Incompetent to Stand Trial, Not Restorable, and Dangerous

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This article focuses on the preferred disposition for an individual charged with a serious crime against another person, adjudicated incompetent to stand trial and not restorable to competence, whose original criminal charges are dismissed without prejudice, and who is regarded by the state as dangerous to the general public. Three current models used today in California, Oregon, and Ohio are described. All three rely on modifications of various aspects of civil commitment law. We then propose a fourth model based on a modified version of the 1989 American Bar Association (ABA) Criminal Justice Mental Health Standards, in which individuals who are found incompetent to stand trial and not restorable to competence and are considered dangerous would be committed under the same special procedures governing the management and treatment of insanity acquittees.

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The late 1960s and early 1970s were times of dramatic changes in many aspects of civil commitment law.[1-3] One significant focus was the relationship of civil commitment to the criminal justice system. The U.S. Supreme Court decision in *Baxstrom v. Herold* addressed the question of psychiatric hospitalization of mentally ill prisoners at the end of their prison terms.[4] Johnnie Baxstrom was a prisoner who was "declared mentally ill" and transferred during his prison term to Dannemora State Hospital for the Criminally Insane under the supervision of the New York Department of Corrections. After his prison term ended, the state determined, at a perfunctory hearing, that Mr. Baxstrom remained dangerous and ordered him to remain at Dannemora without the benefit of the full civil commitment hearing available to other citizens not coming from prison. Later, the release of Mr. Baxstrom and of others in similar situations led to Steadman's landmark research on the long-term prediction of dangerousness, published in 1973 in the first year of publication of the Journal of the American Academy of Psychiatry and the Law.[5]

Baxstrom logically led to the 1972 Supreme Court case of *Jackson v. Indiana*,[6] which examined the question of how long individuals charged with crimes could be held in pretrial status as incompetent to stand trial (IST) and what was to happen to them after a verdict of IST and not restorable (IST/NR) was rendered:

> We hold . . . 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 a reasonable period of time necessary to determine whether there is substantial probability that he will attain capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceedings that would be required to commit indefinitely any other citizen, or release the defendant [Ref. 6, p 739].

The Court was reluctant to define either a "reasonable period of time" or the "substantial probability" that the person would be found competent in the "foreseeable future" This reluctance to provide specific time limits has had important ramifications for later implementation of this decision.

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Other elements of the *Jackson* decision are important to note. The Court applied the "*Baxstrom* principle" of equal protection to insanity acquittal by citing *Bolton v. Harris*[7] and to "commitment in lieu of sentence following conviction of a sex offender" (Ref. 6, p 724–5) pursuant to the Wisconsin Sex Crimes Act in the case of *Humphrey v. Cady*.[8]

The Court also addressed the question of the "disposition of charges" against Mr. Jackson, discussing the possible use of an involuntary insanity defense for the final disposition of IST/NR defendants by citing that other "courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency" (Ref. 6, p 740). This was followed by a reference to the Model Penal Code, which "would permit an incompetent accused's attorney to contest any issue 'susceptible of fair determination prior to trial and without the personal participation of the defendant'" (Ref. 6, p 740).

Defendants Found IST/NR

If the process outlined in *Jackson* were followed in every case, after a "reasonable period of time," all individuals found IST/NR would have the original charges dropped and would be released, with or without prejudice, or civilly committed under the same civil commitment rules that apply to all citizens of the state. If the charges were dismissed without prejudice, the charge could be reinstated at the discretion of prosecutors at any time within the statute of limitations for the crime charged. In many states, however, this disposition does not occur in a uniform manner.

In 2012, Parker[9] reviewed state statutes regarding the evaluation, possible restoration, and final disposition of defendants found IST. He found a high degree of variability among states in their approach and the need for empirical research to help legislatures and courts develop reasonable limits to incompetency to stand trial, including attempts at restoration. Kaufman *et al.*[10] also found significant heterogeneity in the approaches taken by states in response to *Jackson*.

Morris and Parker, in a study of the time necessary to restore competency, reported that more than 80 percent of 1,475 IST defendants were restored within one year, and more than 70 percent were restored in the first six months.[11] In a subsequent study, Morris and DeYoung[12] followed 81 IST defendants who remained unrestored after an initial six months of hospitalization. They concluded that "most successful restoration occurred during the initial years of restoration efforts. Restoration success plateaued during two to three years of hospitalization and became rare after three years" [Ref. 12, p 87].

As part of a comprehensive examination of forensic mental health services provided by states, Fitch[13] also noted that there was little consistency among states' approaches to adapting a reasonable time for competency restoration. The disposition of defendants adjudicated IST/NR was also inconsistent, with 49 percent of responding states reporting release or civil commitment, 24 percent reporting release or civil commitment and ongoing criminal court involvement, and a minority of states continuing treatment or applying unique commitment criteria to this population.[13]

Notwithstanding that many states have developed statutes and informal ways of prolonging the period allotted to restore an incompetent defendant, there comes a time when the determination of IST/NR cannot be avoided. The idea that a person found IST/NR can be civilly committed indefinitely is less feasible today than it was in previous years. As described by Parker[9] and illustrated in this article, some state legislatures, courts, and prosecutors believe that modification of civil commitment laws is necessary to provide societal protection from individuals with mental illness who are presumed to be dangerous and who are adjudicated IST/NR. The following sections describe three such modifications of state civil commitment statutes from California, Oregon, and Ohio. These states were chosen because of our personal experience with these states and to illustrate situations that may exist in more than these three states. These modifications are presented to emphasize different aspects of traditional civil commitment law, each with the common element of a judicial determination that the individual in question is currently dangerous to others.

California's Murphy Conservatorship

Simpson[14] described in detail the modification of California's civil commitment statute that allows for the long-term commitment of IST/NR individuals. First, consistent with *Jackson*,[6] the Supreme Court of California held in *In re Davis*[15] that if "there exists no reasonable likelihood that the person will recover his competence to stand trial in the foreseeable future,

the court should either order the person released from confinement or initiate appropriate alternative commitment proceedings under the Lanterman-Petris-Short (LPS) Act" (Ref. 15, p 1025). California initially limited the maximum duration of commitment for the purpose of competency restoration to "three years from the date of commitment or a period of commitment equal to the maximum term of imprisonment."[16] In 2018, the maximum commitment for competency restoration was reduced to two years.[17]

Following *Davis*, Judge Harry Brauer wrote to his local legislators Donald Grunsky and Frank Murphy, Jr., stating:

> [A] number of judges joined me in expressing our despair and bewilderment at what can now be done with the killer who is insane . . . . Some provision must be made for the indefinite, high-security, civil confinement of persons who are dangerous and insane, and I do not mean for 72 hours, 14 days, or even one year under guardianship, which seems to be the maximum confinement under [the] LPS Act [Ref. 18, p 1].

In his letter, Judge Brauer mentioned his concern that a Santa Cruz county serial killer, Herbert Mullin,[19] may not stand trial due to incompetence.

After receiving the letter, Murphy[20] had the Legislative Counsel draft Assembly Bill 1529, which modified the existing statutory definition of gravely disabled to include two separate definitions for gravely disabled. The first, which is the traditional definition of a gravely disabled person, focused on individuals who are unable to care for their basic personal needs. The second, as later codified into statute, focused on individuals found incompetent to stand trial for charges "involving death, great bodily harm, or a serious threat to the physical well-being of another person" (Ref. 21, § h,2). The Murphy Conservatorship bill, signed into law by Governor Reagan in 1974,[22] effectively provided a mechanism to acquire long-term civil commitment for individuals found IST/NR not otherwise eligible for commitment on the traditional gravely disabled criteria of individuals found IST/NR under the original LPS Act. Simpson describes this new legislation as "plug-[ging] 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" (Ref. 14, p 172).

After the initial one-year term expires, the LPS Act did not require a finding of ongoing dangerousness for renewal of a Murphy conservatorship.[23] This was changed in the California Supreme Court case of *Conservatorship of Hofferber*,[24] in which Justice Newman opined, "We therefore hold that every judgment creating or renewing a conservatorship for an incompetent criminal . . . 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. 24, p 847). This requirement for current dangerousness was thus added to the Murphy conservatorship statute.[21]

The Murphy conservatorship survives today in California with approximately 100 individuals committed to the state hospital under this status as of May 2019 (Warburton K, personal communication, May 2019). This number has increased from the 69 patients reported by Simpson in 2014.[14]

Oregon's New Dangerousness Standard

In 1977, the Oregon legislature created the Psychiatric Security Review Board (PSRB) to manage the hospital and community course of the state's insanity acquittees.[25] The legislature extended the PSRB's jurisdiction to include juvenile insanity acquittees in 2005, and in 2010 the legislature made the Board responsible for Oregon's Gun Relief Program.[26,27]

In 2013, the legislature further expanded the responsibilities of the PSRB to include a section of the state's civil commitment statute designed to monitor a newly defined population of those found IST/NR and civilly committed as "extremely dangerous" persons.[28] The impetus for this change came from two cases of individuals with mental illness who had been found IST/NR.[29] One was D.S., who was hospitalized following a homicide and scheduled for release after 10 years in the state hospital.[30,31] Once released, he was immediately rearrested, jailed for months, eventually rehospitalized, and again declared IST/NR and civilly committed. The second case involved a middle-aged woman who shot an Oregon police officer during a traffic stop and was subsequently adjudicated IST and eventually found IST/NR.[14] Because of these prominent cases, the state legislature added a new section to the civil commitment statute; this new section stands parallel to the regular civil commitment procedures in Oregon but includes unique features.[32]

Briefly, commitment to the PSRB as an "extremely dangerous person" can be initiated by a district attorney alleging that the individual is an adult

who "[b]ecause of a mental disorder, presents a serious danger to the safety of other persons" and, "[u]nless committed, will continue to represent an extreme risk to the safety of other persons in the foreseeable future" (Ref. 28, § 1,a).

After commitment to the PSRB, the statutes, rules, and procedures are similar to those governing commitment of insanity acquittees.[26] The court places the individual under the jurisdiction of the PSRB for 24 months with potential renewals until the statute of limitations for the original crime has run.[33] Additionally, the PSRB holds six-month hearings to determine the appropriate placement of the individual (i.e., hospitalization or conditional release). At the end of any 24-month period of commitment, the PSRB must discharge any person back to the court if the person is found no longer extremely dangerous. The district attorney is notified of the discharge and may order a competency examination to determine whether the person remains IST/NR or is now competent to stand trial. If competent, the individual may then be tried on the original charge. If the PSRB terminates its jurisdiction and the person remains IST/NR, the state must then either pursue regular civil commitment or allow for the charges to be dismissed without prejudice.[34,35] On May 13, 2019, the PSRB was responsible for the supervision of 16 "extremely dangerous" persons (Bort A, personal communication, May 2019).

Ohio's Modified Sex Offender Commitment

In *Kansas v. Hendricks*,[36] the United States Supreme Court formed the basic template for Ohio's approach for individuals found IST/NR and dangerous to others. Leroy Hendricks had an undisputed diagnosis of pedophilia and was viewed as highly likely to reoffend. "In 1994, Kansas enacted the Sexually Violent Predator Act, which established procedures for the civil commitment of persons who due to a 'mental abnormality' or a 'personality disorder' are likely to engage in 'predatory acts of sexual violence'" (Ref. 36, p 350). A key component of the Court's decision was classifying this new type of commitment in Kansas law as a permissible civil procedure as opposed to a further criminal procedure that was added at the end of a prison sentence. Ohio applied this distinction to develop procedures for holding individuals found IST/NR and dangerous. Once committed, these individuals were kept under the jurisdiction of the court that originally heard the criminal case rather than transferring the case to the jurisdiction of the probate courts that would ordinarily handle civil commitment.

The Ohio statutory scheme for the disposition of those adjudicated IST/NR and dangerous closely parallels the statutes for Ohio's post–insanity defense procedures. Briefly, if after up to one year, an individual charged with a serious crime (e.g., aggravated murder, murder, first- or second-degree violent felonies, or conspiracies related to these crimes)[37] is found IST/NR, the trial court judge may either refer the individual to the probate court for consideration of civil commitment or:

> . . . on the motion of the prosecutor or on its own motion, the court may retain jurisdiction over the defendant if at a hearing the court finds both of the following by clear and convincing evidence: (a) the defendant committed the offense with which the defendant is charged [, and] (b) the defendant is a person with mental illness subject to court order or a person with an intellectual disability subject to institutionalization by court order.[38]

The statutes define procedures for the court to maintain jurisdiction, for the hospitalization or conditional release, and the possible release of these individuals when they reach the maximum sentence possible had they been tried for the original charge. If at any point in this time period there is reason to believe the defendant is competent, the prosecutor, the defense counsel, or a designee of the Department of Mental Health may request a hearing on competency.[39]

In 2008, the Court of Appeals for Ohio's Second District found in a divided decision in *State v. Williams* that the Ohio statute was unconstitutional on three grounds.[40] First, the majority found that the statute was not civil in nature but more closely resembled a criminal statute without the necessary procedural safeguards. Second, the appeals court found that the statute violated the defendant's right to equal protection. Finally, the length of criminal court supervision of a possible maximum term was excessive in relation to the goals of civil commitment. The Ohio Supreme Court reviewed the case in 2010 and reversed the Appeals Court in all aspects of the decision.[41] Choi and Weiss[42] focused on a discussion of the Ohio Supreme Court's determination that the statute was not criminal in nature and fit into the general requirements of a civil statute.

As of January 31, 2019, there were a total of 249 people found IST/NR who remained under the jurisdiction of trial courts; 164 of them were in

state hospitals, and 85 were on conditional release (Stankowski J, personal communication, May 2019). The state of Arizona is considering the adoption of a model like that of Ohio for the disposition of individuals found IST/NR and considered dangerous.[43]

ABA Special Procedures

In 2010, Levitt *et al.*[44] reported on a group of individuals found IST/NR in Arizona who were civilly committed to a psychiatric hospital immediately following their adjudication as IST/NR. When compared with individuals committed pursuant to the regular civil commitment process, individuals found IST/NR were more frequently medicated and had a longer hospital course.

In a commentary to that article, Hoge[45] reviewed the inconsistent implementation of *Jackson* among states and the changes in civil commitment that have come about recently with the narrowing definitions of both dangerousness and grave disability.[46] Hoge concluded his commentary with an appeal to "reform our laws on the management of unrestorable, incompetent defendants and to implement sensible policies to protect the public" (Ref. 45, p 363). He recommended considering the 1986 and 1989 American Bar Association Criminal Justice Mental Health Standards special procedures to manage IST/NR individuals charged with a serious crime and viewed as dangerous.[47] The ABA special procedures included an initial adversarial hearing, during which the prosecution had to prove the factual guilt of the defendant beyond a reasonable doubt. Per Standard 7-4.13, if the finder of fact determined that the prosecution met its burden of proof and the individual was found guilty, then the court could commit these individuals using the same special commitment procedures that followed an acquittal by reason of insanity.[47] From that point forward, individuals originally found IST/NR and insanity acquittees would be handled in the same manner.[47]

The ABA revised its Standards in 2016 and reversed course regarding the procedures for individuals adjudicated IST/NR.[48,49] The new standards have eliminated the earlier proposal to merge the special procedures for insanity acquittees and IST/NR individuals and now recommend only civil commitment or release for those found IST/NR with one modification: "If the defendant is found unrestorable, then the defendant should be released from any detention or commitment for treatment to attain or restore competence. If the defendant meets the criteria for involuntary civil commitment, the court may order such commitment and may direct that the initial commitment take place in a forensic facility" (Ref. 46, Standard 7-4.14(c)). Initial commitment to a forensic facility is the only apparent recognition that certain IST/NR individuals may require special treatment procedures.

Discussion

Prior to finding a defendant IST/NR, states have produced heterogeneous interpretations of "reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future" (Ref. 6, p 716). Parker[9] and Morris and DeYoung[12] have helped define how to translate this concept into practice. From clinical experience and from the empirical literature, this should not be too difficult to accomplish, but this is not just an empiric question. There are political and practical motives in the states for keeping individuals who are charged with serious crimes in some form of surveillance for as long as possible before a determination of IST/NR and potential release.

This situation exists in part because regular civil commitment is no longer viewed as a sufficient outcome. Civil commitment criteria have narrowed, and the number of available psychiatric beds has decreased.[45,46,50] Regardless of the often legitimate opposition to special procedures for special populations, legislators, prosecutors, and many in the general public are unwilling to view regular civil commitment as the answer for managing special populations, including insanity acquittees, sex offenders, and those found IST/NR.

The authors accept that special procedures are necessary in contemporary society, especially when considering populations that are viewed as dangerous. The IST/NR population, however, is in the least advantageous position when compared with other individuals enmeshed in the criminal justice system. Insanity acquittees and sex offenders have already been tried and are entered into programs that require them to navigate special commitment procedures and barriers to release. Release is possible, however circuitous it may be. In contrast, for those found IST/NR, recovery may lead straight back into the criminal justice system.

The 2016 ABA Criminal Justice Standards on Mental Health present a reasonable model for the management of insanity acquittees, including: limiting state jurisdiction to the possible sentence for the original criminal charge; providing humane and informed treatment programs and well-trained personnel; making it increasingly difficult over time to keep individuals in forensic hospitals; and conditional release programming and involvement to the extent possible in community life. We disagree, however, with ABA's elimination of the earlier use of special procedures for the disposition of IST/NR individuals in its revised standards.[47]

With the goal of restoring the earlier ABA position with certain modifications, we support the adoption of similar special procedures for management and treatment of both insanity acquittees and those found IST/NR. These two groups are mirror images of each other. Both groups are charged with serious crimes, both groups contain individuals with serious mental illness, and both are considered dangerous. The difference is that IST/NR individuals are pretrial while insanity acquittees are posttrial, having already had their day in court. Based on these similarities and differences we propose five revisions to the ABA position.

First, states considering the use of a special procedure for IST/NR individuals should adopt the 2016 ABA standard for the special procedure for insanity acquittees and apply them as well to those found IST/NR as was done in the 1986 and 1989 ABA standards.[48]

Second, these special standards should apply to both insanity acquittees and those found IST/NR where the original criminal charge involves death or threat of serious bodily harm to others (Ref. 48, Standard 7-7.4) as established in a full adversarial hearing to determine beyond a reasonable doubt whether the individual committed the criminal act as charged (Ref. 48, Standard 7-7.5).

Third, for individuals found IST/NR, we view the possibility of a future criminal trial as a substantial disincentive to recovery.[31] If this situation exists in a particular jurisdiction, we propose that at the mandatory hearing, in addition to a presumptive finding of guilt to the crime charged, the IST/NR individual, at the discretion of the defense attorney, should be allowed to raise an insanity plea at this hearing. This insanity portion of the hearing can either lead to an insanity acquittal or become part of the record for any future criminal trial or negotiation that may arise if the individual is restored to competency.

Fourth, the defense attorney should undertake an evaluation of criminal responsibility early after the criminal charge has been filed, even if the individual is declared IST, with the confidentiality of the accused protected under lawyer–client privilege. If an evaluation of insanity soon after the crime is ordered by the defense, the expert's report is not automatically discoverable unless it is brought to the attention of the court by the defense. It is equally important to have this evaluation done early, even if the client and the attorney need it many years later, in the event that the client regains competency and the charges are reinstated.

Finally, following the imposition of an insanity verdict, the newly declared insanity acquittee can then follow the special procedures in place for insanity acquittees in that jurisdiction.

Our fourth and fifth recommendations are intended as a proposal that is beyond our competency as psychiatrists, but one that even the *Jackson* court mentioned as worthy of consideration.[6]

Conclusion

We have presented three models of special procedures that exist today in California, Oregon, and Ohio to manage the disposition of those found IST/NR and who are presumed to continue to be dangerous. These are contemporary examples of how civil commitment law following *Baxstrom* and *Jackson* has morphed into special commitment proceedings for special populations. While there may be models in other states that have not yet come to our attention, we believe these three illustrate the point that special procedures, for better or for worse, are the legacy of the *Baxstrom Principle*, translating civil commitment law into contemporary times. We agree with Hoge[45] that this is the time to try something new as proposed earlier by the ABA with the additions suggested above, and to finally merge a portion of the IST/NR population into the modern postverdict management of insanity acquittees in an effort to settle these questions and to give this population a fairer opportunity for recovery.

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