An End to Incompetency to Stand Trial

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COMMENTS

AN END TO INCOMPETENCY TO STAND TRIAL

In May of 1968 a 27-year-old mentally defective deaf mute with the mental ability of a pre-school child was arrested for the robbery of nine dollars worth of property and money. Had he been fortunate enough to be tried for his alleged crime, he might have gone to jail for a few months or even been put on probation. Instead, this defendant was found incompetent to stand trial and, in the face of psychiatric testimony that his condition would not improve, was committed to a mental institution until declared competent. The trial court was presumably concerned that the defendant should not have to stand trial when he was not mentally capable of defending himself. The alternative was to put this 27-year-old man in a mental institution essentially for life. The cure is far more onerous than the affliction.

Unfortunately this case is not so unusual as its atrocity would lead one to hope. Statutes governing commitment of persons found incompetent to stand trial exist in most jurisdictions. Although their justification is to protect defendants' due process rights to a fair hearing, their effect is to incarcerate people indefinitely on a psychiatrist's determination of their incompetency.

This comment first discusses the traditional rationale for the status of incompetency to stand trial and the corruption of the standard for incompetency into a tool to incarcerate undesirables. Then the recent Supreme Court case of Jackson v. Indiana and its effects on the present use of incompetency to stand trial are explained. Finally, Justice Douglas' separate opinions in two related cases, McNeil v. Director, Patuxent Institution and Murel v. Baltimore City Criminal Court, are compared to the Court's position in Jackson, and their implications are explored.

INCOMPETENCY TO STAND TRIAL—BEFORE JACKSON V. INDIANA

Historical Development

The notion of incompetency to stand trial was an extension of the common law ban against trials in abstantia. The incom-

petent defendant, although physically present, was thought to be mentally absent. The theory was that, if the defendant were competent, he might be able to present the court with some fact or explanation which would lead to his acquittal. Indeed the rule was that an insane person could “neither plead to an arraignment, be subjected to a trial, . . . receive judgment, or . . . undergo punishment.”

The underlying concern was with the fairness of the trial. The due process clause of the fifth and fourteenth amendments requires that the defendant must be in a position to present to the court any exculpatory facts or arguments. Therefore, conviction of an accused person while he is legally incompetent has been held a violation of due process.

The problem with the notion of incompetency to stand trial is that the determination is not presently made for the salutary purposes outlined above, nor do the effects of a finding of incompetency comport with the expressed intention of protecting the due process rights of the accused.

A frequently cited case illustrative of the extent to which incompetency proceedings are misused is United States v. Barnes. In that case, Clarence Coons was one of four defendants who were determined to have been denied a speedy trial guaranteed by the sixth amendment. This denial required that the charges against them be dismissed, and they were dismissed as to three defendants. However, Coons was committed as incompetent to stand the “trial” of the dismissal hearing. A psychiatrist reported that he was “presently insane and so mentally incompetent as to be unable to understand the proceedings against him, or to properly assist in his own defense.” The court admitted that there was little for Coons to do to assist his counsel in the dismissal of his case, but found that the test under the applicable statute was whether the defendant was insane or unable to understand the proceedings or unable to assist counsel. The court stated that the statute was intended to afford “some protection for society” as

11. Id. at 65.
well as to preserve the rights of the accused.\textsuperscript{13} Therefore, the court ordered Coons committed until he became mentally competent to stand trial.

The determination of incompetency has become merely a diagnosis by psychiatrists of the defendant's mental illness, and a finding of incompetency has become a strategic weapon by which persons are incarcerated indefinitely without a criminal conviction or even a commitment under civil statutes. "[I]n attempting to develop and practice a concept of fairness, due process in the administration of justice, we have developed a practice which is a denial of the very due process we are trying to emulate."\textsuperscript{14}

\textit{The Standard for Incompetency}

The standard by which incompetency to stand trial should be judged has been set forth by the Supreme Court of the United States in \textit{Dusky v. United States}.\textsuperscript{15}

It is not enough . . . to find that the defendant is oriented to time and place and has some recollection of events, but . . . the test must be whether he 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.\textsuperscript{16}

Despite the fact that this standard is universally accepted and has been incorporated into the statutory law of a number of states,\textsuperscript{17} a finding of incompetency often turns on whether the defendant is psychotic or should be hospitalized.\textsuperscript{18} The courts defer to psychiatric judgments regarding the defendant's "competency." Psychiatrists in turn apply medical definitions of mental illness rather than the legal standard in making their determina-

\begin{thebibliography}{99}
\bibitem{13} 175 F. Supp. at 65. Emphasis in original omitted.
\bibitem{14} Vann & Morganroth, \textit{The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial}, 43 U. Det. L.J. 1, 12 (1965).
\bibitem{15} 362 U.S. 402 (1960) (per curiam).
\bibitem{16} Id.
\bibitem{17} \textit{MODEL PENAL CODE} § 4.04, Comment (Tent. Draft No. 4, 1955); \textit{CAL. PEN. CODE} §§ 1367-68 (West 1970). The California code sections refer to the "insanity" of the defendant, but insanity in this context has been interpreted to mean inability to understand the nature and purpose of the proceedings or to aid counsel in conducting the defense. \textit{People v. Merkouris}, 52 Cal. 2d 672, 678, 344 P.2d 1, 4 (1959).
\bibitem{19} Eizenstat, \textit{Mental Competency to Stand Trial}, 4 \textit{HARV. CIV. RIGHTS-CIV. LIB. L. REV.} 379, 392 (1969). An empirical study in Michigan showed that in 41 cases where the psychiatrists reported to the court that the persons they examined were incompetent, the courts followed the psychiatrists' recommendations in all but one case. Vann, \textit{Pretrial Determination and Judicial Decision-Making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice}, 43 U. DET. L.J. 13, 22-23 (1965).
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INCOMPETENCY TO STAND TRIAL

...tions.20 Even in those cases where psychiatrists make some attempt to deal with the legal standard, records show that they tend to confuse the standard for competency with that for criminal responsibility.21 Psychiatrists' reports to the court are either conclusionary on the issue of competency, lacking facts on the basis of which a court might make an independent determination of competency,22 or else are written in terms of psychiatric labels which tell the court nothing regarding competency.23 Furthermore, once committed, patients are held until no longer "mentally ill" rather than until competent to stand trial, the former period in most cases being substantially longer than the latter.24 Thus, the standard for a finding of incompetency has become not so much a legal standard as a medical one, not so much concerned with competency and understanding as with "mental illness" and the psychiatrist's view of the desirability of hospitalization.

Incompetency to Stand Trial: Perversion of Purpose

Although the original rationale for a finding of incompetency to stand trial was to protect the due process rights of an incompetent defendant, little of that purpose seems to motivate the present operation of the law.

Due process protection cannot logically justify denial of due process plus denial of an accused's right to a speedy trial. Yet this is exactly what is done through incompetency to stand trial proceedings. A finding of incompetency in the United States results almost universally in commitment to a mental institution through either mandatory commitment statutes25 or judicial prac-

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22. For an example of such a conclusionary psychiatric report, see, Whalen v. United States, 346 F.2d 812, 819 (D.C. Cir. 1965) (dissenting opinion by Chief Judge Bazelon). A few cases, to be sure, have inquired into psychiatric reports and have rejected them as founded on a misunderstanding of the standard to be applied (United States v. Gundelfinger, 98 F. Supp. 630, 631 (W.D. Penn. 1951) ) or as conclusionary (Gunther v. United States, 215 F.2d 493 (D.C. Cir. 1954) (opinion by Judge Bazelon again) ) and have required a judicial determination as to competency. Such judicial assumption of duty is unfortunately rare.
Thus there are contradictory motivations involved: the original incompetency rationale of sheltering the insane from the severity of the criminal process conflicts with the desire to protect society from those suspected of criminal behavior. The loose standards for incompetency commitment can be and are manipulated to accomplish the latter objective without having to meet the burden of proof requirements for criminal convictions or the often strict standards for civil commitment.

The report of the Judicial Conference of the District of Columbia Circuit on this subject recognizes that such a practice exists and deplores its use. For example, the report asserts that the court in United States v. Barnes was influenced by the fact that dismissal of the charges would have freed a defendant who might be dangerous. The court, therefore, used a finding of incompetency to stand trial for dismissal of charges as an alternative to normal civil commitment procedures.

Prosecutors and judges frequently use the issue of incompetency as a means to accomplish preventive detention. Minor criminal charges serve as a jurisdictional excuse for indefinite confinement of undesirables. Sometimes the real motivation behind an incompetency commitment is expressed overtly. For example, it is the practice in some jurisdictions for the superintendent of the psychiatric hospital, upon making a determination that a patient has regained his competency to stand trial, to write to the committing court and request that the patient be returned to the court's jurisdiction. In one case where that procedure was followed, the court responded: "After referring the above matter to the district attorney, we were advised that their office does not want this man back in the community." A number of commentators have reported similar attitudes of courts and prosecutors. Clearly, then, before Jackson v. Indiana, the status of in-
competent to stand trial was imposed on a defendant, not as a means of protecting his due process right to a fair adjudication of his guilt or innocence, but rather as a means to indefinitely commit him while circumventing both a criminal trial and civil commitment proceedings.

A TRILOGY OF MENTAL HEALTH DECISIONS—
JACKSON, McNEIL, MUREL

Jackson v. Indiana

Theon Jackson, a 27-year-old mentally defective deaf mute with the mental age of a pre-school child was prosecuted for robbery in a county criminal court in Indiana. Jackson pleaded not guilty but the trial never reached the merits because the court instituted proceedings under Indiana law to determine Jackson's competency to stand trial. The court appointed two psychiatrists to examine Jackson and at a competency hearing received their testimony plus that of a deaf school interpreter who had tried to communicate with Jackson. According to these witnesses, Jackson's mental deficiency and almost total lack of communicative ability made it impossible for him to understand the nature of the charges against him or to participate in his defense. They also testified that it was highly improbable that his condition would ever improve. The court found Jackson incompetent and ordered him committed to a mental institution until sane.

Jackson's counsel filed a motion for a new trial on the ground


35. There were two offenses charged: 1) theft of a purse and its contents worth four dollars; and 2) robbery of five dollars in money.

36. Ind. Code 35-5-3-2 (1971), which reads in part:

When at any time before the trial of any criminal cause ... the court . . . has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two . . . physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at a hearing. . . . If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed . . . . If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to . . . an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the . . . hospital shall certify that fact to the proper court, who shall enter an order . . . directing the sheriff to return the defendant [to the court] . . . [H]e or she shall then be placed upon trial for the criminal offense. . . .
that, because Jackson would never become competent to stand trial, he was essentially being sentenced for life without ever having been convicted of a crime. He was thereby deprived of his fourteenth amendment rights to due process and equal protection and was subjected to cruel and unusual punishment proscribed by the eighth amendment. The trial court denied the motion and on appeal the Supreme Court of Indiana affirmed. The case came to the Supreme Court of the United States on a grant of certiorari. The Court, in a unanimous decision, reversed on the grounds that the defendant had been denied equal protection and due process under the fourteenth amendment. These two important bases for the decision deserve separate treatment.

**Equal Protection.** Jackson contended that he was denied equal protection because he was subjected to a more lenient commitment standard and more stringent standard of release than was applied to persons not charged with criminal offenses. Jackson was committed under a statute governing exclusively those found incompetent to stand trial. Indiana has two other commitment statutes, one governing commitment of the “feeble-minded” and the other the “mentally ill.”

To commit a person as “mentally ill,” the state must show that he suffers from mental illness, and is in need of “care, treatment, training or detention.” The state may also be required to show that the person is “dangerous.” From the record it appeared that Jackson could not be committed under this statute. First, there was no showing that he was in need of custodial care

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39. IND. CODE 35-5-3-2 (1971). A new system of numbering codes was adopted by the Indiana legislature in 1971. All cites are to these new numbers although the decision refers to the old numbers also.
40. IND. CODE 16-15-1-3 (1971). This section refers to commitment of those who are feeble-minded but not insane. The term “feeble-minded” is not therein defined, but IND. CODE 16-15-4-1 (1971) refers to citizens who are “eeble-minded, and are therefore unable properly to care for themselves.” A feeble-minded person may be released from commitment at any time upon determination by the hospital superintendent that his condition warrants it. IND. CODE 16-15-4-12 (1971).
41. IND. CODE 16-14-9-1(1) (1971) and IND. CODE 16-14-9-9 to -18 (1971). Section 16-14-9-1(1) defines a “mentally ill person” as one “who is afflicted with a psychiatric disorder” and who “because of such . . . disorder, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others in the community. . . .” The other cited sections set forth a procedure for psychiatric examination and a judicial hearing to determine insanity. Finally, a “mentally ill person” may be released at the discretion of the hospital superintendent or when “cured of such illness.” IND. CODE 16-14-9-23 (1971).
42. IND. CODE 16-14-9-1(1) (1971). The Court sees a possible requirement of showing dangerousness in the language “[D]etention in the interest of the welfare of such person or the welfare of others in the community. . . .”
or detention;\textsuperscript{46} second, there was testimony that the state did not have the facilities to provide treatment or training for Jackson's condition; finally, there was no showing that he was dangerous. To commit a person as being "feeble-minded," the state must show that he is "unable properly to care for [himself]."\textsuperscript{44} By contrast, the state had to show only inability to stand trial in order to commit Jackson. Furthermore, under an incompetency commitment, one cannot be released until competent to stand trial,\textsuperscript{48} while both the "feeble-minded" and the "mentally ill" may be released when they no longer require custodial care or treatment.\textsuperscript{46} The Court suggested that Jackson might meet the latter requirements for release immediately even without any improvement, although it appeared quite unlikely that he could ever meet the competency for trial requirement.\textsuperscript{47}

Indiana applied different commitment standards to Jackson solely because he had criminal charges pending against him. The Court, relying on its decision \textit{Baxstrom v. Herold}\textsuperscript{48} and citing several consonant state and lower federal court decisions,\textsuperscript{49} found the pendency of criminal charges insufficient to justify different commitment and release standards.\textsuperscript{50} \textit{Baxstrom} involved a state prisoner who was civilly committed at the end of his prison sentence without the right to a jury trial on the issue of competency; the jury trial was available to all persons civilly committed except those nearing the end of prison sentences. The Court held that for the purpose of granting jury review of the question of whether a person is mentally ill, "[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."\textsuperscript{51} In \textit{Jackson}, the Court simply applied \textit{Baxstrom}'s reasoning to a pre-trial commitment, saying: "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

\textsuperscript{43} 406 U.S. at 728. In fact, the opposite appeared to be true: Jackson was perfectly capable of caring for himself.  
\textsuperscript{44}  IND. CODE 16-15-4-1 (1971). See note 40, supra.  
\textsuperscript{45} See note 36, supra.  
\textsuperscript{46} See notes 40 & 41, supra.  
\textsuperscript{47} 406 U.S. at 729.  
\textsuperscript{48} 383 U.S. 107 (1966).  
\textsuperscript{50} 406 U.S. at 724.  
\textsuperscript{51} 383 U.S. at 111-12.
suffice.”  

Essentially the Court ruled that once a state provides due process safeguards in its involuntary civil commitment proceedings, it cannot withhold those safeguards from persons who come to involuntary commitment through criminal proceedings.

Due Process. Jackson's commitment was to continue until such time as he was certified “sane” in the sense of being competent to stand trial. However, the evidence showed that Jackson would probably never be able to meet that standard; thus his commitment was indefinite and most likely for life. However, if Jackson's condition of incompetency to stand trial could not be improved through custodial care and treatment and his commitment were indefinite, then the whole rationale for his commitment would fail. In light of this dilemma, the Court held that due process requires that

a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it determined that the defendant probably soon will be able to stand trial, his continued confinement must be justified by progress toward that goal.

Incompetency commitments, then, must be both temporary and effective in rehabilitating the defendant to competency or they will be invalid.

The usual bases for the states' power to commit persons indefinitely who are judged mentally ill are dangerousness to self, dangerousness to others and the need for care, treatment or training. Indeed, these were the criteria invoked by Indiana statutes for commitment of the “mentally ill” and “feeble-minded.” The question of the due process sufficiency of these justifications for involuntary commitment was not before the Court in Jackson. On the one hand it appears that, by designating civil commitment procedures as the standard which must be equaled in incompe-

52. 406 U.S. at 724.
54. 406 U.S. at 720, n.2.
55. Id. at 738.
56. Id. at 737; Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L. Rev. 1288, 1289-97 (1965-66).
tency proceedings and by citing civil commitment as an alternative disposition of one who cannot regain competency to stand trial in a reasonable time, the Court may be implying acceptance of these criteria. On the other hand, the Court's statement that "[c]onsidering number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated" seems to indicate that, although this decision turned on the narrow constitutional validity of incompetency to stand trial proceedings, the Court may be willing to scrutinize involuntary civil commitment proceedings for constitutional validity in an appropriate case.

McNeil v. Director, Patuxent Institution

Consideration of two other cases also decided by the Court last term, McNeil v. Director, Patuxent Institution and Murel v. Baltimore City Criminal Court, is useful for a fuller understanding of the Court's position and important for the implications of Justice Douglas' separate opinions. The McNeil decision extends the due process rationale in Jackson to misuse of temporary commitment procedures in a post-conviction setting.

Edward McNeil was convicted of two assaults and sentenced to a maximum of five years in prison. Instead of sending him to prison, the trial court referred McNeil to Patuxent Institution for examination to determine if he should be committed there for an indefinite term under Maryland's Defective Delinquency Law. Although at the time of this decision McNeil had been in Patuxent for six years, he had never been diagnosed a defective delinquent because he refused to answer psychiatrists' questions and the doctors insisted they could make no evaluation without his coopera-

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59. See discussion of the Douglas opinions, text accompanying notes 99-119, infra, for the opposite view.
60. 406 U.S. at 737.
63. Md. Ann. Code, art. 31B (1971). This law provides that a person who has been convicted of a felony or certain misdemeanors may be committed to Patuxent Institution indefinitely if a court determines that he is a "defective delinquent". Id. § 9(b). A defective delinquent is defined as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require . . . confinement and treatment . . . ." Id. § 5. Upon initial commitment for examination, the institution psychiatrists are to evaluate the prisoner and make a report to the court. Id. § 7(a). If the report recommends commitment, a hearing is held with a jury trial, if the person so requests, to determine whether he should be committed as a defective delinquent. Id. § 8.
tion. The state contended that McNeil could be held indefinitely in this status until he cooperated.64

McNeil filed a petition for post-conviction relief on the ground that, with the expiration of his prison sentence, the state lost all power to hold him on a simple court order for examination. That order was based solely on an ex parte judicial determination that there was "reasonable cause to believe that the defendant may be a defective delinquent." The trial court denied relief and the Court of Appeals of Maryland denied leave to appeal. The case came to the Supreme Court on a grant of certiorari.65

The Court found that McNeil's continued confinement was a violation of due process66 because it was in fact an indefinite commitment67 resting on procedures designed to authorize a short period of observation. The Court observed that "lesser safeguards may be appropriate" where confinement is for a short period and for a limited purpose, but conversely, where confinement is by a procedure lacking important due process safeguards, its duration must be very limited.68 Quoting from its decision in Jackson v. Indiana the Court said “[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”69 That is, due process does not permit a state to confine a person indefinitely on the basis of an ex parte order for commitment for observation and evaluation. The McNeil decision, then, is analogous to the due process rationale in Jackson in that both invalidated the use of temporary commitment procedures as a means of confining people indefinitely.70

Murel v. Baltimore City Criminal Court

The last of the trilogy of mental illness cases is significant solely for the dissent by Justice Douglas. The majority opinion in Murel v. Baltimore City Criminal Court was merely a dismissal of a writ of certiorari on the ground that it was improvidently granted.71 The case involved state prisoners who were convicted

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64. 407 U.S. at 254-55, n.4 (concurring opinion by Douglas, J.).
67. He had already been confined for six years and the Court found there was "no reason to believe . . . he will ever be released" or "will ever be easier to examine than he is today." Id. at 249-50.
68. Id.
69. Id. at 250 quoting Jackson v. Indiana, 406 U.S. at 738.
70. Justice Douglas' concurring opinion in this case is discussed in text accompanying notes 101-109, infra.
71. The original grant of certiorari is reported at 404 U.S. 999 (1971). The case is reported under different names in the lower courts. The United
of various crimes, assessed fixed prison terms and then committed to Patuxent Institution under Maryland's Defective Delinquency Law. The prisoners sought habeas corpus relief challenging the criteria and procedures for their indefinite commitment on the ground, inter alia, that the government should have been required to prove that the prisoners were defective delinquents beyond a reasonable doubt.

The Court dismissed the writ because one of the four petitioning prisoners had been released and the other three were still subject to fixed prison sentences which would bar their release even if they prevailed on these issues. In his dissent, Justice Douglas agreed with the prisoners' assertion that they had been denied due process protection because they were committed indefinitely on only a fair preponderance of the evidence. The implications of that dissent will be discussed later.

THE EFFECTS OF JACkSON V. INdIANA

The Supreme Court in Jackson ordered a halt to the use of incompetency to stand trial proceedings as a means of indefinite commitment. The Court held that a person committed solely because he was incompetent to proceed to trial could not be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will soon become competent. If he is not likely to regain competency quickly, the state must either institute civil commitment proceedings or else release him. Even if the defendant probably will rapidly recover, his continued confinement must be justified by progressive improvement.

Clearly the Supreme Court left no room in the future for indefinite commitments based on an adjudication solely of this form of incompetency. Henceforth, incompetency commitments must be brief and rehabilitatively successful or they will be held unconstitutional. Thus, it will no longer be advantageous for the prosecution or the court to raise the issue of incompetency against the defendant's will. A finding of incompetency can no longer be a means of indefinitely disposing of a case, of incarcerating a person charged with a crime without meeting the proof require-
ments of a criminal proceeding, or of circumventing civil commitment.

Will the doctrine of incompetency to stand trial slip from common practice into legal history? The Jackson limitations make it now advantageous for the defense to plead incompetency to stand trial. The defendant no longer faces the risk of indefinite commitment and may, in a rare situation such as that of the Jackson case, be able to get off entirely as both not competent to stand trial with little chance of improvement and also not within the purview of the civil commitment statutes. However, in view of the way incompetency determinations have been used to incarcerate people previously, it is likely that courts will be very hesitant to make a finding of incompetency, in all but the most extreme cases, if the result would be complete release of the defendant. The more likely result will be that great numbers of people, who before Jackson would have been found incompetent and indefinitely committed, will now stand trial. It is at least conceivable that some of these people will actually be incompetent under a true application of the Dusky standard. That is, they will not be able to consult reasonably with their attorneys and will not have a rational understanding of the trial proceedings. Two questions are raised: is such a result desirable, and is it constitutional?

If an incompetent defendant were to stand trial, his interests would be represented by his retained or appointed counsel rather than by a prosecutor, judge or court-appointed psychiatrist. Surely in view of the basic assumptions of our adversary system and the sorry consequences to an incompetent of a pre-Jackson non-adversary commitment, it will be to his advantage to stand trial, even if arguably incompetent.

The constitutional question may be murkier. In Pate v. Robinson, the Supreme Court previously held that it was a denial of due process to try a person while he is legally incompetent. On the other hand, the Court in Jackson referred favorably to a decision of the Illinois Supreme Court in People ex rel. Myers v. Briggs which held that a defendant, facing indefinite commitment because of incompetency to stand trial with little chance of becoming competent, should be given an opportunity to be tried on the issue of guilt or else be released. While such approval

78. See text accompanying notes 15-16, supra.
80. Id. at 377-78.
81. 406 U.S. at 736.
82. 46 Ill. 2d 281, 263 N.E.2d 109 (1970).
83. Id. at 285, 263 N.E.2d at 113.
by no means guarantees that the Court is ready to overrule Pate, at
least it may indicate a willingness to consider the issue again.84

In those cases where a defendant is found incompetent to
stand trial, the Court makes clear that its prior decisions, such as
Pate, in no way prevent the states from allowing incompetent de-
fendants to raise some defenses, such as the insufficiency of the
indictment, and to make pre-trial motions through counsel if such
defenses and motions do not require the defendants' assistance.85
Such a procedure has been frequently suggested86 and success-
fully used.87

Thus incompetency to stand trial will be a much less fre-
frequently invoked doctrine as a result of the Jackson decision and
more defendants will enjoy due process protections heretofore
strangely missing for those branded incompetent.

The effects of the Jackson decision will be widely felt. The
transition will be least difficult in the federal criminal system,
since a “rule of reasonableness” had been earlier read into the in-
competency commitment statutes88 by the lower courts.89 That
“rule” requires that commitment for incompetency to stand trial
under federal statutes must not be for an unreasonable or indefinite
period of time—essentially the due process holding of Jackson.

Changes in the state criminal systems will be more substan-
tial. For example, the California incompetency commitment pro-
visions are typical of those against which the Jackson decision
was directed. California Penal Code section 1370 requires that
upon finding the defendant insane,90 the court must order that
he be committed until he becomes sane. The statutory tests for
commitment and recovery in most states91 are similar to Cali-

84. It may be that the question will not be presented. If the issue of in-
competency is not raised at the trial level and the defendant is found guilty,
the defendant cannot then appeal on that ground. If the issue is raised below
and the defendant adjudged competent, a higher court will no doubt give great
dereference to the trial court finding and therefore only reach the constitutional
issues if the trial court finding was patently wrong.
86. See, e.g., MODEL PENAL CODE § 4.06 (Proposed Official Draft, 1962);
D.C. REPORT, supra, note 8, at 143-44 (Recommendation 15).
87. United States v. Marino, 148 F. Supp. 75 (N.D. Ill. 1957); Regina v.
89. See, e.g., Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970) and
Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961). This rule was not af-
fected by the Supreme Court decision in Greenwood v. United States, 350
U.S. 366 (1956) which approved the indefinite commitment of an incompe-
tent federal criminal defendant, since that decision was based on an explicit
finding of dangerousness and not merely on defendant's incompetency.
90. Interpreted as "incompetent". See note 17, supra.
91. THE MENTALLY DISABLED AND THE LAW 359-60 and chart 386-93 (F.
Lindman & D. McIntyre eds. 1961).
fornia's, and therefore, to the extent that the statutes are used to commit people indefinitely, they violate due process guarantees and must fall. 92

The scattered statistics which exist on the number of persons committed as incompetent to stand trial indicate that the Jackson decision will have a dramatic impact on inmate population. For example, the patient population of Matteawan State Hospital for the criminally insane in New York was 2142 in November 1962. Of these, 1167 or 54.5%, had been admitted as incompetent to stand trial. 93 By 1966 the Matteawan population had shrunk to 838 patients, but 565 (68%) of them were committed for incompetency. 94 Ionia State Hospital in Michigan had 1484 patients in August, 1960; 755 or 57% of these were there because they were held incompetent. 95

The length of time for which those found incompetent to stand trial are held in mental institutions is even more shocking and revealing than their number. The median 96 stay at Matteawan in 1965 was six to seven years as compared to four to eight months in non-criminal mental institutions run by the State of New York. 97 Similarly, the record for restoration to competency at St. Elizabeth's Hospital in Washington, D.C. shows a shocking prolongation of the commitment period. 98 Thus, Jackson can

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92. On February 7, 1973 the California Supreme Court did indeed find that the California statutes requiring commitment of persons found incompetent to stand trial were unconstitutional under Jackson. Davis, Cowan & Palma v. State of California, Nos. 16512, 16513, 16530 (Cal. Feb. 7, 1973). The court stated that "In view of the similarities between California and Indiana procedure, it seems evident that we must adopt . . . the rule of the Jackson case that no person charged with a criminal offense and committed to state hospital solely on account of his incapacity to proceed to trial may be so confined more than a reasonable period of time necessary to determine whether there is a substantial likelihood that he will recover that capacity in the foreseeable future. Unless such a showing of probable recovery is made within this period, defendant must either be released or recommitted under alternative commitment procedures."


96. The median given is for all patients, of whom 68% were committed as incompetent. However, Matteawan patients include only misdemeanants and persons with criminal sentences of one year or less. Morris, The Confusion of Confinement Syndrome: An Analysis of Confinement of Mentally Ill Criminals and Ex-criminals by the Department of Correction of the State of New York, 17 BUFF. L. REV. 651, 657 (1968).

97. Id. at 656. Of 1654 patients, 703 had been there at least 10 years, 306 at least 20 years, 119 at least 30 years, 29 at least 40 years, 4 at least 50 years and one for 64 years.

98. D.C. REPORT, supra, note 8, at 49. 53.8% of the patients took over
mean a totally different life for some defendants unfortunate enough to have been labeled incompetent to stand trial.

**IMPLICATIONS OF THE DOUGLAS OPINIONS**

*Jackson v. Indiana* is a highly laudable decision in that it guaranteed to defendants found incompetent to stand trial at least those due process safeguards found in civil commitment statutes. But its virtues are also its shortcomings: the decision never went beyond comparing incompetency commitment proceedings to civil commitments, never designated criminal procedural safeguards as the standard to be met.

Justice Douglas was the only member of the Court to question that approach at least to some extent. He did that not in the *Jackson* case, but in the two other mental health decisions last term: *McNeil v. Director, Patuxent Institution*, in which the Court held that a person may not be incarcerated indefinitely on a pre-trial commitment for psychiatric examination, and *Murel v. Baltimore City Criminal Court*, in which the Court refused to hear a challenge to Maryland's Defective Delinquency Laws.

In his concurring opinion in *McNeil*, Douglas argued that the defendant was deprived of his fifth amendment right to avoid self-incrimination because he was punished by indefinite deprivation of his liberty for refusal to answer psychiatrists' questions. One cannot reach such a conclusion without trampling on some cherished assumptions in the law of involuntary commitment. It is a central tenet that involuntary commitment must be distinguished from criminal incarceration; commitment proceedings are not adversary contests but are intended to determine what is best for the defendant. Furthermore, psychiatrists are neutral experts who necessarily recommend that disposition which is in the defendant's best interests.

Douglas rejected both assumptions. Following the *Gault* rationale that it is the deprivation of liberty which is determinative of the procedural protections necessary, not the civil or criminal label attached to the process, he argued that where one is under threat of incarceration against his will in any institution, whatever it is called, he is entitled to remain silent and not incriminate himself. In short, such a proceeding is adversary and must be rec-

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101. 407 U.S. at 257.
103. 407 U.S. at 257.

a year to be restored to competency, 22.7% took over 3 years, and 10.6% took over 5 years.
ognized as just that. Furthermore, a psychiatrist appointed by the court to question the defendant regarding, among other matters, the crime charged, and who then makes a report which may result in indefinite commitment of the defendant, is not a neutral party. He represents a threat to the defendant's liberty; therefore, the defendant may refuse to answer his questions.104

Douglas is not alone in this view.105 The judges of the District of Columbia Circuit have recommended that no sanction be imposed against an accused who refuses to participate in a pre-trial mental examination and that he be advised in advance of his right to withhold his cooperation.106 They see such a practice as necessary to preserve the defendant's privilege against self-incrimination. They do not deal with whether that protection is technically applicable, but rather believe it is conceptually required.107 In addition, one study108 attacked the assumption of the psychiatrist's neutral or benevolent position head on by asking a group of psychiatrists who conducted pre-trial competency examinations whose agent they considered themselves to be in making that examination. Three replied they were agents for the hospital director, two said for the court, one was unsure, and one said he was an agent for himself. None said they were the agent of "Science" or made any similar neutral response.109

Douglas' conclusions depart from those of the Court as a whole because of his view that involuntary commitment must be compared to criminal confinement. Both are deprivations of liberty against the subject's will. Indeed they differ only in that one is the result of specified overt criminal acts, whereas the other is based on a psychiatrist's determination of present state of mind and his prediction of future behavior.

In his Murel dissent, Douglas applied the analogy again and said that "an individual's personal liberty is an interest of transcending value for the deprivation of which the State must prove its case beyond a reasonable doubt."110 Furthermore, Douglas interprets prior Supreme Court decisions as requiring this result. In Speiser v. Randall,111 the Court characterized an individual's personal liberty as "an interest of transcending value"112 and as-

104. Id. at 256.
106. D.C. REPORT, supra, note 8, at 93-94.
107. Id. at 95.
109. Id. at 83.
110. 407 U.S. at 365.
112. Id. at 525.
asserted that it is the rights at stake which must determine the procedural safeguards required. In *In Re Gault*, the Court similarly held that the civil or criminal label attached to the proceeding must be ignored in favor of consideration of the rights involved. However, none of these earlier cases were concerned with involuntary commitment of persons to mental institutions, and the present cases suggest that only Douglas is willing to extend the precedent to reach them.

The effects of requiring proof of mental illness or dangerousness beyond a reasonable doubt are nothing short of revolutionary. The science of psychiatry has not yet reached a level of precision allowing accurate and consistent diagnosis of present mental disorders let alone prediction of future behavior. One commentator, after analyzing the few studies which had been done following up psychiatric predictions of anti-social behavior, concluded that psychiatrists are highly inaccurate in their predictions. Furthermore, they tend toward one type of error—over-prediction of dangerousness, which results in over-committing. It is evident that psychiatrists could not possibly determine mental illness or predict dangerousness beyond a reasonable doubt. Since the prosecution and the court rely heavily, if not exclusively, on psychiatric reports in determining whether to commit a person, the heavy burden of proof is not likely to be met by other means. Dangerousness could only be adequately demonstrated if a person were shown to have already committed an act endangering society, at which point he is very likely within the scope of criminal sanctions. Requiring proof beyond a reasonable doubt for involuntary commitment would essentially eliminate the possibility of such commitment. That would mean that the mentally ill could no longer be singled out for preventive detention on a probably inaccurate prediction that they may be dangerous in the future. Their status as mentally ill would be legally irrelevant; they could be incarcerated only for criminal acts and only after a trial with full procedural due process safeguards.

113. Id. at 520-21.
114. 387 U.S. 1 (1967).
115. Id. at 50. See also *In re Winship*, 397 U.S. 358, 363 (1970).
119. Id. at 46.
CONCLUSION

Jackson v. Indiana will substantially eliminate the status of "incompetent to stand trial" if its mandates are applied. People who might previously have been labeled incompetent and incarcerated indefinitely in a mental institution have, with this decision, been brought within the reach of constitutional protections supposedly available to all citizens.

Justice Douglas would extend those constitutional protections to civil commitment proceedings and would eliminate coerced confinement on the basis of mere psychiatric prediction. There is no indication that the rest of the Court is presently willing to follow Douglas' lead, but perhaps, as in the past, a dissenting view will grow to be that of the majority in some future Court.

Marian Kennedy Pollack