

A COMMENT ON PRE-TRIAL COMMITMENT OF CRIMINAL DEFENDANTS

CALEB FOOTE †

In 1949 four military prisoners killed a fellow prisoner in a California disciplinary barracks and were convicted of murder by a military court martial. Ten years later the Supreme Court sustained the defendants' contention under section 92 of the Articles of War that the military court had had no jurisdiction over a case of murder committed within the continental United States in time of peace.¹ Thereafter on March 4, 1959, defendants were indicted in the civil federal district court. As to three of the defendants, the court, relying principally upon *United States v. Provoo*,² granted a motion to dismiss on the ground that the ten-year delay, occasioned not through the fault of the defendants but as a result of a calculated tactical gambit by the government, had amounted to denial of the right to a speedy trial. However, the indictment against the fourth defendant, Coons, was not dismissed; he was recommitted to the custody of the Attorney General. Coons had been brought to court from Springfield, Missouri, where he had been serving his military life sentence in the federal institution for the criminally insane. This fact together with his conduct in court caused the judge to order a psychiatric examination pursuant to the 1949 federal statute governing determination of mental competence to stand trial.³ After examination and hearing, Coons was found to be "presently insane and so mentally incompetent as to be unable to understand the proceedings against him," and he was returned to Springfield until, presumably, he should be sufficiently recovered to "participate" in the dismissal of the indictment against him. *United States v. Barnes*, 175 F. Supp. 60 (S.D. Cal. 1959).

This case is a fascinating illustration of the complexities which are developing as by-products of the criminal law's expanding concern for the allegedly insane defendant, and demonstrates once more that liberal discretionary welfare legislation contains hidden potentiality as a two-

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¹ *Lee v. Madigan*, 358 U.S. 228 (1959).

² 17 F.R.D. 183 (D. Md.), *aff'd per curiam*, 350 U.S. 857 (1955).

³ 18 U.S.C. §§ 4241-48 (1958).

edged sword.⁴ Clearly our concepts of fair procedure require that a defendant not be overreached in a criminal prosecution because his mental illness impairs his ability to defend himself; this is a beneficent purpose of the federal commitment statute. Likewise it will not be disputed that if Coons is mentally ill he should be treated, and that if because of his illness he is dangerous (the court made no explicit finding to this effect) he ought to be restrained in the public interest. It does not follow from this, however, that it is justifiable to submit Coons to a commitment procedure which is a part of the criminal process and which will result in confinement with the criminally insane.

Any enlargement of the class of criminal cases treated as mentally ill, whether through operation of a *Durham* rule or through operation of a commitment statute such as that applied to Coons, creates important new problems because of the limitations of psychiatric expertise and the vague and perhaps unpredictable standards of "dangerousness" which, in substitution for a determinate term of imprisonment, become the criteria determining the duration of detention. These problems are particularly difficult if such substitute treatment is applied on the basis merely of a charge of crime, before there has been a conviction. The purpose of this Comment is to explore the deficiencies of the present law relating to pre-trial insanity when the defendant either cannot be convicted as a matter of law or has reasonable basis for contesting the criminal charge on the merits. It will also suggest some serious problems of federal jurisdiction posed by the statute under which Coons was committed.

I

Most of the writing relating to mentally ill defendants with which we have been deluged in recent years concerns standards for the determination of criminal responsibility, but the related question of competency to be tried is of great practical importance. The Royal Commission on Capital Punishment reported a steady rise in the number of murder defendants found insane on arraignment relative to the number found guilty but insane,⁵ and in recent years this pre-trial determination has resulted in more commitments to Broadmoor than jury findings of insanity after trial.⁶ Comparable statistics for this

⁴ Compare HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 326 (1953): "Haven't you noticed how frequently the protected groups in an administrative program pay for their protection by a sacrifice of procedural and litigating rights?"

⁵ Royal Comm'n on Capital Punishment, *1949-53 Report*, CMD. No. 8932, at 220 (1953).

⁶ *Id.* at 300. For the period 1945-49, there were 87 commitments on findings of insane on arraignment as opposed to 79 found guilty but insane.

country are not available, but the number of such dispositions is certainly significant. In theory the two proceedings are sharply distinguished, the test for competence to stand trial being both different from and probably less rigorous than the standards used in determining criminal responsibility by application of the *M'Naghten* case. The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.⁷ As a matter of defense strategy, however, the motion to find the defendant incompetent to be tried and the plea of not guilty by reason of insanity have usually been but two prongs of a general insanity defense. Both will achieve the same immediate end of avoiding the imposition of criminal punishment, and both will result in an indeterminate commitment to the same institution for the criminally insane. The tactical disadvantage of a pre-trial commitment is, of course, that the defendant remains an accused, subject upon recovery to possible trial and punishment.⁸ As actually being put to trial after recovery is probably rare except where the commitment is of short duration,⁹ this may be the lesser risk for the defense in view of the difficulty and uncertainty attendant upon an insanity defense, particularly in a *M'Naghten* jurisdiction.

Almost all the reported litigation concerning mental competence to stand trial has arisen in this context of defense strategy, where the defendant after conviction has alleged that it had been error to put him to trial at all. As long as in practice the initiative in raising the issue rests with the defense, the problem of a defendant who, although insane, nonetheless wishes to go to trial on the merits is unlikely to arise. The 1949 federal incompetency statute under which Coons was committed, however, takes this initiative away from the defendant and requires the United States Attorney (or permits the court on its own initiative) to move for a hearing to determine competency if there is "reasonable cause to believe" incapacity may exist.¹⁰ While there have been scattered earlier federal cases in which a defendant has resisted a

⁷ For a history of the rule see, *e.g.*, *Youtsey v. United States*, 97 Fed. 937, 940-46 (6th Cir. 1899).

⁸ *E.g.*, *Commonwealth v. Carlucetti*, 369 Pa. 190, 85 A.2d 391 (1952) (trial and death sentence for murder committed fourteen years earlier after intervening pre-trial commitment to mental hospital).

⁹ See Royal Comm'n, *supra* note 5, at 222. The same is probably true in the United States, although there is an almost total lack of information as to the final outcome of cases committed to institutions for the criminally insane.

¹⁰ 18 U.S.C. § 4244 (1958).

prosecution motion under this statute,¹¹ and a few other instances in which an originally acquiescent defendant grew restless and sought to terminate his commitment and force a trial,¹² *Barnes* is the first American case which sharply dramatizes the emergence of this new problem. If the United States Attorney or the court initiates the motion, commitment will preclude the defendant from asserting a defense which might bar conviction on the pending indictment. Although the objective of the common-law incompetency rule was to protect defendants from being prejudiced by their insanity, it is obvious that in this case Coons' ability to comprehend the charge or assist his counsel was irrelevant to what would have been the disposition of the criminal charge against him. In his commitment, therefore, the criminal charge serves as little more than a fictional jurisdictional excuse for indeterminate confinement, the duration of which will be governed by psychiatric evaluation of his alleged dangerousness. Such a retention of federal criminal jurisdiction over Coons thus pushes the federal government still further toward the jurisdictional field of "civil" commitment historically reserved to the states.

II

Before turning to the policy problems raised by the application of an indeterminate criminal pre-trial commitment to defendants who cannot be convicted or who allege that they are innocent, a brief examination of the jurisdictional issues raised by the 1949 federal statute is in order. The statute's passage was urged by the Federal Bureau of Prisons and the Judicial Conference, which were concerned because (1) considerable numbers of those sentenced were found to be insane at the time of their reception in prison, raising the inference that they should never have been brought to trial at all,¹³ and (2) the Bureau was being forced to release at the expiration of their terms prisoners whom the Bureau regarded as insane and dangerous, but for whom it had been unable to make arrangements for commitment by state authority.¹⁴ The statute adopted by Congress¹⁵ substantially followed that recommended by the Judicial Conference and provided (1) by section 4244, for determination of mental incompetency after arrest and

¹¹ See especially *United States v. Miller*, 131 F. Supp. 88 (D. Vt. 1955), *aff'd*, 233 F.2d 171 (2d Cir. 1956). See also *Howard v. United States*, 261 F.2d 729 (5th Cir. 1958).

¹² *E.g.*, *Greenwood v. United States*, 350 U.S. 366 (1956).

¹³ *Greenwood v. United States*, 219 F.2d 376, 381 (8th Cir. 1955), *aff'd*, 350 U.S. 366 (1956).

¹⁴ *Hearings on S. 850 Before a Subcommittee of the Senate Committee on the Judiciary*, 80th Cong., 2d Sess. 7 (1948).

¹⁵ 18 U.S.C. §§ 4241-48 (1958).

before trial upon the motion of either party or the court; (2) by section 4245, for a government-initiated postconviction procedure to determine competency of prisoners whose alleged mental incompetency has been undisclosed at trial, such postconviction proceedings to result in vacation of the convictions of those found to have been incompetent at their original trial; (3) by section 4246, for federal pre-trial commitment of those found incompetent pursuant to either of the foregoing provisions (with important innovations to be noted below); (4) by section 4247, for continued custody of prisoners whose sentences have expired but who are found to be insane, dangerous to the interests of the United States and for whom suitable arrangements for state custody and care are not otherwise available; (5) by section 4248, that a commitment made pursuant to section 4247 will continue until the defendant is cured or suitable arrangements for state custody can be completed.

A state can subject any mentally ill person to an involuntary civil commitment, a power which stems from Chancery's exercise of the doctrine of *parens patriae*. When a state prisoner is found to be insane upon his completion of a criminal sentence, therefore, it is a relatively simple matter to have his custody continued by a civil commitment. The Constitution, however, nowhere gives the federal government general commitment power over the insane, and prior to the 1949 statute the absence of any federal legislation or judicial assertion of such power bears out the assumption that *parens patriae* powers are reserved to the states.¹⁶ The constitutional sanction for continued federal custody under sections 4247-48 after completion of a federal sentence could presumably be founded upon one of two theories. The first is the limitation in the statute that custody is conditioned upon a finding that "if released [the prisoner] will probably endanger the safety of the officers, the property, or other interests of the United States." The trouble with this magical jurisdictional incantation is that it proves too much.¹⁷ Presumably any potentially dangerous in-

¹⁶ "Negative testimony is often as compelling as bits of affirmative evidence." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 370 (1959). See the dissenting opinion of Chief Justice Taney in *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 393 (1855). For a discussion of lack of federal jurisdiction in the related field of domestic relations, see HART & WECHSLER, *op. cit. supra* note 4, at 1016-18 (1953).

¹⁷ For an attempt to support a federal civil commitment power under this theory, see Note, 64 YALE L.J. 1070, 1078-79 (1955). See also Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684 (1944), where, in an article written before the adoption of the federal statute, an expansive view of federal jurisdiction in this field is advanced. Perhaps a more restrictive—and thereby more tenable—reading might be urged of the statutory phrase which purports to ground federal jurisdiction upon a danger to federal interests. If the language is limited to the case of persons who, having previously been convicted of a federal crime, are now insane, the isolation of this particular class for congressional treatment would seem less arbitrary, the inference of a special threat more rational.

sane person, and not just one completing a federal sentence, may take it into his mind to go to Washington and try to assassinate the President. Federalism as applied in the insanity field has presumed that the states are competent to protect the community (including federal interests) against the insane, and impatience with the apparent failure of the states to do this job in the cases of a few released federal prisoners hardly warrants a novel theory of federal power which would establish the constitutional basis for upsetting an historically entrenched bastion of exclusive state jurisdiction.

A second more limited and more reasonable constitutional basis for sections 4247-48 is that continued custody after termination of sentence is a necessary incident to the federal power to prosecute and punish criminals. If a federal prisoner becomes insane while in prison, and if in fact no state will recognize him as a resident and give him proper care and custody after his release, it may be that the federal power to prosecute carries with it a responsibility to step into the breach. While the factual assumption upon which this theory rests seems puzzling in view of the fact that states do not apparently make residence or domicile a prerequisite for the institutionalization of dangerous insane persons,¹⁸ applications of the statute in cases where there is actual unavailability of state facilities would seem to be a reasonable exercise of constitutional power to prosecute crimes. As yet no cases have been reported construing this part of the statute applying to commitments upon termination of a federal sentence.

More troublesome are the jurisdictional and policy problems arising in pre-trial commitment cases. Three situations must be dis-

But inasmuch as commitment under these sections is also available in the case of court or prosecution pre-trial motion, such an interpretation of congressional intent is unsupportable.

¹⁸ See, *e.g.*, ILL. ANN. STAT. ch. 91½, §§ 9-10, 9-11 (Smith-Hurd 1956) (provision for detention of nonresidents); N.J. STAT. ANN. §§ 30:4-52 (1940) (state to bear costs of institutionalization of nonresidents), 30:4-57 (Supp. 1959) (provision where no settlement found in any county). Of course the heritage of the poor laws remains, and states are undoubtedly anxious to avoid financial responsibilities for nonresidents, especially since as a factual matter it is probably much harder to get permanent care for a nonresident. That reluctance might be overcome in part by a provision for federal payment of costs along lines currently authorized in 39 Stat. 309 (1916), 24 U.S.C. § 213 (1958), applying to state commitments of federal prisoners during their term of sentence. This would allow the states to retain control over the substantive questions of duration of commitment and the grounds therefor. Of course, this may be precisely what the proponents of the federal statute were seeking to avoid; one suspects that in many cases state authorities refused to find committable prisoners who in the opinion of the Federal Bureau of Prisons were not fit for release. With an expanding concept of insanity as applied to criminal types (*e.g.*, release was denied to defendant committed following verdict of not guilty by reason of insanity when doctors agreed that he was a "sociopathic personality with dyssocial outlook" in *Overholser v. Leach*, 257 F.2d 267, 269 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959)), the application of this federal statute could be developed into a form of indeterminate sentence.

tinguished. The first is where there is prospect that within a reasonable time there will be a recovery sufficient to enable the case to go to trial. Here both reason and history would support federal jurisdiction to commit as incident to the power to prosecute crimes. The second situation is where the prospects of recovery are remote, and here the jurisdictional theory based on the power to prosecute becomes more tenuous. As the likelihood of any trial diminishes, what began as a criminal pre-trial detention would seem more and more to resemble an ordinary *parens patriae* civil commitment. For this reason, prior to 1956, several lower federal courts held that application of the statute to defendants who were "permanently" insane or unlikely to recover was an unconstitutional exercise of federal power.¹⁹ In that year, however, the Supreme Court in *Greenwood v. United States*²⁰ sustained a pre-trial commitment under the statute despite the "fact that at present there may be little likelihood of recovery. . . ." Mr. Justice Frankfurter, writing for the Court, was sceptical about the psychiatric evidence: "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioner's," with the result that "we cannot say that federal authority to prosecute has now been irretrievably frustrated."²¹ That this judicial scepticism was not without foundation appears from the fact that Greenwood subsequently recovered and was tried and convicted.²²

The Court in *Greenwood* did not mention the speedy trial problem. Past litigation concerning denial of a speedy trial to one who could not be tried because of incompetence has arisen where the defendant initiated the incompetency proceedings and, it was held, thereby waived his right to a speedy trial.²³ Where the defendant is objecting to the delay, however, a point will certainly be reached at which erosion of his case by the passage of time will require application of the speedy trial rule, which will "irretrievably frustrate" the prosecution. The

¹⁹ *Wells v. Attorney General*, 201 F.2d 556 (10th Cir. 1953); *Dixon v. Steele*, 104 F. Supp. 904 (W.D. Mo. 1951). Cf. *Higgins v. United States*, 205 F.2d 650 (9th Cir. 1953) (Commitment order upheld, but "if the court should determine that defendant is not and will not within a reasonable time be able to stand trial by reason of mental incapacity, he should be released from federal restraint, preferably to appropriate state authorities." *Id.* at 653).

²⁰ 350 U.S. 366 (1956).

²¹ *Id.* at 375.

²² See Smith, *A Commentary on Some Psychiatric Aspects of Title 18, U.S. Code, Section 4246*, 19 FED. B.J. 208, 209 (1959).

²³ *E.g.*, *Germany v. Hudspeth*, 209 F.2d 15 (10th Cir.), *cert. denied*, 347 U.S. 946 (1954). For a discussion of the limited availability of this right see 108 U. PA. L. REV. 414 (1960).

difficulty of prediction in this area is suggested by a recent statement of the medical director of the Federal Bureau of Prisons:

"Actually, the crucial questions being put to the psychiatric experts in this instance are simply *whether* and *when* the defendant will recover sufficiently to go to trial. Although the questions are clear and straightforward enough, it happens all too frequently that the medical intelligence available does not permit a clear-cut answer. In short, the ability to predict accurately the future course and outcome of the great bulk of mental disease awaits the further progress of science."²⁴

Under these circumstances the "wait-and-see" approach adopted in *Greenwood* is probably the best way out of a bad situation. In that case the delay factor had apparently not yet become critical (*Greenwood* had been indicted in 1952) and there was no suggestion that he had any defense on the merits.²⁵ Nonetheless this reasoning suggests that there should be a limit to the *Greenwood* theory, not only in point of prejudicial passage of time, but in point of improbability of prosecution. Once the court, taking a properly sceptical view concerning the psychiatric prognosis of nonrecovery, is nevertheless convinced that a prosecution can never eventuate, the quasi-criminal commitment based on the federal power to prosecute should be terminated and the defendant released to the state.

The statute in terms, however, purports to go further than the situation where future trial is merely remote; it permits the continuation of a criminal pre-trial commitment in a third category of cases where there can never be a conviction. Section 4246 provides for the conventional pre-trial commitment until there has been sufficient recovery "or until the pending charges against [the defendant] are disposed of according to law," *e.g.*, a *nol pros* or other dismissal of the indictment. But an added sentence in the section also permits commitment under the provisions of sections 4247-48, pertaining to prisoners whose sentences have expired. Under this alternative section 4247 commitment, the possibility of eventual recovery, the impossibility of conviction or even the dismissal of the indictment would appear to be irrelevant to termination of federal custody. Section 4248 explicitly provides that a section 4247 commitment "shall run until the sanity or

²⁴ Smith, *supra* note 22, at 210.

²⁵ *Greenwood* signed a waiver of trial in Missouri under FED. R. CRIM. PRO. 20 which provides that "a defendant arrested in a district other than that in which the indictment or information is pending" may be transferred for plea and sentence if he states in writing, *inter alia*, "that he wishes to plead guilty or *nolo contendere*." While an incompetent's offer to plead guilty should be regarded with suspicion, this offer emphasizes that the *Greenwood* court had no claim of defense on the merits before it.

mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the . . . interests of the United States, or until suitable arrangements have been made [for state custody], whichever event shall first occur." What this statute seems to say is that upon the mere pretext of a federal criminal charge a man can be subjected to an indeterminate detention terminable only upon the conditions enumerated above, even if he is never indicted (for the prosecutor can move for commitment at any time after arrest), or the indictment is dismissed, or the defendant can show that as a matter of law he can never be convicted. This bold jurisdictional assertion, which goes far beyond the necessities of pre-trial commitment and about which the legislative history is strangely silent, bothered Mr. Justice Frankfurter in the *Greenwood* case:

"Although the language of the statute and the report of the Committee of the Judicial Conference demonstrate that the statute deals generally with the situations both of temporary and more than temporary insanity, one could infer from the reports on the bill by the Committee, by the Judicial Conference itself, and by the committees of both Houses of Congress that the specific commitment under § 4248 was designed only for prisoners whose sentences are about to expire. But this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute. The second sentence of § 4246 clearly makes commitment under § 4248 applicable to persons found mentally incompetent under § 4244 who meet the conditions specified in § 4247."²⁶

In *Greenwood* itself, where there was a still-pending charge, the Court did not have to reach this issue and it was careful to note that "we decide no more than the situation before us presents. . . ." ²⁷ Certainly the rationale for jurisdiction in the *Greenwood* case—that commitment is necessary and proper to the power to prosecute offenses—cannot be extended to a pre-trial section 4247 commitment whose "pre-trial" nature becomes pure fiction where the criminal charge has been dropped or demonstrably cannot be maintained. Coons' prosecution has been "irretrievably frustrated" by the holding applied to his co-defendants that as a matter of law they were denied their right to a speedy trial. The only basis for jurisdiction here is *parens patriae*, albeit qualified in some vague and not very significant manner by the requirement of potential danger to federal personnel, property or other interests. I have already suggested the constitutional thinness of such

²⁶ *Greenwood v. United States*, 350 U.S. 366, 374 (1956).

²⁷ *Id.* at 376.

a jurisdiction, and shall now seek to demonstrate that such an extension of quasi-criminal commitment is as unwise in principle as it is ungrounded by federal jurisdictional power.

III

The constitutional question aside, the case of *Coons* points up a defect in pre-trial commitment procedure which is likely to be increasingly troublesome in the future. Just as federal jurisdiction depends upon a relationship between the commitment and the power to carry out a prosecution in the future, so in any case, state or federal, the propriety of a criminal pre-trial commitment to a special institution for the criminally insane should turn on the existence of a bona fide criminal accusation. At present neither the federal statute nor the common law makes any allowance for the defendant who, although perhaps conceded to be incompetent, has valid grounds for attacking the criminal charge on the merits.

This question might arise in three different types of situations. The first is the instance, as with *Coons*, 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."

It may be answered that although this is regrettable the situation will arise so seldom as not to be worth the effort to prevent it, and that in any case the defendant will not be prejudiced, since if we stipulate that he is insane, he is going to be institutionalized anyway. As to the first objection, our law does not fail to protect a defendant from a situation deemed inimical to fair procedure merely because of the

infrequency of its occurrence.²⁸ Besides, we have no way of estimating how rare such cases may be, for it is only when the initiative to raise the competency issue shifts to the prosecution that cases will come to light in which counsel believes that it is in defendant's best interest to go to trial on the merits, notwithstanding his incompetency. If there is general acceptance and application of the rule implied in the federal statute and specifically enunciated by the Court of Appeals for the District of Columbia, that a defendant "cannot be master of his own pleadings" as regards incompetency,²⁹ then we can expect cases raising this issue to appear with increasing frequency.

The degree to which incompetent defendants who allege that they will not be convicted are prejudiced by delay of the opportunity for exculpation depends both upon the effect of the delay on available evidence and upon the type of institutionalization to which the insane accused are subject compared with that provided in ordinary civil commitments. There is no need here to belabor the obvious fact that production of an affirmative defense may be seriously jeopardized by delay: memories fade, witnesses die or move away, documentary records may become unavailable.³⁰ That the prosecution may be similarly prejudiced or that a defense based on speedy trial will be available are at best speculative possibilities, neither of which assures a defendant against prejudice.³¹ Nor is there any way at present whereby critical defense evidence can be preserved by deposition. Meanwhile, during the period of delay, in most jurisdictions the accused will be detained not with the general run of mental patients but with others accused of crime, with criminal defendants found not guilty by reason of insanity and with insane prisoners transferred from penal institutions. That

²⁸ Two recent federal habeas corpus cases where the situation which prejudiced the defendant and voided the conviction is so improbable that it may never arise again illustrate the application of this principle. See *Grandsinger v. Bovey*, 153 F. Supp. 201 (D. Neb. 1957), *aff'd*, 253 F.2d 917 (8th Cir.), *cert. denied*, 357 U.S. 929 (1958) (during defendant's trial, it was revealed to the jury that defense counsel had tampered with the prosecution's evidence, a disclosure which defendant contended deprived him of effective counsel); *United States, ex rel. De Vita v. McCorkle*, 248 F.2d 1 (3d Cir.), *cert. denied*, 355 U.S. 873 (1957) (one of the jurors failed to reveal that he had been the victim of a robbery similar to the one underlying the murder prosecution of defendant).

²⁹ *Seidner v. United States*, 260 F.2d 732, 734 (D.C. Cir. 1958). In this case an action under 18 U.S.C. § 2255 (1958) involved an examination under D.C. CODE ANN. §§ 24-301 (1951), but the issue is the same as in cases arising under 18 U.S.C. § 4244 (1958).

³⁰ See, e.g., *Taylor v. United States*, 238 F.2d 259, 262 (D.C. Cir. 1956); *United States v. Chase*, 135 F. Supp. 230, 233 (N.D. Ill. 1955); *United States v. Provoov*, 17 F.R.D. 183, 203 (D. Md.), *aff'd per curiam*, 350 U.S. 857 (1955); *Commonwealth v. Hanley*, 337 Mass. 384, 386-87, 149 N.E.2d 608, 610, *cert. denied*, 358 U.S. 850 (1958); *People v. Prosser*, 309 N.Y. 353, 356, 130 N.E.2d 891, 893 (1955).

³¹ See 108 U. PA. L. REV. 414 (1960), for a discussion of the infirmities of the speedy trial defense.

such a form of institutionalization imports a criminal stigma in both the public and administrative mind is beyond dispute. We have almost no data regarding conditions in institutions for the criminally insane, but it is probable that compared with civil patients the criminally insane are (1) afforded less treatment; (2) detained in stricter custody (a distinction that will become more pronounced with the development of "open" hospitals for the mentally ill); and (3) less likely to gain release after making comparable progress toward recovery. In *Miller v. Overholser*,³² the Court of Appeals for the District of Columbia ordered a civilly committed sexual psychopath removed from a hospital ward for the criminally insane because the ward was a place of punishment rather than of treatment:

"Petitioner testified without contradiction that he had been assaulted by mentally deranged persons in shackles. He described noisome, unnatural and violent acts by inmates in this Hall. . . . [T]he facts which petitioner asserts depict a place of confinement for the hopeless and the violent, not a place of remedial restriction."³³

While this is doubtless extreme, there is little reason to question that a criminal pre-trial commitment will usually result in the poorest and most restrictive form of hospitalization.

In England the problem of the accused who resists a Crown motion to find him unfit to plead, wishing to go to trial on the merits, has been considered in two recent cases which have reached opposite results. In *Regina v. Roberts*,³⁴ Devlin, J., after noting that the question had probably never arisen before, postponed swearing a jury to try the preliminary issue of fitness to plead until the general issue should be laid before the jury.³⁵ Three years later in *R. v. Beynon*,³⁶ Byrne, J., declined to follow the *Roberts* opinion and insisted upon a prior deter-

³² 206 F.2d 415 (D.C. Cir. 1953).

³³ *Id.* at 418-19.

³⁴ [1954] 2 Q.B. 329.

³⁵ The nature of the defense on the merits which Roberts wished to advance was not stated; counsel "has not disclosed, as he is not bound to do and as, indeed, he should not do, the nature of his defence. It may well be that the defence is that the prosecution witnesses do not make out a prima facie case; or it may be that the defence have at their disposal other witnesses, not yet called, who, if believed, would destroy the case which the prosecution would otherwise have made out. Whatever it be, it is a perfectly conceivable situation, although it appears never to have arisen in practice before, but counsel for the defence, although he cannot be instructed by the accused, may say: 'I do not think that the prosecution can bring any case against this accused man at all. If they can, then of course I am in no position to defend it with his aid because he cannot instruct me and cannot tell his story. [The defendant in this case was deaf and dumb from birth.] But as the prosecution can make out no case, I am not prepared to let the matter go merely on the issue whether he is fit or unfit to plead.'" *Id.* at 332.

³⁶ [1957] 2 All E.R. 513 (Cardiff Ass.). These cases are discussed in Prevezer, *Fitness to Plead and the Criminal Lunatics Act, 1800*, 1958 CRIM. L. REV. 144.

mination of the fitness issue. As a purely conceptual matter, the latter is certainly logical: not to try a preliminary issue first is "a novel proposition." Byrne, J., cites a long line of authority to the effect that an insane man should not be put to trial. But none of this authority anticipated or dealt with the narrow issue involved, and its application misses the point that Devlin, J., drives home:

"to 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 was not—and investigations which might have led to the apprehension of the true criminal would not take place."³⁷

The difficulty with which these cases dealt was anticipated by the Royal Commission on Capital Punishment, to which witnesses had suggested the existence of "a risk, not negligible, that persons who were not guilty would be deprived of the opportunity of establishing their innocence."³⁸ The Commission agreed, and stated that "we think that cases of indefinite detention as a Broadmoor patient without trial ought to be kept to a minimum, and we do not favour freer recourse to the practice of raising the issue of insanity on arraignment."³⁹

IV

It is thus evident that the federal jurisdictional issue in the commitment of Coons leads into a more fundamental policy problem, and resolution of the policy issue would moot the constitutional question. It is now apparent that the competency rule can be literally applied under either the common law or the federal statute to work great injustice. It must be remembered that the precept of forbidding trial of defendants while they are insane evolved to insure fairness of procedure for the defendant. Pre-trial commitment achieves this end by postponing his trial until he can have an opportunity to contest the charge. The rule arose in a day when defendants were not afforded counsel, and, if adequate representation is assumed, there will be many instances today in which delay in resolving the issue of criminal guilt on its merits will not be so imperatively required as it was in the time of Hale. Pre-trial commitment has never been and should not be permitted to become a devious means of assuring criminal custody over persons on the alternative ground that, although they can demonstrate

³⁷ *Regina v. Roberts*, [1954] 2 Q.B. 329, 333.

³⁸ Royal Comm'n, *supra* note 5, at 222.

³⁹ *Id.* at 224.

that they are not guilty, psychiatric opinion finds them dangerous to the interests of the United States. Experience with commitments under sexual psychopath laws should alone give us pause before we embark upon another venture involving similar imprecise and uncertain psychiatric standards of prediction. It follows, therefore, that Devlin, J., is right in insisting that the defendant who alleges he is not guilty should be given an opportunity to establish that fact before he is subjected to indeterminate detention as a criminal lunatic. State civil commitment procedures are available to deal with the dangerous but noncriminal insane.

While the evolution of statutory revision would present some difficulty, the problems involved are largely conceptual. A proposal along the following lines would seem to meet the needs of the incompetent but allegedly innocent defendant without creating undue administrative or practical problems:

(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,⁴⁰ an amicus curiae should be appointed to make an independent presentation of the defendant's interests.⁴¹

(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 United States Attorney can refer the defendant's case to the appropriate local mental health

⁴⁰ *E.g.*, United States v. Miller, 131 F. Supp. 88 (D. Vt. 1955), *aff'd*, 233 F.2d 171 (2d Cir. 1956).

⁴¹ 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.

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 under sections 4244-46 until he is sufficiently recovered to be retried or until other appropriate disposition can be made of the case.

(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. Section 4245 of the federal statute mitigates the effect of a waiver of incompetency to the extent that after conviction the director of the Bureau of Prisons chooses to have the issue of competency reopened in a postconviction hearing, but this relief is dependent upon the director's exercise of discretion. Defense counsel should not be required to make such an election. As Devlin, J., pointed out in the *Roberts* case:

"He cannot be forced to say to himself: 'Shall I play for safety and obtain a verdict whereby this man is detained as a criminal lunatic, or shall I, in effect, gamble on my chance of my being able to get him off altogether, with the knowledge that if my gamble fails he will be convicted of murder, and there is only one sentence which the court can pass.' . . . There must, in my view, be a procedure which would enable counsel for the defence to have the advantage of taking both points, and if there were no such procedure I think that it would be necessary to invent it. . . ." ⁴²

If the number of cases in which an incompetent defendant can offer a bona fide defense on the merits is as small as most people assume, the added burden which this proposal would impose on the courts would be negligible.⁴³ If the number of such cases turns out to be significant, this would document that a concern for fair procedure justifies the extra time and effort required by court and prosecutor. A result such as that achieved in the case of Coons is indefensible unless 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.

⁴² *Regina v. Roberts*, [1954] 2 Q.B. 329, 332-33.

⁴³ It seems improbable that defense counsel would clog the court machinery with frivolous allegations, but, if experience showed that this was happening, a provision could be inserted whereby a defense counsel wishing to go to trial on the merits would be required to satisfy the judge that his action was not frivolous.