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Introductory Remarks: The Convention on the Rights of Persons with Disabilities and the Treatment of Institutionalized Forensic Patients

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THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE TREATMENT OF INSTITUTIONALIZED FORENSIC PATIENTS

This panel was convened at 11:00 a.m., Thursday, April 9, by its moderator Michael L. Perlin of New York Law School, who introduced the panelists: Yoshi Ikehara of the Tokyo Advocacy Law Office; Carole Petersen of the University of Hawaii Law School; Maya Sabatello of the Division of Law, Ethics, and Psychiatry, Department of Psychiatry at Columbia University; and Zhiyuan Guo of the China University of Political Science and Law.

INTRODUCTORY REMARKS BY MICHAEL L. PERLIN*

Persons institutionalized in psychiatric institutions and facilities for persons with intellectual disabilities have always been hidden from view. This population was traditionally, to the public, faceless and less than human. However, in the early 1970s, a series of court cases shone a harsh light on the brutal and inhuman conditions in such facilities in many U.S. jurisdictions. These cases eventually led, if tardily, to the legislative passage of so-called “Patients Bills of Rights,” which created substantive and procedural protection for those in danger of being deprived of their liberty, and those who had been so deprived.¹

A similar progression was occurring in Western Europe at this time. Perhaps as a by-product of all of this, those individuals who had been hidden and whose voices had been silenced began to raise their voices to protest the dehumanization of the conditions in which they had been confined.² Much of the case law that developed ignores forensic patients entirely. By and large (although not exclusively), the facilities that were the subject of this litigation (and concomitant press scrutiny) were facilities that mostly housed patients who had never been charged with or prosecuted for criminal charges, a fact that is, interestingly and ironically, discordant with the false “ordinary common sense” that posits that “most mentally ill individuals are dangerous and frightening [and] are invariably more dangerous than non-mentally ill persons.” Even in this hidden world of those institutionalized because of psychiatric disability (or alleged disability), forensic patients—mostly those awaiting incompetency-to-stand trial determinations, those found permanently incompetent to stand trial, those who had been acquitted by reason of insanity, and, in some jurisdictions, individuals transferred from correctional facilities—remained the most hidden.³

This extra level of social isolation was generally just fine with most of those who had been involved in the patients’ rights revolution that has restructured mental health care around the world. It was fine to the advocacy groups that came forward at this time, since the

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¹ See generally, 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 98 (Michael Dudley et al. eds., 2012).

² See MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011).

³ See generally, Michael L. Perlin & Meredith R. Schriver, “You That Hide Behind Walls”: *The Relationship between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, in TORTURE AND ILL-TREATMENT IN HEALTH-CARE SETTINGS: A COMPILATION 195 (American University Center on Humanitarian Law ed., 2013); Michael L. Perlin & Alison J. Lynch, “The Distant Ships of Liberty”: *Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692109.

existence of a forensic “world” could be used as evidence that there was a causal relationship between mental illness (or intellectual disability) and “dangerousness.” It was fine to the lawyers who brought the bulk of the first generation of public interest cases since one of the significant underpinnings of the initial right to liberty/least restrictive alternative civil rights suits was that the plaintiff had never been “alleged to have committed any crime.” It was fine to the state hospital system, since it was clear that if it appeared that this population was being released or deinstitutionalized, there would be a predictable public outcry. And it was fine to prosecutors and police officials since it insured that this population would remain locked up indefinitely, as they always had been. As a result of all of this, things have remained basically status quo for about forty years, and the “patients’ rights revolution” has had very little impact on those in forensic facilities.

This must be radically reconsidered in light of the ratification of the UN’s Convention on the Rights of Persons with Disabilities (CRPD). This Convention—the most revolutionary international human rights document ever created that applies to persons with disabilities—further the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life, endorsing a social model of disability and re-conceptualizing mental health rights as disability rights, clearly and directly repudiating the traditional medical model.

It has ushered in a new era of disability rights policy, calling for “respect for inherent dignity” and “non-discrimination,” freedom from “arbitrary or unlawful interference” with privacy, “freedom from torture or cruel, inhuman or degrading treatment or punishment,” “freedom from exploitation, violence and abuse,” and a right to protection of the “integrity of the person.”⁴ It also sets out explicitly the many steps that states must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.

Its ratification must be read with the UN’s Convention against Torture (CAT). Together, these documents make it more likely—or *should* make it more likely—that, for the first time, worldwide attention will be paid to the conditions of confinement of this population, how those conditions regularly violate international human rights law, and how those who are in charge of these institutions do so with impunity.

The relationship between the CAT and the CRPD has begun to come under scrutiny. Janet Lord has written eloquently about the “anti-torture” framework of the CRPD, concluding:

The adoption of the CRPD clearly constitutes an important development in the anti-torture framework under international human rights law. Its principal contribution is to apply the torture prohibition within a disability context, consistent with core principles of the CRPD including dignity, non-discrimination, autonomy, and independence. . . . These principles add content to the overall anti-torture framework and should thus find ready application as a guide to regional and international regimes applying the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment.⁵

But, there has been little follow-up literature on this connection, and that gap is truly problematic if we are ever to fully and effectively contextualize the two Conventions in the context of the treatment of persons institutionalized because of mental disabilities. Six core issues must be considered if the scope of the underlying problems is to be understood:

⁴ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, arts. 3, 15-17, 22 (Dec. 13, 2006).

⁵ Janet Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities?*, 33 *LOY. L.A. INT’L & COMP. L. REV.* 27 (2010).

1. Although there is a robust literature on the CRPD and on the CAT, there is virtually no mention of the plight of forensic patients. So, even within the world of those who focus broadly on these human rights issues, this population has remained invisible.
2. Conditions at forensic facilities around the world continue to “shock the conscience,” and it is essential that any “anti-torture” publication (such as this one) highlight this.
3. Even when regional courts and commissions have found international human rights violations in cases involving forensic patients, the discussion of these cases largely ignores the plaintiffs’ statuses as forensic patients
4. There are few lawyers and fewer “mental disability advocates” providing legal and advocacy services to this population,
5. There is little mention in the survivor movement literature about the specific plight of forensic patients.
6. Forensic patients in facilities for persons with intellectual disabilities are particularly absent from the discourse.

These issues and more will be discussed by our fine panelists: Yoshi Ikehara of the Tokyo Advocacy Law Office; Carole Petersen of the University of Hawaii Law School; Maya Sabatello of the Center for the Division of Law, Ethics, and Psychiatry, Department of Psychiatry at Columbia University; and Zhiyuan Guo of the China University of Political Science and Law.

WHERE HAVE THE RIGHTS OF FORENSIC PATIENTS GONE?

*By Maya Sabatello**

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.”¹ It was preceded by a few decades of bottom-up disability activism, which called attention to the prejudice and discrimination experienced by persons with disabilities, especially those with psychiatric conditions, worldwide. The invisibility of persons with disabilities on both national and international levels further highlighted the inadequacy of existing human rights treaties in honing to disability claims.² Thus, there was much optimism throughout the CRPD’s negotiations that this instrument would create a new world for persons with disabilities, including those with psychiatric conditions: a world of inclusion, full equality, and stakeholders’ participation in the decision-making and implementation processes.

Indeed, the CRPD’s provisions are promising in reversing the historical subjugation of persons with psychiatric conditions in society. Although the treaty was not intended to create new rights, the CRPD makes it crystal clear that disability rights are human rights, and that

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¹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, art. 1 (Dec. 13, 2006) [hereinafter: CRPD].

² Gerard Quinn & Theresia Degener, *Human Rights and Disability*, UN HR/PUB/02/1 (2002), available at <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>; Colm O’Cinneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Frameworks: Established Limits and New Possibilities*, 163, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* (O.M. Arnardóttir & G. Quinn, eds., 2009).