Pennsylvania's Mental Health Procedures Act

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Comment

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I. INTRODUCTION

In 1976, the Pennsylvania legislature enacted the Mental Health Procedures Act in an attempt to put due process “teeth” into the Mental Health-Mental Retardation Act of 1966. The enactment was a response to court decisions holding that the 1966 law, which

2. Id. §§ 4401-4408 (Purdon 1969).


Generally, the procedures for voluntary admission for mental health treatment parallel the provisions with respect to rights accorded involuntarily committed patients, that is, full notice as to the possible types of treatment, and individualized treatment plans. See the Mental Health Procedures Act, id. §§ 7201,7203,7205 (Purdon Supp. 1977-1978).

Procedures for voluntary admission have been amended in only one major respect by the new Act, dealing with the ability of a parent or person in loco parentis to seek admission of a minor as a voluntary patient, thereby eliminating the need for procedural safeguards for minors. The Act lowers the permissible age limit for such voluntary admissions from eighteen years to fourteen. Compare PA. STAT. ANN. tit. 50, § 7201 (Purdon Supp. 1977-1978), with id. §§ 4402, 4403 (Purdon 1969). A federal district court has found the 1966 provisions with respect to voluntary commitment of minors by parents violate due process by failing to provide notice to the minor and an opportunity to oppose the commitment at a judicial hearing. See Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), vacated and remanded, 45 U.S.L.W. 4451 (U.S. May 16, 1977), noted in 15 Duq. L. Rev. 337 (1977).
provided for the forced confinement and treatment of the mentally ill, lacked adequate safeguards to protect the constitutional rights of persons alleged to be mentally ill. The Mental Health-Mental Retardation Act of 1966 was the first comprehensive statutory scheme attempting to deal humanely with the mentally ill in Pennsylvania. The purpose of the statute was plain—to place the responsibility of deciding whether the individual needed treatment for mental illness with medical authorities. Since the state's provision of mental health care was designed to benefit the patient, the legislature did not determine it necessary to require similar procedural safeguards in the civil commitment process as were required in criminal proceedings. This view was not entirely accurate; since 1969, four of the five provisions allowing the state to commit persons for mental health treatment were declared unconstitutional. In addition, the Pennsylvania Supreme Court interpreted the remaining provision, which authorized confinement of persons found incompetent to stand trial, as subject to due process limitations against lengthy confinement.


5. For example, the 1966 Act authorized confinement and treatment merely on a finding that the person was mentally disabled. PA. STAT. ANN. tit. 50, §§ 4404, 4406 (Purdon 1969). The Act also gave wide latitude to physicians in diagnosing and treating persons by forced confinement. See, e.g., id. § 4404.

6. The underlying rationale for this type of statute has been described as an acceptance of the "medical model" for the determinative standard of mental illness that will justify state-enforced confinement and treatment which qualifies the illness in terms of need for treatment rather than an objective legal standard. The elusiveness of the standard has led to its rejection by courts. See Suzuki v. Quisenberry, 411 F. Supp. 1113,1116-17 (D. Hawaii 1976). Critics of the medical model have argued that its acceptance by courts has resulted in needless deprivations of liberty and confinement in mental hospitals based largely on the opinions of psychiatrists as to the desirability of conformance to social norms and the need of treatment. Dershowitz, Psychiatry in the Legal Process: "A Knife that Cuts Both Ways," 51 JUD. 370, 374 (1968). See also Wexler, Therapeutic Justice, 57 MINN. L. REV. 289, 294 (1972).


8. See notes 123-74 and accompanying text infra.

The legislative response to these decisions was to enact the Mental Health Procedures Act. The new Act provides a more specific and objective definition of the nature and degree of mental illness that must be present to justify forced treatment and confinement. Once the individual is subject to treatment, the Act sets forth his rights and the procedures which the state must follow to assure minimal care. Finally, the Act attempts to end both automatic and indefinite confinements of incompetent defendants in mental institutions by imposing new procedural safeguards and placing a statutory time limit on forced treatment. The purpose of this comment will be to examine this act and assess the probability that it will achieve its goals of providing effective state intervention without unduly depriving patients of their due process rights.

II. CIVIL COMMITMENT

Pennsylvania has long recognized care of the mentally ill is a legitimate and necessary responsibility of state government, both for persons who have voluntarily sought treatment and for those who have not. Coercive treatment was initially limited to institutionalization of those persons demonstrably dangerous to others, but it was gradually extended to persons needing treatment solely to prevent harm to themselves.

Confinement of mentally ill persons dangerous to others has been justified as an exercise of the state’s police power, while confinement of the mentally ill who were simply unable to care for themselves was based on the parens patriae power. A mere finding of

10. The terms “involuntary civil commitment” and “civil commitment” are used in this comment to refer to any type of state-enforced hospitalization or treatment, whether outpatient treatment is ordered in a local mental health clinic or total hospitalization is ordered. The Mental Health Procedures Act generally provides for three classes of mental patients: those who voluntarily seek treatment; those mentally ill, but not charged with or convicted of a crime; and those either charged with or convicted of a crime. Pa. Stat. Ann. tit. 50, §§ 7201-7207, 7301-7306, 7401-7406 (Purdon Supp. 1977-1978).

11. See 1966 Comment, supra note 4, at 304.


13. Id. at 422-23.


15. This interest has generally been expressed in civil commitment statutes in terms of mentally ill persons “in need of care and treatment.” See, e.g., The Mental Health-Mental Retardation Act, Pa. Stat. Ann. tit. 50, §§ 4404, 4406 (Purdon 1969). Confinement of the
mental illness, however, has often been sufficient to justify the exercise of either power on the theory that mental illness alone is evidence of both a potential for harm and the inability of the person to seek needed treatment. Because the state was attempting to act in the person's best interest when it sought to confine the mentally ill, procedural safeguards in the commitment process were regarded as unnecessary. However, it has been increasingly recognized that confinement in a mental institution results in serious deprivations of liberty. Once an individual is classified as mentally ill, he suffers social stigmatization which causes the individual to have difficulties re-establishing family, social, and employment relationships when he is released from confinement. These practical consequences of forced confinement led courts to conclude that the mentally ill had significant interests in opposing confinement which deserved due process protection, and which justified requiring the state to show a substantial interest in confinement and forced treatment.

mentally ill under the parens patriae power is of relatively recent origin in the overall history of state care for the mentally ill; it was first recognized in the United States in In re Josiah Oakes, 8 Law Rep. 123 (Mass. 1845) (state court authorized commitment of a man for the unorthodox behavior of becoming engaged to a woman of unsavory character shortly after his wife's death). See American Bar Foundation, The Mentally Disabled and the Law 7 (S. Brakel & R. Rock eds. 1971); Developments, supra note 14, at 1195.

Most statutes allow the exercise of the power where it is determined that the individual lacks the capacity to evaluate whether he needs treatment. However, the legal sufficiency of capacity has been frequently confused by the courts and examining psychiatrists who assume the presence of mental illness means an incapacity to choose. See Developments, supra note 14, at 1212-14. But see Winters v. Miller, 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 985 (1971) (while mentally ill, person still had sufficient legal capacity to refuse treatment).


19. See, e.g., In re Ballay, 482 F.2d 648 (D.C. Cir. 1973). "There can no longer be any doubt that the nature of the interests when a person . . . [is] involuntarily committed . . . is one within the contemplation of the 'liberty and property' language of the fourteenth amendment." Id. at 655, quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

Persons confined in a mental hospital suffer significant deprivations of personal liberties—the freedom to move about, both within and outside the institution, the freedom to order their daily lives, to choose their activities and associates, or even the clothes they may wear. Even where outpatient care is ordered, the patient's freedom of movement is restricted in the same way as a criminal parolee and his right of privacy is also infringed. Developments, supra note 14, at 1193.


A purpose of the new Procedures Act is to provide a statutory scheme for civil commitment that will reconcile the state's interests in preventing potential harm and treating mental illness and the individual's interest in maintaining his liberty. It attempts to achieve this goal by objectively defining the standard of mental illness and conduct demonstrating such illness, by providing additional procedural safeguards, and by guaranteeing a right to treatment.

A. Definition of Mental Illness

The statutory definition of mental illness is important because its satisfaction is a condition of state intervention; it serves to set forth the nature of the condition the state seeks to treat and to delineate the conduct demonstrating the existence of that condition. The 1966 Act defined illness warranting state intervention as "mental illness sufficient for a need of care." The Procedures Act narrows this standard and requires that the person be "severely mentally disabled" before commitment is justified. The Procedures Act also imposes a stricter standard for conduct sufficient to manifest a condition requiring commitment. Traditionally, "conduct evidencing mental illness and a need for treatment" has been the generalized standard employed by the state. The Procedures Act requires instead that committing judges find a "clear and present danger" of serious bodily harm demonstrated by a recent overt act. In cases


California was the first state to redraft its commitment statutes in response to court decisions. The California statute, in contrast to the Pennsylvania scheme, provides civil commitment for two classes of people: those gravely disabled and unable to care for themselves, and those found incompetent to stand trial who are charged with a violent felony involving death, serious bodily harm or the threat of such harm to another. See CAL. WELF. & INST. CODE § 5008 (West Supp. 1976). See also, Parker, California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial, 6 PAC. L.J. 484, 492-501 (1975). A majority of states, however, still allow forced treatment and confinement solely on a finding of mental illness. Developments, supra note 14, at 1205.

23. Id. § 7301(a) (Purdon Supp. 1977-1978).
25. Id. § 7304 (Purdon Supp. 1977-1978). Clear and present danger is shown by establishing that harmful conduct occurred within the preceding thirty days. Id. § 7301(b). The statute, therefore, appears to combine the medical and legal models since medical opinion will be required in any commitment to guage the likelihood of the conduct being repeated. Commentators who have examined psychiatric research on dangerousness have found this
of harm to others, the dangerous act must either result in or threaten serious bodily harm.27 Harm to self must be manifested by a recent suicide attempt or by self-mutilation.28 The only exception to the requirement of a showing of dangerousness by a recent overt act is if there is a continuing debilitating condition that renders the individual so unable to care for himself that serious bodily harm will result if he is not treated.29 In addition to evidence of past dangerous conduct, the court must also find that because of the mental disability there is a substantial probability that such conduct will be repeated.30

The requirement that dangerousness to a person is necessary to justify forced confinement substantially expands the protection provided the individual by Dixon v. Attorney General,31 which held that only a general showing of dangerousness need be established.32 Under this standard, any threatened harm, whether minor or directed only against property, was sufficient to invoke the provisions of the 1966 Act.33 The new requirement militates against confine-
ment or forced treatment for relatively harmless but offensive conduct. While more precise, the statutory definition still places unjustified reliance on predictions or psychiatric opinions about the probability of future harm. Not only does the Procedures Act suggest psychiatrists must express opinions about the existence of mental illness, but the Act's requirement of finding a probability of future dangerous conduct compels psychiatric opinions on that issue as well. Although such predictive ability was apparently taken for granted by the drafters of the Procedures Act, there may not be a substantial scientific basis for such an assumption: a study of 1,000 patients diagnosed as dangerous showed the accuracy of psychiatric predictions was less than that achieved by random choice. Thus, a decision that civil commitment is necessary is largely based on the questionable assumption that mental illness or the probability of future dangerous conduct can be accurately diagnosed. The tendency of psychiatrists to over-predict dangerousness and overdiagnose mental illness may be restrained by the requirement that

physician were the most frequently abused. Police, faced with complaints by one family member against another, often refer the latter to a mental facility, with the result that he is labelled mentally ill; also, in the past, law enforcement officers who wanted to remove an individual who was acting strangely did not have to wait until he had committed a criminal act before confining him to a mental institution. See 1966 Comment, supra note 4, at 423.

34. The Act does require that the report to the court on mental condition be in terms understandable to laymen. See PA. STAT. ANN. tit. 50, § 7303(c)(1) (Purdon Supp. 1977-1978). But see id. § 7402(e)(4), which contains no similar requirements for the report in a hearing to determine competency to stand trial. See note 25 supra for discussion of the unreliability of psychiatric opinions.


36. Diagnosis of mental illness has been particularly subject to over-inclusiveness by medical authorities. See Rosenhan, supra note 25, at 384-86. In addition, medical authorities apparently agree on two factors: first, that an uncooperative patient cannot benefit from therapy, see Katz, The Right to Treatment—An Enchanting Legal Fiction?, 36 U. CHI. L. REV. 755, 768-69 (1969); and second, even given the patient's cooperation, there are some mental illnesses that are untreatable in the sense that there is no known successful form of treatment, see Schweitzer, The Right to Effective Mental Treatment, 62 CAL. L. REV. 936, 941-48 (1974).

37. See Diamond, supra note 25, at 440-44. The author notes: "I know of no reports in the scientific literature which are supported by valid clinical experience and statistical evidence that can describe psychological or physical signs or symptoms which can be reliably used to discriminate between the potentially dangerous and the harmless individual." Id. at 444.

An alternative to requiring a showing of substantial and serious physical harm where the state is seeking to confine under the parens patriae power would be to require a showing of proof beyond a reasonable doubt that the person needed assistance. See Developments, supra note 14, at 1301.
a recent overt act must have occurred; however, it should be specified that the psychiatric diagnosis be limited to explaining how the overt act demonstrates the existence of mental illness or the probability of future dangerous conduct.\textsuperscript{38}

B. \textit{Emergency and Long-Term Commitment}

To prevent needless confinements, the Procedures Act requires that prior to any type of forced treatment, medical authorities and judicial officers must establish that the person is mentally ill and dangerous. The new Act essentially develops provisions in the 1966 Act which provided for two general types of treatment—emergency and long-term care—but were silent about the commitment procedures to be followed under either category.

1. \textit{Emergency Detention}

Short-term temporary confinement, characterized as emergency detention, is appropriate when the person, without warning, exhibits violent, erratic behavior indicating a sudden mental imbalance. While his conduct might normally subject him to arrest and criminal charges, the apparent existence of a severe mental disturbance causes recognition that treatment is more appropriate than incarceration.

Emergency detention, the broadest exercise of the state's powers with regard to the mentally ill, is designed to deal with these crisis situations and to avoid the inappropriate use of criminal sanctions. The Procedures Act limits procedural prerequisites in this situation to a minimum, and authorizes the county mental health administrator to approve the issuance of a warrant for the person's detention upon application by a physician or other responsible party, which sets forth facts tending to show the person is dangerous and needs treatment.\textsuperscript{39} Furthermore, a person may be placed in custody without a warrant by any police officer, physician, or mental health authority who personally observes the individual acting in a bizarre and dangerous manner.\textsuperscript{40} After the individual is taken to a mental health facility, he must be examined by a physician within two hours to determine whether he is mentally ill within the statutory

\textsuperscript{38} Diamond, \textit{supra} note 25, at 440-44.


\textsuperscript{40} Id. § 7302(a)(2).
requirement of "clear and present danger." Treatment may be started immediately if he is found to be mentally ill; if not, he must be immediately discharged. If the person is detained, mental health authorities are required to tell the person why he is being detained and inform him of his right to use the telephone or to have someone notified of his hospitalization. A seventy-two hour time limit is imposed on emergency detention. If continued treatment is not necessary, the patient must be released prior to the expiration of the seventy-two hour limit. If further treatment is necessary, the patient may agree to voluntary treatment, or he may be detained for extended emergency treatment.

Extended treatment is limited to a maximum of twenty days and requires the certification of a judge or mental health review officer who must find that the person is severely mentally disabled and in need of such treatment. Certification possesses some due process protection since it is made after conducting an informal hearing at which the person has the right to be represented by counsel and to examine witnesses and present evidence in his own behalf; a full record of the proceedings is required. In addition, where the certification is made by a mental health review officer, the patient may appeal the decision in common pleas court.

The more relaxed procedural safeguards pertaining to seventy-two hour emergency treatment were partly justified by the rationale that dangerous conduct was required to trigger the application of the statute. The provision was regarded as one of the more laudatory aspects of the 1966 statute in that it provided an alternative to the arrest and jailing of a person on a criminal charge. The Procedures

41. Id. § 7302(b).
42. Id.
43. Id. § 7302(c).
44. Id. § 7302(d).
45. Id. § 7303.
46. Id. §§ 7303(b), (c). The provisions create a new subdivision of emergency detention.
47. The Act provides that such officers may be appointed by the county court of common pleas for a period of one year; they must be members of the bar of the state supreme court. See id. § 7109.
48. Id. § 7303(c)(1).
49. Id.
50. Id. § 7303(g).
Act continues this policy by granting mental health authorities the sole discretion to decide whether to confine a person for treatment, but shortens the maximum time of detention from ten to three days. The 1976 Act’s treatment of this type of emergency detention, however, remains somewhat deficient since it fails to provide a prior hearing before a neutral judicial officer at which a person can challenge the three-day confinement. This criticism is made more compelling by the fact that the legislature has made no distinction between the degree of mental disability or the type of dangerousness justifying emergency as opposed to court-ordered confinement. Thus, whether a person will be afforded the greater safeguards involved in court-ordered treatment or will be detained under the more informal procedures of the emergency provisions remains largely within the discretion of the mental health authorities. Similarly, while the hearing for extended emergency treatment provides additional due process protection, notably the right to counsel and appeal under some circumstances, major rights of patients are not fully protected since, given the limited time, the ability to prepare

the individual benefits from treatment has been criticized on the ground that the treatment is essentially a behavior control method designed to produce social conformance, an exaction that would not be made in the case of a person tried and punished for a criminal offense. See Wexler, Therapeutic Justice, 57 MINN. L. REV. 289, 291-92 (1972). A response to that argument is that a short period of confinement to determine whether the person is seriously mentally ill is a minor deprivation of liberty compared to the more serious consequences that may flow from a failure to intervene, either in terms of serious bodily harm, or a resulting criminal charge. See Suzuki v. Quisenberry, supra at 1126; Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1102 (E.D. Mich. 1974). See also Developments, supra note 14, at 1265-66.

52. Provisions in criminal statutes requiring a preliminary hearing to determine whether there is probable cause to detain have been used as a rationale for requiring a similar preliminary hearing in emergency commitments. See Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974)(probable cause hearing must be held as soon as possible after emergency commitment begins); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1098 (E.D. Mich. 1974)(preliminary hearing is needed to determine probable cause which must be followed by full hearing within reasonable time after a complete diagnosis has been made). It has also been suggested that even if a probable cause hearing need not be held in all cases, it should still be available to the individual who wishes to challenge a physician’s judgment. See Comment, The Gates of Cerberus, Involuntary Civil Commitment in Philadelphia, 49 TEMP. L.Q. 323, 337-39 (1975) [hereinafter cited as Commitment in Philadelphia]. There it was noted that applications for emergency commitment are routinely approved by telephone conversations with the petitioning party, generally either a family member or a police officer; the psychiatrist is thus given virtually unfettered discretion in determining who is in need of treatment. See also ANNUAL PLAN OF THE ALLEGHENY COUNTY MENTAL HEALTH AND MENTAL RETARDATION PROGRAM 66 (1976) (telephone authorizations for emergency commitment are also established procedure in Allegheny County).
a defense or to have adequate assistance of counsel is greatly restricted.\textsuperscript{53} Hearings may, in a sense, be pro-forma.

2. Court-Ordered Treatment

A judicial determination of mental illness and potential harm is required for the second major category of civil commitment—court-ordered involuntary treatment. Since confinement under the 1966 Act was based on "need of care," court-ordered commitment continued indefinitely until the person no longer needed treatment.\textsuperscript{54} Under the Procedures Act, the order is effective only for a ninety-day period.\textsuperscript{55} Because court-ordered treatment is lengthy in duration the legislature provided more detailed procedural safeguards in the initial commitment proceeding than for emergency treatment, and enacted provisions to prevent needless and continued hospitalization.

The method of initiating proceedings under the Procedures Act depends on whether the person is already in custody. Where the person is already confined for emergency treatment, the proceedings are initiated by the county mental health administrator, who must file a petition with the common pleas court\textsuperscript{56} which states reasonable grounds to support a conclusion that the person is dangerously mentally ill.\textsuperscript{57} A copy of the petition must be given to the person along with an explanation of the proceedings.\textsuperscript{58} A hearing on the petition must be held within five days.\textsuperscript{59} Where the person is not in custody, "any reasonable party" may file a petition with the court, which must then independently determine whether probable cause is shown on the face of the petition to warrant a hearing.\textsuperscript{60} No definite time limit is set for the hearing as is provided when the person is

\textsuperscript{53} For example, the Act does not specify what standard of proof should be used in determining the need for continued treatment and does not give the person the right to have his own mental health expert testify on his behalf. See The Mental Health Procedures Act, \textit{Pa. Stat. Ann.} tit. 50, § 7303(c) (Purdon Supp. 1977-1978). \textit{See also} notes 73-102 and accompanying text \textit{infra}, which discuss procedures applicable in court-ordered commitments.


\textsuperscript{56} Id. § 7304(b).

\textsuperscript{57} Id. § 7304(b)(2).

\textsuperscript{58} Id. § 7304(b)(3).

\textsuperscript{59} Id. § 7304(b)(4).

\textsuperscript{60} Id. § 7304(c).
already in custody. This difference in the two sections presents potential problems of unfairness. A person not in custody may have substantially more time to prepare a defense against confinement than a person in custody who has only five days to prepare such a defense. This discrepancy might be justified given the fact that the person in custody has at least previously exhibited conduct indicating dangerousness, but since this finding is somewhat discretionary it would seem that permitting a pre-hearing release and additional time to prepare a defense would be more consonant with the Act's general objective of limiting the number of needless confinements. Aside from these differences, however, the procedural safeguards examined below apply to all court-ordered commitments, whether the person is already in custody or not.

a. Procedural Safeguards

Despite the fact that coercive treatment and lengthy confinement often result in deprivations of liberty, relaxed procedures in the pre-hospitalization stage were permitted by the 1966 Act because the state was attempting to avoid imposing the stigma of a criminal charge on the mentally ill. However, courts have declared that the mere characterization of a proceeding as civil does not remove the requirement of procedural due process. As the deprivation of liberty resulting from civil commitment became more apparent, and as dangerousness developed as the basis for involuntary treatment, commitment hearings were increasingly compared to criminal proceedings. Although the United States Supreme Court has yet to consider the due process limitations in pre-commitment procedures, its decisions in other contexts indicate safeguards identical to those required in criminal proceedings are not necessary if the commitment procedures ensure fairness and accuracy in the fact-

61. The court is required only to set a date for a hearing as soon as is practical. Id. § 7304(c)(3).
62. There is also a contradiction in the Act since an emergency patient may be released after three days and not be “in custody” when a hearing is held pursuant to the five-day requirement. Compare id. § 7302(d), with id. § 7304(b)(4).
63. See Developments, supra note 14, at 1286-87.
65. Id. at 171, 339 A.2d at 772.
66. See cases cited at note 3 supra.
67. See cases cited at note 3 supra.
finding process. Lower courts faced with a due process challenge to commitment proceedings have responded diversely, some requiring safeguards identical to those in criminal proceedings, and others permitting more relaxed procedures in civil commitments. In according mentally ill persons due process protection and rights, the Procedures Act establishes safeguards in excess of those required by Dixon, but less than those required in criminal proceedings.

1. Notice

Effective notice is critical because the nature and degree of notice may well determine whether the individual is able to exercise other procedural rights. The Procedures Act recognizes the necessity of notice even in those circumstances where bodily harm is threatened and requires that the individual receive at least three days prior to the hearing a summons and the petition seeking commitment, the names of any adverse witnesses, medical opinions concerning his mental condition, and the name of court-appointed counsel. Although the three-day minimum period may raise questions of adequacy in regard to the time needed to prepare a defense, other provisions may obviate the potential for unfairness. A person already in custody has constructive notice resulting from the emergency commitment. Thus, only a person not in custody would be truly surprised by the petition. As was indicated earlier, under those circumstances, the hearing need not be held within a specified time.

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2. Assistance of Counsel

The right to court-appointed counsel,73 which Dixon found implicit in the court-ordered commitment provisions of the 1966 Act,74 has been expressly provided in the Procedures Act.75 The Procedures Act also allows the defendant to have counsel present during any court-ordered psychiatric interview.76 Furthermore, he has the right to employ his own mental health expert to assist in his defense and to testify on his behalf.77

The provisions for technical assistance show a strong legislative concern that the person have roughly the same type of expertise available as the state. This reduces the danger that the court will hear only expert evidence presenting the state's view of the person's mental condition. The provision permitting counsel to be present during the psychiatric examination, however, creates the potential that the examination will turn into an adversary proceeding. In addition, presence of counsel puts the psychiatric examination itself in a different light for both the psychiatrist and his patient. Confidentiality and the establishment of a doctor-patient relationship, considered crucial to an accurate diagnosis, would be difficult in the presence of a third party. Thus, the provision seems destined to result in wasted time for court-appointed psychiatrists. Since the

73. The right to counsel has been recognized as a fundamental right in criminal proceedings. See Argeringer v. Hamlin, 407 U.S. 25, 37 (1972) (right to counsel in minor criminal offenses); In re Gault, 387 U.S. 1, 36 (1961) (right as applied to juvenile proceedings).


76. Id. § 7304(c)(5). In fashioning procedural safeguards for the psychiatric interview, proposals have ranged from requiring that the person be warned of his right to be silent or to not participate in any tests, the right to refuse to participate at all, or the right to have counsel present during the interview. Denial of the right to have counsel present at the interview has been rationalized on the theory that counsel's presence would unnecessarily impinge on the confidential nature of the doctor-patient relationship. Lessard v. Schmidt, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974). See generally Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv. L. Rev. 648 (1970).

77. PA. STAT. ANN. tit. 50, § 7304(d) (Purdon Supp. 1977-1978). If the person cannot afford such a specialist, the Act also allows the court to provide a reasonable fee for such purpose. Id.
person can in fact refuse to answer unwanted questions or participate in testing, a more efficient means of reaching the same result would be to allow the patient to refuse the examination initially. 78

3. Hearing

During the pre-commitment hearing, the Procedures Act expressly provides four specific safeguards: the right to the assistance of counsel and an expert of the person's choice; the right to remain silent; the right to confront and examine witnesses and present evidence; and the right to choose a public or a private proceeding. 79 These rights provide substantial protection to persons facing confinement. However, the right to be present, the application of the customary rules of evidence, and the right to a jury trial—rights normally accorded criminal defendants—are not expressly provided.

The right to appear at trial is a constitutional right; 80 in the past, however, the fear of unnecessarily upsetting the individual and aggravating his condition led courts to excuse the requirement of presence at a commitment hearing. 81 Although not explicitly, the Procedures Act conversely appears to provide the person with the right to be present at the commitment hearing. 82 Recognition of the right is preferable since, practically, determining that a person is so mentally ill that he cannot be present seems to presuppose the result of the proceeding. 83 Moreover, there is an increasing tendency by

78. Although perhaps not as detailed, an expert opinion could be developed from observation of the person's conduct at the hearing and by hypothetical questions concerning the presence of mental illness based on alleged dangerous conduct.
80. U.S. Const. amend. VI. The guarantee is applicable to the states through the fourteenth amendment. See Pointer v. Texas, 380 U.S. 400, 403 (1965).
82. See PA. STAT. ANN. tit. 50, §§ 7304(c)(4), (e)(3) (Purdon Supp. 1977-1978). See also id. § 7303(b) (informal hearing held at a mental health facility where emergency extension is sought); id. § 7304(e)(6) (court-ordered hearings may be held at locations other than the courthouse when it would be in the best interest of the person to do so).
courts to view presence at a hearing as a fundamental right.\textsuperscript{84}

In contrast, strict adherence to the hearsay rules and the right to a jury is not as compelling. The courts have found that rather than constituting fundamental rights, these procedural safeguards are designed to promote the accuracy of the fact-finding process.\textsuperscript{85} Rules governing the admission of evidence, however, particularly those excluding hearsay, go directly to the inherent reliability of the evidence; hence, the accuracy of a finding of mental illness and fairness of the proceeding are enhanced by adherence to the hearsay rules.\textsuperscript{86} Most courts have not reached the same conclusion regarding jury trials; they have analogized commitment to juvenile proceedings and have concluded that a jury does not enhance the fact-finding process and is not an essential element of due process.\textsuperscript{87} It is suggested that if fairness to the person is the primary consideration in deciding whether to require a certain procedure, courts should apply the hearsay rules, at least where the hearsay lacks sufficient indicia of reliability. Regarding jury trials, if the need to apply a jury's common-sense notions appears slight compared to the danger of a jury committing a person who was merely acting in a way that is embarrassing to others or simply undesirable, then reliance on the conclusion of a judge may be preferable. It would be appropriate for the legislature to examine the feasibility of applying the rules of evidence and requiring a jury trial in these proceedings.

4. \textit{Burden of Proof}

Once a hearing has been held, the judge or mental health review officer must determine whether the person is severely mentally disabled and subject to forced treatment. Of the three standards of proof developed for use in judicial proceedings, preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt, the Procedures Act adopts the clear and convinc-

\begin{itemize}
  \item \textsuperscript{84} See Specht v. Patterson, 386 U.S. 605, 610 (1967) (due process in further commitment proceedings required defendant be present with counsel).
  \item \textsuperscript{85} In re Winship, 397 U.S. 358, 369-72 (1970) (Harlan, J., concurring).
\end{itemize}
This choice is open to criticism since courts and commentators comparing commitment to criminal proceedings have strongly advocated imposing the stricter reasonable doubt standard\textsuperscript{89} which is constitutionally required in criminal proceedings.\textsuperscript{90} Moreover, the Supreme Court has applied the reasonable doubt standard to juvenile proceedings in \textit{In re Winship},\textsuperscript{91} on the theory that juveniles suffer deprivations of liberty and stigmatization comparable to those endured by criminal defendants. Some lower federal courts have similarly held the reasonable doubt standard to be proper in commitment proceedings, reasoning that if the highest standard is a necessary constitutional element where a crime has occurred, there is an even greater necessity for its application where confinement is sought solely to prevent harm.\textsuperscript{92} Other courts have adopted the risk allocation analysis articulated in Justice Harlan’s concurring opinion in \textit{In re Winship}: the comparative social costs of a possible error should determine the acceptable standard.\textsuperscript{93}

The risk-allocating method of determining the standard of proof focuses on who has the greater interest in the outcome of the proceedings and would be likely to suffer the greater harm by an erroneous decision. Thus, where deprivation of liberty is not as great as in criminal proceedings and the state has countervailing interests of equal weight, courts have found due process requirements satisfied by a standard of “clear, unequivocal and convincing evidence.”\textsuperscript{94} When civil commitment is subjected to a risk-allocating analysis the clear and convincing standard seems inadequate. The loss of


\textsuperscript{90} Prior to its consideration of due process rights of juveniles, the Supreme Court had never explicitly stated that proof beyond a reasonable doubt was required in criminal proceedings. See \textit{In re Winship}, 397 U.S. 358, 361 (1970); \textit{Developments, supra} note 14, at 1295.

\textsuperscript{91} 397 U.S. 358, 365 (1970).


liberty and stigmatization to the individual caused by commitment are certainly as great as the potential deprivations to juveniles charged with a crime, while the state interest in providing treatment is roughly equivalent. In addition, the inability of psychiatrists to predict dangerousness with consistent accuracy suggests the state interest may not be as great as the individual's interest in remaining free.

Although the evidentiary standard of the Procedures Act appears inadequate to guard against an erroneous factual finding, it may be argued that other, supplementary provisions of the Act support its use, notably those which curtail the length of commitment and which clearly indicate that confinement is not to be viewed as the primary treatment tool. Yet the threshold question of the severity of mental illness sufficient to justify state intervention—serious bodily harm and the potential for its recurrence—does not depend upon these ancillary considerations. The statute sets a standard by which the state must justify imposing its notions of social normalcy upon the individual through treatment by requiring evidence of conduct which would justify criminal proceedings absent the presence of mental illness. That the state is treating the individual, not punishing him, is irrelevant to the standard of proof; the state's characterization of the nature of confinement is unimportant where there are substantial deprivations of liberty. Moreover, it can be argued that the difficulties of proving conduct manifesting mental illness would not be aggravated by the reasonable doubt standard. Indeed, since psychiatrists would be required to justify their predictions more persuasively in order to satisfy a higher standard of proof, the accuracy of the fact-finding process may be assured by

95. Developments, supra note 14, at 1298-1300.
96. Id.
97. For example, certain safeguards against unnecessary confinement also make it more probable that an error will be quickly recognized and corrected. Before any treatment can be ordered, the patient's personal circumstances, the availability of community resources, family, and employment possibilities must be considered. See PA. STAT. ANN. tit. 50, § 7304(f) (Purdon Supp. 1977-1978). Also, treatment itself can only be ordered for a specific time, the patient's condition is required to be re-evaluated monthly, and he must be released when he no longer poses a serious threat of harm. Id. §§ 7108(a),(b).
98. The meaning of "clear and present danger," implies that with the exception of harm to self, the dangerous conduct of the person would constitute a crime. See PA. STAT. ANN. tit. 50, § 7301(b) (Purdon Supp. 1977-1978).
99. See Developments, supra note 14, at 1301-03.
increasing the reliability of those predictions. An examination of the statutory scheme, particularly those provisions regarding persons subject to criminal prosecution, supports the conclusion that the equal protection and due process clauses require that the burden of proof in civil commitments be beyond a reasonable doubt.

b. Rights of Persons Subject to Treatment

Once it has been determined that the individual is severely mentally disabled, a court must determine the kind of treatment it should order. Prior to the 1966 Act, institutionalization was the usual answer. The 1966 Act established community centers and authorized a committing court to consider partial hospitalization as another form of treatment. This alternative treatment is promoted by the Procedures Act which mandates that "in every case, the least restrictions consistent with adequate treatment shall be employed."

100. See note 25 and accompanying text supra regarding the accuracy of psychiatric opinions on future dangerous conduct.

101. See notes 135-78 and accompanying text infra.

102. See McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) (procedural safeguards must be afforded all mental patients including those who had been convicted of a crime); Jackson v. Indiana, 406 U.S. 715 (1972) (due process and equal protection requirements prohibit indefinite commitment of incompetent defendants); Humphrey v. Cady, 405 U.S. 504 (1972) (equal protection guarantees extend to criminal mental patients); Baxstrom v. Herold, 383 U.S. 107 (1966) (equal protection guarantees require the same procedural safeguards for all mental patients, criminal and noncriminal). See also Developments, supra note 14, at 1295-1303.


104. The Act of 1966 allowed a committing court to consider partial hospitalization, but the provision was permissive rather than mandatory. See Pa. Stat. Ann. tit. 50, § 4406(b) (Purdon 1969). Most mental health experts now believe patients respond best (and are given the best chance for cure) if they remain in their community and continue with their jobs, home life and personal relationships. Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 Mich. L. Rev. 1108, 1113 (1972) [hereinafter cited as Chambers]. Some of the intractable obstacles to successful treatment are that hospitals are often too far away from the patients' communities, are understaffed and overcrowded, and lack enough psychiatrists and other professional personnel. Id. at 1125. Even if the hospital is adequate, the isolation of patients in an institution may create in long-term patients symptoms of withdrawal, muteness, and loss of motivation. Id. at 1125-27. See also Rosenhan, supra note 25, at 398.

105. Pa. Stat. Ann. tit. 50, § 7102 (Purdon Supp. 1977-1978). The least restrictive type of confinement was first espoused by federal courts as a requirement of due process, on the reasoning that since the ultimate goal of treatment is nearly always to enable the individual to function in an unrestricted environment, the patient should be given as much opportunity
The kind of treatment which the state must provide has also been more specifically delineated under the Procedures Act. An entirely new section defines what constitutes adequate treatment. Limited in part to the basic essentials "necessary to maintain decent, safe and healthful living conditions," an express right to diagnosis and treatment is accorded. The right is implemented by a requirement that mental health authorities develop, with the cooperation and consent of the patient, an individualized treatment plan. The plan must be reevaluated for each patient every thirty days by a staff treatment team and a determination must be made whether to continue treatment, develop a new plan, or discharge the person.

The provisions for individualized treatment appear to be aimed at complying with language in the Supreme Court's decision in *O'Connor v. Donaldson*, which upheld a private cause of action for the confinement of a non-dangerous person in a state mental hospi...
tal.112 The Court rejected the argument that mere custodial care is justified as "milieu therapy,"113 therapy by reason of the hospital setting, and held such care constitutionally infirm because it failed to provide a plan aimed at treatment of the individual.114 The Court's holding in *Donaldson* and the provisions of the Procedures Act place a substantially greater burden on the professional staffs of mental health facilities. Whereas a treatment plan is necessary to deal with the inherent problems of institutionalization,115 if it is

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112. *Id.* at 576-77.
113. *Id.* at 573-75. The Court, however, did not disapprove of such custodial care in all cases. *See id.* at 578 n.2 (Burger, C.J., concurring).
114. *Id.* at 573-75. Although the Supreme Court in *Donaldson* specifically refused to decide whether there is a constitutional right to treatment, the Court held it is a denial of due process to confine an individual without a treatment plan aimed at meeting his needs. *Id.* at 573.

Conditions in state mental hospitals, absent a statutory provision for a "right to treatment" for mental patients, have been attacked in federal courts as violative of the fourteenth amendment guarantee of due process where there is a failure to provide minimum levels of care and safe facilities. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1310-12 (5th Cir. 1974) (constitutional right to treatment included adequate professional staff); New York Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 758 (E.D.N.Y. 1973) (minimum safe, custodial care is an element of due process.) *See generally Comment, Wyatt v. Stickney and the Rights of Civilly Committed Mental Patients to Adequate Treatment, 86 Harv. L. Rev. 1282 (1973); Debate: The Right to Treatment, Encounter and Synthesis, 10 Duq. L. Rev. 554 (1973). But *see* O'Connor v. Donaldson, 422 U.S. 563, 588-89 (1975) (Burger, C.J., concurring) (noting that many types of mental illness are currently diagnosed as untreatable by medical authorities); Lessard v. Schmidt, 349 F. Supp. 1078, 1087 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974).

The justification for finding a constitutional right to treatment was set forth by the court of appeals in *Donaldson*, where the court said: "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." *O'Connor v. Donaldson*, 493 F.2d 507, 521 (5th Cir. 1975), *quoting* Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971). This constitutional right, however, was premised on the indeterminate nature of the confinement, *id.* at 522, which has been expressly eliminated by the Mental Health Procedures Act. *See Pa. Stat. Ann.* tit. 50, § 7304(g)(Purdon Supp. 1977-1978).

The right accorded under the statute is to "adequate treatment," defined as "such accommodations, diet, heat, light, sanitary facilities, clothing, recreation, education and medical care as are necessary to maintain decent, safe and healthful living conditions . . . diagnosis, evaluation, therapy, or rehabilitation as needed to alleviate pain and distress and to facilitate the recovery of the patient." *Id.* at § 7104.

115. *It has been observed,* for example, *that continued hospitalization creates a psychological dependence on the institutional setting. Bentinck, A Study of Relatives' View of State Mental Hospital Patients, 50 Social Casework 519, 525 (1969); Robitscher, The Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient, 18 Vill. L. Rev. 11, 11 (1972).*
to be realistically effective, a continuing expenditure of funds is necessary.\textsuperscript{116}

III. CRIME AND THE MENTALLY ILL

Perhaps no other issue cuts so deeply into the bases of the criminal justice system than the treatment of the mentally ill person charged with a crime. In these circumstances, the right of the individual to obtain a fair trial and the interest of society in being protected from the criminal are brought into sharp conflict.\textsuperscript{117} The 1966 Mental Health-Mental Retardation Act responded to this conflict by making it easier to confine the criminal defendant than the civil committee, and to impose longer periods\textsuperscript{118} and more restrictive conditions of confinement.\textsuperscript{119} It is still recognized, however, that since commitment of both groups of mentally ill persons satisfies similar state interests, equal protection and due process require that both groups be treated substantially the same.\textsuperscript{120} The Procedures Act deals with the problem of the criminal defendant consistent

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\textsuperscript{116} Studies have shown the cost of in-patient care and professional staff shortages are the practical reasons why mental hospitals can provide only custodial care. See Wall St. J., Aug. 19, 1976, at 1, col. 1. The article deals with the problems of former mental patients released in part because of the cost of in-patient care.

\textsuperscript{117} The treatment of the mentally ill person charged with a crime reflects the basic ambivalence of society, which, on the one hand desires to protect and shelter the mentally ill from the harshness of the criminal process, and, on the other hand, desires to protect society and innocent persons. Janis, Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme, 23 Cath. U.L. Rev. 720, 735 & n. 86 (1974) [hereinafter cited as Janis]. The conflict has been accentuated by extraordinary cases which demonstrate the inability of society to effectively deal with some classes of dangerously mentally ill persons. Such cases have been noted as part of the reason for relaxed commitment procedures. See Diamond, supra note 25, at 439.

\textsuperscript{118} See, e.g., The Mental Health-Mental Retardation Act, Pa. Stat. Ann. tit. 50, § 4409 (Purdon 1969), which provides for commitment if the defendant is incompetent and charged with any crime, regardless of how minor, for so long as the defendant is mentally ill; id. § 4410 (commitment in lieu of sentence); id. § 4411 (commitment while undergoing sentencing); id. § 4412 (permits commitment in a mental institution upon the agreement of the Department of Corrections and the Department of Mental Health that the person in prison is mentally ill). See also Bloomberg, A Proposal for Community-Based Hospitals as an Alternative to a State Hospital, in Psychoanalysis, Psychiatry and the Law 664 (J. Katz, J. Goldstein & A. Dershowitz eds. 1967); Janis, supra note 117, at 722.

\textsuperscript{119} See generally Note, Hospitalization of the Mentally Ill Criminals in Pennsylvania and New Jersey, 110 U. Pa. L. Rev. 78 (1961) [hereinafter cited as Hospitalization].

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with this recognition; its response will be discussed in the following sections.

A. Incompetency to Stand Trial

Throughout the United States, a defendant cannot be tried if he is found incompetent to stand trial. The rule is derived from the common law, which developed the ban because of the prohibition against trial of a defendant in absentia, the increased risk of convicting an innocent person which exists when the defendant cannot assist in his defense, and the belief that it is inhumane to prosecute and punish a deranged person.\(^{121}\) This rationale was accepted by the legislature, which provided that a person is incompetent to stand trial if he is unable to understand the nature or object of the proceedings against him or is unable to assist in his own defense.\(^{122}\)

A finding of incompetency has usually resulted in both an absolute stay of the criminal proceedings until the defendant is considered competent, and automatic confinement of the defendant to a mental institution. Stay of the proceedings is justified as protecting the defendant's interest in receiving a fair trial.\(^{2}\) Automatic confinement\(^{2}\) has been held justified since it assertedly enables the

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122. PA. STAT. ANN. tit. 50, § 7402(a) (Purdon Supp. 1977-1978). See also Janis, supra note 117, at 720 & n.1, 721 & n.3. This general standard has been increasingly construed by courts and psychiatrists alike in a broad fashion so that it has come to include greater proportions of criminal defendants. Eizenstat, supra note 121, at 388-94. This trend has been criticized by commentators who urge it is an unnecessary deprivation of the defendant's civil liberties. One writer noted a study which showed that a random group of competent persons who took the standard competency test were found incompetent by psychologists. See Brakel, Presumption, Bias and Incompetency in the Criminal Process, 1974 Wis. L. Rev. 1105, 1119-20. See also Eizenstat, supra note 121, at 392-93.

That psychiatrists' opinions on competency and mental illness itself frequently include value judgments and conclusions about matters unrelated to those issues was apparent in one report which stated: "We are agreed that his limited . . . educational back[ground] and his deprived social environment may make it likely that the patient may impulsively repeat the act for which he was originally incarcerated." Commonwealth v. Klinger, 215 Pa. Super. Ct. 505, 507-08, 258 A.2d 668, 669 (1969) (Hoffman, J., dissenting).


124. A majority of competency statutes provide that a defendant found incompetent to stand trial must be confined for treatment by the state until he regains his competency; others, like Pennsylvania under the 1966 Act, authorize the hearing judge to order an alterna-
individual to regain his competency thereby permitting the trial to proceed,\textsuperscript{125} benefits the individual by providing necessary treatment, and protects society.\textsuperscript{126} These traditional reactions to a finding of incompetency have not completely survived more recent balancings of the competing interests involved, including legislative concerns expressed in the Procedures Act.

1. \textit{Automatic Confinement}

As suggested above, there are two distinct issues involved once a finding of incompetency has been made: whether fairness requires delay of the trial, and whether the defendant's mental condition which brought about the incompetency finding would be improved by hospitalization. Courts have rarely distinguished these separate issues.\textsuperscript{127} In some situations, confinement may in fact be illogical; the reasons for confinement may not necessarily be the same as those necessitating delay of the trial.\textsuperscript{128} More importantly, however, confinement may not attain its stated purposes of treating the individual and ultimately enabling a trial to proceed. It is entirely conceivable that a severely mentally disabled person is untreatable. Even where treatment is possible, moreover, it has been recognized that the prognosis for recovery may be greater in an out-patient facility in some circumstances than in a mental institution.\textsuperscript{129}

Assuming that confinement is appropriate, it has also been recognized that a severly disabled person who is committed to an institution for the criminally insane receives little more than custodial


\textsuperscript{127} The procedure of automatically committing the defendant to Farview State Hospital after a sanity commission had found the defendant incompetent, but before any judicial hearing, was tacitly approved in Commonwealth v. Bruno, 435 Pa. 200, 255 A.2d 519 (1969).

\textsuperscript{128} See Janis, \textit{supra} note 117, at 723; Note, \textit{Incompetency to Stand Trial}, 81 \textit{Harv. L. Rev.} 454, 461 (1967) [hereinafter cited as \textit{Incompetency}]. For example, a defendant deemed incompetent to stand trial because he suffers from amnesia would not be so dangerous or mentally ill that he would require custodial care. This problem has been noted both with respect to criminal defendants and civil committees. See O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring). See also Schwitzgebel, \textit{The Right to Effective Mental Treatment}, 62 \textit{Cal. L. Rev.} 936, 941-48 (1974).

\textsuperscript{129} See Janis, \textit{supra} note 117, at 724.
care, which does not lead to eventual recovery and trial. On the other hand, in less serious cases the probability of recovery may indeed be hampered by confinement in an institution. In sum, confinement has frequently either failed to produce ultimate competency or has directly hampered the attainment of competency, and thus prolonged rather than shortened the length of time before a trial could be held, without significantly benefiting the individual. These criticisms were recently underscored in *Jackson v. Indiana*, which held that indefinite commitment, at least where no viable treatment plan was provided, violated equal protection and due process.

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130. See id. at 722 & nn.9 & 10. It has been observed that the criminal insane are given low-budget priority by legislators and often a criminal stigma attaches to the incompetent defendant, making him an unsatisfactory patient for the medical staff. Eizenstat, *supra* note 121, at 382.

131. *Commonwealth v. Bruno*, 435 Pa. 200, 204, 255 A.2d 519, 521 (1969). The low priority given to defendants and the criminal mentally ill in terms of treatment is evidenced by two studies made of Pennsylvania’s Farview State Hospital. In 1961, law students who had examined the institution concluded: “It is difficult to deny that the type of psychiatric treatment available at Farview State Hospital, as well as that actually given, is inadequate. Patients at Farview are fed, clothed, cared for and amused but few of them are treated.” *Hospitalization, supra* note 119, at 107.

Public and governmental interest in Farview was revived more than 15 years after this observation when several deaths had occurred at the institution. Testimony given at committee hearings in 1976 indicates conditions have not materially improved; allegations of murder, brutality and neglect were presented. Despite attempts by the staff to improve conditions by formulating a patient care program, in July 1976, Pennsylvania Welfare Secretary Frank Beal recommended the state shut down the facility. However, combined opposition from the community surrounding Farview and from the employee union caused the Governor to reverse the decision. See Valley News Dispatch (Tarentum, Pa.), Nov. 29, 1976, at 3, col. 3.


Perhaps a related reason why defendants seek to avoid the incompetency label other than the indefinite nature of confinement is that, according to studies, persons found incompetent to stand trial stood a significantly greater risk of being ultimately convicted than persons not deemed incompetent. Steadman & Braff, *Effects of Incompetency Determinations on Subsequent Criminal Processing: Implications for Due Process*, 23 CATH. U.L. REV. 754, 757 (1974).

An example of the degree of prejudice the defendant must overcome when he attempts to challenge an incompetency determination is illustrated in the case of one defendant who tried unsuccessfully for eight years to be brought to trial, having filed several petitions each year in his own behalf alleging he had been deprived of due process and his civil and constitutional rights. Despite the prolific and persistent evidence of his ability to deal with legal matters, psychiatrists continued to opine that he could not understand legal matters, a conclusion the courts accepted without discussion. See United States ex rel. Daniels v. Johnston, 328 F. Supp. 100, 102-09 (S.D.N.Y. 1971).


134. The Court concluded that the more lenient commitment standards and more strin-
A response of the Procedures Act to these criticisms and the *Jackson* holding is the incorporation into the common law definition of incompetency\(^\text{135}\) of the requirement that the defendant be found “substantially”\(^\text{136}\) unable to understand the nature of the proceedings or assist in his own defense. In addition to qualifying the generalizations embodied in the common law rule, and providing some guidance to the judiciary, the substantiality requirement suggests legislative sensitivity to criticisms that the common law rule permitted, and was used to obtain forced treatment and confinement regardless of whether the treatment would actually make a defendant more competent to stand trial.\(^\text{137}\) The requirement is apparently intended to decrease unnecessary commitments. Requiring that the defendant be substantially unable to understand the nature of the proceedings may also be a legislative suggestion to the courts to permit trial of a defendant when the degree of competency is slight, and may weaken the entrenched judicial belief that a strong

gent release procedures applicable to criminal defendants compared to other mentally ill persons deprived the defendant of equal protection of the laws and amounted to due process violations where the commitment is based solely on incompetency to stand trial, without a determination that commitment would enable the defendant to regain competency in the foreseeable future. *Id.* at 723-28.

A tragic instance of such confinement was that of a retired Air Force colonel, charged in a first offense with passing bad checks, who was confined in a mental hospital based on the opinion of psychiatrists that the charge resulted from a mental condition brought on by financial reverses. *See* Lynch v. Overholser, 369 U.S. 705 (1962). Unable to see an end to his indefinite confinement, he committed suicide. *See* Arens, *Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch*, 13 CATH. U.L. REV. 3, 38 & n.126 (1964).


135. *Pa. Stat. Ann.* tit. 50, § 7402(a) (Purdon Supp. 1977-1978). Under the 1966 Act, the common law test was broadened to allow the court to consider a wide range of factors in addition to the defendant’s minimal ability to understand and assist in his defense. The statute provided:

> In making such an order, the court shall give due regard to the capacity of such person to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to the proceedings, to understand the nature of the punishment which might be inflicted upon him, to confer with his counsel with reference to such proceedings, to make a rational defense, and the probable effect of the trial on such person’s physical and mental condition.


showing of competency is required. The substantiality requirement therefore appears consonant with the purposes of the competency rule—to protect the defendant from an essentially unfair trial while limiting the effects of a delay in the criminal proceedings.

Following the dictates of Jackson, the Act further requires that once there is a finding of incompetency, the committing court must be reasonably certain that the treatment it orders will help the defendant to attain competency to stand trial. This provision may have little practical effect. It seems unlikely that psychiatrists will admit there is no possibility that the defendant will be helped by some kind of treatment, and unless that opinion is expressly articulated a judicial finding that treatment is feasible seems certain. Furthermore, the less able a defendant is to understand the nature and object of the trial, the greater the likelihood the court will conclude the defendant needs the intensive kind of treatment provided by total institutionalization. These considerations may be partially balanced by statutory provisions requiring periodic review of the patient’s condition and an individualized treatment plan.


139. The section for involuntary treatment provides:

Notwithstanding the provisions of Article II of this Act (emergency and court-ordered civil commitment) a court may order involuntary treatment of a person found incompetent to stand trial but who is not severely mentally disabled, such involuntary treatment not to exceed a specific period of thirty days. Involuntary treatment pursuant to this subsection may be ordered only if the court is reasonably certain that the involuntary treatment will provide the defendant with the capacity to stand trial. The court may order outpatient treatment, partial hospitalization or inpatient treatment.


The 1966 Mental Health-Mental Retardation Act impliedly suggests automatic commitment was the anticipated effect of an incompetency finding. For example, the only way criminal proceedings could resume was if continued confinement was no longer necessary after a finding of incompetency. See PA. STAT. ANN. tit. 50, §§ 4408(a), 4409(a) (Purdon 1969); but see id. § 4408(e) (permitting partial hospitalization of an incompetent defendant). Courts also seem to have presumed confinement was automatic, particularly where the defendant is charged with a violent crime or crimes. See, e.g., Commonwealth v. Bruno, 435 Pa. 200, 255 A.2d 519 (1969).

140. See note 127 supra.

141. After the initial thirty-day treatment allowed for all incompetent defendants, civil commitment is authorized only for specific felonies. See PA. STAT. ANN. tit. 50, § 7304(g) (Purdon Supp. 1977-1978). See also notes 144-50 and accompanying text infra. It has been suggested that the defendant can be examined for incompetency and to determine whether
Although they do not aid in the initial determination of whether confinement is necessary, these provisions at least require the state to periodically justify continued confinement of the individual awaiting trial.

A final restraint imposed on automatic commitment is the Act's identification of specific crimes for which confinement is appropriate. While it clearly indicated that there were due process limitations on confinement of the incompetent defendant, the *Jackson* Court failed to define the type of conduct that would warrant confinement for mental treatment or the maximum time such confinement could be imposed without requiring either release or trial. It did, however, clearly require the commitment to be justified by the defendant's alleged conduct or his asserted future ability to stand trial.142 This latter position is explicitly developed under the Procedures Act; an incompetent defendant is not automatically assumed committable irrespective of the crime for which he is charged. In response to *Jackson*, the legislature created a special sub-group of civil committees whose commitment is essentially justified because of alleged criminal conduct143 involving serious harm to another person. Thus, persons found incompetent to stand trial who are charged with murder,144 involuntary manslaughter,145 aggravated assault,146 kidnapping,147 rape,148 or involuntary deviate sexual intercourse149 may be committed for a period of one year under the civil provisions of the Act.150

Although confinement for one year is considerably less than the period incompetent defendants could be confined in the past, competent defendants awaiting trial for a number of these offenses nor-

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145. *Id.* § 2503.
146. *Id.* § 2702.
147. *Id.* § 2901.
148. *Id.* §§ 3121(1), (2).
149. *Id.* §§ 3123(1), (2).
mally have a right to bail and persons civilly committed for similar conduct may be confined for only ninety days. Thus, the incompetent defendant is not treated substantially the same as the competent defendant or the civil committee. The provision also fails to take sufficient notice of the fact that an incompetent defendant may have important rights to be vindicated within the criminal justice system that are not present in the case of a civil commitment and which may be jeopardized by delay in trial. Finally, the automatic, technical application of commitment for crimes specifically identified may mean that the goal of confinement—enabling the defendant to attain competency—may be ignored.

New procedural safeguards provided incompetent defendants prior to commitment at least partially rectify these problems, since they are designed to ensure fairness in the determination of incompetency. A petition to halt the trial proceedings to determine the question of competency may be made only by the court, Commonwealth, defense, or persons charged with custody of the defendant. In addition, the Act states that an examination shall be ordered by the court where there is a clear question of incompetency.

152. For example, the defendant may want to remove the criminal cloud on his name, or to prevent the loss of exculpatory evidence threatened by a delay of the trial.
153. PA. STAT. ANN. tit. 50, §§ 7402(c),(d) (Purdon Supp. 1977-1978). Under the 1966 Mental Health-Mental Retardation Act, the initial petition for incompetency hearing could be made by "any interested party." See PA. STAT. ANN. tit. 50, §§ 4407, 4408(a) (Purdon 1969). It is possible that a party, such as a relative, although nominally "interested," might have some personal reason for not seeking a trial, and is able to have that personal interest satisfied, while ostensibly acting on behalf of the defendant. The reason generally advanced to allow competency to be raised over the objections of the defendant is that "it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial." Pate v. Robinson, 383 U.S. 375, 384 (1966). However, extending the rule to allow anyone to raise the competency issue may lead to potential abuse, as where the prosecution seeks to have a competency examination as a means of obtaining information about the defendant's capacity at the time of the crime. The need for the incompetency rule may not be as great today; when it was first developed the right to counsel was not available. Thus, it has been argued that defense counsel should be allowed to make the decision to go to trial, where, for example, the maximum criminal penalty for the offense charged would be less than the maximum amount of time necessary to determine competency. See Incompetency, supra note 128, at 467-68.
155. The Act provides no definition of what would constitute a prima facie question of incompetency. At least the court's interest should be aroused either by the nature of the alleged crime or surrounding circumstances, the defendant's prior medical history, or the defendant's conduct during the trial or earlier stages of criminal proceedings. See Pate v. Robinson, 383 U.S. 375, 378-84 (1966).
ordered to be conducted by at least one psychiatrist. During the examination, the defendant must be warned that he does not have to answer any questions or perform any tests, and has the right to have counsel present during the psychiatric interview. As in civil commitment, the defendant is permitted to have his own expert review the conclusions of the court-appointed psychiatrist; if he is indigent, the state must provide funds enabling him to retain an expert. The court must make a determination on the competency issue within twenty days of the hearing, and must find "clear and

156. PA. STAT. ANN. tit. 50, § 7402(e)(2) (Purdon Supp. 1977-1978). The 1966 Act provided that the court could either have the person examined by two physicians, or by a sanity commission composed of two physicians and an attorney. PA. STAT. ANN. tit. 50, § 4408(b) (Purdon 1969). The Procedures Act appears to reflect the belief of the draftsmen that psychiatrists would be able to form sounder opinions and provide better expert testimony at the hearing.


Although waiver of the right to remain silent follows the general procedure in a criminal trial, courts have seldom articulated a rationale for the waiver other than the state's need for the information. Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 HARV. L. REV. 648, 667 (1970).


159. The civil committee is given the "right" to such expert assistance but an incompetent defendant may have it only where he has a substantial objection to the determination of the court-appointed psychiatrist. Compare id. § 7402(f), with id. § 7304(d).

All three of the specific rights granted the defendant in the Act, the right to remain silent, the right to have counsel present during the interview, and the right to expert witnesses, militate against frequently made criticisms that courts overrely on medical opinions although incompetency is essentially a legal question and psychiatrists tend to give disproportionate weight to the defendant's need for treatment. See Incompetency, supra note 128, at 470-71.

convincing evidence" of incompetency in order to commit.161 This substantially modifies prior case law that incompetency could be proven by a preponderance of the evidence.162

In summary, the Procedures Act acknowledges the due process/equal protection limits on automatic confinement and responds to the recognition that automatic confinement may not guarantee the achievement of its stated goals. This acknowledgement is demonstrated by the addition of the substantiality requirement to the common law definition of incompetency, by requiring the courts to determine that treatment is reasonably certain to be successful and to periodically review such plans, and by limiting automatic confinement to specified crimes. Despite somewhat dissimilar treatment, and seemingly inadequate recognition of some rights of the incompetent defendant, procedural safeguards do exist under the Act which prevent a cursory or incompletely based finding of incompetency.

2. Stay of the Proceedings

As discussed above, one result of a determination of incompetency has been the stay of judicial proceedings.163 This result remains, although it has been modified by the Procedures Act which permits the court to hear any legal objections which may be made prior to trial without the personal participation of the defendant.164

161. Id. §§ 7403(a), 7406.
162. The requirement of a fair trial had previously been regarded as so fundamental that the moving party need only show incompetency by a preponderance of the evidence. See Commonwealth v. Davis, 459 Pa. 575, 330 A.2d 847 (1975); Commonwealth v. Kennedy, 451 Pa. 483, 488, 305 A.2d 890, 892-93 (1973) (right to a fair trial and a meaningful defense strikes at the heart of due process; without the ability to consult with counsel, the protection becomes a nullity). The preponderance of the evidence test was criticized in Murel v. Baltimore City Court, 407 U.S. 355, 359 (1972) (Douglas, J., dissenting).
163. Compare Pa. Stat. Ann. tit. 50, § 4409(a) (Purdon 1969), with id. § 7403(b) (Purdon Supp. 1977-1978). But under the 1966 Act, the prosecution was permitted to petition the court to resume the proceedings if the interests of justice required, suggesting the prosecution could move to dismiss or reduce the charge. See id. § 4409(c) (Purdon 1969). Ironically, the defendant was given no similar right, a situation which the Procedures Act corrects.
164. Pa. Stat. Ann. tit. 50, § 7403(b) (Purdon Supp. 1977-1978). While not specified in the Act, it has been suggested that courts should hear pre-trial motions regarding such matters as the insufficiency of the indictment and alibi defenses based on evidence other than the defendant's testimony. Professor Foote argues that this may be true in three different situations: first, where the statute of limitations on the crime has run; second, where there is an unlawful search and seizure or other constitutional infirmity in the prosecution's case; third, where a complete alibi defense can be made that the defendant was elsewhere at the
This provision raises the question of whether the defense should be permitted to raise such preliminary issues as suppression of evidence and to move for a dismissal where such evidence is the only basis for the prosecution’s case. However, even if the criminal charge was dismissed, it is possible the prosecution could establish a sufficient case to commit the defendant under the civil provisions of the Act.

Further protection of the incompetent defendant is provided by limiting the length of the stay of proceedings to the shorter of five years or the maximum sentence that may be imposed for the crime or crimes charged. Moreover, the court may dismiss the charges and order the person discharged if time has affected the criminal proceedings in such a manner that it would be unjust to resume the prosecution.

B. Determination of Criminal Responsibility

Where it appears that the defendant, although competent to stand trial, was so mentally ill at the time of the commission of the crime that he lacked criminal responsibility, the traditional result has been acquittal by reason of insanity because imposition of the time of the crime, proven either by employment or other kinds of records or by testimony of third parties. Foote, supra note 121, at 841.

The bar against defendant’s participation personally in such pre-trial proceedings, however, appears to be contrary to the general purpose of the statutory section to eliminate those cases where the prosecution would be ultimately dismissed anyway. Moreover, adjudication of capacity and competency depends on the context in which the issue is raised; and defendant may be competent or have sufficient capacity to testify for certain purposes, e.g., memory and recollection, but lack sufficient capacity to adequately assist counsel at time of trial. See Developments, supra note 14, at 12-14.

It has been suggested that it would be preferable to allow such pre-trial motions to be made before, not after, the incompetency hearing, in order to give the defendant’s counsel an opportunity to challenge the indictment or raise a defense that would exculpate the defendant. Incompetency, supra note 128, at 468. This would appear consonant with the overall policy of the Act to avoid unnecessary commitments and needless court proceedings.

166. Id. § 7403(f).
167. Id. § 7403(e). It has been asserted that the defendant should be given the opportunity to challenge the validity of the state’s evidence before he is committed in any event. In addition to allowing specific pre-trial motions, a trial on the merits, followed by a determination of incompetency, has been suggested as a second alternative. See Janis, supra note 117, at 737. The serious consequences of increasing the number of criminal trials which would ultimately have to be dismissed has led to the adoption by Wisconsin of a procedure for an abbreviated trial of the state’s evidence, a preliminary hearing where the state must show probable guilt. See State v. McCredden, 33 Wis. 2d 661, 688-71, 148 N.W.2d 33, 37-38 (1967).
deterrent and retributive elements of criminal punishment is not justified.\textsuperscript{168} Under the Mental Health-Mental Retardation Act of 1966, civil commitment of a defendant who lacked criminal responsibility for the crime could be made only after the criminal trial and verdict.\textsuperscript{169} The Procedures Act broadens the discretion of the court in determining when a finding of criminal responsibility can be made. The defendant's criminal responsibility may be considered at an incompetency hearing, at which time the court has the discretion to direct a verdict of acquittal by reason of insanity.\textsuperscript{170} If the court does not find an absence of criminal responsibility at the incompetency hearing, the issue may be raised again at trial,\textsuperscript{171} when the court may permit the issue to be heard separately\textsuperscript{172} and, in a trial by jury, the court may submit the issue of criminal responsibility to a separate jury.\textsuperscript{173} When the defendant is acquitted because he lacked criminal responsibility, the statute then allows the Commonwealth, the defendant, the county administrator, or any other interested party to petition for court-ordered civil commitment.\textsuperscript{174} Finally, once a defendant has been found guilty of a crime, the trial court, in conformity with prior procedure, is permitted to defer sentencing to examine the defendant for mental disability.\textsuperscript{175} The 1966 Act's provisions allowing confinement when sentencing is deferred have been amended to require that the examination be made on an out-patient basis\textsuperscript{176} unless the defendant is committed to a facility under either the emergency\textsuperscript{177} or court-ordered\textsuperscript{178} commitment provisions.

These provisions of the Procedures Act regarding confinement and treatment of the mentally ill charged with a crime again reflect a legislative concern for equal treatment of mentally ill persons. But, as was previously discussed, certain incongruities in the Act

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  \item \textsuperscript{168} Uniform Treatment, supra note 17, at 834.
  \item \textsuperscript{169} PA. STAT. ANN. tit. 50, § 4413 (Purdon 1969).
  \item \textsuperscript{170} Id. §§ 7402(e)(2), (4) (iii), (iv) (Purdon Supp. 1977-1978). This procedure has been criticized because of the tendency of examining psychiatrists to confuse the standards of incompetency and criminal responsibility. Eizenstat, supra note 121, at 389-90.
  \item \textsuperscript{171} PA. STAT. ANN. tit. 50, § 7404(a) (Purdon Supp. 1977-1978).
  \item \textsuperscript{172} Id. § 7404(c).
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id. § 7406.
  \item \textsuperscript{175} Id. § 7405.
  \item \textsuperscript{176} Compare id., with id. § 4407 (Purdon 1969).
  \item \textsuperscript{177} Id. § 7302 (Purdon Supp. 1977-1978).
  \item \textsuperscript{178} Id. § 7304.
\end{itemize}
exist. In creating subclasses of persons subject to treatment, the legislature separates those who have not been criminally charged, but whose actions caused or threaten bodily harm; those criminally charged, but who are incompetent to stand trial; and those who have been found to lack criminal responsibility because of mental disability at the time of the crime and who continue to need treatment as a result of that disability.

The primary effect in terms of confinement exists in the creation of two classes, the mentally ill who are civilly committed subject to confinement for only ninety days, and the mentally ill either competent to stand trial or acquitted of dangerous felonies who may be confined for as long as one year. The rationale of this distinction is undermined by the fact that the decision to civilly commit or bring criminal charges is often simply a matter of prosecutorial discretion. Moreover, subjecting the incompetent defendant to the same minimum period of confinement as the person acquitted by reason of insanity results in the incompetent defendant being treated less fairly than the others. While the person who has been tried has the benefit of a criminal trial where evidence on the factual issue must be proved, the incompetent defendant has no such hearing available to him and the criminal charges alone may justify confinement. Thus, both the person who has been tried and released of criminal liability and the person not tried who has not had factual evidence of his conduct presented in court are subject to deprivations of liberty.

Rationalizing the longer period of confinement for the incompetent defendant on the theory he is being treated fails to take into account the deprivations resulting from an existing criminal charge. The harshness of such deprivation is recognized elsewhere in the Act by the fact that confinement in a mental institution is specifically

179. Id. § 7304(g). Commentators have criticized separate treatment for the mentally ill as unjustified because an accurate prediction of dangerousness is either nearly impossible or grossly overrated; evidence that shows most individuals released from hospitals for the criminal insane have a lower recidivism rate than felony parolees from prisons has also been attacked. See Burt, Of Mad Dogs and Scientists: The Perils of the 'Criminal Insane,' 123 U. PA. L. Rev. 258, 261 (1974); Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 Mich. L. Rev. 1161, 1169 (1974); Ochberg, Mental Health and the Law: Partners in Advancing Human Rights, 123 U. Pa.-L. Rev. 491 (1974).

180. See Pa. Stat. Ann. tit. 50, §§ 7304(b), (g) (Purdon Supp. 1977-1978). For example, the prosecution may have sufficient evidence to prove by the clear and convincing evidence (but not beyond a reasonable doubt) standard that the defendant was responsible for a rape or assault.
credited as time served for any prison sentence and, where the defendant is found incompetent, detention on criminal charges is limited to the maximum sentence that can be imposed for the crime. The technical application of commitment for certain dangerous crimes enumerated in the Act may lead to a justification for automatic commitment without considering the needs of each individual, which the Act was intended to prevent.

C. An Unresolved Issue: The Right to a Speedy Trial

A substantial question which was not dealt with by the legislature is whether an incompetent defendant who objects to an incompetency hearing can assert his right to a speedy trial. The statute does not expressly give the incompetent defendant the right to assert a speedy trial claim, reflecting the long-standing belief that to try a defendant who is incompetent would violate his right to a fair trial, a right regarded as more fundamental than the right to a speedy trial. Pate v. Robinson supports the view that conviction of a defendant while he is incompetent violates due process of law and intimates it may be impossible for an incompetent defendant to waive his right not to be tried. However, in Jackson v. Indiana, the Court suggested that the interests furthered by the right to a speedy trial may require a state proceeding where the state's evidence is tested or the accused would be allowed to prove his innocence. Pate, which appears to establish a general rule, may stand for the more narrow proposition that where evidence of incompetency is before the court during trial, a sua sponte hearing on incompetency must be conducted.

181. See id. § 7401(b).
182. See id. § 7403(f).
187. 383 U.S. at 384.
189. Id. at 740-41, citing with approval People ex rel. Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970) (trial was permitted to go forward where it appeared that there would be no opportunity for the defendant to become more competent and the state had made a reasonable attempt to rehabilitate).
190. 383 U.S. at 378-86. Pate involved a failure of the trial court to raise the issue of competency where medical evidence was presented that the defendant had suffered possible brain damage in an earlier occurrence.
speedy trial rights suggests, contrary to the inferences to be drawn from the language of *Pate*, that the Court may be willing to consider balancing the right to a speedy trial against the possibility that such a trial would be unfair, particularly where there is a long delay or evidence of prosecutorial abuse.

The constitutional confrontation of the defendant's speedy trial and fair trial rights has been squarely addressed by the Pennsylvania Supreme Court only in *Commonwealth v. Bruno*, where delay of trial was justified because its purpose was to treat the defendant in order to afford an opportunity to defend himself. Three justices in *Bruno*, however, thought some accommodation should be made when the defendant asserts his right to a speedy trial while he is technically incompetent. It was noted that the same reasons supporting the right to a speedy trial—an opportunity to remove the criminal cloud on the defendant's name, and to prevent the loss of exculpatory evidence—apply to all criminal defendants whether competent or not.

D. A Suggested Amendment

The Mental Health Procedures Act provides for a limited type of trial during the civil commitment procedures that must occur when the state seeks to confine a defendant for specific crimes. In this

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192. Id. at 204, 255 A.2d at 521.
193. Id. at 215, 255 A.2d at 524 (O'Brien, J., dissenting). Justices Cohen, O'Brien and Roberts indicated that some accommodation should be made to allow the defendant to assert his right to trial. See id. at 213-27, 255 A.2d at 523-30 (dissenting opinions). Justice Pomeroy, agreeing that the statute prohibiting trial of a defendant may invite abuse and be a denial of fundamental fairness to the defendant, stated that the record in the case before the court did not show such abuse. Id. at 213, 255 A.2d at 532-33 (Pomeroy, J., concurring).

The federal courts have almost uniformly held incompetency puts in abeyance any speedy trial rights. See *In re Harmon*, 425 F.2d 916 (1st Cir. 1970) (one year delay no violation); United States *ex rel. Daniels v. Johnston*, 328 F. Supp. 100 (S.D.N.Y. 1971) (eight year delay no violation); Cook *v. Ciccone*, 312 F. Supp. 822 (W.D. Mo. 1970) (eighteen month delay no violation). However, the right to a speedy trial and due process became compelling in the case of extraordinary delay where the incompetent defendant was confined in a maximum security institution for the criminal insane for twenty years. United States *ex rel. von Wolfersdorf v. Johnston*, 317 F. Supp. 66, 68 (S.D.N.Y. 1970). Ironically, in his habeas petition, defendant sought only release from a maximum security facility to an institution for civil committees.

194. The Act provides that civil commitment proceedings may be initiated and the defendant confined for periods longer than ordinary civil committees when he has been charged with violent felonies against another person and found incompetent to stand trial. See notes 143-50 and accompanying text *supra*.
provision, the legislature has drawn a rational distinction, allowing for longer periods of confinement for persons mentally disabled and charged with dangerous felonies than those who are only mentally ill. However, the civil commitment hearing with respect to incompetent defendants is deficient in two aspects. First, the prosecution must prove the occurrence of dangerous conduct (in this case, the felony for which the defendant is charged) only by a clear and convincing standard of proof, rather than by the beyond a reasonable doubt standard which would be required at trial. Second, other incompetent defendants who are not charged with a serious crime and therefore are not civilly committable have no opportunity at all under the Act to test the prosecution’s case against them. It appears that the legislature’s failure to provide the incompetent defendant with a mechanism to assert his right to a speedy trial is a serious flaw in the Act. A suggested amendment to the Procedures Act would be a provision for a hearing where the criminal charge would be dismissed if the defendant could prove his innocence by a preponderance of the evidence. If the defendant failed to establish his burden of proof, the criminal charge would remain, but the results of the hearing would not be determinative of guilt. Although such a hearing could be criticized as not fostering judicial economy, it is suggested that the procedure would actually be utilized in only a minimal number of cases, where the defendant has a substantial defense.

IV. CONCLUSION

When a person is found to be unaccountable for his conduct because of mental illness, it must then be determined what kind of conduct is serious enough to warrant confinement and treatment. The possibilities are almost limitless; the Mental Health Procedures Act permits involuntary confinement for conduct which threatens or results in personal physical harm which might otherwise be categorized as a serious felony. The requirement that there be a showing of potential dangerousness evidenced by a recent overt

195. For example, the kinds of conduct included are felonies, violent felonies, any conduct that would provoke a violent act, any physical violence, or any conduct threatening physical or psychological harm. See Goldstein & Katz, Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 YALE L.J. 225, 235 (1960).
act reduces the possibility that needless confinements will result. In addition, over-reliance on the judgments of medical authorities is partially avoided by the formulation of more concrete guidelines setting forth society's judgment as to the nature of conduct which manifests a potential for harm serious enough to warrant state intervention.

The statute reflects a legislative policy of allowing a mentally ill person to retain the greatest amount of freedom possible and to continue his employment, social associations and family life. The policy of imposing the least restrictive type of treatment on the mentally ill and requiring the state to release non-dangerous persons whom it cannot treat obviates criticism of prior legislation which allowed the purposeless, indefinite confinement of the mentally ill.196 But it also places substantially greater burdens on local mental health centers to provide more intensive care for more people than was previously given.197 To effectuate the policies of the Act the legislature must provide for increased expenditures for such centers.

With regard to the incompetent defendant, the statute merely makes explicit that which was implicit in the 1966 Mental Health-Mental Retardation Act: involuntary confinement in a mental institution is equivalent to an imposition of a criminal sentence when the defendant cannot be tried, even though he has never been found guilty of a crime beyond a reasonable doubt. Unfortunately, the failure of the legislature to completely come to grips with this difficult and complex problem has created a gap in an otherwise precise

196. *See* Burt, *Abolition of Incompetency Pleas*, 40 U. CHI. L. Rev. 66, 67 (1972). There is a related problem that the mentally ill will never be helped and the incompetent defendant will not be able to regain competency within a reasonable time unless the state is willing to spend substantial amounts of funds to make definite commitment provisions effective. *Id.* at 90.

197. State mental health officials estimated 6,000, almost half of the 13,000 persons in mental hospitals, were not sufficiently dangerous to justify custodial confinement under the Act. Valley News Dispatch (Tarentum, Pa.), Sept. 8, 1976, at 31, col. 5 & 6. Even before the potential effect of the new Act had been considered, it had been noted that increasing numbers of persons had been released from mental institutions, spurred largely by mounting costs of institutional care; concurrent federal funds to individuals had created additional burdens on local mental health centers which they were not able to meet. *See* The Wall St. J., Aug. 19, 1976, at 1, col. 1. This trend was apparent in Pennsylvania, where the in-patient population decreased sixteen percent from 1969 to 1972, and an additional thirteen percent from 1972 to 1974. More than half the persons who remained in institutions had been confined for twenty years or more. *See* II Governor's Executive Budget 154 (Milton J. Shapp, Governor of the Commonwealth of Pennsylvania 1974).
and comprehensive legislative scheme. This will result in unequal treatment of mentally ill persons who are subjected to the criminal process.

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