Journal of Criminal Law and Criminology

Volume 82
Issue 2 *Summer*

Article 3

Summer 1991

Specifying Criminalization of the Mentally Disordered Misdemeanant

Ellen Hochstedler Steury

0091-4169/91/8202-334
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 82, No. 2

Printed in U.S.A.

CRIMINOLOGY

SPECIFYING "CRIMINALIZATION" OF THE MENTALLY DISORDERED MISDEMEANANT

ELLEN HOCHSTEDLER STEURY, Ph.D.*

I. INTRODUCTION

There is often little distinction between the treatment of those with mental disorder and the treatment of those held criminally responsible.[1] Furthermore, as other forms of social control wane, the criminal justice system is expected to fill the void, a situation that will unduly tax not only the operation of the criminal justice system, but also the meaning and the symbolic value of criminal responsibility.[2] Recently, these two familiar observations have re-surfaced and merged with a specific focus: the mentally disordered in the criminal justice system. Theorists claim that reforms in law and policy governing civil commitment have introduced a new class of mentally

* Associate Professor, Criminal Justice Program, University of Wisconsin-Milwaukee, P.O. Box 786, Milwaukee, WI 53201.

Acknowledgements: There are several people I wish to thank for their help in the production of the research supporting this paper: the remarkably efficient and accurate graduate and undergraduate research assistants who collect these data, Renee Younk, Suzanne Sobczak, Anne Voegeli, Mark Seis, and Deborah Lang; the administrators who provided access and orientation to these data, Rose Nugent and Robert Erdmann of the Office of the Clerk of Milwaukee County Circuit Courts, and Alice Klaybor and Peg Schmidt of the Office of Medical Records of the Milwaukee County Mental Health Complex; and Frances Johannes, Director of the Research Support Office of the School of Social Welfare, who provided expert technical assistance. I also thank John Monahan for comments on an earlier draft of this paper. The funds for the collection of these data were provided by The Graduate School of The University of Wisconsin-Milwaukee.

[1] M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965); M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977); Penrose, *Mental Disease and Crime: Outline of a Comparative Study of European Statistics*, 28 MED. PSYCHIATRY Q. 1 (1939).

[2] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY (1964).

disordered into the already strained criminal justice system.[3] Legislators and policymakers have lent credence to this claim, now commonly known as the criminalization hypothesis.[4] This claim has also been supported by some scholarly research.[5]

The criminalization hypothesis is fairly clear on two accounts, both subject only to longitudinal testing. First, the hypothesis clearly implies that a certain subpopulation of those previously served by the mental health system has been shifted, in large part, to the criminal justice system. This aspect of the hypothesis specifies the process; it provides an explanation of the mechanism of change. Second, the criminalization hypothesis claims that, in contrast to a previous era, more mentally disordered persons are entangled in the criminal justice system today. This aspect of the hypothesis represents the logical conclusion of the specified process, the shift. This second aspect provides a quantitative specification of the current situation in comparison to the previous situation. The consensus on what the criminalization hypothesis represents ends there, however.

The criminalization literature reveals no consensus on what criminalization itself entails or means. In fact, very little attention has been given to the definition of criminalization. The criminalization hypothesis is silent with respect to how cases involving mentally disordered defendants are processed and disposed of in the criminal justice system. Knowing the nature of the control exercised over the mentally disordered in the criminal justice system is critical to a useful definition of criminalization. As long as the key term "criminalization" remains undefined, the criminalization hypothesis will remain inadequately specified. The research reported here rep-

---

[3] Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side-effect of a New Mental Health Law*, 23 HOSP. & COMMUNITY PSYCHIATRY 13 (1972); Stelovich, *From Hospital to the Prison: A Step Forward in Deinstitutionalization?* 30 HOSP. & COMMUNITY PSYCHIATRY 618 (1979); *see* Teplin, *The Criminalization of the Mentally Ill: Speculation in Search of Data*, 94 PSYCHOL. BULL. 54 (1983).

[4] Durham, *The Impact of Deinstitutionalization on the Current Treatment of the Mentally Ill*, 12 INT'L J. OF L. & PSYCHIATRY 117 (1989).

[5] *See, e.g.*, Arvanites, *The Impact of State Mental Hospital Deinstitutionalization on Commitments for Incompetency to Stand Trial*, 26 CRIMINOLOGY 307 (1988); Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22 (1980); Geller & Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examination: An Evaluation*, 135 AM. J. OF PSYCHIATRY 53 (1978); Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794 (1984); *but see* Steadman, Monahan, Duffee, Hartstone, & Robbins, *The Impact of State Mental Hospital Deinstitutionalization on United States Prison Populations, 1969-1978*, 75 J. OF CRIM. L. AND CRIMINOLOGY 474 (1984); *see also* note 41, *infra*.

resents a first step toward specifying criminalization in practical terms based on empirical evidence.

II. SPECIFYING "CRIMINALIZATION"

Three competing alternative specifications of the term criminalization suggest themselves, any one of which could be consistent with the criminalization hypothesis. One possible specification is that *the mentally disordered are treated more punitively than other criminals,* or are "twice-cursed." Some previous criminalization research directly addresses this possibility.[6] In most previous studies, however, this orientation operates implicitly, reflected in the research design through the choice of criterion variables or sampling frame. For example, studies that compare the disordered and non-disordered with respect to arrest rates or the severity of punishment imposed are premised on this specification although not explicitly.[7]

A second possible specification of the criminalization hypothesis is that the mentally disordered are treated as mentally disordered, and therefore differently (perhaps more leniently, perhaps not). A corollary of this differential treatment expectation is that *the mentally disordered are treated as patients within the criminal justice system.*. In other words, the criminal justice system has become a major provider of mandated psychiatric treatment. This possibility is more often simply asserted in the research literature than empirically tested.[8]

Consideration of these two competing expectations leads to an obvious third possibility, largely ignored by researchers. Criminalization may mean that *the mentally disordered are not distinguished from others in the criminal justice system,* but instead are treated merely as criminals. Rather than providing grounds on which to reject the criminalization hypothesis, such findings are arguably in accord with the hypothesis. The analysis presented here is not intended as a test of the criminalization hypothesis itself. Rather, it is an effort to empirically specify the key term "criminalization."

---

[6] *See, e.g.,* Hochstedler, *Criminal Prosecution of the Mentally Disordered,* 20 LAW & SOCIETY REV. 279 (1986) [hereinafter *Criminal Prosecution*]; Hochstedler, *Twice-Cursed? The Mentally Disordered Defendant,* 14 CRIM. JUST. & BEHAV. 251 (1987) [hereinafter *Twice Cursed*].

[7] *See, e.g.,* Cocozza, Melick, & Steadman, *Trends in Violent Crime Among Ex-mental Patients,* 16 CRIMINOLOGY 317 (1978); Steadman, Vanderwyst, & Ribner, *Comparing Arrest Rates of Mental Patients and Criminal Offenders,* 135 AM. J. OF PSYCHIATRY 1218 (1978); Steadman, Monahan, Duffee, Hartstone, & Robbins, *supra* note 5.

[8] *Cf.* Hochstedler, *Criminal Prosecution, supra* note 6, at 285.

A. THE SAMPLE

The data used in this report pertain to randomly selected cases stemming from criminal misdemeanor[9] charges filed between January 1, 1981 and December 30, 1985 in the Milwaukee (Wisconsin) Circuit Court, a court of general jurisdiction. The court serves a single urban county of approximately one million residents. I drew a random sample of 4958 criminal misdemeanor cases from official, public court records, from which 5924 defendants' names were collected.[10] I then pared this collection of defendants' names to eliminate duplicates,[11] a procedure that produced a random sample of unique *defendants* from the original random sample of *cases.* I further identified the defendants as either possessing or not possessing a record of admission at the local public psychiatric facility, the Milwaukee County Mental Health Complex (CMHC), and the sample was stratified on that basis. All defendants with a record of admission were retained for the working sample (N=1068), except for cases where court records could not be located (2%). Defendants without a record of admission were systematically subsampled by a factor of four which produced a sample of 1116 non-psychiatric defendants and associated criminal cases after missing cases were deleted from the sample. The product of these sampling procedures is a stratified random sample of defendants (N = 2184).

The sample described here consists only of cases in which charges were issued by the prosecutor and survived the initial judicial review of the arrest decision as mandated by *Gerstein v. Pugh.*[12] A sampling frame based on cases filed is not as inclusive as a sampling frame of arrests, yet it is more desirable in some respects, given the operating standards in the study jurisdiction. Many arrests never result in prosecution, *i.e.*, never result in any but the least significant form of criminalization. As front-line agents of order maintenance, police sometimes arrest citizens without expecting or even in-

9 The sampling frame excluded criminal traffic offenses and simple marijuana possession of small amounts, on the premise that these offenses, while very frequent, are not typically viewed as *mala in se* offenses.

10 Some cases had multiple defendants, in which event all defendants became part of the sample.

11 Some defendants were involved in more than one case in the five-year time period. Only one case was retained for each unique defendant, and as a rule, this was the most recent case. An exception to this rule was made when the most recent case in the sample was either a bail-jumping or escape charge *and* the underlying charge had also been drawn in the original sample. In that event, the case associated with the underlying charge was retained for the sample in preference to the bail-jumping or escape charge.

12 420 U.S. 103 (1975).

tending for prosecution to follow.[13] More frequently, and more importantly, police arrest persons who are never subsequently prosecuted because the cases do not survive the prosecutor's screen. The prosecutor wields a great deal of discretion, which is supposed to be applied in accord with "doing justice." Prosecutorial discretion is widely exercised in the study jurisdiction, and about 30 percent of the cases are culled prior to presentment in court for review.[14] This sample, then, represents all those whose arrests were not immediately screened out by the prosecutor or dismissed by the reviewing magistrate for legal insufficiency or humanitarian reasons pertinent to justice.

Misdemeanor cases are the focus of this particular examination because it is likely that differential processing of cases will be most obvious among misdemeanor offenses. A variety of findings support this presumption. First, Hochstedler[15] presented evidence to suggest the mentally disordered are not granted leniency if the offense exceeds an unspoken operating threshold of seriousness. Moreover, findings presented by Bonovitz and Guy[16] showed an increase in the proportion of inmates in a prison psychiatric hospital unit arrested for minor offenses (*e.g.*, disorderly conduct and trespassing) after commitment laws had been changed. In addition, Dickey's[17] research findings showed an increase in evaluations for incompetency to stand trial particularly among those charged with minor offenses. Finally, Arvanites'[18] findings showed a trend similar to the one Dickey reported in some, but not all, jurisdictions in his study. These research findings, coupled with a general understand-

---

[13] Studies of police have established that sometimes arrests are made for reasons other than to initiate the prosecution process. An arrest may provide a cooling-off period, or over-night shelter, or protection from predators; *see e.g.*, Bittner, *Police Discretion in Emergency Apprehension of Mentally Ill Persons,* 14 SOC. PROBS. 278 (1967); Matthews, *Observations on Police Policy and Procedures for Emergency Detention of the Mentally Ill,* 61 J. CRIM. L., CRIMINOLOGY AND POLICE SCI. 283 (1970).

[14] Information from Deputy District Attorney Herman B. John, established that 30% of the cases filed were screened out. According to Deputy District Attorney Thomas P. Schneider, cases are screened out in this jurisdiction if they do not meet all of the three following criteria upon initial review by the assistant district attorney (ADA): (1) the case can be proved beyond a reasonable doubt; (2) the issuing ADA *believes* (a subjective, personal assessment) that the defendant is guilty, and (3) the issuing ADA believes that issuing the charge is "the 'right' [*i.e.*, 'just'] thing to do."

[15] Hochstedler, *Criminal Prosecution of the Mentally Disordered,* 20 LAW & SOC. REV. 279, 289-90 (1986).

[16] Bonovitz & Guy, *Impact of Restrictive Civil Commitment Procedures on a Prison Psychiatric Service,* 136 AM. J. OF PSYCHIATRY 1045 (1979).

[17] Dickey, *supra* note 5.

[18] Arvanites, *supra* note 5.

ing of how law-enforcement discretion operates,[19] support the presumption that if the mentally disordered are differentially processed, or if the imposition of mental health treatment is the ulterior motive for invoking the criminal justice apparatus, it would be most obvious among misdemeanor cases where discretion to grant or withhold leniency is the greatest.[20]

B. MEASURES

1. Criminalization Measures: Punitiveness

The criminalization research to date is of limited value because of three basic problems involving measurement of the dependent variable, criminalization. First, there is no apparent agreement as to a single useful indicator of criminalization. Whether managed as a variable or as a defining element of the sampling frame, indicators vary widely across studies. Some researchers have used arrest as an indicator,[21] others have used prosecution,[22] and still others have used penal incarceration[23] or jail detention.[24] Each of these measures denotes a different degree of criminalization. Second, no single indicator alone is an adequate measure of the broad concept of criminalization. The use of a single indicator to measure criminalization, a phenomenon that results from a series of decisions in a dynamic and interdependent system, falls far short of the mark. Third, research results based on single item indicators from different jurisdictions cannot be patched together to form a whole or composite picture. Differences across jurisdictions are too great to allow generalizations about criminalization, especially when criminalization is examined only in fragments.

Virtually any multi-jurisdictional research on criminal justice can be used to demonstrate the important differences in the opera-

19 *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1971).

20 Standard 7-2.5(a) and (b) of THE ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1986), published a year after the end of this study period, instructs law-enforcement officers to forego criminal prosecution of mentally disordered misdemeanants, and transport such persons directly to a mental health facility. On the other hand, criminal prosecution of mentally disordered alleged felons is encouraged.

21 *See* Cocozza, Melick, & Steadman, *supra* note 7; Schuerman & Kobrin, *Exposure of Community Mental Health Clients to the Criminal Justice System: Client/Criminal or Patient/Prisoner, in* MENTAL HEALTH AND CRIMINAL JUSTICE 87 (L. Teplin ed. 1984); Steadman, Cocozza, & Melick, *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals,* 135 AM. J. OF PSYCHIATRY 816 (1978); Teplin, *supra* note 5.

22 *See* Arvanites, *supra* note 5; Dickey, *supra* note 5; Hochstedler, *Criminal Prosecution, supra* note 6; Hochstedler, *Twice-Cursed, supra* note 6.

23 *See* Steadman, Vanderwyst, & Ribner, *supra* note 7.

24 *See* Teplin, *supra* note 3.

tion of criminal justice in different settings. James Q. Wilson's seminal work on the different styles of policing,[25] which have very real and very different consequences for the citizen, provides one such example. In some jurisdictions, prosecutors carefully screen arrests and cull a substantial minority of them from the system without ever issuing charges, while in others prosecutors issue charges in virtually every arrest.[26] Lengthy pretrial detention is a commonplace occurrence in some jurisdictions, but not in others.[27] Moreover, in some jurisdictions sanctions encountered before and during adjudication (*i.e.*, jail detention) are more severe than the punishment,[28] while in others the punishment imposed after conviction is more severe.[29] These studies and others underscore the point that seemingly similar indicators may not, in fact, be tapping similar phenomena across jurisdictions. This problem may be partially cured by using multiple indicators of criminalization from a single jurisdiction, an attempt to operationalize the concept of criminalization in a more comprehensive manner.

Thus, the real differences between apparently equivalent indicators of criminalization, coupled with research based on single-item indicators, leaves unsettled the empirical specification of criminalization. It is not enough, for example, to know that mentally disordered suspects are differentially selected for arrest;[30] the consequences of arrest are critical to a meaningful test of the criminalization hypothesis. For example, it is possible that after the arrest of the mentally disordered, they are not further criminalized but instead are released or diverted to the mental health system. Is this what is meant by criminalization? It is also possible that after arrest, the problems of mentally disordered defendants are ignored by the criminal justice system. These defendants may be left to subsequently languish and deteriorate in jail and prison environments. Is this what is meant by criminalization? Similarly, it is not sufficient to know of an increase in the proportion of defendants either examined for, or committed because of, incompetency to stand trial.[31]

---

25 J. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES (1968).

26 W. McDonald, *The Prosecutor's Domain, in* THE PROSECUTOR 15 (W. McDonald ed. 1979). *See also* note 14, *supra.*

27 J. EISENSTEIN & N. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977).

28 M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

29 Ryan, *Adjudication and Sentencing in a Misdemeanor Court: The Outcome is the Punishment,* 15 LAW & SOC. REV. 79 (1980-81).

30 *See* Teplin, *supra* note 5.

31 *See* Arvanites, *supra* note 5; Dickey, *supra* note 5.

Evaluation or even commitment for treatment does not indicate whether the criminal law is subsequently used to punish these defendants, or whether they escape the heavy hand of the law which might otherwise be imposed. Would either result be viewed as criminalization? Clearly, a more complete definition of criminalization is necessary for an adequate examination of the criminalization hypothesis. Until a more meaningful definition of criminalization is established, support for or refutation of the criminalization hypothesis has commensurately limited value. In short, the research conclusions are only as good as the indicators used.

This study employs several criminalization measures. The findings reported here are based on the following five indicators, each of which denotes a different degree of punitive sanction:

(1) whether there was any jail detention;
(2) length of jail detention, if any;
(3) terms of release, if applicable;
(4) judgment; and
(5) sentence.[32]

This set of indicators allows an examination of the degree and nature of various aspects of criminalization. Together, these indicators are capable of describing a more comprehensive, informative picture of criminalization in a single jurisdiction, because more than one indicator is used, and because they all pertain to a single jurisdiction.

2. *Criminalization Measures: Patient Status*

Defendants with a psychiatric history may or may not be recognized, either officially or unofficially, as mentally disordered by the criminal justice system. The existence of a mental health screening unit in the Milwaukee District Attorney's office suggests that it is likely that those with a history of psychiatric hospitalization are recognized by court workers.[33] Recent research findings from another

[32] Length of term of imprisonment was a variable also collected, but the N's were too small to be statistically reliable due to missing data and the relatively infrequent use of imprisonment as punishment for misdemeanor offenses.

[33] These data do not indicate with certainty whether or not the court knew of the defendant's psychiatric history. It is reasonable to assume that in many, if not most, cases, the court did know of the mental health history. In January 1981 a Mental Health Screening Unit was established in the District Attorney's Office. This unit was staffed by a case worker who reviewed the charging lists to identify defendants known to be chronically mentally ill. Any defense attorney or prosecutor could refer a defendant to the Screening Unit for a screening interview. If the case worker thought further evaluation was warranted, a psychologist or psychiatrist would conduct a more thorough evaluation. Often, the defendant would be a person known to the case worker, and the court

jurisdiction lends plausibility to this presumption.[34]

The data set used here includes the following indicators of official recognition of a defendant's mental health problem:

(1) treatment mandated under criminal law authority as a condition of freedom, either pretrial release or probation;

(2) evaluation for incompetency to stand trial;

(3) commitment for incompetency to stand trial;

(4) a plea of not guilty by reason of mental disease or defect; and

(5) a judgment of not guilty by reason of mental disease or defect.

These measures indicate the extent to which the criminal justice system imposes mental health evaluation and treatment on its subjects. Such court orders are interpreted here as "official recognition" of the mental disorder.

3. Independent Measures of Mental Disorder

The measures of mental disorder in criminalization research suffer from the same problems as the measures of criminalization. First, there is no agreement as to a single appropriate indicator of mental disorder. Teplin[35] notes this problem in her review of studies of mental disorder in jail populations. The phenomenon referred to by the term "mental disorder" is itself a fluid and variable condition. Second, most studies rely on a single measure, often a fairly narrow one (*e.g.*, previous hospitalization in a state psychiatric institution), a choice also criticized elsewhere.[36] Third, previous research has relied on single-item indicators to measure a phenomenon that is the result of decisions made in a dynamic and interdependent system.

Selecting an appropriate, robust operational definition of mental disorder may be an even more difficult task than defining criminalization. It is difficult and controversial to define and measure mental disorder even in the best of circumstances. To compli-

---

would be supplied with a brief psychiatric history of the defendant including such things as hospitalizations, care by residential treatment centers, etc. Nonetheless, it is not clear from these data what or how much the court knew about whom. The only positive indication of this is a court order for some kind of evaluation or treatment. There is no negative indication.

[34] *See* Teplin, *Detecting Disorder: The Treatment of Mental Illness Among Jail Detainees*, 58 J. OF CONSULTING & CLINICAL PSYCHOL. 233, 235 (1990). Teplin reports that 32.5% of all severely ill jail detainees were recognized as such by jail personnel, and 91.7% of those known to the jail personnel as having a treatment history were detected. Teplin's measure of mental disorder was defined as both current and severe, a definition which differs markedly from the one used in this study. *Id.* at 234.

[35] *See* Teplin, *supra* note 3, at 63-64.

[36] *Id.* at 64.

cate matters, there is no reason to believe that mental health system standards and operations are any more consistent across jurisdictions than criminal justice standards. The mental health system is at least as buffeted by fiscal constraints and other practical exigencies as the criminal justice system. Moreover, it is less standardized by procedural law. There is probably good reason to presume, given the nature of the phenomenon under scrutiny, that there is less consistency across jurisdictions in the mental health system than in the criminal justice system. Generalizations and direct comparisons between jurisdictions are risky matters under such circumstances. Again, one must conclude that a more comprehensive picture within a jurisdiction is essential for a good understanding of the situation.

The measures of mental disorder used in this study were taken from a single source: the admission files of the county mental health complex. It is a shortcoming of this study, and a common one in the criminalization research, that information on defendants' psychiatric history is limited to the admission records of a single local public hospital. It is, of course, possible that some of the defendants in the sample had been treated or evaluated at other public mental health facilities, or even at private hospitals. However, the county mental health complex was clearly the primary service provider in the region. In 1983, the midpoint of the study period, admissions to the county mental health complex accounted for 68% of all psychiatric admissions in the county.[37] Moreover, this is the only facility in the county that accepts short-term commitments allowed under the state's emergency detention statute.[38] Furthermore, given the economic status of most of the defendants (80% were ruled indigent for the purposes of defense at public expense), there can be little doubt that the data used in this study was drawn from the institution that provided most of the mental health services to the population of defendants. In any case, it should be understood that these methods for identifying defendants with a psychiatric history would result in a conservative estimate of their number, a factor which would tend to obscure rather than exaggerate any real differences between the two groups.

In the study reported here, I used a variety of measures to indicate mental disorder, some of which are highly inclusive and others quite restrictive and specialized. Listed in order of increasing restrictiveness, the measures used were:

---

[37] Wisconsin Department of Health and Social Services and Wisconsin Hospital Association, Wisconsin Hospital Directory (1983).

[38] *See* WIS. STAT. ANN. 51.15 (West 1987 & Supp. 1990).

(1) any evaluation for admission or treatment;
(2) any admission as an inpatient;
(3) more than two admissions as an inpatient;
(4) any involuntary admission as an inpatient;
(5) more than two involuntary admissions as an inpatient.

An evaluation for admission or treatment would generally be regarded as an unacceptably broad standard for establishing a psychiatric history. It is included here, along with more restrictive measures, simply to yield a more complete picture of the situation. I believe a very broad, inclusive measure is desirable to establish one end of a variable that can be viewed in gradients.[39] The measures I used here are inclusive in a second manner, as well. The measures pertain to admission at any point in the defendant's lifetime, from birth to the point of data collection (1986).

I employed successively restrictive measures of mental disorder, the most restrictive of which (more than two involuntary inpatient admissions) denotes not only a chronic mental health problem, but resistance to accepting treatment, as well. While none of these measures, alone, is an adequate indicator of the very vague concept, "mental disorder," the fact that the measures form a logical and empirical scale[40] is reassuring and helpful in giving definition to them as individual measures. All of the mental disorder measures I used indicate contact with the mental health system independent of psychiatric evaluation or treatment ordered by the court in conjunction with incompetency or insanity determinations.[41]

---

39 The relatively new and controversial psychiatric classification of "borderline personality disorder," is one that provides an apt description of many persons involved in the criminal justice system, *see* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). As a personality disorder, it is a classification often viewed as unworthy of an inpatient bed in the real world of limited resources. For reasons such as this one, a broadly inclusive measure is desirable.

40 Sixty-nine percent (N = 756) of those evaluated for admission were admitted as inpatients. Of those admitted as inpatients, 70% (N = 529) were admitted involuntarily. Furthermore, repeated admissions were associated with involuntary status. Of the 289 defendants with three or more inpatient admissions, 88% of them had been involuntarily admitted at least once (gamma = .85; tau_b = .44).

41 Independent measures of mental disorder are critical to some examinations of the criminalization hypothesis, a fact apparently overlooked by many researchers. Virtually all the *longitudinal* research that has been interpreted to support the criminalization hypothesis is the product of research designs that are simply incapable of the test. It is impossible to determine whether there has been a shift of population from the mental health system to the criminal justice system by examining indicators pertinent only to one of the two systems. For example, incompetency to stand trial is an indicator pertinent only to the criminal justice system. To show that there has been growth in the number or proportion of defendants examined for or found to be incompetent to stand trial (*see e.g.*, Abramson, *supra* note 3; Arvanites, *supra* note 5; Dickey, *supra* note 5; Geller

C. FINDINGS

1. Population Estimates

The stratified sample I selected, weighted to correctly represent the misdemeanor defendant population sampled,[42] revealed that 18.38% of the prosecuted population had an admission record[43] at the county mental health complex. Defendants with a psychiatric history differed in some important respects from the defendants without such records. The psychiatric group was comprised of a greater share of white defendants; 44% of the psychiatric group were white compared to 36% of the others ($X^2 = 15.46$; $p < 0.01$). The psychiatric group had a larger share (62% compared to 48%; $X^2 = 41.08$; $p < 0.01$) of defendants older than the average (weighted) age of misdemeanor defendants, 28.5 years of age. The psychiatric group of misdemeanants also had more extensive criminal records than the non-psychiatric group. Sixty-six percent of the psychiatric group, but only 46% of the comparison group, had been charged with a criminal offense at some earlier point ($X^2 = 80.98$; $p < 0.01$), an association which is not diminished when age is controlled. Furthermore, the criminal records of the psychiatric group were more serious than the records of their non-psychiatric counterparts. Thirty percent of the psychiatric group had at least one prior felony charge ($X^2 = 22.68$; $p < 0.01$) compared to 19% of the non-

& Lister, *supra* note 5) is to show only that. Given the case law of the 1960s and early 1970s, (*see, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960); Jackson v. Indiana, 406 U.S. 715 (1972); Pate v. Robinson, 383 U.S. 375 (1966)), the increased use of lawyers to represent poor people charged with lesser crimes, the advances in the understanding and use of psychotropic medicine, and the renewed faith in psychiatric treatment after it bottomed out in the mid-sixties, one should expect that the number of evaluations and commitments for incompetency to stand trial would increase. This signifies little more than an increase in attention. Similar problems plague the research conducted by Bonovitz & Bonovitz, *Diversion of the Mentally Ill into the Criminal Justice System: The Police Intervention Perspective,* 138 AM. J. OF PSYCHIATRY 973 (1981), and Bonovitz & Guy, *supra* note 16. Conclusions about the population shift from one system to another would require more complete and thorough analyses of the two systems and the populations they served over time. The research by Steadman, Monahan, Duffee, Hartstone, & Robbins, *supra* note 5, did not suffer from this particular problem. Interestingly, Steadman and associates concluded that their findings did not support the criminalization hypothesis.

[42] All population estimates are based on weighting the 2184 cases to adjust for the stratified sampling technique: the 1068 defendants who had a history of mental disorder account for only 401 weighted cases, which is their correct proportion (18.38%) in the prosecuted population; the 1116 cases of non-psychiatric defendants have been weighted to comprise 81.62% of the sample (N = 1783). Note is made in the text when weighted cases are used.

[43] Although called an admission record, it is important to keep in mind that this includes evaluations for admission, some of which do not result in an inpatient admission.

psychiatric group. Again, this statistically significant difference persists when age is controlled.

I observed no differences between the psychiatric and non-psychiatric groups with respect to defense representation. Approximately 80% of each group were represented by public defenders, an indication that the vast majority of both groups had limited financial resources.

Differences between the two groups of defendants are noteworthy with regard to only two of the charges levied against the two groups. Retail theft accounted for a larger share of the charges among the psychiatric group (23% compared to 13%; $X^2 = 40.38$; $p < 0.01$), while issuing worthless checks was much more common among defendants without psychiatric records (12% compared to 6%; $X^2 = 29.51$; $p < 0.01$). Other differences with respect to the type of charges issued were negligible. For both groups, disorderly conduct, retail theft, and battery were the three most common charges. These three offenses accounted for 51% of the psychiatric group's charges and 43% of the comparison group's charges. The number of cases in each of three offense categories—disorderly conduct, retail theft, and battery—is sufficiently large to allow examination of various aspects of criminalization while controlling for each of these three offenses.[44]

2. *Are Defendants with a Psychiatric History Treated More Severely?*

Considered together, the findings portrayed in Table 1 support the summary conclusion that the sanctions imposed on defendants with a psychiatric history were more severe, even when controlling for the seriousness of the offense, with one important exception, battery. Four of the five criminalization indicators displayed in Table 1—custody, cash bail, detention for more than two weeks, and imprisonment—are related to decisions to maintain physical custody of the defendant. Judging from these custody indicators, the group of defendants with a psychiatric history fared worse than their counterparts (compare the two left-most columns in Table 1 with each other).[45] Except for those charged with battery, more of the psychiatric group was taken into custody initially, and detained for relatively long periods of time, despite the fact that cash bail was not

[44] More than 100 defendants in each group, based on unweighted counts, were charged with each of these three offenses.

[45] Although several of the differences displayed in Table 1 and discussed in this section as differences fall short of statistical significance at 95% level of certainty, the fact that the differences are fairly consistent across categories and appear to establish general trends encourages faith in their validity.

TABLE 1

CRIMINALIZATION OF DEFENDANTS WITH A PSYCHIATRIC HISTORY.

(figures in percents; "*" denotes a difference from the comparison group that is statistically significant at $p < 0.05$)

	Indicators of mental disorder[a]				
Criminalization Indicators	None	Eval	Inpt	>2 Inpt	>2 Invol
Disorderly conduct (N=398)[b]	(209)	(189)	(140)	(65)	(46)
taken into custody	53	80*	88*	88*	85
cash bail required[c]	42	23*	21*	19*	26
detained >2 weeks[d]	11	22*	25*	32*	39
convicted	71	60	53*	42*	43
imprisoned[e]	9	25*	28*	44*	45*
Retail theft (N=388)	(139)	(249)	(174)	(80)	(46)
taken into custody	79	86	88*	90*	87
cash bail required[c]	33	27	25	29	28
detained >2 weeks[d]	25	27	32	36*	37
convicted	56	59	61	63	61
imprisoned[e]	49	54	57	64	61
Battery (N=262)	(143)	(119)	(81)	(27)	(16)
taken into custody	93	90	94	88	87
cash bail required[c]	26	29	26	31	33
detained >2 weeks[d]	34	50*	54*	59*	75
convicted	35	38	36	30	19
imprisoned[e]	32	44	38	50	67
Other misdemeanors (N=1138)	(627)	(511)	(337)	(111)	(49)
taken into custody	69	78*	83*	86*	92*
cash bail required[c]	31	26	24	21*	23
detained >2 weeks[d]	24	28	31*	37*	45*
convicted	42	47	45	39	31
imprisoned[e]	35	39	44	56*	53

[a]Each of the categories included under "indicators of mental disorder" is a subset of the category to its left. The categories "None" and "Eval" sum to the total N of cases for that category (row). "None" = no record at county mental health complex (CMHC). "Eval" = evaluated for treatment at CMHC. "Inpt" = admitted at least once as an inpatient at CMHC. ">2 Inpt" = more than two inpatient admissions at CMHC. ">2 Invol" = more than two involuntary inpatient admissions at CMHC.

[b]Figures in parentheses are unweighted case Ns pertinent to that category.

[c]Based only on those for whom release terms were stated.

[d]Pertains only to pretrial jail detention; does not include time spent in custody at a psychiatric facility pursuant to an Incompetency to Stand Trial (IST) or Not Guilty by Reason of Insanity (NGRI) evaluation or commitment.

[e]Based only on those convicted.

required of them more often. In addition, if convicted, more of the psychiatric group was imprisoned than the non-psychiatric group. Furthermore, the differences were ever greater for each more narrowly defined psychiatric group. In other words, if convicted, more of the defendants who had been hospitalized were imprisoned than their non-psychiatric counterparts, and an even greater percentage of defendants who had been hospitalized more than twice were imprisoned (compare figures from left to right across rows labelled "custody," "detained > 2 weeks," and "imprisoned"). These general trends are evident for each of the three offenses considered individually (except for the deviation noted above in the case of battery), as well as for misdemeanants charged with all other offenses considered together.

Conviction rates are one important exception to this general trend of punitiveness. Of those charged with disorderly conduct, the psychiatric group was convicted less often than the comparison group. Of those charged with battery or "other misdemeanors," only the defendants with a history of repeated psychiatric hospitalizations were convicted less often than the defendants in the comparison group. For the most part, the data indicate that for defendants with repeated psychiatric hospitalizations, conviction is less frequent. Furthermore, among those charged with disorderly conduct, this leniency is extended to those with less evidence of a chronic problem.

Retail theft convictions pose a contrast to the general trend in convictions. Of those charged with retail theft, the psychiatric group was convicted just about as often as the comparison group. However, this offense-specific deviation from the generally lenient conviction trend can be explained. Misdemeanor retail theft is frequently settled with a restitution agreement and the case subsequently dismissed short of judgment. Often the mentally disordered either do not have the financial means to enter into such an agreement, or do not give the impression that they will follow through on such an agreement, and are therefore less likely to settle the case short of judgment.

3. Are Defendants with a Psychiatric History Treated as Patients?

This data set includes measures that indicate which defendants were officially recognized by the criminal justice system as having some mental health problem (*i.e.*, as "patients"). These indicators identify defendants who at some point invoked the insanity defense, those for whom an evaluation and/or treatment for incompetency to

TABLE 2

COINCIDENCE OF THE DEFENDANTS' PSYCHIATRIC HISTORY AND EVALUATION/TREATMENT ORDERED BY THE CRIMINAL COURT.

(figures in percents; "*" denotes a difference from the comparison group that is statistically significant at $p < 0.05$)

	Indicators of mental disorder[a]				
Court-ordered eval./treatment[b]	None	Eval	Inpt	>2 Inpt	>2 Invol
Disorderly conduct (N=398)[c]	(209)	(189)	(140)	(65)	(46)
None	96	67*	59*	48*	44*
CJSMHT	4	33*	41*	52*	56*
OCJMHT	3	26*	32*	37*	37*
ISTEVAL	2	16*	21*	32*	35*
ISTCOMM	1	9*	11*	19*	22*
Retail Theft (N=388)	(139)	(249)	(174)	(80)	(46)
None	96	80*	76*	64*	50*
CJSMHT	4	20*	24*	36*	50*
OCJMHT	3	15*	18*	25*	30*
ISTEVAL	2	7	9*	16*	28*
ISTCOMM	1	4	5	11*	20*
Battery (N=262)	(143)	(119)	(81)	(27)	(16)
None	94	71*	70*	52*	38*
CJSMHT	6	29*	30*	48*	62*
OCJMHT	6	26*	25*	33*	44*
ISTEVAL	0	8*	11*	30*	38*
ISTCOMM	—	4*	6*	19*	31*
Other misdemeanors (N=1138)	(627)	(511)	(337)	(111)	(49)
None	95	78*	73*	60*	57*
CJSMHT	5	22*	27*	40*	43*
OCJMHT	5	16*	18*	23*	25*
ISTEVAL	1	9*	13*	26*	30*
ISTCOMM	0	6*	9*	21*	26*

[a]Each of the categories included under "indicators of mental disorder" is a subset of the category to its left. The categories "None" and "Eval" sum to the total N of cases for that offense category; they are mutually exclusive and exhaustive of the cases in that category (row). "None" = no record at county mental health complex (CMHC). "Eval" = evaluated for treatment at CMHC. "Inpt" = admitted at least once as an inpatient at CMHC. ">2 Inpt" = more than two inpatient admissions at CMHC. ">2 Invol" = more than two involuntary inpatient admissions at CMHC.

[b]Definitions of categories:

CJSMHT = "criminal justice system mental health treatment." This category includes defendants whose cases involve the insanity defense, an IST evaluation or commitment, or any treatment condition of pretrial release or probation. This category is mutually exclusive of the category "None," and the two are exhaustive of the cases in that category (column).

OCJMHT = "other criminal mental health treatment." This is a subset of CJSMHT and includes only those who had treatment imposed as a condition of pretrail release or probation.

ISTEVAL = "IST evaluation." This is a subset of CJSMHT and includes all those who were evaluated for IST (Incompetency to Stand Trial).

ISTCOMM = "IST commitment." This category includes only those commited after being found IST. The three subsets of CJSMHT—OCJMHT, ISTEVAL, and ISTCOMM—are neither mutually exclusive nor exhaustive of CJSMHT.

[c]Figures in parentheses are unweighted case Ns pertinent to that category.

TABLE 3

COINCIDENCE OF CRIMINALIZATION AND COURT-ORDERED EVALUATION/TREATMENT FOR DEFENDANTS WITH AND WITHOUT A PSYCHIATRIC HISTORY.

(figures in percent; "*" denotes a difference from the comparison group that is statistically significant at $p \leq 0.01$)

	No Court-ordered evaluation/treatment		Court-ordered evaluation/treatment					
			Without[a]			With[b]		
	Without[a]	With[b]	Any Kind[c]	PTR/PROB/ ISTEVALO[d]	COMM[e]	Any Kind[e]	PRT/PROB/ ISTEVALO[d]	COMM[e]
Disorderly conduct (N=398)[f]	(200)	(126)	(9)	(7)	(1)	(63)	(42)	(16)
taken into custody	52	73*	89*	100*	0	95*	93*	100*
cash bail required[g]	44	21*	14	83	0	24*	21*	33
detained >2 weeks[h]	14	16	22	29	0	43*	31*	69*
convicted	72	75	57	71	0	32*	43*	13*
imprisoned[i]	8	23*	20	20	—	30*	22	100*
Retail theft (N=388)[f]	(133)	(200)	(6)	(4)	(2)	(49)	(40)	(8)
taken into custody	80	84	67	50	100	92*	93*	88
cash bail required[g]	33	26	20	33	100	27	27	29
detained >2 weeks[h]	27	25	17	0	50	51*	45*	75*
convicted	57	59	33	50	0	61	70	25*
imprisoned[i]	47	56	100	100	—	47	46	50
Disorderly conduct (N=262)[f]	(135)	(84)	(8)	(8)	(0)	(35)	(28)	(4)
taken into custody	93	86	88	88	—	100	100	100
cash bail required[g]	26	31	29	29	—	23	21	25
detained >2 weeks[h]	37	46	38	38	—	71*	71*	100*
convicted	34	30	50	50	—	57*	71*	0
imprisoned[i]	30	36	50	50	—	55*	55*	—

	No Court-ordered evaluation/treatment		Court-ordered evaluation/treatment					
	Without[a]	With[b]	Without[a]			With[b]		
			Any Kind[c]	PTR/PROB/ ISTEVALO[d]	COMM[e]	Any Kind[c]	PRT/PROB/ ISTEVALO[d]	COMM[e]
Disorderly conduct (N=1138)[f]	(594)	(366)	(33)	(30)	(1)	(145)	(86)	(23)
taken into custody	68	73	94*	93*	100	92*	91*	96*
cash bail required[g]	32	26	11*	12*	0	25	24*	29
detained >2 weeks[h]	23	24	39*	33	100	42*	37*	61*
convicted	40	44	70*	77	0	58*	71*	17*
imprisoned[i]	35	41	30	30	—	34	33	50

[a]Defendants *without* a record of admission at the county mental health complex.

[b]Defendants *with* a record of admission at the county mental health complex.

[c]This category includes cases in which any one or combination of the following occured: insanity plea, evaluation/treatment imposed as a condition of pretrial release or probation, and evaluation or treatment for Incompetency to Stand Trial (IST).

[d]This category includes cases in which any one or combination of the following occured: evaluation/treatment imposed as a condition of pretrial release or probation, and evaluation-*but not commitment*-for Incompetency to Stand Trial (IST).

[e]This category includes only those who were found Incompetent to Stand Trial (IST) and committed for treatment to restore competency.

[f]Figures in parenthesis are unweighted case Ns for that category.

[g]Based only on those granted some kind of release terms.

[h]Pertains to pretrial detention in jail only. Days spent in hospital custody for IST evaluation/treatment are *not* included.

[i]Based only on those convicted.

stand trial was ordered, and those for whom mental health treatment was a condition of either pretrial freedom or probation.

Only a minority of defendants with psychiatric records were recognized and treated as patients.[46] Twenty-four percent (N = 259) of the psychiatric group was required to undergo evaluation or treatment by order of the criminal court. Nonetheless, defendants with a psychiatric history were far more often recognized as patients in the criminal justice system than were their counterparts without psychiatric records (compare the two left-most columns in Table 2 with each other). Furthermore, the defendant group with more than two inpatient hospitalizations and the group with more than two involuntary inpatient hospitalizations were even more likely to be evaluated or treated than defendants with less extensive psychiatric records (compare the two right-most columns in Table 2 with the ones further to the left). Thus, the degree of involvement with the mental health system is clearly and positively associated with the imposition of mental health treatment or evaluations in the criminal justice system.

The criminal justice system rarely imposed mental health evaluation or treatment on defendants who did not have a record of admission at the county mental health complex. Only 5% of the nonpsychiatric defendants were evaluated or treated by order of the court. In sum, the data suggest that when mental health evaluation or treatment is imposed by the criminal court, there is often some history of psychiatric problem to justify the order.

4. If Recognized as Patients, Are Defendants Treated More Punitively?

Judging from the findings displayed in Table 3, the criminal justice system imposed more severe sanctions on those defendants who had been treated as patients in the criminal justice system *and* who had a verifiable psychiatric history ("twice-recognized defendants"). Reference to Table 3 establishes that most of the statistically significant differences between the comparison group (the leftmost column) and any other group in the sample are concentrated in the group of defendants who had both a psychiatric history and were evaluated or treated by order of the criminal court. With isolated exceptions, the findings suggest that the twice-recognized defendants were treated more punitively; more of them were taken into custody, held in custody, and convicted (see the three right-most columns in Table 3).

For the most part, twice-recognized defendants were detained

[46] *See* notes 33 and 34, *supra*.

before trial for longer periods than their counterparts, a finding not easily explained with these data. The twice-recognized defendants were not required to post cash bail any more frequently than were the comparison defendants (see Table 3), and were less likely than the comparison group to be denied release due to holds relating to other pending charges, probation or parole ($X^2 = 35.11$; $p < 0.01$). Furthermore, the twice-recognized defendants were not required to post greater amounts of cash bail. Where there were differences in the amount of cash bail, the twice-recognized defendants were granted more lenient terms, although the differences are not statistically significant. The longer pretrial detention cannot be attributed to time spent in custody for psychiatric evaluation. Most of the evaluations took only a few hours and were conducted in the jail itself without interrupting the detention. If the detention was interrupted by hospitalization for evaluation, days in the hospital were not included in the tally of days spent in jail. Ruling out the above explanations, I conjectured that the longer pretrial detention of the twice-recognized defendants may be related to their relative social and economic marginality, factors which would negatively affect their ability to make cash bail.

In general, conviction rates were higher for the twice-recognized defendants. Retail theft conviction rates for twice-recognized defendants were not significantly different from those of the comparison group. There are two important exceptions to the general trend of more severe sanctions against the twice-recognized group: (1) the lower conviction rate for defendants found incompetent to stand trial and committed for treatment, and (2) the lower conviction rates for all disorderly conduct defendants who had any treatment or evaluation imposed on them by the court. Across all offense categories, the defendants who had been committed for treatment due to incompetency to stand trial had low conviction rates, a noticeable contrast to other twice-recognized defendants who, for the most part, had higher conviction rates than their comparison group counterparts. This apparent leniency toward committed defendants seems to extend to other treated or evaluated defendants charged with disorderly conduct. Nearly three-quarters of the comparison group of defendants, but only one-third of the twice-recognized defendants, were convicted of disorderly conduct.

Of those convicted, the twice-recognized defendants were treated more harshly with respect to sentence as well. Twice-recognized disorderly conduct and battery defendants were imprisoned more often than the comparison defendants. While imprisonment rates for retail theft and other misdemeanor defendants were

not higher among the twice-recognized, those defendants were nonetheless more severely sanctioned. More of them were placed under supervision on probation, and very few were punished with only a fine.

A fine as the only sanction was a common punishment for the comparison group, but not for twice-recognized defendants. Considering only the comparison group, 11% of the battery defendants, 18% of the retail theft defendants, and 19% of the other misdemeanor defendants were punished by a fine only; a large majority (74%) of the disorderly conduct defendants were fined. In stark contrast, none of the twice-recognized defendants escaped with merely a fine for their offense (differences between the comparison and the twice-recognized groups are statistically significant at $p < .05$ for all four offense categories). In short, the twice-recognized defendants were not freed after conviction at the same rate as were the comparison defendants.

5. Are the Cases Involving Mentally Disordered Defendants Indistinguishable From Other Cases with Respect to Processing and Disposition?

This third possible specification of the term criminalization can be ruled out as a result of the findings presented above. There are obvious and even pronounced differences between the twice-recognized defendants and the comparison group. There are lesser, but discernible, differences in the case processing and disposition of defendants who either (a) had a psychiatric history, or (b) were ordered by the court to undergo psychiatric evaluation or treatment.

III. Discussion

The most pronounced leniency with respect to conviction is concentrated among those who were found incompetent to stand trial and were committed for treatment. There is no doubt that part of this leniency is a direct result of state law governing incompetency commitment procedures. The critical task here is to determine how much apparent leniency is due to other factors. More specifically, it is important to determine whether the apparent leniency in sanctions is an integral part of a pattern of subversion of the criminal justice process to respond to perceived mental health treatment needs of persons who may also be cast as criminal defendants. This issue is a logical, and sinister, extension of the second specification of the term criminalization, namely that the mentally disor-

dered are treated as patients in the criminal justice system and, as such, are forced to undergo psychiatric treatment.

The criminal procedures that authorize commitment and treatment of the incompetent defendant provide an opportunity to subvert the criminal justice system and use it instead as a means of imposing treatment on the resistant patient. For example, a mentally disordered person could be arrested, charged with an offense such as disorderly conduct, and then evaluated and committed for incompetency to stand trial. State law in this jurisdiction restricts the duration of an incompetency commitment to either (a) eighteen months, with an additional six months under certain circumstances, or (b) the maximum potential term of imprisonment authorized for the offense charged.[47] Thus, for misdemeanor offenses, all commitments for incompetency are limited to twelve months (the absolute maximum term authorized for *any* misdemeanor offense) or less. In *most* misdemeanor cases, the maximum authorized penalty is nine months,[48] and in the case of disorderly conduct, the maximum penal incarceration is ninety days.[49] If the defendant is not restored to competency within the allotted time, or if it becomes apparent that the defendant is not likely to regain competency, the defendant must be discharged from the criminal commitment,[50] and as a matter of practice, the court grants a motion to dismiss. Alternatively, if the incompetent is restored to competency, any time spent in confinement for evaluation or treatment must be credited to the sentence if the defendant is subsequently convicted and incarcerated.[51] The court, of course, may decide to dismiss the case and impose no criminal punishment. If the criminal justice system were being used, at least in a discernible number of cases, as an alternative to involuntary civil commitment, then one would expect evidence of expansive use of the treatment options under state law, and a corresponding conservative use of criminal sanctions in those cases.

The findings from these data, however, simply do not provide any evidence of wholesale subversion of the criminal process to accomplish psychiatric treatment goals, even in the case of defendants evaluated and/or committed for incompetency. First of all, only a

---

47 WIS. STAT. ANN. § 971.14(5)(d) (West 1985 & Supp. 1990). The law governing duration of commitment for incompetency in Wisconsin is one of the more restrictive in the country. *See* Winick, *Incompetency to Stand Trial: Developments in the Law, in* MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIOLOGY 3, 21-2 (J. Monahan & H. Steadman eds. 1983).

48 WIS. STAT. ANN. § 939.51 (West 1982 & Supp. 1990).

49 WIS. STAT. ANN. § 947.01 & 939.51 (West 1982 & Supp. 1990).

50 WIS. STAT. ANN. § 971.14(6) (West 1985 & Supp. 1990).

51 WIS. STAT. ANN. § 971.14(5)(a) (West 1985 & Supp. 1990).

very small fraction of defendants (2.6%, based on weighted N) were evaluated for incompetency. State law restricts hospitalization for evaluations for incompetency to fifteen days under normal circumstances; when good cause is shown, the fifteen days may be extended to thirty days.[52] For the defendants in this study, evaluations for incompetency were usually completed in a very short time. Seventy-two percent of the incompetency evaluations took less than one day. Only nine (20%) of the forty-six defendants who were evaluated, but not committed, were hospitalized for longer than fifteen days.

Of the defendants examined for incompetency, only slightly more than one-half (54%; N = 55) were judged to be incompetent. Defendants found incompetent to stand trial and committed for treatment were generally not hospitalized for the maximum amount of time allowable by law. Counting both time spent in evaluation and treatment to restore competency, more than half of the committed defendants were hospitalized less than forty percent of the amount of time they could have been, given the potential punishment for their charges.[53] In all, only seven (13%) of the committed defendants did not become competent to stand trial; of these seven, two were discharged after being hospitalized for only part (25% and 76%) of their potential criminal incarceration. The remaining five defendants were hospitalized long enough to "max out," *i.e.*, to be discharged because their hospital confinement had reached its maximum duration under law. These findings do not suggest a norm of expansive use of the psychiatric treatment options available under the criminal procedure statutes. Rather, these findings suggest a prudent use of criminal treatment options in a state that has relatively restrictive incompetency commitment laws.

Even though there is no evidence that treatment options were expansively utilized, it is clear that the court was reluctant to convict defendants who had been committed. Except in the case of disorderly conduct defendants, this leniency was not extended to those evaluated but not committed, or to those required to cooperate with some treatment plan as a condition of pretrial release or probation. Except for the disorderly conduct defendants, the leniency shown to twice-recognized defendants was restricted to those committed for incompetency. The majority (80%; N = 44) of cases against the

---

52 WIS. STAT. ANN. § 971.14(2)(c) (West 1985 & Supp. 1990).

53 Of course, the law requires periodic reports of progress and examinations for fitness to stand trial, and it is clear that the legally allowable period of time should be only that which is necessary to accomplish the goal. The point here is that the spirit of the mandate to confine only for the amount of time necessary appears to be observed.

fifty-five committed defendants were terminated by dismissal. Seven (13%) of the fifty-five committed defendants were not restored to competency, leaving the court with no alternative but to dismiss the charges. In addition, however, dismissal was the result in 77% (N = 37) of the cases in which the defendant had been committed and later found competent to stand trial (N = 48). Furthermore, dismissal was a common disposition in cases where the defendant had been evaluated but not committed. Nearly half (46%; N = 21) of the cases against defendants who were evaluated, but not found incompetent, were dismissed.

The exceptional leniency shown twice-recognized defendants charged with disorderly conduct with respect to conviction is intriguing and defies ready explanation. Several plausible explanations suggest themselves, all of which are highly speculative and none of which can be addressed by these data. This deviation from the norm is consistent with two theses presented in previous criminalization literature, which are noted below.

Teplin[54] showed that the police differentially selected the mentally disordered for arrest. If the same phenomenon were operating in this study jurisdiction, then the markedly lower conviction rates of the twice-recognized defendants charged with disorderly conduct is perhaps a sign of judicial correction for the over-selection of the mentally disordered by law-enforcement agents.[55] If that is an accurate explanation, however, it should be stressed that the differential selection in enforcement was corrected rather than ratified at the point of judgment.

Not inconsistent with Teplin's thesis of differential over-selection, is a thesis proposed by Hochstedler,[56] which relates to the court's selective use of leniency. Hochstedler's findings suggested that unless some minimum threshold of seriousness was crossed, the mentally disordered were treated with leniency by the criminal court. Disorderly conduct is among the least serious offenses processed by the criminal court, and as such, may be below that unspoken threshold of seriousness. Congruent with this explanation is the nature of sentences imposed on those convicted of disorderly conduct. Most disorderly conduct cases incur a fine only, although none of the twice-recognized defendants incurred such a sanction. If the court determines its judgment in part on the feasibility and effectiveness of sanctions available, then perhaps the court sees no

54 Teplin, *supra* note 5.

55 *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 20.

56 *See* Hochstedler, *supra* note 15.

point in judging many of the twice-recognized disorderly conduct defendants guilty. If the individual and offense do not warrant incarceration or probation, and if a fine is practically futile, then perhaps the court declines to find guilt.

The inability to explain with certainty the leniency accorded twice-recognized disorderly conduct defendants leaves open the possibility that, with respect to this single vague offense category, the criminal justice system is being subverted to control mentally disordered persons who would otherwise escape criminal prosecution. The totality of the findings presented here make that possibility seem remote. Nonetheless, it cannot be ruled out as a possible explanation of the unusual conviction trends for disorderly conduct defendants.

IV. Conclusion

The findings from this large, stratified random sample of misdemeanor defendants provide the basis for some firm conclusions. As a group, defendants with psychiatric records were criminally sanctioned more severely than defendants without psychiatric records, and defendants with relatively extensive psychiatric records were even more severely sanctioned. Defendants with psychiatric records were more often ordered by the criminal court to undergo psychiatric evaluation and treatment. As a group, defendants with psychiatric records are distinguishable from other defendants with respect to case processing and disposition.

These data provide little support for the notion that the criminal justice system has been subverted to operate as a substitute for civil commitment. Only a minority (24%) of defendants with psychiatric records had any kind of psychiatric evaluation or treatment imposed on them. Of those evaluated for incompetency, only about half were found incompetent; and the vast majority of those initially evaluated as incompetent were later determined to have regained competency. The maximum period of time allowed for either the evaluation or treatment for incompetency was only rarely used. These findings indicate conservative rather than expansive use of treatment options available under the incompetency commitment laws. Only with respect to the exceptionally low conviction rates of disorderly conduct defendants who had a psychiatric record *and* had been subjected to some form of psychiatric evaluation or treatment by the criminal court is there even the slightest possibility that in the name of the criminal process, treatment options were used expansively while criminal sanctions were used conservatively.

On balance, these findings lead to the conclusion that the mentally disordered, especially if recognized as such in the criminal process, are sanctioned more severely than other defendants, both in process and punishment. The empirically grounded specification of "criminalization," then, is *relatively greater punitiveness.* The conclusions drawn from this study surely will reinforce the valid concerns about the humane treatment of mentally disordered persons ensnarled in the criminal justice system. On the other hand, concerns about the integrity of the criminal justice system and the possible subversion of its processes should be allayed by these findings.