

2012

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Nicholas Rosinia

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Recommended Citation

Nicholas Rosinia, *How 'Reasonable' Has Become Unreasonable: A Proposal for Rewriting the Lasting Legacy of Jackson v. Indiana*, 89 WASH. U. L. REV. 673 (2012).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol89/iss3/5

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HOW 'REASONABLE' HAS BECOME UNREASONABLE: A PROPOSAL FOR REWRITING THE LASTING LEGACY OF JACKSON V. INDIANA

INTRODUCTION

Inquiry into a defendant's competence to stand trial has been termed "the most significant mental health inquiry pursued in the system of criminal law."¹ As a result, competency to stand trial is one of the most widely debated concepts in criminal jurisprudence.² Proposals for upheaval and revision of the doctrine of competence to stand trial pervade legal literature.³ Among the most frequent contention is that competency is misunderstood within the legal process, leading many scholars to advocate for a greater understanding of the basic doctrine.⁴ One commentator even believes the doctrine may be doing more harm than good, and has thus suggested a defendant should be granted limited rights to waive competency inquiries.⁵

1. ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 200 (1975).

2. See generally Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193 (2004); Sara Longtain, Comment, *The Twilight of Competency and Mental Illness: A Conciliatory Conception of Competency and Insanity*, 43 HOUS. L. REV. 1563, 1564 (2007). Scholarship addresses competency issues spanning juvenile proceedings to appellate litigation. See generally Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135 (2009); Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259 (2009).

3. See, e.g., Kathleen Winchell, *The Need to Close Kentucky's Revolving Door: Proposal for a Movement Towards a Socially Responsible Approach to Treatment and Commitment of the Mentally Ill*, 29 N. KY. L. REV. 189 (2002); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985).

4. See, e.g., Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 549–60 (1993); James J. Gobert, *Competency to Stand Trial: A Pre- and Post-Jackson Analysis*, 40 TENN. L. REV. 659, 664 (1973) ("One of the chief difficulties in the generally prevalent formulation is its failure to recognize that defendant's ability to communicate with counsel and rationally understand the proceedings might be totally irrelevant to the merits of his case."); Ronald Roesch, Stephen D. Hart & Patricia A. Zapf, *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model*, 2 PSYCHOL. PUB. POL'Y & L. 96, 101–02 (1996) (arguing that competency fits best in context rather than being understood as one unilateral concept); see generally Louis B. Schlesinger, *A Case Study Involving Competency to Stand Trial: Incompetent Defendant, Incompetent Examiner, or "Malingerer by Proxy"?*, 9 PSYCHOL. PUB. POL'Y & L. 381 (2003).

5. See, e.g., Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 623–24 (1995).

This debate has spilled into pretrial commitment of incompetent defendants.⁶ Once a defendant is deemed incompetent to stand trial, courts typically remand the defendant to the care of state hospitals and/or mental health professionals.⁷ This process has spawned tales of defendants faced with extended pretrial commitment for alleged crimes, prompting revisionary proposals to protect defendants from court-sanctioned injustice.⁸ The debate is particularly contentious, however, because within this pretrial commitment process stands a trifecta of competing interests. While the state and public as a whole deserve protection and justice, a defendant equally deserves due process and a fair trial.⁹ Thus, a collision course is charted, with a defendant's constitutional rights squaring off against the deep-rooted motivations of criminal jurisprudence—offering victims closure and justice while ensuring respect for the law.¹⁰

This Note enters the debate over pretrial commitment for defendants deemed incompetent to stand trial, arguing that revisions are needed to remedy an insufficient patchwork of state statutory provisions providing for such commitment. Part I features an overview of the competency doctrine. Part II addresses the durational limitations on pretrial

6. See generally J. Amy Dillard, *Without Limitation: "Groundhog Day" for Incompetent Defendants*, 56 DEPAUL L. REV. 1221 (2007); Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants With Mental Disabilities*, 52 ALA. L. REV. 193 (2000).

7. See Winick, *supra* note 5, at 571 n.1. This procedure is followed across the nation, with deviations typically only arising in the type of commitment—such as inpatient or outpatient. For an example of this procedure in Washington, see Michael J. Finkle, *Washington's Criminal Competency Laws: Getting From Where We Are to Where We Should Be*, 5 SEATTLE J. FOR SOC. JUST. 201, 203–04 (2006).

8. See Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960) (discussing story of four military prisoners in California); Jamie Mickelson, Note, *"Unspeakable Justice": The Oswaldo Martinez Case and the Failure of the Legal System to Adequately Provide for Incompetent Defendants*, 48 WM. & MARY L. REV. 2075, 2075–85 (2007) (detailing stories of Oswaldo Martinez and Donald Lang).

9. See Dillard, *supra* note 6, at 1225 (describing the conundrum facing both defendant and prosecutor in the case of Gregory Murphy); Winchell, *supra* note 3, at 190–92 (describing story of Patricia Smith); see also *State v. Davis*, 898 N.E.2d 281, 289 (Ind. 2008) (citing *Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973); *Drope v. Missouri*, 420 U.S. 162, 171 (1975)) ("Justification for the commitment of an incompetent accused is found in the State's interest in the restoration of the accused to competency because of the right of the public and the defendant to the prompt disposition of criminal charges pending against him . . . and the protection of the accused against being required to answer to charges that she lacks the capacity to understand or to assist her attorney in defending against.").

10. See Gobert, *supra* note 4, at 685 (describing how pretrial commitment may serve core sentencing rationales, but punishment based upon such rationales is "inappropriate prior to an adjudication of guilt"). For a current example of this clash of interests, see Sam Penrod, *Judge Orders Legally Incompetent Sex Offender Released*, DESERET NEWS (Apr. 7, 2011), <http://www.deseretnews.com/article/705370164/Judge-orders-legally-incompetent-sex-offender-released.html>.

commitment of defendants deemed incompetent to stand trial set forth in the 1972 Supreme Court decision *Jackson v. Indiana*.¹¹ Part III investigates statutory provisions in all fifty states and the District of Columbia to determine how states have responded to *Jackson*'s durational limitations. Finding wild variations among these state provisions, Part IV turns to social science literature to decipher what such durational limits should be. Finding a need for revision within states and for further research to propel these revisions, Part V proposes establishment of a cross-disciplinary group of experts tasked with conducting targeted research and crafting a model statute in hopes of providing states with a legislative solution to meeting *Jackson*'s mandate.

I. A BRIEF HISTORY OF COMPETENCY

Arising from common-law roots¹² and fears associated with a trial in absentia,¹³ competency to stand trial has become a fundamental concept in today's criminal justice system.¹⁴ This stature is justified by an interest in preserving the respected appearance of the trial process, as well as ensuring that a fair, accurate, and adversarial trial is achieved and that appropriate sentencing rationales can be applied.¹⁵

The Supreme Court first offered a definition of competency in *Dusky v. United States*.¹⁶ In a per curiam opinion, the *Dusky* Court stated that competency hinged on "whether [the 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."¹⁷ This standard has since been recognized as the baseline inquiry that due process requires.¹⁸

11. 406 U.S. 715 (1972).

12. See, e.g., Dillard, *supra* note 6, at 1225 ("The notion that a criminal defendant must be competent before standing trial dates as far back as medieval English law."); Morris et al., *supra* note 2, at 201 (drawing upon reports of medieval English law cases).

13. See Foote, *supra* note 8, at 834 (noting that "the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself"); Schlesinger, *supra* note 4, at 381 ("The law on competency to stand trial . . . stems from the prohibition against trial in absentia.").

14. See Longtain, *supra* note 2, at 1569 ("The requirement of competency ensures the accuracy, reliability, and integrity of criminal trials, all of which are important to both the criminal defendant and society as a whole."); Perlin, *supra* note 6, at 198 ("Few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an incompetent defendant may not be put to trial.").

15. See Morris et al., *supra* note 2, at 201–02.

16. 362 U.S. 402 (1960).

17. *Id.*

18. See *Godinez v. Moran*, 509 U.S. 389, 402 (1993) (noting that "while States are free to adopt

Though initially only applicable at the federal level, the *Dusky* standard has become widely regarded as the standard state courts should apply.¹⁹

A defendant's right to competency during trial was subsequently ensconced in constitutional protection in *Pate v. Robinson*.²⁰ In *Pate*, the defendant, Robinson, was convicted of murder, but not before his attorney raised a question as to his competence.²¹ Robinson's attorney entered into evidence a long history of mental health issues by producing a slew of witnesses that testified to Robinson's incompetence.²² Robinson's conviction was nonetheless affirmed by the Illinois Supreme Court, which held that Robinson had waived his right to claim incompetence, and, even if he had not, Robinson had failed to proffer enough evidence of his incompetence.²³ The United States Supreme Court overturned Robinson's conviction, finding that the Constitution requires a trial halt and an inquiry into competence commence when a defendant's competency is questioned.²⁴ The Court held that failure to perform this inquiry abridged Robinson's right to due process under the Fourteenth Amendment, and thus Robinson's trial was fatally flawed.²⁵

The fundamental precepts of *Dusky* and *Pate* were then woven together by the Supreme Court in *Drope v. Missouri*.²⁶ In *Drope*, the petitioner was on trial for the forcible rape of his wife.²⁷ The petitioner's counsel filed a pretrial request for an inquiry into the petitioner's competence

competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements").

19. See Morris et al., *supra* note 2, at 208 ("[S]tate courts in interpreting their states' competency statutes have quoted the *Dusky* language verbatim, accepting the *Dusky* standard as the required standard for measuring competency. These decisions have occurred with such frequency that some commentators have asserted that all states construe their statutes to conform with the *Dusky* standard."); Benjamin James Vernia, Note, *The Burden of Proving Competence to Stand Trial: Due Process at the Limits of Adversarial Justice*, 45 VAND. L. REV. 199, 203 (1992) ("Although the Supreme Court has never held expressly that states must apply the standard it announced in *Dusky*, states have followed the same formulation."); see also, e.g., KAN. STAT. ANN. § 22-3301(1) (2007); R.I. GEN. LAWS § 40.1-5.3-3(a)(2) (2006) ("'Competent' or 'competency' means mental ability to stand trial. A person is mentally competent to stand trial if he or she is able to understand the character and consequences of the proceedings against him or her and is able properly to assist in his or her defense."); Adams v. State, 509 N.E.2d 812, 814 (Ind. 1987) ("The test for competency is whether the defendant has sufficient present ability to consult with defense counsel with a reasonable degree of rational understanding, and whether the defendant has a rational as well as a factual understanding of the proceedings against him.");

20. 383 U.S. 375 (1966).

21. *Id.* at 376.

22. *Id.* at 378.

23. *Id.* at 376-77.

24. *Id.* at 385-87.

25. *Id.* at 386-87.

26. 420 U.S. 162 (1975).

27. *Id.* at 164.

accompanied by a psychiatric report declaring him to be in need of psychiatric assistance.²⁸ The petitioner's wife then testified that her husband suffered from irrational behavior, which was followed by the petitioner attempted suicide during trial.²⁹ In analyzing his subsequent conviction, the Supreme Court stated that to meet the *Dusky* standard, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."³⁰ Under this standard, the Court vacated the petitioner's conviction, stating, "[w]hatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that . . . the correct course was to suspend the trial until such an evaluation could be made."³¹

As a result, when faced with a defendant whose competence is questioned, courts follow the approach set out in *Dusky* and *Drope* to evaluate a defendant's fitness to proceed.³²

II. JACKSON V. INDIANA

A. The Case

The Supreme Court added another wrinkle to the competency doctrine when it decided *Jackson v. Indiana* in 1972.³³ The defendant in *Jackson* was a "mentally defective deaf mute with a mental level of a pre-school child," rendering his ability to communicate virtually nonexistent.³⁴ Arrested on suspicion of two separate robberies, Jackson was deemed incompetent to stand trial and committed to the Indiana Department of

28. *Id.* at 164 n.1.

29. *Id.* at 165–67.

30. *Id.* at 171.

31. *Id.* at 181.

32. See Bonnie, *supra* note 4, at 548 (noting that "the criteria articulated in *Dusky v. United States* and *Drope v. Missouri* . . . typically are said to denote 'competence to stand trial'").

33. 406 U.S. 715 (1972).

34. *Id.* at 717. While outside the scope of this Note, it is worthwhile to mention that in the wake of *Jackson* a new subcategory of "incompetent" defendants has arisen—individuals considered "linguistically incompetent defendants." See Mickelson, *supra* note 8, at 2113–14. This subcategory includes defendants who do not suffer from a mental disorder but instead lack the ability to communicate. They are thus "incompetent to stand trial" based solely on their inability to communicate with their attorneys, but do not qualify for civil commitment proceedings in many states. *Id.*

Mental Health until “the defendant [was] sane.”³⁵ Armed with physician evaluations finding Jackson’s prognosis “rather dim”³⁶ and doubting his ability to ever attain the communication skills necessary to be deemed competent, Jackson’s counsel filed a petition alleging—in part—that Jackson’s commitment amounted to a “life sentence” in violation of the Fourteenth Amendment’s Due Process Clause.³⁷ The Court agreed, finding that “Indiana’s indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment’s guarantee of due process.”³⁸ The Court then stated that “[a]t 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.”³⁹ To flesh out this “rule of reasonableness,”⁴⁰ the Court continued:

35. *Jackson*, 406 U.S. at 717–19. The Indiana statute at the time, IND. ANN. STAT. § 9-1706(a) (Supp. 1971), allowed for commitment after two “competent disinterested physicians” had time to examine the defendant and testify to his sanity, as well as a court subsequently finding the defendant incompetent to stand trial. *Id.* at 717 n.1. Additionally, the statute mandated that a defendant be held in custody until restored to sanity. *Id.*

In Jackson’s case, his evaluating physicians concluded that his “almost non-existent communication skill, together with his lack of hearing and his mental deficiency, left him unable to understand the nature of the charges against him or to participate in his defense.” *Id.* at 718. The weight of this evidence led the Court to conclude, “[t]here is nothing in the record that even points to any possibility that Jackson’s present condition can be remedied at any future time.” *Id.* at 726.

36. *Id.* at 719.

37. *Id.* Jackson’s counsel also argued that Jackson’s commitment violated the Fourteenth Amendment’s Equal Protection Clause, in that the state court had treated his commitment differently than those involuntarily committed under Indiana’s civil commitment statutes at the time—which invoked different standards for commitment and release. *Id.* at 723. This argument was successful. *Id.* at 729–30. In so holding, the Court stated:

Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [the civil commitment statutes], Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.

Id. at 730. However, this holding may have been unnecessary, given the Court’s due process determination. See Gobert, *supra* note 4, at 681–82.

38. *Jackson*, 406 U.S. at 731.

39. *Id.* at 738.

40. *Id.* at 733. The federal standard, under 18 U.S.C. §§ 4244–48 (1970), permitted “indefinite commitment” only if a defendant was deemed incompetent to stand trial, dangerous, and that “suitable arrangements for the custody and care of the prisoner [were] not otherwise available.” *Id.* at 731–33; see also *Greenwood v. United States*, 350 U.S. 366, 373–74 (1956). Armed with this blend of criminal and civil commitment standards, the Court was satisfied that commitment was not based on incompetency alone—which it readily asserted would not accord with the Due Process Clause when a defendant of questionable ability to attain competency was at issue and the commitment was for an indeterminate period of time. *Jackson*, 406 U.S. at 738; see also Gobert, *supra* note 4, at 683 (stating

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 must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal. 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. We note, however, that petitioner Jackson has now been confined for three and one-half years on a record that sufficiently establishes the lack of a substantial probability that he will ever be able to participate fully in a trial.⁴¹

The Court then remanded the case to the Indiana courts to consider Jackson's commitment under its newly established standard, with the hint that Jackson's situation fell into the first category of defendants—those without the capacity to attain competency in the “foreseeable future.”⁴²

B. The Mandate

Jackson thus held that the Fourteenth Amendment's Due Process Clause mandates state-imposed durational limits on two separate inquiries surrounding competence to stand trial. First, if a defendant faces pretrial commitment solely based upon a finding of incompetence to stand trial, then the defendant must undergo evaluation within a “reasonable” time to determine if he or she will attain competency in the “foreseeable future.”⁴³ If this evaluation finds that a defendant will not attain competency within the “foreseeable future,” *Jackson* mandates either dismissal of the charges

that “the Supreme Court decided that the rule of reasonableness, which had previously been applied to federal incompetency statutes, was in fact a constitutional requisite binding on state incompetency procedures as well”).

41. *Jackson*, 406 U.S. at 738–39.

42. *See id.* at 741.

43. *Id.* at 738. This has become *Jackson*'s lasting mantra. *See* Perlin, *supra* note 6, at 204.

or initiation of civil commitment proceedings.⁴⁴ Second, if this initial inquiry reveals that a defendant will “probably soon” attain competency, commitment may continue—but it must end once it is no longer “justified by progress toward that goal.”⁴⁵ However, the Court coyly declined to offer specific “arbitrary”⁴⁶ time limits for these two durational limitations, and thus left unresolved what these time limits should be.⁴⁷ Therefore, two durational questions linger in the wake of *Jackson*:

(1) What constitutes, for the purposes of due process, a “reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain [competency] in the foreseeable future?”⁴⁸

(2) Further, given *Jackson*’s spirit of limiting indefinite commitment of incompetent defendants, when is continued commitment no longer “justified by progress toward”⁴⁹ the goal of restoring competency for the purposes of due process?

44. *Jackson*, 406 U.S. at 738.

45. *Id.* This second limitation has also been interpreted to require periodic review of a defendant’s competency status if commitment continues. See Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 10–12 (1993) (“Although the language 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.”). Because this Note is primarily focused on durational limitations for commitment, periodic review provisions are not discussed in depth. However, it is important to note that periodic review, coupled with the two durational inquiries, helps form what has been commonly termed as the three requirements of *Jackson*. This three-part mandate was addressed by Morris and Meloy, wherein both scholars surveyed all fifty states’ and the District of Columbia’s provisions relating to this three-part mandate. *Id.* at 9–22. They then focused on the problems inherent in California’s “conservatorship” statute while urging compliance with *Jackson*. Additionally, Ronald Roesch and Stephen Golding also briefly discussed this three-part framework, but proceeded to recommend a trial on the merits of a defendant’s case be held in order to allow continued commitment. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 120–31, 209–16 (1980). While approving of and investigating durational limits within this three-part framework, this Note diverges by attempting to provide answers to *Jackson*’s lingering questions rather than propose alternative solutions.

The Sixth Amendment’s guarantee of a “speedy trial” also enters the picture at this point, but its provisions and possible infringements are also outside the scope of this Note. For a brief overview, see Dillard, *supra* note 6, at 1231 n.72 (citing and explaining the import of *Barker v. Wingo*, 407 U.S. 514 (1972)).

46. *Jackson*, 406 U.S. at 738.

47. See Robert A. Nicholson & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research*, 109 PSYCHOL. BULL. 355, 355 (1991) (stating that “the court did not set firm limits on the duration of commitment”).

48. *Jackson*, 406 U.S. at 738.

49. *Id.*

The following part discusses the divergent paths states have taken in an attempt to answer these lingering durational questions.

III. STATE RESPONSES TO *JACKSON*

Based upon a fifty-state study,⁵⁰ forty-four states have attempted to define a “reasonable” time for commitment to predict restorability,⁵¹ and forty states have attempted to place an upper limit on commitment for restoration of competence.⁵² Of note, four states have chosen to avoid *Jackson*’s mandate altogether by allowing for only civil commitments.⁵³ The following parts expound upon these state responses.

A. *State Responses to Jackson’s Directive That Commitment be Limited to the “Reasonable Period of Time Necessary”⁵⁴ to Predict Restorability*

Jackson first required that a defendant deemed incompetent to stand trial not be committed for “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.”⁵⁵ At the outset, this mandate presupposes a court has already determined a defendant is incompetent to stand trial. States have responded to this directive in three ways: (1) by avoiding *Jackson* entirely and instead assessing a defendant’s restorability at the initial competency determination; (2) by placing a specific limit on the duration of this commitment; and (3) by rehashing

50. For the purpose of simplicity, the District of Columbia is referred to as a state throughout Part III.

51. These states are: Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

52. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

53. These states are: Minnesota, New Hampshire, North Carolina, and Vermont. See MINN. R. CRIM. PROC. 20.01, subdiv. 6(b)(1) (West 2010) (“If the defendant is not under commitment, the court must commence a civil commitment proceeding.”); N.H. REV. STAT. ANN. § 135:17-a(II) (2005) (permitting commitment pursuant to civil proceedings); N.C. GEN. STAT. §§ 15A-1002(b)(1), 15A-1004(b) (2007) (allowing for commitment pursuant to civil proceedings); VT. STAT. ANN. tit. 13, §§ 4820(2)–(4) (2009) (providing for only civil commitment upon a finding of incompetence).

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

55. *Id.*

Jackson's language without providing any guidance. Overall, just one state has failed to incorporate any approach within its statutory fabric.⁵⁶

1. *States Avoiding Jackson and Requiring Evaluation of Restorability at the Initial Competency Determination*

Fourteen states require the determination of a defendant's ability to attain competency in the foreseeable future at an initial proceeding in place to evaluate a defendant's general competence to proceed.⁵⁷ Given *Jackson's* language, these states avoid the thorny issue of post-determination commitment entirely. One such state is Alabama, which specifies that if "reasonable ground[s] exist to doubt the defendant's mental competency" based upon expert reports, a judge shall set a hearing within forty-two days.⁵⁸ At this hearing, if the judge or jury determines that the defendant is not competent to proceed, a further finding of whether there is "a substantial probability that the defendant will be restored to competency within a reasonable period of time" is required.⁵⁹

Nearly all states within this category also limit the time a defendant can be committed for the purposes of evaluating his or her competency and

56. This state is Delaware. For the purposes of drawing a line between states that have and have not responded to *Jackson's* first durational inquiry, this part considers the four states allowing for only civil commitment as having responded—though, by skirting *Jackson* entirely, they may more properly belong in the first category of states in this part.

57. These states are: Alabama, Arizona, Connecticut, Florida, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, West Virginia, and Wisconsin. See ALA. R. CRIM. PROC. 11.6(c)(3) (LexisNexis 2009) (rehashing *Jackson's* language without specifying period of time, but directing inquiry to be completed at initial competency inquiry); ARIZ. REV. STAT. ANN. § 13-4507(F) (2010 & Supp. 2011) (providing for a maximum of forty-five days of commitment prior to initial competency hearing); ARIZ. REV. STAT. ANN. § 13-4510(C) (2010 & Supp. 2011) (providing for prediction of future competence at initial competency hearing); CONN. GEN. STAT. ANN. §§ 54-56d(d)–(e) (West 2009 & Supp. 2011) (allowing for determination at initial competency hearing, but also allowing thirty-one days for commitment of defendants for this evaluation); FLA. STAT. ANN. § 916.12(4)(d) (West 2001 & Supp. 2011); FLA. R. CRIM. PROC. 3.212(c)(3)(B) (West 2007); KY. REV. STAT. ANN. § 504.110(1) (LexisNexis 2008) (providing for determination of future competence at initial competency hearing); KY. REV. STAT. ANN. § 504.080 (LexisNexis 2008) (providing that the court can commit a defendant for thirty days to evaluate potential incompetency); LA. CODE CRIM. PROC. ANN. art. 648(A) (2003 & Supp. 2011); MICH. COMP. LAWS ANN. § 330.2028(2)(d) (West 1999) (requiring that determination must be made within sixty days); N.D. CENT. CODE § 12.1-04-08(1) (1997); OHIO REV. CODE ANN. § 2945.38(B) (LexisNexis 2010); OKLA. STAT. ANN. tit. 22, § 1175.5(2) (West 2003 & Supp. 2011); R.I. GEN. LAWS § 40.1-5.3-3(f) (2006 & Supp. 2010) (report must be filed within ten days); S.C. CODE ANN. §§ 44-23-410(A)(1), 44-23-420(A) (2002 & Supp. 2010) (providing that defendant can be detained for thirty days, and that a report of findings must be filed within ten days following detention); W. VA. CODE ANN. § 27-6A-3(e) (LexisNexis 2008); WIS. STAT. ANN. § 971.14(3)(d) (West 2007 & Supp. 2010).

58. ALA. R. CRIM. PROC. 11.6(a) (LexisNexis 2009).

59. *Id.* at 11.6(c)(3).

predicting restorability, ranging from a low of ten days⁶⁰ to a high of sixty days.⁶¹ States that specify permissible duration of this commitment, however, generally allow between thirty and sixty days of commitment to complete this evaluation.⁶²

2. *States Placing a Specific Durational Limit on Commitment for Prediction of a Defendant's Restorability*

Thirty states expressly limit the time a defendant deemed incompetent to proceed can be committed for inquiry into his or her ability to attain competency in the foreseeable future.⁶³ These time limits vary widely,

60. R.I. GEN. LAWS § 40.1-5.3-3(f) (2006 & Supp. 2010) (requiring that report must be filed within ten days).

61. See MINN. R. CRIM. PROC. 20.01, subdiv. 4(a) (West 2010) (allowing sixty days to complete examination).

62. See, e.g., ARIZ. REV. STAT. ANN. § 13-4507(F) (2010) (providing for commitment of at most forty-five days prior to initial competency hearing); KY. REV. STAT. ANN. § 504.080 (LexisNexis 2008) (providing that court can commit defendant for thirty days to evaluate potential to regain competency); S.C. CODE ANN. §§ 44-23-410(A)(1), 44-23-420 (2002 & Supp. 2010) (providing that defendant can be detained for thirty days, and that report of findings must be filed within ten days following detention).

63. These states are: Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See ALASKA STAT. ANN. § 12.47.110 (West 2007 & Supp. 2011) (180 days); ARK. CODE ANN. §§ 5-2-310(b)(1), 5-2-310(b)(2)(A) (2006 & Supp. 2011) (requiring report after ten months and hearing after a "reasonable period of time," but not to exceed one year of commitment); CAL. PENAL CODE § 1370(b)(1) (West 2011) (ninety days); COLO. REV. STAT. ANN. § 16-8.5-116(2) (West 2006 & Supp. 2011) (within three months after commitment); D.C. CODE § 24-531.03(f)(1) (LexisNexis 2005) (the defendant can be committed up to forty-five days for evaluation after found incompetent to stand trial); GA. CODE ANN. § 17-7-130(c) (2008 & Supp. 2011) (ninety days); IDAHO CODE ANN. § 18-212(2) (2004 & Supp. 2011) (ninety days); 725 ILL. COMP. STAT. ANN. 5/104-17(e) (West 2006) (thirty days); IND. CODE ANN. § 35-36-3-3(a) (West 2004) (ninety days); IOWA CODE ANN. § 812.7 (West 2003 & Supp. 2011) (thirty days); KAN. STAT. ANN. § 22-3303(1) (2007) (ninety days); ME. REV. STAT. ANN. tit. 15, § 101-D(5)(A) (2003 & Supp. 2010) (thirty days); MD. CODE ANN., CRIM. PROC. § 3-106(c)(1)(i) (LexisNexis 2008 & Supp. 2011) (must hold reconsideration hearing within a year); MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003) (sixty days); MISS. UNIFORM R. CIR. & COUNTY CT. PRAC. 9.06 (2010) (requiring report at least four months after defendant deemed incompetent to stand trial); MO. ANN. STAT. § 552.020(11)(1) (West 2002) (six months); MONT. CODE ANN. § 46-14-221(3)(a) (2011) (ninety days); NEB. REV. STAT. § 29-1823(2) (2008) (six months); NEV. REV. STAT. ANN. § 178.450(2) (West 2000 & Supp. 2011) (requiring report within three months if charged with misdemeanor and monthly afterward; requiring report within six months if charged with a felony and every six months thereafter); N.J. STAT. ANN. § 2C:4-6(c) (West 2005 & Supp. 2011) (requiring a hearing within three months); N.M. STAT. ANN. § 31-9-1.3(A)(2) (LexisNexis 2000) (ninety days); N.Y. CRIM. PROC. LAW §§ 730.40(1), 730.50(1) (McKinney 2011) (allowing hearing after ninety days if charged with a misdemeanor, or one year if charged with a felony, but never specifically requiring inquiry into whether a defendant will attain competency in the foreseeable future. However, presumably this hearing is to inquire into a defendant's ability to attain competency in the future, and thus this statutory provision has been placed within this section.); OR. REV. STAT. ANN. §§ 161.370(3)-(4) (West 2003 & Supp. 2011) (allowing

from a low of thirty days⁶⁴ to a high of one year.⁶⁵ However, most states limit commitments for this purpose to between sixty and one hundred eighty days.⁶⁶ Some states—such as Nevada,⁶⁷ New York,⁶⁸ and Washington⁶⁹—place limitations on this duration based upon the type of crime with which a defendant is charged. While commendably placing limitations on this initial commitment, scholars note that these states may not comply with *Jackson*'s spirit because predicting future competence has little to do with the severity of one's alleged crime.⁷⁰

3. *States Rehashing Jackson's Language Without Delineating a Durational Limit*

Two states simply restate *Jackson*'s language without providing any specific durational limit on commitment for predicting restorability.⁷¹ Hawaii, for example, provides that "[w]ithin a reasonable time following any commitment . . . the director of health shall report to the court on whether the defendant presents a substantial likelihood of becoming fit to

sixty days for director of an institution to prepare a report; ninety days until he must notify the court); S.D. CODIFIED LAWS § 23A-10A-14 (2004) (four months); TENN. CODE ANN. § 33-7-301(c) (2007 & Supp. 2010) (six months); TEX. CODE CRIM. PROC. ANN. art. 46B.073(b) (West 2006 & Supp. 2010) (120 days); UTAH CODE ANN. § 77-15-6(2) (LexisNexis 2008) (after ninety days, with a possible ninety-day extension); VA. CODE ANN. § 19.2-169.3(B) (West 2007 & Supp. 2011) (six months); WASH. REV. CODE ANN. § 10.77.086(1) (West 2002 & Supp. 2011) (ninety days if a felony); WASH. REV. CODE ANN. § 10.77.088(1)(a)(i) (West 2002 & Supp. 2011) (fourteen days if a misdemeanor); WYO. STAT. ANN. § 7-11-303(g)(i) (1995) (ninety days with possible ninety-day extension).

64. ME. REV. STAT. ANN. tit. 15, § 101-D(5)(A) (2003 & Supp. 2010) (thirty days).

65. See, e.g., ARK. CODE ANN. §§ 5-2-310(b)(1), 5-2-310(b)(2)(A) (2006 & Supp. 2011) (requiring report after ten months and hearing after a "reasonable period of time," but not to exceed one year of commitment); MD. CODE ANN., CRIM. PROC. § 3-106(c)(1)(i) (LexisNexis 2008 & Supp. 2011) (must hold hearing within a year of commitment).

66. See, e.g., MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003) (sixty days); IND. CODE ANN. § 35-36-3-3(a) (West 2004) (ninety days); VA. CODE ANN. § 19.2-169.3(B) (West 2007 & Supp. 2011) (six months).

67. NEV. REV. STAT. ANN. § 178.450(2) (West 2000 & Supp. 2011).

68. N.Y. CRIM. PROC. LAW §§ 730.40(1), 730.50(1) (McKinney 2011).

69. WASH. REV. CODE ANN. § 10.77.086 (West 2002 & Supp. 2011) (ninety days if a felony); WASH. REV. CODE ANN. § 10.77.088(1)(a)(i) (West 2002 & Supp. 2011) (fourteen days if a misdemeanor).

70. See Morris & Meloy, *supra* note 45, at 18 ("In *Jackson*, the Court conditioned an incompetent defendant's treatment on progress toward the goal of restoration to competence. 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.").

71. The states are Hawaii and Pennsylvania. See HAW. REV. STAT. ANN. § 704-406(3) (LexisNexis 2007 & Supp. 2010); 50 PA. STAT. ANN. § 7403(d) (West 2001) ("Nor shall [the defendant] in any event 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 that capacity in the foreseeable future.").

proceed in the future.”⁷² These states do not comply with *Jackson* because while *Jackson* left specific durational limitations undefined in an effort to leave this determination to the states, a state cannot rely upon this same reasoning.⁷³

B. State Responses to Jackson's Directive Requiring Limits Upon the Ultimate Duration of Commitment for Restoration of Competency

Jackson's most important holding was a blanket ban on indefinite commitment of defendants deemed incompetent to stand trial.⁷⁴ As a result, states must institute an upper limit on commitments for competency restoration based solely on a defendant's incompetency to stand trial. Overall, forty states provide some upper limit on commitments or skirt the issue entirely by allowing commitment only when factors other than incompetency to stand trial are present.⁷⁵ Eleven states, however, evade *Jackson's* most sacred holding by failing to provide a ceiling on such commitments.⁷⁶ State provisions within this part evoke four distinct categories: (1) states avoiding *Jackson* by allowing commitment only upon

72. HAW. REV. STAT. ANN. § 704-406(3) (LexisNexis 2007 & Supp. 2010). However, as of publication, the Hawaii legislature was in the process of revising this statute to mandate short commitment periods for petty and nonviolent misdemeanors—periods short enough to potentially preclude the need to ask whether the defendant will attain competency in the foreseeable future. See S.B. 2726, 25th Leg., Reg. Sess. (Haw. 2010).

73. See Morris & Meloy, *supra* note 45, at 9 (finding states that “merely parrot” *Jackson's* language do not address the required definitional inquiry).

74. See ROESCH & GOLDING, *supra* note 45, at 114 (“Clearly the Supreme Court is concluding that limits need to be set on the type and length of commitment of incompetent defendants . . .”); Morris & Meloy, *supra* note 45, at 13 (“The very essence of *Jackson* is the Court's prohibition against indeterminately confining incompetent defendants.”).

75. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

76. These states are: Florida, Hawaii, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, Oklahoma, and Wyoming.

This problematic latter category also might include the federal statute. Under 18 U.S.C. § 4241(d)(1) (2006 & Supp. 2010), if a defendant is deemed incompetent to stand trial, he or she can be committed for four months while a prediction of restorability is made. If it is predicted that a defendant will attain competency, he or she can be committed “for an additional reasonable period of time until his mental condition is so improved that trial may proceed” or until “the pending charges against him are disposed of according to law”—whichever comes first. 18 U.S.C. §§ 4241(d)(2)(A)–(B) (2006 & Supp. 2010).

However, 18 U.S.C. § 4247(e)(1)(A) (2006 & Supp. 2010) requires that “[t]he director of the facility in which a person is committed pursuant to section 4241 shall prepare semiannual reports.” Thus, continued commitment under § 4241(d)(2)(A) extends from a possible ten-month stay to a seemingly indefinite duration.

a finding of dangerousness or by only allowing civil commitments;⁷⁷ (2) states tying commitment length to the defendant's alleged crime or potential maximum sentence;⁷⁸ (3) states providing a bright-line upper

77. These states are: Alabama, Delaware, Maryland, Minnesota, Nevada, New Hampshire, North Carolina, Tennessee, and Vermont. *See* ALA. CODE § 15-16-21 (LexisNexis 1995) (“until he is restored to his right mind”). However, commitment can only occur with a finding of dangerousness to the public and oneself. Otherwise a defendant must be treated in outpatient fashion. *See* ALA. R. CRIM. PROC. 11.6(c)(3)(i) (LexisNexis 2009). This commitment, however, must only be revisited after the first six months and then every year thereafter, with no upper limit. ALA. R. CRIM. PROC. 11.6(d)(1) (LexisNexis 2009).

See DEL. CODE ANN. tit. 11, § 403(b) (2007 & Supp. 2010) (stating that court must review commitment after one year to determine if “public safety will not be endangered by the [defendant’s] release”); MD. CODE ANN., CRIM. PROC. § 3-106(a) (LexisNexis 2008 & Supp. 2011) (court can set bail and release defendant if “not dangerous, as a result of a mental disorder or mental retardation, to self or the person or property of others”). *But see* MD. CODE ANN., CRIM. PROC. §§ 3-107(a)(1)–(3) (LexisNexis 2008) (allowing for dismissal of charges after time periods spanning three to ten years, depending upon severity of crime charged).

See MINN. R. CRIM. PROC. 20.01, subdiv. 3 (West 2010) (providing for only civil commitment upon finding defendant incompetent to proceed); NEV. REV. STAT. ANN. § 178.460(4)(b) (West 2000 & Supp. 2011) (state can recommit defendant only if “the defendant is dangerous to himself or herself or to society”). In Nevada, however, commitment cannot last beyond “the longest period of incarceration provided for the crime or crimes with which the person is charged or 10 years, whichever period is shorter.” NEV. REV. STAT. ANN. § 178.460(5) (West 2000 & Supp. 2011).

See N.H. REV. STAT. ANN. § 135:17-a(II) (2005) (permitting commitment only pursuant to civil proceedings); N.C. GEN. STAT. §§ 15A-1002(b)(1), 15A-1004(b) (2007) (allowing for only civil commitment); TENN. CODE ANN. § 33-7-301(b)(5) (2007 & Supp. 2010) (requiring commitment only if defendant is found dangerous, but not placing any limitation upon duration of commitment); VT. STAT. ANN. tit. 13, §§ 4820(2)–(4) (2009) (indicating that only civil commitment can be pursued upon finding of incompetence).

78. These states are: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Iowa, Louisiana, Michigan, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, and Wisconsin. *See* ALASKA STAT. ANN. §§ 12.47.110(a)–(b) (West 2007 & Supp. 2011) (allowing commitment for two ninety-day initial periods, then additional six-month period if defendant is charged with a felony crime involving force and remains dangerous; commitment is optional if the defendant is charged with a misdemeanor); ARIZ. REV. STAT. ANN. § 13-4515(A) (2010) (twenty-one months or maximum sentence, whichever is less); *see also* Nowell v. Rees, 199 P.3d 654 (Ariz. Ct. App. 2008) (holding that trial court cannot issue commitment order if defendant will not achieve competency within twenty-one months).

See CAL. PENAL CODE § 1370(c)(1) (West 2011) (three years or maximum time defendant can be sentenced for charged crime, whichever is less); *see also* *In re Polk*, 84 Cal. Rptr. 2d 389, 392–93 (Cal. Ct. App. 1999) (describing process after maximum period of commitment has been reached).

See COLO. REV. STAT. ANN. § 16-8.5.116(1) (West 2006 & Supp. 2011) (up to maximum period of time for which defendant can be sentenced); CONN. GEN. STAT. ANN. § 54-56d(i) (West 2009 & Supp. 2011) (up to eighteen months or maximum sentence, whichever is less); D.C. CODE § 24-531.05(b) (LexisNexis 2005) (“not to exceed 180 days in the aggregate”). *But see* D.C. CODE § 24-531.05(c) (LexisNexis 2005) (if charged with a violent offense, the defendant can be committed for consecutive 180-day periods); D.C. CODE § 24-531.05(d)(1) (LexisNexis 2005) (“[I]npatient treatment may last no longer than the maximum possible sentence that the defendant could have received if convicted of the pending charges.”).

See IOWA CODE ANN. § 812.9(1) (West 2003 & Supp. 2011) (eighteen months or maximum sentence for crime charged, whichever comes first); LA. CODE CRIM. PROC. ANN. art. 648(B)(1) (2003 & Supp. 2011) (tying commitment to maximum sentence); MICH. COMP. LAWS ANN. § 330.2034(1)

limit;⁷⁹ and (4) states failing to respond by allowing potentially indefinite

(West 1999) (providing that commitment cannot exceed "15 months or 1/3 of the maximum sentence the defendant could receive if convicted of the charges against him, whichever is lesser"); N.Y. CRIM. PROC. LAW § 730.50(3) (McKinney 2011) ("[T]he 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 or for the highest class felony of which he was convicted."). However, if the defendant is accused of a misdemeanor, commitment cannot last longer than the initial ninety-day detention period. N.Y. CRIM. PROC. LAW § 730.40(1) (McKinney 2011).

See N.D. CENT. CODE § 12.1-04-08(1) (1997) (stating that commitment must end by the "expiration of the maximum period for which the defendant could be sentenced"); OHIO REV. CODE ANN. §§ 2945.38(C)(1)–(4) (LexisNexis 2010) (limiting treatment duration to one year if most serious offense charged with is violent felony or conspiracy to commit a violent felony, six months if charged with lesser felony, sixty days if charged with first- or second-degree misdemeanor, and thirty days if charged with other misdemeanor); OR. REV. STAT. ANN. §§ 161.370(6)(a)–(b) (West 2003 & Supp. 2011) (the shorter of three years or the maximum sentence); 50 PA. STAT. ANN. § 7403(f) (West 2001) ("In no instance, except in cases of first and second degree murder, shall the proceedings be stayed for a period in excess of the maximum sentence of confinement that may be imposed for the crime or crimes charged or ten years, whichever is less. In cases of a charge of first or second degree murder, there shall be no limit on the period during which proceedings may be stayed."); R.I. GEN. LAWS § 40.1-5.3-3(j) (2006) (no longer than "period of time equal to two thirds (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, the court shall for the purpose of computation deem such offense to be punishable by a maximum term of thirty (30) years."); S.D. CODIFIED LAWS § 23A-10A-15 (2004) (maximum sentence if charged with a Class A or B felony, but no limitations discussed for lesser crimes); UTAH CODE ANN. §§ 77-15-6(6), (8), (10), (13) (LexisNexis 2008) (defendant can be committed for lesser of one year or maximum sentence unless accused of murder or aggravated murder, in which case defendant can be committed for up to 5.5 years); VA. CODE ANN. §§ 19.2-169.3(C)–(D), (F) (West 2007 & Supp. 2011) (forty-five days if a specified misdemeanor, up to five years or a defendant's maximum sentence if a specified felony, and indefinitely if charged with capital murder); WASH. REV. CODE ANN. § 10.77.086(4) (West 2002 & Supp. 2011) (providing that if charged with a felony, defendants can only be committed for a six-month period following two initial ninety-day periods for evaluation if they are found to be dangerous); WASH. REV. CODE ANN. § 10.77.088(1)(a)(i) (West 2002 & Supp. 2011) (providing that if charged with a misdemeanor, defendants can only be committed for up to fourteen days); WIS. STAT. ANN. § 971.14(5)(a) (West 2007 & Supp. 2010) (one year or maximum sentence, whichever is less).

79. These states are: Arkansas, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, South Carolina, Texas, and West Virginia. See ARK. CODE ANN. § 5-2-310(b)(2)(A) (2006 & Supp. 2011) (one year). *But see* J.W. Looney, *The Arkansas Approach to Competency to Stand Trial: "Nailing Jelly To A Tree,"* 62 ARK. L. REV. 683, 685 (2009) (discussing difficulty with making this determination).

See GA. CODE ANN. § 17-7-130(c)(3) (2008 & Supp. 2011) (nine months); IDAHO CODE ANN. § 18-212(2) (2004) (up to 270 total days); 725 ILL. COMP. STAT. ANN. 5/104-23(b) (West 2006) (one year). *But see* 725 ILL. COMP. STAT. ANN. 5/104-25(d)(1)–(2) (West 2006) (providing that after ensuing discharge hearing, the State can further commit a defendant for up to five years when charged with certain felonies); 725 ILL. COMP. STAT. ANN. 5/104-25(g)(4) (West 2006) (noting that even if defendants are committed after a discharge hearing, this period cannot exceed the maximum sentence they could receive under statute).

See IND. CODE ANN. § 35-36-3-3(b) (West 2004) (six months); KAN. STAT. ANN. § 22-3303(2) (2007) (six months); KY. REV. STAT. ANN. § 504.110(2) (LexisNexis 2008) (providing no limitation on amount of reissued commitment orders court can provide). *But see* KY. REV. STAT. ANN. § 504.060(1) (LexisNexis 2008) (defining "foreseeable future" as "not more than [360] days"); Winchell, *supra* note 3, at 196 (confirming that Kentucky courts have "interpreted the statute to mean that a defendant with a substantial probability of attaining competency has 360 days to do so").

commitment.⁸⁰

See MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003) (sixty days, and then civil commitment proceedings must commence); S.C. CODE ANN. § 44-23-430(3) (2002 & Supp. 2010) (up to sixty days); TEX. CODE CRIM. PROC. ANN. art. 46B.080(a) (West 2006 & Supp. 2010) (allowing only one sixty-day extension period after initial 120-day commitment period); TEX. CRIM. PROC. GUIDE § 53.05[2] (LexisNexis 2011) (describing in detail Texas process for commitment of incompetent defendants); W. VA. CODE ANN. § 27-6A-3(f) (LexisNexis 2008) (nine months).

80. These states are: Florida, Hawaii, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, Oklahoma, and Wyoming. See FLA. R. CRIM. PROC. 3.212(c)(6) (West 2007) (allowing commitment orders to be issued after every year). *But see* FLA. R. CRIM. PROC. 3.213(b) (West 2007 & Supp. 2011) (providing for release or initiation of civil proceedings after five years for felony or one year for misdemeanor, but only if “there is no substantial probability that the defendant will become mentally competent to stand trial”). This allows for potentially indefinite commitments if a defendant is continually found likely to become competent in the foreseeable future; *see also* Zabalo v. State, 513 So. 2d 701 (Fla. Dist. Ct. App. 1987) (allowing commitment after five-year period).

See HAW. REV. STAT. ANN. § 704-406(2) (LexisNexis 2007 & Supp. 2010) (providing that the State will not proceed with charges if “so much time has elapsed since the commitment or release on conditions of the defendant that it would be unjust to resume the proceeding”). *But see* State v. Raitz, 621 P.2d 352 (Haw. 1980) (reading in language from *Jackson* and remanding one-year detention for determination if it exceeded reasonable bounds).

See ME. REV. STAT. ANN. tit. 15, § 101-D(5)(A) (2003 & Supp. 2010) (providing for recommitment within one year, with no limitations thereafter); MISS. UNIFORM R. CIR. & COUNTY CT. PROC. 9.06 (2010) (“If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings . . . be instituted.”); MO. ANN. STAT. § 552.020(11)(5) (West 2002 & Supp. 2011) (providing that recommitment proceedings can continually occur in six-month increments); MONT. CODE ANN. § 46-14-221(2)(a) (2011) (allowing for commitment “for so long as the unfitness endures or until disposition of the defendant is made pursuant to this section, whichever occurs first”); NEB. REV. STAT. § 29-1823(1) (2008) (allowing for commitment “until such time as the disability may be removed”); N.J. STAT. ANN. § 2C:4-6(c) (West 2005) (laying out potentially perpetual cycle of six-month reviews). *But see* State v. Gaffey, 456 A.2d 511, 518 (N.J. 1983) (“In conclusion, we hold that a criminal indictment shall be dismissed with prejudice under N.J.S.A. [§] 2C:4-6(c) when it is determined that an adequate period of time has elapsed during which the defendant has been institutionalized and has remained unfit to be tried.”).

See N.M. STAT. ANN. § 31-9-1.3(E) (LexisNexis 2000) (stating that the State will only proceed to civil commitment or release if defendant is found not to be making progress). *But see* N.M. STAT. ANN. § 31-9-1.4 (LexisNexis 2000) (emphasizing need for action when “there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency”). Given New Mexico’s emphasis on a nine-month period, it is possible that the legislature intended this to serve as the upper limit to commitment—though there is no mention of what occurs if a defendant is deemed restorable. However, pursuant to N.M. STAT. ANN. § 31-9-1.5(D) (LexisNexis 2000), New Mexico will hold a hearing on the sufficiency of the evidence if the defendant is accused of a violent felony, and, if substantiated, the defendant can remain committed until the maximum sentence he or she could receive has been reached.

See OKLA. STAT. ANN. tit. 22, § 1175.8 (West 2003) (“If the medical supervisor reports that the person appears to have achieved competency after a finding of incompetency, the court shall hold another competency hearing to determine if the person has achieved competency. If competency has been achieved, the criminal proceedings shall be resumed.”). However, under OKLA. STAT. ANN. tit. 22, § 1175.5(2) (West 2003 & Supp. 2011), the jury at a competency hearing must decide whether the defendant can achieve competency within a “reasonable period of time.” And, OKLA. STAT. ANN. tit. 22, § 1175.1(6) (West 2003 & Supp. 2011) defines a “reasonable period of time” as an individual’s

1. *States Providing for Commitment Based Upon Dangerousness or Only Via Civil Commitment Proceedings*

Nine states avoid *Jackson* altogether by allowing for commitment only if factors other than incompetence to stand trial are present—namely “dangerousness” or similar factors reminiscent of civil commitment proceedings.⁸¹ Because *Jackson*’s holding was limited to defendants “committed solely on account of [their] incapacity to proceed to trial,”⁸² these states avoid confronting *Jackson*’s mandate.

2. *States Providing a Ceiling on Commitments Stemming from the Underlying Charges and/or Potential Sentence*

Twenty states limit the duration of an incompetent defendant’s commitment based upon the charges facing the defendant or the potential sentence if convicted.⁸³ Five of these twenty states limit this duration based upon the severity of the crime charged,⁸⁴ while five other states premise a durational limit upon the possible sentence a defendant could receive.⁸⁵ The ten remaining states reference either a possible sentence or a specific upper limit—whichever arises first—to define this durational limit.⁸⁶

maximum sentence or two years, whichever is less. Despite this, such “reasonable period of time” seemingly only applies to a determination of whether a defendant will achieve competence or not. Thus, because there is no mention of connecting “reasonable period of time” to an upper limit on commitment if a defendant is deemed restorable, it appears that Oklahoma does not accord with *Jackson*’s mandate to limit indefinite commitments solely on account of a defendant’s inability to attain competency.

See WYO. STAT. ANN. § 7-11-303(g)(ii) (1995) (“[T]he commitment of the accused at a designated facility shall continue until the head of the facility reports to the court that in his opinion the accused is fit to proceed . . .”).

81. These states are: Alabama, Delaware, Maryland, Minnesota, Nevada, New Hampshire, North Carolina, Tennessee, and Vermont. See *supra* note 77.

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

83. These states are: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Iowa, Louisiana, Michigan, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, and Wisconsin. See *supra* note 78.

84. These states are Alaska, New York, Utah, Virginia, and Washington. It should be noted, however, that Utah could fit into any sub-category within this part, as it provides durational limitations on commitment based upon a potential sentence or a hard ceiling, as well as provides differing periods of commitment for exceptionally serious crimes.

85. These states are: Colorado, District of Columbia, Louisiana, North Dakota, and South Dakota.

86. These states are: Arizona, California, Connecticut, Iowa, Michigan, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin.

Maximum period of commitment within this category of states varies wildly. If accused of a misdemeanor in Washington, a defendant can be committed for only fourteen days.⁸⁷ In California, however, a similar defendant can be committed for the lesser of three years or the maximum sentence for the crime charged.⁸⁸ Additionally, a defendant charged with a crime punishable by life imprisonment in Rhode Island can be committed for twenty years.⁸⁹ Moreover, a defendant charged with first- or second-degree murder in Pennsylvania faces no cap on commitment.⁹⁰ This disparity demonstrates that while having answered *Jackson*'s call to action, many states within this category have not fully addressed the problem of indefinite commitment of incompetent defendants.

Some scholars maintain that tying a defendant's alleged crime or potential sentence to limitations on duration of commitment violates *Jackson*'s spirit because regaining competence has little to do with the type of crime with which a defendant has been charged.⁹¹ Another pair of scholars, however, maintain that this approach might be the most practical way of ensuring a defendant is not committed for an extended duration on a relatively minor charge.⁹² Further, one study found that defendants most incompetent and least likely to regain competence in the foreseeable future were those accused of low-level crimes.⁹³ Thus, tying the length of commitment to a potential sentence or the severity of the alleged crime may ensure defendants accused of low-level crimes will be either civilly committed or released in compliance with *Jackson*, which requires that commitment "bear some reasonable relation to the purpose for which the individual is committed."⁹⁴

87. WASH. REV. CODE ANN. § 10.77.088(1)(a)(i) (West 2002 & Supp. 2011).

88. CAL. PENAL CODE § 1370(c)(1) (West 2011).

89. R.I. GEN. LAWS § 40.1-5.3-3(j) (2006).

90. 50 PA. STAT. ANN. § 7403(f) (West 2001).

91. See Morris & Meloy, *supra* note 45, at 18 ("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."); Nicholson & Kugler, *supra* note 47, at 366 ("Type of offense likely bears a stronger relation to the decision to refer than it does to the decision about competency itself.").

92. See ROESCH & GOLDING, *supra* note 45, at 119 ("An exception to this . . . is the case that has a maximum sentence which is less than the treatment limit.").

93. Barry Rosenfeld & Kerri Ritchie, *Competence to Stand Trial: Clinician Reliability and the Role of Offense Severity*, 43 J. FORENSIC SCI. 151 (1998).

94. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Of note, one scholar goes so far as to suggest that the seriousness of the charges should affect the determination of competence, using a so-called "sliding scale" method to demand a higher level of competence for more serious crimes. See Alec Buchanan, *Competency to Stand Trial and the Seriousness of the Charge*, 34 J. AM. ACAD. PSYCHIATRY & L. 458, 459–65 (2006).

3. *States Offering a Bright-Line Limit on Commitments*

Eleven states have directly responded to *Jackson's* mandate by providing a ceiling on the commitment of defendants deemed incompetent to stand trial.⁹⁵ Such time periods range from sixty days⁹⁶ to five years for defendants charged with exceptionally serious crimes.⁹⁷ Most states in this category, however, do not allow commitments to exceed nine months.⁹⁸

4. *States Without a Cap on Duration of Commitments in Contravention of Jackson*

Eleven states fail to comply with *Jackson's* mandate by refusing to offer a durational limit on commitment of an incompetent defendant or by simply rehashing *Jackson's* language without providing any legislative guidance on how courts should apply this restriction.⁹⁹ States in the former category are typified by New Jersey, which allows for continual six-month commitment orders with no definitive upper limit.¹⁰⁰ States in the latter category are exemplified by Wyoming, which provides that "the commitment of the accused at a designated facility shall continue until the head of the facility reports to the court that in his opinion the accused is fit to proceed."¹⁰¹ By endorsing possibly unlimited commitment, these states contravene what the *Jackson* Court sought to avoid—indefinite commitment of defendants deemed incompetent to stand trial.

95. These states are: Arkansas, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, South Carolina, Texas, and West Virginia. *See supra* note 79.

96. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003) (sixty days, and then civil commitment proceedings must commence); S.C. CODE ANN. § 44-23-430(3) (2002 & Supp. 2010) (up to sixty days).

97. 725 ILL. COMP. STAT. ANN. 5/104-23(b) (West 2006) (one year). *But see* 725 ILL. COMP. STAT. ANN. 5/104-25(d)(1)–(2) (West 2006) (after ensuing discharge hearing, can further commit defendant for up to five years when charged with certain felonies). However, under 725 ILL. COMP. STAT. ANN. 5/104-25(g)(4) (West 2006), even if committed after a discharge hearing, this period cannot exceed the maximum sentence a defendant could receive under statute.

98. *See, e.g.*, IND. CODE ANN. § 35-36-3-3(b) (West 2004) (six months); KAN. STAT. ANN. § 22-3303(2) (2007) (six months); W. VA. CODE ANN. § 27-6A-3(f) (LexisNexis 2008) (up to nine months).

99. These states are: Florida, Hawaii, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, Oklahoma, and Wyoming. However, New Mexico debatably does not fit this mold. *See supra* note 80.

100. N.J. STAT. ANN. § 2C:4-6(c) (West 2005).

101. WYO. STAT. ANN. § 7-11-303(g)(ii) (1995).

C. Conclusions

Overall, three states do not define “reasonable” for the purposes of commitment to predict restorability,¹⁰² and eleven states fail to place any upper limit on the ultimate duration of a defendant’s commitment for restoration of competency to stand trial.¹⁰³ As a result, these states have failed to address *Jackson*’s fundamental questions.

Further, there is alarming variation among states that have attempted to answer *Jackson*’s mandates. Defendants committed for predictions of restorability in Maine must have such analysis completed within thirty days,¹⁰⁴ while in Maryland the same inquiry can lawfully take up to a year.¹⁰⁵ Further, defendants deemed restorable face commitment for only sixty days in Massachusetts,¹⁰⁶ while the same defendant arrested in Rhode Island can be committed for twenty years¹⁰⁷—or potentially indefinitely in Pennsylvania.¹⁰⁸ These examples reflect an overall disparity that ensures defendants in many states can likely be committed for longer “than the reasonable period of time necessary” to predict restorability or past the point when commitment is no longer “justified by progress toward [restoration].”¹⁰⁹

Given this patchwork of state provisions, it is evident that even thirty-six years after *Jackson*, incompetent defendants in many states lack basic due process safeguards.¹¹⁰ The following part offers insight into social science research in an attempt to answer *Jackson*’s fundamental questions by determining what due process should require.

IV. RESEARCH EXAMINING DURATIONAL LIMITS

Social science scholarship addressing durational limitations on commitment for predicting restorability and commitment for restoration demonstrates that only limited periods of time are necessary for either

102. See *supra* notes 56 and 71.

103. See *supra* note 99 and accompanying text.

104. ME. REV. STAT. ANN. tit. 15, § 101-D(5)(A) (2003 & Supp. 2010).

105. MD. CODE ANN., CRIM. PROC. § 3-106(c)(1)(i) (LexisNexis 2008 & Supp. 2011).

106. MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003).

107. R.I. GEN. LAWS § 40.1-5.3-3(j) (2006).

108. 50 PA. STAT. ANN. § 7403(f) (West 2001).

109. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Additionally, it should be noted that the *Jackson* Court itself found that three-and-one-half years of commitment without improvement offended due process in *Jackson*’s case. *Id.* This further casts doubt on the constitutionality of state statutes allowing for extended commitment.

110. See *Morris & Meloy*, *supra* note 45, at 9 (finding similarly).

inquiry—thus signaling that many states likely exceed the bounds of what due process should require for one or both of these inquiries.¹¹¹ However, scholarship also showcases the need for further research regarding standards to predict and evaluate competency before definitive durational limits can be authoritatively ascertained.¹¹² The following parts expound upon these findings.

A. Research Defining Durational Limits on Commitment for Predicting a Defendant's Restorability

Though research on the duration commitment for prediction of restorability should span is extremely limited,¹¹³ available literature suggests a short period of time (e.g., thirty days or less) is more than adequate. Ronald Roesch and Stephen Golding, in their 1980 treatment of the issue, surveyed twelve proposals for durational limitations and found that most invoked a six-month treatment limitation as an adequate amount of time.¹¹⁴ However, these findings conflict with a recent work by Michael Finkle et al., which found that the process for interviewing and reporting opinions on a defendant's competency can range from one day to several weeks.¹¹⁵ Further, the late Bruce Winick reiterated that initial competency assessments can occur over a period "of several days or weeks."¹¹⁶ These findings are supported by the many states that require prediction of future competency at the initial competency hearing—which often occurs on a more truncated timetable than a separate hearing devoted to this finding.¹¹⁷ Finally, it is instructive that many states have memorialized short durational limits for commitment predicated on predicting restorability in their statutory provisions—evidencing the fact that this inquiry can be completed within short periods of time.¹¹⁸ Thus, because this inquiry

111. See discussion *infra* Parts IV.A–B.

112. See discussion *infra* Part IV.C.

113. See generally Karen L. Hubbard, Patricia A. Zapf & Kathleen A. Ronan, *Competency Restoration: An Examination of the Differences Between Defendants Predicted Restorable and Not Restorable to Competency*, 27 L. & HUM. BEHAV. 127 (2003); Gregory B. Leong, *Commentary: Restorability of Incompetence to Stand Trial—Implications Beyond Predictive Equations*, 35 J. AM. ACAD. PSYCHIATRY & L. 44, 44–45 (2007) (setting out research and approaches for predicting competency, but declining to discuss duration in making determinations).

114. See ROESCH & GOLDING, *supra* note 45, at 116–19.

115. Michael J. Finkle et al., *Competency Courts: A Creative Solution for Restoring Competency to the Competency Process*, 27 BEHAV. SCI. & L. 767, 774 (2009).

116. See Winick, *supra* note 3, at 931–32.

117. See *supra* note 57 and accompanying text; see also Hubbard, Zapf & Ronan, *supra* note 113, at 136 (pertaining to Alabama law).

118. See, e.g., 725 ILL. COMP. STAT. ANN. 5/104-17(e) (West 2006) (thirty days); IOWA CODE

can—and in many states must—be completed within 30 days or less, it appears that states allowing for commitment extending beyond thirty days likely fail to properly protect a defendant's right to due process as laid out in *Jackson*—which requires commitment of a defendant span only the time *necessary* to predict future competence. This carries immediate consequences, as Finkle et al. discuss, because “the longer it takes to complete an evaluation . . . the greater the risk that the defendant's condition could be deteriorating further.”¹¹⁹ Therefore, a disconnect exists between durational limits set forth in research and a contingent of state provisions providing for extended commitment to predict an incompetent defendant's ability to regain competency.

B. Research Defining Durational Limits on Commitment of Incompetent Defendants for Restoration of Competency

A review of literature suggests that approximately six months may delineate the upper limit of time needed to restore an incompetent defendant's competency to stand trial. One scholar, Debra Pinals, recently encapsulated four studies describing the time needed to restore incompetent defendants to competence.¹²⁰ First, in 1979, Linda Pendleton found an average treatment period of 104 days for incompetent defendants attaining competency.¹²¹ H. Richard Lamb found that of the defendants within his study who achieved competence, “the median length of hospitalization was 4.5 months”—though the time from arrest to a court determination of competence was ten months.¹²² In a study by Steven K. Hoge et al., a small group of incompetent defendants were successfully restored in an average of 100 days.¹²³ Additionally, Stephen G. Noffsinger found that after the implementation of a novel competency restoration program, the average length of stay for incompetent defendants achieving competency was approximately eighty days.¹²⁴

ANN. § 812.7 (West 2003 & Supp. 2011) (within thirty days); see also *supra* notes 57–62 and accompanying text.

119. See Finkle et al., *supra* note 115, at 773.

120. Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial From a Clinical Perspective*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81, 98–99 (2005).

121. Linda Pendleton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 AM. J. PSYCHIATRY 1098, 1100 (1980).

122. H. Richard Lamb, *Incompetency to Stand Trial: Appropriateness and Outcome*, 44 ARCHIVES GEN. PSYCHIATRY 754, 755 (1987).

123. Steven K. Hoge et al., *Mentally Ill and Non-Mentally Ill Defendants' Abilities to Understand Information Relevant to Adjudication: A Preliminary Study*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 187, 190 (1996) (97.9 days to be exact).

124. Stephen G. Noffsinger, *Restoration to Competency Practice Guidelines*, 45 INT'L J.

Further, Robert D. Miller, while proposing an outpatient evaluation schema, cited the results of three separate studies finding the average length of inpatient stay until restoration of competence was only six months—though defendants tended to stay longer because many states had much higher durational limits for such treatment.¹²⁵ Finkle et al. reiterated a six-month finding in a recent literature review.¹²⁶ Moreover, a 2008 study in Indiana specifically focused upon restoration of competency found that 72.3 percent of defendants admitted to a forensic hospital from 1988–2004 for competency restoration attained competency within six months.¹²⁷ Additionally, 83.9 percent of the defendants in the study attained competency within one year.¹²⁸ A more dated study of defendants found incompetent to stand trial in Michigan observed that the average length of stay until restoration of competency was 9.8 months for males and 5.4 months for females.¹²⁹

However, many studies have found even shorter restoration periods were adequate. Robert Nicholson and John McNulty found the average length of time for restoration of competency within their study was 63.7 days, and less than 6 percent of defendants ultimately restored took longer than six months to achieve competence.¹³⁰ Additionally, Kathleen Stafford and Dustin Wygant found that, of a small sample size of incompetent defendants, those achieving competence were restored within an average of 48.9 days.¹³¹

Overall, these findings are far from definitive. They do, however, suggest that state statutes allowing for commitment exceeding approximately six months offend a defendant's due process rights, as, on average, a defendant's commitment no longer bears "some reasonable relation to the purpose for which the individual is committed" beyond that point.¹³²

OFFENDER THERAPY & COMP. CRIMINOLOGY 356, 360 (2001).

125. Robert D. Miller, *Hospitalization of Criminal Defendants for Evaluation of Competence to Stand Trial or for Restoration of Competence: Clinical and Legal Issues*, 21 BEHAV. SCI. & L. 369, 379 (2003).

126. See Finkle et al., *supra* note 115, at 775.

127. Douglas R. Morris & George F. Parker, *Jackson's Indiana: State Hospital Competence Restoration in Indiana*, 36 J. AM. ACAD. PSYCHIATRY & L. 522, 528 (2008).

128. *Id.*

129. Carol T. Mowbray, *A Study of Patients Treated as Incompetent to Stand Trial*, 14 J. SOC. PSYCHIATRY 31, 33 (1979).

130. See Robert A. Nicholson & John L. McNulty, *Outcome of Hospitalization for Defendants Found Incompetent to Stand Trial*, 10 BEHAV. SCI. & L. 371, 378 (1992).

131. Kathleen P. Stafford & Dustin B. Wygant, *The Role of Competency to Stand Trial in Mental Health Courts*, 23 BEHAV. SCI. & L. 245, 255 (2005).

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

C. Limitations on Research Defining Durational Limits

Scholarship thus shows that short periods of time for commitment surrounding prediction of restorability and commitment for restoration can adequately fulfill *Jackson's* durational mandates. However, this research is limited in addressing a durational limitation on commitment for predicting future competence, and is unsettled when addressing a durational limit on commitment for competence restoration. These issues reflect the reality that mental health law has not adequately addressed workable, transferable methods to predict restorability and evaluate restoration.¹³³ As literature frequently notes, there is no gold standard for evaluating competency,¹³⁴ and likewise there is no widely accepted standard in place from which mental health professionals can draw to predict future competency.¹³⁵ Forensic research has been remiss to develop a detailed understanding of factors best suited to aid in predicting and evaluating competency.¹³⁶ As a result, some experts have long questioned what such an inquiry should entail.¹³⁷

This deficiency manifests itself in state provisions requiring periodic review of defendants deemed restorable and committed in furtherance of that goal. *Jackson* requires that when faced with an incompetent defendant

133. See Looney, *supra* note 79, at 700 ("It is unclear which variables best predict a particular defendant's restorability.").

134. See Jessica Wilen Berg, Paul S. Appelbaum & Thomas Grisso, *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345, 347 (1996) ("Presently there is a lack of both an authoritative framework for thinking about legal competence and clear standards for determining it. Cases and statutes generally lack sufficient analysis of competence and its different elements. Terms such as 'understanding' or 'rationality' may be poorly defined and used indiscriminately.").

135. See Hubbard, Zapf & Ronan, *supra* note 113, at 130 ("On the basis of current inconsistent findings, it is not possible to conclude which variables are most accurate in predicting a defendant's ability to be restored to competency."); Morris & Parker, *supra* note 127, at 523 ("[S]urprisingly little research on competence restoration has been published.").

136. See, e.g., Karen L. Hubbard & Patricia A. Zapf, *The Role of Demographic, Criminal, and Psychiatric Variables in Examiners' Predictions of Restorability to Competency to Stand Trial*, 2 INT'L J. FORENSIC MENTAL HEALTH 145, 146 (2003) ("[I]nconsistent findings seem to indicate that no clear consensus yet exists about which variables best predict a defendant's ability to regain competency."); Leong, *supra* note 113, at 44 ("[P]ublished literature through 2006 has not proven to be particularly useful in assisting the psychiatrist in arriving at a determination of the likelihood of restoration.").

137. See ROESCH & GOLDING, *supra* note 45, at 119 ("[W]e simply have no way of predicting, with any reasonable degree of accuracy, the probability of regaining competency."); Morris et al., *supra* note 2, at 227–29 (describing shortcomings in knowledge and practice regarding competency assessments). But see Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. PSYCHIATRY & L. 34, 40 (2007) ("In contrast to findings in several previous publications, this study suggests that specific clinical data could help competence examiners assess restorability.").

who “probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.”¹³⁸ This has been interpreted to require periodic review to ensure a defendant is progressing towards attaining competency.¹³⁹ Thirty-nine states provide for periodic review in their statutory schemes.¹⁴⁰ However, not one state dictates

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

139. See *Morris & Meloy*, *supra* note 45, at 10–11 (“Although the language of *Jackson* does not impose a duty of judicial oversight, such a duty is implicit.”).

140. These states are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See ALA. R. CRIM. PROC. 11.6(f) (LexisNexis 2009) (requiring reports at least every ninety-one days); ALA. R. CRIM. PROC. 11.6(d)(1) (LexisNexis 2009) (mandating court review after first six months, then every year thereafter); ALASKA STAT. ANN. § 12.47.110(b) (West 2007 & Supp. 2011) (mirroring ninety-day hearings); ARIZ. REV. STAT. ANN. §§ 13-4514(A)(1)–(2) (2010) (for inpatient treatment, after the first 120 days and then every 180 days thereafter; outpatient treatment, every sixty days); CAL. PENAL CODE § 1370(b)(1) (West 2011) (six-month intervals); COLO. REV. STAT. ANN. § 16-8.5-116(2) (West 2006 & Supp. 2011) (every three months); CONN. GEN. STAT. ANN. § 54-56d(k)(1) (West 2009 & Supp. 2011) (every ninety days when prior commitment order becomes invalid); DEL. CODE ANN. tit. 11, § 403(b) (2007) (one year after initial hearing, then anytime thereafter upon the defendant’s motion); D.C. CODE §§ 24-531.06(a)(1)–(2) (LexisNexis 2005) (requiring hearings only upon the expiration of ordered commitment or upon a change in the defendant’s competence status); FLA. R. CRIM. PROC. 3.212(c)(5)–(6) (West 2007) (after first six months of commitment, and then every year thereafter); IDAHO CODE ANN. § 18-212(2) (2004) (after initial ninety days of commitment); 725 ILL. COMP. STAT. ANN. 5/104-20 (West 2006) (every ninety days); IOWA CODE ANN. § 812.7 (West 2003 & Supp. 2011) (within first thirty days, and then sixty days thereafter); KY. REV. STAT. ANN. § 504.110(1) (LexisNexis 2008) (after sixty days); LA. CODE CRIM. PROC. ANN. art. 648(B)(1) (2003 & Supp. 2011) (“At any time after commitment . . . the court shall, within sixty days and after at least ten days notice to . . . defendant’s counsel . . . conduct a contradictory hearing to determine whether the . . . defendant is . . . incapable of standing trial . . .”); ME. REV. STAT. ANN. tit. 15, § 101-D(5)(A) (2003 & Supp. 2010) (requiring report after first thirty days; then, if defendant is recommitted, after sixty days and one year); MD. CODE ANN., CRIM. PROC. §§ 3-106(c)(1)(i)–(iii) (LexisNexis 2008 & Supp. 2011) (noting that the court must hold reconsideration hearing within a year or within thirty days after defendant’s counsel or the State’s Attorney files a motion for reconsideration or within thirty days of receiving a Health Department report with new facts or circumstances); MASS. GEN. LAWS ANN. ch. 123, § 16(b) (West 2003) (review within sixty days of commitment); MICH. COMP. LAWS ANN. § 330.2038(1)(a) (West 1999) (every ninety days); MISS. UNIFORM R. CIR. & COUNTY CT. PRAC. 9.06 (2010) (every four months); MO. ANN. STAT. § 552.020(11)(5) (West 2002) (every six months); MONT. CODE ANN. § 46-14-221(3)(a) (2011) (ninety days); NEB. REV. STAT. § 29-1823(2) (2008) (six months); NEV. REV. STAT. ANN. § 178.450(2) (West 2000 & Supp. 2011) (monthly intervals for a misdemeanor after first report is filed; six month intervals for a felony after first report is filed); N.J. STAT. ANN. § 2C:4-6(c) (West 2005) (every six months); N.M. STAT. ANN. § 31-9-1.3(D)(1) (LexisNexis 2000) (nine months from commitment); N.Y. CRIM. PROC. LAW §§ 730.50(2)–(3) (McKinney 2011) (if the defendant is charged with a felony, a new order of retention is required after the first year and then every two years thereafter); OHIO REV. CODE ANN. §§ 2945.38(F)(1)–(4) (LexisNexis 2010) (requiring reports whenever there is a change in defendant’s status, fourteen days before felony a commitment order expires, and ten days before a misdemeanor commitment order expires); OR. REV. STAT. ANN. § 161.370(5) (West 2003 & Supp. 2011) (every 180 days); 50 PA. STAT. ANN. § 7403(c) (West 2001) (every ninety days); R.I. GEN. LAWS § 40.1-5.3-3(k) (2006) (every six months, the director of the defendant’s institution shall prepare a report and petition the court for a

factors to consider when evaluating a defendant's progress toward regaining competency.¹⁴¹

This lack of guidance is problematic because courts and jurists—who are not well versed on mental health issues—typically defer to mental health professionals' assessments of a defendant's present and future competence.¹⁴² Unfortunately, these mental health professionals are operating without a well-developed understanding of how to best analyze these inquiries.¹⁴³ Inconsistencies are therefore apt to arise in both evaluating and predicting competency, leaving durational definitions an inexact science under the present framework.¹⁴⁴ Reliable methods to

hearing); S.D. CODIFIED LAWS § 23A-10A-14 (2004) (review after four months and again after one year); TENN. CODE ANN. § 33-7-301(c) (2007 & Supp. 2010) (six months); TEX. CODE CRIM. PROC. ANN. art. 46B.077(b) (West 2006 & Supp. 2010) ("at least once during the commitment period"); UTAH CODE ANN. § 77-15-6(6) (LexisNexis 2008) (court must review one year from recommitment). *But see* UTAH CODE ANN. §§ 77-15-6(8)–(10) (LexisNexis 2008) (if charged with specified serious crimes, court can extend commitment orders up to thirty-six months and must review the defendant's progress at least every eighteen months).

See VA. CODE ANN. § 19.2-169.3(B) (West 2007 & Supp. 2011) (every six months); WASH. REV. CODE ANN. § 10.77.086(4) (West 2002 & Supp. 2011) (mandating review if defendant is charged with a felony after each of two ninety-day periods of commitment, and then after possible six-month extension); W. VA. CODE ANN. § 27-6A-3(f) (LexisNexis 2008) (every three months); WIS. STAT. ANN. § 971.14(5)(b) (West 2007 & Supp. 2010) (three months, six months, nine months, and thirty days before end of commitment); WYO. STAT. ANN. § 7-11-303(g)(ii) (1995) (at least every three months).

141. *See supra* note 140.

142. *See* Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions about Competency*, 28 LAW & PSYCHOL. REV. 109, 125 (2004) (finding that in course of study "[t]he court agreed with the mental health professional on 326 of 327 cases"); David Freedman, *When Is a Capitally Charged Defendant Incompetent to Stand Trial?*, 32 INT'L J. L. & PSYCHIATRY 127, 127 (2009) ("[B]oth defense counsel and the trial courts, more often than not, defer to the judgment of defendant competence of mental health professionals.").

143. *See* Nicholson & Kugler, *supra* note 47, at 368 ("Despite the lack of crucial evidence on the mental health professional's expertise in forensic matters, it is unlikely that the use of such professionals in court proceedings will diminish in the near future."); Pinals, *supra* note 120, at 105–06 ("[T]here are no clearly established means of accurately predicting who among defendants are restorable and who are not."). This misunderstanding has also likely resulted in the wide variation among state provisions related to *Jackson's* durational inquiries. *See* Miller, *supra* note 125, at 372 ("This somewhat oracular pronouncement was sufficiently vague to cause different states to interpret it differently.").

144. *See* Noffsinger, *supra* note 124, at 357 ("[T]here is a striking paucity of information dealing *en point* with the issue of restoring competence to stand trial."). To remedy this shortcoming in information, Noffsinger advocates for "more research on competency restoration techniques." *Id.*; *see also* Hubbard & Zapf, *supra* note 136, at 146 ("Furthermore, there is a lack of research that examines the efficacy of treatment for incompetent defendants and the ability of examiners to make accurate predictions about competency restoration."). Without adequate understanding of techniques to predict and evaluate competence, as well as with a dearth of information on restoration techniques, it is not surprising that durational limits on commitment have not been investigated at length. *See generally* Nicholson & McNulty, *supra* note 130 (discussing difficulty in making determinations about restorability—and hence progress towards competence—given a dearth of guidance); Roesch, Hart & Zapf, *supra* note 4 (identifying difficulty in creating system to aid in competence determinations).

predict and evaluate competency are thus essential to defining durational limits, and therefore hold the key to fully realizing *Jackson*'s mandates.¹⁴⁵

In light of the constitutional ramifications at stake, further research and statutory change are needed regarding evaluation methods and durational limits surrounding prediction and restoration of a defendant's competence to stand trial.¹⁴⁶ The next part proposes accomplishment of these objectives via a cross-disciplinary working group of mental health professionals and legal experts.

V. PROPOSAL FOR STATUTORY REVISION

A. *Need for Further Study*

Given the disconnect between many state statutory provisions and existing scholarship addressing *Jackson*'s durational inquiries, change is needed to ensure that these directives remain vibrant and due process respected.¹⁴⁷ To address these shortcomings in the doctrine of competence, scholars have suggested the establishment of provisional trials,¹⁴⁸ the ability to waive competency,¹⁴⁹ and various methods of outpatient treatment.¹⁵⁰ However, these proposals obscure the underlying problem, as disparity in treatment of incompetent defendants among states cannot be remedied until the forensic community better understands methodologies necessary to predict restorability and evaluate restoration.¹⁵¹

145. See Ronald Roesch & James R. P. Ogloff, *Settings for Providing Criminal and Civil Forensic Mental Health Services*, in MENTAL HEALTH AND LAW: RESEARCH, POLICY AND SERVICES 191, 197 (Bruce D. Sales & Saleem A. Shah eds., 1996) ("[I]t may not be possible for mental health professionals to assess the *Jackson* criterion of response to treatment, which of course raises questions about whether this criterion can actually be used as a basis for determining treatment length."); see also MARK C. BARDWELL & BRUCE A. ARRIGO, CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON 33 (2002) ("[F]itness to stand trial standards utilize broad language which is flexible in application but, nonetheless, is a source of confusion.").

146. Indeed, due process rights are equated to "fundamental fairness" in our nation's legal framework. See Honorable David Souter, *Remarks by Justice Souter*, 99 GEO. L.J. 157, 158 (2010).

147. See Morris & Meloy, *supra* note 45, at 77–78 (calling for change in wake of finding states failing to meet *Jackson*'s requirements).

148. See ROESCH & GOLDING, *supra* note 45, at 209–16.

149. See Winick, *supra* note 3, at 975–76.

150. See Perlin, *supra* note 6, at 214.

151. See Hubbard & Zapf, *supra* note 136, at 147 ("[M]ore research needs to be conducted to determine which predictors are most accurate in determining the restoration of competency."); see also Berg, Appelbaum & Grisso, *supra* note 134, at 388–89 ("Clearly more research on these issues is necessary before conclusively establishing a legal standard of competence. At present, it may be sufficient to note that formulating a legal standard of competence is somewhat context specific, and as a result, different situations may require different application of those standards.").

Further study is therefore needed to develop working methodologies for predicting restorability and evaluating restoration of a defendant deemed incompetent to stand trial.¹⁵² Such scholarship would help guide courts and allow for reasoned, accurate decisions surrounding a defendant's competency.¹⁵³ Additionally, evidenced by the disconnect between state provisions and scholarship addressing durational limits on prediction and restoration of incompetent defendants, further study of these lingering questions is needed to aid states in developing reasoned legislation that adequately fulfills *Jackson*'s due process requirements.¹⁵⁴

B. A Cross-Disciplinary Approach with an Old Adage

Given this need, a cross-disciplinary working group comprised of mental health and legal experts in the doctrine of competency would be well suited to the task.¹⁵⁵ This group would commission a study set upon developing a standardized, research-based model to use in predicting competency and evaluating restoration—taking into account the difference between general competency and legal competency.¹⁵⁶ This model would then be used to garner answers to durational questions surrounding commitment for predicting restorability and commitment for restoration.

152. See *supra* Part IV.C.

153. See Morris et al., *supra* note 2, at 227–29 (describing shortcomings in judicial ability to determine incompetence).

154. See Finkle et al., *supra* note 115, at 783 (discussing the need for further research because “how long the average defendant needs inpatient treatment is unknown”). Additionally, the time for change may be now; sixteen of the states examined in this Note feature proposed legislation surrounding one or more of their *Jackson* provisions. These states are: Alaska, Georgia, Illinois, Hawaii, Kansas, Maryland, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Washington, Wisconsin, and Wyoming. See H.B. 9, 26th Leg., 1st Sess. (Alaska 2009); S.B. 391, 150th Gen. Assemb., Reg. Sess. (Ga. 2010); S.B. 2726, 25th Leg., Reg. Sess. (Haw. 2010); H.B. 5303, 96th Gen. Assemb., 2d Reg. Sess. (Ill. 2010); H.B. 2518, 83d Leg., Reg. Sess. (Kan. 2010); H.B. 1075, 428th Gen. Assemb., Reg. Sess. (Md. 2011); A.B. 264, 75th Reg. Sess. (Nev. 2009); H.B. 1655, 161st Leg. (N.H. 2010); S.B. 794, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009); S.B. 79, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.B. 2496, 194th Gen. Assemb., Reg. Sess. (Pa. 2010); H.B. 3139, 106th Gen. Assemb., 2nd Reg. Sess. (Tenn. 2010); H.B. 631, 2009–2010 Leg. Sess. (Vt. 2010); S.B. 5519, 61st Leg., Reg. Sess. (Wash. 2009); S.B. 492, 99th Leg., Reg. Sess. (Wis. 2010); H.B. 4, 2010 Budget Sess. (Wyo. 2010).

155. See BARDWELL & ARRIGO, *supra* note 145, at 130 (suggesting similar approach by proposing that “lawyers and clinical practitioners are best equipped” to resolve durational questions stemming from initial competency evaluations).

156. Many scholars have called for similar reform. See, e.g., Noffsinger, *supra* note 124, at 357 (“[M]ore research on competency restoration techniques is called for.”). While scholars may debate whether this is an attainable goal, at least one recent work has synthesized data to better understand competency and proposed recommendations focused on developing a workable construct for evaluating and predicting competency—signaling that this goal can and must be met in light of *Jackson*. See generally Nicholson & Kugler, *supra* note 47.

Armed with its findings, this group would subsequently draft a model statute, supplying states with proper durational limits regarding treatment of incompetent defendants and an approved approach to predicting and evaluating competence that will allow both mental health and legal professionals to become well versed in its facets. The result would be the confluence of diverging professional paths, bridging the historic disconnect between scientists and jurists in the doctrine of competency to create workable guidelines in hopes of aiding implementation of *Jackson's* mandates.¹⁵⁷

Armed with this leadership, states will have a model statute upon which to build a competency-to-proceed framework endorsed by the mental health and legal communities. In addition, courts will have scholarship and targeted studies to refer to when confronted with constitutional questions surrounding the commitment of incompetent defendants—potentially providing the impetus for change to lagging legislatures. In this way, a well-developed model would pave the way for increased protections aimed at defendants deemed incompetent to stand trial.

This approach, featuring a group of scholars joining together to study a problem and propose a unifying solution to a statutory shortcoming, has frequently been employed to produce a host of socially useful legislation.¹⁵⁸ This approach helped create the Model Penal Code, which has become widely implemented among the states.¹⁵⁹ Further, the Model State Administrative Procedure Act arose from an analogous group approach and has been widely adopted.¹⁶⁰ Additionally, the Uniform

157. See Longtain, *supra* note 2, at 1575 (“Until legislatures and courts define the standard for competency more narrowly, evaluators do not deserve blame for using clinical descriptions to assess defendants . . .”).

158. This approach was exemplified in a recent work. See Peter A. Alces & Chris Byrne, *Is it Time for the Restatement of Contracts, Fourth?*, 11 DUQ. BUS. L.J. 195 (2009). Alces and Byrne note that:

[D]uring the progressive era, both the ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have proven to be two of the most influential legal institutions in the United States. Each organization has been essential in improving the administration of law through efforts to simplify the law by distilling its best principles and making its application uniform throughout the states. The ALI has done most of this simplification through their Restatements of law, while NCCUSL has accomplished the same through uniform laws.

Id. at 196.

159. See John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 636–37 (1998) (identifying the Model Penal Code as one of the American Law Institute’s “most successful projects”).

160. Anuradha Vaitheswaran & Thomas A. Mayes, *The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA*, 27 J. NAT’L

Commercial Code features a similar success story.¹⁶¹ On a smaller scale, the National Association of Insurance Commissioners created a model Unfair Trade Practices Act that has gained widespread acceptance and helped foster uniformity in this area of the law within the states.¹⁶² Similarly, to provide uniformity amid varying state statutes, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association created the 1968 Uniform Anatomical Gift Act to provide model legislation regarding organ donation—which most states subsequently adopted.¹⁶³ Further, creation of a model statute by a group of experts has been deemed to be within “American jurisprudential traditions.”¹⁶⁴ Thus, utilizing a collection of experts to develop a model statute in a quest for clarity and uniformity has produced some of the most influential legislation to date, and is widely accepted as a way to solve shortcomings within the law.

Overall, faced with scholarship’s acknowledged need for further research and a constitutional backdrop yearning for statutory revision, similar success can be duplicated within the doctrine of competency.

CONCLUSION

Competency to stand trial issues go to the heart of our constitutional safeguard of due process, a requirement essential to the fairness upon which our nation’s judiciary was designed. *Jackson v. Indiana* held that due process requires durational limits be placed on both commitment for predicting competency and commitment for restoration of competency. Unfortunately, many states have failed to define, or have inadequately provided for, these durational limits. As a result, incompetent defendants face a patchwork and unsatisfactory set of state protections governing their due process rights.

ASS’N ADMIN. L. JUDICIARY 402, 418–19 (2007) (noting that the 1961 Model State Administrative Procedure Act has been adopted in some form by at least thirty states).

161. See Alces & Byrne, *supra* note 158, at 203 (describing the cooperative approach taken between the American Law Institute and National Conference of Commissioners on Uniform State Laws in creating and overseeing the Uniform Commercial Code).

162. Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions*, 42 AKRON L. REV. 519, 571 (2009).

163. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 66–69 (1995).

164. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 10 (1997) (noting additionally that ALI could have solved “uncertainty and complexity” in the law by the creation of model statutes) (internal quotation marks removed).

Available social science research confirms this inadequacy, demonstrating that due process should reflect shorter durational periods of commitment than many states currently provide for. This obvious disconnect between state provisions and scientific literature, however, is coupled with a lack of workable standards for predicting and evaluating competency. This has slowed development of research surrounding *Jackson's* durational questions. Thus, resolving these durational questions requires further research and increased guidance in workable methodologies to predict and evaluate competency.

A cross-disciplinary working group of mental health and legal experts would be well suited to tackle this problem by proposing best practices for mental health professionals to follow when predicting and evaluating competency. This, in turn, would help answer *Jackson's* lingering durational questions, culminating in a model statute incorporating these solutions. Only with this concerted push to halt the divergence of science and law within the doctrine of competency can due process triumph and *Jackson* achieve its objectives.

*Nicholas Rosinia**

* J.D. Candidate (2012), Washington University in St. Louis School of Law; B.S. (2008), University of Florida. I would like to thank Professor Mae Quinn, whose criminal law class and scholarship inspired this Note. I would also like to thank the staff of the *Washington University Law Review* for their tireless editing and exceptional comments. Last, but certainly not least, I would like to thank my editor, Kristina Finney, without whom none of this would be possible.