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## PROMISED REFORMS FALL SHORT OF THE MARK

*Colleen Miller\**

Did the General Assembly pass sweeping mental health law reforms? Do the new laws make it easier to hospitalize individuals against their will, and if so, is that a desirable end? While new legislation rewords our civil commitment statute,<sup>1</sup> do the new words really improve Virginia's mental health care system? In all likelihood, the most significant effect of the new legislation will be making our mental health laws more vulnerable to constitutional challenge, while simultaneously making it more difficult for Virginians to get necessary mental health treatment voluntarily.

Civil commitment statutes establish standards that must be met before a state can force an individual into a hospital for treatment against his will.<sup>2</sup> Before the 2008 session, Virginia law permitted the Commonwealth to deprive an individual of his liberty rights and force him into a mental hospital for having a mental illness, where he either (1) presented an "imminent danger" to himself or others, or (2) was "substantially unable to care for himself," and needed treatment but was not willing to accept it voluntarily.<sup>3</sup> This standard closely tracked the criteria established by the Supreme Court of the United States in *O'Connor v. Donaldson*.<sup>4</sup>

Even prior to the incident on April 16, 2007 when a suspected mentally ill student killed himself and thirty-two others at Virginia Tech,<sup>5</sup> academics and others believed that Virginia's civil commitment standards needed to be changed.<sup>6</sup> For more than thirty years, Virginia law allowed jurists to define

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1. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

2. See VA. CODE ANN. § 37.2-817(B) (Repl. Vol. 2005).

3. *Id.*

4. 422 U.S. 563, 574 (1975).

5. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1.

6. ELIZABETH MCGARVEY, COMM'N ON MENTAL HEALTH LAW REFORM, CIVIL COMMITMENT PRACTICES IN VIRGINIA: PERCEPTIONS, ATTITUDES, AND RECOMMENDATIONS 1-3 (2007), available at

the spectrum of dangerousness or inability for personal care and an individual's placement on that spectrum.<sup>7</sup> This determination guided the decision as to whether the state could deprive the individual of liberty and force him into an institution.<sup>8</sup> As a practical matter, whether an individual was committed or released often depended as much on the personal beliefs of the presiding jurist as it did on the circumstances of the individual before the court.

The Virginia Tech Review Panel and the Supreme Court of Virginia's Mental Health Law Reform Commission studied these issues extensively and provided their findings and recommendations to the General Assembly this winter.<sup>9</sup> But the legislature chose not to follow the study groups' recommended changes to the civil commitment standard. Instead, the General Assembly chose to consider new provisions.<sup>10</sup> The result does little to resolve confusion, presents interesting evidentiary problems, and may leave our commitment law more vulnerable to constitutional challenge than before.

Under the new law, passed by both the Senate and the House of Delegates and signed by the Governor, a person with mental illness can be forced into a hospital if:

there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment... that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate.<sup>11</sup>

Although the core conditions of dangerousness or lack of personal care abilities remain the standard, noticeable changes in the wording exist. For example, the old law's "danger" to self or others standard has been replaced by "likelihood of serious harm" to self or others.<sup>12</sup> Similarly, the new law

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[http://www.courts.state.va.us/cmh/civil\\_commitment\\_practices\\_focus\\_groups.pdf](http://www.courts.state.va.us/cmh/civil_commitment_practices_focus_groups.pdf); VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL 1-2 (2007), [http://www.vtreviewpanel.org/report/report/07\\_SUMMARY.pdf](http://www.vtreviewpanel.org/report/report/07_SUMMARY.pdf).

7. See VA. CODE ANN. §37.2-817.

8. See *id.*

9. MCGARVEY, *supra* note 6, at 1, 56; VA. TECH REVIEW PANEL, *supra* note 6, at 1.

10. See H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

11. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

12. Compare VA. CODE ANN. § 37.2-817(B)(i) (Repl. Vol. 2005), with H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

replaces the old—and much simpler—“imminent” danger requirement with a finding that harm is “substantial[ly] likel[y]” to occur “in the near future.”<sup>13</sup>

It remains to be seen whether this substitution of nearly synonymous words will achieve the law’s desired effect on judgments made by magistrates and special justices when deciding whether to take away an individual’s rights. But if these changes are interpreted to enable the Commonwealth to operate under a lesser standard than the Constitution permits, Virginia has set itself up for unnecessary legal challenges.

Some of the most interesting—and potentially threatening—issues raised by the new law are ones affecting the standard of proof and the admissibility of evidence in commitment proceedings. For example, in considering whether a substantial likelihood exists that an individual will cause serious physical harm to himself or others, any relevant information can be considered; however, there must also be evidence of “recent behavior causing, attempting, or threatening harm....”<sup>14</sup> It would appear to follow, therefore, that if evidence of these behaviors is not before the court, no other evidence may be considered, regardless of its nature.

This strict rule results from the legislature’s use of the word “and” in the place of “or” in the new legislation, which does not appear to be an accident.<sup>15</sup> The legislature specifically considered a proposal to use “or,”<sup>16</sup> but wisely decided against it. Using the conjunction “or” essentially would have removed all limits on what could be considered when deciding whether to take away an individual’s liberty rights. By choosing the conjunction “and,” legislators decided that other relevant evidence may be considered only if evidence of recent dangerous behaviors exists first.

While the new law sets a strict limit on *what* is to be decided, it establishes extremely lax standards on *how* to make the decision. The new standard strictly insists on proof of recent behaviors.<sup>17</sup> But in proving those behaviors for the purpose of obtaining an emergency custody order, jurists can now accept “any other information available that the magistrate

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13. Compare VA. CODE ANN. §37.2 -817(B), with H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

14. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

15. See H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

16. Legislative Information Services, Bill Tracking: HB499, 2008 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=hb499> (last visited Apr. 17, 2008); Legislative Information Services, Bill Tracking: SB246, 2008 Session, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=081&typ=bil&val=sb246> (last visited Apr. 17, 2008).

17. See *supra* text accompanying notes 11-13.

considers relevant,”<sup>18</sup> including hearsay and other evidence that would not be considered reliable enough for admissibility in criminal or other legal proceedings.

Perhaps most worrisome of all is the new provision allowing magistrates to consider testimony in the form of affidavits “if the witness is unavailable and it so states in the affidavit.”<sup>19</sup> This troubling exception to well-established rules of evidence purports to summarily deprive the individual of his constitutional right to cross-examine witnesses against him.<sup>20</sup>

The second of the core conditions deals with circumstances when individuals may be deprived of their liberty rights because they are unable to care for themselves.<sup>21</sup> This highly paternalistic standard has always been problematic, for it is a matter of opinion as to whether the court should consider lifestyle matters as mundane as personal hygiene or the cleanliness of one’s home. The standard under the old law was that a person must be “substantially” unable to care for himself.<sup>22</sup> The new language essentially permits commitment if there is a substantial likelihood that an individual with a mental illness will cause serious harm to himself or others or suffer serious harm due to a lack of capacity or ability to provide for his basic human needs.<sup>23</sup>

The words chosen may be significant because legislators had the choice of triggering commitments when there was simply diminished capacity. Instead, they chose to limit forced hospitalization to those who lack capacity altogether.<sup>24</sup>

Significantly, the legislature did little to help people avoid the need for hospitalization or maintain mental health upon release from institutions. Federal laws, such as the Americans with Disabilities Act,<sup>25</sup> make clear that people with disabilities, including people with mental illnesses, have the

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18. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

19. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

20. U.S. CONST. amend. VI.

21. *See supra* note 2.

22. VA. CODE ANN. § 37.2 -817(B) (Repl. Vol. 2005).

23. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

24. The use of the term “lack of capacity” in the involuntary commitment standard will circumscribe the option of forcing outpatient treatment on an individual, as well. Under the new legislation, a person cannot be ordered into outpatient treatment unless he has the capacity to comply with the treatment plan. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 315, Va. Gen. Assembly (Reg. Sess. 2008). An individual who lacks the capacity to protect himself would not have the capacity to comply with an outpatient treatment plan. Forced outpatient treatment, therefore, will be an option only for those who meet the dangerousness conditions. *See* H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

25. 42 U.S.C. § 12101.

right to receive services in the setting that restricts their liberty the least.<sup>26</sup> Apparently ignoring the federal mandate, Virginia's legislature passed laws designed to encourage greater use of the most restrictive setting possible: forced hospitalization.<sup>27</sup>

If our legislature were serious about vigorously addressing the problems of mental illness, it easily could have taken some significant steps to help people with mental illness avoid the need for hospitalization in the first place. For example, the legislature could have approved appropriate funding to increase the availability of mental health services in the community. Or it could have added enough flexibility to the Commonwealth's "auxiliary grant" program to allow people to use it effectively to secure appropriate living arrangements upon release from institutions.<sup>28</sup>

Unfortunately, the legislature did not adopt these or other positive measures to address the problems of mental illness in Virginia. Instead, Virginia will now channel resources into the process for involuntary civil commitment, thereby using funds that could have been available for better voluntary services. The legislature elected to gut the funding of many of the community-based programs proposed this year, to spend another year studying the auxiliary grant program, and to concentrate on rewording the commitment statute.

The United States Constitution guarantees individual liberty under the Fifth and Fourteenth Amendments,<sup>29</sup> and courts have long understood that a state can only deprive an individual of liberty because of mental illness under very limited circumstances.<sup>30</sup> Virginia's "reform" efforts may well exceed the boundaries of those and other constitutional protections. It remains to be seen whether the changes to Virginia's commitment laws are merely word games or something much more ominous.

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26. See 28 C.F.R. § 35.130(d) (2007).

27. H.B. 499, Va. Gen. Assembly (Reg. Sess. 2008); S.B. 246, Va. Gen. Assembly (Reg. Sess. 2008).

28. The auxiliary grant program provides supplemental assistance to people who need some kind of supported living arrangements, but as it is currently structured, the grants can only be used in institutional settings called "assisted living facilities." VA. CODE ANN. § 63.2-800 (Repl. Vol. 2005).

29. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

30. See, e.g., *Humphrey v. Cady*, 405 U.S. 504, 508-11 (1972); *Evans v. Paderick*, 443 F. Supp. 583, 585 (E.D. Va. 1977).