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Mental Disability Law: Cases and Materials, 3rd ed (2017)

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Mental Disability Law

Cases and Materials

THIRD EDITION

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MLP: When I did the first edition of this casebook, my daughter, Julie, was a senior in high school, and my son, Alex, was in 9th grade. Julie is now a post-doc in developmental biology at Harvard Medical School; Alex is now a public defender with the Brooklyn Defender Service, working in Red Hook, Brooklyn. They—and my wife, Linda—remain the lights of my life. They bring me joy and laughter and happiness.
Not a day goes by when I do not realize how lucky I am.

HEC: To my husband and daughter for their never ending love and support.

AJL: To my family, friends and colleagues: thank you for your support and love, and for your unwavering belief in the importance of these issues and the work we continue to do.

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Introduction to the Third Edition

The first edition of *Mental Disability Law: Cases and Materials* was published in the spring of 1999 and the second edition in 2005. Over these years, the explosion of case law and legislation documented in those volumes has continued unabated. United States Supreme Court decisions have restructured the law as it applies, *inter alia*, to the relationship between the Americans with Disabilities Act (ADA) and institutionalized persons with mental disabilities (see *Olmstead v. L.C.*, pp. 700–716) and questions involving access to the courts (see *Tennessee v. Lane*, p. 724), to persons charged under Sexually Violent Predator Acts (SVPA) (see, e.g., *Kansas v. Crane*, p. 292), to persons with serious mental disabilities who wish to represent themselves at trial (see *Indiana v. Edwards*, pp. 897–904), to persons incompetent to stand trial who wish to resist the imposition of antipsychotic medication (see *Sell v. United States*, pp. 906–915), to persons pleading the insanity defense in jurisdictions with narrow definitions of that term (see *Clark v. Arizona*, pp. 962–966), and to the relationship between mental disability and the death penalty (see *Atkins v. Virginia*, pp. 1159–1173, and *Hall v. Florida*, pp. 1173–1181). Further, dissatisfied with some Supreme Court decisions on the ADA, Congress responded by enacting the Americans with Disabilities Act Amendments of 2008, legislatively overruling some of the Court’s jurisprudence in that area of the law (see pp. 688–691).

Other courts have continued to fine-tune the law of involuntary civil commitment, of institutional rights (especially the right to refuse treatment in *civil* cases), of community care, and of all aspects of the criminal trial process. State legislatures have enacted—not without controversy—new sorts of outpatient commitment laws (now mostly known as AOT (“assisted outpatient treatment”) acts), and state judiciaries have expanded—again, not without controversy—the role of “mental health courts,” a very specific sort of “problem-solving court” (drug courts and domestic violence courts are its forerunners). And, as in so many other areas of the law, litigators and advocates have begun—perhaps somewhat tardily—to look at questions of international human rights law in a mental disability law context. The bulk of newly-reported mental disability law litigation has come in three areas—SVPA cases, ADA cases, and criminal procedure cases—but virtually every area covered in the first and second editions of this casebook has seen unprecedented growth in the past sixteen years. It is also crucial that those who study mental disability law be familiar with other areas of the law that have significant application to

this specific area: international human rights law, the school of therapeutic jurisprudence and the application of new insights from the field of neuroscience.

Careful readers will note the use of the word “we” in this Introduction, as opposed to the word “I” that was used in the Introductions to the first two versions of this casebook. This is now a joint effort: besides the original editor (MLP), there are two additional ones this time around: New York Law School (NYLS) Adjunct Professor Heather Ellis Cucolo and Alison J. Lynch, a litigator with Disability Rights of New York. We have written multiple books and articles together in the past,¹ and this was a logical next step for us to take. We believe that our multiple perspectives will be of great value to student readers as well. Also, since the publication of the second edition, MLP has retired from the full-time faculty at NYLS, and has created, along with HEC, a consulting company, Mental Disability Law and Policy Associates (MDLPA), where AJL is an instructor. MDLPA was developed to offer mental disability law and policy training to both domestic and international students, lawyers, and mental health professionals. The training offered covers a wide array of mental disability and criminal law topics and incorporates all of the subject areas discussed in this casebook.

We also wish to thank MLP’s student assistants over the years, many of whom helped prepare some of the more recent law review articles that are excerpted here, and all of whom have helped me with the pocket parts to the treatise, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, which we draw on for many of the ideas incorporated here: Jenna Anderson, Jeannie Bliss, Marissa Costales, Betsy Fiedler, Jackie Halpern, Ryan Hild, Nikki Hirsch, Zev Holzman, Danielle Horowitz, Diana Moss, Naomi Schneidmill, Amanda Wichot, Megan Crespo, Mia Luna, Rachel Hisler, Jessica Cohn, Mia Luna, Katherine Davies, and Krystina Drasher, we thank you all. We also want to thank colleagues whose thoughts and insights, help, encouragement and encouragement have meant so much over the years: Bob Sadoff, David Wexler, the late Bruce Winick, Joel Dvoskin, Doug Mossman, Debbie Dorfman, Pam Cohen, Henry Dlugacz, Steve Ellmann, Rick Friedman, Eric Rosenthal, Richard Sherwin, Eva Szeli, and Karen Owen Talley for their help and encouragement and inspiration. Finally, we wish to thank former NYLS Dean Rick Matasar and current Dean

1. See e.g., MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (3d ed.) (Lexis Law Publishing) (2016); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION* (Temple University Press) (2017); MICHAEL L. PERLIN & ALISON J. LYNCH, *SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER?* (Palgrave Macmillan) (2016); Heather Ellis Cucolo & Michael L. Perlin, “*Far From the Turbulent Space*”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J. L. & SOC’L CHANGE 125 (2015); Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories In the Press*”: *The Impact of Media Distortions on Sex Offender Law and Policy* 3 U. DENV. CRIM. L. REV. 185 (2013); Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014); Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016).

Anthony Crowell for their faith in us and their ongoing support. These words are not enough to reflect our appreciation.

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