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Remedies for Individuals Wrongly Detained in State Mental Institutions Because of Their Incompetency to Stand Trial: Implementing Jackson v. Indiana

NOTES

REMEDIES FOR INDIVIDUALS WRONGLY DETAINED IN STATE MENTAL INSTITUTIONS BECAUSE OF THEIR INCOMPETENCY TO STAND TRIAL: IMPLEMENTING JACKSON V. INDIANA

INTRODUCTION

A determination that a defendant lacks competency to stand trial[1] can be the most crucial decision in a criminal proceeding. It may, in fact, be the final determination in the criminal process for that defendant.[2] In a majority of jurisdictions, such a finding results in an automatic commitment to a state mental hospital for an indeterminate pe-

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1. The term "competency to stand trial" is used interchangeably with "present sanity," "present capacity" and "sanity at time of trial." The standard of competency, as articulated by the Supreme Court adopting the standard proposed by the Solicitor General is

> "whether he [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."

Dusky v. United States, 362 U.S. 402 (1960) (per curiam).

The statutory provisions of most states tend to obscure these criteria by speaking in terms of "insanity" or some other form of mental deviance. Even where the term is sufficiently defined, it is often misapplied by the examining psychiatrist or the committing court. On the general problems of articulating and applying the incompetency standard, see Bacon, *Incompetency to Stand Trial: Commitment to an Exclusive Test*, 42 S. CAL. L. REV. 444 (1969); Bennett, *Competency to Stand Trial: A Call For Reform*, 59 J. CRIM. L.C. & P.S. 569 (1968); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIAT. 616 (1965). *See also* Aponte v. State, 30 N.J. 441, 153 A.2d 665 (1959), for an excellent discussion of the distinction between mental illness and competency to stand trial.

2. A study of an institute for the criminally insane in Michigan concluded that over 50 percent of the patients committed as incompetent would remain at the institute for the rest of their lives without ever reaching the trial stage. Comment, *Insane Persons—Competency to Stand Trial*, 59 MICH. L. REV. 1078 (1961). Sample surveys conducted at other institutions would seem to indicate that this finding is hardly unique. *See, e.g.*, Rosenberg, *Competency for Trial—Who Knows Best*, 6 CRIM. L. BULL. 577, 578 (1970) (quoting statistics from national survey of 58 institutions).

Even where the incompetent defendant gains competency and is certified competent by the detaining institution, the probability that he will return to the trial process is somewhat remote. In many of the cases, even those involving homicide, the charges against the defendants are dismissed by the prosecutor when an accused is remanded to the court as restored to competence. A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 147-49 (1970) [hereinafter cited as A. MATTHEWS]. Several factors account for these dismissals, particularly the length of detention of most incompetent defendants (which weakens the prosecutor's case) and the desire to avoid prosecuting against a complicated insanity defense. *Id.* at 149. Nonetheless, numerous cases have arisen where the prosecutor has attempted to go forward with the trial after prolonged confinement. *See* notes 33 and 34 *infra* and accompanying text.

With these factors in mind, it is clear that the commitment of the incompetent defendant may

riod.[3] Moreover, once the disability is removed,[4] the accused defendant must again face the pending criminal charges.[5]

The abuses of the process of pretrial commitment[6] have led many

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well represent the final disposition of his case, and courts in many jurisdictions seem to have adopted this attitude. *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 417 (rev. ed. 1971) (accounting for the reluctance of courts to consider restoration cases) [hereinafter cited as S. BRAKEL & R. ROCK].

3. An exhaustive survey of state incompetency statutes disclosed the following:

> In at least forty-two jurisdictions hospitalization is mandatory for persons adjudged incapable of standing trial or being sentenced. In the remaining jurisdictions hospitalization is entirely discretionary or, in some states, conditioned upon the court's finding that release of the accused would be "dangerous" or a "menace."

S. BRAKEL & R. ROCK, *supra* note 2, at 415. While a few states provide for conditional release of the incompetent defendant by parole, *e.g.*, WIS. STAT. ANN. § 51.21(6) (Supp. 1972), in most states release is contingent upon either dismissal of the criminal charges or restoration of competency to stand trial. *See, e.g.*, CAL. PENAL CODE § 1370 (West 1970). The commitment thus becomes indefinite irrespective of the policies controlling the need for continued confinement such as "dangerousness" or "need for care or treatment." For a discussion of the distinction between the criteria for indefinite commitment and the criteria for incompetency to stand trial see Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 461-66 (1967).

In some jurisdictions the indefinite nature of an incompetency commitment has been ameliorated by judicial decision. *See, e.g.*, Commonwealth v. Druken, 356 Mass. 503, 254 N.E.2d 779 (1969) (Massachusetts' civil commitment statute incorporated into incompetency statute after 35 day observation period). In the federal courts, if it does not appear that the defendant will be ready for trial within a reasonable period, it has long been recognized that he is entitled to release if he is not dangerous to the public interest, or recommitment in a state institution under an appropriate civil statute. *See, e.g.*, United States v. Curry, 410 F.2d 1372 (4th Cir. 1969); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971); Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969); Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961); Craig v. Steele, 123 F. Supp. 153 (W.D. Mo. 1954).

4. Unfortunately, the restoration question has also been obscured by statutory language. In most jurisdictions the focus is upon the defendant's recovery of "sanity" rather than his ability to rationally consult with counsel and understand the nature of the proceedings against him. In Jackson v. Indiana, 406 U.S. 715 (1972), the Court was faced with such a statute but interpreted restoration of sanity to be equivalent to the restoration of competency to stand trial. *Id.* at 720 n.2. It is apparent, however, that most psychiatrists and many courts take the term quite literally. *See, e.g.*, Morris, *The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFF. L. REV. 393, 412 n.153 (1969) (report of interviews with state psychiatrists); Rosenberg, *supra* note 2.

5. Resumption of the criminal process is contemplated in every jurisdiction and is generally provided for by statute. S. BRAKEL & R. ROCK, *supra* note 2, at 417. Some states have ameliorated the basic unfairness of resumption of the trial after long periods of confinement by placing time limits within which the incompetent defendant must be brought to trial or have the charges dismissed. *See, e.g.*, N.Y. CODE CRIM. PRO. § 730.50 (McKinney 1971). On the difficulties engendered by the pending criminal charges *see* notes 31-65 *infra* and accompanying text.

6. Ostensibly, the rule is designed to protect the defendant from an unfair trial. Pate v. Robinson, 383 U.S. 375 (1966). Despite this altruistic purpose, it is often misused to the serious detriment of the defendant. Some of the more blatant abuses occur when the incompetency issue is raised by the trial judge or prosecutor as a jurisdictional ploy, based on a meritless charge, to rid the community of undesirables, to avoid a prolonged trial involving an insanity defense, or as a pretrial discovery device to ascertain the defendant's mental condition at the time of the alleged

legal and psychiatric commentators to call for reform.[7] In *Jackson v. Indiana*,[8] the United States Supreme Court expressed similar dissatisfaction with the practice of the automatic and indefinite commitment of the incompetent defendant. In a unanimous decision (Mr. Justice Rehnquist and Mr. Justice Powell not participating), the Court held that the indefinite commitment of an accused to a state mental hospital because of his incompetency to stand trial was unconstitutional. Such a commitment, employing one standard for the commitment and release of the mentally ill in general and another standard for the commitment of the mentally ill accused of crime, deprived the accused of his rights to due process and equal protection guaranteed by the fourteenth amendment.

The *Jackson* decision forms a basis for affirmative relief for those individuals who are currently being detained in state mental institutions because of their incompetency to stand trial. This note will focus on the form of relief these individuals may reasonably expect and the methods of obtaining that relief.

THE JACKSON DECISION

The *Jackson* case presented the Court with a compelling vehicle for its most recent expression on the issue of competency to stand trial. The defendant was accused of the separate robberies of two women.[9] The value of the goods allegedly taken totalled nine dollars. In a pretrial hearing, it was determined that Jackson, a mentally deficient deaf-mute, was incompetent to stand trial.[10] Despite psychiatric testimony that

crime. *See* A. MATTHEWS, *supra* note 2, at 89-100; Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 379, 379-81 (1969) [hereinafter cited as Eizenstat]. There is also the possibility of abuse by the defense attorney, as where the competency issue is raised merely as a dilatory tactic. *See* Note, *Incompetency to Stand Trial*, 13 ARIZ. L. REV. 160, 161-62 (1971) (interview with prosecutors and defense attorneys disclosing their use of the incompetency issue).

7. A recent bibliographical listing can be found in S. BRAKEL & R. ROCK, *supra* note 2, at 423-29, which cites numerous cases and commentaries on both the insanity defense and the issue of incompetency to stand trial.

8. 406 U.S. 715 (1972).

9. The robberies allegedly took place in July 1967. The affidavits, however, were not filed until May 1968. The merits of the charges against Jackson and the possible defenses he might have raised (for example, lack of mens rea) were never determined. The trial court, upon receipt of Jackson's not guilty pleas, initiated proceedings to determine Jackson's competency to stand trial. *Id.* at 717.

10. Unquestionably, Jackson did meet the standard for incompetency to stand trial. Besides being deaf and dumb and blind in one eye, Jackson possessed the mentality of a preschool child. His only means of communication was through rudimentary gestures, and three years of outpatient training at the Deaf and Dumb School in Indianapolis had proved futile. The testifying psychiatrists expressed grave doubts that Jackson would ever recover. *Id.* at 719.

Jackson would never gain competency to stand trial, he was ordered confined in a state mental institution until declared "sane." Such an order clearly condemned him to languish in a state mental institution for the remainder of his life.

On appeal of Jackson's request for a new trial,[11] the majority of the Indiana Supreme Court all but ignored the constitutional arguments. The court simply stated:

> Appellant's argument, that the statute in question is unconstitutional because it imprisons appellant possibly for life, must fail. The legislature under its police power may provide for the safety, health, and general welfare. This necessarily includes the confinement, care and treatment of the mentally defective, retarded or insane.[12]

As the strong dissent by Judge DeBruler indicates, the majority utterly failed to take into account the appellant's mental and physical condition, the purpose behind committing a criminal defendant who is incompetent to stand trial, and the constitutional limitation on Indiana's power to commit an individual indefinitely.[13]

Because of the important constitutional question presented, the United States Supreme Court granted certiorari.[14] In a unanimous decision, the Court reversed and held that Indiana could not constitutionally commit Jackson for an indefinite period solely on account of his incompetency to stand trial.[15]

Relying heavily on *Baxstrom v. Herold*,[16] the Court ruled that

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11. 253 Ind. 487, 255 N.E.2d 515 (1970). Jackson was perhaps fortunate that a review of the commitment order was appealable. Some jurisdictions have apparently taken the position that such an order is not appealable prior to a final judgment as to his guilt or innocence for the crime charged. *See, e.g.*, People v. Sepanek, 2 Ill. App. 3d 437, 275 N.E.2d 926 (1971); Lang v. State, 238 Miss. 677, 119 So. 2d 608 (1960); Cogburn v. State, 198 Tenn. 431, 281 S.W.2d 38 (1955). A denial of appeal where the defendant is ruled competent and the trial proceeds is perhaps defensible on the grounds that there is no termination of the proceedings and the decision may be appealed in a brief period of time. Desho v. State, 237 Ind. 308, 145 N.E.2d 429 (1957). Where, however, the ruling is that the defendant is incompetent, the better view would seem to be that the order is appealable. Inasmuch as the defendant's mental condition might be of long duration and his trial delayed over a long period of time (perhaps forever), the order adjudging him incompetent for trial seems sufficiently final to allow the appeal. People v. Fields, 62 Cal. 2d 538, 399 P.2d 369, 42 Cal. Rptr. 833, *cert. denied*, 382 U.S. 858 (1965).

12. 253 Ind. at 492, 255 N.E.2d at 518.

13. *Id.* at 492-95, 255 N.E.2d at 518-19.

14. 401 U.S. 973 (1971).

15. 406 U.S. 715 (1972).

16. 383 U.S. 107 (1966).

Indiana's pretrial commitment procedures deprived Jackson of equal protection. The *Baxstrom* Court held that conviction and sentencing were insufficient justifications for the differences in procedural and substantive standards in the commitment of the mentally ill. Baxstrom was denied equal protection when he was deprived of a jury trial and the judicial finding of dangerousness afforded to all others civilly committed to an institute for the criminally insane.

Utilizing the *Baxstrom* principle the Court reasoned:

> If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.[17]

While the procedural standards were basically the same in *Jackson,* the alternative standards for commitment and release were substantially different.[18]

The Court concluded that, since Jackson was subjected "to a more lenient standard of commitment and more stringent standard of release than those generally applicable to all others not charged with offenses,"[19] he was deprived of his constitutional right of equal protection of the law. For closely related reasons, the Court also found that Jackson was deprived of his right to due process.[20]

The ostensible purpose of pretrial commitment of an incompetent defendant is to treat his condition so that he may stand trial. Jackson's

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17. 406 U.S. at 724.

18. Under Indiana's general commitment statutes, it would be necessary for the state to show that Jackson was feebleminded or mentally ill, in need of care or treatment, and required detention for the protection of himself or others. In contrast, under the pertinent Indiana statute for pretrial commitment of an incompetent, it need only be shown that Jackson lacked competency to stand trial. *Compare* IND. ANN. STAT. § 9-1706a (Supp. 1972) (incompetency to stand trial) *with* IND. ANN. STAT. §§ 22-1201 to 1256 (Supp. 1972) (statutory scheme for involuntary civil commitments) *and* IND. ANN. STAT. §§ 22-1801 to 1919 (Supp. 1972) (provisions for the feebleminded). The standard for commitment is thus more lenient for those accused of crime than for those being committed generally.

The comparative standards of release were also at a substantial variance. An individual committed under the feebleminded provisions may be released when his condition justifies it. IND. ANN. STAT. § 22-1814 (1964). If committed as mentally ill, an individual could gain release if discharged by the administrator or when cured. IND. ANN. STAT. § 22-1223 (1964). Jackson, however, if committed under IND. ANN. STAT. § 9-1706a (Supp. 1972), had to gain competency to stand trial, an event highly unlikely ever to occur.

19. 406 U.S. at 730.

20. *Id.* at 731.

physical and mental condition virtually precluded that possibility; for all practical purposes Jackson's commitment was indefinite.[21] Indiana's power to commit an individual indefinitely rests on one of two bases: (1) the interest of society in restraining an individual because of dangerousness to self or others, or (2) the need of the individual for care or treatment.[22] The Court noted:

> It is clear that Jackson's commitment rests on proceedings which did not purport to bring into play, indeed did not even consider relevant, *any* of the articulated bases for exercise of Indiana's power of indefinite commitment. . . . *At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.*[23]

In an attempt to justify Jackson's commitment, the prosecutor relied heavily on the similarities between the Indiana and the federal procedures of pretrial commitment of incompetent defendants in both the equal protection and due process arguments.[24] While the statutory provisions of the federal procedure for pretrial commitment are similar on their face to the Indiana procedure, in practice federal courts subject the statutory provision to a "rule of reasonableness":

> Without a finding of dangerousness, one committed [under 18 U.S.C. § 4246] can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does

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21. *See* note 10 *supra.*

22. 406 U.S. at 737.

23. *Id.* at 737-38 (emphasis added).

24. 18 U.S.C. §§ 4244, 4246-4248 (1970) would seemingly provide for an automatic and indefinite commitment similar to IND. ANN. STAT. § 9-1706a (Supp. 1972). The federal provision, however, has been modified by judicial decision. See cases cited note 3 *supra.*

The State relied particularly on Justice Frankfurter's decision in Greenwood v. United States, 350 U.S. 366 (1956). In that case, however, Justice Frankfurter merely justified the federal government's power to commit a federal prisoner to a mental institution. The major contention of Greenwood was that the state, as parens patriae, had sole power to commit an individual and that 18 U.S.C. §§ 4244, 4246-4248 were an infringement on state power in violation of the tenth amendment. No equal protection argument was presented or decided. Further, while there was some uncertainty in the psychiatric diagnosis in the *Greenwood* case, there was no such uncertainty in the *Jackson* case.

The *Greenwood* case is noted in 42 A.B.A.J. 451 (1956) and 55 MICH. L. REV. 127 (1956). *See also* Foote, *A Comment on Pretrial Commitment of Criminal Defendants,* 108 U. PA. L. REV. 832, 838 (1960).

not in fact improve, then he must be released or granted a §§ 4247-4248 hearing.[25]

The Court in the *Jackson* case has now imposed that "rule of reasonableness" upon the states. A defendant found incompetent to stand trial in a state court now can be detained only for the minimal time necessary to determine the probability of his gaining competency. His commitment must be aimed at that goal. If his recovery is improbable, he must be either released or committed in accordance with the general civil commitment provisions.[26]

No attempt has yet been made to implement the *Jackson* decision and it remains to be seen what form of relief will be afforded these individuals.[27] Fashioning remedies for those individuals already committed under unconstitutional statutes presents some difficulties in itself.[28] Generally, however, the goal is to restore the individual to a condition at least equivalent to his precommitment state. To that end, four basic requirements should be satisfied: (1) disposition of the criminal charges, (2) reconsideration of the nature and duration of confinement, (3) resto-

25. 406 U.S. at 733.

26. *See* notes 66 to 130 *infra* and accompanying text.

27. In Indiana, where the Court's decision should have the most impact, the criminal courts are simply delaying their rulings on suspected mentally ill defendants until the State initiates contemporaneous civil commitment procedures in courts of civil jurisdiction. Post-Tribune (Gary), Jan. 28, 1973, at A-7, col. 5. No attempt, however, has been made by the courts, legislature or detaining institutions to release or recommit those individuals previously committed as incompetent to stand trial. A class action suit is now pending in the United States District Court for the Northern District of Indiana, South Bend Division, requesting that the State be required to provide guidelines for releasing or recommitting these individuals. Anderson v. Murray, Civil No. 73S13 (N.D. Ind., filed Jan. 30, 1973).

The State attributes its delay to the "vagueness" of the decision and the failure of the Court to establish adequate guidelines for such procedures. Post-Tribune, *supra*. Perhaps a more fundamental reason for such recalcitrance is the distrust of anyone deemed mentally ill and the notion that "[s]ociety has as much right to be protected from the mentally ill as those persons have to be protected from illegal confinement." *Id.* (statement of Lake County prosecutor and criminal court judge). This same fear was expressed in New York after the Supreme Court's decision in Baxstrom v. Herold, 383 U.S. 107 (1966), which resulted in the release or recommitment of approximately 1,000 prisoners whose sentences had expired but who were detained in institutions for the criminally insane. For a description of "Operation Baxstrom," the administrative implementation of the *Baxstrom* decision, and the resultant community reaction and legislative response to the transfer of these patients, see Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFF. L. REV. 651, 670-78 (1968).

28. Part of the difficulty of fashioning general remedies for such cases is engendered by the varying condition of each incompetent defendant, such as his present mental condition, the length of his detainment, his need for financial assistance and the nature of the pending criminal charges. The problem is further complicated by the variety of remedies available from jurisdiction to jurisdiction.

ration of maximum civil liberties, and (4) compensation for the unwarranted deprivation of the individual's civil liberties.

DISPOSITION OF THE CRIMINAL CHARGES

The pending criminal charges pose a somewhat unique problem for the incompetent defendant. After suffering a long confinement in a state mental institution[29] (usually under the strictest security[30]), the defendant is again faced with the prospect of incarceration.[31] Such a prospect not only has a detrimental effect on his mental health,[32] but may also violate his constitutional rights to a speedy trial[33] and due process.[34]

29. Morris, for example, reported that the average stay at Matteawan Institute for the Criminally Insane (where New York incompetent defendants are incarcerated) was between six and seven years compared with an average stay of four months at civil detention centers. Morris, *supra* note 27, at 656. A study of the Ionia Institute in Michigan indicated that over 50 percent of the patients committed as incompetent to stand trial would spend the rest of their lives at the institute. Comment, *Insane Persons—Competency to Stand Trial*, 59 MICH. L. REV. 1078 (1961).

30. *See, e.g.*, J. KATZ, J. GOLDSTEIN & A. DERSCHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 701-02 (1967) (chart comparing restrictions at Bridgewater Treatment Center and Massachusetts State Prison at Walpole).

31. *See* note 5 *supra*.

32. The adverse effect seems to manifest itself in two different ways. The patient may give up all hope of ever gaining release and simply acquiesce to the surrounding environment, sometimes becoming catatonic. Comment, *Insane Persons—Competency to Stand Trial*, 59 MICH. L. REV. 1078 (1961). The patient may also feel that the confinement is unjust and react violently to continued detention. *See, e.g.*, Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

33. For cases holding that the incompetent defendant's right to a speedy trial was violated, *see* Marshall v. United States, 337 F.2d 119 (D.C. Cir. 1964) (partial delay because of defendant's incompetency); Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957) (seven year delay because of defendant's incompetency); United States *ex rel.* Wolferdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970) (alternative holding); Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970) (25 month detention without treatment); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969); People *ex rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970); People v. Delfs, 31 Misc. 2d 655, 220 N.Y.S.2d 535 (Dist. Ct. Nassau Co. 1961); *cf.* United States *ex rel.* Hill v. Johnston, 321 F. Supp. 818 (S.D.N.Y. 1971) (contention had merit but defendant was required to exhaust state remedies before invoking federal habeas corpus).

Many courts, however, have held that the right to a speedy trial is not violated by delays engendered by incompetency proceedings. The general justification for such holdings is that the state is not the cause of such delays. *See, e.g.*, United States v. Smalls, 438 F.2d 711 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971); United States *ex rel.* Thomas v. Pate, 351 F.2d 910 (7th Cir. 1965), *cert. denied*, 383 U.S. 962 (1966); United States v. Davis, 365 F.2d 251 (6th Cir. 1966); Barfield v. Settle, 209 F. Supp. 143 (W.D. Mo. 1962); Demers v. Miami Circuit Court, 249 Ind. 616, 233 N.E.2d 777 (1968); State v. Jackson, 252 Iowa 671, 108 N.W.2d 62 (1961); People v. Chambers, 14 Mich. App. 164, 165 N.W.2d 430 (1968); State v. Violett, 79 S.D. 292, 111 N.W.2d 598 (1961).

The Supreme Court's recent decision in Barker v. Wingo, 407 U.S. 514 (1972), indicates that four factors must be considered in determining whether a defendant has been denied his right to a speedy trial: (1) the length of delay, (2) the reason for the delay, (3) the defendant's responsibility to assert his right to trial, and (4) prejudice to the defendant's case. In the context of the incompetent defendant the state may well have a substantial reason for delaying the trial. Pate v. Robinson,

Moreover, the individual may wish to vindicate himself for his own self respect.

Dismissal of the criminal charges ostensibly removes the purpose for the defendant's commitment. The state must thus either release the incompetent defendant or proceed with a civil commitment hearing.[35] Disposition of the criminal charges naturally forces a reevaluation of a patient's condition and hopefully will lead to restoration of the maximum civil liberties warranted by the defendant's condition.[36] Depending on the jurisdiction, dismissal of the charges may be accomplished by statutory provisions, by the prosecutor, or by a court of competent jurisdiction.

Statutory Dismissal

Some state statutes require the dismissal of charges after the incompetent defendant has been detained for a specific portion of the

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383 U.S. 375 (1966). Where, however, the defendant has made a demand for trial and asserts that he has a good defense, further delay would seem unjustifiable even in light of the *Barker* decision. *Cf.* Dickey v. Florida, 398 U.S. 30 (1970); Klopfer v. North Carolina, 386 U.S. 213 (1967).

34. *See* cases cited note 33 *supra*. In United States *ex rel.* Daniels v. Johnston, 328 F. Supp. 100 (S.D.N.Y. 1971), the defendant's right to a speedy trial was deemed inapplicable but the court found that the defendant, who had been confined over eight years, had been denied due process. In United States *ex rel.* Wolferdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970), the court held:

> [R]elator's incarceration among the "criminally insane" for 20 years because of his status as an insane defendant (presumed innocent) named in an untriable indictment violates his protection against cruel and unusual punishment as it is enforceable against the States under the Fourteenth Amendment.

Id. at 68. Jackson's counsel also raised the eighth amendment right to be free from cruel and unusual punishment but, because of its holding on due process and equal protection, the Court found it unnecessary to reach that claim. 406 U.S. at 739.

35. *See, e.g.*, CAL. PENAL CODE § 1370 (West 1970).

36. Of course, if the same institutional doctors who made the initial determination of incompetency are also the reviewing doctors, much of the value of a review of the patient's condition is lost. A recent experiment by Dr. David Rosenhan, professor of psychology and law at Stanford University, emphasizes the need for an independent evaluation of a patient's mental condition. In a three year study of a dozen institutions throughout the country, Dr. Rosenhan and several associates had themselves committed by alleging that they heard voices. Although they studiously resumed normal behavior after admission and attempted to convince staff members that they ought to be released, in some instances it took up to 52 days to gain release even though most had been admitted voluntarily under laws which make discharge mandatory on request within 72 hours. Dr. Rosenhan maintains it is the nature of the institution, not the inability of the staff, which distorts their perception of the patients' behavior. Reported in Newsweek, Jan. 29, 1973, at 46-47.

In DeMarcos v. Overholser, 137 F.2d 698 (D.C. Cir. 1943), the court considered it more important to provide indigent patients with an independent psychiatric examiner to rebut the testimony of the institution psychiatrist than to provide him with counsel. *See also* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1076-77 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969); Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

maximum sentence he would have received if found guilty.[37] Given the length of detention of most incompetent defendants,[38] these statutes can prove quite useful.

State statutes which prescribe specific lengths of time within which a competent defendant must be brought to trial or have charges dismissed have no direct application to the incompetent defendant.[39] The defendant's disability and hospitalization are merely considered a pause in the proceedings and not a part of them. It is conceivable, however, that once the disability has been removed and the court and prosecutor have been notified, the statute again begins to run. Should the state fail to resume the proceeding either by means of a hearing on the defendant's competency or a trial on the merits, the charges should be dismissed.[40] Such an application of state speedy trial statutes, of course, would occur only where a court ignores a recovery notice from the hospital administrators.[41]

These statutes, despite their desirability, will have only a limited application to most incompetent defendants. They are in force in only a minority of jurisdictions and they may be inapplicable to a given defendant because he has not been committed for the requisite amount

37. *See, e.g.*, N.Y. CODE CRIM. PRO. § 730.50 (McKinney 1971).

38. *See* note 29 *supra*.

39. *See, e.g.*, Demers v. Miami Circuit Court, 249 Ind. 616, 233 N.E.2d 777 (1968); State v. Jackson, 252 Iowa 671, 108 N.W.2d 62 (1961); People v. Chambers, 14 Mich. App. 164, 165 N.W.2d 430 (1968).

40. Logically, speedy trial statutes are aimed at curtailing delays when the case could go forward. In such cases, the burden of proceeding with the trial should be on the state. *Cf.* Dickey v. Florida, 398 U.S. 30 (1970). In State v. Violett, 79 S.D. 292, 111 N.W.2d 598 (1961), however, the Supreme Court of South Dakota firmly rejected this position. The facts of the case were as follows: in 1954 the petitioner was found incompetent to stand trial on manslaughter charges and was committed to the state hospital for the insane; in 1956 the superintendent of the state hospital indicated that the defendant was sufficiently competent to stand trial; the defendant was not returned until 1959 after repeatedly requesting to be returned for trial. The court, while admitting that the delay may have prejudiced the defendant's case, nonetheless found that such delay was inherent in incompetency proceedings and did not deny the defendant a speedy trial. The court stated that

> [u]nless there was more delay than was reasonably attributable to mental incompetency to stand trial, the delay was consistent with the ordinary processes of justice and would not entitle accused to discharge. . . . [W]e are not impressed with the argument that the record discloses that there was an unreasonable delay that was not a direct or indirect consequence of mental incompetency in returning accused to Pennington County for trial.

Id. at 603.

41. The reluctance of courts to hear restoration cases often accounts for extended delay in the re-initiation of the trial process. S. BRAKEL & R. ROCK, *supra* note 2, at 417. Inadvertence or clerical error may also cause such delays. *Cf.* Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

of time.[42] Since it is desirable to avoid protracted litigation where possible, the next stage is to approach the office of the prosecutor.

Dismissal by the Prosecutor

Dismissal of the charges by the prosecutor is another means of disposing of the problem without resort to litigation. Some state statutes specifically authorize the prosecutor to dismiss the charges against an incompetent defendant after a reasonable length of commitment.[43] This is apparently little more than an affirmation of the inherent authority of his office.[44]

Ideally, the prosecutor will exercise his discretion rationally in determining whether the state has any valid interest in resuming the criminal proceedings.[45] Some of the considerations he may take into account are the nature and duration of the defendant's confinement, the severity of the pending charge, the probability of the state's success on the merits (including the defendant's possible defenses), the possible dangerousness of the defendant, and possible sentence limitations.[46] Probably more than anything else, the nature and severity of the charges pending against the incompetent defendant will be the controlling factor.[47]

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42. For example, under N.Y. CODE CRIM. PRO. § 730.50 (McKinney 1971), an indictment charging only a misdemeanor must be dismissed if the defendant is still incarcerated in a state mental institution after 90 days. In the case of felonies, the charges must be dismissed if the defendant is still detained as incompetent after serving two-thirds of the maximum sentence he could have received if found guilty. Further, such dismissals bar any subsequent prosecution on the same charges.

43. *See, e.g.*, MO. REV. STAT. § 552.020(7) (Supp. 1973); MONT. REV. CODES ANN. § 95-506(b) (1969).

44. F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 10 (1969).

45. Field studies would seem to indicate that most prosecutors exercise their discretion rationally, at least in those cases where an accused is remanded to court as restored to competency. A. MATTHEWS, *supra* note 2, at 147-49. Generally, the prosecutor will either enter a motion to dismiss or negotiate a guilty plea with defense counsel. *Id.* at 147. Where, however, the defendant has not been restored to competency and the prosecutor does not have to face the prospect of trial, he may decline to act. *See, e.g.*, United States *ex rel.* Wolferdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970) (prosecutor refused to dismiss indictment even though defendant would never be brought to trial).

46. Guidelines for the exercise of the prosecutor's discretion are often necessarily vague to insure the flexibility needed to administer a complex system of criminal justice. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960). None of the criteria listed are binding on the prosecutor, although they appear to be the factors most generally taken into account. A. MATTHEWS, *supra* note 2, at 147. *See also* Kaplan, *Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965) (personal account of the decision-making process in the office of the United States Attorney).

47. Kaplan, *supra* note 46, at 181. Matthews suggests that it is the probability that the defendant will commit a serious crime in the future rather than whether he committed one in the past which motivates most prosecutors. A. MATTHEWS, *supra* note 2, at 149.

Some prosecutors may feel that the state has a valid interest in leaving the charges pending because of a feeling that too much laxity may lead to an abuse in incompetency proceedings, *i.e.*, defense lawyers may raise the issue of incompetency in bad faith with the hope of ultimately having the charges dismissed after a brief detention in a mental institution. Where the defendant is charged with a serious crime, defense lawyers may indeed be more inclined to employ the incompetency issue as a defensive shield to delay or avoid prosecution.[48] Yet the incompetency hearing theoretically provides an adequate safeguard against less than meritorious claims. There is considerably less reason for fear of abuse where the defendant is charged with a relatively minor crime. In fact, such cases usually present quite a dilemma for defense attorneys. Often it is better to avoid the incompetency issue altogether,[49] thus avoiding the possibility of commitment beyond the maximum sentence available.

There are very few guidelines for a prosecutor to follow in exercising his discretion other than common sense and the need for pragmatic administration of criminal justice. Sanctions against the prosecutor are largely indirect, *i.e.*, through the ballot box and the bar.[50] He is both agent and advocate representing the state in arbitration between the defendant and the criminal justice system. His position makes him naturally distrustful of appeals from "suspected criminals."

It is possible that the prosecutor, who is in close contact with his community, will lose some of his objectivity in such cases and succumb to the prevalent local prejudices against anyone deemed "mentally ill."[51] There is also the possibility that the state may have a valid interest in leaving the charges open, as for example where the prosecutor fully expects the defendant to be fit for trial without an inordinate delay. In either case, to adequately dispose of the pending criminal charges without the aid of the prosecuting attorney, it would be necessary to return to the court of original criminal jurisdiction or to initiate a collateral judicial proceeding in a court of competent jurisdiction.

Judicial Dismissal

Should the prosecutor be recalcitrant, resort to the courts is inevita-

48. Note, *Incompetency to Stand Trial*, 13 ARIZ. L. REV. 160, 161 n.78 (1971) (survey of 50 cases disclosed defense raised the competency issue 46 times, generally where prison term of greater than five to 15 years could be expected).

49. A. MATTHEWS, *supra* note 2, at 92-93.

50. F. MILLER, *supra* note 44, at 298-306.

51. A. MATTHEWS, *supra* note 2, at 149.

ble. Litigation to dispose of the criminal charges could take several forms depending on the procedural technicalities within a given state. Some states, for example, will permit limited pretrial motions to be made in the court of original criminal jurisdiction.[52] These motions are generally limited to those which are solely the product of counsel and do not require the participation of the defendant.[53] Motions which merely involve a legal determination, such as the insufficiency of an indictment, are clearly permissible.[54] The defendant would not have to assist his counsel in the preparation of such a motion or furnish any factual evidence in support of the motion.

A few states have apparently gone beyond the "limited participation" statutes and will permit an evidentiary hearing or even a trial to determine if there is any merit to the charges pending against the defendant.[55] The advantage of such procedures to the incompetent defendant is clear: it permits him to establish his innocence without permitting a conviction. The time and expense the state expends in litigating a case from which it can never secure a conviction seem justified on the grounds that it may clear an innocent defendant and may also avoid protracted litigation at a later stage when evidence is less available.

Absent statutory authorization permitting limited pretrial motions or hearings, some states have adhered to the common law position that all proceedings related to the pending criminal charges are terminated until the defendant is restored to competency.[56] Not even motions which

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52. MD. ANN. CODE art. 59, § 24a (Cum. Supp. 1971); MASS. GEN. LAWS ANN. ch. 123, § 17b (1972); MONT. REV. CODES ANN. § 95-506(c) (1971); N.Y. CODE CRIM. PRO. § 730.60(5) (McKinney 1971); WIS. STAT. § 971.14(6) (1971).

53. These statutes are apparently modeled after the provision of the Model Penal Code which provides:

> The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

MODEL PENAL CODE § 4.06(3) (Final Draft, 1962).

54. The emphasis in these statutes is upon the personal participation of the defendant. *See* note 53 *supra.*

55. MASS. GEN. LAWS ANN. ch. 123, § 17b (1972). In People *ex rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970), on facts barely distinguishable from the *Jackson* case, the court stated:

> [T]his defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released.

Id. at 285, 263 N.E.2d at 113. *See also* MODEL PENAL CODE § 4.06(4) (Final Draft, 1962) (alternative proposal).

56. The common law rule, as stated in Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899), is that "[a]n insane person can neither plead to an arraignment, be subjected to trial, or, after trial, receive judgment, or after judgment, undergo punishment."

are solely the product of the defendant's counsel are permitted.[57] In such cases a collateral attack on the pending charges would seem necessary.

A collateral attack to enjoin the prosecution of the defendant, in either state or federal courts, is theoretically possible.[58] In practice, however, such remedies are difficult to obtain.[59] It is difficult to construe the peculiar situation of the incompetent defendant into that class of cases in which injunctive relief has traditionally been granted. Disregarding the somewhat arbitrary distinction between personal and property rights, the nature of the irreparable injury involved in the instant case remains somewhat abstract. While the impending criminal charges may impair the defendant's mental health,[60] the possible damage is elusive of proof. As to the violation of the incompetent defendant's constitutional rights, there is no reason to suspect that the defendant could not interpose them as a defense when and if the state attempts to resume the criminal proceedings.[61]

The practicality of disposing of the criminal charges prior to the resumption of proceedings by the state is greatly diminished both by the probability of success and the inherent procedural difficulties. The *Jackson* decision, however, may afford some affirmative relief in this area. While the Court abstained from dismissing the charges, it clearly indicated that a state may not hold the charges pending indefinitely and commented generally upon the desirability of permitting some proceeding to go forward regardless of the issue of incompetency.[62] More explicitly, it removed any barriers to such procedures based on *Pate v. Robinson*.[63] In *Pate*, the Court held that it was a violation of due process to convict an incompetent defendant even where the issue was not formally raised at trial.[64] Narrowly construed, the case does not prohibit the trial but only the sentencing of the accused.[65] Whether these suggested procedures will be implemented is, of course, dependent on state courts and legislatures. The Court, however, has provided that

57. *Cf.* United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959) (defendant could not participate in the dismissal of the indictment against him); Negro v. Dickens, 22 A.D.2d 406, 255 N.Y.S.2d 804 (1st Dept., 1965) (trial suspended except for motion to dismiss by prosecutor).

58. *E.g.*, Mitchum v. Foster, 407 U.S. 225 (1972).

59. *Cf.* Younger v. Harris, 401 U.S. 37 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

60. *See* note 32 *supra*.

61. *Cf.* Byrne v. Karalexis, 401 U.S. 216 (1971).

62. 406 U.S. at 740-41.

63. 383 U.S. 375 (1966).

64. *Id.* at 385.

65. This is the apparent construction of the *Pate* case by the *Jackson* court. 406 U.S. at 741.

vital initial thrust in suggesting solutions to perhaps the most technical procedural problem confronting the incompetent defendant.

Disposing of the criminal charges is, of course, only one means of obtaining impartial treatment for the incompetent defendant. Once the purpose for the pretrial commitment has ended and a swift return to the criminal process is no longer probable, the defendant is again entitled to the same considerations applied generally to all others irrespective of the pending charges. Methods of obtaining that impartial treatment will now be considered.

NATURE AND DURATION OF CONFINEMENT

Commitment of an incompetent defendant is premised on a speedy recovery so that the criminal process may proceed without inordinate delay.[66] Such a delay works an injustice on the defendant and defeats the interest of a state in the effective administration of criminal justice.[67] Commitment to a state mental institution may in itself be a cause of such a delay. Rather than aiding the defendant to a rapid recovery, the very nature of these institutions often impedes and sometimes reverses any meaningful progress the defendant might make towards recovery.[68] Even where the defendant does recover, his improved mental condition will often go unnoticed, and consequently unreported to the committing court.[69]

The recent trend of therapeutic care of the mentally ill is toward the "least restrictive means" of confinement.[70] The movement is toward a restoration of the maximum freedom from restraint warranted by the

66. Eizenstat, *supra* note 6, at 400; Foote, *supra* note 24, at 839.

67. Barker v. Wingo, 407 U.S. 514 (1972).

68. *See* note 170 *infra.*

69. The limited staff found in most institutions virtually precludes periodic review except on a limited basis. Patients often only see the psychiatrist once every six months for an hour interview. Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 631-32 (1971). *See also* Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968), where the court noted that Whitree was given only one psychiatric staffing in the 14 years he was detained and periodic psychiatric examinations as much as 15 months apart.

70. The trend is toward both a rejection of inpatient hospitalization and a recognition that treatment cannot be coerced:

> Few experts today recommend hospitalization, particularly in the large public mental hospital, as the preferred setting for treatment to occur. Those who defend hospitalization do so in terms that exclude most public mental hospitals, which generally remain understaffed, overcrowded, and distant. . . . Separation, it is now believed, impedes reintegration into community life; and the isolation of hospitalization, coupled with other aspects of institutionalization, breeds further withdrawal and deterioration.

Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 MICH. L. REV. 1107, 1113 (1972) (footnotes omitted).

individual's condition through conditional release and various forms of outpatient care.

The response of the courts to this change in the attitudes toward treatment has largely been inflexible in regards to the needs of the incompetent defendant. With a few notable exceptions,[71] the courts have almost invariably ordered institutionalization[72] rather than examining the various alternatives to commitment. Although some state statutes provide that the defendant may be committed to any "appropriate" psychiatric institution,[73] most courts have made little use of them.[74] Consequently, most incompetent defendants are held considerably longer than necessary.

The *Jackson* case clearly provides a basis for reexamining the nature and duration of the incompetent defendant's commitment. Viewed analytically, the *Jackson* Court divided the commitment of an incompetent defendant into two periods: (1) a period of observation, and (2) a period of treatment. In the first instance, the incompetent defendant can only be held for the period of time necessary to determine the probability of recovery.[75] The period of treatment can be justified only by an improvement in his condition.[76] In most cases, no determination is made concerning the patient's chances of recovery. Even in those cases where such a determination is made, given the conditions of most state institutions, the chances that the suggested treatment will lead to a reasonably swift recovery are highly remote.[77] In either situation, the defendant must either be released or recommitted under the customary civil statutes.

The condition of the incompetent defendant will largely determine the type of relief (recommitment, conditional release or absolute release) he may expect. In some cases, for example, the state may be

71. The District of Columbia Circuit has perhaps been the most active in exploring alternative means of treating the mentally ill. *See, e.g.*, Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967).

72. *E.g.*, Jackson v. Indiana, 406 U.S. 715 (1972).

73. *See, e.g.*, IND. ANN. STAT. § 9-1706a (1968).

74. The recurring problem of the failure at the district court level to explore various alternatives to hospitalization caused Justice Clark to comment:

> This Court questions the commitment of the accused to such an institution under such conditions and again suggests that in exercising their discretion District Judges consider carefully the advisability of commitment to local medical facilities where available and adequate.

Henry v. Ciccone, 440 F.2d 1052 (8th Cir. 1971).

75. 406 U.S. at 738.

76. *Id.*

77. *See* note 170 *infra*.

unable to recommit the defendant under the general civil commitment statutes.[78] In other cases, assuming the state has a substantial interest in bringing the defendant to trial, it may have to adopt more flexible treatment standards to insure progress towards the goal of recovery.[79]

RELEASE OR RECOMMITMENT: AFFIRMATIVE RELIEF

The problem of obtaining relief presents considerable difficulties. The first step is to secure a reevaluation of the incompetent defendant's condition. Based on that condition and the desires of the defendant, affirmative relief in the form of recommitment, conditional release or absolute release must then be sought.

The review of mental conditions on a case by case basis is not particularly amenable to the judicial process. There are statutory provisions for judicial discharge of the mentally ill in a majority of states,[80] and in every state habeas corpus is available to seek release from an illegal confinement.[81] These provisions, however, would generally be available to the incompetent defendant only if he had allegedly recovered and was challenging the validity of his continued confinement.[82]

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78. The Supreme Court indicated, for example, that Jackson himself was perhaps uncommitable under the Indiana civil commitment statutes. He apparently was not dangerous and the care he was receiving at his home seemed, on the record, entirely adequate. 406 U.S. at 729.

79. *Cf.* McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) ("defective" delinquent cannot be detained indefinitely where he refused to cooperate in treatment).

80. *See, e.g.*, KAN. STAT. ANN. § 59-2923 (1968).

81. S. BRAKEL & R. ROCK, *supra* note 2, at 139.

82. It is extremely difficult to generalize on the availability of these remedies to the incompetent defendant due to the wide variety of statutes in force. For example, some states require a medical certificate, attesting that the patient has recovered, to accompany the application for judicial discharge. *See, e.g.*, COLO. REV. STAT. ANN. § 71-1-27 (1963). In a few states, however, even unimproved patients may petition and be released under the judicial discharge statutes. *E.g.*, R.I. GEN. LAWS ANN. § 26-3-4 (1968) (any person hospitalized although not recovered may be discharged by a supreme court justice).

Habeas corpus relief also varies considerably from jurisdiction to jurisdiction. Habeas corpus petitions generally provide for a determination of mental illness at the time of the writ to determine eligibility for release. IND. ANN. STAT. § 22-1307 (1964); Edenharter v. Conner, 185 Ind. 643, 114 N.E. 212 (1916) (extending habeas corpus to determine sanity at the time of the writ). In some states, however, habeas corpus may only be used to determine the legality of the proceeding under which the patient was committed. Douglas v. Hall, 297 S.C. 550, 93 S.E.2d 891 (1956). In the District of Columbia, habeas corpus is available not only to challenge the legality of confinement, but also the degree of security a patient requires. Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (habeas corpus available to determine eligibility for transfer from maximum security to civil hospital). For a thorough analysis of habeas corpus and judicial discharge in New York, see Morris, *Habeas Corpus and the Confinement of the Mentally Disordered in New York: The Right to the Writ*, 6 HARV. J. LEGIS. 27 (1968).

There may be some initial question of the applicability of judicial discharge statutes to incompetent defendants because of the specific conditions for release specified in statutes concerning

While this situation may apply to some defendants, many more may not seek absolute release, but may desire continued psychiatric care on a less restrictive basis. Moreover, in many cases a defendant's condition simply does not warrant absolute release. Where he presents a substantial danger to himself or the community, the state's interest in his continued confinement is certainly substantial.

Individual petitions to a court to examine the nature and duration of confinement, even where available,[83] approach the problem in a piecemeal fashion. Furthermore, many individuals serving indefinite sentences because of their incompetency will go undetected. The release action must be initiated by the individual or by a person on his behalf.[84] To place the responsibility on the incompetent defendant, who is generally unaware of his rights in this area, seems hardly justifiable.

Hospital authorities would appear to be in the best position to implement the *Jackson* decision. Ostensibly, they know the incompetent defendant's previous history, his present mental state and the type of treatment the patient requires.[85] Moreover, in most states they have the authority over the transfer, parole or absolute release of involuntary patients, subject generally to the notification of interested parties.[86] Under the *Jackson* rationale, the release provisions available to those committed civilly should be available to the incompetent defendant. Most administrators, however, would undoubtedly be reluctant to assume such authority without judicial affirmation of its existence. They may well be expected instead to cling to the statutory provisions for the release and confinement of the incompetent defendant.[87]

Various forms of proceedings in state and federal courts are available to compel the administrators of state mental hospitals to establish an adequate procedure to implement *Jackson*. The remedy sought would seem to fall into one of three categories—mandamus, mandatory

incompetency to stand trial. *See* note 3 *supra*. Under the *Jackson* decision, however, the means of release available to other mentally ill patients not charged with crime must also be available to the incompetent defendant. Any other conditions, such as restoration of competency to stand trial, imposed on the requirement for release of incompetent defendants would constitute a clear violation of equal protection.

83. *See, e.g.*, Henry v. Ciccone, 440 F.2d 1052 (8th Cir. 1971); Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971); *In re* Jones, 338 F. Supp. 428 (D.D.C. 1972).

84. *See, e.g.*, D.C. CODE ANN. § 21-546 (1967).

85. This is perhaps questionable in some cases given the infrequency of review of the patients' conditions in some institutions. *E.g.*, Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

86. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-524 (Supp. 1970). In a few states the approval of the central agency is also required. *See, e.g.*, IDAHO CODE § 66-337 (1969).

87. This is apparently the case in Indiana. *See* note 27 *supra*.

injunction or declaratory relief, depending on how the court construes the request for relief and the available statutory guidelines. The system of extraordinary remedies in the state courts varies considerably from jurisdiction to jurisdiction; thus it is difficult to predict the proper remedy in a given jurisdiction.[88] The complexity of the system of extraordinary remedies in the state courts has led one writer to comment:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing, the boundaries of each remedy would be undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[89]

While the complexity of state remedies does not foreclose relief, it certainly renders federal proceedings more practical.

REDRESS IN THE FEDERAL COURTS

The federal courts offer a more satisfactory and flexible forum in requesting the affirmative relief needed to implement *Jackson*. Moreover, a federal court may be expected to be detached sufficiently from state policy and prejudice to render a more objective opinion. The same aloofness from state affairs, however, which leads to impartial judicial decision-making also accounts for the obstacles hindering entrance into the federal court system: jurisdictional and policy limitations.[90] In the present case, however, jurisdiction is easily established.

Incompetent defendants, as a class of citizens, are being deprived of their constitutional rights to equal protection and due process.[91] The broad purview of 42 U.S.C. § 1983[92] clearly creates a cause of action

88. K. DAVIS, ADMINISTRATIVE LAW TEXT § 24.01 (3d ed. 1972).
89. *Id.* at 458.
90. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.6 (2d ed. 1972).
91. Jackson v. Indiana, 406 U.S. 715 (1972).
92. 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the

to redress the deprivation of such rights under the color of state law. Jurisdiction is established by 28 U.S.C. § 1343.[93] Upon such a basis it is clear that a federal court has the power to act if it so chooses. Jurisdiction, however, is not the only obstacle which must be overcome. The abstention and exhaustion doctrines may also hinder federal relief.

Abstention and Comity

The nature and history of federalism call for restraint on the part of federal courts wherever deference to state courts and legislatures is "appropriate." To this end, various policies have grown to curtail the unfettered exercise of federal power. The chief obstacles to the exercise of federal power are the self-imposed policies of abstention and comity.[94] In the context of enjoining state mental health laws and redressing the deprivation of liberty under those laws, federal courts have been generally more receptive to entertaining the action.[95] In cases in which they have abstained, they have usually had reasonable grounds. For example, in *Fhagen v. Miller,*[96] the court abstained from deciding the constitutionality of a recently enacted New York statute providing for emergency admission of the mentally ill because the New York state courts had not been given the opportunity to interpret their own statute. The court noted the recentness of the legislation, the thoroughness with which it was prepared and, most importantly, the history of the New York courts in narrowly construing such statutes and avoiding constitu-

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United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

An action for declaratory and injunctive relief is also authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970).

93. 42 U.S.C. § 1983 merely creates a cause of action: it does not establish jurisdiction. In the present case, however, jurisdiction is clearly conferred by 28 U.S.C. § 1343 (1970). *Cf.* Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y. 1972).

94. Basically, abstention and comity are merely discretionary withholdings of federal relief where state and federal courts have concurrent jurisdiction over a cause of action. See 1A J. MOORE, FEDERAL PRACTICE ¶¶ 0.202-.203 (2d ed. 1965) for a summary of the principles governing the use of abstention and comity.

95. *See, e.g.,* Baxstrom v. Herold, 383 U.S. 107 (1966); Robinson v. California, 370 U.S. 660 (1962); Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). In *Lessard v. Schmidt, supra*, the court stated that

> [p]rinciples of federalism and comity do not require this court to refuse to act when to do so would only discourage the assertion of federal constitutional rights and perhaps cause irreparable injury to persons subject to involuntary loss of freedom as the result of the challenged commitment procedure.

Id. at 1084.

96. 312 F. Supp. 323 (S.D.N.Y. 1970).

tional violations through interpretation.[97] Given the history of the New York legislature and courts in devising fair and impartial treatment for the mentally ill, the decision seems basically sound.[98]

Federal courts, however, need not always await a state court's interpretation of a statute before acting.[99] The course of judicial response to the plight of the mentally ill has been quite clear over the past decade. The failure of state legislatures to enact appropriate legislation in this area renders federal judicial action necessary to protect the incompetent defendant's constitutional rights to due process and equal protection. The mere possibility that a state legislature or judiciary may act in the near future is an insufficient basis for a federal court to defer its judgment.[100] The federal constitutional rights at stake in these instances clearly outweigh any state interests which call for abstention by the federal courts.

Exhaustion of State Remedies

For similar reasons, the exhaustion doctrine requiring a plaintiff to first seek redress in state courts would seem inapplicable to the present case. Actions brought under 42 U.S.C. § 1983 do not require exhaustion of state administrative or judicial remedies,[101] particularly where those remedies do not afford a realistic alternative for relief.[102] The general unavailability of state administrative and judicial relief is apparent in the present case. The incompetent defendant has no means to initiate administrative action, and while a writ of habeas corpus is available in theory, it is difficult to acquire in practice.[103]

Some federal courts, however, have construed actions challenging the constitutionality of confinement under Section 1983 as petitions for release by federal habeas corpus.[104] In such cases they have held that Section 1983 may not be used as a substitute for habeas corpus relief

97. *Id.* at 328.

98. *E.g.*, Neely v. Hogan, 62 Misc. 2d 1056, 310 N.Y.S.2d 63 (1970); *In re* Buttonow, 23 N.Y.2d 385, 244 N.E.2d 677, 297 N.Y.S.2d 97 (1968); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

99. The *Jackson* Court explicitly rejected this argument. 406 U.S. at 729 n.8.

100. Zwickler v. Koota, 389 U.S. 241 (1967).

101. McNeese v. Bd. of Educ., 373 U.S. 668 (1963).

102. Houghton v. Shafer, 392 U.S. 639 (1968).

103. *See* notes 80-82 *supra* and accompanying text.

104. *See, e.g.*, Gaito v. Ellenbogen, 425 F.2d 845 (3d Cir. 1970); Bennett v. Allen, 396 F.2d 788 (9th Cir. 1968); King v. McGinnis, 289 F. Supp 466 (S.D.N.Y. 1968).

For a discussion of the history and general applicability of the exhaustion requirement in federal habeas corpus actions, see R. SOKOL, FEDERAL HABEAS CORPUS §§ 22-23 (1965).

to circumvent the exhaustion requirement of 28 U.S.C. § 2254.[105] In *Wilwording v. Swenson,*[106] however, the Supreme Court held: (1) that the case is properly brought under Section 1983 when the conditions of confinement are challenged, and (2) that a federal court cannot require an exhaustion of state judicial remedies even if they are available.

The key, then, to whether exhaustion is required is the extent to which the petition is construed as a petition for release. Arguably, in the present case the relief sought is not release, but merely a determination of the plaintiff's eligibility for release or recommitment under the same criteria as applied to all others committed involuntarily. In *Gomez v. Miller,*[107] where the constitutionality of New York's incompetency statute was challenged, the court found this logic persuasive. The court stated:

> [T]he instant case is not properly classified as a habeas corpus matter. Plaintiffs here seek merely a limited determination of dangerousness as a prerequisite to retention at Matteawan. Granting the relief they seek will not result in their release from custody. To secure freedom they must, as the convening judge said, traverse two gates: a determination of non-dangerousness and a finding of competence.[108]

The implementation of other decisions affecting large numbers of patients committed in mental institutions would indicate the validity of the distinction made in *Gomez* between release and review. In "Operation Baxstrom,"[109] none of the approximately 1,000 patients directly affected were granted immediate release.[110] The implementation of *Dixon v. Commonwealth*[111] resulted in the outright release of only 1.5 percent of the patients affected by the decision.[112] What did result from these deci-

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105. *E.g.*, in King v. McGinnis, 289 F. Supp. 466 (S.D.N.Y. 1968), the court stated that
> [p]laintiff [an incompetent defendant incarcerated for approximately 16 years] has as yet not exhausted his state remedies, and he should not be permitted to circumvent the requirements of 28 U.S.C. § 2254 by seeking federal adjudication of the legality of his confinement in a civil rights act suit.

Id. at 468.

106. 404 U.S. 249 (1971).

107. 341 F. Supp. 323 (S.D.N.Y. 1972).

108. *Id.* at 328.

109. "Operation Baxstrom" was the administrative implementation of the Supreme Court's decision in Baxstrom v. Herold, 383 U.S. 107 (1966), requiring mentally ill convicts whose sentence had expired to be transferred from maximum security institutions to civil institutions.

110. Morris, *supra* note 27, at 671.

111. 325 F. Supp. 966 (M.D. Pa. 1971).

112. 10 DUQUESNE L. REV. 674, 676 (1972).

sions was a *review* of each patient's need for continued confinement. The relief requested is thus only an intermediary step toward release or recommitment.[113]

The difficulty engendered by this type of case in which either federal habeas corpus or a Section 1983 action would seem appropriate is largely due to the expansion of both remedies in an effort to protect federal rights.[114] In many instances, except for the exhaustion requirement attached to federal habeas corpus,[115] appropriate relief could be granted under either construction of the petition. To require exhaustion of state remedies merely because habeas corpus may also be appropriate tends to obscure the real issue of whether there are any legitimate reasons for requiring exhaustion.[116]

NATURE OF RELIEF

The same policy considerations which influence a federal court to take jurisdiction in the first instance are often determinative of the type of relief the court will grant. The court seeks, where practical, to make the least possible intrusion on state affairs. Where declaratory relief will establish the desired result, a federal court is hesitant to issue a sweeping order for reform.[117] Where, however, a state policy obstructing federal rights is likely to go unchanged without mandatory relief, such relief is usually granted.

In the context of mental health, the relief granted by federal courts has taken a variety of forms. For example, in *Bolton v. Harris*,[118] the court merely enjoined future operation of a statute providing for the automatic commitment to institutions for the criminally insane of persons found not guilty by reason of insanity. While urging the hospital concerned to establish procedures for the release and treatment of individuals confined previously, the court did not go so far as to estab-

113. Many federal courts, even prior to the Supreme Court's decision in Wilwording v. Swenson, 404 U.S. 249 (1971), had adopted the "total release" doctrine which exempted prisoners from the exhaustion requirement where the relief granted would not result in total release from confinement. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1970); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Holland v. Ciccone, 386 F.2d 825 (8th Cir. 1967); United States *ex rel.* Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969). *See also* Houghton v. Shafer, 392 U.S. 639 (1968).

114. Edwards v. Schmidt, 321 F. Supp. 68, 69-70 (W.D. Wis. 1971).

115. 28 U.S.C. § 2254 (1970).

116. *Cf.* notes 98 and 99 *supra* and accompanying text.

117. A declaratory judgment may, of course, be as coercive as a mandatory injunction in some cases. Eccles v. Peoples Bank, 333 U.S. 426 (1948).

118. 395 F.2d 642 (D.C. Cir. 1968).

lish such procedures.[119] In *Dixon v. Commonwealth*,[120] on the other hand, the court established an elaborate procedure for the release of incompetents who were committed involuntarily to maximum security sections of mental institutions.

Several factors may account for the difference in the relief granted in the two cases. In the District of Columbia, habeas corpus was more readily available to those individuals affected to secure their release than in Pennsylvania.[121] Moreover, the court in *Bolton* fully expected voluntary compliance on the part of the hospital largely because of the court's previous experience with its administrators.[122] Perhaps the most decisive difference between the two cases was the difference in the facilities themselves. The *Bolton* court had previously examined the condition of the facilities for the incarceration of the criminally insane and had taken measures to alleviate the harshness of such confinement.[123] In the *Dixon* case, however, the court was shocked by the inadequate and deplorable conditions of the institution in which the plaintiffs were detained and perhaps felt the need for immediate redress.[124]

The same considerations which led the *Dixon* court to establish compulsory state standards probably exist in a majority of jurisdictions.[125] The procedure established by the *Dixon* court for the release or recommitment of involuntarily committed patients presents an adequate model to assure the relief required by the *Jackson* decision.[126] The court established a three-tiered process. The first stage involved an informal exchange between the hospital, the patient and the patient's family. The hospital had to evaluate the patient, discuss with him a proper course of treatment and then seek voluntary compliance with the patient on the disposition of his case (either release or recommitment to the facility least restrictive of his freedom and nearest his home).

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119. *Id.* at 652 n.58.

120. 325 F. Supp. 966 (M.D. Pa. 1971). *See also* Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971) (requiring and setting out administrative hearing procedure prior to detention in maximum security section); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (requiring hearing procedure for persons detained under Wisconsin emergency commitment law).

121. In the District of Columbia, a petitioner may obtain a writ of habeas corpus to challenge the nature of his confinement irrespective of his present mental state. Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969). In Pennsylvania, however, the patient must have a physician certify that he is sane. PA. STAT. ANN. tit. 50, § 4426 (1969).

122. *See, e.g.*, Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Watson v. Cameron, 312 F.2d 878 (D.C. Cir. 1962).

123. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

124. *Cf.* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

125. *See* note 170 *infra*.

126. 325 F. Supp. at 973-75.

If the hospital and the patient failed to reach an agreement, the hospital had to initiate the second stage, a full judicial hearing.[127] The hearing procedure, a model of fairness,[128] was designed to correct most of the deficiencies previously existing in commitment proceedings. Perhaps most importantly, the court specified a maximum time (six months) during which the individual could be detained under the commitment order.

The final tier of the commitment process was a state appellate review of the findings. The defendant had to be advised of his right to appeal and, if indigent, had to be furnished a complete transcript and counsel.

Subsequent studies show the workability of such a procedure.[129] The administrative burden of requiring a full judicial hearing proved to be minor. Only 2.5 percent of the patients incarcerated were involuntarily recommitted through this process. Only a small minority were discharged and the rest recommitted themselves voluntarily under various terms of confinement.[130]

The deplorable conditions the court found in *Dixon* are unfortunately all too typical of the institutions to which incompetent defendants are summarily sent. In some respects release or recommitment which merely reverses past errors is hardly adequate to compensate for the loss these individuals have suffered. The prospect, however, of achieving restitution in the form of money damages is highly remote.

DAMAGES

The basic purpose for seeking damages from the state or its agents is to compensate the individual for both the monetary and personal losses he has suffered.[131] This involves a recognition that the state is responsible for the unwarranted deprivation of the defendant's liberty and is best able to bear the loss.[132] Monetary compensation cannot, of

127. *Id.* at 974.

128. While the hearing was modeled after the basic requirements of the juvenile hearing in *In re* Gault, 387 U.S. 1 (1967), the court in some respects went even further. For example, the court not only required that the patient be informed of his right to counsel, but also required that counsel and independent medical experts be provided for indigent defendants. Moreover, the burden of proof was placed on the State to establish by a preponderance of the evidence that the patient "[p]oses a present threat of serious physical harm" to himself or others. 325 F. Supp. at 974.

129. 10 DUQUESNE L. REV. 674 (1972).

130. *Id.* at 676.

131. C. MCCORMICK, THE LAW OF DAMAGES § 1 (1935).

132. *See, e.g.*, Note, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091 (1970).

course, totally restore the individual. Much of what the defendant has lost is not easily measured by monetary value. Yet this remains the traditional and most practical form of restitution. A money award not only compensates for past losses, but also aids the defendant in his transition from confinement to freedom.[133]

An ancillary purpose of money damages is to provide a positive sanction against a state for abusing its police power. A state's power to confine an individual indefinitely is not absolute. As one authority notes in connection with the incompetent defendant:

> The only legitimate purpose of commitment is to prepare defendants for trial. If this cannot be accomplished in a more certain, less dilatory manner, the recuperative purpose behind incarceration becomes a dangerous pretense.[134]

This was the precise rationale of the *Jackson* decision. The mere release of accused defendants may provide little motivation for a state to voluntarily limit the unconstitutional extension of its police power.[135] The prospect of liability for damages, however, may provide that motivation.[136]

The incompetent defendant undoubtedly deserves compensation for that period of his detention which was unlawful under *Jackson*. While theoretically he has a variety of means of recovery, in practice the probability of success is extremely limited.

Judicial Recovery

Depending on the particular circumstances of the defendant, he may well have one of several causes of action sounding in tort.[137] The practicality of initiating suit, however, depends largely upon finding a responsible defendant who is not shielded by immunity. While immunities are rapidly being abrogated by judicial and legislative action, they nonetheless present an obstacle in many jurisdictions. In addition, the

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133. *Cf. id.* at 1097 (noting the indigency of most federal prisoners upon release and lack of employment for a considerable period thereafter).

134. Eizenstat, *supra* note 6, at 400.

135. The fear of abuse by public officials was the historical foundation justifying exemplary damages. C. MCCORMICK, THE LAW OF DAMAGES § 81, at 288 (1935); W. PROSSER, THE LAW OF TORTS § 4, at 23 (4th ed. 1971).

136. 82 HARV. L. REV. 1771, 1776 (1969) (comment on the possible effects of the large damage award in the *Whitree* decision).

137. *See generally* Note, *Civil Liability of Persons Participating in the Detention of the Allegedly Mentally Ill*, 1966 WASH. U. L. Q. 193.

practicality of initiating a protracted lawsuit diminishes greatly where the financial position of the incompetent defendant is desperate.[138]

Generally, the first difficulty is stating a claim against a responsible defendant. While there are a variety of common law theories of recovery against an individual for wrongfully depriving another of his liberty,[139] very few are amenable to the peculiar circumstances presented here. The gist of any action based on *Jackson* is that the incompetent defendant is confined longer than the reasonable time necessary to restore his competency. Conceivably this could occur in two situations: (1) where the patient is untreatable, but nonetheless confined under the inapplicable statute, or (2) where the patient is treatable, but failure to provide adequate treatment unduly prolongs that confinement. It is possible then to focus on the unlawful detention and base a cause of action on false imprisonment[140] or, in the alternative, to focus upon the negligent treatment and base a cause of action on psychiatric malpractice.[141] In either case, the action must be brought against the detaining institution largely because its claim of either judicial or official immunity is the most tenuous to maintain.

An overwhelming number of state courts, however, have rejected the liability of the institution or responsible official for confining an individual pursuant to a court order.[142] Although several theories have been offered, it is generally held that the institution or its agent is immune as a "quasi-judicial" officer.[143] While the "fault" for such confinement under an invalid statute may well rest with the judiciary, the absolute immunity of that branch prohibits recovery.[144]

A negligence action against the hospital or its administrator, based upon the breach of its duty to provide the care necessary to restore the individual to the trial process within a reasonable time, would clearly

138. *See* note 133 *supra.*

139. *E.g.*, false arrest, false imprisonment, malicious prosecution, abuse of process.

140. Even though the initial detention may have been valid, false imprisonment may still lie. The most analogous situation is where a jailer fails to release his prisoner at the end of his sentence. *See, e.g.*, Weigel v. McCloskey, 113 Ark. 1, 166 S.W. 944 (1914); Waterman v. State, 2 N.Y.2d 803, 140 N.E.2d 551, 159 N.Y.S.2d 702 (1957). *See also* Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Luker v. Nelson, 341 F. Supp. 111 (N.D. Ill. 1972).

Where the prosecutor has refused to drop the charges and is arguably responsible for the further incarceration of the defendant, he too may be held liable. *Cf.* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971).

141. *See* Annot., 99 A.L.R.2d 599 (1965).

142. *See* Annot., 145 A.L.R. 711 (1943).

143. *Id.*

144. *E.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

focus on that aspect of the incompetent defendant's incarceration for which it is responsible. In *Whitree v. State*,[145] the court based liability on medical malpractice and allowed recovery of damages in the amount of $300,000. The court first found that the state owed a duty to provide rehabilitative psychiatric care to the individuals it incarcerates as incompetent to stand trial.[146] The failure to provide that care consonant with the medical standards in the community constituted a breach of that duty.[147] The measure of damages was assessed according to the period for which Whitree was improperly detained because of the inadequate care.[148] With proper treatment the court found Whitree could have been released three to six months after his commitment. His actual release, however, did not come about until over 14 years later. Whitree was also awarded damages for the consequential injuries he received while incarcerated.[149]

The *Whitree* case merely recognizes that the care available to some patients should be available to all patients irrespective of the legal status of their commitment. The major propositions of the *Whitree* case in awarding damages may lack precedent,[150] but its rationale is characteristic of those cases concerned with the emerging right to treatment.[151] The judicial system seems to be losing its tolerance of inadequate facilities and care for the mentally ill accused of crime:

> [S]ociety denominates these institutions as hospitals and they should be so conducted. If they are to be no more than pens into which we are to sweep that which is offensive to "normal society" then let us be honest and denominate them as such.[152]

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145. 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

146. The court drew an analogy to two prison cases in which it previously found a duty on the part of the state to provide adequate medical treatment for prisoners. *Id.* at 706, 290 N.Y.S.2d at 500.

147. This is apparently the first time a court has found inadequate care to be a basis of liability in a psychiatric malpractice case. Annot., 99 A.L.R.2d 599 (1965) (Supp. 1972).

148. 56 Misc. 2d at 708, 290 N.Y.S.2d at 507. While false imprisonment is exclusively an intentional tort, negligence which results in false imprisonment is also actionable where actual damage results. *Cf.* Mouse v. Central Savings & Trust Co., 129 Ohio St. 599, 167 N.E. 868 (1929).

149. The personal injuries from beatings and maltreatment were quite extensive and are well worth reviewing to gain insight into the life in a mental institution. 56 Misc. 2d at 710, 290 N.Y.S.2d at 504.

150. See criticism of the case in 82 HARV. L. REV. 1771 (1969).

151. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Nason v. Supt. of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).

152. 56 Misc. 2d at 711, 290 N.Y.S.2d at 504.

An award of damages may well stimulate the states to improve those conditions which the court found so deplorable in *Whitree*.

The award of damages in the *Whitree* case was possible not only because the court devised an adequate theory on which to base a cause of action, but also because of the New York law regarding immunity of state hospitals.[153] In other jurisdictions, the probability of success will depend on how their state courts have dealt with the concepts of sovereign immunity and the official immunity extended to state mental institutions and physicians.[154]

It is possible to avoid litigation in state courts by basing a claim for damages under 42 U.S.C. § 1983 for the deprivation of civil rights under color of state law.[155] This possibility again focuses on the real issue of the *Jackson* case—the unwarranted deprivation of the incompetent's constitutional rights. The federal courts, however, have assimilated the common law theories of tort immunities and defenses into the Civil Rights Act.[156] While immunities are generally more narrowly construed in federal courts than in state courts, they nonetheless reduce the prospects of recovery considerably.[157]

Establishing a claim against a responsible defendant is only an initial difficulty. Other obstacles involve the difficulties and expense of proving fault and proximate cause.[158] Establishing a proper measure of damages,[159] while not in itself an express bar to recovery, may actually

153. In New York, the state is liable for the negligence of its doctors. Stephens v. Dept. of Health of Orange Co., 65 Misc. 2d 308, 317 N.Y.S.2d 210 (Orange Co. 1970).

154. *See* Annot., 25 A.L.R.2d 203 (1952).

155. *See* note 92 *supra.*

156. *See, e.g.,* Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961).

157. Given the general principles of tort immunity which the federal courts have incorporated into Section 1983 actions, it is perhaps not surprising that individuals basing damage actions on erroneous confinement in mental institutions have met with little success. *See, e.g.,* Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963) (official immunity and good faith); Cooper v. Wilson, 309 F.2d 153 (6th Cir. 1962) (quasi-judicial immunity to witness making false statement at insanity hearing); Bartlett v. Weimer, 268 F.2d 860 (7th Cir.), *cert. denied,* 361 U.S. 938 (1959) (quasi-judicial immunity of committing doctor); Kennedy v. Fox, 232 F.2d 288 (6th Cir. 1956) (judge and doctor granted judicial immunity); King v. McGinnis, 289 F. Supp. 466 (S.D.N.Y. 1968) (state was real party in interest). *But see* Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966) (psychiatrist liable for imposing work program could not claim official immunity); Delatte v. Genovese, 273 F. Supp. 654 (E.D. La. 1967) (coroner testifying falsely at insanity hearing could not claim judicial immunity). *Cf.* Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971).

158. *See, e.g.,* Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970) (insufficient evidence); Ploof v. Brooks, 342 F. Supp 999 (D. Vt. 1972) (defendant institutional doctors were not the proximate cause of injury).

159. The method derived by the *Whitree* court would seem the most equitable form of compensation to the incompetent defendant.

tend to limit the amount recoverable. Moreover, a class action under Section 1983 (to reach as many prospective plaintiffs as possible) is highly desirable.[160] However, such actions often present considerable obstacles to damage awards because of the difficulty of apportioning claims among the numerous plaintiffs.[161]

Arguments basing or denying relief on common law torts or the immunity or nonimmunity of a given official often detract from the real issue of the case. Moreover, there is a certain injustice in placing the blame on any one individual for the inadequate commitment procedures, inadequate state mental hospitals and overextension of police powers. It is the social entity—the state—which should bear the burden collectively.[162] In states where sovereign immunity has been abrogated, this may be possible through judicial action. However, another means of "shifting the loss" to the state is through the legislature.

Legislative Recovery

Legislative remedies may also be available to the incompetent defendant in the form of private bills and general statutes providing for state liability for the erroneous confinement.[163] In addition, some states provide a small stipend for the period of time during which the incompetent defendant was confined in a state hospital under a sanctioned work program. The opportunity for abuse of such programs, however, has made this form of relief somewhat undesirable.[164] The lack of availability and the limited scope of these forms of legislation greatly curtail their usefulness to the incompetent defendant.

Other writers have described and commented upon the process of achieving relief through legislative bills and the general desirability of this form of relief over the judicial theories of recovery based on fault.[165] It is difficult, however, to assess how sympathetic state legislatures will be to the incompetent defendant.[166] They may well prefer to alleviate the generally poor conditions of state institutions rather than to direct specific funds to a class of injured parties.

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160. *See* note 83 *supra* and accompanying text.

161. The problem could be avoided, however, by requesting a flat sum to be paid to each incompetent defendant who warrants release or recommitment.

162. K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 25.01-27.07 (3d ed. 1972).

163. Note, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1107-12 (1970).

164. S. BRAKEL & R. ROCK, *supra* note 2, at 166-67. *Cf.* Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966).

165. Frankel, *Preventive Restraint and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229 (1968); Note, *supra* note 163.

166. *See* notes 99 and 100 *supra* and accompanying text.

The prospect of recovery through either legislative or judicial action remains somewhat remote. Courts have on occasion, nevertheless, awarded huge money damages for such unlawful confinement[167] and legislatures have provided bills to redress the victims of erroneous confinement.[168] The prospect of such recovery, however remote, may also serve to stimulate lethargic legislatures into providing adequate legislation to insure the impartial treatment of all the mentally ill, irrespective of pending criminal charges.

CONCLUSION

If the empirical data on pretrial commitments is at all reliable, the *Jackson* decision should be of considerable importance due to the sheer number of people directly affected.[169] These individuals represent the largest class of court-related commitments and also represent the most compelling case for relief. The condition of many state mental hospitals for the criminally insane has been documented all too vividly.[170] It is barely tolerable to justify such conditions for those individuals who have been convicted of a crime and represent a danger to society;[171] it is less

167. *E.g.*, Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

168. *E.g.*, CAL. PENAL CODE § 4904 (West 1970).

169. A considerably large proportion of the inmates at institutions for the criminally insane have been committed because of their incompetency to stand trial. A national sampling indicated this group constituted 52 percent of the patient population of such institutions while the group composed of prisoners transferred while serving sentence, the second largest grouping, constituted only 17 percent of the patient population. Rosenberg, *supra* note 2, at 578. In New York's Matteawan Institute for the Criminally Insane, 74 percent of the patients were classified as incompetent to stand trial. Morris, *supra* note 4, at 413 (1968 confinement figures).

170. Most state mental hospitals, largely because of low budget priorities, fail to meet even minimum requirements for custodial care, let alone psychiatric treatment. The requirements for the physical condition of psychiatric facilities are set forth in AMERICAN PSYCHIATRIC ASSOCIATION, STANDARDS FOR PSYCHIATRIC FACILITIES 64-66 (1969). As Dr. Birnbaum has noted, most state mental hospitals are characterized by overcrowded conditions, dilapidated facilities, inadequate dietary programs and inadequate sanitation works which fail to comply with the minimum standards of the American Psychiatric Association. Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 631 (1971). Coupled with inadequate facilities is the problem of inadequate staffing. Not only are state mental institutions understaffed, with ratios of one doctor to 800 or 900 patients all too common, but in many states these professional personnel are unlicensed within the state. *Id.* at 631-32.

Particular institutions have become somewhat infamous because of judicial decisions highlighting their inadequacies. *See, e.g.*, Ploof v. Brooks, 342 F. Supp. 999 (D. Vt. 1972) (Vermont State Hospital); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (Bryce Institute in Alabama); Nason v. Supt. of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968) (Bridgewater Institute in Massachusetts); Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968) (Matteawan Institute in New York).

171. *See, e.g.*, United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969).

tolerable to impose such conditions for an indefinite period on a defendant still presumed innocent.

The *Jackson* case presumably brought an end to the practice of automatic and indefinite commitment of the incompetent defendant. Yet there are currently thousands of individuals who should benefit from the decision but remain behind institutional walls.

Disposition of the criminal charges, besides being an end in itself, may also be a means of obtaining the further relief of release or recommitment. Under the *Jackson* case, however, disposition of the criminal charges may be an unnecessary step in obtaining release or recommitment. The most efficient means of implementing *Jackson* is mandatory injunctive relief directing the hospital administration to review each case. Based on such review, the hospital would then be required to release or recommit the individual under the general civil commitment statutes irrespective of the pending criminal charges. As a form of ancillary relief, damages for wrongful confinement may also be available. Damages may serve to both compensate the individual and to provide a stimulus for the state to comply with the *Jackson* decision.

All of these remedies present considerable procedural difficulties. The best prospect for obtaining these goals lies in the federal forum, largely because of the more flexible procedures and the prospect of obtaining multiple remedies within a single litigation. The policies of abstention and comity, however, may foreclose redress in the federal courts. While relief in state courts is theoretically possible, most state proceedings are so imbued with procedural technicalities and the relief available so inflexible that the substantive issues may never be reached or appropriate relief granted.

An imaginative court, either state or federal, has the inherent power to grant affirmative relief to these individuals. The same safeguards against indefinite commitment in state mental institutions available to all citizens should be available to the incompetent defendant. This is the basic rationale of the *Jackson* decision. The right to be free from the arbitrary restraints imposed on the individual because of his incompetency to stand trial is largely meaningless unless a means is found to effectuate the *Jackson* decision. The methods discussed here, where liberally construed by the courts, may offer that means.