

# AALS SECTION ON LAW AND MENTAL DISABILITY NEWSLETTER – FALL/WINTER 2017

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## Program Announcement

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At the 2018 AALS Annual Meeting in San Diego, the Section on Law and Mental Disability, with co-sponsors the Sections on Disability Law, Family and Juvenile Law, and Law, Medicine, and Health Care, will host

### ***LEGAL CAPACITY AT THE CROSSROADS: MENTAL DISABILITY AND FAMILY LAW***

Friday, January 5, 2018, from  
1:30 - 3:15pm.

Legal competency, the law's recognition of an individual's personhood and agency, represents a conceptual cornerstone for law and mental disability scholars. The success of the disability rights movements in fostering greater public support for economic and social rights for people with mental disabilities has generated, at least rhetorically, broader support for the law's

recognition of the decisional capacity of people with mental disabilities in these areas. The scope of scholarly inquiry has expanded in recent years from curbing state encroachment in private decision-making to crafting positive theories of rights for people with mental disabilities in sexuality, reproduction, marriage, and parenting.

This panel seeks to bring together legal scholars across several fields to explore emerging theory and doctrine in family law for people with mental disabilities. With its emphasis on intersectionality and cross-pollination, panelists will discuss such issues as assisted reproductive technology, parental termination, and sexual access. An explicit goal of this panel is to develop a research agenda for this emerging interdisciplinary area of legal scholarship.

**Moderator: Jasmine Harris,**  
UC Davis School of Law.

**Panelists:**  
**Alexander Boni-Saenz,**  
Chicago-Kent College of Law,  
will address one of the

foundational concepts in disability law scholarship – “the dignity of risk” -- and explore its limits and the implications of that understanding for family law decision-making (selected from the Call for Papers).

**Natalie Chin,** Brooklyn Law School, will address sexual rights for people with intellectual and developmental disabilities in the context of group homes and how the Americans with Disabilities Act can be a tool for greater sexual access for this population (selected from the Call for Papers).

**Leslie Francis,** University of Utah S.J. Quinney College of Law, and

**Kimberly Mutcherson,** Rutgers Law School, will address questions of legal competency from bioethics and reproductive justice perspectives.

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## Member News

*Publications, presentations,  
other professional activity,  
awards, and accomplishments.*

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**Linda C. Fentiman,**

Professor of Law, Elisabeth Haub School of Law, Pace University, published her book, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* (New York University Press). The book explores the unconscious processes of risk construction, showing how these psychological and social processes intersect with ostensibly neutral legal concepts like the “reasonable person” and “proximate cause.” As a result, many acts or omissions of mothers and pregnant women are seen as “risky” to their children's health, while analogous behavior of fathers and other men, as well as corporate actors, is not viewed as dangerous. Thus, mothers, but not others, frequently face criminal prosecution and tort liability. The book examines children's health in a broad context, considering the health impacts of nutrition, exercise, and alcohol and drug use during pregnancy; breastfeeding; domestic violence; lead poisoning; and childhood vaccination.

In June, she spoke about her book at the AALS Midyear Criminal Justice Section meeting and also spoke at the American Society of Law, Medicine, and Ethics Health Law Professors conference on the subject “Threats to Access to Abortion and Contraception in the Age of Zika.”

**Wendy F. Hensel,** Interim Dean and Professor of Law, Georgia State University College of Law, became Interim Dean at GSU College of Law on July 1.

She also published *Squaring State Child Vaccine Policy with Individual Rights Under the Individuals with Disabilities Education Act: Questions Raised in California*, 132 Public Health Reports 593 (July/August 2017) with Ross Silverman.

**James T. R. Jones,**

Professor of Law, University of Louisville Brandeis School of Law, published *State psychology licensure questions about mental illness and compliance with the Americans with Disabilities Act*, 86 American Journal of Orthopsychiatry 620-631 (2016) (written with Jennifer E. Boyd, Bruce Graunke, Frederick J. Frese, Jennifer W. Adkins, and Ronald Bassman) (peer reviewed interdisciplinary journal).

He also presented at the 2017 United States Court of Appeals for the Ninth Circuit Judicial Conference, July 19, 2017, San Francisco, California, on a panel on “Understanding and Managing Mental Health Issues in Federal Court.”

**Arlene S. Kanter,** Bond, Schoeneck & King Distinguished Professor of Law;

Laura J. and L. Douglas Meredith Professor of Teaching Excellence; Director, Disability Law and Policy Program, Syracuse University College of Law, is a visiting scholar at Harvard Law School in Fall 2017 and is a Lady Davis Visiting Scholar at Hebrew University in Spring 2018. She also submits the following:

**Publications**

Her chapter, *The Right to Inclusive Education Under International Human Rights Law*, will be published as the lead chapter in an upcoming book of the same title, by Gauthier de Beco, Shivaun Quinlavan, and Janet Lord (Cambridge U Press, 2018).

Her chapter, *Article 35 of the Convention on the Rights of People with Disabilities*, will be published in an upcoming book edited by Ilias Bantekas, entitled COMMENTARY ON THE CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES, as part of the Oxford U Press Series on Treaty Commentaries.

Her article, with Yotam Tolub, titled *The Fight For Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities In Israel and Beyond*, will be published in the upcoming volume of the Cardozo Law Review.

**Invited Presentations**

November 17, 2017, *Gendering Disability Rights*, Northeastern Law School Presentation,

Symposium in Memory of Hope Lewis.

November 10, 2017, *The Difference a Treaty Can Make: The Case for the Convention on the Rights of People with Disabilities*, Public Lecture at Harvard Law School.

November 5, 2017, *Keynote Presentation on The Right to Inclusive Education Under the Americans with Disabilities Act and Olmstead*, American Education Research Association Conference.

June 23, 2017, *Human Rights and Disability*, Public Lecture at University of Nairobi, Kenya.

June 19, 2017, *Students with Disabilities in Higher Education*, Public Lecture at Kenyatta University, Kenya.

June 15, 2017, *Stopping Violence against Women with Disabilities and International Human Rights Law*, with Milanoi Koiyiet, Esq. (SUCOL LLM Class of 2016), Guest of Disability and Justice Conference, Nairobi, Kenya.

April 5, 2017, *Disability as Part of Diversity in Higher Education*, Public Lecture at Colgate, University Lecture.

February 23, 2017, *Presuming Competence: The Legal Right to Personhood for People with Disabilities*, Invited participant at Cardozo Law School Conference on Personhood and Civic Engagement by People with Disabilities.

January 5, 2017, *Human Rights and Disability: Recent Developments around the Globe*, AALS Annual Meeting International Human Rights Panel: Outside the West.

January 5, 2017, *Disability as Part of Diversity in Legal Education*, AALS Annual Meeting, President's Panel on Diversity.

**Marshall B. Kapp**, Director, Center for Innovative Collaboration in Medicine and Law, Florida State University College of Medicine and College of Law, has published the following:

“Future Directions in Public Policy Relating to Elder Abuse,” in Elder Abuse: Research, Practice and Policy, edited by XinQi Dong. New York: Springer, pp. 693-707 (2017).

“Prescribing Medication for Chronic Pain Management: The State of Education in Florida Medical Schools and Residency Programs,” Vol. 14, pp. 22-32, *FLORIDA PUBLIC HEALTH REVIEW* (2017) (with Bonett, Perdomo, & Baker).

“Can Lawyers Improve Transitions of Care?”, Vol. 18, pp. 207-210, *JAMDA* (2017) (with Katz).

He also made the following presentation: “Honoring the Choices of Nursing Home Residents While Practicing Good Risk Management,” at the

XXVth International Congress on Law and Mental Health sponsored by the International Academy of Law and Mental Health, Prague (Czech Republic), July 14, 2017.

**Kate Mewhinney**, Clinical Professor, Manager of Elder Law Clinic, Wake Forest Univ. School of Law, is also an associate in the university medical center's Department of Internal Medicine, Section on Geriatrics. She teaches the geriatrics fellows about law-related topics and invites them to observe actual incompetency proceedings in which she and her students are involved.

She gave a webinar, “How Can N.C.'s Mediation Programs Address the Needs of an Aging Population?” with Associate Professor of Medicine, Maryjo Cleveland, M.D. The program was sponsored by the N.C. Dispute Resolution Commission. Mewhinney is a Certified N.C. Superior Court Mediator with additional certification to mediate guardianship and estate matters.

She published an article in the NCBA Dispute Resolution Section newsletter, *The Peacemaker*: “How Can N.C.'s Mediation Programs Address the Needs of an Aging Population?” (Part 1: October 2017; Part 2 in Spring 2018).

She developed and taught a summer course, “Comparative Law and Aging,” in London. A highlight was a visit to the U.K. Court of Protection to meet with

judges and solicitors and to observe a “deprivation of rights” hearing. Also, one of the guest lecturers was Professor Israel Doron (University of Haifa, Israel) who spoke about comparative guardianship systems. Students also met with international human rights activists from HelpAge International. For more news about the Wake Forest program, see the latest newsletter, at <http://elder-clinic.law.wfu.edu/files/2017/06/Spring-2017-Newsletter.pdf>. To receive the newsletter via email or hard copy, twice a year, please email [mewhinka@wfu.edu](mailto:mewhinka@wfu.edu).

### **Michael L. Perlin,**

Professor Emeritus of Law, New York Law School; Founding Director, International Mental Disability Law Reform Project; Co-founder, Mental Disability Law and Policy Associates, passes along the following publications, presentations, and other items:

### **Publications**

- Two chapters published in Principles and Practice of Forensic Psychiatry (Drs. Richard Rosner & Charles Scott, eds.) (CRC Press 2016): *The Death Penalty*, with Alison J. Lynch, Esq., and *The Right to Refuse Treatment in a Forensic Setting*, in Principles and Practice of Forensic Psychiatry, with Naomi Weinstein, Esq.

- *“God Said to Abraham/Kill Me a Son”*: *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, has been published at 54 Am. Crim. L. Rev. 477 (2017).
- *The Right to Treatment*, has been published as a chapter in The SAGE Encyclopedia of Abnormal and Clinical Psychology 2897 (Amy Wenzel, ed. 2017).
- with Lynch, *“Toiling in the Danger and in the Morals of Despair”*: *Risk, Security, Danger, the Constitution, and the Clinician's Dilemma*, has been published at 5 Indiana J. L. & Soc'l Equality 409 (2017).
- *“Your Corrupt Ways Had Finally Made You Blind”*: *Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities*, has been published at 65 Am. U. L. Rev. 1437 (2016).
- with Lynch, *“In the Wasteland of Your Mind”*: *Criminology, Scientific Discoveries and the Criminal Process*, has been published at 4 Va. J. Crim. L. 304 (2016).
- *International Human Rights and Institutional Forensic Psychiatry: The Core Issues*, has been published in The Use of Coercive Measures in Forensic Psychiatric Care: Legal, Ethical and Practical Challenges 9 (Profs. [Birgit Völlm](#) & [Norbert Nedopil](#) eds.) (Springer 2016).
- *“Infinity Goes up on Trial”*: *Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities*, published at 16 Queensland University of Technology Law Review 106 (2016), was featured by The Champion (the publication of the National Association of Criminal Defense Lawyers), (Dec. 2016), at 55, in its [Getting Scholarship into Court](#) project as “scholarship ... especially useful to courts and practitioners,” see <https://www.nacdl.org/champion.aspx?id=44910>.
- *“Merchants and Thieves, Hungry for Power”*: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, has been published at 73 Wash. & Lee L. Rev. 1501 (2016).
- with NYLS Adjunct Prof. Heather Ellis Cucolo, *“Tolling for the Aching Ones Whose Wounds Cannot Be Nursed”*: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, has been published at 20 J. Gender, Race & Justice 431 (2017). On February, 25, 2017, we

presented a version of this article as the keynote at a symposium at Iowa Law School – *Structurally (Un)sound: Implicit Unfairness in Legal Procedure and Protocol, and Disproportionate Impacts on Marginalized Groups* – that marked the 20<sup>th</sup> anniversary of this journal.

- with Cucolo, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, will be published in an upcoming issue of the Florida Journal of Law and Public Policy.
- with Weinstein, “*Said I, ‘But You Have No Choice’*”: *Why a Lawyer Must Ethically Honor a Client’s Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, has been published at 15 Cardozo Public L., Pol’y & Ethics J. 73 (2016-2017). He presented a version of this article as the keynote of the yearly conference of the National Association of Rights, Protection and Advocacy (co-sponsored by Disability Rights Maine), in Portland, ME, Sept. 9, 2017
- with Lynch, “*To Wander Off in Shame*”: *Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their*

*Treatment of Persons with Mental Disabilities*, will be published as a chapter in *Power, Humiliation and Violence* (Prof. Daniel Rothbart [George Mason U.] ed. 2017) (Palgrave MacMillan).

- with Lynch, “*Had to be Held down by Big Police*”: *A Therapeutic Jurisprudence Perspective on Interactions between Police and Persons with Mental Disabilities*, will be published in an upcoming issue of Fordham Urban Law Journal.
- with Lynch, “*Life’s Hurried Tangled Road*”: *A Therapeutic Jurisprudence Analysis of Why Dedicated Counsel Must Be Assigned to Represent Persons with Mental Disabilities in Community Settings*, has been published at 35 Behav. Sci. & L. 353 (2017). On April 15, 2016, the authors presented a version of that paper to the Rocky Mountain Psychological Association.
- with Lynch, “*She’s Nobody’s Child/The Law Can’t Touch Her at All*”: *Seeking to Bring Dignity to Legal Proceedings Involving Juveniles* (with Alison J. Lynch, Esq.), will be published at 56 Fam. Ct. Rev. – (2018).
- with Weinstein, “*Who’s Pretending to Care For Him?*” *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives*

*Persons with Mental Disabilities the Right to Continuity of Care*, will be published in Wake Forest J. L. & Pol’y (2018)

- with Lynch, “*My Brain Is So Wired*”: *Neuroimaging’s Role in Competency Cases Involving Persons with Mental Disabilities*, will be published in Boston U. Pub. Int. L. J. (2018). The authors presented an earlier version of this article at the 2016 conference of the American Society of Criminology, New Orleans, LA. At the same conference, the two authors presented another paper, *A Therapeutic Jurisprudence Model of Representing Criminal Defendants with Traumatic Brain Injury*, and two other papers on two panels: “*To Show That ... the Courts Are on the Level*”: *Addressing Questions of Competency and Adequacy of Counsel in Mental Health Courts*, and “*The Foreign Sun, It Squints Upon/A Bed That is Never Mine*”: *How Domestic Sex Offender Policies Violate International Human Rights Laws and Ethical Standards*. At the same conference, He taped a podcast -- <http://www.beforetheabstract.com/2017/03/16/michael-perlin-maybe-they-brought-in-the-wrong-priest/> (about a case he litigated in the 1970s when he was a Public Defender that led to the creation of the Division of



Mental Health Advocacy in NJ, involving someone who had been held in maximum security at the state hospital for the “criminally insane” for 27 years without a hearing and was factually innocent of the underlying charge). That podcast has also been released on the “Story Collider” podcast channel, see

<http://www.storycollider.org/stories/2017/3/31/observational-error-qi-lin-michael-perlin>

- The 2017 edition of his treatise, with Cucolo, *Mental Disability Law: Civil and Criminal* (3d ed. Lexis Law Publishing), has been published.
- The third edition of his casebook, *Mental Disability Law: Cases and Materials*, has been published (Carolina Academic Press 2017).
- with Cucolo, *SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION*, has been published by Temple University Press (2017). On March 7, 2017, the authors presented on this book to the Forensic Psychiatry Grand Rounds Seminar at the University of Pennsylvania Medical School.
- with Mehgan Gallagher, *Why a Disability Rights Tribunal Must Be Premised on Therapeutic Jurisprudence Principles*,

will be published in *Psychological Injury & L.* (2017) .

- with Prof. Eva Sezli (Arizona State U.), *Commentary on Article 14 of the Convention on the Rights of Persons with Disabilities*, will be published in *Commentary on UN Convention on the Rights of Persons with Disabilities* (Oxford University Press, 2017) (Ilias Bantekas, Michael A. Stein & Dimitris Anastasiou co-editors).
- In March-April, 2017, He spent three weeks in Australia as the Distinguished Visiting Scholar at RMIT Law School in Melbourne. While there, he did the following:
  - Spent three days observing problem-solving courts (Neighborhood Justice Center; Mental Health Court; Koori (Aboriginal) Court), spent a day observing a prison unit for inmates with intellectual disabilities, and had multiple meetings with judges of the Magistrates Court, District Court, Federal Court, and Supreme Court.
  - Presented six papers. These included:
    - A lecture to the RMIT faculty, “*To Wander Off in Shame*”:

*Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their Treatment of Persons with Mental Disabilities*,

- A lecture to the Melbourne Magistrates; Court, “*Infinity Goes up on Trial*”: *Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities*,
- A lecture to the Victoria Legal Aid Society (co-sponsored by RMIT), “*Have You Seen Dignity?*”: *The Story of the Development of Therapeutic Jurisprudence*,
- A “master class” at Melbourne University’s School of Social and Political Science, “*Temptation’s Page Flies out the Door*”: *Navigating Complex Systems of Disability and the Law*,
- A panel discussion at the Hallmark Disability Research Initiative of Melbourne Law School, on *Sex, Sexuality, and the Rights of People with Disability*, and



Professor of Law & Project Leader, Project on Health Law, Policy & Ethics, Emory University School of Law, submits the following:

### **Publications**

*Protecting Injured Workers' Medical Privacy: HIPAA's Privacy Rule, Workers' Compensation, and "Symbiotic Federalism,"* EMORY L. J. (forthcoming 2018).

*Animals as Living Accommodations,* 24 ANIMAL L. REV. (forthcoming 2017) (symposium).

### **Presentations**

Panel, *Disability and Public Health Emergencies*, Defining the Gap, Minding the Gap: Law and Practice in Public Health Emergencies, Emory Law Journal's Thrower Symposium, Atlanta, Georgia (Feb. 2, 2017)

Panel (Moderator), *Bridging the Gap, Minding the Gap: Law and Practice in Public Health Emergencies*, Emory Law Journal's Thrower Symposium, Atlanta, Georgia (Feb. 2, 2017)

Panel (Discussant), *Health Law Works in Progress*, Section on Law, Medicine & Health Care; Association of American Law Schools Annual Meeting, San Francisco, California (Jan. 5, 2017)

Panel (Organizer and Moderator), *Animals as Living Accommodations*, Section on Animal Law, Association of American Law Schools Annual

Meeting, San Francisco, California (Jan. 6, 2017)

Panel, *Animal Protection and the Myth of AWA Preemption*, AWA Interaction with Other Laws, The Animal Welfare Act at Fifty, Harvard Law School, Cambridge, Massachusetts (Dec. 2, 2016)

Workshop Participant, *Animal Protection and the Myth of AWA Preemption*, The Animal Welfare Act at Fifty, Harvard Law School, Cambridge, Massachusetts (Dec. 1, 2016)

Panel, *Without Work and Medical Privacy: HIPAA's Privacy Rule, Workers' Compensation, and the Challenges of Federalism*, Southeastern Association of Law Schools Annual Meeting, Boca Raton, Florida (Aug. 2016)

Participant, *Works in Progress, Without Work and Medical Privacy: HIPAA's Privacy Rule, Workers' Compensation, and the Challenges of Federalism*, Southeastern Association of Law Schools Annual Meeting, Boca Raton, Florida (Aug. 2016)

Panel (Discussant), *Works in Progress: New Voices in Labor and Employment Law*, Southeastern Association of Law Schools Annual Meeting, Boca Raton, Florida (Aug. 2016)

### **Other**

American Law Institute, Elected Member 2016

*AALS Section on Animal Law*, Immediate Past-Chair 2017

*AALS Section on Law, Medicine & Health Care*, Past-Chair 2016  
*Emory Global Health Institute*, Appointed Faculty Fellow, 2017-

*Faculty Senate*, Elected Law School Representative, 2017-  
*University Senate*, 2017-  
*University Senate Governance Committee*, Appointed Member, 2017-

The Health Law, Policy & Ethics Project co-hosted (with the Human Toxicology Project Consortium) the national symposium *Exploring New Technologies in Biomedical Research*.

### **Christopher Slobogin,**

Milton R. Underwood Chair in Law, Director of Criminal Justice Program, Vanderbilt Law School, passes along the following: The American Bar Association's Criminal Justice Mental Health Standards, first promulgated in the 1980s, have been revised to reflect new legal, clinical and empirical developments. Drafted by a multi-disciplinary Task Force chaired by Christopher Slobogin, Vanderbilt University Law School, they were adopted by the ABA's House of Delegates in August, 2016.

See [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/mental\\_health\\_standards\\_2016.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf). A description and analysis of their content, governing topics such as the



role of lawyers, mental health professionals, judges and police in criminal cases involving people with mental disability, competency and insanity issues, sentencing and imprisonment of people with mental disability, and evaluation and admissibility issues, is found at Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTING CONST. L.Q. 1 (2016), available at <https://ssrn.com/abstract=2884925>.

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