Virginia's Legal Obligations to Offenders with Mental Illness or Substance Abuse Disorders

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I. Introduction

Federal and Virginia law affords several key rights to incarcerated people with mental illness or substance abuse disorders. The Eighth Amendment prohibition against "cruel and unusual punishment" requires that anyone in custody suffering from a mental illness be given medical treatment for any "serious" illness. Rehabilitation for a substance abuse disorder, however, is not a right guaranteed under the Eighth Amendment. The Fourteenth Amendment "due process" clause provides a procedural safeguard protecting an inmate/prisoner's "liberty interest." Thus, when a prisoner is diagnosed with either a mental illness or substance abuse disorder requiring a detrimental change in one's "liberty interest," the Fourteenth Amendment requires either an adversarial hearing or an evidentiary hearing. However, it need not be before a judicial decision-maker, but can be before an administrative panel. The Americans with Disabilities Act of 1990 is the leading statutory provision of rights to people with mental illness or substance abuse disorders. If a jail or prison provides a benefit or service, it cannot exclude an inmate/prisoner based on their having either a mental illness or substance abuse disorder. Lastly, Virginia law closely tracks the minimum requirements of Federal law and goes beyond by requiring the provision of substance abuse treatment to those with such a disorder.

II. Federal Law

A. Eighth Amendment Rights

The leading case on a prisoner's right to medical treatment under the Eighth Amendment's prohibition against "cruel and unusual punishment" is *Estelle v. Gamble*[1]. There, the court held that in order for a prisoner to state a claim for violation of the Eighth Amendment, a prisoner/plaintiff must show that the prison officials showed a

[1] 429 U.S. 97 (1976).

"deliberate indifference to the prisoner's "serious" illness.[2] Thus, a prison must not *deliberately* ignore a prisoner's "*serious*" ailments. Furthermore, since there is "no underlying distinction between the right to medical care for physical ills and its psychological counterpart,"[3] the Eighth Amendment protections delineated in *Estelle* also apply to those with mental illnesses.[4]

Several courts have also attempted to define "deliberate indifference" and what constitutes a "serious" illness. The U.S. Court of Appeals for the eleventh circuit defined "deliberate indifference" to constitute "wantonness,"[5] while the Eight Circuit has indicated that even "multiple incidences of medical malpractice or negligence do not amount to deliberate indifference without some specific threat of harm from a related system-wide deficiency."[6] A "serious" illness entitling a prisoner to medical attention under *Estelle* is required if

> a physician or other medical health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.[7]

This care, however, is "limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable."[8] Several courts have attempted to further refine the Eighth Amendment requirements of a "minimally adequate prison mental health care delivery system." The courts identified six components, including: 1) a

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[2] Id. at 104. *See also* Little v. Lycoming County, 912 F.Supp. 809 (M.D. Pa. 1996) (citing Estelle v. Gamble, 429 U.S. 97 (1976) and Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 346 (3rd Cir. 1987) *cert. denied*, 486 U.S. 1006 (1988)).
[3] Bowring v. Godwin, 551 F.2d. 44, 47 (4th Cir. 1977).
[4] *But see* Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982) (holding that the Eighth Amendment applies only in the criminal context and does not apply to the civil juvenile justice system).
[5] LeMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993).
[6] Dulavy v. Carnahan, 132 F.3d 1234, 1245 (8th Cir. 1997).
[7] Bowring, 551 F.2d 44, 47 (4th Cir. 1977).
[8] Id at 48.

systematic program for screening and evaluating inmates to identify those in need of mental health care; 2) a treatment program that involves more than segregation and close supervision of inmates with mental illness; 3) employment of a sufficient number of trained mental health professionals; 4) maintenance of accurate, complete and confidential mental health treatment records; 5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and 6) a basic program to identify, treat, and supervise inmates at risk for suicide.[9]

A separate Eighth Amendment guarantee is derived from the holding in *Estelle* but contemplates future harm. In *Helling v. McKinney*[10] the U.S. Supreme Court held that the Eighth Amendment can be violated if a prison official is deliberately indifferent to conditions posing a substantial risk of serious future harm. In a claim involving a prison inmate alleging that exposure to high levels of environmental tobacco smoke constituted an unreasonable risk of serious future harm, the court held that a prison system cannot expose inmates to 1.) an unreasonable risk the likes of which are "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk,"[11] and 2.) the prison cannot be deliberately indifferent to the inmate's serious medical needs as defined in *Estelle*.

With regard to issues surrounding substance abuse, the court has held that there is no Eighth Amendment right to educational, vocational or rehabilitative services.[12]

B. Fourteenth Amendment Rights

A separate, but related, line of cases deal with the Fourteenth Amendment procedural due process elements of diagnosing and treating mental illness within the

[9] *See* Coleman v. Wilson, 912 F.Supp 1282, 1298 (E.D. CA. 1995) (citing Balla v. Idaho State Board of Corrections, 595 F.Supp 1558, 1577 (D. Idaho 1984)).
[10] 509 U.S. 25 (1993).
[11] Id. at 36.
[12] *See* Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

prison environment. In *Vitek v. Jones*[13] the U.S. Supreme Court held that when a prisoner is diagnosed with a mental illness requiring transfer out of the prison to a mental hospital, the Fourteenth Amendment requires procedural due process protections in the form of either an adversarial hearing[14] or an evidentiary hearing[15]. Such procedural safeguards, however, need not be before a judicial decision-maker, but can be before an administrative panel.[16] Thus, if the diagnosis or treatment of a prisoner's mental illness involves a detrimental change in the liberty interest of the prisoner (including the "stigmatizing effect" of mental illness), the Fourteenth Amendment due process clause requires the above or similar procedures to protect the liberty interest of the prisoner.[17] While the court has never defined what constitutes a "liberty interest" implicating due process protections, the case law suggests that the court will consider involuntary commitment to a mental institution or the involuntary administration of psychotropic drugs to trigger a "liberty interest."[18]

A Fourteenth Amendment analysis has also been used to support the right for juveniles to receive rehabilitative services, despite court holdings to the contrary for adults. One suggested reason for the disparity in rights is the difference in the stated purposes of the two systems. For adults, a leading purpose in the justice system is punishment, while for juveniles the major purpose is rehabilitation.[19] Although there is a paucity of cases addressing this issue, the Supreme Court in *Youngberg v. Romero* held

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[13] 445 U.S. 480 (1980).
[14] Id. at 496.
[15] *See e.g.* Bowring, 551 F.2d at 49.
[16] *See* Washington v. Harper, 494 U.S. 210, 228 (1990).
[17] It is worth noting that treatment for mental illness against one's will does not violate the procedural due process interests where a prisoner is found to be a danger to himself or others and the treatment is in his interest. *See* note 9.
[18] *See* Riggins v. Nevada, 504 U.S. 127 (1992) (applying to pretrial detainees); Harper, 494 U.S. 210 (1990); Mills v. Rogers, 457 U.S. 291 (1982). *See also* Johnson v. Silvers, 838 F.2d 466 (4th Cir. 1988) (unpublished table decision) (per curiam); United State v. Charters, 863 F.2d 302 (4th Cir. 1988) *cert. den.* 494 U.S. 1016 (1990); Washington v. Silber, 805 F.Supp 379 (W.D. Va.1982) *affd without op.* 993 F.2d 1541 (4th Cir. 1993).
[19] *See generally* UNIVERSITY OF VIRGINIA INSTITUTE OF LAW, PSYCHIATRY & PUBLIC POLICY, JUVENILE OFFENDERS' LEGAL RIGHT TO RECEIVE REHABILITATIVE TREATMENT 6 (1999).

that an adult with severe mental retardation civilly committed to a state hospital had a Fourteenth Amendment right to "such training as an appropriate professional would consider reasonable."[20] Thus, the court established a minimal right to "reasonable" treatment for civilly committed individuals. Other federal courts have applied this standard to juveniles, but have not extensively built upon its minimal requirements and discretion afforded to professional staff.[21] Other arguments supporting the right to rehabilitative treatment for juveniles have been less successful.[22] Thus, while there does seem to be some support for a Fourteenth Amendment right to rehabilitative treatment of juveniles, evidence of this right is derivative and indirect; given the lack of direction from the courts, most juvenile rights stem from state law.

C. Americans with Disabilities Act of 1990[23]

Title II of the Americans with Disabilities Act of 1990[24] deals with the obligations of public entities toward those with disabilities. The Act defines a public entity as any state or local government, department, agency, special purpose district or other instrumentality of the state or local government.[25] Specifically, the Act prohibits the exclusion of a "qualified individual with a disability" from participation in or the denial of the benefits of services, programs or activities provided by the public entity.[26] A "qualified individual with a disability" is a person who has a disability and "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity."[27] Title I of the Act defines a disability to be "(A) a physical or mental impairment that substantially limits one or more

[20] Youngberg v. Romero, 457 U.S. 307, 324 (1982).
[21] *See* JUVENILE OFFENDERS' LEGAL RIGHT TO RECEIVE REHABILITATIVE TREATMENT at 11-12.
[22] Ibid at 12-13.
[23] 42 U.S.C. § 12101 (2000) et. seq.
[24] 42 U.S.C. § 12131 et seq.(2000).
[25] 42 U.S.C. § 12131 (2000).
[26] 42 U.S.C. § 12132 (2000).
[27] 42 U.S.C. § 12131 (2000).

of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment."[28]

Interpreting this language, the U.S. Supreme Court held in *Pennsylvania Dept. of Corrections v. Yeskey*[29] that a prison is a public entity within the definition provided by Title II of the Act and that prisoners with a "qualified disability" could maintain an ADA claim. Moreover, because the definition of disability includes mental illness, a prisoner with a mental illness could sue the state for a violation of the ADA.

Furthermore, the ADA's definition of disability also seems to include those with substance abuse disorders. The Act states that, "Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who-(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use."[30] Thus, the language of the Act seems to cover those with substance abuse disorders, preventing the denial of services based on this ADA defined "disability." While federal courts have held that there is no constitutional right to educational, rehabilitative, or vocational programs in the prison context,[31] these cases have not addressed a prisoner's right to such services under the ADA. The practical impact of these requirements is that if a prison system provides a service or benefit (e.g. counseling, recreation etc.), the prison cannot exclude a

[28] 42 U.S.C. § 12102 (A) - (C) (2000).
[29] 524 U.S. 206 (1998).
[30] 42 U.S.C. § 12210(b)-(c) (2000). Subsection (a) referred to in the quote notes that the ADA is inapplicable to those currently using illegal drugs.
[31] *See* Zimmerman v. Tribble, 226 F.3d 568, 571 (7th Cir. 2000) (quoting Garza v. Miller 688 F.2d 480, 486 (7th Cir. 1982).

"qualified" inmate from those services/benefits based upon their being mentally ill or having a substance abuse disorder.[32]

III. State Law

State law substantially mirrors the requirements of federal law. Virginia law generally provides for medical services to be available to state prison inmates.[33] The state is obligated to provide "medically necessary" medical treatment[34], mirroring the Supreme Court's holding in *Estelle*. And since medical treatment includes psychiatric treatment,[35] Virginia law requires the treatment of a prisoner's mental illnesses so long as it is "medically necessary," as opposed to medically desirable.[36] Moreover, the state is obligated to provide substance abuse treatment programs within the state's prisons[37], thereby going beyond the minimum requirements of Federal law. Lastly, Virginia law meets the due process requirements for treatment without consent[38] as outlined in *Vitek, Washington v. Harper* and *Bowring*.

IV. Possible Future Developments

A. Eleventh Amendment

Recently, the U.S. Supreme Court has begun to limit the applicability of some federal laws to the states based on the requirements of the Eleventh Amendment. The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any

[32] Unless the prison can show that the inmate is a danger to himself or others in such a setting and can not make reasonable alternate accommodations for the provision of the services to the inmate.
[33] VA. CODE ANN. § 58.2-32 (2001).
[34] Id. at § 58.2-32(A) (2001).
[35] *See* Bowring, 551 F.2d at 47 (4th Cir. 1977).
[36] *But see* VA. CODE ANN. § 16.1-248.2 (2001) (requiring mental health screening within twenty-four hours of a professional determination that it may be needed); discussion *infra* Part II, B.
[37] VA. CODE ANN. § 58.2-32(B) (2001).
[38] *See* VA. CODE ANN. § 58.2-40.1 (2000).

Foreign State."[39] The court has interpreted this language to prevent non-consenting states from being sued by private individuals in federal court, absent a valid abrogation of the right by Congress.[40] A valid abrogation of the states' Eleventh Amendment rights requires an unequivocal intention by Congress to do so and action pursuant to a valid grant of constitutional authority (e.g. § 5 of the Fourteenth Amendment).[41] However, in *Seminole Tribe of Florida v. Florida*[42], the U.S. Supreme Court held that Congress cannot abrogate the states' Eleventh Amendment protections based upon its Article I Commerce clause powers. The effect of these interpretations is to limit the applicability of federal legislation on the states where a right of action is created in federal court and in particular, they may limit the applicability of the Americans with Disabilities Act of 1990 (ADA) to state prison systems.

Left unresolved in the *Yeskey* decision previously mentioned was the issue of *whether application of the ADA to state prisons is a constitutional exercise* of Congress' power under § 5 of the Fourteenth Amendment. Addressing this (at least tangentially), the Court in *Board of Regents of the University of Alabama v. Garrett*[43] held that Title I of the ADA (dealing with employment discrimination against those with disabilities) invalidly abrogated the state's Eleventh Amendment immunity against being sued in federal court for money-damages. Thus, a state cannot be sued in federal court for money damages on a claim of Title I employment discrimination. Writing for the majority, Chief Justice Rehnquist based his holding on previous cases delineating the scope of Congress' ability to abrogate a state's Eleventh Amendment immunity from suits in federal courts.[44] Noting the invalidity of an abrogation based on Commerce Clause powers, the court

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[39] U.S. CONST. amend. XI.
[40] *See* Kimel v. Florida Board of Regents, 528 U.S. 62, 72-73 (2000)
[41] Id. at 73.
[42] 517 U.S. 44 (1996).
[43] 2001 WL 173556 (U.S. Ala.).
[44] *See* Kimel, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

indicated that valid grants of constitutional authority usually come from an act passed under Congress' § 5 authority to enforce § 1 of the Fourteenth Amendment.[45] "[Section] 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[46] Similarly, a state's actions rationally furthering legitimate purposes is a defense against an allegation of discrimination in violation of such § 5 legislation.[47]

From this, the court examined whether Title I of the ADA was a valid use of Congress' § 5 powers in response to historic or patterned § 1 violations by the states.[48] After review of the ADA's legislative history, the court concluded that the sporadic incidents of discriminatory state employment practices were not enough to validate Congress' exercise of its § 5 powers.[49] Therefore, Congress' abrogation of the state's Eleventh Amendment immunity rights against money-damages in federal courts was an unconstitutional use of its § 5 powers.

Garrett is important in the context of this research since it seems to continue a trend toward restricting the federal government's powers over state operations. Although, strictly construed, the holding in *Garrett* only prevents states from being sued for money-damages in federal court based on a Title I claim[50], the dicta seems to indicate that Title II as applied to the states is in question. Thus, in the future, the

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[45] Id. (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) for the proposition that "the Eleventh Amendment and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment"). *See also* Kimel, 528 U.S. at 79 (finding that Congress may not base its abrogation upon powers enumerated in Article I of the U.S. Constitution).
[46] Id. (quoting Boerne, 521 U.S. at 520).
[47] Id. at 7.
[48] Id. at 8.
[49] Id. at 8-11.
[50] According to the opinion, there doesn't seem to be anything especially offensive to the Eleventh Amendment with regard to money-damages that wouldn't also be true of other remedies. Title II's remedies for a violation of its terms basically only provide equitable relief (although some attorney's fees may be awarded). Indeed the Court has held that suits in federal court against a state are barred by the 11th Amendment even where money damages are not sought. *See* 72 AM JUR. 2D *States, Etc.* § 110-117 (1964).

reasoning in *Garrett* could be used to question the applicability of Title II of the ADA to the states.[51]

B. Discrimination by Category

Assuming that the ADA remains applicable to the states as written, another developing issue is the treatment of discrimination by category. That is, in the context of Title II of the ADA, does a prison have to treat those with a mental illness or substance abuse disorder in the same fashion as it treats someone who has a heart condition or paraplegia? "The courts are nearly unanimous that people may not be discriminated against on the basis of the severity of their disability", but are "divided on whether people with a particular disability may be disadvantaged in favor of people with another disability."[52] However, several Federal courts in various different contexts have acknowledged some form of discrimination by category prohibited by the ADA.[53] Of particular note is *Lewis v. Aetna Life Ins. Co*[54]*.* There, the U.S. District Court for the Eastern District of Virginia held that the "ADA prohibits discrimination on the basis of an individual's particular disability," regardless of whether "a disabled person is treated differently than a non-disabled person or another disabled person."[55] Thus, while there is little direct judicial treatment of discrimination by category, there does seem to be a growing (albeit slowly) body of precedent recognizing the ADA's prohibition against this form of discrimination. If, in the future, there is a more explicit ruling that the ADA

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[51] *But see* Garrett, at 9, note 7 (noting that Justice Breyer's dissent catalogs numerous accounts of alleged discrimination by the states in the provision of public services, potentially providing enough evidence for the court to conclude that there is a history and pattern of state discrimination to validate Congress's use of its §5 powers to enact Title II of the ADA).

[52] Susan Stefan, *The Americans With Disabilities Act and Mental Health Law: Issues for the Twenty-first Century*, 10 J. CONTEMP. LEGAL ISSUES 131, 176 (1999).

[53] *See* Helen L. v. DiDario, 46 F.3d 325 (3rd. Cir. 1995); Martin v. Voinovich, 840 F.Supp. 1175 (S.D. OH 1993); Garrity v. Gallen, 522 F.Supp. 1711 (S.D. N.H. 1981) (interpreting §504 of the Rehabilitation Act of 1973, one of the ADA's predecessors). *See also* Olmstead v. L.C., 119 S.Ct. 2176 (1999). *But see* Trask v. General Signal Corp., 1999 WL 1995204 (D. Me. Aug. 13, 1999); Conners v. Maine Medical Center, 42 F.Supp.2d 34 (D. Me. 1999); Rogers v. Dept. of Health and Environmental Control, 985 F.Supp. 635 (D.S.C. 1997).

[54] 982 F.Supp. 1158 (E.D. Va. 1997).

[55] Id. at 1168.

prohibits discrimination by category, state prison systems may be required to more closely scrutinize the services they provide to their inmates with disabilities, ensuring that not only are services provided equally to those with and without disabilities, but that all inmates with disabilities (absent a legitimate professional judgement to the contrary) are treated equally.

APPENDIX

CASE NAME	SUBJECT MATTER	KEY HOLDING
Estelle v. Gamble	8th Amendment	"Deliberate indifference" to prisoner's "serious" illness
Bowring v. Godwin	8th Amendment	Eighth Amend. protections apply to prisoner's with mental health problems
Balla v. Idaho State Board of Corrections	8th Amendment	Minimally Adequate Prison Mental Health Care Delivery System
Helling v. McKinney	8th Amendment	Deliberate Indifference to serious future harm
Vitek v. Jones	14th Amendment	Procedural Due Process in form of adversarial or evidentiary hearing when "liberty interest" changed
Washington v. Harper	14th Amendment	Adversarial or evidentiary hearing need not be before a judge, but can be before an administrative panel.
Youngberg v. Romero	14th Amendment	civilly committed adult has right to "reasonable [rehabilitative] treatment"
Pennsylvania Dept. of Corrections v. Yeskey	ADA	Title II of ADA applicable to state criminal justice systems (prisons & jails)
Board of Regents of the Univ. of Alabama v. Garrett	11th Amendment & ADA	Congress invalidly abrogated state's 11th Amend. immunity from being sued in Fed. court for money damages when they enacted Title I of ADA. Title I of ADA inapplicable to states.
Lewis v. Aetna Life Ins. Co.	ADA	ADA prohibits discrimination on the basis of individual's particular disability. ADA right to be free from discrimination by category?