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A STEP TOWARD AUTOMATIC COMMITMENT FOR UNFIT DEFENDANTS—PEOPLE v. LANG

The State of Illinois recognizes different standards for both determining unfitness to stand trial and involuntary commitment, resulting in a number of perplexing problems for the judicial system. A person who has been indicted for a crime and subsequently found unfit to stand trial does not necessarily satisfy the more extreme requirements for civil commitment. Because the state lacks statutory authority to detain such a defendant by incarceration or commitment, its only alternative is to release this potentially dangerous individual into society. The nature of this dilemma is illustrated by Illinois' fourteen-year struggle to reconcile its unfitness and commitment procedures in an effort to accommodate Donald Lang, an illiterate deaf mute who was twice charged with murder but was determined to be unfit to stand trial. The Illinois Supreme Court, in People v. Lang, solved the dilemma by holding that all persons found to be unfit to stand trial, other than those whose unfitness is due to a solely physical condition, shall be classified as mentally ill. Pursuant to the new Mental Health and Developmental Disabilities (MHDD) Code, a finding of both mental illness and dangerousness is essential for civil commitment. As a result of the Lang decision, however, all unfit defendants other than those with purely

1. ILL. REV. STAT. ch. 38, § 1005-2-1(a) (1977). A defendant is unfit to stand trial if a mental or physical condition renders him or her unable to understand the nature and purpose of the proceedings or to assist in his or her defense. Id.

2. ILL. REV. STAT. ch. 91½, § 1-119 (Supp. 1978). A person will be committed involuntarily if he or she is mentally ill and is either expected to inflict physical harm on himself or herself or another, or is unable to provide for personal physical needs. Id.


5. To assure the administration of due process, trial, conviction, and sentencing are prohibited when a defendant is determined to be unfit. ILL. REV. STAT. ch. 38, § 1005-2-1(a) (1977). See notes 15-17 and accompanying text infra. The defendant, therefore, must either be civilly committed under the authority and criteria set forth in the present civil commitment statute or be released on bail or recognizance. Id. § 1005-2-2(a). See note 17 infra.


7. Id. at 327, 391 N.E.2d at 356.


physical disabilities, will be committed solely upon a finding of dangerousness.\textsuperscript{10}

Development of the law dealing with unfit defendants and its relationship to the civil commitment procedure are examined in this Note. An analysis of the \textit{Lang} court’s rationale and criticism of both the court’s reliance on the legislative intent underlying the new civil commitment statute and its shift in emphasis from the mental illness to the dangerousness requirement is submitted. It is suggested that the court’s interpretation of the term “mentally ill” as used in the MHDD Code may constitute equal protection and due process violations. Finally, the impact of the \textit{Lang} decision and suggestions for radical reform in the laws pertaining to unfit defendants are presented.

**BACKGROUND**

**Illinois’ Unfitness and Civil Commitment Provisions**

The United States Supreme Court has held that trying and sentencing an incompetent\textsuperscript{11} defendant violates the due process clause.\textsuperscript{12} Incompetency refers to a defendant’s ability to consult with his or her attorney with a reasonable degree of rational understanding and also to have a rational and factual understanding of the proceedings.\textsuperscript{13} Most states, including Illinois, have incorporated this test for incompetency into their unfitness statutes.\textsuperscript{14}

Under Illinois’ present statutory scheme, a defendant is unfit to stand trial if a mental or physical condition renders the individual unable to understand...
the nature and purpose of the proceedings or to assist in the defense. The unfitness statute further requires the court to order a hearing to determine if the unfit defendant should be hospitalized in accordance with the civil commitment statute. If the defendant is not hospitalized, the court must order a release on bail or recognizance.

Prior to January 1, 1979, an Illinois citizen could be committed involuntarily only if the requirements set forth in the Mental Health Code were met. A person was subject to commitment, classified as "in need of mental treatment," if he or she was afflicted with a mental disorder and, as a result of that disorder, was expected physically to injure himself or herself or another, or was unable to provide for personal physical needs.

Under the new civil commitment statute, the MHDD Code, a person will be committed involuntarily if he or she is mentally ill rather than


The present unfitness statute, supra note 1, replaced the term "competence to stand trial" with "fitness." The latter term refers only to a person's ability to function within the context of a trial. Council Commentary, Ill. Ann. Stat. ch. 1005-2-1 (Smith-Hurd) (1973) [hereinafter cited as Council Commentary]. Competency, on the other hand, is a mental health term used when determining if commitment is necessary. Id. Furthermore, the term competency excludes physical fitness. Id.

The question of a defendant's fitness can be raised before or during the trial by either the state, the defendant, or the court. Ill. Rev. Stat. ch. 38, § 1005-2-1(b) (1977). If raised before, the question is determined by either the court or a jury upon a motion by either the defendant, the state, or the judge; if the question is raised after the trial has commenced, the court decides. Id. § 1005-2-1(d). If requested by the state or the defendant, the court shall appoint expert(s) to examine the individual and testify regarding the defendant's fitness. Id. § 1005-2-1(g). The party raising the question has the burden of going forward with the evidence. If the court raises the question, the state must carry the burden. Id. § 1005-2-1(j). This latter provision has been held to be unconstitutional to the extent that it places the ultimate burden on the defendant to prove his or her unfitness. People v. McCullum, 66 Ill. 2d 306, 362 N.E.2d 307 (1977). See generally Note, Illinois Fitness for Trial: Processes, Paradoxes, Proposals, 6 Loy. Chi. L.J. 678 (1975) [hereinafter cited as Fitness for Trial].


17. Id. The Unified Code of Corrections provides that if a defendant is not hospitalized pursuant to the commitment hearing, the Department of Mental Health and Developmental Disabilities must petition the trial court to release him or her on bail or recognizance. Id. A court, however, may impose conditions on his or her release that it finds appropriate. People ex rel. Martin v. Strayhorn, 62 Ill. 2d 296, 301-02, 342 N.E.2d 5, 8-9 (1976). See also People v. Dublin, 63 Ill. App. 3d 387, 380 N.E.2d 31 (2d Dist. 1978); People v. Patterson, 54 Ill. App. 3d 931, 370 N.E.2d 819 (1st Dist. 1977); People v. Theim, 52 Ill. App. 3d 160, 367 N.E.2d 267 (1st Dist. 1977). Nevertheless, a court may not set excessively high bail on the belief that the unfit defendant is dangerous. People v. Ealy, 49 Ill. App. 3d 922, 930-34, 365 N.E.2d 147, 155-57 (1st Dist. 1977).


19. Id.

afflicted with a mental disorder. A person must be dangerous, a criterion similar to that used in the Mental Health Code. The "dangerous" requirement is satisfied if, as a result of the mental illness, a person is expected to inflict physical harm upon himself or herself or another, or is unable to provide for personal physical needs. In other words, one who is mentally ill and dangerous as described by the MHDD Code will be classified as a person subject to involuntary commitment.

Prior United States Supreme Court Cases
Dealing with Unfitness and Commitment

Prior to 1972, most jurisdictions, including Illinois, automatically committed all unfit defendants to a mental institution until competency was restored. This practice was highly criticized because defendants often were confined for a substantially longer period than they would have been if they had been tried and sentenced. Furthermore, in many states, time spent in an institution did not proportionately reduce any subsequent sentence the defendant may have received upon attaining fitness.

As a result, the United States Supreme Court, in Jackson v. Indiana, held these automatic commitment procedures violative of the equal protec-

21. Id. § 1-119.
22. Id.
23. Id.
24. Id.
26. See Gobert, supra note 13, at 662.
27. See People v. Lang, 76 Ill. 2d at 323, 391 N.E.2d at 354, American Bar Foundation, Mental Disability and the Criminal Law 76-77 (A. Matthews 1970) [hereinafter cited as Matthews]; B. Ennis, Prisoners of Psychiatry, chs. 1-3 (1972).

In order to avoid the possibility of a life sentence in a mental institution, the defendant's attorney may fail to raise the issue of unfitness. Lang's attorney offered to waive Lang's right not to be tried while unfit in order to avoid indefinite commitment that the defense believed would result in a life sentence. People v. Lang, 76 Ill. 2d at 317, 391 N.E.2d at 351. Logically, though, one cannot say that a defendant is incompetent to stand trial but capable of knowingly waiving his or her right to have the court determine capacity to stand trial. Pate v. Robinson, 383 U.S. 375, 384 (1966). See generally Gobert, supra note 13, at 662-67.


29. 406 U.S. 715 (1972). The Jackson case involved a mentally defective deaf mute who was incapable of communication except through limited sign language. He had been found unfit to stand trial for two robbery indictments. Evidence established that the defendant would probably never attain competency. Id. at 719. As a result of his unfitness, Jackson had been automatically committed under Indiana's criminal commitment statute. Pursuant to this provision, he was to have been confined in a mental institution until sanity was restored. Id. at 717-19.
tion and due process clauses of the United States Constitution. The Court found that the equal protection clause requires that unfit defendants be committed and released pursuant to the same standards and procedures as those employed for all other citizens.\textsuperscript{30} It noted that criminal charges alone cannot justify less substantive and procedural protection against indefinite commitment than that available to all others.\textsuperscript{31} The\textit{ Jackson} Court further held that the due process clause forbids detention of a person solely because he or she is unfit to stand trial,\textsuperscript{32} but permits detention of an unfit defendant for a reasonable period of time to determine if there is a substantial probability that he or she will attain the capacity necessary to stand trial in the foreseeable future.\textsuperscript{33} If the defendant will not become fit to stand trial in the foreseeable future, the state must either civilly commit him or her as it would any other citizen, or it must release the unfit defendant.\textsuperscript{34} Finally,\textit{ Jackson} held that the due process clause mandates that the nature and duration of commitment be reasonably related to the purpose for which the individual is committed\textsuperscript{35} and demanded that any commitment be justified by progress toward the goal of fitness.\textsuperscript{36}

These due process requirements suggest that there may be a constitutional right to treatment for persons involuntarily committed.\textsuperscript{37} Proponents of this right allege that an institutionalized person must be given appropriate treatment for the condition for which he or she was compulsorily committed\textsuperscript{38}

\footnote{For a discussion of the\textit{ Jackson} case, see generally Gobert,\textit{ supra} note 13; Note Pretrial Mental Commitment of the Accused, 33\textit{ LA L. REV.} 456 (1973); Note, Remedies for Individuals Wrongly Detained in State Mental Institutions Because of Their Incompetency to Stand Trial: Implementing\textit{ Jackson} v. Indiana, 7\textit{ VAL. U. L. REV.} 203 (1973).}

\footnote{30. 406 U.S. at 730. The Court noted that Jackson might not have been committable under Indiana's civil commitment standards. Furthermore, it was unconstitutiona to subject the defendant to more stringent release criteria than the civil counterpart.\textit{id.} at 727-29.}

\footnote{31.\textit{id.} at 724. The\textit{ Jackson} Court relied on\textit{ Baxstrom} v.\textit{ Herold}, 383 U.S. 107, 111-12 (1966), which held that no conceivable basis exists for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments. 406 U.S. at 723-24.}

\footnote{32. 406 U.S. at 731.}

\footnote{33.\textit{id.} at 738. The Court referred to this as the rule of reasonableness developed by Greenwood v. United States, 350 U.S. 366 (1956), and subsequent lower federal court decisions. 406 U.S. at 732-33. Neither\textit{ Jackson} nor Illinois' unfitness provision specified what length of time would be reasonable.\textit{But see} Illinois\textit{JUDICIAL CONFERENCE}, Report 42 (1976) (recommending that a court conduct a hearing within thirty days of the entry of an order finding unfitness to determine the probability that the defendant will attain fitness within one year)\cite{JUDICIAL CONFERENCE}.}

\footnote{34. 406 U.S. at 738.}

\footnote{35.\textit{id.}}

\footnote{36.\textit{id.}}

\footnote{37. The due process and cruel and unusual punishment clauses form the basis of arguments in support of this right. Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). See generally\textit{ AMERICAN BAR FOUNDATION, 2 MENTAL DISABILITY LAW REPORTER} 108-17, 625-26 (1978)\cite{MDLR}.}

\footnote{38. See, e.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); 4\textit{ PRESIDENT'S COMMISSION ON MENTAL HEALTH, TASK PANEL REPORT} 1420-30 (1978)\cite{TASK PANEL REPORT};\textit{ COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, NATIONAL ASS'N OF ATTORNEYS GENERAL, THE RIGHT TO TREATMENT IN MENTAL HEALTH LAW} (1976).}
and that a person may not be committed in the absence of available effective treatment.\textsuperscript{39} The United States Supreme Court, in \textit{O'Connor v. Donaldson},\textsuperscript{40} declined to decide whether \textit{Jackson} ensured mentally ill persons a constitutional right to treatment.\textsuperscript{41} The Court did hold, however, that a state may no longer civilly commit a person solely on a finding of mental illness.\textsuperscript{42} The question concerning what other requirement(s) must be satisfied in order constitutionally to commit a citizen was left unanswered in \textit{Donaldson}.\textsuperscript{43} Lower federal court decisions, however, have suggested that a finding of dangerousness may be necessary.\textsuperscript{44} This is the legal climate that the Illinois Supreme Court encountered when deciding \textit{People v. Lang}.\textsuperscript{45}

\textbf{People v. Lang}

\textit{Lang's Unique Encounter with the Illinois Judicial System}

In 1965, Donald Lang was indicted for murder\textsuperscript{46} and, subsequently, found unfit to stand trial because of a permanent mental and physical impairment.\textsuperscript{47} As a result of this determination, he was institutionalized indef-

\textsuperscript{39} Jackson v. Indiana, 406 U.S. at 738, demands that a person's continued commitment be justified toward the goal of fitness. \textit{See also} the materials cited at note 38 \textit{supra}.

\textsuperscript{40} 422 U.S. 563 (1975).

\textsuperscript{41} \textit{Id.} at 573.

\textsuperscript{42} \textit{Id.} at 575. Donaldson had been committed as a paranoid schizophrenic for fifteen years in a Florida state mental hospital for care, maintenance, and treatment. There was evidence that the patient was not a danger to others. Evidence also showed that his commitment offered an enforced custodial care rather than a program designed to alleviate or cure his illness. Despite his requests to be released and the hospital's authority to do so, the hospital superintendent refused to release him. \textit{Id.} at 565-69.


\textsuperscript{43} The Court expressly declined to decide whether, when, or by what procedures a state may commit a citizen. In addition, the Court did not specify if the grounds generally advanced by contemporary statutes could justify commitment. These grounds included prevention of injury to others, insurance of the patient's survival and safety, and treatment of the illness. 422 U.S. at 573-74.


\textsuperscript{45} 76 Ill. 2d 311, 391 N.E.2d 350 (1979).

\textsuperscript{46} \textit{Id.} at 317, 391 N.E.2d at 351.

\textsuperscript{47} Pursuant to a hearing on the issue of Lang's physical competency, the jury returned a verdict holding the defendant incompetent to stand trial. \textit{People v. Lang}, 376 Ill. 2d 75, 77, 224
initely under the authority of the former unfitness statute providing for automatic commitment until competency was attained.\(^{48}\) Seeking Lang's release, his attorney filed a petition for a writ of habeas corpus, contending that a person cannot be imprisoned for life without having been convicted at a trial.\(^{49}\) In *People ex rel. Myers v. Briggs*,\(^{50}\) the Illinois Supreme Court granted the relief requested in Lang's petition\(^{51}\) and held that, despite a defendant's handicaps, a person facing indefinite commitment should be given the opportunity to have his or her guilt or innocence determined.\(^{52}\) Consequently, Lang's case was remanded for trial,\(^{53}\) but the charges were dismissed because of the death of the principal witness.\(^{54}\)

Within six months of his release, Lang was charged with a second murder.\(^{55}\) Under the *Myers* rationale, the defendant was granted another trial in which he was convicted and sentenced to fourteen to twenty-five years imprisonment.\(^{56}\) The appellate court reversed the conviction, stating that no trial procedures could effectively compensate for Lang's particular handicaps.\(^{57}\) Thereafter, at a fitness hearing, the trial court found Lang unfit to stand trial.\(^{58}\) At a commitment hearing, however, the trial judge concluded that Lang was not in need of mental treatment and, therefore, was not subject to civil commitment.\(^{59}\) Pursuant to the Unified Code of Corrections, N.E.2d 839, 839 (1967). At the request of the State's Attorney, another hearing was held in which the defendant was determined also to be mentally incompetent. *Id.* at 78-79, 224 N.E.2d at 840.

\(^{48}\) 76 Ill. 2d at 317, 391 N.E.2d at 351. The statute in effect at the time of the incompetency verdicts provided for automatic commitment upon the determination of a defendant's unfitness to a mental health facility until competency was attained. *Ill. Rev. Stat. ch. 38, § 104-3(a) (1967) (current version at *Ill. Rev. Stat. ch. 38, § 1005-2-2(a) (1977)).*


\(^{50}\) 46 Ill. 2d 281, 263 N.E.2d 109 (1970).

\(^{51}\) *Id.* at 285, 263 N.E.2d at 112.

\(^{52}\) *Id.* at 288, 263 N.E.2d at 113. The court primarily relied on Klopfer v. North Carolina, 386 U.S. 213 (1967), which held that indefinitely postponing a criminal prosecution violates the sixth and fourteenth amendments, and Regina v. Roberts, [1953] 2 A11 E.R. 340, in which the court awarded an unfit deaf mute defendant a trial in which the defense attorney believed he could obtain a verdict of not guilty. People *ex rel. Myers* v. Briggs, 46 Ill. 2d 286-88, 263 N.E.2d at 112-13. The *Myers* court held that it must grant an unfit defendant the opportunity to establish his or her innocence to avoid the "grave injustice of detaining as a criminal lunatic a man who was innocent. . . ." *Id.* at 288, 243 N.E.2d at 113, quoting Regina v. Roberts, [1953], 2 A11 E.R. 340. The *Myers* court further held that the trial of a handicapped defendant should provide him or her with compensating procedures to insure constitutional rights. *Id.* at 287, 263 N.E.2d at 113.

\(^{53}\) 76 Ill. 2d at 317, 391 N.E.2d at 351.

\(^{54}\) *Id.*

\(^{55}\) *Id.* The facts of the second murder were similar to those of the first murder.

\(^{56}\) 76 Ill. 2d at 318, 391 N.E.2d at 352.

\(^{57}\) People v. Lang, 26 Ill. App. 3d 648, 653, 325 N.E.2d 305, 308 (1st Dist. 1975).

\(^{58}\) 76 Ill. 2d at 318, 391 N.E.2d at 352.

\(^{59}\) People v. Lang, 62 Ill. App. 3d 688, 692, 378 N.E.2d 1106, 1111 (1st Dist. 1978). Lengthy hearings were conducted to ascertain whether the defendant's mental state required confinement under the civil commitment standard. Three expert witnesses testified that Lang was mentally retarded and likely to be dangerous to himself or others in the future. *Id.* at
the court imposed conditions for bail and ordered that Lang continue in a training program and reside in a secure setting.\footnote{60} On appeal to the Illinois Supreme Court, the public defender contended that because Lang could not be tried, civilly committed, or meet the impossible conditions of bail, the charges should be dismissed.\footnote{61} The State's Attorney responded that the defendant presented a serious danger to society and should be detained.\footnote{62} On the other hand, Lang's conservator sought a writ of mandamus compelling the Department of Mental Health and Developmental Disabilities to accept the defendant for voluntary admission.\footnote{63} The Department, however, claimed that it lacked statutory authority to treat persons who were not in need of mental treatment.\footnote{64} In response to the various requests advanced by the State's Attorney, Lang's conservator, and the Department of Mental Health and Developmental Disabilities, the Illinois Supreme Court decided \textit{People v. Lang}.\footnote{65}

\textbf{The Decision}

In \textit{People v. Lang},\footnote{65} the Illinois Supreme Court resolved the problem of determining the disposition of unfit defendants who are not subject to civil commitment. It held that all unfit defendants, other than those found unfit solely by reason of a physical condition, shall be considered mentally ill.\footnote{66} To reach its decision, the \textit{Lang} court primarily relied on the enactment of the new civil commitment provision and the legislative intent underlying this new statute.\footnote{67} The court further justified its decision by noting its

\footnote{60. 76 Ill. 2d at 320, 391 N.E.2d at 353. Lang was discharged from the Department facility and placed in jail where he remained without any training. The Director of the Department was ordered in a writ of mandamus to create and implement an adequate treatment program for the defendant. \textit{Id.}}

\footnote{61. 76 Ill. 2d at 321, 391 N.E.2d at 353.} Lang's conservator claimed that he was unable to locate a training program that would accept the defendant because of the pending murder charges or to persuade the Department to provide treatment. \textit{Id.}

\footnote{62. \textit{Id.}}

\footnote{63. \textit{Id.}}

\footnote{64. \textit{Id.}}

\footnote{65. 76 Ill. 2d 311, 391 N.E.2d 350 (1979).}

\footnote{66. \textit{Id.} at 327, 391 N.E.2d at 356. See notes 20-24 and accompanying text \textit{supra}.}

\footnote{67. \textit{Id.} at 326, 391 N.E.2d at 356.}
compliance with the dictates of Jackson, and the protection of defendants' rights by procedural safeguards provided in the commitment and unfitness statutes. Nevertheless, the decision may be criticized for its failure to adhere to the legislative intent and for its possible equal protection and due process violations.

1. The Court's Use of Legislative Intent

In reaching its decision, the Lang court first had to close the gap between the commitment and the unfitness standards. To achieve this, the court essentially relied on the enactment of a new civil commitment provision, the MHDD Code, and the legislative intent underlying this statute. The court noted that, in the past, the problem of an unfit but uncommittable defendant resulted from a finding that he or she was not afflicted with a mental disorder. This conflict, the court reasoned, had been alleviated by the MHDD Code and its requirement that a person suffer from a mental illness rather than from a mental disorder. Therefore, it was unnecessary for the court to utilize different standards for determining unfitness to stand trial and mental illness.

The court relied on the legislative intent recorded in the Report of the Governor's Commission for Revision of the Mental Health Code of Illinois (Report). The court noted that the Report specifically indicated that the Commission had left the term "mentally ill" undefined so that courts could formulate a definition on a case-by-case basis to avoid a broad or circular definition. Given this authority, the Lang court construed the term to encompass all unfit defendants except persons whose only handicap is physical.

In essence, the Lang court has insured that virtually all unfit defendants will be classified as mentally ill for commitment purposes unless their hand-

68. Id. at 328, 391 N.E.2d at 356-57.
69. Id. at 328-30, 391 N.E.2d at 357.
70. See notes 1-4 and accompanying text supra.
71. ILL. REV. STAT. ch. 91½, §§ 1-100 to 6-107 (Supp. 1978).
72. 76 Ill. 2d at 326, 391 N.E.2d at 356.
73. Id. at 324, 391 N.E.2d at 355. See notes 18-19 and accompanying text supra.
75. 76 Ill. 2d at 326-27, 391 N.E.2d at 356.
76. Id. at 326, 391 N.E.2d at 356.
77. GOVERNOR'S COMMISSION FOR THE REVISION OF THE MENTAL HEALTH CODE OF ILLINOIS, REPORT (1976) [hereinafter cited as REPORT].
78. 76 Ill. 2d at 326, 391 N.E.2d at 356. The Report provides that:
That term is left undefined as in prior codes, largely because any definition which could be made legally explicit would necessarily be so broad or circular as to preclude accurate application. By not providing an explicit statutory definition, a common law definition fashioned by the courts on a case-by-case basis is deemed to be preferable as it has been in the past.
79. 76 Ill. 2d at 327, 391 N.E.2d at 356.
icap is purely physical. To establish this proposition, however, it first must be noted that the Illinois Supreme Court has recognized that it is difficult and perhaps impossible to distinguish between physical and mental or psychological handicaps.80 Secondly, a well-trained psychiatrist "can manipulate any set of facts to sustain almost any conclusion" about a person.81 Undoubtedly, therefore, the courts, armed with the ability to classify all unfit defendants as mentally ill, will do so in an effort to avoid the type of conflict that arose in Lang's situation.82 If a court should fail to arrive at this conclusion, it would find itself contradicting the Lang court's intention to resolve the problem of determining the disposition of the unfit but uncommitatable defendant.83

Finally, the Lang court failed to consider that, in actuality, the new MHDD Code was not intended to produce substantive changes in the civil commitment standard.84 Although the court noted85 that the Mental Health Code required a person to be afflicted with a mental disorder,86 while the MHDD Code mandates that the person be mentally ill,87 the court did not explain how this change in the language, from disorder to ill(ness), actually could have altered the standard. In fact, past judicial opinions have suggested that the terms mental illness and mental disorder are synonymous.88 In addition, the Lang court failed to consider the language in the Report indicating that a change in the substantive meaning of the

80. People ex rel. Myers v. Briggs, 46 Ill. 2d at 286, 263 N.E.2d at 112. Even the "experts" who examined Lang disagreed on whether he was mentally defective. See note 59 supra.


82. One author has noted that a state will most likely stretch its civil commitment statute in order to successfully confine an incompetent defendant. Burt & Morris, A Proposal for the Abolition of the Incompetency Plea, 40 U. Chi. L. Rev. 66, 71 (1972) [hereinafter cited as Burt & Morris].

83. The court intended to resolve the question that has "heretofore confounded court and counsel," that is, the disposition of the unfit but uncommitatable defendant. 76 Ill. 2d at 328, 391 N.E.2d at 356. Unless the court were to find all unfit defendants to be mentally ill, the problem would remain unsolved.

84. In the new commitment statute, the phrase "subject to involuntary admission" replaces the phrase "in need of mental treatment." This change was made in order to avoid confusion between the legal effects of classification and the common usage of the latter phrase. REPORT, supra note 77, at 14.

85. 76 Ill. 2d at 326, 391 N.E.2d at 356.


88. In In re Whitehouse, 56 Ill. App. 3d 245, 371 N.E.2d 990 (5th Dist. 1977), the court used the terms mental disorder and mental illness interchangeably. Although ordering commitment under the Mental Health Code, the court, in In re Dukes, 57 Ill. App. 3d 618, 620, 373 N.E.2d 722, 724 (1st Dist. 1978), found that the person was suffering from a mental illness. See also In re Garcia, 59 Ill. App. 3d 500, 375 N.E.2d 557 (1st Dist. 1978); In re Sciara, 21 Ill. App. 3d 889, 316 N.E.2d 153 (1st Dist. 1974).
question was not intended. Clearly, the Lang court's rationale that the state has been relieved of its burden to demonstrate an affliction with a mental disorder contradicts this evidence and legislative intent.

2. Emphasis on the Dangerousness Requirement

Although both mental illness and dangerousness are mandated by the involuntary commitment provision, the Lang court shifted its emphasis to what it believed to be the more important condition, that of dangerousness. The court noted that prior courts focused primarily on the nature of the mental condition and failed to consider adequately the dangerousness criterion. Further, the court justified minimizing the importance of litigating the exact nature of the defendant's mental condition by citing the legislative removal of the phrase "afflicted with a mental disorder" from the involuntary commitment statute. Finally, the court relied on the United States Supreme Court's holding in O'Connor v. Donaldson that mental illness alone cannot constitutionally justify involuntary commitment. The Lang court reasoned, therefore, that focusing on the dangerousness requirement would satisfy the mandate of Donaldson.

Rather than shifting the emphasis from the mental condition to the dangerousness criterion, however, the Lang court has virtually eliminated the mental illness requirement from the commitment standard for unfit defendants. It has been noted that mental illness is, at best, a vague standard. Therefore, it can be argued that a court should spend more time and give more weight to the determination of dangerousness rather than debating the exact nature of a mental condition. The Lang decision, however, does not produce this result despite its language limiting the holding.
to defendants who are unfit due to other than a solely physical handicap. In practice, virtually all unfit defendants may be committed under Lang upon proof of dangerousness. This interpretation is not only contrary to a plain reading of the civil commitment statute, but also contrary to the case law on which the court relies.

Furthermore, the dangerousness criterion is almost certain to be satisfied by virtue of the indictment in the case of an unfit defendant. A prior Illinois court stated that the crime for which the defendant is being held can be the basis of the medical opinion that the person is dangerous. It also has been noted that the dangerousness criterion is little more than a vague standard. Furthermore, dangerousness is usually overpredicted.

98. See notes 80-83 and accompanying text supra.

99. The Lang court primarily relied on O'Connor v. Donaldson, 422 U.S. 563 (1975), and Jackson v. Indiana, 406 U.S. 715 (1972). In neither of these cases was the mental illness requirement as defined in the respective civil commitment statute waived. In particular, Jackson requires the state to establish that the defendant satisfies all the requirements mandated by the civil commitment statute. Id. at 727-28, 730.

100. People v. Sansone, 18 Ill. App. 3d 315, 323, 309 N.E.2d 733, 739 (1st Dist. 1974) (commitment must be based on explicit medical opinion regarding the patient's future conduct); People v. Bradley, 22 Ill. App. 3d 1076, 1084, 318 N.E.2d 267, 273 (1st Dist. 1974) (criminal charges may provide the basis for the medical opinion).

In Lang, the court justified the finding of dangerousness by stating that there is substantial evidence of the defendant's dangerous traits. 76 Ill. 2d at 331, 391 N.E.2d at 358. The court considered the brutality of the murder for which the defendant was being held and awaiting trial as evidence of dangerousness. Id. The appellate court reversed Lang's conviction because no trial procedures could compensate for his disabilities. See note 57 and accompanying text supra. Nevertheless, the Illinois Supreme Court reasoned that the trial established that he had committed the murder. 76 Ill. 2d at 331, 391 N.E.2d at 358. Therefore, the conviction was used as evidence to commit the defendant. This rationale conflicts with a prior Illinois court decision, People v. Sanders, 59 Ill. App. 3d 650, 375 N.E.2d 921 (5th Dist. 1978), holding that a person accused of a crime has a right to a fair trial. More importantly, the Lang court's rationale conflicts with the well known principle that a person is innocent until proven guilty, and the Illinois Constitution that states that no person shall be deprived of life, liberty, or property without due process. Ill. Const. art. I, § 2 (1970).

Commentators, as well as a number of courts, have suggested that a finding of dangerousness must be based on recent overt conduct or behavior. For a survey of existing law indicating this proposition see Overt Dangerous Behavior, supra note 44; TASK PANEL REPORT, supra note 38, at 1148-49; JUDICIAL CONFERENCE, supra note 33, at 44-46.


101. Psychiatrists reach their conclusions about dangerousness, diagnoses, need for treatment, and mental illness through vague and subjective standards. A psychiatrist "can manipulate any set of facts to sustain almost any conclusion about people that they examine." Hearings, supra note 81, at 305. Furthermore, these experts often are confused about the content of the legal standard and the purpose for the examination. Matthews, supra note 27, at 85. For a discussion of the role of psychiatric experts in commitment proceedings see note 111 infra.

102. The trial judge, in People v. Ealy, 49 Ill. App. 3d 922, 365 N.E.2d 149 (1st Dist. 1977), noted that a court will believe a doctor who says a man is dangerous despite testimony from another doctor who says that the same person is not dangerous. Id. at 927, 365 N.E.2d at 153 (emphasis in original).
importantly, the *Lang* court suggested that unless a defendant proves his or her innocence at an "innocent only" hearing, the attending criminal offense can establish dangerousness for involuntary commitment purposes.\(^{103}\) Therefore, the *Lang* court has added support to the proposition that unfit defendants can be found dangerous by reason of the criminal charge.

3. *Compliance with Jackson*

The *Lang* court reasoned that its interpretation of the commitment provision complied with the dictates of *Jackson v. Indiana*.\(^ {104}\) The *Lang* court noted that its decision will not cause a defendant to be held indefinitely solely because he or she is found unfit to stand trial.\(^ {105}\) It stated that if a court establishes that a defendant is both dangerous and unfit by reason of a condition that is not solely physical, he or she will be committed according to the provisions of the civil commitment statute.\(^ {106}\) Without such a determination, the court added, the defendant would be released.\(^ {107}\) It appears, however, that the *Lang* decision violates the equal protection and due process requirements as set forth in *Jackson*. First, *Jackson* interpreted the equal protection clause as a demand that unfit defendants be committed and released pursuant to the same standards and procedures as those employed for all other citizens.\(^ {108}\) The *Lang* decision, on the other hand, allows courts to apply different standards to commit two classes of people—one standard to commit those accused of committing a crime and another standard for all other persons. The mental illness requirement must be established for the latter group by the standards set forth in the MHDD Code.\(^ {109}\) For the former class, however, the mental illness criterion can be satisfied by establishing that the defendant is unfit, a different standard than that set forth in the Unified Code of Corrections.\(^ {110}\) In addition, the *Lang* court permits different procedures to be utilized to commit these two classes of persons. While the mental condition of persons who have not been accused of committing a crime is determined at a commitment hearing where a qualified expert must testify as to that person's mental health,\(^ {111}\) an unfit

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\(^{103}\) 76 Ill. 2d at 330, 391 N.E.2d at 358.

\(^{104}\) Id. at 328, 391 N.E.2d at 356-57.

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) 406 U.S. at 730.


\(^{111}\) Ill. Rev. Stat. ch. 91½, § 3-807 (Supp. 1978). See MDLR, supra note 37, at 625 (a California study "revealed that a majority of judges classified their function in civil commitment
defendant is said to be mentally ill without having been given a commitment hearing\(^{112}\) and possibly without an expert's examination and subsequent testimony as to his or her mental health.\(^{113}\) More importantly, an unfit defendant who has been accused of committing a violent crime is certain to be classified as mentally ill\(^{114}\) and dangerous,\(^{115}\) unlike his or her civil counterpart. Thus, because criminal charges alone cannot justify less substantive and procedural protection against indefinite commitment than that available to all others,\(^{116}\) the *Lang* decision violates the equal protection clause.

Secondly, *Lang* violates the due process mandates that an unfit defendant cannot be held solely as a result of his or her unfitness\(^{117}\) and that the nature and duration of the commitment must be reasonably related to the purpose for which the individual is committed.\(^{118}\) Pursuant to the *Lang* decision, a person can be committed solely as a result of an indictment and a subsequent determination of unfitness to stand trial.\(^{119}\) This sequence of events parallels the statutory scheme that was held unconstitutional in *Jackson*.\(^{120}\) In addition, the *Lang* court demands involuntary commitment regardless of the *Jackson* requirement that commitment be justified by progress toward the goal of fitness\(^{121}\) or be reasonably related to the purpose for which the person is committed. The ruling encompasses and facilitates the commitment of permanently handicapped individuals, regardless of the fact that attempts to correct the condition would be futile.\(^{122}\) *Jackson* and the

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\(^{112}\) The defendant is given a hearing to determine if he or she is fit to stand trial. [I.L. Rev. Stat. ch. 38, § 1005-2-1 (1977)]. If the individual is found to be unfit other than for a solely physical condition, he or she is automatically presumed to be mentally ill under the rationale of *Lang*, 76 I.I. 2d at 327, 391 N.E.2d at 356. Thus, this issue is not relitigated and decided by a jury at a commitment hearing.

\(^{113}\) In the civil commitment hearing, a finding of mental illness must be based upon medical opinion. People v. Sansone, 18 I.I. App. 3d at 323, 309 N.E.2d at 739. See, e.g., In re Doe, 56 I.I. App. 3d 1052, 1057, 372 N.E.2d 866, 869 (1st Dist. 1978); People v. Williams, 47 I.I. App. 3d 861, 869, 365 N.E.2d 404, 411 (1st Dist. 1977), In re Sciara, 21 I.I. App. 3d at 897, 316 N.E.2d at 158.

\(^{114}\) The defendant is examined by an expert only upon the request of the state or the defendant. [I.L. Rev. Stat. ch. 38, § 1005-2-1(g) (1977)]. Thus, it is conceivable that the defendant will be classified as unfit without an expert's examination and testimony that his or her unfitness does not result from a solely physical disorder. Cf. note 111 supra.

\(^{115}\) The American Bar Foundation Commission on the Mentally Disabled recommends a separate commitment procedure for persons found unreasonably incompetent to stand trial.
due process clause directly oppose commitment of permanently handicapped defendants for whom no treatment is available.\textsuperscript{123} Therefore, the \textit{Lang} decision is contrary to the due process requirements as mandated by the \textit{Jackson} decision.

4. Procedural Safeguards

In further support of its holding, the \textit{Lang} court emphasized the procedural safeguards provided in the commitment and unfitness statutes.\textsuperscript{124} First, the court observed that a defendant has the right, under the Unified Code of Corrections, to a periodic review of his or her unfitness.\textsuperscript{125} Secondly, it also noted that upon filing of a petition for discharge, an unfit defendant who is no longer subject to involuntary admission as defined in the MHDD Code\textsuperscript{126} is eligible for release on bail.\textsuperscript{127} Finally, the \textit{Lang} court remarked that Illinois courts have granted the incompetent defendant an "innocent only" hearing, a trial given to an unfit defendant to determine whether he or she in fact committed the offense or should be released as innocent.\textsuperscript{128}

Fairness implies that a defendant should not be detained unless given an opportunity to show that he or she may in fact be innocent or that he or she may have an adequate defense.\textsuperscript{129} These innocent only hearings, however,

\textsuperscript{123} 406 U.S. at 738. See notes 35-39 and accompanying text supra.
\textsuperscript{124} 76 Ill. 2d at 328-29, 391 N.E.2d at 357.
\textsuperscript{125} The court shall review his or her unfitness ninety days after the original finding of unfitness, each twelve months thereafter, and upon petition of either the state or the defendant. ILL. REV. STAT. ch. 38, § 1005-2-2(b) (1977).
\textsuperscript{126} In order for an unfit defendant to be classified as not subject to involuntary commitment, the court must find that he or she is not dangerous. 76 Ill. 2d at 329, 391 N.E.2d at 357.
\textsuperscript{127} Any person hospitalized pursuant to the MHDD Code may petition for discharge. If the court finds that he or she is not subject to involuntary admission, the court shall enter an order so finding. ILL. REV. STAT. ch. 91½, §§ 3-900(a), 3-901 (Supp. 1978).
\textsuperscript{128} 76 Ill. 2d at 329-30, 391 N.E.2d at 357. As authority to require these hearings, the court relied on People \textit{ex rel. Myers} v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970), the Report's recommendation to provide discharge hearings for unfit defendants, REPORT, supra note 77, at 184-85, and the \textit{Jackson} Court's favorable comments on such hearings, 406 U.S. at 735-36. 76 Ill. 2d at 329-30, 391 N.E.2d at 357. For other alternative proposals, see Model Penal Code § 4.06(3) (Proposed Official Draft, 1962) and JUDICIAL CONFERENCE, supra note 33, at 43-44.
\textsuperscript{129} United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959), exemplifies the potential unfairness of the incompetency plea that, ironically, has been mandated to protect the defendant's rights. See generally Matthews, supra note 27, at 19. In \textit{Barnes}, four defendants were indicted for the same murder. Alleging a violation of their sixth amendment right to a speedy trial, the charges against three of the defendants were dismissed. Despite his reliance on the
may unconstitutionally shift the burden of proof to the defendant. Traditionally, a person accused of a crime is presumed to be innocent until proven guilty.\footnote{130} In an innocent only hearing, however, if the defendant should fail to establish his or her innocence, the individual almost certainly will be incarcerated under the guise of civil commitment.\footnote{131}

An unfit defendant attains the status of incompetency because of an inability to understand the proceedings or to assist in his or her defense.\footnote{132} If the defendant is so severely disabled, he or she could not establish innocence in any kind of hearing. The \textit{Myers} court suggested that special procedures be followed to compensate for the defendant's handicap.\footnote{133} If such compensating techniques are available in order to determine fairly if the defendant is innocent, a court should proceed directly to trial in order to guarantee substantial constitutional rights.\footnote{134}

In \textit{Lang}, the court held that the defendant had been given an innocent only hearing to determine if he should be released as an innocent person.\footnote{135} Lang's conviction was reversed by the appellate court due to the absence of adequate procedures to compensate for Lang's disabilities.\footnote{136} The supreme court, in \textit{Lang}, failed to justify how this trial, without compensating procedures, was a fair opportunity for Lang to establish his innocence. The court, nevertheless, permitted the use of the conviction as evidence of his dangerousness in order to effectuate commitment.\footnote{137} In theory, the innocent only hearings are meant to be beneficial to the unfit defendant. In reality, the state may utilize these hearings as evidence to establish dangerousness and, thus, facilitate commitment of such a person.

**IMPACT**

The court's holding in \textit{People v. Lang} is not limited to the unique facts of Donald Lang's experience. The decision may have a considerable impact on all unfit defendants. Contrary to the de-institutionalization movement,\footnote{138} the \textit{Lang} court has substantially increased the scope of persons who may be
committed and has concurrently relaxed the standard for civil commitment of unfit defendants. In essence, the court has eliminated one of the two requirements—that of mental illness—for civil commitment of unfit defendants. A determination of unfitness results in a classification of mental illness for practically all defendants despite the fact that they do not meet the requisite mental condition demanded by the MHDD Code. In addition, the Lang court has suggested that the second requirement for commitment—that of dangerousness—can be established by evidence of the criminal charge. Thus, this decision is a retreat toward the pre-Jackson era of automatic commitment for unfit defendants.

To prevent almost automatic, and possibly indefinite, commitment, a lawyer or a client may intentionally fail to raise the issue of the defendant's fitness. Subsequently, the defendant would be tried despite the loss of his or her constitutional right to be mentally present at his or her trial. The Lang decision may encourage defendants to attempt to conceal an unfit mental or physical condition and to take their chances at trial. Unlike a fit defendant, a person determined as unfit faces almost certain detention for a period that could equal the maximum sentence for the designated crime.

In addition, the Lang opinion offers none of the desperately needed safeguards to end the potential abuse accompanying the unfitness proce-

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A Report to the President's Commission on Mental Health recognized that people have a right to be different without risking civil commitment because others disapprove of their way of life. Task Panel Report, supra note 38, at 1446. The Task Panel Report recommended drastic reform in the area of civil commitment and specifically suggested a modified abolition of civil commitment. Under this proposal, the present civil commitment system would be virtually abolished. Instead, there would be emergency confinement for a brief period for persons on the verge of or in the process of engaging in suicidal behavior. Id. at 1445-46. The Report further suggested that dangerous mentally ill persons and permanently incompetent defendants must be accommodated through a restructuring of the criminal law or through partial reliance on the mental health system. Id. at 1447.

139. See notes 80-83, 100-03, and accompanying text supra.
140. See notes 80-83, 100-03, and accompanying text supra.
141. Unless a defendant becomes fit or is no longer dangerous, he or she will be confined for the maximum sentence that could have been imposed for the crimes charged. Ill. Rev. Stat. ch. 38, § 1005-2-2(c) (1977). His or her convicted counterpart, on the other hand, is eligible for parole after twenty years, less time credited for good behavior. Ill. Rev. Stat. ch. 38, § 1003-3-3 (1977); People v. Phillips, 58 Ill. App. 3d 109, 112, 373 N.E.2d 1072, 1074 (3d Dist. 1978); People v. Doom, 48 Ill. App. 3d 959, 962, 363 N.E.2d 457, 460 (3d Dist. 1977).
142. Arguably, the Canon of Ethics may prevent an attorney from failing to raise the issue of a defendant's competency. See Gobert, supra note 13, at 667; A.B.A. Code of Professional Responsibility E.C. 7-12, 7-27.
143. An incompetent is presumed to be mentally "absent" from trial. "The competency rule . . . has deep roots in the common law as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Penn. L. Rev. 832, 834 (1960). For a history of the rule, see Youtsey v. United States, 97 F. at 940-46.
144. See note 141 supra.
The decision will not prevent a prosecutor from detaining a defendant solely because he or she fears that the defendant is a danger to society. Even though the prosecutor may have insufficient evidence successfully to incarcerate the defendant through the trial and conviction procedure, incarceration may be achieved through the unfitness and subsequent civil commitment procedure. The *Lang* decision invites prosecutors to utilize the unfitness procedure to attain such a result.

If the *Lang* court had limited its holding to the unique set of facts of the case and used its authority to define "mentally ill" on a case-by-case basis, the detrimental effect on all unfit defendants could have been avoided. For Donald Lang, the decision was beneficial. It enabled him to be released from jail into a training program designed to render him fit to stand trial in three to five years. The decision, although limited, has considerable impact on all unfit defendants. Thus, radical reform in this area of law should be considered.

**Conclusion**

The abolition of the incompetency plea would resolve the type of conflict faced by the Illinois judicial system in *People v. Lang* and would be in the best interest of both the state and the permanently incompetent defendant. Under this proposal, a finding of unfitness would be grounds for a trial continuance for a period to extend no longer than six months. During this period, the state would provide resources to aid the defendant in achieving trial competence. At the end of this rehabilitation period, the state must either dismiss the charges or proceed to a trial despite the defendant's unfitness. If the state chooses the latter, it must incorporate into the trial any available procedures that would compensate for the defendant's handicap.

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The American Bar Foundation Commission on the Mentally Disabled questioned whether a prosecutor should be allowed to raise the issue of a defendant's competency in light of the potential for abuse. *MDLR, supra* note 37, at 620.

146. For an example of such abuse of the unfitness and subsequent civil commitment procedure see *Cobert*, *supra* note 13, at 664-65 (the history of S.D.N.Y. (1970)); *Fitness for Trial*, *supra* note 15, at 682-83 n.35.

147. *76 Ill. 2d* at 321-22, *391 N.E.2d* at 353-54.

148. *Burt & Morris, supra* note 82.

149. *Id.* at 67. The state has a legitimate interest in confining dangerous persons. The unfit defendant also has an interest in contesting his or her dangerousness and having its factual basis rigorously proven. The risk that the commitment procedure will be misused in order to protect society would be sharply reduced under the proposed scheme. The criminal trial is more likely to protect a person against unwarranted confinement. *Id.* at 73.

150. *Id.* at 67.

151. *Id.*
Incarcerating a defendant through the regular trial and conviction procedure is preferable to "incarcerating" him or her through civil commitment. Unless a defendant establishes innocence at an "innocent only" hearing, it is possible that he or she will be "incarcerated" through commitment for a period equal to the maximum sentence of the crime. Under the trial and conviction procedure, a defendant is guaranteed certain constitutional and procedural safeguards not guaranteed to unfit defendants under the present statutory scheme. The Illinois Legislature has failed to provide the statutory solution; consequently, the court has resorted to stretching the new commitment statute in an effort to accommodate such persons, and in so doing, the court has violated the equal protection and due process clauses.

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152. See note 143 supra.


A fit defendant is guaranteed a trial by jury. If the issue of competency is raised after the trial has commenced, that defendant is not allowed a jury to determine that issue. Ill. Rev. Stat. ch. 38, § 1005-2-1(d) (1977); People v. Welsh, 30 Ill. App. 3d 887, 333 N.E.2d 572 (2d Dist. 1975); People v. White, 131 Ill. App. 2d 652, 264 N.E.2d 228 (3d Dist. 1970); People v. Reaves, 412 Ill. 555, 107 N.E.2d 861 (1952); Council Commentary, supra note 15.

A fit defendant is incarcerated only if a jury convicts him or her of the crime beyond a reasonable doubt. Ill. Rev. Stat. ch. 38, § 3-1 (1977). An unfit defendant, on the other hand, is incarcerated through the commitment procedure if clear and convincing evidence establishes that the person is dangerous. In re Whitehouse, 56 Ill. App. 3d 245, 249, 371 N.E.2d 990, 993 (5th Dist. 1977). Cf. Lessard v. Schmidt, 349 F. Supp. at 1095 (proof beyond a reasonable doubt). There is only probable cause to believe that the defendant committed the crime. Ill. Rev. Stat. ch. 38, § 111-2(a) (1977). Yet, evidence of this crime can be used as a basis for the medical opinion that the person is dangerous. See note 102 and accompanying text supra.

154. The Lang court noted that the Illinois General Assembly is presently considering legislation that provides for some procedural changes in the present unfitness statute. 76 Ill. 2d at 327, 391 N.E.2d at 356. This Bill, S. 0133, 81st Gen. Assembly, 1979 Sess. (Introduced February 15, 1979), however, does not discuss the disposition of the unfit but uncommittable defendant.
The annotations are as much the law as text itself.

get all the statutory law in Smith-Hurd