholism	1	3.6
Pedophilia	1	3.6
Psychosis with other cerebral condition	1	3.6
Axis II		
Personality disorders (total)	4	14.3
personality disorder (not otherwise specified)	2	7.1
antisocial	1	3.6
schizoid	1	3.6
Borderline intellectual functioning	2	7.1
Missing data	2	7.1

C. Court Evaluators' Assessment of Defendants' Competency to Stand Trial

Evaluator's Assessment	Number	Percent
Defendant incompetent	16	57.1
No report of competency assessment	9	32.1
Defendant competent and incompetent	1	3.6
Missing data	2	7.1

D. Most Serious Crime Charged Against Each Defendant

Crime	Number	Percent
Murder	9	32.1
Assault with intent to commit rape	3	10.7
Arson	2	7.1
Assault with a deadly weapon	2	7.1
Attempted murder	2	7.1
Oral copulation with child under 14 years	2	7.1
Robbery	2	7.1
Assault with a deadly weapon on police officer	1	3.6
Assault with a firearm	1	3.6
Attempted kidnapping	1	3.6
Lewd and lascivious act with child under 14 years	1	3.6
Possession of material device for arson	1	3.6
Rape	1	3.6

E. Types of Crimes Charged Against Each Defendant, by County

	Murder		Sex Crime		Other	
County	Number	Percent	Number	Percent	Number	Percent
Los Angeles (N=16)	7	43.8	4	25.0	5	31.3
San Diego (N=8)	0	0.0	6	75.0	2	25.0
Orange (N=3)	1	33.3	0	0.0	2	66.7
Riverside (N=1)	1	100.0	0	0.0	0	0.0

Typically, in proceedings to establish special conservatorships, evidence was not presented by the treating doctors at Patton State Hospital. Rather, individuals whom the authors identify as "court evaluators" presented evidence to support the conservatorship petition. TABLE 5A summarizes the academic credentials of these evaluators. TABLE 5A, however, does not reveal the differences in practice from county to county. In Los Angeles County, for example, all sixteen court evaluators were employed as deputy public guardians or senior deputy public guardians in the Office of the Public Guardian. To be employed as a deputy public guardian, an individual must have graduated from an accredited college with specialization in the social sciences, behavioral sciences, business administration, accounting or a related field. Experience involving extensive public contact in estate or trust administration, real property management, sales, appraisal or management of assets, or social work may be substituted for education on a year-for-year basis.[218] To be employed as a senior deputy public guardian, the individual is required to have one year's experience as a deputy public guardian.[219]

In contrast, five psychiatrists and three clinical psychologists served as court evaluators for San Diego County's eight cases. In one Orange County case, three court evaluators were used—a psychiatrist, a psychologist, and a lawyer. In a second Orange County case, only one evaluator was used, but he was both a lawyer and a psychologist, and in a third case, information on the evaluator's qualifications was missing. A licensed clinical social worker served as court evaluator for Riverside County's one case. Thus, in all eleven cases on which data were obtained that originated from San Diego, Orange, and Riverside counties, a mental health professional served as a court evaluator; in none of Los Angeles County's sixteen cases, did a mental health professional serve. As will be discussed below, the discrepancy in court evaluators' qualifications affected significantly the information that was furnished to the judges deciding these cases.

TABLE 5B lists the mental disorders diagnosed in the sample patient population as reported by the court evaluators. The twenty-six patients on whom data were obtained received a total of thirty-

---

218 Information on job requirements was provided by Cheryl Avelar, Los Angeles County, Office of the Public Guardian, January 15, 1993 (on file with authors).

219 *Id.*

nine diagnoses.[220] The most frequent disorder reported was schizophrenia, diagnosed in sixteen of the twenty-six cases (61.5%). Schizoaffective disorder was reported in seven cases (26.9%) and psychoactive substance abuse disorders in six cases (23.1%).

Although the mental disorders reported by court evaluators in TABLE 5B generally corresponded to the mental disorders reported in Patton State Hospital records in TABLE 4A, there were some noticeable differences. Psychoactive substance abuse disorder declined from eleven to six and schizophrenia from eighteen to sixteen. Reports of personality disorders increased from two to four, and all four were of a type that was not previously reported. Borderline intellectual functioning increased from one to two patients.

By examining the individual case files, the authors were able to discover the source of the changed diagnoses. When a psychiatrist or psychologist served as a court evaluator, he or she often made an Axis II diagnosis that was not previously contained in the Patton State Hospital patient file. For example, four such diagnoses were made in the eight San Diego County cases. Thus, mental health professionals serving as court evaluators provided additional information to the judge deciding the case. A diagnosis of antisocial personality disorder, made in one case by a court evaluator, may be probative on the issue of permanence of condition and dangerousness. A diagnosis of borderline intellectual functioning, made in another case by a court evaluator, may be probative on permanence of condition. We note that the mental health professionals serving as court evaluators made these diagnoses based on their interviews with the patients and review of the records. Ironically, these diagnoses were not previously made by Patton State Hospital professionals during the patients' years of observation and treatment at that facility.

When a Los Angeles County public guardian served as a court evaluator, he or she merely informed the judge of the mental disorders diagnosed by the Patton State Hospital mental health professional (eight cases) or informed the judge of the primary diagnosis made by the Patton State Hospital mental health professional but omitted secondary diagnoses (six cases). Thus, in fourteen of the sixteen cases, Los Angeles judges were provided with the same information or less information than was available in the patients' hospital records. In the cases in which secondary diagnoses were

---

[220] In two cases, the court evaluator did not report diagnostic information. Multiple diagnoses were reported for several patients.

omitted, perhaps the court evaluators assumed that evidence of a primary diagnosis was sufficient to establish permanent mental incompetence. Alternatively, perhaps the court evaluators decided that patients' substance abuse disorders should not be reported when the disorders had been in hospital remission for many years.

In two cases, the Los Angeles County court evaluators reported a different diagnosis than contained in the patients' records. In one case, the patient record available to us was thirteen years old, and, perhaps, the patient's hospital diagnosis had changed over the years. In the other case, the hospital reported schizoaffective disorder, and the evaluator reported schizophrenia. Although schizoaffective disorder was once categorized as a subtype of schizophrenia,[221] it is now an independent diagnosis that can be made only if schizophrenia has been ruled out.[222] Because public guardians lack the professional training to make diagnoses of mental disorders, we can only assume that the changed diagnosis in this one case was the result of an error[223] or that information about the patient's changed condition was supplied to the evaluator but not recorded in the patient's hospital record.

Mental disorder, in and of itself, is not a criterion for establishing a special conservatorship for permanently incompetent criminal defendants. Under the statute defining grave disability, the defendant must be incompetent to stand trial as a result of mental disorder.[224] Additionally, the California Supreme Court required that the individual present a substantial danger of physical harm to others by reason of a mental disorder.[225] Thus, an assessment of mental disorder without an assessment of the relationship between that disorder and the defendant's competence and dangerousness provides inadequate information for the court to make its judgment.

TABLE 5C provides information on the court evaluators' assessment of the sample patient population's competency to stand trial. In sixteen of the twenty-six cases in which data were available (61.5%), the court evaluator specifically informed the court that

---

221 AMERICAN PSYCHIATRIC ASS'N, *supra* note 209, at 208.

222 *Id.* at 210.

223 Because both disorders begin with "schizo-", perhaps a mistake was made by the court evaluator in recording the proper diagnosis.

224 CAL. WELF. & INST. CODE § 5008(h)(1)(B)(iii) (West Supp. 1993).

225 Conservatorship of Hofferber, 616 P.2d 836, 847 (Cal. 1980).

the defendant was presently incompetent.[226] In one case (3.8%), the court evaluator's report contained conflicting information on the evaluator's assessment of competence. In that report, the evaluator asserted his initial conclusion that the defendant "was borderline mentally competent to go to trial" despite the defendant's psychopathology. However, the evaluator ultimately concluded that the defendant was not competent because of an inability to assist counsel rationally in the conduct of a defense. In nine cases (34.6%), the court evaluator's report contained no specific assessment of the defendant's competence. Thus, these nine defendants may have been found gravely disabled without an adequate consideration of the statutory requirement that they be *presently* incompetent to stand trial. In ordering special conservatorships for these defendants, the judges may have relied upon dated hospital records and reports that found these defendants incompetent at some earlier date when their competence was previously evaluated.

As criteria for establishing a special conservatorship, the statute requires that the defendant be charged with "a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person" and that the indictment or information not have been dismissed.[227] Defendants in the sample patient population had been charged with crimes of varying severity ranging from murder to driving a vehicle without the owner's permission. In all, twenty-nine different crimes were alleged, and seventeen of the twenty-eight defendants (60.7%) were charged with committing more than one crime.[228]

---

226 Included within the group of 16 incompetent patients is one whom the evaluator assessed as "remains severely impaired . . . . [H]asn't improved any." There was no specific assertion that this person was presently incompetent to stand trial, however.

227 CAL. WELF. & INST. CODE § 5008(h)(B)(i) & (ii) (West Supp. 1993).

228 Listed below are the crimes with which the sample population were charged and the number of defendants charged with each crime:

Crime Charged	*Number*
Annoying or molesting a child	1
Arson	2
Assault with a deadly weapon	5
Assault with a deadly weapon on police officer	1
Assault with a firearm	1
Assault with intent to commit murder	1
Assault with intent to commit rape	3
Attempted kidnapping	1
Attempted murder	3
Attempted rape	2

TABLE 5D lists the most serious crime with which each defendant was charged. In twenty-one of the twenty-eight cases (75.0%), the defendant was charged with murder, attempted murder, serious assault, attempted kidnapping or robbery—felonies that necessarily involve death, great bodily harm, or a serious threat to the physical well-being of another. A narrow construction of the statutory criterion would limit special conservatorships to those crimes. Some crimes, such as arson and rape, may be committed with or without a serious threat to the well-being of another or great bodily harm.[229] A slightly more expansive construction of the statutory requirement would include arson and rape if the defendant was charged with that form of the crime that involved the necessary threat or harm.

Attempted sodomy	1
Battery	1
Burglary	4
Driving vehicle without owner's permission	1
Failure to appear on felony charges	1
Grand theft auto	1
Infliction of great bodily injury	2
Lewd & lascivious act with child under 14 years	3
Murder	9
Oral copulation	2
Oral copulation with child under 14 years	2
Passing bad checks	1
Possession of material device for arson	1
Rape	2
Receiving stolen property	1
Robbery	2
Sodomy with child under 14 years	2
Use of deadly weapon	1
Use of firearm	1

In all 28 cases, the indictment or information had not been dismissed.

[229] CAL. PENAL CODE § 451(a) (West Supp. 1993) provides that arson causing great bodily harm is a felony punishable by imprisonment for five, seven, or nine years. CAL. PENAL CODE § 451(b) (West Supp. 1993) provides that arson causing an inhabited structure to burn is a felony punishable by imprisonment for three, five, or eight years. One defendant was charged under § 451(a); another under § 451(b).

CAL. PENAL CODE § 261(a) (West Supp. 1993) defines several forms of rape, some accomplished "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another" and others accomplished without force but when the victim was mentally or physically incapable of giving a valid consent or was tricked into consenting by a belief that the defendant was the victim's spouse. CAL. PENAL CODE § 261(b) (West Supp. 1993) defines "duress" as a direct or implied threat of force. One defendant was charged with forcible rape under § 261(b).

The one defendant charged with rape and one of the two defendants charged with arson would be included within this broader definition.

In two cases, the defendants were charged with oral copulation with a child under fourteen years. Of the crimes charged, this crime presents the greatest uncertainty for inclusion within the special conservatorship criterion. For a defendant to be convicted of the crime, California Penal Code Section 288a(c) requires either an act of oral copulation with another person under the age of fourteen years and more than ten years younger than the defendant or an act of oral copulation accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim.[230] In each of the two sample patient cases, the defendant was more than ten years older than the victim, but neither the patient record nor the court evaluator's report contained information that would support an assertion that the criminal act was accomplished by force.[231] Thus, these two defendants do not appear to be charged with a crime that involves a serious threat to the well-being of another or great bodily harm.

Support for this conclusion can be found in a California Penal Code statute denying probation to "any person who, with the intent to inflict such injury, personally inflicts great bodily injury on the person of another in the commission or attempted commission of . . . [o]ral copulation, in violation of Section 288a."[232] Through this statute, the legislature recognizes that the crime of oral copulation may be committed with or without the infliction of great bodily injury, and that denial of probation is appropriate only in those instances in which great bodily injury has been inflicted during the commission of the crime.

However, another California Penal Code statute declares that for the purpose of denying bail, "a violation of . . . subdivision (c) . . . of

---

230 CAL. PENAL CODE § 288a(c) (West Supp. 1993).

231 One of the two defendants charged with oral copulation with a child under 14 years was also charged with sodomy of a child under 14 years, a crime for which punishment of equal severity is imposed. For a defendant to be convicted of the crime, the statute requires an act of sodomy with another person under the age of 14 years and more than 10 years younger than the defendant or an act of sodomy accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim. CAL. PENAL CODE § 286(c) (West Supp. 1993).

232 CAL. PENAL CODE § 1203.075 (West Supp. 1993). Probation will not be granted for the intentional infliction of great bodily injury during the commission of any one of 11 crimes enumerated in the statute.

Section 288a . . . shall be deemed to be a felony offense involving an act of violence and a felony offense involving great bodily harm."[233] Unless this statute is interpreted narrowly to refer only to those acts of oral copulation accomplished against the victim's will by means of force, then unforced acts of oral copulation with a child under fourteen years would be included as felonies involving great bodily harm for bail denial purposes. A similarly expansive construction of the oral copulation statute itself would result in the inclusion of these two defendants regardless of whether or not they used force on their child victims.

In two cases, the defendants were charged with crimes that clearly do not involve death, great bodily harm, or a serious threat to the physical well-being of another. One was charged with committing a lewd or lascivious act with a child under fourteen years.[234] Unlike the oral copulation statute that combines in one subdivision acts with a child under fourteen years and acts accomplished by force, the statute prohibiting lewd or lascivious acts with a child under fourteen years is divided into separate provisions distinguishing the unforced act (subdivision (a)) from the act committed by the use of force (subdivision (b)).[235] The defendant in the sample population was charged under that subdivision of the statute governing unforced acts.

Further, unlike the crime of oral copulation with a child under fourteen years, the legislature did not include the crime of lewd or lascivious act with a child under fourteen years as a crime that by definition involves great bodily harm for purposes of denial of bail.[236] Only if the crime charged includes the actual use of force is it included. The court evaluator may have attempted to remedy the deficiency in the charge against this defendant by asserting in his report that the defendant "did cause some injury to the victim by

---

[233] CAL. PENAL CODE § 292 (West 1988). Various other sex crimes are enumerated as felonies involving great bodily harm for the purpose of denying bail.

[234] This defendant was accused of violating CAL. PENAL CODE § 288(a) (West Supp. 1993).

[235] Ironically, the punishment imposed for the unforced act and the act committed by force is identical—three, six, or eight years. CAL. PENAL CODE § 288(a)-(b) (West Supp. 1993).

[236] CAL. PENAL CODE § 292 (West 1988). Additionally, the legislature has not identified commission of a lewd or lascivious act with a child under 14 years as a felony for which denial of probation is proper, regardless of whether the defendant inflicted great bodily harm. CAL. PENAL CODE § 1203.075 (West Supp. 1993).

digital penetration of vagina and rectum."[237] However, the causing of "some injury," even if proven, does not establish the requisite great bodily harm. In other statutes, the legislature has defined great bodily harm as "a significant or substantial physical injury."[238]

The other defendant was charged with possession of a flammable, explosive, or combustible material, substance, or device with intent to commit arson.[239] Although arson may, in some situations, involve death, great bodily harm, or a serious threat to the physical well-being of another,[240] the mere possession of a device to commit arson does not. The relatively minor nature of this possession crime is demonstrated by the punishment imposed for its commission. Under the statute, conviction "is punishable by imprisonment in the state prison, or in the county jail, not exceeding one year."[241] If the judge orders imprisonment in the county jail, the crime is classified as a misdemeanor, even if imprisonment is ordered for the full year.[242] In contrast, arson that causes great bodily injury is

---

237 In San Diego County, forensic evaluation reports are public records. Thus, a report of the evaluator's statement does not breach any confidentiality to which the authors agreed in order to obtain access to confidential patient records or sealed court files in other counties.

238 CAL. PENAL CODE § 198.5 (West 1988) (use of force against intruder within one's residence); CAL. PENAL CODE § 12022.7 (West 1992) (additional punishment for defendant who personally inflicts great bodily injury during commission of a felony).

239 CAL. PENAL CODE § 453(a) (West 1988).

240 *See supra* note 229 (comparing CAL. PENAL CODE § 451(a) (West Supp. 1993) with CAL. PENAL CODE § 451(b) (West Supp. 1993)).

241 CAL. PENAL CODE § 453(a) (West 1988). By placing commas around the words "or in the county jail," the legislature appears to have prescribed a one-year maximum sentence either in the state prison or in the county jail. If the comma following the word "jail" had been omitted, then county jail imprisonment, if it were ordered, could not exceed one year, but the length of state imprisonment, if it were ordered, would be unspecified. In such event, CAL. PENAL CODE § 18 (West 1988) would be applicable. That statute provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years . . . ." Research discloses no appellate court decisions that have considered the applicability of § 18 to a violation of § 453(a).

242 CAL. PENAL CODE § 17(a) (West Supp. 1993) defines a felony as a crime that is punishable by death or imprisonment in the state prison. CAL. PENAL CODE § 17(b)(1) (West Supp. 1993) declares that a crime punishable by imprisonment in the state prison or by a fine or imprisonment in the county jail is a misdemeanor if the judgment imposes a punishment other than imprisonment in the state prison.

punishable by imprisonment in the state prison for a presumptive period[243] of seven years.[244] The presumptive period of imprisonment for the other crimes charged in TABLE 5D range from two and one-half years for attempted kidnapping[245] to life imprisonment for murder.[246]

In summary, at least two (7.1%) and as many as seven (25.0%) of the twenty-eight defendants in the sample patient population appear not to have been charged with a felony that satisfies the criterion to establish a special conservatorship. Apparently, the issue was not considered by the court evaluator or raised by the patient's attorney at trial or on appeal. The statute establishing the criteria for a special conservatorship is unilluminated by any court decisions interpreting its requirements.

TABLE 5E reveals a discrepancy among the counties in the types of crimes that result in special conservatorships. Although San Diego County's eight cases account for 28.6% of the sample patient population, none of the San Diego defendants were charged with murder. Rather, San Diego County's patient population was composed overwhelmingly of defendants who had been charged with various sex crimes. Six of San Diego's eight patients (75.0%) were so charged. By comparison, the percent of defendants charged with murder in other sample counties ranged from 33.3% to 100%, and defendants charged with sex crimes ranged from 0% to 25.0%. The heavy emphasis on sex crimes in San Diego County seems especially suspect when one considers the problems raised above with the attempted inclusion within the special conservatorship criterion of both lewd or lascivious conduct[247] and oral copulation.[248]

---

[243] When a statute specifies three possible terms of imprisonment, CAL. PENAL CODE § 1170(b) (West Supp. 1993) requires the court to impose the middle term, unless aggravating or mitigating circumstances are established.

[244] CAL. PENAL CODE § 451(b) (West Supp. 1993).

[245] CAL. PENAL CODE § 208(a) (West Supp. 1993) prescribes a term of imprisonment of three, five, or eight years for the crime of kidnapping. CAL. PENAL CODE § 664(1) (West 1988) prescribes a term of one-half the felony term when the defendant is convicted of the attempted felony.

[246] CAL. PENAL CODE § 190(a) (West Supp. 1993) prescribes a penalty of 25 years to life for first degree murder and 15 years to life for second degree murder.

[247] *See supra* text accompanying notes 234-36.

[248] *See supra* text accompanying notes 230-33.

(4) Assessment of Dangerousness

TABLE 6: SOUTHERN CALIFORNIA SAMPLE: DANGEROUSNESS ASSESSMENT (N=28)

A. History of Violence Towards Others at Hospital Prior to Establishing Special Conservatorship

Type of Violence	Number	Percent
None	11	39.3
Assaulted patients and staff	6	21.4
Assaulted staff	4	14.3
Assaulted patients	3	10.7
Assaulted patients and threatened staff	1	3.6
Rubbed his hand over the person of a female staff member	1	3.6
Missing data	2	7.1
Frequency of Violence	**Number**	**Percent**
No reported incidents	11	39.3
One reported incident	4	14.3
Two reported incidents	1	3.6
Several reported incidents	10	35.7
Missing data	2	7.1

B. Comparison of Violence Towards Others Prior to and Subsequent to Establishing Special Conservatorship

Frequency of Violence Before (See Table 6A)	Violence After	
	Number of N^1	Percent of N^1
No reported incidents (N^1=11)	3	27.3
One reported incident (N^1=4)	1	25.0
Two reported incidents (N^1=1)	0	0.0
Several reported incidents (N^1=10)	7	70.0
Missing data (N^1=2)	1	50.0

C. Other Factors Used by Court Evaluators and Hospital Staff to Predict Future Dangerousness of Permanently Incompetent Defendants

Factor	Number	Percent
Psychotic Symptoms		
Delusions or psychotic thinking	20	71.4
Hallucinations	8	28.6
Paranoia; paranoid; paranoid ideation	6	21.4
Loose associations	2	7.1
Possible Psychotic Symptoms		
Lacks insight	6	21.4
Schizotypal personality	1	3.6

Nonpsychotic Factors		
Impulsive	7	25.0
Angry and hostile	6	21.4
Judgment impaired	5	17.9
Agitation	3	10.7
Public masturbation	3	10.7
Depression	2	7.1
Mental condition not stabilized	2	7.1
Refuses psychotropic medications	2	7.1
Sexually preoccupied	2	7.1
Amnesia	1	3.6
Predilection for arson	1	3.6
Says he'll do something violent if released	1	3.6
Says he'll kill President if released	1	3.6
Says he'll molest young boys if released	1	3.6
Sexual perversions	1	3.6
Sexually aggressive	1	3.6
Shows no remorse for crime	1	3.6
The look in defendant's eyes makes evaluator uncomfortable	1	3.6

D. Frequency of Other Factors Used to Predict Future Dangerousness

Factor	Number	Percent
Psychotic Symptoms (total)	21	75.0
One symptom	12	42.9
Two symptoms	5	17.9
Three symptoms	3	10.7
Four symptoms	1	3.6
Possible Psychotic Symptoms (total)	7	25.0
One symptom	7	25.0
Nonpsychotic Symptoms (total)	23	82.1
One symptom	8	28.6
Two symptoms	12	42.9
Three symptoms	3	10.7

In *Hofferber*,[249] the California Supreme Court upheld the validity of the special conservatorship statute. In the court's judgment, the legislature could constitutionally create a long-term commitment scheme for permanently incompetent criminal defendants who were charged with violent felonies. These criteria, however, were held to be insufficient, in and of themselves, to warrant involuntary commitment of any individual. The "sole basis"[250] for the creation or renewal of a special conservatorship is a finding "that, by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others."[251]

In the court's judgment, the magistrate's or grand jury's finding of probable cause to believe that the defendant committed a violent

[249] Conservatorship of Hofferber, 616 P.2d 836 (Cal. 1980). *See supra* text accompanying notes 139-44.

[250] *Hofferber*, 616 P.2d at 848.

[251] *Id.* at 847.

felony may justify the legislature's concern, but that probable cause determination cannot give rise to a presumption of continuing dangerousness.[252] There has been no determination that the defendant was guilty of the crime charged. Additionally, even if the defendant committed the criminal act, there has been no determination that the act was the product of a mental disorder. Finally, there has been no determination that current dangerousness, if it exists, is the product of a mental disorder. Before the special conservatorship is established, the incompetent defendant has been subjected to a lengthy period of treatment, typically of three years' duration. This passage of time undermines any assumption that a dangerous mental condition, even if it existed at the time of the alleged crime, continues unabated at the time the special conservatorship is established.[253] Thus, to create or renew a special conservatorship, the California Supreme Court required a finding beyond a reasonable doubt that the defendant is currently dangerous as the result of a mental disorder.[254]

Dr. John Monahan, a leading authority on violence assessment,[255] has noted that "[t]he prediction of violent behavior is difficult under the best of circumstances."[256] A failure to consider the principal statistical correlates of future violence dooms from the start any attempt at prediction.[257] The one factor that overshadows all others in predicting a person's future violence potential is a history of violent behavior.[258] Researchers have concluded that in the absence of an established pattern of violence, dangerousness simply cannot be predicted.[259] Thus, the recency, severity, and frequency of past violent acts must be examined before future violence may be predicted.[260]

Indeed, *Hofferber* suggests that a failure to consider the existence or absence of recent dangerous overt behavior denies the perma-

---

252 *Id.*

253 *Id.*

254 *Id.* at 848.

255 Dr. Monahan has been called "the leading thinker" on the issue of psychiatric predictions of future dangerousness. Barefoot v. Estelle, 463 U.S. 880, 900 n.7 (1983).

256 JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 123 (1981).

257 *Id.* at 10-11.

258 *Id.* at 71, 107.

259 Nathan L. Pollack, *Accounting for Predictions of Dangerousness*, 13 INT'L J.L. & PSYCHIATRY 207, 211 (1990).

260 MONAHAN, *supra* note 256, at 107.

nently incompetent criminal defendant equal protection of the laws. The court recognized that the special conservatorship statute is a long-term civil commitment device to isolate, treat, and restrain dangerous persons.[261] However, neither the probable cause determination of violent felonious conduct, nor the psychiatrists' impressions of the defendant's violence potential developed during the defendant's treatment as an incompetent defendant, justifies a conclusive presumption of continuing dangerousness.[262] According to the court, such a presumption would not only be arbitrary, it would deny equal protection.[263] In order to civilly commit a person for 180 days, California requires a finding that the person attempted, inflicted, or made a serious threat of substantial physical harm on another either prior to being taken into custody or while in custody for evaluation and treatment.[264] Subsequent 180-day detentions can be ordered only if the person attempted, inflicted, or made a serious threat of substantial physical harm on another during the previous 180-day detention.[265] A one-year commitment of a permanently incompetent criminal defendant, or the renewal of that commitment for an additional year, cannot be justified without a similar finding.

TABLES 6A and 6B provide data on the sample patient population's violent behavior in the hospital. As reported in TABLE 6A, eleven of the twenty-six patients on whom data were obtained (42.3%) neither assaulted nor threatened to assault other patients or staff during the time they were treated as incompetent defendants prior to establishing a special conservatorship. Before a special conservatorship can be established or renewed, the defendant's future dangerousness must be proven beyond a reasonable doubt.[266] We believe that this burden cannot be satisfied for these eleven patients. The absence of any violent behavior during the lengthy treatment period undermines the accuracy of any prediction of future violence.

The frequency of violence varied markedly among the fifteen patients (57.7% of the twenty-six patients on whom data were obtained) who exhibited violent behavior prior to establishing special conservatorships. Five of the sixteen (31.3%) were reported to

---

261 Conservatorship of Hofferber, 616 P.2d 836, 844 (Cal. 1980).
262 *Id.* at 847.
263 *Id.*
264 CAL. WELF. & INST. CODE § 5304(a) (West 1984).
265 *Id.* § 5304(b).
266 *Hofferber*, 616 P.2d at 848. *See supra* note 144 (discussing *Hofferber*).

have engaged in only one or two incidents of assaultive behavior.[267] The remaining ten patients were reported to have committed at least four assaults and often were reported as having committed "many" or "frequent" assaults.

TABLE 6B compares the incidence of violence by patients before and after a special conservatorship was established. Although any act of violence increases the probability of future violence, the data in TABLE 6B suggest that one or two assaultive acts during the three-year pre-conservatorship treatment period does not increase significantly the probability of future violence after the conservatorship is established. Only one of the five patients (20.0%) with one or two pre-conservatorship violent acts committed a violent act after the special conservatorship was established. As a group, these patients were actually less violent after being placed on a special conservatorship than patients with no pre-conservatorship acts of violence. In this latter group, three of eleven (27.3%) acted violently after the special conservatorship was established. Thus, we believe that the burden of proving future dangerousness beyond a reasonable doubt cannot be satisfied for the five patients with one or two pre-conservatorship violent acts.

In sharp contrast, seven of the ten patients (70.0%) who were reported to have committed several violent acts prior to being placed on a special conservatorship engaged in violent behavior thereafter. In the absence of any change in individual or situational correlates of violence,[268] proof of frequent violent acts in the recent past may be sufficient, in and of itself, to permit a judgment that these patients pose an increased risk of future violence. Even here, we hesitate to suggest that individual patients can be predicted to be dangerous. Dr. Monahan has questioned the legitimacy of inferring statements about an individual from the fact that the person belongs to a group of persons who have characteristics that increase their probability of violence:

> In truth, all one can say in actuarial prediction is that the person whose behavior is being predicted has characteristics X, Y, Z, and that *other* persons who have been studied in the *past*, who have had characteristics X, Y, and Z, have committed violent acts at a certain rate. . . .

---

267 The patient who is reported to have rubbed his hand over the person of a female staff member is included within the group of five patients with one reported incident of violence.

268 *See supra* note 186 (discussing individual and situational correlates of violence).

> What is necessary to make the inferential leap from membership in a class that has in the past been violent to the prediction that this member of the same class will in the future be violent is a *theory* linking the conditions operating to produce violence in the past class of cases with the conditions operating to produce violence in this specific present case.[269]

Although patients in the sample population have been on special conservatorships for varying amounts of time,[270] some have not committed a violent act for several years. For example, the one individual with two assaults prior to being placed on a special conservatorship is reported to have attacked a staff member in 1982 and another patient in 1983. He was placed on a special conservatorship in 1984. His conservatorship has been renewed each year through 1990 even though for this seven-year period he engaged in no further violent behavior. Despite the equal protection argument made above,[271] the state has been able to renew the special conservatorship repeatedly without proving that the defendant attempted, inflicted, or made a serious threat of substantial physical harm on another during the previous one-year period. For these renewal hearings, the state has not been required to prove dangerousness beyond a reasonable doubt.

TABLE 6C identifies factors other than violent behavior in the hospital that were relied upon by court evaluators to predict dangerousness. These factors refer almost exclusively to patients' mental disorders.[272] This focus on the patients' mental disorders is attributable, in large measure, to the evaluators' use of psychiatric reports contained in Patton State Hospital patient records.[273]

In an amicus brief submitted to the United States Supreme Court in 1983, the APA discussed the various individual and situational

---

269 MONAHAN, *supra* note 256, at 65-66.

270 For the sample patient population, the length of time on a special conservatorship as of October 30, 1990, varied from a low of five months to a high of 12 years and two months. The average length for the 28 patients was three years and 10 months.

271 *See supra* text accompanying notes 261-65.

272 However, an assertion that the patient was "angry and hostile" or that the patient "showed no remorse for the crime" are equivocal and may or may not be related to the patient's mental disorder.

273 Psychiatric reports in patient records were also used for other purposes by court evaluators. For example, sometimes an evaluator would discuss symptoms of a patient's mental disorder to explain why the patient remained mentally incompetent to stand trial.

factors that correlate with violent behavior.[274] The APA concluded: "Significantly, one factor which demonstrably *fails* to correlate with recurring criminal activity is mental illness."[275] Studies conducted in the late 1980s[276] attempting to link mental disorder with violence have been described as "contradictory and inconclusive."[277]

Nevertheless, relying on studies published since 1990,[278] Dr. Monahan has recently reversed his position and now believes that mental disorder may be related to violent behavior.[279] The research discloses, however, that an increased risk of violence is found only among those mentally disordered persons who are currently experiencing psychotic symptoms.[280] Psychotic symptoms experienced in the past bear no relationship to violence.[281] Further, the elevated risk of violence for actively psychotic individuals is modest and makes only a "trivial contribution" to the total violence in society.[282] For example, actively psychotic individuals are less violent than young, uneducated males[283] and far less violent than persons who abuse alcohol or other substances.[284]

According to the APA, the symptoms of psychosis are: "[g]ross impairment in reality testing as evidenced by delusions, hallucinations, incoherence or marked loosening of associations, catatonic stupor or excitement, or grossly disorganized behavior."[285] Because

---

274 Amicus Curiae Brief for the American Psychiatric Association at 14-15, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

275 *Id.* at 15.

276 *See, e.g.*, R.L. Binder & D.E. McNeil, Violence and Decompensating Schizophrenic Patients, paper presented at American Psychiatric Ass'n meeting 1990, *cited in* Carmen Cirincione et al., *Schizophrenia as a Contingent Risk Factor for Criminal Violence*, 15 INT'L J.L. & PSYCHIATRY 347, 357 (1992); Joseph D. Bloom, *The Character of Danger in Psychiatric Practice: Are the Mentally Ill Dangerous?* 17 BULL. AM. ACAD. PSYCHIATRY & L. 241 (1989).

277 Cirincione et al., *supra* note 276, at 347.

278 Bruce G. Link et al., *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 AM. SOC. REV. 275 (1992); Swanson et al., *supra* note 197, at 761.

279 John Monahan, *Mental Disorder and Violent Behavior*, 47 AM. PSYCHOLOGIST 511, 511 (1992).

280 Link et al., *supra* note 278, at 290.

281 Monahan, *supra* note 279, at 519.

282 Link et al., *supra* note 278, at 290.

283 *Id.*

284 Swanson et al., *supra* note 197, at 769. The authors reported that in their study, 12.7% of persons with schizophrenia reported violent behavior during the year compared with 25% of persons with alcoholism.

285 AMERICAN PSYCHIATRIC ASS'N, *supra* note 209, at 378.

only those patients who are actively psychotic have an increased violence potential, we cataloged the patient information in TABLE 6C into psychotic symptoms,[286] possible psychotic symptoms, and nonpsychotic symptoms. The categorization was somewhat arbitrary. For example, we included "paranoia; paranoid; and paranoid ideation" in the list of psychotic symptoms because, properly used, these words imply the presence of delusions or hallucinations.[287] We note, however, that these words are often used inappropriately to suggest suspiciousness. Because suspiciousness may be rationally based, it is not an appropriate symptom of psychosis.

In the list of possible psychotic symptoms, we included "lacks insight." Because psychotic people have lost touch with reality, all actively psychotic individuals lack insight. However, not all people who lack insight are psychotic. For example, a person who abuses alcohol or another psychoactive substance and drives a motor vehicle may lack insight, but he or she may experience no delusions, hallucinations, or other psychotic symptoms.[288] Schizotypal personality was also included as a possible psychotic symptom. Although the peculiarities of ideation in a person with a schizotypal personality disorder are not severe enough to meet the criteria for schizophrenia,[289] the person is considered to be pre-psychotic. He or she can become psychotic if placed under stress.

The large category of nonpsychotic symptoms includes all items that do not, in and of themselves, evince a break with reality. Surely, many psychotic individuals are impulsive, hostile, and agi-

---

286 In some patient records and court evaluator reports, the words "psychotic thinking" were mentioned. Although, technically, the words "psychotic thinking" are not a psychotic symptom listed by the American Psychiatric Association, the words were undoubtedly used to indicate a gross impairment in reality testing. Therefore, when psychotic thinking was reported, we included such reports in TABLE 6C under the broadened category of "delusions or psychotic thinking."

287 The essential feature of schizophrenia, paranoid type "is preoccupation with one or more systematized delusions or with frequent auditory hallucinations related to a single theme." AMERICAN PSYCHIATRIC ASS'N, *supra* note 209, at 197. The essential feature of delusional (paranoid) disorder "is the presence of a persistent, nonbizarre delusion that is not due to any other mental disorder." *Id.* at 199.

288 The diagnostic criteria for psychoactive substance abuse do not include psychotic symptoms. *Id.* at 169.

289 *Id.* at 340.

tated. But nonpsychotic persons have similar characteristics. None of the listed factors signal psychosis.[290]

The court evaluators and hospital staff identified at least one of the factors mentioned in TABLE 6C in each of the twenty-eight patients in the sample population. The number of factors identified varied from a low of one in two patients to a high of five factors in three patients. Nevertheless, not all twenty-eight patients were identified as having either psychotic symptoms or possible psychotic symptoms.

As indicated in TABLE 6D, twenty-one of the twenty-eight patients (75.0%) experienced psychotic symptoms. Seven of the twenty-eight (25.0%) experienced possible psychotic symptoms. However, because five of the seven who experienced possible psychotic symptoms also experienced psychotic symptoms, a total of twenty-three of the twenty-eight patients (82.1%) were identified as experiencing either psychotic or possible psychotic symptoms. For the remaining five patients (17.9% of the total), the lack of psychotic or possible psychotic symptoms precludes the use of their mental disorders as a violence assessment factor.[291] For those who experienced psychotic or possible psychotic symptoms, their potential for violence is increased only if they are currently experiencing psychotic symptoms.[292] And even for those who are currently experiencing psychotic symptoms, the increase in potential violence is relatively slight.[293]

Although we have discussed a number of factors used to assess patients' dangerousness, our discussion of information available in patients' records and evaluators' reports would be incomplete without a consideration of a "nondangerousness" assessment that is often conducted when special conservatorships are renewed. As discussed above,[294] prior to *Jackson*, mental health conservatorships could be established in California for gravely disabled people—people who were unable to provide for food, clothing, or shelter. In creating the special conservatorship for permanently incompetent

---

290 In essence, these "symptoms" are comparable to dandruff. Psychotic people have dandruff, and nonpsychotic people have dandruff. Merely because a person is proven to have dandruff does not mean that he or she is more likely to be psychotic or to become psychotic than a person who is proven not to have dandruff.

291 *See supra* text accompanying note 280.

292 *See supra* text accompanying notes 280-81.

293 *See supra* text accompanying notes 282-84.

294 *See supra* text accompanying notes 128-38.

defendants, the California Legislature added an alternative definition of "gravely disabled" only applicable to permanently incompetent criminal defendants who have outstanding felony charges involving death, great bodily injury, or a serious threat to the physical well-being of another. By statute, the two definitions are mutually exclusive.[295] In *Hofferber*, the California Supreme Court declared that "dangerous mental condition is the *sole* basis on which continued confinement of a permanent incompetent can be justified under the new 'gravely disabled' provisions."[296]

Despite the disjunctive statutory language and the California Supreme Court's pronouncement, special conservatorships have been renewed for some incompetent defendants because they are unable to provide for food, clothing, and shelter, even though they are no longer dangerous. For example, in one case, a psychiatrist serving as court evaluator wrote the following conclusion:

> It is the clinical opinion of the examiner that the patient, [patient's full name], continues to be gravely disabled by her mental disorder and if left to her own devices, she would not be able to provide for her own food, shelter, clothing. This is because she has impaired attention and cannot focus very long on one thing. Her thinking is alogical. Her memory is impaired. She does have delusions of grandiosity and paranoia, hallucinations, and a history of aggression and violence. She simply cannot get along with other people and left to her own devices, would soon be losing her shelter and soon would be spending her money on things other than basic necessities. For these reasons I feel a Conservatorship should be re-established.[297]

Another case is even more egregious. Three weeks before the patient's special conservatorship was due to expire, the patient suf-

---

295 CAL. WELF. & INST. CODE § 5008(h)(1) (West Supp. 1993) specifically provides that "gravely disabled" means *either* of the two definitions.

296 Conservatorship of Hofferber, 616 P.2d 836, 848 (Cal. 1980) (emphasis added).

297 The evaluator reached no conclusion about the patient's present dangerousness. However, in discussing what disabilities should be imposed on the conservatee, the evaluator recommended that the patient should not be permitted to possess a firearm "because she has a history of aggressiveness that began when she was about 13 or 14, and periodically she does act out on her paranoid delusions and she could be a danger to others." This forensic evaluation report was submitted to the San Diego County Superior Court. Because the report is a public record, discussion of the evaluator's statements does not breach any confidentiality to which the authors agreed in order to obtain access to confidential patient records or sealed court files in other counties.

fered a stroke. In a letter to the superior court judge, the hospital informed the judge:

> This left-sided hemiparalysis has resulted in Mr. [patient's last name] being unable to feed, bathe or dress himself. He has incontinence of bowel and bladder, he is unable to give minimal assistance when he is transferred from one position to another, and his ability to communicate or interact is markedly impaired. In short, he now needs total nursing care. He is non-assaultive. The prognosis for his post-cerebral vascular accident (CVA) recovery is described by his treating physician as stable with the expectation his condition will remain the same or deteriorate. Medically and psychiatrically, Mr. [patient's last name] belongs in a skilled nursing facility but can't be placed while charges remain pending against him. We would like for him to be able to live out the remainder of his life with dignity.[298]

Despite this evidence that the patient was not currently dangerous, the court ordered the special conservatorship re-established.

The hearing transcript of a third case confirms the court's application of the regular mental health conservatorship criteria to the special conservatorship situation. The court noted that the question of grave disability has two subparts: Does the patient's mental disorder make him unable to provide for food, clothing, or shelter, and does it make him a serious danger to others? In this case, the court found that both subparts were established, and the court renewed the special conservatorship.

In California, regular mental health conservatorships are used as a civil commitment device to prolong society's control over large numbers of nondangerous mentally ill persons.[299] In contrast, special conservatorships are infrequently used for a small group of permanently incompetent criminal defendants. Because court evaluators and judges commonly handle cases in which "gravely disabled" means inability to provide for food, clothing, or shelter, they may be confused when the rare case arises in which "gravely disabled" means dangerousness. More than twice the number of patients on special conservatorships originate from Los Angeles County than from any other county in the state.[300] However, Los Angeles County has not developed a separate form for use by court

---

[298] The letter was sent to the judge of the mental health court, San Diego County Superior Court, and was included as a public record within the court's file on the patient.

[299] Morris, *supra* note 123, at 214-15.

[300] Twenty-two of the 97 California patients on special conservatorships (22.7%) originated from Los Angeles. *See supra* TABLE 1A.

evaluators in assessing whether the criteria exist in individual cases. Rather, the court evaluators use a conservatorship evaluation form that is also used for regular mental health conservatorships. That form specifically directs the evaluator to determine whether the individual can provide for his or her food, clothing, or shelter and whether the individual is incapable or unwilling to accept voluntary treatment. Those two questions are relevant for determining whether a regular mental health conservatorship should be established but are irrelevant for determining whether a special conservatorship should be established.

(5) Applying the Dangerousness Factors to the Sample Patient Population

In this article, we have discussed ten factors that researchers have identified as correlating with violent behavior. TABLE 7A identifies the extent to which these factors are found in each of the twenty-eight cases in our sample patient population. For purposes of compiling these data, we assumed the truth of all information contained in the patients' records and court evaluators' reports. Thus, if a patient was reported as delusional, we listed the patient as currently experiencing psychotic symptoms. If the patient was reported to have struck another patient, we recorded the report as an unjustified and unprovoked act of violence by the patient.

TABLE 7: SOUTHERN CALIFORNIA SAMPLE: AUTHORS' ASSESSMENT OF WHETHER FUTURE DANGEROUSNESS COULD BE PREDICTED BEYOND A REASONABLE DOUBT

A. Individual Cases

Case Number:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Dangerousness Factors																												
Is defendant under age 40?	N	N	Y	Y	N	N	Y	N	Y	N	Y	Y	N	Y	N	N	Y	Y	Y	N	N	Y	N	N	Y	N	Y	N
Is defendant a male?	Y	Y	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
Is defendant an African-American?[301]	N	N	N	N	Y	N	Y	N	N	N	Y	N	Y	N	N	N	N	Y	Y	N	Y	Y	Y	?	Y	Y	N	N
Did defendant fail to graduate from high school?	Y	Y	Y	?	N	N	Y	N	Y	N	N	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	?
Did defendant have an unstable employment record?	Y	Y	Y	Y	Y	N	Y	N	Y	N	N	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	Y
Did defendant have a history of drug or alcohol abuse?	Y	Y	Y	N	N	Y	Y	Y	Y	N	Y	Y	N	Y	N	Y	Y	Y	Y	N	N	Y	N	N	Y	N	Y	Y
Was defendant charged with a crime involving death, great bodily harm, or serious threat?	Y	N	Y	Y	Y	?	Y	N	Y	Y	Y	Y	?	Y	Y	Y	Y	Y	Y	?	Y	Y	Y	Y	Y	Y	Y	Y
Did defendant commit more than two acts of violence in the hospital before a special conservatorship was established?	N	N	N	N	N	N	Y	N	Y	N	Y	N	N	Y	N	Y	Y	Y	Y	N	N	Y	?	?	N	Y	Y	N
Did defendant commit a violent act after the special conservatorship was established?	N	N	N	Y	N	N	N	N	N	N	N	N	Y	Y	N	Y	Y	Y	Y	N	N	Y	Y	N	Y	Y	Y	N
Is defendant currently experiencing psychotic symptoms?	N	Y	Y	Y	Y	N	?	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	?	Y	N	N
Authors' Assessment																												
Could dangerousness be predicted beyond a reasonable doubt:																												
At time special conservatorship was established?	N	N	N	N	N	N	Y	N	Y	N	Y	N	N	Y	N	Y	Y	Y	Y	N	N	Y	?	?	N	Y	Y	N
At time special conservatorship was most recently renewed?	N	N	N	Y	N	N	N	N	N	N	N	N	Y	Y	N	Y	N	Y	Y	?	N	Y	Y	N	Y	Y	Y	N
At time special conservatorship was established and most recently renewed?	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	Y	N	Y	Y	N	N	Y	?	N	N	Y	Y	N

B. All Cases (N=28)

	Yes		No		?	
	Number	Percent	Number	Percent	Number	Percent
Could dangerousness be predicted beyond a reasonable doubt:						
At time special conservatorship was established?	11	39.3	15	53.6	2	7.1
At time special conservatorship was most recently renewed?	11	39.3	16	57.1	1	3.6
At time special conservatorship was established and most recently renewed?	7	25.0	20	71.4	1	3.6

301. Although we present the question of race as a "dangerousness factor," we are not suggesting a causal link between race and violent behavior. *See supra* note 197 (discussing why overrepresentation of African-Americans in criminal population may be attributable to factors other than race).

In TABLE 7A, we used question marks for various purposes. In a few instances, information about defendants was not available. In one case, the defendant's race was not identified. In two cases, our data did not specify whether the defendant failed to graduate from high school. In two cases, we lacked data on whether the defendant committed violent acts in the hospital before a special conservatorship was established. For these items, we placed a question mark to indicate information was missing. In response to the question: "Was defendant charged with a crime involving death, great bodily harm, or serious threat?," we placed a question mark for one defendant charged with arson and two defendants charged with oral copulation with a child under fourteen years. Apparently, for these three defendants the alleged crime was committed without the necessary harm or threat. As previously discussed,[302] we question whether the statutory criterion can be established for these defendants. Question marks were also used for the two defendants who were currently experiencing possible psychotic symptoms to distinguish them from other defendants who were either experiencing psychotic symptoms or were experiencing no psychotic symptoms.

After identifying which violence factors are present in each sample patient case, we conclude TABLE 7A with our assessment of whether the information gathered from the patient records and court evaluator reports would support a prediction of dangerousness at the level of certainty required by the California Supreme Court—proof beyond a reasonable doubt.[303] At the outset, we note that such burden may be impossible to satisfy. In *Addington v. Texas*,[304] the United States Supreme Court held that in ordinary civil commitment proceedings, due process does not require the commitment criteria to be established by proof beyond a reasonable doubt. Unlike a criminal prosecution that focuses on the purely factual question of whether the accused committed the criminal act, the civil commitment process focuses on the meaning of facts that require interpretation by psychiatrists and psychologists. Given this difference, the Court questioned "whether a state could ever prove beyond a reasonable doubt that an individual is both

---

[302] *See supra* text accompanying notes 229-33. Additionally, we indicated that neither the defendant charged with committing a lewd and lascivious act with a child under 14 years nor the defendant charged with possession of a device to commit arson were charged with a crime involving death, great bodily harm, or serious threat. *See supra* text accompanying notes 234-46.

[303] Conservatorship of Hofferber, 616 P.2d 836, 848 (Cal. 1980).

[304] 441 U.S. 418, 432 (1979).

mentally ill and likely to be dangerous."[305] The Court noted that the difficulty of making definitive conclusions about the future conduct of any particular patient has led courts to allow mental health professionals to testify when their opinions are formed with a reasonable degree of professional certainty.[306]

In a subsequent case involving a defendant found guilty of a capital offense, the Supreme Court held that in the sentencing hearing conducted to determine whether the death penalty should be imposed, psychiatrists offering their predictions about the criminal's future dangerousness were not constitutionally precluded from testifying as expert witnesses.[307] In this case, however, state law permitted the death penalty to be imposed if "there is *a probability* that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[308] Psychiatric predictions could be made with an acceptable degree of reliability because the statute required only proof that future criminal activity by the defendant be more likely than not.[309] The decision does not suggest that an individual's dangerousness can be predicted beyond a reasonable doubt by mental health professionals or anyone else.

Although each of the ten dangerousness factors listed in TABLE 7A correlates with an increased risk of violence, the correlation is not so great that it warrants a finding of dangerousness beyond a reasonable doubt when any one of those factors is found in an individual case. Obviously, a person cannot be predicted beyond a reasonable doubt to be dangerous simply because he is a male, or is under forty years of age, or is an African-American, or failed to graduate from high school, or had an unstable employment record. Alcoholism and other drug abuse significantly elevate the risk of

---

305 *Id.* at 429. Because *Hofferber* was decided one year after *Addington*, the California Supreme Court may well have been aware of the United States Supreme Court's skepticism of proving dangerousness beyond a reasonable doubt. Nevertheless, because it imposed that stringent burden in proceedings to create or renew special conservatorships, the California Supreme Court likely believed that the burden could be satisfied at least in some cases.

306 *See id.* at 430.

307 Barefoot v. Estelle, 463 U.S. 880, 896-903 (1983).

308 *Id.* at 884 n.1 (emphasis added). As revised, the statute is currently codified as TEX. CODE CRIM. PROC. ANN. art. 37.071(2) (West Supp. 1993).

309 *Barefoot*, 463 U.S. at 896. The Court noted that "likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty." *Id.* (citing Jurek v. Texas, 428 U.S. 262 (1976)).

violence.[310] However, this risk is substantially reduced for the sample patient population who have experienced a lengthy period of hospitalization. In almost every case, the individual's diagnosed substance abuse disorder was listed as "in hospital remission."

Because the increase in potential violence is relatively modest for individuals currently experiencing psychotic symptoms,[311] dangerousness beyond a reasonable doubt cannot be predicted on this factor alone. Nevertheless, symptoms of mental disorder were often the only evidence supporting a finding of dangerousness for those patients who had committed no violent acts either prior to or subsequent to the establishment of a special conservatorship. For example, a report on one patient (TABLE 7A, Case 1) stated: "It should be noted that there is no evidence of Mr. [patient's last name] having exhibited any violent or sexually inappropriate behavior while at Patton State Hospital, it is believed, however, that since his condition is not stabilized, there is a substantial likelihood that the act precipitating his incarceration could be repeated." In another case (TABLE 7A, Case 3), the evaluator reported that the patient did not have insight into his illness and might be a potential danger to others without medication. In a third case (TABLE 7A, Case 24), the court evaluator admitted that no delusional or assaultive behavior was detected, but the patient's delusions could make him assaultive and a danger to others. In a fourth case (TABLE 7A, Case 10), the court evaluator asserted, more generally, that the defendant poses a substantial danger of physical harm to others because of her mental illness.

In *Hofferber*, the California Supreme Court held that the probable cause determination that the defendant committed a violent felony cannot give rise to a presumption of continuing dangerousness.[312] Nevertheless, in a few cases the court evaluator apparently used the underlying criminal charge as the exclusive factor to predict future dangerousness. In one case (TABLE 7A, Case 5), the evaluator stated simply: "He has committed a felony that has involved great bodily harm and continues to represent a substantial danger of physical harm to others." In another case (TABLE 7A, Case 6), the evaluator, in referring to the criminal charge, wrote: "[H]e has been a danger to the health and safety of others, he has molested on at least one occasion, having sexually molested a minor female.

---

310 *See supra* text accompanying notes 215-17.

311 *See supra* text accompanying notes 280-84.

312 *See supra* text accompanying notes 252-54.

Inasmuch as Mr. [patient's last name] is not mentally competent and gravely disabled, and a danger, I am going to recommend . . . [a special conservatorship]."

We believe that any attempt to predict future violence should begin by focusing on repeated violent acts committed by the individual in the recent past. As discussed above,[313] this factor dominates all others. Additionally, the factor focuses on the actions of the individual and thus avoids a prediction based on fixed factors over which the individual has no control. As a policy judgment, our society may be offended by long-term confinement founded upon a prediction of dangerousness using only the individual's inherent characteristics that he or she is powerless to refute.[314]

In a case decided one year after *Hofferber*, the California Supreme Court intimated that proof of repeated violent acts is a prerequisite to a prediction of dangerousness. The court reversed a judgment imposing the death penalty based on an expert's prediction that the guilty defendant would commit violent and possibly homicidal acts in prison.[315] The court found such predictions to be "unreliable, and frequently erroneous."[316] However, the court did not adopt an absolute rule barring all predictions of violence at the penalty phase of a capital trial. The court noted that a reliable prediction might "be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence."[317]

TABLE 7B summarizes our assessment in the twenty-eight cases. In eleven of the twenty-six cases in which data were available (42.3%), a prediction of dangerousness at the time the special conservatorship was established could be supported by proof that the defendant committed more than two violent acts in the hospital. In eleven of the twenty-seven cases in which data were available (40.7%), a prediction of dangerousness at the time the special conservatorship was most recently renewed could be supported by

---

313 *See supra* text accompanying notes 258-60.

314 *See generally*, Goodman, *supra* note 187, at 516-27.

315 People v. Murtishaw, 631 P.2d 446 (Cal. 1981), *cert. denied*, 455 U.S. 922 (1982).

316 *Id.* at 466.

317 *Id.* at 470. In *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983), the Supreme Court expressed its agreement with the district court's finding: "The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises." *Id.* at 902.

proof that the defendant committed a violent act after the conservatorship was established. Nevertheless, the eleven cases were not identical. In only seven of the twenty-seven cases in which data were available (25.9%), did the defendant commit more than two acts of violence before the special conservatorship was established and also commit a violent act after the special conservatorship was established. Thus, in some cases, the establishment of a special conservatorship may have been warranted initially but could no longer be justified. In other cases, the evidence was insufficient to establish a special conservatorship initially even though, subsequent to its establishment, the defendant committed a violent act.

For a special conservatorship to be created or renewed, *Hofferber* requires that the individual be dangerous by reason of a mental disorder.[318] Of those defendants who committed a violent act after the special conservatorship was established, nine of the eleven (81.8%) were experiencing psychotic symptoms at the time the special conservatorship was most recently renewed. In one of the other two cases, the evaluator noted that the defendant was "impulsive" and "unpredictably assaultive." In the other, the evaluator referred to the patient's hostility and extremely impaired judgment. Quite possibly the evaluators in these two cases may have believed that the patients were experiencing psychotic symptoms, although the language used to describe the patients is not definitive.

A prediction of dangerousness by reason of mental disorder should, at a minimum, require proof of recent, repetitive violent behavior by an individual who is currently experiencing psychotic symptoms. If this proof exists, the accuracy of a dangerousness prediction may be enhanced when other dangerousness factors are also present. In two cases (TABLE 7A, Cases 18 and 19), all ten dangerousness factors were present, and in one case (TABLE 7A, Case 14), all factors except one were present—the defendant was not an African-American.

The requirement of proof beyond a reasonable doubt imposes on society almost the entire risk of error in the adjudicatory process.[319] If the minimum criteria to predict dangerousness are not present, the individual should be released, notwithstanding the potential risk. In some cases, however, we do not believe society is willing to accept that risk despite an inability to predict dangerous-

[318] Conservatorship of Hofferber, 616 P.2d 836, 848-49 (Cal. 1980).
[319] Addington v. Texas, 441 U.S. 418, 424 (1979).

ness beyond a reasonable doubt. For example, in one case (TABLE 7A, Case 17), the individual had been on special conservatorship for nine years. Until two years ago, every report from the hospital or from a court evaluator listed several instances of physical assaults by the patient. He was described as severely psychotic even on the highest doses of medication. However, the two most recent conservatorship renewal reports stated that the patient had not been assaultive during the previous year. A special conservatorship renewal was sought, and ultimately obtained, because the patient was still considered a potential danger. We concluded that in the absence of violent behavior for a two-year period, this patient cannot be predicted to be dangerous beyond a reasonable doubt.[320]

In a second case (TABLE 7A, Case 12), the patient committed no acts of violence in the hospital prior to the establishment of the conservatorship or during its three-year existence. However, the patient continually experienced delusions and hallucinations and was charged with the bizarre murder of his mother. He allegedly stabbed her to death with a butcher knife, poured toilet bowl cleaner over her face, and claimed that the dead body was not that of his mother but of a man dressed as her. The lack of any violent conduct during the last six years precludes a prediction of dangerousness beyond a reasonable doubt. However, the patient will probably be detained for several more years because of the grotesque nature of the alleged crime and the patient's continued psychotic symptoms.

In a third case (TABLE 7A, Case 20), the patient was also not violent before or after the special conservatorship was established. However, the defendant was charged with various sexual offenses involving a child under the age of fourteen years, has experienced and continues to experience psychotic symptoms, and has repeatedly stated that he will molest young boys if he is released. Some individuals are quite specific in their choice of victim and will not be violent other than to a given victim or class of victims.[321] Individuals diagnosed with pedophilia, including this patient, experience "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' duration, involving sexual activity with a prepubescent child."[322] Thus, the defendant's nonviolence in the hospital may be attributable to his nonaccess to potential victims.

---

320 *See supra* text accompanying notes 258-60.

321 MONAHAN, *supra* note 256, at 96.

322 AMERICAN PSYCHIATRIC ASS'N, *supra* note 209, at 284.

Nevertheless, we question whether dangerousness can be predicted beyond a reasonable doubt for this defendant who has not been violent for several years. Although his potential for violence may permit a prediction with a reasonable degree of professional certainty, the higher standard of proof beyond a reasonable doubt cannot be satisfied.

CONCLUSION

In American criminal jurisprudence, guilt is a prerequisite to punishment.[323] But to find guilt, a trial must be conducted at which the accused is accorded fundamental procedural safeguards.[324] A mentally incompetent defendant is not subject to trial[325] and thus is not subject to punishment. When it appears that a defendant will not regain trial competence in the near future, *Jackson* permits detention only through the customary civil commitment proceedings that are used to confine other citizens.[326] If a state's customary civil commitment statutes do not adequately protect the public from dangerous patients, the legislature can modify them to achieve a more protective result.[327] The modifications must, however, apply equally to all civilly committed patients—including those who are permanently incompetent to stand trial.

A review of legislation in the fifty states and the District of Columbia reveals that *Jackson* has been ignored or circumvented in a

---

323 *See, e.g.*, Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937) ("[N]o person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior.").

324 U.S. CONST. amends. V; VI; XIV, § 1. *See also In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

325 Drope v. Missouri, 420 U.S. 162 (1975). *See supra* text accompanying note 9.

326 Jackson v. Indiana, 406 U.S. 715, 738 (1972). *See supra* text accompanying notes 24-32.

327 For example, the California Legislature lengthened the civil commitment period for dangerous mentally ill persons from 90 days to 180 days. *See supra* text accompanying notes 160-61. A subsequent 180-day detention can be ordered for those persons who threaten, attempt, or inflict physical harm on another during the 180-day commitment period. *See supra* text accompanying note 162. If the California Legislature chose to do so, this statute could be amended to allow the committing judge, in assessing the patient's current dangerousness, to consider evidence of the patient's threats or violent behavior during the year or two prior to the 180-day commitment period.

majority of jurisdictions.[328] In California, for example, the legislature enacted a special conservatorship statute to permit civil commitment of permanently incompetent criminal defendants using different criteria than is used for other civilly committed patients.[329] The California Supreme Court upheld the validity of that statute but imposed a requirement of proof beyond a reasonable doubt that the incompetent defendant presents a substantial danger of physical harm to others.[330]

An empirical study of patients in one of California's state mental hospitals led us to conclude that a majority of permanently incompetent criminal defendants confined there were not proven beyond a reasonable doubt to be dangerous either at the time the special conservatorship was established or at the time it was most recently renewed.[331] In practice, the burden is often reversed—permanently incompetent criminal defendants must prove beyond a reasonable doubt that they are not dangerous. In some cases, defendants who have not acted violently for years are found to be dangerous simply because they exhibit symptoms of mental disorder. In essence, because they are out of their minds, they are kept out of sight.

The alternative is simple; the alternative is *Jackson*. *Jackson* is not optional; it is the law. The Supreme Court interprets the Constitution for all fifty states, not just for some. Twenty-two states have accepted *Jackson* and accommodate permanently incompetent criminal defendants within their customary civil commitment process. The rest can—and must—do so. Permanently incompetent criminal defendants are not a special class to be separately categorized for commitment purposes. In truth, a decision to subject them to different commitment procedures and criteria inflicts punishment without a finding of guilt.[332]

---

328 *See supra* text accompanying notes 56-170.

329 *See supra* text accompanying notes 120-38.

330 *See supra* text accompanying notes 139-44.

331 *See supra* text accompanying notes 303-22.

332 In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Supreme Court identified the following factors to be considered in determining whether the sanction imposed by a statute is punitive in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which

APPENDIX: LEGISLATIVE RESPONSE TO *JACKSON V. INDIANA*

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
ALABAMA	Not specified.	Not specified.	"[U]ntil he is restored to his right mind." ALA. CODE § 15-16-21 (1982).[333]
ALASKA	Not specified.	A court hearing is conducted within 90 days to determine whether the defendant remains incompetent. ALASKA STAT. § 12.47.110(b) (1990).	180 days, however, if the defendant is charged with a crime involving force against a person and the defendant presents a substantial danger to other persons and there is a substantial probability that the defendant will regain competency within a reasonable period, the court may extend the commitment for an additional six months. *Id.*
ARIZONA	Not specified.	Not specified. The court may order the submission of periodic reports on the defendant's status. ARIZ. R. CRIM. P. 11.5(d).	6 months. *Id.* Rule 11.5(b)(3).

---

it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned

. . . .

Id. at 168-69 (citations omitted). Statutes that subject permanently incompetent criminal defendants to a more lenient commitment standard or a more stringent standard of release, or provide fewer procedural protections in the commitment process impose an affirmative disability or restraint that promotes a traditional aim of punishment—deterrence.

[333] Despite ALA. CODE § 15-16-21 (1982), in Ferguson v. State, 552 So. 2d 175 (Ala. Crim. App. 1989), the court ordered the immediate release of an incompetent criminal defendant who was unlikely to attain capacity to stand trial in the foreseeable future and whose condition failed to meet the criteria for involuntary civil commitment.

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
ARKANSAS	Not specified.	Not specified. The Director of the Department of Human Services must file a written report on the defendant's condition within 10 months of commitment. ARK. CODE ANN. § 5-2-310(b)(1) (Michie Supp. 1991).	One year. *Id.* § 5-2-310(b)(2)(A).
CALIFORNIA	90 days. CAL. PENAL CODE § 1370(b)(1) (West Supp. 1993).	The medical director of the treatment facility shall report in writing to the court at six-month intervals, and a court hearing shall be held after 18 months. *Id.* § 1370(b)(1)-(2).	Three years or the maximum period of imprisonment for the most serious offense charged, whichever is shorter. *Id.* § 1370(c)(1). If it appears to the court that the defendant is gravely disabled, the court shall order conservatorship proceedings initiated. *Id.* § 1370(c)(2).
COLORADO	Not specified.	The court shall review the case at least every six months. COLO. REV. STAT. ANN. § 16-8-114.5(2) (West 1990).	Not in excess of the maximum term of confinement that could be imposed for the offenses charged less earned time. *Id.* § 16-8-114.5(1) (West Supp. 1992).
CONNECTICUT	A court hearing shall be held within 90 days of placement. CONN. GEN. STAT. ANN. § 54-56d(k) (West 1985).	Not specified. The person in charge of the facility shall submit a written progress report at least seven days prior to any hearing on the defendant's competency. *Id.* § 54-56d(j).	Placement for treatment shall not exceed the period of the maximum sentence that the defendant could receive on conviction of the charges or 18 months, whichever is less. *Id.* § 54-56d(i).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
DELAWARE	Not specified.	Not specified.	"[T]he court may order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial." DEL. CODE ANN. tit. 11, § 404 (1987).
DISTRICT OF COLUMBIA	Not specified.	Not specified.	Not specified. *See* D.C. CODE ANN. § 24-301(b)-(c) (1989).[334]
FLORIDA	Not specified.	No later than six months after defendant was hospitalized, and every year thereafter, the administrator shall file a report with the court. The court shall hold a hearing within 30 days. FLA. R. CRIM. P. 3.212(c)(5)-(6).	Five years if the defendant was charged with a felony or one year if charged with a misdemeanor. *Id.* 3.213(b).
GEORGIA	90 days. GA. CODE ANN. § 17-7-130(b) (1990).	Not specified.	Nine months. *Id.* § 17-7-130(d).
HAWAII	Not specified. The statute requires the Director of Health to report to the court "[w]ithin a reasonable time." HAW. REV. STAT. § 704-406(3) (Supp. 1992).	Not specified.	Not specified.[335]

[334] If the trial court finds that the defendant is unlikely to become competent in the foreseeable future, the government should be required to institute a civil commitment proceeding within 30 days, or the defendant should be released. Thomas v. United States, 418 A.2d 122, 126-27 (D.C. 1980).

[335] In State v. Raitz, 621 P.2d 352 (Haw. 1980), the Hawaii Supreme Court construed the seemingly open-ended commitment provision of Hawaii's statute consistently with *Jackson*'s requirements. The court did not articulate specific time limits, however.

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
IDAHO	90 days. IDAHO CODE § 18-212(2) (1987).	The facility is required to prepare a progress report on the defendant's condition which is considered by the court at a hearing following the initial 90-day commitment. *Id.* § 18-212(2).	180 days. *Id.* § 18-212(2).
ILLINOIS	30 days. ILL. ANN. STAT. ch. 38, para. 104-17(e) (Smith-Hurd Supp. 1992).	A court hearing is conducted every 90 days. *Id.* ch. 38 para. 104-20(a) (Smith-Hurd 1980). Written progress reports must be submitted to the court seven days prior to any hearing. *Id.* ch. 38 para. 104-18(a)(1) (Smith-Hurd 1980).	One year, however, thereafter an evidentiary hearing on the crime charged may be conducted and if the defendant is found "guilty," he or she may be subjected to an extended treatment period of five years if the defendant was charged with murder, two years for certain felonies, and 15 months for other felonies. *Id.* ch. 38 paras. 104-23, 104-25(a)-(d) (Smith-Hurd Supp. 1992).[336]
INDIANA	90 days. IND. CODE ANN. § 35-36-3-3 (Burns Supp. 1992).	Not specified.	Six months. *Id.* § 35-36-3-3.
IOWA	Six months. IOWA CODE ANN. § 812.5 (West Supp. 1992).	Not specified.	Not specified.
KANSAS	90 days. KAN. STAT. ANN. § 22-3303(1) (1988).	Not specified.	Six months. *Id.* § 22-3303(1).
KENTUCKY	Not specified.	Not specified.	60 days. KY. REV. STAT. ANN. § 504.110 (Baldwin 1984), as amended by 1988 Ky. Rev. Stat. & R. Serv. ch. 139, § 17 (Baldwin).

[336] At the end of the extended treatment period, the defendant must be unconditionally released if he or she does not meet the criteria for involuntary civil commitment. People v. Bocik, 570 N.E.2d 671, 675 (Ill. Ct. App. 1991).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
LOUISIANA	At the time the defendant is found incompetent, the court determines whether the defendant's competence is likely to be restored within 90 days and whether the defendant should be treated as an outpatient, in jail, or at a forensic facility. LA. CODE CRIM. PROC. ANN. art. 648(A) (West Supp. 1993).	Not specified.	Not to exceed "the maximum sentence the defendant could receive if convicted of the crime with which he is charged." *Id.* art. 648(B)(1).[337]
MAINE	Not specified.	At the end of 30 days, 60 days, and one year, a report on the defendant's condition is submitted to the court which holds a hearing on the defendant's competence. ME. REV. STAT. ANN. tit. 15, § 101-B(4)(A) (Supp. 1992).	One year. *Id.*

[337] In State *ex rel.* Lockhart v. Armistead, 351 So. 2d 496, 498-99 (La. 1977), the Louisiana Supreme Court ruled that a statute permitting commitment to a mental institution for the maximum sentence for the crime with which the accused is charged but not convicted does not validate confinement beyond that period of time necessary to determine that the accused will not be restored to competency within a reasonable period of time. In *Lockhart*, the maximum sentence that could have been imposed for conviction of the crime charged against the accused was 10 years. The court ordered the defendant's release because he had been confined for two years notwithstanding a finding of permanent incompetence after 14 months.

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
MARYLAND	Not specified.	Not specified. The Department of Health and Mental Hygiene is required to submit an annual report to the court that committed the incompetent defendant. MD. CODE ANN., HEALTH-GEN. § 12-107(a) (1990).	The incompetent defendant may be committed "until the court is satisfied that the defendant no longer is incompetent to stand trial or no longer is, because of mental retardation or a mental disorder, a danger to self or the person or property of others." *Id.* § 12-105(b).
MASSACHUSETTS	Not specified, however, the incompetent defendant is hospitalized for 40 days "for observation and examination." MASS. GEN. LAWS ANN. ch. 123, § 16(a) (West Supp. 1993).	Not specified. A periodic clinical review is mandated, but the period is not specified. *Id.* ch. 123, § 17(a).	After the period of observation, the incompetent defendant may be hospitalized for six months and then additional one-year periods if found to be mentally incompetent and whose discharge would create a likelihood of serious harm. *Id.* ch. 123, §§ 8(a)-(b), 16(b)-(c).
MICHIGAN	Not specified.	A court hearing is conducted every 90 days upon receipt of a report from the medical supervisor of treatment. MICH. COMP. LAWS ANN. §§ 330.2038, 330.2040 (West 1992).	"15 months or 1/3 of the maximum sentence the defendant could receive if convicted of the charges against him, whichever is lesser . . . ." *Id.* § 330.2034.

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
MINNESOTA	Not specified.	Not specified. The institution to which the defendant is civilly committed shall report on the defendant's competency not less than once every six months. MINN. R. CRIM. P. 20.01(5).	Incompetent defendants are only subject to civil commitment proceedings. *Id.* Rule 20.01(4). However, if the incompetent defendant has homicidal tendencies, he or she shall be committed to the Minnesota Security Hospital "until recovery." MINN. STAT. ANN. § 253.25 (West Supp. 1993).
MISSISSIPPI	Not specified.	Not specified. However, by court rule the state asylum to which the defendant is committed shall submit a written report to the court at the time of commitment and every following four months. A court hearing is required only if the defendant is reported to be competent. MISS. UNIF. CRIM. R. CIR. CT. PRAC. 4.08(1).	Not specified. However, by court rule the defendant may be confined for "a reasonable period of time." *Id.* Rule 4.08(1).
MISSOURI	Six months. MO. ANN. STAT. § 552.020(10) (Vernon 1987).	Upon receiving the six-month evaluation report, the court shall determine the defendant's mental fitness to proceed or whether the defendant will be mentally fit to proceed in the reasonably foreseeable future. *Id.*	12 months. *Id.*
MONTANA	90 days. MONT. CODE ANN. § 46-14-221(2) (1991).	Not specified.	"[F]or so long as the unfitness endures." *Id.*
NEBRASKA	Not specified.	Not specified.	"[U]ntil such time as the disability may be removed." NEB. REV. STAT. § 29-1823 (1989).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
NEVADA	Three months if the defendant was charged with a misdemeanor; six months if the defendant was charged with a felony. NEV. REV. STAT. § 178.450(2) (1992).	The administrator of the Mental Hygiene and Mental Retardation Division shall notify the judge at monthly intervals after the initial three-month report for defendants charged with misdemeanors and at six-month intervals for defendants charged with felonies. The judge conducts a hearing if notified that the defendant is either competent or that there is no probability that he will attain competency in the foreseeable future. *Id.* §§ 178.450(2), .455, .460.	"[T]he longest period of incarceration provided for the crime or crimes with which he is charged or 10 years, whichever period is shorter." *Id.* § 178.460(4).
NEW HAMPSHIRE	Not specified.	Not specified.	The incompetent defendant may be confined for up to 90 days "to be evaluated for appropriateness for involuntary admission into the state mental health services system, including the secure psychiatric unit, and to commence civil proceedings, if appropriate." N.H. REV. STAT. ANN. § 135:17-a (Supp. 1992).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
NEW JERSEY	Not specified. The statute merely restates *Jackson*'s requirement "that no commitment to any institution shall be in excess of such period of time during which it can be determined whether it is substantially probable that the defendant could regain his competence within the foreseeable future." N.J. STAT. ANN. § 2C:4-6(b) (West 1982).	"[E]ach defendant's case shall be specifically reviewed by the court at 6-month intervals . . . ." *Id.* § 2C:4-6(c).	Not specified.
NEW MEXICO	30 days. N.M. STAT. ANN. § 31-9-1.2(D) (Michie Supp. 1993).	A court hearing is conducted within 90 days. *Id.* § 31-9-1.3(A). A written progress report must be submitted to the court at least seven days prior to the hearing. *Id.* § 31-9-1.3(B). If the defendant remains incompetent but is making progress, another hearing is conducted within one year of the original finding of incompetency. *Id.* § 31-9-1.3(D).	One year. *Id.* §§ 31-9-1.3(E), 31-9-1.4. However, thereafter an evidentiary hearing on the crime charged may be conducted and if, by clear and convincing evidence, the defendant is found both "guilty" and dangerous, "the defendant shall be detained by the department of health in a secure, locked facility." The trial court reviews the issues of competency and dangerousness every two years. A defendant who remains incompetent and dangerous may be confined "until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had he or she been convicted . . . in a criminal proceeding." *Id.* § 31-9-1.5.

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
NEW YORK	Not specified.	If the incompetent defendant is charged with a felony, a court hearing on the defendant's competence is held after one year. If the defendant remains incompetent, the court may issue an order of retention for not more than one year. Subsequent hearings result in retention orders not to exceed two years. N.Y. CRIM. PROC. LAW § 730.50 (McKinney 1984 & Supp. 1993).	If the defendant is charged with a misdemeanor, a 90-day order of observation is issued and the complaint or indictment is dismissed. The defendant's competence is not assessed during the 90 days and further confinement occurs through the civil commitment process. *Id.* §§ 730.40(1), 730.50(1) (McKinney 1984). If the defendant is charged with a felony, "the first order of retention and all subsequent orders of retention must not exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment." *Id.* § 730.50(3) (McKinney 1984).[338] If the defendant is a danger to himself and others, the court may authorize an additional retention of up to six months. *Id.* § 730.60(6)(c) (McKinney 1984).[339]

[338] Although the New York statutes do not specifically address the *Jackson* issues, a Richmond County Supreme Court judge ruled that habeas corpus is a proper procedural device to obtain a *Jackson* hearing in order to convert the petitioner's commitment status from criminal to civil. People *ex rel.* Ardito v. Trujillo, 441 N.Y.S.2d 348, 351 (Sup. Ct. 1981).

[339] Relying on *Jackson*, a Bronx County Supreme Court judge has held that when it is determined that the defendant will not attain the capacity to proceed to trial in the foreseeable future, any restrictions on his or her liberty are governed by the civil commitment laws. Thus, the statute authorizing the District Attorney to initiate proceedings to extend an incompetent

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
NORTH CAROLINA	Not specified.	Not specified. The hospital must report on the defendant's condition just prior to the end of each inpatient commitment period applicable to civilly committed patients—i.e., 90 days, then 180 days, then annually thereafter—unless the court requires more frequent reports. N.C. GEN. STAT. §§ 15A-1004(d) (1988), 122C-271(b), 122C-276(e)-(f) (1989).	Incompetent defendants are only subject to civil commitment proceedings. *Id.* § 15A-1003(a) (1988).
NORTH DAKOTA	Not specified. However, at the time the defendant is found to be incompetent, the trial court determines whether the defendant will attain competence in the foreseeable future. N.D. CENT. CODE § 12.1-04-08(1) (Supp. 1991).	Not specified.	Not specified. However, charges against the defendant must be dismissed at the expiration of the maximum period for which the defendant could be sentenced, or if the court determines that the defendant will not regain competence. *Id.*
OHIO	At the time the defendant is found to be incompetent, the trial court determines "whether there is a substantial probability that the defendant will become competent to stand trial within one year." OHIO REV. CODE ANN. § 2945.38(B) (Baldwin 1992).	Upon receiving a report from the person who supervises the defendant's treatment—after 90 days of treatment and after each 180 days thereafter—the court conducts a hearing on the defendant's competence. *Id.* § 2945.38(E)-(F).	15 months or 1/3 of the longest maximum sentence that might be imposed for conviction of the most serious crime charged against the defendant, whichever is less. *Id.* § 2945.38(D).

---

defendant's commitment for an additional six months was not useable because it was not useable for civilly committed patients generally. People v. Merrill, 474 N.Y.S.2d 198 (Sup. Ct. 1984).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
OKLAHOMA	Not specified. However, the statute declares that the reasonable period of time is "defined by the court." OKLA. STAT. ANN. tit. 22, § 1175.7(A) (West Supp. 1993).	Not specified. The court may require the medical supervisor of treatment to provide periodic progress reports. *Id.* tit. 22, § 1175.7(B).	Not specified. However, a defendant charged with a crime punishable by death or life imprisonment "shall be placed in a maximum security ward of [a Department of Mental Health] facility . . . until such time as said person is adjudicated to be competent or is adjudicated no longer determined to be a threat to any other person." *Id.* tit. 22, § 1175.6(B).
OREGON	Not specified.	Not specified.	"[F]or a period of time equal to the maximum term of the sentence which could be imposed if the defendant were convicted of the offense with which the defendant is charged or for five years, whichever is less . . . ." OR. REV. STAT. § 161.370(3) (1991).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
PENNSYLVANIA	Not specified. The statute merely restates *Jackson*'s requirement that the defendant shall not "be detained on the criminal charge longer than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." PA. STAT. ANN. tit. 50, § 7403(d) (Purdon Supp. 1993).	Not specified. A psychiatrist appointed by the court is required to reexamine the defendant not less than every 90 days and submit a report to the court. *Id.* tit. 50, § 7403(c).	If the defendant is charged with first or second degree murder, no limit is placed on the length of confinement, so long as the probability exists of the defendant attaining competence in the foreseeable future. If the defendant is charged with any other crime, the defendant may be confined for the maximum sentence that could be imposed for the crime or crimes charged or 10 years, whichever is less, so long as the probability exists of the defendant attaining competence in the foreseeable future. *Id.* tit. 50, § 7403(d)-(f).
RHODE ISLAND	Not specified.	Not later than six months from the date of the order of commitment, and every six months thereafter, the Director of the Department of Mental Health, Retardation and Hospitals shall petition the court, and the court shall conduct a hearing to review the defendant's competency. R.I. GEN. LAWS § 40.1-5.3-3(h)-(j) (1990).	2/3 of the maximum term of imprisonment for the most serious offense with which the defendant is charged. If the maximum term for the most serious offense charged is life imprisonment or death, then defendant may be detained 20 years. *Id.* § 40.1-5.3-3(g).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
SOUTH CAROLINA	Not specified. However, at the time the defendant is found incompetent, the trial court determines whether the defendant is likely to become competent in the foreseeable future. S.C. CODE ANN. § 44-23-430 (Law. Co-op. 1985).	Not specified.	60 days. *Id.*
SOUTH DAKOTA	Four months. S.D. CODIFIED LAWS ANN. § 23A-10A-4 (Supp. 1993).	At the end of the four-month evaluation, the court determines whether there is a reasonable likelihood that the defendant will become competent within the next year. However, whether or not such likelihood exists, the defendant continues to be detained as an incompetent defendant if charged with a Class A or B felony. Court hearings to review the defendant's competence are conducted every 12 months. *Id.* §§ 23A-10A-14 to 23A-10A-15.	May not exceed the maximum penalty allowable for the most serious charge facing the defendant. *Id.* § 23A-10A-15.
TENNESSEE	Not specified.	Not specified. However, after the patient has been hospitalized for six months, and at six month intervals thereafter, the superintendent of the hospital shall file a report that includes an assessment of whether the patient will become competent in the foreseeable future. TENN. CODE ANN. § 33-7-301(c) (Supp. 1992).	Incompetent defendants are only subject to civil commitment proceedings. *Id.* § 33-7-301(b).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
TEXAS	Not specified. However, at the time the defendant is found incompetent, a jury impaneled to determine competence determines "whether there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future." TEX. CODE CRIM. PROC. ANN. art. 46.02, § 4(d) (West 1979).	Not specified. However, the facility to which the defendant is committed shall report to the court on the defendant's progress toward achieving competency at least every 90 days. *Id.* art. 46.02, § 5(c).	18 months. *Id.* art. 46.02, § 5(a) (West Supp. 1993).
UTAH	Not specified.	Not specified.	The defendant shall be committed to the Utah State Hospital or to another mental health facility "until the court that committed him . . . finds that he is competent to proceed." UTAH CODE ANN. § 77-15-6(1) (Supp. 1993).[340] If the defendant's incompetence is a result of mental retardation and there is a substantial probability that the defendant will remain incompetent indefinitely, the defendant may nevertheless be committed for a period not to "exceed the period for which he could be incarcerated had he been convicted and received the maximum sentence for the crime of which he was accused." *Id.* § 77-15-6(2).

[340] In State v. Drobel, 815 P.2d 724, 728 n.3 (Utah Ct. App.), *cert. denied*, 836 P.2d 1383 (Utah 1991), the court noted that *Jackson* prohibits the

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
VERMONT	Not specified.	Not specified.	Incompetent defendants are only subject to civil commitment proceedings.[341] VT. STAT. ANN. tit. 13, §§ 4820-4823 (Supp. 1992).[342]
VIRGINIA	Six months. VA. CODE ANN. § 19.2-169.3(B) (Michie 1990).	Court hearings are conducted at the completion of each six-month period of commitment. *Id.*	Not specified. However, charges against the unrestorable incompetent defendant are dismissed "on the date upon which his sentence would have expired had he been convicted and received the maximum sentence for the crime charged, or on the date five years from the date of his arrest for such charges, whichever is sooner." *Id.* § 19.2-169.3(C).

involuntary confinement of an incompetent defendant for longer "than is necessary to determine whether there is a substantial probability of competency being restored in the foreseeable future. If no such probability exists, the defendant must either be civilly committed or released." *Id.*

341 The Vermont Supreme Court has ruled that the standard for involuntary commitment of incompetent defendants is the same as that for civil commitment. State v. Spear, 458 A.2d 1098, 1100 (Vt. 1983). The 90-day limit on initial hospitalization orders for civilly committed patients is also applicable for incompetent defendants who have been civilly committed. State v. Mayer, 423 A.2d 492, 493 (Vt. 1980).

342 Unlike release procedures for other civilly committed persons, "[i]n any case involving personal injury or threat of personal injury, the committing court may issue an order requiring a court hearing before [the civilly committed incompetent defendant] may be discharged from custody." VT. STAT. ANN. tit. 13, § 4822(a) (Supp. 1992).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
WASHINGTON	90 days, however, after conducting a hearing, the court may order a second 90-day period. The second 90-day period shall not be ordered if the defendant's incompetence is solely the result of a developmental disability and competency is not likely to be regained during the extension. WASH. REV. CODE ANN. § 10.77.090 (1)-(2) (West 1990).	A court hearing is conducted at the end of the initial 90-day commitment period and at the end of the second 90-day commitment period. *Id.*	90 days for developmentally disabled defendants and 180 days for other defendants. However, the period of commitment may be extended for an additional six months if the incompetent defendant is found to be "a substantial danger to other persons, or presents a substantial likelihood of committing felonious acts jeopardizing public safety or security, and . . . there is a substantial probability that the defendant will regain competency within a reasonable period of time." *Id.* § 10.77.090(3).
WEST VIRGINIA	At the time the defendant is found incompetent, the court determines whether there is a substantial likelihood that the defendant will attain competence within the ensuing six months, and if the court so finds, the defendant is committed. W. VA. CODE § 27-6A-2(b) (1992).	Not specified. However, if the defendant is civilly committed following a treatment period as an incompetent defendant, his competency is reviewed every six months and reported to the court. *Id.* § 27-6A-2(d).	Nine months (i.e., the chief medical officer may request, and the court may order that the initial six-month treatment period be extended by three months.) *Id.* § 27-6A-2(b).

	What is the reasonable period of time necessary to determine whether there is a substantial probability that the defendant will attain trial competency in the foreseeable future?	*Is there periodic court review of the defendant's progress toward attaining the goal of restoration to competence?*	*How long may an incompetent defendant be treated before the state must institute customary civil commitment proceedings or release the defendant?*
WISCONSIN	At the time the defendant is found incompetent, the court determines whether the defendant is likely to become competent within "12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." WIS. STAT. ANN. § 971.14(4)(d) (West 1985), (5)(a) (West Supp. 1992).	The court shall conduct hearings on the defendant's competence and progress toward attaining competence after receiving reports from the treatment facility 3 months after commitment, 6 months after commitment, 9 months after commitment and within 30 days prior to the expiration of commitment. *Id.* § 971.14(5)(b) (West Supp. 1992).	"[A] period of time not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." *Id.* § 971.14(5)(a).
WYOMING	Not specified. The statute merely states that the commitment shall be "for such period as the court may order but not to exceed the time reasonably necessary to determine whether there is substantial probability that the accused will regain his fitness to proceed." WYO. STAT. § 7-11-303(g) (1987).	Not specified. At least once every three months the head of the facility is required to report on the defendant's progress toward regaining his fitness to proceed. *Id.*	Not specified. The statute authorizes civil commitment proceedings only if it is determined that there is no substantial probability that the accused will regain his fitness to proceed. *Id.*