Incompetency to Stand Trial and Mental Health Treatment: A Case Study Testing the Subversion Hypothesis

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This study is a test of the so-called subversion hypothesis, which posits that mentally disordered persons who commit minor offenses are prosecuted primarily for the purpose of imposing mental health treatment on them through evaluation and treatment for incompetency to stand trial. These persons, according to the subversion hypothesis, find themselves in the criminal process because they do not meet the stringent civil commitment standards, but do meet the less stringent criteria for a disorderly conduct prosecution. The findings, based on 893 disorderly conduct prosecutions in a single jurisdiction over a two-year period, do not lend general support to the subversion hypothesis.

The extent to which the criminal process and its incompetency provisions are used to detain and treat persons who are not within the reach of the involuntary civil commitment laws is the subject of much speculation. The subversion hypothesis—that the criminal process is frequently subverted to accomplish the ends of the civil commitment process because the civil commitment standards are unrealistically stringent—implies three questions. Two of these questions are empirical: the question of description (including existence and prevalence) and the question of causation. The other question is the public policy question. The public debate over the policy issue rages, largely without benefit of answers to the empirical questions. This study represents an effort to describe the relevant empirical evidence to determine whether the data reveal a pattern of processing defendants that is consistent with the subversion hypothesis. The second empirical question, which concerns causation, is left for another time, although the public policy debate presumes the answer.

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The prospect of mentally disordered persons in need of psychiatric treatment being embroiled in the criminal process has provoked much public comment. Legal scholars decry such a situation because the criminal punishment is ideologically inappropriate and possibly unjust.[1–3] Criminal justice practitioners object to such a situation because staff and facilities are inadequately equipped to deal constructively with such persons.[4, 5] Mental health practitioners find such a situation deplorable because of the inhumane and unfair treatment accorded those who need specialized medical treatment instead of criminal punishment.[6, 7] For the society as a whole, the demarcation between mad and bad, already unclear because of the remarkably similar social and governmental responses to these two subpopulations, would be further confused by such a situation.[8, 9] In short, if the empirical evidence indicated that some psychiatrically disturbed persons beyond the reach of the civil commitment laws could be treated only if they were first labeled as criminal, few thoughtful people would not question the wisdom and fairness of this subversion of the criminal process to accomplish the ends of the mental health process.

The concern that underlies this public policy debate is pertinent to virtually all jurisdictions in the United States.[10–13] This report, however, is offered as a case study of Milwaukee County, Wisconsin, a single jurisdiction. Because the particulars of civil commitment and criminal statutes affect the operation of their respective systems and their interplay, generalizations to jurisdictions with different laws, norms, and operating procedures are highly speculative. Therefore, the findings, discussion, and conclusions based on this study and reported herein are presented in terms specific to Wisconsin.

Political Context

For several years, mental health and criminal justice practitioners and lay advocates* familiar with Wisconsin's mentally ill population have expressed concern that the state's criminal process is too often subverted to accomplish ends usually reserved for the mental health system: the custody and treatment of mentally ill persons. This subversion hypothesis fuels the persistent and regular attempts to change the relatively stringent civil commitment laws in the state.[14] The link between the two is fairly simple to understand. Wisconsin's civil commitment laws are sufficiently stringent that psychiatrically disturbed persons can often successfully resist involuntary commitment.[15] Predictably, some portion of these psychiatrically disturbed but untreated persons get into trouble, often criminal trouble.[16, 17] Once the person has committed a crime, the state's police powers authorize arrest and prosecution of persons for whom it had not authorized involuntary civil commitment. Having been charged, the defendant may be evaluated for incompetency to stand trial. If found incompetent, the defendant may be given treatment. If not found incompetent, the defendant may be persuaded to submit to treatment anyway. Thus,

*This group includes activist individuals and groups such as the local chapter of the Mental Health Association and the Alliance for the Mentally Ill.

through the criminal process, mental health treatment may be imposed on persons who otherwise, given the civil commitment laws, successfully resist treatment.

Legal Context

Criminal incompetency provisions in Wisconsin comport with the standards articulated in *Dusky v. United States*[18] and reiterated in *Drope v. Missouri*[19]: "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried . . . for the commission of an offense so long as the incapacity endures."[20] If the defendant's competency to stand trial is in doubt, the court appoints one or more expert examiners to evaluate the defendant and report to the court.[21] This evaluation may be conducted in an inpatient setting and last for up to 15 days, after which a 15-day extension may be allowed by court order.[22] Alternatively, the examination may be conducted on an outpatient basis.[23] Defendants granted pretrial release may not be compelled to undergo an inpatient examination, unless failure to cooperate with an outpatient examination necessitates custody.[24] Defendants undergoing either inpatient or outpatient evaluation may elect to accept or refuse medication, except where medication is necessary to prevent physical harm to the defendant or others.[25]

Unless waived, a hearing is held to consider evidence in addition to the experts' reports bearing on the question of competency to stand trial.[26] If the defendant does not contest a conclusion of incompetency, the court must find by a greater weight of the credible evidence that the defendant is incompetent to proceed.[27] If the defendant contests the matter, the court must find incompetency by a higher standard, that of clear and convincing evidence.[28]

If the defendant is found competent to proceed, the process of criminal adjudication resumes.[29] If the defendant is determined to be incompetent to stand trial, he or she may be committed to the department of health and social services for placement in an appropriate institution for a period not to exceed the duration of the maximum sentence authorized for the offense charged or for a period of time not to exceed 12 months, whichever is less.[30] In accord with this limitation, the maximum hospitalization permitted for disorderly conduct is 90 days.[31] Defendants who are judicially determined to be incompetent to stand trial may refuse medication only if they are competent to make such a decision and if they do not pose an immediate danger to themselves or others that could be averted by medication.[32] If the court determines that the defendant is not likely to regain competency in the 90 days allowed for disorderly conduct defendants, the court must discharge the defendant from the criminal commitment.[33] If cause exists, the state may initiate involuntary civil commitment proceedings.[34]

Before the mid-1970s, Wisconsin had some of the most inclusive civil commitment laws in the country. The court could order a patient to be involuntarily committed if the court was "satisfied that he is mentally ill or infirm or deficient and that he is a proper subject for custody and

treatment."[35] A person could be detained for five days on an emergency basis if he or she was "violent or threaten[ed] violence and . . . appear[ed] irresponsible and dangerous."[36] Under the former laws, a person could be detained for up to 105 days without any hearing at all on the need for custody and treatment.[37]

In 1972, the federal district court for the Eastern District of Wisconsin filed an opinion in *Lessard v. Schmidt*[38] that forced a dramatic overhaul of Wisconsin's civil commitment laws.[39] Reflecting the same kind of reasoning and distrust of benign motivations evident in the Supreme Court's opinion in *In re Gault*[40] with respect to proceedings for juvenile delinquency commitments, the district court essentially required that the deprivation of liberty involved in civil commitment be justified under the police powers doctrine of state action, the same doctrine that justifies criminal sanctions.[†] In addition, the court imposed many procedural protections common to the criminal process, including (1) the right to timely and effective notice of charges and hearings; (2) the right to a probable cause hearing on the issue of continued detention within a short period of time for emergency detainees; (3) the right to appointed counsel for indigents; (4) explicit notice of the right to a jury trial; (5) the exclusion of hearsay evidence at the commitment hearing; and (6) the privilege against self-incrimination as applied to any interviews with a psychiatrist or examining physician.[‡] Wisconsin's new Mental Health Act, which took effect in 1976, established one of the most adversarial civil commitment processes in the nation.[41] In addition to the procedural changes, the law now requires a person to be determined imminently dangerous to self or others in order for a court to authorize involuntary civil commitment.[42]

Previous Empirical Research

There is no doubt that involuntary civil commitments in Wisconsin have declined since the laws were changed in the mid-1970s.[43] There is no doubt that psychiatric patients are overrepresented in the criminal defendant population.[44] There is also no doubt that in Milwaukee County, psychiatrically disturbed defendants often receive psychiatric medication, if medically indicated, for the disorder. A jail psychiatrist is available to diagnose disorders and prescribe medication for a jailed defendant whether or not the defendant is evaluated for incompetency to

[†]There is an irony here that cannot be denied. Essentially rejecting the doctrine of *parens patriae* as sufficient to justify the forced deprivation of liberty, the court imposed a criterion, dangerousness, that would justify the invocation of police powers. Nonetheless, as it is played out, if the subversion hypothesis has any basis in fact, police powers in the criminal process reach further than the combined police *and* the more benign *parens patriae* powers in the mental health system. One need only consider the nature of disorderly conduct arrests to realize that in many instances the conduct exhibited by the arrestee is not threatening enough or dangerous enough to meet the dangerousness criterion as they are applied in the civil commitment process in this jurisdiction. If the police powers of the civil commitment process had as long an arm as the police power of the criminal process, there would be no concern about subversion hypothesis and no need for this research.

[‡]The *Lessard* decision also required that the party bringing the petition for civil commitment prove its case beyond a reasonable doubt. In a later case, Addington v. Texas, 441 U.S. 418 (1979), the Supreme Court held that civil commitment proceedings did not require proof beyond a reasonable doubt. Accordingly, Wisconsin revised its laws and now requires clear and convincing proof. Wis Stat Ann. § 51.20(13)(e) (West 1985 & Supp 1993).

stand trial.[45] In fact, more often than not, detained mentally disordered defendants voluntarily accept medication while in custody awaiting adjudication or release, irrespective of an incompetency evaluation or its results.[46§] In addition, a mental health screening unit monitors defendants who are released prior to trial on the condition that they cooperate with an ongoing treatment plan.[47] Moreover, the state's funding arrangements may well discourage civil commitment.[48] Together, these facts raise the distinct possibility that the current laws cause psychiatrically disturbed offenders to be shunted into the criminal justice system for psychiatric treatment. This possibility, however, is not an established fact.

Four published research reports, based on three different empirical studies, have examined the use of criminal incompetency provisions in Wisconsin since the change in the civil commitment laws. The first study examined the statewide commitments for incompetency to stand trial at the state facilities designated to receive such prisoners. His study incorporated a before-and-after comparison in numbers of incompetency commitments. The findings showed a "marked increase in the number of people committed for examination to determine competency and as incompetent to stand trial in the year following the change in civil commitment law."[49] In addition, the data showed that:

> [f]requently, the charges against individuals committed as incompetent to stand trial are dropped at the end of the commitment. A survey taken by the author of all people [institutionally] committed as incompetent to stand trial . . . during July and August of 1977 revealed that . . . [t]he criminal charges against all twenty-four defendants were dropped upon their return to court after the commitment period was over.[50]

Furthermore, a dramatic increase in the number of commitments for misdemeanor offenses was noted, for disorderly conduct offenses in particular.[51]

The second study was based on a sample of 379 criminal defendants in Milwaukee County between 1981 and 1983 who had been identified in the process as having a history of mental disorder. The data showed that the criminal court used its authority in a small but discernible number of cases to impose treatment only, while withholding criminal punishment.[52] Furthermore, there was an inverse relationship between the number of a defendant's prior admissions to the local public mental health facility and the severity of criminal sanction imposed: those with more mental health contacts were more likely to have their cases dismissed and less likely to be sanctioned by incarceration.[53]

The third study used a research design that was more robust than the ones used in either of the preceding studies. This study was based on a random sample of 2,000 misdemeanor defendants in Milwaukee County who were charged between 1981 and 1985. The findings from this research project did not support the

§It should be noted that the medication is not necessarily provided as part of the incompetency evaluation or treatment. The fact is that the population evaluated for incompetency is a population that often has a history of psychiatric disorder and treatment. Once arrested and detained, such persons tend to avail themselves of the services available through the psychiatric facility in the jail. So treatment frequently coincides with evaluation, but does not necessarily follow from it.

conclusions drawn in the two previous studies.[54]

> These data provide little support for the notion that the criminal justice system has been subverted to operate as a substitute for civil commitment. . . . Of those evaluated for incompetency, only about half were found incompetent; and the vast majority of those initially evaluated as incompetent were later determined to have regained competency. The maximum period of time allowed for either the evaluation or treatment for incompetency was only rarely used. These findings indicate conservative rather than expansive use of treatment options available under the incompetency laws.[55]

However, disorderly conduct defendants presented one possible exception to this general conclusion. With respect to disorderly conduct defendants only, the data showed a pattern of issuing but later dismissing the charges.

> Only with respect to the exceptionally low conviction rates of disorderly conduct defendants who had a psychiatric record and had been subjected to some form of psychiatric evaluation or treatment by the criminal court is there even the slightest possibility that in the name of the criminal process, treatment options were used expansively while criminal sanctions were used conservatively.[56]

These findings left open the question of whether, for these particular defendants at least, the subversion hypothesis was valid.

This Study

Working Hypotheses This article presents the result of a fourth and more recent study. It was designed to examine disorderly conduct defendants specifically in light of the previous findings. Two questions are examined in this report: (1) whether the conduct of defendants who are charged with disorderly conduct and evaluated and/or treated for incompetency to stand trial is less serious than the conduct of other disorderly conduct defendants; and (2) whether the disorderly conduct defendants evaluated for incompetency are subjected to mental health treatment without being subjected to criminal punishment (i.e., convicted and imprisoned).

An affirmative answer to the first question would suggest that defendants who may be incompetent are criminally charged for conduct that would not give rise to criminal charges if it were exhibited by others. This raises a question of whether the motive for the arrest and prosecution is to impose mental health treatment or punishment. If the answer to the second question is affirmative, it would suggest that treatment options are being used expansively while punishment is used conservatively. A consistent pattern of differential selection for prosecution and treatment without punishment would support the subversion hypothesis in the case of disorderly conduct defendants. In any individual case, such a pattern may well be the prudent, humane, and just disposition of the matter. If this appears to be an institutional pattern, occurring frequently, it raises questions about the purpose, clientele, and functioning of the criminal justice system vis à vis the mental health system.

The Research Design and Data This study was designed to directly examine the use of the incompetency provisions in cases in which the defendant was charged with disorderly conduct.[‖] The number of

[‖]The disorderly conduct cases included in this study were drawn from among the misdemeanor files, which were housed separately from the felony files. Thus, a

cases on which the findings are based is large, and a comparison group is employed. The combination of these features represents an improvement over previous research addressing this issue in this jurisdiction.

This study is based on a sample of disorderly conduct defendants charged in 1989 and 1990 in Milwaukee County's circuit court. The study was restricted to disorderly conduct cases not only because of the previous findings, but also because of the greater likelihood that subversion of the criminal process for mental health purposes would be discernible in this crime category. In many cases, police have vast discretion to decline to arrest[57–60] and prosecutors have vast discretion to decline to issue charges.[61] The Milwaukee County District Attorney's Office screens out approximately 30 percent of the cases its reviews as unsuitable for prosecution.[62] Where the crime is least serious, discretion to refrain from arrest and not issue charges is greatest. In the face of very serious crimes such as homicide, armed robbery, or aggravated battery, for example, there is less discretion available to the law enforcement official to decline charging the suspect. At the other extreme, minor offenses may be and often are overlooked. Disorderly conduct offenses probably provide the greatest opportunity for the exercise of discretion. Moreover, disorderly conduct encompasses a wide variety of behavior, and the seriousness of the conduct is very much a matter of interpretation and judgment. What might be viewed as imprudent or impudent behavior might also be viewed as a crime. For example, walking in traffic at rush hour or running down the street naked at midnight are examples of conduct that could result in a charge of disorderly conduct. Such behavior might, however, be overlooked, perhaps understood as a foolish dare or prank and not likely to recur. The decision depends on the context, the explanation given, the trouble created, and probably a variety of other factors.[63] It is easy to believe that a person exhibiting one of these behaviors *and* showing signs of mental disorder might provoke an official response whereas someone not showing signs of mental disorder might be handled informally.

Official court records provided the information necessary for this analysis, including information about incompetency evaluations, determinations, and commitments. The criminal complaint, included in the court file, provided a description of the conduct that had resulted in arrest. This document usually included information about the relationship of the victim to the offender, the harm caused, the circumstances surrounding the offense, and the nature of the conduct itself. Finally, the court record contained information on the criminal adjudication process: the conditions of pretrial release, if any, the judgment, and the sentence.

Findings There were 1,922 defendants charged with disorderly conduct during the two-year study period of 1989

defendant charged with a felony burglary and disorderly conduct would not be represented in this sample. Moreover, the data indicate that disorderly conduct charges were not used as "pile-on" charges, but were usually the sole charge filed against the defendant in the case.

to 90.[¶] Only four percent (N = 81) of these defendants were evaluated for incompetency to stand trial in connection with their disorderly conduct charge, and only a minority of those (38%; N = 31) were found incompetent to stand trial. Furthermore, a finding of incompetency did not automatically result in commitment for treatment. Slightly less than three-quarters (74%; N = 23) of those found incompetent were committed to an institution for treatment. In other words, only 23 of the 1,922 disorderly conduct defendants, or just over one percent, were committed to an institution for treatment pursuant to the incompetency provisions of the criminal process.

The behavior giving rise to a criminal charge for disorderly conduct distinguishes the evaluated defendants from the other defendants with respect to two types of behaviors: (1) physical attacks on others; and (2) creating a public disturbance, such as shouting in a place of business (see Table 1). The evaluated defendants were underrepresented at the severe end of the seriousness continuum of behaviors, and overrepresented at the nonserious end. Of particular note is the fact that more than one-quarter (27%) of the evaluated disorderly conduct defendants were arrested for creating a public disturbance, compared with only 12 percent of the other defendants (see Table 1). The findings presented in Table 1 also indicate that, compared with other defendants, the evaluated defendants were less likely to have caused any personal injury or other tangible harm by their conduct and more likely to be arrested in a place where business is conducted.

Information pertaining to the decisions of the court suggests that evaluated defendants were more likely to be treated and less likely to be convicted than other defendants (see Table 2). Mental health treatment was imposed as a condition of pretrial release on a full half of the evaluated defendants, but only one-quarter of the other defendants. The court dismissed more of the evaluated defendants' cases; almost half of the evaluated defendants' cases were dismissed (see Table 2). If convicted, however, the punishment was not more lenient for evaluated defendants. Evaluated defendants were as likely as others to be required to serve time for their offense and were less likely to be sanctioned with a fine only (see Table 2), a finding that is consistent with earlier reported findings.[64]

It is not unusual for the court to impose treatment before a trial that is not associated with incompetency. Such treatment is usually imposed at the recommendation of the court's mental health screening unit and operates as a condition of pretrial release.[65] A defendant with an established history of psychiatric treatment and a cur-

[¶]The 1922 defendants is a total population, not a sample. Detailed data were not collected on all 1922 cases. Instead, using the population of 1922 defendants, a stratified random sample was created: all defendants who had a record of admission at the Milwaukee County Mental Health Complex were retained in the sample; the remaining defendants were subsampled by selecting every fourth case. This produced a sample of 893 defendants. An evaluation for incompetency to stand trial creates an admission record, so all those evaluated are, by definition, a subset of those admitted. Evaluated defendants in this study represent the total population of evaluated disorderly conduct defendants for the two years, and are represented as such in the data portrayed in the tables found in Reference 64. Data pertaining to other defendants has been weighted to adjust for the oversampling of those who had been admitted to the county psychiatric facility.

Table 1
Behaviors Resulting in Disorderly Conduct Charge, Milwaukee, WI, 1989–1990 (percentage)

Behavior	Evaluated Defense N = 81[a]	Other Defense N = 812[b]
Physical assault/restraint	33[c]	41
Sex offenses	6	3
Threat of bodily harm	41	43
Weapons	5	15
Robbery-theft	7	1
Prohibited contact	1	1
Wrong place	6	1
Interfering with authorities	6	11
Criminal trespass/loitering	9	6
Creating a public disturbance	27	12
Creating a private disturbance	12	12
Harm caused		
None	50	43
Personal fear	23	29
Personal injury	2	12
Where		
Bar/restaurant	0	19
Government/commercial place of business	73	43
To whom		
Strangers	36	31
Police/guard	27	22

[a]This is a total population of all defendants charged with disorderly conduct and evaluated for incompetency to stand trial in Milwaukee County Circuit Court, 1989–1990. Tests of statistical significance are not reported, because they are meaningless and misleading when applied to total populations.
[b]This number represents disorderly conduct defendants who were not evaluated for incompetency to stand trial. This group comprises two component groups: a total population of defendants charged with disorderly conduct between 1989–1990 who had been admitted for some time to the county psychiatric facility, but who were not evaluated for incompetency in conjunction with their 1989–1990 disorderly conduct charge; and a sample of disorderly conduct defendants who had no record of admission at the county psychiatric facility. Because the study design undersampled defendants who had never been admitted to the county psychiatric facility, arithmetic weighting adjusts for that undersampling.
[c]Up to four behaviors were coded for each incident. Therefore, the percentages reported add up to more than 100 percent; there is a theoretical maximum of 400 percent.

rent subscription for medication is a likely candidate for such a court-imposed condition. The data show that pretrial treatment was associated with subsequent dismissal for both evaluated defendants and others. Of the evaluated defendants, 62 percent of those who received mental health treatment before trial were not convicted, compared with 49 percent of those who had not received treatment. For defendants who were not evaluated for incompetency, the same association holds true: 54 percent of those with pretrial treatment were not convicted, compared with 45 percent of those without pretrial treatment.

Public Disturbance Defendants

Compared with other behavior categories

Table 2
Treatment and Punishment Measures for Disorderly Conduct Defendants, Milwaukee, WI, 1989–1990 (percentage)

	Evaluated Defense N = 81[a]	Other Defense N = 812[b]
Treatment as condition of release	51	26
Convictions	44	53
Dismissals	48	37
Of those convicted:	N = 36	N = 433
Fined only	0	16
Supervised release	47	39
Serve time	53	49

[a]This is a total population of all defendants charged with disorderly conduct and evaluated for incompetency to stand trial in Milwaukee County Circuit Court, 1989–1990. Tests of statistical significance are not reported, because they are meaningless and misleading when applied to total populations.
[b]This number represents disorderly conduct defendants who were not evaluated for incompetency to stand trial. This group comprises two component groups: a total population of defendants charged with disorderly conduct between 1989 and 1990 who had been admitted at some time to the county psychiatric facility, but who were not evaluated for incompetency in conjunction with their 1989–1990 disorderly conduct charged; and a sample of disorderly conduct defendants who had no record of admission at the county psychiatric facility. Because the study design undersampled defendants who had never been admitted to the county psychiatric facility, arithmetic weighting adjusts for that undersampling.

(see Table 1), an unusually large proportion of public disturbance defendants were evaluated for incompetency. However, the court's disposition of these defendants does not distinguish them from other defendants evaluated for incompetency. Of the 22 public disturbance defendants who had been evaluated for incompetency to stand trial, eight (36%) were found by the court to be incompetent. Of those eight, six (75%) were committed for treatment. Despite the fact that evaluation for incompetency to stand trial was far more common for public disturbance defendants than for any other behavior category, the proportion of those evaluated defendants who were found incompetent and institutionalized is similar to that of other evaluated defendants in this study.

Like other disorderly conduct defendants, about half of the public disturbance defendants (54%; N = 12) were required to agree to treatment conditions of pretrial release. The dismissal rate for evaluated public disturbance defendants, at nearly 60 percent,[#] was higher than either other evaluated defendants (44%) or defendants who were not evaluated (37%). Of the eight public disturbance defendants who were convicted, five were sentenced to serve a sentence of supervised release.

Discussion

Use of the criminal process to treat defendants who would not otherwise find themselves prosecuted for crime should

[#]These data are not presented in Table 2, but are reported here. Thirteen (59%) of the 22 cases in which defendants had been arrested for making a public disturbance and were evaluated for incompetency to stand trial were dismissed.

be the most obvious in situations where the crime involved is least serious and therefore more easily not prosecuted. Even when considering the least serious of criminal offenses, disorderly conduct, the number of defendants evaluated for incompetency to stand trial is very small. The number committed for treatment is even smaller. Viewed from a broad perspective, these findings do not portray a wholesale subversion of the criminal process to accomplish mental health goals.

At the same time, these findings reflect just enough activity consistent with the subversion hypothesis to prevent it from being completely dismissed. A close examination of the data indicates that in a very few instances, the criminal process is used for its treatment capacities rather than its penal capacities.

Two findings from this study support the hypothesis that those evaluated for incompetency are selected differentially for prosecution. First, those who were evaluated were arrested and charged on the basis of less serious misbehavior than others who were arrested and prosecuted on the identical charge. Second, the most pronounced difference between the evaluated defendants and other defendants is found in the public disturbance behavior category. Each of these findings, alone, suggests that the mentally disordered were selectively arrested and charged. Together, and considered in light of findings from other studies,[66] these two findings make an even stronger case for the hypothesis of selective arrest and prosecution.

The data from this study do not show that treatment options are used expansively, while punishment is avoided for defendants evaluated for incompetency. The findings are more complex than that. Evaluated defendants had their cases dismissed more often than did defendants who were never questioned for competency.** On the other hand, if convicted, evaluated defendants were more likely to be sentenced to serve time, either under community supervision or incarceration, than other defendants.

Conclusion

The findings from this study show that the use of the criminal incompetency provisions to accomplish the ends of the mental health system is not prevalent in this jurisdiction. Rather, the pattern of outcomes predicted by the subversion hypothesis fits only a tiny segment, just over one percent, of the disorderly conduct defendant population. This pattern occurs so rarely, even in this particular segment of the defendant population, that to construe it as a structural institutional problem appears unwarranted. It must be clear that these findings describing the use of the incompetency provisions in disorderly conduct cases do not by themselves provide a justification for relaxing the civil commitment standards. While there may be other policy arguments to justify broadening the reach of Wisconsin's civil

**While the authors did not systematically collect data on this point, it is our impression that usually disorderly conduct cases were dismissed because the cases just fell apart after having been in the system too long. It was typical that after about five or six court appearances with either the defendant or one of the two adversary attorneys not present, the judge would dismiss the case. Of course, this situation might well obtain more often in cases involving psychiatrically disturbed defendants than in other cases.

commitment laws, the subversion of the criminal process is not properly one of them.

References

1. Allen FA: The Borderland of Criminal Justice: Essays in Law and Criminology. Chicago: University of Chicago Press, 1964
2. Morris N: Madness and the Criminal Law. Chicago: University of Chicago Press, Chicago, 1982
3. Packer HL: The Limits of Criminal Sanction. Stanford, CA: Stanford University Press, 1968
4. Dunn CS, Steadman HJ: Mental health services in local jails: report of a special national workshop. Rockville, MD: US Dept of Health & Human Services, 1982
5. Gibbs JJ: Problems and priorities: perceptions of jail custodians and social service providers. J Crim Just 11:327
6. Abramson MF: The criminalization of mentally disordered behavior: possible side-effect of a new mental health law. Hosp Community Psychiatry 23:13, 1972
7. Jemelka R, Trupin E, Chiles JA: The mentally ill in prison: a review. Hosp Community Psychiatry 40:481, 1989
8. Foucault M: Madness and Civilization: A History of Insanity in the Age of Reason. New York: Pantheon Books, 1965
9. Horwitz AV: The Social Control of Mental Illness. New York: Academic Press, 1981
10. Arvanites TM: The impact of state mental hospital deinstitutionalization on commitments for incompetency to stand trial. Criminology 26:307, 1988
11. Belcher JR: Are jails replacing the mental health system for the homeless mentally ill? Community Ment Health J 24:185, 1988
12. Steadman HJ, Monahan J, Ouffee B, Hartstone E, Robbins PC: The impact of state mental hospital deinstitutionalization on United States prison populations, 1968–78. J Crim Law Criminology 75:475, 1984
13. Teplin LA: The prevalence of severe mental disorder among male urban jail detainees: comparison with the Epidemiologic Catchment Area Program. Am J Public Health 80: 663, 1990
14. *E.G.*, Wis AB 203 (1991–92 Sess); Wis AB 652 (1993–94 Sess); Wis SB 379 (1993–94 Sess); Wis AB 395 (1993–94 Sess); Wis SB 195 (1993–94 Sess)
15. Isaac JB, Armant VC: Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill. 1990, p 127 (noting that after the civil commitment laws were changed in Wisconsin, "the percentage drop in resident patients in Wisconsin's mental hospitals has been larger than in any state except Arkansas")
16. Hochstedler Steury E: Criminal defendants with psychiatric impairment: prevalence, probabilities and rates. J Crim Law Criminology 84:352, 368, 1993 (reporting that public psychiatric patients in Milwaukee County, Wisconsin, were over-represented in the criminal defendant population by a factor of close to four times)
17. Teplin, *supra* note 13, at 664–65 (estimating that there were about three times as many severely mentally disordered males detained in jail as there were in the population at large in the same area)
18. 362 U.S. 402 (1960) (". . . it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'")
19. 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?' . . . Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'")
20. Wis Stat Ann § 971.131 (West 1985 & Supp 1993)
21. Wis Stat Ann § 971.14(2)(a) (West 1985 & Supp 1993)
22. Wis Stat Ann § 971.14(2)(c) (West 1985 & Supp 1993)

23. Wis Stat Ann § 971.14(2)(am) (West 1985 & Supp 1993)
24. Wis Stat Ann § 971.14(2)(b) (West 1985 & Supp 1993)
25. Wis Stat Ann § 971.14(2)(f) (West 1985 & Supp 1993)
26. Wis Stat Ann § 971.14(4)(b) (West 1985 & Supp 1993)
27. *Id.*
28. *Id.*
29. Wis Stat Ann § 971.14(c) (West 1985 & Supp 1993)
30. Wis Stat Ann § 971.14(5)(a) (West 1985 & Supp 1993)
31. Wis Stat Ann §§ 971.01 & 939.51(3)(b) (West 1985 & Supp 1993)
32. Wis Stat Ann §§ 971.14(2)(f); 971.14(5)(am); 971.14(3)(dm) (West 1985 & Supp 1993)
33. Wis Stat Ann § 971.14(6) (West 1985 & Supp 1993)
34. Wis Stat Ann § 971.14(6)(b) (West 1985 & Supp 1993)
35. Wis Stat § 51.02(5) (1971–72)
36. Wis Stat § 51.04(1) (1971–72)
37. Wis Stat § 51.04(2) and (3) (1971–72)
38. 349 F Supp 1078 (ED Wis 1972), vacated and remanded on procedural grounds, 414 U.S. 473, new judgment entered, 379 F Supp 1376 (ED Wis 1974), vacated and remanded, 421 U.S. 957 (1975), reaff'd, 413 F Supp 1318 (ED Wis 1976)
39. Zander TK: Civil commitment in Wisconsin: the impact of *Lessard v. Schmidt*. Wis L Rev 503–62 (1976)
40. 387 U.S. 1 (1967)
41. Isaac and Armant, *supra* note 15, at 127 (noting that while a great number of states changed their civil commitment laws, few adopted all the procedural protections adopted in Wisconsin)
42. Wis Stat § 51.15(1) (1991–92)
43. Isaac and Armant, *supra* note 15
44. Hochstedler Steury, *supra* note 16
45. Smail K, personal communication (interview with Director, Milwaukee County Forensic Unit), July 27, 1994
46. Smail K, personal communication (interview with Director of the Milwaukee County Forensic Unit), July 27, 1994
47. Harvey B, personal communication (interview with Justice System Review Coordinator, Milwaukee County Circuit Court), July 26, 1994
48. Miller RD: Economic factors leading to diversion of the mentally disordered from the civil to the criminal commitment systems. Int J Law Psychiatry 15:1–11, 1992 (noting that criminal commitments are paid for out of state funds, while civil commitments are borne by the county: Miller concludes that while local law enforcement agents are driven at least as much by non-economic factors, other local policy and decision makers may take the economics of the choice into account)
49. Dickey W: Incompetency and the mentally ill client. Crim Law Bull 16:22–30, 1980
50. *Id.* at 31
51. *Id.*
52. Hochstedler E: Research note, criminal prosecution of the mentally disordered. Law Soc'y Rev 20:279, 1986
53. Hochstedler E: Twice-cursed?: the mentally disordered criminal defendant. Crim Just Behav 14:251–259, 1987
54. Hochstedler Steury E: Specifying "criminalization" of the mentally disordered misdemeanant. J Crim Law Criminology 83:334, 1991
55. *Id.* at 358
56. *Id.*
57. Bittner E: Police discretion in emergency apprehension of mentally ill persons. Soc Probs 14:278, 1967
58. Matthews AR: Observations on police policy and procedures for emergency detention of the mentally ill. J Crim Law Criminology Police Sci 61:283, 1970
59. Monahan J, Caldiera C, Friedlander HD: Police and the mentally ill: a comparison of committed and arrested persons. Int J Law Psychiatry 2:509, 1979
60. Teplin LJ: Criminalizing mental disorder: the comparative arrest rate of the mentally ill. Am Psychologist 39:794, 1984
61. Hochstedler Steury E, Frank N: The Criminal Court Process. Minneapolis: West Publishing Company, 1996, pp 155, 192 (noting that it is common for a prosecutor's office to decline to prosecute one-third or more of the cases it reviews; and that where it ever did exist, the practice of issuing charges in virtually all cases forwarded by the police did not persist past the late 1960s)
62. Hochstedler Steury, *supra* note 53, at 338 n 14 (reporting that approximately 30% of the cases reviewed by the Milwaukee County District Attorney's office are screened out as unsuitable for prosecution)
63. Teplin LA: The criminality of the mentally ill. Am J Psychiatry 142:593–95, 1985
64. Hochstedler, *supra* note 53, at 258
65. Harvey, *supra* note 47
66. Teplin LA: Criminalizing mental disorder: the comparative arrest rate of the mentally ill. Am Psychol 39:794, 1984