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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

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“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

MICHAEL L. PERLIN*

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I. INTRODUCTION

As recently as fifteen years ago, disability was not broadly acknowledged as a human rights issue. Although there were prior cases decided in the United States and in Europe that, retrospectively, had been litigated from a human rights perspective,¹ the *characterization* of “disability rights” (especially the rights of persons with *mental* disabilities) was not discussed in a global public, political, or legal debate until the early 1990s. Instead, disability was seen only as a medical problem of the individual requiring a treatment or cure. By contrast, viewing disability as a human rights issue requires us to recognize the inherent equality of all people, regardless of their abilities, disabilities, or differences, and obligates society to remove

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1. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (holding it unconstitutional to confine a nondangerous person capable of surviving safely in freedom to a mental hospital); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (stating that a statute that fails to provide a person alleged to be mentally ill with adequate procedural safeguards is unconstitutional); *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (holding that persons with mental illness have a constitutional right to adequate treatment in mental hospitals), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Winterwerp v. Netherlands*, App. No. 6301/73, 2 Eur. H.R. Rep. 387 (1979) (Eur. Ct. H.R.) (holding that detention on grounds of unsoundness of mind must be based on objective medical evidence of a true mental disorder, be a proportionate response, and be carried out in accordance with a procedure prescribed by law). See generally 1 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* ch. 2 (2d ed. 1998); 2 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* ch. 3 (2d ed. 1999).

the attitudinal and physical barriers to equality and inclusion of people with disabilities.

But, as my muse, Bob Dylan (more on that later), sang several years ago, "Things Have Changed."² In a recent article, I identified several "important and overlapping positive developments, all . . . of which, when considered together, shine new light on the underlying issues and promise to focus new attention on them in the near future."³ There is no question in my mind that the most important of these developments is the recent ratification of the United Nations Convention on the Rights of Persons with Mental Disabilities (CRPD).⁴ I believe that this convention has the potential to create the most significant tectonic plate shift in mental disability law since the United States Supreme Court, finally, in 1972, agreed that the Due Process Clause of the U.S. Constitution applied to persons institutionalized because of mental disability.⁵ And that is the topic addressed in this article.

I chose this topic because I believe it is essential that I talk about this convention, and it allows me to argue that this new international law truly has the potential to force us to reconceptualize everything that we have thought of as the "accumulated truths" of mental disability law. I also think it is important to do since, frankly, it is a development that appears to me to have escaped under the radar for almost all law students (and, alas, most professors and practitioners as well). But before I begin this discussion, it is important for readers to know a bit about me so they better understand my perspective on this area of law and policy.

I spent thirteen years as a lawyer representing persons with mental disabilities and have taught mental disability law courses at New York Law School since 1984. I am the only law professor in the nation (and, most

2. BOB DYLAN, *Things Have Changed*, on THE ESSENTIAL BOB DYLAN (Columbia 2000). I regularly use Dylan lyrics/song titles in my law review article titles. See, e.g., 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, 545 (2002-03).

3. Michael L. Perlin, "I Might Need a Good Lawyer, Could Be Your Funeral, My Trial": *A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 241, 252 (2008) (discussing, inter alia, recent international case law articulating a new broadened right to counsel, the publication by the World Health Organization of the *WHO Resource Book on Mental Health, Human Rights and Legislation*, expanded professional interest in the issue, and the focus on mental disability specific nongovernment organizations on conditions affecting persons institutionalized because of mental disability).

4. See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006). The convention entered into force on May 3, 2008. UN Enable—Entry into Force, <http://un.org/disabilities/default.asp?id=210> (last visited Apr. 20, 2009).

5. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

likely, the world) who teaches and/or supervises *nine* different courses in this area (soon to be twelve). I have written twenty books and nearly 200 articles on all aspects of this topic.

For the past several years, I have turned my attention to the intersection between mental disability law and international human rights law in several major ways. First, under the aegis of Mental Disability Rights International (MDRI), a Washington, D.C.-based human rights advocacy non-government organization (NGO),⁶ I have done site visits and conducted mental disability law training workshops in Hungary, Estonia, Latvia, Uruguay, and Bulgaria. Second, through New York Law School's (NYLS) Online Distance Learning Mental Disability Law program (which I direct), I have taught mental disability law courses in Japan and Nicaragua and have worked extensively in Nicaragua with local advocates and activists in an effort to build a mental disability advocacy network in that nation (one that could optimally be expanded to other nations in Central and South America).⁷ I have also done work in Costa Rica and Guatemala to this end. We are currently involved in expanding this program to create a new partnership in Japan and, subsequently, other partnerships in China, in Israel, and in Uganda/Kenya.

Third, through the International Mental Disability Law Reform Project of the NYLS Justice Action Center (which I also direct),⁸ I have worked in Taiwan and in Japan, as the first step in the creation of a Pan-Asian Rim Mental Health Advocacy Network and in the creation of an Asia Regional Disability Rights Commission, and in Uganda in the creation of an Institute on Criminal Justice at Nkumba University Law School in Entebbe.

I also have done a significant amount of international teaching. Several years ago, I was a Visiting Scholar at Hebrew University in Jerusalem, Israel; a Visiting Professor at the Institute on Human Rights, Abo Akademi University/University of Turku in Turku, Finland; and a Visiting Fellow at the European University Institute—Law in Florence, Italy. In January, as a Fulbright Senior Specialist, I served as a Visiting Professor in the Global Law Program at Haifa University in Haifa, Israel. Also, in conjunction with the American Bar Association's Rule of Law Asia office, the All China Lawyers' Association, and Northwest University of Politics and Law, I have conducted "Training the Trainers" workshops in Xi'an, China to teach

6. See MDRI—Mental Disability Rights International, <http://www.mdri.org> (last visited Apr. 14, 2009).

7. See generally Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 *FORDHAM INT'L L.J.* 435 (2007).

8. See New York Law School—Justice Action Center, http://www.nyls.edu/centers/harlan_scholar_centers/justice_action_center/projects (last visited Apr. 20, 2009).

experienced death penalty defense lawyers how to train inexperienced lawyers, employing the online distance learning methodologies used in NYLS's Online Mental Disability Law curriculum that I developed.

I recount my experience *not* to give the short-form version of my curriculum vitae, but to reinforce how absolutely *essential* it is for U.S.-based mental disability law scholars, practitioners, and advocates to update their passports, visit Seatguru.com, and consider an investment in foreign language lessons (although that did not always work out *that* well for me). I have come to believe (I did not always feel this way, I must confess) that it is impossible to be a truly effective advocate if one looks only at what is happening in one's home jurisdiction. And if readers come away from this article with only one lasting impression, I hope it is that one.

The work to which I just referred—and other work that I have done in Europe and South America—has clarified to me the extent of our societal blindness to the ongoing violations of international human rights law in the context of the institutional commitment and treatment of persons with mental disabilities. Notwithstanding a robust set of *earlier* international law principles, standards, and doctrines—many substantially based on American constitutional law decisions and statutory reforms of the past three decades⁹—people with mental disabilities live in some of the harshest conditions that exist in any society.¹⁰ The series of reports issued by Mental Disability Rights International—condemning conditions in Uruguay, Serbia, Hungary, and Turkey¹¹—bear stark witness to this reality.

This article is divided into three unequal segments. First, I will discuss the realities of mental disability law abroad and highlight what I call the “universal factors” that contaminate the practice and reality of this law no

9. See, e.g., 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); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 469, 527-31 (2002).

10. See Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COM. 333, 335 (2007).

11. See, e.g., MENTAL DISABILITY RIGHTS INT’L, CHILDREN IN RUSSIA’S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM (1999), available at <http://mdri.org/mdri-reports-publications.html>; MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: HUNGARY (1997), available at <http://mdri.org/mdri-reports-publications.html>; MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: MEXICO (2000), available at <http://mdri.org/mdri-reports-publications.html>; MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: URUGUAY (1995); MENTAL DISABILITY RIGHTS INT’L, RUINED LIVES: SEGREGATION FROM SOCIETY IN ARGENTINA’S PSYCHIATRIC ASYLUMS (2007), available at <http://mdri.org/mdri-reports-publications.html>; MENTAL DISABILITY RIGHTS INT’L, TORMENT NOT TREATMENT: SERBIA’S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES (2007), available at <http://mdri.org/mdri-reports-publications.html>.

matter where it is applied.¹² Then, I will talk about the U.N. Convention and what its implications may be for the United States. Finally, I will conclude with some thoughts, predictions, and hopes for the future.

II. UNIVERSAL FACTORS

There are at least five dominant, universal core factors that must be considered carefully in any evaluation of the key question of whether international human rights standards have been violated. Each factor is a reflection of the shame that the worldwide state of mental disability law brings to all of us who work in this field. Each is tainted by the pervasive corruption of sanism that permeates all of mental disability law, and each reflects a blinding pretextuality that contaminates legal practice in this area.¹³

First, what do I mean by "sanism"? 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.¹⁴ Sanism permeates mental disability law, affecting all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses. 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).¹⁵

And what do I mean by "pretextuality"? Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends. This pretextuality is poisonous, infecting all participants in the judicial system, breeding cynicism and disrespect for the law, demeaning participants, and reinforcing shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.¹⁶

All aspects of mental disability law are pervaded by sanism and pretextuality, whether the specific presenting topic is involuntary civil com-

12. See Perlin, *supra* note 10, at 355 (explaining that the conditions discussed are "endemic to institutional mental health care around the world").

13. See *id.* at 333.

14. Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 374 (1992).

15. Michael L. Perlin, "*You Have Discussed Lepers and Crooks*": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 684 (2003).

16. 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) (citing 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, 5 (1999)).

mitment law, the right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process; this is true in both domestic and international law.¹⁷ Together, I believe these concepts help explain the contamination of scholarly discourse and lawyering practices alike.¹⁸ And I argue that, unless and until we come to grips with these concepts and their stranglehold on mental disability law development, any efforts at truly understanding this area of the law are doomed to failure.¹⁹

So what are the Core Factors to which I referred? I will briefly list them here with the simple observation that these factors are constant no matter where we observe the practice of mental disability law and the treatment of persons institutionalized because of mental disability. These core factors are:

1. Lack of comprehensive legislation to govern the commitment and treatment of persons with mental disabilities, and failure to adhere to legislative mandates²⁰
2. Lack of independent counsel and lack of consistent judicial review mechanisms made available to persons facing commitment and those institutionalized²¹
3. A failure to provide humane care to institutionalized persons²²
4. Lack of coherent and integrated community programs as an alternative to institutional care²³
5. Failure to provide humane services to forensic patients²⁴

I know that this is a bleak picture. The examples that I can share are actually much bleaker. But—and I want to stress this—I am optimistic that change is going to come (and I use that phrase very purposely). And it is to this potential for change that I turn my attention.

17. *Id.* See generally MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000).

18. Perlin, *supra* note 16, at 26.

19. *Id.*

20. Perlin, *supra* note 10, at 337.

21. *Id.* at 340.

22. *Id.* at 343.

23. *Id.* at 349.

24. *Id.* at 354.

III. THE UN CONVENTION²⁵

Disability rights, as a human rights issue, has now taken center stage at the United Nations, and the involvement of stakeholders—consumers and users of psychiatric services, sometimes referred to as “survivor groups”²⁶—has been critical 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.²⁷

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.”²⁸ 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 Disabilities²⁹ was adopted in December 2006 and opened for signature in March 2007.³⁰ It entered into force—thus becoming legally binding on states parties—on May 3, 2008, thirty days after the twentieth ratification.³¹ One of the hallmarks of the process that led to the publication of the UN convention was the participation of persons with disabilities and the clarion cry, “Nothing about us, without us.”³² This has

25. This section is largely adapted from Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS (Michael Dudley ed., forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132428.

26. Perlin, *supra* note 7, at 438.

27. For an example of the singular role of this convention, see Frederic Megret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267723; Frederic Megret, *The Disabilities Convention: Toward a Holistic Concept of Rights*, 12 INT'L J. HUM. RTS. (forthcoming 2009), available at <http://ssrn.co/abstract=1267726>; and Michael Ashley Stein & Janet Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167 (2007).

28. G.A. Res. 56/168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001).

29. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

30. *Id.*

31. On the twentieth ratification, see Press Release, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May (Apr. 3, 2008), available at <http://www.un.org/News/Press/docs/2008/hr4941.doc.htm>. See generally Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF, Winter 2007, at 37, 44; Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).

32. See, e.g., 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); Honorable Ruth Dyson, Minister for Disability Issues, N.Z. Mission to the

led commentators to conclude that the convention “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.”³³

The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life.³⁴ It calls for “respect for inherent dignity”³⁵ and “non-discrimination.”³⁶ Subsequent articles declare “freedom from torture or cruel, inhuman, or degrading treatment or punishment”;³⁷ “freedom from exploitation, violence, and abuse”;³⁸ and a right to protection of the “integrity of the person.”³⁹

However, it is still a *very* open question as to whether or not these will actually be given life or whether they will remain little more than “paper victories.”⁴⁰ The enforcement of the disability convention remains a critical

U.N., Statement for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disabilities (Mar. 30, 2007), *available at* http://www.un.org/esa/socdev/enable/documents/Stat_Conv/nzam.doc (“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.

33. Kayess & French, *supra* note 32, at 4 n.17; see Louise Arbour, United Nations High Comm’r for Human Rights, Statement at Special Event on the Convention on Rights of Persons with Disabilities (Mar. 26, 2007), *available at* [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/7444B2E219117CE8C12572AA004C5701?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/7444B2E219117CE8C12572AA004C5701?OpenDocument); Don Mackay, Permanent Representative of N.Z. and Chair of the United Nations Ad-Hoc Comm. on the United Nations Convention on the Rights and Dignity of Persons with Disabilities, Statement at Special Event on the Convention on Rights of Persons with Disabilities (Mar. 26, 2007), *available at* [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/7444B2E219117CE8C12572AA004C5701?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/7444B2E219117CE8C12572AA004C5701?OpenDocument).

34. For a thoughtful and helpful forerunner article, see Aaron 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 (2005).

35. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 3(a), U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

36. *Id.* art. 3(b).

37. *Id.* art. 15.

38. *Id.* art. 16.

39. *Id.* art. 17.

40. 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, 246 (2002) (“Mental disability law is strewn with examples of ‘paper victories.’”) (quoting Michael Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 93 (Valerie J. Bradley & Gary J. Clarke eds., 1976)); see also Michael L. Perlin, “*Through the Wild Cathedral Evening*”: *Barriers, Attitudes, Participatory De-*

issue. Consider the Core Factors discussed previously and the impact that the convention might have on each of them.

I noted in Core Factor One that there was often no mental health law *at all* in other nations. The new CRPD obligates all state parties to "adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."⁴¹ The extent to which this obligation is honored will reveal much about the convention's ultimate "real world" impact.

I noted in Core Factor Two that there was often no counsel provided to persons facing institutionalization. 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."⁴² Elsewhere, the convention commands that

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.⁴³

The extent to which this article is honored in signatory nations will have a major impact on the extent to which this entire convention "matters" to persons with mental disabilities.⁴⁴

I noted in Core Factor Three that conditions in psychiatric institutions around the world "shock[] the conscience" and violate the "decencies of civilized conduct."⁴⁵ Consider article 22 of the new UN convention, which

mocracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities, 13 TEX. J. C.L. & C.R. 413, 419 (2008) ("It is still a very open question as to whether or not these rights will actually be given life, or whether they will remain little more than 'paper victories.'" (quoting 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, 246 (2002))).

41. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 4.1(a), U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

42. *Id.* art. 12.3.

43. *Id.* art. 13.1.

44. On the global unavailability of counsel to persons facing civil commitment because of mental disability, see Perlin, *supra* note 3.

45. *Cf. Rochin v. California*, 342 U.S. 165, 172-73 (1952). Although the Court was referring to a particularly objectionable and unconstitutional invasion of the privacy of a criminal defendant, this language applies equally to conditions in some psychiatric institutions. *See id.*

states, “No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy.”⁴⁶ What impact will this article have on future cases in ameliorating conditions such as those described here?

I noted in Core Factor Four that, internationally, virtually all nations were deficient in providing community services. Consider the potential application of article nineteen:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place [sic] of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.⁴⁷

The phrase “*rep ipsa loquitur*” applies here, I think.

Finally, I noted in Core Factor Five that conditions in forensic facilities were even more abysmal than in civil facilities. For example, in Hungary, until very recently, convicted prisoners from Budapest Prison were used to “keep an eye on” patients in that nation’s only high security forensic psychiatric institution “with high suicide risk.”⁴⁸ In Albania, persons with mental disabilities who have been charged with a criminal offense reside in a prison unit and must comply with prison rules while institutionalized; these inmates were regularly institutionalized for *five* years before a re-evaluation of their condition.⁴⁹ These conditions are stupefying and amount to wholesale violations *per se* of the UN convention.

So, what does all this mean? Commentators have concluded that the convention “is regarded as having finally empowered the ‘world’s largest

46. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 22, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

47. *Id.* art. 19.

48. Perlin, *supra* note 10, at 354 (citing Press Release, Mental Disability Advocacy Center (MDAC), Prisoners or Patients (June 2005), available at http://www.mdac.info/documents/PR_IMEI_20050627_eng.pdf).

49. Perlin, *supra* note 10, at 354 (citing Harvey Weinstein et al., *Protecting the Mentally Disabled*, CARNEGIE COUNCIL, May 6, 2001, http://www.cceia.org/resources/publications/dialogue/2_06/online_exclusive/654.html).

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."⁵⁰

Rosemary Kayess and Phillip French observed:

Proponents emphasised [sic] that a convention on the human rights of persons with disability would give shape to the nature of, and add specific content to, human rights as they apply to persons with disability, and in turn, provide a substantive framework for the application of rights within domestic law and policy.⁵¹

Prof. Arlene Kanter stated, "The extent to which the Convention can realize its goals will depend in large part on the extent to which the Convention is ratified, and whether the world's nations will comply with and further the goals of the Convention through enactment of or changes to their domestic laws."⁵² As previously noted,

The new United Nations Convention on the Rights of Persons with Disabilities obligates all state parties "[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised [sic] in the present Convention." The extent to which this obligation is honored will reveal much about the Convention's ultimate "real world" impact.⁵³

The convention leaves open many important questions in many areas of law and policy.⁵⁴ Its focus—and the focus of the scholarly debate now taking place—has certainly been more on questions of empowerment than on questions of trial procedure.⁵⁵ Yet, it is clear that the convention opens up for reconsideration the full panoply of issues discussed in this article as they relate to persons with mental disabilities. If, by way of example, rules of evidence and procedure create an environment that perpetuates the sort of sanism and pretextuality that has had such a negative impact on the lives

50. See, e.g., Kayess & French, *supra* note 32, at 4.

51. *Id.* at 16-17.

52. Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287, 309 (2007).

53. Perlman, *supra* note 10, at 339 (mistake in original) (quoting Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 4.1(a), U.N. Doc. A/RES/61/106 (Dec. 13, 2006)).

54. For a consideration of questions remaining unanswered with regard to the relationship between the convention and the International Classification of Functioning, Disability and Health, see Kayess & French, *supra* note 32, at 24.

55. See Kayess & French, *supra* note 32, at 9-13.

of persons with mental disabilities and that condones teleological judicial behavior⁵⁶ through over-reliance on cognitive-simplifying heuristics,⁵⁷ then a strong argument could be made that these rules must be recrafted in the context of the convention. Certainly, this question *must* be “on the table” for lawyers and for advocates in the coming years.

Many obstacles to the enforcement of UN human rights conventions have been identified in the decades since the entry into force of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵⁸ These include concerns that (1) there is limited enforcement machinery; (2) the existing machinery is understaffed, underfunded, and may not have the authority to compel compliance with—or to punish violations of—human rights standards; (3) ultimately, human rights enforcement may be viewed as a state function (a version of the “fox guarding the henhouse” dilemma); and (4) the general lack of accountability that results from some of these issues.⁵⁹

Of course, there are some very reasonable questions that may come to mind. First, has the United States signed this convention? Next, will it? And finally, if it does, what then?

The first can be answered easily and sadly. No, it has not. During the recent presidential election campaign, whenever I spoke to an audience about this general topic, I said, “Come back and talk to me after January 20—I hope!” Well, it is now several months after that date, and I remain very hopeful that, yes, we will sign it, and that we will obligate ourselves to fulfilling its many mandates.

What has our track record been with regard to other similar conventions that might be invoked to protect other “discrete and insular minorit[y]” populations?⁶⁰ To be charitable, it is a mixed bag. Courts in the United States have been inconsistent in their enforcement of and adherence to UN conventions. In *Lareau v. Manson*, a federal district court cited to the United Nations Standard Minimum Rules for the Treatment of Prisoners

56. This refers to the ways that courts “cherry pick” social science evidence so as to justify decisions arrived at arbitrarily. See 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, 29 (1999).

57. Heuristics are cognitive-simplifying devices that frequently lead to systematically erroneous decisions through ignoring or misusing rationally useful information. Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992).

58. See generally MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: DOCUMENTARY SUPPLEMENT (2006).

59. See, e.g., *Enforcing Human Rights: The U.N. Machinery*, 30 U.N. CHRON., Mar. 1993, at 93.

60. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

standards in cases involving the "double bunking" of inmates.⁶¹ On the other hand, in *Flores v. Southern Peru Copper Corp.*, the Second Circuit found that the United Nations' Convention on the Rights of the Child (CRC) did not convey a private right of action to plaintiffs as a matter of law.⁶² In at least one case, however, while noting that the nonratified convention was not binding on U.S. courts, the Massachusetts Supreme Judicial Court "read the entire text of the convention . . . and conclude[d] that the outcome of the proceedings in this case are completely in accord with principles expressed therein."⁶³

Most significantly and most recently, in *Roper v. Simmons*,⁶⁴ in the course of striking down the juvenile death penalty, the Supreme Court (per Justice Kennedy) acknowledged that the United States had not ratified the CRC but added,

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.⁶⁵

There is some important literature that suggests that, in other nations, in other contexts, ratification of a UN convention has had a salutary impact on domestic law. Writing about the ratification in the United Kingdom of the CRC, Professor Adrian James has written:

[T]here have been significant changes in the environment within which children's issues are addressed in both private and public law cases in the family courts; in addition, it is also clear that at an organizational level, major strides have been taken in embracing the provisions of the [CRC] and in

61. 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).

62. 414 F.3d 233, 259 (2d Cir. 2003).

63. *In re Adoption of Peggy*, 767 N.E.2d 29, 38 (Mass. 2002).

64. 543 U.S. 551 (2005).

65. *Id.* at 578. (citation omitted). Soberingly, a recent survey by Professor Jean Koh Peters found that almost three-quarters of children worldwide live in countries where the CRC is not observed or where evidence as to observance is inconclusive, despite the CRC's widespread ratification. Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968-69 (2006).

making children's rights, especially those of participation, meaningful.⁶⁶

So, I certainly am retaining some measure of optimism as we move forward.⁶⁷

I plead guilty to the charge of being "lawyer-centric." I have argued elsewhere, and I repeat those arguments, that without a cadre of trained, dedicated (in both senses),⁶⁸ advocacy-focused counsel, it is impossible to aspire to any meaningful level of ameliorative change in this area.⁶⁹ Only the appointment and continued presence of such lawyers can make it possible for meaningful law reform in all aspects of commitment and institutional rights law to take place.

Writing recently about the need for law schools—internationally—to commit themselves to the creation of clinical programs to train lawyers to provide legal representation to indigent persons facing involuntary civil commitment, I pointed out:

In the civil commitment context, any sanism-inspired blunders by lawyers can easily be fatal to the client's chance of success. If a lawyer rejects the notion that his client may be competent (indeed, if s/he engages in the not-atypical "presumption of incompetency" that is all too often *de rigueur* in these cases), the chances are far slimmer that s/he will advocate for such a client in the way that lawyers have been taught—or, at the least, should be taught—to advocate for their clients. In nations with no traditions of an "expanded due process model" in cases involving persons subject to commitment to psychiatric institutions or those already institutionalized, sanism in lawyers can be fatal to an individual's chance for release or for a judicial order mandating amelioration of conditions of confinement and/or access to treatment and/or to be free from unwanted treatment interventions.⁷⁰

66. Adrian James, *Children, the UNCRC, and Family Law in England and Wales*, 46 FAM. CT. REV. 53, 61 (2008).

67. See generally 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. (forthcoming 2009).

68. That is, "dedicated," as in devoted to the substance and importance of the work, and "dedicated," as in focusing solely on the type of work in question.

69. See generally Perlin, *supra* note 3.

70. Perlin, *supra* note 3, at 262 (footnotes omitted). On the question of presumption of incompetency, see Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Com-*

Similarly, writing about representation in the context of the right to refuse treatment, I noted, "[I]f active, trained counsel is not provided for patients seeking to interpose this right, then the right becomes nothing more than a paper document: useless and meaningless (and perhaps, counterproductive) in the 'real world.'"⁷¹

In short, the presence of counsel is the lynchpin to authentic change in this area of the law.

IV. SOME FINAL THOUGHTS

In arguing why the United States should ratify the new UN convention, Tara Melish focused on the "deeply entrenched attitudes and stereotypes about disability that have rendered many of the most flagrant abuses of the rights of persons with disabilities 'invisible' from the mainstream human rights lens."⁷² These stereotypes are the essence of sanism; United States ratification of the convention would be the greatest blow against institutionalized sanism for which we could hope.

Seven years ago, I ran a conference at New York Law School on the treatment of persons with mental disabilities in Central and Eastern Europe. A presenter at that conference—a student with whom I had done advocacy work in Hungary—told the audience, "Without advocates willing to get in the trenches and fight for these ideals, so that they might become a reality for persons with mental disabilities, these treaties and standards remain mere words without action."⁷³ This is a goal to which all of us who take this area of law and society seriously should aspire.⁷⁴

Back to my title. President Obama based his successful campaign on change. During the campaign, we often heard Sam Cooke's brilliant civil rights anthem, "A Change is Gonna Come."⁷⁵ Just as the American elector-

mitment: Kendra's Law as Case Study, 9 PSYCHOL. PUB. POL'Y & L. 183, 193 (2003) ("In short, the presumption in which courts have regularly engaged—that there is both a de facto and de jure presumption of incompetency to be applied to medication decision making—appears to be based on an empirical fallacy: psychiatric patients are not necessarily more incompetent than non-mentally ill persons to engage in independent medication decision making." (footnote omitted)). For an explanation of the "expanded due process model," see Michael L. Perlin, "Make Promises by the Hour": *Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947, 971 (1997).

71. 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, 737 (2005).

72. Melish, *supra* note 31, at 44.

73. 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. 361, 381 (2002) (setting out the remarks of Jean Bliss).

74. Perlin, *supra* note 10, at 357.

75. There is a Dylan connection here.

ate embraced change in November at the ballot boxes, I hope that Congress is as willing to embrace change by ratifying the UN Convention on the Rights of Persons with Disabilities. If it were to do that, this would, indeed, be the dawn of a new era.

Cooke was greatly moved upon hearing Bob Dylan's "Blowin' in the Wind" in 1963 and was reportedly in awe that such a poignant song about racism in America could come from someone who was white. While on tour in May 1963, and after speaking with sit-in demonstrators in Durham, North Carolina following a concert, Cooke returned to his tour bus and wrote the first draft of what would become "A Change Is Gonna Come."

In a sense, "A Change Is Gonna Come" is an answer to Dylan's "Blowin' in the Wind," as well as a song of hope for the Civil Rights Movement. The hypothetical questions posed by Dylan, the most obvious being "how many years can some people exist, before they're allowed to be free?", were answered by an implied, "Fewer than you think." Though Cooke recognized, "it's been a long, a long time coming," the song states that change is inevitable. SAM COOKE, *A Change Is Gonna Come*, on A CHANGE IS GONNA COME (RCA Victor 1964), available at http://www.last.fm/music/Sam+Cooke/_/A+Change+Is+Gonna+Come.