2009

It’s Doom Alone That Counts: Can International Human Rights Law Be An Effective Source of Rights in Correctional Conditions Litigation?

Michael L. Perlin
New York Law School, michael.perlin@nyls.edu

Henry A. Dlugacz

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"It's Doom Alone That Counts": Can International Human Rights Law Be An Effective Source of Rights in Correctional Conditions Litigation?

Michael L. Perlin, J.D.* and Henry A. Dlugacz, J.D, M.S.W.†

Over the past three decades, the U.S. judiciary has grown increasingly less receptive to claims by convicted felons as to the conditions of their confinement while in prison. Although courts have not articulated a return to the "hands off" policy of the 1950s, it is clear that it has become significantly more difficult for prisoners to prevail in constitutional correctional litigation. The passage and aggressive implementation of the Prison Litigation Reform Act has been a powerful disincentive to such litigation in many areas of prisoners' rights law. From the perspective of the prisoner, the legal landscape is more hopeful in matters that relate to mental health care and treatment. Here, in spite of a general trend toward more stringent applications of standards of proof and a reluctance to order sweeping, intrusive remedies, some courts have aggressively protected prisoners' rights to be free from "deliberate indifference" to serious medical needs, and to be free from excessive force on the part of prison officials. A mostly hidden undercurrent in some prisoners' rights litigation has been the effort on the part of some plaintiffs' lawyers to look to international human rights doctrines as a potential source of rights, an effort that has met with some modest success. It receives support by the inclination of other courts to turn to international human rights conventions—even in nations where such conventions have not been ratified—as a kind of "best practice" in the area. The recent publication and subsequent ratification (though not, as of yet, by the United States) of the UN Convention on the Rights of Persons with Disabilities (CRPD) may add new

*Correspondence to: Michael L. Perlin, J.D., New York Law School 57 Worth St. New York, NY 10013, U.S.A. E-mail: michael.perlin@nyls.edu
†New York Law School And New York Medical College.
The authors wish to thank Naomi Weinstein for her excellent research assistance.
support to those using international human rights documents as a basis for litigating prisoners' rights claims. To the best of our knowledge, there has, as of yet, been no scholarly literature on the question of the implications of the CRPD on the state of prisoners' rights law in a U.S. domestic context. In this article, we raise this question, and offer some tentative conclusions. Copyright © 2009 John Wiley & Sons, Ltd.

Over the past three decades, the U.S. judiciary—especially the Supreme Court—has grown increasingly less receptive to claims by convicted felons as to the conditions of their confinement while in prison. Courts have not articulated a return to the "hands off" policy of the 1950s; yet, it is clear that it has become significantly more difficult for prisoners to prevail in constitutional correctional litigation. Although it did not lead to across-the-board dismissal of all existing consent decrees governing prison conditions, nor has it entirely inhibited the initiation of new matters that relate to mental health care and treatment. Here, in spite of a general passion for "best practice," courts have aggressively protected prisoners' rights to be free from "deliberate indifference" to serious medical needs, and to be free from excessive force on the part of prison officials.

A mostly hidden undercurrent in some prisoners' rights litigation has been the effort on the part of some plaintiffs' lawyers to look to international human rights documents as a basis for litigating prisoners' rights claims. Even in nations where such conventions have not been ratified—as a kind of "best practice" in the area. 6


3 E.g. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995); for subsequent developments, see Coleman, supra.


International human rights law and correctional conditions litigation

The recent publication and subsequent ratification (though not, as of yet, by the United States) of the UN Convention on the Rights of Persons with Disabilities (CRPD) may add new support to those using international human rights documents as a basis for litigating prisoners' rights claims. That Convention calls for "respect for the inherent dignity" and "non-discrimination." Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment," "freedom from exploitation, violence and abuse," a right to protection of the "integrity of the person," "equal recognition before the law," and, finally, "equal "access to justice." To the best of our knowledge, there has, as of yet, been no scholarly literature on the question of the implications of the CRPD on the state of prisoners' rights law in a U.S. domestic context. In this article, we raise that question, and offer some tentative conclusions.

First, we shall offer a short history of developments in this area of the law, and shall next briefly consider legal developments as they affect the specific issue of the provision of mental health services in a correctional context. Next, we shall briefly outline some of the relevant international human rights law principles as they have been applied in this context, and then discuss the significance of the new Convention. After that, we shall consider the impact that the Convention may have on future developments in this area of the law, and will offer some modest conclusions.

The title of this article is taken, in part, from Bob Dylan's brilliant song Shelter from the Storm, from the album "Blood on the Tracks." In a full-length book about that album, the critics Andy Gill and Kevin Odegard characterize the song as depicting a "mythic image of torment." Individuals in correctional institutions with mental illnesses are often similarly deeply tormented. We hope that the ideas we offer here may, some day, go to alleviate that level of torment.

A BRIEF HISTORY OF CORRECTIONAL LAW

In this section, we shall trace correctional law developments from the "slave of the state" status to the "hands off" doctrine to contemporary constitutional law doctrine.
Slave of State

Early in our history, even basic constitutional protections were not routinely available to prisoners. Imprisonment created an almost impermeable barrier through which the Bill of Rights could not pass, absent specific legal sanction. Inmates were thought to be "slaves of the state." As such, the societal need to inflict punishment for transgressions of cultural norms trumped any idea that the violations were due any meaningful constitutional protections. The classic formulation of this doctrine can be found in Ruffin v Commonwealth.20

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the slave of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due in expiation of their crimes.21

Hands Off

Although legal doctrines supporting this laissez-faire approach developed other rationales such as separation of powers, federalism, prison security, and the inability of courts to comprehend the inner workings of complex institutions,22 the lack of judicial attention to potential constitutional violations within prisons evinced by the slave of the state doctrine continued until well into the 1960s. Until that time, the prevailing judicial approach to suits involving conditions within correctional institutions was the "hand-off doctrine." As its name implies, this doctrine held that the inner workings of institutions were too complex and so ill suited to judicial intervention as to be beyond the ken of the court.23 The 1954 case of Banning v. Looney was a leading exemplar of this cramped reading of the judicial role in ensuring (or, in reality, in not ensuring) constitutional protections for all citizens. In response to a prisoner's complaint that his constitutional rights were being violated by prison officials, the Tenth Circuit, in a per curium opinion, held that

Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations. Neither have we power to inquire with respect to the prisoner's detention in the Lewisburg Prison. No authorities are needed to support those statements.24

Rejection of Hands-Off Doctrine

Early Cases

In the 1960s and early 1970s, a small cadre of pioneering judges removed the self-imposed blinders of the hands-off doctrine. Willful ignorance was replaced by a willingness to hold evidentiary hearings that revealed conditions within jails and prisons, which indeed "shocked their conscience." Judge Frank Johnson's findings in Newman v Alabama dramatically underscored the issue at hand:

A quadriplegic, who spent many months in the hospital... suffered from bedsores which had developed into open wounds because of lack of care and which eventually became infected with maggots. Days would pass without his bandages being changed, until the stench pervaded the entire ward. The records show that in the month before his death, he was bathed and his dressings were changed only once. Equally neglected was another patient... who could not eat. Although intravenous feeding was ordered, it was not administered, and no other form of nourishment was received for the three days prior to his death. Another hospital patient, a geriatric who had suffered a stroke and was partially incontinent, was made to sit day after day on a wooden bench beside his bed so that the bed would be kept clean. He frequently fell from the bench, and his legs became blue and swollen. Ope leg was later amputated, and he died the following day.25

Confronted with this type of factual record, judges in these early cases began to fashion standards guiding when the traditional presumption of deference to wardens and hospital administrators embodied in the hands-off doctrine could be overcome.

The Supreme Court, in a prison conditions case, finally rejected the "hands-off" doctrine in Wolff v. McDonnell,26 holding that "[t]here is no iron curtain between the Constitution and the prisons of this country."27 It thus appeared that the Court would be, in the future, more responsive to prison conditions cases brought by plaintiffs.

Historical Factors

A variety of legal and societal factors worked in mutually reinforcing ways to influence the rejection of the hands-off doctrine:

(1) increased media attention and congressional hearings concerning conditions in correctional institutions, likely prompted by well publicized riots in places such as Attica and Santa Fe;
(2) the civil rights and anti-Vietnam war movement brought more well-connected, middle-class people into contact with our nation's jails and prisons than at any time since the Revolutionary War;
(3) the growth of civil rights law eased the process of holding state and local officials accountable for violations of federal law in federal courts.
(4) governmental funding of legal services organizations as well as fee-shifting provisions in civil rights statutes increased the economic viability of prison reform litigation;

21 Id., 1871 WL at *4.
24 Id. at 771.
27 Id. At 555-56.
(5) the general tenor of the times and the civil rights movement in particular increased the sense on the part of some inmates that they could effectively and properly be agents of social change.28

Against this backdrop, the Supreme Court, in Estelle v. Gamble,29 announced the constitutional standard by which to judge the adequacy of correctional health care:

The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."30

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We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain."31

This test has two primary components, one relatively objective (a serious medical need), and the other almost entirely a subjective state of mind (deliberate indifference to that need).32 The meaning of the phrase "deliberate indifference," and the nature of the proof required to demonstrate this prong of the test, has taken decades to sort out.

It is of particular relevance to this discussion that, in support of the proposition that contemporary standards of decency required some minimal standard of care, Justice Marshall cited, among other references, international human rights law.33

LEGAL ISSUES RELATED TO THE PROVISION OF MENTAL HEALTH SERVICES TO PERSONS IN CORRECTIONAL INSTITUTIONS

Persons in Correctional Institutions with Mental Disabilities: Some Statistics

The statistics are fast becoming a matter of national, bipartisan concern.34 And well they should: One out of every 31 adults in the United States is under some type of supervision by the criminal justice system, as is 1 in 18 men and 1 in 11 African Americans.35 Department of Justice statistics indicate that over half of jail and prison inmates report having a mental health problem.36 Jeffrey Metzner reports that both

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Millions of people are released each year from our nation's jails and prisons, many of whom require linkages to an already inadequate and overtaxed public mental health system. Jamie Fellner estimates that about half of jail and prison inmates have mental health problems.38 Gail Wasserman and her colleagues estimate that, among incarcerated juveniles, the rate rises to as high as 65%.39 The rate of mental illness among prison inmates is three times higher than that of the general population.40 We know also that prisoners with mental illness—as a result of their mental illness—are statistically more likely to violate certain prison rules, making it resultantly more likely that they face segregation and thus exacerbation of their mental illness.41 Such prisoners are "considerably" more likely than non-mentally-ill inmates to be victimized by physical or sexual assault while incarcerated,42 and serve, proportionately, longer terms of imprisonment.43 In the context of the unprecedented increase in the overall prison population during the past three decades, these factors have combined with the erratic access of persons with mental disabilities to adequate screening and treatment during incarceration, and inconsistent efforts at promoting successful reentry upon release, to create a major challenge on the national scale.44

Earlier Legal Developments

Although the empirical scholarship described above was as of yet undeveloped, the compelling need to include mental health care within Gamble’s requirement for basic health care was quickly clear to early courts interpreting Gamble’s scope. The leading case was Boursong v. Godwin,45 finding that psychiatric conditions qualified as a serious medical need under Gamble:

41 Eva Nilsen, Decency, Dignity, and Despair: Restoring Ideals of Human Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111, 131 (2007); Craig Harvey, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 CRIME & DELINQ. 124, 142 (2003).
42 Marschke, supra note 40, at 496.
43 Id. at 497.
44 See Rich, supra note 38, at 115 ("Failure to prepare inmates for reentry, and failure to provide supervised medication, trained staff and related housing, and social services to paroled inmates almost assures repetition of the cycle of crime and punishment").
In the instant case, petitioner seeks psychological diagnosis and treatment. We see no
underlying distinction between the right to medical care for physical ills and its
psychological or psychiatric counterpart.

We therefore hold that Bowring (or any other prison inmate) is entitled to psychological
or psychiatric treatment if a physician or other health care provider, exercising ordinary
skill and care at the time of observation, concludes with reasonable medical certainty (1)
that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease
or injury is curable or may be substantially alleviated; and (3) that the potential for harm
to the prisoner by reason of delay or the denial of care would be substantial.46

With the general applicability of the prohibition against cruel and unusual
punishment clearly applicable to the mental health care provided to individual
inmates, federal courts quickly had to grapple with the application of this principle to
classes of inmates with mental disabilities. One of the early cases that explored the
basic requirements of a minimally constitutional system was Ruiz v. Estelle.47 There,
Judge Justice held that such a system of mental health care had six fundamental
aspects:

First, there must be a systematic program for screening and evaluating inmates in order
to identify those who require mental health treatment [citations omitted]. Second, it
was underscored in both Newman and Bowring, treatment must entail more than
segregation and close supervision of the inmate patients. Third, treatment requires the
participation of trained mental health professionals, who must be employed in sufficient
numbers to identify and treat an in individualized manner those treatable inmates
suffering from serious mental disorders [citations omitted]. Fourth, accurate, complete,
and confidential records of the mental health treatment process must be maintained.
Fifth, prescription and administration of behavior-altering medications in dangerous
amounts, by dangerous methods, or without appropriate supervision and periodic
evaluation, is an unacceptable method of treatment. Sixth, a basic program for the
identification, treatment, and supervision of inmates with suicidal tendencies is a
necessary component of any mental health treatment program...49

The erosion of the hands-off doctrine was hastened by judicial discovery of
disturbing and frightening conditions within prisons by those judges willing to hold
prison officials accountable for the gross inadequacy of medical care. Such cases as
Pugh v. Locke48 ordered sweeping reforms to the violent, unsanitary, and
unconstitutional conditions uncovered in Alabama's prisons. Pugh is considered one of the landmark cases in this era of expanded judicial intervention in prison
condition litigation, in which relatively loose standards of proof regarding causation and
remedy had led to long-term oversight of prison condition by multiple federal courts.50

While the application in specific litigations and practice within correctional
systems was more nuanced in the district courts and courts of appeals, the course of
Supreme Court jurisprudence in this area moved clearly back toward deference to

46 Id. at 47.
1042 (1983).
48 Id. at 1339.
50 See Schlanger, supra note 1, at 606 ("A paradigm prison case was the Alabama litigation, Pugh v. Locke.
Pugh was very typical of the first generation of prison cases in that its substantive scope, its method of
litigation, and its remedial approach were extremely broad") (citations omitted).
County of Washoe, Nevada.\(^{61}\) held that officials’ knowledge concerning the prevalence of certain disorders (in this case, manic-depressive disorder) across the correctional population could meet Farmer’s threshold for “knowledge” of risk.\(^{62}\) Madrid v. Gomez\(^{63}\) gave additional definition to the post-Farmer deliberate indifference standard in the mental health context. The Madrid court applied a two-prong test: (1) first, the care must be inadequate as measured by an objective standard as demonstrated by a pattern of negligent conduct of systematic deficiencies; (2) the plaintiff must prove that the system was aware of the risk to health that grew out of this inadequacy and acted with disregard of that risk.\(^{64}\)

After the PLRA

By 1995 when the Prison Litigation Reform Act\(^{65}\) (PLRA) was passed—raising severe barriers to prisoner reform litigation at all stages—the Supreme Court had already made matters more difficult for plaintiffs’ attorneys. There was a widespread sense that the era of judicial intervention in prison conditions had effectively ended. Indeed, limiting judicial oversight of prisons was a stated goal of the act: “The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”\(^{66}\)

The PLRA did significantly reduce the number of cases filed by prisoners.\(^{67}\) This result may also have obtained as a combined effect of the PLRA and increased deference to prison administrators.\(^{68}\) Still the overall effect may not have been quite as drastic as had been predicted:

Lawyers obtained the first federal court orders governing prison and jail conditions in the 1960s. This and other types of civil rights injunctive practice flourished in the 1970s and early 1980s. But a conventional wisdom has developed that such institutional reform litigation peaked long ago and is now moribund. This Article’s longitudinal account of jail and prison court-order litigation establishes that, to the contrary, correctional court-order litigation did not decline in the late 1980s and early 1990s. Rather, there was essential continuity from the early 1980s until 1996, when enactment of the Prison Litigation Reform Act (PLRA) reduced both the stock of old court orders and the flow of new court orders. Even today, ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes.\(^{69}\)

The nature of successful cases has indeed changed. Litigation in the “...1980s and 1990s... grew ever more resource-intensive, and addressed increasingly narrow topics with more rigorous proof and causation requirements.”\(^{70}\) One manifestation of this in the mental disability context may have been a number of successful constitutional litigations challenging the conditions of confinement in SuperMax prisons\(^{71}\) and their negative effect on mental health.\(^{72}\) Vincent Nathan, a vastly experienced monitor and special master in correctional litigation, has noted that many correctional systems have chosen not to take full advantage of the Supreme Court’s invitation to reduce services and due process.\(^{73}\) Nathan has argued that reform efforts have in effect changed the landscape so that fewer than expected states have taken advantage of Sandin v. Conner’s\(^{74}\) holding that a state imposition of disciplinary segregation for a term of less than a year did not require significant due process protections.\(^{75}\) Likewise, some but not many prison systems have taken advantage of the invitation in Lewis v. Casey\(^{76}\) to eliminate law libraries. Nathan suggests that, “In some important ways, the new and more constructive status quo is resisting efforts at change, just as did its less laudable predecessor.”\(^{77}\)

Significantly, some notable cases have resisted the trend away from judicial intervention. In California, two senior federal judges have maintained long-standing oversight of the entire state correctional system’s medical and mental health care.\(^{78}\) In Plata v. Schwarzenegger, Judge Henderson ordered the appointment of a receiver to take over the administration of basic functions of California’s correctional health care system.\(^{79}\) In Coleman v. Wilson\(^{80}\) Judge Karlton has, through appointment of a special master under Federal Rule of Civil Procedure 53, overseen the provision of

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\(^{61}\) 290 F.3d 1175 (9th Cir. 2002).

\(^{62}\) See Henry Dlugacz & Julie Low, Key Considerations in Liability Management for the Correctional Psychiatric Patient, in CORRECTIONAL PSYCHIATRY: PRACTICE GUIDELINES AND STRATEGIES chapter 3-1 to 3-23 (Ole J. Theinhaus & Melissa Pasiecki eds., 2007).

\(^{63}\) 809 F. Supp. 1146 (N.D. Cal. 1995).

\(^{64}\) Id. at 1256.


\(^{67}\) Id. at 1256.

\(^{68}\) Id. at 1256.

\(^{69}\) Id.

\(^{70}\) While definitions vary, “SuperMax” units are generally high security units or prisons that hold prisoners in very restrictive conditions. They generally have certain features in common including confinement to cells 22-23 hours per day; very limited contact with other people; limited exercise and showers; limited privileges such as telephone, commissary and visiting; little or no access to work, religious activities, programming; direct escort policies. See, e.g., William Collins, SuperMax Prisons and the Constitution: Liability Concerns in the Extended Control Unit. U.S. Dep’t of Justice, National Institute of Corrections (2004). Available at www.nicic.org/pubs/2004019835.pdf.


\(^{72}\) Vincent Nathan, Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?, 24 FACE L. REV. 419, 425 (2004).

\(^{73}\) 518 U.S. 343 (1996).

\(^{74}\) Nathan, supra note 73, at 425 n 19.

\(^{75}\) 518 U.S. 343 (1996).

\(^{76}\) Nathan, supra note 73, at 425.


\(^{78}\) Coleman, supra.

\(^{79}\) Coleman, supra.
mental health care within that same system. In related proceedings, a three judge panel recently issued a tentative order requiring release of prisoners from California's prisons, finding a nexus between overcrowding and the state's inability to provide constitutionally mandated health and mental health care. During this same era of judicial retreat, the Ohio Department of Corrections entered into a consent decree that brought significant improvements and considerable new resources to bear to the provision of mental health care.

Self-evidently, all of the caselaw developments in this area of jurisprudence are intensely dependent on both the quality of counsel and the "politics" of such questions as assignment of trial judge, judicial philosophy of the circuit courts of appeals, and litigation strategies focusing on either insuring or avoiding the subsequent grant of certiorari by the Supreme Court. Other relevant factors (related to, not unimportantly, the wider implications of the current economic downturn) include:

1. The degree to which strapped-for-funds correctional systems make more aggressive use of the leeway provided to them by the Supreme Court;
2. The extent to which large firms, which have been instrumental in recent successful litigations in this area, maintain their commitment to this area during times of fiscal constraint; and
3. The impact of economic circumstances on the scope of relief granted by trial courts.

In short, there are many factors here beyond judicial philosophies that are likely to have a major impact on the denouement of subsequent developments in this area of the law. With this in mind, we turn next to the "outside event" question of the potential influence of international human rights law on domestic correctional law and policies.

INTERNATIONAL HUMAN RIGHTS LAW

In General

Human rights are necessary for all individuals; human rights violations occur when persons are treated as objects or as a means to others' ends. Offenders have enforceable human rights. The Vienna Declaration and Programme of Action and the Universal Declaration of Human Rights recognized that inherent dignity and inalienable rights of all individuals are the foundation of freedom, justice, and peace. Through global covenants, individual rights regarding offenders are safeguarded against cruel, inhuman, or degrading treatment or punishment, prisoners should be treated with humanity and dignity, and provided with reformation and social rehabilitation, individuals are guaranteed the right to the highest attainable standard of physical and mental health, and prisoners should be treated in a humane manner and with dignity.

As Applied to Persons with Disabilities

Historical Background

Remarkably, the issue of the human rights of people with disabilities, particularly people with mental disabilities, had been ignored for decades by the international agencies vested with the protection of human rights on a global scale. Early developments in global international human rights law following World War II—and the various forms of human rights advocacy that emerged in the decades that followed—failed to focus on mental disability rights. As Dr. Theresa Degenner, a noted disability scholar and activist, has observed:

[D]rafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the equality clauses of any of the three instruments of this Bill, the Universal Declaration of Human Rights (1948) (hereinafter UDHR), the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR), mention disability as a protected category.

It was not until the United Nations' declaration of 1981 as the International Year of Disabled Persons that there was significant activity on an international level. The United Nations General Assembly subsequently established the World Programme of Action Concerning Disabled Persons, and declared 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 (widely referred to as the "MI Principles"). The MI Principles established the most comprehensive international human rights standards for persons with mental disabilities, and their adoption was a critical global step in recognizing mental disability rights issues within the human rights arena.

Degener's writings reflect the change that has taken place in disability rights jurisprudence. In 2000, she stated further that "disability has been reclassified as a human rights issue," and that "law reforms in this area are intended to provide equal opportunities for disabled people and to combat their segregation, institutionalization and exclusion as typical forms of disability-based discrimination." Yet, historically, mainstream human rights protection systems and advocacy organizations had difficulty acknowledging mental disability rights as part of their mandates. The human rights issues encountered by persons with mental disabilities may have been perceived as too complex or esoteric. This challenge was sometimes articulated in rather unfortunate ways, such as "We work in human rights, not mental disability rights." While the oblique suggestion that people with mental disabilities were not "human" was generally unintended, it may well have reflected deep-seated beliefs that they were somehow less human than the broader population whose human rights merited unquestioned protection. But while human rights are—by definition—universally possessed by all humans, the formal recognition of the applicability of these rights in contexts specific to vulnerable populations is critical for their enforcement.

To some extent, this new interest in human rights protections for people with disabilities echoes a larger international movement to protect human rights, and

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appears to more precisely follow track C. Raj Kumar's observation that "the judicial protection of human rights and constitutionalization of human rights may be two important objectives by which the rule of law can be preserved and which may govern future human rights work." More Recent Application of International Human Rights Law Doctrines to Persons with Disabilities

Many obstacles to the enforcement of U.N. human rights conventions have been identified in the decades since the entry into force of the ICCPR and the ICESCR. 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 ("the fox guarding the henhouse") syndrome; and (4) the general lack of accountability that results from some of these issues.

What has our track record been with regard to such conventions? To be charitable, it is a mixed bag. Courts in the U.S. have been inconsistent in their enforcement of and adherence to UN Conventions. In Larue v. Manson, a federal district court applied United Nations Standard Minimum Rules for the Treatment of Detained Persons standards in cases involving the "double bunking" of inmates, but 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. In at least one case, however, while noting that the non-ratified convention was not binding on U.S. courts, the Massachusetts Supreme Judicial Court "read the entire text of the convention... and conclude[d] that the outcome of the proceedings in this case are completely in accord with principles expressed therein."

Most significantly and most recently, in Roper v. Simmons, in the course of striking down the juvenile death penalty, the Supreme Court (per

United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: human rights and disability, U.N. Doc. E/CN.4/Sub.2/1991/31 (report by Leandro Despouy), and principles, guidelines, and guarantees for the protection of persons detained on grounds of mental ill-health or suffering from mental disorder, U.N. Doc. E/CN.4/Sub.2/1993/17 (report by Erica-Irene Daes). It is sobering that these reports were, for all practical purposes, the first major governmental documents ever published discussing these matters. We believe that sanctions—manifested here by a refusal to take seriously the issues that affect persons with mental disabilities, especially institutionalized persons—is the root cause of this phenomenon. See Perlin & Spachman, supra note 93; Michael L. Perlin, "Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor Tenbrook, and the Rights of Persons with Mental Disabilities, 13 TEX. J. ON C.L. & C.R. 413, 417-18 (2008).


Variations on such a statement have been encountered by the authors and their colleagues in discussions with human rights organizations across the globe, on practically every continent.

See Michael L. Perlin, "When the Winds of Change Shift: Why Doing What We Do Keeps Us "Forever Young," (paper presented at Society of American Law Teachers conference, University of California Berkeley Law School, March 15, 2008), manuscript at 9:

When I have shared with others our vision of [doing mental disability law advocacy work and teaching on-line mental disability law courses] in sub-Saharan Africa, those others have often scoffed, suggesting that the problems faced in that part of the world are so profound that it is almost frivolous to create the programs we are seeking to launch. As you might expect, I disagree, profoundly.

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. See Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. 115

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 UK of the CRC, Prof. 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 principles-in conventions, treaties, etc-that then help entrench the standard-as a best practice or eventually as a standard of care-that eventually works its way back into domestic constitutional law.

The Specific Application of International Human Rights Law to Correctional Law

International human rights law and standards specifically address the full range of issues that affect prisoners with mental illness. 117 A “white paper” prepared by the American Friends Service Committee reveals how documents such as the ICCPR, the ICESCR, and the Convention Against Torture all contain significant protections to persons in correctional institutions. 118 In this context, recently, Professor Eva Nilsen has written persuasively that global human rights standards should be relied on as a source of legal protections for persons in correctional settings, 119 arguing that

Although this has rarely been the subject of scholarly consideration in this context, it appears that these developments, in a way, can be seen as “closing the loop”; that is, a mutually re-enforcing phenomenon of early forays into the tentative acceptance of international human rights law principles is seen as reinforcing the norms that underlie that acceptance then leads to stronger iterations of these principles—in conventions, treaties, etc—that then help entrench the standard—as a best practice or eventually as a standard of care—that eventually works its way back into domestic constitutional law.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) 122

Historical Background

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” 123—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. 124 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, …” 125 The Ad Hoc Committee drafted a document over the course of five years and eight sessions, and the new Convention on the Rights of Persons with Disabilities 126 was adopted in December 2006 and opened for signature in March 2007. 127 It entered into force—thus becoming legally binding on state parties—on May 3, 2008, 30 days after the 20th ratification. One of the hallmarks of the document 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.” 128 This has led

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115 At 578. Soberingly, a recent survey by Professor Jean Koh Peters found that almost three-quarters of a moral responsibility to accept as binding [international] human rights standards.”

116 Alvin Bronstein & Gainsborough, supra note 109, at 814 (emphasis added).

117 Bronstein & Gainsborough, supra note 109, at 84 (emphasis added).

118 This section is adapted from Perlin, supra note 108.

119 Perlin, supra note 7, at 438.


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."130

The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life.131 As referred to above, it calls for "respect for inherent dignity"132 and "non-discrimination."133 Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment,"134 "freedom from exploitation, violence and abuse,"135 and a right to protection of the "integrity of the person."136

Impact of CRPD

A recent proposal seeking to reform correctional law and practices as they affect persons with mental disabilities recommends that prisons be required to adopt procedures guaranteeing systematic screening for mental illness, and that in cases involving allegations of violations of the Eighth Amendment, the current subjective standard be replaced with an objective standard.137 The new UN Convention is entirely in accord with these recommendations.

132 CRPD, supra note 7, Article 3(2).
133 Id., Article 3(b).
134 Id., Article 15.
135 Id., Article 16.
136 Id., Article 17.

We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaw cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well with to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. See Prosser and Keeton §2, pp. 6, 213-214; see also Federal Tort Claims Act, 28 U.S.C. §2671-2680; United States v. Muns, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

CONCLUSION AND POTENTIAL FUTURE DEVELOPMENTS

Prison inmates were once traditionally deprived of protections afforded to other citizens by the Bill of Rights. Later, in spite of the fact that prisoners were no longer considered "slaves of the state," judicial deference to the putative expertise of prison administrators left no practicable avenue of redress for those seeking relief from alleged constitutional violations. Through a confluence of legal, social, and doctrinal developments of Supreme Court jurisprudence, the wall between the Constitution and the inner workings of prisons began to crumble in the 1960s and 1970s, leading to judicial decisions in which federal judges issuing sweeping injunctions that affected most aspects of prison life, specifically aspects dealing with physical and mental health care. However, although many of the injunctions entered in these cases still remained in force, the 1980s and 1990s brought multiple important Supreme Court opinions emphasizing a renewed deference to prison administrators. During the latter part of this period, the Supreme Court clarified the subjective nature of the Eighth Amendment test in prison litigation (the deliberate indifference standard). These jurisprudential trends were reinforced by the passage of the PLRA, with its exhaustion requirements and significant restrictions on injunctive relief.

Overall, prisoner suits were reduced and standards of proof of causation became more stringent. However, the granting of injunctive relief was not, as many had predicted, fully curtailed.138 This may have been the result of a "lag" in the impact of the PLRA (as some large scale and long-standing cases remained vibrant), and may, as Nathan has argued,139 indicate a resistance to change on the part of corrections systems that had grown accustomed to more humane standards. Yet, there are questions that remain unanswered (as to reactions to the current economic crisis, the potential concomitant response of states now aggressively employing the PLRA to seek relief from such obligation, and to potentially push the limits of the meaning of "constitutional minimums,"140 the response of courts that may feel that economic conditions inhibit their willingness to enter expansive relief orders, or, perhaps seemingly paradoxically, whether states will take a proactive stance and work to responsibly reduce prison populations through legislative, sentencing reform, enlightened parole and probation practices, and serious efforts at diversion and reentry, particularly for persons with mental disabilities). The answers to these questions will be critical in determining the path of litigation in this area.

The CRPD, although signed by President Obama, has not yet been ratified by the United States Senate. Nonetheless, its principles should serve as a model of "best practice," in the same way that the Convention on the Rights of the Child served as practice," in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice, in the same way that the Convention on the Rights of the Child served as practice.

138 See supra text accompanying notes 78-82.
139 See Nathan, supra note 73.
140 Adoption of Privacy, 767 NE 2d 29, 38 (Mass 2002). See supra note 113.
The U.S. Supreme Court—albeit by the most slender of majorities—has made it clear in a series of criminal law and procedure cases that international human rights law is a legitimate source of rights in any determination of appropriate domestic constitutional standards. Although lower courts have, in the past, incorporated UN Standards, Covenants and Conventions in decisions dealing with prisoners' issues, the Supreme Court has never, to this date, had the occasion to construe this body of law in a correctional conditions case.

The CRPD is a beacon to those who advocate for persons with disabilities. In his definitive encyclopedia about Bob Dylan's music, Oliver Trager characterizes Shelter From the Storm (from which the beginning of the title of this article comes) as concluding that "the possibility of redemption still exists." We believe that lawyers representing plaintiffs in institutional condition cases should turn to the convention as a potential affirmative source of rights on behalf of their clients, and as a strategy for offering "redemption" to this population. In arguing in support of the U.S.'s ratification of the convention, Tara Melish recently wrote that "Ratification will allow us simultaneously to serve as a model for the rest of the world, projecting our commitment to the rights of persons with disabilities outward, while ensuring that we are in fact living up to that projection as a nation and social community of equals at home." This is a development that lawyers representing prison inmates must follow if correctional law is to grow and expand.

141 This is a matter of great contention in the Supreme Court. Contrast Justice Kennedy's embrace of international law in Atkins v. Virginia, 536 U.S. 304 (2002) (persons with mental retardation exempt from capital punishment under the cruel and unusual punishment clause) with Justice Scalia's total repudiation of it in Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (juveniles exempt from capital punishment under the Cruel and Unusual Punishment Clause). For recent scholarly investigations, see e.g., Ganesh Sitaraman, The Use And Abuse Of Foreign Law In Constitutional Interpretation, 32 HARV. J.L. & PUB. POL'y 653 (2009); Melissa A. Waters, Getting Beyond The Crossfire Phenomenon: A Militant Moderate's Take On The Role Of Foreign Authority In Constitutional Interpretation, 77 FORDHAM L. REV. 635 (2008).


144 Melish, supra note 128, at 47.