The Unconstitutionality of Mandatory Detention During Competency Restoration

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Defense attorneys have long struggled with the ethical obligation to raise competency concerns about a client to the court when doing so would prolong the client's time in detention. This dilemma, well-documented in legal ethics scholarship, relies on an assumption that detention is a necessary component of competency restoration. As this Article shows, that assumption is wrong.

This Article uncovers how the practice of mandatory detention for competency restoration was left undisturbed for decades, even as policymakers and courts increasingly recognized the constitutional concerns with automatic detention of individuals with severe mental illness in other arenas. After exposing the unconstitutionality of mandatory detention during competency restoration, the Article proposes reforms that would modernize the outdated competency detention system, alleviate the dilemma defense attorneys face, and contribute to the broader discussion on curbing mass incarceration.

DOI: https://dx.doi.org/10.15779/Z38GH9B88R

* Clinical Associate Professor of Law, Yale Law School. I am grateful to Muneer Ahmad, Heather Gerken, Jean Koh Peters, Michael Wishnie, Fiona Doherty, Miriam Gohara, James Forman, Jr., Clare Priest, Robert Post, Steven Wizner, Judith Resnik, William Eskridge, Jr., Issa Kohler-Hausmann, Carel Ale, Jill Ginstling, Michael Tanaka, and Alyssa Bell for their insightful feedback and suggestions. A special thank you to Justin Weinstein-Tull for his guidance and support. Rachel Shur, Dennise Moreno, and Carolyn Lipp provided excellent research assistance.

INTRODUCTION

Criminal defense attorneys are haunted by the possibility that a lawyering choice they make will prolong a client's time in detention. That fear is often heightened when a defense attorney doubts her client's competence to stand trial. In sharp contrast to almost every other strategic decision she makes, a defense attorney must tell the court if she doubts her client's competence,[1] for courts cannot adjudicate the cases of criminal defendants found incompetent to stand trial.[2] However, incompetent defendants are usually detained pending competency

[1] ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(b) (AM. BAR ASS'N 2016); *see infra* Part I.C.

[2] Dusky v. United States, 362 U.S. 402, 402 (1960). In *Dusky*, the Supreme Court defined competency to stand trial as requiring "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[] and[] a rational as well as factual understanding of the proceedings." The concept of competency is not static, it relates to its purpose, and therefore it does not have a uniform meaning across all contexts. For example, competency to make medical decisions calls for a different standard than competency to waive one's rights in a criminal trial. Indeed, most defendants determined incompetent to stand trial are found competent to make their own medical decisions. *See* Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 SAN DIEGO L. REV. 161 (2009). In this Article, I use the term "competency" as shorthand to refer to competency to stand a criminal trial.

restoration and can spend more time in custody than if they had never gone through competency proceedings.[3] Defense attorneys thus face a dilemma. Raise an issue to the court and risk directly harming the client or let a client who may not even understand what a trial is be subjected to one.

Defense attorneys and scholars traditionally have understood this dilemma as one of conflicting ethical obligations, pitting the duty of candor to the court against the duty of loyalty to the client.[4] While commentators disagree about which duty should prevail, and even about which duty best serves the client, the entire debate rests on one core assumption: that detention is a necessary component of competency restoration proceedings. That core assumption is wrong, as this Article is the first to argue.

This Article contends that an ethical lens will not solve the defense attorney's dilemma, as decades of scholarly debate have failed to solve this problem. Instead, this Article argues, the Due Process Clause provides the appropriate frame for analysis, which leads to uncovering limiting principles on detention authority. Focusing on jurisdictions that require detention for competency restoration,[5] where the dilemma defense attorneys face is particularly acute, the Article argues that mandatory detention is unconstitutional.

In order to expose the constitutional deficiencies with mandatory detention for competency restoration, this Article analyzes how the practice has rested on an inappropriately broad interpretation of a single Supreme Court case, *Jackson v. Indiana*.[6] *Jackson* did not address whether detention is justified in all cases, regardless of considerations such as bail suitability or seriousness of the offense. Yet, *Jackson* has been treated for decades as not only prohibiting indefinite detention for competency restoration, its actual holding but also as *sub silentio* permitting mandatory detention, and this broad reading renders it an outlier in the case law. By placing *Jackson* in the context of current case

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3 *See* discussion *infra* Part I.A.

4 *See* discussion *infra* Part I.C.

5 Specifically, this Article focuses on the federal competency statute, 18 U.S.C. § 4241 (2012), which mandates that any defendant found incompetent to stand trial be detained pending competency restoration. In addition to the federal statute, a handful of other jurisdictions also require detention by statute, but evidence suggests that the practice of detaining those found incompetent is automatic in the vast majority of states. *See infra* Part I.B.

6 406 U.S. 715 (1972).

law on both civil and pre-trial detention, this Article illuminates serious constitutional concerns raised by the practice of mandatory detention during competency restoration.

The Article then suggests a set of remedies that legislatures and courts can and should adopt in order to serve a governmental interest in prosecuting crime while promoting competency restoration in the community. These proposals are particularly salient given the explosion of individuals with significant mental health issues currently in jails, receiving inadequate treatment.[7] In the wake of *Jackson v. Indiana*, our understanding of mental illness and our capacity to treat it outside of the carceral apparatus have increased dramatically. Community mental health care, which was just starting when *Jackson* was decided, is now prevalent if under-resourced.[8] That means that there is not just doctrinal space for reform, but there are also policy-making tools necessary to help reform succeed.

While this analysis is confined to a single, important dilemma confronted by criminal defense attorneys, it also offers insight into a larger set of problems that plague the criminal justice system. In other areas, from immigration to policing to sentencing, we have become acutely aware of the societal costs associated with an expansive penal system and the social control exerted through unconventional aspects of the criminal justice system. This Article explores yet another facet of those costs. Individuals with mental illness disproportionately are subject to encounters with law enforcement,[9] thereby swept into a jail system incapable of treatment but more than capable of exacerbating their injuries.[10] The treatment of individuals in competency proceedings is one part of a larger discussion about how the criminal justice system affects individuals living with mental illness.

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[7] *See, e.g.*, Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761 (2009) (discussing the high rates of incarcerated individuals with serious mental health needs); Desirae Hutchinson, *Inadequate Mental Health Services for Mentally Ill Inmates*, 38 WHITTIER L. REV. 161 (2017) (describing the state of mental health services for incarcerated individuals suffering from a mental illness).

[8] *See infra* Part II.A.

[9] Individuals with mental illness are disproportionately subject to violent encounters with law enforcement, according to analysis conducted by the Washington Post. *See* Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/?utm_term=.579f442396d6.

[10] *See* Steadman et al., *supra* note 7.

The Article proceeds in three parts. Part I provides an overview of competency proceedings and discusses how the ethical obligations imposed on defense attorneys regarding competency interact. It shows that the core assumption undergirding the ethical debate—unquestioned by scholars of all stripes—is that detention is necessary to restore competency. Part II reveals that assumption to be incorrect. It explores the jurisprudence on competency and detention, uncovering a doctrinal and practical space for reform of the use of detention for competency restoration. In doing so, it provides an account of reform gone wrong, of how a single Supreme Court case has prevented the judicial system from keeping up with policy-making advances and case law in other arenas where mental health is concerned. Part III proposes reforms to the use of detention for restoring competency and discusses their implications. Consistent with this Article's reframing of the question in constitutional terms, it draws upon relevant due process requirements and equal protection principles to propose three types of reform that could be taken up by courts and legislatures alike. The Article concludes by identifying a broader set of questions regarding the relationship between mental health and the criminal justice system.

I. THE DILEMMA

Defense attorneys often experience an ethical dilemma when they doubt the competency of their client. Well-versed in criminal procedure, these attorneys know that they are obligated to inform the court of their concerns. However, by raising competency concerns, they put in motion a set of processes that keep their client detained for months, if not longer. Practicing lawyers and commentators alike have understood this problem as one of competing and conflicting ethical duties.[11] No ethical defense attorney wants a client who is incompetent to be subjected to criminal adjudication, nor does she want to cause her client to be detained or have detention extended as a result of competency proceedings. A debate about competing ethical duties misses the point, however, as it assumes that defendants must be detained for competency restoration, and that such mandatory detention is constitutional.

This Part lays out how a defense attorney's dilemma arises through a discussion of criminal competency procedure and illustrations of where the dilemma is at its peak. This Part then introduces the ethical

[11] *See infra* Part I.C.

debate that dominates legal scholarship on the dilemma, and concludes by arguing that an ethical debate will not resolve this problem.

A. Criminal Justice Procedure on Competency

The Constitution prohibits criminal trial of individuals who are mentally impaired to the point of being unable to have a rational understanding of the proceedings against them, or who are unable to assist their counsel in their defense.[12] Such individuals likewise cannot plead guilty to a crime.[13] As a result of this prohibition, most clearly enunciated by the Supreme Court in *Dusky v. United States*,[14] both state and federal criminal jurisdictions have created procedures for making competency determinations and decisions about how to treat individuals who are criminally charged but against whom the state cannot pursue the traditional criminal process.[15]

The concept of competency is a fluid one. A person can lose competency, regain it, and lose it again,[16] meaning that a defendant found not competent may be subjected to multiple competency proceedings in a single criminal adjudication.[17] Such proceedings can

[12] Dusky v. United States, 362 U.S. 402 (1960). The standard for determining competency was most clearly enunciated in *Dusky*, but the general prohibition on trying defendants who lacked the ability to participate meaningfully in criminal proceedings dates back to English common law. *See also* Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 201 (2004) (describing medieval English prohibition on succumbing mentally disabled defendants to forcible pleading of criminal charges, an otherwise permissible procedure at the time).

[13] Godinez v. Moran, 509 U.S. 389 (1993). In *Godinez*, the Supreme Court rejected the argument that competence to waive trial requires a more robust standard than that to stand trial.

[14] *Dusky*, 362 U.S. 402.

[15] Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 267 (2009) ("Every state has now adopted statutory schemes to conform with the Court's constitutional framework and ensure that no one is forced to stand trial while incompetent.").

[16] *See* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 231–32 (2008).

[17] Broadly speaking, two categories of defendants fall into the group of individuals for whom competency to stand trial proceedings are initiated. One category is comprised of defendants who suffer from severe mental illnesses that interfere with the criminal adjudicative process. Approximately ninety percent of individuals found not competent suffer from a mental illness. *See* PATRICIA ZAPF, STANDARDIZING PROTOCOLS FOR TREATMENT TO RESTORE COMPETENCY STAND TRIAL: INTERVENTIONS AND CLINICALLY APPROPRIATE TIME PERIODS, WASH. STATE INST. PUB. POL'Y 15 (2013), http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-

occur at various stages in the criminal process, including pretrial, trial, plea-taking, or sentencing. Every actor in the criminal justice system—including the court, prosecutor, and defense attorney—has an obligation imposed through ethical rules or case law to initiate competency proceedings should a bona fide concern arise that the defendant is not competent to stand trial.[18]

Competency proceedings halt the regular criminal process. When an attorney raises competency concerns, a court must hold a hearing if it believes that the defendant's competency is genuinely in doubt.[19] Most states permit or mandate that a mental health professional conduct an evaluation of the defendant to aid the court and assess the defendant using the broad criteria outlined in *Dusky*: the defendant's factual understanding of the proceeding, the defendant's rational ability to comprehend various aspects of the criminal process, and the defendant's ability to assist her counsel in her defense.[20] If the court then finds that the defendant is not competent to stand trial, the court refers the defendant for a period of "restoration,"[21] a process aimed at addressing whatever gap kept the defendant from being found competent

Appropriate-Time-Periods_Full-Report.pdf. The other category includes individuals who suffer from intellectual disabilities, or what was formerly called mental retardation, or significant cognitive disabilities. This Article focuses on the former group, due to the fact that it makes up the vast majority of the population found not competent.

[18] *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.3(a-c); Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L.Q. 1, 21 (2016) ("The important point about these various standards for present purposes is that, with the goal of assuring a reliable process, standard 7-4.3 provides that all parties—the defense attorney, the prosecutor, and the judge—should seek an evaluation if they have a good faith doubt about the defendant's competence to proceed or make decisions."). *See also* Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that the court has a *sua sponte* duty to inquire as to competency when it doubts that the defendant is competent); Drope v. Missouri, 420 U.S. 162, 179–181 (1975) (affirming *Robinson*); *infra* note 55.

[19] *Drope*, 420 U.S. at 179–181; *Robinson*, 383 U.S. at 385. Although not every state mandates an evaluation, as a practical matter evaluations are a norm, and courts heavily rely on expert opinions on a defendant's competency to stand trial.

[20] Over time, mental health professionals have developed various standardized assessments tools, with some distinction between assessment tools used for defendants whose competency concerns arise out of intellectual or developmental disabilities and those for whom competency concerns arise out of a mental illness. Richard Rogers & Jill Johansson-Love, *Evaluating Competency to Stand Trial with Evidence-Based Practice*, 37 J. AM. ACAD. PSYCHIATRY L. 450 (2009).

[21] *See* Jackson v. Indiana, 406 U.S. 715, 719–22 (1972) (describing restoration process in that case).

to stand trial in the first place that can include medication, cognitive skill-building, and education regarding the legal system.[22] Although various models for restoration exist, these models have not been subject to extensive efficacy assessment, and restoration treatment has advanced much less than the field of competency evaluation.[23]

Here is where the problem, and an assumption, arises: when courts find a defendant incompetent to stand trial, restoration is commonly conducted in detention.[24] That means that even those defendants who were not detained prior to the finding of incompetence are regularly ordered committed for the restoration period. During the period of restoration, criminal proceedings are stayed, and the trial court is free to reject a defendant's stated desires, such as a desire to plead guilty or go to trial.[25]

Once the defendant is "restored," meaning that the court has made a determination that the defendant has a rational understanding of the proceedings and can assist her counsel in her defense, the criminal process can proceed with trial or plea negotiations and, if necessary, sentencing. At times, the government may seek to medicate a defendant who is not restored but who has declined medication in attempts at restoration.[26] For that group of defendants, the Constitution requires that prosecutors justify involuntary medication and obtain a court order permitting its administration.[27]

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[22] ZAPF, *supra* note 17, at 4–5 (describing protocols for competency restoration).

[23] W. Neil Gowensmith et al., *Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration As a Promising Approach to Modern Challenges*, 22 PSYCHOL. PUB. POL'Y & L. 293, 294 (2016).

[24] Two recent studies confirm the widespread use of detention in order to restore competency, regardless of individual characteristics of the defendants. A 2014 survey of state mental health program directors reports that the majority of states conduct restoration in state hospitals, although some community-based restoration was reported. *See* W. LAWRENCE FINCH, FORENSIC MENTAL HEALTH SERVICES IN THE UNITED STATES, NAT'L ASSOC. STATE MENTAL HEALTH PROG. DIRECTORS 3, 9, 12 (2014), https://www.nasmhpd.org/sites/default/files/Assessment%203%20-%20Updated%20Forensic%20Mental%20Health%20Services.pdf. In 2016, a review and survey of state community-based restoration practices confirmed that a small number of states provide outpatient restoration practices, and, even in those states, community-based restoration was provided up to 50 defendants a year in a jurisdiction, whereas at least 10,000 defendants nationwide are found not competent to stand trial. *See* Gowensmith et al., *supra* note 23, at 293.

[25] Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1587 (2000).

[26] Sell v. United States, 539 U.S. 166 (2003).

[27] *Id.* at 180–82 (setting forth the test, the showing upon which the government may

In theory, restoration to competency need not subject defendants to years in detention. Studies on competency restoration indicate that restoration can be completed in the majority of cases in less than six months, and that the majority of defendants who undergo restoration can resume criminal proceedings.[28] In practice, a number of factors result in far longer periods of detention. Competency restoration usually occurs at a psychiatric facility, and, due to overcrowding, defendants spend lengthy periods in jail awaiting transfer for treatment.[29] Once restored, some defendants decompensate after returning to the stressful environment of a local jail, only to be sent for additional restoration, potentially leading to a competency/restoration turnstile.[30] As a result, in many cases, defendants found not competent to stand trial can face a longer period of detention than would result from a trial and sentencing after conviction.[31] For example, in misdemeanor matters, the competency process can take so long that those defendants found not competent and subsequently restored never undergo a trial because they already have served the maximum potential sentence permissible for the charges against them.[32] Even for some felony defendants, individuals who undergo competency proceedings spend more time in detention than their counterparts who do not suffer from a mental illness or disability.[33] Therein lies the criminal defense attorney's dilemma. Defense attorneys endeavor to limit the time their clients spend in detention, but by raising competency concerns, in many cases, their

obtain a court order to medicate a defendant against her will in order to restore her to competency).

[28] Gowensmith et al., *supra* note 23 (compiling results of studies).

[29] *Id.* at 294 (claiming that many states cannot comply with the holding of *Jackson v. Indiana* due to long periods of commitment after a finding of incompetence).

[30] *See, e.g.*, Ben Hattem, *How New York's Mentally Ill Get Lost in Courts, Jails, and Hospitals*, ALJAZEERA AMERICA (July 27, 2015), http://america.aljazeera.com/articles/2015/7/27/ny-mentally-ill-get-lost-in-the-justice-system.html ("Delays plague New York City's system for evaluating, treating and trying felony defendants found incompetent to stand trial due to mental illness. Because of these delays, people who have attained competency in the state's mental hospitals frequently decompensate while waiting to appear in court, bouncing back and forth between psychiatric facilities and Rikers [Island] sometimes for years without trial.").

[31] FINCH, *supra* note 24, at 9, 12; King, *supra* note 16, at 264 (commenting on how declaring doubt as to a client's competency can lead to detention and potentially indefinite detention, even in cases involving minor offenses).

[32] FINCH, *supra* note 24, at 11.

[33] *Id.* at 9, 12.

clients are made worse off.[34]

B. Illustrations of the Problem

Not every case raising competency concerns will expose a defendant to prolonged detention that exceeds her likely sentence. Those cases where the likely sentence involves a minimal period of detention, as well as those where the client is released on bail, pose defense attorneys with the greatest dilemma. This is particularly true in jurisdictions where, like the federal system, a finding of incompetence will lead to mandatory detention of the defendant.[35] But even in felony cases involving an expectation of a moderate custodial sentence, defense attorneys face concerns about how long detention for competency restoration may last. A few examples illustrate the issue.

An individual charged with a minor offense is the most likely to have the opportunity to avoid detention upon conviction, and a finding of incompetency would undercut that possibility. Imagine a person suffering from a severe mental illness who shows up at a Social Security office on the wrong day for her appointment. She gets frustrated, asserting that she is there on the correct day and refuses to leave when instructed to do so. After numerous exchanges with federal security officers, she begins to yell and is arrested and charged for trespassing and disturbing the peace.[36] The statutory maximum for these offenses is less than a year in jail. Many courts would not impose a custodial sentence at all under these facts. But, if this defendant's attorney raises competency concerns, the defendant could be detained for a competency evaluation. If found not competent, the federal competency statute

[34] Of course, this dilemma does not arise in every single criminal prosecution. In the most serious of cases, even a years-long detention pending competency restoration is unlikely to extend past the likely sentence for the criminal charge. Murder, for example, carries such lengthy sentence exposure that a defense attorney would not be concerned that raising competency concerns could subject her client to a lengthier detention than being convicted. Generally speaking, the less serious the charge, the more likely the dilemma will arise.

[35] *See* 18 U.S.C. § 4241 (2012) (mandating that individuals found not competent be remanded to the custody of the Attorney General for restoration); Gowensmith et al., *supra* note 23, at 294 (surveying state jurisdictions and finding that the majority of states do not provide restoration services outside of detention).

[36] The Assimilative Crimes Act, 18 U.S.C. § 13 (2012), renders state criminal offenses subject to federal prosecution when they occur on federal land. Intuitively, since the number of federal misdemeanors is small relative to the number of federal felonies, many misdemeanors that are prosecuted by the federal government are state offenses that occur on federal property.

would *require* that any period of restoration be carried out in detention.[37] Yet any period of detention is, in the defense attorney's eyes, a detriment to the client. In these circumstances, defense counsel is placed in an untenable position of voicing competency concerns, although detention runs counter to her client's best interest.

Even in cases involving felony charges, defense counsel can face the same dilemma. In the federal judicial system, any theft of government benefits totaling over $1,000 is a felony. Imagine a defendant who suffers from auditory hallucinations and delusions, who is charged with theft of veterans' benefits totaling $1,500 arising from her mental illness, and who is released on bond. A case like this would result in a recommended sentence exposure of 6-12 months, provided she has no criminal history.[38] A finding of incompetence would result in the revocation of bail and in her detention. What is more, while an initial period of competency restoration under the federal competency statute lasts four months, the court may extend that period if there is a likelihood that the defendant can be restored.[39] Raising competency concerns therefore creates the risk of confinement exceeding any sentence within the recommended range.

While most salient in jurisdictions where detention for competency restoration is mandatory, the problem also exists in states that permit outpatient restoration. California is one example. In Los Angeles, the number of misdemeanant defendants found not competent has skyrocketed in the past few years.[40] Defendants are therefore detained in jails to receive restoration services, whereas they otherwise would face noncustodial sentences.[41] In fact, a recent survey and study of state practices found that most states only conduct competency

[37] 18 U.S.C. § 4241 (2012); United States v. Shawar, 865 F.2d 856 (7th Cir. 1989) (discussing mandatory nature of competency restoration detention in the federal competency statute).

[38] The recommended sentence exposure here is derived by calculating the advisory recommended sentence from the federal sentencing guidelines issued by the United States Sentencing Commission. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1; Chapter Five (U.S. SENTENCING COMM'N 2016).

[39] 18 U.S.C. § 4241 (2012).

[40] Between 2010 and 2015, the county saw a 217% increase in the number of misdemeanant defendants found not competent to stand trial. Mitchell Katz, EXAMINATION OF INCREASE IN MENTAL COMPETENCY CASES, LOS ANGELES COUNTY HEALTH AGENCY 2 (Sept. 19, 2016), http://file.lacounty.gov/SDSInter/bos/supdocs/102162.pdf .

[41] Restoration services for misdemeanant defendants in California are carried out in jails or on an outpatient basis. *Id.* at 4.

restoration on an inpatient basis.[42] These practices are therefore not unique to the federal jurisdiction but rather generally illustrate how defendants found incompetent are treated across the country.

C. Ethical Framework for Competency Proceedings

For decades, scholars have recognized that raising competency concerns can expose some defendants to a longer period of detention than would otherwise result. They have debated how to prioritize a set of ethical duties implicated in the representation of individuals with severe mental illness, hoping to resolve, within an ethical framework, the dilemma illustrated in this Article. No workable solution has emerged from this construct.

This Part first describes the ethical obligations defense attorneys encounter when representing individuals with a serious mental illness, as well as the debate in legal ethics scholarship surrounding these ethical duties. By illustrating the shortcomings of this debate, the Part concludes by arguing that the answer to the defense attorney's dilemma will not be found within an ethical framework, and we should instead analyze the problem as a constitutional one.

A defense attorney's ethical obligations stem from states' rules of professional conduct, which are largely modeled on the Model Rules of the American Bar Association (ABA). A defense attorney must act diligently, which encompasses a duty to act loyally to the client, as well as to act zealously on behalf of the client.[43] Zealous advocacy has, in fact, been famously described as the attorney's "first and only duty."[44] She also owes her client the duty of confidentiality, which mandates keeping confidential those matters "relating to the representation of the

[42] Gowensmith et al., *supra* note 23, at 294. As Gowensmith notes, although much attention has been paid to the evaluation process for determining whether a defendant is competent to stand trial, competency restoration is in need of focus and research. *Id.* at 294–95. For this reason, there is little data available on how long defendants are being detained pending competency restoration or on the prevalence of findings of incompetence among low-level felony cases, which would help identify and target reforms appropriately.

[43] MODEL RULES OF PROF'L CONDUCT r. 1.3, cmt. (AM. BAR ASS'N 2016) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[44] King, *supra* note 16, at 221 (quoting Lord Henry Brougham's statement in Queen Caroline's case in 1820). King describes the duty to act zealously as "especially pronounced in the criminal defense context, where the stakes are such that the lawyer for the accused must adopt her client's cause as her own." *Id.* at 222.

client," absent a few exceptions.[45] Attorneys, including those practicing criminal defense, also have a duty of candor to the court, which requires attorneys to be truthful with the court[46] and to maintain the integrity of the judicial system.[47] For those representing individuals with mental illnesses or disabilities, the Model Rules also require attorneys to maintain as close to a normal attorney-client relationship as possible.[48] Although this rule recognizes that a mental illness or disability may affect a client's capacity to make decisions about critical aspects of his case, it has been criticized as providing insufficient guidance about how to represent clients with significant mental illness.[49]

While the ABA promulgated its Model Rules of Professional Conduct in the 1970s, it provided additional guidance to criminal justice actors in the next decade through a set of Criminal Justice Standards. These Mental Health Standards, first adopted in 1984 and revised in 2016, elaborate on how the Model Rules apply to the representation of individuals whose competency is at issue. The Mental Health Standards ask defense counsel to raise competency concerns to the court.[50] The stated purposes of this rule are to maintain the integrity of the judicial process and the attorney's duty of candor to the court, as well as to safeguard the attorney's client from being subjected to trial when he is not competent.[51]

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[45] MODEL RULES OF PROF'L CONDUCT r. 1.6.

[46] *Id.* r. 3.3.

[47] *Id.* r. 3.3 cmt. ("This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.").

[48] *Id.* r. 1.14.

[49] King, *supra* note 16, at 233–34 ("The Model Rules of Professional Conduct are not helpful in guiding a criminal defense lawyer representing a client with mental impairment."); Slobogin & Mashburn, *supra* note 25, at 1612 (critiquing the lack of guidance in the Model Rules to attorneys representing individuals with mental disabilities); Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 75 (1988).

[50] ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.3(c) (AM. BAR ASS'N 2016) ("Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant's competence to proceed whenever counsel has a good faith doubt about the defendant's competence, even if the motion is over the defendant's objection."). Although the text of the rule suggests that it permits, rather than requires, defense counsel to raise competency concerns, commentary by the Chair of the Criminal Justice Section of the ABA confirms that the "may" language is not intended to diminish defense counsel's obligation to raise such concerns to the court. *See* Slobogin, *supra* note 18, at 21.

[51] Slobogin, *supra* note 18, at 21; Slobogin & Mashburn, *supra* note 25, at 1622.

Parallel to the development of ethical guidance by the ABA, courts have also weighed in on ethical implications of competency concerns in the criminal justice system. Some courts have held that the Sixth Amendment right to effective representation entails a duty to raise competency concerns.[52] This requirement stems from a view that attorneys must safeguard the integrity of the judicial process and ensure that their client is not subjected to trial when he lacks the ability to decide whether or not trial is in his or her best interest.[53] Courts view defense counsel as being in the best position to alert the court to any doubts as to competency, and, due to the "importance of the prohibition on trying those who cannot understand proceedings against them," the court imposes "a professional duty to do so when appropriate" on defense attorneys.[54]

The ABA has recognized the ethical quandary that defense attorneys face when representing individuals who may not be competent to stand trial. The comments accompanying the 1984 Mental Health Standards acknowledged that the ethical obligation to raise competency concerns to the court may put defense attorneys in a difficult position of having to perform an act that is not in the best interest of their client.[55] Ultimately, however, the Mental Health Standards resolve the tension by holding the attorney's duty to the court as paramount over her obligations to the client.[56]

Scholars have noted how the set of ethical duties defense attorneys face can conflict, and much of the debate in this area has

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[52] Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1114 (2016).

[53] United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998); Morris, *supra* note 12, at 201 (describing medieval English prohibition on succumbing mentally disordered defendants to forcible pleading of criminal charges).

[54] *Boigegrain*, 155 F.3d at 1188. Courts have also held that counsel has a constitutional obligation, pursuant to the duty to provide effective assistance of counsel, to investigate her client's competency to stand trial, and "cannot blindly" follow a demand to not challenge competency. *See, e.g.*, Stanley v. Cullen, 633 F.3d 852, 862 (9th Cir. 2011) (holding that an attorney acts deficiently when she has sufficient indicia to doubt client's competency but fails to move for a competency hearing); Robidoux v. O'Brien, 643 F.3d 334, 338–39 (1st Cir. 2011); Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir. 2001); Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996); Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994); Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990) (counsel ineffective for failing to have defendant's competence evaluated when he was aware defendant had been in a psychiatric hospital).

[55] Uphoff, *supra* note 49, at 89.

[56] *Id.*

revolved around how these duties should interact with each other. Some commentators argue that the duty of loyalty should be prioritized, while others justify the current landscape that gives primacy to the duty of candor.[57] Through this ethical debate scholars have offered resolutions to the defense attorney's dilemma. None relieve the problem, however. After illustrating the shortcomings of the ethical debate, this Part argues that the solution to the dilemma is not found within an ethical framework.

Two of the most outspoken scholars advocating for allowing defense counsel discretion to not raise competency concerns in certain cases are Rodney Uphoff and John King. Uphoff has argued that an ethical obligation to inform the court of doubts as to a client's competency directly frustrates the ethical obligation to be a zealous advocate for the client.[58] He argues that, short of a belief that a client is in fact incompetent, defense attorneys should be permitted to incorporate tactical considerations in deciding whether or not to bring doubts about competency to the court's attention.[59]

More recently, John King has argued against a strictly construed obligation to raise competency concerns.[60] King disputes whether a defense attorney should have any responsibility for maintaining the integrity of the judicial system, by seeking "the truth," or ensuring reliable outcomes from trial.[61] Indeed, he argues, the stated purpose of prohibiting criminal defendants who are not competent from being subjected to trial—the integrity of judicial proceedings—is not fulfilled by the prohibition, since it undermines the attorney-client relationship

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[57] *Id*. at 72 ("For many defendants, particularly those charged with minor offenses, raising competency subjects the defendant to a far greater deprivation of his liberty than if he were convicted of the crime with which he is charged."). Bruce J. Winick also noted that competency proceedings easily resulted in detention and led to defendants being detained for a longer period of time than if they had been permitted to proceed with their criminal cases. Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 581 (1995). Winick suggests an approach to reform the process of determining and waiving competency by the defendant. *Id.*

[58] Uphoff, *supra* note 49.

[59] Uphoff would permit defense attorneys to refrain from raising competency to the court in any case where the defendant does not wish to raise it and the attorney agrees that it is not advantageous to raise it. *Id.* at 97.

[60] King, *supra* note 16, at 234–35 (arguing that imposing obligation on defense attorneys to raise competency doubts is not justified and undermines the attorney-client relationship).

[61] *Id.* at 223.

that is the bedrock of that system.[62] He asserts, therefore, that the integrity of judicial proceedings is best served by protecting defense counsel's duty to act zealously on behalf of her client.[63]

Recognizing that raising competency exposes clients to prolonged detention, King, like Uphoff, advocates for reform to the ethical obligation imposed on defense attorneys.[64] King proposes an ethical obligation that includes consideration of the consequences of competency proceedings and provides greater discretion to defense attorneys.[65]

For a few reasons, the proposal advocated for by this set of scholars fails to relieve the defense attorney's dilemma. Uphoff acknowledges that the ethical conflict is not simply between a duty of loyalty to the client, on one hand and a duty of candor to the court on the other. Rather, within the duty of loyalty to the client, there are internally conflicting ethical obligations: the criminal defense lawyer must limit exposing her client to detention and must also not permit her incompetent client be tried. He still advocates for defense attorneys to voice concerns the more significant the disability or illness.[66] Under Uphoff's proposal, the lawyer representing a clearly incompetent client who faces a short sentence is still haunted by her ethical obligation to raise competency to the court.[67]

King's proposal has two limitations. First, King proposes that

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[62] *Id.* at 234–35 ("Such an approach is not justified by history, necessity, or logic and undermines the integrity of the attorney-client relationship and, therefore, the integrity of the criminal justice system.").

[63] *Id.* at 214 ("[T]he historic role of zeal as a guiding principle in the ethics of criminal defense requires that the criminal defense lawyer be endowed with significant discretion in determining first, whether to raise issues of competency and second, in how to engage in surrogate decision-making for her mentally impaired client.").

[64] *Id.* at 239 ("The potentially disastrous consequences that flow from a finding of incompetency to stand trial—or, sometimes, from a defendant's mere involvement in the evaluation process—must be taken into account when the defense attorney is weighing which course of action to take.").

[65] *Id.* at 260–61 (proposing that defense attorneys move for evaluation of a defendant's competence when the attorney has a good faith doubt as to that client's competency unless it would be contrary to the client's interest).

[66] Uphoff, *supra* note 49, at 105 ("It follows, then, that the further a defendant is from the rational decision-maker end of the continuum, the more willing counsel should be to override a defendant's disastrous choice and raise competency.").

[67] Further, although Uphoff posits that in a few rare instances, a defense attorney representing an incompetent client may be able to identify an alternative course of action, *see* Uphoff, *supra* note 49, at 108, he does not offer what potential courses of actions could serve as alternatives to competency proceedings.

attorneys refrain from raising competency concerns when it is not in the best interest of the client, without resolving how a defense attorney is to assess the client's interest in exercising her constitutional right to assert her innocence and go to trial. King's proposal supplants a client's reasoned, counseled decision in favor of the attorney's assessment of her best interests, and thereby sidesteps the conflict that inheres within the duty of loyalty. Second, King's proposal runs counter to the holdings of a chorus of courts that impose an obligation on defense attorneys to raise competency concerns without regard to the risk of exposing clients to lengthier detention.[68] Whatever its merits, therefore, it is not practicable to implement.

Commentators such as Chris Slobogin and Amy Mashburn advocate the contrary position. They make a normative claim that the duty of candor to the court serves the interests *of the client*, and thus the value of not subjecting individuals who are severely mentally ill or disabled to a criminal trial outweighs, and should override, competing concerns.[69] They recognize that adverse consequences to the defendant may flow from raising the issue of competency to the court but assert that the value of client autonomy requires that defense attorneys inform the court despite the risk to the client.[70]

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[68] In addition to the courts cited by King, *supra* note 16, several others impose a duty on defense attorneys to raise competency concerns. *See, e.g.*, Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir. 2001); United States v. Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998); Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994); Stanley v. Cullen, 633 F.3d 852, 862 (9th Cir. 2011) (holding that an attorney holding that an attorney acts deficiently when she has sufficient indicia to doubt client's competency but fails to move for a competency hearing); Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990) (counsel ineffective for failing to have defendant's competence evaluated when he was aware defendant had been in a psychiatric hospital). These courts impose an obligation to raise competency concerns within the framework of ineffective assistance under the Sixth Amendment, not under a professional rule of responsibility. However, the courts' delineation of the contours of deficient representation significantly influences how attorneys view their ethical obligations. *See* Manuel Berrélez, Jamal Greene, & Bryan Leach, Note, *Disappearing Dilemmas: Judicial Construction of Ethical Choice As Strategic Behavior in the Criminal Defense Context*, 23 YALE L. & POL'Y REV. 225, 227 (2005) ("By determining the proper scope of this constitutional protection, courts heavily influence the extent to which lawyers engage in the kind of ethically-motivated decision-making that would come at the expense of the client's best interests.").

[69] Slobogin & Mashburn, *supra* note 25, at 1585 ("We believe that a preference for autonomy and a number of practice considerations dictate the more traditional response to the incompetent client.").

[70] *Id.* at 1585, 1622. According to these commentators, client autonomy is preserved

This approach has appeal, as it presents itself as a win-win for defendants, but it is based on a misperception of detention. To justify the argument that duty of candor outweighs other concerns, Slobogin and Mashburn assert that detention for competency restoration should not be lengthy in relation to criminal proceedings absent competency concerns, based on the availability of outpatient competency services in 2000.[71] Seventeen years later, however, a comprehensive survey of outpatient restoration indicates that only a small number of jurisdictions offer outpatient restoration services and only serve approximately 50 defendants a year each.[72] Since between 10,000 and 18,000 defendants are found not competent a year nationwide,[73] an average of 50 per jurisdiction that conduct outpatient services is a tiny fraction. This factual misperception about the length of detention for competency restoration calls into question whether the duty of candor to the court actually serves the interests of the defendant.

Indeed, just last year, Slobogin recognized that defendants continue to be detained due to competency proceedings where they otherwise might be facing little or no time.[74] Slobogin and Mashburn's proposal benefits those defendants facing a lengthy time in prison if convicted, but for those facing less serious offenses or little custody time, their approach leaves the dilemma intact.

This Article proposes that no ethical debate will resolve the defense attorney's dilemma. Rather than trying to choose among competing ethical norms, the problem is better resolved by addressing the constitutional limitation of due process on the government's authority to detain. At the root of the problem is the assumption that detention is a necessary aspect of competency restoration. That assumption fails to hold up under inspection when analyzed through the rubric of constitutional justification for detention, as later parts of the Article address. And if detention for purposes of competency restoration instead was limited to situations where the length of detention for

by restoring an incompetent client to competency. Once restored, that client can participate meaningfully in the proceedings, thus effectuating the goal of client autonomy. The debate of how client autonomy is best served is outside the reach of this Article. However, implicit in this Article's argument that detention should not be mandatory for competency restoration is that the criminal justice system can serve autonomy-related goals without unduly restricting a defendant's liberty.

[71] *Id.* at 1623–24.

[72] Gowensmith et al., *supra* note 23, at 293.

[73] *Id.*

[74] Slobogin, *supra* note 18, at 21.

competency proceedings did not extend beyond what would likely result from the criminal process, the ethical problem would not need solution as it would not arise. By looking outside the ethical framework, the ethical dilemma can be dissolved.

II. HISTORY AND JURISPRUDENCE ON DETENTION OF PEOPLE WITH MENTAL ILLNESS

This Part discusses recent historical and doctrinal changes with detention of individuals with serious mental illnesses, both in and out of the competency context. By comparing the changes in and out of the competency system, Part II reveals why detention is so commonly used to restore competency and what the constitutional shortcomings of it are. It then argues that detention need not be the norm as a practical matter, and it cannot stand as a constitutional one.

During the past four decades, a de-institutionalization movement successfully challenged the mass use of detention of individuals with mental illness to medically treat them.[75] The movement confirmed that administering mental health care in the community was possible, effective, and beneficial for individuals with serious mental illnesses.[76] Around the country, state mental hospitals shut down, and vast numbers of individuals with mental illness returned to the community. This movement left the competency detention system untouched, however. Despite the potential for a parallel de-institutionalization movement for competency restoration services, we have yet to see it. Instead, an outdated competency system detains defendants automatically and, in some cases, unnecessarily.

The competency detention system is also stuck in a doctrinal haze. The sole Supreme Court case on competency-related detention, *Jackson v. Indiana*, dealt with indefinite detention of incompetent defendants, not whether the government should get to detain automatically in every case. *Jackson* was assumed to have resolved this question, and this assumption has persisted unexamined in the courts for decades. But case law from other systems of detention illustrates the

[75] Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 7 (2012).

[76] As Bagenstos describes, the de-institutionalization movement has been critiqued for being arguably tied to the rise of homelessness among individuals with mental illness. *Id.* However, that rise is not a result of de-institutionalization itself or the principles it relied on, but a consequence of inadequate funding by federal and state governments toward community health care. *See id.* at 12–13.

constitutional concerns with mandatory detention for competency restoration. Based on a discussion of those related systems of detention, this Article then argues that mandatory detention for competency restoration is unconstitutional.

A. The De-institutionalization Movement and Competency Detention

While there is a long history of detaining defendants who are found not competent to stand trial,[77] for purposes of this Article the relevant history begins in the 1970s. Throughout the 1970s and 80s, the use of detention for the provision of medical care to individuals with significant disabilities, including those with significant mental illnesses, came under intense political and social criticism.[78] This period, commonly called de-institutionalization, was successful in challenging the notion that individuals who suffered from significant disabilities, including mental illnesses, should be provided medical care in an institutionalized setting.[79] The critique of detention for provision of medical care to individuals with severe disabilities was threefold: it was expensive, the conditions were poor, and those people detained fared better when integrated into the community.[80] Over the span of a few decades, de-institutionalization resulted in dramatic decreases in the population of individuals held at state mental hospitals and facilities for people with developmental and psychiatric disabilities across the country.[81] This movement, which occurred both in courts as well as in legislatures, challenged the limitations of the government to civilly commit individuals and argued that individuals with disabilities had a

[77] George H. Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684, 687 (1943); Note, *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 YALE L.J. 1070, 1071 n.9 (1955) (describing "routine criminal procedure to incarcerate incompetent prisoner until he became triable"). *See also* Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899) (citing English common law and early cases in the states as excusing the "absolutely mad" from answering charges and "remitt[ing]" them "to prison until that incapacity be removed").

[78] Bagenstos, *supra* note 75.

[79] *Id.*

[80] Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 703 (2001).

[81] Bagenstos, *supra* note 75, at 9. For example, the population of individuals at public psychiatric hospitals in the United States rose from 560,000 in 1955 to fewer than 50,000 in 2003.

right to appropriate treatment, which institutionalization was failing to provide.[82]

The de-institutionalization movement challenges the assumption that detention is necessary per se in order to restore competency. The ability to close or decrease the population size of many facilities was in part based on advances in medical care.[83] During the movement, advances in psychotropic medication created opportunities to administer medical care, including mental health care, to individuals with significant mental illness in the community.[84] As a result, the movement revealed that providing mental health care in the community was not just desirable but also possible.

Given how widespread it was, one might expect that the movement to provide medical treatment in the community would translate into a de-institutionalization in the competency system, but that has not been the case. When the Supreme Court decided *Jackson v. Indiana*, in which it struck down indefinite detention for individuals found not competent to stand trial and the government could not successfully restore them,[85] there appeared to be great promise of reform. Indeed, as a result of the ruling in *Jackson*, jurisdictions around the country began revising their respective statutory schemes in order to comply with its mandate that indefinite detention of a defendant who was incompetent to stand trial was prohibited.[86] There are two shortcomings to the promise of *Jackson*. First, compliance with *Jackson*'s mandate is debatable, both as a legal matter and as a practical one.[87] Second, and importantly, *Jackson* prohibits only indefinite

[82] *Id.* at 22–29. Interestingly, the right to appropriate treatment does not inherently lead to de-institutionalization but focuses on getting adequate treatment while detained. As a result, the right to appropriate treatment does not necessarily affect the rate of detention of individuals with mental health treatment needs.

[83] Smith & Calandrillo, *supra* note 80, at 707.

[84] *Id.* at 707–08.

[85] Jackson v. Indiana, 406 U.S. 715 (1972).

[86] Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1 (1993).

[87] *Id.* According to Morris and Meloy, who surveyed legislative responses to *Jackson* and states' practices of using detention for competency restoration, detention continued to be widely used in competency restoration for lengthy periods of time, and many states failed to fully implement *Jackson*'s mandate. *See also* FINCH, *supra* note 24, at 13 ("Several studies over the years have suggested that courts routinely ignore *Jackson* requirements and keep []defendants [who are found incompetent to stand trial] hospitalized long after it is apparent that their prospects for restoration are dim . . . .").

detention; it did not speak clearly about the use of detention at the time a person is found not competent. As a result, there was no impetus for jurisdictions to enact or amend their competency statutes to limit the use of detention at the initial competency determination.

Historically, the de-institutionalization movement compounded the missed opportunities of reform in the competency context. The de-institutionalization movement suffered from funding resistance by federal and state governments, directly harming individuals with severe mental illness.[88] As psychiatric facilities closed, inadequate resources necessary to succeed in the community resulted in many of those released becoming homeless.[89] Unsurprisingly, many of these individuals cycled into the criminal justice system.[90] The failure to reform the competency system after *Jackson* meant that those with serious mental illness entering the criminal justice system would face prolonged detention as a result of competency proceedings. Instead of having true de-institutionalization, the result was one of trans-institutionalization[91] of individuals with serious mental illness.

Today, more than 10 jurisdictions, including the federal criminal system, have statutes that mandate detention for a defendant who is found not competent to stand trial.[92] An additional nine states permit detention without mandating it but do not have any specified criteria for requiring or disallowing detention.[93] The problem is not just legal, however. Although many states restrict the use of detention for competency purposes on paper, they do not do so in practice. In

[88] Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 319 (2009); Bagenstos, *supra* note 75, at 11–13.

[89] Bagenstos, *supra* note 75, at 9–10.

[90] Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87 (2011) ("[A]t the close of the twentieth century, there was a high level of mentally ill offenders in prisons and jails in the United States—283,800 in 1998—representing 16% of jail and state prison inmates."); Davoli, *supra* note 86, at 319.

[91] FINCH, *supra* note 24, at 5.

[92] *See* 18 U.S.C. § 4241 (2012); Neb. Rev. Stat. § 29-1823(1); 40.1 R.I. Gen. Laws § 40.1-5.3-3(h)(2); S.C. Code Ann. § 44-23-430(3); S.D. Codified Laws § 23A-10A-4; Haw. Rev. Stat. § 704-406(1); Idaho Code § 18-212(2); Ind. Code § 35-36-3-1(b); Kan. Stat. Ann. § 22-3303(1); Mont. Code Ann. § 46-14-221(2)(a); Utah Code Ann. § 77-15-6(1); Miss. Unif. Circ. & Cty. R. 9.06.

[93] *See* Colo. Rev. Stat. § 16-8.5-111(2)(b); Del. Code Ann. tit. 11, § 404(a); 725 Ill. Comp. Stat. 5/104-17; Me. Stat. tit. 15, § 101-D(5); 50 Pa. Cons. Stat. § 7402(b); Okla. Stat. tit. 22, § 1175.6a(A); 2017 Ark. Laws Act 472 (S.B. 42); Wyo. Stat. Ann. § 7-11-303(g)(i)(D); N.D. Cent. Code § 12.1-04-08.

responding to a survey conducted by the National Association of State Mental Health Program Directors in 2014, 34 of 39 responding states reported that they ordered defendants committed for competency restoration without any additional criteria beyond a finding of incompetence.[94] While a few states reported that they considered dangerousness in theory, one of those states, Maryland, reported that most defendants found not competent were ordered committed without strict application of the dangerousness criteria.[95]

Although the use of detention for competency restoration remains widespread, the use of outpatient services for competency proceedings outside of the restoration context is growing. About 40 years ago, almost all competency evaluations occurred in inpatient facilities.[96] Now, however, outpatient evaluations are common.[97] Although competency evaluations have moved away from being conducted in a detention setting, the process for administering competency restoration services has been "stagnant."[98] Even in jurisdictions where the applicable statute contemplates outpatient restoration, they actually operate inpatient services.[99] As of 2014, only 16 states report conducting competency restoration on an outpatient basis.[100] Just last year, a survey found that the vast majority of states did not provide any outpatient restoration services.[101] Because outpatient restoration services are relatively new, these programs serve a small number of defendants found not competent to stand trial, usually up to 50 defendants a year, a tiny portion of the population found not competent to stand trial.[102] Nevertheless, this shows that although

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[94] FINCH, *supra* note 24, at 12. Since the survey conducted by Finch, another comprehensive survey conducted in 2016 likewise found that the majority of states still detain defendants found not competent to stand trial in order to undergo restoration procedures. *See* Gowensmith et al., *supra* note 23, at 295.

[95] FINCH, *supra* note 24, at 12.

[96] *Id.* at 9.

[97] *Id.* For example, the state of Washington conducted approximately 11% of its competency evaluations in an inpatient basis is 2013, a significant decrease from 43% in 2001. Gowensmith et al., *supra* note 23, at 294.

[98] Gowensmith et al., *supra* note 23, at 294. ("In contrast, less attention has been given to competency restoration—the treatment and service array required by persons adjudicated as [incompetent to stand trial.] As a result, the historical trajectory of competency restoration has been comparatively stagnant.").

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 297.

detention remaining the norm for competency restoration, it is possible to provide competency restoration services in the community.[103]

B. The Mistaken Interpretation of *Jackson v. Indiana*

For decades, attorneys and scholars alike have treated *Jackson v. Indiana* as announcing the constitutional requirements for the government to detain defendants pending competency restoration.[104] That assumption rests on a mistaken interpretation of the case, unexamined until now. In *Jackson*, the Supreme Court held that the Due Process and Equal Protection Clauses both prohibited indefinite detention of a criminal defendant for purposes of restoring competency.[105] Although the decision unambiguously forbids indefinite detention, it does not resolve what the Due Process or Equal Protection Clauses require before the government detains an incompetent defendant. Nor does it sanction mandatory detention for competency restoration. The confusion surrounding this case has left defendants found incompetent with little recourse to challenge their detention.

The Supreme Court's holding turned on a comparison of Indiana's competency and civil commitment schemes. At the time, Indiana civilly committed individuals under two different schemes: one when the state sought to commit an individual found to be "feeble-minded" and the other for when an individual was determined "insane."[106] In order to detain, the state had to show that the person could not take care of herself or that detention was in the interest of the person or community.[107] The presence of a mental illness or disability was not enough to keep an individual detained. Doubting that the government could justify civil commitment for the defendant in the case before it, the Supreme Court held that the unequal treatment of individuals with mental illness in competency as compared to those detained pursuant to civil commitment schemes violated the Equal

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[103] ZAPF, *supra* note 17, at 4 ("Although outpatient treatment is possible, most treatment continues to take place in residential forensic facilities.").

[104] For the discussion of the scholarly treatment on competency detention, *see supra* Part I.C,. Although it is possible that litigators are bringing claims challenging the legality of mandatory detention, the absence of case law in the area indicates that attorneys are likewise assuming that mandatory detention for competency restoration is constitutional under *Jackson*. 406 U.S. 715 (1972).

[105] *Id*. at 730–31.

[106] *Id.*

[107] *Id.* at 721–22.

Protection Clause.[108] The Court then also held that due process forbids indefinite detention based on the lack of mental competency alone.[109]

One theory is that *Jackson* upheld *sub silentio* mandatory detention for competency restoration.[110] There are two reasons to doubt this conclusion. First, the Court did not engage in a due process analysis, substantive or procedural, of the initial decision to commit for restoration of competency. Thus, the Court did not discuss the government interest in detention, nor did it analyze whether detention bore a relation to a government interest. It also did not discuss whether the procedures provided for in the Indiana statute gave adequate notice and opportunity to be heard on the issue of commitment. [111] Second, the factual circumstances of the case did not necessitate resolution of that question. The defendant had been detained for multiple years and was not challenging the initial authority to detain. The defendant was mute, deaf, and had extremely limited cognitive functioning, and the government had detained him for three years as it tried unsuccessfully to restore his competency. Under the statute at issue, his detention would, absent intervention, last indefinitely.[112] A more likely explanation for the Court's silence is that the Court simply assumed that mandatory detention was permissible.

There is also a historical lens through which to view and locate

[108] *Id.* at 727–29 ("The evidence available concerning Jackson's past employment and home care strongly suggests that under these standards he might be eligible for release at almost any time, even if he did not improve.").

[109] The Court reasoned that the detention statute, which mandated detention for restoration of competency, would raise significant constitutional concerns if it permitted indefinite detention based on solely this factor. *Id.* at 731–32.

[110] While the Court was silent on what the Constitution requires before the government detains a defendant to restore her competency, the Court did set a maximum length of detention permitted in order to restore competency. *Id.* at 733. ("Without a finding of dangerousness, one committed [under the federal competency framework] 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.").

[111] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

[112] Jackson v. Indiana, 406 U.S. 715, 719 (1972). Although the statute at issue, and therefore the opinion, used the term "sanity," as opposed to the term "competency," it did not define "sanity." The procedural history indicates that the competency hearing inquiry revolved around the ability of the defendant to understand the charges against him and participate in his defense. The Supreme Court therefore derived that the term "sanity" as used in the statute was meant to be synonymous with competency to stand trial. *Id.* at 720 n.2. This is noteworthy because the concept of "insanity" in modern criminal justice has a distinct definition from competency and serves, in some states, as a defense to criminal liability but not a bar to the criminal adjudicative process.

the limited holding of *Jackson*. The case was announced in 1972, when the de-institutionalization movement was in its beginning stages. At the time, most medical treatment of serious mental illnesses occurred in inpatient psychiatric facilities, not in a community setting. It is doubtful that any jurisdiction conceived of providing competency restoration services in the community when the Court was considering *Jackson*. Without that, a court would not have known that there was or would be a practical alternative to government detention to evaluate or restore competency.[113]

The legislative aftermath of *Jackson* suggests at least some confusion as to the constitutionality of mandatory detention.[114] Some jurisdictions, like the federal one, mandate detention whenever a defendant is found not competent to stand trial.[115] Others permit detention but do not specify any criteria by which to guide courts in deciding whether to detain or permit outpatient restoration.[116] Some states do limit the use of detention by requiring that the government show the defendant to be dangerous or requiring that the charge is serious enough.[117] The doctrinal confusion is evident in the patchwork collection of statutes around the country.[118]

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[113] For this reason, even *Jackson*'s holding is an implicit sanctioning of mandatory detention for purposes of evaluating and restoring competency, there is reason to revisit the issue. The one scholar who has argued that the federal statute governing commitment for competency restoration was justified is George Dession. In 1943, decades before *Jackson*, he asserted that this detention was justified because the government arguably has a special interest in the "care and protection" of this group, analogous to the *parens patriae* justification for detention. Dession, *supra* note 77, at 692. This justification is based on a view that competency restoration is "care" or "protection" of defendants found not competent to stand trial, a view that is worth revisiting. *Id.*

[114] The legislative responses to the Court's mandate illustrate this confusion. *See* Morris & Meloy, *supra* note 86.

[115] *See* Bagenstos, *supra* note 75.

[116] *See id.*

[117] *See, e.g.*, Ala. Code § 15-16-21 (limiting detention for competency restoration to felony charges); Alaska Stat. Ann. §§ 12.47.110(a)-(b) (same); Ga. Code Ann. § 17-7-130(e)(2) (same); N.M. Stat. Ann. § 31-9-1.2 (requiring a showing that the defendant is dangerous before permitting detention); N.J. Stat. Ann. § 2C:4-6 (same); Mass. Gen. Laws Ann. ch. 123, § 8 (same).

[118] Similarly, *Jackson*'s holding lacks guidance about how indefinite detention should be measured. The Court held that the length of detention for purposes of restoring competency should not exceed the reasonable period of time necessary to determine whether there exists a substantial probability that the defendant will be restored within the foreseeable future. *Jackson*, 406 U.S. at 738. But the court gave no guidance on

C. The Unconstitutionality of Mandatory Competency Detention

The uncertainty left behind by *Jackson* can be resolved. Just as the Court reasoned in *Jackson* through a comparison of different systems of detention, a comparison of the competency system to other similar detention systems illustrates the constitutional concerns with detention during competency restoration. Without a doubt, the nature of competency detention is unique. But it bears semblance to other familiar forms of detention, namely pretrial detention, federal civil commitment, and commitment after a verdict of not guilty by reason of insanity. This Part analyzes how due process limits the government's authority to detain in those systems and how those limitations should translate to the competency context, considering the similarities and differences in systems of detention.

The discussion of these various systems of detention brings to light two principles which this Article uses to argue that mandatory detention for competency restoration is unconstitutional. First, mental illness, on its own, cannot serve as the sole basis for the government's authority to detain consistent with substantive due process. Additionally, providing no review as to the necessity of detention is contrary to procedural due process guarantees. After examining the unique characteristics of competency detention, this Part concludes that due process is not satisfied by a system that mandates detention when a defendant is not competent to stand trial.

1. Pretrial Detention

Competency detention bears important similarities to the pretrial detention system and a comparison of the two helps to illustrate some of the due process concerns with detention in the competency system. For both pretrial and competency detention, the government seeks to maintain its ability to pursue prosecution and protect the community. In the pretrial detention context, the government maintains its ability to pursue prosecution by assuring that the defendant appears in court. In the competency context, the government must seek restoration in order

what constitutes a reasonable period of time or, for that matter, the foreseeable future. As a result, state legislatures have varied widely in how they institute this mandate. The federal jurisdiction, for example, ties the maximum length of detention to the holding of the case. 18 U.S.C. § 4241 (2012). Other jurisdictions set it at the statutory maximum of the criminal charge, while others simply approximate a time period. *See* Morris & Meloy, *supra* note 86.

to try the defendant and potentially obtain a conviction.

Although the two systems bear such similarity, they contrast starkly in how the government currently justifies its' detention authority. To detain an individual charged with a crime, the government must show that, but for detention, there is too significant a risk that the defendant will either endanger the community or not show up for trial.[119] But the federal competency statute fails to require anything more than a finding of incompetence. A pretrial defendant who is released on bail because she is not dangerous and unlikely to flee would face mandatory detention if a court found her incompetent to stand trial.

The higher burden the government must bear to detain a defendant in its pretrial detention system stems from the Due Process Clause's liberty protections. Fifteen years after the Supreme Court announced *Jackson*, the court addressed due process and Eighth Amendment challenges to the federal bail statute, which imposes a presumption of detention for defendants charged with certain offenses, a less onerous restriction on liberty than mandatory detention. Specifically, the federal bail statute establishes a rebuttable presumption of detention for those charged with serious drug trafficking offenses, firearm offenses, and crimes of violence.[120] In *United States v. Salerno*, the Court upheld the statute, holding that it satisfied substantive due process where the justification for detention was limited to a set of serious, enumerated charged offenses[121] and the time limitation on the detention was protected by the Speedy Trial Act.[122] The Court also recognized prior case law providing that pretrial detention could be

[119] Specifically, the federal statute authorizes detention when the government demonstrates that no set of conditions will reasonably assure the presence of the defendant at court, 18 U.S.C. § 3142(e)(1), or where the government establishes by clear and convincing evidence that no set of conditions on release will reasonably assure the safety of others or of the community, 18 U.S.C. § 3142(e)(2) (2012). *See also* United States v. Salerno, 481 U.S. 739 (1987).

[120] 18 U.S.C. § 3142 (2012).

[121] 481 U.S. at 747 ("The [statute] carefully limits the circumstances under which detention may be sought to the most serious of crimes.").

[122] *Id.* at 747 ("The arrestee is entitled to a prompt detention hearing[,] and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."). The Speedy Trial Act requires the government to proceed to trial, subject to enumerated statutory exceptions, within 70 days of a defendant's arrest. 18 U.S.C. § 3161(c)(1) (2012). One of the enumerated statutory exceptions in the statute are continuances related to competency proceedings, including the period during which defendants are evaluated for competency and the period during which the government attempts to restore competency. 18 U.S.C. §§ 3161(h)(1)(a), (h)(4) (2012).

justified, consistent with substantive due process, where the government showed that detention was necessary in order to ensure the appearance of the defendant at trial.[123]

If pretrial defendants are entitled to release absent the government showing flight risk or danger and entitled to a presumption of release absent a serious criminal charge, what explains mandatory detention for all defendants who are found not competent to stand trial? The sole difference between the two groups is the presence of a serious mental illness or disability that renders the defendant incompetent. The question then is whether the lack of competency justifies mandatory detention in order to meet the government's objective in pursuing prosecution or protecting the community.

One possible explanation is that a defendant's lack of competency creates an irrefutable presumption of danger or flight risk. If lack of competency bears a reasonable relationship to either of those factors, that should arguably satisfy the burden the government normally bears for defendants it seeks to detain in pretrial detention. But no such reasonable relationship exists. The federal competency statute mandates detention even where an individualized determination has been made, under the relevant bond statute, that the defendant does not pose a significant danger or flight risk.[124] Defendants for whom courts have made an individualized determination that release is appropriate are subject to mandatory detention under the competency statute.

A second theory is that the government's interest in being able to prosecute a defendant justifies the intrusion into a defendant's liberty interest, regardless of whether the defendant poses a danger or is a flight risk. While the government's interest in pursuing prosecution is an important one, the theory that it justifies detention is based on a factual assumption that is incorrect—namely, that detention is necessary in order to carry out competency restoration. As the previous section discusses, competency restoration services can be carried out in the community.[125] Nor should the government be able to avoid

[123] *Salerno*, 481 U.S. at 749 (citing Bell v. Wolfish, 441 U.S. 520, 534 (1979)).

[124] Interestingly enough, in reciting the body of due process jurisprudence that has upheld preventative detention on danger, the Court in *Salerno* characterized *Jackson v. Indiana* as upholding the detention of "dangerous" individuals found not competent to stand trial. *Salerno*, 481 U.S. 739. However, nothing in *Jackson* limits detention to individuals determined to be dangerous and, in fact, mandates detention for all defendants who are found not competent to stand trial. *See* Part II.B, *supra*.

[125] *See* Part II.A, *supra*.

constitutional scrutiny by failing to fund community restoration services, and, indeed, that is not how courts analyze substantive due process claims in similar contexts.[126] For this reason, the governmental interest in pursuing prosecution does *not ipso facto* justify detention.

Finally, apart from demonstrating substantive due process concerns, a comparison to pretrial detention also illustrates related procedural due process deficiencies with the federal competency system. In upholding the federal bail statute, the Court in *Salerno* also relied on the procedures available to defendants, including the right to counsel and a full adversarial hearing, in challenging the necessity of detention.[127] Although the federal competency statute provides a set of procedural rights as part of the determination of whether a defendant is competent, it does not provide any procedural safeguards as to the appropriateness of detention for purposes of restoring competency if found not competent, such as the ability to challenge evidence that detention is appropriate for competency restoration.[128] Under a procedural due process framework, the risk of erroneous deprivation is highest for a defendant who poses no danger to the community or flight risk and for whom community restoration could be effective.[129] By requiring detention, however, the federal competency statute fails to provide meaningful review of the necessity of detention, contrary to procedural due process principles.[130]

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[126] For example, in the civil commitment context, courts do not analyze the limitation on the authority to detain based on the availability, or lack thereof, of community treatment services. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975). Similarly, a substantive due process analysis in the competency context should focus on the government interest—ability to prosecute—and its relationship to detention. Because the interest here, the ability to prosecute a defendant, could be served by providing community restoration services, detention is not necessary in this context.

[127] *Salerno*, 481 U.S. at 750–51. The Court also rejected a procedural due process challenge to the statute, concluding that the right to counsel, a full adversarial hearing, and other procedural protections rendered the statute permissible. *Id.* at 751–52; 18 U.S.C. § 3142.

[128] 18 U.S.C. § 4241 (2012).

[129] To this point, *Hamdi v. Rumsfeld*, pertaining the government's authority to detain enemy combatants, is illustrative. 542 U.S. 507 (2004). Although the government interest in that case was remarkably significant, the detainee's liberty interest in being free from detention required the government to provide the detainee the ability to challenge the government's evidence. *Id.* at 528–29 (holding that due process required the detainee to be able to challenge the government's evidence, but permitted hearsay evidence and a presumption of evidence in favor of the government).

[130] There are two other noteworthy principles arising out of *Salerno*. First, the Court explicitly acknowledged that prolonged detention could render the statute punitive in

2. Civil Commitment

The government's overlapping interests in and potential justifications for competency detention and civil commitment makes civil commitment an illustrative system to explore. Broadly speaking, civil commitment is the procedure by which the government seeks to detain an individual outside the criminal justice system.[131] In the federal system, civil commitment can come about through different ways. The government can seek to civilly commit someone whose sentence is expiring, someone whose case was dismissed due to a mental illness, or someone who the government could not restore to competency.[132] Individuals whom the government detains for competency restoration are all therefore potentially subject to civil commitment proceedings at the conclusion of their criminal cases. By looking at the intimate

relation to the stated goal. *Salerno*, 481 U.S. at 769. Having addressed only the constitutionality of indefinite detention for competency restoration, the Court has yet to decide at what point prolonged detention becomes punitive. As a result, it is impossible to extrapolate a principle regarding the outer bounds of detention that should apply in the competency context, although the Court has developed jurisprudence on prolonged detention in the immigration context. *See, e.g.*, Demore v. Kim, 538 U.S. 510 (2003) (upholding mandatory detention for a brief period pending removal proceedings).

Second, the Supreme Court in *Salerno* did address and reject an Eighth Amendment challenge, rejecting the argument that the Eighth Amendment required bail to be considered only on the basis of flight risk. 481 U.S. at 752-53. The Court refrained from defining what limitations the Excessive Bail Clause set on legislatures' ability to limit bail to categories of offenses, holding only that the Eighth Amendment permitted the government to seek detention based on compelling interests and future dangerousness was one such interest. *Id.* at 753.

[131] There are various forms of civil commitment, including temporary detention lasting approximately 48–72 hours. In addition, a number of states have statutes providing for involuntary supervision in the community of individuals with severe mental illness. *See, e.g.*, CAL. WELF. & INST. CODE §§ 5345-5349.1 (2002); N.Y. MENTAL HYG. LAW § 9.60. (2015). These forms of involuntary treatment and supervision are at times called civil commitment. *See* Rachel A. Scherer, *Toward A Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment*, 4 IND. HEALTH L. REV. 361, 363 (2007) (discussing outpatient involuntary treatment statutes as updated civil commitment statutes). This Article uses the term civil commitment to refer to inpatient commitment that lasts months, if not longer, that is authorized when there are no pending criminal charges. However, at least one federal court has referred to detention for purposes of competency restoration as civil commitment. *See* United States v. Lapi, 458 F.3d 555 (7th Cir. 2006). The term civil commitment as used in this Article is defined distinct from competency restoration detention.

[132] 18 U.S.C. § 4246 (2012). In addition, the statute requires a showing that the person's release "create a substantial risk of bodily injury to another person or serious damage to property of another" before authorizing detention. *Id.*

relationship between the two systems of detention, we can use the constitutional bounds of civil commitment to gauge the constitutional defects with mandatory detention for competency restoration.

These systems of detention bear two significant similarities and one critical difference. In both systems, the government is acting within its preventative authority to detain. That is, for both competency restoration and civil commitment, the government has never borne the burden to prove that the person it seeks to detain has committed any criminal conduct. Second, both systems of detention are designed specifically to exercise detention authority over individuals with mental illness.[133] The critical difference between the two systems is the presence of a criminal charge for those subject to detention for competency restoration. The relevant question, therefore, is whether this difference justifies mandatory detention of individuals found not competent to stand trial.

The answer is no. When compared to civil commitment, the federal competency statute appears to presume one of two things: mental illness either creates a presumption of danger to the society or, on its own, provides a ground for detention. Neither presumption is constitutionally permissible. As the discussion of the constitutional limitations of pretrial detention show, even the presence of a serious criminal charge is insufficient to mandate detention when criminal charges are pending.[134] As to the second potential rationale for detention, the Supreme Court has rejected the concept that the government may detain solely on the basis of the presence of mental illness.[135] A serious mental illness can justify detention absent dangerousness only when the individual is not able to take care of herself.[136] Yet the federal competency statute reaches far beyond those

[133] Both federal statutes authorize detention for individuals who, inter alia, are "presently suffering from a mental disease or defect." *See* 18 U.S.C. §§ 4241(d), 4246 (2012).

[134] *See* Part II.C.i, *supra*.

[135] O'Connor v. Donaldson, 422 U.S. 563 (1975). Specifically, the Supreme Court held that the state's interest in providing therapeutic care to its residents was insufficient to justify detention where the person could take care of herself. *Id.* at 575.

[136] Addington v. Texas, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

unable to take care of themselves and those found dangerous.[137]

Constitutional concerns with mandatory detention implicate not only substantive due process but also procedural due process. Federal civil commitment provides for periodic review of dangerousness.[138] The federal competency system does not, unsurprisingly, since the statute does not speak to dangerousness at all.[139] The Supreme Court has, in upholding a state's civil commitment scheme against a procedural due process challenge, relied on the fact that the scheme provided for periodic review of danger.[140] The mandatory nature of competency detention presents a procedural due process concern by foreclosing review of a factor that may justify release from detention.

3. Insanity Acquittees

Finally, competency determination bears semblance to the system for finding individuals not guilty by reason of insanity. Once more, a comparison of these two systems of detention confirms that the federal competency detention system contravenes due process principles.

The similarity between the two systems is the population that the government seeks to detain. Like in civil commitment, mental illness serves as a requisite factor for detention of individuals found not guilty by reason of insanity. In order to obtain an acquittal after asserting a defense of insanity, a defendant must show that she lacked appreciation for the difference between right and wrong at the time that she committed the charged acts.[141] While in both of these systems the government seeks to detain individuals involved in the criminal justice system, there is a significant difference between the two populations. A detainee held for competency restoration has neither gone through trial nor been convicted. But a person subject to detention as an insanity acquittee has admitted, through the plea of insanity, to have engaged in

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[137] Nor is competency treatment the same as therapeutic care. Competency treatment is designed specifically toward a forensic purpose, such as providing education on who the judge is, who the prosecutor is, and appropriate courtroom behavior. Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J. L. & PSYCH. 249 (1990); Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from A Clinical Perspective*, 31 NEW ENG. J. CRIM. & CIV. CONFINEMENT 81, 84–85 (2005).

[138] 18 U.S.C. § 4246 (2012).

[139] 18 U.S.C. § 4241 (2012).

[140] *Addington*, 441 U.S. at 428–29.

[141] Foucha v. Louisiana, 504 U.S. 71, 74 n.1 (1992).

conduct that government proscribes.

In detention of insanity acquittees, the coupling of mental illness with the factual admission of engaging in prohibited conduct authorizes the government to detain for a limited period of time.[142] In *Jones v. United States*, the Supreme Court held that mandatory detention was authorized after a verdict of not guilty by reason of insanity.[143] Specifically, the Court held that the statute satisfied the Constitution because factual admission of engaging in proscribed conduct created a presumption of danger, but the defendant could still rebut that presumption and obtain release if she showed that she was no longer dangerous or no longer mentally ill.[144] In contrast, in the federal competency system, there occurs no fact-finding that could stand in the place of a dangerousness determination.

The jurisprudence on these forms of detention illustrates due process concerns with mandatory detention of individuals found not competent to stand trial. In the three related systems of detention, the Supreme Court has never upheld detention based on mental illness alone. In the federal competency system, however, mental illness is currently treated as an irrebuttable presumption that detention is necessary, as a presumption of danger. This runs contrary to requirements of both substantive and procedural due process jurisprudence. For substantive due process to be satisfied, the purpose of detention must be related to the basis used to detain. Without showing that mental illness by itself justifies detention, substantive due process is not satisfied. Similarly, the absence of procedures permitting a defendant to show that restoration could occur in the community, and detention is not necessary presents procedural due process concerns that the Court has found crucial to upholding detention is similar systems of detention. With these constitutional concerns in mind, the next Part addresses what kind of reforms to the federal competency detention system would make it consistent with due process.

III. REFORM PROPOSAL AND IMPLICATIONS

Mandatory detention for restoration presents constitutional problems that demand reforms to the competency system. This Part proposes three categories of reform: (A) a categorical bar to detention

[142] *Id.*

[143] *Id.* The Court reaffirmed this holding in *Foucha*, 504 U.S. at 77–78 ("[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer.").

[144] *Id.*

for competency restoration for misdemeanors, minor felonies, and cases where the defendant has been granted bail; (B) limiting the length of detention based on the likely sentence a defendant would face if convicted; and (C) periodic review of the necessity of detention in all cases. This Part draws on the doctrinal deficiencies of mandatory detention exposed in Part II, but does not limit the proposals to litigation.[145] While courts should adopt these reforms, legislatures should also enact them into law. Furthermore, though Part II focused on the federal competency statute, these reforms are not limited to the federal system. Because most states automatically detain individuals found not competent to stand trial,[146] these proposals are applicable in the majority of jurisdictions in the country. After discussing the proposed reforms, this Part concludes by highlighting potential consequences of implementing the proposals.

A. Bar to Detention

Legislatures should prohibit the use of detention for competency restoration in certain types of cases. Specifically, states and the federal government should enact legislative reforms to bar detention for competency purposes in cases where defendants have been admitted to bail and in misdemeanor cases and nonviolent felonies with short sentence exposure. A prohibition on detention in such circumstances is consistent with due process jurisprudence forbidding detention based on presence of mental illness alone.[147] It allows defendants who are suitable for release to remain free from incarceration, and it prevents the criminal detention system from disproportionately harming individuals with mental illness.

In all criminal cases where the defendant has been granted bail, legislatures should bar the government from detaining defendants for competency evaluation and restoration. In those cases, a court has already determined that the defendant is likely to show up for court appearances and does not pose a danger to the community.[148] The government therefore cannot justify detention on its typical pretrial

[145] The proposed reforms in this Article aim are also not limited to the minimum that would satisfy constitutional safeguards, although they are inspired by the constitutional principles discussed in the previous Part.

[146] Gowensmith, et al., *supra* note 23.

[147] *See* Part II.C, *supra*.

[148] 18 U.S.C. § 3142 (2012); United States v. Salerno, 481 U.S. 739 (1987).

justifications to detain.[149] The government still has an interest in its ability to prosecute, which the preceding Part argues does not justify detention in all cases.[150] Prohibiting detention of those admitted to bail makes consistent the competency detention system with the pretrial detentions system. This reform is most immediately pressing in jurisdictions like the federal system, where the competency statute requires that every single person who is found not competent to stand trial is detained. But many other states could implement this reform. Numerous states' statutes permit, but do not mandate, detention. Despite allowing competency restoration to occur in the community, in practice most states automatically detain those defendants found not competent.[151] The practical reality of automatic detention across the country makes this reform timely and necessary.

A categorical bar on detention for competency-related purposes also should extend to those classes of defendants who face little or no custody time even if convicted. Two categories of defendants fall into this group: misdemeanant defendants and defendants charged with low-level felonies.[152] We can reasonably expect that competency restoration in detention will keep a defendant detained for a handful of months, if not longer.[153] A defendant in one of these categories could resolve her case and obtain release from detention in a shorter period of time than it would take to restore her competency. Permitting detention for competency restoration exposes this group of defendants to a longer period of detention as a result of their incompetence to stand trial. And, in these cases, the government's interest in pursuing prosecution is weak

[149] *Id.*

[150] *See* Parts II.B, II.C, *supra*. While the government's interest in the ability to prosecute is compelling, this Article takes the view that it is not static regardless of the seriousness of the charged offense, and that is does not justify detention where the defendant does not present a flight risk or danger to the community warranting custody. For a discussion of how the seriousness of the offense justifies a greater or lesser intrusion on a defendant's liberty interest. *See* Sell v. United States, 539 U.S. 166, 180–81 (2003). The claim that detention is not justified based solely the presence of lack of competency stems from the Court's prohibition of detention just on this basis in order to treat the individual. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975).

[151] Gowensmith et al., *supra* note 23.

[152] I define low-level felony as those felonies that do not contain as an element an act of violence and where, if convicted, the defendant is unlikely to look at a significant custodial offense. Examples of low-level federal felonies that would fall into this group include charges of theft of government benefits, 18 U.S.C. § 641 (2012), or mail theft, 18 U.S.C. § 1708 (2012).

[153] *See* Gowensmith, *supra* note 23.

relative to that in violent or serious felonies.[154] Prohibiting competency-related detention in these cases is supported by the weaker relative government interest, and the imbalance in length of detention that otherwise results.

Some states are already experimenting with a variation of this proposal. In Virginia, the competency statute requires the government to provide outpatient competency evaluations unless a court finds that an inpatient evaluation is necessary or outpatient services are unavailable.[155] The proposal made here is a stronger version of Virginia's current model because it prevents the government from detaining even where services are unavailable. Such an exception would render the proposal meaningless in jurisdictions were the government currently fails to provide outpatient services. In another example, Minnesota forbids competency restoration in most misdemeanor cases, and criminal charges are automatically dismissed when competency concerns are raised in such cases.[156] The proposal outlined here is similar to Minnesota's model, and, in both, the government could still seek to detain based on other potential justifications, such as civil commitment.

B. Cap on the Length of Detention

A cap on the length of detention for competency restoration is necessary to ensure that defendants are not detained longer simply as a result of their mental illness or disability. In many cases, the government will justify detention for competency evaluation and restoration by establishing that the charged offense is serious and the defendant ill-suited for bail. The only protection these defendants have on the length

[154] In balancing the government's interest in prosecution for purposes of whether the government may forcibly administer medication to restore competency, courts analyze the government's interest in pursuing prosecution by the severity of the crime. *See* Sell v. United States, 539 U.S. 166, 180–81 (2003); United States v. Dillon, 738 F.3d 284, 292 (D.C. Cir. 2013) ("Government's interest in a prosecution generally qualifies as 'important' when the defendant is charged with a serious crime."); *see also* United States v. Cruz, 757 F.3d 372, 383 (3d Cir. 2014); United States v. Breedlove, 756 F.3d 1036, 1041 (7th Cir. 2014); United States v. Mikulich, 732 F.3d 692, 696 (6th Cir. 2013); United States v. White, 620 F.3d 401, 411 (4th Cir. 2010). If the government cannot show that the crime is serious enough, it is not permitted to forcibly administer medication to a defendant in order to restore her to competency.

[155] Va. Code Ann. § 19.2-169.1. The Virginia legislature amended its competency detention statute after concluding that outpatient evaluations would entail cost savings to the state. FINCH, *supra* note 24, at 32.

[156] Minn. R. Crim. P. 20.01(6)(b) (2015).

of their competency-related detention is that provided by *Jackson v. Indiana*.[157] But despite *Jackson*, incompetent defendants are still subject to lengthy periods of detention.[158]

Although the Supreme Court has forbidden indefinite detention for restoring competency, this constitutional principle has proved difficult to implement and falls short of preventing lengthy detention of those found incompetent to stand trial.[159] In *Jackson*, the Supreme Court defined indefinite detention in terms of the likelihood that a defendant would regain competency, without specifying any length of time that would approximate indefinite detention.[160] Although a number of states have set time limits on the length of detention allowed for competency restoration, the federal competency system simply mirrors the holding of *Jackson* and lacks a specified time limit for detention pending restoration efforts.[161] As some scholars have noted, even in states with limitations on the use of detention for competency restoration, the application of *Jackson* is unwieldy.[162] As a result, defendants found not competent to stand trial cannot rely on *Jackson*'s holding to avoid detention that is lengthier than would result absent competency

[157] 406 U.S. 715 (1972).

[158] *See* Part II.B, *supra*.

[159] *See* Morris & Meloy, *supra* note 86 (surveying legislative responses to *Jackson v. Indiana* and arguing that many states have not fully implemented the holding of that case).

[160] 406 U.S. 715 (1972).

[161] 18 U.S.C. § 4241(d) (2012). The statute provides for an initial four-month period of restoration, subject to extension if the court finds that there is a substantial probability that the defendant will attain competency in the foreseeable future. In that case, the statute permits ongoing detention until competency is regained or until that time the case is disposed of, without specifying a time limitation.

[162] *See, e.g.*, Morris & Meloy, *supra* note 86; Michael Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 206 (2000) ("Even in states that expressly sanction outpatient commitment as an alternative in criminal incompetency cases, judges remain reluctant to employ this mechanism due to their fear that the patient might become violent in an outpatient setting."); Janet I. Warren et al., *Factors Influencing 2,260 Opinions of Defendants' Restorability to Adjudicative Competency*, 19 PSYCHOL. PUB. POL'Y & L. 498, 499 (2013) (noting that despite statutory changes to competency detention schemes many incompetent defendants continue to spend months, if not years, undergoing restoration services in detention). *See also* Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 28 J. AM. ACAD. PSYCHIATRY & L. 349, 354, 356 (2010) (explaining that defendants found not restorable who were hospitalized without meeting the civil commitment criteria had longer lengths of stay, and were more likely to be treated with psychotropic medications over their objection, when compared with other inpatients).

proceedings.

Tying the maximum length of detention permitted for restoring competency to a likely sentence of the charged offense limits the risk of subjecting defendants to an uncertain and potentially lengthy time in detention. The fact that this group of defendants has yet to have a trial or be convicted justifies a time limit that does not exceed the likely sentence for the charged offense. In the federal system, the likely sentence can be determined through the recommended sentence exposure set forth by the United States Sentencing Commission.[163] If the defendant has not been restored by that point, the government would have to initiate civil commitment proceedings in order to keep the defendant detained.

Equal protection and due process concerns animate this proposal. Preventing additional time in detention past a likely sentence for the charged offense serves the goal of equal treatment between similarly situated defendants. Traditionally, states enjoy latitude in implementing detention procedures, as long as they comply with the Constitutional minimum.[164] In certain instances, however, strict limitations on the use of detention are appropriate. A clear illustration of such a strict limitation is the procedural requirement for review within 48 hours of initial detention in the pretrial criminal context.[165] Here, where implementing a more flexible approach would fail to provide sufficient guidance to the states, a stricter approach to the limitation on detention is appropriate.

C. Periodic Bail Review

Finally, legislatures should enact periodic bail reviews in those cases where the government is permitted to detain a defendant for

[163] The recommended sentence would be calculated under the United States Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL (2016). Another type of evidence that could be considered is sentences actually issued, as compiled by the U.S. Sentencing Commission, or evidence of common sentences in the district of prosecution.

[164] Addington v. Texas, 441 U.S. 418, 431 (1979) ("As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.").

[165] For example, in *County of Riverside v. McLaughlin*, the Supreme Court justified a 48-hour general limitation on detention absent a probable cause determination because a requirement for a "prompt" determination had proved difficult to implement by the states. 500 U.S. 44, 55–56 (1991) ("[I]t is not enough to say that that probable cause determinations must be 'prompt' . . . .").

competency evaluation and restoration. This would include most felony matters where the defendant was initially detained under pretrial detention considerations of flight risk and danger. Periodic bail review permits defendants who are initially detained pending competency restoration to argue for release where a change in circumstances affects the necessity of detention. This reform provides a procedural safeguard that acts as a check on the length of competency-related detention.

A proposal for periodic bail review is similarly fueled by procedural due process and equal protection concerns with lengthy competency-related detention. In similar detention systems, defendants whom the government detains can ask for release, either when circumstances change or as a result of period review of detention.[166] In the civil commitment context, the Supreme Court found it crucial that periodic review of the necessity of detention accompany the government's exercise of detention authority.[167] To fulfill due process concerns, legislatures should require an assessment of whether release is appropriate pending competency restoration. Providing review of the necessity of detention also ensures equal treatment between defendants found incompetent and those who are competent. Defendants who are not undergoing competency restoration may seek review of bail determinations.[168] The reform is premised on the argument that having a serious mental illness does not justify treating incompetent defendants differently for purposes of the opportunity to ask for release.

A periodic bail review type of legislative fix can be reasonably implemented. The federal competency statute does not allow for any sort of review of the necessity of detention. It does provide for review every four months of the likelihood that an individual will be restored to competency.[169] A legislative amendment could easily expand the scope of the periodic review to include factors bearing on the necessity of detention, namely flight risk and danger. Such a reform could have a significant impact. Imagine that a court initially ordered an incompetent

[166] *See* Part II.C, *supra*. Pretrial defendants in the federal system do not enjoy statutorily mandated period review of detention but can seek release upon changed circumstances. Detainees civilly committed or held under insanity laws have periodic reviews of their detention.

[167] *See* Addington v. Texas, 441 U.S. at 428–29. Although the Supreme Court did not require periodic bail review as a necessary aspect of pretrial detention, it did rely heavily on other procedural protections that limit the length of detention for pretrial detainees. *See also* United States v. Salerno, 481 U.S. 739, 750–51 (1987).

[168] 18 U.S.C. §§ 3142, 3145 (2012).

[169] 18 U.S.C. § 4241 (2012).

defendant detained because the court found her to pose a danger. But, after a number of months of mental health treatment while in detention, the defendant no longer poses a danger. What is the rationale for forbidding that defendant from seeking release, simply as a result of not being competent to stand trial, when a competent defendant would be able to seek the same? There is none.

D. Implications

Three sets of consequences flow from the reforms discussed above, separate and apart from reducing the number of defendants kept detained for competency restoration and the length of detention. First, the reforms alleviate the dilemma defense attorneys face when attorneys raise competency concerns to the court. Second, the reforms incentivize jurisdictions to start, fund, or expand community-based restoration services. Finally, the reforms begin a conversation between constitutional and statutory disability rights law in the criminal justice context.

These reforms would resolve the defense attorney's dilemma of raising doubts of competency due to fear that her clients would face lengthier detention as a result. By limiting the circumstances in which a defendant could be detained for competency proceedings, capping the length of those who do end up detained for competency restoration, and providing periodic bail review, the reforms effectively reduce the number of people detained for competency restoration as well as the length of their detention. Defense attorneys could then comply with their ethical obligation to raise competency concerns to the court without fearing that they are causing harm or violating their duty of loyalty to their client.[170]

The examples in Part I demonstrate the benefit of this proposal. For example, under these reforms, the government could not detain a defendant charged with trespassing and obstructing a peace officer in order to restore her competency. Instead, the defense attorney, when

[170] The ABA is also taking strides to address the dilemma this Article discusses. Just last year, it issued its updated Criminal Justice Mental Health Standards, which contain some moderate reforms to the use of detention for purposes of competency restoration. While commendable, the Standards do not go far enough, and absent the reforms discussed here in, they still leave defense attorneys in a bind in many situations. Furthermore, absent these reforms, it is unclear how the Standards would be, as by the own description of the ABA, Criminal Justice Standards are "aspirational" only, and not enforceable. ABA CRIMINAL JUSTICE STANDARDS 4-1.1(b) (AM. BAR ASS'N 2016).

noticing signs that her client may not be competent, could raise her concerns to the court without fearing that she would cause her client's detention. In doing so, she would also not have to resolve an ethical battle between her duty to the court and her duty to be a zealous representative. The ethical dilemma is dissolved.

The defendant in Part I that is charged with a federal felony provides another example. For purposes of this illustration, assume that her likely sentence was six months in prison, and the court orders her to be restored in detention. The defense attorney in that case knows that, under these reforms, she can seek relief from the court at six months. If the government successfully restored her client by that time, the case would proceed to trial or resolve. But, if delays in restoration treatment or simply unsuccessful restoration within that time frame resulted, the defense attorney would have recourse. Thus, although the government may detain the defendant, the client would not, by entering competency proceedings, be detained for a longer period of time than otherwise could result from criminal proceedings.

This reform should not incentivize defense attorney funnel competent clients through this system in order to obtain dismissal of a case. If found to be malingering, her client could face harsher consequences at sentencing, a significant risk of harm to the client which should disincentivize such behavior.[171] In addition, the process of obtaining an evaluation, which would flow from raising competency concerns, could interfere with the attorney-client relationship or lead to information provided to the court and opposing counsel without the attorney's control. These risks should limit any incentive the reform creates for defense attorneys to misuse the competency system.

These reforms would also incentivize jurisdictions to create, fund, and support community-based competency restoration services. Under these proposals, the government's ability to bring defendants to trial would be limited by the availability of detention for competency

[171] Of course, a defense attorney would have to violate her ethical obligation of duty of candor to the court if she were to declare competency doubts when she had no basis to do so. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2016) ("A lawyer shall now knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;"); *see also* Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1109 (2016) (describing the purpose of candor professional rules to be the "protect[ion of the] courts and others from being deceived by [attorneys'] words or conduct").

restoration. In the misdemeanor example mentioned above, the government could not try that defendant if she were found incompetent. If the government wanted to have the defendant sentenced or placed on supervision, it would first have to secure a conviction. Although the government could still keep individuals detained if it met civil commitment criteria, the government would likely want to exercise its prosecutorial power within the criminal justice system, as it would permit the government to sentence a defendant. But, if the jurisdiction had available community-based competency restoration services, the government's prosecutorial power remains intact. In order to keep their prosecutorial power, governments would be incentivized to create or expand upon current community-based restoration services.[172]

Finally, these reforms would fuel a conversation between the constitutional rights of individuals with serious mental illness in the criminal justice system with theories developed in disability discrimination law. The litigation arm of the de-institutionalization movement in the 1970s and 80s focused exclusively on constitutional challenges to detention.[173] Since then, disability rights litigation has successfully experimented with anti-discrimination theories, resulting most notably in the landmark de-institutionalization case of *Olmstead v. L.C. ex rel Zimring*.[174] While this Article focuses on the constitutional deficiencies of mandatory detention in the competency arena, the developments in disability rights litigation could provide additional tools in implementation of these reforms and other perspectives for thinking of how the criminal justice system interacts with individuals with serious mental illnesses.[175]

CONCLUSION

For too long, attorneys and scholars have assumed that the government may lawfully detain anyone who is found incompetent to

[172] Although prosecutors and legislatures belong to different branches of the government, historically they have acted in concert to increase prosecutorial power and expand the reach of the carceral state. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1073–74 (2017). For this reason, we can expect legislatures to respond to limitations on prosecutorial power by finding reforms that would reinstate it to the status quo.

[173] *See* Bagenstos, *supra* note 75, at 22.

[174] 527 U.S. 581 (1999).

[175] For example, Bagenstos argues that new political partnerships of previously antagonistic groups can form as a result of moving toward an anti-discrimination theory based litigation practice. Bagenstos, *supra* note 75, at 40–50.

stand trial in order to restore that person's competency. That assumption made sense when mental health treatment was administered only on an inpatient basis. We can see that assumption at work in *Jackson v. Indiana*, as well as in the scholarly literature on competency. But now we know that assumption is wrong.

Competency restoration can occur in the community and in certain cases there is no justification for detaining someone found not competent to stand trial. Moreover, doctrinal developments in similar detention arenas establish that the government must justify its authority to detain with more than just the presence of mental illness. In a system of mandatory detention to restore competency, the government fails to do that. For that reason, we must reform the use of detention for competency restoration. The proposals advanced here render the use of competency detention consistent with constitutional principles. Importantly, they ensure that defendants are not subjected to a longer period of detention solely as a result of being found not competent to stand trial.

This Article builds on a broader discussion about the carceral state. Scholars, advocates, and policymakers have all recognized that mass incarceration is a problem, but we now face the difficult question of how to safely and fairly reduce rates of incarceration. This Article proposes that one way is to shift the way we think of the relationship between mental illness and the criminal justice system: we should not detain people with severe mental illness mandatorily so that the government can pursue prosecution. But more broadly, we should question whether the criminal justice system can adequately handle the needs of individuals with mental illness. Now, mental illness can trigger mandatory detention. Instead, mental illness should trigger discussion about whether detention is just or appropriate in the first place.

Furthermore, the Article highlights one of ways the penal system exerts control beyond its traditional realm of punishment. As it stands, the competency system is one more way that the carceral state keeps individuals detained, sometimes for long periods of time, without having to adjudicate their criminal case. Individuals with mental illness can be detained beyond the time they would serve if they were convicted, without the prosecution ever having to bear the burden of the criminal trial. Left unchecked, the competency system is a dangerous tool of carceral control. But just as mass incarceration has momentum for change, so does the criminal justice system more broadly. We should capitalize on this momentum to identify and reform those spaces of the

criminal justice system that greatly and disproportionately harm vulnerable populations, including those with mental illness.