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"There's Voices in the Night Trying to Be Heard"

THE POTENTIAL IMPACT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES ON DOMESTIC MENTAL DISABILITY LAW

Michael L. Perlin[†] *& Naomi M. Weinstein*[††]

INTRODUCTION

We cannot consider the impact of anti-discrimination law on persons with mental disabilities without a full understanding of how sanism[1] permeates all aspects of the legal system—in judicial opinions, legislation, the role of lawyers, juror decision-making—and the entire fabric of American society.[2] Notwithstanding nearly thirty years of experience under the Americans with Disabilities Act,[3] and an impressive corpus of constitutional case law and state statutes,[4] the attitudes of judges, jurors, and lawyers often reflect the same level of bigotry

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[1] *See infra* text accompanying notes 41–54 for definition and explanation.

[2] In this article, we also will make reference to Canadian developments, which parallel U.S. developments in many important ways, but diverge in others.

[3] 42 U.S.C. §§ 12101–12213 (1990).

[4] *See* Michael L. Perlin, "They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education, 54 ST. LOUIS U. L.J. 857, 857 n.2 (2010) [hereinafter Perlin, "They Keep It All Hid"] (listing cases). For the Canadian and Australian perspectives, see Ravi Malhotra, The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States, 33 MANITOBA L.J. 1, 25 (2009) [hereinafter Malhotra (listing cases). *See generally* Ron McCallum & Hannah Martin, A Forgotten Cohort: Citizenship through Work and Persons with Disabilities, 41 QUEEN'S L.J. 317 (2016).

that defined this area of law a half century ago.[5] The reasons for this are complex and, to a great extent, flow from centuries of prejudice—often hidden and socially acceptable prejudice[6]—that has persisted in spite of prophylactic legislative and judicial reforms, and a seemingly (on the surface) significant uptick in public awareness.[7] One of the co-authors has railed multiple times about the "irrational," "corrosive," "malignant," "pervasive," "vicious," and "ravaging" effects of sanism, but its "pernicious power" still poisons all of mental disability law.[8] And scholars in other disciplines are now exploring the impact of that poison on daily social interactions as well.[9]

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[5] *See generally* Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003) [hereinafter Perlin, *Lepers and Crooks*] (discussing how sanism affects all participants in the judicial system).

[6] *See generally* MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL (2000) (explaining why this prejudice is often hidden from view).

[7] On how an awareness of the power of sanism is necessary in any consideration of any aspect of the mental disability law system, see Perlin, *"They Keep It All Hid"*, *supra* note 4, at 860–61.

[8] *See, e.g.*, Michael L. Perlin, *"And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 750 (2005) [hereinafter Perlin, *Best Friend*] ("irrational"); Michael L. Perlin, *"Life Is In Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315, 346 (2003) [hereinafter Perlin, *Life Is In Mirrors*] ("ravaging"); Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1, 25 (2003) [hereinafter Perlin, *She Breaks*] ("malignant and corrosive"); Michael L. Perlin & 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 Policing Rape Complaints*, J. GENDER, RACE & JUST., Summer 2017, at 431, 451 [hereinafter Perlin & Cucolo, *Tolling for the Aching Ones*] ("malignant and corrosive"); Michael L. Perlin, *"Everybody Is Making Love/Or Else Expecting Rain": Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 502 (2008) [hereinafter Perlin, *Making Love*] ("corrosive"); Michael L. Perlin, *"Things Have Changed": Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 541 (2002) [hereinafter Perlin, *Things Have Changed*] ("pernicious power"); Michael L. Perlin, *"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*, 54 AM. CRIM. L. REV. 477, 510 (2017) [hereinafter Perlin, *God Said*] ("vicious"); Michael L. Perlin & Alison J. Lynch, *"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299, 306 (2016) [hereinafter Perlin & Lynch, *Mr. Bad Example*] ("pervasive stigma"). On the "corrosive" impact of sanism on criminal sentencing of defendants with post-traumatic stress disorder, see Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5*, 2015 UTAH L. REV. 881, 887–88 (2015). On its "corrosive" impact on the entire criminal trial process, see Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALBANY GOV'T L. REV. 381, 395 (2015) [hereinafter Perlin & Schriver, *Drugs at Your Command*].

[9] *See, e.g.*, Greg Procknow, *Silence or Sanism: A Review of the Dearth of Discussions on Mental Illness in Adult Education*, 29 NEW HORIZONS ADULT EDUC. & HUM. RESOURCE DEV. 6–7 (2017); Stephanie LeBlanc & Elizabeth Anne Kinsella, *Toward Epistemic Justice: A Critically Reflexive Examination of 'Sanism' and Implications for*

Certainly, the passage of the Americans with Disabilities Act (ADA) in 1990[10]—far and away the broadest anti-discrimination law ever enacted on behalf of this population—gave great hope at that time. Commentators then raved about its "breathtaking promise"[11] and characterized it as "the most important civil rights act passed since 1964,"[12] and the "Emancipation Proclamation for those with disabilities."[13] It was, or so many of us thought, "without question, Congress' most innovative attempt to address the pervasive problems of discrimination against citizens with physical and mental disabilities by providing, in the words of a congressional committee, 'a clear and comprehensive national mandate for the elimination [of] discrimination against individuals with disabilities.'"[14]

We remain generally optimistic, though our optimism has been somewhat tempered both by subsequent court decisions[15]

Knowledge Generation, 10 STUD. SOC JUST. 59 (2016); Tonette S. Rocco, *Sanism, Black Dogs Barking, and Mental Illness*, 29 NEW HORIZONS ADULT EDUC. & HUM. RESOURCE DEV. 1, 1–2 (2017); MAD MATTERS: A CRITICAL READER IN CANADIAN MAD STUDIES (Brenda A. LeFrançois, Robert Menzies & Geoffrey Reaume eds., 2013); Jennifer Poole et al., *Sanism, 'Mental Health,' and Social Work/Education: A Review and Call to Action*, 1 INTERSECTIONALITIES 20, 21 (2012); Marina Morrow & Julia Weisser, *Towards a Social Justice Framework of Mental Health Recovery*, 6 STUD. SOC JUST. 27, 28 (2012); Essya M. Nabbali, *A "Mad" Critique of the Social Model of Disability*, 9 INT'L J. DIVERSITY IN ORGAN., COMMUNITIES & NATIONS 1 (2009); Brenda A. LeFrancois & Vicki Coppock, *Psychiatrist Children and Their Rights: Starting the Conversation*, 28 CHILD. & SOC'Y 165, 166 (2014); PhebeAnn M. Wolframe, *The Madwoman in the Academy, or, Revealing the Invisible Straightjacket: Theorizing and Teaching Saneism and Sane Privilege*, 33 DISAB. STUD. Q. NO. 1 (2012); for recent considerations of sanism in a variety of social policy contexts, *see generally* CRITICAL INQUIRIES FOR SOCIAL JUSTICE IN MENTAL HEALTH (Marina Morrow & Lorraine Halinka Malcoe eds., 2017).

[10] Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012).

[11] Bonnie Milstein et al., *The Americans With Disabilities Act: A Breathtaking Promise for Persons with Mental Disabilities*, 24 CLEARINGHOUSE REV. 1240, 1240 (1991).

[12] Kimberly A. Ackourey, *Insuring Americans With Disabilities: How Far Can Congress Go To Protect Traditional Practices?*, 40 EMORY L.J. 1183, 1183 n.1 (1991) (quoting Kent Jenkins, Jr., *Spotlight Finds Hoyer*, WASH. POST (May 28, 1990)).

[13] *Id.* (quoting AMERICANS WITH DISABILITIES ACT OF 1990: SUMMARY AND ANALYSIS, SPECIAL SUPPLEMENT (BNA), at S-5).

[14] Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 218–19 (2000), (quoting H.R. REP. NO. 101-485, pt. 1, at 3 (1990)). The United States is not the only nation to have passed such anti-discrimination legislation. By way of example, the Canadian Charter of Rights and Freedoms was amended in 1981 so as to include, as a protected category, persons with physical and mental disability. Canadian Charter of Rights and Freedoms, sec. 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (UK), 1982. For an evaluation of the similarities and differences in the two nations' laws, see Arlene S. Kanter, *A Comparative View of Equality under the UN Convention on the Rights of Persons with Disabilities and the Disability Laws of the United States and Canada*, 32 WINDSOR Y.B. ACCESS JUST., no. 2, 2015, at 65, 88–89 (2015).

[15] The ADA Amendments Act of 2008 (ADAAA) was enacted expressly to legislatively overrule the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), by expanding the statutory definition of "disability" within the ADA, and by seeking to reinvigorate "regarded as" prong in the ADA's definition of disability. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at

and by efforts in Congress to cut back on the scope of the ADA.[16] By example, the titles of some of the articles about the ADA by one of the co-authors and others reflect that diminution of optimism.[17] Notwithstanding this, we believe that the ADA still can and must be relied upon as a source of rights for persons with mental disabilities in multiple discrete areas of law and policy.[18]

At the time at which mental disability law scholars were beginning to focus on the ADA, few considered the dim-on-the-horizon potential redemptive influence of international human rights law. Eric Rosenthal and Leonard Rubenstein had written

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42 U.S.C.A. §§ 12103 and 12205a, amending 29 U.S.C. § 705, 42 U.S.C.A. §§ 12101, 12102, 12111 to 12114, 12201, and 12210, re-designating 42 U.S.C. §§ 12206 to 12213, and enacting provisions set out as notes under 29 U.S.C. § 705 and 42 U.S.C. § 12101.); *see also* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, at § 11-4, at 11-124 to 11-125 (3d ed. 2018) [hereinafter PERLIN & CUCOLO, MENTAL DISABILITY LAW]. The ADA Amendments are discussed carefully in Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLAMETTE L. REV. 357 (2009); Stephen Befort, *Let's Try this Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the 'Regarded As' Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993 (2010).

[16] *See, e.g.*, Carlos Ballesteros, *House Votes to Gut the Americans With Disabilities Act to Nip 'Abusive Lawsuits,'* NEWSWEEK (Feb. 15, 2018), http://www.newsweek.com/house-republicans-americans-disabilities-act-civil-rights-808106 [https://perma.cc/DS4D-SNCR].

[17] *See, e.g.*, Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15 (1993); Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997) [hereinafter Perlin, *Make Promises*]; Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53 (2000); Michael L. Perlin, *"What's Good Is Bad, What's Bad Is Good, You'll Find out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act* (*and* Olmstead v. L.C.) *Anything More than "Idiot Wind"?*, 35 U. MICH. J.L. REFORM 235 (2002); Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.C.L. L. REV. 133, 133 (2009); Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 205 (2016); Thomas J. Auner, *For the Protection of Society's Most Vulnerable, the ADA Should Apply to Arrests*, 49 LOY. L.A. REV. 335, 335 (2016).

[18] *See, e.g.*, 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, 297–99 (2014) [hereinafter Perlin & Lynch, *Sexless Patients*] (sexual autonomy); Michael L. Perlin & Naomi M. Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 30–33 (2014) [hereinafter Perlin & Weinstein, *Friend to the Martyr*) (deinstitutionalization and community treatment); Naomi M. Weinstein & Michael L. Perlin, *"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*, 8 WAKE FOREST J.L. & POL'Y 455, 457–58 (2018) (right to continuity of care); Perlin & Schriver, *Drugs at Your Command*, *supra* note 8, at 403; (availability of potential pre-trial alternatives in the case of currently-incompetent criminal defendants). Similarly, Canadian scholars have critiqued the Supreme Court of Canada as remaining "remedially timid" in its interpretations of the Charter's disability anti-discrimination provision. *See* Malhotra, *supra* note 4, at 27 (quoting Dianne Pothier, *Legal Developments in the Supreme Court of Canada Regarding Disability*, *in* CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW 316 (Dianne Pothier & Richard Devlin eds., 2006)).

their groundbreaking piece,[19] *International Human Rights Advocacy Under the "Principles For The Protection Of Persons With Mental Illness,"*[20] in 1993, but it had been barely mentioned in the law journals—only cited seven times prior to 2002.[21] When Rosenthal and Rubenstein first illuminated how the United Nations' Mental Illness (MI) Principles[22]—in many ways the forerunner of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD)—came "from an individualistic, libertarian perspective that emphasizes restrictions on what the state can do to a person with mental illness,"[23] they inspired lawyers, advocates, professors, and progressive mental health professionals to begin thinking seriously about the intersection between international human rights law and mental disability law.[24]

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[19] MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 3–19 (2012) [hereinafter PERLIN, INTERNATIONAL HUMAN RIGHTS].

[20] Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness*," 16 INT'L J.L. & PSYCHIATRY 257 (1993) [hereinafter Rosenthal & Rubenstein].

[21] Per WESTLAW search, Feb. 12, 2019. *See* Pamela Schwartz Cohen, *Psychiatric Commitment in Japan: International Concern and Domestic Reform*, 14 UCLA PAC. BASIN L.J. 28, 35 (1995); Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355 (1996); Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117 (2000); Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. 1 (2000); Angelika C. Moncada, *Involuntary Commitment and the Use of Seclusion and Restraint in Uruguay: A Comparison with the United Nations Principles for the Protection of Persons with Mental Illness*, 25 U. MIAMI INTER-AM. L. REV. 589 (1994); Allyn R. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257 (1996); Allyn R. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J.L. & MED. 479 (1999).

[22] The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care are widely referred to as the "MI Principles." *See, e.g.*, Rosenthal & Rubenstein, *supra* note 20, at 259; *see also* G.A. Res. 46/119, annex, Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (Dec. 17, 1991).

[23] Rosenthal & Rubenstein, *supra* note 20, at 260. The MI Principles subsequently became "the centrepiece of the human rights based approach to mental health care" in Australia. *See* Neil Rees, *International Human Rights Obligations and Mental Health Review Tribunals*, 10 PSYCHIATRY, PSYCHOL. & L. 33, 34–38 (2003); *see also* Terry Carney, *Mental Health in Postmodern Society: Time for New Paradigms?*, 10 PSYCHIATRY, PSYCHOL. & L. 12, 14 (2003). Response to the Principles was not entirely positive. *See, e.g.*, Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT'L L. & COM. 405, 407 (2007) (criticizing MI Principles for not being sufficiently protective of the rights of persons with psychosocial disabilities, especially in the context of the right to refuse treatment); T.W. Harding, *Human Rights Law in the Field of Mental Health: A Critical Review*, 101 ACTA PSYCHIATRICA SCANDINAVICA 24, 24 (2000) (discussing how MI Principles are "basically flawed," also in the context of the right to refuse treatment). For a discussion of criticisms, *see* H. Archibald Kaiser, *Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State*, 17 HEALTH L.J. 139, 160 (2009).

[24] This led to a symposium at New York Law School in 2002 on *International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary*, the first such program ever put on at any US-based law school. *See*

Disability rights took center stage at the United Nations in the most significant historical development in the recognition of the human rights of persons with mental disabilities: the drafting and adoption of a binding international disability rights convention.[25] In late 2001, the United Nations General Assembly established an Ad Hoc Committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities."[26] The Ad Hoc Committee drafted a document over the course of five years and eight sessions, and the new Convention on the Rights of Persons with Disabilities (CRPD)[27] was adopted in December 2006 and opened for signature in March 2007.[28] It entered into force, thus becoming legally binding on State parties, on May 3, 2008, thirty days after the twentieth ratification.[29] One of the hallmarks of the process that led to the

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Symposium, *International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 340 (2002). Presenters at this conference included Rosenthal, Krassimir Kanev, "a human rights advocate with the Bulgaria Helsinki Committee", Gabor Gombos, head of the most important psychiatric survivor organization in Hungary, and Eva Szeli, then "Director of European Operations at MDRI's Budapest office." *See id.* at 346–48. Professor Szeli subsequently co-authored with the co-author of this article and three others the first casebook on the intersection between mental disability law and international human rights as well as other articles about the CRPD. *See* MICHAEL L. PERLIN ET AL, INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (2006); *see also* Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, *in* MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 88 (Michael Dudley et al. eds., 2012) [hereinafter Perlin & Szeli, *Evolution and Contemporary Challenges*]; Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the New Convention*, *in* UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: MULTIDISCIPLINARY PERSPECTIVES 241 (Jukka Kumpuvuori & Martin Scheinin eds., 2010) [hereinafter Perlin & Szeli, *Promise of the New Convention*]. Major articles based on presentations at that conference include Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 469 (2002), and Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537 (2002).

[25] On the singular role of this Convention, see Frederic Megret, *The Disabilities Convention: Toward a Holistic Concept of Rights*, 12 INT'L J. HUM. RTS. 261 (2008); Frederic Megret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RIGHTS Q. 494 (2008) [hereinafter Megret, *Disability Rights*]; Perlin & Szeli, *Evolution and Contemporary Challenges, supra* note 24, at 81; Perlin & Szeli, *Promise of the New Convention*, *supra* note 24, at 243; Michael L. Perlin, *"A Change Is Gonna Come": The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483 (2009) [hereinafter Perlin, *A Change is Gonna Come*].

[26] G.A. Res. 56/168, ¶ 1 (Dec. 19, 2001).

[27] G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter CRPD].

[28] *Id.*

[29] On the twentieth ratification, *see* Press Release, *With 20 Ratifications, Landmark Disability Treaty Set to Enter Into Force on 3 May*, U.N. Press Release HR/4941 (Apr. 3, 2008), http://www.un.org/News/Press/docs/2008/hr4941.doc.htm [https://perma.cc/

publication of the CRPD was the participation of persons with disabilities and the clarion cry, "Nothing about us, without us."[30]

This has led commentators to conclude that "the CRPD is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[31] As we discuss,[32] this Convention is the most revolutionary international human rights document ever ratified that applies to persons with disabilities.[33] Our hope is that the CRPD serves as a vehicle that will finally extinguish the toxic stench of sanism that permeates all levels of society.[34] There is certainly precedent for international human rights treaties and conventions to be used in domestic courts.[35]

C2RV-BKP5]; *see* Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, HUM. RTS. BRIEF, Jan. 2007, at 37, 44; Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1126 (2007). As of the time of the preparation of this paper, 177 nations have ratified the Convention. U.N. Dep't of Econ. & Soc. Affairs, *Convention on the Rights of Persons with Disabilities (CRPD)* https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html [https://perma.cc/QH4S-9PBC].

[30] Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 4 n.15 (2008) ("Statement by Hon Ruth Dyson, Minister for Disability Issues, New Zealand Mission to the UN, for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disability, 30 March 2007: 'Just as the Convention itself is the product of a remarkable partnership between governments and civil society, effective implementation will require a continuation of that partnership.' The negotiating slogan 'Nothing about us without us' was adopted by the International Disability Caucus.").

[31] *Id.* at 4. *See generally* Michael L. Perlin & Eva Szeli, *Liberty and Security of the Person*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 402 (Ilias Bantekas et al. eds., 2018) [hereinafter COMMENTARY ON UN CONVENTION] (discussing Article 14).

[32] *See infra* text accompanying notes 83–146.

[33] Perlin & Szeli, *Evolution and Contemporary Challenges*, *supra* note 24, at 81; PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19 , at 24.

[34] "[T]he dynamics of sanism and pretextuality are a toxic combination that potentially weakens any enforcement opportunities of the CRPD." Elayne E. Greenberg, *Overcoming Our Global Disability in the Workforce: Mediating the Dream*, 86 ST. JOHN'S L. REV. 579, 593 (2012).

> "Pretextuality" means that courts regularly accept (either implicitly or explicitly) testimonial dishonesty, countenance liberty deprivations in disingenuous ways that bear little or no relationship to case law or to statutes and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."

PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 15, § 2-3, at 2-10 to 2-11(citing in part Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131, 133 (1991)).

[35] *See, e.g.*, Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980), *aff'd in part & rev'd in part*, 651 F.2d 96 (2d Cir. 1981) (citing to the United Nations Standard Minimum Rules for the Treatment of Prisoners in cases involving the "double bunking" of inmates). *But see* Flores v. S. Peru Copper Corp., 414 F.3d 233, 257–59 (2d Cir. 2003) (holding United Nations' Convention on the Rights of the Child (CRC) did not convey a

This article considers whether the CRPD, ratified or not, is likely to eradicate—or, at least, seriously reduce—domestic sanism. This article proceeds in the following parts. Part I discusses our sanist past, while Part II discusses our sanist present. Part III considers how the CRPD has the greatest potential for combating sanism and changing social attitudes. In doing so, this Part looks at five universal core factors that must be considered when evaluating the impact of the CRPD.[36] Part IV draws on the tools of therapeutic jurisprudence when evaluating the impact of the CRPD.[37] Finally, this article offers some brief and modest conclusions.

The title of this paper comes from a song from Bob Dylan's 1997 album, *Time Out of Mind*. The song—*Million Miles*[38]—has been termed by Dylan chronicler Oliver Trager as a "jaded, late-century, person-to-person confession of alienation,"[39] and that is probably about right. The line that starts this paper, "There's voices in the night trying to be heard," reflects Dylan's song-persona's sense of loneliness as he sings "I'm tryin' to get closer but I'm still a million miles from you." We use it here, though, as a metaphor for the CRPD's role in any inquiry into this aspect of disability law. Persons with disabilities—always marginalized, always ignored, always trivialized, all through sanism—have the "voices in the night trying to be heard."[40] Perhaps the CRPD will redemptively allow all of us to hear those voices.

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private right of action to plaintiffs as a matter of law). In at least one case, however, while noting that the non-ratified Convention was not binding on U.S. courts, the Massachusetts Supreme Judicial Court "read the entire text of the convention, . . . [and in an adoption case] conclude[d] that the outcome of the proceedings in [that] case [were] completely in accord with principles expressed therein." *In re* Adoption of Peggy, 767 N.E.2d 29, 37–38 (Mass. 2002). *See generally* Perlin & Schriver, *Drugs at Your Command*, *supra* note 8, at 387–88; Michael L. Perlin & Henry A. Dlugacz, *"It's Doom Alone That Counts": Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?*, 27 BEHAV. SCI. & L. 675, 688–90 (2009).

[36] *See* Perlin, *A Change is Gonna Come*, *supra* note 25, at 488.

[37] "Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation on mentally disabled individuals." It requires (1) studying the role of the law as a therapeutic agent; (2) recognizing that substantive rules, legal procedures, and lawyers' roles may have either therapeutic or anti-therapeutic consequences; and (3) questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due-process principles. Perlin, *She Breaks*, *supra* note 8, at 30 n.233; *see also infra* text accompanying notes 188–223.

[38] *Million Miles*, Bob Dylan (1997), http://www.bobdylan.com/songs/million-miles [http://perma.cc/Z7RS-DS9K].

[39] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 429 (2004).

[40] *See, e.g.*, PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19; *see also* RICHARD THOMAS, WHY BOB DYLAN MATTERS 188 (2017) (characterizing *Million Miles* as a song that "confront[s] love that is lost, but can't be forgotten.").

I. OUR SANIST PAST[41]

Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.[42]

> It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses.[43] Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial and sentencing).[44]

It has affected us for generations, well before it was ever identified or named.

Judges are not immune from sanism. "[E]mbedded in the cultural presuppositions that engulf us all,"[45] judges take deeper refuge in heuristic thinking and flawed, non-reflective "ordinary common sense," both of which continue the myths and stereotypes of sanism.[46] They "reflect and project the conventional morality of the community," and "judicial decisions in all areas of [civil and criminal] mental disability law continue to reflect and perpetuate sanist stereotypes."[47] Their language demonstrates bias against

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[41] This section was largely adapted from Michael L. Perlin, "*Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 14–19 (1999).

[42] *See* Michael L. Perlin, *On "Sanism*,*"* 46 SMU L. REV. 373, 374–75 (1992) [hereinafter Perlin, *Sanism*]. The classic study of these prejudices is GORDON W. ALLPORT, THE NATURE OF PREJUDICE 7, 14–15 (1954).

[43] Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 910 (2009). There is a robust literature about sanism in other nations as well. *See, e.g.*, Lora Patton, *"These Regulations Aren't Just Here to Annoy You:" The Myth of Statutory Safeguards, Patient Rights and Charter Values in Ontario's Mental Health System*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 9, 22 (2008); H. Archibald Kaiser, Conway*: A Bittersweet Victory for Not Criminally Responsible Accused*, 75 C.R. 1–2(2010); Aaron A. Dhir, *Relationships of Force: Reflections on Law, Psychiatry and Human Rights*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 103, 108–09 (2008) [hereinafter Dhir, *Relationships of Force*].

[44] Perlin, *Lepers and Crooks*, *supra* note 5, at 684.

[45] Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991).

[46] Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 67 (1990); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier? 20* NYU REV. L. & SOC. CHANGE 517, 539 (1993–1994) (on how sanist myths pervade judicial decision making). The Supreme Court has been guilty of this behavior for over ninety years. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("[T]hree generations of imbeciles are enough"). For a refutation of *Buck*, see generally PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL (2008).

[47] *See* Perlin, *Sanism*, *supra* note 42, at 400–04.

individuals with mental disabilities[48] and contempt for the mental health professions.[49] "Courts often appear impatient with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve."[50] Thus, a popular sanist myth is that "[m]entally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint."[51] We assume that "[m]entally ill individuals are presumptively incompetent to participate in 'normal' activities [and] to make autonomous decisions about their lives (especially in areas involving medical care)."[52]

At its base, sanism is irrational.[53] Any investigation of the roots or sources of mental disability jurisprudence must factor in society's irrational mechanisms that govern our dealings with individuals with mental disabilities.[54] The entire legal system

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[48] Although, in recent years, what was commonplace for decades—*see* Corn v. Zant, 708 F.2d 549, 569 (11th Cir. 1983) (defendant referred to as a "lunatic"); Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974)) (using "lunatic"); Brown v. People, 134 N.E.2d 760, 762 (Ill. 1956) (trial judge asked defendant, "You are not crazy at this time, are you?"); Pyle v. Boles, 250 F. Supp. 285, 288 n.3 (N.D. W. Va. 1966) (trial judge accused habeas petitioner of "being crazy"); *cf.* State v. Penner, 772 P.2d 819 (Kan. 1989) (unpublished disposition), at *3 (witnesses admonished not to refer to defendant as "crazy" or "nuts")—has largely abated, there are still some recent examples to consider, *see, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (using "lunatic"); United States v. Garza, 751 F.3d 1130, 1136 (9th Cir. 2014) ("Even a mentally deranged defendant is out of luck if there is no indication that he failed to understand or assist in his criminal proceedings."); s*ee also* Michelle Armstrong, Note, *Addressing Defendants Who Are "Crazy, But Not Crazy Enough": How* Hall v. Florida *Changes the Death Penalty for Mentally Ill Defendants*, 47 U. TOL. L. REV. 743, 744–45 (2016).

[49] *See* Commonwealth v. Musolino, 467 A.2d 605, 614 (Pa. Super. Ct. 1983) (reversible error for trial judge to refer to expert witnesses as "headshrinkers"). *Compare* State v. Percy, 507 A.2d 955, 956–57 n.1 (Vt. 1986) (reversing a conviction where prosecutor, in closing argument, referred to expert testimony as "psycho-babble"), *with* Commonwealth v. Cosme, 575 N.E.2d 726, 731 (Mass. 1991) (not error where prosecutor referred to defendant's expert witnesses as "a little head specialist" and a "wizard"). *See generally* Douglas Mossman & Marshall B. Kapp, *"Courtroom Whores"?—or Why Do Attorneys Call Us?: Findings from a Survey on Attorneys' Use of Mental Health Experts*, 26 J. AM. ACAD. PSYCHIATRY & L. 27, 27–28 (1998).

[50] *See, e.g.*, Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 670–71 (1993) [hereinafter Perlin, *Pretexts*].

[51] Perlin, *On Sanism*, *supra* note 42, at 396; *see, e.g.*, J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (in the insanity defense trial of John W. Hinckley, charged with the attempted murder of then-President Ronald Reagan, the prosecutor suggested to jurors, "if Hinckley had emotional problems, they were largely his own fault"); *see also* State v. Duckworth, 496 So. 2d 624, 635 (La. Ct. App. 1986) (no error when juror who felt defendant would be responsible for actions as long as he "wanted to do them" not excused for cause).

[52] Perlin, *On Sanism*, *supra* note 42, at 394.

[53] *See, e.g.*, Perlin, *Lepers and Crooks*, *supra* note 5, at 684.

[54] *See generally* Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. L. REV. 599 (1989) (discussing the idiosyncratic development of the insanity defense and the interplay of psychiatry, the law, and public notions of good versus evil that underlie empirical and social myths about persons with mental illness).

makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable.[55] These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally disabled.[56] We rarely ask the most important question of all:[57] why do we feel the way we do about these people?

Consider now the deleterious impact of sanism on mental disability law, especially institutional mental disability law. We must consider carefully five universal core factors that contaminate the practice and reality of mental disability law when evaluating the impact of sanism on international human rights, one of the main focuses of this paper.[58] These core factors are:

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[55] *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (exploring the historical sources of the ideas about difference resulting in contradictory legal strategies for persons with disabilities and arguing for jurisprudence based on the ability to recognize and work with perceptible forms of difference); SANDER GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 19–35 (1985) (on the history of psychoanalysis and the stereotypes of persons with mental illness and sexuality using historical and literary examples).

[56] *See* Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 Yale L.J. 853, 868–69 (1963); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 93 n.174, 108 (1991) (on society's fears of mentally disabled persons); *id.* at 93 n.174 ("[W]hile race and sex are immutable, we all can become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here."). On the way that public fears about the purported link between mental illness and dangerousness "drive the formal laws and policies" governing mental disability jurisprudence, see John Monahan, *Mental Disorder and Violent Behavior: Perceptions and Evidence*, 47 AM. PSYCHOLOGIST 511, 511 (1992).

[57] *See* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 6–7 (1994) (asking this question); *cf.* Carmel Rogers, *Proceedings Under the Mental Health Act 1992: The Legalisation of Psychiatry*, 1994 N.Z. L.J. 404, 408 (1994) ("Because the preserve of psychiatry is populated by 'the mad' and 'the loonies,' we do not really want to look at it too closely—it is too frightening and maybe contaminating."). On how sanism is more pernicious than stigma, see Matthew Large & Christopher J. Ryan, *Sanism, Stigma and the Belief in Dangerousness*, 46 AUSTL. & N.Z. J. PSYCHIATRY 1099, 1099–1100 (2012). On how sanism may have permeated the profession and practice of social work, see Poole et al., *supra* note 9, at 24. On the role of the media in perpetuating such stigma, see generally Danielle Andrewartha, *Words Will Never Hurt? Media Stigmatisation of People with Mental Illnesses in the Criminal Justice Context*, 35 ALTERNATIVE L.J. 4 (2010). On how it explains the "double standard[s]" present in much mental health legislation, see Christopher James Ryan, *One Flu Over the Cuckoo's Nest: Comparing Legislated Coercive Treatment for Mental Illness with that for Other Illness*, 8 J. BIOETHICAL INQUIRY 87, 87–88, 91 (2011). On how writers in other disciplines beyond law and psychology have begun to embrace the concept of sanism, see PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 15, § 2-2, at 2-10 n.52.1 (citing sources).

[58] Perlin, *A Change is Gonna Come*, *supra* note 25, at 487.

1. Lack of comprehensive legislation to govern the commitment and treatment of persons with mental disabilities, and failure to adhere to legislative mandates.[59]

2. Lack of independent counsel and lack of consistent judicial review mechanisms made available to persons facing commitment and those institutionalized.[60]

3. Failure to provide humane care to institutionalized persons.[61]

4. Lack of coherent and integrated community programs as an alternative to institutionalized care.[62]

5. Failure to provide humane services to forensic patients.[63]

Failure to consider these factors means that we are doomed to continue a sanist system that ignores the basic principles of international human rights law.[64]

Sanism, along with pretextuality,[65] has controlled and continues to control modern mental disability law. Just as importantly (perhaps, more importantly), these forces continue to exert this control invisibly.[66] This invisibility means that the most important aspects of mental disability law—not just the law "on the books," but, more importantly, the law in action and

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[59] Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L L. & COM. 333, 337 (2007).

[60] *Id.* at 340.

[61] *Id.* at 343.

[62] *Id.* at 349.

[63] *Id.* at 354.

[64] *See generally* PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19.

[65] "Pretextuality describes the ways in which courts accept testimonial dishonesty—especially by expert witnesses—and engage similarly in dishonest (and frequently meretricious) decision-making. It is especially poisonous where courts accept witness testimony that shows a 'high propensity to purposely distort their testimony in order to achieve desired ends." Perlin & Cucolo, *Tolling for the Aching Ones*, *supra* note 8, at 452 (quoting Perlin, *Morality and Pretextuality*, *supra* note 34, at 133); *see also* Michael L. Perlin, *"Baby, Look Inside Your Mirror": The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 602 (2008):

> The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of "morality" and openly subvert statutory and case-law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency-to-stand-trial finding. Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.

See also PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 15, §§ 2-3 et seq. *See generally* Perlin, *supra* note 19, at 15.

[66] Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them*," 31 LOYOLA L.A. L. REV. 775, 792 (1998).

practice—remains hidden from the public discussions about mental disability law.

II. OUR SANIST PRESENT

Although we are more aware now of the impact of sanism than we were forty-five years ago when it first emerged in the legal literature, it remains unclear whether the legal system has made the sort of structural changes needed to combat sanism's power.[67] We will consider one example of sanism to illustrate this: negative attitudes toward the sexual autonomy of persons with mental disabilities, especially those who are or who have been institutionalized.[68]

The right to voluntary sexual interaction for persons with mental disabilities remains a controversial topic.[69] This population faces a double set of conflicting prejudices: on the one hand, persons with disabilities are infantilized, and on the other hand, they are demonized as being hypersexualized.[70] Notwithstanding the fact that the U.S. Supreme Court has implicitly recognized the right to sexual privacy in *Lawrence v. Texas*,[71] U.S. law has paid very little attention to the legal rights of persons with disabilities to exercise their autonomy, especially in institutionalized settings.[72] In striking down a Texas statute that criminalized certain intimate voluntary conduct engaged in by two persons of the same sex, the Court emphasized the respect the Constitution demands for the autonomy of a person making intimate and personal choices.[73] However, the Supreme Court has not directly addressed collateral sexual privacy rights, such as the individual right to purchase and use sexual aids, a question on which the federal courts have split.[74]

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[67] *See* Morton Birnbaum, *The Right to Treatment: Some Comments on Its Development*, in MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 97, 106–07 (Frank J. Ayd, Jr. ed., 1974).

[68] *See generally* MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER? (2016) [hereinafter PERLIN & LYNCH, SEXUALITY, DISABILITY AND THE LAW].

[69] Perlin, *Making Love*, *supra* note 8, at 483.

[70] Michael L. Perlin & Alison J. Lynch, *"Love is Just a Four-Letter Word": Sexuality, International Human Rights, and Therapeutic Jurisprudence*, 1 CAN. J. COMP. & CONTEMP. L. 9, 10–11 (2015) [hereinafter *Four-Letter Word*].

[71] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[72] PERLIN & LYNCH, SEXUALITY, DISABILITY AND THE LAW, *supra* note 68, at 23.

[73] *Lawrence*, 539 U.S. at 574.

[74] *Compare* Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1238, 1250 (11th Cir. 2004) (declining to extrapolate from dicta in Lawrence a right to sexual privacy triggering strict scrutiny in upholding a statutory ban on the sale of sexual devices), *with* Reliable Consultants v. Earle, 517 F.3d 738, 747 (5th Cir. 2008) (striking down statute criminalizing sale of sexual devices, finding that statute impermissibly burdened customer's due process rights to engage in private intimate conduct). The authors discuss these collateral sexual privacy rights in Michael L. Perlin & Naomi M. Weinstein, *Said I, 'But You Have No Choice':*

Sanism and pretexuality rob persons with mental disabilities of basic dignity and from exercising their right to sexuality in institutional settings.[75] Compounding the issue is the fact that there is no standard to determine the competency required to engage in sexual interaction.[76] At the most basic level, the test requires that an individual have the capacity to understand there is a decision to be made and have an ability to consent or not.[77]

How does this relate to the CRPD? The CRPD guarantees a respect for dignity, the elimination of discrimination in all matters related to interpersonal relationships, and services in the area of sexual and reproductive health.[78] "It is apparent that the preferences and decisions of persons with disabilities must be respected and promoted," including decisions about sex, sexuality and reproduction, which is a "core element of self-determination and empowerment."[79]

Beyond the right to sexual autonomy, the CRPD guarantees full access and participation for all persons with disabilities.[80] In addition to the right to dignity and nondiscrimination, the CRPD also guarantees "[f]reedom from torture or cruel, inhuman or degrading treatment or punishment, . . . [f]reedom from exploitation, violence, and abuse,"[81] and a right to protection of the "integrity of the person."[82] Thus in ensuring that persons are free from humiliating and shaming sanctions,[83] sanist attitudes are directly combatted.

Nevertheless, sanism is *not* an issue that has gone away. Although, as we have noted already, it is recognized more and more

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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, 15 CARDOZO PUB. L., POL'Y & ETHICS J. 73, 108 (2017) [hereinafter Perlin & Weinstein, *But You Have No Choice*].

[75] Perlin & Lynch, *Sexless Patients*, *supra* note 18, at 273.

[76] To a significant extent, that is because of the fluidity of such a determination. *Id.* at 264; *see also* Michael L. Perlin et al., *"Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 TOURO L. REV. 405 (2019).

[77] Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1217 (2015).

[78] CRPD, *supra* note 27, at art. 3, 23, 25.

[79] Perlin & Lynch, *Sexless Patients*, *supra* note 18, at 277.

[80] CRPD, *supra* note 27, at art. 1.

[81] *Id.* at art. 15–16.

[82] *Id.* at art. 17.

[83] Perlin & Weinstein, *Friend to the Martyr*, *supra* note 18, at 33.

by scholars[84] and, more recently, by practitioners,[85] it still remains "under the radar" for most courts in the United States.[86] In fact, there are only a handful of court cases in the United States that even mention the term sanism.[87] This is likely due to the fact that mental disability continues to be viewed as a hidden prejudice, one that is ignored by society, including the judicial system, in general.[88]

III. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A. In General[89]

We now turn to the Convention of the Rights of Persons with Disabilities (CRPD). The CRPD is unique because it is the first legally binding instrument devoted to the comprehensive protection of the rights of persons with disabilities. It not only clarifies that States should not discriminate against persons

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[84] *See, e.g.*, Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race And Mental Status*, 15 BERKELEY J. CRIM. L. 1, 19 n.63 (2010); John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REPORTER 667, 667 (2005); Deirdre M. Smith, *The Disordered And Discredited Plaintiff: Psychiatric Evidence In Civil Litigation*, 31 CARDOZO L. REV. 749, 809 n.329 (2010); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 847 (2009). A recent search of the Westlaw Law Reviews and Journals database found 200 references to "sanism" in articles other than those by the author (last searched Feb. 26, 2019). A similar search of the Westlaw International Materials Journals database found seven references to "sanism," other than those by the author (last searched Feb. 25, 2019).

[85] *See, e.g.*, Bryan Lester Dupler, *Capital Cases Involving Mental Retardation*, 93 AM. JUR. TRIALS § 26, Westlaw (database updated Mar. 2019), (discussing sanism's focus on the "characteristically irrational fear of feigned mental illness"); Gregory G. Sarno, *Adequacy of Quasi*-Miranda *Warning Prior to Involuntary Civil Commitment*, 40 AM. JUR. PROOF OF FACTS, Westlaw (database updated Feb. 2019) (citing Perlin, *Things Have Changed*, *supra* note 8).

[86] When one of the co-authors, Michael Perlin, does domestic presentations for forensic psychologists and/or forensic psychiatrists, the audience generally has some sense of what sanism is. When he spoke recently, however, to the annual conferences of both Academy of Criminal Justice Sciences and the American Society of Criminology, it was clear that it was fairly unknown to the audience. On the other hand, just about all in the audience were receptive and seemed to "get" the concept immediately. Interestingly, there has been intense interest in it on the part of advocates and mental health professionals in other nations, especially in Canada. *See, e.g.*, Dhir, *Relationships of Force*, *supra* note 43, at 108; Mary Donnelly, *Treatment for a Mental Disorder: The Mental Health Act 2001, Consent and the Role of Rights*, 40 IRISH JURIST 220, 232, 249 n.150 (2005); Kaiser, *supra* note 43; Oliver Lewis, *Advancing Legal Capacity Jurisprudence*, 6 EUR. HUM. RTS. L. REV. 700, 700–01 (2011); Morrow & Weisser, *supra* note 9, at 34; Nabbali, *supra* note 9; LeFrancois & Coppock, *supra* note 9, at 166; Patton, *supra* note 43, at 22; Poole et al., *supra* note 9, at 27.

[87] A Westlaw search for all federal and state cases including the term "sanism" yielded only four results (last searched Apr. 6, 2019).

[88] *See* Perlin, *They Keep it All Hid*, *supra* note 4, at 876.

[89] This section is generally adapted from PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19, at Chapter 7.

with disabilities but also explicitly sets out the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.[90] There is no question that the CRPD has "ushered in a new era of disability rights policy."[91]

The CRPD furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life.[92] It firmly endorses a social model of disability—a clear and direct repudiation of the medical model that traditionally has been a part-and-parcel of mental disability law.[93] "The Convention responds to traditional models, situates disability within a social model framework[94] and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities."[95] It provides a

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[90] *See* COMMENTARY ON UN CONVENTION, *supra* note 31, at 94–98 (discussing each article); *see also* Bryan Y. Lee, *The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities*, 44 COLUM. J.L. & SOC. PROBS. 393, 413–30 (2011) (discussing the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with CRPD mandates).

[91] Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PA ST. L. REV. 1159, 1173–74 (2013) [hereinafter Perlin, *Striking for the Guardians*]; *see also* Kanter, *supra* note 14, at 76:

> [T]he CRPD challenges policy makers, scholars, advocates, and activists to reframe the meaning of equality and inclusion for people with disabilities by requiring States Parties to take affirmative steps to ensure equality for people with disabilities that go beyond traditional notions of equal treatment as well as equal opportunities, specifically in the employment context.

[92] *See, e.g.*, Aaron A. Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181, 189–91 (2005) [hereinafter Dhir, *Human Rights*].

[93] *See generally* Michael L. Perlin, *"Abandoned Love": The Impact of* Wyatt v. Stickney *on the Intersection Between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 127 (2011) (discussing the social model framework of the CRPD and how post *Wyatt* lawyers began to "replicate" the decision and transform mental disability law from medical to legal model). On the tension between the two models, see Piers Gooding, *Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law*, 20 PSYCHIATRY, PSYCHOL. & L. 431 (2013) [hereinafter Gooding, *Supported Decision-Making*]. On the ways that aspects of mental disability law were traditionally premised on a medical model, see Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1083 (2010). On how the medical model "is in direct violation" of the CRPD, see Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the UN Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT'L L. REV. 1,14 (2012).

[94] *See, e.g.*, Janet E. Lord et al., *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564, 564 (2010); Kaiser, *supra* note 43.

[95] Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L J. 249, 256 (2009); *see also* Ronald McCallum, The United Nations Convention on the Rights of

framework for insuring that mental health laws "fully recognise the rights of those with mental illnesses."[96]

As we noted earlier, one of the core issues that must be confronted directly if we ever can meaningfully eradicate sanism is the lack of adequate, independent and dedicated counsel for individuals facing involuntary civil commitment.[97] This remains one of the most critical issues in seeking to bring life to international human rights law in a mental disability law context. The CRPD mandates that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[98] Elsewhere, the convention commands:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[99]

The question remains: will this Article be honored in nations that have ratified the CRPD, and will it, authentically, have a major impact on the extent to which the entire CRPD affects the individuals in question.[100] If and only if, there is a mechanism for the appointment of dedicated counsel,[101] can this dream become a reality.

The ratification of the CRPD is the most important development in institutional human rights law for persons with mental disabilities. The CRPD is detailed, comprehensive,

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Persons with Disabilities: Some Reflections (Mar. 2010) (unpublished manuscript), http://ssrn.com/abstract=1563883 [https://perma.cc/29V3-LDKN].

[96] Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW CONTEXT 1, 8 (2008). *But see* Kristen Booth Glen, *Introducing a "New" Human Right: Learning from Others, Bringing Legal Capacity Home*, COLUM. HUM. RTS. L. REV., Spring 2017, at 1, 36 ("[M]edical models still hold particular sway when it comes to psychosocial disabilities such as schizophrenia, depression, and bipolar disorder.") (citing MENTAL HEALTH EUR., AUTONOMY, CHOICE AND THE IMPORTANCE OF SUPPORTED DECISION-MAKING FOR PERSONS WITH PSYCHOSOCIAL DISABILITIES: MHE POSITION PAPER ON ARTICLE 12 UNCRPD ON LEGAL CAPACITY 5 (2017)).

[97] Perlin, *supra* note 59, at 340–42.

[98] CRPD, *supra* note 27, at art. 12, ¶ 3.

[99] CRPD, *supra* note 27, at art. 13, ¶ 1.

[100] Michael L. Perlin, "*I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases*, 28 WASH. U. J.L. & POL'Y 241, 253 (2008).

[101] On the significance of "cause lawyers" in the development of mental disability law in the United States, see Michael A. Stein et al., *Cause Lawyering for People With Disabilities*, 123 HARV. L. REV. 1658, 1661–62 (2010) (reviewing SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009)).

integrated and the result of a careful drafting process.[102] It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities. Its goal is clear: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[103] Whether this will actually *happen* is still far from a settled matter.

The United States remains one of the lone members of the UN to have not yet ratified the CRPD.[104] In December 2012, the ratification of the CRPD fell short by five votes, out of concerns that the CRPD would threaten national sovereignty.[105] One of the main arguments against ratification of the CRPD by Republican members of the Senate was that disability rights were already guaranteed by the ADA, the Equal Protection Clause of the Fourteenth Amendment, and by the Individuals with Disabilities Education Act.[106] Thus, by ratifying the CRPD, the United States would be exposing itself to risky international monitoring when these adequate protections were already in place.[107] But this argument failed to acknowledge that a federalism reservation[108] would have "alleviate[d] any national sovereignty concerns" by making it clear that the CRPD would not necessarily intrude upon domestic law.[109] It also failed to recognize the

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[102] *See* HUMAN RIGHTS AND DISABILITY ADVOCACY (Maya Sabatello & Marianne Schulze eds., 2014) (describing various perspectives on the involvement of civil society in the drafting of the Convention).

[103] CRPD, *supra* note 27, at art. 1.

[104] *CRPD and Optional Protocol Signatures and Ratifications*, U.N. (May 2016), http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.pdf. For discussions of Canada's ratification of the CRPD, see Ravi Malhotra & Robin F. Hansen, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education*, 29 WINDSOR Y.B. ACCESS JUST. 73, 83–90 (2011); Mona Paré, *Of Minors and the Mentally Ill: Re-Positioning Perspectives on Consent to Health Care*, 29 WINDSOR Y.B. ACCESS JUST. 107, 116–18 (2011).

[105] LUISA BLANCHFIELD & CYNTHIA BROWN, CONG. RESEARCH SERV., R42749, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ISSUES IN THE U.S. RATIFICATION DEBATE 1–8 (2015), https://fas.org/sgp/crs/misc/R42749.pdf [https://perma.cc/74EC-DNRX].

[106] Candace Farmer, *Can the U.S. Use a Reservation to Alleviate Sovereignty Concerns Regarding the Convention on the Rights of Persons with Disabilities?*, 43 GA. J. INT'L & COMP. L. 249, 266–67 (2014).

[107] *See id.* at 267.

[108] A reservation is a "unilateral statement . . . made by a State . . . when signing . . . a treaty . . . whereby the State . . . purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." *Id* at 271 (quoting Int'l Law Comm'n, U.N. Doc. A/66/10, 63d Sess. (2011), *United Nations Guide to Practice on Reservations to Treaties*). For the CRPD, the Obama Administration proposed a federalism reservation which stated that "US obligations under [the] CRPD are limited to those measures appropriate to the federal system, such as the enforcement of the [ADA]." BLANCHFIELD & BROWN, *supra* note 105, at 5.

[109] Farmer, *supra* note 106, at 270.

shortcomings of the ADA[110] and how the CRPD could be used "to expand the rights of people with disabilities beyond civil and political rights to economic, social, and cultural rights" beyond what is guaranteed or aspired to under domestic law.[111]

Notwithstanding the fact that Congress has not yet ratified the CRPD, the fact that it was signed by President Obama in 2012 means that the CRPD still has weight and influence over domestic policy.[112] The signing of the Convention triggers the application of the Vienna Convention of the Law of Treaties "which requires signatories 'to refrain from acts which would defeat the Disability Convention's object and purpose.'"[113] Importantly, New York state courts have relied on this and have cited the CRPD with approval in cases involving guardianship matters.[114]

Surrogate Judge Kristen Booth Glen thus granted the CRPD "persuasive weight' in interpreting our own laws and constitutional protections."[115] In a later decision, New York State Surrogate Judge Margarita Lopez Torres relied again on international human rights law (including the CRPD) in a decision that rejected a guardianship appointment petition, in a

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[110] *See, e.g.*, Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 413–14 (1997) (arguing that "special treatment" approaches to interpreting the ADA have led to problems with enforcing the law); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 102 (1999) (noting that courts' refusal to defer, as required, to agency interpretations of the ADA led to a pro-defendant bias in litigation).

[111] Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 883 (2015).

[112] *See* Michelle Diament, *Obama Urges Senate to Ratify Disability Treaty*, DISABILITY SCOOP (May 18, 2012), https://www.disabilityscoop.com/2012/05/18/obama-urges-senate-treaty/15654/ [https://perma.cc/4FPN-X7ME]. Because the Senate lacked a super-majority of votes, it failed to ratify the CRPD on December 4, 2012. *See The Convention on the Rights of Persons with Disabilities*, U.S. INT'L COUNCIL ON DISABILITIES, http://usicd.org/index.cfm/crpd [https://perma.cc/3MYQ-C9M2]. *See generally* Perlin & Schriver, *Drugs at Your Command*, *supra* note 8, at 387.

[113] *See In re* Mark C.H., 906 N.Y.S.2d 419, 433 (Sur. Ct. 2010) (citing Vienna Convention on the Law of Treatises art. 18, May 23, 1969, 1155 U.N.T.S. 331), as discussed in Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362–63 (2011).

[114] *See, e.g.*, *Mark C.H.*, 906 N.Y.S.2d at 435 (holding due process required that the guardianship appointment be subject to a requirement of periodic reporting and review); *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) (holding that substantive due process requirement of adherence to principal of least restrictive alternative applied to guardianships sought for mentally persons). There is nothing new or radical about the use of international human rights law in U.S. courts. *See generally* Michael W. Lewis & Peter Margulies, *Interpretations of IHL in Tribunals of the United States*, *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES 415 (Derek Jinks et al. eds., 2014) (demonstrating how U.S. courts have been interpreting international human rights law ever since the nation was founded).

[115] *Dameris L.*, 956 N.Y.S.2d at 855; *see* Perlin, *Striking for the Guardians*, *supra* note 91, at 1178 n.97 (discussing *Dameris L.* in this context).

case of a woman with Down's Syndrome living in the community. Concluded Judge Torres:

> The perfunctory appointment of a plenary guardian based upon medical certifications or diagnostic tests alone, without careful and meaningful inquiry into the individual's functional capacity, relies upon the incorrect assumption that the mere status of intellectual disability provides sufficient basis to wholly remove an individual's legal right to make decisions for himself. This approach is contrary to established conventions of international human rights.[116]

Here, Judge Torres incorporated a state task force's finding that "[c]ommunity integration includes the ability of people with disabilities to make their own choices to the maximum extent possible." She added that "guardianship removes the legal decision-making authority of an individual with a disability and should . . . only be imposed if necessary and in the least restrictive manner,"[117] relying on the U.S. Supreme Court's anti-institutional segregation ADA decision of *Olmstead v. L.C.*[118] She also stressed that, in coming to her decision, she found the CRPD to provide "persuasive authority for the foundational premise that 'persons with disabilities have a right to recognition everywhere as persons before the law' and 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'"[119]

In an even more recent decision, another New York State Surrogate Court judge found that an indigent adult—subject to guardianship proceedings upon allegations of incapacitation—had a right to assigned counsel. The Court reasoned that her fundamental liberty interests—including the right to privacy, the right to determine her residence, and the right to decide on medical treatment—would be profoundly affected,[120] especially given the fact that guardianship proceedings were of unlimited duration and scope, and had no provision for independent review or examination.[121] In finding that individuals living with disabilities are no less entitled to these constitutional guarantees of due process than persons who are not alleged to be under disability, the court

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[116] *In re* Guardian of Michelle M., No. 2014, 2016 WL 3981204, at *3 (Sur. Ct. 2016); *see generally* PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 16, at §§ 2-8, 2-82–2-83.

[117] *Michelle M.*, 2016 WL 3981204, at *3.

[118] Olmstead v. L.C., 527 U.S. 581, 591–92 (1999) (state programs for persons with disabilities must be administered in the most integrated setting appropriate to the individual's unique needs). On the relationship between the CRPD and the Americans with Disabilities Act, see Kanter, *supra* note 14, at 80–85, and on the advantages of the human rights approach of the CRPD, see Kanter, *supra* note 111, at 823–24.

[119] *Michelle M.*, 2016 WL 3981204, at *3 (quoting CRPD, *supra* note 27, at art. 12(1)-(2)).

[120] *In re* Zhuo, 42 N.Y.S.3d 530, 532 (Sur. Ct. 2016).

[121] *Id.* at 536.

pointedly added, "[p]ersons with disabilities have a right to recognition everywhere as persons before the law . . . [and] enjoy legal capacity on an equal basis with others in all aspects of life."[122]

Some argue that the enactment of the ADA made it unnecessary for the United States to ratify the CRPD.[123] We reject that argument *in toto*. The ADA and the CRPD are neither identical nor are they mutually exclusive. Although the ADA has resulted in greater access to services, buildings, and programs for persons with disabilities in the United States, it has failed to live up to its goal of destroying the "wall of exclusion" for persons with disabilities.[124] The CRPD goes further than the ADA in the protection of rights for persons with disabilities, to not just prohibit discrimination but to ensure substantive equality including civil, political, economic, social, and cultural rights,[125] and by including *prescriptive* rights ("the right to") as well as *proscriptive* rights ("the right to be free from").[126]

The CRPD categorically affirms the social model of disability[127] by describing it as a condition arising from "interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" instead of inherent limitations.[128] Further, it reconceptualizes mental health rights as disability rights,[129] and extends existing human rights to take into account the specific experiences of persons with disabilities.[130] To this end, it calls for "[r]espect for inherent

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[122] *Id.* at 532–33 (quoting CRPD, *supra* note 27, at art. 12(1)-(2)). The CRPD is also cited with approval in Proceeding for the Appointment of Guardian For Leon Pursuant to SCPA Article 17–A, 53 Misc.3d 1204(A), 43 N.Y.S. 3d 769 (Surrogate's Ct. 2016, at *1 ("Persons with disabilities have a right to recognition everywhere as persons before the law . . . [and] enjoy legal capacity on an equal basis with others in all aspects of life." (citing Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 (Dec. 6, 2006))).

[123] *See* BLANCHFIELD & BROWN, *supra* note 105, at 12.

[124] Kanter, *supra* note 111, at 822.

[125] *Id.* at 848–51.

[126] *See* Perlin & Schriver, *Drugs at Your Command*, *supra* note 8, at 386; Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 920 (1994) (noting the significance of the inclusion of proscriptive and prescriptive rights in human rights treaties in general); Gooding, *Supported Decision-Making*, *supra* note 93, at 434 (explaining how the CRPD combines these two categories of rights).

[127] Lord et al., *supra* note 94, at 568. The CRPD has also been used as a basis for rethinking New York guardianships for persons with intellectual disabilities. *See* Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287, 329–31 (2015).

[128] CRPD, *supra* note 27, at pmbl. ¶ (e), art. 1.

[129] Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95, 106 (2008).

[130] Megret, *Disability Rights*, *supra* note 25, at 504; *see* PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19, at 143–55.

dignity"[131] and "[n]on-discrimination."[132] As noted earlier, subsequent articles declare "[f]reedom from torture or cruel, inhuman or degrading treatment or punishment,"[133] "[f]reedom from exploitation, violence and abuse,"[134] the right to "liberty and security of the person,"[135] and a right to protection of the "integrity of the person."[136]

B. Issues of Dignity[137]

We must next consider the significance of dignity in its inquiry and its relationship to international human rights law.[138] When the United Nations embarked upon the drafting process of the CRPD, it established an ad hoc committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities."[139] This was consonant with the perspectives of observers such as Professor Aaron Dhir: "Degrading living conditions, coerced 'treatment,' scientific experimentation, seclusion, restraints—the list of violations to the dignity and autonomy of those diagnosed with mental disabilities is both long and egregious."[140]

As ratified, the CRPD calls for "[r]espect for inherent dignity."[141] It requires State parties "to adopt immediate, effective and appropriate measures . . . [t]o raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities."[142] The Preamble characterizes "discrimination against any person on the basis of disability [as] a violation of the inherent dignity and worth of the

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131 CRPD, *supra* note 27, at art. 3(a).

132 *Id.* at art. 3(b).

133 *Id.* at art. 15.

134 *Id.* at art. 16.

135 *Id.* at art. 14.

136 *Id.* at art. 17. On the possible application of these article to persons with mental disabilities in prison, see Perlin, *God Said*, *supra* note 8, at 486.

137 This section is generally adapted from PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19, at Chapter 2.

138 We know, by way of example, that "[p]erceptions of systemic fairness are driven, in large part, by 'the degree to which people judge that they are treated with dignity and respect.'" Michael L. Perlin, *"Who Will Judge the Many When the Game is Through?": Considering the Profound Differences between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts*, 41 SEATTLE U. L. REV. 937, 955 (2018) (quoting Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 415 (2000)).

139 G.A. Res. 56/168, at ¶ 1 (Feb. 26, 2002).

140 Dhir, *Human Rights*, *supra* note 92, at 182.

141 CRPD, *supra* note 27, at art. 3(a).

142 *Id.* at art. 8.

human person."[143] And these provisions are consistent with the entire CRPD's "rights-based approach focusing on individual dignity,"[144] placing the responsibility on the State "to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons."[145]

Professor Michael Stein puts it well this way: A "dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth."[146] In Professor Cees Maris's summary: "The Convention's object is to ensure disabled persons enjoy all human rights with dignity."[147] In his testimony in support of the CRPD, Eric Rosenthal, the director of Mental Disability Rights International, shared with Congress his observations of the treatment of institutionalized persons with mental disabilities in Central and Eastern European nations: "[w]hen governments deny their citizens basic human dignity and autonomy, when they subject them to extremes of suffering, when they segregate them from society-we call these violations of fundamental human rights."[148]

Dignity issues self-evidently affect institutionalization issues as well.[149] The U.S. Court of Appeals for the Third Circuit has held that a state welfare department regulation requiring certain patients to receive services in the segregated setting of a nursing home, rather than in their own homes, violated the Americans with Disabilities Act (ADA). In the course of its opinion, it read the ADA to intend to ensure that "qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside,

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143 *Id.* at pmbl ¶ (h).

144 Dhir, *Human Rights*, *supra* note 92, at 195.

145 GERARD QUINN ET AL., HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY 14 (2002).

146 Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 106 (2007).

147 Cees Maris, *A ≠ A: Or, Freaky Justice*, 31 CARDOZO L. REV. 1133, 1156 (2010).

148 Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121, 140 (2005) (alteration in original) (quoting *International Disability Rights: The Proposed UN Convention: Hearing before the Congressional Human Rights Caucus*, 108th Cong. (Mar. 30, 2004)).

149 See *Indiana v. Edwards*, 554 U.S. 164, 176 (2008), for the role of dignity in the criminal trial process in cases involving criminal defendants with mental disabilities, as discussed in PERLIN & CUCOLO, MENTAL DISABILITY LAW, *supra* note 15, § 13-3-2.4.

hides, and ignores them."[150] Importantly, such values have been affirmed in other nations as well.[151]

Further, the human rights approach embodied in the CRPD promotes a basis for intervention that is more care-oriented[152] rather than the violence-preventative basis that now exists in the United States and elsewhere in the world.[153] "Waiting for treatment until persons are deemed a danger of violence to themselves or others is a denial of human dignity."[154] Any intervention must be the least restrictive, must take into account the person's preferences,[155] and must ensure that any potential trauma be diminished.[156]

Dignity means that people "possess an intrinsic worth that should be recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth."[157] There are four principles that can strengthen the application of dignity in judicial decisions:

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[150] Helen L. v. DiDario, 46 F.3d 325, 327, 335 (3d Cir. 1995); *see also* Michael L. Perlin & Deborah A. Dorfman, *"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*, 2 PSYCHOL. PUB. POL'Y & L. 114, 118–19, 132 (1996) (on how hearings in right to refuse treatment cases can enhance dignity values); Perlin, *Make Promises*, *supra* note 17, at 961–62 (on the ADA and dignity in general).

[151] Courts in Canada have similarly stressed the role of dignitarian values in cases involving the autonomy of persons with mental disabilities: "Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection . . . ." Fleming v. Reid [1991], 4 O.R. 3d 74, 86–87 (Can. Ont. C.A.); *see also* Dhir, *Relationship of Force*, *supra* note 43, at 109 (discussing *Fleming*). Professor Malhotra has a less sanguine view of other Canadian cases. *See, e.g.*, Malhotra, *supra* note 4, at 29 (stating Canada Supreme Court disability rights decisions in Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28 (QL), and in Auton v. British Columbia, 2004 SCC 78, [2004] 3 S.C.R. 657, were "problematic decisions with negative impacts for persons with disabilities"). On the role of Canadian provincial legislatures in matters involving the rights of persons subject to the civil commitment process, see Isabel Grant & Peter J. Carver, *PS v Ontario: Rethinking the Role of the Charter in Civil Commitment*, 53 OSGOODE HALL L.J. 999, 1031 (2016) ("[D]oing nothing is the more likely response of most provincial legislators, as the rights of civilly detained individuals have rarely been given priority.").

[152] On how the CRPD may be used as a vehicle to promote continuity of care for persons with mental disabilities, see Weinstein & Perlin, *supra* note 18.

[153] Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 40 (2015).

[154] *Id.*

[155] *Id.* at 41.

[156] *See, e.g.*, Mehgan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 FLA. J. INT'L L. 271 (2017).

[157] Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009) (quoting Gerald Neuman, *Human Dignity in the United States Constitution*, *in* ZUR AUTONOMIE DES INDIVIDUUMS 250 (Dieter Simon & Manfred Weiss eds., 2000)). Although some "[c]ritics dismiss dignity as a legal concept on the ground that it is too indeterminate and subjective to provide judgments or even guidance to judges and other legal interpreters," Simon &

> (1) "[t]he application of human dignity in judicial decisions should be based on a written law";
>
> (2) "[j]udges should try to define what human dignity is and be explicit about its meaning";
>
> (3) "[j]udges should attempt to use human dignity consistently in the same rulings and in future decisions";
>
> (4) "[h]uman dignity should advance human rights rather than limit them."[158]

Citing to the CRPD can alleviate some of the ambiguity that arises when concepts of dignity are raised in judicial decisions.[159] By employing these principles, court proceedings are more likely to have beneficial outcomes leading to a rejection of sanist attitudes.

C. Controversial Aspects of the CRPD

This is not to say that the CRPD is without controversy, even in the disability rights community. By way of example, does Article 14(1)(b)'s requirement that those with disabilities "are not deprived of their liberty unlawfully or arbitrarily"[160] protect against *all* institutionalization,[161] or, in some circumstances, *is* involuntary hospitalization permissible if an individual poses a serious risk of harm to himself or others?[162] Is the High

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Rosenbaum, *supra* note 153, at 23, we reject that interpretation. *See* Perlin & Weinstein, *But You Have No Choice*, *supra* note 74, at 79 (explaining why adherence to therapeutic jurisprudence "is further demanded as a matter of dignity").

158 Doron Shultziner, *Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law*, 25 CARDOZO J. INT'L & COMP. L. 435, 448–49 (2017).

159 *See* Michael L. Perlin & Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79, 79 n.6 (2018) (alterations in original):

> The U.S. Supreme Court has acknowledged that all persons possessed dignity by virtue of their basic humanity, at least since *McNabb v. United States*, 318 U.S. 332, 343 (1943) ("[a] democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process"), and continues to write about it to this day; *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (finding "[fundamental] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

160 CRPD, *supra* note 27, at art. 14 (1)(a).

161 *See* Vandana Peterson, *Understanding Disability Under the Convention on the Rights of Persons with Disabilities and Its Impact on International Refugee and Asylum Law*, 42 GA. J. INT'L & COMP. L. 687, 697 (2014).

162 Rebecca Zarett, *To Work and to Love: How International Human Rights Law Can Be Used to Improve Mental Health in the United States*, 40 FORDHAM INT'L L.J. 191, 208 (2016); *see, e.g.*, Sascha Mira Callaghan & Christopher Ryan, *Is There a Future for Involuntary Treatment in Rights-Based Mental Health Law?*, 21 PSYCHIATRY, PSYCHOL. & L. 747, 747 (2014) (arguing that the CRPD does allow for involuntary treatment in some instances, and that "failing to account for it in law will jeopardise rights more than it protects them").

Commissioner's conclusion that, "[i]n the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defense based on the negation of criminal responsibility because of the existence of a mental or intellectual disability,"[163] or does the CRPD *demand* the retention of the insanity defense?[164] These and other like questions reflect the complexity of the issues raised by this CRPD.[165]

A controversial topic regarding the CRPD—one related to both sanism and therapeutic jurisprudence principles[166]—is whether Article 12 completely abolishes guardianships.[167] Article 12 of the CRPD guarantees that persons with disabilities have the right to recognition everywhere before the law.[168] The International Disability Alliance, a network of global and regional organizations of persons with disabilities, has argued that, under the CRPD, the following must be abolished:

> (1) "plenary guardianship"; (2) "unlimited time frames for exercise of guardianship"; (3) "the legal status of guardianship as permitting any person to override the decisions of another"; (4) "any individual guardianship arrangement upon a person's request to be released from it"; (5) "any substituted decision-making mechanism that overrides a person's own will, whether it is concerned with a single or a long-term arrangement"; and (6) "any other substituted decision-making mechanisms, unless the person does not object, and there is a concomitant requirement to establish supports in a person's life so they can eventually exercise full legal capacity".[169]

Whether or not Article 12 definitively abolishes guardianship, Article 12(3) reflects "the critical insight that even people with the most significant disabilities have legal capacity and are covered by the CRPD."[170] Article 12 ensures measures relating to the exercise of capacity must have safeguards that "respect the rights, will and preferences of the person, are free of conflicts of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial

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[163] Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, ¶ 47, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009).

[164] *See* Perlin, *God Said*, *supra* note 8, at 518.

[165] *See, e.g.*, Perlin & Szeli, *supra* note 24, at 251.

[166] *See infra* Part IV, for a full discussion of the meaning of therapeutic jurisprudence in this context.

[167] *See* INT'L DISABILITY ALL., PRINCIPLES FOR IMPLEMENTATION OF CRPD, ARTICLE 12, at ¶ 17 (2013), http://www.internationaldisabilityalliance.org/resources/article-12-legal-capacity-principles-implementation [https://perma.cc/RW8F-Q4T5] [hereinafter IDRA]. On this question generally, *see* Perlin, *Striking for the Guardians*, *supra* note 91, at 1173–74.

[168] CRPD, *supra* note 27, at art. 12.

[169] IDRA, *supra* note 167, at ¶ 17.

[170] Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-making*, 19 HUM. RTS. BRIEF 8, 9 (2012).

authority or judicial body."[171] "This mandate screams out for a universal overhaul of guardianship law and practice."[172]

D. Supported Decision-Making[173]

While the issue of the complete abolishment of guardianship under the CRPD remains controversial,[174] the CRPD does mandate that if intervention is necessary, it must take the form of *supported* decision-making rather than *substituted* decision-making.[175] As discussed above, Article 12 of the CRPD underscores the importance of legal capacity as an inalienable right and provides for safeguards to ensure that a person's capacity is not subject to abuse.[176] "Instead of paternalistic guardianship laws . . . the CRPD's supported-decision making model recognizes first, that all people have the right to make decisions and choices about their own lives."[177]

Supported decision-making is also reinforced in U.S. law under the ADA.[178] Title II of the ADA prohibits discrimination based on disabilities by public entities in their services, programs, or activities.[179] Guardianships unnecessarily isolate persons with psychosocial impairments.[180] This unjustified isolation can be

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[171] CRPD, *supra* note 27, at art. 12; *see also* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 161, 232 n.232 (2010) [hereinafter Salzman, *Rethinking Guardianship*].

[172] Perlin, *Striking for the Guardians*, *supra* note 91, at 1190.

[173] Michael L. Perlin & Naomi M. 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*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 79 (2016).

[174] *See* Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 559 (2017).

[175] *Id.* at 559–60; *see also* CPRD, *supra* note 27, at art. 12.

[176] Robert Dinerstein et al., *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT'L & COMP. L. 435, 444 (2016).

[177] Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 563 (2009).

[178] Supported decision making incorporates the least restrictive alternative doctrine, and is based on the concept that no one makes decisions in a vacuum. Supported decision making can come in many different forms depending on the needs and abilities of the individual. It can include health care proxies, powers of attorney, or contract agreements. *See generally* Supported Decision Making N.Y., *What is Supported Decision-Making?*, SDMNY, https://sdmny.org/about-sdmny/about-sdm/ [https://perma.cc/ZA97-3PGU].

[179] 42 U.S.C. § 12132 (2006).

[180] Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 289 (2011) [hereinafter Salzman, *Guardianship for Persons with Mental Illness*]. The social model of disability "places the responsibility squarely on society (and not on the individual with a disability) to remove the physical and attitudinal barriers that 'disable' people with various impairments, and prevent them from exercising their rights and fully integrating into

viewed as discrimination based on a disability in violation of the ADA.[181] A declaration of incapacity by any court can lead to feelings of helplessness and loss of control, which are detrimental to a person's mental well-being and create feelings of shame and humiliation.[182] Substituted decision-making can lead to unjustified confinement for persons with mental illness.[183] When attorneys use substituted judgment in making legal decisions for their clients, "there are no checks and balances."[184]

Supported decision-making allows individuals with limitations to receive support in order to understand relevant information and available choices in order to make decisions based on their preferences, instead of completely taking away their ability to make any decisions.[185] It is important to consider the context in which individuals face decisions and not just the personal characteristics of the individual with a disability.[186] Education and training are also important for all parties involved in supported decision-making, including attorneys, judges, clients, and state parties.[187] Again, the extent to which the ratification of the CRPD actually affects our history of stigmatization and marginalization will, in many ways, be the bellwether of the CRPD's actual success. We turn now to the school of legal thought known as therapeutic jurisprudence as a lens through which we will examine all the relevant issues.

IV. THERAPEUTIC JURISPRUDENCE[188]

One of the most important legal theoretical developments of the past three decades has been the creation and dynamic

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society." Arlene S. Kanter, *The Law*: *What's Disability Studies Got to Do With It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 427 (2011).

[181] Kevin M. Cremin, *Challenges to Institutionalization: The Definition of "Institution" and the Future of* Olmstead *Litigation*, 17 TEX. J. C.L. & C.R. 143, 152 (2012).

[182] Salzman, *Rethinking Guardianship*, *supra* note 172, at 169, 184; *see also* Perlin & Weinstein, *Friend to the Martyr*, *supra* note 18, at 38.

[183] Salzman, *Guardianship for Persons with Mental Illness*, *supra* note 180, at 290.

[184] Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1372 (1998). *See generally* Perlin & Weinstein, *But You Have No Choice*, *supra* note 74.

[185] Salzman, *Guardianship for Persons with Mental Illness*, *supra* note 180, at 306.

[186] Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1153 (2013).

[187] *Id.*

[188] This section is generally adapted from Perlin & Lynch, *Sexless Patients*, *supra* note 19; 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); and Perlin & Weinstein, *Friend to the Martyr*, *supra* note 18. Further, it distills the work of one of the authors over the past twenty-five years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993). For full historical discussions see generally Michael L. Perlin, *"Have You Seen Dignity?:" The*

growth of therapeutic jurisprudence (TJ).[189] Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.[190] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[191]

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[192] and focuses on the law's influence on emotional life and psychological well-being.[193] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and, when consistent with other values served by law, should attempt to bring about healing and wellness."[194] By way of example, therapeutic jurisprudence "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."[195] In recent years, scholars have considered a vast range of topics through a therapeutic jurisprudence lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal

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Story of the Development of Therapeutic Jurisprudence, 27 N.Z. U. L. REV. 1135 (2017); Michael L. Perlin, *"Changing of the Guards:" David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT'L J.L. & PSYCHIATRY 3 (2019).

189 *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE .J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005). *See generally* David B. Wexler, *Mental Health Law and the Seeds of Therapeutic Jurisprudence*, *in* THE ROOTS OF MODERN PSYCHOLOGY AND LAW: A NARRATIVE HISTORY 78 (Thomas Grisso & Stanley Brodsky eds., 2018); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008).

190 For a transnational perspective, see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, *in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kerry Peterson eds., 2006).

191 *See, e.g.*, Perlin, *They Keep It All Hid*, *supra* note 4, at 875; Perlin, *Best Friend*, *supra* note 8, at 751; Perlin, *Making Love*, *supra* note 8, at 510 n.139.

192 Bruce J. Winick, *Forward: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

193 David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* DENNIS P. STOLLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (2000).

194 Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, *in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds. 2003).

195 Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003).

law and procedure, employment law, gay rights law, and tort law.[196] As Ian Freckelton has noted, "[I]t is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[197]

TJ is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[198] These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[199] That is, "[therapeutic jurisprudence] supports an ethic of care."[200]

One of the central principles of therapeutic jurisprudence is a commitment to dignity. Professor Amy Ronner describes the "three Vs: voice, validation and voluntary participation,"[201] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very

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[196] *See, e.g.*, Perlin, *Things Have Changed*, *supra* note 8, at 543–45; *see also* Roberto P. Aponte Toro, *Sanity in International Relations: An Experience in Therapeutic Jurisprudence*, 30 U. MIAMI INTER-AM. L. REV. 659, 660–61 (1999) (on its potential application to international law issues in general).

[197] Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 THOMAS JEFFERSON L. REV. 575, 576 (2008).

[198] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement*, *in* STOLLE, *supra* note 193, at 465.

[199] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001).

[200] Michael Perlin, "I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence 27 (unpublished manuscript) (Mar. 2017), https://ssrn.com/abstract=2930061 [https://perma.cc/3R72-DN24] (citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

[201] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

> judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [202]

TJ principles frequently converge with many of the principles underlying international human rights protections for those with mental disabilities, such as the protection of liberty against arbitrary deprivation and a commitment to procedural fairness,[203] and a need for robust counsel.[204] As stated earlier, the CRPD declares a right to "[f]reedom from . . . degrading treatment or punishment,"[205] and a "[r]espect for inherent dignity."[206] It promotes "awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities."[207] An understanding of dignity is absolutely central to an understanding of the intersection between international human rights and mental disability law.[208] TJ can provide insights on how international human rights principles should be applied "to achieve therapeutic aims and avoid antitherapeutic effects."[209]

The "three Vs" articulated by Professor Ronner are all critical aspects of the ways that TJ meshes with the CRPD. If the CRPD is truly followed, persons with mental disabilities will—finally—have a voice and be validated. And it is far more likely that they will act voluntarily and not under the compulsion of others.

We believe that TJ has the best capacity to rid the law of sanism and pretextuality.[210] Elsewhere, in a book-length treatment of the insanity defense, one of the co-authors has written:

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[202] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002); *see generally* AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE 23 (2010) (discussing the "three V's").

[203] *See* Winick, s*upra* note 24, at 543.

[204] *See* Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004) (characterizing the right to counsel as "the core of therapeutic jurisprudence").

[205] CRPD, *supra* note 27, at art. 15; *see also* Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing but a Phrase?*, 41 PHIL. & PUB. AFFAIRS 259, 289 (2013) (discussing the relationship between human dignity and the "importance of . . . specific protections . . . such as the prohibition of torture and cruel or degrading treatment [in international human rights treaties and conventions]").

[206] CRPD, *supra* note 27, at art. 3.

[207] CRPD, *supra* note 27, at art. 8.

[208] Beitz, *supra* note 205, at 281 (noting that a special class of "dignitary harms" denies individuals "the capacity for dignified conduct").

[209] Winick, *supra* note 24, at 544.

[210] In the specific context of criminal law and procedure, on this question, see Michael L. Perlin, *"Infinity Goes up on Trial": Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities*, 16 QUT L. REV. 106, 107–08 (2016).

> [W]e must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning and teleological decision making from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.[211]

We believe the same principles apply to the subject matter of this article as well. We believe that the adoption of TJ principles will best reflect the "ethic of care" that has been tragically missing from the ways that persons with mental disabilities have been treated, domestically and internationally.

Janet Lord and her colleagues focused on the significance of "voice accountability" in the drafting of the CRPD.[212] One of the co-authors has previously written that "[t]he CRPD is a document that resonates with TJ values,"[213] and we believe that remains true. The CRPD empowers persons with mental disabilities, and "one of the major aims of TJ is explicitly the empowerment of those whose lives are regulated by the legal system."[214] The application of TJ, by promoting dignity and ensuring therapeutic effects in the implementation of the CRPD, and by mandating "voice,"[215] enhances the likelihood that sanism will be eradicated,[216] and that the "silenced" voices will finally, if tardily, be heard.[217]

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[211] PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE, *supra* note 57, at 443; s*ee also* Perlin, *They Keep It All Hid*, *supra* note 4, at 876:

> To teach mental disability law meaningfully, it is necessary to teach about the core characteristics that contaminate it (sanism and pretextuality), to teach about the cognitive approaches that distort it (false [ordinary common sense] and cognitive-simplifying heuristics), and to teach the school of jurisprudence that can optimally redeem it (TJ).

[212] Lord et al., *supra* note 94, at 567. On the role of "voice" in other similar UN Conventions, see Aisling Parkes, *Tokenism Versus Genuine Participation: Children's Parliaments and the Right of the Child to be Heard Under International Law*, 16 WILLIAMETTE J. INT'L L. & DISP. RESOL. 1, 16 (2008) (discussing how children's "voices are all too often frequently overlooked and undervalued").

[213] Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the U.N. Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT'L L. REV. 1, 36 (2012) [hereinafter Perlin, *Promoting Social Change*].

[214] *Id.*

[215] *See* Ronner, *supra* note 202, at 94–95.

[216] *See* Perlin & Lynch, *Mr. Bad Example*, *supra* note 8, at 320.

[217] Again, these attitudes are not limited to those teaching or practicing law in the US. For a Canadian perspective, *see* Nathalie Des Rosiers, *From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes*, 13 CAN. J.L. & JURIS. 171, 174–75 (2000) ("One can find in the Therapeutic Jurisprudence literature several references to the need for the tribunal to listen fully to all the concerns of the participants, and to recognize the value of such expression."); *see also* Frank Sirotich, *Reconfiguring Crime Control and Criminal Justice: Governmentality and Problem-Solving Courts*, 55 U. NEW BRUNSWICK L.J. 11 (2006); Timothy T. Culbert, *Mental Health Law Reform for a New Government in New Brunswick*, 62 U. NEW BRUNSWICK L.J. 173 (2011).

The CRPD and TJ principles are further entwined as evidenced by the fact that the CRPD embraces the importance of effective counsel for persons with disabilities, the right to refuse treatment, and the protection of persons with disabilities who are institutionalized.[218] TJ and the CRPD are of vital importance in order to promote, protect, and enforce the rights of persons with mental disabilities.[219] The CRPD, in honoring a person's dignity, ensures a more beneficial therapeutic process, improved outcomes, and more effective exercise of state power, when that power need be exercised.[220]

Writing previously about the CRPD and the guardianship system prevalent in many civil law nations, one of the co-authors said: "I believe that, if we embrace TJ, and the precepts of procedural justice, we will have taken an important step towards meaningfully enforcing the CRPD in ways that, for the first time, will bring both due process and dignity to the guardianship system."[221] Similarly, the CRPD will bring dignity and due process to the entire mental disability law system.[222] Almost twenty years ago, the Florida Supreme Court recognized the value of therapeutic jurisprudence in juvenile commitment hearings.[223] We believe that this approach would similarly

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[218] Mehgan Gallagher, *No Means No, or Does It? A Comparative Study of the Right to Refuse Treatment in a Psychiatric Institution*, 44 INT'L J. LEGAL INFO. 137, 144–46 (2016).

[219] *Id.* at 148.

[220] Simon & Rosenbaum, *supra* note 153, at 48.

[221] Perlin, *Striking for the Guardians*, *supra* note 91, at 1189.

[222] *See* Gallagher & Perlin, *supra* note 156, at 292 ("The principles of TJ are also in line with the CRPD's requirement to treat individuals with disabilities with inherent dignity and respect and to ensure 'full and effective participation and inclusion in society' for persons with disabilities.").

[223] *See* Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350., 804 So.2d 1206, 1210–11 (Fla. 2001) (alterations in original):

> According to the comment filed by Judge Ginger Wren and Professor Bruce Winick, "Therapeutic jurisprudence is an interdisciplinary field of legal scholarship and approach to law reform that focuses attention upon law's impact on the mental health and psychological functioning of those it affects." According to Judge Wren and Professor Winick, the dependent child's perception as to whether he or she is being listened to and whether his or her opinion is respected and counted is integral to the child's behavioral and psychological progress. Their comment also explains that feelings of voluntariness rather than coercion in children facing placement tend to produce more effective behavior. Thus, Judge Wren and Professor Winick contend that "[e]ven when the result of a hearing is adverse, people treated fairly, in good faith and with respect are more satisfied with the result and comply more readily with the outcome of the hearing." As such, a child who feels that he or she has been treated fairly in the course of the commitment proceedings will likely be more willing to accept hospitalization and treatment.
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> The comment further asserts that juveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity and trust. According to Judge Wren and Professor Winick, "[c]ivil commitment hearings for juveniles that deny them the ability to articulate

invigorate international human rights law as it applies to questions that affect persons with mental disabilities.

CONCLUSION

The CRPD, at base, is a document that seeks to eradicate and eviscerate "stigmas and stereotypes,"[224] one that emphasizes and "upholds the social inclusion [and] anti-stigma . . . agenda."[225] Its purpose is to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities."[226] It is also a document that demands law reform at the local and national level all over the world,[227] whether in the United States or in the tiny island nation of Vanuatu.[228] Although much of its framework was inspired by the principles and concepts in the ADA,[229] the CRPD goes far beyond the ADA in its positive mandates, its focus on stigma and prejudice, its uncompromising adoption of the social model, its reporting requirements, and its identification of the specific steps that States must take to ensure an environment for the enjoyment of human rights (such as "awareness-raising, ensuring accessibility, ensuring protection and safety in situations of risk and humanitarian emergencies, promoting access to justice,

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> their wishes through counsel, but which solely use guardians ad litem to present the guardian's views of the juvenile's best interests, will not fulfill the juvenile's participatory or dignitary interests."

See also, in this context, Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 563 n.9 (2005), discussing the participation of the University of Miami School of Law, Children & Youth Law Clinic in the process that led to the re-writing of these court rules:

> We relied on the principles of Therapeutic Jurisprudence to argue that affording foster children a pre-commitment hearing at which they are represented by counsel furthers their therapeutic interests and is psychologically beneficial for these children. The Florida Supreme Court agreed with and adopted this argument in the three decisions that it rendered on the due process rights of foster children facing involuntary commitment to these facilities. *See* M.W. v. Davis & DCF, 756 So. 2d 90 (Fla. 2000); *see also* Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So. 2d 1206 (Fla. 2001); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763 (Fla. 2003).

[224] Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449, 475 (2008).

[225] Fennel, *supra* note 129, at 107.

[226] CRPD, *supra* note 27, at art. 8.

[227] On the law reform obligations of the CRPD, see Lord & Stein, *supra* note 224, at 471.

[228] *See* Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, 37 N. KY. L. REV. 363, 364 (2010) (making this comparison).

[229] *See* Janet Lord, *The U.N. Disability Convention: Creating Opportunities for Participation*, BUSINESS L. TODAY, May/June 2010, at 23, 24.

ensuring personal mobility, enabling habilitation and rehabilitation, and collecting statistics and data").[230] It also—perhaps most importantly—makes visible what has long been "invisible to the world's political, social and economic process,"[231] and reflects the reality that "only positive state action can combat the deeply entrenched patterns of disability disadvantage arising from stigma, devaluation, stereotyping and exclusion."[232]

Mary Donnelly was precisely accurate when she argued that "the goal of [mental disability] law reform must include delivery on the rights . . . to dignity."[233] The CRPD has the capacity to do this, but only if signatory nations grasp the extent to which sanism has pervaded all mental disability law policy and enforcement over the centuries. The application of TJ principles will, finally, allow us to see this and to, we hope, make this truly the "dawn of a new era."[234] And maybe then, also, finally, in Dylan's words, the "voices in the night"[235] will, for once, be heard.

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[230] *See* PERLIN, INTERNATIONAL HUMAN RIGHTS, *supra* note 19, at 147.

[231] Peter Blanck, *"The Right to Live in the World": Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367, 401 (2008); on the invisibility of persons with disabilities in this context in general, see PERLIN, *supra* note 6.

[232] Ena Chadha & C. Tess Sheldon, *Promoting Equality: Economic and Social Rights for Persons with Disabilities Under Section 15*, 16 NAT'L J. CONST. L. 27, 42 (2004).

[233] Mary Donnelly, *From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights*, 26 L. CONTEXT 37, 57 (2008).

[234] Perlin, *A Change is Gonna Come*, *supra* note 25, at 498.

[235] *Million Miles*, Bob Dylan (1997), http://www.bobdylan.com/songs/million-miles [http://perma.cc/Z7RS-DS9K].