Reforming Virginia's MENTAL HEALTH Statutes & Processes

by Chief Justice Leroy R. Hassell Sr.

When I became the Chief Justice of the Supreme Court of Virginia, I met with the leadership of the Senior Lawyers Conference and expressed my great desire to work closely with the Conference. Gregory E. Lucyk, the Chief Staff Attorney for the Supreme Court of Virginia, has helped me pursue various initiatives with the Senior Lawyers Conference.

I can state without reservation that Virginia's lawyers are very blessed because we have many members of the Senior Lawyers Conference who have invaluable knowledge and experience and they are willing to use their talents and vast resources to mentor new lawyers and help Virginia's senior citizens. Recognizing the experience, ability, energy, and enthusiasm exhibited by members of the Senior Lawyers Conference, I asked the Conference to assist the Supreme Court as the Court embarked upon an effort to improve Virginia's mental health statutes and involuntary mental commitment processes.

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The provision of adequate mental health treatment and fair judicial processes that ensure due process for mental health patients are issues of national importance and are not unique to Virginia. According to the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, (DSM-IV), approximately 22.1 percent of Americans eighteen and older suffer from a diagnosable mental disorder in a given year. If this conclusion is correct, approximately 44.3 million Americans experience some type of diagnosable mental disorder each year. Common mental disorders include depressive disorders, schizophrenia, anxiety disorders, panic disorders, post-traumatic stress disorders, eating disorders, Alzheimer's disease, and autism spectrum disorders, just to mention a few.

Interestingly, as early as 1100 A.D., asylums existed for the treatment of persons who suffered from mental disorders. Both the English and the French established facilities for persons who suffered with mental illnesses, but I suspect that these facilities were more similar to jails than to hospitals.

In Great Britain, before the founding of Jamestown, persons who suffered from mental illnesses were either incarcerated or cared for by their families. Upon the establishment of British colonies in America, the new colonists also cared for mentally ill family members at home. Mentally ill individuals without family support often drifted from town to town. As local jails began to be constructed in colonial America, drifters suffering from mental illness were commonly confined for petty crimes and vagrancy.

The Pennsylvania Hospital, the first hospital in the United States, opened in 1751 in Philadelphia to care for the poor and the mentally ill. The first public facility dedicated solely to the treatment of the mentally ill was established in Williamsburg, Virginia, during the colonial era. This facility continues to operate today and is now known as Eastern State Hospital.

In November 1769, at the urging of Governor Francis Fauquier, the Virginia House of Burgesses passed "An Act to make provision for the support and maintenance of ideots, lunatics, and other persons of unsound minds." That statute stated in relevant part:

> WHEREAS several persons of insane and disordered minds have been frequently found wandering in different parts of this colony, and no certain provision having been yet made either towards effecting a cure of those whose cases are not become quite desperate, nor for restraining others who may be dangerous to society: Be it therefore enacted, by the Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same, That the honourable John Blair, William Nelson, Thomas Nelson, Robert Carter, and Peyton Randolph, esquires, and Robert Carter Nicholas, John Randolph, Benjamin Waller, John Blair, jun. George Wythe, Dudley Diggs, jun. Lewis Burwell, Thomas Nelson, jun. Thomas Everard, and John Tazewell, esquires, be and they are hereby constituted trustees for founding and establishing a public hospital, for the reception of such persons as shall, from time to time, according to the rules and orders established by this act, be sent thereto.

The judicial branch of government is committed to improving the quality of mental health services provided to Virginians and the judicial processes attendant to civil commitments.

Although the Legislature's choice of language would be extremely inappropriate and antiquated if it were used today, the Act was considered very progressive for the eighteenth century.

The 1769 Virginia Act not only provided funds for the construction of a public hospital for the mentally ill, but the Act also established Virginia's first legal procedures for involuntary commitment. Pursuant to the Act, a magistrate acting on his own knowledge or other information that a mentally ill individual was "going at large" was required to issue a warrant directing the sheriff to bring that person before the court. Three magistrates would examine the individual and receive evidence. If a majority of the magistrates deemed it "expedient and necessary," the individual would be transferred to the public hospital. The president of the directors of the hospital would summon the hospital's court of directors, who would determine the proper course of action. Medical training was not a qualification for a seat on the court of directors, although many prestigious Virginians were members.

The 1769 Act, though in many ways innovative for that era, lacked the legal safeguards that commonly accompany modern commitment procedures, including a right to counsel, the right to trial by jury on appeal, and the right to a prompt preliminary determination of the necessity of detention. The 1769 Act and other subsequent legislation were consolidated in the 1819 Code of Virginia. In 1825, the General Assembly approved the construction of a second public asylum in Staunton.

The first major revision of Virginia's mental health statutes was undertaken in 1841, when famed American mental health advocate Dorothea Dix was just beginning her national campaign for humane treatment of the mentally ill. The 1841 revisions required that a panel of three magistrates elicit the testimony of the mentally ill individual's doctor, if the person had been receiving medical treatment. If the magistrates recommended commitment, the new changes required the hospital's court of directors to convene "as soon as may be" in a meeting "which shall not unnecessarily be delayed" in order to determine whether the patient should be committed to the asylum.

Despite having made some improvements, the 1841 Act also specifically provided that mentally ill individuals were to be kept in jail until and unless one of Virginia's asylums gave notice of a vacancy. Notably, the Act distinguished between mental illness and mental retardation, requiring State asylums to refuse patients suffering from the latter condition. The new law ordered county "overseers of the poor" to care for mentally retarded citizens who were without financial resources.

The year 1841 represents another milestone in Virginia's treatment and care of its mentally ill citizens. That year, Dr. John Galt became the superintendent at the public hospital in Williamsburg. Although conditions in nineteenth century mental hospitals were often deplorable, Dr. Galt rarely restrained his patients and employed a philosophy of compassionate treatment known as moral management. He also advocated deinstitutionalization and medication as alternatives to confinement.

By 1950, more than 500,000 individuals resided in mental institutions across the United States. By this time, Virginia's commitment statutes had undergone significant reforms, but concerns about civil rights abuses and dismal living conditions in mental institutions captured the public's attention. Over the next three decades, as public confidence in the effectiveness of medication and community-based treatment options grew, widespread deinstitutionalization of mental health patients was implemented. Virginia's experiences reflected the national trend. According to a paper issued by the Treatment Advocacy Center, Virginia experienced a deinstitutionalization rate of over 90 percent between 1955 and 1996.

The solutions to the problems that confront Virginia's mental health system and legal processes are complex and subject to great debate.

In the year 2004, the last year for which complete statistics are available, there were 45,369 involuntary mental commitment hearings in the general district courts in Virginia and 2,024 proceedings in the juvenile and domestic relations district courts. Legal protections now include, among others, the right to counsel during the involuntary commitment process, the right to a commitment hearing within 48 hours of the execution of a temporary detention order, and periodic reviews of the necessity of detention.

According to the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, 5.4 percent of Virginia's adult residents between the ages of 18 and 69 suffer from a serious mental illness. By comparison, the Virginia Department of Corrections estimates that 15 percent of Virginia's prisoners have some form of mental illness or mental disorder. This unintended consequence of deinstitutionalization has left jail superintendents and sheriffs lamenting their newfound responsibility of housing the mentally ill because sheriffs and jail superintendents lack the expertise and resources to do so effectively.

There are numerous issues that affect the provision of mental health services in Virginia and the administration of justice. When I began my tenure as Chief Justice, one of my most important priorities was to contribute to the discussion of reform of Virginia's mental health statutes and processes. The judicial branch of government is committed to improving the quality of mental health services provided to Virginians and the judicial processes attendant to civil commitments. All persons and institutions that are involved in Virginia's mental health system and processes—mental health practitioners; law enforcement personnel, including sheriffs; judges and court personnel; attorneys; magistrates; special justices; patients; patients' families and friends—have a stake in improving this area of law.

The solutions to the problems that confront Virginia's mental health system and legal processes are complex and subject to great debate. The Supreme Court of Virginia and the Senior Lawyers Conference of the Virginia State Bar recently sponsored a conference on mental health issues, and over three hundred people attended. We discussed a variety of important topics: the desirability of a comprehensive evaluation of the Commonwealth's mental health statutes, Title 37.2 of the Code of Virginia; improvement of the civil commitment process; better community capacity to provide intensive crisis intervention services for people who suffer from mental illnesses; ending unnecessary criminalization of people with mental illnesses; alternative methods of transportation for mentally ill persons in protective custody for evaluation or treatment; new processes that encourage and facilitate voluntary treatment of mental health patients who are in crisis or experiencing deteriorating

conditions; intensive stabilization services for mentally ill patients in the absence of dangerous behavior or threats; and greater respect and protection of patients' rights, dignity, and due processes.

Many complex issues must be discussed and resolved in an effort to improve Virginia's mental health statutes and the involuntary commitment process. Now that we have the benefit of more than 200 years of hindsight, we must heed the lessons of Virginia's past to be sure that our reforms adequately balance the provision of care with respect for patients' rights and public safety considerations. One crucial part of that mission will be to divert persons with mental health disabilities away from the criminal justice system by providing forums where they can receive appropriate treatment. The Supreme Court—with the assistance of the Senior Lawyers Conference, Professor Richard J. Bonnie of the University of Virginia's Institute of Law, Psychiatry and Public Policy and others—has embarked upon a journey that we hope will culminate in the resolution of these multifaceted problems and hence, better care and treatment for Virginia's citizens and families who must confront mental health issues.

Leroy Rountree Hassell Sr. has been Chief Justice of the Supreme Court of Virginia since February 2003. He has led the Court and the Virginia State Bar to undertake several initiatives, including special training of defense lawyers for indigent criminal defendants, a Solo & Small-Firm Forum and Town Hall Meeting held in different areas of the state, and the project referred to in this article—a multidisciplinary effort to improve the process for involuntary civil commitment of people with mental illnesses. Chief Justice Hassell is a native of Norfolk. He received a bachelor's degree in government and foreign affairs from the University of Virginia in 1977 and a law degree from Harvard Law School in 1980. He was a partner at McGuireWoods before he was appointed to the Supreme Court in 1989 by then-Governor Gerald L. Baliles.

I am very pleased to have an opportunity to share with the members of the Virginia State Bar concerns regarding Virginia's mental health statutes and commitment processes.I am indebted to my law clerk Regina J. Elbert, for her assistance with this article. I would be remiss, however, if I did not first thank the members of the Senior Lawyers Conference of the Virginia State Bar, which comprises all members of the Virginia State Bar who are 55 years of age or older and are in good standing with the Bar. The Senior Lawyers Conference was established in 2001. Even though the Conference focuses upon issues of interest to senior lawyers and senior citizens, the Conference is intimately involved in improving the legal profession and the law and in pursuing the public good. I am happy to report that even though I have not yet attained the minimum age requirement, William Brice Smith made me an honorary member of the Conference.

Every member of the Senior Lawyers Conference, as well as every member of the State Bar, is indebted to Patricia A. Sliger, the Virginia State Bar staff liaison with the Senior Lawyers Conference. Simply stated, her commitment to issues that affect Virginia's senior citizens is unparalleled, and I thank her very much.—Chief Justice Leroy R. Hassell Sr.

CALL FOR NOMINATIONS

Award of Merit Competition

Established by the VSB Conference of Local Bar Associations, this competition is designed to recognize outstanding projects and programs of local and specialty bar associations; share successful programming ideas and resources with all bar associations; encourage greater service to the bench, bar and public; and inform the public about some of the excellent work of local and specialty bars and the legal profession in general. The deadline for the receipt of nominations is May 1, 2006.

Local Bar Leader of the Year

Established by the VSB Conference of Local Bar Associations, this award recognizes past and presently active leaders in their local bar associations who have continued to offer important service to the bench, bar and public. The award serves as a continuing monument to the dedication of local bar leaders. It also serves to emphasize the importance of close cooperation between the Virginia State Bar and local bar leaders. The conference does not necessarily present this award every year, but only as often as the caliber of nominations deems appropriate. The deadline for the receipt of nominations is May 1, 2006.

R. Edwin Burnette Jr. Young Lawyer of the Year Award

This award was established by the VSB Young Lawyers Conference to honor an outstanding young Virginia lawyer who has demonstrated dedicated service to the Young Lawyers Conference, the legal profession and the community. The deadline for the receipt of nominations is May 1, 2006.

For more information on these awards, see www.vsb.org/awards.html.