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In discussing the problems of incompetent defendants it is useful to divide their patient/inmate careers into three distinct periods: (1) from police apprehension to competency evaluation; (2) from competency evaluation to release from a hospital for the criminally insane;[1] and (3) from release from that hospital to sentencing. This division is useful for a number of reasons, foremost of which is its tendency to point out the almost exclusive concentration of recent legal and social scientific research on the second period. Interest in the incompetent defendant's predicaments did not gain much currency until the last decade, but even as it has, there has been little inquiry and even less data on anything other than his experience during the second period.

Considerable recent discussion of the incompentent defendant has been spurred by *Jackson v. Indiana*.[2] However, the portions of this case which have received the brunt of analysis are, in fact, indicative of the concentration of attention on the evaluation and hospitalization periods of the incompetent defendant's career. For, while there are a wide variety of important ideas contained in *Jackson*, the one which is most frequently mentioned is that pertaining to the requirement that the incompetent defendant be re-

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1. It is important to note here that incompetent defendants are usually included as one type of criminally insane patient although they are not criminals at all. This attribution occurs because in most states the hospitals which house these defendants after incompetency determinations also house mentally ill inmates and are usually called hospitals for the criminally insane.

2. 406 U.S. 715 (1972).

turned to trial within a "reasonable period of time."[3] Certainly, it is appropriate that the incompetent defendant's traditionally inordinately long confinements, which often amounted to lifelong detentions before trial, should be remedied.[4] Yet, as judicial and research attention continues to focus on these defendants, there has been little indication of increasing interest in the other important segments of their criminal/mental health careers. Our presentation here is an attempt to move in such directions.

We will deal in this paper with the issues surrounding the specific application of equal protection and due process doctrines to the situations encountered by the incompetent during commitment, and upon return to criminal court following a finding of capacity to proceed.[5] To begin, we will first review some of the less frequently discussed decisions and research related to equal protection issues for incompetent defendants. The dominant theme of this review will be how both the equal protection issues and the cruel and unusual punishment facet of due process are important considerations in examining what happens to incompetent defendants when they are returned to court for trial. After establishing this framework, we will present some data and discussion relating to how well these equal protection and due process principles appear to be heeded currently, during this third stage of the incompetent defendant's processing.

Equal Protection and the Incompetent Defendant

When examining the developments in equal protection for incompetent defendants it is useful to do so by dividing these developments as they relate to the two aspects of the label "criminally insane." This is useful because these equal protection developments can be rather neatly grouped into (1) those dealing with the equal protection of incompetent defendants through procedural safeguards for commitment and retention, as in civil processes (the insane portion of the label) and (2) those establishing detention limits for incompetent defendants similar to those of criminal offenders (the criminal segment of the label).

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3. *Id.* at 738.

4. Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCHIATRY 713 (1963); McGarry, *The Fate of Psychotic Offenders Returned to Trial*, 127 AM. J. PSYCHIATRY 1181 (1971); [hereinafter cited as McGarry]; Steadman and Halfon, *The Baxtrom Patients: Backgrounds and Outcomes*, 3 SEMINARS IN PSYCHIATRY 376 (1971).

5. The other major portion of the incompetent defendants situation which has been badly slighted, we will not be able to discuss here. We refer to the period between police apprehension and competency evaluation. Suffice it to say that the latter is a segment of the criminal justice system's operation that is amazingly vague and filled with critical decisions about which we know practically nothing.

A landmark in these equal protection developments is the *Baxstrom v. Herold*[6] decision. The case involved Johnnie K. Baxstrom who was convicted of second degree assault in 1958 and sentenced to two to three years in Attica State Prison. While in Attica he suffered from epileptic fits during which he was aggressive and assaultive toward both inmates and guards. As a result, on June 1, 1961, he was transferred to Dannemora State Hospital, New York's correctional hospital for convicted male felons who require mental hospitalization. Baxstrom's full sentence expired in October 1961, at which time he was reviewed for continued retention in Dannemora as still being mentally ill. The court agreed with the psychiatric reports that he remained mentally ill, and his retention was approved.

Shortly after this hearing, and again in 1963, Baxstrom filed habeas corpus briefs, the latter being appealed through the state courts to the United States Supreme Court which handed down its decision in February 1966. The basic thrust of the Court's decision demanding that Baxstrom be given proper review involved two aspects of the equal protection doctrine. The first was the comparability of civil commitment procedures in New York's Mental Health Law with those for mentally ill inmates in its Penal Law. The court stated that since a jury trial to determine whether an individual was mentally ill was allowed under civil proceedings, Baxstrom should have had access to similar procedures since, with the expiration of his sentence, he was no longer committed as a criminal patient. At that time, he became a civil patient under the custody of the Department of Mental Health.

The second application of equal protection related to the question of dangerousness. For civil patients, the only way in which they could be detained in Matteawan, the state's other hospital for the criminally insane run by the Department of Corrections, was to be determined dangerously mentally ill under the Mental Hygiene Law. If an individual in a civil mental hospital was seen as dangerous by the hospital psychiatrists, this patient was entitled to a court hearing to determine dangerousness judicially. In the case of convicted Dannemora or Matteawan patients who were being reviewed for continued retention as mentally ill at the expiration of a sentence, the assumption implicit in the New York Correction Law was that if a patient were determined mentally ill, he was also, necessarily, dangerous. The United States Supreme Court's decision declared that this was not a proper legislative assumption. Since Dannemora was a facility quite distinct from civil hospitals, the court ruled that there should be judicial review of the question of dangerousness before retention in a hospital for the criminally insane was permissible. No longer could time-expired, mentally ill inmates be the

6. 383 U.S. 107 (1966).

only patients in New York who did not have access to jury review on the question of mental illness and dangerousness.

The *Baxtrom* case involved a mentally ill inmate and the review mandated by the decision directly related only to such patients. However, New York's interpretation of the Supreme Court decision led to the transfer of 185 incompetent defendants from Matteawan State Hospital, in addition to over 700 other patients. Over and above this direct impact on some incompetent defendants in New York, the *Baxstrom* decision had an impact on many more incompetent defendants outside the state through its contributions to the principles of the *Jackson* case. *Jackson* rests to a great degree on the equal protection doctrines enunciated in *Baxstrom*. *Jackson* also dealt with equal protection issues for both the insane and criminal aspects of the incompetent defendant's situation.

On questions relating to the insane side the Court ruled in *Jackson* that because of his pending charges, the criteria under which Jackson was committed and refused release to programs of potential benefit were considerably different from civil guidelines. Thus, the court stated:

> As we noted above, we cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by Section 22-1209 or Section 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.[7]

Therefore, not only must rights such as that to a jury trial be as strictly upheld on behalf of the criminal incompetent as on behalf of the civil incompetent, but also the criteria for admission and discharge in the civil statutes must be similarly applied in criminal cases. The alleged commission of a criminal offense does not allow more severe restrictions on the question of mental illness.

The part of the *Jackson* decision most often discussed is that which dealt with the limitation of the period of time for which an incompetent defendant may be detained under criminal orders.[8] Together with the previous *Bax-*

7. 406 U.S. at 730.

8. A defendant "who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the forseeable future." 406 U.S. at 738.

strom and *United States ex rel. Schuster v. Herold*[9] decisions, the *Jackson* decision may be seen as part of a trend toward setting detention limits for all individuals labelled criminally insane and giving them the equal protection and due process protections of those defendants remaining in the criminal justice system.

Another recent Supreme Court decision which relates back to the insane segment of the label was an affirmation without comment of a federal district court ruling that an incompetent felony defendant, who had been found dangerously incapacitated by a criminal court, was entitled to a jury review of the dangerousness question.[10] Precisely for the same reasons that Johnnie Baxstrom had been ruled to have the right to such review, in this class action suit Gomez and other petitioners were granted jury trials because under New York civil statutes governing commitment of the dangerously mentally ill, a person has the right to a jury trial on the question of dangerousness. Now, with the *Gomez* and *Jackson* cases, incompetent defendants have been given equal protection with patients civilly committed either as mentally ill or as dangerous, and with inmates, by the imposition of more definite limitations on the length of the detention period.

All of these decisions have been important and certainly appropriate. However, the concerns for the incompetent defendant which are reflected in these decisions are limited, centering almost exclusively on the questions of commitment and return to trial. The situation which has developed for incompetent defendants is remarkably similar to that in criminal sentencing recently discussed by Judge Marvin Frankel:

> The heart of the matter, as I see it, is that we have chosen, or permitted ourselves, to stop thinking about the criminal process after the drama of apprehension, trial, and conviction (or plea) has ended.

Likewise, with incompetent defendants, legal and research concern has not focused to a significant degree on the problems of incompetent defendants beyond their return to trial. What we propose to do here, however, is to focus specifically on these latter phases of the incompetent defendant's experiences. First we will examine what is known about the dispositional experiences of incompetent defendants. From these data we will pose, and probe empirically, a number of questions about these experiences as they relate to due process and equal protection.

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9. 410 F.2d 1071 (2d Cir. 1969), dealt primarily with the necessity of full procedural safeguards for mentally ill inmates at the time of their transfers from prison to hospitals for the criminally insane. A major portion of this decision's logic dealt with the differences between prisons and hospitals of the criminally insane. One of the key distinctions was the lack of parole consideration during hospitalization. Although not specified in the decision, the implication is fairly strong that there should be equal opportunity for parole whether a defendant is imprisoned or hospitalized.

10. Gomez v. Miller, 341 F. Supp. 323 (S.D.N.Y. 1972), *aff'd*, 412 U.S. 914 (1973).

What Happens to Incompetent Defendants Upon Return to Court?

There is very little research to indicate what happens to incompetent defendants upon their regaining ability to proceed with their trials. We know of four published studies which deal empirically with this, one from Massachusetts, one from Detroit, and two from New York.[11] It is difficult to find any consistencies between these four studies. The Massachusetts study found that of seventy-one incompetent felony defendants returned to trial after an average of fourteen years and nine months in Bridgewater State Hospital, thirty-four (46%) were convicted and fourteen (20%) were found not guilty by reason of insanity. The remaining twenty-four (34%) were not prosecuted.[12]

In one New York study of twenty-seven incompetent felony defendants from Erie County, nineteen were discharged from Matteawan State Hospital for the criminally insane between 1950 and 1960. Only five of the nineteen were convicted[13] and the other fourteen (74%) had their indictments dismissed.

The five patients convicted were returned to trial after an average hospitalization of nine months. For the ten patients whose indictments were dismissed while still hospitalized, the average confinement was one year and one month in Matteawan. For the four patients committed and released, whose indictments were subsequently dismissed, the average stay was two years and five months. There were an additional seven individuals among the twenty-seven committed to Matteawan who were still under indictment and detained in Matteawan at the conclusion of the research. Their average hospitalization to that point was six years and two months, and the charges against them included two murders, one assault, one robbery, one child molestation, one burglary, and one illegal possession of a machine gun. The more serious the offense, the longer the stay in Matteawan, but as the hospitalization period lengthened, there was an increased likelihood that the indictment would be dismissed.

The Detroit study involved only twenty-one homocide offenders between 1959 and 1963. Of these, eighteen (86%) had their charges dismissed,

11. Vann, *Pretrial Determination and Judicial Decision-Making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice*, 43 U. DET. L.J. 13 (1965); A. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW (1970); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT (1968).

12. It is interesting to note that among the seventy-one cases there were twenty-three alleged homicides and eleven assaults. Twelve of the homicide charges were disposed of as determinations of not guilty by reason of insanity.

13. The four convictions included three for grand larceny and one for manslaughter.

two were found guilty of manslaughter and one was found not guilty by reason of insanity. The author does not give the lengths of hospitalization, but says it was "long" in each case.

The second New York study, completed by the New York City Bar Association, was the largest of the four. It determined the dispositions for all 235 cases returned to court from New York's Matteawan State Hospital in fiscal 1964. In marked contrast to the Erie County and Detroit findings, only twenty-one (8.9%) of all those returned to court throughout New York State in this period had their charges dismissed. This was after an average of four years in Matteawan. The most frequent outcome was a guilty plea (67% of the cases), usually to a reduced charge (58%) and a sentence of time already served.

The one thread of consistency among these four studies is the conclusion that "in the majority of cases the court has allowed the confinement to a criminal mental hospital to serve as compensation to society for a prison sentence."[14] Where length of hospitalization was long, the conviction rate was low. When hospitalization was short, the conviction rate increased. In addition, the seriousness of the charge was positively related to longer hospitalization and, therefore, lower conviction rates.

On the one hand, it seems as though the criminal system was not overly punitive to these individuals when they returned. Even where the offenses were very serious, significant numbers had their charges dismissed. On the other hand, for violent offenses against persons, lengthy pretrial hospitalization and the possibility of continued involuntary detention in a civil mental hospital after a finding of not guilty by reason of insanity was much more likely.

One of the reasons for the interpretive difficulties of these studies is that they were not designed to address whether the dispositional and sentencing practices they observed represented the usual manner in which the criminal justice system operated for all defendants in their jurisdiction, incompetent or not.[15] What we set out to determine was what happens to a group of incompetent felony defendants returned to trial, *as opposed* to a group of indicted defendants who were never diverted for competency evaluations.[16]

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14. Vann, *supra* note 11, at 31.

15. One portion of Vann's study did examine one aspect of a similar question by comparing the dispositions and sentences of defendants evaluated for competency, but found fit to proceed with those of a sample of defendants who remained at all times after arrest within the criminal justice system. He concluded that those evaluated for competency, and found competent, received harsher sentences than those not evaluated at all. *Id.* at 25-27.

16. We had some difficulty arriving at a handy term to designate this criminal justice control group. We finally decided to call them "purely criminal defendants" and

In other words, what equal protection and due process standards are maintained on behalf of incompetent defendants subsequent to their return to trial?

This framework will explore the issues of whether incompetent defendants are receiving equal treatment with "other criminals" upon their return to the criminal justice system. It refers to due process considerations through its questions about cruel and unusual punishment as they relate to the disposition and sentences of incompetent defendants. If, in fact, there are significant discrepancies, in terms of "punishment," between the dispositions and sentences of defendants found incompetent and those of purely criminal defendants, serious questions would thus be raised about the designation of such a group at any stage of criminal justice processing. Should such a situation exist, would it not be cruel and unusual punishment to render judicial determinations under statutes and procedures which mandated such a categorization?

Basically we are proposing to examine due process through the indicators of (1) relative conviction rates and (2) relative severity of sentences between incompetent defendants and purely criminal defendants. In addition, we will explore equal protection issues by probing the mechanisms of criminal justice processing which must be taken into account in making the above comparisons.

Accordingly, we collected data on all eighty-eight incompetent felony defendants returned to court for criminal trial in three New York City counties in a one year period. A control group of eighty-eight defendants who were not diverted into the mental health systems from the same three counties was selected.[17] By defining our study groups in this manner we worked with incompetent defendants whose maximum hospitalizations under New York's 1971 Criminal Procedure Law was one year. Our two basic questions were (1) how did these two groups of defendants compare on the disposition of their cases, and (2) how did they compare on their sentences?

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this is what we will use below to refer to our control group.

17. The incompetent felony defendants were all those defendants returned to court in Manhattan, Bronx, and Brooklyn from Matteawan and Mid-Hudson Psychiatric Center (the Department of Mental Health hospital for the entire state's nondangerous and unindicted incompetent felony defendants) between November 1972, when the first patient was returned under the 1971 Criminal Procedure Law, and November 1973. The control group was selected in the respective counties' district attorney's office by preceding indictment number for each of the eighty-eight incompetent defendants. Where this was either a female, or a defendant who had been diverted into the mental health system, the subsequent indictment number was used. These procedures were used to control as closely as possible any differences which may have occurred simply because the processing of the two groups took place during vastly different periods.

Findings

From some of our earlier work[18] we knew that we might encounter difficulties in making the comparison of dispositions and sentences because of a disproportionate representation of violent crimes against persons among incompetent felony defendants as compared to the frequency with which criminal defendants generally are charged with such offenses. For example, in 1971, of the 114,948 felony arrests in New York State, 941 (.8%) were for murder, while seventy-one of 533 (14.4%) of New York State incompetent felony defendants in 1971-1972 were charged with murder, making murder eighteen times more frequent among these defendants. This overrepresentation occurred for all violent crimes against persons, while property offenses and drug offenses were dramatically underrepresented statewide among incompetent felony defendants. These differences were, in fact, also found among the eighty-eight incompetent defendants in our current sample.

Table 1

Distribution of Indictment Charges

Charges	Incompetent Defendants		Criminal Defendants	
	N	%	N	%
Murder, Manslaughter, Assault, Rape	26	29.5	22	25.0
Robbery, Burglary	43	48.9	21	23.9
Grand Larceny, Forgery, Arson	7	8.0	16	18.2
Drugs, Weapons, Other	12	13.6	29	32.9
Total	88	100.0	88	100.0

$X^2 = 18.4664$; $P < .001$

As seen in the above table, 78% of the incompetent defendants were charged with crimes actually or potentially against persons (murder, manslaughter, assault, rape, robbery, burglary), while only 49% of the control group were so charged. Therefore, as we proceeded to examine the dispositional experiences of both groups, the offenses of each group were considered as possible influences on dispositions and sentences.

18. Paper prepared by H. Steadman and J. Braff, "Incompetency to Stand Trial: The Easy Way In?" presented at the American Society of Criminology Annual Meeting, in New York City, November 1973.

Table 2 shows the dispositional outcomes of both groups of defendants as of October 31, 1973.

Table 2

Dispositions of Incompetent and Criminal Defendants as of October 31, 1973

Disposition	Incompetent		Criminal	
	N	%	N	%
Guilty, Felony	51	79.7	35	47.9
Guilty, Misdemeanor	12	18.8	18	24.7
Dismissed; Acquitted	1	1.5	14	19.2
Youth Offender	0	—	3	4.1
Criminal Court Pending	0	—	3	4.1
Total	64	100.0	73	100.0
Pending Supreme Court	24		15	

X^{2*} (corrected for continuity) = 14.3221 $P < .41$
X^{2**} (corrected for continuity) = 9.6532 $P < .01$

* Criminal Court Pending omitted
** Guilty of Felony, Misdemeanor, or Youth Offender vs. Dismissal

Most strikingly, fifty-one of the sixty-four (80%) incompetent defendants who had had their cases disposed of were found guilty of felonies,[19] compared to 48% of the purely criminal defendants. Approximately the same percentages of both groups were convicted of misdemeanors, 19% of the incompetents and 25% of the control group. The most significant additional difference, which was associated with the large discrepency in the felony conviction rate, was that fourteen of the seventy-two (19.2%) purely criminal defendants had their charges dismissed or were acquitted while only one of the sixty-four (1.5%) cases involving incompetent defendants was so concluded.

Because so many more incompetent defendants were charged with more serious offenses, this factor was tested as a possible source of the variation in frequency of felony conviction between the two groups. To consider this question we analyzed the relative disposition of cases in both groups, controlling for charges. As evident in Table 3, consistently greater percentages of incompetent defendants were convicted of felonies in *all* offense categories. In *every* offense category, substantially more purely criminal defendants were acquitted or had charges dismissed.

19. Because of inconsistencies in the District Attorney's records among the three counties where the data were gathered, it was impossible to determine which cases were decided by pleas of guilty rather than by a judicial finding.

Table 3

Dispositions of Incompetent and Criminal Defendants by Indictment Charge

Disposition	*Against Person*				*Robbery-Burglary*				*Against Property*				*Drugs, Weapons, Other*			
	Incomp.		Crim.		Incomp.		Crim.		Incomp.		Crim.		Incomp.		Crim.	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Guilty Felony	15	88.2	12	70.5	26	83.9	7	38.9	1	25.0	3	18.8	9	75.0	13	59.1
Guilty Misdemeanor	2	11.8	2	11.8	4	12.9	2	11.1	3	75.0	9	56.2	3	25.0	5	22.7
Dismissed-N.G.	0	—	2	11.8	1	3.2	7	38.9	0	—	3	18.8	0	—	2	9.1
Youth Offender	0	—	0	—	0	—	2	11.1	0	—	0	—	0	—	1	4.5
Crim. Court Pending	0	—	1	5.9	0	—	0	—	0	—	1	6.2	0	—	1	4.5
Total	17	100.0	17	100.0	31	100.0	18	100.0	4	100.0	16	100.0	12	100.0	22	99.9
Pending	9		5		12		3		3		0		0		7	

X^{2*} (corrected) = 8.8940 $P < .01$ N.S.*

X^{2**} = 8.8433 $P < .01$ N.S.**

* Guilty Felony, Misd, or Youth Offender vs. Dismissal
** Guilty Felony vs. any other disposition

It certainly was not because the incompetent defendants were charged with more serious offenses that they practically always were guilty. Within every offense category, fewer defendants who had not been diverted from the criminal justice system as incompetent to stand trial were found guilty. Currently, at least in the New York counties studied here, when an individual has been indicted for a felony offense and found incompetent to stand trial, there is little chance that he will encounter the same likelihood of dismissal or lower court disposition as the indicted defendant who remains in the criminal justice system.[20]

Having determined that relative to those defendants remaining in the criminal justice system, incompetent defendants are more likely both to be found guilty and to be found guilty of a felony, we next moved to the question of how the experiences of the two groups compared at sentencing. Of the sixty-four cases from the incompetent group which ended in convictions, in forty-five sentencing had occurred by October 31, 1973. Of the fifty-six control cases which ended in convictions, sentencing had occurred in fifty by that date. Table 4 summarizes these results.

Table 4

Sentences of Incompetent and Criminal Defendants by Conviction Charge

Sentence	Actually or Potentially Against Person				Against Property, Drug Offense, Other			
	Incompetent		Criminal		Incompetent		Criminal	
	N	%	N	%	N	%	N	%
Time Served, Cond. Disch. or Probation	15	51.7	7	33.3	11	68.8	18	62.1
Any Imprisonment	14	48.3	14	66.7	5	31.2	11	37.9
Total	29	100.0	21	100.0	16	100.0	29	100.0
			N.S.				N.S.	

20. After having analyzed our data and reached this conclusion, we thought of another possible explanation which was associated with the manner in which we had defined our incompetent defendants study group. By drawing for study all those incompetent felony defendants who were returned to court, it was possible that we necessarily excluded most of those whose cases were dismissed, since dismissal may have frequently occurred while the defendant was under detention in the mental hospital. Therefore, in order to have greater certainty about our initial conclusion, we obtained data on a group of incompetent, indicted felony defendants, commencing from the same point as the control group of criminal justice defendants, the time of indictment. Accordingly, we drew a second sample of indicted felony defendants by taking 50% of all those defendants who were admitted during the first year following enactment of the Criminal Procedure Law. This selection resulted in a group of seventy-two incompetent felony defendants, forty-four of whom had had their cases disposed of by January 2, 1974. Of these, none had his charges dropped while hospitalized and only one was subsequently acquitted. Thus, as with the original study group, 98% of this second group of incompetent defendants were found guilty.

Because of limited numbers in each cell, we dichotomized the offense categories into those directly or potentially against the person, and those involving property, drug, and other offenses. Using these categories we see that for those defendants convicted of crimes against the person, those who have been previously found incompetent are much more likely to be sentenced to the time already served, conditionally discharged, or put on probation, than those convicted who have experienced the usual criminal processing. For less serious felony convictions, the incompetent defendants and control group had similar sentencing experiences, although the probability of less severe sentences for the incompetent defendants persisted.

An inference suggested by the consistencies across offense categories in the dispositional and sentencing data is that the courts we studied are setting off the time spent in a mental hospital regaining competency against incarceration time upon subsequent conviction. This is not mandated by the Criminal Procedure Law except where the indicted defendant is found dangerously incapacitated and his pretrial commitment is in a correction department hospital. Where the defendant is either not dangerous or unindicted when first found incompetent, the hospitalization is in a facility run by the Department of Mental Hygiene, and therefore is not necessarily counted as "time served."[21] Nevertheless, the courts in the three counties studied here appeared to be applying hospitalization time against subsequent sentences regardless of the stage of the process at which commitment occurred, and the grounds on which it was based.

To be found an incompetent felony defendant in the three New York City counties under study meant almost inevitable conviction, most probably for a felony (80%), as opposed to the control group's 20% chance of outright dismissal and 50% chance of a felony conviction. However, accompanying their high conviction rate is the lessened chance of incompetent defendants receiving a sentence of imprisonment.

Conclusions

The general issues which we proposed to examine at the outset were those of due process and equal protection, as they related to the criminal process, from the time of the defendant's release from the hospital, through sentencing. The major due process questions revolved around the issue of cruel and unusual punishment, while those of equal protection related to a com-

21. This is the most common situation in the United States. Although a number of recent revisions have required that time spent hospitalized regaining competency be counted regardless of which department operates the facility. *Cf.* S. BRACKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 417 (1971).

parison of the safeguards maintained for incompetent defendants, to those maintained for purely criminal defendants. The empirical indicators of these issues which we have utilized were the comparative dispositions and sentences of a group of incompetent defendants and a group of defendants receiving the more usual criminal justice processing in the same locale. The data we have presented suggest somewhat conflicting conclusions about the two general issues of due process and equal protection.

The courts have quite clearly established that the sole reason an incompetent defendant may be hospitalized is to receive treatment to aid his return to trial. Incarceration of a defendant found incompetent is wrong and hospitalization in the absence of treatment is incarceration.[22] Although not so stated by the courts, the thinking reflected in these decisions may be viewed in the framework of cruel and unusual punishment as prohibiting any type of punishment for incompetent defendants since any at all would be cruel and unusual. We cannot deal here with the closely related question of the right to treatment, which arises in hospitals for the criminally insane. However, our data do address the later stage of criminal sentencing and we find no indications that discrepancies exist in the sentencing of incompetent defendants that conflict with due process in the sense of cruel and unusual punishment. The courts in the three counties studied appear to give consideration in their sentencing practices to the time the defendants have been hospitalized. They are allowing those periods of involuntary confinement for treatment to moderate subsequent criminal sentences, thereby making the confinement no more burdensome than that imposed upon any convicted felon.

Similarly, positive conclusions about due process and equal protection for incompetent defendants are not reached from our data as they relate to dispositional practices. In the locale studied, when felony defendants were indicted and subsequently determined incompetent to stand trial, they faced virtually certain conviction, most often of felonies, when returned to the criminal system. Those indicted but not found incompetent had roughly a 50% chance of not being convicted of a felony and a 20% chance of dismissal. It seems that those incompetent defendants returned to court are probably most often pleading guilty to the alleged or less serious offense, expecting their sentence to reflect consideration for the length of time they have been hospitalized. Our data cannot address the questions of whether the nearly 100% conviction rate of incompetent defendants was due to legal aid attorneys (who represent most of the defendants), aware of the sentencing patterns, urging their clients to accept guilty pleas; whether hospitals

22. Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).

are now detaining incompetent defendants for periods that appear most likely to elicit "time served" sentences upon their return; or whether the prosecution and courts simply do not give incompetent defendants equal opportunity to avail themselves of unprejudiced criminal proceedings. Because the first and third of these questions, if considered as propositions for a moment, may be supportive of one another, and because we cannot reject the possibility of the third on the basis of our data or previous research, they potentially demonstrate the absence of equal protection for incompetent defendants upon their regaining the capacity to proceed to trial.

One might argue that the higher frequency of convictions for incompetent defendants occurs despite their right within the process to make their own informed choices, and that they have access to the protections offered if they choose to use them. However, since their decisions are, of course, so dependent on legal counsel, it would seem that the nearly 100% guilty rate reflects something of their counsel's perceptions and expectations of the criminal justice system. There simply are no data to indicate whether in fact it is prejudicial in subsequent criminal proceedings for a defendant to have been found incompetent. However, from the comparative materials we have presented, there are some indications that a determination of incompetency limits the protections afforded.

It is somewhat reassuring to have found that the incompetent defendants studied did appear to receive equitable treatment at the point of sentencing. However, their dispositional experiences raise serious questions, especially in light of the numerous points in their processing where their treatment is questionable or has been concealed from public view. The additional constitutional, procedural, legal, and research questions that the conviction experiences of the defendants studied here raise, further emphasize that this area is worthy of the increased attention it is now beginning to receive. Equal protection and due process for incompetent defendants have been explicitly mandated by the courts in a variety of circumstances. The task now is to determine if, in fact, they are receiving them, and where this is in doubt, to move to ensure it. In addition, we must probe those issues to which the concepts of due process and equal protection have been less than strictly applied, such as the effects of incompetency determinations on the subsequent trial and sentencing experiences of such defendants.