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CRIMINAL DEFENDANTS WITH PSYCHIATRIC IMPAIRMENT: PREVALENCE, PROBABILITIES AND RATES

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I. INTRODUCTION

This Article presents the findings of a study designed to estimate the proportion of individuals in a given criminal defendant population who were also treated for psychiatric impairment. This inquiry, based on data from Milwaukee County, Wisconsin, from the period 1981-1985, is of interest for both practical and theoretical reasons.[1] The focus of this Article, however, is the theoretical interest in the intersection of the criminal and psychiatric populations; an interest which is rooted in two traditions of thought: jurisprudence and sociology.

* Professor, University of Wisconsin-Milwaukee. I am grateful to Alice Klaybor and Mary Pepke for access to and collection of data from the Milwaukee County Mental Health Complex; to Robert Erdmann for access to the felony and misdemeanor case files of the Milwaukee County Clerk of Courts; to Renee Younk, Deborah Lang, Mark Seis, Suzanne Sobczak, and Anne Voegele for data collection; and to Frances Johannes for assistance in data processing and management. This research was supported in part by a grant from The Graduate School, University of Wisconsin-Milwaukee.

[1] Most obvious among the practical reasons is the need to provide adequate medical services to those enmeshed in the criminal justice system. Jails and prisons are extremely stressful environments, where even relatively stable minds might begin to lose balance. *See, e.g.*, John J. Gibbs, *Symptoms of Psychopathology Among Jail Prisoners: The Effects of Exposure to Environment*, 14 CRIM. JUST. & BEHAVIOR 288 (1987). Basic humanitarian concerns suggest the importance of adequate mental health services in such settings. A related concern is for the safe management of persons in custodial settings. Safe and effective management of mentally disordered persons in penal settings requires adequately trained custodial personnel, adequate medical and mental health services, and appropriately designed and equipped facilities. The threat of civil liability compels attention to the special needs of the mentally disordered in these settings.

A. JURISPRUDENTIAL SIGNIFICANCE

This research is of jurisprudential importance because its findings have broad implications for understanding the link between mental disorder and criminal behavior, and in turn, for the meaning of criminal culpability. For centuries,[2] Anglo-American law has recognized the special defense of insanity.[3] Although rarely applied,[4] the insanity defense has been of profound theoretical importance in defining the limits of criminal responsibility, and its resulting community moral sanction.[5] In fact, many have argued that without the insanity defense it would be difficult to understand what criminal culpability really means.[6]

In the history of the United States, the insanity test has been variously formulated to recognize particular effects[7] of mental ab-

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2 The first recorded jury acquittal by reason of insanity occurred in 1505. NIGEL WALKER, CRIME AND INSANITY IN ENGLAND 26 (1968). However, juries were not the first to exculpate accused criminals based on a psychiatric condition. Kings had been granting pardons for murder on the basis of madness since the 1300's. AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE AND MENTAL HEALTH STANDARDS 324 (1989) [hereinafter ABA STANDARDS].

3 Except where otherwise noted, this term refers to the plea of not guilty by reason of insanity, or not guilty by reason of mental disease or defect, and these terms are used interchangeably here. *See infra* text accompanying notes 7-11, for a more detailed discussion of the variants of the insanity defense.

4 There is some evidence that the number of insanity pleadings has increased in the past several decades. *See* Jonas Robitscher & Andrew K. Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 49-51 (1982). However, the rate of insanity pleadings still hovers at a very low point, typically between .25% and 2% of all felony filings. Lisa A. Callahan et al., The Volume and Characteristics of Insanity Defense Pleas: An Eight State Study, Table 1 (unpublished working paper, on file with Policy Research Associates).

5 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

6 This venerable position holds that the abolition of the insanity defense would change the meaning of guilt, and necessarily, the meaning of innocence. *See, e.g.*, ABRAHAM GOLDSTEIN, THE INSANITY DEFENSE 223-226 (1967); Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 133 (1968). Essentially, the insanity defense is the validating exception to the general rule of responsibility. This argument is similar to the point made by the functionalist school of deviance: deviants are identified in order to instruct everyone by inference as to what is acceptable behavior. SOCIAL DEVIANCE 9 (Ronald A. Farrell et al. eds., 1975).

7 The nature of the causal relationship between mental abnormality and conduct is a matter that remains largely unspecified and has been the cause of some revisions of the insanity test formulation. The *M'Naghten* rule uses the term "from" to denote the connection between the mental disorder and the cognitive impairment. *See infra* note 10. The Model Penal Code [hereinafter MPC] specifies that the cognitive or volitional impairment must be the "result" of the mental disease or defect. *See infra* note 11. In 1870, New Hampshire adopted an insanity defense test that stipulated the conduct must be "the offspring and product of the mental disease." State v. Jones, 50 N.H. 369, 394 (1871). The New Hampshire rule, which is still in effect today, was not used by any

normality[8] on (a) the accused's ability to exercise free will or freedom of choice, the so-called "volitional" element,[9] (b) the accused's

other jurisdiction in the United States except the District of Columbia, which adopted "product" language in 1954, in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), and later abandoned it in favor of the MPC rule. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[8] Mental abnormality is variously defined in statutes. The MPC construction, "mental disease or defect" is common. *See, e.g.*, MODEL PENAL CODE § 4.01 (1985). The MPC language specifically adds that "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01(2) (1985). The MPC construction of mental abnormality is itself a variant on the *M'Naghten* terminology, "a defect of reason, from disease of the mind." M'Naghten's Case, 10 Cl. & Fin. 200 (1843). The new federal insanity test, also a variant of the *M'Naghten* rule, refers to "severe mental disease or defect." 18 U.S.C. § 17 (1988). In modern statutory language, the required psychiatric condition is not typically restricted to a "mental illness" or "mental disease." The legal meaning of mental disease or defect needs to be at the same time both broader than and narrower than the classifications used by mental health professionals for diagnostic and therapeutic purposes. ABA STANDARDS, *supra* note 2, at 345.

[9] The volitional element found in many insanity tests is as old as, or older than, the cognitive element. GOLDSTEIN, *supra* note 6, at 67; Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 2-3 (1988). Its most famous construction, the "irresistible impulse" test, was meant to excuse those who had lost the power to choose between right and wrong, and thus avoid doing the act in question. Parsons v. State, 81 Ala. 577, 596 (1886). Encouraged by the Supreme Court in Davis v. United States, 160 U.S. 469 (1895), many states added the volitional element to the *M'Naghten* test. The resulting two-pronged test became the standard in the United States until the 1962 MPC rule replaced it with a more modern formulation of the volitional and cognitive elements. MODEL PENAL CODE § 401 (1985) (as adopted at the 1962 annual meeting of the American Law Institute). *See infra* note 11 for a complete discussion of the rule.

There has been evidence of growing dissatisfaction with the volitional element of the insanity defense. In 1983, the House of Delegates of the American Bar Association voted to drop the volitional prong from its recommended standards. ABA STANDARDS, *supra* note 2, at 335-336. In 1984, the fifth circuit eliminated the volitional prong of its insanity test in United States v. Lyons, 731 F.2d 243 (5th Cir. 1984), and the United States Congress adopted an insanity test that did not include a volitional element. *See* 18 U.S.C. § 17(a) (1988). Much of the dissatisfaction seems to stem from a perception that it is impossible to distinguish between "an irresistible impulse and an impulse not resisted," Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A.J., Feb. 1983, at 196, a position which the American Psychiatric Association substantially supported in its 1982 statement on the insanity defense. *See* ABA STANDARDS, *supra* note 2, at 341 n.49. Of course, psychiatrists and jurors today are no worse at distinguishing between compulsion and indulgence than they were in previous times. English, *supra*, at 11.

It is worth noting, however, that where the volitional element has not been a part of the insanity test, foreign and domestic jurisdictions have developed alternative means of recognizing the diminished or partial responsibility of the volitionally impaired accused. The United Kingdom, although retaining the traditional *M'Naghten* rule, allows a defense of diminished responsibility based on volitional impairment (available since 1957) and allows a defense of non-insane automatism (available since 1991). P.J. Sutherland & C.A. Gearty, *Insanity and the European Court of Human Rights*, 1992 CRIM. L. REV. 418; Alec Samuels, *Mental Condition as a Defense in Criminal Law: A Lawyer Addresses Medical Men*, 28 MED. SCI. & L. 21 (1988). Scotland's diminished capacity defense dates from the late 1600's, and persists today. Christopher M. Green et al., *Criminal Responsibility and Mental*

ability to comprehend meaningfully the wrongfulness of the act, the so-called "cognitive" element,[10] or (c) both the accused's volitional and cognitive abilities.[11] The notion of free will or freedom of choice is perhaps the most critical justifying premise of our criminal laws and punishments. The volitional element of the insanity test relates directly to the "free choice" premise by recognizing that a particular individual, at a particular point in time, may not possess

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Disorder in Britain and North America: A Comparative Study, 31 MED. SCI. & L. 45, 48 (1991). California is notable for developing several variations on the theme of diminished capacity during the time its insanity defense recognized only cognitive impairment. *See, e.g.*, People v. Gorshen, 336 P.2d 492 (1950); People v. Wolff, 394 P.2d 959 (1964); People v. Conley, 411 P.2d 911 (1966); People v. Drew, 583 P.2d 1318 (1978). California adopted the MPC rule in 1978, but rejected it in 1982, when the legislature enacted laws permitting psychiatric evidence to be introduced to address the element of mens rea only, and specifically prohibiting defenses of diminished capacity, diminished responsibility, or irresistible impulses. Harlow M. Huckabee, *Avoiding the Insanity Defense Straight Jacket: The Mens Rea Route*, 15 PEPP. L. REV. 1 (1987). Despite the statutory proscriptions, the fact that California allows psychiatric evidence to bear on mens rea culpability suggests that it may soon allow diminished capacity defenses to an entire charged offense. *Id.*

10 The cognitive element of the insanity defense is reflected in the famous *M'Naghten* rule, established in 1843:

> [I]t must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 10 Cl. & Fin. at 210. The *M'Naghten* rule soon became the standard in the English speaking world, and prevailed in most jurisdictions in the United States until modified by the addition of the irresistible impulse test or until replaced by the MPC rule. *See infra* note 11. But *M'Naghten* is enjoying rediscovered status of late. The United States Congress, which had declined to adopt any insanity rule for the federal courts until 1984, finally adopted an updated version of the *M'Naghten* rule:

> It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17 (1988)). The *M'Naghten* rule can be seen as the culmination of earlier, cruder tests that acknowledged the effects of cognitive defects on criminal behavior. Earlier constructions made references to "idiots," "lunatics," one who "wholly loseth his memory and understanding," one with a lesser understanding than "ordinarily a child of fourteen hath," or one "totally deprived of his understanding and memory so as not to know what he is doing, no more than an infant, brute or a wild beast." *See* ABA STANDARDS, *supra* note 2, at 331 (citations omitted).

11 The MODEL PENAL CODE § 401 (1985), insanity defense test reads as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social misconduct.

This formulation, while not quite as predominant as it was in the early 1980's, is still the prevailing insanity rule in the United States. ABA STANDARDS, *supra* note 2, at 333.

sufficient capacity to exercise freedom of choice. If an individual lacked free choice, then it is unfair to punish that individual for failing to exercise free choice properly. The cognitive element of the criminal insanity test, on the other hand, relates only indirectly to free choice. It reflects the position that persons not capable of distinguishing between "right and wrong," as commonly understood by normally functioning adults, cannot be understood to have "chosen" a wrong act in preference to a right act, and therefore should not be held criminally responsible for their "choice." Specifically, the cognitive element of the insanity defense examines whether the accused's volitional act was informed by an impaired mental process that prevented the accused from appreciating the impropriety of his actions. The rationale was summarized succinctly long ago by the English jurist, Sir Matthew Hale:

> The consent of the will is that, which renders human actions either commendable or culpable . . . . And because the liberty or choice of the will presupposeth an act of understanding to know the thing or action chosen by the will, it follows that where there is a total defect of the understanding, there is no free act of the will.[12]

Although the volitional and cognitive elements of the insanity defense comprise the standard pillars of the insanity rule, their merits have been periodically debated and challenged. The history of the insanity defense in Anglo-American law has been marked by revision and re-revision. Instead of breaking new ground, however, the revisions typically retreated or advanced by excluding or including one of the two standard elements.[13]

Whatever the constituent elements of the test have been, the insanity defense has traditionally operated as an all-or-nothing proposition: if insane at the time of the offense, the defendant is not responsible for the conduct.[14] For at least 300 years, respected scholars and practitioners have argued that the all-or-nothing approach to excusing criminal responsibility is ignorant and unfair in light of modern psychiatric understanding. In the United States, Dr.

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12 SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 14-15 (1736).

13 Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17 (1988)), provides an example of such a retreat with respect to the insanity defense. Between 1961 and 1981 the federal courts adopted the MPC rule, which included both cognitive and volitional elements as alternative means to establish a defense of insanity. English, *supra* note 9, at 2-3; *supra* note 11. By adopting the 1984 Act, Congress retreated from the later and more inclusive MPC rule and returned to a version of the traditional *M'Naghten* rule. *See supra* note 10. Congress has been criticized for doing so. *See, e.g.*, English, *supra* note 9.

14 Sir Matthew Hale proposed the concept of partial insanity at the end of the seventeenth century in England. RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM 564 (1985).

Isaac Ray was an early advocate of adopting a legal view recognizing degrees of diminished responsibility instead of an all-or-nothing position.[15] Several prominent scholars of law and psychiatry have advanced similar arguments since Ray's time.[16] Norval Morris' book best articulates the abolitionists' position by proposing the abolition of the special insanity defense as it has been known for centuries.[17]

Morris' objection to the insanity defense is based on the reality that "choice is neither present nor absent . . . [W]hat is at issue is the degree of freedom of choice on a continuum from the hypothetically entirely rational to the hypothetically pathologically determined—in states of consciousness neither polar condition exists."[18]

> [T]he special defense of insanity . . . [is] a morally unsatisfactory classification on the continuum between guilt and innocence. It applies in practice to only a few mentally ill criminals, thus omitting many others with guilt-reducing relationships between their mental illness and their crime; it excludes other powerful pressures on human behavior, thus giving excessive weight to the psychological over the social. It is a false classification . . . .[19]

Morris does not, however, advocate ignoring a defendant's mental disorders. On the contrary, he proposes using mental disorder evidence to disprove all or part of the actus reus and/or the mens rea, and to inform the sentencing decision if the defendant is convicted.[20] Thus, he advocates a more inclusive and graduated approach to the assessment of the relationship between mental disorder and criminal responsibility, instead of the all-or-nothing result of the insanity defense.

Most legal scholars and lawmakers have resisted the idea of such reforms precisely because the essential meaning of criminal responsibility is so clearly rooted in its insanity exception.[21] The tra-

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15 ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 21 (1838).

16 Among the eminent abolitionists are Professor H.L.A. Hart, Professor Joel Feinberg, Lady Barbara Wooton, Dr. Seymour Halleck, and Dr. Thomas Szasz. In this Article, I refer primarily to the work of Norval Morris as representative of this position.

17 *See* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982).

18 *Id.* at 61.

19 *Id.* at 64.

20 *Id.* at 65.

21 In the past few years, three jurisdictions in the United States embraced the abolitionist position. *See* IDAHO CODE § 18-207 (1993), MONT. CODE ANN. § 46-14-102 (1985); § 46-14-201 (1985) (current version at § 46-14-214 (1992); § 46-14-203 (1985) (current version at § 46-14-206 (1992); § 46-14-212 (1985) (current version at § 46-14-205 (1992); and § 46-14-213 (1985); UTAH CODE ANN. § 76-2-305 (Supp. 1993). These jurisdictions abolished the special defense as it had traditionally operated and allowed evidence of mental abnormality to be introduced to rebut the mens rea of the offense charged, as well as to influence the sentencing decision. Research in two of these jurisdictions shows that the requirements of the new laws are not well understood or observed. *See* Peter Heinbecker, *Two Years' Experience Under Utah's Mens Rea Insanity Laws,*

ditionalists argue that to abolish the well-established special insanity defense, as Norval Morris proposes, would threaten the very meaning of criminal culpability.[22] Even to alter our perspective on the proper legal consideration of the link between mental abnormality and criminal responsibility would be to alter the very meaning of criminal responsibility.

The positions of both the traditionalists and the abolitionists beg equally for more information. As scientific inquiry slowly yields greater understanding about the causal relationship between mental disorder and volitional impairment, and between cognitive disorder and volitional impairment, the insanity defense, or its substitute, will surely be revised accordingly. The integrity of the meaning of criminal culpability ultimately will depend on the extent to which centuries-old notions of freedom of choice and moral cognition can accommodate new scientific understanding.[23]

The research findings presented in this Article are basic, and provide an empirical context in which to consider the debate over the proper legal view of the relationship between mental disorder and criminal responsibility. Beyond that, however, the findings have important implications for the meaning of criminal responsibility as they pertain to the traditionalist-abolitionist debate. These implications are suggestive rather than definitive, but potentially profound. After all, if a substantial proportion of criminal defendants have a psychiatric impairment, then surely jurists must question the fundamental meaning of criminal responsibility, at least as it is operationalized.

B. SOCIOLOGICAL SIGNIFICANCE

The sociological interest in the coincidence of these two populations may be understood in the context of the study of social control. Criminal justice and public psychiatry are two forms of formal, governmental social control, which are premised on clearly distin-

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14 BULL. AM. ACAD. L. & PSYCH. 185 (1986); Henry J. Steadman et al., *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCH. 357 (1989).

22 *See supra* text accompanying note 6.

23 This notion is reflected in the words of the plurality opinion in *Powell v. Texas*, 392 U.S. 514, 536 (1967), where reference is made to:

> . . . the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.

guishable criteria, but which sometimes operate in suspiciously similar fashion.[24] Both historical[25] and empirical[26] research suggest that control of the psychiatrically disordered and the criminal is, and has been over the centuries, an interchangeable exercise to some extent. In other words, some portion of the population controlled by the mental health system is also controlled by the criminal justice system, and vice-versa.

Interest in the subpopulation common to both systems of social control has intensified in the past couple of decades. Relevant literature reflects a fairly widespread presumption that the subpopulation of persons with mental disorders among the criminal defendant population is substantial in size.[27] This situation is commonly attributed to three major factors: the deinstitutionalization movement

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24 *See* DONALD BLACK, THE BEHAVIOR OF LAW (1976); ALLAN HORWITZ, THE SOCIAL CONTROL OF MENTAL ILLNESS (1982).

25 MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

26 *See, e.g.*, Thomas M. Arvanites, *The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial*, 26 CRIMINOLOGY 307 (1988); Robert D. Borgman, *Diversion of Law Violators to Mental Health Facilities*, 56 SOC. CASEWORK 418 (1975); Walter Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22 (1980-81); Ellen Hochstedler, *Criminal Prosecution of the Mentally Disordered*, 20 L. & SOC. REV. 279 (1986) [hereinafter *Criminal Prosecution*]; Ellen Hochstedler, *Twice-Cursed? The Mentally Disordered Defendant*, 14 CRIM. JUST. & BEHAV. 251 (1987) [hereinafter *Twice Cursed?*]; Ellen Hochstedler Steury, *Specifying "Criminalization" of the Mentally Disordered Misdemeanant*, 82 J. CRIM. L. & CRIMINOLOGY 334 (1991); TRANSCARCERATION: ESSAYS IN THE SOCIOLOGY OF SOCIAL CONTROL (John Lowman et al. eds, 1987); Robert J. Menzies & Christopher D. Webster, *Where They Go and What They Do: The Careers of Forensic Patients in the Medicolegal Complex*, 29 CAN. J. CRIMINOLOGY 275 (1987); Robert J. Menzies, *Psychiatrists in Blue: Police Apprehension of Mental Disorder and Dangerousness*, 25 CRIMINOLOGY 429 (1987); John Monahan et al., *Police and the Mentally Ill: A Comparison of Committed and Arrested Persons*, 2 INT'L J. L. & PSYCHIATRY 509 (1979); L.S. Penrose, *Mental Disease and Crime: Outline of a Comparative Study of European Statistics*, 28 BRIT. J. MED. PSYCHOL. 1 (1939); Henry J. Steadman et al., *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals*, 135 AM. J. PSYCHIATRY 816 (1978); Henry J. Steadman & Stephen A. Ribner, *Changing Perceptions of the Mental Health Needs of Inmates in Local Jails*, 137 AM. J. PSYCHIATRY 1115 (1980); Henry A. Steadman et al., *Comparing Arrest Rates of Mental Patients and Criminal Offenders*, 135 AM. J. PSYCHIATRY 1218 (1978); Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOL. 794 (1984); Linda A. Teplin, *Detecting Disorder: The Treatment of Mental Illness Among Jail Detainees*, 58 J. CONSULTING & CLINICAL PSYCHOL. 233 (1990) [hereinafter *Detecting Disorder*]; Linda A. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 AM. J. PUB. HEALTH 663 (1990) [hereinafter *Prevalence*].

27 *See, e.g.*, Ron Jemelka et al., *The Mentally Ill in Prisons: A Review*, 40 HOSP. & COMM. PSYCHIATRY 481 (1989); Edmund Kal, *Mental Health in Jail*, 134 AM. J. PSYCHIATRY 463 (1977); Carole Morgan, *Developing Mental Health Systems for Local Jails*, 8 CRIM. JUST. & BEHAV. 259 (1981); Mark A. Schuckit et al., *The Importance of Psychiatric Illness in Newly Arrested Prisoners*, 165 J. NERVOUS & MENTAL DISEASE 118 (1977).

that began in the 1950s and continued through the 1960s, the failure to establish an extensive network of community mental health programs to replace the institutional programs, and the increased stringency of standards for involuntary civil commitment that swept the nation from the late 1960s through the mid-1970s.[28] Despite the interest in this subpopulation, basic questions about its characteristics remain unanswered—inquiries which this Article addresses.

C. THE RESEARCH QUESTIONS

The findings presented in this Article address questions fundamentally important to both the jurisprudential and sociological lines of inquiry. This study explores three important features of the subpopulation that is subjected to control by the criminal justice and public mental health systems.

1. The *prevalence* question: *What proportion of the criminal defendant population are also public psychiatric patients?*
2. The *probability* question: *Is the size of the psychiatrically impaired criminal defendant population larger than expected?*
3. The *rate* question: *Does the psychiatrically impaired criminal defendant population account for a disproportionately large share of criminal cases?*

The prevalence question lays the foundation for the latter two questions, and establishes the parameters of the matter. The probability question relates directly to the jurisprudential concern about the very meaning of criminal culpability. If the empirical evidence shows that the mentally impaired are not more likely to be accused of a crime, then the independence of the meaning of criminal culpability from the meaning of mental disorder is implied. If, on the other hand, the empirical evidence suggests a link between criminal defendants and psychiatric patients, then independence of the operationalized concepts is not implied, and the association requires further examination from both a jurisprudential and a sociological perspective. From the jurisprudential perspective, such an association would question the integrity of the meaning of criminal responsibility. From the sociological perspective, such a finding would demand further inquiry to determine whether the coincidence is due to the behavior of the individuals or to discretionary selection by governmental agents. The importance of the rates question is identical to the importance of the probability question; it simply represents an amplification of the probability question. In other words, if there is a statistically significant coincidence of status as defendant and status as psychiatric patient, then do defendant-

28 RAEL JEAN ISSAC & VIRGINIA ARMANT, MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL (1990).

patients incur criminal charges at a greater rate than other defendants? In terms of social control, both the rates question and the prevalence question are potentially important with respect to defining the business of the criminal justice system.

II. LITERATURE REVIEW

In recent years, a fair amount of social scientific inquiry has focused on questions relating to, or questions presuming, the overlap in the populations of the mental health and criminal justice systems. These studies tend to be of two distinct varieties. One type analyzes the decisions of a police officer when encountering persons who may qualify as subjects of either the criminal justice or mental health system.[29] Each study in this category implicitly acknowledges the existence of the intersection of these two populations. Only one of them, however, was designed to provide an estimate of the size of the two populations' intersection. Teplin's observational study of field encounters between police and citizens produced an estimate that 9.5% ($N=14$) of those arrested ($N=147$) exhibited signs of mental disturbance at the time of arrest.[30] The major shortcoming of Teplin's study is the small number of mentally disordered persons observed.

The other type of study may be classified as "criminalization" or "deinstitutionalization" literature. In large part, these studies were ultimately aimed at assessing whether the proportion of psychiatrically impaired criminals had increased as a result of the deinstitutionalization movement or as a result of the legal restrictions placed on civil commitment, or both, as the "criminalization" hypothesis claims.[31] Most of these studies used large samples or populations, but almost without exception based the sampling

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29 *See, e.g.*, Egon Bittner, *Police Discretion in Emergency Apprehension of Mentally Ill Persons*, 14 SOC. PROBS. 278 (1967); Jennifer C. Bonovitz & Jay S. Bonovitz, *Diversion of the Mentally Ill into the Criminal Justice System: The Police Intervention Perspective*, 138 AM. J. PSYCHIATRY 973 (1981); Jacobson et al., *A Study of Police Referral of Allegedly Mentally-Ill Persons to a Psychiatric Unit*, *in* THE URBAN POLICEMAN IN TRANSITION: A PSYCHOLOGICAL AND SOCIOLOGICAL REVIEW (J. Snibbe & J. Snibbe eds., 1973); Arthur R. Matthews, *Observations on Police Policy and Procedures for Emergency Detention of the Mentally Ill*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 283 (1970); Menzies, *supra* note 26; Monahan et al., *supra* note 26; Linda A. Teplin, *Managing Disorder: Police Handling of the Mentally Ill*, *in* MENTAL HEALTH & CRIMINAL JUSTICE 157 (Linda A. Teplin ed., 1984).

30 Teplin, *supra* note 29, at 163.

31 Testing the criminalization hypothesis is as difficult as testing the general deterrence hypothesis. Critical to the test is the measurement of something that did *not* happen. This inherently tricky measurement is, in this case, confounded by dramatic changes in psychiatric understanding and treatment during the same period of time pertinent to the criminalization hypothesis.

frames on populations specially selected for captivity, such as prison or jail populations or releasees,[32] psychiatric hospital patients or former patients,[33] incarcerated persons seeking psychiatric services,[34] or defendants hospitalized for treatment after being ruled incompetent to stand trial.[35] Incarcerated populations are already winnowed by important selection decisions in the criminal justice and mental health systems, and therefore reflect several levels of official selection factors which confound the issue of the overlap between the criminal and psychiatric populations. Other studies have avoided captive criminal populations, but examined criminal populations carefully selected on the basis of special psychiatric needs.[36] None of these studies were capable of providing an estimate of the prevalence of the mentally disordered in the general (i.e., not selected for captivity) criminal defendant population.

Based on a sample of charged, but not necessarily confined, defendants, Hochstedler Steury reported that eighteen percent of the misdemeanor defendants in her sample had a history of mental disorder.[37] That study, however, employed indicators of mental disorder that did not permit the estimation of time-specific probabilities or rates.[38] Furthermore, the findings reported did not include felony defendants. Thus, Hochstedler Steury's results leave open the basic question of the proportion of criminal defendants who are also public psychiatric patients.

Any empirical study of crime and psychiatric disorder will suffer from the inherent problems of measuring a nominal concept that is a socio-political construct. Both crime and psychiatric disorder are socio-political constructs that depend on official definition and are applied to individuals in a real-world, socio-political context. It is well recognized that the set of those who engage in criminal behav-

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32 *E.g.*, Henry J. Steadman et al., *The Impact of State Mental Hospital Deinstitutionalization on United States Prison Populations*, 1968-78, 75 J. CRIM. L. & CRIMINOLOGY 474 (1984); Steadman, *supra* note 26.

33 *E.g.*, Joseph J. Cocozza et al., *Trends in Violent Crime Among Ex-Mental Patients*, 16 CRIMINOLOGY 317 (1978); Steadman, *supra* note 26.

34 *E.g.*, Jennifer C. Bonovitz & Edward B. Guy, *Impact of Restrictive Civil Commitment Procedures on a Prison Psychiatric Service*, 136 AM. J. PSYCHIATRY 1045 (1979).

35 *E.g.*, Arvanites, *supra* note 26; Dickey, *supra* note 26.

36 *E.g.*, Hochstedler, *Criminal Prosecution*, *supra* note 26; Hochstedler, *Twice-Cursed?*, *supra* note 26; S. McMain et al., *The Post-Assessment Careers of Mentally Disordered Offenders*, 12 INT'L J. L. & PSYCHIATRY 189 (1989); Menzies, *supra* note 26; Menzies & Webster, *supra* note 26.

37 Hochstedler Steury, *supra* note 26.

38 *Id.* at 343. The indicator of mental disorder in that study was very inclusive. It included all those who had a record of contact with the public psychiatric facility at some time in their lifetime, and also those who were screened and not admitted to either an inpatient or outpatient program.

ior and the set of those who are officially treated as criminals is not an exact match.[39] Similarly, there is no exact match between the set of those who exhibit symptoms of psychiatric disorder and those who "officially" have a psychiatric disorder.[40] The problems of definition, observation, official recognition, and official selection are inherent in any measure of the applied forms of the criminal responsibility and psychiatric disorder constructs.

Notwithstanding these inherent shortcomings, this study improves the assessment of the intersection of the two subject populations, by using a very large sample that is *not* defined by incarceration status. In this study, the criminal population consists of all those *charged with an offense during a five-year study period.* The psychiatric population consists of all those *admitted for inpatient or outpatient treatment during the same five-year study period.* In other words, this study is a cohort study of all those who had significant contact (i.e., charged as a defendant or treated as a patient) with both the criminal justice system and the mental health system in a five-year period. In the terms popularized by Monahan and Steadman,[41] this study estimates the coincidence of "treated mental disorder" and "treated crime," and offers a more inclusive assessment of that relationship than have other studies in the United States to date.

III. Research Methods

A. STUDY SITE

Milwaukee County, Wisconsin, was the site of the study. During the period under study, 1981-85, Milwaukee County had a population of approximately one million residents, distributed throughout one major city (with about 600,000 residents) and several suburban municipalities. The adult (18 years old and older) population in the jurisdiction averaged 704,000 during the five-year study period.[42]

The Milwaukee metropolitan area may be fairly described as more socially conservative than much of the urban United States; its residents have a reputation for orderliness and conformity. At the time of the study period, the area enjoyed a relatively low crime rate compared to other urban areas. Drug-related crime, and its highly

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[39] John Monahan & Henry J. Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, *in* 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145 (Michael Tonry & Norval Morris eds., 1983).

[40] *Id.* at 177.

[41] *Id.* at 153.

[42] U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 1988, 588 (1988).

publicized attendant problems, came to Milwaukee later than in many other parts of the country, and thus was not a salient crime factor at the time of this study.

The Milwaukee metropolitan area is noticeably segregated along ethnic and racial lines. During the study period, Milwaukee's African-American population composed less than twenty percent of the population,[43] was clearly segregated with respect to housing, and occupied a distinctly disadvantaged socio-economic position. Moreover, both African-Americans and the poor were proportionately over-represented in Milwaukee's criminal population: more than half of the defendants in the study were African-American (sixty percent of the felons and fifty-two percent of the misdemeanants), and a large majority of the defendants in the study were indigent for the purpose of providing defense counsel (eighty-two percent of the felons and fifty-eight percent of the misdemeanants).

Although Wisconsin is socially conservative, it is not necessarily politically conservative, as indicated by its long tradition of progressive government and social services. It has sometimes been characterized as a "social work state," due in large part to its publicly-funded mental health facilities which have been highly ranked in the industry.[44] Milwaukee's 830-bed public inpatient psychiatric facility, opened in 1979, is Wisconsin's largest mental health care facility. The intake unit for this facility is one of the busiest psychiatric emergency reception centers in the nation.[45]

Historically, Wisconsin has aggressively protected the rights of its accused, liberally providing constitutional rights to alleged criminal defendants. For instance, Milwaukee's criminal defense bar has been generally viewed as zealous and competent and its legal aid lawyers have bequeathed a legacy of cases protecting the mentally ill from undue state intervention. Furthermore, Wisconsin adjudicated *Lessard v. Schmidt*,[46] the "primer" on due process rights for civil commitment respondents, as well as subsequent cases requiring periodic reviews of orders to confine the mentally ill and others who have been protectively placed.[47] Though the state legislature peri-

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[43] *Id.*

[44] Wisconsin's mental health facilities have been favorably rated as "improving significantly" in recent years. E. FULLER TORRY ET AL., CARE OF THE SERIOUSLY MENTALLY ILL: A RATING OF THE STATE PROGRAMS (3d ed. 1990).

[45] Telephone interview with Jon E. Gudeman, M.D., Chief Administrator and Medical Director, Milwaukee County Mental Health Complex (1992).

[46] 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), 413 F. Supp. 1318 (E.D. Wis. 1976).

[47] State *ex rel* Watts v. Combined Community Services Bd., 362 N.W.2d 104 (1985).

odically debates whether to relax the civil commitment laws, it has not substantively altered those laws since adopting *Lessard*'s criteria in the Mental Health Act of 1976.[48]

The local prosecutor's office has enjoyed a reputation of stability, efficiency, and even-handedness. It exhibits a legalistic[49] approach to applying the law, and is led by a career prosecutor who has been re-elected every two years since first taking office in 1968. It is a progressive office in many respects,[50] and, like most government offices in Wisconsin, has avoided any major scandal or hint of corruption in recent memory.

In short, during the study period, Milwaukee County was a socially conservative and racially segregated community, with a resident population that prized orderliness. It had some of the most stringent civil commitment laws in the country, and one of the best-equipped and staffed public psychiatric facilities. Milwaukee's justice system consisted of respected defense lawyers representing accused criminals and respondents to civil commitment petitions, and even-handed prosecutors operating in a legalistic, yet progressive, manner. This, then, was the climate for public psychiatry and criminal justice in the study jurisdiction.

B. SAMPLE AND DATA

Two independent random samples, one felony and one misdemeanor, were drawn from criminal cases filed between January 1, 1981 and December 31, 1985.[51] The felony sample consisted of

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48 State Alcohol, Drug Abuse, Developmental Disabilities, and Mental Health Act, WIS. STAT. § 51.20 (1976).

49 *See* JOHN Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968). Wilson observed police behavior in eight departments and classified the styles of behavior as: watchman, legalistic, and service-oriented. These styles may be easily viewed as styles of dispensing justice which extend beyond the police department. The legalistic style is characterized by greater adherence to the letter of the law. *Id.* at 172. "Who you are, who you know, and what kind of neighborhood you live in" would make the least difference in the legalistic bureaucracy; what you did would make the most difference in this working environment. *Id.* at 188.

50 Examples of the progressiveness of the prosecutor's office abound. For example, it received one of the first computerized information systems (PROMIS) from federal funds; it has received numerous grants for demonstration projects to improve case processing and delinquent youth programs; it established a mental health screening unit in 1981, and a diversion program for bad-check writers. It has been, and is one of a handful of very aggressive local prosecutor's offices with respect to white-collar and corporate crime, an egalitarian crusade that garnered national attention in the 1980's. *See* Ira Reiner & Jan Chatten-Brown, *When it is not an Accident, but a Crime: Prosecutors Get Tough with OSHA Violations*, 17 N. KY. L. REV. 83 (1989).

51 It was necessary to draw independent samples of felony and misdemeanor cases because of the filing system of the Clerk of Courts.

5000 cases, with charges filed against 5431 defendants. Some defendants, of course, had more than one felony case charged against them in the five-year time period; there were 4921 *unique* defendants in the felony sample.

Selection of the 20,000 cases that originally composed the misdemeanor sample was made with the knowledge that certain cases would be purposefully excluded from this analysis. The intention was to examine "street crime" misdemeanors, or at least those offenses widely viewed as *mala in se*, or the lesser forms of felony offenses. To that end, the following kinds of cases were excluded from the study: (1) all misdemeanor criminal traffic offenses; (2) all Department of Natural Resources crimes;[52] (3) all Department of Transportation offenses;[53] (4) child support transgressions; and (5) a group of "other" offenses that include rather esoteric regulations such as selling goods without a permit, or operating a salvage business without a permit. Simple possession of marijuana offenses were also excluded from the study.[54] After excluding the above mentioned cases, the remaining misdemeanor sample consisted of 5928 named misdemeanor defendants, 5411 of which were *unique* misdemeanor defendants.

The 4921 unique felony defendants and 5411 unique misdemeanor defendants constitute the two independent,[55] random samples used in this analysis as the basis for estimates pertaining to the population of formally accused criminals. The names and birth dates of the defendants in the two random samples were manually checked against the admission records of the local public psychiatric facility, the Milwaukee County Mental Health Complex. The patient identification number was collected from the hospital admission records and, in turn, this anonymous identifier was used to access

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52 The Department of Natural Resources ("DNR") oversees the use of lakes, state parks, state forests, and other protected land areas in the state. The DNR enforces mostly regulatory offenses, including, *inter alia,* hunting and fishing licenses, boat registration, fish-hook usage, oar lock and life preserver usage in boats, swimming, and scuba diving areas.

53 Department of Transportation regulations include such things as truck weight, road tax assessments, and required equipment for commercial vehicles.

54 Milwaukee hosts large festivals nearly every weekend of the summer that attract a lot of tourists, and are the occasion for a great deal of petty recreational drug use among young tourists and residents. During the study period, the vast majority of misdemeanor drug offense charges were associated with these festivals. Such activity did not meet the "street crime" criterion established for inclusion in the study, and therefore misdemeanor marijuana offenses were excluded from the study. Note that among drug offenses, only misdemeanor offenses for simple possession of marijuana were excluded; all other drug offenses were retained for inclusion in the study.

55 Some of the "unique" misdemeanor defendants were also "unique" felony defendants. *See infra* note 57 and accompanying text.

computerized admission and discharge data for all study subjects admitted to the Mental Health Complex during the study period, 1981-85.[56]

IV. FINDINGS

A. PREVALENCE

During the five-year study period, less than 10% of the accused defendants were also treated as psychiatric patients (see Table 1).[57] Specifically, only 8.6% of the felony defendants, 9.1% of the misdemeanor defendants, and 9.7% of the defendants drawn in *both* samples were treated at the public psychiatric facility in the five-year study period. Although the figures signify that a small percentage of the defendant population, regardless of the seriousness of the offense, were treated for psychiatric problems at some point during the five-year study period, that percentage is not negligible.

The findings are remarkably similar to Teplin's finding that 9.5% of those arrested exhibited signs of mental disorder at the time of arrest, despite the fact that Teplin's measures of criminal involvement and mental disorder differed from the ones used in this study.[58] Teplin's study measured criminal involvement by arrest while this study measured criminal involvement by charges issued. Also, Teplin measured mental disorder on the basis of trained graduate students' observations of the subject during the police-citizen encounter,[59] whereas this study measured mental disorder on the basis of admission to a bed or a program at the public psychiatric facility sometime within the five-year study period.

B. PROBABILITIES

Although a fairly small proportion of defendants were also psychiatric patients, the defendant-patients were nevertheless over-represented in the defendant population. Table 2 provides figures to support this conclusion. Using sample *N*s as a guide, the number of unique defendants in the five-year study period was estimated

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56 The human subjects protection review boards at both the University of Wisconsin-Milwaukee and at the Medical College of Wisconsin reviewed and approved the human subject research protocol for this study. The medical college of Wisconsin's Research Committee is the human subjects oversight board for the Milwaukee County Mental Health Complex.

57 Even when the two independent samples were combined and "unduplicated" for defendants appearing in both the felony and misdemeanor samples, the proportion of mentally disordered was less than 10% (8.9%).

58 Teplin, *supra* note 29, at 162.

59 *Id.* at 160-62.

(N=38878). The number of unique adult patients admitted to either inpatient or outpatient programs during the study period (N=16144) was determined from the computerized admission records of the mental health facility. The average adult county population during the five year study period was 704,000.[60] During the study period, about 55 out of 1000 adult residents were charged with a crime, and about 23 out of 1000 adult residents received treatment at the public psychiatric facility in the same period.

If two phenomena are unrelated, the probability of both occurring jointly is the product of the two independent probabilities. Thus, the probability of a subject being both a defendant and a psychiatric patient during the study period, if the two phenomena were independent, was less than 13 in 10,000 resident adults, or about 890 persons for the county area.[61] In contrast, the estimated number of actual defendant-patients was 3489 in the five-year period, or a probability of nearly 50 in 10,000 (.00495). Given these estimates, the coincidence of psychiatric treatment and criminal accusation occurred nearly four times as often as would be expected if the two phenomena were independent. Stated in another way, approximately 23 of every 1000 adult residents received treatment at the public psychiatric facility during the study period, whereas 89 out of every 1000 defendants received treatment at the public psychiatric facility during the study period. Again, the conclusion is that psychiatric impairment was over-represented among defendants by almost four times compared to the general population.

Based on these findings, the two phenomena do not appear to be independent. The findings from this study parallel the only other published finding of this nature based on data from the United States. Teplin reported that the incidence of severe mental disorder among urban male jail inmates was between two and three times the rate of those disorders detected in the population in the catchment area.[62]

C. RATES

On the whole, the psychiatrically impaired defendants accounted for more than their share of the cases filed. Table 3 shows the number of cases per defendant. Defendant-patients, with the

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60 U.S. BUREAU OF THE CENSUS, *supra* note 42, at 588.

61 The probability of being a criminal defendant (.055) multiplied by the probability of being a public psychiatric patient (.023) is equal to .001265, or less than 13 in 10,000. *See* HERMAN J. LOETHER & DONALD J. MCTAVISH, INFERENTIAL STATISTICS FOR SOCIOLOGISTS: AN INTRODUCTION 27 (1974).

62 Teplin, *Prevalence*, *supra* note 26, at 663.

exception of those drawn only in the felony sample, accumulated more criminal accusations in the five-year study period than did other defendants.

The similarity in the rates of felony defendants and defendant-patients may be explained by an opportunity factor. It is reasonable to expect that felons would not have the same opportunity to commit additional offenses, given their longer incarceration periods. This lack of opportunity is the probable explanation of the lower rate for felons, regardless of mental disorder. This explanation is also consistent with the differential between the mentally disordered and others who are charged with lesser offenses. A plausible summary interpretation of these findings is that, given ample opportunity to commit crimes, those with mental disorders are more often charged with criminal offenses.

V. DISCUSSION

There exists a small subset of persons who are members of both the criminal justice system and the public mental health system. Specifically, slightly less than ten percent of the defendants in a five-year period had been public psychiatric patients in the same five-year period. This figure is far less than many have predicted.[63]

The two findings—that there are more individuals with both mental disorder and criminal charges than would be predicted if the two phenomena were independent of each other, and that defendants with mental disorders have higher rates of incurring criminal charges than do other defendants—raise an always-troubling question: are these statistical associations due to the behavior of the offenders or to the choices of the decision-makers in the criminal justice system? It is possible that those with mental disorder are more likely to be involved in activities that typically lead to arrest and prosecution. Alternatively, the findings on the probability question and the rate questions may be a result of discretionary decisions by police and prosecutors. Indeed, these two different explanations have special, although not incongruent, importance to both jurisprudential and sociological thinking.

A. JURISPRUDENTIAL ISSUES

These findings address the critical question of the meaning of criminal responsibility.[64] On the one hand, the fact that the mental

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[63] *See supra* note 27.

[64] Of course, some number of persons charged are not convicted because of their mental capacity. A subsample (1680 felons and 2220 misdemeanants) of those who

health system regulated less than ten percent of the defendant population in a five-year period suggests that criminal responsibility is not a pseudonym for psychiatric impairment to any significant degree. On the other hand, if being criminally responsible is predicated on particular cognitive and/or volitional capacities, then the finding regarding the size of the defendant-patient subpopulation still begs for explanation. It is clear that very few persons and very few defendants have psychiatric impairments that satisfy the criminal insanity test. It is also clear that cognitive and volitional psychiatric impairments exist on a continuum. These data seem to show that those with psychiatric impairment of some kind and some degree are found in disproportionately large numbers among those charged with crime. Even if their representation is due to conduct rather than to differential responses by law enforcement personnel (discussed below), this finding has important implications for the definition of criminal responsibility. To what extent are the notions of criminal culpability and the concomitant condemnation of the community[65] inconsistent with modern understandings of personal responsibility in light of psychiatric incapacities? The obvious jurisprudential question that must be addressed ultimately is the extent to which psychiatric impairment diminishes moral cognition and free will, and the extent to which those diminished states are dissonant with the premise of criminal culpability.

Future research must examine, on an individual-level, the temporal proximity and sequential order of the mental health problem to the criminal conduct,[66] the nature of the psychiatric disorder in light of the nature of the crime, and the nature and severity of the psychiatric disorder in terms of improperly developed, diminished or impaired free will. A re-examination of the concept of free will in light of modern psychiatric and psychological understanding of cognitive and volitional capacities may well lead to a reconsideration of the traditional exceptions to criminal responsibility.[67]

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were charged was drawn, and data pertinent to the case disposition was collected. Only 14 felons and one misdemeanant were found not guilty by reason of insanity ("NGRI"), hardly enough to make a statistical difference in a sample of this size. In addition, one-third of those found NGRI were not treated at the public psychiatric facility in the five-year study period. A different perspective showed no difference between defendants and defendant-patients with respect to case disposition: the conviction rate for the felony defendant-patients is identical to that for other felony defendants (80%); similarly, the conviction rate for misdemeanor defendant-patients is identical to that for other misdemeanor defendants (49%).

65 Hart, *supra* note 5, at 404.

66 Judith Godwin Rabkin, *Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research*, 86 PSYCHOL. BULL. 1, 17 (1979).

67 In fact, such a reconsideration may well lead to an *integration* of these distinct ex-

B. SOCIOLOGICAL ISSUES

These findings, once again, point to the importance of distinguishing between qualification and selection in the operation of social control. In other words, is there a statistical association between the mentally disordered and the criminally accused because mentally disordered persons are particularly well qualified (i.e., they exhibit more criminal conduct), or because they are particularly singled out for selection?

1. Selection Studies

A handful of prior studies have focused on the exercise of police discretion in selecting mentally disordered persons for arrest, but none have resolved the qualification-versus-selection controversy. Prior to the study conducted by Teplin,[68] all observational studies of the exercise of police discretion with respect to arresting mentally disordered persons were flawed by the use of small or nonrandom samples, or both.[69]

Teplin's study was designed to correct the flaws in earlier studies.[70] Her primary conclusion was that police select informal dispositions more often than not, irrespective of the person's state of mental health.[71] She also notes, however, that the incidents for

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ceptions, and a new way of understanding the relationship between criminal responsibility and cognitive and volitional impairment and development. It is obvious how the special exception for insanity is inextricably linked to the special exception for infancy (immaturity) and the special provisions for incompetency to stand trial.

Illness is an exception to criminal responsibility that is so deeply ingrained in our thinking that it is difficult for us to even recognize it. The presumption that illness is a matter which is out of bounds for the criminal law is evident from case law.

> No man shall be held accountable, criminally, for an act which was the offspring and product of a mental disease. . . . No argument is needed to show that to hold that a man may be punished for what is the offspring of a disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law.

State v. Jones, 50 N.H. 369, 394 (1871). Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold. Robinson v. California, 370 U.S. 660, 667 (1962).

Samuel Butler's *Erewhon*, written in the mid-1800's, challenges the presumption that illness is not a proper subject of punishment. In the fictional land of *Erewhon*, wrongdoing is treated with sympathetic "correction," but disease is punished, sometimes with the death penalty. This system of justice might be criticized for giving excessive weight to the physical over the social and psychological. Morris, *supra* note 17, at 64. The points to be pondered are these: as medical science and understanding advance, what will become of the distinction between illness and insanity, and in turn, what will become of the meaning of criminal culpability, which is now partially defined by insanity?

68 Teplin, *supra* note 29.

69 Bittner, *supra* note 29; Bonovitz, *supra* note 29; Jacobson et al., *supra* note 29; Matthews, *supra* note 29; Menzies, *supra* note 26; Monahan et al., *supra* note 26.

70 Teplin, *supra* note 29.

71 *Id.* at 173.

which the mentally disordered were arrested did not result in arrest when committed by apparently non-disordered persons.

> Arrest was not a particularly frequent disposition; only 16.5% of the eighty-five mentally disordered persons were arrested. Nevertheless, the arrest rate for suspects exhibiting signs of serious mental disorder was significantly greater than that for non-mentally ill suspects for similar types of incidents . . . . Apparently, there are a number of characteristics common to situations involving mentally disordered persons that appear to increase the probability of arrest.[72]

Confidence in Teplin's conclusion is threatened by the very small number of subjects ($N=14$). Furthermore, her study was restricted to police discretion; the exercise of prosecutorial discretion is not part of the Teplin study. Thus, it is unknown whether the arrestees were charged and convicted, i.e., whether they were treated as criminals by subsequent decision-makers.

Robertson[73] used a different perspective to explore the possibility of selection bias in arrests of mentally disordered persons. He presented evidence of a selection bias in effect, but did not attribute the disparity to decision-making on the part of law-enforcement officials. Rather, Robertson's assertion, as borne out by his findings, is that non-disordered persons are more likely to escape detection and are less likely to turn themselves in to the police than are persons with mental disorder.[74]

Studies of the exercise of prosecutorial discretion in issuing charges against the mentally disordered are virtually nonexistent. Hochstedler used samples of defendants who had already been charged, thus reflecting the outcome of the exercise of prosecutorial discretion, but did not examine the exercise of prosecutorial discretion itself.[75] Using a sample of misdemeanor defendants, Hochstedler Steury reported the combined effects of the exercise of prosecutorial and judicial discretion, as reflected in judgment and sentencing decisions.[76] She concluded that defendants with a history of mental disorder were sanctioned more severely than other misdemeanants, "both in process and punishment."[77] With respect to defendants charged with disorderly conduct, however, she interpreted the findings to suggest that there was "judicial correction,"

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72 *Id.* at 165.

73 Graham Robertson, *Arrest Patterns Among Mentally Disordered Offenders*, 153 BRIT. J. PSYCHIATRY 313 (1988).

74 *Id.*

75 Hochstedler, *Criminal Prosecution*, *supra* note 26; Hochstedler, *Twice-Cursed?*, *supra* note 26.

76 Hochstedler Steury, *supra* note 26, at 337.

77 *Id.* at 359.

primarily in the form of dismissal, for the presumed police and prosecutorial over-selection of the mentally disordered.[78]

2. *Qualification Studies*

Recent research findings lend support to the qualification hypothesis.[79] One study compared community residents—with and without recent evidence of psychiatric disorder—on the basis of self-reported violent acts.[80] The researchers report a statistically significant association between self-reported violent acts and mental disorder.[81] Another community study compared self-reported and official measures of violent and illegal behavior of psychiatric patients in the community with a sample of community residents who had no history of psychiatric treatment.[82] Findings from this study also indicate that the psychiatric patients had higher rates of violent conduct, as well as higher arrest rates. Furthermore, the arrest of the former patients were more likely to be for serious offenses and violent behavior than for trivial offenses.[83] These studies have particular importance because they do not rely exclusively on official measures of violent or criminal behavior, which inherently introduce the possibility of selection bias. In light of these studies, there is greater faith in the conclusions of other population studies that do rely on official measures of crime.[84]

3. *Future Research*

While the research of recent years shows a marked improvement over much of the previous work in this area, the qualification-selection debate is not yet resolved, and future research must be designed to explore these alternative explanations. The next logical step in this line of inquiry is an examination of the behavioral precipitants of the formal accusation, the behavior that led to the charge. Such an investigation should be designed to determine whether defendant-patients behave in a manner that is typical of, or

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78 *Id.* at 357.

79 *See* John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOL. 511 (1992).

80 Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMM. PSYCHIATRY 761 (1990).

81 *Id.* at 765.

82 Bruce Link et al., *The Violent and Illegal Behavior of Mental Patients Reconsidered*, 57 AM. SOC. REV. 257 (1992).

83 *Id.* at 289.

84 *E.g.*, Per Lindqvist & Peter Allebeck, *Schizophrenia and Crime: A Longitudinal Follow-up of 644 Schizophrenics in Stockholm*, 157 BRIT. J. PSYCH. 345 (1990); Pamela J. Taylor & John Gunn, *Violence and Psychosis I: Risk of Violence Among Psychotic Men*, 288 BRIT. MED. J. 1945 (1984).

different from, other defendants.[85] Furthermore, future research must determine whether defendant-patients are charged with offenses that are similar to or different from the offenses charged against other defendants who exhibit the same kind of behavior in the same context. Such research would provide information critical to the assessment of the qualification-versus-selection controversy. Moreover, such information would directly address the suspicion that the criminal justice system tends to differentially control the mentally disordered when other means of social control are not readily available, i.e., the so-called criminalization hypothesis.

VI. SUMMARY

An examination of the size of the intersection of two populations subjected to formal governmental social control—criminal defendants and psychiatric patients—revealed that the intersection is small: less than ten percent of the criminal defendants who were charged with a felony, a misdemeanor, or both in the space of five years received psychiatric treatment at the public mental health facility during the same five-year period. Despite the small size of the defendant-patient subpopulation, it is nonetheless nearly four times as large as it would be if the two phenomena were independent. In other words, there is a significant association between mental disorder and defendant status as reflected by these data. Moreover, findings from this study also indicate that defendants with mental disorder have higher per capita rates of being charged with crime than do other defendants.

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85 Taylor recently reported the results of such an inquiry, but her sample was restricted to prisoners. She reported that the nature and seriousness of the criminal violence differed markedly between psychotic and non-psychotic prisoners. *See* Pamela J. Taylor, *Schizophrenia and Crime: Distinctive Patterns in Association*, *in* MENTAL DISORDER AND CRIME (Sheilagh Hodgins ed., 1993). Ashford also conducted a study that reflected this approach, but his population was the already-winnowed jail inmate population, and the detail of his information on criminal activity and context was far more limited. *See* José B. Ashford, *Offense Comparisons Between Mentally Disordered and Non-Mentally Disordered Inmates*, 31 CAN. J. CRIMINOLOGY 35 (1989).

TABLE 1. NUMBER AND PERCENT OF SAMPLED DEFENDANTS, BY PATIENT STATUS, MILWAUKEE COUNTY, 1981-85.

		Not Patient		Patient	
	N	N	%	N	%
All felony defendants	4921	4493	91.3	428	8.7
All misdm. defendants	5411	4916	90.9	495	9.1
Only felony defendants	4424	4044	91.4	380	8.6
Only misdm. defendants	4044	4467	90.9	447	9.1
Both felony & misdm. defs.	497	449	90.3	48	9.7
Unique defendants	9835	8960	91.1	875	8.9

TABLE 2. NUMBER OF SAMPLED CASES AND DEFENDANTS, AND POPULATION ESTIMATES, BY PATIENT STATUS, MILWAUKEE COUNTY, 1981-85.

	Sample N		Population Estimates	
	Cases	Defendants	Cases	Defendants
All felonies	5431	4921	14691	13908
All misdmeanors	5928	5411	30123	26911
Only felony defendants				
Defendants	4450	4044	12037	10930
Defendant-patients	416	380	1125	1028
Only misdemeanor defendants				
Defendants	4821	4467	24498	22699
Defendant-patients	530	447	2693	2271
Both felony & misdemeanor defendants				
Felony				
Defendants	511	449	1382	1751
Defendant-patients	54	48	146	190
Misdemeanor				
Defendants	517	449	2627	1751
Defendant-patients	60	48	305	190
Total unique defendants		9835		33878
Unique defendants		8960		30389
Unique defendant-patients		875		3489

TABLE 3. RATES OF CHARGES (CHARGES PER DEFENDANT) OF SAMPLED DEFENDANTS, BY PATIENT STATUS, MILWAUKEE COUNTY, 1981-85.

	Cases	Defendants	Rate
Only felony defendants			
Defendants	4450	4044	1.10
Defendant-patients	416	380	1.09
Only misdemeanor defendants			
Defendants	4821	4467	1.08
Defendant-patients	530	447	1.19
Both felony & misdemeanor defendants			
Defendants	1028[a]	449	2.29
Defendant-patients	114[b]	48	2.38

[a] Includes 511 felony and 517 misdemeanor cases.
[b] Includes 54 felony cases and 60 misdemeanor cases.