

AMERICAN BAR ASSOCIATION

FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

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STANDING COMMITTEE ON ASSOCIATION
STANDARDS FOR CRIMINAL JUSTICE

AMERICAN BAR ASSOCIATION

Standards for Criminal Justice:

FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS July 1983

A special criminal justice improvement project of the ABA Standing Committee on Association Standards for Criminal Justice. Comments on these draft standards will be welcomed and should be sent to Director, Criminal Justice Mental Health Standards Project, American Bar Association, 1800 M Street, NW, Washington, DC 20036.

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Preface

This publication has been made possible by a grant from the John D. and Catherine T. MacArthur Foundation. The standards within this first tentative draft have not been approved by the House of Delegates or Board of Governors and, until approved, these standards do not constitute the policy of the American Bar Association. Standards 7-6.1(a), 7-6.9(b)(i) and (ii) and 7-6.10(b) reflect American Bar Association policies as enacted by the House of Delegates on February 9, 1983.

Under a grant from the MacArthur Foundation the ABA's Standing Committee on Association Standards for Criminal Justice has operated the Criminal Justice Mental Health Standards Project since February, 1981. This First Tentative Draft of the Criminal Justice Mental Health Standards represents the culmination of the Standing Committee's efforts to date. The standards and supporting commentary herein will be subject to further examination and review prior to final submission to the ABA's House of Delegates in August, 1984. As a preliminary step these standards will be the subject of a special July 31, 1983 Open Meeting at the ABA's Annual Meeting in Atlanta, Georgia. In recognition of the interdisciplinary impact of these standards the Standing Committee on Association Standards for Criminal Justice requested Board of Governors permission for circulation of this publication to individuals and organizations outside the ABA. The Board granted that permission and the purpose of the resultant wide circulation of this Tentative Draft is to elicit comments and suggestions from practitioners and organizations in the mental health and legal fields. All recipients of this publication are urged to send their comments to the ABA Standing Committee on Association Standards for Criminal Justice, 1800 M Street, NW, South Lobby, Second Floor, Washington, DC 20036.

B. James George, Jr., Chairperson
ABA Standing Committee on
Association Standards for Criminal
Justice

July, 1983

Introduction

Mental disease or defect, mental retardation and that full host of abnormal conditions which affect the mental and emotional processes should be familiar to all who engage in the workings of our criminal justice system. Even the untrained cannot help but recognize the presence of mental and emotional distress exhibited by many of those unfortunate enough to find themselves detained in precinct stations, arraigned or tried in the criminal courts or incarcerated in jails or prisons. No informed observer can fail to reflect upon the prevalence of significant mental abnormalities exhibited by detainees, defendants and convicts. Daily our criminal justice agencies and institutions deal with society's walking wounded. Many who are caught up in the criminal process are underprivileged and many suffer the further disadvantages of mental affliction or retardation.

This recognition does not mean that mental illness or retardation—in their variegated forms—are criminogenic. Nor does it suggest any reliable causal relationships between the two. Indeed, millions upon millions of Americans suffer from and seek help for a wide range of mental and emotional problems. The overwhelming proportion are law-abiding citizens who will live out their lives free of criminal involvement.

How then can we account for the prevalence of psychic abnormality observed by police, prosecutors, jailors, judges and clinicians involved with the administration of criminal justice? There is no certainty to any explanation. Clearly the disadvantaged are disproportionately represented at all stages of the criminal process. Whether that disadvantage be economic, educational, or mental, the disproportionate representation appears to be relatively constant. Lacking certainty as to cause and effect, we are nevertheless painfully aware of the fact that the manifestations of severe forms of mental disease,

defect and retardation act out their sad scenarios day after day in every corner of every criminal justice institution.

The criminal law's introduction to mental aberration is not recent. Indeed, "legal insanity" has for long been the subject of legal scholarship. Ironically, this subject has received scant attention within the American Bar Association's remarkably comprehensive criminal justice standards development effort until recent years. Practitioners, judges and legal scholars who consult the four-volume second edition ABA Standards for Criminal Justice know that the standards represent a twenty-year investment of legal resources. In the late 1970's, after completing a major effort to update the first edition ABA standards, the ABA recognized that it had an unfinished agenda. While the issue of mental disease or defect was touched upon in chapter 18, Sentencing Alternatives and Procedures, at no point in the otherwise comprehensive second edition had the subject of mental health issues in the criminal law been canvassed in thorough fashion.

Chapter 7, Criminal Justice Mental Health Standards, cures this defect. The history of the development of this lengthy and comprehensive chapter will be of interest to practitioners and clinicians alike. Chapter 7 owes its existence to two principal factors: generous financial support from the John D. and Catherine T. MacArthur Foundation and remarkable pro bono publico contributions from 79 lawyers and mental health professionals who formed the hardworking interdisciplinary task forces responsible for the development of standards proposals. A \$1 million grant from the MacArthur Foundation enabled the American Bar Association, through its Standing Committee on Association Standards for Criminal Justice, to establish the Criminal Justice Mental Health Standards Project. Under the direction of the ABA's Standing Committee on Association Standards for Criminal Justice the Project began its planned four-year operation on February 1, 1981. In recognition of the fact that the subject matter was interdisciplinary in character, the expert task forces involved mental health as well as legal practitioners from the beginning. During the early stages of the Project, 48 psychiatrists, psychologists, other mental health professionals, prosecutors, defense lawyers, judges and legal academicians were involved. By mid-1982 the Project's six interdisciplinary task forces had been increased to involve 79 nationally recognized experts in law and mental health. Moreover, to ensure the adequacy of interdisciplinary involvement, the Project established formal liaisons with a host of non-legal professional or-

ganizations. Thus, the American Psychiatric Association, the American Psychological Association, the American Orthopsychiatric Association and the National Sheriffs' Association were invited to assign official representatives to one or more of the Project's task forces. In addition, every effort was made to see to it that interested entities of the American Bar Association were represented in the developmental stages. The ABA's Commission on the Mentally Disabled was a full participant in the Project from its beginning. We acknowledge with gratitude the signal contributions of those who gave unstintingly of their time and talent as members of the Project's task forces and as members of the Project's Advisory Committee. We also acknowledge with gratitude the MacArthur Foundation's generosity which, in last analysis, has enabled us to undertake this major effort to improve the administration of criminal justice.

Within our democratic society and under our system of law there are two principal ways through which citizens may be deprived of their liberty. Arrest, trial and conviction under the criminal law may result in incarceration. That is the first way, but not the only way. Under the state's equally awesome mental health powers, citizens who, because of mental disease or defect, represent a danger to themselves or others may be involuntarily confined. For years there has been a growing interaction between these two liberty-depriving powers. They are separate—but not entirely so. When they mesh or become confounded one with the other, problems result. Moreover, they represent areas where the criminal and civil laws have courted one another with not entirely satisfactory results. This chapter attempts to define clearly the limits of the state's criminal powers as those powers relate to the mentally afflicted who have become involved with the criminal law.

This century has seen noteworthy progress in the scientific understanding of mental illness in all its permutations. Yet, there seems general agreement among the most informed mental health and mental retardation experts that we continue to see darkly and that we are merely on the frontier of knowledge as it relates to the human mind. Nonetheless, relatively recent scientific achievements have been noteworthy. The development and wide-scale use of psychotropic medications led to dramatic changes in the treatment of the severely mentally ill. Rapid development and utilization of psychotropic drugs contributed to the movement toward deinstitutionalization. That movement, in turn, has had a profound effect on public