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## Criminal Law - Insane Persons - Competency to Stand Trial

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CRIMINAL LAW — INSANE PERSONS — COMPETENCY TO STAND TRIAL\* — Mental unsoundness in a person accused of a crime raises two distinct legal questions. One is the question of the individual's responsibility for his behavior and the other is the question of the individual's competency to enter into the legal procedures of trial or punishment.<sup>1</sup> In recent years considerable attention has been given to matters of responsibility,<sup>2</sup> but relatively little attention has been paid to the problem of incompetency and especially to the consequences of incompetency proceedings. In order to analyze and evaluate the operations of the Michigan law in the area of incompetency to stand trial,<sup>3</sup> two psychiatrists joined two law students to conduct field research at Ionia State Hospital to which all persons found incompetent to stand trial are committed.<sup>4</sup>

This comment reports and analyzes the results of this field research. Attention is given also to the merits of alternative procedures for the commitment and treatment of incompetents.

### I. INCOMPETENCY PROCEEDINGS — COMMON LAW

It was the 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 meet the common

\* The authors wish to thank Dr. R. E. Cooper, Medical Superintendent of Ionia State Hospital, and his staff for their cooperation in this study.

<sup>1</sup> WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 428, 430 (1954) [hereinafter cited as WEIHOFEN, *MENTAL DISORDER*].

<sup>2</sup> See HALL, *PRINCIPLES OF CRIMINAL LAW* ch. 14 (2d ed. 1960); WEIHOFEN, *THE URGE TO PUNISH* (1956); BIGGS, *THE GUILTY MIND* (1955); ROYAL COMM'N ON CAPITAL PUNISHMENT, *REPORT* (1949-1953).

<sup>3</sup> MICH. COMP. LAWS § 767.27 (1948).

<sup>4</sup> The total patient population at Ionia was 1484 as of August 1960. Of these 755 are classified as "criminal court referrals," 356 as Criminal Sexual Psychopaths, 101 as convicts serving sentences (transferred to Ionia from prison), 140 as convicts with expired sentences (adjudicated mentally ill in retention proceedings), 118 as homicidal patients transferred from civil institutions, 4 as ex-convicts declared mentally ill, and 10 unclassified. The majority of "criminal court referrals" are those committed as incompetent to stand trial. However, about 50 of the 755 are persons found not guilty of murder by reason of insanity and committed under section 766.15c of the Michigan Compiled Laws. Additionally, of the 393 patients of all classifications currently on parole, approximately 200 had been committed for incompetency. Conclusions regarding the 755 are based upon a representative and random sample of 77 patients whose records were studied. Selecting at random one record of every five subjects in the appropriate category, we studied the records of 21 persons discharged back to the committing court by the hospital during the period July 1954 - December 1960; 20 records of persons currently on parole; and 11 records of persons discharged from parole since October 1947. Each subject's record was examined for background information, nature of the judicial proceeding, and hospital and parole experience. Further, 11 patients were interviewed by the two psychiatrists participating in the study. The investigation was aided by the opportunity afforded us by the hospital superintendent to observe a staff interview of a patient and to interview the doctors on the hospital staff.

law tests of competency; that is, when he could not understand the nature and object of the proceedings against him, comprehend his own condition in reference to such proceedings, and assist in his defense.<sup>5</sup>

The common-law judge had wide discretion in calling and conducting a competency examination. Whether an examination into the defendant's competency would be made at all depended on whether the judge had reason to believe that the defendant was mentally unable to proceed with trial.<sup>6</sup> It was often said that once a competency examination was ordered, the judge was free to use any method for determining the accused's competency which was "discreet and convenient."<sup>7</sup> Also the judge had discretion to summon a jury to make the determination of competency or to make such determination himself.<sup>8</sup> If it was determined that the accused was incompetent, the common-law practice seems to have been to confine him in jail. Indeed, it had been held that in the absence of statutes the judge had power only to order the incompetent confined in jail.<sup>9</sup> He would then be tried at such time as the judge determined his competency restored.

At the common law there was no right of appeal from the incompetency hearing itself, but the issue of the accused's competency could be raised on appeal from the criminal trial. Despite authority that an accused's constitutional rights would be violated if he were tried while incompetent,<sup>10</sup> the judge's decision was generally sustained unless it was clearly arbitrary.<sup>11</sup> Since most states have merely codified the common law in this field,<sup>12</sup> wide

<sup>5</sup> WEIHOFEN, MENTAL DISORDER 431.

<sup>6</sup> *Id.* at 433, 444.

<sup>7</sup> See, e.g., *People v. Rhineland*, 2 N.Y. Crim. 335 (Ct. Gen. Sess. 1884).

<sup>8</sup> WEIHOFEN, MENTAL DISORDER 445, 446-47.

<sup>9</sup> *Hawie v. Hawie*, 128 Miss. 473, 91 So. 131 (1922).

<sup>10</sup> *Youtsey v. United States*, 97 Fed. 937 (6th Cir. 1899) (trial of insane person under indictment involving liberty or life violates due process); *United States v. Gundelfinger*, 98 F. Supp. 630 (W.D. Pa. 1951) (dictum) (fair trial embraces right to be mentally present); *United States ex rel. Mazy v. Ragen*, 149 F.2d 948 (7th Cir. 1945) (dictum), cert. denied, 326 U.S. 791 (1946) (trial of insane person raises federal due process questions).

<sup>11</sup> WEIHOFEN, MENTAL DISORDER 474.

<sup>12</sup> See, e.g., LA. REV. STAT. § 15:267 (1950); MINN. STAT. § 610.10 (1957); N.D. CENTURY CODE § 29-20-01 (1960); ORE. REV. STAT. § 136.150 (1959).

From time to time statutes similar to the Michigan incompetency statute have been attacked on the grounds that they violate the accused's state or federal constitutional rights. Such attacks have been almost invariably rejected for the reason that a sanity hearing and commitment do not constitute a trial. These procedures are designed to protect the accused, not to incriminate him. See cases collected in Annot., 32 A.L.R.2d 434 (1953). Although the Michigan statute has not been tested against the federal constitution, the Michigan Supreme Court has held that this statute "preserves, instead of deprives [the

discretionary powers continue to be exercised by the trial courts of these states.

## II. INCOMPETENCY PROCEEDINGS — MICHIGAN

### A. *Commitment: Law and Operation*

1. *Law.* The Michigan incompetency statute<sup>13</sup> follows the basic pattern of the common law. It requires the court to hold a sanity hearing<sup>14</sup> to determine the accused's competency to proceed with trial when one accused of a felony "shall appear to be insane." The question of the accused's competency can be raised by the accused, the prosecuting attorney, or the court.<sup>15</sup> Whether the defendant "appears to be insane" within the statute may be decided either by the court or by a jury.<sup>16</sup>

If it is determined that the defendant does "appear to be insane," the court fixes a time and place for a hearing of the competency issue at which it "shall call 2 or more reputable physicians and other credible witnesses to testify at said hearing, and [shall call] the prosecuting attorney to aid in the examination and if it be deemed necessary to call a jury for that purpose, [the court] is fully empowered to compel the attendance of witnesses and jurors."<sup>17</sup>

The statute retains the common law three-pronged test of incompetency: "[T]he test on the trial of [the defendant's competency]<sup>18</sup> . . . shall be whether such person is [1] capable of under-

defendant] . . . of due process of law." *People v. Janek*, 287 Mich. 563, 567, 283 N.W. 689, 690 (1939).

<sup>13</sup> MICH. COMP. LAWS § 767.27 (1948).

<sup>14</sup> The statute actually directs the court to "inquire and ascertain the issue of insanity." MICH. COMP. LAWS § 767.27 (1949). This is done by means of the sanity hearing.

<sup>15</sup> If the defense desires to raise the issue of defendant's competency, written notice to this effect must be given to the prosecuting attorney not less than four days before the scheduled date of trial. MICH. COMP. LAWS § 768.20 (1948).

<sup>16</sup> "[W]hen a person accused of a felony shall appear to be insane . . . the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain the issue of insanity." MICH. COMP. LAWS § 767.27 (1948).

<sup>17</sup> MICH. COMP. LAWS § 767.27 (1948).

<sup>18</sup> The word "competency" is not used in the statute, but use of the common law competency tests indicates that "competency" is in issue. The statute actually reads: "If it is claimed that such person became insane after the commission of the felony with which he is charged and before or during the trial thereon" then the test of whether he is mentally able to be tried will be the common law competency test. Although this provision has not been reviewed in Michigan, other states have interpreted similar clauses to require that the accused must appear to have become insane *since* the commission of the offense. This distinction based upon the *time* when the accused became mentally unfit is not justified by the common law nor is it practiced by the Michigan courts. See WEIHOFEN, MENTAL DISORDER 431-33.

standing the nature and object of the proceedings against him and [2] of comprehending his own condition in reference to such proceedings and [3] of assisting in his defense in a rational or reasonable manner."<sup>19</sup>

It would be expected that if the defendant is found to be incompetent, he would be sent to a rehabilitative institution. This the statute does provide, but it does not use incompetency terminology or refer to the incompetency tests:

"If such person is found *insane*, the judge of said court shall order that he be discharged from imprisonment and that he be turned over to the sheriff for safe custody and removal to Ionia state hospital, to which hospital such person shall be committed to remain until restored to sanity."<sup>20</sup>

The use of "insane" and "sanity" can be explained by the fact that it is this same provision which provides for examination and commitment of persons found not responsible for criminal acts. Both these and incompetents are sent to Ionia, and the general word "insane" encompasses the criteria for commitment for both groups. However, with respect to the criterion for commitment of incompetents, reason would indicate that the legislature intended the three-pronged competency test to be used.<sup>21</sup>

2. *Operation.* At the hearing to determine the competency of the accused to stand trial "two reputable physicians" are required to testify regarding the accused's mental state. The influence which their testimony exerts upon the competency determination is substantial, for they speak as experts in a field shrouded in mystery for both judge and jury. Not understanding the medical complexities associated with mental illness, the legal authorities enunciate legal policy objectives and broad competency tests by way of statute and then rely upon the doctors to apply these tests to the individual defendants.

Our study suggests that the Michigan statute's direction to commit the accused if he cannot meet the competency test is being very loosely applied in many cases. Several records studied at Ionia indicated that the doctors confuse the legal standards for competency with those for responsibility. An example of this confusion of legal concepts was evidenced by a report which read: "This man

<sup>19</sup> MICH. COMP. LAWS § 767.27 (1948).

<sup>20</sup> MICH. COMP. LAWS § 767.27 (1948). (Emphasis added.)

<sup>21</sup> Office of the Attorney General, Memorandum to Conference Participants on Overcrowded Conditions at Ionia State Hospital, September 8, 1960.

does not know right from wrong, he is incompetent, he is not able to help his counsel, he should be committed to an institution because he is insane and should be released only when he is found to be sane." Most of the records which did not manifest such confusion were form statements which simply parroted the incompetency test of the statute.<sup>22</sup>

The confusion of legal concepts is caused in part by the imprecise wording of the Michigan statute which codifies the three-pronged common-law test as the criterion for testing the accused's ability to proceed with trial but subsequently uses the word "insane" to indicate the criterion for committing him to Ionia State Hospital. Another probable causal factor is that frequently the "two reputable physicians" who make psychiatric determinations have no psychiatric training. Also, in many cases a report on the defendant's condition is prepared by a social worker or psychologist. After the doctor interviews the patient he adds a covering letter to the psychologist's report suggesting that the accused be committed.

The records also indicate that some of the examining physicians assumed the role of moral experts. In one case the doctor recommended commitment because of the patient's "hostile and aggressive tendencies." However, it may be supposed that those defendants well enough for sentencing to prison exhibit similar tendencies. In another instance the examining physicians said: "We actually feel the patient could cooperate with counsel but that it would be better if he were to be hospitalized in Ionia." This departure from the physician's proper role as expert medical witness seems to be based on two factors. First, the physician does not understand that the legal objective is the narrow one of determining whether the defendant is competent to proceed with trial but rather tends to think of his function as a broader one of protecting society, the defendant, or both. Implicit in many of the physicians' recommendations is the feeling that the individual defendant is such a pathetic figure and so clearly not responsible for his crime that he should not be consigned to prison. Second, the physicians seem to believe that commitment to Ionia is infinitely preferable to a prison sentence. Misapprehending the purpose of the incompetency proceedings and his role in them, the physician assumes the responsibility for insuring that the defendant is treated in a more humane atmosphere than a prison. Exam-

<sup>22</sup> These "form" reports were employed in 54 of the 129 records studied.

ples of this type of distortion occurred in many of the hospital records studied, but were most prominent in the records of elderly persons or those who were obviously mentally defective.

It is our judgment that as a result of this loose application of the competency tests, persons are being committed to Ionia who are not in fact legally incompetent. This judgment is corroborated by the fact that frequently the Ionia Hospital physicians' diagnosis of the accused varied from the opinion presented to the court by the court-appointed physicians. It was not unusual to find that the hospital staff found a newly-admitted patient was mentally ill but nevertheless able to meet the legal competency standards.

### B. *Procedures at the Hospital*

The Ionia State Hospital is overcrowded and understaffed. The total patient population of 1484 as of August 1960 represents a patient excess over maximum capacity of 262 persons or about 21 percent. Of the total number of patients approximately 755, or 51 percent, were committed because incompetent to stand trial. To administer to the needs of these patients there are but four physicians including the superintendent of the hospital. Incompetency as a legal concept is not meaningful to these doctors, for whether a person is "sane enough" for trial is a legal concept incapable of precise medical evaluation and determination. Since the doctors do not understand the law, nor their role in its administration, it is not surprising that clinical results bear scant resemblance to legal policy objectives.

A less obvious but perhaps more important problem concerns the goals of the hospital. Patients' progress notes indicate that the hospital staff frequently does not know what is expected of them. The hospital's objective appears to be to restore the incompetent to "soundness of mind," a goal which could be, and in practice is, very different from the goal of restoring the patient to a condition which would permit him to stand trial. For most categories of patients at Ionia<sup>23</sup> the objective of "restoration to sanity" is sound. It is easy to understand that this objective could be unconsciously applied to the total patient population. Without doubt much of the confusion regarding therapeutic goals for patients who are incompetent to stand trial results from the necessity of establishing different standards of cure for the various classifica-

<sup>23</sup> For a breakdown on the number of patients in each category, see note 4 *supra*.

tions of patients at the hospital. A lack of clearcut therapeutic goals results in a case such as the following: *F. C.*, a twenty-five-year-old male, has been held as an incompetent patient for four years while hospital personnel work toward achieving "insight into his behavior" and "confession of his crime."

The therapeutic procedures carried out at Ionia State Hospital differ relatively little from those carried on at other state mental institutions. Little in the way of individual attention can be offered. The incoming patient is given a mental and physical examination upon arrival and assigned to a ward. Contact with his staff physician is frequent at first while evaluation is in process, but the longer the patient remains in the hospital, the less frequent are the doctor's interviews. The records studied indicated that only 33 percent of the patients were seen by a doctor as often as once every three months and 61 percent were seen by a doctor only every six months. The infrequency of doctor-patient interviews is not solely caused by crowded conditions. Since the interview should further some recognizable goal, if such a goal does not exist, the interview will be unproductive and is therefore less likely to be held.

Other therapeutic efforts consist primarily of relieving the patients of their social and legal responsibilities and exposing them to a healthy hospital environment. Such techniques have definite value, although limited to be sure, and with this minimum treatment alone a large percentage of the individuals committed as incompetent could probably be expected to reach a state of legal competency in a relatively short period of time if the hospital were to concentrate on this goal. Other therapeutic endeavors consist of the extensive use of tranquilizing medication, electroconvulsive shock therapy, and limited group therapy usually conducted by a psychologist, social worker, or "lay therapist."

### C. *Discharge*

In addition to commitment and treatment of incompetents, the Michigan statute provides for their discharge back to the committing court.<sup>24</sup> Since the reason for commitment of the incompetent is his failure to comply with the standards of competency, one would likewise expect that the criterion for discharge back to the committing court would be the accused's ability to

<sup>24</sup> MICH. COMP. LAWS § 767.27 (1948).



“pass” the same competency tests. However, the stated criterion for such discharge is not the three-pronged competency test but that of “restoration to sanity.”

“When [the accused] . . . shall be *restored to sanity*, and that fact has been determined by the superintendent of said hospital or by any other proceeding authorized by this section, the said superintendent of said hospital shall forthwith certify that fact in writing to said judge and prosecuting attorney. The judge shall thereupon immediately require the sheriff without delay to bring such person from the said hospital and place him in proper custody until he is remanded to prison, brought to trial or judgment, as the case may be, or is legally discharged.”<sup>25</sup>

This use of the “restoration to sanity” standard can again be explained by the fact that the statute covers procedures for commitment and discharge of both incompetents and those found non-responsible. The proposition that the legislature in the case of incompetents intended “restoration to sanity” to refer specifically to the three-part competency test is supported by the Michigan Attorney General’s office:

“[I]t would seem that the law does differentiate between those individuals who are committed because they are criminally insane, which fact has justified their acquittal on criminal charges, and those individuals who are committed because they cannot stand trial. In the case of a person who is committed after acquittal as criminally insane, the legal and logical test to be applied would seem to be whether he has actually been restored to sanity so that he no longer represents a threat to society.

“But, in the case of an individual who is committed before trial, the legal and logical test would seem to be whether he has been restored to sanity to the extent that the reason for his commitment no longer exists, i.e., that he now is ‘capable of understanding the nature and object of the proceedings against him and of comprehending his own condition in reference to such proceedings and of assisting in his defense in a rational and reasonable manner.’ ”<sup>26</sup>

It is probable that this vague criterion for discharge — “restoration to sanity” — is partly responsible for the indicated lack of

<sup>25</sup> MICH. COMP. LAWS § 767.27 (1948). (Emphasis added.)

<sup>26</sup> Office of the Attorney General, Memorandum to Conference on Overcrowded Conditions at Ionia State Hospital, September 8, 1960.

defined therapeutic goals in treatment of incompetents at Ionia. Further, the vague term "sanity" can justify retention of incompetents until it is felt "safe" to return them to society, a criterion for discharge apparently underlying many cases. Moreover, this statutory criterion also justifies the hospital's frequently stated goal of restoring "soundness of mind" to the incompetent before discharging him.

#### D. *Parole*

The Michigan incompetency statute was amended in 1947 to provide that any patient may be paroled or given a leave of absence by the hospital superintendent. This amendment, part of the present statute, provides:

"The superintendent of the Ionia state hospital may grant a parole or leave of absence to any person committed under the provisions of this section subject to such conditions as may be prescribed by the department of mental health, provided such parole is concurred in by the committing court after due notice has been given by mail to the prosecuting attorney of the county from which the patient was committed.

"Such paroled person committed under the provisions of this section who has not recovered sanity but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare and will not be injurious to the patient, may be discharged, provided such discharge is concurred in by the committing court and due notice has been mailed to the prosecuting attorney of the county in which the patient was committed within 10 days prior to such discharge."<sup>27</sup>

Our study shows that the hospital requires a high degree of mental alertness and exemplary conduct before even considering a patient for parole. Before a patient can be paroled he must come before a staff conference composed of all the doctors plus the ward attendants, psychologists, and social workers. As in the case of doctor visitations, the frequency of a patient's staff conferences varies inversely with the length of his confinement at the hospital. At first he may be "staffed" as often as every three months. But as time passes the meetings are held less and less frequently and it is not unusual for long-time patients to be staff-interviewed less than once every two years. The records indicate

<sup>27</sup> MICH. COMP. LAWS § 767.27 (1948).

that the standards which the doctors set for those seeking parole are "soundness of mind," "social competency," and "emotional maturity." In addition, factors quite apart from the patient's mental state are considered. Whether the patient has a home in Michigan, whether he has a family to look after him, and whether he can find employment are fully as important to his chance for parole as is his mental condition. In one instance, a woman had been in the hospital for over two years and the reports were extremely pessimistic concerning her condition. It appeared that her chances of parole or discharge were exceedingly remote when a letter arrived from a lawyer expressing concern. This was followed by an inquiry from the committing court. Immediately the tone of her progress reports changed and within three months she was paroled.

Once paroled, the patient must meet strict standards of conduct to retain his valued status. He may not drink, drive a car except as necessary in his work, or marry without permission from the hospital. He must report periodically to the parole authorities at a clinic or state hospital near his home, and he must be able to hold a job and make a successful adjustment in society. If he is able to maintain these high standards of conduct for a period of three years, he is then eligible for discharge.

Although the statute provides for discharge of paroled persons who have "not recovered sanity," it is clear that anyone meeting the criteria for parole could meet the relatively modest standards required in order to stand trial. The provision for parole makes no sense as part of incompetency to stand trial procedure. If the defendant is well enough for parole, he is well enough for trial. If he is to be tried after discharge from parole, such a procedure denies him his right to a speedy trial guaranteed him by the Michigan constitution<sup>28</sup> and state statute,<sup>29</sup> and is vulnerable to a charge of invalidity. If he is not to be tried, but is to be released into society after discharge from parole, the only proper way for the

<sup>28</sup> MICH. CONST. art. 2, § 19.

<sup>29</sup> "The people of this state and persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay *except as may be necessary to secure the accused a fair and impartial trial.*" MICH. COMP. LAWS § 768.1 (1948). (Emphasis added.) It belabors the obvious to suggest that parole of incompetents is not necessary to secure them a "fair and impartial trial."

state to hold him as a parolee would appear to be by means of a civil commitment.<sup>30</sup>

#### IV. SOME RESULTS OF THE MICHIGAN SYSTEM

##### A. *Legal Results*

We earlier indicated belief that some persons have been sent to Ionia who are not in fact legally incompetent and that there appears to be a conflict between the apparent goals of incompetency law and the hospital goals in treating incompetents. At common law it was for the protection of his rights that an incompetent was not tried, and this same idea appears to be the basis for the Michigan statute. Once the defendant is again competent to stand trial the desire to protect his rights should compel his early return to the committing court for trial. Society also has the "right" to try him at this time. But since the hospital does not concentrate on the goal of making the defendant competent for trial, and in many cases instead concentrates on achieving the more difficult goal of restoring "soundness of mind," many defendants are deprived of a chance to complete their trials.

If our estimate is correct that many incompetents at Ionia could be readied for trial with existing facilities in a short period of time, it is indefensible that for a substantial number of defendants commitment to Ionia is the equivalent of a life sentence. During the period July 1954 to December 1960 a total of 470 defendants were committed to Ionia as incompetent to stand trial, a rate of about 84 admissions per year. During this same period approximately 105 were discharged back to the committing court, a rate of little more than 16 per year.<sup>31</sup> Even if there is added to this figure approximately 15 who are paroled in any given year there are many more admitted to Ionia than are released. How many of the present 755 incompetents will be discharged is impossible to say with complete accuracy but if the past rates are any guide, the number discharged is likely to fall well short of one-half. The rest can

<sup>30</sup> It should also be pointed out that this anomalous provision for parole is probably a major reason for the confusion in therapeutic goals at the hospital and the lack of concentration on readying the accused for trial. As a result the 124 persons paroled during the past ten years should instead have been returned to the committing court as competent to stand trial.

<sup>31</sup> The hospital reported 319 releases during 1958-1959. However, most of these were committed for diagnosis only. Incompetents comprise only a small percentage of these releases.

expect to spend the rest of their lives at the hospital.<sup>32</sup> This system accounts for the clear preference of many incompetents for confinement at the state penitentiary at Jackson rather than commitment to Ionia.

Moreover, confinement at Ionia because of incompetence to stand trial is not deemed imprisonment to be computed upon the patient's subsequent conviction and sentence.<sup>33</sup> The sentence begins to run only after conviction. This should be contrasted with the provisions of a Michigan statute<sup>33a</sup> which requires an application to the probate court for civil commitment to retain those patients who have been convicted of a crime but who subsequently are sent to Ionia because of mental illness and are still residents at Ionia when their sentences expire. The incompetent who has never faced trial need never be civilly committed under the present procedures.

Instead of protection for the defendant until he is ready for trial, the administration of mental incompetents more closely resembles an alternative to the regular penal system. Through the use of incompetency law those found dangerous to society by reason of mental affliction can be isolated without the formalities of trial and conviction. Statutory ambiguity and hospital misunderstanding are not solely to blame. Acquiescence by the courts and police in a system producing the above figures on "inflow and outflow" of incompetents suggests satisfaction with the system's operation. The almost total lack of judicial or police inquiry into a patient's progress suggests indifference to whether these persons are ever brought to trial. This is demonstrated by the additional fact that in most cases when the defendant is discharged to the committing court the charges against him are dismissed, and he is released without trial. The authors reviewed the records of 21 incompetent patients discharged back to the committing court for trial. The records showed that 14 of these patients were returned to the Recorder's Court in Detroit. A review of these records at the Recorder's Court by the authors revealed that *not one* of the 14 had been tried after being returned to the court. This fact lends support to the conclusion that the Ionia State Hos-

<sup>32</sup> *E.g.*, J. C., a sixty-six-year-old man, was committed to Ionia pending trial on a gross indecency charge in 1926. He is still under treatment at Ionia, now showing signs of "simple psychosis."

<sup>33</sup> *In re Roberts*, 310 Mich. 372, 17 N.W.2d 218 (1945).

<sup>33a</sup> MICH. COMP. LAWS § 330.68 (1948).

pital is often used as a place to incarcerate persons without benefit of trial. When this period of incarceration is ended the state apparently considers that adequate punishment has been accomplished. Thus it appears that the emphasis in fact is not on protection of the accused but on protection of society.

Although the Michigan competency statute, providing for examination and commitment of the defendant, is not invalid on its face, commitment for an indefinite period of time and without periodic and thorough review appears to violate<sup>34</sup> the protection afforded the defendant by the due process clause of the federal constitution<sup>35</sup> and the due process and speedy trial clauses of the Michigan constitution.<sup>36</sup>

### B. *Non-Legal Results*

1. *The Doctor at the Incompetency Hearings.* Certainly most doctors would agree that their proper function in hearings to determine competency consists of a scientific evaluation of the patient and an accurate and useful presentation of the scientific conclusions to the court. The abhorrence of the psychiatric discipline for value judgments involving the moral and ethical behavior of its patients is well known;<sup>37</sup> yet in the Michigan commitment proceedings the physician seems to forget this abhorrence when dealing with his legal brethren. All too often in this situation he not only evaluates the defendant's psychological status, but judges his behavior, estimates its social and ethical significance, and decides on a fitting consequence, be it commitment or trial. Such a sacrifice of professional identity and its replacement by a quasi-legal status is not without a price; the physician has enormously complicated if not completely lost his therapeutic advantage. The patient who feels that he has been committed as the result of his confidential utterances to the examining physician loses confidence not in just the "committing doctor" but in *all* physicians.

2. *The Doctor at the Hospital.* The label "hospital" connotes a long tradition of alleviation of pain and suffering dictated by the appropriate and humane application of the science and the art of medicine. Such application is traditionally entrusted to an

<sup>34</sup> See BROWN, *Due Process of Law, Police Power and the Supreme Court*, 40 HARV. L. REV. 943 (1927).

<sup>35</sup> U.S. CONST. amend. XIV, § 1.

<sup>36</sup> MICH. CONST. art. 2, § 16 (due process); § 19 (speedy trial).

<sup>37</sup> See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 406-08 (1952).

individual having both in name and in function the title "doctor." The patient admitted to Ionia State Hospital by virtue of the distorted role of the examining physician has already begun to suspect the individual bearing the title "doctor" and to wonder at his intentions.

Many of the patients at Ionia State Hospital do not consider it a hospital but rather a prison and, in fact, an extremely undesirable prison. For the majority, it is a prison to which one is committed on an arbitrary and incomprehensible basis; it is a prison in which apparent medical functions are carried on in a mechanical fashion without reference to any previous or future framework; it is a prison in which hopes of release gradually are transformed into despair and finally into psychotic delusions. The Ionia atmosphere is predominantly composed of feelings of uncertainty and insecurity. Such feelings have their origin in, and are reinforced by, the uncertainty of the statute, the uncertainty in the mind of the court, and the uncertainty in the minds of the examining physicians. Uncertainty continues at the hospital in the minds of the patient and the doctors.

Is the hospital dealing with an alleged criminal or with a sick human being? Is its role that of a non-judgmental, therapeutically-oriented institution, or is it in fact a custodial burying ground for potentially dangerous persons who by social caprice and legal conscience are not sent to prison? Is its goal to restore its patients to health and to social competency or to provide the necessary treatment which would allow the patient to achieve legal competence? It is answers to these questions that Ionia State Hospital lacks, and it is this lack which produces the stultifying mechanical nature of its proceedings and the insidious pessimism of its atmosphere.

Improvement in the hospital's physical facilities or even in the size and quality of its staff could not alone bring about an effective hospital operation. A realizable therapeutic mission is the *sine qua non* of a successful hospital.

3. *Significance for the Patient.* What of the patient? How does he react to the uncertainty and the endless drifting to which he is subjected? The answer is simple: he becomes sicker. The records studied at Ionia are replete with examples of patients who in the initial stages of their hospitalization made significant improvement. However, because such improvement was not measured against any therapeutic framework or applied to any definite goal other than vague concepts of social competency or "restora-

tion to sanity," it passed almost unnoticed. At such a time the patient is struck by the realization that his chances of release are remote. His already sick and flimsy personality structure collapses and the frightening hostility and desolating worthlessness against which the patient has struggled are intensified. Possibilities of mental health become more remote. Questions of parole or discharge become academic. The picture of the gradually decreasing frequency of the doctors' visits and the less frequent staff interviews looms large. Concepts of incurability are considered by both patient and hospital staff. Many human beings are lost, not a dozen or fifty, but literally hundreds, to themselves and to society.

## V. A LOOK AT ALTERNATIVE METHODS

### A. *Federal Procedure*

The examination of the defendant to determine competency under the Michigan statute is generally conducted in the county jail. Examination in a jail atmosphere has been severely criticized on the ground that no thorough physical, mental, or neurological examination is possible under prison conditions and because rarely is a study of a case history of the defendant even attempted.<sup>38</sup>

In an attempt to eliminate these defects, the federal government has enacted a statute<sup>39</sup> which provides that whenever the defendant's mental competency to stand trial becomes an issue in a criminal case the trial court may order the defendant *to a mental hospital for observation* and examination.<sup>40</sup> If at the end of the examination period the doctors' report indicates a state of present incompetency, the court conducts a competency hearing. If the court is then convinced of the defendant's inability to proceed, it may order his commitment.<sup>41</sup>

However, this system would not solve all of the Michigan problems. Although it is true that an examination at a hospital would be more thorough than one in jail, the confusion which exists in Michigan between non-responsibility and incompetency could still exist. Furthermore, hospital staffs, just like individual doctors, are susceptible to the idea that it is more humane to the de-

<sup>38</sup> See Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419 (1935).

<sup>39</sup> 18 U.S.C. § 4244 (1958).

<sup>40</sup> Some states have enacted similar statutes. See, e.g., ME. REV. STAT. ANN. ch. 27, § 118 (1954); N.D. CENTURY CODE § 29-20-01 (1960); WIS. STAT. § 957.27(3) (1959).

<sup>41</sup> 18 U.S.C. § 4246 (1958).



fendant to declare him incompetent than it is to require his trial to proceed.

Neither the federal system nor the Michigan system makes provision for the incompetent defendant with a valid defense on the merits to raise initially this defense.

### B. *Model Penal Code Approach*

In addition to providing for examination of the accused by a "psychiatrist" rather than by a "reputable physician," the Model Penal Code<sup>42</sup> provides for a determination by the judge at the initial stages of the proceeding of both the defendant's mental competency to stand trial and his responsibility for the criminal act.<sup>43</sup> The latter determination can be made in Michigan only if the accused is competent to stand trial. Under the Model Code if the medical report by the examining psychiatrist indicates that the defendant suffered from a mental disease which "substantially impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, and the court is satisfied that such impairment was sufficient to exclude responsibility, the court shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility."<sup>44</sup> This avoids commitment on the grounds of incompetency and removes the threat of a trial. This is important for the psychiatrists participating in our study strongly believe that the threat of trial and the uncertainty of his status deters the recovery of incompetents at Ionia.

The Model Code's provision for non-responsibility eliminates any reference to "right" or "wrong."<sup>45</sup> A person is non-responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. This is a meaningful and significant contribution to the law relating to trial competency. The Model Code recognizes that many commitments for incompetency are the result of dissatisfaction with the harsh tests of responsibility. This dissatisfaction too often leads to prosecution and defense acquiescence in automatic classification of a defendant as incompetent to stand trial and to speedy commitment to a state hospital.

<sup>42</sup> MODEL PENAL CODE §§ 4.01-.09 (Tent. Draft. No. 4, 1955).

<sup>43</sup> MODEL PENAL CODE § 4.05 (Tent. Draft No. 4, 1955).

<sup>44</sup> MODEL PENAL CODE § 4.07 (Tent. Draft No. 4, 1955).

<sup>45</sup> MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

The provisions of the Model Code permitting the court to find the defendant non-responsible at the initial sanity hearing will be effective in removing the threat of a trial upon the defendant's hospital release only if there is also liberalization of the traditional M'Naghten rules of criminal responsibility.<sup>46</sup>

### C. *Trial on the Merits at the Option of the Defendant*

A defense may exist which does not depend on the competency of the accused for its assertion. For example, counsel for the defendant may be able to show that the prosecution is barred as a matter of law; or that the indictment on its face discloses that the statute of limitations has run; or that he can assert an affirmative defense which does not require the defendant's personal participation.<sup>47</sup> Frequently an affirmative defense is jeopardized by the passage of time. Memories fade, witnesses die or move away, and documentary records may become unavailable. In many cases the defense will be that of non-responsibility; here the longer a trial is postponed, the more difficult it is for the defendant to make such a defense. Indeed, in this situation, it is to the defendant's advantage to be seen by the jury *before* regaining his sanity. The vital question, then, is whether defendant's counsel can proceed with an affirmative defense without, by so doing, foreclosing his client's incompetency plea.

In this country a few states permit a defendant a trial on the incompetency issue along with a trial on the merits.<sup>48</sup> A recently-enacted provision of the Texas Criminal Code<sup>49</sup> provides that the jury shall state in the verdict whether the defendant is "sane or insane" at the time of the trial. If the issue of the defendant's

<sup>46</sup> The M'Naghten rules require for a showing of nonresponsibility that the accused, at the time he committed the act, was laboring under such a "defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). In America the M'Naghten test is still the primary test of criminal responsibility. In at least 29 states it is the only test, and in others it is still the main test supplemented only by the irresistible impulse test. See WEIHOFEN, *MENTAL DISORDER* 51, 69-72. Cf. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). This case abolished the M'Naghten rule in the District of Columbia by replacing the right-wrong test with one which asks if the defendant is suffering from a mental disease or defect and if the criminal act is the product of such mental disease or defect. However, the liberalizing of the responsibility law signaled by *Durham* has not gained acceptance. See Watson, *Durham Plus Five Years: Development of the Law of Criminal Responsibility in the District of Columbia*, 116 AM. J. PSYCHIATRY 289 (1959).

<sup>47</sup> Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960).

<sup>48</sup> WEIHOFEN, *MENTAL DISORDER* 456-57.

<sup>49</sup> TEX. CODE CRIM. PROC. ANN. art. 932b (Supp. 1960).

competency is tried along with the criminal charge and it is found that the defendant is "insane at the time of the trial"<sup>50</sup> he is then committed to a state mental hospital. When it is determined that he has recovered his "sanity," the proceedings against him continue. Although it is not specifically stated in the statute, the clear implication is that the defendant is entitled to a new trial even if he is found guilty of the crime at the same trial which found him incompetent to stand trial. It also appears that the defendant is entitled to go ahead with the trial on the merits of the criminal charge even though he may in fact be incompetent. In *Ex parte Hodges*<sup>51</sup> the Court of Criminal Appeals of Texas held that the accused was deprived of his rights guaranteed by the sixth amendment of the United States Constitution and by the state constitution to a speedy trial and to effective aid of counsel where the trial court declined to proceed to trial in a murder case and required a preliminary trial to determine the sanity of the defendant.

Two recent English cases have considered the question of a trial on the merits prior to a competency determination. In *Regina v. Roberts*<sup>52</sup> the Queen's Bench held that the defense counsel could try the general issue of his client's guilt prior to the competency determination without sacrificing the incompetency plea.<sup>53</sup> The nature of the defense which the defendant's counsel wished to raise was not disclosed. The court indicated that in the event the defendant were found responsible for the crime, but at the same time incompetent for trial, he would be sent to a hospital for the criminally insane. The court did not discuss the different and difficult problem of what disposition was to be made of the defendant upon a subsequent restoration to competency. However, in 1957 the Queen's Bench declined to follow the *Roberts* case, holding that a jury must be sworn to try the fitness of the defendant to plead as a *preliminary* issue.<sup>54</sup> It was said that an insane man cannot be tried.

<sup>50</sup> *Ibid.*

<sup>51</sup> 166 Tex. Crim. 433, 314 S.W.2d 581 (1958).

<sup>52</sup> [1954] 2 Q.B. 329.

<sup>53</sup> "[T]o insist on the issue of fitness to plead being tried [first] might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or not—and investigations which might have led to the apprehension of the true criminal would not take place." *Regina v. Roberts*, [1954] 2 Q.B. 329, 333.

<sup>54</sup> *Regina v. Beynon*, [1957] 2 Q.B. 111.

Professor Foote of the University of Pennsylvania Law School has proposed a plan similar to the procedure followed in *Regina v. Roberts* whereby at the defense counsel's option the case would be tried on the merits without foreclosing the defendant's protection of the incompetency plea.<sup>55</sup> His plan includes the following provisions:

"(1) In the event that the prosecutor or court moves for pre-trial mental examination to determine competency, if the defendant is unrepresented counsel should be appointed to represent him on the motion. Only in this way can there be assured full development of an issue which may have an adverse effect on the defendant. If the defendant (perhaps because of his illness) refuses counsel,<sup>56</sup> an amicus curiae should be appointed to make an independent presentation of the defendant's interests.<sup>57</sup>

"(2) After the court has proceeded to have the defendant mentally examined and has heard evidence on the issue of competency to stand trial, if it finds that the defendant is competent it should so rule and all subsequent proceedings will follow their normal course. If the court is of the opinion that the defendant is incompetent, a ruling to this effect should be deferred if (a) counsel moves to dismiss the indictment, or for exclusion of illegally obtained evidence, or raises any other matter which can be determined in a pre-trial hearing, or (b) 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. In these situations the court shall determine the pre-trial question or proceed to a trial on the merits. If as a result the indictment is dismissed or if there is a finding of not guilty on the merits, that will be the end of the matter, although of course the court or [the prosecuting attorney] . . . can refer the defendant's case to the appropriate local mental health authorities for possible state civil commitment. If there is a verdict of guilty, 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.

<sup>55</sup> Foote, *supra* note 47, at 845-46.

<sup>56</sup> "E.g., *United States v. Miller*, 131 F. Supp. 88 (D. Vt. 1955), *aff'd*, 233 F.2d 171 (2d Cir. 1956)." Foote, *supra* note 47, at 845 n.40.

<sup>57</sup> "This suggestion was made in *Seidner v. United States*, 260 F.2d 732 (D.C. Cir. 1958), where it was anticipated that defendant would refuse counsel." Foote, *supra* note 47, at 845 n.41.

“(3) The procedures outlined in (2) above should also be made available at defendant’s election. Under present law counsel representing a defendant who is both probably incompetent and probably not guilty on the merits is required to make an election prejudicial to his client. If he moves for a pre-trial finding of incompetency, he waives any possibility of seeking a present determination on the merits, whereas if he goes to trial on the merits he waives the incompetency issue.”<sup>58</sup>

Professor Foote’s plan has considerable merit and should be studied carefully. If the defendant were found not guilty on the merits he would not face the ignominy of a commitment as a criminally insane person. A civil commitment carries no such stigma and if the defendant were mentally ill he would be entitled to be treated as a patient, not as a potential criminal. If he were acquitted on grounds of non-responsibility, he would be committed to a hospital, and since he would not have a trial awaiting him upon his discharge, his treatment could be geared solely to his mental condition with the threat of trial no longer impeding his cure. If he were found guilty of the crime he would not be sent to prison but the verdict would be set aside and he would be committed to a hospital as a person incompetent to stand trial.

The Foote plan does not suggest what should be done with a guilty defendant upon his restoration to competency, other than retrial or “other appropriate disposition.”<sup>59</sup> Nor did the *Roberts* case need to deal with this problem. But the problems attendant to this part of the Foote plan cannot be ignored. Facing a virtual “free trial” at the defendant’s option, prosecutors and judges could be expected to raise the issue of the defendant’s competency much less frequently. If the defendant were without counsel, it is likely that in many more cases than at present he would be tried and convicted simply because no one raised the competency issue.

## VI. RECOMMENDATIONS

### A. *Statutory Changes*

The present Michigan parole system in conjunction with incompetency law is not only anomalous but may very likely be unconstitutional as well, for if the defendant is well enough for parole

<sup>58</sup> Foote, *supra* note 47, at 845-46.

<sup>59</sup> *Id.* at 846.

he is well enough for trial. Therefore, parole should be eliminated from the Michigan incompetency statute. In addition, the statute<sup>60</sup> should be amended to achieve separation of incompetency from responsibility criteria. The problems of legal incompetency to stand trial and legal responsibility for criminal acts are separate and distinct<sup>61</sup> and to attempt to set up machinery for handling both problems within a single statute only results in confusion. The procedures for examination, commitment, and treatment of incompetents should be described in a separate statute or provision which should make clear that the criteria for finding a person incompetent, commitment, and discharge back to the committing court are the same.

Serious consideration should be given to making the time spent at Ionia as the result of an incompetency commitment a "credit" against any subsequent conviction and sentence.<sup>62</sup> Since the defendants are kept under as rigid supervision and control as they would be in the state prison, and since society is as fully protected by isolating them at Ionia as at Jackson, it would seem fair to allow the time spent at Ionia to be computed against any subsequent sentence. To complement this proposition, consideration should be given to amending the statute to provide for defendant's discharge from Ionia and for civil commitment, if necessary, when the maximum prison sentence would have expired.

An alternative proposal would require amending the statute to provide for a maximum period of time for which the defendant could be committed as incompetent. For example, the statute could provide that at the end of a two-year period he would have to be discharged from Ionia and then either tried or civilly committed. This would set an absolute time limit on the possibility of trial, which should have salutary therapeutic effects, if not during, then certainly after the two-year period, since the uncertainty of a trial appears to be a factor which inhibits recovery from the mental affliction. It would also exert pressure on the hospital staff to ready the defendant for trial. To protect the defendant, the statute should include a provision that no treatment to speed restoration to competency should be given if it would have deleteri-

<sup>60</sup> MICH. COMP. LAWS § 767.27 (1948).

<sup>61</sup> The problems of administration *are* distinct, but the severity of the responsibility tests is likely to affect the extent to which the incompetency procedures are used. See WEIHOFFEN, *THE URGE TO PUNISH* 53-54 (1956).

<sup>62</sup> See text accompanying note 33 *supra*.

ous effects on final and ultimate recovery.<sup>63</sup> Thus responsibility for the ultimate cure in severe cases of mental illness would be left with civil institutions.

### B. *Articulation of Goals*

Part of the problem in the administration of the incompetency law today appears to stem from a deviation from the original purpose of the proceedings, which was to afford the incompetent defendant protection from trial. It is our belief that prosecutors and judges view Ionia as a convenient place to send those defendants who cannot carry the burden of the non-responsibility plea, and yet are such pitiful subjects that they prefer to consign them to Ionia rather than to prison.<sup>64</sup> If this contention is correct, commitment has become a sentencing without a trial. Unless adequate safeguards are provided to protect the incompetent from remaining the forgotten man of the legal system, and unless clear goals are articulated which are comprehensible to both lawyer and doctor, he will continue to be assigned to Ionia for treatment, only to be lost and ultimately forgotten.

In this process the first role of the physician should be that of an expert witness. It is his job to offer a scientific description of the defendant to the court with clear-cut substantiation of his conclusions. The merits of such testimony and its relevance to the legal question of incompetency are matters to be decided by the judge or jury. The doctor's second function is to apply his therapeutic skills to the treatment of the patient committed to a hospital on the grounds of incompetency. Here the therapeutic approach and the medical judgments must lie completely within the province of the physician. Nonetheless, the goals toward which the physician strives and the results which he hopes to attain

<sup>63</sup> This provision would prevent extensive shock or drug therapy which could render the defendant competent at the expense of his ultimate recovery to full mental health.

<sup>64</sup> Professor Weihofen believes that incompetency procedures are used to avoid conviction of mentally disturbed defendants who could not carry the arduous burden of the M'Naghten criminal responsibility tests. He refers to figures for Scotland and England to support his view and states: "The same factors also operate in varying degree in the American states. I have no statistics, but it is my impression that an increasing proportion of the cases are disposed of on a plea of mental unfitness to stand trial, instead of by the actual trial in which the disorder is raised as a defense. In New York, I understand this is now as prevalent a practice as in England; over half the cases are disposed of this way. This has the advantage of avoiding the expense and effort of a criminal trial, as well as the advantage of employing a less rigid and artificial legal test of 'insanity.'" WEIHOFEN, *THE URGE TO PUNISH* 53-54 (1956).

through his efforts must be defined by the law.<sup>65</sup> The law must make its standards clear and meaningful to the doctor to enable him to evaluate a defendant's competency and to apply his therapeutic skills in restoring his patient's fitness for trial in the shortest possible time consistent with ultimate recovery of mental health.

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<sup>65</sup> It should be noted that the concept of incompetency as it exists in the law does not exist in medicine. No physician within the framework of his science or his experience alone can sensibly state that a given individual is incompetent. Incompetency is a legal definition, not amenable to precise medical standards of mental health. Psychiatrists, upon whose testimony and judgment the administration of the law depends, need a definition not in terms of "incompetency to stand trial" but rather in psychoanalytic ego functions.