

# When Restoration Fails: One State's Answer to the Dilemma of Permanent Incompetence

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The landmark 1972 U.S. Supreme Court decision in *Jackson v. Indiana* prohibited the indefinite commitment of criminal defendants on grounds of incompetence to stand trial if there was no substantial probability of restoration to competency in the foreseeable future. Such defendants are still subject to ordinary civil commitment; however, not all will meet civil commitment criteria, given that the criteria for a finding of incompetency to stand trial do not map directly onto the general criteria for involuntary psychiatric hospitalization. If a person charged with a serious crime, such as murder, has no substantial probability of being restored to competency, but does not meet standard civil commitment criteria, compliance with *Jackson* would seem to require release into the community. This article describes a legislative response to this possibility that became law in California four decades ago, as well as the outcome of its main legal challenge a few years later. Although the law has received harsh criticism from some quarters, it has survived, and provides a legally straightforward, if ethically controversial, means of answering the question of what to do with a permanently incompetent defendant who is charged with a serious violent offense and does not meet traditional civil commitment criteria.

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A 2013 article in *The Journal*<sup>1</sup> describes an intriguing case from Oregon in which ethics complaints were filed against three parties: a magistrate, the district attorney of Washington County, Oregon, and a defense attorney with Portland's Metropolitan Public Defender Agency. The complaints arose from the use of a so-called "mental illness magistrate hold" (Ref. 1, p 116) in the case of Donn Spinosa, a murder defendant who had been found incompetent to stand trial. After he spent three years in Oregon State Hospital (OSH), the maximum commitment period for competency restoration under Oregon law, he was found to have remained incompetent. The charges were dismissed without prejudice, and he was civilly committed to OSH.

Nearly 10 years later, when the hospital sought to release him to a community placement, the charges were refiled, and he was placed in the Washington County jail. He was again found incompetent and transferred back to OSH. There, a psychologist

opined that there was no substantial probability that he would become competent. The criminal charges were dismissed, at which point the novel "magistrate hold" was used to recommit him to OSH. The defense attorney and district attorney on the case agreed to the use of this order.

A retired judge who had worked as special master to OSH filed ethics complaints against the magistrate and both attorneys, asserting that they had acted unethically in committing the patient to OSH under a magistrate hold, which, according to the retired judge, is not supported by Oregon law. Following the complaints, the Oregon State Bar opened an investigation and eventually pursued charges of ethics violations against both the defense attorney and the Washington County district attorney. These charges were ultimately dropped. In dismissing the ethics complaints, the Oregon Bar opined that the two attorneys had not attempted to circumvent existing civil commitment laws, but rather to initiate a civil commitment.<sup>2</sup>

The *Spinosa* case is a compelling reminder of the dilemma posed by permanently incompetent defendants who are alleged to have committed serious crimes in the era after the landmark U.S. Supreme

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Court decision in *Jackson v. Indiana*.<sup>3</sup> *Jackson* holds that incompetency to stand trial is not, in and of itself, sufficient to justify civil commitment once it has been determined that there is no substantial probability of restoration to competency. Given the differences between the criteria for incompetence to stand trial and the criteria for civil commitment, some incompetent, unrestorable defendants will not meet traditional civil commitment criteria and would therefore seem eligible for release from jail or hospital confinement. When the alleged crimes are misdemeanors or less serious felonies, their release may not be a cause for great concern. However, if the charge is serious, such as murder, attempted murder, and the like, the prospect of release raises a significant question of public safety.

The California state legislature addressed the problem of permanently incompetent defendants charged with violent crimes in the immediate aftermath of the *Jackson* decision. By creating a new route to civil commitment, the state plugged the gap resulting from the difference between the criteria needed to be found incompetent to stand trial and those that must be met for long-term civil commitment. The constitutionality of the new commitment scheme was challenged and was ultimately decided by the California Supreme Court.

The general topic of unrestorability of criminal defendants after *Jackson* was reviewed by Parker in 2012.<sup>4</sup> Although the decision in *Jackson* specifically prohibits continued commitment after a reasonable effort at restoration is unsuccessful, Parker found that 10 states had no statute that set a maximum time of commitment for incompetent criminal defendants. Thirty states had laws that specified a maximum period of commitment, either as a certain number of years or as some proportion of the maximum prison sentence for the crime charged (e.g., one-half, two-thirds, or 100 percent). The remaining 10 states allowed for indefinite commitment, but only as long as the defendant met civil commitment criteria. (California is counted among the latter 10; however, as will be made clear herein, this characterization does not fully capture its statutory scheme.)

Parker also pointed out how a theoretical ban on indefinite commitment may not translate into *de facto* compliance with the *Jackson* holding. He cited the *Jackson*-respondent state of Indiana, where, until 2010, the state hospitals “always sought the renewal of the civil commitment of incompetent defendants,

and it was always granted by the courts” (Ref. 4, p 172). Similarly, in an empirical study of defendants who were found to be incompetent and unrestorable in Maricopa County, Arizona, and who were referred for civil commitment, Levitt *et al.*<sup>5</sup> reported that the unrestorable defendants were civilly committed at a higher rate than comparison patients, despite meeting fewer admission criteria, and had a longer length of stay.

This article describes an unusual California statute addressing the long-term involuntary commitment of incompetent, unrestorable defendants facing serious felony charges. These defendants are eligible for a one-year, renewable civil commitment, even if they do not meet the traditional standard of grave disability, the standard that must be proven in California for a one-year civil commitment outside of the criminal justice system. Some readers may find this commitment scheme surprising and perhaps even disturbing from an ethics standpoint.

Several characteristics of this type of commitment are remarkable, setting it apart from most other civil commitment laws and raising questions of ethics and fairness. Unlike civil commitment after a finding of not guilty by reason of insanity, the statute does not require proof beyond a reasonable doubt that the crime charged was committed by the patient. An indictment or information is sufficient; not even a preliminary hearing is required. The question of inability to care for oneself because of a mental disorder, which must be established for most other types of long-term civil commitment, is not relevant, nor are questions of amenability to or availability of treatment. As written, the law does not even require the state to establish that the patient remains dangerous, other than by the implication of the original, unproven criminal charge. Long-term deprivation of liberty on such grounds is likely to give some (perhaps many) forensic mental health professionals pause.

California’s law providing for the civil commitment of permanently incompetent criminal defendants requires only three facts to be established: that the defendant is currently charged with an enumerated violent felony, is incompetent to stand trial, and cannot be restored to competency. These latter two facts are established using the preponderance-of-evidence standard of proof. In most other long-term commitment proceedings in most U.S. jurisdictions, either the clear-and-convincing-evidence or the

beyond-a-reasonable-doubt standard of proof is required. As will be seen, the lack of a requirement for a showing of ongoing dangerousness was held to be a fatal procedural flaw, but with this adjustment made by case law, the commitment law has now been used for more than 30 years.

### Plugging the Gap

California passed the groundbreaking Lanterman-Petris-Short (LPS) Act<sup>6</sup> in 1967. Under this statutory scheme, long-term civil commitment requires the presence of grave disability, which the law defined as: “[a] condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter” (Ref. 7). Individuals who meet this criterion can be civilly committed for a period of 12 months. This commitment is described by statute as a conservatorship for gravely disabled persons and is commonly referred to as mental health conservatorship, LPS conservatorship, or simply conservatorship. The public guardian’s office or a private party can be appointed as the conservator for the person, the estate, or both the person and the estate. A conservatorship of the person grants the conservator the power to make decisions about the conservatee’s residence, including consenting on his behalf to psychiatric hospitalization or placement in a locked mental health facility (such as an institution for mental disease or IMD) and consenting to the administration of psychotropic medications.

Under the LPS Act, patients who are dangerous to themselves or others due to a mental disorder, but are not gravely disabled, can be involuntarily committed to an inpatient psychiatric hospital unit for shorter periods, but do not qualify for a one-year commitment unless they are gravely disabled. In the years since the passage of the LPS Act, most U.S. jurisdictions have eliminated long-term commitment (i.e., greater than three to six months) on grounds other than grave disability (i.e., danger to self or danger to others).<sup>8</sup>

In the aftermath of the *Jackson* decision and a related California Supreme Court case, *In re Davis*,<sup>9</sup> the state changed its law governing incompetency to stand trial. The maximum commitment after a finding of incompetency was fixed at three years or the maximum prison or jail sentence for the most serious offense charged, whichever was less. Thereafter, if a defendant was still not restored to competency, he

had either to be released or civilly committed according to the procedures set forth in the LPS Act.

Marjory Winston Parker was Deputy Attorney General for California in the early 1970s. She was asked by State Assemblyman Frank Murphy to assist in drafting Assembly Bill 1529, which became law in 1974. In a 1975 law review article,<sup>10</sup> Ms. Parker described AB 1529 as:

... a complex attempt to integrate and resolve the conflicting concerns of protecting society from dangerous individuals who are not subject to criminal prosecution, preserving a libertarian policy regarding the indefinite commitment of mentally incompetent individuals who have not been charged with criminal conduct, and safeguarding the freedom of incompetent criminal defendants who present no threat to the public [Ref. 10, p 485].

In explaining the dilemma that the bill was intended to resolve, Ms. Parker wrote:

A defendant charged with an atrocious crime would be close to complete freedom if he could initially convince a jury that he was mentally incompetent to stand trial, and then at his civil commitment hearing, establish that he was capable of caring for himself, and not, therefore, gravely disabled as required for long-term civil commitment [Ref. 10, pp 488–9].

She added in a footnote:

Assemblyman Murphy was especially concerned with the problem since his district included Santa Cruz County where three mass murderers, Edmund E. Kemper III, Herbert Mullin, and John L. Frazier, [who,] among them[,] had perpetrated 23 killings in less than a three year period . . . [Ref. 10, p 489, fn 36].

AB 1529 added a second category to the definition of the legal term “gravely disabled.” Now, in addition to the original group of those unable to provide their own food, clothing, and shelter because of a mental disorder, a criminal defendant who had been found incompetent to stand trial, who had a pending indictment or information, and who remained incompetent at the conclusion of the three-year statutory maximum, was defined by statute as being gravely disabled, if he was charged with “having committed a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person” (Ref. 10, p 493). Such individuals were now subject to a one-year renewable civil commitment, even if they did not meet the standard criterion of being unable to provide for their own food, clothing, and shelter. This type of commitment has become commonly known as a “Murphy conservatorship,” after the author of the law.

The new law was not without its critics. Grant Morris, law professor and, at the time, acting dean of the University of San Diego School of Law, authored a law review article that questioned the wisdom of the entire concept of LPS conservatorship, provocatively titled “Conservatorship for the ‘Gravely Disabled’: California’s Nondeclaration of Nonindependence.”<sup>11</sup> Included in his critique is the following indictment of the Murphy law:

Such expansion of the LPS conservatorship criteria is not warranted. In [*Jackson*] the Supreme Court held that the mere filing of criminal charges does not justify fewer procedural and substantive protections against indefinite commitment than those generally available to nondefendants. The Court struck down as violative of the equal protection clause an Indiana statute that subjected mentally incompetent criminal defendants to commitment standards more lenient and release standards more stringent than those applicable generally to civil commitment.

California’s attempt to create a new category of civilly committable patients—a category into which only mentally incompetent defendants charged with violent crimes can fit—is an obvious attempt to circumvent the requirements of *Jackson* and should not be sanctioned. Proof of the commission of a violent felony—that is, a finding of guilt in a criminal trial—is not, without more, proof of the future dangerousness of the individual. *A fortiori*, proof only of probable cause to believe that the defendant committed a violent felony and an adjudication of mental incompetence to stand trial do not in themselves justify a prediction of future dangerousness and preventive detention of this presumably innocent individual [Ref. 11, pp 212–3, fn 58].

### Putting the Law to the Test

It would not be long before the California courts mediated between the opposing viewpoints represented by Ms. Parker and Mr. Morris. The case of Glenn Hofferber made its way up to the California Supreme Court and was decided in 1980 in *Conservatorship of Hofferber*.<sup>12</sup>

Mr. Hofferber was originally charged with murder in 1974. Later that year, he was found incompetent to stand trial and remanded to the state hospital. He had been on a standard LPS conservatorship, which had been terminated before the alleged crime. He was reported to have arrived at his work place on the day of the crime “in a specially tailored, 10-star-general’s uniform befitting his self-proclaimed position as Commander-in-Chief of the armed forces” (Ref. 12, p 840). It was also noted that he:

... perceives himself as God and the President of the United States (and thus as supreme director of the FBI, the CIA, etc.). He was secret president by arrangement with Lyndon Johnson, but only Dwight Eisenhower was fully aware of his mission. He has deposited substances which will change

everything at secret locations near the United Nations and in the Los Angeles sewer system [Ref. 12, p 840].

In 1977, after Mr. Hofferber had been confined for the statutory maximum three-year commitment for restoration of competency, the Department of Health determined that there was “no substantial likelihood he would regain mental competence in the foreseeable future” (Ref. 12, p 840), and he was returned to the criminal court. He was again found incompetent by a jury at a competency trial, using preponderance of the evidence as the standard of proof. In 1978, he was adjudicated to be gravely disabled and placed on a Murphy conservatorship.

Hofferber appealed his civil commitment on three grounds:

... that (1) a person charged with a violent felony and found mentally incompetent to stand trial may not be civilly committed for reasons and under procedures that differ from those applicable to other mentally disordered persons, (2) to establish grave disability his incompetency must be proved beyond a reasonable doubt, and (3) his conservatorship violates the proscription of retroactive or ex post facto laws [Ref. 12, p 840].

The court’s ruling was divided, with a four-justice majority opinion, a concurring and dissenting opinion by two justices, and Chief Justice Rose Bird dissenting. The majority opinion summarized Hofferber’s claims:

Appellant argues that the new scheme is a transparent and unsuccessful evasion of *Jackson* and *Davis*. Despite the law’s attempt to make incompetents committable under the “customary” civil commitment law, he suggests, it still denies them equal protection because their incompetence bears no rational relationship to the “grave disability” provisions of the LPS Act. *Jackson* and *Davis*, he urges, make unproved criminal charges and a subsequent finding of incompetence insufficient grounds for any distinction, procedural or substantive, from other persons subject to civil commitment. Since he has been found hopelessly incompetent, he contends, he may now be civilly committed only under LPS Act provisions not dealing with criminal incompetence. He also asserts that the new scheme denies due process because it allows indefinite commitment of hopeless incompetents on that ground alone, without any new showing that they are dangerous, helpless, or otherwise in need of further confinement. Therefore, he concludes, he must be released unless his confinement can be justified under laws articulating one or more of those grounds [Ref. 12, p 843].

In summarizing the state’s position, the majority opinion noted:

The conservator responds that the new commitment procedures do meet constitutional standards because they follow a determination of probable cause to believe defendant committed a violent felony. . . . Separate treatment and indefinite confinement of such a defendant, he contends, are

justified on grounds of public safety because the probable criminal conduct evidences extraordinary dangerousness [Ref. 12, p 843].

The majority opinion also noted the deliberations that ultimately led to the passage of AB1529:

In 1973 hearings on the Jackson-Davis problem (Assem. Select Com. on Mentally Disordered Criminal Offenders, Dec. 13–14, 1973) legislators, health professionals, and the Attorney General's representative contended that incompetents charged with violent felonies warranted special treatment precisely because their past conduct implied future danger. Participants in the hearings also feared that many of those persons, while delusional and potentially violent if released, would "slip through the cracks" if they neither behaved violently in short-term confinement (a requirement for renewal of 90-day "imminent threat" commitments under the LPS Act) nor could be proved unable to care for themselves (necessary for a traditional LPS Act "gravely disabled" conservatorship) [Ref. 12, p 846].

Although favorably disposed to the state's argument, the majority vacated Hofferber's Murphy conservatorship and remanded the case for further proceedings. The court held that depriving an individual of his liberty requires a showing of ongoing dangerousness. The Murphy statutory scheme did not require a finding specifically addressing the potential conservatee's current dangerousness, and so no determination of this was made in Hofferber's original commitment proceeding. The court held that ". . . every judgment creating or renewing a conservatorship for an incompetent criminal defendant . . . must reflect written findings that, by reason of a mental disease, defect, or disorder, the person represents a substantial danger of physical harm to others" (Ref. 12, p 847). The standard of proof for establishing dangerousness was specified as beyond a reasonable doubt.

The court rejected the contention that incompetence to stand trial must also be established beyond a reasonable doubt. "It would be anomalous if indefinitely he could avoid penal treatment by consecutive, preponderant judgments that he was incompetent and then, though dangerous, also avoid LPS Act confinement as a 'gravely disabled' person because incompetence could not be established beyond a reasonable doubt" [Ref. zrefol12, pp 847–8]. They also rejected Hofferber's *ex post facto* objection on the grounds that the commitment statute is not penal.

Two justices concurred in the judgment, but opined that the standard of proof for dangerousness should be preponderance of the evidence, rather than the reasonable-doubt standard specified in the majority opinion. In other words, these two justices

believed that the decision granted too much procedural protection to the incompetent, unrestorable defendant.

Chief Justice Rose Bird issued a strongly-worded dissent, which began:

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 truths that this court has heretofore openly embraced are now somehow repealed [Ref. 12, p 852].

The Chief Justice first referred to the landmark U.S. Supreme Court decision in *Baxstrom v. Herold*<sup>13</sup> some 14 years earlier. That decision struck down the differential treatment under New York law of a prison inmate whom the state sought to civilly commit. Under New York law at the time, civil commitment could be ordered by a court (i.e., a judge) for a prison inmate completing his sentence, but all other persons had the right to a jury determination. The Supreme Court found that this difference violated equal protection. The Chief Justice then referenced the high court's *Jackson* decision and the California Supreme Court's *Davis* decision and opined that the Murphy statute violated equal protection according to the precedents established by these three decisions.

Specifically, Chief Justice Bird identified two ways in which the Murphy scheme failed the equal protection test: first, whereas others could only be civilly committed for dangerousness to receive treatment, incompetent defendants could be committed, even if there was no treatment available; second, the length of an incompetent defendant's commitment is theoretically indeterminate, whereas anyone else committed for dangerousness could only have his commitment renewed if he threatened, attempted, or engaged in violence during the preceding commitment period.

In addition to these failings, Chief Justice Bird's dissent raised the question that this type of conservatorship might constitute cruel and unusual punishment, with its potential to result in the lifelong institutionalization of a person on the basis of the status of having a dangerous mental condition, where it has not been proven beyond a reasonable doubt that a violent crime was committed and the mental condition is untreatable.

### After Hofferber

The California legislature did not change the language of the Murphy conservatorship statute after the *Hofferber* decision. Mr. Hofferber was committed after a new hearing and was retained in a state forensic hospital. Presumably, the second hearing included a written determination of his present dangerousness. The state was never able to try him, and he remained on conservatorship (Murphy for many years, and later on a standard LPS conservatorship) until his death in a skilled nursing facility in 2007, 33 years after his alleged crime (D. Meyer, JD, personal communication, May 2014). He had one episode of freedom, however: two or three years after the supreme court's decision, he escaped from Metropolitan State Hospital in the Los Angeles suburb of Norwalk, took a bus to downtown and traveled by bus to Las Vegas. After spending a few days at a hotel there, he went to a police station and told them he was an escaped murderer from California (D. Meyer, JD, personal communication).

As the description of the *Spinosa* case by Rodol *et al.*,<sup>1</sup> and research such as that reported by Parker<sup>4</sup> and Levitt *et al.*<sup>5</sup> illustrate, the dilemma posed by permanently incompetent, arguably dangerous defendants such as Mr. Hofferber has not been addressed in most U.S. jurisdictions. In 1986, the American Bar Association (ABA) issued a nearly 500-page document containing recommended standards for many key concerns at the interface between the fields of mental health and criminal law.<sup>14</sup> Standard 7-4.13 addresses the disposition of permanently incompetent defendants. It recommends that after a specified period of competency restoration efforts, a hearing should be held to determine whether the defendant is permanently incompetent. If the defendant is permanently incompetent, "and has been charged with a felony causing or seriously threatening serious bodily harm" (Ref. 14, p 239), then a hearing on factual guilt is held, followed (assuming the defendant's guilt is proved) by a special commitment proceeding akin to that for a defendant found not guilty by reason of insanity. Defendants who are not charged with felonies causing or threatening serious bodily harm and who are found permanently incompetent must be released or civilly committed through traditional means.

Although it resembles California's solution to some degree, the ABA standard does not reference

California's law or the *Hofferber* decision. According to a commentary published alongside the article by Levitt *et al.*, the ABA proposal for the management of permanently incompetent defendants has been "long ignored" throughout the country (Ref. 15 p 363).

Morris, who, as discussed above, questioned the LPS scheme generally,<sup>11</sup> took a more in-depth look at laws governing the disposition of permanently incompetent defendants 15 years later. He collaborated with forensic psychologist J. Reid Meloy, on a 96-page law review article, published in 1993.<sup>16</sup> The authors first reviewed the statutory responses to *Jackson* in all U.S. jurisdictions and then presented an analysis of patients committed under the Murphy statute in California. They found that, in September 1992, there were 97 patients committed under the Murphy law in the state hospital system. The duration of confinement ranged from less than 1 year to 12 years, with the majority (55.7%) having been confined for 4 years or less (not including the preceding 3 years of commitment for competency restoration).

The extremely small number of patients committed under the Murphy law is a reminder of the rarity of the situation in which a defendant charged with a serious felony cannot be restored to competency, even after three years of inpatient hospital treatment. It is impossible to determine how many of these patients may also have met criteria for traditional civil commitment if the option of the Murphy conservatorship were not available, but this arguably could make the pool of defendants who would have to be released but for the existence of the Murphy law even smaller. The sparing use of this type of commitment has continued for the two decades since the Morris and Meloy review.<sup>16</sup> Despite the intervening growth of California's population and of its state hospital population, the number of patients confined under Murphy is actually smaller now, with 69 patients residing in the state hospitals in June 2014.<sup>17</sup> The total capacity of California's five forensic hospitals is approximately 6,000 patients.<sup>18</sup>

It is not clear why the number of patients on Murphy conservatorship has declined. If any clinical, as opposed to institutional (e.g., the practices of forensic hospital staff), factors have contributed to the decrease, one such factor could be the advent of atypical antipsychotic medications, beginning with the introduction of clozapine in 1990, which may have allowed for a higher percentage of these severely ill

patients to be restored to competency; but in the absence of any recent systematic studies of this population, this is mere speculation.

### **Oregon's Response: A (Slightly) Different Approach**

The *Spinosa* case and another high-profile case in Oregon in 2011 involving the murder of a police officer led to the passage of Oregon Senate Bill 421 as §426.701 in 2013.<sup>19,20</sup> The new law creates a two-year renewable commitment for individuals who have a mental disorder that is resistant to treatment, who are currently exhibiting symptoms, and who are extremely dangerous. Extreme dangerousness is defined by having been found to have committed, as a result of a treatment-resistant mental disorder, one of several listed violent or criminal sexual acts. Clear and convincing evidence is the standard of proof. A criminal conviction is not a requirement.

Unlike the Murphy conservatorship, the language of Oregon's new commitment law for the extremely dangerous is not specific to criminal defendants in general or to defendants who have been found incompetent or unrestorable in particular. However, two cases involving murder defendants who were incompetent for an extended period were the impetus for the law, and, given the entry requirement of a serious violent or criminal sexual act, it may be that many or even most patients committed under the new law will in fact be criminal defendants, indeed incompetent defendants.

The law's requirement of a violent crime or sex offense sets a high threshold for commitment. Situations where a person, who can be shown to have committed a crime of violence, does not have any charges pending are presumably quite rare. On the other hand, defendants who are charged and are initially competent or are restored to competency will be either sentenced to a term of incarceration or found not guilty by reason of insanity; in either case, they would not be committed under this law. One scenario other than an incompetent criminal defendant would be someone who was previously convicted and sentenced to prison or found not guilty by reason of insanity, who is off parole or has been unconditionally released from supervision. If such a person, who presumably had improved clinically, were to relapse such that he again exhibited severe symptoms and presented a serious danger to others,

he could theoretically be subject to commitment under Oregon's statute, even without committing a new violent act.

### **Conclusion**

Thanks to the Murphy conservatorship, California courts do not face the dilemma of the type that led to ethics charges being filed against two attorneys and a magistrate in Oregon who devised an unusual method of coping with an unrestorable defendant charged with murder. Some may find it surprising that California, which is often perceived as highly patient-rights oriented (the LPS Act revolutionized civil commitment procedures and has been emulated by many states) has this type of law. However, the California legislature and courts have not shied away from passing and upholding relatively restrictive laws regarding criminally convicted persons with mental illness, including a sexually violent predator law<sup>21</sup> similar to those of nearly half the states and a law allowing for the civil commitment of prison inmates with severe mental disorders at the time of parole,<sup>22,23</sup> a rarity in the United States.

Although some forensic mental health professionals may find the Murphy solution ethically objectionable for reasons described earlier, a layperson, hearing that there is a controversy over what to do with someone who is so impaired by mental illness that he cannot be put on trial for a violent crime, yet who is at the same time able to provide for his own food, clothing, and shelter and therefore is not eligible for traditional long-term involuntary commitment, would probably be incredulous at the idea that unconditional, unsupervised release would be considered to be one of the available choices. This attitude may have more to do with the imperfect fit between legal definitions and categories on the one hand and the realities of mental illness on the other, than with any inclination on the part of forensic mental health professionals to release potentially dangerous people. Many professionals have written about the difficulty inherent in attempts at predicting future violence. We do know that among many relatively poor predictors of future violence, the best predictor is a history of past violence. Although an incompetent defendant charged with a crime of serious violence has not been proven through the mechanism of a trial to have perpetrated a violent act, as a matter of probability, it could be argued that the defendant is more likely to commit violence in the

future than someone who has never been charged with a violent crime, all other things being equal.

Faced with the extremely difficult choice of either releasing a person accused of murder or some other serious violent felony or keeping him confined despite the inability to prosecute him, a legal device such as the Murphy conservatorship could be considered the lesser of two evils (i.e., hospitalizing someone who might not be dangerous versus releasing someone who might be). As with sexually violent predator laws, this appeal to public protection and the police powers of the state may go a long way toward explaining why the Murphy law was passed in the first place and why no court has seen fit to overturn it in the 40 years since its passage.

The small number of patients committed under Murphy may provide an explanation for why few other jurisdictions have a specific law to deal with permanently incompetent defendants charged with serious crimes. California is the most populous state and currently has very few patients confined under the Murphy statute, indicating that the circumstances where it is needed are rare. Indeed, some states with lower populations may never have had a case of this type. The Murphy statute was passed at a time of increased attention to mental illness and crime. As mentioned above, at the time the law was created, nearly two dozen people had been murdered by three perpetrators in a single county over a three-year period. This was a few years after the LPS Act had drastically changed civil commitment laws in the state and shortly after *Jackson* prohibited the indefinite commitment of incompetent criminal defendants. Concern about violent patients with mental illness falling through loopholes in the legal system and being released without supervision was presumably high at that time. Similar factors in Oregon led to that state's recent legislative response.

It seems very likely that most patients who cannot be restored to trial competency after extended efforts including enforced medication in a hospital setting will remain sufficiently impaired that they will meet the traditional civil commitment criterion of being gravely disabled and can therefore be placed in a hospital setting without invoking their status as an incompetent criminal defendant as the justification for confinement. Furthermore, judges and juries asked to determine the grave disability of an incompetent defendant may very well be inclined to interpret the "grave disability" term of art in an expansive fashion,

relative to patients who do not have unresolved serious criminal charges. That such a scenario occurs is suggested by the studies by Parker<sup>4</sup> and Levitt *et al.*<sup>5</sup>

Nevertheless, it is clear that the match between incompetency to stand trial and grave disability is not perfect, and the *Spinosa* case illustrates how the legal system can be thrown into disarray when there is no means to address the problem. California and now Oregon provide examples of U.S. jurisdictions that address the public policy dilemma posed by an un-restorable criminal defendant charged with a serious violent crime who does not meet traditional civil commitment criteria, without violating the letter of *Jackson*. The California Supreme Court's 1980 decision in *Hofferber*, requiring a finding of present dangerousness, arguably brings the Murphy statute closer to compliance with the spirit of *Jackson* as well, in that the patient is not committed solely on the basis of incompetency to stand trial.

The question of predicting future dangerousness remains an ethically challenging aspect of the Murphy approach, as well as Oregon's §426.701. There is a temptation to argue that the existence of the criminal charge constitutes sufficient evidence of the patient's dangerousness; as we have seen, the language of the Murphy statute does not require any additional showing of dangerousness. Thus, it contains an element of the logical fallacy of arguing from the conclusion: because the defendant is charged with a crime, he is presumed to be dangerous and in need of confinement. The court in *Hofferber* mitigated this to some degree, increasing the burden on the state by mandating additional evidence of ongoing dangerousness, independent of the original criminal charge.

Oregon's new law, while not exclusive to criminal defendants, can and most likely will be used in the context of incompetence to stand trial. It requires some evidence indicating that the patient has been responsible for a serious criminal act, but does not require conviction. Like Murphy commitments post-*Hofferber*, it also requires a showing of present dangerousness. But what if the defendant did not actually commit the crime charged? The Murphy law has no mechanism to establish factual guilt or innocence, such as a trial on the facts as described in the ABA proposal<sup>14</sup> discussed above. Similarly, if Oregon's commitment law for the extremely dangerous is applied in the case of an incompetent defendant, there will be no criminal conviction. Thus, neither law is immune from the risk of a person with mental

illness who is factually innocent of a charged crime being confined in a mental hospital indefinitely, as incompetence to stand trial precludes being acquitted.

Predicting future dangerousness is difficult to do with any reasonable degree of accuracy,<sup>24,25</sup> perhaps especially when attempting to predict rare events such as serious physical assaults and homicides. Given the prejudicial weight that finders of fact (as well as forensic evaluators) might give to serious criminal charges, a mechanism such as a trial on the facts would guard against the risk of indefinitely confining an innocent defendant who cannot be restored to competency. Given that nearly 30 years later no U.S. jurisdiction has adopted any part of the ABA's recommendations in this area,<sup>15</sup> that risk is likely to remain.

The incompetent, unrestorable defendant charged with a serious violent crime poses a significant problem for the criminal justice system and the forensic mental health system, especially when the situation cannot be resolved, at least temporarily, through a civil commitment on grounds of grave disability because the defendant does not satisfy that criterion. The Murphy conservatorship is a legislative attempt to solve the dilemma posed by this type of case. In 2013, Oregon passed a new law that, although it did not specifically address incompetent criminal defendants, was, like the Murphy law, drafted in response to that situation. These types of laws raise their own ethics-related concerns, including the difficulty of making accurate predictions about future dangerousness and the possibility of committing a defendant who did not in fact commit the charged crime. It is hoped that this review will stimulate research in this area and raise awareness regarding the need for other jurisdictions to devise a management strategy for defendants such as Hofferber and Spinosa.

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