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"ABANDONED LOVE": THE IMPACT OF WYATT V. STICKNEY ON THE INTERSECTION BETWEEN INTERNATIONAL HUMAN RIGHTS AND DOMESTIC MENTAL DISABILITY LAW

Michael L. Perlin*

INTRODUCTION

Wyatt v. Stickney1 is the most important institutional rights case litigated in the history of domestic mental disability law.2 It spawned copycat litigation in multiple federal district courts and state superior courts;3 it led directly to the creation of Patients’ Bills of Rights in most states;4 and it inspired the creation of the Developmental Disabilities Assistance and Bill of Rights Act,5 the Mental Health Systems Act Bill of Rights,6 and the federally-funded Protection and Advocacy System.7 Its direct influence on the development of the right-to-treatment doctrine abated after the Supreme Court’s disinclination, in its 1982 decision in Youngberg v. Romeo,8 to find that right to be constitutionally mandated, but its historic role as a beacon and inspiration has never truly faded. It has been cited (at least) an astounding 411 times in domestic law journals.9

However, little has been written about the influence of Wyatt on the intersection between international human rights and mental disability law, an intersection whose importance has grown exponentially since the ratifi-

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3. See id., § 3A-3.3, at 57-60.
8. 457 U.S. 307 (1982); see generally 2 PERLIN, supra note 2, §§ 3A-9 to 9.9, at 87-108.
cation of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD). In this article, I begin a preliminary exploration of that influence, drawing four conclusions:

1. Although Wyatt has not been cited in foreign cases, respected commentators have articulated its importance.

2. A study of important cases from international regional human rights tribunals reveals its impact, both on holdings and on court reasoning.

3. Relevant sections of the CRPD have been based on Wyatt's holdings and the institutional standards mandated by subsequent Wyatt orders.

4. It is not much of a reach to predict that, in another 40 years, Wyatt's influence on international human rights law will be seen as profound as (or as more profound than) its influence on domestic law.

I will first discuss the influence of Wyatt on domestic mental disability law in the context of case law and the sociopolitical environment. Next, I will briefly trace the development of institutional mental disability rights law abroad from the period prior to the publication of the UN Mental Illness Principles, through the period following publication of that document, through the ratification of the CRPD to present. I will then show how Wyatt, although often in a sub silentio manner, has been the guiding force behind those international human rights law developments that mandate positive rights for institutionalized patients, especially in the context of the CRPD. Although Wyatt is cited less and less frequently by US


13. See infra Part IV.

courts in the current era, it remains the inspiration for the most profound international human rights advances worldwide.

The first part of the title of this paper, Abandoned Love, comes from a lesser-known Bob Dylan song, first released in 1985 on *Biograph.* In this "brilliant song," Dylan sings, "Won't you let me in your room one time 'fore I finally disappear?" and, two verses later, "I march in the parade of liberty." It is a song of "anger" and "relief," filed with "loss and yearning." *Wyatt v. Stickney* may appear to have been "abandoned" by the US Supreme Court in its *Youngberg* decision, but, through the vehicle of the CRPD, we allow it to return to our "room" another time, in the guise of international human rights law, as part of the "parade of liberty." For those of us inspired by *Wyatt* when we litigated in the 1970s, the subsequent years have often been filled with anger and loss and yearning. The ratification of the CRPD, however, gives us a large measure of relief.

I. THE DOMESTIC INFLUENCE OF *Wyatt*

Writing about *Wyatt* some 13 years ago, I suggested that its ultimate legacy needed to be considered from four different perspectives: (1) further developments in the litigation itself; (2) *Wyatt*’s ultimate impact on the delivery of mental disability services in Alabama; (3) *Wyatt*’s impact on the development of statutory law elsewhere; and (4) *Wyatt*’s impact on the development of constitutional law elsewhere. As part of that analysis, I concluded that *Wyatt* was at least partially responsible for these positive changes in the delivery of mental health services in Alabama: population at Alabama’s psychiatric hospitals declined dramatically; environmental and safety hazards were eliminated or ameliorated; staff attitudes toward patients changed; state expenditures on mental healthcare increased dramatically; and in some areas, staff numbers increased signifi-

16. See BOB DYLAN, ABANDONED LOVE, ON BIOGRAPH (Columbia Records 1975).
18. Dylan, supra note 16.
22. 2 PERLIN, supra note 2, § 3A-3.2, at 45.
These outcomes were all measurable and empirically validated. They demonstrated, without fear of contradiction, the "real life" effect Wyatt had on the care and treatment of institutionalized persons with mental disabilities in Alabama.

Wyatt's domestic impact outside of Alabama was significant as well, there being "no doubt" of its "massive influence" on the development of state-level Patients' Bills of Rights;25 the promulgation of rights-enforcing regulations in nearly three-quarters of all states;26 and a host of federal legislation including Section 504 of the Rehabilitation Act of 1973,27 the Mental Health Systems Act,28 the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act),29 and the Developmental Disabilities Assistance and Bill of Rights Act.30 The state laws inspired by Wyatt "established baseline civil rights governing the substantive and procedural limitations on the involuntary civil commitment process, the right to treatment, and the right to refuse treatment."31 Beyond that, the Wyatt mandate of a right to treatment in the least restrictive alternative is "echoed in the Americans with Disabilities Act,"32 as articulated in Olmstead v. L.C.33 There is no dispute that Wyatt was "the beginning of a revolution" recognizing the rights of institutionalized persons with mental disabilities.34

24. 2 PERLIN, supra note 2, §3A-3.2b, at 51-53.
25. Id. § 3A-3.2c, at 54.
28. 42 U.S.C. § 9401 (1980). This Advocacy title was short-lived after being enacted on October 7, 1980. It was repealed effectively on October 1, 1981 by the Reagan Administration's Omnibus Reconciliation Act of 1981. See also 2 PERLIN, supra note 2, § 8.13 (discussing repeal).
32. Thornburgh & Burnim, supra note 7, at 606. See also 2 PERLIN, supra note 2, §3A-3.2c, at 56 (Wyatt "clearly infuses [Olmstead]").
And, of course, *Wyatt* had a "dramatic influence on constitutional and case law developments in other jurisdictions." Soon after Judge Johnson issued his first order, similar litigation was filed in Ohio, Minnesota, Louisiana, and elsewhere. After these courts began entering "Wyatt-esque" orders, a "second generation" of cases was filed that included suits that focused more critically on certain of the *Wyatt* standards, and suits that sought relief in areas beyond that requested in *Wyatt*.

Subsequent cases built on the *Wyatt* base by extending the constitutional right to treatment explicitly to include treatment in the least restrictive alternative. Although U.S. Supreme Court eventually failed to constitutionalize some of these holdings in the lead case of *Youngberg v. Romeo*, the Court's resuscitation of this doctrine—in the civil case of *Olmstead v. L.C.* and in the forensic case of *Sell v. United States*—teaches us that *Wyatt*'s influence in this area of mental disability law is still vital.

Post-*Youngberg* case law has been mixed; however, a close reading of these cases reveals that *Wyatt* continues to inform much of the impor-

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35. 2 PERLIN, supra note 2, §3A-3.2d, at 56. See also, Cynthia Faye Barnett, *Treatment Rights of Mentally Ill Nursing Home Residents*, 126 U. PA. L. REV. 578, 588 (1978) ("As dramatic as the changes wrought by *Wyatt* are at the state level, its impact is not limited to Alabama.").
40.  See *e.g.*, *Davis*, 384 F. Supp. at 1197.
41.  See cases discussed in 2 PERLIN, supra note 2, §§ 3A-5 to 5.5, at 64-77, and in PERLIN & CUCOLO, supra note 23, §§ 3A-5 to 5.5, at 6-7.
44.  *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999) (finding that under Title II of the ADA, states are required to provide persons with mental disabilities community-based treatment when such resources are available). On the relationship between *Olmstead* and the least restrictive alternative doctrine, see *e.g.*, Michael L. Perlin, "Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities, 13 TEX. J. C.L. & C.R. 413, 414 (2008).
45.  *Sell v. United States*, 539 U.S. 166 (2003) (holding that defendant has qualified right to refuse to take antipsychotic drugs prescribed solely to render him competent to stand trial; medication over objection is permissible where court finds treatment medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, necessary significantly to further important governmental trial-related interest). On the relationship between *Sell* and the least restrictive alternative doctrine, 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, 736 (2005).
46.  On *Wyatt*'s influence on a national level in general, see Tovino, supra note 6, at 541-45.
47.  2 PERLIN, supra note 2, §§ 3A-12 to 3A-12.3, at 111-24.
tant judicial decisionmaking in this area of the law.\(^4\) I believe that my conclusion of thirteen years ago still stands today:

Although the direct, precedential impact of *Wyatt v. Stickney* would appear to have been dulled somewhat by the U.S. Supreme Court’s decision in *Youngberg v. Romeo*, the moral strength of Judge Johnson’s vision in *Wyatt* remains powerful to this day. *Wyatt*’s dramatic influence on subsequent case law and legislation bears testament to its weight. As a result of *Wyatt*, concepts such as staffing ratios, individual treatment plans, and environmental standards have been regularly incorporated in the fabric of the law. While the Supreme Court stopped far short of mandating *Wyatt* standards in *Youngberg*, these standards remain the law in many jurisdictions; more importantly, there have been few post-*Youngberg* cutbacks in “*Wyatt* states.”\(^5\)

It is thus no surprise that the eminent forensic psychiatrist Milton Greenblatt has characterized *Wyatt* as “the most significant case in the [history] of forensic psychiatry.”\(^5\)\(^1\) and the “foundation of modern psychiatric jurisprudence.”\(^5\)\(^2\) In the words of an Alabama probate judge, it treated persons with mental illness “as individuals with basic human rights, as opposed to faceless masses of insanity.”\(^5\)\(^3\)

II. THE INSTITUTIONAL TREATMENT OF PERSONS WITH MENTAL DISABILITIES IN OTHER NATIONS

*Wyatt* and its progeny revealed persistent and pervasive mistreatment of persons with mental disabilities in the United States. Conditions in psychiatric hospitals in most parts of the world today eerily mimic conditions


\(^5\) Milton Greenblatt, *Foreword* in RETROSPECT & PROSPECT, supra note 26, at ix; 2 *PERLIN*, supra note 2, §3A-6, COMMENT, at 78-79.

\(^5\) Id. at x; see also, 2 *PERLIN*, supra note 2, §3A-3.1, at 24 (*Wyatt* is “one of the most influential mental disability law cases ever filed.”).

in United States facilities at the time Wyatt was brought. Several years before Wyatt, the then-President of the American Psychiatric Association characterized such hospitals as "bankrupt, beyond remedy." A few years after Wyatt, when the chairman of the legal action committee of the National Association of Retarded Children (now the ARC) characterized the Pennhurst State School as "Dachau, without ovens," there was never any accusation of exaggeration. Subsequently, lawyers began to "relicate" the US experience in Eastern Europe and other parts of the world to begin the transformation of mental disability law from a medical to a legal model.

There is a remarkable overlap between the body of decisions that define U.S. constitutional mental disability law and the body of international human rights standards that mandate humane treatment of persons with mental disabilities. The revolution that Wyatt began has largely constitutionalized virtually every aspect of the involuntary civil commitment and release process as well as most “pressure points” in the course of institutionalization: the right to treatment, the right to refuse treatment, the right to the least restrictive alternative course of treatment.

54. 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); Michael L. Perlin, International Human Rights Law and Comparative Mental Disability Law: The Universal Factors, 34 SYRACUSE J. INT’L L. & COM. 333, 347 (2007). The cruelty of conditions at the hospitals that were the focus of the Wyatt litigation cannot be overstated. See Wyatt, 344 F. Supp. at 393 n.13 (“A few of the atrocious incidents cited at the hearing in this case include the following: (a) a resident was scalded to death by hydrant water; (b) a resident was restrained in a strait jacket for nine years in order to prevent hand and finger sucking; (c) a resident was inappropriately confined in seclusion for a period of years, and (d) a resident died from the insertion by another resident of a running water hose into his rectum. Each of these incidents could have been avoided had adequate staff and facilities been available.”).

55. Harry Solomon, Presidential Address: The American Psychiatric Association in Relation to American Psychiatry, 115 AM. J. PSYCHIATRY 1, 7 (1958). Three years later, a witness testified at a Congressional hearing that “[s]ome [state hospital] physicians I interviewed frankly admitted that the animals of nearby piggeries were better housed, fed and treated than many of the patients on their wards.” Constitutional Rights of the Mentally Ill, Hearings Before the Senate Subcommittee on Constitutional Rights of the Judiciary 87th Cong., 2nd Sess. 40-42(1961) (statement of Albert Deutsch), quoted in Perlin et al., supra note 31, at 97.

56. See, e.g., Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that the Developmental Disabilities Bill of Rights Act (42 U.S.C. § 6010) was merely a federal/state grant program and that neither the right to treatment nor the least restrictive alternative sections of the bill of rights was enforceable in private action); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns). Pennhurst was the facility that housed Nicholas Romeo, the plaintiff in Youngberg. 457 U.S. at 310-12.


58. Winick, supra note 54, at 539.

59. Perlin, supra note 54, at 347.

60. Perlin et al., supra note 31, at 96-103.
These actions followed earlier developments in the United Nations. In 1948, that body underscored its commitment to human rights by adopting the Universal Declaration of Human Rights (UDHR) in 1948. As stated in the Preamble, the UDHR sets forth a common standard of achievement for all peoples and nations. Its primary authors drew upon established religious and secular philosophical traditions worldwide in crafting provisions that recognize the inherent, universal, and transcendent nature of human rights. Professor David Kinley has thus concluded that human rights "are not only compatible with democracy, they are essential to its functioning and survival." Subsequent declarations followed in the same vein: the declaration of 1981 as the International Year of Disabled Persons, the establishment by the United Nations General Assembly of the World Programme of Action Concerning Disabled Persons, and the declaration of 1983 to 1992 to be the Decade of Disabled Persons. As part of these efforts, the United Nations Human Rights Commission appointed two special rapporteurs to investigate and report on the human rights of persons with mental disabilities, and in 1991 the General Assembly adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (MI Principles). The MI Principles established the most comprehensive international human rights standards at that time for persons with mental disabilities, and their adoption was a critical global step in recognizing mental disability rights issues within the human rights arena.

68. MI Principles, supra note 14.
Adoption of the MI Principles was spurred on by the work done by Eric Rosenthal and his colleagues in Mental Disability Rights International in Central and Eastern Europe. Then, in 1993, Rosenthal and Rubenstein wrote *International Human Rights Advocacy Under the “Principles for the Protection of Persons with Mental Illness,”* the first publication of a theoretical article exploring the relationship between international human rights law and mental disability law in the specific context of the MI Principles. Rosenthal and Rubenstein’s article was the first detailed international statement of the rights of persons with mental illness and was the first awareness on the part of the United Nations that this most marginalized population was entitled to basic human rights. The MI Principles reflected many of the core rights that had been articulated in the Wyatt opinions, including specifically the right to treatment in the least restrictive alternative. By adopting these principles, the UN “internationalized” mental disability law rights.

In the post-Wyatt years, scholars interpreted other international documents similarly to draw on Wyatt’s spirit. While characterizing the European Court’s jurisprudence as “still . . . undeveloped,” noting that construction of Article 5 of the ECHR has been mixed, Professor Lawrence Gostin argued forcefully that a theory supporting a “right to therapeutic conditions [of confinement]” can be articulated under Article 5, articulating in his reasoning a line of argument that tracks nearly perfectly the *quid*
pro quo rationale basis of Wyatt: “If a person is to be deprived of liberty, not as punishment for a criminal offense, but because of the need for therapy, then government should have a duty to provide minimally adequate treatment.” In the same vein, Professor Gerard Quinn specifically looked to the litigation strategy in Wyatt—and its statutory-based predecessor, Rouse v. Cameron—to “point the way to success under the [European] Convention [for finding a right to treatment].”

Similarly, Article 12(1) of the ICCPR recognizes the right to the “highest attainable standard of . . . mental health.” Professor Terry Carney and his colleagues have linked this right to the right to treatment, citing Wyatt as “a paradigmatic example of institutional litigation which led to a marked improvement in treatment standards in line with the court order.”

Wyatt has also been seen as providing ammunition for broader-based rights under the domestic law of other nations. In discussing the need for an overhaul of New Zealand’s mental health law, Professor John Dawson specifically linked Wyatt’s right to treatment rationale to the draft Bill of Rights’ guarantee of humane conditions for detained persons.

It is clear: both directly and indirectly, Wyatt inspired the development of substantive international mental disability law, especially as it related to institutionalized persons, and this inspiration has been pronounced by respected scholars and critics.

III. MENTAL DISABILITY CASE LAW OUTSIDE THE UNITED STATES

The prevailing human rights conventions, all linked to the UDHR, create judicial or quasi-judicial institutions that are given the responsibility of interpreting, administering, and applying “an entire regime of rules

78. Lawrence O. Gostin, Human Rights of Persons with Disabilities: The European Convention of Human Rights, 23 INT’L J.L. & PSYCHIATRY 125, 153-54 (2000); see also Wyatt, 503 F.2d at 1312 (“Treatment had to be provided as the quid pro quo society had to pay as the price of the extra safety it derived from the denial of individuals’ liberty.”).
79. 373 F.2d 451, 455 (D.C. Cir. 1966); see also 2 PERLIN, supra note 2, §§ 3A-2.2 to 2.3, at 13-20.
80. Quinn, supra note 11, at 38-39; see also id. at 48-49 (“Given the overriding concern with autonomy in any regime of rights, the negative right to liberty could require positive rights to care and treatment in therapeutic environments once liberty has been lost under article 5(1)(e).”).
85. See PERLIN, supra note 61.
which each of these treaties embodies." 86 In this section, I will briefly survey developments in other regions of the world beyond the United States. 87

A. Europe

In a broad context, Professors Laurence Helfer and Anne-Marie Slaughter have characterized the European Convention on Human Rights (ECHR) as a "remarkable and surprising success." 88 As noted above, Article 5 of the ECHR guarantees the right to liberty and security of the person, 89 mandates the provision of a "speedy" review of the detention by an independent court or tribunal, and provides an enforceable remedy in damages to those who are detained in a manner that contravenes the Convention. 90

However, this Article is in no way a panacea to prevent all violations of human rights of persons with disabilities. By way of example, in a carefully-nuanced article, Professors Lawrence Gostin and Lance Gable focus on two important problems that appear to fall outside of the scope of the Convention: confinement of nonprotesting patients and compulsory supervision in the community. 91 The ECHR also—in Article 3's prohibition of inhuman and degrading treatment—creates "a mechanism for monitoring the conditions of confinement." 92

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87. See generally, PERLIN, supra note 61, Chapter 3. There is no regional human rights tribunal or commission in Asia. See id., chapter 8; see also Michael L. Perlin & Yoshikazu Ikehara, Promoting Social Change in East Asia: The Movement to Create a Disability Rights Tribunal and the Promise of International Online, Distance Learning (N.Y.L.S. Legal Studies Research Paper No. 10/11 #17, 2010), available at http://ssrn.com/abstract=1743741 [hereinafter, Perlin & Ikehara, Promoting Social Change].
89. European Convention on Human Rights, supra note 77, at art. 5(i). Note that this is subject to limited circumstances in which governments may justifiably deprive persons "of unsound mind" of their liberty. Id.
90. See PETER BARTLETT, OLIVER LEWIS & OLIVER THOROLD, MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007) (providing a comprehensive evaluation of all ECHR case law as it applies to persons with mental disabilities).
91. Gostin & Gable, supra note 75, at 59.
92. Id. at 78; see also BARTLETT, LEWIS & THOROLD, supra note 90, at 112 (discussing how Article 10 of the Council of Europe Recommendations regarding the Rights of Persons with Mental Disorder "import[s] a duty on the part of States to provide a reasonable standard of health care to persons with mental disabilities.").
Professor David Hewitt has concluded that the European Court on Human Rights “has interpreted the ECHR very restrictively in psychiatric cases,”\(^\text{93}\) considering specifically cases that characterized the handcuffing of patients as “therapeutically necessary”\(^\text{94}\) or sanctioned the use of seclusion for “disciplinary” purposes.\(^\text{95}\) Notwithstanding this gloomy analysis, Professor Gerard Quinn has concluded that the due process protections of the “negative right to liberty . . . are very robust under the Convention.”\(^\text{96}\)

Professor Bruce Winick bridges the gap between Hewitt and Quinn by arguing that, even in the absence of case law, many of the ongoing “abusive practices” still common in Eastern Europe\(^\text{97}\) “can be understood to violate the [ECHR] and other evolving principles of international human rights law.”\(^\text{98}\) According to Winick, the remedy for these abuses is a “healthy dose of international human rights law and therapeutic jurisprudence.”\(^\text{99}\)

Several cases decided by the European Court of Human Rights illuminate this tension. In *Winterwerp v. Netherlands*, the Court found that in order to detain “persons of unsound mind” in accordance with Article 5 of the European Convention, there must be a finding that the disorder requires confinement, and the disorder must be diagnosed using objective medical expertise.\(^\text{100}\) The ECHR also found that it is essential for the person concerned to have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.\(^\text{101}\) In *Aerts v. Belgium*, the Court concluded that the ECHR provided a right to be held in an institution not destructive of the individual’s mental health.\(^\text{102}\) Profs. Gostin and Gable note that this case suggests that “persons with mental illness must be confined in a minimally therapeutic environment.”\(^\text{103}\)

In *Herczegfalvy v. Austria*, the ECHR noted that the position of inferiority and powerlessness typical of patients confined to psychiatric hospitals calls for increased vigilance. Although ultimately the ECHR did

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96. Quinn, supra note 11, at 48; see also Timothy W. Harding, *The Application of the European Convention of Human Rights to the Field of Psychiatry*, 12 Int’l J.L. & Psychiatry 245, 260-62 (1989) (listing most important principles established in ECHR cases involving individuals being committed to psychiatric hospitals or institutionalized in such facilities); see generally Bartlett, Lewis & Thorold, supra note 90.
97. See generally Winick, supra note 54; see also Perlin, supra note 54.
98. Winick, supra note 54, at 572.
99. *Id.*; see also PERLIN, supra note 61, chapter 9 (arguing that Winick’s insights must be taken seriously by scholars and policymakers in this area).
101. *Id.*
103. Gostin & Gable, supra note 75, at 87-88.
not find a violation of Article 3, it noted that use of handcuffs and security beds were "worrying." Professor Hewitt is especially critical of this decision. After Herczegfalvy, he charges, "[i]t is hard to think of a single accepted psychiatric practice that might breach [Article] 3."

Other cases illustrate other aspects of the ECHR. While Article 5(2)'s provision that everyone arrested must be given "the reasons for his arrest and the charge against him" appears to be self-limiting to the criminal setting, the court in Van der Leer v. Netherlands held that it applied to all detentions and was thus breached when a patient was not informed that her stay in a hospital as a voluntary patient had been converted to a detention ordered by a court. The European Court has found that ordering detention in a psychiatric institution without prior medical opinion violates the European Convention, that mental disability must be of sufficient seriousness to justify deprivation of liberty, and that individuals have a right, under Article 5, to initiate review of detention. In E v. Norway, the European Court of Human Rights has found that a delay of eight weeks violates the right to speedy review by a court. And in Megyeri v. Germany, the court found that for periodic review of commitment to be effective, there might need to be procedural safeguards present; the court found a breach of the European Convention where no lawyer was assigned to represent the patient in question. There must also be judicial process involved in determining whether detention under Article 5 is lawful.

105. Hewitt, supra note 93, at 1278.
106. See generally Mary Donnelly, From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights, 26 LAW IN CONTEXT 37 (2008); see also BARTLETT, LEWIS & THOROLD, supra note 90.
In the most recent litigation—a potentially significant procedural decision—the European Court of Human Rights agreed to hear a case concerning a Bulgarian citizen with a psychosocial disability.\textsuperscript{113} The court found that the plaintiff, who was partially deprived of his legal capacity and institutionalized without his consent, could proceed with his case.\textsuperscript{114} The plaintiff, who had never been evaluated to determine whether he was capable of living on his own, was placed in the guardianship of the institution’s director who was given authority to control the patient’s finances and identity papers and to determine his place of residence.\textsuperscript{115} The plaintiff alleged violations of his rights under the ECHR, including a violation of his right not to be subject to inhuman and degrading treatment, his right to liberty, his right to a fair hearing, his right to respect for home and private life, and his right to an effective remedy.\textsuperscript{116}

Notwithstanding this array of cases, Professor Peter Bartlett and his colleagues conclude that the number of cases remains “miniscule, set against the number of people with mental disabilities within ECHR territory whose circumstances engage Convention guarantees.”\textsuperscript{117}

\textbf{B. South America}

Rosario Victor Congo was a 48-year-old Ecuadorian who died of malnutrition, hydroelectrolitic imbalance, and heart and lung failure as a result of Ecuador’s gross negligence and willful acts.\textsuperscript{118} Specifically, Congo was beaten with a club on the scalp by a guard, deprived of any medical treatment, and placed in isolation naked and virtually cut off from communication.\textsuperscript{119}

The Inter-American Commission on Human Rights found that the State violated Congo’s right to humane treatment under Article 5 of the American Convention on Human Rights and determined that Article 5 of the American Convention must be interpreted in light of the MI Principles:

The Commission considers that in the present case the guarantees established under Article 5 of the American Convention must be

\textsuperscript{114} See id. at ¶ 21.
\textsuperscript{115} See id. at ¶¶ 12, 16.
\textsuperscript{116} See id. at ¶¶ 87-90.
\textsuperscript{117} BARTLETT, LEWIS & THOROLD, supra note 90, at 254.
\textsuperscript{119} Id. at ¶¶ 9-10.
interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. These principles were adopted by the United Nations General Assembly as a guide to the interpretation in matters of protection of the human rights of persons with mental disabilities, which this body regards as a particularly vulnerable group.\(^\text{120}\)

In a subsequent footnote, the Inter-American Commission underscored this point:

The UN Principles for the Protection of Persons with Mental Illness are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These Principles serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems. Mental Health Principle 23 establishes that each State must adopt the legislative, judicial, administrative, educational, and other measures that may be necessary to implement them. These Principles are also standards of assessment that make international human rights monitoring by non-governmental organizations more possible.\(^\text{121}\)

Continuing, the Inter-American Commission found that the solitary confinement of Congo constituted inhuman and degrading treatment in violation of Article 5(2) of the American Convention, especially in light of the fact that he was left in isolation unable to satisfy his basic needs.\(^\text{122}\) Thus, the State violated Congo’s right to “be treated with respect for the inherent dignity of the human person.”\(^\text{123}\) Further, the Inter-American Commission found the State responsible for the physical assault committed by one of its agents and a State duty to ensure the physical, mental, and moral integrity of persons suffering from mental illness.\(^\text{124}\)

The Inter-American Commission also found that the State violated Article 4(1) of the American Convention because it failed to take measures within its power so that a person who “partly because of his state of health and in part owing to injuries inflicted on him by a State agent, was defenseless, isolated and under its control” was ensured the right to life.\(^\text{125}\) Finally, the Commission found that, under Article 25(1) of the American

\(^{120}\) Id. at ¶ 54.
\(^{121}\) Id. n. 8.
\(^{122}\) Id. at ¶ 59.
\(^{123}\) Id.
\(^{124}\) Id. at ¶ 62.
\(^{125}\) Id. at ¶ 84.
Convention, Congo had a right to judicial protection which the State violated, since there were no judicial proceedings opened to investigate and establish the responsibilities for the injuries to and death of Congo. As a result of this case, the Commission recommended that the persons responsible for the violations be punished, that the family of Congo be compensated, that medical and psychiatric care for persons suffering from mental illness be provided, and that specialists be assigned to the penitentiary system to identify psychiatric disorders of those confined.

Also, in Ximenes-Lopes v. Brazil, a man died while being held for psychiatric treatment at a private psychiatric clinic/rest home that was operating as part of the Brazilian public health system. Responding to allegations that he was abused and tortured and that these actions led to his premature death, the Inter-American Court:

[Brazil's duties] to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under the jurisdiction thereof, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in inter-individual relationships.

The court concluded that Brazil owed a special duty to protect life and personal integrity, notwithstanding the fact that the facility was a private one. It found that via the Convention, private entities acting in a state capacity in the provision of health care were under its jurisdiction, where, as in this case, the state failed adequately to regulate and supervise them. It also required Brazil to establish educational programs for staff working in mental health institutions.

Again, there can be little doubt that Wyatt – albeit sub silentio – served as a major inspiration for these rights-expanding cases.

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126. Id. at ¶ 97.
127. Id. at ¶ 103.
129. Id. at ¶ 85.
130. Id. at ¶ 89.
131. Id.
Abandoned Love

C. Africa

In Purohit and Moore v. The Gambia, the African Commission on Human and Peoples' Rights found that the Gambia violated various provisions of the African Charter on Human and Peoples’ Rights by the way it treated persons with mental disabilities in the Gambia and by the Lunatic Detention Act of the Gambia (LDA). Although it does not receive communications until local remedies are exhausted, the African Commission found in this case that the existent remedies unrealistic for persons with mental disabilities.

In determining the merits of Purohit and Moore, the African Commission found that when States ratify the African Charter, they undertake a responsibility to bring their “domestic laws and practice in conformity with the African Charter.” Further, the Commission found that Articles 2 and 3, guaranteeing equal protection and anti-discrimination, were non-derogable rights. Thus, Gambia violated these rights through the implementation of the LDA, which detained more people from poor backgrounds and provided only those charged with capital offenses with legal assistance.

The LDA failed to conform with the African Charter by its classification of persons with mental disabilities as “lunatics” and “idiots.” The African Commission found that these terms dehumanized persons with mental disabilities and took away their inherent right to human dignity in violation of Article 5. Like the Inter-American Commission, the African Commission turned to the MI Principles in reaching this conclusion. In addition, the African Commission found that the LDA violated Article 6 of the African Charter because the LDA authorized detention on the basis of opinions by general medical practitioners, lacked fixed detention periods, and precluded review or appeal. In Purohit and Moore, the Commission also found the right to health crucial and “as a result of their condition and by virtue of their disabilities,” persons with mental disabilities should be accorded special treatment enabling them to sustain the optimum level of independence in accordance with both the African Charter and MI Principles.

134. Id. at ¶71.
135. Id.
136. Id. at ¶42.
137. Id. at ¶54.
138. Id. at ¶53-54.
139. Id. at ¶59.
140. Id. at ¶68.
141. Id. at ¶81.
In a recent paper in which I argued for the creation of a disability rights tribunal for Asia and the Pacific, I relied on the decisions in Congo and Purohit to support my position:

[E]xperiences in other regions show that similarly-situated courts and commissions have been powerful forces in mandating the practical implementation . . . of other UN Conventions and treaties . . . We do not believe there is a single person in the world who believes, by way of example, that the high courts of Ecuador or Gambia would have decided the Congo or the Purohit cases the way that the interregional bodies did.

I believe that Wyatt was an inspiration for both of these decisions, and for the judicial bodies’ conclusions that the State violated Congo’s right to “be treated with respect for the inherent dignity of the human person” and Gambia’s actions that took away plaintiffs’ inherent right to human dignity. But, of course, the universe of such cases is, in the words of Professor Peter Bartlett and his colleagues “miniscule.” The ratification of the U.N. Convention on the Rights of People with Disabilities, however, may change that dramatically.

IV. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES

There is no question that the most important international development in this area of law and policy to date has been the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD). The “wide scope” of the “holistic” CRPD furthers the human rights ap-

142. See Perlin & Ikehara, Promoting Social Change, supra note 87.
143. Id. at 23.
Abandoned Love

approach to disability and recognizes the right of people with disabilities to equality in most aspects of life. The CRPD “responds to traditional models, situates disability within a social model framework 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.” It provides a framework for insuring that mental health laws “fully recognize the rights of those with mental illness.” It categorically affirms the social model of disability by describing it as a condition arising from “interaction with various barriers [that] may hinder [the individual’s] full and effective participation in society on an equal basis with others” instead of inherent limitations. It also reconceptualizes mental health rights as disability rights and extends existing human rights to take into account the specific rights experiences of persons with disabilities.

In Professor Gerard Quinn’s eloquent phrase, the CRPD provides a “moral compass for change,” reflecting a “paradigm shift” in the way we think about and treat persons with disabilities. He characterizes it as a “beacon for an international consensus on justice and disability.” Professor Lisa Waddington implies it ushers in a “new era in human rights protection.” Professor Jacqueline Laing says it “brings hope to the vulnerable.” Professor Penelope Weller argues that it illustrates “profound shifts both in the conception of human rights and the implementation of human rights in public policy domains.”
The CRPD makes clear that persons with disabilities have the same human rights as all other persons.\(^{162}\) Multiple sections of the CRPD track the holdings of the \textit{Wyatt} decision and its supplemental standards. Thus, Article 3 calls for “\[r\]espect for inherent dignity” and “\[n\]ondiscrimination”;\(^{163}\) Article 12, “\[e\]qual recognition before the law”;\(^{164}\) Article 13, equal “\[a\]ccess to justice”;\(^{165}\) Article 14, “\[t\]he right to liberty and security of \[t\]he person”;\(^{166}\) Article 15, “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment”;\(^{167}\) Article 16, “[f]reedom from exploitation, violence and abuse”;\(^{168}\) Article 17, a right to protection of the “\[i\]ntegrity of the person”;\(^{169}\) Article 19, the right to community living;\(^{170}\) Article 25, the right to health and the non-discriminatory provision of services;\(^{171}\) and Article 26, the right to rehabilitation.\(^{172}\)


\(^{163}\) CRPD, supra note 10, art. 3; Wyatt v. Stickney, 344 F. Supp. 373, 379 (M.D. Ala. 1972) (stating that “patients have a right to privacy and dignity.”); see also Lord, Suozzi & Taylor, supra note 152, at 572 (discussing Article 3 of the CRPD).

\(^{164}\) CRPD, supra note 10, art. 12; Wyatt, 344 F. Supp. at 379 (“No person shall be deemed incompetent to manage his affairs, to contract, to hold professional or occupational or vehicle operator’s licenses, to marry and obtain a divorce, to register and vote, or to make a will solely by reason of his admission or commitment to the hospital.”); see also Lord, Suozzi & Taylor, supra note 152, at 573-74.

\(^{165}\) CRPD, supra note 10, art. 13; Wyatt, 344 F. Supp. at 379 (“Patients shall have an unrestricted right to visitation with attorneys”); see also Wyatt, 344 F. Supp. at 378 (“[T]he Court has determined that this case requires the awarding of a reasonable attorneys’ fee to plaintiffs’ counsel.”); see Terry Carney, Fleur Beaufort, Julia Perry & David Tait, \textit{Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?}, 26 LAW IN CONTEXT 125 (2008).

\(^{166}\) CRPD, supra note 10, art. 14; Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (“To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.”); see also Rosemary Kayess & Phillip French, \textit{Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities}, 8 HUM. RTS. L. REV. 1, 21 (2008).

\(^{167}\) CRPD, supra note 10, art. 15; Wyatt, 344 F. Supp. at 380 (“Patients have a right to be free from physical restraint and isolation.”); see also Lord, Suozzi & Taylor, supra note 152, at 573.


\(^{169}\) CRPD, supra note 10, art. 17; Wyatt, 344 F. Supp. at 391 n.7 (quoting plaintiffs’ expert) (“The conditions I would say are hazardous to psychological integrity, to health, and in some cases even to life.”); see also Kämpf, supra note 147; Bernadette McSherry, \textit{Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment}, 26 LAW IN CONTEXT 111 (2008).


\(^{172}\) CRPD, supra note 10, art. 26; Wyatt, 344 F. Supp. at 376 (The court-appointed Human Rights Committee “shall have review of all research proposals and all rehabilitation programs, to
I am not suggesting that the Convention drafters kept a copy of Wyatt close at hand during the drafting process. That would be asserting too much. But I believe it is undeniable that the rights first articulated so eloquently by Judge Johnson in Wyatt—subsequently restated in modified formats in cases decided by the regional human rights courts and commissions—are the heart and soul of the U.N. Convention. It is conceivable, I expect, that the CRPD might have been drafted as it was had Wyatt never been decided as it was, and had Wyatt's progeny not given it additional life in multiple U.S. jurisdictions. But I doubt it.

V. CONCLUSION

Wyatt exploded into the consciousness of public interest lawyers forty years ago, and that explosion irrevocably changed the course of American institutional conditions law for all time. Although its contemporaneous impact on legal developments in the United States has ebbed in the aftermath of Youngberg v. Romeo, its legacy stands. And that legacy informs and inspires the CRPD.

Professor Quinn sees the Convention as a reflection of the reality that "the American disability rights revolution now belongs to all." By noting that "[t]he most important potential of the Convention is its potential to transform the process that leads to those laws in the first place," he engrafts that legacy of Wyatt—a case that transformed the entire legal process as it affected persons with mental disabilities who were institutionalized—on to the Convention itself.

Interestingly, Wyatt's use of international law has been rarely discussed and is mostly forgotten. Judge Johnson specifically noted:

It is interesting to note that the Court's decision with regard to the right of the mentally retarded to habilitation is supported not only by applicable legal authority, but also by a resolution adopted on

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ensure that the dignity and the human rights of patients are preserved.
170. at 565 n.150.
171. See Perlin, supra note 57, at 100.
172. See generally 2 Perlin, supra note 2, chapter 3.
174. Quinn, supra note 156, at 51.
175. Id. at 47.
176. Id.; see also Bartlett, Lewis & Thorold, supra note 90, at 262 ("For too long, people with disabilities, and people with mental health problems and intellectual disabilities in particular, were left at the margins of human rights discourse. A change has commenced, but only commenced.
December 27, 1971, by the General Assembly of the United Nations. That resolution, entitled "Declaration on the Rights of the Mentally Retarded," reads in pertinent part: "... The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential."\(^{180}\)

A discussion of the use by domestic courts of international human rights law is beyond the scope of this paper.\(^{181}\) But the coincidence here is, to say the least, intriguing.

To a great extent, the mental disability law revolution has, until relatively recently, largely been a domestic one. However, I expect that ratification of the UN Convention—building on European jurisprudence and cases such as Congo\(^{182}\) and Purohit\(^{183}\)—has the capacity to radically alter this reality.\(^{184}\) It is not a reach, I think, to predict that forty years from now, we will look back at Wyatt’s international influence and legacy as being at least as or more profound and paradigm-shattering than its domestic influence.

To conclude by returning to the Dylan lyric that begins my title, the “love” shown in the Wyatt case for persons institutionalized in facilities akin to concentration camps\(^{185}\) may have been, to some extent, “abandoned” by US courts. But the CRPD, I hope, will allow such persons, in Dylan’s words, to finally “march in the parade of liberty.”\(^{186}\)

\(^{180}\) Wyatt, 344 F. Supp. at 390 n.6.


\(^{184}\) See Weller, supra note 171, at 75 (discussing how the Convention reflects a “quiet revolution” in human rights/mental disability law).

\(^{185}\) See Perlin, supra note 57, at 63.

\(^{186}\) DYLAN, supra note 16.