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Pre-Trial Criminal Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms

STEVEN L. ENGELBERG*

Mental unsoundness in a person accused of crime may give rise to two entirely distinct legal problems. The first is the question of the defendant's responsibility: whether, at the time of the act charged, he was so mentally disordered as not to be punishable for it, under the legal test of responsibility. . . . The other involves the defendant's mental condition not at the time of the act charged, but at the time of the criminal proceeding—whether he is presently sane enough to plead or be tried. . . . Since the first problem involves the "guilt" or "innocence" of the defendant, while the second does not, the latter has been given comparatively little consideration. Nevertheless, as a matter of procedure, it is highly important.**

I. Introduction

In Massachusetts, the crime of assault with intent to murder carries a ten year maximum sentence.1 Yet, a man spent over 43 years of his life at the Bridgewater State Hospital because he was charged with such a crime. This individual was 26 years old when admitted to the hospital on March 30, 1915, and he died there on October 26, 1958. His diagnosis was schizophrenic reaction, paranoid type. He never left Bridgewater, and he was never tried for the crime of assault with intent to murder. Although under the law of Massachusetts he was presumed to be innocent of the charge and although he was never convicted, the charge itself served as a sufficient basis for the state to

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**H. Weihofen, Mental Disorder as a Criminal Defense 428 (1954).

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detain him for the greatest part of his life. An even more startling case was that involving a 24 year old man admitted to Bridgewater on March 17, 1896, on the basis of being charged with the crime of vagrancy. His diagnosis was schizophrenic reaction, hebephrenic. This man was detained at Bridgewater until his death on September 23, 1959, without ever being tried for the minor criminal charge which brought him there.\(^2\)

These two cases are not isolated occurrences. According to a 1961 study which focused on the population at Bridgewater, of the 197 patients listed as indefinite pre-trial commitments since 1896, only two persons had ever been released.\(^8\)

Why are these individuals committed? In theory, such commitments are the result of a long established rule at common law that an accused could not be required to plead to an indictment or be tried for a crime when he was so mentally disordered that he could not make a rational defense.\(^4\) One reason often given in support of this rule is that it prevents trial of a defendant who, though physically present, is mentally absent during much of the trial.\(^5\) This reason is based on a “leading principle that pervades the entire law of criminal procedure . . . that, after indictment . . . nothing shall be done in the absence of the prisoner.” More basically, this “universally accepted rule prohibiting the trial of a mentally incompetent defendant” is derived from the realization that “the judicial process would be denigrated by the spectacle of a prosecution of a severely disoriented person,” and that “the reliability of a conviction is reduced if individuals incapable of self-defense are forced to stand trial.” This idea has been expressed in various cases as follows:

It would be inhumane, and to a certain extent a denial of the right of trial upon the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or be tried for his life or liberty. There may be circumstances in all cases of which the defendant alone has knowledge, which would prove his innocence, the advantage of which, if insane to such an extent that he did not appreciate the value of such facts, or the propriety of communicating them to his counsel, he would be deprived.\(^8\)

The common law standard for determining competency to stand trial grew out of the basic principle that an individual must be capable of “playing the

\(^2\) D. Bright, Pre-Trial Commitment in Massachusetts 30, June 1, 1961 (unpublished thesis in Boston University Law-Medicine Institute Library).

\(^3\) Id. at 44. In addition to Bridgewater, which is under the authority of the Commissioner of Corrections, such pre-trial commitments are also made to twelve state hospitals of the Department of Mental Health throughout the state.

\(^4\) Youtsey v. United States, 97 F. 937 (6th Cir. 1899).


\(^6\) Lewis v. United States, 146 U.S. 370, 372 (1892).


\(^8\) Jordan v. State, 124 Tenn. 81, 87, 135 S.W. 927, 928 (1911).
role” of a criminal defendant in order to participate in any criminal proceedings against him. According to this standard, a criminal defendant is ready to participate in criminal proceedings only if he “is capable of understanding the nature and object of the proceedings going on against him; if he rightly comprehends his own condition with reference to such proceedings, and can conduct his defense in a rational manner. . . .” This standard, unlike the test for determining criminal responsibility, is uniformly accepted in almost every jurisdiction with only slight variations.10

It is held to be a violation of due process of law “to subject an insane person to trial upon an indictment involving liberty or life,”11 and the trial or conviction of an incompetent defendant is held absolutely void.12 The basic problem, then, concerns the proper disposition of a criminal defendant who is found to be incompetent to stand trial. At common law, the practice seems to have been to confine such an individual to jail.13 It has even been held that in the absence of a statute the judge had the power only to order the incompetent defendant confined in jail.14 Such statutes, however, are common. Professor Weihofen reports that in all but a few states the subject of mental incompetency at the time of criminal proceedings is now covered by statute, and that almost all of these statutes provide that if the defendant is found to be incompetent, he shall be confined to a hospital or a mental in-

10. In all but a few states, the subject of a defendant’s competency to stand trial is covered by statute. H. Weihofen, Mental Disorder as a Criminal Defense 435 (1954). As two commentators who surveyed the statutory formulation of this standard observed, none of the statutes establishes a rigid test, such as that used in determining criminal responsibility:

Thus, in thirty-four jurisdictions “insanity” figures among the grounds for postponement of the proceedings: in some of these jurisdictions the state of mind must be one of “insanity” before postponement of the proceedings is allowed, while in the rest of these jurisdictions “insanity” is one of two or more alternative mental conditions justifying such a postponement. Other terms commonly used are “idiot,” “lunatic” . . . “unsound mind” . . . “mentally disordered” . . . and so forth. . . . Seventeen states embody the term “mentally defective” or its equivalent in the statutory definition. In thirteen states and the District of Columbia the test “incapable of assisting in his defense” or its equivalent is applied.


However, regardless of the varying statutory formulations of the test of competency to stand trial, almost every jurisdiction has “retained the common law criteria of ability to comprehend the proceedings and assist in the defense.” Ibid. See also Annot., 3 A.L.R. 94 (1919). This is true of the statute adopted by Congress. 18 U.S.C. § 4244 (1964). One notable exception is the Pennsylvania statute which states that a person should not be tried for a crime if his mental illness is severe enough to make it necessary or advisable for him to be under care. Pa. Stat. Ann. tit. 50, § 1222 (1954).

12. Ashley v. Pescor, 147 F.2d 318 (8th Cir. 1945).
stitution. In *Greenwood v. United States*, the Supreme Court sanctioned the authority of the federal government to commit incompetent defendants to a mental institution prior to trial as incident to the power to prosecute crime, an "incontestable national power." The result of such pre-trial confinement is that criminal proceedings are postponed until the accused is considered competent to stand trial.

Whether or not the assumption that commitment to a mental institution will enable most defendants to regain their competency is a correct one, it is clear that such an assumption underlies the state and federal statutes which provide for pre-trial criminal commitment. Inherent in the suspension of criminal proceedings and the subsequent commitment to a mental institution is the judgment that this type of institutionalization will improve the defendant's mental condition to the point where he is competent to face the charges against him. Thus, from the point of view of the policy underlying the commitment procedure, it follows that the justification for such commitments is that the defendant may sufficiently respond to institutional treatment so that he can be returned to court.

In Massachusetts, however, the justification for pre-trial criminal commitments has not been clarified. Obviously, when an individual charged with the crime of vagrancy is committed to a mental institution for the remainder of his life, the purpose of such commitment is not to enable the defendant to return to court and face the charge against him. In the past several years, some courts and psychiatrists in Massachusetts have shown a growing awareness of the problem of indefinite pre-trial commitment and have attempted to formulate a proper justification for a practice which has existed for many years. Nevertheless, there still exists a great deal of confusion and misunderstanding as to what constitutes the proper purpose of these commitments. This is primarily a result of inadequacy in the statute regulating the procedure for pre-trial commitment and the dearth of case law on the subject.

It is this procedure of pre-trial criminal commitment in Massachusetts which will serve as the focal point of this article, the aims of which are basically two-fold. The first is to analyze the procedure whereby a criminal defendant is committed in Massachusetts and to determine the consequences of such commitment for the individual involved. It will be necessary to de-

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15. H. Weihofen, *supra* note 10, at 435, 438. In those states which do not require hospitalization, it is discretionary, but in at least five states, hospitalization "is ordered if the court believes that the release of the accused would be 'dangerous' or a 'menace.'" F. Lindman & D. McIntyre, *supra* note 10, at 361.


17. "Incompetency as a ground for postponing criminal proceedings may be raised at any stage from arraignment to execution of sentence. The issue is usually raised before the trial and most statutes deal mainly with the capacity to stand trial." F. Lindman & D. McIntyre, *supra* note 10, at 360. Therefore, it is the finding of incompetency prior to trial and the commitment that occurs at that time with which this study is concerned.
cipher the standard upon which such commitments are based. ("Decipher" is used advisedly, for as it will appear, there is a current debate within Massachusetts as to just what is the proper standard.)

In explaining the Massachusetts system of pre-trial commitment, the objections to this system will be surveyed. In addition, there are several constitutional problems which arise because of the constant use of this pre-trial commitment process for purposes other than to enable a mentally incompetent defendant to return to court. These constitutional problems must at least be presented and explored; they cannot simply be ignored as is the tendency of most of the cases dealing with this subject.

The second aim of this article is to recommend needed reforms in the present procedure of pre-trial criminal commitment in Massachusetts. These suggestions should flow from the analysis in the first section of this procedure and the problems which it has created. Basically, an attempt will be made to clarify the proper standard for competency to stand trial, to establish a procedure for the determination of a defendant's competency and the disposition of those defendants who are considered incompetent, and to specify the role of the court, the psychiatrist, and the defendant and his lawyer in this procedure.

It should be noted that the basic concern in this study is with the deprivation of liberty of an individual criminal defendant who has not been convicted of any crime. Theoretically, the state's interest in achieving criminal justice could also be endangered by a defendant who feigns mental incompetency to avoid standing trial. Where the crime charged is very serious, the possibility of such malingering would seem to be enhanced. But based on the writer's study of the practice in one state, this theoretical possibility does not exist in practice. Rather, the defendant who is indefinitely committed to a mental institution prior to trial either is indifferent to his fate or opposes it; very rarely is the problem presented where a defendant claims he is incompetent to stand trial, and the state suspects him of attempting to avoid standing trial. As a practical matter, therefore, the process of pre-trial criminal commitment inevitably raises the problem of attempting to prevent an unwarranted and unjustified pre-trial detention in a mental institution.

There is no reason to assume that this basic problem does not exist in many other jurisdictions. Based on this study of the operation of the pre-trial commitment procedures in Massachusetts, it seems evident that the problem is a pervasive one. As previously mentioned, this article focuses on Massachusetts simply because it was possible for the writer to interview some

18. "[M]alingering to avoid trial rarely occurs except in homicide cases where the penalty is death. In fact, a moderate prison term with the possibility of early parole is usually preferred when the alternative is indefinite commitment to a mental hospital with the prospect of trial on release." Slough & Wilson, Mental Capacity to Stand Trial, 21 U. Pitt. L. Rev. 593, 601 (1960).
of the judges, district attorneys, psychiatrists, and other officials who play an
important role in this system of pre-trial criminal commitment. However,
since the statutory scheme in almost every jurisdiction is similar to that in
Massachusetts, it is likely that the confusion and misunderstanding which has
existed there exists elsewhere. Indeed, many of the cases discussed herein
illustrate that abuses of the pre-trial commitment procedure do arise in other
jurisdictions. Since it is unwarranted to suppose that Massachusetts is unique
in its handling of the problem of pre-trial criminal commitments, it is hoped
that the discussion and observations to follow will, in general, apply to the
practices of other jurisdictions. Even though the recommendations contained
in the third part of this article will be aimed at reforming the procedure of
pre-trial commitment in one state, it is believed that they will be relevant to
the general problem throughout the United States.

II. The Massachusetts System of Pre-Trial Commitment: The Procedure
and the Problems

If it be argued that the court, in employing the concept of competency for purposes other than those inherent in the common law
tradition and statute and in relinquishing their interest in the defendant after his commitment, are attempting to reach toward some
more humane goal than imprisonment, it can be pointed out that
such humane goals are not reached in terms of the aftermath of in-
competency proceedings. To put the matter bluntly, in many cases

19. The following is a list of the individuals interviewed by the writer:
Honorable Reuben L. Lurie, Superior Court Judge of Massachusetts, in Brookline,
Massachusetts, Jan. 27, 1966.
Honorable Julien L. Yesley, District Court of Newton, Massachusetts, in Newton,
Honorable Paul K. Connolly, 2d District Court of Eastern Middlesex County, in
Dr. A. Louis McCarr, Law-Medicine Institute, Boston University, in Boston, Massa-
Dr. Ames Robey, Medical Director of Bridgewater State Hospital, in Bridgewater,
Dr. Alan Rothstein, Senior Psychiatrist on the Female Reception Service, Boston State
Hospital, in Boston, Massachusetts, Dec. 20, 1965.
Howard Colpitts, Criminal Court Clerk, 1st Session, Middlesex County, in Cambridge,
Massachusetts, Feb. 4, 1966.
John Fleeming, Probation Officer, Middlesex County, in Cambridge, Massachusetts,
Walter Lewler, Chief Probation Officer, Middlesex County, in Cambridge, Massa-
In addition to interviews, the writer worked as an intern at the Middlesex County District
Attorney's Office during 1965-66; during this period, the writer benefited from informative
discussions with several assistant district attorneys concerning the Massachusetts pre-trial
commitment procedure. The interviews and discussions served as the basis of the writer's
understanding of this procedure, and most of the observations and criticisms in the study are
a result of these interviews and discussions; specific interviews are referred to only where it is
thought to be necessary to do so.
a prison sentence would be preferable to the presumably more compassionate act of committing an individual as incompetent.\textsuperscript{20}

\textit{The Statutory Framework}

The authority for pre-trial criminal commitment in Massachusetts is found in two sections of the Massachusetts General Laws. Chapter 123, Section 100 provides that:

If a person under complaint or indictment for any crime . . . is at the time appointed for trial, hearing or sentence, or at any time prior thereto found by the court to be mentally ill or in such mental condition that his commitment to a state hospital is necessary for his proper care or observation pending a determination as to any mental illness, the court may commit him to a state hospital . . . under such limitations, subject to the provisions of section one hundred and five, as it may order. The court may in its discretion employ one or more experts in mental illness . . . to examine the person . . . \textsuperscript{21}

Section 105 provides in part that “a prisoner committed. . . to a state hospital under section one hundred. . . for his proper care or observation pending the determination of his insanity shall, unless found to be insane as hereinafter provided, be returned” to court within 35 days after his commitment under Section 100.\textsuperscript{22} Section 105 also provides for the return to court of a person committed as insane under Section 100 who has not been “restored to sanity.” He is returned “because in the opinion of the superintendent . . . neither the public interest nor the welfare of the prisoner will be promoted by his further retention in the hospital,” and the hospital must submit “a report relative to the prisoner’s mental condition as affecting his criminal responsibility and the advisability of his discharge or temporary release from the . . . custody to which he is returned.”\textsuperscript{23} The most crucial part of Section 105 is that providing for indefinite pre-trial commitment:

If a prisoner, committed. . . under section one hundred. . . for his proper care or observation as aforesaid, is found by the superintendent. . . to be insane, the finding shall be certified upon the warrant or commitment, and the superintendent of the institution. . . shall report the prisoner’s mental condition to the court or judge issuing the warrant or commitment . . . with the recommendation that the prisoner be committed as an insane person. The court . . . may thereupon commit the prisoner to an institution for the insane, if, in the opinion of the court. . . such commitment is necessary.

\textsuperscript{22} Id. § 105.
\textsuperscript{23} Ibid.
The provisions of this section relative to the return to custody... of a prisoner taken therefrom under section one hundred... shall apply, so far as apt, to a prisoner committed under this section.24

And finally, Section 105 provides:

When, in the opinion of the superintendent of the state hospital to which a prisoner has been committed... under section one hundred... the mental condition of the prisoner is such that he should be returned to custody... he... shall so certify upon the warrant or commitment, and notice, accompanied by a written statement regarding the mental condition of the prisoner, shall be given to the proper custodian... who shall thereupon cause the prisoner to be reconveyed... [to court].25

These sections were first enacted in 1849, but even prior to that time, the Massachusetts courts recognized the common law principle that one could not be required to plead or be tried while he was insane. In Commonwealth v. Braley26 and Commonwealth v. Hathaway,27 the trial courts, based on their observation of the defendant's appearance and conduct at the time of arraignment, had reason to doubt the defendant's sanity. In each case, the court impaneled a jury to determine the defendant's sanity, and in each instance, after the jury determined that the defendant was in fact insane, he was remanded to prison.

The statute significantly changed this common law practice. The psychiatrist has replaced the jury in aiding the court in its determination of the defendant's mental condition. If the defendant is considered mentally ill, the court may commit him to a mental institution, but not to prison. According to Professor Weihofen, almost every state specifically authorizes the court either to appoint one or more impartial psychiatrists to examine the defendant whose mental competency is in issue or to commit the defendant to a state hospital for a period of observation.28

There are other methods of determining a defendant's mental condition which do not require commitment. Section 100 allows the court in its discretion to employ experts in mental illness, apparently to aid the court in its determination of the defendant's mental condition. In addition, Chapter 123,

24. Ibid.
25. Ibid.
27. Supra note 13.
28. H. WEIHOFEN, supra note 10, at 449. It has been reported that in thirty-four jurisdictions, the determination of the defendant's competency to stand trial is expressly required to be made by the judge; but many of these statutes authorize the court to employ experts and impanel juries to assist it in reaching a decision. Thus, in five states the court has discretion as to whether a jury should be impaneled, whereas in nineteen states a jury is mandatory, at least if requested by one of the parties. Use of a panel of experts to determine this question is provided for in eight jurisdictions. F. LINDMAN & D. MCINTYRE, supra note 10, at 361.
Section 99 provides that "[i]n order to determine the mental condition of any person coming before any court of the commonwealth, the presiding judge may, in his discretion, request the department [of mental health] to assign a member of the medical staff of a state hospital to make such examinations as he may deem necessary." Finally, the existence of court clinics under the Department of Mental Health enables a court to screen defendants in order to determine whether it is necessary to commit them to a mental institution. Thus, even where a court has some doubt about a criminal defendant's mental condition prior to trial, it can receive an evaluation of his condition without committing the defendant under Sections 100 and 105. At the present time, however, very few courts take advantage of these alternatives to commitment. Where the court seeks a determination of a defendant's mental condition, Sections 100 and 105 are most often relied upon.

The Search for a Standard

Sections 100 and 105 refer only to "mental illness" or "insanity," without attempting to define these terms for the purpose of pre-trial commitment. Even though in most jurisdictions "insanity" is the standard in determining whether a defendant should be committed prior to trial, the case law has made it clear that the criterion is the common law test of competency to stand trial.

In Massachusetts, however, the vagueness in the statutory formulation has not been clarified by case law; indeed, the few cases which deal with this problem have only succeeded in muddying the waters. In Commonwealth v. Deveraux, the Supreme Judicial Court upheld the denial of a new trial based on defendant's post-trial claim that he was insane and therefore not criminally responsible. This defendant had been examined under the Briggs Law, and the court concluded that if these examiners had found that defendant was not criminally responsible for the crime because of insanity, he would never have been brought to trial: "It is a necessary deduction from all the circumstances that the defendant was put upon trial on the indictment because the report of the department of mental diseases upheld his criminal responsibility." Similarly, in Commonwealth v. Gray, the court stated that the purpose of requiring an examination under the Briggs Law is to prevent one within the purview of the statute from being "put upon his trial unless

30. Interview with Judge Paul K. Connolly, supra note 19.
33. Id. at 396-97, 153 N.E. at 883.
34. 314 Mass. 96, 49 N.E.2d 603 (1943).
his mental condition is thereby determined to be such as to render him responsible to trial and punishment for the crime charged against him. . . .”\textsuperscript{35}

These cases indicate the view of the Supreme Judicial Court that a criminal defendant should not be brought to trial, and should therefore be indefinitely committed under Sections 100 and 105, if he is suffering from a mental disease affecting his responsibility for the crime charged against him. There is no concern in these cases as to whether the defendant is capable of understanding the charges against him and assisting in his defense. This attitude of the Massachusetts court is best illustrated in \textit{Commonwealth v. Cox},\textsuperscript{36} where a defendant was examined prior to trial on a first degree murder charge and then committed to Bridgewater for observation under Section 100. On the basis of a report that the defendant was “insane and in need of care in a hospital for mental disease,” the defendant was committed indefinitely for almost two years.\textsuperscript{37} When the medical director at Bridgewater reported that the defendant had “recovered,” he was returned for trial, where a jury found him guilty. The appellate court found that the defendant was not criminally responsible and that the guilty verdict “was against the weight of the evidence, and [that] there should be a new trial.”\textsuperscript{38} The court, relying on \textit{Commonwealth v. Devereaux}, realized that the reports of the psychiatrists after the observation “did not undertake to state that the defendant was not criminally responsible on the day of the killing. Had they done so, the defendant doubtless would not have been brought to trial.”\textsuperscript{39} (Emphasis added.)

The court in \textit{Cox} did not examine the basis upon which the defendant was committed for two years prior to trial and did not consider the propriety of such a commitment. The defendant had allegedly killed his wife in a brutal manner “to spare her the sufferings of financial adversity” and of growing old; he confessed immediately to the crime. The court stated that “following the assaults, the defendant exhibited no remorse, and his outward manner was calm and composed.” Regardless of whether this defendant was criminally responsible, the impression emerges that he was competent to stand trial under the common law standard. But the court demonstrated that it was not even aware of the problem in committing the defendant prior to trial for almost two years without any indication that he was incapable of standing trial. On the contrary, the court assumed that a defendant would not be returned to trial where there were doubts as to his criminal responsibility.\textsuperscript{40}

\textsuperscript{35} Id. at 100, 49 N.E.2d at 607.
\textsuperscript{36} 327 Mass. 609, 100 N.E.2d 14 (1951).
\textsuperscript{37} Id. at 612, 100 N.E.2d at 16.
\textsuperscript{38} Id. at 615, 100 N.E.2d at 17.
\textsuperscript{39} Id. at 614, 100 N.E.2d at 16.
\textsuperscript{40} In only one case has the Massachusetts court squarely faced and discussed the issue of defendant’s capacity to stand trial. In \textit{Commonwealth v. Harrison}, 342 Mass. 279, 173 N.E.2d 87 (1961), the defendant was tried and convicted for the murder of his wife. Defendant argued on appeal that a self-inflicted brain injury, caused by an attempt to shoot him-
The Supreme Judicial Court thus has confused the test for competency to stand trial and the test for criminal responsibility, and it has stated that a defendant could not stand trial if he lacked criminal responsibility. In no case did the court even comment on the validity of an indefinite pre-trial commitment. In an effort to fill this void caused by the absence of judicial guidelines, Dr. Ames Robey, the Medical Director at Bridgewater, has attempted to communicate to the courts, as well as to psychiatrists, a clear standard of competency to stand trial to be applied under Sections 100 and 105. Dr. Robey accepts the common law standard of competency to stand trial. After dealing with many individuals at Bridgewater, who had been committed "without reference to their competency to be returned to trial," he devised a "checklist" consisting of three basic categories: comprehension of court proceedings, ability to advise counsel, and susceptibility to decompensation while awaiting or standing trial.

In his radical departure from past practice in Massachusetts, Dr. Robey states that "even in the presence of mental illness," incompetency does not automatically follow: "Even though found to be psychotic, if the patient is self, "blunted [his] emotional awareness of the peril of his position" so "that he knew that he might be found guilty but did not care." But the court was impressed with the psychiatrist's testimony that the defendant was "correctly oriented in all spheres" and with the fact that defendant had appeared in court and addressed the jury. The court therefore concluded that:

[It] was not error to decide that the defendant, notwithstanding his illnesses, weaknesses and injury, was sufficiently a human being to be brought to trial, with ability, although impaired, to cooperate in his own defense. "Constitutional or other inferiority is not the test of criminal responsibility." (Emphasis added.)

Id. at 295, 173 N.E.2d at 97. Even though the court was able to analyze the issue of defendant's capacity to stand trial, it concluded its analysis by reference to "the test of criminal responsibility." The court thereby indicated its confusion as to exactly what was being determined in the case.

Perhaps the most startling example of a court's failure to comment on the propriety of a pre-trial commitment occurred in Commonwealth v. Zelenski, 287 Mass. 125, 191 N.E. 355 (1934), a case involving a man indicted for murder who had been committed for ten years prior to trial. The issue in the case was whether the defendant's confession, which had been given the day after the crime occurred, was admissible in view of the defendant's mental illness. The court held that it was admissible:

This testimony was not rendered inadmissible by the mental condition of the defendant. The medical evidence falls far short of proving that the mental infirmities of the defendant deprived him of the faculty of consciousness of the physical acts performed by him, of the power to retain them in his memory, and of the capacity to make a statement of those acts with reasonable accuracy. An insane person is not necessarily an incompetent witness. Kendall v. May, 10 Allen 59, 64. (Emphasis added.)

Id. at 126-29, 191 N.E. at 357.

It is at least arguable that if a person who is mentally ill is capable of making a reliable confession, he is capable of standing trial; this does not necessarily follow, but it is a question which would have warranted the court's consideration. And yet, the court simply accepted the competency of this defendant to make a reliable confession, which involved the ability to retain and communicate certain facts, without even recognizing the possible inconsistency between this finding and the defendant's ten year commitment prior to trial.

Interview with Dr. Robey, supra note 19.

able to comprehend those aspects of the court procedure listed, and able to work with his lawyer in conducting a defense, he should go back to trial.”

According to Dr. Robey, many courts are now willing to accept his report at the end of an observation commitment that a defendant is “mentally ill but competent to stand trial.” He claims that such acceptance was difficult at first, for most courts believed if a defendant was suffering from a mental illness, he was committable under Sections 100 and 105.

One superior court judge, however, expressed dissatisfaction with a report which stated that defendant was “mentally ill but competent to stand trial.” When he gets such a report, this judge stated that he requests the Department of Mental Health under Sections 99 or 100 to assign a psychiatrist to examine the defendant and make another report to the court. An assistant district attorney in Middlesex County argues that a finding by the psychiatrist that a defendant is “mentally ill but competent to stand trial” increases the expenses of the state, since it forces certain judges to request an additional psychiatric examination from the Department of Mental Health. This assistant believes that such a report serves no useful function and confuses the court. A probation officer summed up these objections to the so-called “mixed reports” coming from Bridgewater: “Either the defendant is [mentally ill] or he ain’t.”

Several courts in various jurisdictions agree with the conclusion that a defendant can be mentally ill and yet competent to stand trial.45 In *Lyles v. United States*, the court stated that a defendant

may have a mental disease, and the mental disease may have been the cause of his criminal act, and he may be suffering from the same disease at the time of his trial; but it is a scientific fact that he nevertheless may become competent to stand trial under this [common law] definition of competency. A paranoic or a pyromaniac may well understand the charges against him and be able to assist in his defense. “To assist in his defense” of course does not refer to legal questions involved but to such phases of a defense as a defendant usually assists in, such as accounts of the facts, names of witnesses, etc. . . .


47. *Id.* at 729-30. Colorado is one of the few jurisdictions which recognizes this concept in its statute:

The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature and object of the proceeding against him and to rightly comprehend his own condition with reference to such proceeding, and has sufficient mind to conduct his defense in a rational and reasonable manner, although on some other subjects his mind may be deranged or unound. (Emphasis added.)

Dr. Rothstein, a psychiatrist at Boston State Hospital, agreed with Dr. Robey and these cases on this question of whether one could be mentally ill and still competent to stand trial. He stated that some individuals can be paranoid and deluded, "but in a very organized way." Even though he might recommend that such an individual is not criminally responsible, he believes that this type of defendant would be competent to stand trial.

Thus, because of the total lack of judicial guidance as to the proper standard upon which an indefinite commitment should be based, the Medical Director at Bridgewater was forced to fill this vacuum by communicating to the committing courts the common law standard of competency to stand trial. The courts which have refused to accept a finding that a defendant is mentally ill but competent, and the courts which do not commit defendants to Bridgewater and therefore have no contact with Dr. Robey, continue to consider a defendant committable if the psychiatrist recommends to the court that he is mentally ill and in need of further hospitalization. It is only in the past several years that some courts in Massachusetts have been forced to relate the determination of the defendant's mental condition and the commitment procedures under Sections 100 and 105 to the question of the defendant's competency to stand trial, thereby developing an understanding of the purpose which a pre-trial commitment is supposed to serve.

48. Interview with Dr. Rothstein, supra note 19.

49. This standard of pre-trial commitment, which has been developed over the years by the courts and psychiatrists in Massachusetts, is embodied in the statute of only one state, Pennsylvania; the Pennsylvania statute is designed to prevent the trial of a defendant who "appears to be mentally ill or in need of care in a mental hospital." PA. STAT. ANN. tit. 50, § 1222 (1954). It has been observed that "the mental characteristics of a person which make it 'necessary or advisable' that he be hospitalized are not parallel to those which fundamental fairness dictates must of necessity delay the trial of an accused pending his recovery." F. LINDMAN & D. MCINTYRE, supra note 10, at 860.

50. It is interesting to note that in the District of Columbia (as well as in other jurisdictions), the statute which authorizes pre-trial commitment allows such commitment where the court finds that: "[T]he accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense...." (Emphasis added.) D.C. CODE ANN. § 24-301 (a) (1967).

Under this type of statute, a dual standard for pre-trial commitment seems to be established—a defendant can be committed if he is incompetent under the common law definition and alternatively, he can be committed if he is considered to be of "unsound mind," regardless of whether or not this unsoundness affects his competency to stand trial. However, in Williams v. Overholser, the United States Court of Appeals for the District of Columbia Circuit interpreted this statutory standard to mean that the [trial] court shall order the accused confined in a mental hospital if it finds that because of unsoundness of mind or for any other reason he is mentally incompetent to stand trial." (Emphasis added.) 259 F.2d 175, 176 (D.C. Cir. 1958). The court then stated that the purpose of this section "is simply to prescribe the procedure for determining whether an accused person can understand the proceedings against him and properly assist in his defense, and to provide for his confinement in a hospital instead of a jail until he can." Id. at 177. Thus, even though the statute strongly suggests that a court can commit a defendant found to be of unsound mind, without the necessity of relating his mental condition to his ability to participate in the criminal proceedings, the Williams decision interpreted this possibility out of the statute.
Raising the Issue of Defendant's Mental Condition.

There is no suggestion in Section 100 as to who may raise the issue of the defendant's mental condition before the court. In practice, the issue is usually not raised prior to trial by either the defendant or his attorney. Where a defendant has a criminal record, the trial judge is alerted to the fact that the defendant has a past history of mental illness by the probation department. Where the trial judge has reason to question the defendant's mental condition, it has been held in another jurisdiction that he may order an inquiry on his own motion, even over the objection of defendant's attorney. Although no cases in Massachusetts deal with this problem, the terms of Section 100 explicitly allow the court to make such an inquiry, regardless of any objection by defendant or his attorney.

Another possible method of raising the issue of the defendant's mental condition, leading to his commitment under Section 100, is the procedure under Chapter 123, Section 100A, known as the Briggs Law. The Briggs Law was the first American legislation to provide a routine psychiatric examination for certain classes of criminal defendants. A person indicted for a capital offense, a person who has been previously indicted more than once, and a person who has been previously convicted of a felony must be examined by the Department of Mental Health "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." The Briggs Law makes no provision for commitment, and the examination is intended to take place in jail (if the defendant is not out on bail) or wherever the defendant is told to report. A defendant, however, is not required to submit to the examination.

One commentator optimistically stated that because of the Briggs Law, Massachusetts "has eliminated the problem of how the defendant's possible mental disorder at the time of trial is to be called to the attention of the court." However, putting aside the value of such a law in clarifying the issue of crim-
inal responsibility at the trial itself, in practice, the Briggs Law does not play an important role in determining the issue of the defendant's present mental condition. Where a defendant who falls under the terms of the law has no previous background of mental illness, he is usually induced to waive the Briggs examination, and there is usually no commitment in such a case. This occurs in a large percentage of the non-capital cases falling within the terms of the statute.\(^6\) If the defendant falling within the terms of the statute has a background of mental illness or if he is charged with a capital crime, the present practice is that the Briggs psychiatrist reports to the court which requested the examination that the accused requires inpatient observation, and the court orders the defendant committed under Section 100.\(^7\)

The issue of defendant's mental condition is perhaps most often called to the court's attention by the district attorney. In interviews at the Middlesex County District Attorney's Office, a motive for the prosecutor's interest in raising this issue emerged: it was argued that if there is no inquiry into the defendant's mental condition, and the defendant is subsequently convicted, this conviction could later be set aside on appeal or collateral attack on the ground that defendant was not competent to stand trial. Thus, the state's interest in raising the issue of defendant's mental condition is in preventing a costly trial that can later be set aside. This justification is more persuasive in a case involving a felony rather than a misdemeanor; for in the latter type of case, the expense and difficulty in achieving a conviction and the likelihood of subsequent attacks on the conviction are not nearly so great as in the former.

However, even where the crime charged is a felony, the district attorney's attempt to justify his practice of raising the issue of defendant's mental condition is not convincing. It has been pointed out that most committing courts make no effort to determine a defendant's competency to stand trial. The standard for indefinite commitment in these courts is simply whether the defendant is mentally ill. There is a widespread assumption, shared by prosecutors and many trial judges, that a defendant who is mentally ill should not be involved in any criminal proceedings, regardless of the fact that his mental illness may not affect his ability to participate in these proceedings. In raising this issue of the defendant's mental condition, therefore, the state's aim cannot be viewed as an attempt to protect a conviction from subsequent attack by a defendant who was incompetent to stand trial. Rather, the state's aim is to avoid a trial altogether and to seek the indefinite commitment of defendants who are regarded as mentally ill. What, then, is the state's interest in seeking to commit such individuals?

\(^{56}\) Interview with Howard Colpitts, Criminal Court Clerk, supra note 19.  
\(^{57}\) Ibid.
Based on the writer's observation of the Massachusetts practice and on the reported cases from other jurisdictions, three such interests emerge. Where the crime charged is a misdemeanor and where the defendant has a background of mental illness (such as previous civil commitments), one interest is in short-circuiting the civil commitment procedure. While it is not considered vitally important that such a defendant return to court to face the charges against him, it is considered important to institutionalize this type of defendant in an efficient and time saving manner. Thus, the criminal charge is often a pretext for an indefinite "pre-trial" commitment which is a more summary procedure than that provided in most civil commitment statutes. This is not to imply that the state has "evil motives" or that the state is attempting to permanently commit such individuals to a mental institution. In many instances, the individuals involved present a nuisance to the administration of justice. It is believed that the commitment is not only in the individual's best interests, but also serves at least temporarily to relieve the nuisance caused by such individuals to the community, the police, and the courts. As one commentator, however, pointed out in describing the plight of a person who is usually committed prior to trial for a misdemeanor, the state mental institutions are also unable to cope with such individuals:

The group of chronic male recidivists cited are a taxing and difficult problem for the courts. Resources and technics [sic] for the rehabilitation and treatment of such men continue to be very limited. It is not surprising that the courts should have recourse to State Hospitals in such a situation. The group might be described as being in psycholegal limbo, shuttling among courts, hospitals, and jail [sic]. They appear frequently before the courts, draining time and money from the public treasury and are not deterred by punishment or the traditional technics [sic] of probation. Psychiatrists, particularly those in State Hospitals who are heavily burdened, do not regard them as treatable or committable, label them with a characterological diagnosis and return them to court.58

Where the crime charged is a serious one, the state's interest in pre-trial commitment shifts. As one court stated (in discussing the federal pre-trial commitment procedure), underlying this procedure "is the concept of some protection to society, as well as the preservation of the rights of an accused person."59 Thus, in State v. Swails,60 the trial court recommitted the defendant (charged with murder) to the state hospital after the lunacy commission had advised that defendant was competent to stand trial, but likely to become dangerous to the community if released. The trial court was thus

60. 223 La. 731, 66 So. 2d 796 (1956).
seeking "to anticipate the commission of crime by preventive treatment before a legally defined crime occurs." But the state supreme court rejected such a reason as the basis of continued pre-trial commitment:

The apprehension and even the predictions of some of the physicians that appellant may be a menace to society, if he is ever released, affords no basis whatever for holding him presently insane, within the meaning of the law, or for recommitting him to an institution. . . . Protection of the public from possible harm from the accused is not envisioned by the law.

The extent to which its interest in preventive detention causes the state to raise the issue of a defendant's mental condition in Massachusetts is not entirely clear; however, there is some indication that in certain cases, the state does attempt to use the indefinite pre-trial commitment procedure to accomplish this goal.

A defendant who is considered extremely dangerous because of mental instability, e.g., a psychopath, is often subject to pre-trial commitment, even when there is no real doubt about his competency to stand trial. Although this is not a justifiable use of the pre-trial commitment process, the state has some interest in detaining a defendant prior to trial who is charged with a violent crime and who has a record of prior convictions for similar crimes. Often, preventive detention is accomplished by setting bail at an unattainably high figure, but it has been observed that this practice is unfair and arbitrary. In an effort to improve the present bail practice, one commentator proposes the establishment of a special proceeding "in the nature of a civil commitment proceeding at the time of arraignment" to deal with those cases where preventive detention is sought by the state. A statute would define the cases where this proceeding would be permitted, e.g., "obviously pathological crimes." The government would be required to make a very strong showing "to warrant the invocation of commitment" and the defendant would have the opportunity for a full hearing. All doubts would be resolved in favor of the defendant. Under this system, everything possible would be done "to make this incarceration less personally destructive than is present pretrial detention," e.g., separation from convicted prisoners. Trial dates would be "expedited by giving calendar preferences to these cases" and the time of pre-trial detention would be reduced from any subsequent sentence if defendant is convicted. Furthermore, "[t]he defendant

63. Interview with Dr. Robey, supra note 19.
64. R. GOLDFARB, RANSOM 127-48 (1965).
65. Id. at 245.
66. Id. at 247.
should be released at the time of trial, and the fact of his incarceration should 
not be brought to the jury's attention."

While this commentator recognizes the dangers and the constitutional prob-
lems inherent in such a system, he correctly points out that preventive de-
tention is practiced within the workings of the present bail system in a much 
more arbitrary manner. To a lesser extent, the pre-trial commitment system 
is also used for the purpose of preventive detention. The use of these two 
processes to accomplish such detention is not only unfair to the defendant, 
but is also difficult to justify in view of the stated purposes of bail and pre-
trial criminal commitment. A proposal such as that suggested above, there-
fore, warrants consideration simply because it recognizes the existence of 
preventive detention in the present system and seeks to protect the rights of 
the individuals involved as much as possible.

It has been stated that pre-trial commitment is "mainly employed to ac-
complish preventive detention" of dangerous individuals. But this sweeping 
assessment overlooks another state interest in such commitments where the 
crime charged is a serious one. This interest is in avoiding the formal trial 
of the issue of the defendant's criminal responsibility. The desire to sidestep 
the issue of criminal responsibility "through the medium of a lax appraisal 
of defendant's fitness to proceed" is based on dissatisfaction with the criteria 
for determining criminal responsibility. Two noted commentators stated 
their approval of such a use of the pre-trial commitment procedure:

Reforms which it has been impossible to achieve through revision 
of the tests of responsibility are being achieved through perfecting 
means for preventing the trial of . . . mentally disordered defendants. 
By making use of statutes which . . . provide for a period of observa-
tion in a mental hospital . . . we discover that a number of such per-
sons are too defective or disordered to understand the criminal pro-
ceedings or make a rational defense, and they are thereupon com-
mitted without having to stand trial . . . (Emphasis added.)

The prosecutor's interest in the pre-trial commitment of this type of de-
fendant is to avoid the expense and delay of a trial where the verdict of not 
guilty by reason of insanity seems inevitable. Since such a verdict would also 
lead to the defendant's commitment to a mental institution, the pre-trial 
commitment is said to accomplish the same result in a cheaper and more 
efficient manner. Furthermore, there is a paternalistic attitude that a defen-
dant who clearly appears to be mentally ill should not be "put through the 
ordeal of a trial." There are, however, great injustices to the defendant in-

67. Id. at 248.
volved. The defendant may be innocent of the charge, but he is deprived of the opportunity to clear himself by an indefinite commitment. In addition, institutionalization under the shadow of a criminal charge hinders the effort to effectively treat such an individual.

As a result of the prosecutor's initiative in raising the issue of a defendant's mental condition prior to trial, many individuals charged with crime suddenly find themselves indefinitely committed to a mental institution, far removed from the criminal proceedings which originally brought them within the state's authority. The impression emerges from observing the operation of this system in Massachusetts that the defendant (and his attorney, if he has one) plays an unimportant role in the procedure leading to an indefinite commitment. The decision to initiate the commitment is often made by the prosecutor and acted upon by the trial judge because of their firm conviction that such commitments of mentally ill defendants are in the best interest of the defendant and the criminal system.

The problem is that these commitments not only fail to make sense from the point of view of the policy underlying the commitment procedure, but they also jeopardize the defendant's right to equal protection of the laws and his right to a speedy trial. Before discussing these constitutional objections, we must turn to the actual operation of the procedure by which a defendant ultimately finds himself indefinitely committed to a mental institution. It is this procedure which fails to provide any safeguards to prevent these unnecessary and unjustifiable commitments, which are totally unrelated to any idea of bringing a defendant who is incompetent to stand trial back into the criminal process.

From Observation to Indefinite Commitment

After the issue of defendant's present mental condition is raised in one manner or another before the court, Section 100 seems to establish two types of commitments. The court can either find that the defendant is "mentally ill or in such mental condition that his commitment to a state hospital is necessary for his proper care or observation pending determination as to any mental illness. . . ." 70 (Emphasis added.) The latter type of commitment is referred to as an "observation commitment," and it is limited to 35 days under Section 105. Where the trial court initially finds the defendant to be mentally ill, however, he may be committed for as long as his condition requires; the 35 day limitation in Section 105 explicitly refers only to a commitment for "observation pending determination as to any mental illness."

At present, the practice seems to be exclusive reliance upon the 35 day

observation commitment.71 Where the crime charged is a serious felony, such as first degree murder, the observation commitment is often made by the district court as a matter of course on the basis of a complaint.72 Such commitments are made to Bridgewater, which is considered a security institution (women in this category are usually sent to Boston State Hospital, since Bridgewater has no facilities for women).73 The great majority of observation commitments, however, are not made to Bridgewater and presumably involve individuals considered “less dangerous” than the Bridgewater population. In a study of 107 observation commitments processed at the Boston State Hospital in fiscal year 1960, it was estimated that better than 80 percent of the alleged offenses were misdemeanors.74

Where the charge is a misdemeanor, the district court is the committing court. One district court judge stated that he relies on the psychiatric clinic assigned to his district court in order to avoid unnecessary observation commitments. He uses this clinic not only as a screening device to avoid unnecessary commitments, but also to provide outpatient psychotherapy where it is necessary, thereby avoiding any commitment. In a study of 107 observation commitments at Boston State Hospital in fiscal year 1960, it was found that:

[T]hose courts which had the services of a psychiatric court clinic were able to screen out unnecessary commitments to a degree that 65% (13 of 20) of those committed by the courts were found to require further hospitalization, whereas the courts operating without psychiatric consultation sent 86 persons of whom only 19 or 22% required further hospitalization. This suggests that with psychiatric court clinic consultation in the court as many as 50% of the Section 100 commitments could be avoided. Such an arrangement would be to the advantage of the court, the State Hospital and surely also to the

71. From 1956 to 1964 (inclusive), there were 8,256 observation commitments at the twelve state hospitals and from 1957 to 1964 (inclusive) there were 1,386 such commitments at Bridgewater. McGarry, Competency For Trial and Due Process Via the State Hospital, 122 AM. J. PSYCHIATRY 623 (1965). Commenting on the figures for 1964, the author stated:

The number so committed continues an increasing trend by the courts to use the state hospitals for this purpose [pre-trial observation of defendants' mental status].

Thus, for the 12 hospitals administered by the Massachusetts Department of Mental Health, the 1,217 committed in 1964 represent a 66 percent increase over those committed in 1956 [75]. A similar increase has been noted at the state hospital of the Massachusetts Correctional Institution, Bridgewater, under the Department of Correction [from 137 in 1957 to 264 in 1964]. The pre-trial observation commitments in 1964 comprised better than 10 percent of all the admissions to all Massachusetts state hospitals in 1964. SPECIAL COMM. ON MENTAL HEALTH, A STUDY OF THE COMMITMENT AND HOSPITALIZATION LAWS OF THE COMMONWEALTH [OF MASSACHUSETTS] 85 (1965) [hereinafter cited as SPECIAL COMM. ON MENTAL HEALTH].

72. In Massachusetts, a preliminary hearing on a crime involving a prison sentence of over five years can be held in the district court, even though the trial for such a crime must ultimately occur in the superior court. MASS. GEN. LAWS ANN. ch. 218, § 30 (1958).

73. Interview with Dr. Rothstein, supra note 19.

74. SPECIAL COMM. ON MENTAL HEALTH, supra note 71, at 84, 101.
individuals who might be spared the stigma of a state hospital admission.\textsuperscript{75}

This study concludes that these findings "are a strong argument . . . for requiring a physician's (hopefully a psychiatrist's) certification before commitment is resorted to."\textsuperscript{76} This same judge, however, refused to go so far as to require some type of screening procedure before a defendant could be committed for observation; he argued that in many cases, a psychiatrist is not available, and in such situations, a judge should not be forced to choose between letting the defendant post bail or remanding him to jail.

There is usually no notice and hearing before an observation commitment. One judge stated that if the commitment is unjustified, the defendant will be quickly returned to court. This lack of notice and a hearing prior to an observation commitment is aggravated by the fact that most defendants involved are unrepresented by counsel. The absence of counsel seems to violate Rule 10 of the Rules of the Supreme Judicial Court of Massachusetts, which requires that

\begin{quote}
if a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.\textsuperscript{77} (Emphasis added.)
\end{quote}

A district court judge, however, stated that in most cases involving misdemeanors, the defendant "elects to proceed without counsel" and signs a waiver to that effect. Regardless of how harmful such a procedure is to the interests of a person who will face the charge of a misdemeanor against him in a normal manner, it seems incongruous to allow a defendant whose mental capacity is being questioned to sign such a waiver. At any rate, the present practice is to commit a defendant for observation without any notice and hearing, and apparently, the defendant either does not protest such a commitment or his protests are not effectively communicated to the committing court.

The observation commitment usually lasts from 10 to 34 days; in the rare case that the hospital asks for more time to observe the defendant, the court will extend the commitment for an additional 35 days. When the observation is completed, the hospital sends a letter to the committing court in the nature of a report on the defendant's mental condition. One commentator has stated that the results of the observation commitment are highly successful:

\begin{quote}
\textsuperscript{75} Id. at 85.
\textsuperscript{76} Ibid.
\textsuperscript{77} MASS. SUP. JUD. CT. R. 10.
\end{quote}
In the instance of Section 100 [observation] commitments there are obvious advantages to the court and to the subject as a result of such inpatient study. A careful case workup, intensive study and close observation should be of positive assistance to the court. ...78

But in reality, the hospitals do not have adequate staff and facilities to conduct a thorough examination of a committed criminal defendant. Indeed, "it is complained that there are too many [observation] commitments called for under Section 100, that the facilities of . . . Bridgewater . . . and of the state mental hospitals not restricted to the criminally insane, are overburdened by the number of cases referred to them."79 Thus, at Boston State Hospital, where there is a constant effort to reduce the size of the total population in order to improve the patient-staff ratio, doctors are burdened by a steady flow of observation commitments.80 At Bridgewater, the Medical Director stated that it was his policy to discourage needless observation commitments, and thus, defendants are often sent back to court within several days after the original commitment.

It is not surprising that the quality of these reports to the committing court is far from adequate. Several judges complained that the reports were usually vague and uninformative, written in medical terms with no reference to the defendant's competency to stand trial or fitness to proceed. (This failure to discuss the defendant's competency to stand trial is certainly not the fault of the psychiatrists, for as we have seen, the statute establishes no standard for competency and no clear standard has been developed.) Other reports speak only in terms of the defendant's responsibility for the crime, often using the language of the M'Naghten test.81 Such reports reflect the confusion of the Supreme Judicial Court in distinguishing between competency to stand trial and criminal responsibility. Many of the reports are concerned only with the question of whether the defendant is suffering from a mental disease, thereby requiring further hospitalization. Even those reports, which

80. Interview with Dr. Rothstein, supra note 19.
81. Two psychiatrists involved in the federal pre-trial commitment procedure also found that the reports of pre-trial psychiatric examinations did not differentiate competency to stand trial from mental illness or criminal responsibility. These reports also showed "a lack of clarity as to what the Federal court wants to know in these situations." The examining psychiatrist tends to "throw the book" at the patient; he is likely to say that he is "legally insane, doesn't know the difference between right and wrong, doesn't understand the nature and quality of the act or the proceedings against him, and is incompetent to assist in his defense." [The psychiatrist] seems to want to make sure that he answers all possible questions in advance—possibly to avoid being subpoenaed. The court usually goes along with such an opinion, readily adjudicates the patient as incompetent and commits him . . . . Settle & Oppegard, The Pre-Trial Examination of Federal Defendants, 85 F.R.D. 475, 480 (1964).
do refer to the defendant's competency to stand trial, are hopelessly cursory. Two such complete reports, furnished by a district court judge, were as follows:

The staff finds the patient non-psychotic. He is competent to stand trial, and we recommend return to court.

and:

The patient is psychotic and not competent. The formal diagnosis made it Schizophrenic Reaction, Chronic Undifferentiated Type. We recommend the patient's commitment to this hospital for care and treatment.

According to this judge, the above reports are typical of those received from most hospitals. While the purpose of the observation commitment should be to evaluate the defendant's ability to stand trial for a criminal charge, it is clear that this type of report provides no worthwhile information for a judge who must decide whether a defendant should be indefinitely committed to a state hospital.

When the report recommends indefinite commitment, the defendant is usually not brought back to court from the hospital when such an experience would be considered (by the hospital) detrimental to his mental health. Thus, in many cases this commitment is accomplished by an "exchange of letters" and the defendant is not brought back to the court which committed him for observation. As a result of this procedure, there is usually no notice to the defendant and no hearing prior to such an indefinite commitment. Furthermore, a defendant can be indefinitely committed on the basis of a complaint alone and therefore without ever having a probable cause hearing concerning the crime with which he is charged.

In addition to this lack of notice and hearing prior to an indefinite commitment, it appears that many of those who are indefinitely committed are not represented by counsel; this is so despite the requirements in Massachusetts that counsel be assigned at all stages of the proceeding. Even if courts as-

82. Interview with Dr. Robey, supra note 19.
83. One progressive aspect of the Massachusetts system of pre-trial commitment is that the sentence of a defendant who is convicted after a pre-trial commitment is reduced by the days spent in confinement in the mental institution. In In re Stearns, 943 Mass. 53, 175 N.E.2d 470 (1961), the Supreme Judicial Court of Massachusetts held that MASS. GEN. LAWS ANN. ch. 127, § 129B (Supp. 1966), providing that sentence of any prisoner "held in custody awaiting trial" shall be reduced by days spent in confinement, applied to the defendant committed prior to trial.
84. Where the crime charged is a misdemeanor, the defendant is usually not represented by counsel prior to an indefinite commitment; where the crime is a felony, however, it is more likely that defendant will be represented by counsel. According to a random sample of the court records of 69 indefinitely committed defendants at Bridgewater in 1963, 22 out of 36 committed from three superior courts were represented by counsel, whereas only 6 out of the 33 committed from five district courts were represented by counsel. SPECIAL COMM. ON MENTAL HEALTH, supra note 71, at 109. In view of Rule 10 of the Rules of the Massachusetts
signed counsel automatically in these cases, however, there is a more serious problem as to whether Massachusetts law requires notice and a hearing prior to any commitment. A defendant’s interests are not sufficiently protected because some courts, as a matter of practice, provide for notice and a hearing; for a defendant is more likely to be indefinitely committed simply by an exchange of letters.

The law in Massachusetts is not entirely clear as to whether notice and a hearing is required for either an observation or an indefinite commitment. In In re Dowdell,\textsuperscript{85} the Supreme Judicial Court held that notice and a hearing was not required for civil commitment, because:

\begin{quote}
The order of commitment settles nothing finally or conclusively against the person committed. . . . He is entitled, as a matter of right, to institute judicial proceedings under the statutes to determine the necessity and propriety of his confinement. . . . He is not, therefore, deprived of liberty without due process of law . . . .\textsuperscript{86}
\end{quote}

The holding of this case was specifically overruled in 1955 by Chapter 123, Section 51, which required notice and a hearing in civil commitment cases in these terms:

\begin{quote}
Upon receipt of an application for commitment the court shall cause written notice to be personally served upon the person named therein informing the said person of the application for commitment and of his right to a hearing at which he can be present and be represented by counsel. . . . The person served shall be allowed forty-eight hours in which to request a hearing, and further time, not less than seventy-two hours, if desired for the preparation of his case. . . . If the person does not request a hearing, the court may order commitment . . . . In any commitment under sections ninety-nine through one hundred and five, inclusive, where the person is before the court in connection with a criminal matter, the court may commit the person to a mental institution in accordance with the provisions of said sections and this section, but no additional hearing as established by this section need be held in addition to the hearings provided in section ninety-nine through one hundred and five.\textsuperscript{87} (Emphasis added.)
\end{quote}

This last sentence of Section 51 was added in 1956 after an Attorney General’s opinion in May 1956 had stated that since “commitments under Section 100 are entirely different from commitments under Section 51,” the procedure

\textsuperscript{85} 169 Mass. 387, 47 N.E. 1033 (1897).
\textsuperscript{86} Id. at 388, 47 N.E. at 1034.
"for commitment under Section 100 should not be construed to include the new notice and hearing provisions added to Section 51."88 Thus, it is clear that the Section 51 procedure is not the procedure under Sections 100 and 105; but the Attorney General's opinion refused to express any opinion "as to what hearing or notice, if any, apart from Section 51, may be required for commitments under Section 100."89 (Emphasis added.) Sections 100 and 105 are silent on this question, and by their terms, they do not seem to require any such notice and hearing.

In other jurisdictions, however, the courts have required notice and a hearing where the statute providing for pre-trial criminal commitment was silent on this point. In In re Lutker90 and State ex rel. Smilack v. Bushong,91 it was held that it would be a violation of due process of law to deprive a defendant of notice and a hearing before committing him to a state hospital for observation and examination. In both cases, the courts read a requirement of notice and a hearing into the commitment statute in order to preserve its constitutionality. In Bushong, the court stated that: "The sending of a person to an institution for the criminal insane, even for a short time, is a serious matter and his confinement there is as full and effective a deprivation of personal liberty as is his confinement in jail."92 The court pointed out that the defendant's commitment was ordered "against his vigorous protest and where he had pleaded not guilty to an indictment charging him with a misdemeanor punishable only by fine."93 The reasoning in these cases would certainly require such notice and a hearing prior to an indefinite commitment.

In In re O'Leary,94 the Supreme Judicial Court construed another Massachusetts law dealing with commitment to require notice and a hearing in order to preserve its constitutionality. The case arose under Chapter 123, Section 113, dealing with the commitment of defective delinquents. This type of commitment differs from a pre-trial commitment in that the commitment under this section is a "final disposition of any criminal offence charged."95 The court relied on Simon v. Craft,96 a case involving civil commitment in which the United States Supreme Court stated that "[t]he essential

88. MASS. OP. ATT'y GEN. 92, 93 (May 31, 1956).
89. Ibid.
91. 159 Ohio St. 259, 111 N.E.2d 918 (1953).
92. Id. at 266, 111 N.E.2d at 921.
93. Ibid. In People ex rel. Anderson v. Superintendent, 40 N.Y.S.2d 84 (Sup. Ct. 1943), the court said that "opportunity to be heard" contemplated by the New York statute prescribing the procedure for determining defendant's competency includes cross-examination of witnesses, the right to confront the psychiatrists, and the right to offer evidence and produce witnesses on defendant's behalf.
96. 182 U.S. 427 (1901).
elements of due process of law are notice and opportunity to defend." The court then stated that:

Without [notice and an opportunity to defend] there can be, in truth, no real hearing. While section 113 expressly makes accessible to a defendant and his attorney the report of the department of mental health . . . before the hearing, there must be reasonable notice to a defendant of the filing of an application for his commitment. . . . We construe section 113 as impliedly calling for notice in accordance with the elements inherent in due process. That section, therefore, is not unconstitutional as wanting a provision for notice of the filing of the application to the person whose commitment as a defective delinquent is sought.

The Massachusetts legislature subsequently amended Section 113 and it now explicitly states that "[i]f a person is found to be mentally defective, the court shall give written notice to the person . . . that a hearing is to be held for his commitment to a defective delinquent department." 99

The reasoning of the O'Leary case would seem to apply to indefinite pre-trial commitments, for even though the criminal charges are not dropped against the defendant (as in the case of a defective delinquent), the result of both types of commitment is to detain an individual in a mental institution for an indefinite period of time. The fact that the charges are pending would not give a court the power to commit without notice and a hearing when it is denied this power in dealing with defective delinquents. As to the observation commitments, O'Leary may not be controlling, since there is a definite time limit on such commitments; but the reasoning in the cases discussed clearly supports the argument that "due process of law" requires notice and a hearing prior to these commitments as well. The justification for extending this requirement to an observation commitment was expressed by Weihofen:

The order of commitment, even though it is merely for a period of observation which will not run for more than sixty days . . . is nevertheless a fairly serious interference with a person's liberty. He is taken away from his family and his job, and subjected to a type of confinement which may cast reflection upon his sanity in the minds of some people. This, it is argued, should not be permitted to be done ex parte, without notice and opportunity to be heard . . . . [P]rovision for confinement in the hospital . . . raises more serious constitutional doubts than mere provision for appointing impartial experts to examine the defendant. 100

97. Id. at 436.
98. In re O'Leary, supra note 94, at 182, 89 N.E.2d at 771.
Even if notice and a hearing were required prior to both an observation commitment and an indefinite commitment, either by a judicial holding or by a legislative amendment of Sections 100 and 105, such a requirement would have little impact in practice. To begin with, the present practice of allowing a defendant to waive his right to have counsel appointed by the court would greatly hinder the defendant in objecting to either type of commitment. Even in the case where the defendant was represented by competent counsel who could effectively present an argument to the court against commitment, the results in those courts which now provide for notice and a hearing prior to an indefinite commitment indicate that a defendant has little hope of overturning the hospital's recommendation that he be "committed as an insane person." The judges interviewed viewed this pre-trial determination of the defendant's mental condition as a medical question, which could best be answered by the psychiatrists at the state hospitals. Where the report after observation states that the defendant is committable, these judges accept this conclusion, regardless of their own impression of the defendant's capacity, regardless of how informative the report is, and regardless of their notion as to what is the proper standard for commitment in these cases. Despite the flimsy quality of the reports, most judges have great respect for the psychiatrists making them and will inevitably follow their recommendations. Thus, where the defendant's attorney requests a hearing to contest a report recommending indefinite commitment, the only way that he can persuade the court not to commit is to bring in a psychiatrist to testify that the defendant is not insane, committable, or incompetent to stand trial.

This attitude was demonstrated clearly by one judge who was asked hypothetically what he would do, in the light of a report recommending indefinite commitment, a defendant insisted that he was ready to be tried on the charges against him, and if this hypothetical defendant demonstrated to the judge in every way that he was perfectly capable of immediately standing trial. It was also assumed that the defendant's attorney represented to the court that the defendant was clearly able to assist him in preparing the case for trial. The judge's response was that he would still commit the defendant, no matter how "rational" he appeared to be, unless the defendant could bring forth expert psychiatric testimony to support his contention that he was capable of standing trial and was not committable. This judge stated that he had no problem in determining whether a defendant was competent to stand trial, since the report made this determination for him. He therefore made it clear that he would not allow a defendant to stand trial on his statement alone and the representations of his attorney, where there was a report recommending commitment. Where the report, however, did not recommend commitment, the trial would proceed and the judge would not question the defendant's mental condition.
This deference of the committing court to psychiatric opinion tends to put a great burden on an indigent defendant who might want to contest a conclusion by the examining psychiatrist that he is committable. It has been held that when a defendant is examined under the Briggs Law and found criminally responsible, he is not entitled to another examination by a psychiatrist of his own choosing at state expense. The Supreme Judicial Court stated that "[h]aving been examined by impartial experts the defendant was not entitled as of right to a further examination at the public expense." Even though the state psychiatrists may be truly impartial, the defendant who can afford to choose his own psychiatrist is given an opportunity by the committing courts to challenge a finding that he is committable. Since the attitude of many judges seems to be that the defendant himself can do nothing to convince them that he should not be committed, the ability to bring in supporting psychiatric opinion becomes crucial.

Judicial deference to psychiatric opinion often results in those states "where the statute provides that the defendant shall be committed to an institution for observation and examination." Even though the Massachusetts statute provides for psychiatric observation, Section 105 makes it clear that the court itself must make the ultimate decision whether to commit the defendant. Furthermore, there are several decisions in Massachusetts which indicate that those judges who are reluctant to allow their own observations of a defendant to override the recommendation of a psychiatrist are abdicating to the psychiatrists on this issue. In Commonwealth v. Spencer, the Supreme Judicial Court, interpreting the forerunner of Sections 100 and 105, noted that after an observation commitment, the trial court can "determine for itself the question of insanity upon the reports made by the officers or upon any other competent evidence." (Emphasis added.) The court added that the "purpose and legal effect of the statute is not to take away from the court the jurisdiction to determine finally the question of the sanity of the defendant, but to provide a place for his care and custody pending the determination of that question." In Commonwealth v. Devereaux, the court explained the trial court's role in determining a defendant's criminal responsibility for a crime. After pointing out that the trial judge had observed the defendant's conduct during the trial and heard him testify, the court stated:

102. Where a court refuses to allow an indigent defendant in this situation to choose his own psychiatrist at state expense, it could be argued that the defendant is being denied "equal protection of the laws." Cf. Douglas v. California, 372 U.S. 353 (1963).
105. Id. at 443, 99 N.E. at 268.
106. Ibid.
The judge may well have been able to form a judgment as to legal responsibility of the defendant for crime, based upon *common sense inferences and intelligent observation*, more reliable as a practical guide to accomplishment of justice than the refined distinctions and technical niceties of alienists and experts in psychopathic inferiority.108 (Emphasis added.)

Yet the trial courts have refused to rely upon "common sense inferences and intelligent observation" in determining the issue raised under Sections 100 and 105.

The dangerous aspects of this abdication is that the psychiatrist, and not the court, will in effect make the ultimate decision to suspend the criminal proceedings, which is the inevitable result of a declaration of mental illness or incompetency. But such a decision is purely legal, to be determined only by the trial court. While the trial court can seek advice from the psychiatrist, the court alone should make the ultimate decision to suspend the proceedings.109

Even though the court in almost every case accepts the psychiatric judgment of the observation report, the statistics indicate that most defendants committed for observation are *not* subsequently committed indefinitely. Thus, at the twelve state hospitals, excluding Bridgewater, there were 1,594 indefinite commitments out of the 8,256 defendants sent for observation from fiscal year 1956 through fiscal year 1964; at Bridgewater, there were 254 indefinite commitments out of the 1,111 defendants sent for observation from fiscal year 1959 through fiscal year 1964.110 While these defendants who are indefinitely committed comprise a very small percentage of the total number of criminal defendants in Massachusetts each year,111 it is still essential to consider the fate of such individuals. It must be remembered that these are persons who are being detained in a mental institution merely because criminal charges have been filed against them and they are considered mentally ill. It may be argued that their fate is no worse than that of any individual who is committed indefinitely to a mental hospital under the *civil* commitment process in Massachusetts. But it is submitted that there are sig-


109. United States v. Miller, 131 F. Supp. 88 (D. Vt. 1955), is a case which illustrates the absurdity which can result from a trial court's complete deference to psychiatric opinion. In this case, the defendant, threatened with pre-trial commitment, submitted a cogently written argument to the court demanding her right to a speedy and public trial. On the basis of psychiatric evidence that the defendant was suffering from a mental disease which was temporary and curable, however, the court found that although the defendant understood the nature of the charges against her, "she is unable to properly assist in or conduct her own defense." *Id.* at 92. The court thus completely disregarded the defendant's written argument which strongly indicated that she was very capable of conducting her own defense.


111. *Id.* at 624.
significant distinctions between the two types of commitment, distinctions which seriously affect the legal status of the individual involved.

*The Status of the Indefinitely Committed Defendant and a Problem of Equal Protection*

An individual subjected to indefinite civil commitment is given a better opportunity to avoid such commitment under the Massachusetts statute than his counterpart on the criminal side. As discussed previously, Chapter 123, Section 51, clearly prescribes the notice and hearing procedure required for an indefinite civil commitment. In addition, Chapter 123, Section 1, indicates some standard for civil commitments; it states in part:

"Mentally ill" person, for the purpose of involuntary commitment to a mental hospital...shall mean a person subject to a disease, psychosis, psychoneurosis or character disorder which renders him so deficient in judgement or emotional control that he is in danger of causing physical harm to himself or to others, or the wanton destruction of valuable property, or is likely to conduct himself in a manner which clearly violates the established laws, ordinances, conventions or morals of the community.\\(^{112}\)

Admittedly, this standard is imprecise, and it is quite likely that in practice many courts do not insist upon a showing of dangerousness. But this section at least provides some guidance to a court which may doubt the validity of civilly committing a particular individual. Under Sections 100 and 105, however, the statute gives no such guidance. A court therefore can indefinitely commit a defendant simply on the basis that he is "mentally ill."

In addition, the criminal defendant can be indefinitely committed to Bridgewater on the basis of a complaint without any notice or hearing and without any proof that he is dangerous. Bridgewater is a security institution for the criminally insane, and the prison-like atmosphere of this institution does not aid an individual's recovery. Furthermore, it has been shown that Bridgewater is understaffed and that it is difficult for patients there to receive adequate treatment.\\(^{118}\)

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113. In Nason v. Commissioner of Mental Health, 351 Mass. 94, 217 N.E.2d 733 (1966), the Supreme Judicial Court of Massachusetts refused to issue a mandamus ordering the Commissioner of Mental Health to make available to the petitioner proper care and treatment at Bridgewater, or in the alternative, to make proper care and treatment available to him by transferring him to another state hospital. Nason had been indicted for murder in 1962 and was committed during the pre-trial hearing to Bridgewater under Sections 100 and 105. In 1963, the Superior Court had ordered Nason transferred to another state hospital (he had subsequently been transferred back to Bridgewater); the court noted that in the 1963 proceedings, the testimony had shown that Bridgewater was "markedly understaffed" and that Bridgewater did not give treatment to its patients unless "it's an emergency." The court also noted that at this 1963 proceeding, both the prosecutor and the judge agreed that conditions at Bridgewater were deplorable.
The Massachusetts statute thus prevents those who are civilly committed from being sent directly to Bridgewater. A civilly committed individual "who has made two or more attempts to escape" or who is considered dangerous can be transferred to Bridgewater only under the following conditions:

[W]ritten notice must be given to the patient and to his nearest relative or guardian of the department's intention to transfer him to Bridgewater . . . at least three days before such transfer. The notice shall contain a statement that the patient has a right to appeal this decision to the commissioner and a right to a hearing in a court . . . . The court shall hear and determine whether or not the department is justified in making the transfer under this section . . . .

The major differences between the person who is civilly committed and one who is criminally committed prior to trial are apparent after the commitment is ordered. To begin with, the status of the untried defendant is clearly a criminal one, since Section 105 states that "[t]he word 'prisoner' as used in this section shall include all persons committed under section one hundred . . . ." As a result of this classification, a defendant, committed under Sections 100 and 105 with charges outstanding against him, cannot take advantage of the discharge and temporary release procedures available to a civilly committed individual. Chapter 123, Section 89 states that the "superintendent [as well as a probate or superior court judge] may discharge any inmate if it appears upon examination that he will be sufficiently provided for . . . or that his detention in such institution is no longer necessary for his own welfare or the safety of the public . . . ." Chapter 123, Section 88 allows the superintendent to permit a patient to "temporarily . . . leave such institu-

Even though the court held that mandamus was not a proper remedy, it stated that the legality and constitutionality of confinement of prisoners at state hospitals, which had smaller staffs and poorer facilities than other state hospitals, could be determined in other proceedings and that "[n] such proceedings the constitutionality of great differences in treatment might require judicial determination." Id. at 97, 217 N.E.2d at 736. In this regard, the court observed that the respondent recognized in its brief that the right of an individual committed during the pre-trial period "to care, observation and treatment" is implicit in Sections 100 and 105.

This right to care and treatment was recognized by the United States Court of Appeals for the District of Columbia Circuit in the landmark decision of Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). There the court held that a person mandatorily committed to a mental hospital, after being found guilty by reason of insanity, has a statutory "right to treatment" that is cognizable in habeas corpus. Although the ramifications of the Rouse decision are as yet unclear, the reasoning of this decision and the language of the court in Nason strongly indicate that those who have been indefinitely committed under Sections 100 and 105 can seek a writ of habeas corpus to challenge the legality of their confinement by showing that they are not receiving adequate care and treatment.

114. MASS. GEN. LAWS ANN. ch. 123, § 20 (1958). If an emergency exists, the transfer can be made "forthwith"; however, the notice of the transfer must be given within 24 hours and the patient still has the same right to a hearing.

115. Id. § 105.

116. Id. § 89.
tion... for a period not exceeding twelve months," and any patient "who has not returned to the institution at the expiration of twelve months shall be deemed to be discharged therefrom."\(^{117}\)

On the other hand, Section 105 states:

> If a prisoner under complaint or indictment is committed in accordance with section one hundred, and such complaint or indictment is dismissed or nol prossed... the superintendent... may permit such prisoner temporarily to leave such institution in accordance with sections eighty-eight and ninety or may discharge such prisoner in accordance with section eighty-nine... \(^{118}\)

Thus, an individual criminally committed prior to trial cannot be unilaterally discharged or released by the mental institution, unless the charges against him are dismissed or nol prossed.\(^ {119}\) And even if the charges against such an individual are dismissed, the superintendent of the institution still has discretion to release or discharge him. In such a situation, the only justifiable purpose of the commitment, i.e., to enable the defendant to regain his competency and return to trial, has disappeared, and yet the state still retains the power to confine such an individual (who was not afforded the protections of the civil commitment procedures) in a mental institution.

Perhaps the most serious disadvantage to the criminally committed defendant is the inability of the mental institution to "temporarily release" him under Section 88. This procedure enables the institution to give a civilly committed individual a trial period in which to adjust to the outside community. The criminally committed defendant with charges outstanding against him is not, however, even allowed home visits or off the grounds privileges. He cannot go out into the community for any reason, even when such activity would be beneficial to him from a therapeutic point of view.\(^ {120}\) Dr. Rothstein resented this aspect, more than any other, of the criminal commitment procedure. He stated that it greatly hindered the psychiatrist's ability to adequately help the individual involved. It is therefore his practice to press for a dismissal of the criminal charges, in order that the defendant can fall under the exception established in Section 105. According to Dr. Rothstein, psychiatrists want their patients out of the hospital as soon as possible; but the existence of criminal charges interferes with this goal.

Despite these differences between the civil commitment process and the pre-trial criminal commitment process, it was seen that an indefinite pre-

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117. Id. § 88.
118. Id. § 105.
119. In the past, such action was rarely taken, but there is some indication at the present time that the institutions involved are frequently requesting the court and the district attorney to do so, especially where the charge is a misdemeanor. However, in most cases, the charges are not dismissed, and the defendant's status remains a criminal one under Section 105.
120. Interview with Drs. Robey and Rothstein, supra note 19.
pre-trial commitments to mental institutions often based on the grounds that the defendant is mentally ill and requires hospitalization. A great many of these commitments are in no way related to a defendant's competency to stand trial. In effect, many pre-trial commitments are merely attempts by the state to commit mentally ill individuals who happen to be charged with a crime without going through the statutorily prescribed procedures for civil commitment.

Such a practice was rejected in Williams v. Overholser. In that case, the municipal court in the District of Columbia (presently, Court of General Sessions for the District of Columbia) had ordered a pre-trial commitment after finding that the defendant, who had attempted to enter a plea of guilty to the charge of public drunkenness, was "of unsound mind." The municipal court did not make any finding as to defendant's competency to stand trial. Defendant then sought release from the hospital through habeas corpus, and the district court ordered his release within ten days "unless ... the Municipal Court determines petitioner's mental capacity to stand trial"; it then added that if defendant "is found incompetent to stand trial he will be committed . . . . If he is found competent to stand trial ... whether convicted or acquitted he will be returned to the mental hospital under the prior commitment on unsoundness of mind." Defendant then appealed from the district court's order, which the court of appeals viewed as final, subject to review: "Read with the opinion, [the order] determines that the appellant will be confined in a mental hospital, whether he is found competent or incompetent to stand trial." The court then held that both the municipal court and the district court had abused the pre-trial commitment procedure:

Title 21 ... of the District of Columbia Code contains elaborate provisions for commitment of persons alleged to be insane ... In the present case, the Municipal Court and the District Court seem to have thought that when the person suspected of insanity is also accused of crime, Congress intends to bypass all those provisions and safeguards and to permit any trial court ... to commit the person to a mental hospital without benefit of a jury or of the Mental Health Commission, although he may be perfectly competent to stand trial. We think Congress had no such intention. Such an intention, if it were plainly expressed, would raise serious questions of due process of law and equal protection of the laws . . . . The purpose of [the pre-trial commitment section] ... is simply to prescribe the procedure for determining whether an accused person can understand the proceedings against him and properly assist in his defense, and to provide for his confinement in a hospital instead of a jail until he can. (Emphasis added.)

121. 259 F.2d 175 (D.C. Cir. 1958).
123. Williams v. Overholser, supra note 121, at 176.
124. Id. at 176-77.
It is true that in Massachusetts, the contrast between the procedural protections available to an individual prior to civil commitment and those available to one prior to an indefinite pre-trial commitment is not so great as in the District of Columbia. But there are significant differences in the status of the two types of processes after commitment. In Massachusetts, as in the District of Columbia, a trial court should not be allowed to bypass the procedures and safeguards under the civil commitment process by ordering the pre-trial criminal commitment of a defendant who may be mentally ill, but who has not been found incompetent to stand trial. To the extent that the Massachusetts statute itself permits such pre-trial commitments, it would raise serious questions of due process and equal protection of the laws. The cure for such a defect lies in perfecting the procedure of pre-trial commitment so that only those defendants who are incompetent to stand trial are committed; otherwise, the commitment has no relation to the criminal process and is merely a cheap method of committing those who would normally be protected by the statutes governing civil commitment.

In Baxstrom v. Herold, the Supreme Court held that an individual finishing a prison sentence "was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York." The Court said that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." Relying primarily on the Supreme Court's decision in Baxstrom, the United States Court of Appeals for the District of Columbia Circuit held in Cameron v. Mullen that an individual who did not raise the insanity defense could be committed to a mental hospital only under the civil commitment procedure. This case arose after the Supreme Court's decision in Lynch v. Overholser, where the Court held that a defendant who did not raise the insanity defense was not subject to the mandatory commitment procedure in the District of Columbia which applied to those found not guilty by reason of insanity. The Court stated that commitment in such a case must be accomplished either under the civil commitment provisions or under Title 24, Section 301 (a) of the District of Columbia Code, which allowed the trial court to commit an individual prior to the imposition of sentence who was found to be of "unsound mind" or "mentally incompetent" to stand trial.

125. In the District of Columbia, an individual faced with civil commitment has the right to a separate hearing before the Mental Health Commission and to a de novo judicial hearing, with a jury if desired, on the issue of insanity. D.C. CODE ANN. § 21-541 to -545 (1967).
127. Id. at 110.
128. Id. at 111-12.
The court in *Mullen*, however, refused to follow the Supreme Court's dictum in *Lynch* that Section 301 (a) would authorize commitment in such a case, arguing that "serious constitutional doubts would attend any construction of [Section 301 (a)] which authorized post-verdict indefinite confinement."\(^{131}\) The government attempted to justify the denial of the civil commitment procedural safeguards and the use of the more summary criminal commitment in such a case by arguing that an accused found not guilty by reason of insanity constitutes a greater danger to the community than those civilly committed. But the court rejected this justification, noting that it was similar to the justification offered by New York and rejected by the Supreme Court in *Baxstrom*. The court in *Mullen* recognized that after *Baxstrom*, propensity for criminal conduct is not relevant in determining the procedures to be followed in making a judicial determination whether an individual is mentally ill at all: "*Baxstrom* thus might be said to require the conclusion that while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination."\(^{132}\)

*Baxstrom* and *Mullen* thus stand for the proposition that to commit one serving a prison term or one found not guilty by reason of insanity to a mental institution without affording him the procedural safeguards established under the civil commitment scheme constitutes a denial of equal protection of the laws. In each case, the idea, that the expeditious criminal commitment was somehow justified because of the dangerous or criminal propensities of the individual involved, was flatly rejected.

In effect, the operation of the Massachusetts procedure of pre-trial commitment arbitrarily withholds the notice and hearing and the post-commitment procedures provided under the civil commitment process from those who are charged with crime in the same manner that New York and the District of Columbia attempted to arbitrarily withhold such safeguards from those completing a prison sentence and those found not guilty by reason of insanity. The only basis for these pre-trial commitments is that the defendant is mentally ill, not that he is incompetent to stand trial. There is no more justification, therefore, for avoiding the procedures of the civil commitment process in committing an individual charged with crime than there was in committing *Baxstrom* and *Mullen*. In each of these cases, the state's purpose was to expedite the commitment of mentally ill individuals who happen to be involved in the criminal process by treating them as part of an "exceptional class" and somehow less deserving of the procedural safeguards afforded to those who are civilly committed. In each of these cases, no justifiable purpose is served in treating such individuals differently from any other person subject to civil commitment.

132. *Id.* at 13.
There is, however, a proper basis for pre-trial criminal commitment which is not based on the dangerous and criminal propensities of the individual involved. Where there has been a determination, after notice and a full hearing, that a defendant is clearly unable to participate in the criminal proceedings against him, it would seem that the state has a legitimate interest in committing such an individual to a mental institution, without following the civil commitment procedure, for the sole purpose of enabling him to regain his competency. Unlike the situation of the prisoner in *Baxstrom* and the defendant found not guilty by reason of insanity in *Mullen*, when a person has been properly found incompetent to stand trial, the criminal charge is not decided, and there is a question of custody incident to the disposition of the charge. The criminal commitment, therefore, would be justified, and there would be a basis for treating these individuals differently from those subject to civil commitment. But in order to avoid the constitutional pitfalls raised in *Baxstrom* and *Mullen*, there must be effective safeguards to prevent these pre-trial commitments from becoming merely another means of indefinitely detaining a mentally ill person in a mental institution. The recommendations in the third part of this study are designed to limit the purpose of pre-trial commitments and thereby avoid this problem of denying individuals equal protection of the laws.188

**The Return to Court and the Denial of a Speedy Trial**

An individual's best hope in avoiding a long and unnecessary pre-trial commitment is for the examining psychiatrist to distinguish between mental illness and incompetency to stand trial, thereby recommending indefinite commitment only for the defendant whose mental illness clearly impairs his ability to participate in the criminal proceedings. As previously discussed, most psychiatrists in Massachusetts will recommend such commitment for any de-

188. The Supreme Court in *Baxstrom* also cast doubt on the Massachusetts procedure whereby a defendant, who has been committed under Sections 100 and 105, can be directly committed to Bridgewater without the notice and hearing and the showing of dangerousness required to transfer those who are civilly committed to Bridgewater. *Mass. Gen. Laws Ann.* ch. 123, § 20 (1958). The Court held that the petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction [as is Bridgewater] beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence. *Baxstrom v. Herold*, *supra* note 126, at 110.

The Court assumed that this institution was significantly different so as to affect the fundamental rights of one sent there, since the statute itself had made this assumption in putting it under the supervision of the Department of Correction rather than that of the Department of Mental Health. In Massachusetts, as well as in New York, "[t]he capriciousness of the classification employed by the State is thrown sharply into focus by the fact that full benefit of a judicial hearing to determine dangerous tendencies" for the purpose of being sent to such a functionally distinct institution is granted to those who are civilly committed and withheld from those who are committed as mentally ill prior to trial. *Id.* at 115.
fendant who is mentally ill, without inquiring into his competency to stand trial. Once commitment is recommended, the die is cast, and the defendant will spend an unlimited amount of time in a mental institution.\footnote{134}

Even when the defendant’s condition, however, has improved to the point that he can be returned to court, this return is often delayed for a long period of time. Under Section 105, the mental institution is given sole responsibility for returning the defendant to court. But the tendency of many of these institutions, to discharge patients as quickly as possible in order to reduce the total patient population and thereby improve the patient-staff ratio, does not exist in cases of pre-trial commitments. To begin with, some psychiatrists are reluctant “to set in motion the proceedings for trial” where there is a belief that the stress of the trial may adversely affect the defendant’s mental condition. Where the crime charged is serious and the issue of criminal responsibility is likely to be raised at the trial, the psychiatrist realizes that he will probably be called to court to testify; in “the balancing of the decision to discharge,” this consideration will also “weigh against return to trial, particularly in an overcrowded, understaffed hospital.”\footnote{135}

Perhaps the most basic explanation for the tendency of these defendants to simply get lost in the process is the fact that the additional burden of dealing with pre-trial commitments is often a great strain on the facilities of understaffed mental institutions:

Where the institution is understaffed, however, and the staff properly is concentrating its energy on new observation patients, recovered patients stand a great risk of being lost on the back wards with their recovery unexploited and no easily invoked opportunity for psychiatric or judicial review of their situation. . . . Inevitably, an institutionalization takes place with the receding hope of rehabilitation as the years pass.\footnote{136}

Even though the statute places sole responsibility on the mental institu-

\footnote{134} The psychiatrists interviewed and other commentators were in complete agreement that an individual with criminal charges pending is less likely to respond to treatment than one who is civilly committed. As one writer stated:

[T]he improved patient who is criminally committed, unlike his peers, looks forward not to freedom but to the anxiety-provoking prospect of an appearance in court and, if guilty, sentencing. . . .

The net effect, then, of an indefinite pre-trial criminal commitment weighs in the direction of obstructing rehabilitation and the return of the individual to society.\footnote{135} McGarry, \textit{Competency For Trial and Due Process via the State Hospital}, 122 AM. J. PSYCHIATRY 623, 626 (1965).

An illustration of the effect of an outstanding criminal charge occurred when a group from the Law-Medicine Institute of Boston University attempted to screen indefinitely committed defendants at Bridgewater who were competent to stand trial. Dr. McGarry, one of the members of the Institute, reported that some individuals initially considered competent to stand trial regressed to a point where they were no longer considered competent because of the threat of the actual return to trial.\footnote{136} \textit{Id.} at 629.

\textit{Id.} at 626.

\textit{Id.} at 629.

\textit{Id.} at 629.
tion for initiating the procedure to return a defendant to court, nothing in the statute prevents the committing court from attempting to remedy this situation by periodically checking the defendant's progress. But courts, too, are overburdened, and this effort is not made. Each judge interviewed admitted that no attempt was made by the committing court to even inquire about an individual who had been indefinitely committed. As far as the court is concerned, the case is in indefinite suspension.

Thus, a defendant who may have been competent to stand trial at the time of his commitment can remain in a mental institution, even though his mental condition "is such that he should be returned" to court. The question inevitably arises whether such detention violates the defendant's right to a speedy trial, guaranteed by the United States Constitution. Although this right is considered "a basic concept of our system of justice," it is a relative right, consistent with delays and dependent upon circumstances; this guarantee of a speedy trial "secures rights to a defendant" but does "not preclude the rights of the public justice." It has been said of the incompetent accused that "during the time he is mentally in abstenia, time ceases to run." Criminal proceedings are suspended during the period of incompetency, but the jurisdiction of the court continues. When defendant's competency is restored, the case may proceed as if nothing has intervened. In *Williams v. United States*, Judge Bazelon stated:

To hold that delay occasioned by the accused's mental incompetence . . . always requires dismissal of his indictment would be to ignore the "rights of public justice." On the other hand, to resume the prosecution of the accused after long delay may in some circumstances violate his rights beyond the requirements of public justice.

137. According to one judge, the mental hospitals with which he is familiar return an individual to court as soon as it is possible to do so. At Bridgewater, there has been much improvement within the past several years in shortening the time of an indefinite pre-trial commitment. As the 1961 study of Bridgewater indicated, the most startling abuses of this commitment procedure occurred at Bridgewater. However, the work of the staff at the Law-Medicine Institute of Boston University has done much to improve the situation at this institution. Since the fall of 1963, 193 indefinitely committed defendants have been examined, and on the basis of one screening examination, 68 (35 percent) were evaluated as competent to stand trial; as of December 1965, 42 of these individuals (one of whom had been hospitalized for forty years) have already stood trial. McGarry, *supra* note 134, at 629. In addition, Bridgewater reduced the number of indefinite commitments from 56 in 1963 to 50 in 1964 despite a rise in its number of observations from 220 in 1963 to 264 in 1964; this was attributed to a "greater sophistication in the evaluation of competence for trial." McGarry, *supra* note 134, at 629.

141. 250 F.2d 19 (D.C. Cir. 1957).
142. Id. at 21.
An indefinite pre-trial commitment would not violate a defendant's right to a speedy trial if it is for the purpose of treating a defendant, considered incompetent to stand trial, in order that he can be returned to trial. If the hospital confinement is lengthy, however, the prosecution may be compelled to prove that no prejudice resulted to the defendant from any delay, apart from that attributable to the inevitable postponement necessitated by treatment. In *Williams*, the court said that the delay of seven years was "beyond the ordinary" and that the defendant was seriously prejudiced in preparing a defense based on a lack of criminal responsibility for the crime with which he was charged. The court therefore held that "since the delay has been substantial" and since the Government failed to show that the defendant suffered no serious prejudice "beyond that which ensued from the ordinary and inevitable delay," the conviction should be reversed and the case remanded with instructions to dismiss the indictment.

In *Williams v. Overholser*, the trial court failed to make a determination of the defendant's competency to stand trial; it found merely that the defendant (charged with public drunkenness) was of "unsound mind" and committed him on that basis, with the criminal charge still pending. The district court noted that an accused could be of "unsound mind" and yet competent to stand trial. The court then held that the failure of the trial court to make a determination on the issue of defendant's competency to stand trial "resulted in a denial of a right given him by the statute as well as his right, if competent, to a speedy trial under the Constitution." (Emphasis added.) On the basis of the reasoning in this case, most of the indefinite pre-trial commitments in Massachusetts have violated the defendant's right to a speedy trial, since these commitments were ordered without any showing whatsoever of the defendant's incompetency to stand trial. The state cannot justify the delay by simply asserting that the defendant was confined in a mental hospital because of his "mental illness." The only justifiable basis for such confinement is that a defendant is incompetent to stand trial.

In *State v. Swails*, the court recognized the accused's right to be tried if he meets the conditions of the common law test of "present sanity," even though, judged by other criteria, he should remain hospitalized. In this case, the lunacy commission had reported to the trial court that although the defendant was competent to stand trial, he was likely to become dangerous to the community if released. The court rejected this latter ground as a basis for further pre-trial commitment, arguing that "to deny him a trial for such a speculative reason would... infringe upon his fundamental right of due

144. *Id.* at 26.
146. *Id.* at 517.
147. 223 La. 751, 66 So. 2d 796 (1953).
process of law and to be accorded a speedy public trial vouch-safed by... our Constitution and the Fourteenth Amendment to the Constitution of the United States." 148

And finally, the court in Ex parte Hodges 149 invoked the right to a speedy trial to cast doubt on the procedure whereby a district attorney presses for the defendant's pre-trial commitment over the strong objections of defendant. The defendant's counsel "vainly protested the impaneling of a jury [prior to trial] to pass only upon the issue" of defendant's present insanity; the defendant's counsel also stated that he was "ready for trial on the indictment for murder without raising the question of insanity" and was not raising the question in defense or in bar of the prosecution. 150 A jury was impaneled, defendant was found insane at the time of trial, and under this finding, he was ordered committed to a state mental hospital. The appellate court reversed, finding nothing in the statute which would authorize such a preliminary trial "being held over the protest of defendant's counsel." 151 The court then held that:

By the action of the trial court in declining to proceed to trial in the murder case, and in requiring a preliminary trial to determine the sanity of the defendant over protest of his counsel, the defendant has been deprived of his rights guaranteed by the 6th Amendment of the Constitution of the United States, and by... the Constitution of Texas... to a speedy trial and to the effective aid of counsel. 152 (Emphasis added.)

These cases recognize the seriousness of detaining an individual in a mental institution for an indefinite period on no firmer basis than a criminal charge and a declaration that he is mentally ill. This pressure on the rights of individual defendants would be greatly reduced if the state viewed the pre-trial commitment procedure simply as a means of enabling an incompetent defendant to participate in the criminal proceedings. The pre-trial commitment procedure in Massachusetts, however, is easily used by the state for the purpose of detaining certain defendants in custody without the necessity of a formal trial or even a hearing. When it is not so used, it tends to operate in a somewhat aimless manner. There are no external checks to prevent the abuses of such a system. Even though the indefinitely committed defendant can seek a writ of habeas corpus, this is rarely done, and a system which is inherently abusive is not cured by the fact that the writ is available. The system must be reformed at the front end if the traditional respect for the rights of individuals charged with crime is to be preserved.

148. Id. at 759, 66 So. 2d at 799.
150. Id. at 583.
151. Id. at 584.
152. Ibid.
III. Suggested Reforms of the Massachusetts Pre-Trial Commitment Procedure

Any procedure for the commitment prior to trial of persons charged with a criminal offense necessarily involves some limitations upon personal liberties. . . While a pre-trial mental examination of an accused of doubtful competency is absolutely essential if we are to avoid trying the incompetent, this examination and any ensuing commitment must not themselves be allowed to defeat the justice they seek to achieve. For this reason such procedures must be carefully scrutinized to see that the essential rights of the accused are recognized and respected to the greatest possible extent.1

In suggesting reforms of the Massachusetts pre-trial commitment procedure, a system must be devised which recognizes the limited purpose of such a commitment and which seeks to protect the right of an individual charged with a crime to due process of law, to equal protection of the laws, and to a speedy trial. As we have seen, the present system has totally failed in these respects.

In seeking to define and thus limit the purpose which a system of pre-trial commitment should be designed to achieve, it is necessary to determine the proper standard for such commitments. As previously pointed out, the only justification for this type of commitment is to enable a defendant, considered incompetent to stand trial, to face the criminal charges against him in whatever manner he chooses. The common law standard of competency to stand trial is broad, and it does not precisely identify the type of behavior by a defendant which would indicate his incompetency. But as previously discussed, many cases have held that the test is not so broad as to make any finding of mental illness tantamount to incompetency to stand trial. These cases recognize that a defendant's particular form of mental illness may have no effect on his understanding of his predicament and his willingness to assist in his defense. Thus, in Cox154 the defendant was probably mentally ill and operating under a delusion when he killed his wife. Yet, the defendant understood that he was being charged with murder (and the consequences of such a charge), and he was sufficiently rational to assist his lawyer in preparing a defense.

A determination of a defendant's mental competency should include a consideration of the complexity of the case, for "the capacity to stand trial may increase or diminish inversely with the complexity of the charge lodged against the accused."155 Another factor which should be considered in determining defendant's competency is the severity of the charges against him. Thus, where the charge is first degree murder, the defendant's inability to

relate facts to his lawyer would be more detrimental than where the charge is assault and battery or breaking and entering.

The common law test of competency establishes sufficiently broad criteria to allow the consideration of such factors. It is an acceptable test, since it focuses the determination upon the question being asked, i.e., can the individual “play the role” of a criminal defendant? The test merely lists the most basic criteria for determining whether a defendant has this capability. Unlike the Massachusetts statute, it does not use such terms as “mental illness” and “insanity,” the use of which only serve to confuse the purpose of the competency determination. As such, Sections 100 and 105 should state this common law test, or some variation of it, omitting any reference to “mental illness” or “insanity.” The Massachusetts statute should even state that where a defendant meets this common law test, he should be considered competent to stand trial, “although on some other subjects his mind may be deranged or unsound.”

Thomas Szasz rejects the notion that there is any connection between mental illness and incompetency to stand trial. He argues that it is judges and lawyers, rather than psychiatrists, who possess the necessary experience to make a determination of the defendant’s competency. If it is clear that the court must not allow psychiatrists ultimately to determine a defendant’s competency to stand trial, as Mr. Szasz argues, then why should the psychiatrist be allowed to play any role in this determination?

Dr. Rothstein of Boston State Hospital submitted that in a few situations, a person’s particular form of mental illness may not be superficially apparent. It is for the purpose of detecting these situations that he would favor a psychiatric examination and a report to the court. While it is beyond the scope of this analysis to examine the full implication of Mr. Szasz’s argument rejecting any psychiatric examination, it seems that he does go too far in stating that there is no causal connection between mental illness and incompetency to stand trial. It is not inconceivable that a particular mental illness could have a direct impact on a defendant’s competency. A psychiatrist should be allowed to call the court’s attention to any such direct relationship between a defendant’s mental illness and his competency to stand trial. The court, however, must draw its own conclusions from such a rela-

156. See COLO. REV. STAT. ANN. § 39-8-6 (1953).
158. The Medical Director at Bridgewater has suggested that the special skills of the psychiatrist can be of particular value to the court in assessing the patient’s “susceptibility to decompensation” under the scope of the court’s abilities. But if a defendant can understand the charges against him and assist in his own defense, it is not relevant that under the stress of trial, he may “decompensate” to such an extent that he is no longer competent. Even a perfectly normal defendant can break down under the stress of a trial; and yet, no attempt is made to screen such defendants prior to trial. Thus, what a defendant’s future behavior is likely to be is a problem with which the trial court can deal in due time; speculation should not be a basis for determining a defendant’s present capacity to face the charges against him.
tionship. Thus, the court may decide that, even though the defendant is suffering from a mental illness which affects his ability to assist in his own defense, the severity of the charge and the nature of the case do not require that the criminal proceedings be suspended. It has been stated that a court often makes this type of decision:

The ultimate question—whether or not the proceedings should be stayed—is not peculiarly within the competency of the psychiatrist. Rather, the answer hinges not only upon an accurate diagnosis of the defendant's condition but also upon a judicious balancing of the social advantages of prompt adjudication under circumstances less than ideal, against the unfairness of subjecting a defendant to trial under mental handicaps. Courts and legislatures regularly make judgments of this kind. It is unlikely that a better balance would be struck by those who by training and inclination attach singular importance to the therapeutic necessities of the case.¹⁶⁰

If the psychiatrist is to be used to advise the court on the issue of defendant's competency to stand trial, it is crucial that he be informed by the court of the tasks which a criminal defendant should have the ability to perform. It should be made perfectly clear to the psychiatrist that the issue is not whether a defendant is suffering from a mental illness which may be curable by commitment to a mental institution. Two psychiatrists whose study of the Michigan system convinced them of the confusion inherent in determining competency to stand trial made the following suggestions:

We would suggest that attention be paid to the intentions and goals of competency proceedings so that such proceedings be restricted only to those criminal defendants who appear to be appropriate objects for competency determinations. In addition, courts and attorneys could profitably clarify in their own minds what sorts of information they would require from the psychiatric expert, inform him accordingly, and take steps to ensure that the expert provides this in understandable terms and with sufficient scientific data to support his conclusions. Finally, the law should recognize that the entire matter of competency to stand trial is a legal matter and that the legal influence does not stop when an individual is found to be incompetent. Undoubtedly, efforts should be expended to educate psychiatrists...as to the goals of the competency proceedings.¹⁶⁰

Turning to the operation of the procedure for determining defendant's competency to stand trial, it is suggested that only the defendant or the trial judge should be allowed to raise this issue. Under the present practice, the district attorney also has this right. The justification for allowing him to do

so is the state's interest in preventing the unnecessary trial and conviction of a defendant who is subsequently held to have been incompetent to stand trial. The objection in allowing the district attorney to raise the issue of defendant's competency is that the state's ultimate interest may be in commitment of the defendant as an end in itself and not in his restoration to competency. As has been stated, such an interest is not justifiable. The possibilities of abuse of the pre-trial commitment system are lessened by preventing the state from setting in motion the procedure which could ultimately lead to defendant's indefinite commitment.

The trial judge, unlike the district attorney, traditionally has had the power to inquire into the defendant's physical or mental condition at every stage of the proceedings. Where the defendant's counsel, however, decides not to raise the issue of defendant's competency, then his decision should be given great weight by the trial judge in deciding whether to pursue such an inquiry. Ex parte Hodges\textsuperscript{161} illustrates this point. The common law test of competency is based on the notion of the defendant's capacity and willingness to effectively assist in his own defense, and the defendant's counsel is obviously in the best position to determine whether the defendant has such capacity. Thus, the trial judge should raise the issue of a defendant's competency to stand trial only when he is convinced that the defendant's attorney is clearly incorrect in not doing so; if the trial judge does raise the issue over the objections of the defendant's attorney, he should be required to clearly state his reasons on the record.\textsuperscript{162}

If this decision is left primarily in the hands of the defendant's counsel, a problem might arise when he seeks to raise the issue, and the defendant objects to any inquiry into his competency. The trial court should have some discretion in such a situation. It should be allowed either to appoint or to assign new counsel to represent defendant or to initiate an inquiry into the defendant's competency where it has some basis for believing that the defendant is in fact incompetent.

Once the issue of defendant's competency has been raised, the court should have the discretion to seek a mental examination of the defendant. At this point, the defendant must be represented by counsel, and he should not be allowed to waive this right. Where possible, such examination should be conducted on an outpatient basis; however, where the court believes on the basis of a hearing that an observation commitment is necessary, then it should be allowed to commit the defendant for a period of no more than

\textsuperscript{161} 814 S.W.2d 581 (Tex. Crim. App. 1958). \textit{See also} Hess & Thomas, supra note 160.

\textsuperscript{162} A decision not to raise the issue of the defendant's competency should constitute a waiver in any subsequent attack on the conviction based on the argument that the defendant was incompetent at the time of trial. If, however, it can be shown that the failure to raise the issue was a result of the defense counsel's ineffectiveness, then this waiver rule would not apply.
ten days. At the end of the commitment, the examining psychiatrist should make a written report to the court. If the psychiatrist concludes that the defendant is incompetent to stand trial, he should be asked to state whether defendant can be effectively treated on an outpatient basis.

When the examining psychiatrist concludes that the defendant is competent, and the court agrees, then, unless the defendant objects, the normal criminal proceedings can be resumed. When the report, however, states that defendant is incompetent or when defendant's counsel objects to the court's preliminary conclusion that the defendant is competent, then the court should order a hearing, giving proper notice to the defendant and his counsel. Defendant's counsel should be provided with a copy of the report prior to the hearing.

At the hearing itself, the court, in considering the defendant's capacity to stand trial, should apply the common law test strictly; that is, a defendant should be presumed competent, unless the court is convinced that he is incompetent by a preponderance of evidence. The court should make this determination with the idea that it is both in the state's interest and in the defendant's interest for a defendant to face the charges. A delay in disposing of the case which would result from a finding of incompetency would prejudice both the state and the defendant in subsequently preparing for a trial. Delays are of course inevitable in the administration of criminal justice, but the court should avoid adding extra delays to those which already exist.

The court must first decide whether and to what degree the defendant's capacity to stand trial is impaired. Even when the psychiatrist's report concludes that defendant is incompetent, the court should give primary consideration to its own impression of the defendant's capacity. Thus, if the court believes the defendant competent, it is not only entitled but should be obliged to proceed with the trial. When the defendant's counsel maintains that defendant is incompetent, the court must of course give considerable consideration to his argument. The decision to suspend the criminal proceedings, however, must be controlled by the trial court. It cannot be delegated to either the psychiatrist or the defendant's counsel. Thus, when the court believes that the defendant is rational and understands his predicament, and yet defendant's counsel insists that the defendant is unable to assist in his own defense, the court then may conclude that the problem is in defendant's inability to communicate effectively with a particular lawyer. The court should therefore have the discretion to appoint or assign new counsel with the expectation that the problem will thereby be eliminated.

There should be no observation commitments or indefinite commitments made to Bridgewater unless the defendant has been determined to be dangerous and unsuited for confinement at any other state hospital. Such a determination should be made only after the defendant and his attorney have been given notice and have been afforded a full hearing on the issue of dangerousness.
If the court concludes that defendant is clearly incompetent to stand trial, then it is at an important crossroad. What the court must avoid is a disposition of the defendant's case which could lead to indefinite commitment in a mental institution with a criminal charge outstanding. The only justification for this type of commitment is that the defendant may respond to treatment sufficiently to be able to face the charge against him. When the charge against the defendant is a misdemeanor, the interest in having an individual face such a charge is less than where the charge involved is a felony. In addition, where a person charged with a misdemeanor is committed, he often spends more time in a mental institution than he would have served in jail if convicted. On balance, therefore, it would be desirable to eliminate pre-trial commitments in a class of cases where the result to be achieved by such a commitment, *i.e.*, recovery of a defendant to a point where he can return to court, is not of vital importance to the administration of criminal justice. The charges against this type of defendant would not be dropped, and the district attorney would be allowed to reopen the case at any time when the defendant's mental condition is such that he can face the charges against him. If the defendant is considered dangerous to himself or others, the state can institute civil commitment proceedings against him. If he is so committed, the criminal charges would be dropped. It is arguable that when such a defendant is not civilly committed, he would be allowed to remain unconfined with the prospect of never being tried for the misdemeanor. But this is what often occurs when a defendant is not brought to trial because of such a physical infirmity as a severe heart condition.

When the defendant considered incompetent to stand trial by the court is charged with a felony, then the state's interest in bringing such a defendant to trial, at least in theory, is sufficient to warrant some type of disposition by the court which will accomplish this result. This does not necessarily mean that all such defendants must be committed to a mental institution. In some cases, the psychiatrist or the court may believe that the defendant can effectively be restored to competency with the aid of outpatient treatment. Thus, in the case of Bernard Goldfine, the court permitted such outpatient treatment on the ground that "the petitioner is presently incompetent to stand trial; that as of now his condition so far as it affects his competency to stand trial, is not improving at St. Elizabeth Hospital, where he is confined, and he is not likely to improve so long as he is under confinement . . . ."164 The court further found that "the probabilities of his recovering competence are less in confinement than if he is permitted to return to a normal environment with outpatient psychiatric and medical treatment . . . ."165 Similarly,
in *United States v. Klein*,\(^{166}\) where the psychiatrist who had treated a defendant found incompetent to stand trial for more than 30 years insisted that institutionalization would prove "catastrophic," the court held that the record did not furnish sufficient grounds for pre-trial commitment:

> [T]he only controversy concerns treatment. . . . Accordingly, where a defendant such as Klein is receiving extensive psychiatric care and there is no question as to the integrity and high professional competence of his personal psychiatrist, we do not consider [the pre-trial commitment statute] as intended to compel the District Court to determine which of two equally reputable methods of psychiatric treatment would prove most efficacious in a particular case.\(^{167}\)

The Massachusetts statute should therefore be changed to allow the court to order outpatient treatment as an alternative to commitment when a defendant is found incompetent to stand trial.\(^{168}\)

If the court decides, after considering the recommendation from the examining psychiatrist, that commitment would be the best method of restoring a defendant's competency, then such commitment should be strictly limited in time. It should not become an *indefinite* commitment.\(^{169}\) Thus, a maximum of one year should be established for such commitments; at the end of this period, the court should have another hearing to determine whether the defendant is competent to stand trial. If he is considered competent and is subsequently tried and convicted, the time that he spent in a mental institution should be credited toward his sentence. If he is found incompetent and there is little hope that he will regain his competency in the near future, the following should occur: Where the state can make an initial showing that the defendant is dangerous to himself or others because of his mental condition, the court should have the discretion to detain defendant temporarily to allow the state to institute civil commitment proceedings immediately. If the defendant is civilly committed, then in most cases, the charges against him should be dropped; however, if the crime charged is particularly serious, then the state should be able to start the criminal proceedings again if the defendant is released from the mental institution within a specified number of years.

If the defendant is not civilly committable, then it may again be argued that a defendant charged with a felony should not be allowed to go free. But this argument ignores the fact that defendant has not been *convicted* of

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\(^{166}\) 325 F.2d 283 (2d Cir. 1963).

\(^{167}\) *Id.* at 285.


\(^{169}\) Prior to the commitment, there should be a preliminary hearing to determine whether there is "probable cause" to detain the defendant on the basis of the charge against him; a complaint alone should not be considered sufficient for pre-trial commitments.
any crime and is therefore presumed innocent. Furthermore, if society has a legitimate interest in detaining such a defendant in a mental institution, this interest should be protected under the civil commitment procedure. It should not be asserted under the procedure of pre-trial criminal commitment, where the purpose of such a commitment (to restore a defendant to competency) appears to be unobtainable. The criminal charge against the defendant would not be dropped, and the state would have the prerogative to attempt to bring him to trial when the state believes that the defendant is competent.

In most cases, one year should be sufficient to determine whether a defendant will regain his competency to stand trial. If, at the hearing held at the end of this one year period, the psychiatrist is reasonably certain that the defendant will be able to stand trial within a short time, such as three months, the court, in its discretion, can extend the commitment for this period. If at the end of this time, defendant still is unable to return to trial, the criminal commitment should come to an end, and the court would have the same alternatives discussed above. The purpose of such an arbitrary limit on the pre-trial commitment is to avoid long and useless commitments such as that which occurred in the well-known case of Ezra Pound.\(^\text{170}\)

During the defendant's pre-trial commitment, the hospital should report to the court on the defendant's condition at regular intervals, e.g., every three months. When the hospital believes that the defendant is competent to stand trial, he should be immediately returned to the court. If the court agrees with this conclusion, the criminal proceedings will be resumed. In addition, the defendant's counsel should be allowed to request a hearing to determine defendant's competency when the hospital files its required report to the court. The purpose of these recommendations is to provide ade-

\(^{170}\) United States v. Pound, Crim. No. 76028 (D.D.C., Nov. 28, 1945). For discussion of this case, see Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L.J. 905, 917 (1961). Pound was found unfit to stand trial in 1945; the indictment against him was dismissed and he was finally released in 1958 when the hospital superintendent advised the court that “Pound suffered from a permanent and incurable paranoid state, that further treatment was useless, that there was no likelihood that he would ever be sufficiently competent to stand trial, and that he would not be dangerous if he were released.” Commenting on the Pound case, Mr. Krash stated:

The justification for hospitalizing an incompetent person who has been indicted is that he may respond to treatment sufficiently to stand trial; however, if recovery is improbable, continued detention is not warranted. Indeed, it can be persuasively argued that due process requires that a defendant should be released even though he may be dangerous if it appears that he will never recover sufficiently to stand trial. . . . [I]f a trial can never occur there is no justification for continued detention. Indefinite confinement of a person who has never been tried or found guilty of any offense cannot be supported by a procedural device of such limited scope. . . .

The issue left open by the Pound proceeding is how long a defendant may be detained before he must be released on the grounds that he will in all likelihood never be competent to stand trial. Id. at 917.
quate and continued supervision of the defendant's commitment by the committing court. As the court said in *Johnson v. Settle*, a "[c]ourt owes a duty to its ward to from time to time inquire as to the mental condition of its ward and to legally determine whether or not the defendant is, in fact, competent to stand trial or to be continued as a ward." Such supervision is nonexistent at the present time in Massachusetts. While it is recognized that these recommendations will be an added burden for overworked courts and mental hospitals, it is hoped that the number of these commitments will be greatly reduced because of previous suggestions.

It has been pointed out that the defendant who is considered incompetent to stand trial may have certain valid grounds for attacking the criminal charge against him on the merits. Professor Foote summarized three different types of situations in which this might occur:

The first is the instance . . . where the defendant can show that the prosecution is barred as a matter of law; another example would be an indictment which on its face discloses that the statute of limitations has run. Second are cases where the defendant alleges that he can show an intrinsic defect in the prosecution's factual case which will prevent conviction, for example, that essential evidence was obtained by an unlawful search and seizure or that the prosecution's evidence shows entrapment as a matter of law. Third, counsel for an incompetent defendant may wish to assert an affirmative defense which can be established without participation of the defendant. In a robbery prosecution based on identification evidence, for example, counsel may be able to establish from employment records and the testimony of third parties that the defendant was at work in another city at the time of the crime. In all of these situations present law appears to say to the defendant: "Wait. You can't raise this until and if you have recovered. In the meantime we'll detain you with the criminally insane, where you will have to live under the cloud of an accusation from which we will not allow you to exculpate yourself."

Professor Foote then recommended that if the court believes that the defendant is incompetent, it should defer a ruling to this effect if "counsel moves to dismiss the indictment, or for exclusion of illegally obtained evidence, or raises any other matter which can be determined at a pre-trial hearing . . ." In *United States v. Marino*, the court allowed such a procedure when it ruled on the defendant's motion to dismiss the indictment for failing to state an offense against the United States before deciding

173. Id. at 845.
whether the defendant should be committed as incompetent. When this motion was granted, the court held that it had no power to proceed further under the incompetency statute. A different result was reached in *United States v. Barnes.*175 There, the court dismissed the indictment against three defendants because of denial of their right to a speedy trial, but refused to dismiss the indictment against the fourth codefendant, who was considered incompetent to stand trial. This defendant was committed, presumably until such time as he would be sufficiently recovered to participate in the dismissal of the indictment against him.176 The result in this case as to the incompetent fourth defendant is unfair and inconsistent. Since the indictment was clearly invalid, there was in reality no criminal charge against this defendant. As Professor Foote observed, the result in *Barnes* can be defended only if “we are prepared to incarcerate persons as criminally insane, not as an incident to a valid pending charge of crime but simply in accordance with psychiatric estimates of future dangerousness.”177 In Massachusetts, such a procedure as that recommended by Professor Foote would be possible; and one judge stated that he would consider any pre-trial motions before ordering an indefinite commitment. Such motions should be allowed, and where the result of the pre-trial hearing is a dismissal of the charges against the defendant, there is no longer any justification for criminally committing him.

Professor Foote’s second suggestion is more troublesome. He states that where “counsel alleges that there is a good faith defense on the merits and chooses to go to trial on the merits notwithstanding defendant’s incompetency,” the court shall “proceed to a trial on the merits.” If there is a finding of not guilty, “that will be the end of the matter”; if there is a guilty verdict, “the court should then rule that the defendant is incompetent, set the verdict aside and commit the defendant . . . until he is sufficiently recovered to be retried or until other appropriate disposition can be made of the case.”178 The problem with this proposal is that it tends to impose a great burden on the court and the district attorney. On the other hand, both psychiatrists interviewed by this writer stated that the primary difficulty in treating defendants committed prior to trial is that many of them believe that they have been denied the opportunity to clear themselves of the charges against them. Thus, a compromise between Professor Foote’s proposal and the present procedure of *not* allowing such trials where the defendant is incompetent would be to grant the court discretion as to whether such a trial should occur. The

175. 175 F. Supp. 60 (S.D. Cal. 1959).
176. Foote, supra note 172, at 832.
177. Id. at 846.
178. Id. at 845-46. In Regina v. Roberts, [1953] 2 All E.R. 340, the court postponed a determination of the preliminary issue of the defendant’s competency to stand trial “until the general issue should be laid before the jury.” However, Regina v. Beynon, [1957] 2 All E.R. 513, refused to follow Roberts and required a prior determination of the defendant’s competency.
defendant's counsel would have the burden of persuading the court that such a trial would be likely to result in a verdict of not guilty. The previous suggestions limiting the number and length of these pre-trial commitments reduce the injustice to the possible innocent defendant who is denied this opportunity to clear himself.

IV. Conclusion

It is hoped that these recommendations will eliminate some abuses which exist in the current system of pre-trial commitment in Massachusetts. These abuses are not a result of any judicial or psychiatric tyranny. Rather, they are primarily a result of a vague statute and a lack of any judicial decisions construing it. The conclusions of two psychiatrists who studied the Michigan system of pre-trial commitment serve as an excellent description of the current state of affairs in Massachusetts:

We have described the breakdown of a vital social system necessitating collaboration between two highly respected professions. The confused statute regarding incompetency to stand trial and its distorted application by both physician and lawyer tends to subvert the social and legal principle inherent in the concept of competency and in so doing to sacrifice the professional identity of both lawyer and physician as well as their appropriate functions as assigned by society and which their client has the right to expect.

In this process, the legal position becomes untenable. The court cannot use the psychiatrist effectively because it cannot understand him and because it does not demand that which could be understood. Therefore, in lieu of using his competence, it must accept his pronouncements and tacitly his usurpation of its role. The valued and traditional legal insistence on the right to determine fact is passively given over to the acceptance of opinion as fact. The result is that from start to finish the physician occupies a foremost yet counterfeit role in incompetency proceedings.\footnote{179. Hess & Thomas, supra note 160, at 718.}

It is likely that the recommendations of this article, intended as they are to prevent the indiscriminate pre-trial commitment of defendants alleged to be mentally ill, may force the state to use the civil commitment process for the purpose of detaining many individuals in the custody of a mental institution. While an examination of the propriety of civil commitment is beyond the scope of this article, it is obvious that there are many problems inherent in such a process, even when the proceedings strictly follow the statutory standard for civil commitment. There are those who would argue that there is no justification for society's detaining any individual in a mental institution against his will on the ground that he is considered mentally ill and "dangerous to himself or others."
Regardless of the propriety of civil commitment, it is clearly unjustifiable to use a criminal charge as a pretext for committing a defendant who is considered mentally ill, when there is no relationship between the defendant's mental illness and his capacity to face the charges against him. As long as such commitments are permitted, the type of cases cited in the introduction of this article can occur at any time. Such cases taint the administration of criminal justice in Massachusetts and many other jurisdictions. The procedure which permits their occurrence must therefore be changed.
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