

Mental Disability Law

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.

Contents

Table of Principal Cases	xxi
Introduction to the Third Edition	xxv
Chapter 1 · Background	3
A. Approaching the Material	3
B. An Overview	3
Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	3
C. On Forensic Psychiatry	9
1. Robert L. Sadoff, <i>Practical Issues in Forensic Psychiatric Practice</i>	9
2. Douglas Mossman, <i>Is Expert Psychiatric Testimony Fundamentally Immoral?</i>	16
D. Some Jurisprudential Considerations	18
1. On Sanism	18
Introduction	18
2. On Pretextuality	22
Introduction	22
3. On Heuristics	26
4. On False “Ordinary Common Sense”	27
5. On Therapeutic Jurisprudence	28
a. David Wexler, <i>Therapeutic Jurisprudence: The Law as a Therapeutic Agent</i>	28
b. David B. Wexler, <i>New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices</i>	36
c. Adapted from Michael L. Perlin, “ <i>Striking for the Guardians and Protectors of the Mind</i> ”: <i>The Convention on the Rights of Persons with Mental Disabilities and the future of Guardianship Law</i>	37
d. Bruce Winick, <i>The Side Effects of Incompetency Labeling and the Implications for Mental Health Law</i>	40
E. Other Recent Developments	46
1. Mental Health Courts	46
Adapted from Michael L. Perlin, “ <i>The Judge, He Cast His Robe Aside</i> ”: <i>Mental Health Courts, Dignity and Due Process</i>	46

2.	International Human Rights	53
a.	Adapted from Michael L. Perlin, “ <i>Striking for the Guardians and Protectors of the Mind</i> ”: <i>The Convention on The Rights of Persons with Mental Disabilities and the Future of Guardianship Law</i>	53
b.	In re Mark C.H., 906 N.Y.S.2d 419, 433 (N.Y. Cnty. Surr. Ct. 2010)	54
c.	Note	59
3.	Neuroscience	59
a.	Note	59
b.	On the Use of Neuroscience Adapted from Stephen J. Morse, <i>New Neuroscience, Old Problems: Legal Implications of Brain Science</i>	60
c.	Note	63
d.	Another view (1) Adapted from Eyal Aharoni et al., <i>Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience</i>	63
e.	Notes	64
4.	Other Future Developments?	65
a.	Questions	65
Chapter 2 · Constitutional “Civil” Mental Health Law		69
A.	Involuntary Civil Commitment	69
1.	Introduction	69
2.	Applying the Constitution	69
a.	Theon Jackson v. State of Indiana	69
b.	J.B. O’Connor v. Kenneth Donaldson (1) The Impact of O’Connor Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	82 94 94
(2)	Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, <i>Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?</i>	95
c.	Alberta Lessard et al. v. Wilbur Schmidt et al. (1) Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, <i>Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?</i> (2) <i>Lessard Revisited . . . and Revisited</i> (3) Questions	96 117 117 118
3.	On “Mental Illness”	120
a.	An Overview	120

	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	120
b.	Eric Janus, <i>Toward a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp's and Winick's Explications of Legal Mental Illness</i>	122
4.	Dangerousness	125
a.	An Overview	125
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	125
b.	Dangerousness and <i>Lessard</i>	127
	State of New Jersey v. Stefan Krol	127
c.	On <i>Lessard</i> and <i>Krol</i>	136
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	136
d.	New Perspectives	136
	(1) The MacArthur Network	136
	(2) John Monahan, <i>The Scientific Status of Research on Clinical and Actuarial Predictions of Violence</i>	137
e.	Overt Acts	141
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	141
f.	Dangerousness to Self	142
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	142
g.	Dangerousness to Property	144
	Sharon Suzuki v. George Yuen	144
h.	Grave Disability	147
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	147
i.	Questions	150
5.	Procedural Issues	150
a.	Introductory Note	150
b.	Roy Kirk French, III, Plaintiff, v. The Honorable A. Eugene Blackburn, Defendant	150
c.	Frank O'Neal Addington v. State of Texas	156
	(1) Note	163
	(2) Eric Janus, <i>Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments</i>	164
d.	Note and Questions	171
6.	Special Populations	173
a.	Juveniles	173
	(1) James Parham v. J.R. et al.	173

	(2) On <i>Parham</i>	202
b.	Voluntary Patients	203
	(1) Marlus C. Zinermon, et al. v. Darrell E. Burch	203
	(2) Susan Reed & Dan Lewis, <i>The Negotiation of Voluntary Admission in Chicago; State Mental Hospitals</i>	212
	(3) Note	221
c.	Institutional Transfers	222
	Joseph Vitek, etc., et al. v. Larry D. Jones	222
d.	Intellectual Disabilities	230
	Leonard Heller v. Samuel Doe, by His Mother and Next Friend, Mary Doe	230
e.	Insanity Acquittees	246
	(1) Note	246
	(2) Michael Jones v. United States	246
	(3) On <i>Jones</i>	255
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	255
	(4) Terry Foucha v. Louisiana	256
	(5) Bruce Winick, <i>Ambiguities in the Legal Meaning and Significance of Mental Illness</i>	271
f.	Sex Offenders	276
	(1) Kansas v. Leroy Hendricks	276
	(2) Note on <i>Seling v. Young</i> , 531 U.S. 250 (2001)	291
	(3) Kansas v. Michael Crane	292
	(4) Note	295
	(5) On <i>United States v. Comstock</i>	295
	(a) Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Shaming the Constitution: The Detrimental Results of Sexual Violent Predator Legislation</i> (2017)	295
	(6) Questions	298
g.	Outpatient Commitment	298
	(1) Background Question	304
	(2) Kendra's Law	305
	(a) Michael Perlin, <i>Therapeutic Jurisprudence and Outpatient Commitment Law: Kendra's Law as a Case Study</i>	313
	(b) The <i>Matter of K.L.</i> case	317
h.	Other Commitments	318
	(1) Temporary Commitments	318
	(2) Emergency Commitments	318
	(3) Questions	319

7.	Counsel and Experts	322
a.	Right to Counsel	322
	(1) Historical Background	322
	(2) The Meaning of <i>Vitek</i>	323
	(3) Note, On <i>C.P.K.</i>	323
	(4) Michael L. Perlin, <i>Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases</i>	324
	(5) Joshua Cook, <i>Good Lawyering and Bad Role Models: The Role of Respondent's Counsel in a Civil Commitment Hearing</i>	328
	(6) In the Matter of the Mental Health of K.G.F.	329
b.	The Right to Expert Assistance in Civil Cases	338
	(1) Lyle R. Goetz v. The Honorable Matthew Crosson	338
c.	Other Issues	343
d.	Questions	344
8.	Dispositional Issues	344
a.	Conditional Release	344
b.	Appeal	344
c.	Periodic Review	344
d.	"Discharged Pending Placement"	345
9.	"Real Cases"	346
a.	Note	346
b.	In the Matter of the Commitment of E.G.	346
c.	In the Matter of the Commitment of M.J.	353
10.	Questions	378
B.	The Right to Treatment	379
1.	Historical Background	379
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	379
2.	Statutory Roots	381
a.	Charles C. Rouse v. Dale C. Cameron	381
3.	Constitutional Dimensions: The <i>Wyatt</i> Litigation	387
a.	<i>Wyatt v. Stickney</i>	387
b.	<i>Wyatt v. Stickney</i>	391
c.	<i>Ricky Wyatt v. Virginia Rogers, United States of America, Amicus Curiae</i>	404
d.	Questions	424
4.	The Supreme Court Speaks	425
a.	<i>Duane Youngberg v. Nicholas Romeo</i>	425
b.	After <i>Youngberg</i>	436
	(1) <i>Allen Bodine Scott, by and through his Guardian, Michael J. Weintraub v. Dr. Ingre Rudolph Plante</i>	436

	(2) Thomas S., by His Next Friend, Joyce Brooks, Plaintiff, v. Sarah Morrow	438
	(3) Thomas S., Joyce M. Brooks, appt'd guardian ad litem, v. Sarah T. Morrow	442
	(4) Thomas S., by his guardian ad litem, Joyce M. Brooks v. David T. Flaherty	446
	(5) Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, <i>Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?</i>	449
	(6) Susan Stefan, <i>What Constitutes Departure from Professional Judgment?</i>	450
	(7) Questions	459
	c. Note	460
C.	The Right to Refuse Treatment	460
	1. Historical Background — The Advent of Psychiatric Drugs Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	460
	2. Forerunners	466
	a. James Boyd Mackey v. Raymond K. Proconier et al.	466
	b. Gary Knecht et al., v. James N. Gillman et al.	467
	c. Allen Bodine Scott v. Dr. Ingre Rudolph Plante, M.D.	469
	3. <i>Rennie and Rogers</i>	472
	a. John E. Rennie v. Ann Klein (<i>Rennie I</i>)	472
	b. John E. Rennie v. Ann Klein (<i>Rennie II</i>)	489
	c. John E. Rennie v. Ann Klein (<i>Rennie III</i>)	510
	d. Mark J. Mills et al. v. Rubie Rogers et al.	521
	e. The <i>Rennie</i> Remand	526
	f. John E. Rennie v. Ann Klein (<i>Rennie IV</i>)	526
	g. Rubie Rogers v. Commissioner of the Department of Mental Health	536
	h. Note: Further Developments in <i>Rogers</i>	538
	i. Questions	538
	4. Post- <i>Rennie</i> and <i>Rogers</i>	539
	a. Note on State Constitutional Law	539
	b. Mark Rivers v. Stephen Katz	539
	c. Notes and questions	545
	5. A Therapeutic Jurisprudence Analysis	546
	Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, <i>Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?</i>	546
	6. An Empirical Analysis	551

	Michael L. Perlin & Deborah A. Dorfman, <i>Is It More Than “Dodging Lions and Wastin’ Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases</i>	551
7.	The Role of Counsel	557
	Michael L. Perlin & Deborah A. Dorfman, <i>Is It More Than “Dodging Lions and Wastin’ Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases</i>	557
	Note	559
8.	Other Modalities	559
	a. On Seclusion and Restraint	559
	b. Questions and Other Treatments	562
9.	Looking at the Empirical Data	562
10.	The Development of a Newer Generation of Medications	563
	Douglas Mossman, <i>Unbuckling the “Chemical Straitjacket”: The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis</i>	563
11.	Note	567
	a. Other Criminal Statuses	567
	Michael L. Perlin, <i>Decoding Right to Refuse Treatment Law</i>	567
	b. Note	569
	Question	569
D.	Other Institutional Rights	570
	1. Due Process and Institutional Life	570
	John Davis v. William Balson	570
	2. Other Institutional Rights	580
	3. Sex	580
	a. Virgie Foy and Reffie Foy v. Bradley Greenblott	580
	b. Michael L. Perlin, <i>Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?</i>	587
	c. Douglas Mossman, Michael L. Perlin, and Deborah A. Dorfman, <i>Sex on the Wards: Conundra for Clinicians</i>	595
	d. A Model Policy (from <i>Sex on the Wards . . .</i>)	597
	4. Money	601
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	601
	5. Questions	603
E.	Community Rights	603
	1. Is There a Substantive Right to Aftercare?	603
	a. Statutory Approaches	603
	(1) Catherine Lake v. Dale C. Cameron	603
	(2) William Dixon v. Caspar Weinberger	609
	(3) After <i>Dixon</i>	613

	Melissa Warren & Robert Moon, Dixon: <i>In the Absence of Political Will, Carry a Big Stick</i>	613
b.	Constitutional Approaches	615
	(1) Terri Lee Halderman v. Pennhurst State School & Hospital	615
	(2) Notes on Subsequent Developments in <i>Pennhurst</i>	628
	(3) The Second Supreme Court Decision in <i>Pennhurst</i> Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	629
	(4) <i>Pennhurst</i> , the Final Chapter (?)	631
	(5) The Impact of <i>Pennhurst</i>	632
	(6) Note	633
c.	Deinstitutionalization and Homelessness	633
	(1) Michael L. Perlin, <i>Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization</i>	633
	(2) Questions	646
2.	Other Community Rights	647
a.	Zoning	647
	(1) City of Cleburne, Texas v. Cleburne Living Center	647
b.	Other Civil Rights of Individuals with Mental Disabilities in Community and Aftercare Settings Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	662
c.	On Guardianship	664
3.	Questions	664
Chapter 3 · Federal Statutory Rights		665
A.	The Americans with Disabilities Act	665
1.	Introduction	665
a.	Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, <i>Disability Cause Lawyers</i>	665
2.	The Statute	667
3.	Before <i>Olmstead</i>	676
a.	Michael L. Perlin, <i>The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?</i>	676
b.	Michael L. Perlin, “Make Promises by the Hour”: <i>Sex, Drugs, the ADA, and Psychiatric Hospitalization</i>	684
4.	ADA Amendments Act of 2008	688
	Questions	691
5.	Post ADAAA	692
a.	Margaret E. Vroman, <i>Mentally Disabled Employees and the ADAAA: What’s An Employer To Do?</i>	692
b.	Hoback v. City of Chattanooga	696

Questions	700
c. Tommy Olmstead v. L.C., by Jonathan Zimring	700
(1) After <i>Olmstead</i>	716
(2) The significance of <i>Garrett</i> ?	721
(3) Distinguishing <i>Garrett</i>	724
(4) On <i>Tennessee v. Lane</i>	724
(5) Questions	726
B. Other Federal Statutes	727
1. Section 504 of the Rehabilitation Act of 1973	727
2. The Fair Housing Amendments Act of 1988	728
3. The Developmental Disabilities Bill of Rights Act	728
4. Protection and Advocacy for Mentally Ill Individuals Act	728
C. Oregon Advocacy Center et al. v. Bobby Mink et al.	728
Chapter 4 · Civil Mental Health Law	733
A. Torts	733
1. Persons with Mental Disabilities as Plaintiffs	733
a. In the Commitment Process	733
(1) <i>Becky S. Moore v. Wyoming Medical Center</i>	733
(2) <i>Fair Oaks Hospital v. Susan L. Pocrass</i>	740
(3) Notes	747
(4) Question	748
b. Questions of Medication and Treatment	748
(1) <i>Timothy Floyd Clites v. State of Iowa</i>	748
(2) Note	753
c. Other Tort Issues	754
(1) Sexual Misconduct	754
Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	754
(2) Suicide	757
Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	757
(3) Note and Question	759
2. Persons with Mental Disabilities as Defendants	759
a. <i>State Farm Fire & Casualty Co. v. James C. Wicka</i>	759
b. Questions	767
3. Persons with Mental Disabilities as Third Parties	767
a. “Duty to Protect”	767
(1) <i>Vitaly Tarasoff v. The Regents of the University of California et al.</i>	767
Michael L. Perlin, <i>Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990’s</i>	781
(2) Questions	786

b.	Other Applications of <i>Tarasoff</i>	787
(1)	Christopher Ramos, <i>Adolescent Brain Development, Mental Illness, and the University–Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship With Their Students</i>	787
c.	Other Tort Issues	798
Chapter 5 · The Criminal Trial Process		799
A.	Competency	799
1.	To Stand Trial	799
a.	Background	799
(1)	Bruce Winick, <i>Restructuring Competency to Stand Trial</i>	799
(2)	Claudine Ausness, <i>The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit</i>	802
(3)	Bruce Winick & Terry DeMeo, <i>Competence to Stand Trial in Florida</i>	804
(4)	Questions	805
b.	Substantive Rights	806
(1)	Milton R. Dusky v. United States of America	806
(2)	James Edward Drope v. Missouri	807
(3)	The Evaluation Process in “Real Life” Bruce Winick, <i>Restructuring Competency to Stand Trial</i>	813
(4)	Questions	821
c.	Procedural Standards	822
(1)	Frank J. Pate v. Theodore Robinson	822
(2)	Burden of Proof	830
(a)	Teofilo Medina, Jr. v. California	830
(b)	Byron Keith Cooper v. Oklahoma	842
(3)	Questions	850
d.	Role of Counsel	850
(1)	Introduction	850
(a)	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	850
(2)	James Earl Hill v. State of Nevada	851
(3)	Tommy S. Groover v. State of Florida	852
(4)	Questions	853
e.	Non-Psychiatric Disorders	854
(1)	Introduction	854

(2)	James Ellis & Ruth Luckasson, <i>Mentally Retarded Criminal Defendants</i>	854
(3)	Amnesia	864
(4)	Questions	865
f.	Some History	866
(1)	Note, Before <i>Jackson v. Indiana</i>	866
(a)	Historical Background	866
(b)	Institutional Conditions	866
(c)	Reread <i>Jackson v. Indiana</i> (see supra p. 69–82).	867
(2)	Grant Morris & J. Reid Meloy, <i>Out of Mind? Out of Sight?: The Uncivil Commitment of Permanently Incompetent Criminal Defendants</i>	867
(3)	Questions	875
(4)	On Restoration of Competency	876
g.	Abolition	876
(1)	Robert Burt & Norval Morris, <i>A Proposal for the Abolition of the Incompetency Plea</i>	876
(2)	David Wexler, <i>Criminal Confinement and Dangerous Mental Patients: Legal Issues of Confinement, Treatment and Release</i>	880
(3)	Questions	880
h.	Waiver	881
(1)	A Viable Option?	881
(2)	Questions	881
i.	Experts	881
	Jones v. State	881
j.	The Relationship between the ADA and the Incompetence Process	883
k.	Notes	883
2.	Other Incompetency Issues	884
a.	To Plead Guilty/Waive Counsel	884
(1)	History	884
(2)	Salvador Godinez v. Richard Allan Moran	884
(3)	Note, After <i>Godinez</i>	896
(4)	Questions	897
(5)	State of Indiana v. Ahmad Edwards	897
(6)	Questions	904
b.	Other Issues	904
(1)	The Interplay between Incompetency and Insanity	904
(a)	On <i>Coolbroth v. District Court</i>	904
(b)	Notes	905
(2)	Other Incompetency Questions	905
B.	The Right of Forensic Patients to Refuse Medication	906
1.	Before Trial	906

a.	Charles Sell v. United States	906
2.	At Trial	915
a.	David Riggins v. Nevada	915
3.	In Prison	927
a.	Washington v. Walter Harper	927
4.	Questions	946
C.	Insanity	950
1.	Introduction	950
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	950
2.	Substantive Standards	953
a.	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	953
b.	Something Less than <i>M’Naghten</i> ?	962
(1)	Eric Michael Clark v. State of Arizona	962
c.	Guilty But Mentally Ill (GBMI)	966
(1)	People v. William Lee Seefeld	966
(2)	Arthur C. Whitt v. State of Indiana	968
(3)	Linda Fentiman, “ <i>Guilty But Mentally Ill</i> ”: <i>The Real Verdict is Guilty</i>	969
(4)	Ira Mickenberg, <i>A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense</i>	976
(5)	Diminished Capacity	979
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	979
(6)	After <i>Hinckley</i>	981
(a)	The Insanity Defense Reform Act	981
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	981
(b)	Lisa Callahan, Connie Mayer & Henry Steadman, <i>Insanity Defense Reform in the United States Post-Hinckley</i>	982
(7)	Questions	986
3.	Procedural Issues	988
a.	Burden of Proof	988
(1)	Michael L. Perlin, <i>The Jurisprudence of the Insanity Defense</i> 96–100	988
b.	Why <i>Hinckley</i> Was Decided as It Was	990
(1)	Michael L. Perlin: “ <i>God Said to Abraham/Kill Me a Son</i> ”: <i>Why the Insanity Defense and the</i>	

	<i>Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence</i>	990
c.	Privilege Against Self-Incrimination	990
	Michael L. Perlin, <i>Law and Mental Disability</i>	990
d.	Informing the Jury of the Consequences of an NGRI Plea	992
	Terry Lee Shannon v. United States	992
e.	The Right to Not Plead Insanity	1000
f.	Experts and Counsel	1001
	(1) Glen Burton Ake v. Oklahoma	1001
	(2) United States ex rel. Gilbert Rivera v. Gayle Franzen <i>(Rivera I)</i>	1011
	(3) United States ex rel. Gilbert Rivera v. Gayle Franzen <i>(Rivera II)</i>	1018
	(4) Gary Eldon Alvord v. Louie L. Wainwright	1020
g.	Questions	1024
	(1) Quality of Counsel	1024
	(2) Refusal to Enter the Plea	1026
4.	Defendants with Other Disabilities	1026
a.	Intellectual Disabilities	1026
	James Ellis & Ruth Luckasson, <i>Mentally Retarded Criminal Defendants</i>	1026
b.	Physiological Disorders	1030
	Michael L. Perlin, “Big Ideas, Images and Distorted Facts”: <i>The Insanity Defense, Genetics, and the “Political World”</i>	1030
c.	Notes and Questions	1034
5.	Alternate Bases for the Insanity Defense	1034
a.	Syndromes	1034
	(1) State of Louisiana v. Wayne Robert Felde	1034
	(2) United States of America v. Bridget M. Denny-Shaffer	1039
	Questions	1051
6.	Insanity Defense Myths	1052
a.	Empirical Myths	1052
	Adapted from Michael L. Perlin & Heather Ellis Cucolo, <i>Mental Disability Law: Civil and Criminal</i>	1052
b.	Question	1055
c.	John Hinckley: The Saga Continues	1055
d.	See also, Perlin, <i>The Insanity Defense: Nine Myths that Will Not Go Away</i> , in <i>The Insanity Defense: Multidisciplinary Views on Its History, Trends, and Controversies 1</i> (Mark D. White, ed. 2017)	1056
7.	Abolition	1056

a.	Michael L. Perlin, <i>Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence</i>	1056
8.	Post-Acquittal Commitment	1060
9.	Questions	1061
C.	Trial Process	1062
1.	Privilege against Self-Incrimination	1062
a.	W. J. Estelle, Jr. v. Ernest Benjamin Smith	1062
b.	David Buchanan v. Kentucky	1071
c.	John T. Satterwhite v. Texas	1081
d.	Note: On <i>Powell v. Texas</i>	1088
e.	Note: On <i>Kansas v. Cheever</i>	1089
2.	Confessions	1089
a.	Louie L. Wainwright v. David Wayne Greenfield	1089
b.	Colorado v. Francis Barry Connelly	1096
D.	Death Penalty	1110
1.	Dangerousness	1110
	Thomas A. Barefoot v. W.J. Estelle, Jr.	1110
2.	Mitigation	1128
	On Mitigation	1128
	Adapted from Michael L. Perlin, <i>Mental Disability and the Death Penalty: The Shame of the States 29–44</i> (2013)	1128
3.	The Role of Counsel	1131
	The meaning of <i>Strickland</i>	1135
4.	Competence to Be Executed	1139
a.	Defendants with Mental Illness	1139
(1)	Alvin Bernard Ford v. Louie L. Wainwright	1139
(2)	Scott Louis Panetti v. Nathaniel Quarterman	1152
5.	Cases construing <i>Panetti</i>	1159
a.	Defendants with Intellectual Disabilities	1159
(1)	Daryl Atkins v. Virginia	1159
(2)	Freddie Lee Hall v. Florida	1173
	On <i>Perry v. Louisiana</i>	1181
(3)	David Wexler & Bruce Winick, <i>Therapeutic Jurisprudence and Criminal Justice Mental Health Issues</i>	1181
6.	Questions	1184
E.	Sentencing	1186
	Adapted from Michael L. Perlin, “ <i>I Expected It to Happen/I Knew He’d Lost Control</i> ”: <i>The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5</i>	1186
1.	Sentencing and the ADA	1192
	Index	1193

Table of Principal Cases

Cases are listed in alphabetical order by last name of plaintiff, or defendant where the state is the plaintiff.

Frank O’Neal Addington v. State of Texas, 441 U.S. 418 (1979), 156
Glen Burton Ake v. Oklahoma, 470 U.S. 68 (1985), 1001
Gary Eldon Alvord v. Louie L. Wainwright, 469 U.S. 956 (1984), 1020
Daryl Atkins v. Virginia, 536 U.S. 304 (2003), 1159
Thomas A. Barefoot v. W.J. Estelle, Jr., 463 U.S. 880 (1983), 1110
David Buchanan v. Kentucky, 483 U.S. 402 (1987), 1071
Eric Michael Clark v. State of Arizona, 548 U.S. 735 (2006), 962
City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985), 647
Timothy Floyd Clites v. State of Iowa, 322 N.W.2d 917 (Iowa App. 1982), 748
Colorado v. Francis Barry Connelly, 479 U.S. 157 (1986), 1096
Byron Keith Cooper v. Oklahoma, 517 U.S. 348 (1996), 842
Kansas v. Michael Crane, 534 U.S. 407 (2002), 292
John Davis v. William Balson, 461 F.Supp. 842 (N.D. Ohio 1978), 570
United States of America v. Bridget M. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993),
1039
William Dixon v. Caspar Weinberger, 405 F.Supp. 974 (D.D.C. 1975), 609
James Edward Drope v. Missouri, 420 U.S. 162 (1975), 807
Milton R. Dusky v. United States of America, 362 U.S. 402 (1960), 806
W. J. Estelle, Jr. v. Ernest Benjamin Smith, 451 U.S. 454 (1981), 1062
State of Indiana v. Ahmad Edwards, 554 U.S. 164 (2008), 897
In the Matter of the Mental Health of K.G.F., 306 Mont. 1, 29 P. 3d 485 (2001), 329
Fair Oaks Hospital v. Susan L. Pocrass, 628 A.2d 829 (N.J. Super., Law Div. 1993),
740
State of Louisiana v. Wayne Robert Felde, 422 So.2d 370 (La. 1982), 1034
Alvin Bernard Ford v. Louie L. Wainwright, 477 U.S. 399 (1986), 1139
Terry Foucha v. Louisiana, 504 U.S. 71 (1992), 256
Virgie Foy and Reffie Foy v. Bradley Greenblott, 190 Cal.Rptr. 84 (App. 1983), 580
Roy Kirk French, III, Plaintiff, v. The Honorable A. Eugene Blackburn,
Defendant, 428 F.Supp. 1351 (M.D. N.C. 1977), 150
Salvador Godinez v. Richard Allan Moran, 509 U.S. 389 (1993), 884
Lyle R. Goetz v. The Honorable Matthew Crosson, 967 F.2d 29 (2d Cir. 1992), 338
Tommy S. Groover v. State of Florida, 489 So.2d 15 (Fla. 1986), 852

- In re Mark C.H., 906 N.Y.S.2d 419, 433 (N.Y. Cnty. Surr. Ct. 2010), 54
- Terri Lee Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979), 615
- Freddie Lee Hall v. Florida, 134 S. Ct. 1986 (2014), 1173
- Leonard Heller v. Samuel Doe, by His Mother and Next Friend, Mary Doe, 509 U.S. 312 (1993), 230
- Kansas v. Leroy Hendricks, 521 U.S. 346 (1997), 276
- James Earl Hill v. State of Nevada, 953 P. 2d 1077 (Nev. 1998), 851
- Hoback v. City of Chattanooga, 2013 WL 6698042 (6th Cir. 2013), 696
- Theon Jackson v. State of Indiana, 406 U.S. 715 (1972), 69
- Jones v. State, 375 S.E.2d 648 (Ga.App. 1988), 881
- Michael Jones v. United States, 463 U.S. 354 (1983), 246
- Gary Knecht et al., v. James N. Gillman et al., 488 F.2d 1136 (8th Cir. 1973), 467
- State of New Jersey v. Stefan Krol, 344 A.2d 289 (N.J. 1975), 127
- Catherine Lake v. Dale C. Cameron, 364 F.2d 657 (D.C. Cir. 1966), 603
- Alberta Lessard et al. v. Wilbur Schmidt et al., 349 F. Supp. 1078 (E.D. Wis. 1972), 96
- James Boyd Mackey v. Raymond K. Proconier et al., 477 F.2d 877 (9th Cir. 1973), 466
- Teofilo Medina, Jr. v. California, 505 U.S. 437 (1992), 830
- Mark J. Mills et al. v. Rubie Rogers et al., 457 U.S. 291 (1982), 521
- Becky S. Moore v. Wyoming Medical Center, 825 F. Supp. 1531 (D. Wyo. 1993), 733
- J.B. O'Connor v. Kenneth Donaldson, 422 U.S. 563 (1975), 82
- Tommy Olmstead v. L.C., by Jonathan Zimring, 527 U.S. 581 (1999), 700
- Scott Louis Panetti v. Nathaniel Quarterman, 551 U.S. 930 (2007), 1152
- James Parham v. J.R. et al., 442 U.S. 584 (1979), 173
- Frank J. Pate v. Theodore Robinson, 383 U.S. 375 (1966), 822
- John E. Rennie v. Ann Klein (Rennie I), 462 F.Supp. 1131 (D.N. J. 1978), 472
- John E. Rennie v. Ann Klein (Rennie II), 476 F. Supp. 1294 (D.N. J. 1979), 489
- John E. Rennie v. Ann Klein (Rennie III), 653 F.2d 836 (3d Cir. 1981), 510
- John E. Rennie v. Ann Klein (Rennie IV), 720 F.2d 266 (3d Cir. 1983), 526
- David Riggins v. Nevada, 504 U.S. 127 (1992), 915
- United States ex rel. Gilbert Rivera v. Gayle Franzen (Rivera I), 594 F. Supp. 198 (N.D. Ill. 1984), 1011
- United States ex rel. Gilbert Rivera v. Gayle Franzen (Rivera II), 794 F.2d 314 (7th Cir. 1986), 1018
- Mark Rivers v. Stephen Katz, 504 N.Y.S.2d 74 (1986), 539
- Rubie Rogers v. Commissioner of the Department of Mental Health, 458 N. E.2d 308 (Mass. 1983), 536
- Charles C. Rouse v. Dale C. Cameron, 373 F.2d 451 (D.C. Cir. 1967), 381
- Thomas S., by his guardian ad litem, Joyce M. Brooks v. David T. Flaherty, 902 F.2d 250 (4th Cir. 1990), 446
- Thomas S., Joyce M. Brooks, appt'd guardian ad litem, v. Sarah T. Morrow, 781 F.2d 367 (4th Cir. 1986), 442

- John T. Satterwhite v. Texas, 486 U.S. 249 (1988), 1081
- Allen Bodine Scott v. Dr. Ingre Rudolph Plante, M.D., 532 F.2d 939 (3d Cir. 1976),
469
- People v. William Lee Seefeld, 290 N.W.2d 123 (Mich. App. 1980), 966
- Charles Sell v. United States, 539 U.S. 166 (2003), 906
- Terry Lee Shannon v. United States, 512 U.S. 573 (1994), 992
- State Farm Fire & Casualty Co. v. James C. Wicka, 474 N.W.2d 324 (Minn. 1991),
759
- Sharon Suzuki v. George Yuen, 617 F.2d 173 (9th Cir. 1980), 144
- Vitaly Tarasoff v. The Regents of the University of California et al., 131 Cal.Rptr. 14
(1976), 767
- Joseph Vitek, etc., et al. v. Larry D. Jones, 445 U.S. 480 (1980), 222
- Louie L. Wainwright v. David Wayne Greenfield, 474 U.S. 284 (1986), 1089
- Washington v. Walter Harper, 494 U.S. 210 (1990), 927
- Arthur C. Whitt v. State of Indiana, 497 N.E.2d 1059 (Ind. 1986), 968
- Ricky Wyatt v. Virginia Rogers, United States of America, Amicus Curiae,
985 F. Supp. 1356 (M.D. Ala. 1997), 404
- Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971), 387
- Wyatt v. Stickney, 344 F.Supp. 373 (M.D. Ala. 1972), 391
- Duane Youngberg v. Nicholas Romeo, 457 U.S. 307 (1982), 425
- Marlus C. Zinermon, et al. v. Darrell E. Burch, 494 U.S. 113 (1990), 203

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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