

Mental Illness Law

Fall 2023

Course Schedule/Meeting Times: In Person Friday 5-7 p.m.

Antonin Scalia Law School – George Mason University

Instructor: Mary Mertz Parnell mmertzpa@gmu.edu or mparnell59@gmail.com

Hours: By appointment

Required Course Materials: No textbook. Weekly assignments from Virginia statutory and case law, as well as law review articles and periodicals. ASSIGNMENTS MAY CHANGE AND CHANGES MAY BE ANNOUNCED AT THE END OF EACH CLASS.

Learning Outcomes: By the end of the course, students should have acquired:

- Basic understanding of mental health law in Virginia.
- Skills to identify issues in defending or prosecuting an involuntary commitment cases in Virginia.

Course Structure: Weekly class sessions will consist of lectures and/or guest speakers.

Grading: The grade will consist of 90 percent final exam and 10 percent class participation

The final exam will consist of 15 short-answer questions and two essay questions presenting: 1.) a fact-pattern; and 2.) a general application question about mental illness law. The essay questions ask the students to identify issues in defending or prosecuting the case, or ask the student to write an opinion regarding Virginia mental health law. The exam will be open book and open note. The exam will be two hours long. However, students are not permitted to record any lectures, or reference any such recordings during the exam.

Attendance: Regular and punctual attendance is required to earn academic credit for this course. Attendance requirements for academic credit will follow the policies set forth in Academic Regulation 4-1. Instructor may monitor attendance by any method she deems appropriated including, but not limited to, circulating a sign-in sheet, roll-call or visually surveying the class. Moreover, a student who is absent for at least 75 percent of a session of the course is absent from that session.

Class Recordings Prohibited: Pursuant to Academic Regulation 5-2.2, no portion of a class session or examination may be preserved by means of a recording device such as an audio recording device or camera.

Preliminary Assignment Schedule

Week 1: August 25, 2023

Course overview and Expectations
Definitions of Mental Illness
Deprivation of Constitutional Rights of the Mentally Ill

READING ASSIGNMENT: Va. Code Ann. §§ 16.1-336; 37.2-100 (“Mental Illness Definition”) -800; 12 Va. Admin. Code § 35-105-20 (“Mental Illness Definition”); Steven S. Sharfstein, Big Pharma and American Psychiatry: The Good, the Bad, and the Ugly, PSYCHIATRY ONLINE, August 19, 2005, <https://psychnews.psychiatryonline.org/doi/10.1176/pn.40.16.00400003>; Gavin Francis *Changing Psychiatry’s Mind*, 68 *The New York Review of Books* 26-29, 1/14/2021 (reviewing Anne Harrington, *Mind Fixers: Psychiatry’s Troubled Search for the Biology of Mental Illness* (2019) and Nathan Filer, *This Book Will Change Your Mind About Mental Health: A Journey into the Heartland of Psychiatry* (2019) (GMU Law Library online); Zeb Larson, America’s Long Suffering Mental Health System, ORIGINS, Ohio State University, Stanton Foundation, 2019 https://origins.osu.edu/article/americas-long-suffering-mental-health-system?language_content_entity=en; Paul S. Applebaum, A History of Civil Commitment and Related Reforms in the United States, *Lessons for Today*, 25 *Dev. Of Mental Health L. I*, Jan. 2006, p. 13 (GMU LAW LIBRARY ONLINE); Gerald Grob, Mental Illness Policy in America: Myths and Realities, 11 *Health Affairs* 3, Fall 1992 (GMU Law Library online).

Week 2: September 1, 2023

History of Mental Illness Law to 1940s

READING ASSIGNMENT. Va. Code Ann. § 54.1-2976, *et seq.*; Megan Testa and Sara G. West, Civil Commitment in the United States, *Psychiatry*, Oct. 7, 2010 30-40; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/>; *In re Josiah Oakes*, 8 *Law Reporter* 12 (Mass. 1845) <http://www.disabilitymuseum.org/dhm/lib/detail.html?id=1305&page=all>; Gerald Grob, Mental Illness and American Society, 1875-1940; Ch. 6 *Mental Hygiene*, pp. 144-78 (1983); *Mallory v. Virginia Colony for the Feeble-Minded*, 123 Va. 205 (1918); *Hall v. Verdel*, 40 F. Supp. 941 (W.D. Va. 1941); *Buck v. Bell*, 274 U.S. 200 (1927); *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*; NATIONAL PUBLIC RADIO (March 7, 2016) <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations>; p. 3-5; *Poe v. Lynchburg Training Schools*, 518 F. Supp. 789 (1981)

Week 3, September 8, 2023:

Deinstitutionalization and the Shift to Community-Based Treatment
Initial Contact with the Mental Health System
--988 system
--Marcus Alert
Virginia civil involuntary commitment criteria for adults,
Steps in the Virginia Involuntary Commitment Process

READING ASSIGNMENT: *Lake v. Cameron*, 364 F.2d 657 (1966); *Lessard v. Schmidt*, 349 F.Supp. 1078 (1972), 379 F.Supp. 1376 (1974); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972); Daniel Yohanna, Deinstitutionalization of People with Mental Illnesses: Causes and Consequences, *AMA Journal of Ethics* 2013: 15(10) 886-891, <https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10>;

Mira E. Singer, Virginia's Mental Health System: How it Evolved and What Remains to be Improved, 90 *The Virginia Newsletter* 3, May 2014, The Weldon Center for Public Service (HEINONLINE); Gerald Grob, Public Policy and Mental Illnesses: Jimmy Carter's Presidential Commission on Mental Health, *Milbank Q.* 425-56 (Sept. 2005)(First four pages); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690151/>; : William A. Wray, The Commitment of the Mentally Ill in Virginia, 2 *Wm. & Mary L. Rev.* 407 (1960) (HeinOnline);

Week 4, September 15:

GUEST SPEAKER

Initial Interaction with the Mental Health System

--988 call

--Marcus Alert

Steps in the Commitment Process

-Petition

-Emergency Custody Order

-CSB Examination

-Prescreen Report

-Execution of TDO

-Probable Cause

-Medical Clearance

Impact of Recent Legal Reform on Delivery of Services

--Bed Registry and the Hospital of Last Resort

--Mental Health Docket

--Deferred Disposition

READING ASSIGNMENT: VA. CODE ANN. §§37.2-100 ("Developmental Disability" "Mental Illness"), - 311.11 ("Marcus Alert")- 808 ("Emergency Custody Orders") , -809 ("Temporary Detention Orders"), - 809.1 ("Facility of Temporary Detention"), --813, 814 ("Release," "Petition") -816 ("CSB exam and Prescreen Report") ; 18.2-254.3 ("Behavioral Health Docket"), 19.2-303.6 ("Deferred Disposition") (2022); *Evans v. Paderick*, 442 F.Supp. 583 (1977); Richard Bonnie, et. al, Mental Health System Transformation After the Virginia Tech Tragedy, 28 *Health Affairs* 3, 793-804 (2009) https://www.researchgate.net/publication/24401217_Mental_Health_System_Transformation_After_The_Virginia_Tech_Tragedy;

Megan Pauly, Deaths in Virginia State Hospitals on the Rise, VIRGINIA PUBLIC MEDIA, June 18, 2019, <https://vpm.org/news/articles/3589/deaths-in-virginia-state-psychiatric-hospitals-on-the-rise>;

Jenna Portnoy, Virginia Orders 5 State Hospitals to Stop Taking New Admissions Amid Shifting Staff Crisis, *The Wash. Post*, July 9, 2021, https://www.washingtonpost.com/local/virginia-politics/virginia-mental-health-hospitals-closed/2021/07/09/c9a7253c-e0e6-11eb-ae31-6b7c5c34f0d6_story.html.

Michael Martz, Giles County Agency Sues State for Denying Hospital Bed to Youth in Psychiatric Crisis, The Richmond Times-Dispatch, March 3, 2022

https://richmond.com/news/state-and-regional/govt-and-politics/giles-county-agency-sues-state-for-denying-hospital-bed-to-youth-in-psychiatric-crisis/article_ff681e5d-af18-5878-952d-069b858a3cf7.html#:~:text=A%20youth%20in%20foster%20care,and%20the%20state's%20only%20mental.

Week 5, September 22:

TDO Exercises

Steps in the Involuntary Commitment Process

--Probable Cause

--Appointment of Counsel

--Independent Examination

--Reasonable Degree of Medical Certainty

--Determination of Capacity to Volunteer

--Hearing

--Clear and Convincing Evidence

--Outcomes of Involuntary Commitment Hearing

--Mandatory Outpatient Treatment

READING ASSIGNMENT: Va. Code Ann. §§ 37.2-803 (“Special Justice”), -805 (“Voluntary Admission”) -808 (“ECO”), -809 (“TDO”), -814, -815 (“Hearing, Counsel, Written Explanation,”) -817 to 819 (“Involuntary Commitment”) (“Mandatory Outpatient Treatment”) (“Recordings”), (“CCRE Report), 825 (“Capacity”); *Lagumen v. Richardson*, 80 Va. Cir. 51 (Chesapeake 2010); *Raub v. Bowen*, 960 F. Supp. 2d 602 (E.D. Va. 2013); *Raub v. Campbell*, 3 F. Supp. 3d 526 (E.D. Va. 2014); *Zinermon v. Burch*, 494 U.S. 113 (1990); 113 *Great Eastern Resort Corp. and Lib. Ins. v. Gordon*, 31 Va. App. 608 (2005); *Commonwealth v. Allen*, 269 Va. 262 (2005).

Week 6, September 29:

GUEST SPEAKER— Fairfax General District Court Special Justice Mark Bodner

Appeals

Loss and Restoration of Gun Rights

Red Flag Laws

READING ASSIGNMENT: Va. Code Ann. §§ 37.2 -814 -819, -821 (“Gun Rights”), -844, -845, 846 (“Appeals”) 18.2-308.1:3 (“Gun Rights”) , 19.2-152.13, -14 (“Red Flag Law”) ; 18 U.S.C. 992(g), -925(C); 27 CFR 478.11, 144 (“Federal Gun Law”); *Paugh v. Henrico Area Mental Health and Developmental Services*, 286 Va. 85 (2013); *McLeod v. Commonwealth of Virginia*, 2021 WL 1235421; Lisa H. Gold and Donna Vanderpool, The Legal Restoration of Firearms Rights After Mental Health Prohibition, The Journal of the American Academy of Psychiatry and the Law, Sept. 2018, 298-308 <http://jaapl.org/content/46/3/298>); *United States v. Bean*, 537 U.S. 71 (2002); *Mai v. United States*, 952 F.3d 1106 (9th Cir. 2020); *New York State Rifle & Pistol Association v. Buren, Superintendent of New York City Police Department*, 20-843, slip op. (U.S. June 23, 2022). Post-Conviction Restoration of Civil Rights CRM 1435 Justice/gov/archives/jm/criminal/-resource-manual-1435-post-conviction-restoration-civil-rights; Giffords Law Center, Mental Health Reporting in Virginia, April 19, 2021 <https://giffords.org/lawcenter/state-laws/mental-health-reporting-in-virginia/#:~:text=Federal%20law%20also%20generally%20prohibits,commission%2C%20or%20other%20lawful%20authority.>

Week 7, October 6:

TDO Exercises

Pros and Cons of Mandatory Outpatient Treatment
Administration of Medication Over Objection-Civil
Orders for emergency medical or psychological treatment
Certification to a Training Center
Alternatives to Involuntary Commitment
Conservatorships and Guardianships
Powers of Attorney

READING ASSIGNMENT: Va. Code §§ 37.2-400 (“Rights of Individuals”); 805.1 (“Advanced Directives”), 37.2-817.1 to 817.4 (“Mandatory Outpatient Treatment”), -1101 (“Medication Over Objection”), -1102 (“Unauthorized Actions”), 1103, 1104 (“Medical Orders”), 1105 (“Appeals of Treatment Over Objection”); 54.1-2983 (“Advanced Directives”), 64.2-1600-1606 (“Guardianships”), 2000 to 007 (“Incapacity”), -012 (“Restoration”), -019 (“Guardianships”), -021 (“Guardianships”); 12VAC35-115-146 (“Authorized Representatives”); *Mills v. Rogers*, 457 U.S. 291 (1982); *Rogers v. Commissioner of Department of Mental Health*, 390 Mass. 489 (1983); Zoe Christen Jones and Justin Carissimo, *Britney Spears’ Conservatorship Explained*, CBS NEWS, (February 10, 2021, 637 p.m.)
<https://www.cbsnews.com/news/britney-spears-conservatorship-updates>.

Week 8, October 13

TDO Exercises

Right to Treatment
Involuntary Commitment of Criminal Defendants
Diversion Docket

READING ASSIGNMENT: Va. Code §§ 37.2-805 (“Voluntary Admission”) 18.2-254.3 (“Diversion Docket”); , 814(B) (“Hearing”), -817, 37.2-817.1 to 817.4 (“Mandatory Outpatient Treatment”) ; *Olmstead v. L.C., ex. Rel Zimring*, 527 U.S. 581 (1999); *Vitek v. Jones*, 445 U.S. 480 (1980); *Evans v. Paderick*, 443 F. Supp. 583 (1977).

Week 9, October 20

Lack of Capacity

Diminished Capacity

Incompetence to Stand Trial

Va. Code §§ 19.2-168; 19.2-168.1, (“Lack of Capacity”) 19.2-169.1, -169.2, -169.3:1, -169.4, -169.6, -169.7 (“Competency to Stand Trial”) ; 19.2-271.6 (“Diminished Capacity”); *Ray v. Commonwealth*, 2023 WL 3061796 (Va. App. Ct. No. 1080-22-3, April 25, 2023)(Unpublished); *Calokoh v. Commonwealth*, 76 Va.App. 717 (2023); *Scott v. Commonwealth*, 2023 WL 2374721 (Va. App. Ct. No. 0183-22-2 March 7, 2023) (Unpublished); *Vernon v. Commonwealth*, 2022 WL 15477888 (Va. App. Ct. No. 1279-20-4, May 17, 2022)(Unpublished); *Comm. V. Shaw*, 2022 WL 793425 (Arl. Cir. Ct. Cr. 21000393-00, March 9, 2022); *Grattan v. Commonwealth*, 278 Va. 602 (2009); *Bartosch v. Commonwealth*, 2022 WL 145154 (Va. App. Ct. No. 1249-20-4, Jan. 18, 2022) (Unpublished); *Beck v. Angeone*, 261 F.3d 377 (2001); *Wood v. Zahradnick*, 475 F.Supp. 556 (1979); Jeremy A. Theisen, [A New Standard for Admissibility of Evidence Regarding a Criminal Defendant’s Mental Condition](#), Virginia Lawyer, Virginia State Bar, August 2021

https://virginialawyer.vsb.org/publication/?i=715507&article_id=4081399&view=articleBrowser&ver=html5.

Week 10, October 27

GUEST SPEAKER—

Not Guilty by Reason of Insanity

NGRI CITES: Va. Code Ann. §§ 19.2-169.5, -168, -168.1, -182.2 to -182.7, *Boswell v. Commonwealth*, 61 Va. 860 (1871); *Price v. Commonwealth*, 228 Va. 452 (1984); *Godley v. Commonwealth*, 2 Va. App. 249 (1986); *Brown v. Commonwealth*, 68 Va. App. 746 (2018); *Downing v. Commonwealth*, 26 Va. App. 717 (1998); *Commonwealth v. White*, 272 Va. 619 (2006); *Schmuhl v. Commonwealth*, 69 Va. App. 281 (2018); *Wright v. Commonwealth*, 234 Va. 627 (1988); *Dandridge v. Commonwealth*, 72 Va. App. 669 (2021)

Week 11, November 3

Involuntary Administration of Medication-Criminal Defendants
Civil Commitment of Sexually violent Predators

READING ASSIGNMENT: Va. Code § 37.2-900 to 921; *Washington v. Harper*, 494 U.S. 210 (1990); *Riggins v. Nevada*, 504 U.S. 127 (1992) *Sell v. United States*, 539 U.S. 166 (2003); *U.S. v. Chatmon*, 718 F.3d 369 (4th Cir. 2013); *Kahler v. Kansas*, 140 S.Ct. 1021 (2020); *Kansas v. Crane*, 534 U.S. 407 (2002); *Boswell v. Commonwealth*, 61 Va. 860 (1871); *Commonwealth v. Shivaee*, 270 Va. 112 (2005); *Townes v. Commonwealth*, 269 Va. 234 (2005).

Week 12, November 10

Juvenile Commitment Process

READING ASSIGNMENT: Divya Kiran Chhabra, *Mental Health and the Juvenile Justice System: Where has History Taken Us?* PSYCHIATRY ONLINE Oct. 1, 2017

<https://psychiatryonline.org/doi/full/10.1176/appi.ajp-rj.2017.121001>;

Thomas L. Hafemeister, "Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders," 12 Va. J. Soc. Pol'y & L. 61 (2004). (Westlaw), pp. 1-12, 22-26; *D.L.G. v. Commonwealth*, 60 Va. App. 77 (2012); *Robinson v. Winstead*, 189 Va. 100 (1949); *Parham v. J.R.* 442 U.S. 584 (1979); *Robinson v. Winstead*, 189 Va. 100 (1949) Va. Code §§ 16.1-335 to 16.348

Week 13, November 17

Review Session.