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Illinois Fitness for Trial: Processes, Paradoxes, Proposals

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*It is when we try to grapple with another man's intimate need that we perceive how incomprehensible, waiving and misty are the beings that share with us the sight of the stars and the warmth of the sun.*¹

—JOSEPH CONRAD

Unfitness to stand trial is the legal result of a criminal defendant's inability to understand the charges against him or to assist in his own defense.² It is a keen example of an aberration of our adversary system of justice. Intelligent decisions cannot be made in the system unless the accused has the resources with which to make them. Further, these resources must be sufficient to meet the requirements of the adversary system in which decisions will be made. The criminal justice system operates on the assumption that persons who are shaped by different backgrounds, value systems, personalities, and perceptions are inevitably biased. The parties' bias compels them to present their own versions of events and their own legal theories. The system is justified by the theory that a crossing flow of information and intelligence, initiated by persons who are specially motivated at every stage to make the most of their point of view, will maximize reasoned and just decision-making. In order for the system to work, however, the parties must be comparable in litigating resources.³ For this reason, the criminal law has developed a procedure to deal with persons so mentally or physically handicapped that they are unable to present their case adequately.

At the outset, unfitness to stand trial must be distinguished from the insanity defense. In purely quantitative terms, the issue of fitness

². Leavy, The Mentally Ill Criminal Defendant, 9 CRIM. L. BULL. 197 (1973) [hereinafter cited as Leavy]; see ILL. REV. STAT. ch. 38, § 1005-2-1 (1973). "Unfitness for trial" is the present term for "incompetency to stand trial" and "insanity at time of trial." "Fitness" and "competency" will be used interchangeably throughout this article.
for trial affects far more people than the insanity defense. Strictly speaking, unfitness for trial is not a defense, since a finding of unfitness does not immediately alter the ultimate criminal liability of the accused as a finding of insanity does. Although the mental state of the defendant is of prime concern in both instances, the time at which the mental state is scrutinized is the primary distinguishing factor. The insanity defense hinges on the issue of whether the offender's mental state at the time of the criminal act was such that he cannot now be held responsible for his conduct. The issue of fitness for trial relates rather to the appropriateness of conducting a criminal proceeding in view of the defendant's inability at the time of trial to participate effectively in the proceeding and to comprehend the gravity of his circumstance. Therefore, the celebrated M'Naughten, Durham, and American Law Institute tests are relevant to fitness for trial only to the extent that the past mens rea reflects on the present mental condition of the accused. The probative effect of prior insanity on present fitness for trial has generally been considered negligible or totally ir-

4. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 413 (S. Brakel and R. Rock ed. 1971) [hereinafter cited as Brakel and Rock]; A. Watson, R. I. Schiedmandel, C. K. Kanno, Comment on the Mentally Ill Offender (1969), cited in Rosenberg, Competency for Trial—Who Knows Best? 6 CRIM. L. BULL. 577 (1970), found in their nationwide study of 58 facilities that 52 percent of criminally related mental hospital admissions are for the purpose of study or treatment regarding fitness for trial, 17 percent are transfers while serving sentences, while four percent were persons found not guilty by reason of insanity.

5. ILL. REV. STAT. ch. 38, § 6-2 (1973). This provision contains the Illinois version of the insanity defense. See ILL. REV. STAT. ch. 38, § 1005-2-4 for the diversion procedures involving persons found not guilty by reason of insanity.


Likewise, competence to plead guilty is a separate legal issue which also arises at a different point in the proceedings. This question usually arises at approximately the same time as the question of fitness for trial, but it employs a substantially different test which recognizes a narrower due process safeguard against self-incrimination. See People v. Morlan, 23 Ill. App. 3d 1038, 321 N.E.2d 132 (1974); Note, 1974 DUKE L.J. 149. Generally, the test is that the plea be "knowing and voluntary."

7. See generally GOLDSTEIN, supra note 2, at 45-97; Snouffer, The Myth of M'Naughten, 50 Ore. L. Rev. 41 (1970); Arens, The Durham Rule in Action, 1 L. & Soc'y Rev. 41 (1967); MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). Under M'Naughten, an accused is not criminally responsible if, at the time of committing the act, he had such defective reasoning from disease of the mind that he did not know the nature and quality of the act he was doing, or if he did not know that what he was doing was wrong. Under the Durham rule, sometimes referred to as the product rule, an accused is not criminally responsible if his unlawful act was the product of mental disease or defect. Under the American Law Institute's Model Penal Code insanity test, a person is not responsible for criminal conduct if, as a result of mental defect or disease, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).


Ancient and respected principles forbid the conduct of criminal proceedings against a defendant whose mental condition precludes him from understanding those proceedings or assisting in his defense. In earlier days, the chief reason for the rule was that a person who could not appreciate the nature of the proceedings against him could not appreciate the significance of a conviction, and could not therefore, respond by repentance or be reformed by punishment. The rationale evolved to various other theories. It was reasoned that an incompetent accused was effectively foreclosed from defending himself because he had no knowledge of available defenses, was incapable of being mentally "present" at trial, and lacked common understanding of the nature of the crime and the proceedings against him. Hence, the accused did not appreciate his peril and was precluded from effective consultation with counsel.

Taken together, these rationales form the modern policy basis for the rule: the concern for procedural fairness. Accordingly, where the defendant lacks the physical or mental capacity to participate in his trial, the proceedings against him must be suspended until he is capable of doing so. The United States Supreme Court has recognized that the trial of an accused during his incompetence violates due process, and held in Pate v. Robinson that a trial court must hold a hearing on its own initiative when facts raising a bona fide doubt of a defendant's competence come to its attention. Illinois courts have likewise

11. 4 W. BLACKSTONE, COMMENTARIES 24 (1st ed. 1769).
12. An excellent but outdated work covering this entire area of the law which goes into detail on the historical underpinnings of the rule against trying an incompetent is H. WEHIOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 428 (1954). The various common law authorities for the rule are collected in Youtsey v. United States, 97 F. 937, 940-46 (6th Cir. 1899). See Annot., 3 A.L.R. 94 (1919).
16. United States v. Valentino, 283 F.2d 634 (2d Cir. 1965); Noble v. Sigler, 351 F.2d 673 (8th Cir. 1960); Flynn v. United States, 217 F.2d 29 (9th Cir. 1954).
17. People v. Reeves, 412 Ill. 555, 107 N.E.2d 861 (1952); People v. Maynard, 347 Ill. 422, 179 N.E. 833 (1932); People v. Cornelius, 332 Ill. App. 271, 74 N.E.2d 900 (1947).
20. 22 Ill. 2d 162, 174 N.E.2d 820 (1961), cert. denied, 368 U.S. 995 (1962). The District Court for the Northern District of Illinois denied a writ of habeas corpus in an unpublished decision. This denial was later reversed in 345 F.2d 691 (7th Cir. 1965), aff'd, 383 U.S. 375 (1966). It is necessary to note that the Court did not prescribe a general standard with respect to the nature or quantum of evidence necessary
based the policy for the rule against trying an incompetent on due process grounds. \(^{21}\)

It is clear, though, that incompetency procedures are often used for strategic purposes, or purposes other than that for which the rule is intended. Most certainly, they are used as a discovery device, and their use in the criminal discovery process can become an important factor in a plea negotiation leading to "appropriate" non-criminal disposition consented to by both parties. \(^ {22}\) But oftentimes, either the state or the defense may invoke competency proceedings for less legitimate reasons. Both the prosecution and the defense use psychiatric diagnoses obtained purportedly on the issue of fitness in veiled strategy to develop evidence on the issue of criminal responsibility. \(^ {23}\) Occasionally, there is a conscious substitution of competency proceedings in preference to a jury trial on the issue of insanity. \(^ {24}\) Some defense counsel allegedly use competency proceedings in an attempt to delay trial until community emotions have quieted, or in hope that the memories of prosecution witnesses might fade. \(^ {25}\) Defense counsel may wish to conceal facts of the defendant's incompetence in order to avoid civil commitment, but various authorities assert that counsel has a duty to divulge such facts despite the confidential nature of the relationship with his client. \(^ {26}\) It is often alleged that both judges and prosecutors use the rule to effect preventive detention, \(^ {27}\) but other studies have concluded that there is no support for this contention. \(^ {28}\) Empirical studies evidence that referral to psychiatrists for strategic purposes comprises a high percentage of total referrals, though probably lower than the percentage of referrals based on a legitimate doubt about fitness for trial. \(^ {29}\) The strategic use of incompetency proceedings has

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\(^{23}\) Cooke, Johnston, Pogany, *Factors Affecting Referral to Determine Competency to Stand Trial*, 130 Am. J. of Psychiat. 870, 874 (1973) [hereinafter cited as Cooke].

\(^{24}\) Matthews, *supra* note 13, at 91.


\(^{26}\) See ABA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 7-27, 7-12. Perhaps the Canon's framers foresaw the possibility that an attorney might waive his client's competency claim in order to proceed on the strength of what he estimated to be a sound defense.

\(^{27}\) Note, 13 Santa Clara Law. 560, 564 (1973).

\(^{28}\) Matthews, *supra* note 13, at 79-80.

\(^{29}\) Cook, *supra* note 23, at 874. The authors found that strategic use of the rule is closely related to the proximity of the courts to psychiatric facilities.
been condemned,\textsuperscript{30} but nevertheless it exists.

On a social policy level, contradictory motivations are involved in the implementation of the rule. The humane desire to shelter the handicapped accused from the severity of the criminal process conflicts with the desire to protect society from those suspected of criminal behavior. Implementation of the rule thus requires a delicate balancing of the goals of security for society and the protection of individual liberty.\textsuperscript{31} An ancillary motivation, derivative of the desire for the protection of individual liberty, is the appearance of fairness in the adjudication so that society can be assured of the dignity of the process.\textsuperscript{32} The adversary system necessarily rests on the assumption that a defendant can be an informative and intelligent participant; the Kafkaesque trial of a defendant who cannot fulfill this expectation appears inappropriate and irrational.

Where a defendant is permanently handicapped yet potentially dangerous, the criminal justice system is faced with a “three horned” dilemma in applying the aforementioned policies to the rule against trying an incompetent defendant.\textsuperscript{33} If the system tries and punishes a defendant despite his lack of fitness to stand trial, he has been denied due process;\textsuperscript{34} if it civilly commits the defendant until he is fit for trial, which, if permanently handicapped he probably will never be, it effectively punishes him without a finding of guilt; if it finds him incompetent to stand trial yet is not allowed to incarcerate or commit him, the defendant may as a practical matter have been given a carte blanche to commit further crimes. While the first two posited alternatives are unfair to the individual, the third is unacceptable to society.

Hopefully, the horror stories of the past\textsuperscript{35} will not be repeated in the attempt to deal with this delicate problem. Illinois’ statutory pro-

\textsuperscript{30} See generally Lewin, Incompetency to Stand Trial: Legal and Ethical Aspects of an Abused Doctrine, 1969 L. & Soc. ORDER 233. See also Matthews, supra note 13, at 89-100.


\textsuperscript{33} Gobert, supra note 22, at 660.

\textsuperscript{34} Pate v. Robinson, 383 U.S. 375 (1966).

\textsuperscript{35} Before Jackson v. Indiana, 406 U.S. 715 (1972), defendants found unfit for trial were, in most jurisdictions, automatically committed to maximum security hospitals for the criminally insane until they recovered sufficiently to proceed to trial. See Brakel and Rock, supra note 4, at 415, table 11.2 at 444. Whether the charge was a felony or a misdemeanor, or whether the accused had already been incarcerated for the maximum he could have served if committed, was usually irrelevant. Thus, a permanently handicapped accused might spend the rest of his life in a hospital for the criminally in-
procedure and unique case law on this issue offer an interesting framework for analysis.

**ILLINOIS PROCEDURE REGARDING FITNESS FOR TRIAL**

The relevant Illinois statutory provisions are found in chapter five, article two, paragraphs one and two of the Unified Code of Corrections. The legislature entitled the section “Fitness for Trial or Sentencing” recognizing that physical and mental impairments are equally important in their effect on a defendant’s functioning in a trial atmosphere, and that these two types of disabilities are often difficult to distinguish on an individual basis. The overall purpose of the statutory scheme is to implement the constitutional guarantees of due process by insuring that the persons mentally or physically unfit are not tried or sentenced while their handicap persists.


A notorious horror story is the tale of Ezra Pound. After making broadcasts for Mussolini, the poet spent 13 years in the criminal ward of St. Elizabeth Hospital in Washington, D.C., after being found unfit to face treason charges, United States v. Pound, Crim. No. 76028 (D.D.C. 1945), cited in Engleberg, supra this note at 209. See also United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959); United States v. Marino, 148 F. Supp. 75 (N.D. Ill. 1957).


37. Council Commentary, S.H.A. ch. 38, § 1005-2-1. See People ex rel. Suddeth v. Rednour, 33 Ill. 2d 278, 283, 211 N.E.2d 281, 284 (1965), where the court deemed it permissible to examine the committee comments in order to ascertain the legislative intent.


The Criteria of Unfitness

Chapter 38, section 1005-2-1(a)\textsuperscript{40} delineates the test for determining whether a defendant is unable to stand trial. If, because of his mental or physical condition, the defendant is unable to understand the nature and purpose of the proceedings, or is unable to assist in his defense, he is considered unfit to stand trial. The two parameters reflect the classical criteria for determining fitness for trial as expressed by the United States Supreme Court in \textit{Dusky v. United States}.\textsuperscript{41} The test under the current Code of Corrections is basically the same as that required previous to 1973,\textsuperscript{42} the effective date of the current code, and is comparable to the criteria proposed in the Model Penal Code.\textsuperscript{43}

Whether an accused meets the fitness standard seems clear enough in the abstract. But applying the standard to a particular defendant is another matter. The trier of fact, in applying the statutory standard to the individual in question, usually has the difficult job of interpreting psychiatric opinion and of then applying the opinion to the factual propositions which bear on the legal question of whether the accused comprehends his situation and can assist counsel in his defense.\textsuperscript{44} The expert opinion can not be determinative, since the record must show that the final decision on this issue has been a judicial one.\textsuperscript{45} Relevant facts that a court should consider in determining whether the defendant is aware of the nature of the proceedings include: whether he is aware of the roles of the principals involved, as well as the fact that he is the defendant in the proceedings; whether he understands the nature of the charge and the range of possible verdicts; whether he understands what defenses are available; and whether he can distinguish a guilty plea from a not guilty plea.\textsuperscript{46} Facts to consider in determining

\textsuperscript{40} \textit{ILL. REV. STAT.} ch. 38, § 1005-2-1(a) (1973).
\textsuperscript{44} \textit{Id.} at 102.
\textsuperscript{45} \textit{Id.} at 102.
\textsuperscript{46} \textit{Id.} at 102.
\textsuperscript{40} \textit{Id.} at 102.
whether an accused has the ability to assist in his defense include: whether he has the ability to communicate and relate facts about the alleged criminal act; whether he has the capacity to maintain a consistent defense; whether he has any unfounded suspicions or fears about the attorney-client relationship; and whether, if necessary to defense strategy, he has the ability to testify in his own defense.47

It is important to note that weighing these abilities is inevitably a relative judgment which takes into account the average level of ability of criminal defendants. That many alleged offenders are alienated from the entire process, refuse to communicate, or lack the sophistication or intelligence to participate actively in the trial is no doubt true. But enlarging the class of persons considered unfit for trial to include such persons would violate the intent and purpose of the rule. The question is one of degree; the purpose of the rule is not to compensate for all disparities in the adversary process, but to rectify the process for those handicapped to the extent that their participation and cognizance would otherwise be a nullity.

The determination of an accused's fitness involves two separate procedural applications of the aforementioned criteria—understanding the proceedings and assisting counsel. The threshold question is whether the trial court must order a hearing on the defendant's fitness. The substantive question of whether the accused is, in fact, fit is then determined at the hearing.48

The Threshold Question: Raising a Bona Fide Doubt

The law presumes all persons to be fit for trial.49 Therefore, before a court will inquire into the issue, a bona fide doubt of the accused's fitness must be raised in order for the court to determine the question.50 As previously noted, the trial court has a duty to suspend the proceedings and to conduct a hearing if at any time during the criminal proceedings facts are brought to its attention, either from its own observation or suggestion of counsel, which raise a bona fide doubt of

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47. Robey, supra note 46, at 618.
the fitness of the accused.\textsuperscript{51} In Illinois, either the prosecution, the defense, or the court can raise the threshold question.\textsuperscript{52} The issue is most often raised by defense counsel.\textsuperscript{53} If information is in the hands of the state, the prosecutor usually will divulge his information to the defense.\textsuperscript{54} In any event, if the state has information relevant to the accused's fitness, it has an obligation to inform the court.\textsuperscript{55} The trial court rarely raises the issue sua sponte.\textsuperscript{66}

The issue may be raised before or during trial,\textsuperscript{57} but the logical and most frequent time the question is raised is at the time of arraignment.\textsuperscript{58} The time at which the issue is brought does not affect a defendant's rights, except for the right to a jury trial, which is waived if the question is deferred until after the trial has begun.\textsuperscript{59}

There are no statutory requirements for the manner in which the question of fitness is raised. It may be made orally, or even in a motion for a new trial.\textsuperscript{60} However, in felony court, the motion is usually made in writing, detailing the grounds on which the movant thinks the accused should be declared unfit.\textsuperscript{61}

In practice, the motion is seldom denied, unless there is reason to think it has been interposed solely for delay or is frivolous.\textsuperscript{62} A high degree of deference is given to the trial court's discretion on the question; its decision will be reversed only for abuse.\textsuperscript{63} Because of this high degree of deference, what amounts to a sufficient quantum of evidence at trial to raise a bona fide doubt has been defined at the apel-


\textsuperscript{52} ILL. REV. STAT. ch. 38, § 1005-2-1(b) (1973).

\textsuperscript{53} Matthews, supra note 13, at 74.

\textsuperscript{54} Id. at 79.

\textsuperscript{55} Cf. People v. Martin, 19 Ill. App. 3d 631, 633, 312 N.E.2d 24, 26 (1974), where the court said that the trial judge has a right to know everything relevant to the case that is relevant to sentencing, and the state's attorney, as an officer of the court, has an obligation to convey such information to the court so long as no specific terms of the plea bargaining agreement are violated.

\textsuperscript{56} Matthews, supra note 13, at 74.

\textsuperscript{57} ILL. REV. STAT. ch. 38, § 1005-2-1(b) (1973).

\textsuperscript{58} S. RUBIN, THE LAW OF CRIMINAL CORRECTION 569 (2nd ed. 1973) [hereinafter cited as S. RUBIN].

\textsuperscript{59} ILL. REV. STAT. ch. 38, § 1005-2-1(d) (1973).

\textsuperscript{60} People v. Burson, 11 Ill. 2d 360, 368, 143 N.E.2d 239, 245 (1957). See generally Brakel and Rock, supra note 4, at 414.

\textsuperscript{61} Matthews, supra note 13, at 78-79.

\textsuperscript{62} Id. at 79.

late court level in the negative. The question most often arises in a section 72 petition challenging the validity of a judgment by alleging that facts of the accused's unfitness existed at the time of trial, but that the judge was unaware of them.\textsuperscript{64} There are no fixed or immutable signs which invariably indicate the need for an inquiry to determine fitness to proceed. The question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.\textsuperscript{65} Evidence that has been considered insufficient to warrant ordering a new trial, whether the trial judge was apprised of the facts or not, includes: that the defendant had a sociopathic personality;\textsuperscript{66} that the alleged criminal act was inexplicable, bizarre, brutal;\textsuperscript{67} or a sex crime;\textsuperscript{68} that the defendant had been declared a psychopath;\textsuperscript{69} had a history of mental disorder;\textsuperscript{70} was under psychiatric care;\textsuperscript{71} had a generally belligerent attitude;\textsuperscript{72} refused to cooperate with counsel\textsuperscript{73} or psychiatrists;\textsuperscript{74} that the defendant had no regard for the consequences of his acts;\textsuperscript{75} that the defendant had a

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\textsuperscript{64} See ILL. REV. STAT. ch. 110, § 72 (1973); McDowell v. People, 33 Ill. 2d 121, 131, 210 N.E.2d 533, 535 (1965). In McDowell, the court declared the appropriate remedy to be a writ of error coram nobis pursuant to section 72 of the Civil Practice Act. The writ of error coram nobis has been abolished in Illinois, but all types of relief heretofore granted pursuant to the writ are currently available by proceeding under a section 72 petition, ILL. REV. STAT. ch. 110, § 72 (1973). See also People v. Andrus, 41 Ill. 2d 543, 244 N.E.2d 161 (1969); People v. McLain, 37 Ill. 2d 173, 226 N.E.2d 21 (1967).

\textsuperscript{65} Drope v. Missouri, 420 U.S. 162, 180 (1975).


\textsuperscript{68} People v. Newbern, 18 Ill. App. 3d 532, 538, 310 N.E.2d 42, 46 (1974).

\textsuperscript{69} People v. Richeson, 24 Ill. 2d 182, 184, 181 N.E.2d 170, 171 (1962).


Whatever the relationship between mental illness and incompetence to stand trial, in this case, the bearing of the former on the latter was sufficiently likely that the correct course was to suspend trial until such an evaluation could be made.


\textsuperscript{72} People v. Woods, 26 Ill. 2d 557, 560-61, 188 N.E.2d 1, 3, cert. denied, 373 U.S. 943 (1963); People v. Stamps, 8 Ill. App. 3d 896, 898, 291 N.E.2d 274, 277 (1972).

\textsuperscript{73} People v. Chmilenko, 14 Ill. App. 3d 270, 302 N.E.2d 455 (1973); People v. Thompson, 3 Ill. App. 3d 684, 278 N.E.2d 1 (1972).

\textsuperscript{74} People v. Nicks, 23 Ill. App. 3d 435, 319 N.E.2d 531 (1974).


\textsuperscript{76} People v. King, 54 Ill. 2d 291, 295, 296 N.E.2d 731, 735 (1973).

\textsuperscript{77} People v. Żebba, 20 Ill. App. 2d 269, 271, 170 N.E.2d 97, 98 (1960), cert. denied, 365 U.S. 888 (1961).}
"psychological" discharge from the armed forces; that the defendant did not understand his circumstances because he was afraid; that the defendant was an amnesiac; had used drugs or had suffered a severe blow to the head.

Although these facts did not warrant reversal, the results are more of a testament to trial court discretion than to the lack of merit of the facts found in the record. Generally, an allegation of serious mental illness is sufficient to raise a doubt in the trial judge's mind which rebuts the ordinary presumption of fitness. The judge will then order a psychiatric examination of the defendant, and a fitness hearing will be held before further criminal proceedings take place.

The examination or series of examinations are conducted only by qualified psychiatrists appointed by the court at the request of either party. In Cook County, the exams are conducted solely on an outpatient basis at the psychiatric institute affiliated with the criminal court. The accused will have a clinical psychiatrist administer a variety of tests from which an assessment is made of his emotional development. A neurologist sometimes conducts an examination for organic disorders. The battery of tests are appraised by a psychiatrist, who is then able to fashion an opinion relative to the statutory criteria with

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82. Matthews, supra note 13, at 79.
83. ILL. REV. STAT. ch. 38, § 1005-2-1(c) (1973).
85. ILL. REV. STAT. ch. 38, § 1005-2-1(g). The county board pays the expert's fee even where no bona fide doubt has been found. An indigent defendant may be entitled to funds to hire an expert where his testimony is deemed crucial to a proper defense. People v. Watson, 36 Ill. 2d 228, 232-34, 221 N.E.2d 645, 648 (1966); People v. Clay, 19 Ill. App. 3d 296, 298, 311 N.E.2d 384, 386 (1974); People v. Winfrey, 11 Ill. App. 3d 164, 166, 298 N.E.2d 413, 414 (1973).
86. Matthews, supra note 13, at 81-82. This procedure is consistent with the "least restrictive modality" concept advanced in Kaufman, supra note 35, at 470-73. The theory is designed to maximize the accused's pre-trial liberty in an attempt to equalize his liberty with that of other defendants. In general, outpatient examination is quicker and cheaper, while inpatient exams allow for closer observation and for more elaborate neurological and psychological testing. The choice of procedure is most often determined by parochial cost consequences. Matthews, supra note 13, at 81. The examinations are still conducted on an outpatient basis in Cook County. Outpatient may be a misnomer since most patients are brought from and returned to the county jail. Interview with Mrs. Anna Gordin, social worker at the Psychiatric Institute of the Circuit Court of Cook County, Illinois, Feb. 28, 1975. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, supra note 35, at 8.
which he has been supplied. The report is subsequently delivered to the court to be used as evidence in the hearing on the fitness of the accused.

The Hearing

As a procedural genre, the hearing is considered a preliminary civil proceeding, designed to be more than an empty formality, which is conducted as an official inquiry into the defendant's fitness for trial. The burden of proving the defendant unfit and of going forward with the evidence is on the party raising the issue; if the court raises the issue on its own motion, the burden is on the prosecution. The quantum of proof necessary for a finding of unfitness is a preponderance of the evidence. Directed verdicts are available, but since fundamental rights are involved, appellate courts caution that such dispositions should be used sparingly. Any party can request that the facts be determined by a jury, but if a bona fide doubt is raised after the trial has begun, the question is determined by the court.

The statute enumerates factors the trier of fact may consider in determining the question of fitness. The factors include basic abilities of an accused that generally serve as guidelines for determining whether he meets the statutory criteria of being able to assist in his defense and understanding the proceedings against him. An accused's own opinion as to his ability to function in the adversary system, as well as his attorney's opinion, are generally inadmissible on the theory that admission of such evidence would make a sham out of a

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87. Cf. A. Goldstein, supra note 3, at 36-37.
95. People v. McKinstry, 30 Ill. 2d 611, 616-17, 198 N.E.2d 829, 832 (1964); People v. Reeves, 412 Ill. 555, 560, 107 N.E.2d 861, 864 (1952); People v. Gravot, 19 Ill.
hearing designed to determine that very question. The statute provides that any statement made by the defendant during his psychiatric exam is specifically excluded from the pool of admissible evidence on the issue of guilt. Although any confession made during an exam by an accused would probably not be admissible in the absence of this provision, the section encourages the accused's cooperation in the exam.

If, from a preponderance of the evidence, the defendant is found fit to stand trial, the criminal proceedings will go on. An order finding the defendant unfit, however, precipitates a more complicated disposition.

An order finding the defendant unfit is a final order for purposes of appeal by either party. The issue of fitness for trial is jurisdictional and thus cannot be waived. Therefore, the question can be brought up for the first time on appeal, as an exception to the rule of waiver, on the theory that the trial court exceeded its jurisdiction.

Once an individual is found unfit, a rebuttable presumption arises that the condition continues. The presumption is conditional on the permanency and continuousness of the handicap, and the recency of the finding of unfitness. The presumption continues until the individual is found to be "restored."

Diversion For Defendants Found Unfit

When a defendant is found unfit for trial at the pre-trial hearing, the court remands the accused to a state hospital and orders that a hearing be conducted to determine if the individual is civilly committable. The hearing is conducted according to the procedures enumer-
ated in the Mental Health Code of 1967. The council commentary to the Code of Corrections indicates that this procedure replaced the old automatic and indefinite commitment section in order to save the state the unnecessary expense of institutionalization in cases where it is not required. Cost considerations aside, it is apparent that automatic indefinite commitment was replaced in order to conform the Illinois procedure to the mandate of Jackson v. Indiana, where the United States Supreme Court declared unconstitutional a comparable Indiana automatic commitment procedure.

The state's power of civil commitment is based on its police power to protect the public against the dangerously mentally ill and its parental power to care for the helpless. The procedures set forth in the Mental Health Code are a legislative recognition that civil commitment is a deprivation of personal liberty; the procedures' purpose is to provide adequate safeguards both for the public against dangerous individuals and for the individual against unreasonable detention. This scheme may be seen ideally as a balance between the interests of society and the interests of the individual. Under this scheme, society is protected; and the individual is released upon his transition from mental illness to some predetermined degree of mental health. However, conflicts between the requirements of security and therapy are inevitable. Individual treatment is theoretically directed toward rehabilitation, yet the mental hospital serves, especially for the criminally accused, as a prison separating the mentally ill from society. Although psychiatric consensus is that a security orientation is inimical to treatment programs, Illinois segregates males whose "history discloses criminal tendencies" from the rest of the patient population and places them at the Chester Mental Health Center, formerly known as the Illinois Security Hospital.

106. ILL. REV. STAT. ch. 91 1/2, § 1-1 et seq. (1973).
113. The determination of which males require segregation at the security hospital.
Before an accused is confined at Chester, a hearing is conducted to determine if, indeed, he can be committed to the custody of the Department of Mental Health.\textsuperscript{114} This hearing adds a third procedural step. After raising a bona fide doubt about the accused's fitness, and after a finding by a preponderance of the evidence that he does not meet the criteria necessary to function in an adversary context, the commitment hearing determines whether the accused is "a person in need of mental treatment" or is "mentally retarded."\textsuperscript{115} The definition of a "person in need of mental treatment" is based on a prediction of injury to himself or others, or a prediction of his inability to provide for himself.\textsuperscript{116}

Persons sent by the court to the mental hospital are examined by a criminal ward psychiatrist soon after their arrival. The ward psychiatrist has the option of returning to jail any allegedly mentally ill person he does not consider to be in need of hospitalization, but this option is rarely exercised. The defendant is generally at the mental hospital for about 7 days prior to a civil commitment hearing. During this period, he is interviewed by a social worker who develops a portfolio designed to provide the judge at the court hearing with information as to the individual's past behavior. Usually present at these hearings are the judge, the state's attorney, the public defender (or private attorney) representing the defendant-patient, a psychiatrist and a social worker. Typically, the public defender, who represents all the patients whose cases are to be heard on a given day, speaks with each of the patients in the criminal ward for about five minutes. Usually, he does not have the patient's hospital file with him, but has generally reviewed the patient's record and has some information about his arrest. Normally the public defender views his role as nonadversarial, and may suggest to the patient that he voluntarily submit himself to commitment.\textsuperscript{117}

All that is required to hospitalize a defendant is a finding at the hearing that, as a result of his mental disorder, the defendant is pre-

\textsuperscript{114} ILL. REV. STAT. ch. 38, § 1005-2-2(a) (1973).
\textsuperscript{115} ILL. REV. STAT. ch. 91½, §§ 1-12 (1973).
\textsuperscript{116} Flaschner, The Role of the Court as the Mental Health Laws Change, 62 ILL. B. J. 128, 129 (1973) [hereinafter cited as Flaschner].
\textsuperscript{117} See generally Gilboy and Schmidt, Voluntary Hospitalization of the Mentally Ill, 66 NW. U. L. REV. 429, 444-49 (1971).
dictably dangerous, or is unable to care for his own needs. The burden of proof needed to confine an individual at this point is not the strict reasonable doubt standard, even though the process that brought him to this point was initially criminal.\textsuperscript{118} The defendant has a right to counsel and a jury at the hearing. Further, the Mental Health Code requires that alternatives to hospitalization be considered at the hearing, but if the defendant is ordered hospitalized to a state institution, the Department of Mental Health designates to which facility the defendant is assigned.\textsuperscript{119}

If the accused is not ordered hospitalized, the Department of Mental Health is directed to petition the trial court to release the defendant on bail or recognizance, as the original court directs. The release may be conditioned on the defendant’s securing, or submitting to, treatment.\textsuperscript{120}

If the accused is hospitalized, the statute directs that he be returned to court in 90 days for a review of his fitness. If found fit there, the criminal process resumes. If found unfit, the court can again remand him to the hospital or, if the court finds that he no longer requires hospitalization, can grant him bail. The cycle is repeatable, as the statute provides for a yearly review of the defendant’s capability to function in an adversary context.\textsuperscript{121} The conduct of such periodic inquiry is entirely consistent with the premise underlying commitment that a defendant will receive care enabling him to be tried.\textsuperscript{122}

\textsuperscript{119} ILL. REV. STAT. ch. 91\(\frac{1}{2}\), §§ 9-1 to -13 (1973); Matthews, supra note 13, at 162-92.
\textsuperscript{120} ILL. REV. STAT. ch. 38, § 1002-2-2(a) (1973). The right to bail for a person found incompetent can be advocated under an equal protection theory relying on Baxtrom v. Herold, 383 U.S. 107 (1966), where the Supreme Court held that a convicted criminal cannot be shifted into indeterminate mental hospitalization at the end of a penal sentence without benefit of the same standards and procedural protections that apply to civil commitments. Similarly, it seems that an unfit accused is entitled to the same right to release as an ordinary defendant, especially one who has been found to be not dangerous. See Burt and Morris, A Proposal for the Abolition of the Incompetency Plea, 40 U. CHI. L. REV. 66, 88 (1972) [hereinafter cited as Burt and Morris]; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, supra note 35, at 121-23.
\textsuperscript{121} ILL. REV. STAT. ch. 38, § 1005-2-2(b) (1973). The state's attorney or the defendant can petition for review at other times. See also ILL. REV. STAT. ch. 91\(\frac{1}{2}\), § 9-7 (1973) (providing that no court order placing a person in the Department's care is valid for more than a year); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, supra note 35, at 102-07; Brakel and Rock, supra note 4, at 164-65.
\textsuperscript{122} ILL. REV. STAT. ch. 91\(\frac{1}{2}\), §§ 1-9 and 12-1 (1973) combine to provide that every patient is entitled to adequate care and treatment. See Jackson v. Indiana, 406 U.S. 715, 738 (1972): "[E]ven if it determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

Any extended discussion of the burgeoning right to treatment is beyond the scope of this article. Nevertheless, it is a concept of which every lawyer who has contact with the mental health system must be aware. The rubric “right to treatment” is somewhat
If the accused is eventually found fit for trial and is ultimately sentenced for his offense, the time during which he was hospitalized is credited to his prison term. The credit provision is a reflection of the view that hospital life under criminal commitment is not so much more pleasant than life in prison as to make such a credit unjust. Further, any time spent in involuntary commitment should serve any utilitarian purpose of punishment at least as well as imprisonment does.

If the defendant is not found fit by the time he has been involuntarily confined for a period equal to the maximum term to which he could have been sentenced for the charge, upon motion of the defendant or the Department of Mental Health the court will order the charges dismissed. However, once committed, the patient will not be released from confinement until the superintendent of the hospital in which he is confined determines that he is no longer in need of hospitalization, and can care for himself or be cared for by relatives. Thus, a defendant can be arrested, arraigned, and committed for life without a finding of guilt.

Viewed succinctly, the involved Illinois statutory procedure is nothing more than a provision for a continuance of trial until the state can constitutionally try the accused, with the added option for the state of indefinite civil commitment of an accused who can be proved dangerous to himself or others. Unique Illinois case law, however, apparently gives the accused in these circumstances a right to trial.

of a misnomer inasmuch as it suggests that there is such a right explicitly recognized in the Constitution. As yet, the Supreme Court has not decided whether dangerous individuals have a constitutional right to treatment, or whether a state may confine a non-dangerous person for purposes of treatment, O'Connor v. Donaldson, 422 U.S. —, 95 S.Ct. 2486 (1975). In fact the phrase is a shorthand way of describing that package of rights which the involuntarily confined mental patient is guaranteed by the due process, equal protection, and cruel and unusual punishment clauses of the Constitution. See generally PRACTICING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED (1973) [hereinafter cited as PRACTICING LAW INSTITUTE], an exceptional collection of materials. See also Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); Brakel and Rock, supra note 4, at 164-66; Bazelon, Implementing the Right to Treatment, 36 U. Chi. L. Rev. 742 (1969); Fremouw, A New Right to Treatment, 2 J. PSYCHIAT. & L. 7 (1974).

123. ILL. REV. STAT. ch. 38, § 1005-2-2(c) (1973).
124. S. RUBIN, supra note 58, at 596. See also ILL. LEGISLATIVE INVESTIGATING COMM'N, PATIENT DEATHS AT ELDIN STATE HOSPITAL (1974) [hereinafter cited as ILL. LEGISLATIVE INVESTIGATING COMM'N] for a penetrating analysis of the inadequate facilities and organization at an Illinois facility.
125. ILL. REV. STAT. ch. 38, § 1005-2-2(c) (1973). See N.Y. CODE OF CRIM. PROCEDURE § 730.50(3) (McKinney 1971), providing that commitment be no longer than two-thirds of the maximum. Presumably, this is an approximation of when parole would ordinarily be given. See generally Note, 7 VALPO. L. Rev. 203, 211-17 (1973).
126. ILL. REV. STAT. ch. 91½, § 100-15 (1973). See also ILL. REV. STAT. ch. 91½, §§ 10-1 and 10-6 (1973), providing for a judicial hearing on a petition for discharge and for a writ of habeas corpus.
The Paradox: Unfit For Trial; Therefore a Right To a Trial

If there is a developing right for an incompetent to stand trial on his charges, its existence is wholly attributable to the violent, tragic life of Donald Lang. Mr. Lang is an illiterate deaf-mute who knows no recognized sign language and is considered permanently handicapped. He has been arraigned twice for murder in strikingly similar fact situations—the alleged killings of ghetto prostitutes. He has been found both physically and mentally unfit to stand trial, has never been restored, and, thus, presumptively remains unfit for trial. Yet, he has been before two courts who have both indicated, albeit in an unclear manner, that he has had a right to be tried on his charge if the trial can be conducted with special procedures to compensate for his handicap.

The germinal case concerning an incompetent's right to stand trial is People ex rel. Myers v. Briggs. In this case, Lang had been indicted in the Circuit Court of Cook County on a charge of murder. After he was found physically unfit for trial, Lang's attorney moved that he be placed on trial. The attorney preferred the risks of trial to an inevitable life commitment for Lang as an incompetent. The motion was denied. In a second hearing, Lang was found mentally unfit for trial and was thereafter automatically committed to the Department of Mental Health "during the continuance of that condition." On appeal from the denial of a writ of habeas corpus, the Illinois Supreme Court, in a case "unique in American jurisprudence," reversed and held:

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

127. People v. Lang, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975). However, his trial attorney, Mr. Lowell Myers, contends that Lang is an aphasic, an individual who is unable to symbolize or use language at all. Chicago Tribune, Feb. 17, 1975, § 3, at 3.
128. A novel has been written detailing Lang's bizarre encounters with the criminal justice system of Cook County. E. TIDYMAN, DUMMY (1974). The title is Mr. Lang's unfortunate, inevitable nickname. A movie is reportedly being made based on the book. Chicago Tribune, Feb. 17, 1975, § 3, at 3.
129. The complete title is The People ex rel. Lowell J. Myers, on behalf of Donald Lang v. John F. Briggs, Director of the Department of Mental Health, 46 Ill. 2d 281, 263 N.E.2d 109 (1970).
130. At that time, the Code of Corrections distinguished mental and physical incapacity. ILL. REV. STAT. ch. 38, ¶ 104-3 (1969).
131. See note 35 supra.
133. Id. at 288, 263 N.E.2d at 113.
On the surface, this holding appears diametrically opposed to the rule at common law and the mandate of *Pate v. Robinson*\(^ {134}\) that a person unfit for trial cannot be tried. Analysis of the reasoning behind the holding reveals that the court left the door open for a very narrow construction of its holding, but that the passage of time and higher authority has defeated that strategy.

Ostensibly, the Illinois Supreme Court based its decision on the ground that Lang was physically incompetent in an apparent attempt to elude the state incompetence statutes.\(^ {135}\) The court cited the general rule that physically handicapped persons must be given a reasonable opportunity to obtain the benefit of their constitutional rights. Further, the court stated that the exact manner of trying a particular handicapped individual is best left to the sound discretion of the trial court.\(^ {136}\) However, limiting the holding of the court to physically handicapped individuals is not viable today. First, under current law in Illinois relative to the issue of fitness for trial, no distinction is drawn between physical and mental disability.\(^ {137}\) Second, the *Myers* court itself emphasized that it is frequently difficult and often impossible to distinguish physical and mental handicaps.\(^ {138}\) Third, Lang had never been judicially restored to competency; therefore, since his handicap was permanent, and the finding of incompetence was not too remote, he remained presumptively unfit. Thus, according to the general rule against trying the mentally unfit, he could not have been constitutionally tried. The court did not address the issue of the continuing presumption. Accordingly, limiting the holding of *Myers* to situations of physical infirmity would be an unduly narrow, and probably legally inaccurate, construction.

Apart from the clouded physical basis of the opinion, a second narrow construction can be inferred: Lang's situation is so unusual that the holding should be limited to his particular facts. However, the court never expressed such a limitation and used two cases as broad authority for its holding. First, Justice Burt relied on *Klopf er v. North Carolina*,\(^ {139}\) where the United States Supreme Court held that fundamental fairness required that the defendant was entitled to stand trial even though the state did not wish to proceed. This case involved a

\(^{134}\) 383 U.S. 375 (1966).

\(^{135}\) See Comment, 1971 ILL. L. FORUM 278, 279.


\(^{139}\) 386 U.S. 213 (1967).
competent defendant and was based on speedy trial grounds. Second, the court drew from *Regina v. Roberts*, a case that is no longer authoritative in England, for the proposition that it is legally possible, and more important, morally justifiable under certain circumstances, to try an individual who is unfit to be tried. The dilemma of defense counsel in these cases was colorfully expressed in *Roberts*:

He cannot be forced to say to himself: "Shall I play for safety and obtain a verdict whereby this man is detained as a criminal lunatic, or shall I, in effect, gamble in my chance of being able to get him off altogether, with the knowledge that if my gamble fails he will be convicted of murder, and there is only one sentence which the court can pass." . . . There must, in my view, be a procedure which would enable counsel for the defense to have the advantage of taking both points, and if there were no such procedure, I think it would be necessary to invent it.

Under the broad authority of *Klopfer* and *Roberts*, the Illinois Supreme Court emphasized that because of his evidently permanent condition, without trial Lang faced an indefinite commitment without a showing of guilt. They therefore implicitly recognized that some sort of trial was preferable to the automatic indefinite commitment procedure that was then the law in Illinois, but they gave no specific guidelines as to how such a trial should be conducted.

Most narrowly read, *Myers* gives a permanently handicapped accused a right to a trial with special compensating procedures in a capital case. However, the United States Supreme Court read the case more expansively in *Jackson v. Indiana*, where it was cited for the proposition that under certain circumstances, it might be desirable for "some proceedings" to go forward despite a defendant's incompetency. Further, the Court said that their previous decisions do not pre-

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140. [1954] 2 Q.B. 329 (1953). See *Regina v. Berry* [1876] 1 Q.B. 447, which outlined a procedure similar to that taken in *Roberts*.
142. *Regina v. Roberts*, [1954] 2 Q.B. 329, 332-33 (1953). The English court then proceeded to invent the innocent-only trial for those found unfit to stand trial. In an innocent-only trial the question on the merits is decided first. Then, if the defendant is found guilty, his fitness is considered. If found unfit, the conviction cannot stand because it is constitutionally impermissible. Broken down to its basics, this procedure merely provides a convenient alternative to the insanity defense. Thus, if counsel cannot negative the mens rea, he may alternatively attempt to prove that his client is unfit in order to avoid the guilty verdict. Inevitably, if found "non-innocent," the defendant will be committed. See text accompanying notes 231 through 233 infra.
144. For further discussion, see note 35 supra.
clude a state from allowing an incompetent defendant to raise certain defenses and to make certain pre-trial motions.147

On remand from the Illinois Supreme Court, the state requested a nolo prosequi, dropping the charges because its principal witness had died. Lang was released.148 The unspecified special procedures left to the discretion of the trial court which might constitutionalize the trial of an incompetent, hinted at in both Myers and Jackson, were never instituted.

*Myers* was never construed by a court in Illinois until Donald Lang was arrested again. The second time, he was convicted at trial of murder.149 On appeal, the First District of the Appellate Court reversed the conviction in *People v. Lang*,150 holding:

Because required trial procedures were not provided as mandated by *Myers, Jackson*, and *Pate*, the trial in the instant case was constitutionally impermissible, and the conviction of defendant must be reversed and the case remanded.151

Ostensibly, the holding reaffirms the right to a trial in Illinois under *Myers*. But a closer examination of the opinion and the directions to the trial court on remand reveal that perhaps there is no right to trial in Illinois since the passage of the 1973 amendments to the Code of Corrections, or, if there is a right to trial, it is unavailable to the severely handicapped.

The court found that the trial judge was required by *Myers* to allow the defendant his option to stand trial.152 However, it further found that in view of the extent of Lang's handicap, no special trial procedures were possible.153 Since no special trial procedures were possible, and since unfitness for trial is never waived, the court reversed because the *Myers-Jackson-Pate* trilogy forecloses the trial of an unfit accused absent special trial procedures. The court ordered that a fitness hearing be conducted on remand. If found unfit, Lang would be referred to the Department of Mental Health according to chapter 38, section 1005-2-2.154 Only if Lang were found fit for trial would he be granted a trial with compensating procedures.155 These directions clearly ignore the *Myers* option, which gives an unfit defendant the al-

147. See text accompanying notes 213 through 243 infra.
149. For further discussion, see text accompanying note 216 infra.
151. *Id.* at 655.
152. *Id.* at 652.
153. *Id.* at 655.
ternative to proceed to a trial with compensating procedures. Yet the holding is based on the existence of a trial option. Therefore, a reassessment of the viability of the Myers trial alternative is appropriate.

The Lang court's recognition of the trial option was limited to its discussion of the law prior to the 1973 amendment to the Code of Corrections. The court conceded that such an option is an attractive alternative to a permanently handicapped accused when his only other alternative is facing automatic indefinite commitment. But now that automatic indefinite commitment is no longer permissible under the law, the court implicitly found in its remand order that a trial option for an unfit accused is no longer an alternative, and that he must be remanded to the Department of Mental Health for a commitment hearing.

At the same time, in its holding, the court apparently sanctioned the trial option. The court found that if a person is handicapped to the extent that modifications in trial procedure cannot be devised, he cannot be constitutionally tried. Implicit in this finding is that if special trial procedures can be devised to compensate for a defendant's handicap, a trial can be held consistent with due process. The ambiguity of the court's analysis seems irreconcilable.

Further, if the trial option does exist in Illinois, it apparently is unavailable to the severely handicapped because of the court's finding that no special procedures were possible in Lang's case. Therefore, individuals whose civil commitment would most likely be permanent, and who therefore are in greatest need of an option to stand trial where they can present any exonerating or mitigating evidence are foreclosed from the Myers trial option.

There can be no definite conclusion as to the status in Illinois of the right-to-trial option for the handicapped. The option was originated as an alternative to a statutory procedure that was ripe for abuse. The procedure has been modified in an attempt to prevent such abuses by providing provisions for periodic review and dismissal of charges after the maximum time has passed. Therefore, the viability of Illinois' unique option is questionable under the current Code of Corrections. The centuries-old proscription against trying incompetents, the cryptic decision in People v. Lang, and the courts' apparent reluctance to institute modified trial procedures in certain extreme sit-

156. See note 35 supra.
uations further militate against the viability of the Myers option. On the other hand, the United States Supreme Court\textsuperscript{157} and numerous commentators\textsuperscript{158} have looked favorably on the constitutionality and desirability of a limited right to trial for handicapped individuals.

**CONSTITUTIONAL ANALYSIS**

A constitutional analysis of the Illinois fitness-for-trial procedure requires a comparison with the mandates pronounced by the United States Supreme Court in *Jackson v. Indiana.*\textsuperscript{159} Petitioner Theon Jackson was a 27 year old mentally defective deaf-mute who was arrested for two purse-snatchings amounting to nine dollars. He was unable to communicate except through a limited use of sign language which was not sufficient to allow his effective participation at trial. His chance of ever obtaining an effective level of communicative skills was considered "rather dim."\textsuperscript{160} Upon that finding he was automatically committed under a provision of Indiana law\textsuperscript{161} until such time as "the defendant became sane."\textsuperscript{162}

The Supreme Court saw Jackson's commitment as tantamount to a life sentence without a finding of guilt, and reversed this manifestly unjust procedure on two grounds. Noting that the Indiana civil commitment statute provided a stricter standard for commitment and a more lenient standard for release than was allowed an incompetent defendant, and rejecting the proposition that a pending criminal charge justifies such discriminatory treatment, the Court found the state procedures violative of equal protection. Further, the Court attached as a due process requirement a "rule of reasonableness,"\textsuperscript{163}

\begin{footnotesize}
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\item \textsuperscript{157} 406 U.S. 715, 740 (1972).
\item \textsuperscript{158} See, e.g., Burt and Morris, supra note 120.
\item \textsuperscript{159} 406 U.S. 715 (1972).
\item \textsuperscript{160} Id. at 719.
\item \textsuperscript{161} The Indiana statute was similar to former Ill. Rev. Stat. ch. 38, § 104 (1969).
\item \textsuperscript{162} 406 U.S. at 719.
\item \textsuperscript{163} The "rule of reasonableness" is the standard applied by the federal courts under 18 U.S.C. § 4241 et seq. (1970). The power of Congress to commit individuals under federal law has been constitutionally upheld in Sauer v. United States, 241 F.2d 640 (9th Cir.), cert. denied, 354 U.S. 940 (1957), and Frye v. Settle, 168 F. Supp. 7 (W.D. Mo. 1958). Under the rule of reasonableness, the federal government can constitutionally detain incompetent defendants only if they are temporarily disabled and likely to recover sufficiently to stand trial within a reasonable time. Further, the federal statutes have been construed to require that a mentally incompetent defendant must be found dangerous before he can be committed indefinitely. See United States v. Curry, 412 F.2d 1372 (4th Cir. 1969); United States v. Klein, 325 F.2d 283 (2d Cir. 1963); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971); United States v. Jackson, 306 F. Supp. 42 (N.D. Cal. 1969).
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limiting a state’s authority to hold an unfit defendant prior to trial to a period of time necessary to determine whether there is a substantial probability that the defendant will become fit for trial in the foreseeable future. If it is determined that an accused will not attain triable fitness, the constitutionally permissible alternatives are either to commit the individual in a civil proceeding or to release him.\textsuperscript{164} In its due process discussion the Court also expressed a guideline for civil commitment when it said: “[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”\textsuperscript{165}

On the surface, the Illinois procedure complies with the \textit{Jackson} mandate. Now, criminal detention can only continue for the minimal time necessary to determine the probability of the accused’s gaining competence, after which the state must try, release or civilly commit the accused. In Illinois, once a defendant is found unfit, a hearing is automatically held in accordance with the civil commitment statute. An accused is only hospitalized at that time if he meets the civil criteria of commitment.\textsuperscript{166} If not committable, the accused is released on bail or recognizance. Thus, an unfit accused in Illinois is not detained for a substantial period of time unless he is civilly committable. Similarly, the Illinois procedure seems to satisfy the \textit{Jackson} equal protection requirement. Since the unfit criminally accused ostensibly face the same commitment standards for commitment and release as their non-accused counterparts, the Illinois diversion scheme does not on the surface discriminate against individuals with pending criminal charges. Additionally, Illinois provides for periodic judicial review of hospitalized accused, a procedure sanctioned by the Court.\textsuperscript{167}

There is strong reason to believe, however, that incurably incompetent defendants like Theon Jackson and Donald Lang will be subjected to a virtually automatic civil commitment, and that the impact of \textit{Jackson} will prove relatively meaningless for this type of individual.\textsuperscript{168}

\textsuperscript{164} 406 U.S. at 738.
\textsuperscript{165} Id.
\textsuperscript{166} ILL. REV. STAT. ch. 38, § 1005-2-2 (1973). The grounds for civil commitment are, broadly stated, whether the individual is dangerous to himself or others, or is unable to care for himself. See ILL. REV. STAT. ch. 91½, § 1-11 (1973); People v. Byrnes, 7 Ill. App. 3d 735, 288 N.E.2d 690 (1972), where the court said that the Illinois procedure complies with the \textit{Jackson} mandate.

Whether the “care” criterion conforms to the standard of \textit{O’Connor v. Donaldson}, 422 U.S. —, 95 S.Ct. 2486 (1975), is problematic. Under \textit{Donaldson}, a state may no longer confine an individual in order to raise his living standard if he prefers being outside the “comforts” of a state facility.

\textsuperscript{167} See 406 U.S. at 720.
\textsuperscript{168} \textit{Practicing Law Institute}, \textit{supra} note 122, at 1114.
Closer analysis reveals that though *Jackson* successfully arrested the abuses of automatic, indefinite commitment, it allows states to employ already vague civil commitment laws in order to confine individuals who can no longer be detained indefinitely under criminal commitment statutes. Such a practice is available in Illinois and is subject to similar equal protection and due process attacks as were used in *Jackson*.

Basic due process and equal protection rights are applicable to the civil commitment of unfit defendants. The issue is which elements of these constitutional rights are necessary and applicable. This issue invariably turns on whether the interpreting court perceives civil commitment as a basically benevolent system, providing needed treatment for the mentally ill, or a quasi-criminal system, depriving people of their rights and freedoms. Illinois apparently adheres to the former view.

Illinois' civil commitment of unfit defendants might be vulnerable to an equal protection argument. Initially, it is important to note that equal protection does not require that all persons be treated identically, but that it does require that a distinction made by a state have some relevance to the purpose for which the classification is made. The *Jackson* Court rejected the classification of incompetent criminal defendants that made it easier to commit them than their civil counterparts. Yet it is apparent that judicial interpretation of the Illinois civil commitment statute invites the automatic commitment of the class of criminally accused incompetents. The sanctioned device that sidesteps the *Jackson* proscription of indefinite commitment of criminally accused incompetents is the medical opinion used as evidence in the civil commitment hearing. The court in *People v. Bradley* initially conceded that outstanding criminal charges alone are insufficient evidence to commit civilly an individual on the basis of "dangerousness."

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169. See Burt and Morris, supra note 120, where the authors express a fear that the current use of civil commitment laws to identify the "dangerous" among permanently incompetent defendants will only perpetuate the practice of long-term compulsory confinement of unfit defendants. The authors argue that the best method of protecting the true interests of permanently incompetent defendants is to provide full-scale criminal trials for such individuals.


Nevertheless, the court then said that conduct which is the subject of criminal prosecution can provide the basis for a medical opinion that a person is dangerous and can result in a finding that the person is in need of medical treatment and therefore committable. The court in *People v. Sansone* agreed that the science of predicting future dangerous conduct is inexact, and certainly not infallible. Nevertheless, it found that commitment in the absence of evidence of prior harmful conduct is not preventive detention, and can be based upon a medical opinion which states that a person is expected to engage in dangerous conduct. These are examples of the use of civil commitment that commentators feared would occur in the wake of *Jackson*. Accused and non-accused persons are committed according to the same standard, but the very status of being accused practically guarantees the requisite finding of predictable dangerousness. Behind much of the problem lies the widely accepted assumption that mentally ill people, particularly those who have been charged with a crime, are uniquely dangerous. If this is true, the assumption goes, though it is seldom articulated, the established sanctions of the criminal law, and even the legally legitimized preventive detention of civil commitment, are not sufficient to protect the public against mentally ill criminals. What is needed is custody, for life if necessary, so long as they remain mentally ill or there is the possibility of their committing an offense. This “specter” of dangerousness continues to haunt the legal process.

Regardless of the propriety of civil commitment, it seems unjustifiable to use a criminal charge as a pretext for committing an unfit defendant when there is no relationship between the defendant’s illness

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176. See Burt and Morris, supra note 114, at 74.

A three-judge panel in the Northern District of Illinois recently ruled that a finding of dangerousness under the Illinois statute need not be predicated on a prior overt act in order to meet the standards of due process. United States *ex rel.* Mathew v. Nelson, No. 72 C 2104 (N.D. Ill. Aug. 18, 1975). But see Lessard v. Schmidt, 319 F. Supp. 1078 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated, 422 U.S. —, 95 S. Ct. 1943 (1975), and Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) both of which held that a prior overt act is necessary for a finding of dangerousness. The implication of these decisions for the unfit criminally accused may well be that his arrest record, being a “prior overt act,” can constitutionally be used to commit him.

and his capacity to face charges against him. Some commentators have urged that all persons confined, whether the process leading to their commitment originated in the criminal justice system or not, should receive equal treatment and confinement.\textsuperscript{178}

It is submitted that a lifetime of institutionalization upon a civil commitment is only slightly more attractive than the now outlawed lifetime hospitalization after automatic commitment upon a finding of incompetency to stand trial. In both cases, the defendant may never be tried for the crime with which he is charged, so that any confinement, no matter how effectuated, undermines the presumption of innocence.\textsuperscript{179} Civil commitment based on the medical test of dangerousness appears to violate equal protection if it incorporates arrest as the sole parameter of its finding. It might be argued that the state must have a viable option to detain dangerous people, and an arrest record is a valid criterion. But this argument ignores the presumption of innocence that is a cornerstone of the criminal justice system. Detainment of an individual adjudged dangerous because of his arrest record seems just as repugnant to equal protection as its ignominious predecessor struck down in \textit{Jackson}:

\begin{quote}
If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.\textsuperscript{180}
\end{quote}

The next equal protection question in the area of criminal commitment may well address the issue of whether the "mere filing of criminal charges" can suffice for a finding of dangerousness and justify the resultant indefinite commitment.

The same Illinois procedure may be constitutionally vulnerable to a due process argument.\textsuperscript{181} Under both \textit{Jackson} and \textit{McNeil v. Director, Patuxent Institution},\textsuperscript{182} due process requires a reasonable relation between the duration of commitment and the purpose to be accomplished by that commitment. If the purpose of committing an individual is deemed to be societal protection and treatment for the unfit,\textsuperscript{183}

\begin{footnotes}
\item[] \textsuperscript{178} N. Morris, \textit{The Dangerous Criminal}, 41 S. Cal. L. Rev. 514, 522 n.25 (1968), where the author describes the unequal treatment of the "dangerous" criminally accused in Illinois.
\item[] \textsuperscript{179} See Hibden v. United States, 204 F.2d 834, 838 (6th Cir. 1953), for a discussion of the presumption of innocence as an important protective device.
\item[] \textsuperscript{180} 407 U.S. at 724.
\item[] \textsuperscript{181} See ILL. CONST. art. II, § 2: "No person shall be deprived of life, liberty, or property without due process of law."
\item[] \textsuperscript{182} 407 U.S. 245 (1972).
\item[] \textsuperscript{183} See People v. Sansone, 18 Ill. App. 3d 315, 323-24, 309 N.E.2d 733, 738 (1974).
\end{footnotes}
but the only parameter of dangerousness is the arrest of the accused, the presumption of innocence is undermined. The only purpose that remains is preventive detention, albeit with hearings, notice and right to counsel. Alternatively, if the purpose of detaining an individual is to rehabilitate him so that he can stand trial, detention becomes unreasonable after the maximum has run and the charges are dismissed.\(^{184}\)

Occasionally, commitment statutes are attacked on cruel and unusual punishment grounds. The preeminent case in this area is *Robinson v. California*,\(^{185}\) which held, on the basis of the eighth amendment, that a person cannot be punished because of his status as a mentally ill person. The test for constitutionality is whether the punishment is cruel or degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.\(^{186}\) It has been asserted that continued detention in an inadequate facility when the defendant's prognosis of recovery is dim, in addition to violating due process, amounts to cruel and unusual punishment.\(^{187}\) Besides the type of confinement, the length of confinement is sometimes considered in eighth amendment cases by courts reluctant to decide on speedy trial grounds.\(^{188}\)

Commitment of the criminally accused has also been attacked on the basis of the sixth amendment, which guarantees an accused the right to a speedy trial. The right has three underpinnings: (1) the constitutionally protected presumption of innocence, and the concomitant right of a defendant not to be incarcerated without a determination of guilt; (2) the right to be free from protracted anxiety over a pending trial; and (3) the right to go to trial when evidence is fresh and most illuminating.\(^{189}\) Although the right is considered a basic concept of our system of justice, it is a relative right, consistent with delays and dependent on circumstances.

The Supreme Court has held that every accused offender has the right to a speedy trial.\(^{190}\) The right may be waived, and it is often au-

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In any event, mere public intolerance or animosity cannot justify continuance of commitment, O'Connor v. Donaldson, 422 U.S. —, 95 S.Ct. 2486, 2494 (1975).
189. Klopfer v. North Carolina, 386 U.S. 213 (1967), where the Court confirmed the applicability of the sixth amendment right to the states through the due process clause of the fourteenth amendment.
tomatically waived or extended by counsel when he initiates motions and pre-trial proceedings that extend the prosecution beyond the normal time limits of the speedy trial guarantee. In *Barker v. Wingo*, the Supreme Court indicated that four factors must be considered in determining whether a defendant has been denied his right to a speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's responsibility to assert his right to trial; and (4) prejudice to the defendant's case. The Court also made it clear that fixed time limits established by states do not delineate the constitutional right to a speedy trial. Generally, though, it has been held that the right is not available to an incompetent defendant, especially if he initiated the issue of incompetency, on the theory that the state is not the cause of such delays.

Although generally unavailable, the Supreme Court's case-by-case approach to the right could support an argument that an incompetent defendant is not entirely foreclosed from asserting his right to a speedy trial.

Unfitness for trial also has ramifications for the Fourth Term Act, that section of the criminal code generally requiring that a confined accused be brought to trial within 120 days. It has been held that a petition for discharge under the Act was properly granted when a trial judge granted a defendant's report for psychiatric examination, despite the fact that there was no bona fide doubt at the time the motion was granted. An order for such an exam tolls the running of defendant's term within the meaning of the Fourth Term Act only where the exam is ordered pursuant to section 1005-2-1, requiring a court to impanel a jury to determine a defendant's fitness.

Illinois' trial option for incompetents under *People ex rel. Myers v. Briggs* is also subject to constitutional scrutiny. The trial option

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"Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us . . . . But we do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States . . . are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise."

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could be challenged on the constitutional right to be “present” throughout one’s trial. Courts have universally interpreted the right to be present to include mental as well as physical presence.\textsuperscript{197} Similarly, the right to be present has been applied as a justification for the rule against trying incompetents.\textsuperscript{198} Arguably, a person tried while incompetent, even when procedures designed to compensate for his handicap are used, is effectively mentally absent. The degree to which a defendant is prejudiced by being tried while “absent” will vary with the circumstances of the case. Where the defendant pleads an alibi which is supported by other witnesses, he may not be substantially prejudiced since his testimony, if given, would be largely cumulative. The disadvantage to a defendant whose defense is not fortified by extrinsic evidence would be more apparent.\textsuperscript{199}

If a defendant’s unfitness impairs his ability to relate facts of the alleged criminal act to his counsel, the right to trial option is vulnerable on sixth amendment grounds. When the attorney is not given a reasonable opportunity to ascertain the facts surrounding the charge so that the attorney can prepare a proper defense, the accused’s basic right to effective representation is denied.\textsuperscript{200}

Most basically, however, the trial of an accused seems to violate the basic due process right of incompetents, the right not to be tried.\textsuperscript{201} In \textit{Pate v. Robinson},\textsuperscript{202} the Supreme Court held that a trial court is required to order a fitness hearing on its own motion when a bona fide doubt arises as to a defendant’s fitness for trial. More particularly, the Court declared:

\begin{quote}
[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently “waive” his right to have the court determine his capacity to stand trial . . . \textsuperscript{203}
\end{quote}
This language has been interpreted to mean that an individual cannot be constitutionally tried while unfit.\textsuperscript{204} But it may not be necessary to overrule \textit{Pate} to recognize a trial option\textsuperscript{205} as constitutional because the \textit{Pate} rationale and a trial option are not necessarily contradictory. Asserting a trial option and not waiving a hearing on fitness can co-exist. When a bona fide doubt of fitness arises, it may be incumbent on a court to determine the issue, but nevertheless permissible for it to grant a trial on the merits if defense counsel considers it strategically desirable for his client.

The Supreme Court's opinion in \textit{Jackson v. Indiana}\textsuperscript{206} neither accepted nor rejected this suggestion, but did not foreclose the possibility of the trial of an incompetent accused so long as procedural rules are adopted that redress the incapacity suffered by the particular defendant:

Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetence. We do not read this Court's previous decisions to preclude the state from allowing, at minimum an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel.\textsuperscript{207}

The Court cited with apparent approval not only \textit{Myers} but also the applicable Model Penal Code section providing for limited trial procedures for unfit defendants.\textsuperscript{208}

In \textit{Drope v. Missouri}, Chief Justice Burger, speaking for a unanimous Court, hinted that a trial of an incompetent that deferred the question of fitness until the trial was completed might be constitutionally permissible.\textsuperscript{209} The Court did not offer guidance about the scope of such a trial or the appropriate disposition of a defendant subsequently found unfit.\textsuperscript{210}

\textit{Westbrook v. Arizona}\textsuperscript{211} may offer some guidance as to the extent

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\item 204. 1966 ILL. L. F O R U M 773, 779, asserting that the right not to be tried deserves fundamental right status.
\item 205. \textit{But cf.} Note, 13 SANTA CLARA LAW. 560, 573 (1973).
\item 206. 406 U.S. 715 (1972).
\item 207. \textit{Id.} at 740.
\item 208. \textit{MODEL PENAL CODE} § 4.06(3) (Proposed Official Draft, 1962). This section provides:
\begin{itemize}
\item The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.
\item 209. 420 U.S. 162, 182 (1975).
\item 210. \textit{See text accompanying notes} 213 through 243 \textit{infra}.
\item 211. 384 U.S. 150 (1966).
\end{itemize}
\end{itemize}
\end{small}
to which the trial of an incompetent accused can be constitutional. In this case, the Supreme Court recognized that a defendant might be competent to stand trial, yet be incompetent to waive his right to a jury or plead guilty to the charge. It may be inferred from a combination of *Jackson*, *Drope*, and *Westbrook* that it might be constitutional for an incompetent to stand trial in a very limited manner, but to the extent that the proceedings at trial infringe on the defendant's rights in an adversary context, the trial will be unconstitutional. Of necessity, permitting a limited trial for incompetents requires a case-by-case analysis of the nature of the prosecution's evidence and the degree of the defendant's handicap. It seems that some sort of proceeding would be constitutionally permissible under *Jackson-Westbrook-Drope*. The precise nature of these proceedings has yet to be determined.\footnote{212}

**Reform Proposals**

From the beginning, procedures adopted to deal with people who were physically or mentally disadvantaged in the adversary process have been designed to protect the interests of both society and handicapped individuals. The desire to protect the rights of the handicapped individuals has been directly related to the community's awareness of their problems and sympathy for their plight. Accordingly, in the process of considering reforms for this ever-changing relationship between society and handicapped persons, it is important to note two major premises: justice requires that the main objective of incompetency procedures be the protection of due process rights of the defendant; yet any reform which will unnecessarily frustrate the state's interest in prosecution is unacceptable.\footnote{213}

There is a justifiable fear in society of the possible post-*Jackson* release of a defendant who is neither fit for trial nor civilly commitable. Therefore, it is not surprising to see a broad construction of civil commitment statutes to ensure that "dangerous" people will not be released to victimize the public.\footnote{214} Further, the state has an interest in trying and convicting persons who transgress the criminal law. But a

\footnote{212. Compare People v. Byrnes, 7 Ill. App. 3d 735, 736, 288 N.E.2d 690, 691 (1972), where the court deferred to the legislature the question of whether certain criminal proceedings should continue in the trial court despite the finding of defendant's incompetence, with People v. Lang, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975), where the determination was left to the trial court.}

\footnote{213. See text accompanying notes 173 through 180 supra; Kaufmann, supra note 35, at 468.}

\footnote{214. See generally Burt and Morris, supra note 120.}
defendant's rights need further protection under the current system too. No hypothesized example of the difficulties a handicapped defendant encounters in our adversary system would be more elucidating than a description of the Donald Lang trial. Lang was convicted of murdering a prostitute in a hotel room on the west side of Chicago. The prosecution's evidence was largely uncontested, primarily because the defendant had been deaf and dumb since birth, was completely illiterate, and was unable to communicate by sign language. The state's witnesses testified that Lang and the victim had left a tavern together, checked into the hotel, and that Lang had later left alone. The next day the bloodied, strangled victim was found in the room. Lang was arrested, and blood that was the same type as the victim's was found on his clothes.

Defense counsel emphasized several pieces of enigmatic evidence—enigmatic because the defendant was unable to give his interpretation of the evidence in the normal adversary manner. Among this evidence was a stick-figure drawing and excited gesticulations made by the defendant at the time of his arrest which could be reasonably interpreted as either a confession that he had committed the crime or as exonerating evidence that another person had committed the crime. A night maid had heard mumbling like a conversation in the room. Caucasian hair was found on the victim's person, and blood of undetermined type was found under her nails, which were sharpened to a point for defense purposes. Lang is a negro, and was unmarked by scratches at the time of arrest. The jury found these facts sufficient to prove Lang's guilt beyond a reasonable doubt, and the appellate court in People v. Lang emphasized that the jury had been correct. Thus, the state met its burden of proof by relying entirely on circumstantial evidence, and relied on the violence of the crime to give rise to the rebuttable presumption of murderous intent. Lang could not exculpate himself with evidence that a third person was the murderer and that he was not. Neither could he rebut with mitigating testimony that the prostitute had tried to "trick hustle" him and that he had become passionately enraged and strangled her.

Donald Lang's case epitomizes the problems of the handicapped within the criminal justice system and the problem of the handi-

217. Id. at 655.
capped for the criminal justice system. If they wish to be tried in order
to avoid civil commitment, how should it be done? If they are to be
civilly committed, what methods are fairest?

Pending a wholesale renovation of the criminal process, reform in
this area ought to be approached in a bifurcated program. As the Su-
preme Court noted in Jackson v. Indiana, no analysis of a program of
diversion from the criminal process can be complete without some ex-
amination of the mental health system. Further, in light of the Court's dictum that "some proceedings . . . go forward despite de-
fendant's incompetency," and in light of the apparent vitality of the
Myers option, no analysis of fitness for trial can be complete without
some examination of proposed "trial" proceedings for incompetents.

The fear of commentators that civil commitment procedures would
be misused in order to protect the community against permanently in-
competent criminal defendants is apparently materializing in the
construction of the "dangerous" commitment standard. If a person
can be civilly committed on a finding of dangerousness based solely
on his arrest record, and if he can be committed until he can prove to
a hospital superintendent that he satisfies the standards for release,
there has been no significant reform from the pre-Jackson automatic
indefinite criminal commitment procedure. Further, once committed,
an individual's chances of receiving effective treatment remain
bleak. A full-scale discussion of reform of the mental health system
is beyond the scope of this article, but a limited explanation of
some reforms that most directly affect the criminal defendant is
warranted.

It has been proposed that all civil commitment procedures, includ-
ing "voluntary" procedures, be reviewed for their possible abuse of
criminal defendants by prolonged detention. All indeterminate com-
mitments could be abolished, and time limits could be established for
all civil commitments arising out of criminal charges. In no case
would such commitments exceed the time which might have been
served in a penal institution had the accused been convicted of the
crime. Another effective deterrent to abuse would be a more satis-
factory definition of dangerousness justifying commitment.

218. See 406 U.S. at 722.
219. Id. at 740.
220. See Burt and Morris, supra note 120.
221. Cf. ILL. LEGISLATIVE INVESTIGATING COMM'N, supra note 124.
222. See Leavy, supra note 2, at 247-48; Flaschner, supra note 116, at 130.
223. Leavy, supra note 2, at 248. Cf. G. Morris, supra note 35, where the author as-
Trends and changes in the reform of mental health statutes are generally in response to two broad problem areas: the debilitative and dysfunctional effects of long-term custodial institutionalization, and the neglect of the rights and personal dignity of individuals committed to hospitals for long periods of time. But few of the trends and changes have related to the mentally ill person within the criminal process.\textsuperscript{224} Major improvements in programs of hospital therapy and conditions of care are obviously needed. As a start, improvements including better focusing of programs for restoration of defendants to a state of competency to stand trial could be effected without prohibitive expense to the public or a revolutionary change in treatment philosophy.\textsuperscript{225}

The rule against trying incompetents has considerably more support in logic than in reality and hardly offers sufficient reason for always committing an incompetent defendant.\textsuperscript{226} The trial of an incompetent might be unfair, as the Lang situation graphically exhibited. In practice, however, it proves even more unfair to most, if not all, permanently incompetent defendants to withhold criminal trial,\textsuperscript{227} since withholding trial effects a virtually automatic civil commitment, often for life. This is a paradoxical means of ensuring that the permanently incompetent defendant is treated fairly. The obvious inequity of lifetime commitment is what gave rise to the Myers option and numerous proposals for varying degrees of "trial" procedures that attempt to rectify the natural disadvantage of such persons in the criminal justice system. The legal problems presented by the trial of an incompetent accused can be expressed as the inverse relationship between the degree of the individual's handicap and the extent to which it is constitutionally permissible to try the accused. The less handicapped an individual is, the more consistent with due process his trial would be. Conversely, the more handicapped he is, the more difficult it would be to conduct his trial consistent with due process. On a practical level, the degree of handicap is directly related to the need for a variety of compensating procedures.

Reforms proposing constitutionally permissible proceedings during the unfitness of the defendant can generally be grouped into three

\begin{itemize}
\item \textsuperscript{225} See Leavy, \textit{supra} note 2, at 249.
\item \textsuperscript{226} Note, 81 HARV. L. REV. 454, 467 (1967).
\item \textsuperscript{227} See generally Burt and Morris, \textit{supra} note 120, at 75.
\end{itemize}
categories: those proposals advocating limited proceedings that can transpire without input from the accused; those proposals advocating innocent-only trials; and those revolutionary proposals advocating abolition of incompetency proceedings as now in effect and substituting full-scale trials of the accused with compensating procedures.

So that the suspension of criminal proceedings does not unnecessarily operate to the disadvantage of the defendant, the proposals advocating limited proceedings would only require postponement of those aspects of the proceedings absolutely requiring the participation of the defendant. Thus the Model Penal Code advocates that the accused be given the opportunity to contest issues which are "susceptible of fair determination prior to trial and without the personal participation of the defendant." The Association of the Bar of the City of New York and the Judicial Conference of the District of Columbia Circuit have recommended similar approaches. Generally, when incompetency is decreed, these schemes would require that all issues capable of determination without trial be resolved. Therefore, in many instances the charge would not survive, and there would accordingly be no justification to commit or incarcerate the defendant. Likely issues to be determined under such plans include suppression of real evidence or confessions, and any issue determining the accused's physical participation in the act with which he is charged. A few states have already implemented such limited trials on possible exonerating issues.

The provisional, or innocent-only, trial has also been proposed. Basically, at the request of either party, a full-scale trial would be held at which the defendant is afforded an opportunity to raise a reasonable doubt while not running the risk and penalty of conviction. If found not guilty, the accused would be released unless found not guilty by reason of insanity. A guilty (or non-innocent) verdict would be set aside, and the defendant would be civilly committed. Assuming no double jeopardy problems, the accused could be retried when he

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229. The Association of the Bar of the City of New York, supra note 35, in its Recommendation No. 13 further proposed that steps should be taken to preserve essential evidence, and that denial of relief in pre-trial motions should be without prejudice to renewal after defendant's recovery. See Judicial Conference of the District of Columbia Circuit, Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial, Recommendation 15 at 57 (1965).
regains competency. Various advantages to such a procedure have been expressed. By recording testimony and evidence, any hardship stemming from dimmed memories and stale evidence would be alleviated. If the trial resulted in a finding of not guilty, the social stigma and damage to a defendant's reputation that would otherwise result from having pending charges against him would be vitiated. Such a verdict would also remove a stumbling block in the way of successful psychiatric treatment should a defendant decide to enter therapy. A non-innocent finding could also be successfully integrated into the state's commitment procedures by providing a more empirical basis for construction of the term "dangerousness." A "non-innocent" finding at a trial on the merits is certainly more probative of dangerousness than an arrest record. However, the innocent-only trial has found criticism. Since only an acquittal is officially recorded, the procedure masks its true import: the defendant is released if found innocent, but incarcerated indefinitely if he is not.

More revolutionary approaches have suggested abolishing the incompetency plea altogether and conducting a full-scale trial of the accused as soon as practicable. The thesis of this argument is that the interests of both permanently incompetent defendants and the state would be better served by abandonment of the traditional rule against trying incompetents, and that incompetency should, instead, be grounds for obtaining a short-term trial continuance during which the state must provide resources to assist the defendant toward greater trial competence. If competence is not achieved, the state would be required to dismiss charges, or to proceed to a trial governed, where necessary, by procedures designed to compensate for the incompetent defendant's trial disabilities.


232. The Supreme Court, in Drope v. Missouri, 420 U.S. 162 (1975) said at 182: "Such a procedure may have advantages, at least where the defendant is present at trial and the appropriate inquiry is implemented with dispatch." Hansford v. United States, 324 F.2d 311, 312 (D.C. Cir. 1965). Gobert, supra note 22, at 686.

233. Burt and Morris, supra note 120, at 77.

234. See Burt and Morris, supra note 120; Slovenko, supra note 15, at 14-15.

235. Burt and Morris, supra note 120, at 67. A committee of the Governor's Commission to Revise the State Mental Health Code has been impressed by this position and is in the process of developing a legislative proposal based on the Burt and Morris concept. Letter from Judge Joseph Schneider, Chairman of the Governor's Commission to Revise the State Mental Health Code, to the Loyola U. of Chicago Law Journal, Feb. 19, 1975.

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Of the three types of proposals, it is incredulous that the limited pre-trial motion procedure has not been employed on a wider scale. It seems patently fair, involving no danger of prejudice to the state or defendant. But both the innocent-only and full-scale trial proposals can only be fair and constitutional pending the successful implementation of special trial procedures designed to rectify an incompetent accused's handicap in the adversary system.

Many trial procedures have been advanced. It is obvious that some will be more palatable to the trial system and the public than others. Nevertheless, in order for the trial of an incompetent defendant to be constitutionally permissible, a number of reforms will have to be adopted.

Often advanced, and probably readily acceptable as a modification of present procedure, is complete discovery. The court could review all the evidence that the prosecution intends to offer at trial and order disclosure of any evidence that would assist the defendant in reconstructing an alibi or establishing mitigation. Likewise, the court could review all of the defendant's evidence. Another fairly palatable reform would be a liberalization of the availability of post-conviction relief for incompetents when new evidence is discovered.

Less acceptable to the mainstream of the criminal justice system, but the trial reform that would undoubtedly have the most profound effect on the rights and ultimate disposition of a defendant, is revision of the state's burden of proof at trial. The state would be precluded from convicting an incompetent on the basis of circumstantial evidence. Moreover, the state would be required to produce direct or eyewitness evidence in order to prove the elements of the crime, and its evidence would have to exclude all reasonable hypotheses of innocence. This type of reform would avoid the apparent inequity of a trial like that of Donald Lang. The state could no longer rely on rebuttable

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236 Another special procedure that can render an incompetent temporarily fit for trial is the administration of tranquilizing drugs like Tran copeal or Equanil. Considerable controversy has arisen regarding the use of such chemical instrumentalities. See, e.g., Haddox, Gross, and Pollack, Mental Competency to Stand Trial While Under the Influence of Drugs, 7 Loy. L.A. L. Rev. 425, 443-47; Buschman and Reed, Tranquilizers and Competency to Stand Trial, 154 A.B.A.J. 284 (1968); Comment, 31 Ohio St. L.J. 617 (1970).


239 Burt and Morris, supra note 120, at 76.

240 See generally Burt and Morris, supra note 120 at 76; Golten, supra note 237, at 486.
presumptions or circumstantial evidence or other methods of proof that are dependent upon the potential ability of the defendant to testify on his own behalf. However, this system would probably preclude conviction in all but a small minority of cases. A similar procedure was invoked in *United States v. Wilson*, an amnesia case. The court ordered a post-trial hearing to determine whether the defendant’s loss of memory deprived him of a fair trial. Among the things the trial court was ordered to consider was whether there was any substantial possibility that the accused could have, “but for” his amnesia, established an alibi or other defense. If so, it should be presumed that he would have done so. Further, the court was ordered to determine whether the government’s case negated all reasonable hypotheses of innocence. It seems that revising the burden to this extent in the trial of an incompetent may, in a large number of cases, extract too great a cost in number of convictions. Such measures might result in the release of too many people who probably ought to be confined. Perhaps reserving such a remedy for only the most extreme cases would be the prudent course, and even if reserved for the most extreme cases, such a remedy would require a case-by-case analysis of the nature of the prosecution’s evidence and the degree of the defendant’s handicap.

Other, more general reforms have been suggested for administration at the trial court level. The most important problem appears to be the interaction between psychiatry and the law. It is imperative that courts be discriminating in evaluating the medical testimony which enters the judicial process at numerous points. Courts should differentiate clearly between the separate procedures involving mentally ill defendants and should make the distinctions clear to all those appearing before them or examining the accused. Language of clearly medical import should be avoided, and witnesses should be required to define ambiguous terms. Further, courts should be discriminating in evaluating medical testimony, bearing in mind the uncertainties of psychiatric diagnosis and the difficulty of prediction, the differing points of view of psychiatrists, and their tendency to tailor testimony to the legal result the witness may consider appropriate.


242. See Robey, 122 AMER. J. PSYCHIAT. 616, 618 (1965); Leavy, *supra* note 2, at 250.

243. The literature discussing law and psychiatry is replete with examples of the difficulties encountered by members of the legal and medical professions in attempting to establish a common basis for understanding and communication. One is compelled to
It is inevitable that the practicability of the above proposals will emerge as the central point of debate about compensating procedures. The legislature and the courts will ultimately have to weigh the price of reform against the value of fairness.

CONCLUSION

A person unfit to engage in an adversary proceeding poses a complex problem for the criminal justice system. It seems that whenever attempts are made to improve the manner of dealing with these individuals, the attempts inevitably yield yet another problem. There are no simple, all-inclusive answers. The solution to this legal problem does not lie just over the horizon, waiting for someone to discover it. Any remedies will have to be approached on a case-by-case basis, perhaps implementing some special trial procedures, and hopefully incorporating substantial improvement in the mental health system.

[Do justice to the afflicted.

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recognize that in this area, as elsewhere in the law, the standard established by the law is not inevitably the standard employed in practice. Psychiatrists, whose help is usually sought in determining capacity to stand trial, may be unsympathetic to subtle legal distinctions, and while the determination may ultimately be one for the courts, the probability that the courts will disregard psychiatrists' findings is not great. See Slough and Wilson, supra note 8, at 598. The greater the tendency of judges and lawyers to adopt blindly medical conclusions, the greater the likelihood of prolonged hospitalization, and probable denial of due process. It has been asserted that a prediction of dangerousness is virtually impossible for psychiatrists to accomplish. Mathew v. Nelson, No. 72 C 2104 (N.D. Ill. Aug. 18, 1975); PRACTICING LAW INSTITUTE, supra note 122, at 105. Empirical studies have almost universally concluded that the diagnoses of psychiatrists are very unreliable. See, e.g., Pasamanick, Divity, and Lefton, Psychiatric Orientation and its Relation to Diagnosis and Treatment in a Mental Hospital, 116 AMER. J. PSYCHIAT. 127 (1959); Rosensweig, Vandenberg, Moore, and Dukay, A Study of the Reliability of the Medical Status Examination, 117 AMER. J. PSYCHIAT. 1102 (1961). This problem has moved some to call for the removal of psychiatrists from the process. See T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963). Cf. Pate v. Robinson, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting), but others prefer the status quo. See 201 J.A.M.A. 343 (1967). An excellent bibliography on law and psychiatry can be found in BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 15-19 (1974).