Forty Years After *Jackson v. Indiana*: States' Compliance With "Reasonable Period of Time" Ruling

Andrew R. Kaufman, MD, Bruce B. Way, PhD, and Enrico Suardi, MD

In *Jackson v. Indiana* (1972) the U.S. Supreme Court held that states may not indefinitely confine criminal defendants solely on the basis of incompetence to stand trial. The Court ruled that the commitment duration be limited based on the likelihood of restorability, but did not provide specific time limits. Nearly four decades later, there is striking heterogeneity regarding the length of confinement. As of 2007, 28 percent of the states specify 1 year or less, 20 percent specify 1 to 10 years, 22 percent link the limit to the criminal penalty for the charged offense (up to life), and 30 percent set no limit. Thus, most state statutes seem out of compliance with *Jackson*. While research has focused on predicting restorability and testing restoration modalities, empirical evidence about the reasonable length of time to determine restorability has not been adequately addressed. Quantitative analysis of *Jackson*'s reasonable period of time is needed to ensure due process for incompetent felony defendants.

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In the 1972 landmark decision *Jackson v. Indiana*,[1] the U.S. Supreme Court held that indefinite confinement of criminal defendants solely on the basis of incompetence to stand trial violates constitutional rights. Justice Blackmun wrote for the majority: Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not, the State must either institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant.

The Court left to the states the task of defining the length of a "reasonable period of time." In addition to the respect afforded by the Court for state's rights and heterogeneous mental health systems, it also recognized a lack of evidence about how to restore incompetent defendants. Thus, it stated, ". . .in light of differing state facilities and procedures and a lack of evidence in this record, we do not think it appropriate for us to attempt to prescribe arbitrary time limits" (Ref. 1, p 738).

The *Jackson* Court called for limitations on length of stay for competency restoration, noting that indefinite commitment violates due process. Yet, as of 2007, 30 percent of states allowed for indefinite commitment for the purpose of restoration in their statutory schema for felony defendants,[2] in direct violation of *Jackson*. Further, about 40 percent of the other states imposed a lengthy treatment period (1–10 years) or linked the duration of commitment to the potential criminal sentence, which can vary from 1 year to life. How can these long periods defined in states' statutes be considered reasonable? Reliance on a solid evidence base may help clarify an answer, yet in the intervening years since *Jackson*, there has been little research into the length of time necessary for competency restoration.

In contrast to the long periods of commitment allowed for competency restoration, the average length of stay in civil facilities has decreased substantially since 1972. In 2008, the average inpatient length of stay for a person with an exacerbation of schizophrenia was 11.1 days, and an episode of bipolar mania or depression was 7.8 and 6.5 days, respectively.[3] Given such short inpatient stays for the non-

Drs. Kaufman and Way are Assistant Professors, and Dr. Suardi is a Fellow in Forensic Psychiatry, SUNY Upstate Medical University, Syracuse, NY. Address correspondence to: Andrew R. Kaufman, MD, SUNY Upstate Medical University, 766 Irving Avenue, Syracuse, NY 13210. E-mail: kaufmana@upstate.edu.

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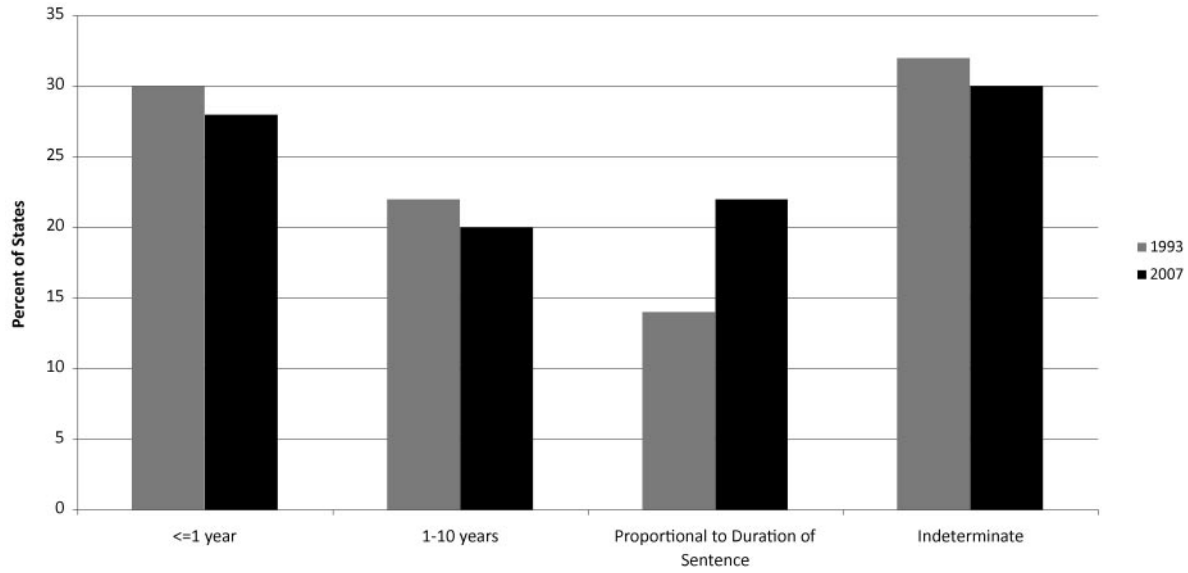

Figure 1. State laws for restoration of CST: length of stay 1999 versus 2007.

criminal mentally ill, do current statutes accord with the constitutional principles of *Jackson*?

A hypothetical example may illustrate this current disparity. A person who has schizophrenia and assaults his neighbor as a result of delusional paranoia may be referred for psychiatric treatment or be arrested, often at the discretion of the responding police officer (Lamb and colleagues[4] found that less than 10% of overtly violent mentally ill persons encountered by a police-mental health team were arrested; most were taken to hospitals). If brought to a hospital, the person in this example may be committed for an average of 11 days,[3] on the basis of the civil commitment criterion of being dangerous to others. Alternatively, if arrested, charged, and found incompetent to stand trial, he may spend years in a forensic hospital, solely for the purpose of competency restoration. In New York, for example, if the charge is assault in the second degree, the maximum length of hospital stay is four years and eight months (two-thirds of the seven-year maximum sentence). If the incident occurs in Delaware, the defendant could be confined for life for any felony charge.

While there are data on civil length of stay, there is a paucity of empirical data in the scholarly literature on actual length of stay for individual defendants being held for competency restoration. Data are needed to help develop a reasonable standard for length of stay. The purpose of this article is to examine existing disparity among states and to call for empirical research to guide policy to protect the mentally ill defendant's constitutional rights in the pretrial setting, as set forth in *Jackson*.

Jackson Disparities

State legislatures have passed into law statutory regulations for restoration of incompetent felony defendants according to three general approaches. One commonly used procedure is simply to set a predetermined time limit. Limits vary considerably, from 6 months to 10 years. Other states have linked the duration of commitment to the term of sentence for the alleged felony offense. Finally, other state legislatures have avoided having to set limitations on length of stay by allowing for indefinite confinement.

The first survey of state statutes of such procedures was published by Morris and Meloy in 1993.[5] State statutes were re-examined in the AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial in 2007.[2] The 1993 and 2007 data are presented in Figure 1 and show a similar overall picture. Nearly 30 percent of the states set the limit at 1 year or less, and about 20 percent limit the length of stay from 1 to 10 years. Approximately 20 percent link duration to the potential criminal sentence, and about 30 percent allow for indefinite confinement.

In the intervening 14 years between the two surveys, 18 states changed their laws governing restoration of incompetent felony defendants. Eleven states

made their laws more punitive by either increasing the time limit ($n = 4$), going from a defined limit to an indefinite period ($n = 3$) or converting a fixed time limit into a term linked to the potential criminal sentence ($n = 4$). Finally, three states decreased the time limit, and four converted from an indefinite to a definite time period.

In 1993, seven states linked their restoration commitment to the criminal sentence. The number increased to 11 states in 2007, with the addition of Massachusetts, South Carolina, Rhode Island, and Texas. All four changed from a set limit independent of the potential criminal sentence. For three of these four, the 1993 limits were not more than 18 months, and the likely result of the change was therefore probably longer stays in these states. For Rhode Island, however, the 1993 limit was 20 years (not included in Figure 1). When Rhode Island converted its law to a sentence-linked period, the durations served under commitment by these criminal defendants may have become shorter.

Three states made their statutes indefinite: Kentucky, Missouri, and Oregon. However, four states repealed indefinite commitment standards. Of those, two (North Carolina and Maryland) imposed a term limit of 10 years.

The fact that eleven states have become more punitive in their laws and moved further away from the *Jackson* opinion raises the question of what forces are behind these legislative actions. The political consequences of the war on crime and war on drugs doctrines, in addition to bipartisan public policies that resulted in increased incarceration rates during this era, may have been influential.[6] In addition, there has been a significant increase in mentally ill offenders entering the criminal justice system, concurrent with a reduction in available civil hospital beds.[7] Finally, in many jurisdictions, there is the potential for states to garner revenue from local municipalities for their restoration services. Thus, longer restoration periods may result in a shift of funds into certain state revenue streams. Whatever the motivation, it seems clear that the basic principles of the *Jackson* ruling have deteriorated in terms of their application at the state level.

Empirical Research: Where Do We Stand?

In addition to political and fiscal factors, the large disparities among the states may be partly attributable to the lack of evidence of what constitutes a reasonable length of time. Since the Court set no defined time limits as a result of the lack of evidence at the time, state legislators have been placed in a difficult position when tasked with crafting statutes that comport with *Jackson*. So, what have mental health and criminal justice researchers studied since the landmark 1972 decision regarding competency restoration?

In a 2005 review article, Pinals[8] noted that the literature shows that between 80 and 90 percent of defendants with mental illness are restored to competence in six months or less. Nicholson and McNulty[9] looked at length of stay in Oklahoma in 1992, when there was no defined time limit. They found that defendants who were successfully restored to competency stayed in the hospital an average of 63.7 days (SD 58.4). Furthermore, more than 75 percent of those restored to competency were discharged within three months. Although they did not report the longest length of stay, they looked at four years of longitudinal data and only 1.6 percent of their sample of 150 defendants stayed in the hospital longer than 12 months.

In a subsequent study of 133 male defendants in Florida (where there was a five-year limit for restoration), Nicholson and McNulty[10] showed that for those restored, the average length of stay was 219.2 days (SD 187.4). This duration was nearly two years shorter than that of those who were ultimately not restored (mean length of stay [LOS] 825.9 days; SD 280.9). Seventy-six percent were restored in less than 12 months. We combined the data from these two studies to calculate a weighted average length of stay of 134.6 days for all those restored to competency.

The empirical literature on prediction of competency restoration and on novel methods of restoration has seen additional valuable contributions in recent years. Mossman[11] identified chronic psychotic disorders, lengthy history of inpatient hospitalization, and irremediable cognitive disorders as predictors of nonrestorability in Ohio. Morris and Parker[12] found that older age and diagnosis of psychotic disorders or intellectual disability reduced the likelihood of restoration. Montgomery and Brooks[13] showed that using the television program *Law & Order* as part of a didactic module improved scores on the MacCAT-CA[14] with a high degree of significance.

Another important topic recently discussed in the literature is what happens to defendants found unrestorable. Levitt *et al.*[15] reported that defendants found nonrestorable were hospitalized without meeting the civil commitment criteria, had longer lengths of stay, and were more likely to be treated with psychotropic medications over their objection, when compared with other inpatients. This evidence suggests that forensic patients who were granted *Jackson* relief have not, in fact, been treated equally to their civil counterparts, even when subjected to the same commitment criteria.

The *Jackson* opinion clearly calls for these defendants to be treated equally to civil patients. However, the first law review article on the *Jackson* decision[16] pointed out the relative weakness of the Court's reasoning on equal protection, as noted by Parker[17] in his recent historical review of *Jackson v. Indiana*. One possible alternative, recently discussed by Hoge in response to Levitt's study, would take "into account the public's interest in safety, while allowing sufficient flexibility to manage committees in the least restrictive setting under supervised monitoring " (Ref. 18, p 363). He recommended adopting a 1989 proposal by the American Bar Association, whereby an unrestorable defendant "charged with a felony causing or seriously threatening bodily harm" (Ref. 19, Standard 7-4.13) would be tried to determine factual guilt. If trial proceedings resulted in a guilty verdict, the defendant would then "be subject to the same special procedures as an insanity acquittee" (Ref. 18, p 363) rather than serve his sentence in prison. This approach would alleviate the perceived need to confine defendants for long periods for restoration by making it easier to commit the most dangerous persons found guilty following *Jackson* relief from restoration commitment. This approach would also prevent the guilty defendant who has successfully malingered incompetence from being released in to the community.

Next Steps: A Call for More Research

It is clear that most if not all states have not modified their laws to follow the principles and procedures outlined by the *Jackson* Court. This failure is partially due to the Court's lack of length-of-stay guidance regarding a reasonable period. There has been some preliminary evidence, however, suggesting that competency can be restored in a certain group of defendants in a relatively short period of time, even in a state with an indefinite limit of confinement. Additional research is needed regarding length of stay of defendants found incompetent to stand trial in other states with different types of statutes and different protocols and practices of restoration. Such research could guide states and future courts regarding deciding on reasonable periods.

At the present time, it would be helpful to determine the actual lengths of stay of felony defendants who are incompetent to stand trial (IST) in states with longer or indefinite time limits for restoration. Further, it is important to know the variables associated with longer LOS among these defendants. For example, are there different reasonable periods for patients with different psychiatric disorders or different ages? We are in the process of conducting a study in New York State, where length of stay is tied to the potential criminal sentence. The study will analyze approximately 1,200 IST felony defendants for length of stay and predictive variables. Data will be collected on the instant criminal offense, competency outcome, psychiatric diagnoses, demographic variables, number of prior admissions for civil hospitalizations as well as for restoration of competency, and number of inpatient days in the preceding five years in a public mental facility.

We respectfully suggest that other researchers consider conducting similar studies in states with different statutory schema, for comparison purposes. Given the currently available data on LOS for restoration, as well as the very short LOS for treatment, it is likely that defendants who are successfully restored will achieve that status in less than one year. What we do not yet know is how many defendants who are never successfully restored remain hospitalized for longer than one year and how long they are kept in states with longer or undefined limits. Once more definitive evidence is gathered, policy makers, courts, and legislators can make more informed choices to protect the liberty interests of defendants who have mental illness, while they adhere to the spirit of the *Jackson* Court.

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