

**AMERICAN BAR ASSOCIATION  
SECTION OF CRIMINAL JUSTICE**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges Congress to enact legislation that  
2 would address the complex problem presented by the large number of adults with mental  
3 illness and juveniles with mental or emotional disorders who come into contact with the  
4 criminal and juvenile justice systems; such legislation should provide for:

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- 6 1) Grant programs to help states, territories and localities develop pre- and post-  
7 booking diversion programs;
  - 8 2) Prevention, in-jail, in-custody, and community-based treatment programs,  
9 including re-entry services to adults with mental illness and juveniles with  
10 mental or emotional disorders; and
  - 11 3) Effective training for mental health personnel, law enforcement, judges, court  
12 and corrections personnel, probation and parole personnel, prosecutors, and  
13 defenders.
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15 FURTHER RESOLVED, That the American Bar Association urges federal, state, local  
16 and territorial governments to increase funding for public mental health systems so that  
17 adults with mental illness and juveniles with mental or emotional disorders can obtain the  
18 support necessary to enable them to live independently in the community, and to avoid  
19 contact with the criminal and juvenile justice systems.

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21 FURTHER RESOLVED, That the American Bar Association urges federal, state, local  
22 and territorial governments to improve their response to adults with mental illness and  
23 juveniles with mental or emotional disorders who come into contact with the criminal  
24 justice and juvenile justice systems, by developing and promoting programs, policies and  
25 laws that would accomplish the following:

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- 27 1) Improve collaboration among professionals, administrators, and  
28 policymakers in the criminal justice, juvenile justice, mental health, and  
29 substance abuse systems;
- 30 2) Provide training on mental illness and co-occurring disorders and the  
31 mental health and substance abuse systems to judges, court and  
32 corrections personnel, law enforcement, probation and parole personnel,  
33 prosecutors, and defenders who deal with adults with mental illness and  
34 juveniles with mental or emotional disorders;
- 35 3) Develop pre- and post-booking programs to divert, where appropriate,  
36 adults with mental illness and juveniles with mental or emotional disorders  
37 from the criminal and juvenile justice systems;
- 38 4) Ensure that law enforcement, courts, and correctional agencies properly  
39 accommodate adults with mental illness and juveniles with mental or

- 40 emotional disorders with whom they come into contact, both as crime  
41 victims and as individuals suspected of committing a crime;
- 42 5) Assist governments at all levels in developing local solutions to the  
43 complex problem of dealing with mental illness in the criminal and  
44 juvenile justice systems;
- 45 6) Improve federal, state and local policy and practice with respect to access  
46 to health and income benefits for persons with mental illness being  
47 released from incarceration so that such benefits are available to them  
48 immediately upon release without administrative delays; and
- 49 7) Collect information and improve research regarding mental illness and  
50 individuals with mental illness in the criminal and juvenile justice  
51 systems, particularly research on interventions that prevent criminal  
52 justice system involvement and reduce recidivism.

## REPORT

In the 1960's and 70's, hundreds of thousands of people with serious mental illnesses were released from civil confinement, freed from conditions that were frequently unsafe and unsanitary. In the decades since this deinstitutionalization, many people with serious mental illnesses have been able to live independently in the community. But this goal has not been realized for many others. Essential supports have not been forthcoming, in large part because states have failed to transfer resources from mental institutions to the community.<sup>1</sup> In fact, state appropriations for mental health services are far lower today than they were in 1955, the peak population year for large state mental institutions.<sup>2</sup> And, over the past ten years state appropriations for mental health have experienced much lower increases than total state spending and, in particular, spending for corrections.<sup>3</sup> The share of state spending devoted to mental health dropped by 15 percent from 1990 to 1997.<sup>4</sup>

A shortfall of resources is not the only problem: the Surgeon General of the United States has highlighted “the gap between what is known from research and what is practiced,” citing “a range of treatments of documented efficacy . . . for most mental disorders” that are generally unavailable in public mental health systems.<sup>5</sup>

The criminal, juvenile justice, and child welfare systems are being asked to bear responsibility for the current crisis in mental health care. By the end of 2000, there were nearly one million adults with psychiatric disabilities in jail or prison, or on probation or parole.<sup>6</sup>

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<sup>1</sup> See, e.g., U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (1999), available at <http://www.surgeongeneral.gov/library/mentalhealth>:

Housing, support services, community treatment approaches, vocational opportunities, and income supports for those unable to work were not universally available in the community. Neither was there a truly welcoming spirit of community support for “returning” mental patients. Many discharged mental patients found themselves in welfare and criminal justice institutions, as had their predecessors in earlier eras; some became homeless or lived in regimented residential (e.g., board and care) settings in the community.

<sup>2</sup> Adjusted for inflation and population growth, spending today is 30 percent less than the 1955 level. Bazelon Center for Mental Health Law. *Under Court Order: What the Community Integration Mandate Means for People with Mental Illnesses* (1999)(hereafter “*Under Court Order*”). See also Lutterman, T. Hirad, A, & Poindexter, B., *Funding Sources and Expenditures of State Mental Health Agencies, Fiscal Year 1997*, National Association of State Mental Health Program Directors Research Institute (1999)(between 1990 and 1997, per capita state mental health expenditures fell seven percent when adjusted for inflation).

<sup>3</sup> *Under Court Order*, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> See *Report of the Surgeon General*, *supra* note 1.

<sup>6</sup> Calculated using the respective rates of mental illness reported in Bureau of Justice Statistics Special Report, *Mental Health Treatment of Inmates and Probationers* (NCJ 174463) and year-end jail and prison population

During 2000 alone, people with mental illness accounted for nearly two million new jail admissions—a rate of 35,000 individuals a week<sup>7</sup>—mostly for nonviolent offenses.<sup>8</sup> The number of young people with mental or emotional disorders entering juvenile detention centers and correctional facilities is also climbing.<sup>9</sup>

The Council of State Governments (CSG) recently completed two years of study involving hundreds of individuals in criminal justice or mental health systems at the state and local levels.<sup>10</sup> The CSG reported that "people with mental illness are falling through the cracks of this country's social safety net and are landing in the criminal justice system at an alarming rate."<sup>11</sup> It reported that many people with mental illnesses are "overlooked, turned away or intimidated by the mental health system," and "end up disconnected from community supports."<sup>12</sup> As a result, "not surprisingly, officials in the criminal justice system have encountered people with mental illness with increasing frequency."<sup>13</sup>

As the laws defining criminal behavior and the resources for their enforcement expand, more and more individuals with psychiatric disorders are caught up in the system, most often for nuisance crimes. In effect, mental illness is fast becoming criminalized, and individuals with mental illness are being re-institutionalized in prisons and jails.

During street encounters, police officers are almost twice as likely to arrest someone who appears to have a mental illness. A Chicago study of thousands of police encounters found that

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numbers reported in Bureau of Justice Statistics Bulletin, Prisoners in 2000 (August 2001, NCJ 188207) and probationers reported in Bureau of Justice Statistics press release of August 26, 20001.

<sup>7</sup>Based on admission rates reported in Bureau of Justice Statistics Bulletin, Census of Jails, 1999 (August 2001, NCJ 186633) multiplied by the percentage of jail inmates with a mental illness (16.3%) reported in Bureau of Justice Statistics Special Report, Mental Health Treatment of Inmates and Probationers (July 1999, NCJ 174463).

<sup>8</sup> Bureau of Justice Statistics Special Report, Mental Health Treatment of Inmates and Probationers (NCJ 174463)(citing a figure of 70 percent).

<sup>9</sup>Joseph. J. Cocozza, et al., "Youth with Mental Health Disorders: Issues and Emerging Responses," Juvenile Justice, Volume VII(1), Washington DC: Office of Juvenile Justice & Delinquency Prevention (2000).

<sup>10</sup> Council of State Governments , Criminal Justice/Mental Health Consensus Project (June 2002), New York: Council of State Governments. The report may be found at [www.consensusproject.org](http://www.consensusproject.org).

<sup>11</sup> *Id.* at xii.

<sup>12</sup> *Id.* at xiii. The President's New Freedom Commission on Mental Health has recently reported on the "fragmented, disconnected and often inadequate" state of the nation's mental health service delivery system. It called for a "fundamental transformation of the Nation's approach to mental health care," to "ensure that mental health services and supports actively facilitate recovery, and build resilience to face life's challenges." See "Achieving the Promise: Transforming Mental Health Care in America," July 2003. The full text of the report can be found at [http://www.mentalhealthcommission.gov/reports/Finalreport/toc\\_exec.html](http://www.mentalhealthcommission.gov/reports/Finalreport/toc_exec.html)

<sup>13</sup> Council of State Governments, Criminal Justice/Mental Health Consensus Project, *supra* note 6 at 9 (June 2002).

47 percent of people with a mental illness were arrested, while only 28 percent of individuals without a mental illness were arrested for the same behavior.<sup>14</sup> In addition, adults with mental illnesses typically are incarcerated for much longer periods than offenders who do not have mental illnesses<sup>15</sup> and while incarcerated they become especially vulnerable to assault and other forms of intimidation by other inmates.<sup>16</sup>

Adverse contact with the criminal and juvenile justice systems obviously has significant negative consequences for those who are subject to arrest, booking and incarceration.<sup>17</sup> Individual rights are violated when people with mental illnesses are denied treatment and subjected to more frequent arrests and harsher sentences than other offenders. And beyond the trauma of arrest and incarceration are the unintended collateral consequences, such as social stigmatization based on a criminal record and the denial of housing or employment or treatment services—even if charges are ultimately dropped.<sup>18</sup> Equally disturbing is the endless cycle of

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<sup>14</sup> Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, National Institute of Justice Journal (July 2000). The article can be found at <http://www.ncjrs.org/pdffiles1/jr000244c.pdf>.

<sup>15</sup> Council of State Governments, Criminal Justice/Mental Health Consensus Project, *supra* note 6 at 9 (June 2002).

<sup>16</sup> *Id.* at 5 (citing testimony of Reginald Wilkinson, then Vice President, Association of State Correctional Administrators and Director, Ohio Department of Rehabilitation and Correction, before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, oversight hearing on “The Impact of the Mentally Ill on the Criminal Justice System,” September 21, 2000).

<sup>17</sup> In October 2003, Human Rights Watch released a report, “Ill-Equipped: U.S. Prisons and Offenders with Mental Illness,” which documents the failure of most U.S. prisons to provide even minimally adequate care and protection to inmates with serious mental illnesses:

“[a]cross the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs. All too often seriously ill prisoners . . . are neglected, accused of malingering, treated as disciplinary problems. Without the necessary care, [they] suffer painful symptoms and their conditions can deteriorate. They are afflicted with delusions and hallucinations, debilitating fears, extreme and uncontrollable mood swings. They huddle silently in their cells, mumble incoherently, or yell incessantly. They refuse to obey orders or lash out without apparent provocation. They beat their heads against cell walls, smear themselves with feces, self-mutilate, and commit suicide.”

See <http://www.hrw.org/reports/2003/usa1003/index.htm>.

<sup>18</sup> See ABA Criminal Justice Standards Committee, Report to the ABA House of Delegates on Proposed Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed.), August 2003; INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT (Meda Chesney-Lind & Marc Mauer eds, 2002); Amy Hirsch et al., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (Center for Law and Social Policy, 2002). In public housing, for example, the “One Strike and You’re Out” policy provides that “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be the cause of the termination of tenancy.” 42 U.S.C. §1437d(1)(6) as amended (2000), upheld by Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002). See also Jane Fritsch and David Rohde, *For New York City’s Poor, A Lawyer with*

recidivism that results when people with psychiatric disabilities are released with their needs unmet.<sup>19</sup> For most of these individuals, the underlying issue is their need for basic services and support that public systems have failed to deliver in meaningful ways.<sup>20</sup>

The American Bar Association strongly endorses efforts that address these root causes of criminalization while also working to appropriately divert and accommodate adults and juveniles with psychiatric disabilities who do end up in the criminal and juvenile justice systems. No rational purpose is served by the current system. Public safety is not protected when people who have mental illnesses are needlessly arrested for nuisance crimes, or if the mental illness at the root of a criminal act is exacerbated by a system designed for punishment, not treatment.<sup>21</sup> Every effort should be made to assist people with serious mental illnesses before they come to the attention of law enforcement, and to identify and address system failures that result in their inappropriate arrest or incarceration for minor offenses.

The ABA, therefore, urges federal, local, state, and territorial governments to address the criminalization issue in several important ways. First, the resolution supports federal grant programs that would assist states and localities providing greater access to services and supports that would prevent involvement with the criminal and juvenile justice systems, minimize involvement for those for whom diversion is appropriate, ensure better treatment while incarcerated or detained, and lessen the likelihood of recidivism.

Many communities have adopted programs that will divert people with serious mental illness from the criminal justice system at various stages of the process:

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*1,600 Clients*, NEW YORK TIMES, April 9, 2001 (“For indigent defendants, even those charged with the least serious transgressions, the stakes are growing. New laws have made criminal convictions grounds for denying people jobs, evicting them from city-owned housing, denying college financial aid and cutting off welfare benefits.”).

<sup>19</sup> For more information about the benefits issue, see the following Bazelon Center publications: *Finding the Key to Successful Transition from Jail to Community* (2001); *A Better Life—A Safer Community: Helping Inmates Access Federal Benefits* (2003); and *Building Bridges: An Act to Reduce Recidivism by Improving Access to Benefits for Individuals with Psychiatric Disabilities upon Release from Incarceration* (2003). These publications may be found at <http://www.bazelon.org/issues/criminalization/publications/index.htm>.

<sup>20</sup> See generally Report of the President’s New Freedom Commission, *supra* note 8. Certainly, not every crime committed by an individual diagnosed with a mental illness is attributable to disability or to the failure of public mental health. But homelessness, unemployment and a lack of access to meaningful treatment services have clearly put many people with mental illnesses at risk of arrest. In addition, substance abuse is a co-occurring disorder for upwards of 75% of people with mental illness who come into contact with the criminal justice system. See Linda Teplin and Karen Abram, “Co-Occurring Disorders among Mentally Ill Jail Detainees: Implications for Public Policy,” *American Psychologist* 46:10, October 1991, at 1036-45.

<sup>21</sup> Center for Court Innovation, *Rethinking the Revolving Door: A Look at Mental Illness in the Courts* (2001). The report may be found at [http://www.courtinnovation.org/pdf/mental\\_health.pdf](http://www.courtinnovation.org/pdf/mental_health.pdf).

- pre-arrest (mental health and/or police crisis response)
- time of arrest (pre-booking diversion);
- initial processing in the jail (pre-booking diversion);
- following booking, but without a trial (post-booking diversion);
- at adjudication or the trial stage (court-based diversion); or
- following incarceration (re-entry programs).

Diversion is most likely to succeed, to be less intrusive regarding individual rights and to be less costly to the criminal justice system, if it occurs in the early stages of criminal justice processing. However, depending on the seriousness of the crime or the individual's prior history in the criminal justice system, this may not be feasible. The resolution recognizes that states, territories, and localities need financial assistance to develop and expand these important diversion programs, and to ensure the provision of “effective training for mental health personnel, law enforcement, judges, court and corrections personnel, probation and parole personnel, prosecutors, and defenders.”

The resolution further encourages all levels of government to “improve their response to adults with mental illness and juveniles with mental or emotional disorders who come into contact with the criminal justice and juvenile justice systems, by developing and promoting programs, policies and laws that would accomplish” a number of important changes. Regardless of the federal government’s response to the criminalization issue, state, local and territorial governments have a responsibility to improve collaboration among social service and criminal and juvenile justice systems, provide training for those who come into contact with adults and juveniles in the criminal and juvenile justice systems, and develop sufficient pre- and post-booking diversion programs. The resolution calls for all levels of government, pursuant to their obligations under the Americans with Disabilities Act and other federal and state laws, to ensure that “law enforcement, courts, and correctional agencies properly accommodate adults with mental illness and juveniles with mental or emotional disorders with whom they come into contact, both as crime victims and as individuals suspected of committing a crime.”

The lack of appropriate re-entry programs and policies has been the subject of recent litigation<sup>22</sup> and growing interest in Congress and in the states. As the CSG found in its report, “individuals with mental illnesses leaving prison without sufficient supplies of medication, connections to mental health and other support services, and housing are almost certain to decompensate, which in turn will likely result in behavior that constitutes a technical violation of

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<sup>22</sup> See, e.g., *Victory for Inmates with Mental Illnesses* (January 27, 2003) <http://www.bazelon.org/newsroom/1-27-03bradh.htm>> (describing the recent settlement in *Brad H. v. City of New York*, 185 Misc.2d 420, 431 (N.Y. Sup. Ct. 2000), aff'd, 276 A.D.2d 440 (N.Y. App. Div. 2000).

release conditions or a new crime.”<sup>23</sup> This finding confirms a 1991 study finding that within 18 months of release from prison, 64 percent of offenders with mental illnesses were rearrested and 48 percent were hospitalized.<sup>24</sup>

Breaking the cycle of repeated contact with the criminal or juvenile justice systems must start with expanded and more focused community-based services and supports.<sup>25</sup> Improving access to meaningful services and supports will inevitably reduce the number of incidents between individuals with mental illnesses and the law enforcement and justice systems. Furthermore, such access is critical to the effectiveness of any criminal justice program directed toward people who have mental illnesses, including diversion programs.<sup>26</sup> The resolution recognizes this cycle can be broken, by ensuring that inmates with psychiatric disabilities have immediate access to the mental health services, housing and other supports they need to avoid re-arrest. The resolution calls on governments to “[i]mprove federal, state and local policy and practice with respect to access to health and income benefits for persons with mental illness being released from incarceration so that such benefits are available to them immediately upon release without administrative delays.”

The resolution is particularly timely, as legislation is currently pending in Congress to create grant programs to address the criminalization phenomenon for adults with mental illnesses and for juveniles with mental and emotional disorders, and additional legislation will soon be proposed to address some of the benefits issues. States and localities around the country are also grappling with legislative proposals and policy reforms that would address this critically important issue.

Federal efforts to decriminalize mental illness should be supported and encouraged by the legal community. The legal community must be ready to initiate and support additional steps at the federal, state, local and territorial level to deal with mental illness in the first instance through the mental health system, and not through the criminal justice system.

Respectfully submitted,

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<sup>23</sup> Id. at p. 274.

<sup>24</sup> L. Feder, “A profile of mentally ill offenders and their adjustment in the community,” *Journal of Psychiatry and the Law*, 19:79-98 (1991).

<sup>25</sup> As currently configured in many communities, public mental health services are substantially targeted at prioritized populations: people exiting state psychiatric institutions, people regarded as being at risk of admission to these facilities, people in crisis and people whose treatment is governed by court orders. Individuals not falling into a defined priority group may find very limited services available to them.

<sup>26</sup> Eric Trupin, et al., *King County District Court Mental Health Court Phase I Process Evaluation Report* (undated) (on file at The Washington Institute for Mental Illness Research & Training, University of Washington).

Norman K. Maleng  
Chair, Criminal Justice Section  
February 2004

## GENERAL INFORMATION FORM

1. Summary of Recommendation.

The recommendation urges the adoption of laws and policies to address the complex problem presented by the large number of adults with mental illness and juveniles with mental or emotional disorders who come into contact with the criminal and juvenile justice systems. It also expresses American Bar Association support for increased funding for public mental health systems so that adults with mental illness and juveniles with mental or emotional disorders do not become an undue burden on the criminal justice system.

2. Approved by Submitting Entity.

This recommendation was approved by the Criminal Justice Section Council at its November 15-16, 2003 meeting.

3. Similar Recommendations Submitted Previously.

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. Relevant Existing ABA Policies and Affect on These Policies.

There are no relevant existing ABA Policies.

5. Urgency Requiring Action at this Meeting.

Swift favorable action by the House of Delegates will allow the ABA to weigh in on federal legislation that Congress is expected to consider on this subject, and to participate in a more general cross-disciplinary conversation about the criminalization of mental illness, and the re-institutionalization of persons with mental illness in prisons and jails, that is taking place nationwide.

Approval of the recommendation is also needed as soon as possible in order to permit the ABA to be a participant in helping shape the disposition of decisions related to these issues by governmental agencies and legislative bodies.

6. Status of Congressional Legislation (If applicable).

No legislation is currently pending.

7. Cost to the Association.

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. Disclosure of Interest (If Applicable).

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2004 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

Individual Rights and Responsibilities

Commission on Mental & Physical Disability Law

10. Contact Person (Prior to 2004 Midyear Meeting).

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11. Contact Persons (Who will present the report to the House).

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