Journal of Criminal Law and Criminology

Volume 66 | Issue 1 Article 4

1975

Crimes of Violence and Incompetency Diversion

Henry J. Steadman

Jeraldine Braff

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 1
Printed in U.S.A.

CRIMINOLOGY

CRIMES OF VIOLENCE AND INCOMPETENCY DIVERSION*

HENRY J. STEADMAN** AND JERALDINE BRAFF**

The issues surrounding the area of competency to stand trial have become more visible in the United States during the past decade than at any time since the advent of special security hospitals for the criminally insane in the late nineteenth and early twentieth century. This visibility has resulted from a number of forces such as the activities of Legal Aid Societies and the American Civil Liberties Union which have resulted in court decisions giving criminally committed patients the right to treatment,[1] granting them equal protection with civil commitment procedural safeguards,[2] and requiring the release or civil committment of defendants who will not regain competency within a reasonable period of time.[3] The plethora of issues surrounding incompetency statutes, procedures, and uses are important, among other reasons, because they may be raised at any point in criminal justice processing from arrest through sentencing. The question of competency may be raised by almost anyone involved in the case, from the arresting officer, to the defendant's family, the defense counsel, the arraigning judge, or the trial judge.[4]

There are many suggestions in the research literature that competency proceedings serve a multitude of purposes other than a genuine concern for the defendant's mental state and ability to stand trial; that it becomes secondary to other functions served by the diversionary process.[5] Hess and Thomas concluded that the question of competency was raised not on the basis of a defendant's mental status, but rather was employed as a means of handling situations for which there seemed to be no other recourse under the law.[6] Eizenstat similarly suggested that incompetency was simply an easier method than civil commitment to handle minor offenses which might not have been prosecuted, but which had high nuisance value.[7] Matthews concluded that there was "a tendency on the part of officials to transform by conscious manipulation the competency proce-

* Read at the American Society of Criminology Annual Meeting, November, 1973, New York, New York. The incisive comments of Joseph Cocozza on earlier drafts of the manuscript contributed greatly to the final product. This research was partially supported by PHS Grant MH 20367 from the Center for Studies of Crime and Delinquency.

** Mental Health Research Unit, New York State Department of Mental Hygiene, Albany, New York.

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

[2] Baxstrom v. Herold, 383 U.S. 107 (1966).

[3] Jackson v. Indiana, 406 U.S. 715 (1972).

[4] The literature suggests, with little empirical justification, that the trial judge and the defense counsel are the two most frequent referrers. The roles of the police and other agents in raising the question of competency are completely open to question and may be considerably more significant than the literature currently indicates. *See* A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 78–80 (1970); Group for Advancement of Psychiatry, *Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial*, 8 REPORTS 881–86 (1974).

[5] S. BRACKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW (rev. ed. 1971); Cooke, Johnston & Pogany, *Factors Affecting Referral to Determine Competency to Stand Trial*, 130 AM. J. PSYCHIATRY 870 (1973) [hereinafter cited as Cooke *et al.*]; Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results and Problems*, 119 AM. J. PSYCHIATRY 713 (1963) [hereinafter cited as Hess & Thomas]; Laczko, James & Alltop, *A Study of Four Hundred and Thirty Five Court-Referred Cases*, 15 J. FOR. SCI. 311 (1970) [hereinafter cited as Laczko *et al.*]; Matthews, *Mental Illness and the Criminal Law: Is Community Health an Answer?*, 57 AM. J. PUB. HEALTH 1571 (1967) [hereinafter cited as Matthews]; McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U.L. REV. 46 (1969); McGarry, *Competency for Trial and Due Process in the State Hospital*, 122 AM. J. PSYCHIATRY 623 (1965) [hereinafter cited as McGarry, *Competency to Stand Trial*].

[6] Hess, *supra* note 5, at 714–15.

[7] Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 379 (1969).

dures into a sophisticated vehicle for dispositional decision." [8]

McGarry has contended that through the use of the incompetency diversion the defendant's "right to a trial on the merits tends to be obscured out of concern for the protection of society." [9] This societal protection rationale is especially ironic in light of three studies which compare the recidivism rates of incompetent defendants (and other "criminally insane" patients) with convicted offenders.[10] In every case these studies found rates lower for the criminally insane than for comparable criminal populations. The incompetency diversion system has traditionally functioned with few protections of patient civil liberties. This permitted long detentions in mental facilities with minimal review for return to trial or involuntary civil, rather than criminal hospitalization.[11] In the balance between individual rights and the protection of society, the latter has consistently been dominant. This is questionable in light of the data indicating that the perceived need for special protection is illusory. The research on competency indicates that a primary reason that the right to trial is denied to these individuals is that this might be the most organizationally convenient way to process them through a complicated system.

One major difficulty in integrating previous work to reach some closure on how incompetency is actually used is the incomparability between and within these studies of the charges of defendants evaluated for competency and of those found incompetent. The research concerning the charges of defendants referred for competency evaluation are quite inconsistent, ranging from serious property crimes being the most frequently reported in Massachusetts[12] and Florida,[13] to serious assault crimes in Pennsylvania,[14] and to nonserious crimes being the most frequent in Kansas.[15] The most recently reported data, which are from Michigan,[16] suggest that the previous data on the offense frequencies are inadequate and they attribute the inconsistencies to one confounding variable—the difference among state crime rates. By analyzing the charges of defendants referred for competency evaluations as a function of the rate for each crime within the state this study implies that some means exists for interstate comparisons.

This problem of developing comparable base rate statistics for incompetent defendants anchored in state crime rates is critical. Only with such statistics is it possible to address many of the questions about the uses of incompetency as a diversionary process from the criminal justice system. To find that violent crimes form the highest frequency of crimes among a group of defendants evaluated or found incompetent says little of substantial value. If, for example, violent crimes are also the most frequent offenses in that state, there would be nothing remarkable about this distribution among incompetency cases. The same would be true of any offense category. Thus, most of the previous studies, excepting the recent Michigan study, do not provide these base rates and are not really able to effectively address the serious question that they nevertheless have discussed.[17] It is our in-

[8] Matthews, *supra* note 5, at 1574.

[9] McGarry, *Competency to Stand Trial, supra* note 5, at 626.

[10] McGarry, *The Fate of Psychotic Offenders Returned for Trial*, 127 AM. J. PSYCHIATRY 1181 (1971); Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders—"Not Guilty by Reason of Insanity" and "Criminal Sexual Psychopaths,"* 57 J. CRIM. L.C. & P.S. 31 (1966) [hereinafter cited as Morrow & Peterson]; Zeidler, Haines, Tikuisis & Uffelman, *A Follow-up Study of Patients Discharged from a Hospital for the Criminally Insane*, J. SOC. THERAPY 21 (1955).

[11] Hess & Thomas, *supra* note 5, at 716; Lewin, *Disposition of the Irresponsible: Protection Following Committment*, 66 MICH. L. REV. 721, 728–82 (1968); McGarry, *Competency to Stand Trial, supra* note 5; Morrow & Peterson, *supra* note 10; Steadman & Halfon, *The Baxstrom Patients: Backgrounds and Outcomes*, 3 SEM. PSYCHIATRY 376 (1971); Tuteur, *Incompetent to Stand Trial: A Survey*, 15 CORR. THERAPY & J. SOC. THERAPY 73 (1969).

[12] Balcanoff & McGarry, *Amicus Curiae: The Role of the Psychiatrist in Pre-Trial Examination*, 126 AM. J. PSYCHIATRY 342, 344–45 (1969).

[13] Drummond, *Characteristics of 273 Offenders Referred for Evaluation to the Department of Forensic Psychiatry, Jackson Memorial Hospital, August, 1966 through December, 1967*, 15 SOUTHERN CONFERENCE ON CORRECTIONS PROCEEDINGS 23 (1970).

[14] Jablon, Sadoff & Heller, *A Unique Forensic Diagnostic Hospital*, 126 AM. J. PSYCHIATRY 1663, 1665; Sadoff, Palsky, & Heller, *The Forensic Psychiatric Clinic: Model for a New Approach*, 123 AM. J. PSYCHIATRY 1402, 1405 (1967).

[15] Maxon & Neuringer, *Evaluating Legal Competency*, 117 J. GEN. PSYCHIATRY 267 (1970).

[16] Cooke *et al.*, *supra* note 5.

[17] *Id.*

tent here to develop such rates for New York and then to discuss some implications of the rates obtained.

Methods and Sample

The larger research project from which this material was developed was undertaken to focus on the problems of those defendants who were actually found incompetent. We began our work when New York's revised Criminal Procedure Law became effective on September 1, 1971.[18] A significant section of this revision dealt with some major changes in the handling of incompetent defendants. Central to the intent of these revisions was the confinement of fewer incompetent defendants in maximum security hospitals and their more rapid return to trial. Under the CPL the only incompetent defendants who were eligible for maximum security institutionalization in a correctional mental hospital were those both indicted for a felony and found dangerous by the court. All other incompetent felony defendants were to be detained in civil mental facilities.

The material we are reporting here deals with the distribution of criminal offenses for the 541 male felony defendants found incompetent to stand trial in the CPL's first year of operation. It seems reasonable to generalize whatever findings we may reach from these defendants found incompetent to all those defendants evaluated, since the two research reports which examine the relationship between charges and determinations of competency found no significant relationship.[19]

The data sources we employed were the New York State Department of Correctional Services statewide arrest statistics for 1971 and the institutional and district attorney records for the defendants in our research population.

Findings

A comparison of the rankings of the frequency of arrest charges of the 541 incompetent defendants with all felony arrests in New York presents some striking similarities. In our population, Robbery, Burglary, and Assault charges rank one, two, and three, while in state arrest statistics they rank, respectively, third, second, and fourth. However, further analysis of this table does indicate that the most frequent statewide charge, Dangerous Drugs, representing 20.7 per cent of all felony arrests, is not among the top eight charges in the incompetent population. On the other side, Murder, the charge of 14.4 per cent of the incompetent defendants, is not among the top eight state offenses.

[18] N.Y. Code Crim. Pro. § 730 (1971).

[19] Laczko *et al., supra* note 5, at 321; Cooke, *The Court Study Unit: Patient Characteristics and Differences between Patients Judged Competent and Incompetent,* 25 J. Clinical Psychology 140 (1969).

TABLE 1

Comparison of New York State Felony Arrest Charges Statewide and for Incompetent Defendants

NYS 1971 Felony Arrests		NYS Incompetent Defendants 9/71-8/72	
Offense	Per cent	Offense	Per cent
Dangerous Drugs	20.7	Robbery	21.2
Burglary	18.6	Burglary	18.9
Robbery	13.4	Assault	15.8
Assault	10.4	Murder	14.4
Grand Larceny—Auto	6.4	Arson	6.6
Crim. Poss. Stolen Property	5.9	Miscellaneous Felonies	4.1
Dangerous Weapons	5.4	Rape	3.4
Forgery	4.4	Grand Larceny—except Auto	3.2
All Others	14.8	All Others	12.4
Total	100.0	Total	100.0

The significant differences that are initially suggested by the drug and murder offense rankings come clearly into focus when these arrest figures are converted into base rates. In New York in 1971, there were 941 arrests for murder, .8 per cent of the 114,948 felony arrests. Thus, of every 1,000 arrests, eight were for murder. However, of every 1,000 incompetent felony defendants, 144 were accused of murder, making murder charges eighteen times overrepresented among defendants found incompetent that would be expected based on the frequency of this charge among all felony arrests.

A greater grasp of some of the vast discrepancies that are evident among the charges of incompetent defendants can be seen in Table 2. Here it is apparent that violent crimes against persons are consistently and highly overrepresented among incompetent defendants. On the other hand, drug and property offenses are drastically underrepresented. For example, dangerous drug offenses represent 20.7 per cent of all state felony arrests, but only 2.6 per cent of the charges of our incompetent population. Of every 1,000 drug arrests, .6 are found incompetent, which compares with eighty-two murder defendants per 1,000 murder arrests.

Murder defendants were declared incompetent at a substantially higher rate than any other offense category. Following closely were arsonists (sixty-seven incompetent determinations per 1,000 arson arrests). Arsonists were also considerably overrepresented in our research population compared to arson arrests statewide (.5 per cent total arrest statewide as compared to 6.6 per cent of all incompetency determinations). The high rate of incompetency determinations per statewide arrests in that category coincides with the Michigan study where arson had the highest rate of referral for competency evaluations.[20] Cooke and colleagues attributed this high rate to the fact that arson is thought

[20] Cook *et al.*, *supra* note 5.

TABLE 2

Base-Rates of New York State Felony Arrest Charges Statewide and for Incompetent Defendants

Offense	1971 NYS Arrests		Incompetent Defendants		N/1,000 Arrests per offense
	N	%	N	%	
Murder	941	.8	77	14.4	81.8
Arson	525	.5	35	6.6	66.7
Negl. Homicide	95	.1	2	.4	21.1
Rape	1,593	1.4	18	3.4	11.3
Other Sex Off.	811	.7	9	1.7	11.1
Malic. Misch.	596	.5	5	.9	8.4
Manslaughter	268	.2	2	.4	7.5
Robbery	15,355	13.4	113	21.2	7.4
Assault	12,012	10.5	84	15.8	7.0
Burglary	21,346	18.6	101	18.9	4.7
G.L.—except Auto	4,965	4.3	17	3.2	3.4
Dang. Weap. Off.	6,182	5.4	14	2.6	2.3
Driving w. Intox.	508	.4	1	.2	2.0
G.L.—Auto	7,382	6.4	11	2.1	1.5
Crim. Poss. St. Prop.	6,740	5.9	5	.9	.7
Forgery	5,084	4.4	3	.6	.6
Dang. Drug Off.	23,803	20.7	14	2.6	.6
Gambling	2,314	2.0	0	.0	.0
All Other Fel.	4,423	3.8	22	4.1	5.0
	114,948	100.0	533*	100.0	

* There were eight individuals for whom arrest charges were not available.

by persons who evaluate mentally ill offenders to be related to psychopathology and they suggest that judges and attorneys have also become aware of this relationship. Also, in keeping with the Cooke study, is our finding that rape and other sex offenses, particularly inflamatory offenses, have the fourth highest incompetency rate with eleven incompetent cases per 1,000 such arrests compared to one of every 1,000 felony arrests being for sex offenses. The violent or potentially violent offenses, robbery and assault follow next, while the property offenses of burglary and larceny are at the lower end of offenses associated with incompetency determinations, although they are among the most frequent arrest charges.

Discussion

Two central, but opposing, explanations are suggested as most responsible for the significant discrepancies in the offense distribution rates we have found. The first is that such discrepancies between violent crime arrest rates and offenses among incompetent defendants are to be expected since mental illness is linked to such behavior. The second explanation is that such discrepancies are the result of dispositional ploys on the part of both prosecution and defense. The latter argument is the one which appears the most viable to us on the basis of existing research and our own data.

The idea of isomorphism between violent crime and mental illness has been associated with the mentally ill label since the label evolved. It now appears to be an idea whose time has passed. There is striking consistency among recent discussions of the relationships between violent crime and mental illness: "The terms sociopath, latent homosexual schizophrenic and others have been carelessly used, with a resulting impression that everyone, especially the criminal, is mentally ill. . . . Is every irresponsible, ill conceived or criminal act evidence of underlying mental illness? Few would say so . . ." [21] The follow-up of convicted felons by Guze and co-workers[22] concluded, "Schizophrenia, manic-depressive disease, organic brain syndromes, the neuroses, and homosexuality are apparently not seen more frequently in criminals than in the general population." [23] Literature reviews by Rollins[24] and Rubin[25] similarly determined that "epidemiological data indicate that (1) the major mental illness rates are not comparable to violence rates and (2) the distribution of major mental illness is not the same as the distribution of violence." [26] Finally, Schwartz[27] asserts that "it is usually the less mentally ill person who is more dangerous." [28]

Explaining the overrepresentation of violent crimes among the incompetent defendants studied here by linking mental illness to the commission of such crimes appears untenable. Rather, the answer would seem to be what has been suggested in a number of previous studies: the use of incompetency as a diversion from the criminal justice system greatly depends on non-medical, dispositional, and procedural machinations. Because of this relationship, serious questions arise surrounding determinations of incompetency. Why are referral sources more inclined to refer for evaluation persons with particular charges (murder, arson, sex offenses)? Do police officers consider these crimes as those offenses most indicative of mental illness? Or does referral at the prosecution stage perhaps indicate that prosecutors are glad to rid themselves of immediate or, in some cases, eventual prosecution of certain crimes, knowing that the accused will be detained in a secure facility for a considerable amount of time? Precisely for what reasons are people being diverted into these mental health systems? Is incompetency the easy way into detention and the easy way out of prosecution? For these critical questions no data presently exist.

[21] Mueller, *Involuntary Mental Hospitalization*, 9 Comprehensive Psychiatry 187, 189 (1968).

[22] Guze, Goodwin & Crane, *Criminality and Psychiatric Disorders*, 20 Archives Gen. Psychiatry 583 (1969).

[23] *Id.* at 590.

[24] Rollins, *Crime and Mental Illness Viewed as Deviant Behavior*, 6 N.C.J. Mental Health 18 (1972).

[25] Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Archives Gen. Psychiatry 397 (1972).

[26] *Id.* at 400.

[27] Schwartz, Psychiatry and the New Criminal Procedure Law: The Problem of the Malingering Defendant, 1971 (unpublished monograph, Department of Psychiatry, Downstate Medical Center, State University of New York).

[28] *Id.* at 22.

These are some of the serious questions our data and previous research raise about the use of incompetency determinations as diversions from the criminal justice system. There is much in our work to suggest that incompetency may be the procedurally easy way of getting a defendant into a custodial situation while serving as the prosecution's easy way out of immediate or eventual trial. Vann[29] reflects on such practices:

> The removal of accused persons to hospitals for the criminally insane at the pretrial stage effectively disposes of most of these cases unless the mass media should arouse the community to the danger of the accused's possible return to the community. A rather odd, but fascinating, situation can thus arise where an accused person who has been committed to a hospital for the criminally insane asks a court for release from the institution. The granting of this request permits not freedom, but the ability to return to the jurisdiction of the court for the purposes of standing trial. In these situations the nature of the adversary system, community strategy, and in some cases lack of a presentable case at trial (due to time intervals) find the prosecutor opposing the petition of the accused person to be released from the mental institution and thus continuing the individual's "hospitalization" in many instances as a substitute for prison. While the practical result may be to prevent community concern, there is also an additional obfuscation of the judicial administrative process when prosecutors attempt to keep untried persons away from the judicial resolution of the charges against them.[30]

Certainly, the other possible explanation for our findings, that mental illness goes hand in hand with the commission of violent crimes against persons, is easily and comfortably accepted by the public, but it is a link which empirically has been rejected by psychiatry. The differential crime distributions apparent in our data instead appear related to questionable uses of incompetency. Unfortunately, data on the dynamics and impacts of the process of evaluation and determination of incompetency are characterized by vast gaps. The studies of these burgeoning sources of criminal justice diversion, however, clearly indicate questionable practices and inappropriate diversions.

[29] Vann, *Pretrial Determination and Judicial Decisions-Making: An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justtice,* 43 U. DET. L. J. 13 (1965).

[30] *Id.* at 30.