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CRIMINAL LAW COMMENTS AND CASE NOTES

COMPETENCY TO STAND TRIAL: A CALL FOR REFORM

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The defense of incompetency to stand trial has been consistently misunderstood and misused.[1] Under the present practice, this doctrine, which was generated for the benefit of the defendant, is often utilized to his detriment and is frequently contrary to the best interests of society as well. This presents a serious problem because a substantial number of defendants in criminal cases come within the purview of the incompetency doctrine,[2] and the trend is toward a greater number of competency hearings.[3] This comment will first attempt to explore the dangers posed by the present practice surrounding the defense of incapacity to stand trial. Next, it will try to set forth a workable standard to determine which defendants are incompetent. Thirdly, the paper will suggest procedures that might be adopted to safeguard the interests of the accused and of society, and examine the proper role of the psychiatrist in the process. Finally, it will discuss the present disposition made of the incompetent accused and how this facet might be improved.

At the outset, incompetency to stand trial must be distinguished from its more glamorous relative, insanity at the time of the offense. A finding of competency demonstrates only that a defendant presently understands the nature of the charges against him and is able to assist counsel in presenting his defense.[4] It intimates nothing about his mental condition at the time of the criminal act. Therefore, the tests of insanity or criminal responsibility such as the M'Naghten rule have no application in this area.[5] If the two concepts are

[1] Discussing the misunderstandings in this area, Federal District Judge Oliver has stated,

> I believe every District Judge will and can avoid eventual trouble and therefore administer justice more effectively, if and only if, he approaches a Section 4244 competency hearing on the general theory that neither the District Attorney, the defense attorney, nor any of the witnesses, professional or otherwise have the vaguest idea about the purpose of the hearing, the scope of the evidence, the specific issue for ultimate decision, or indeed, why everyone is gathered in your courtroom.

Oliver, J., *Judicial Hearings to Determine Mental Competency to Stand Trial*, 39 F.R.D. 537, 545 (1965).

[2] For example, in 1962 in New York State 1406 of the 2142 inmates at Matteawan State Hospital for the Criminally Insane had been committed because incompetent to stand trial. T. SZAZ, PSYCHIATRIC JUSTICE 49-50 (1965).

[3] *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, 147, 155 (1965). In 1957, 87 mental examinations were performed. But in 1963 the number jumped to 205. This increase occurred despite the fact that there were 1,575 defendants who went to trial in 1957 and only 1,308 in 1963.

[4] *See e.g.*, ILL. REV. STAT. ch. 38, § 104-1 (1967); People v. Aparicio, 38 Cal. 2d 565, 241 P.2d 221 (1952).

[5] This test specifies that the defendant is not guilty of crime if he is unable to distinguish between right and wrong at the time he committed the act. Daniel M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718

not kept separate and distinct, it will cause confusion and can further the misuse of the incompetency defense.[6]

Since the middle of the seventeenth century, it has been the rule of the common law that a person cannot be required to plead to an indictment or stand trial for a crime when he is so mentally disordered as to be incapable of making a rational defense. Whenever the trial judge has a reasonable doubt concerning the defendant's fitness to proceed, he is obligated to stop the proceedings and hold a hearing on the issue.[7]

The primary purpose of this doctrine is to protect the accused's right to a fair trial. It would be a reproach to justice to put an incompetent defendant to trial, because there may be facts or circumstances, of which he alone has knowledge, that can prove his innocence. Also, it would be inhuman to put an insane person to trial.[8] But in addition to safeguarding the accused, the incompetency rule also serves a larger societal interest in maintaining dignity in the administration of criminal justice. An adversary trial presupposes an accused who is capable of defending himself against the accusations of the state. But the trial of a person, totally out of contact with reality, would be arbitrary and irrational, and would tend to undermine public confidence in the entire system.[9]

Today, the federal government and the states have statutes which codify this common law rule. But too many of them focus on the underlying mental condition of the accused to the detriment of other considerations. For example, some provide that a defendant who is "presently insane" [10] or "mentally ill or defective" [11] or "feeble minded" [12] should not be tried, but they often do not set out what test is to be used in deciding who is sane and who is insane. This opens up the way for confusion with the issue of insanity at the time of the crime and other improper considerations. Many states, however, are following the lead of the federal provision[13] and of the Model Penal Code[14] which set forth the proper test of incompetence that has evolved in the case law: whether or not the accused is able to understand the nature of the charges against him and to assist in his defense.

Dangers of the Present System

Although the incompetency doctrine has been used more frequently in recent years,[15] defense lawyers are often reluctant to raise the issue, indeed, they will sometimes risk censure rather than bring up the defense.[16] Paradoxically, a doctrine which exists for the protection of the defendant, often works to his disadvantage.[17] Delay makes it more difficult for the accused to present his defense upon regaining his capacity. For example, by the

(1843); Of course the other tests of insanity at the time of the offense, such as the Durham rule relieving the defendant of criminal responsibility if his act was the product of a mental disease or defect, are equally inapplicable: Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[6] Unfortunately semantic similarities have caused much confusion. Incompetency to stand trial has often been designated "insanity at the time of the trial" or "present insanity" which has been confused with "insanity at the time of the crime".

[7] Nobles v. Georgia, 168 U.S. 398 (1897); *See generally* H. Weihofen, Mental Disorder as a Criminal Defense 428-30 (1954).

[8] *See* People v. Bursen, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1910); 1 Hale, Pleas of the Crown 35.

[9] *See* Comment: *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 458 (1967).

[10] W. Va. Code Ann. § 62-3-9 (1966).

[11] Va. Code Ann. 19.1-227 (Supp. 1966).

[12] Pa. Stat. Ann. tit. 19, § 1352 (1965). For a discussion of this statute, *see* Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. Pitt. L. Rev. 593, 595-97 (1960).

[13] 18 U.S.C. § 4244 (1964). "Whenever after arrest and prior to the imposition of sentence . . . the United States attorney has reasonable cause to believe that the person charged with the offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the nature of the proceedings against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused. . . ."

[14] § 4.04 (Proposed Official Draft 1962).
No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.
See, e.g., Ill. Rev. Stat. ch. 38, § 104-1 (1967). People v. Geary, 298 Ill. 236, 131 N.E. 652 (1921).

[15] Szaz, *supra* n.2 at 252; Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832, 833 (1960). The author cites statistics showing a comparable rise in defendants committed for incompetency in England.

[16] Archer, Guzman & Lewin, Report To Michigan Department of Mental Health, Psychiatric Evaluation in Criminal Cases 59 (Mich. Dep't. of Mental Health, unpublished rep't. 1967) (hereafter Mich. Rep't.). The authors reached this conclusion after taking a state wide poll of defense attorneys. Twenty per cent stated that at one time or other they concealed a possible incompetency defense. *See* Evan v. Kropp, 254 F. Supp. 218, 222 (E.D. Mich. 1966) for the court's censure of a defense counsel who failed to use an incompetency defense.

[17] These consequences can be visited upon even an unwilling defendant because once the incompetency issue is raised by the prosecutor or the court, the defendant cannot prevent its being decided. Siedner v. United States, 260 F.2d 732 (D.C. Cir. 1958).

time of trial, witnesses may forget important facts, or they may disappear from the jurisdiction, or even be deceased. This problem affects all defendants, but it would seem to place an especially heavy burden on the indigent who cannot afford to hire an investigator and counsel to seek out and keep track of helpful witnesses. Rather, the penurious defendant must rely on appointed counsel or public defenders who, although they are usually quite competent, frequently face staggering case loads.[18]

The commitment which almost always follows a finding of incompetency for trial imposes significant disadvantages on the accused.[19] Incompetents are generally confined in hospitals for the criminally insane, which, it is fair to say, are usually the poorest available facilities.[20] The defendant is held in stricter custody with fewer privileges than if he were confined in a prison or ordinary mental hospital.[21] He receives little treatment, usually less than if he had been civilly committed to a mental institution.[22] And surprisingly, there is evidence that he would more likely be given the proper treatment in prison, since some penal institutions are more willing to recognize the value of treatment methods of other disciplines such as psychology and sociology.[23] Furthermore, additional difficulties arise because the staffs of the hospitals for the criminally insane are not aware of the more limited therapeutic goals of returning a patient to fitness for trial. In most instances no distinction is made between those patients who were found unfit for trial and those institutionalized because they possess insane criminal propensities and are dangerous. The little treatment provided is directed at the more difficult task of restoring incompetents to full sanity.[24] Some psychiatrists have estimated that if therapy was directed toward the more limited goal of readying the accused for trial, *utilizing existing facilities*, the majority of those unfit to proceed could be returned for trial within a short period of time.[25]

Another danger is that once the defendant is subject to this indefinite commitment, he will spend a substantial period of time in the institution. A study of those committed to Ionia State Hospital in Michigan substantiates this assertion. Of the 470 defendants committed to Ionia between 1954 and 1960, over one-half of these defendants would spend a substantial period of time there, many for the rest of their lives.[26] The case of J.C. is an example. This 63 year old man was committed as incompetent in 1926 after arrest on a gross indecency charge. In 1959 he was still there and showing signs of "simple psychosis."[27] There are several reasons for this situation. Studies indicate that because of the nature of the institutions for the criminally insane and the popular view taken of those confined therein, a defendant is less likely to gain release after making comparable progress

[18] At least one half of those accused of felonies are indigent and must be represented by appointed counsel or public defenders. *See* L. SILVERSTEIN, DEFENSE OF THE POOR 7-8 (1965). Of course this same difficulty is presented to the prosecution.

[19] *E.g.*, ILL. REV. STAT. ch. 38, § 104-3(b) (1964). "A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition."

[20] Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 633, 645 (1958).

> They [psychotic criminals] are usually sent to criminal divisions of state psychiatric hospitals for appropriate psychiatric treatment. In passing, however, the writer might observe that invariably this is the most unattractive, ill-equipped and poorly staffed division of our state psychiatric hospitals.

[21] *See Brief of Donald McEwan, Petitioner Pro Se*, in KATZ, GOLDSTEIN & DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 700-03 (1967) in which an inmate lists all the deprivations such as the right to receive visitors, to send and receive mail, and the unfavorable discrepancies in professional staff, which he suffers solely because he is confined to an institution for the criminally insane.

[22] Foote, *supra* n.15 at 843. To understand how little treatment is received, it must be remembered that the average ward patient in a public mental hospital receives an average of fifteen minutes of psychiatric treatment a month. *Hearings on Constitutional Rights of the Mentally Ill, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. pt. 2, at 638–39, pt. 1 at 43–44 (1961). *See also* Fried, *Impromptu Remarks*, 76 HARV. L. REV. 1319–20 (1963). The author in comparing confinement at Walpole State Prison with that at Bridgewater State Mental Hospital says,

> [I]t is hard to believe that the regime there can seriously be said to be orientated towards treatment and cure; too little of the available resources is left after the inevitable requirements of administration, confinement and security have been met.

[23] Reid, *Disposition of the Criminally Insane*, 16 RUTGERS L. REV. 75, 113 (1961); Eaton, *A Psychiatrist Views Rehabilitation of the Criminal Who Is Mentally Ill*, 4 KAN. L. REV. 356, 360 (1958).

[24] Mich. Rep't. 36.

[25] Hess and Thomas, *Incompetency to Stand Trial: Procedures, Results and Problems*, 119 AMER. J. OF PSYCHIATRY 713, 716 (1963). These two psychiatrists made an extensive survey of Michigan practices in incompetency cases.

[26] Comment: *Criminal Law-Insane Persons, Competency to Stand Trial*, 59 MICH. L. REV. 1078, 1088 (1961).

[27] *Id.* at 1089 n.32.

toward recovery than if he were in a civil institution.[28] Secondly, there is a lack of procedures for periodic review of those confined in institutions. Most statutes merely provide that the superintendent of the hospital should notify the court when the accused has regained competency.[29] As a consequence of this informality, there is a real danger that even if the accused does regain his capacity, he can remain forgotten in the institution.

Furthermore, some defendants who are certified as competent by the superintendent still encounter difficulties proceeding to trial. Often they are competent with the aid of medication such as tranquilizers, but these medications are not administered to the defendant while he is awaiting trial in the local jail. Consequently, he suffers a retrogression and is sent back to the institution.[30] Also, judges are frequently reluctant to find a defendant competent once he has been classified as unfit to proceed at a prior time.[31]

A final difficulty is that the accused suffers a greater stigma after confinement in a hospital for the criminally insane than he would for a detention in other types of correctional or penal institutions.[32] This can make his subsequent adjustment to society much more difficult. Thus, the net result of the present system is to impose added liabilities on those found incompetent to stand trial rather than returning them to the judicial process as soon as possible.[33]

The foregoing would be sufficient cause for concern even if the assumption could be made that all those committed were unable to stand trial and in need of institutionalization. But this is not necessarily true. The incompetency procedure sometimes becomes the method of final disposition of defendants who could stand trial, and thus effectively denies them their constitutional right to trial.[34] A recent study of Michigan practice indicates that many defendants are frequently committed for reasons which have nothing to do with incompetency. The authors of the Michigan report sent questionnaires to judges and prosecutors throughout the state asking what would happen when there was substantial agreement among examining psychiatrists that the defendant was mentally ill at the time of the act. The vast majority reported that the accused would be adjudged incompetent before trial and committed to Ionia. The authors concluded that the prosecutors would handle the matter this way not only because they felt that it was more efficient, but also so that they would not be forced to add an acquittal by reason of insanity to their records.[35] The statistics appear to support this "final disposition" theory. One hundred and eighty defendants were returned to Detroit Recorders Court from Ionia State Hospital as restored to competency from July 1, 1965 through June 30, 1966. None of this group was ever brought to trial.[36] This would seem to indicate

[28] Foote, *supra* n.15 at 843.

[29] *E.g.*, KAN. GEN. STAT. ANN. § 62-1531 (1967); N.Y. CODE CRIM. PROC. § 662-b2 (McKinney Supp. 1967).

[30] Studies indicate that many defendants can be restored to competence by the use of tranquilizers, such as thorazine, and other modern pharmacological treatment. Yet judges are suspicious of this process and often refuse to try an accused who is competent only with the help of these drugs. They feel that the defendant is still insane, and it would be unfair to put him to trial. This reasoning is not necessary to insure due process of law. If the defendant can aid his attorney with the help of medication, there is no more reason not to try him than to refuse to put a diabetic to trial because he would be incompetent without his insulin. Much education is necessary to explain to trial judges the nature and function of this type of pharmacological treatment.

Also, many defendants who have regained competence at the institution, suffer a regression because they are not given their medication in jail while awaiting trial. This situation could easily be corrected by issuing proper instructions to the warden. These measures would further the goal of a trial wherever possible, consistent with due process. *See* Buschman and Reed, *Tranquilizers and Competency to Stand Trial*, 54 A.B.A.J. 284 (1968); MICH. REP'T. 66; Smith, *Psychiatric Approaches to the Mentally Ill Federal Offender*, 39 F.R.D. 553, 560-61 (1966), for the federal experience.

[31] Chief Judge James Monroe of the Third Judicial Circuit in Illinois stated that many judges feel that they have a vested interest in their original finding of incompetency and therefore, tend to adhere to it even after the defendant has been to an institution and later certified as competent. Meeting of the Illinois *Governor's Committee on Competency to Stand Trial*, Mar. 22, 1968. Perhaps this reluctance is tied to the view many judges take that the process will result in a final disposition of the defendant. See text at p.33-36 *infra*.

[32] Foote, *supra* n.15 at 842.

[33] *Id.* at 843.

[34] *See* Hess & Thomas, *supra* n.25 at 713.

> Our conclusion is that the issue of defendant's competency to be tried was most frequently raised not on the basis of defendant's mental status but rather was employed as a means of handling situations and solving problems for which there seemed to be no other recourse under the law.

Accord, Bennett & Matthews, *The Dilemma of Mental Disability and the Criminal Law*, 54 A.B.A.J. 467 (1968).

[35] MICH. REP'T. 6.

[36] MICH. REP'T. 20. A *nolle prosequi* was entered for 114 defendants, four of whom were committed to a civil hospital; fifty-one were returned to Ionia State Hospital as incompetent; two pleaded guilty to the original charge and six pleaded guilty to a lesser charge;

that the judges and prosecutors never expected that these defendants should come to trial. They are apparently using the incompetency doctrine as a method of disposing of a troublesome problem in a short hand fashion.

The psychiatrists also further this use of incompetency for "final disposition." They frequently do not understand or do not adhere strictly to the test of incompetency, but equate unfitness for trial with mental illness.[37] And they find incompetent, defendants whom they feel should be relieved of criminal responsibility because of their mental disease, but whom the doctors do not think will fall within the test of insanity at the time of the crime.[38] Since the trial court often accepts the psychiatrist's conclusion as determinative without questioning his reasons,[39] there is danger that defendants are found incompetent who are capable of standing trial. Hence, the incompetency procedure, far from fulfilling its role as a temporary protective device until the defendant is ready for trial, closely resembles an alternative to the regular penal system.

Psychiatrists point out that this procedure often visits adverse affects upon those found incompetent.[40] Some defendants, particularly those of the mildly paranoid type, feel a sense of grievance that they have been shunted off to a mental hospital without their day in court. This grievance, together with the uncertainty generated by an impending trial and possible punishment, can hinder therapy. The borderline case, that is, the defendant, who although mentally disturbed in some fashion could stand trial, may deteriorate under these circumstances and perhaps spend the remainder of his life in the mental institution.

The state's interests can also be harmed under the present system. The prosecutor might have difficulty proving his case against the defendant after some years have passed. Also, current practice would seem to undermine the societal goal that the incompetency doctrine was designed to protect: public respect for the fairness of the adversary system. A complete trial before the defendant is subjected to confinement would give the public a greater feeling of security that justice had been done, and that the confinement was rationally imposed.

Standard of Incompetency

Generally, it is stated that a defendant is incompetent to stand trial if he is unable to understand the charges against him, or if he is unable to assist in his defense.[41] Although this test is easy to enunciate, it is difficult to apply.[42] At early common law the standard required that the defendant be totally insane, and it did not contemplate that a mental disorder less than complete madness could render him incompetent.[43] Today, due to the emphasis upon the behavioral sciences, the test has widened to include defendants suffering from a lesser degree of mental disturbance. The courts have tended to focus on the fact of mental disease, as opposed to strictly concentrating on the test itself, and thereby equate incompetency with the presence of serious mental disease, such as psychosis.[44]

This has not been a beneficial policy. It is basic to the adversary system that all defendants who are

two were placed on probation and one defendant was sentenced on the original charge; the fate of six of the accused was unknown. The report does not indicate how long these defendants spent in the mental hospital before being returned to the court. But an earlier report indicated that many defendants spent substantial time there, often longer than the sentence set out for the crime with which they were charged. *See* text at n.26 *supra*.

[37] Szaz, *supra* n.2 at 25. *See* Vann and Morganroth, *The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial*, 43 U. Det. L. J. 1 (1965).

[38] *See* Model Penal Code § 4.04, Comment at 195 (Tent. Draft No. 4, 1954); although this problem occurs in all jurisdictions, it seems to be most prevalent in those which adhere to the M'Naghten Rule, because psychiatrists generally consider it to be a strict test of responsibility. Reid, *supra* n.23 at 93.

[39] Mich. Rep't. 19.

[40] Guttmacher, *Institute on Sentencing, Remarks*, 37 F.R.D. 111, 131 (1964).

[41] *E.g.*, 18. U.S.C. § 4244 (1964); Ill. Rev. Stat., ch. 38, § 104-1 (1967).

[42] *See* Hess & Thomas, *supra* n.25 at 719–20 for a discussion of the inherent difficulty of a test for incompetency. These two psychiatrists maintain that concurrence of opinion between the medical and legal professions in this area can take place only in the case of those defendants who are so ill either psychically or organically as to be uncommunicative or to present such a public spectacle as to embarrass our sensibilities of fairness and decorum.

[43] United States v. Lawrence, 26 Fed. Cas. 887, 891 (No. 15, 577) (C.C.D.C. 1835) 1 Hale, Pleas of the Crown 35; *see generally* Weihofen, *supra* n.7 at 428–30.

[44] This phenomenon although generally recognized, is not always praised. *See* Szaz, *supra* n.2 at 252. "[T]he concept of incompetence to stand trial has become greatly expanded during the last few decades. Thus, common sense judgments about competence to stand trial were abandoned and were replaced by psychiatric pronouncements about 'mental diseases.' The result is a mystification of the process of establishing competence for standing trial and inoculation in the public opinion of a belief in a causal connection between mental illness and incompetency to stand trial.... This linkage is responsible for denial of the right to stand trial."

justly able to stand trial do so. Yet, under the courts' present method of applying the test, many defendants are declared incompetent who are properly able to stand trial, because the presence of mental disease does not necessarily mean that the defendant is incompetent.[45] As noted above, a condition of incompetency poses substantial dangers to the accused. Also, because of this focus on mental illness, other defendants who might be equally hampered in making their defenses because of reasons other than typical insanity, such as amnesiacs or narcotics addicts, are denied consideration.

In order to restrict the incompetency doctrine to its true purpose, the trial court should adopt a functional test. The defendant should be found unfit to proceed not simply because he has some type of mental illness, but because he cannot properly perform his role at the trial. That is, the trial judge should focus on those characteristics which the defendant needs in order to understand the charges against him or to assist in his defense.[46] As a consequence of following this test, it would seem that many defendants who are now found unfit to proceed on the basis of a psychiatrist's report that they were psychotic will be brought to trial without prejudice to their interests. Moreover, the door is open for a more realistic determination of the competency of those accused who are unable to make their defense fairly for reasons other than typical insanity.

The functional test does not envision that the defendant must completely comprehend intricate legal strategies and procedures.[47] Because counsel must be appointed in every felony case, it is only necessary that the defendant be able to assist his attorney. The Court of Appeals for the District of Columbia took this tack in *Lyles v. United States:*

> "To assist in his defense" of course does not refer to legal questions involved but to such phases of a defense as the defendant usually assists in such as accounts of facts, names of witnesses, etc.[48]

It is very important that defense counsel be able to establish rapport with the defendant. If the accused is so delusional or paranoid that he will not trust his counsel or tell him the true facts, then he would be incompetent.[49] The defendant must be able to follow the evidence, assist counsel in evaluating the testimony of witnesses, and be able to meet the stresses of a long trial without his rationality or judgment breaking down.[50]

The specific qualities of mind that the defendant must possess to properly perform his role as defendant can be separated into four basic categories: (1) contact with reality; (2) minimum intelligence; (3) rationality and (4) memory.

Most obviously, the defendant must have a minimal contact with reality. This encompasses the basic human functions that are automatic to all but the seriously mentally ill. An accused must appreciate his presence in relation to *time*, *place*, and *things*. He must realize that he is in a court of justice, charged with a criminal offense; that there is a judge on the bench, a prosecutor attempting to convict him; a lawyer who will undertake to defend him against that charge; and a jury that will pass on the evidence presented.[51] A psychiatrist might

[45] Whalem v. United States, 346 F.2d 812 (D.C. Cir. 1964); Baker v. United States, 334 F.2d 444 (8th Cir. 1964); Ashley v. Pescor, 147 F.2d 318 (8th Cir. 1945). Smith, *Psychiatric Examinations in Federal Mental Competency Hearings*, 37 F.R.D. 171, 174 (1964).

[46] *See* Whalem v. United States, 346 F.2d 812, 820 n.6 (D.C. Cir. 1964) (dissent): "The question in any case is whether the mental illness has disabled the specific functions of personality which sound policy in the administration of justice require before the accused may be subjected to adversary proceedings on the charges against him." *See generally* SZAZ, *supra* n.2 at 25; Silving, *The Criminal Law of Mental Incapacity*, 53 J. CRIM. L. C. & P.S. 129, 139–142 (1962).

[47] The suggestion has been made that the test for competency should be whether or not the defendant has the ability to conduct his defense *pro se*. *Silving, supra* n.46 at 140–41. This formulation seems to be overly strict. All defendants have a greater or lesser ability to cope with the judicial process, indeed, it is doubtful that anyone but a criminal lawyer can understand it fully. Moreover it would militate against the policy goal of keeping the number of those who are found incompetent as small as is possible consistent with due process. For example, many defendants of low intelligence would be able to relate relevant facts to assist their counsel, but would be hard pressed to plan their own defense strategy.

[48] 254 F.2d 725, 729–30 (D.C. Cir. 1957). *See also* Gregori v. United States, 243 F.2d 48, 54 (5th Cir. 1947) in which the court noted, "A lower standard of mental ability may be sufficient if defendant is represented by counsel than if he is not so protected."

[49] *See, e.g.*, Pouncey v. United States, 349 F.2d 699 (D.C. Cir. 1965); Wider v. United States, 348 F.2d 358 (D.C. Cir. 1965); Aponte v. State, 30 N.J. 441, 153 A.2d 665 (1959); People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957).

[50] Interview with James Doherty, Chief of the Appeals Division, Cook County Public Defender, March 28, 1968.

[51] *See* list set down by Chief Judge Ridge in Weitner v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961). The clearest enunciation of what qualities should be considered by the trial judge in determining mental capacity have appeared in the opinions of the Federal District Court for the Western District of Missouri. The Federal Medical Center, an excellent institution to which those accused of federal crimes are often sent for

term this ability "perception," that is, the process of becoming aware of his surroundings. If missing, this is the easiest quality to detect, as the defendant without it will be very disorientated.

Next, the defendant must possess the minimum intelligence necessary to grasp the significance of the events taking place. This requirement can be met by the vast majority of those accused of crime, although occasionally a defendant is so mentally defective that he cannot meet the burden. For example, the conviction of an adult defendant who had a mental age of six years was reversed because he did not have the intelligence to understand the charges against him and the nature of the proceedings.[52]

The foregoing qualities are basic to competency, but they are not sufficient in themselves. The defendant must also possess rationality. In *Dusky v. United States*, the Supreme Court of the United States reversed and remanded for further findings stating that it was not enough for the district judge to find that "the defendant is orientated to time and place." [53] Rather the test was said to be:

> Whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him.[54]

Although the Supreme Court did not precisely define rationality, it might be explained in terms of a defendant's insight and judgment.[55] He must have proper insight into himself and his situation so that his emotional and intellectual responses are commensurate with reality. Also, the accused must be capable of exercising judgment, that is, balancing his past, present, and future concerns with the demands of reality. If a defendant lacks a reasonable degree of insight and judgment, he may suffer delusions, illusions, and inappropriate emotional responses that will make it impossible to establish the rapport with counsel that is so important. And, he may not appreciate his situation which could cause him to do or say foolish things, harmful to his best interests. For example, the defendant might attempt to conduct his own defense and argue to the jurors that he was God and was being persecuted by men.[56] Such actions would not only interfere with the accuracy of the proceedings, but would also undermine the dignity of the judicial process.

The final characteristic the defendant must possess is memory. More than anything else the defense counsel must know the facts and the existence of any possible witness to the crime. In many cases where the accused was found to be unfit to proceed because of insanity or mental illness, his inability to remember pertinent events was a key factor in this finding. The Supreme Court of Illinois has stressed that the defendant should be able to cooperate with his counsel so that any available defense could be interposed.[57] This is by no means a recent development. In *Youtsey v. United States*,[58] the court of appeals reversed a conviction of embezzlement and ordered a competency hearing for a defendant who claimed that his memory was impaired by epilepsy so that he could not remember the transaction involved. This issue of memory vis-a-vis competency was also clearly isolated in *United States v. Sermon*.[59] The examining psychiatrists found that the defendant understood the nature of the charges against him; but could not assist counsel because of impaired memory caused by cerebral arteriosclerosis. The court stressed that the primary assistance that must be rendered counsel was the full revelation of facts which are in legitimate dispute and within the defendant's knowledge.[60] Thus if the defendant's memory was impaired by a general mental illness, many courts would find him incompetent.

The functional test would allow the courts to deal properly with the defendant who may be unable to assist counsel for some reason other than general mental illness. Although his inability to remember facts that may be favorable to his defense is equally injurious to the amnesiac, the courts have consistently held that amnesia, stand-

comprehensive mental examinations, is located within the district.

[52] State v. Caralluzzo, 49 N.J. 152, 228 A.2d 693 (1967).

[53] 362 U.S. 402 (1960) (per curiam).

[54] *Id.* at 402.

[55] Interview with Dr. S. Kesert, M.D., a private psychiatrist with substantial experience in performing competency examinations in Cook County, April 19, 1968; WATSON, PSYCHIATRY FOR LAWYERS (Mimeo Draft No. 3 1960) (unpublished, cited in MICH. REP'T. 47).

[56] People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957).

[57] *Id.* at 369; 143 N.E.2d at 245.

[58] 97 F. 937 (6th Cir. 1899). *See also* United States v. Chrisholm, 149 F. 284 (S.D. Ala. 1906), where the judge in his instruction to the jury, convened to decide competency, included the element of memory as important to a finding of fitness to proceed.

[59] 228 F. Supp. 972 (W.D. Mo. 1964).

[60] *Id.* at 977.

ing alone, does not constitute such general unsoundness of mind as to render the accused incompetent,[61] and have put forward several policy reasons to bolster this opposition to incapacity because of amnesia.

First, there is the fear that the defendant may present a false claim, and it is sometimes difficult to detect a malingerer. Secondly, it is urged that such a finding would negate all criminal responsibility for the amnesiac. Furthermore, opponents contend that it would turn over the determination of criminal liability to psychiatrists whose opinions are largely based on the defendant's self-serving statements. This would render the protection of society from crime and criminals far more difficult than ever before.[62] Finally, it can be argued that this rule would place an undue burden on the administration of criminal justice, because of the difficulty of determining whether or not the defendant's claim is valid.

Recently two courts, in attempting to resolve this problem, have abandoned the traditional rule and adopted a functional approach. The Supreme Court of Arizona reversed a conviction solely on the basis of amnesia.[63] The defendant, suffering from amnesia of uncertain duration and type, had filed a motion for further medical tests which the trial judge had denied. The higher court recognized that amnesia could severely hamper the defendant's ability to assist in his defense and reversed. The court reasoned that the trial of a man with an uncertain type of amnesia was a "reproach to justice" because further examination might have revealed his amnesia to be curable.[64] Although this decision deals only with amnesia as a temporary condition, a reasonable continuance for treatment certainly is a positive approach in the situation where there is still a possibility of cure.

But amnesia can also be permanent,[65] and this presents a more difficult question. What should the court do if the defendant has had reasonable continuances and the amnesia still persists? If the defendant is considered to be incompetent he, may be held for the rest of his life in custody without a trial, or if released, he may go free without proper punishment. In *Wilson v. United States*,[66] Judge Bazelon attempted a solution. The government admitted that the defendant suffered from genuine, permanent retrograde amnesia. The court rejected the theory that amnesia *per se* is incompetency. But it held that loss of memory should bar prosecution where unrecalled facts might be crucial to the construction and presentation of a possible defense. The dissenting opinion would have gone further and held that where the defendant has involuntarily lost total recollection, any conviction is a violation of due process.[67]

The case by case method adopted by the majority in *Wilson* appears to be the soundest approach.[68] As stated above, it is anomalous and unreasonable to find that an amnesiac defendant can never meet the common law test of incompetence. He may be just as hampered from aiding his counsel in presenting a valid defense as is a defendant whose difficulty springs from mental disease.

The policy objections are not insoluble either. Although it is true that more defendants might be tempted to feign amnesia than other mental disorders, psychiatrists can generally detect the malingerer.[69] The other policy objections apply

[61] *See, e.g.*, Commonwealth v. Price, 421 Pa. 396, 218 A.2d 758, *cert. den.* 385 U.S. 869 (1966); State v. Swails, 233 La. 751, 66 So.2d 796 (1953); *See generally*, Comment: *A Case Study in the Limits of Particular Justice*, 71 YALE L. J. 109 (1961). This is also the English view. *See* Regina v. Podola [1959] 3 All. E.R. 418.

[62] Commonwealth v. Price, 421 Pa. 396, 406–7, 218 A.2d 758, 763, *cert. den.* 385 U.S. 869 (1966). *See also* Blackner v. United States, 288 F.2d 853 (D.C. Cir. 1961); United States v. Olvera, 4 U.S.C.M.A. 134, 15 C.M.R. 134 (1954).

[63] State v. McClendon, 101 Ariz. 285, 419 P.2d 69 (1966).

[64] *See also* Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959). The Supreme Court of California reversed a conviction because the trial judge did not allow a hypnotist to accompany the defendant's attorney in an attempt to help the accused regain his memory.

[65] This problem can spring from many causes, such as epilepsy, head injury, hysteria, alcoholism, drug intoxication or psychosis. Sometimes the amnesic's memory can be brought back as is often the case with amnesia caused by hysteria; but the loss can be permanent as usually happens where organic brain damage is the cause. MCDONALD, PSYCHIATRY AND THE CRIMINAL 89 (1958).

[66] 391 F.2d 460 (D.C. Cir. 1968); reversing 263 F. Supp. 528 (D.D.C. 1966). The Fourth Circuit has also reversed the conviction of a defendant because of incompetence in part due to amnesia. United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964).

[67] Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968). *See also* dissent in Commonwealth v. Price, 421 Pa. 396, 407–8 218 A.2d 758, 764 in which it was urged that the conviction of an amnesic is a violation of the Sixth Amendment right to counsel.

[68] For a contrary view *see* Note: *Criminal Law—Ability to Stand Trial—Amnesia* 52 IOWA L. REV. 339, 343–44 (1966).

[69] MCDONALD *supra* n.65 at 89. Also, Dr. Kesert stated that the psychiatrist by careful examination

equally to the accused incompetent because of mental illness and are not insoluble in that area.[70] It would seem no more objectionable if occasionally an amnesiac escapes punishment than if an occasional psychotic does.[71] This is not to say that every amnesiac should be found unfit to proceed. If the facts necessary can be gathered from other sources or a defense such as an alibi can be established without the defendant's assistance, sound policy would require that the accused be put to trial. The judge can make an *in camera* investigation of the defense claim to determine if counsel was truly hampered by amnesia. This approach was adopted in *United States v. Sermon*,[72] where the court decided that defense counsel had sufficient information to go to trial. Under this approach it would be the rare occasion where the defendant could not be tried because of amnesia.

The doctrinaire approach of the dissent in *Wilson* —that it is a violation of due process to try any amnesiac—is not satisfactory. If the defendant is not seriously handicapped by his inability to remember, there is no reason for keeping him from trial. Both the policy of an efficacious administration of criminal justice and the possible dangers to the accused himself suggest that he should stand trial.

A second example of the functional approach is in a recent case involving a narcotics addict. In *Hansford v. United States*,[73] the defendant's conviction for possession of narcotics was reversed because the trial judge did not convene a competency hearing when he discovered that the accused was using narcotics during the trial. Judge Bazelon stressed that the accused could have been suffering from a chronic brain syndrome which might render him unfit for trial when he was using narcotics.[74] The important fact to notice is that the court has abandoned the fixation on mental disease and recognized that the defendant might be equally incompetent whatever the cause.

In applying the functional test, the mental condition of the defendant must not be evaluated in a vacuum, but must be considered in relation to the circumstances of the case. The anticipated length and complexity of the trial is an important factor. A defendant who would be competent for a one day trial might well deteriorate under the stress of a long proceeding. Similarly, a defense against certain crimes might require a lesser degree of competency than against others. For example, it is easier for an accused to assist in a defense to the crime of rape than in a conspiracy charge involving many complicated transactions. Moreover, crimes for which specific intent is required, such as larceny, would require a greater degree of competence than a crime such as rape where the criminal intent is assumed from the act.[75] In those offenses requiring specific intent, there are added defenses which often can only be presented by the defendant.

Procedural Safeguards

Raising the Competency Issue

The issue of fitness to proceed may be raised by the prosecution, defense or the court.[76] Even though neither party raises the question of fitness, the trial judge must raise it himself if, before or during the trial, he has a doubt concerning the defendant's competency.[77] Then the judge will usually order that the defendant be examined by a psychiatrist or that he be committed to a mental institution for a short period to be examined.[78] If the defendant's history, present conduct, or the examination indicate some evidence of incompetence, the judge will halt the proceedings and hold a full hearing on the issue.[79]

is able to detect the malingerer. Interview, April 19, 1968. For a contrary view, *see* Comment *supra* n.61 at 123. Such pre-trial procedures must be conducted in such a fashion as to uphold the defendant's privilege against self-incrimination. It has been argued that by pleading amnesia in bar of trial, a defendant waives his privilege or that the privilege does not apply to the collateral proceedings to determine present capacity. Hunt v. State, 248 Ala. 217, 27 So.2d 186 (1946) (dictum). However, the best approach is that adopted by the federal courts. There is a specific statutory prohibition against admitting any statement made by the accused during a medical examination into evidence on the issue of guilt or innocence. 18 U.S.C. § 4244 (1964).

[70] *Accord* Note: *Capacity to Stand Trial: The Amnesic Criminal Defendant*, 27 Md. L. Rev. 182 (1967).

[71] It is suggested that courts' historical difference in attitude between the two disabilities lies in sympathy for the mentally ill defendant that is not present for the amnesic.

[72] 228 F. Supp. 972 (W.D.Mo. 1964).

[73] 365 F.2d 920 (D.C. Cir. 1966).

[74] Judge Bazelon also stated that if the addict did not have his drugs, he might be rendered incompetent because of withdrawal pains. *Id.* at 923–24. *But see* United States v. Tom, 340 F.2d 127 (2d Cir. 1965).

[75] *See generally* J. Hall, General Principles of the Criminal Law, 143–44 (1960).

[76] *E.g.*, Cal. Pen. Code § 1368 (West 1956); N.Y. Code Crim. Proc. § 658 (McKinney 1958).

[77] Pate v. Robinson, 383 U.S. 375 (1966). It is a violation of due process of law for the judge to try an incompetent even though the defense did not specifically raise the issue.

[78] *See, e.g.*, 18 U.S.C. § 4244 (1964).

[79] Some statutes provide for a hearing by the judge alone. Others have a provision for a jury. *See, e.g.*, Ill. Rev. Stat. ch.38, § 104-1 (1967). It has been held that *Pate* did not remove all discretion from the trial judge,

The prosecutor or judge is permitted to raise the issue for the protection of the incompetent defendant.[80] But it appears that this procedure, far from insuring due process, can actually operate to endanger the rights of the unwilling defendant. It gives the prosecutor a totally unwarranted tactical advantage. Instead of being given the opportunity to stand trial for a crime, which even upon conviction will result in a determinate sentence, the defendant, contrary to his counsel's desire, runs the risk of confinement in a mental institution for an indeterminate period without a trial. This danger is enhanced by the propensity of psychiatrists to equate incompetency with mental illness and the court's willingness to accept the doctor's reports as conclusive.[81] Indeed, as indicated above, judges and prosecutors view the incompetency procedure as a method of final disposition of offenders.[82] Thus, the unfitness to proceed doctrine can be and sometimes has become a device to assure custody over persons where there has been no judical determination of guilt.

The position set forth in the statutes and stressed in *Pate v. Robinson*,[83] that the judge can and indeed must raise the issue to insure due process, does not seem necessary in view of the defendant's right to have counsel provided in every felony prosecution.[84] Counsel for the defendant is in a much better position to determine initially if the defendant can cooperate with him sufficiently to present a defense. It can be argued that many indigents are represented by overworked public defenders and appointed counsel, who may not have much opportunity to confer with the accused. But even in this circumstance, defense counsel would usually have more contact with the accused than the prosecutor, and is still in the best position to map strategy for his own client.

The defense of insanity at the time of the crime cannot be used to a defendant's detriment. The same rule should apply in the competency area. In *Lynch v. Overholzer*,[85] the defendant attempted to plead guilty to a charge of passing worthless checks. The trial judge, refusing to accept the plea, found him not guilty by reason of insanity and committed him to a mental hospital. Reversing this decision, the Supreme Court of the United States stressed that this defense was evolved for the benefit of a defendant, and it should not be utilized assiduously to his disadvantage.

Also, if the defendant had the sole responsibility to raise the issue, it might well decrease the number of reversals on appeal and collateral attacks. Today a defendant can refrain from raising the issue at the trial. Later, on appeal or habeas corpus, he contends that he was incompetent at the time of the crime because of a history of mental illness or peculiar past conduct, and agrues that the judge should have *sua sponte* convened a competency hearing.[86] He may be successful because the appellate courts have not defined the quantum of doubt that the trial judge must have in his mind before raising the issue. Then a new trial usually results because it is impossible to determine competency retrospectively.[87] This problem could be alleviated by placing the burden on the defendant to raise the issue at the trial. He should only be able to raise it for the first time on appeal when he can demonstrate incompetency of counsel.

Role of the Psychiatrist

The cases have consistently held that the court should make the final determination of incompetency.[88] The psychiatrist ideally serves as an expert witness whose function it is to advise the court in making its decision.[89] But in the present practice, the psychiatrist often assumes a totally different role, indeed, in many cases the psychiatrist is actually the judge. Studies indicate that many trial judges accept without question the psychiatrist's report, and as a consequence the standard of fit-

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and thus there is no constitutional command to hold a hearing every time the issue arises. Green v. United States, 383 F.2d 199 (D.C. Cir. 1967).

[80] Pate v. Robinson, 383 U.S. 375 (1966).

[81] *See* text at n.88–93, *infra*.

[82] *See* text at n.34–36, *supra*.

[83] 383 U.S. 375, 384–86 (1966). Delay of trial because of a finding of incompetency does not violate the defendant's Sixth Amendment right to a speedy trial even though the accused objects. United States v. Miller, 131 F. Supp. 88 (D. Vt. 1955).

[84] Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Note: *Criminal Procedure: Trial Judge Must Convene Competence Hearings Sua Sponte When Record Produces Bona Fide Doubt as to Defendant's Fitness to Stand Trial Notwithstanding the Absence of a Request*, 12 VILL. L. REV. 655 (1967).

[85] 369 U.S. 705 (1962).

[86] *See, e.g.*, State v. Jensen, — Minn. —, 153 N.W. 2d 339 (1967).

[87] Dusky v. United States, 362 U.S. 402, 403 (1960).

[88] *E.g.*, Sessoms v. United States, 359 F.2d 268 (D.C. Cir. 1966); United States v. Gundelfinger, 98 F. Supp. 630 (W.D.Pa. 1951). In this case the district court refused to accept psychiatric testimony which confused mental illness with incompetency.

[89] Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957); Magnus, *Mental Incompetency*, 18 BAYLOR L. REV. 22, 41–2 (1966).

ness to stand trial becomes discretionary with the psychiatric experts.[90]

This can cause serious problems for the correct application of the incompetency doctrine. Many psychiatrists who are called upon to make these examinations do not fully understand the purpose and scope of the legal concept of incompetency. Frequently the doctor will equate unfitness to proceed with mental illness or mix incompetency with criminal responsibility.[91] Also, some doctors have expressed the attitude that the incompetency procedure presents an opportunity for avoiding the punishment of a mentally ill individual. Thus the psychiatrist will find a defendant incompetent where the doctor feels that the defendant's mental state negates his guilt, but fears he will not come within the insanity test.[92]

Also, the doctors' reports are often mere conclusions, such as "defendant is incompetent and psychotic." They do not give the reasons or method by which the psychiatrist reached his determination.[93] These factors result in findng many defendants as incompetent who can meet the requisite standards of fitness for trial.

It might be suggested that the determination of competency could best be made by a panel of lawyers and laymen, and there is no need for the psychiatrist in the proceedings. It can be argued that the lack of understanding and sympathy of psychiatrists for the legal profession, as illustrated above, substantially diminishes their value as advisors. Furthermore, the concept of fitness to proceed is a strictly legal one, and is not related to the kinds of knowledge psychiatrists are trained to gather. After all, it is contended, a lawyer is in the best position to tell if the defendant can assist him.

It is submitted that the psychiatrist does have a vital role to play in the process. Although the judge should make the ultimate determination, this is a situation that demands expertise in the field of human behavior. The psychiatrist is not an oracle or fortune teller, but by training and experience he is a man possessed of a certain modicum of wisdom about human beings and their behavior.[94] This knowledge should be put to use in evaluating the accused person. For example, his ability may be needed to decide if the defendant is malingering, or whether or not the defendant under the cloak of apparent rationality lacks the judgment necessary to appreciate his situation.

The solution lies in informing the psychiatrist of the true nature of the incompetency doctrine, and what functions the defendant must perform in the adversary system, so that the doctor is able to supply truly useful information. Also, the court should demand to know the reasons behind the expert's conclusion that the defendant is unfit for trial and the reasoning process by which the doctor arrived at his opinion. The doctor would then be compelled in his report and in his testimony to describe the defendant's mental impairment in specific terms of how it will detract from his ability to stand trial. Thus, he would fulfill his true role as an expert.

A practical suggestion to insure more accurate psychiatric examination is to set up special psychiatric institutes to which a defendant could be sent to determine competency. They could be modeled after the Federal Medical Center in Springfield, Missouri,[95] or be similar to the clinic attached to the Recorder's Court in Detroit.[96] This would insure that the examiniations were made by psychiatrists who both understood and were sympathetic to the true aims of the incompetency doctrine.

Further Procedures to Safeguard the Innocent Accused

One of the dangers of the incompetency process is that a defendant who is not guilty of the crime charged or who could not be convicted will nonetheless be committed as incompetent. An extreme

[90] Vann and Morganroth, *supra* n.37 at 3.

[91] MICH. REP'T. 42.

[92] Vann and Morganroth, *Psychiatrists and the Competence to Stand Trial*, 42 U. DET. L. J. 75, 81–85 (1964).

[93] MICH. REP'T. 9 "Few facts are given which describe a defendant's mental impairment in terms of how it will detract from his ability to participate in his defense."

[94] *See* Diamond & Lousell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335 (1965). Smith, *Psychiatric Examinations in Federal Mental Competency Proceedings*, 37 F.R.D. 171 (1964).

[95] This center has extensive psychiatric and medical facilities and performs many competency examinations each year. Settle & Oppegard, *The Pre-Trial Examination of Federal Defendants*, 35 F.R.D. 475 (1964).

[96] MICH. REP'T. 17. This clinic has a staff of three psychiatrists, ten psychologists, one physician and ten stenographers. The clinic has facilities for psychological testing and for gathering data about the defendant's social and medical history. In contrast, Cook County has only two psychiatrists with a small clerical staff, the Behavior Clinic of the Criminal Division of the Circuit Court of Cook County, to perform a great many of its psychiatric examinations. Also, it might be argued that indigents should be provided with funds for a psychiatrist to ensure a fair determination. This far-reaching proposal is probably not administratively feasible.

example is *United States v. Barnes*,[97] where the defendant was declared incompetent to attend the hearing at which the charge against him would have been dismissed because of the government's delay in bringing him to trial. Several steps can be taken to remedy this situation. First, the defendant should be allowed to assert any legal defense, such as lack of venue or point out any legal defect in the prosecution's case, such as an illegal search and seizure. For example, in *United States v. Marino*[98] the court ruled favorably on the defendant's motion to dismiss the complaint as insufficient before ruling on the incompetency issue. A further reaching proposal would permit the defendant by his counsel to raise any affirmative defense such as an alibi or point out any fatal factual defect in the prosecutor's case. If the issue was decided in the defendant's favor, he would be released, if not, he would still be entitled to a trial upon regaining competency.[99] A third suggestion is that whenever the defendant's incompetency appears to be long enduring, there be a tentative trial. In this proceeding the defendant could be acquitted, but if convicted, he would be entitled to a new trial upon regaining his competence. The first proposal can be put into effect immediately with little difficulty. The latter two would offer further safeguards for the accused, but more study is necessary to determine if they are administratively feasible.

Disposition of Those Found Incompetent

In most jurisdictions those defendants who are found unfit to proceed are automatically committed to mental institutions until such time as they gain the ability to stand trial.[100] The sole justification of these commitments is that the defendant will receive treatment that will aid him in regaining competence. There is no finding that the defendant has perpetrated a crime, nor is there a finding that the accused is dangerous to himself or others, as would be required under a civil commitment statute with all of its requisite safeguards.[101] Thus, theoretically, the incompetency doctrine should function solely as a protection for the defendant and not as a means to protect society. But the use of automatic commitment has permitted the doctrine to be used as a surreptitious method of final disposition of the defendant without a trial and without a finding that he is dangerous.[102]

There is strong reason to believe that this automatic commitment procedure is not sound policy. Research indicates that many non-dangerous defendants who could regain competency deteriorate further when placed in these inadequate institutions.[103] Furthermore, present practice assumes that all incompetents can be helped by treatment, which is not necessarily true. Some defendants may never be able to be tried, yet they may not be dangerous to society. To institutionalize these two types of defendants summarily when treatment might be provided either by private facilities or on an outpatient basis, is a waste of the state's resources. The staff and facilities of state mental hospitals are already drastically overextended. If these defendants were not committed and held indefinitely, the staff could concentrate on those people susceptible to treatment in the institutional setting and those who must be hospitalized because they are dangerous. This would likely result in more defendants being returned for trial without substantial detriment to the state.

In addition to being poor policy, these automatic commitments raise the spectre of possible violations of the defendant's constitutional rights.

Confinement without effective treatment or where treatment will not assist the defendant may be a denial of liberty without due process of law.

[97] 175 F.Supp. 60 (S.D. Cal. 1959). In this case four defendants were indicted for the same robbery. The indictment was dismissed as to three of them because of a violation of the right to a speedy trial. But it was not dismissed as to Barnes because it was found that he was incompetent and could not assist his counsel. Hence, he was returned to indefinite confinement although he was never convicted of crime, nor was there a determination that he was dangerous to society. For a criticism of this case, *see* Foote *supra* n.15 at 832.

[98] 148 F. Supp. 75 (N.D. Ill. 1957).

[99] *See* Foote *supra* n.15 at 841. An interesting procedural question would be raised by such a plan: could either party use testimony recorded at the first proceeding at the second trial in the event a witness became unavailable? There might be a constitutional objection to such use by the state. It can be argued that the defendant's counsel was unable to cross-examine the prosecution witnesses properly because of the accused's incapacity, and this violated his Sixth Amendment right to confrontation. There would seem to be no objection to the defendant making use of such testimony.

[100] *See, e.g.*, D.C. Code Ann. § 24-301(a) (1967); Ill. Rev. Stat. ch.38, § 104-1 (1967).

[101] Sullivan v. United States, 205 F. Supp. 545, 550 (S.D.N.Y. 1962). Despite the fact that no determination of dangerousness to society is made, courts have stated that protection of society is a rationale for incompetency confinements. *E.g.*, Greenwood v. United States, 350 U.S. 366 (1956).

[102] Of course, this use of the doctrine is strengthened by the improper fashion in which determination of competency is made.

[103] Foote, *supra* n.15 at 843; *see* text at n.20–27, *supra*.

The state confines the accused on the theory that he will receive the treatment necessary to become competent. But if the state does not provide such treatment, it has no valid basis for detaining the defendant and is doing so without due process. This rationale has been accepted in the analagous situation of a defendant found not guilty by reason of insanity.[104] In *Rouse v. Cameron*, [105] the accused, after acquittal for this reason, was committed under the District of Columbia's mandatory commitment provision. The court of appeals, noting that part of the basis for confinement was treatment, stated that a failure to supply such treatment could raise the issue of a violation of due process. The court also stated that inadequacy of hospital staffs and facilities was no excuse and remanded for further findings on the treatment issue. The reasoning of the court is even more applicable in the competency area, since it has been held that in the acquittal by insanity situation, part of the basis underlying commitment is the protection of society. But this justification is not present in the case of the accused who is unfit for trial.

Moreover, even assuming treatment could be provided in the institution, confinement might be a violation of due process in situations where the defendant is not dangerous. In *State v. Caralluzzo*,[106] the Supreme Court of New Jersey held that it was a violation of due process to confine a defendant who did not have the capacity to stand trial because of a low mental age, without an affirmative finding of danger to society. This seems to be a well reasoned rule. It is a general principle that deprivation of liberty should not go beyond what is necessary for society's or the mentally ill person's protection.[107] And if the state could provide effective treatment by means of outpatient clinics or private psychiatrists for those accused of crimes who are not dangerous to society while they were out on bail, confinement might well violate due process.[108]

It may also be a denial of equal protection of the laws to confine all those persons accused of crime who are incompetent while permitting other defendants the right to be admitted to bail. If the incompetent is not going to receive beneficial treatment, and he is not dangerous, then there is no rational basis for summarily denying him the opportunity to bail. In another situation involving commitments, the Supreme Court of the United States has emphasized the importance of a finding of dangerousness. In *Baxstrom v. Herold*,[109] the petitioner was confined to a mental institution at the end of his prison term on the certificate of the prison doctor. The Supreme Court held that this procedure was a denial of equal protection because the petitioner was not afforded the protection of the civil commitment statute as would any other person who was mentally ill. Such a statute, of course, requires a finding of dangerousness to commit a defendant to an institution that will not afford him proper treatment.

The District of Columbia Circuit has followed *Baxstrom* to strike down the automatic commitment of defendants after an acquittal by reason of insanity. Judge Bazelon, in *Bolton v. Harris*,[110] made clear that the automatic commitment in this situation is a denial of equal protection. He stressed that the defendant is entitled to a hearing with procedures substantially similar to those found in civil proceedings. Also, sexual psychopath laws demand a finding of dangerousness in a full adversary hearing before a defendant may be committed.[111] The incompetent alone can be banished to a mental institution for an indeterminate period without these protections.

The argument can be made that indefinite confinement without treatment may be so inhumane

[104] *See* Nason v. Superintendent of Bridgewater State Hospital, — Mass. —, 223 N.E.2d 908 (1968); *see also* Tribby v. Cameron, 379 F.2d 104 (D.C. Cir. 1967); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). Some writers have urged that it may be a violation of constitutional rights to confine anyone in a mental hospital without providing remedial treatment; Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Bassiouni, *The Right of the Mentally Ill to Cure and Treatment*, 15 DE PAUL L. REV. 291 (1965).

[105] 373 F.2d 451 (D.C. Cir. 1967).

[106] 49 N.J. 152, 228 A.2d 693 (1967).

[107] "A system which presupposes innocence requires that preconviction sanctions be kept at a minimum consistent with assuring an opportunity for the process to run its course." Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543, 549–50 (1960).

[108] This argument would be equally valid for the defendant who can provide his own treatment, and it would not seem to raise serious administrative problems.

[109] Baxstrom v. Herold, 383 U.S. 107 (1966).

[110] 395 F.2d 642 (D.C. Cir. 1968). *Cf.* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964). The automatic commitment also seems to be a denial of the right to bail to those defendants otherwise bailable. In a noncapital case the security given should be no more than is necessary to secure the defendant's presence at trial. *See generally* FREED & WALD, BAIL IN THE UNITED STATES (1964).

[111] Specht v. Patterson, 386 U.S. 605 (1967). *See also* Burek, *An Analysis of the Illinois Sexually Dangerous Person's Act*, 59 J. CRIM. L. C. & P.S. 254 (1968).

as to violate the Eighth Amendment prohibition against cruel and unusual punishment. Since confinement without treatment is essentially punishment, this view is supported by the holding in *Robinson v. California*.[112] In this case the Supreme Court held that it was a violation of the Eighth Amendment to punish a person for the sickness of narcotics addiction. If the incompetent is confined without treatment and when not dangerous, he is essentially being punished because of his mental disorder.

Whether or not prompted by constitutional necessity, several reforms should be effected regarding the disposition of those unfit to proceed to trial. There should be no statutory provision for mandatory commitment, nor should the practice result in automatic confinement. In order to institutionalize a defendant, there should be an affirmative finding of dangerousness in a proceeding (similar to a civil commitment) with proper standards and effective safeguards.[113] Alternatively, there should be an affirmative finding that a good faith effort toward providing effective treatment will result.[114] If the accused is not dangerous and can provide his own treatment equivalent to what he would receive in the institution, the court should admit him to bail as it would any other defendant.[115] And the state and federal government should endeavor to provide outpatient therapy for those admitted to bail but incompetent, or the state should provide funds to obtain private treatment.

Reforms in Procedures for Release Upon Regaining Competence

Today in most states, it is left to the superintendent of the hospital to notify the court when the inmate is ready for trial.[116] The informality of this procedure has resulted in the incompetent sometimes becoming a forgotten man in the mental institution. In order to correct this situation, there should be a requirement of frequent periodic reports of his condition to the court. If the defendant, through his counsel, contests a finding of continued incapacity, there should be a full scale adversary hearing on the issue of competence. The burden of proof should be on the state to demonstrate the accused's continued incompetence.

Finally, in order to prevent lifetime commitment as an incompetent, there should be a limitation on the length of time that a defendant can be held as unfit to proceed. After a two year maximum period, he should either be committed in a strictly civil proceeding, if necessary, or he should be released.[117] In either case, to assure fairness to the accused, the charges against him should be dropped.[118]

[112] 370 U.S. 660 (1962); *see also* Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (Chronic alcoholism is not a crime and is not punishable as such.)

[113] Of course if proper safeguards are not observed, the same dangers can infect civil type commitments. *See* Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U. L. REV. 383 (1962).

[114] *E.g.*, United States v. Miller, 131 F. Supp. 88 (D. Vt. 1955).

[115] *See The Case of Bernard Goldfine*, KATZ, *supra* n.21 at 687, where the trial court did permit a defendant to be admitted to bail on the stipulation that he would see a psychiatrist for treatment. Similarly, *see* United States v. Klein, 325 F.2d 783 (2d Cir. 1963).

[116] *E.g.*, N.Y. CODE CRIM. PROC. § 662-b2 (McKinney Supp. 1967). Of course the defendant can petition for release from improper confinement by seeking a writ of habeas corpus, Sanders v. United States, 373 U.S. 1 (1963). But he has the burden of proving his sanity. This is virtually impossible because he is generally confined in the state institution without access to a lawyer or his own expert witness.

[117] *See, e.g.*, MICH. STAT. ANN. § 28.966 (11) sec. 27a (7) (1967). A caveat to this rule might be where the defendant is showing improvement during the course of his treatment.

[118] As noted above, it may be extremely difficult for the accused to make his defense years after the crime has occurred.