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“There’s Voices in the Night Trying to Be Heard”

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

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INTRODUCTION

We cannot consider the impact of anti-discrimination law on persons with mental disabilities without a full understanding of how sanism1 permeates all aspects of the legal system—in judicial opinions, legislation, the role of lawyers, juror decision-making—and the entire fabric of American society.2 Notwithstanding nearly thirty years of experience under the Americans with Disabilities Act,3 and an impressive corpus of constitutional case law and state statutes,4 the attitudes of judges, jurors, and lawyers often reflect the same level of bigotry

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

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


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

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


9 See, e.g., Greg Procknow, Silence or Sanism: A Review of the Dearth of Discussions on Mental Illness in Adult Education, 29 NEW HORIZONS ADULT EDUC. & HUM. RESOURCE DEV. 6–7 (2017); Stephanie LeBlanc & Elizabeth Anne Kinsella, Toward Epistemic Justice: A Critically Reflexive Examination of Sanism' and Implications for
Certainly, the passage of the Americans with Disabilities Act (ADA) in 1990—far and away the broadest anti-discrimination law ever enacted on behalf of this population—gave great hope at that time. Commentators then raved about its “breathtaking promise” and characterized it as “the most important civil rights act passed since 1964,” and the “Emancipation Proclamation for those with disabilities.” It was, or so many of us thought, “without question, Congress’ most innovative attempt to address the pervasive problems of discrimination against citizens with physical and mental disabilities by providing, in the words of a congressional committee, ‘a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’ ”

We remain generally optimistic, though our optimism has been somewhat tempered both by subsequent court decisions and by subsequent legislative attempts to redefine the scope of the ADA.

13 Id. (quoting AMERICANS WITH DISABILITIES ACT OF 1990: SUMMARY AND ANALYSIS, SPECIAL SUPPLEMENT (BNA), at S-5).
and by efforts in Congress to cut back on the scope of the ADA. By example, the titles of some of the articles about the ADA by one of the co-authors and others reflect that diminution of optimism. Notwithstanding this, we believe that the ADA still can and must be relied upon as a source of rights for persons with mental disabilities in multiple discrete areas of law and policy.

At the time at which mental disability law scholars were beginning to focus on the ADA, few considered the dim-on-the-horizon potential redemptive influence of international human rights law. Eric Rosenthal and Leonard Rubenstein had written
their groundbreaking piece, in 1993, but it had been barely mentioned in the law journals—only cited seven times prior to 2002. When Rosenthal and Rubenstein first illuminated how the United Nations' Mental Illness (MI) Principles—in many ways the forerunner of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD)—came "from an individualistic, libertarian perspective that emphasizes restrictions on what the state can do to a person with mental illness," they inspired lawyers, advocates, professors, and progressive mental health professionals to begin thinking seriously about the intersection between international human rights law and mental disability law.
Disability rights took center stage at the United Nations in the most significant historical development in the recognition of the human rights of persons with mental disabilities: the drafting and adoption of a binding international disability rights convention. 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.” The Ad Hoc Committee drafted a document over the course of five years and eight sessions, and the new Convention on the Rights of Persons with Disabilities (CRPD) was adopted in December 2006 and opened for signature in March 2007. It entered into force, thus becoming legally binding on State parties, on May 3, 2008, thirty days after the twentieth ratification.


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

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

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

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

³² See infra text accompanying notes 83-146.

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

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

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


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

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

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

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

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


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

Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial and sentencing).

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

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

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


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


47 See Perlin, Sanism, supra note 42, at 400-04.
individuals with mental disabilities and contempt for the mental health professions. "Courts often appear impatient with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve." Thus, a popular sanist myth is that "[m]entally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint." We assume that "[m]entally ill individuals are presumptively incompetent to participate in 'normal' activities [and] to make autonomous decisions about their lives (especially in areas involving medical care)."

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

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


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

52 Perlin, On Sanism, supra note 42, at 394.

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

54 See generally Michael L. Perlin, Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence, 40 CASE W. L. REV. 599 (1989) (discussing the idiosyncratic development of the insanity defense and the interplay of psychiatry, the law, and public notions of good versus evil that underlie empirical and social myths about persons with mental illness).
makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally disabled. We rarely ask the most important question of all: why do we feel the way we do about these people?

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

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

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

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

58 Perlin, A Change is Gonna Come, supra note 25, at 487.
1. Lack of comprehensive legislation to govern the commitment and treatment of persons with mental disabilities, and failure to adhere to legislative mandates.\(^59\)

2. Lack of independent counsel and lack of consistent judicial review mechanisms made available to persons facing commitment and those institutionalized.\(^60\)

3. Failure to provide humane care to institutionalized persons.\(^61\)

4. Lack of coherent and integrated community programs as an alternative to institutionalized care.\(^62\)

5. Failure to provide humane services to forensic patients.\(^63\)

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

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


\(^{60}\) Id. at 340.

\(^{61}\) Id. at 343.

\(^{62}\) Id. at 349.

\(^{63}\) Id. at 354.

\(^{64}\) See generally Perlin, *International Human Rights*, supra note 19.

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

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

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

II. OUR SANIST PRESENT

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

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

63 Perlin, Making Love, supra note 8, at 483.
66 PERLIN & LYNCH, SEXUALITY, DISABILITY AND THE LAW, supra note 68, at 23.
67 Lawrence, 539 U.S. at 574.
68 Compare Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1238, 1250 (11th Cir. 2004) (declining to extrapolate from dicta in Lawrence a right to sexual privacy triggering strict scrutiny in upholding a statutory ban on the sale of sexual devices), with Reliable Consultants v. Earle, 517 F.3d 738, 747 (5th Cir. 2008) (striking down statute criminalizing sale of sexual devices, finding that statute impermissibly burdened customer's due process rights to engage in private intimate conduct). The authors discuss these collateral sexual privacy rights in Michael L. Perlin & Naomi M. Weinstein, Said I, 'But You Have No Choice':
Sanism and pretexuality rob persons with mental disabilities of basic dignity and from exercising their right to sexuality in institutional settings. Compounding the issue is the fact that there is no standard to determine the competency required to engage in sexual interaction. At the most basic level, the test requires that an individual have the capacity to understand there is a decision to be made and have an ability to consent or not.

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

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

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

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


CRPD, supra note 27, at art. 3, 23, 25.

Perlin & Lynch, Sexless Patients, supra note 18, at 277.

CRPD, supra note 27, at art. 1.

Id. at 15–16.

Id. at art. 17.

Perlin & Weinstein, Friend to the Martyr, supra note 18, at 33.
by scholars\(^\text{84}\) and, more recently, by practitioners,\(^\text{85}\) it still remains "under the radar" for most courts in the United States.\(^\text{86}\) In fact, there are only a handful of court cases in the United States that even mention the term sanism.\(^\text{87}\) This is likely due to the fact that mental disability continues to be viewed as a hidden prejudice, one that is ignored by society, including the judicial system, in general.\(^\text{88}\)

III. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A. In General\(^\text{89}\)

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


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

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

\(^{88}\) See Perlin, They Keep it All Hid, supra note 4, at 876.

\(^{89}\) This section is generally adapted from PERLIN, INTERNATIONAL HUMAN RIGHTS, supra note 19, at Chapter 7.
with disabilities but also explicitly sets out the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.90 There is no question that the CRPD has "ushered in a new era of disability rights policy."91

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

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


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


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


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

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

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

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

The ratification of the CRPD is the most important development in institutional human rights law for persons with mental disabilities. The CRPD is detailed, comprehensive,
integrated and the result of a careful drafting process.\textsuperscript{102} It seeks to reverse the results of centuries of oppressive behavior and attitudes that have stigmatized persons with disabilities. Its goal is clear: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."\textsuperscript{103} Whether this will actually happen is still far from a settled matter.

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

\begin{footnotes}
\item[102] See HUMAN RIGHTS AND DISABILITY ADVOCACY (Maya Sabatello & Marianne Schulze eds., 2014) (describing various perspectives on the involvement of civil society in the drafting of the Convention).
\item[103] CRPD, supra note 27, at art. 1.
\item[107] See id. at 267.
\item[108] A reservation is a "unilateral statement... made by a State... when signing... a treaty... whereby the State... purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Id at 271 (quoting Int'l Law Comm'n, U.N. Doc. A/66/10, 63d Sess. (2011), United Nations Guide to Practice on Reservations to Treaties). For the CRPD, the Obama Administration proposed a federalism reservation which stated that "US obligations under [the] CRPD are limited to those measures appropriate to the federal system, such as the enforcement of the [ADA]." BLANCHFIELD & BROWN, supra note 105, at 5.
\item[109] Farmer, supra note 106, at 270.
\end{footnotes}
shortcomings of the ADA and how the CRPD could be used "to expand the rights of people with disabilities beyond civil and political rights to economic, social, and cultural rights" beyond what is guaranteed or aspired to under domestic law. Notwithstanding the fact that Congress has not yet ratified the CRPD, the fact that it was signed by President Obama in 2012 means that the CRPD still has weight and influence over domestic policy. The signing of the Convention triggers the application of the Vienna Convention of the Law of Treaties "which requires signatories 'to refrain from acts which would defeat the Disability Convention's object and purpose.'" Importantly, New York state courts have relied on this and have cited the CRPD with approval in cases involving guardianship matters.

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

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


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

115 Dameris L., 956 N.Y.S.2d at 855; see Perlin, Striking for the Guardians, supra note 91, at 1178 n.97 (discussing Dameris L. in this context).
case of a woman with Down's Syndrome living in the community. Concluded Judge Torres:

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

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

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


\(^{117}\) *Michelle M.*, 2016 WL 3981204, at *3.

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

\(^{119}\) *Michelle M.*, 2016 WL 3981204, at *3 (quoting CRPD, supra note 27, at art. 12(1)-(2)).

\(^{120}\) *In re Zhuo*, 42 N.Y.S.3d 530, 532 (Sur. Ct. 2016).

\(^{121}\) Id. at 536.
pointedly added, "[p]ersons with disabilities have a right to recognition everywhere as persons before the law . . . [and] enjoy legal capacity on an equal basis with others in all aspects of life."\textsuperscript{122}

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

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

\textsuperscript{122} Id. at 532–33 (quoting CRPD, supra note 27, at art. 12(1)-(2)). The CRPD is also cited with approval in Proceeding for the Appointment of Guardian For Leon Pursuant to SCPA Article 17–A, 53 Misc.3d 1204(A), 43 N.Y.S. 3d 769 (Surrogate's Ct. 2016, at *1 ("Persons with disabilities have a right to recognition everywhere as persons before the law . . . [and] enjoy legal capacity on an equal basis with others in all aspects of life." (citing Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 (Dec. 6, 2006))).
\textsuperscript{123} See BLANCHFIELD & BROWN, supra note 105, at 12.
\textsuperscript{124} Kanter, supra note 111, at 822.
\textsuperscript{125} Id. at 848–51.
\textsuperscript{126} See Perlin & Schriver, Drugs at Your Command, supra note 8, at 386; Robert J. Quinn, Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model, 62 FORDHAM L. REV. 905, 920 (1994) (noting the significance of the inclusion of proscriptive and prescriptive rights in human rights treaties in general); Gooding, Supported Decision-Making, supra note 93, at 434 (explaining how the CRPD combines these two categories of rights).
\textsuperscript{127} Lord et al., supra note 94, at 568. The CRPD has also been used as a basis for reconceptualizing mental health rights as disability rights,\textsuperscript{129} and extends existing human rights to take into account the specific experiences of persons with disabilities.\textsuperscript{130} To this end, it calls for "[r]espect for inherent

\textsuperscript{128} CRPD, supra note 27, at pmbl. ¶ (e), art. 1.
\textsuperscript{129} Phillip Fennel, Human Rights, Bioethics, and Mental Disorder, 27 MED. & L. 95, 106 (2008).
\textsuperscript{130} Megret, Disability Rights, supra note 25, at 504; see PERLIN, INTERNATIONAL HUMAN RIGHTS, supra note 19, at 143–55.
dignity" and “[n]on-discrimination.” As noted earlier, subsequent articles declare “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment,” “[f]reedom from exploitation, violence and abuse,” the right to “liberty and security of the person,” and a right to protection of the “integrity of the person.”

B. Issues of Dignity

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

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

131 CRPD, supra note 27, at art. 3(a).
132 Id. at art. 3(b).
133 Id. at art. 15.
134 Id. at art. 16.
135 Id. at art. 14.
136 Id. at art. 17. On the possible application of these articles to persons with mental disabilities in prison, see Perlin, God Said, supra note 8, at 486.
137 This section is generally adapted from Perlin, International Human Rights, supra note 19, at Chapter 2.
139 G.A. Res. 56/168, at ¶ 1 (Feb. 26, 2002).
140 Dhir, Human Rights, supra note 92, at 182.
141 CRPD, supra note 27, at art. 3(a).
142 Id. at art. 8.
human person.”143 And these provisions are consistent with the entire CRPD’s “rights-based approach focusing on individual dignity,”144 placing the responsibility on the State “to tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons.”145

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

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

143 Id. at pmbl ¶ (h).
144 Dhir, Human Rights, supra note 92, at 195.
149 See Indiana v. Edwards, 554 U.S. 164, 176 (2008), for the role of dignity in the criminal trial process in cases involving criminal defendants with mental disabilities, as discussed in PERLIN & CUCOLO, MENTAL DISABILITY LAW, supra note 15, § 13-3-2.4.
hides, and ignores them." Importantly, such values have been affirmed in other nations as well.

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

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


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

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


154 Id.

155 Id. at 41.


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

(2) "[j]udges should try to define what human dignity is and be explicit about its meaning";

(3) "[j]udges should attempt to use human dignity consistently in the same rulings and in future decisions";

(4) "[h]uman dignity should advance human rights rather than limit them."

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

C. Controversial Aspects of the CRPD

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

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


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

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


Rebecca Zarett, To Work and to Love: How International Human Rights Law Can Be Used to Improve Mental Health in the United States, 40 FORDHAM INT'L L.J. 191, 208 (2016); see, e.g., Sascha Mira Callaghan & Christopher Ryan, Is There a Future for Involuntary Treatment in Rights-Based Mental Health Law?, 21 PSYCHIATRY, PSYCHOL. & L. 747, 747 (2014) (arguing that the CRPD does allow for involuntary treatment in some instances, and that "failing to account for it in law will jeopardise rights more than it protects them").
Commissioner's conclusion that, "[i]n the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defense based on the negation of criminal responsibility because of the existence of a mental or intellectual disability," or does the CRPD demand the retention of the insanity defense? These and other like questions reflect the complexity of the issues raised by this CRPD.

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

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

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

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164 See Perlin, God Said, supra note 8, at 518.
165 See, e.g., Perlin & Szeli, supra note 24, at 251.
166 See infra Part IV, for a full discussion of the meaning of therapeutic jurisprudence in this context.
168 CRPD, supra note 27, at art. 12.
169 IDRA, supra note 167, at ¶ 17.
authority or judicial body.”171 “This mandate screams out for a universal overhaul of guardianship law and practice.”172

D. Supported Decision-Making173

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

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

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172 Perlin, Striking for the Guardians, supra note 91, at 1190.
175 Id. at 559–60; see also CPRD, supra note 27, at art. 12.
178 Supported decision making incorporates the least restrictive alternative doctrine, and is based on the concept that no one makes decisions in a vacuum. Supported decision making can come in many different forms depending on the needs and abilities of the individual. It can include health care proxies, powers of attorney, or contract agreements. See generally Supported Decision Making N.Y., What is Supported Decision-Making?, SDMNY, https://sdmny.org/about-sdmny/about-sdm/ [https://perma.cc/ZA97-3PGU].
180 Leslie Salzman, Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 289 (2011) [hereinafter Salzman, Guardianship for Persons with Mental Illness]. The social model of disability "places the responsibility squarely on society (and not on the individual with a disability) to remove the physical and attitudinal barriers that ‘disable’ people with various impairments, and prevent them from exercising their rights and fully integrating into
viewed as discrimination based on a disability in violation of the ADA. A declaration of incapacity by any court can lead to feelings of helplessness and loss of control, which are detrimental to a person’s mental well-being and create feelings of shame and humiliation. Substituted decision-making can lead to unjustified confinement for persons with mental illness. When attorneys use substituted judgment in making legal decisions for their clients, “there are no checks and balances.”

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

IV. THERAPEUTIC JURISPRUDENCE

One of the most important legal theoretical developments of the past three decades has been the creation and dynamic
growth of therapeutic jurisprudence (TJ). Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.

The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.

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


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

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


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

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

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

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

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

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

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

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

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

\footnote{202} Amy D. Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles, 71 U. CIN. L. REV. 89, 94–95 (2002); see generally AMY D. RONNER, LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE 23 (2010) (discussing the “three V’s”).

\footnote{203} See Winick, supra note 24, at 543.

\footnote{204} See Juan Ramirez, Jr. & Amy D. Ronner, Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment, 41 CAL. W. L. REV. 103, 119 (2004) (characterizing the right to counsel as “the core of therapeutic jurisprudence”).

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

\footnote{206} CRPD, supra note 27, at art. 3.

\footnote{207} CRPD, supra note 27, at art. 8.

\footnote{208} Beitz, supra note 205, at 281 (noting that a special class of “dignitary harms” denies individuals “the capacity for dignified conduct”).

\footnote{209} Winick, supra note 24, at 544.

\footnote{210} In the specific context of criminal law and procedure, on this question, see Michael L. Perlin, “Infinity Goes up on Trial”: Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities, 16 QUT L. REV. 106, 107–08 (2016).
We must rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense. We need to take what we learn from therapeutic jurisprudence to strip away sanist behavior, pretextual reasoning and teleological decision making from the insanity defense process. This would enable us to confront the pretextual use of social science data in an open and meaningful way.\(^{211}\)

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

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

\(^{211}\) Perlin, The Jurisprudence of the Insanity Defense, supra note 57, at 443; see also Perlin, They Keep It All Hid, supra note 4, at 876:

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

\(^{212}\) Lord et al., supra note 94, at 567. On the role of “voice” in other similar UN Conventions, see Aisling Parkes, Tokenism Versus Genuine Participation: Children’s Parliaments and the Right of the Child to be Heard Under International Law, 16 Williamette J. Int’l L. & Disp. Resol. 1, 16 (2008) (discussing how children’s “voices are all too often frequently overlooked and undervalued”).


\(^{214}\) Id.

\(^{215}\) See Ronner, supra note 202, at 94–95.

\(^{216}\) See Perlin & Lynch, Mr. Bad Example, supra note 8, at 320.

\(^{217}\) Again, these attitudes are not limited to those teaching or practicing law in the US. For a Canadian perspective, see Nathalie Des Rosiers, From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes, 13 Can. J. L. & Juris. 171, 174–75 (2000) (“One can find in the Therapeutic Jurisprudence literature several references to the need for the tribunal to listen fully to all the concerns of the participants, and to recognize the value of such expression.”); see also Frank Sirotich, Reconfiguring Crime Control and Criminal Justice: Governmentality and Problem-Solving Courts, 55 U. New Brunswick L.J. 11 (2006); Timothy T. Culbert, Mental Health Law Reform for a New Government in New Brunswick, 62 U. New Brunswick L.J. 173 (2011).
The CRPD and TJ principles are further entwined as evidenced by the fact that the CRPD embraces the importance of effective counsel for persons with disabilities, the right to refuse treatment, and the protection of persons with disabilities who are institutionalized. TJ and the CRPD are of vital importance in order to promote, protect, and enforce the rights of persons with mental disabilities. The CRPD, in honoring a person's dignity, ensures a more beneficial therapeutic process, improved outcomes, and more effective exercise of state power, when that power need be exercised.

Writing previously about the CRPD and the guardianship system prevalent in many civil law nations, one of the co-authors said: “I believe that, if we embrace TJ, and the precepts of procedural justice, we will have taken an important step towards meaningfully enforcing the CRPD in ways that, for the first time, will bring both due process and dignity to the guardianship system.” Similarly, the CRPD will bring dignity and due process to the entire mental disability law system.

Almost twenty years ago, the Florida Supreme Court recognized the value of therapeutic jurisprudence in juvenile commitment hearings. We believe that this approach would similarly

219 Id. at 148.
220 Simon & Rosenbaum, supra note 153, at 48.
221 Perlin, Striking for the Guardians, supra note 91, at 1189.
222 See Gallagher & Perlin, supra note 156, at 292 (“The principles of TJ are also in line with the CRPD’s requirement to treat individuals with disabilities with inherent dignity and respect and to ensure ‘full and effective participation and inclusion in society’ for persons with disabilities.”).

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

The comment further asserts that juveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity and trust. According to Judge Wren and Professor Winick, “[c]ivil commitment hearings for juveniles that deny them the ability to articulate
invigorate international human rights law as it applies to questions that affect persons with mental disabilities.

CONCLUSION

The CRPD, at base, is a document that seeks to eradicate and eviscerate "stigmas and stereotypes,"224 one that emphasizes and "upholds the social inclusion [and] anti-stigma . . . agenda."226 Its purpose is to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities."226 It is also a document that demands law reform at the local and national level all over the world,227 whether in the United States or in the tiny island nation of Vanuatu.228 Although much of its framework was inspired by the principles and concepts in the ADA,229 the CRPD goes far beyond the ADA in its positive mandates, its focus on stigma and prejudice, its uncompromising adoption of the social model, its reporting requirements, and its identification of the specific steps that States must take to ensure an environment for the enjoyment of human rights (such as "awareness-raising, ensuring accessibility, ensuring protection and safety in situations of risk and humanitarian emergencies, promoting access to justice, their wishes through counsel, but which solely use guardians ad litem to present the guardian's views of the juvenile's best interests, will not fulfill the juvenile's participatory or dignitary interests."

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

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

225 Fennel, supra note 129, at 107.
226 CRPD, supra note 27, at art. 8.
227 On the law reform obligations of the CRPD, see Lord & Stein, supra note 224, at 471.
ensuring personal mobility, enabling habilitation and rehabilitation, and collecting statistics and data).\footnote{See PERLIN, INTERNATIONAL HUMAN RIGHTS, supra note 19, at 147.} It also—perhaps most importantly—makes visible what has long been “invisible to the world’s political, social and economic process,”\footnote{Peter Blanck, “The Right to Live in the World”: Disability Yesterday, Today, and Tomorrow, 13 TEX. J. C.L. & C.R. 367, 401 (2008); on the invisibility of persons with disabilities in this context in general, see PERLIN, supra note 6.} and reflects the reality that “only positive state action can combat the deeply entrenched patterns of disability disadvantage arising from stigma, devaluation, stereotyping and exclusion.”\footnote{Ena Chadha & C. Tess Sheldon, Promoting Equality: Economic and Social Rights for Persons with Disabilities Under Section 15, 16 NAT’L J. CONST. L. 27, 42 (2004).}

Mary Donnelly was precisely accurate when she argued that “the goal of [mental disability] law reform must include delivery on the rights . . . to dignity.”\footnote{Mary Donnelly, From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights, 26 L. CONTEXT 37, 57 (2008).} The CRPD has the capacity to do this, but only if signatory nations grasp the extent to which sanism has pervaded all mental disability law policy and enforcement over the centuries. The application of TJ principles will, finally, allow us to see this and to, we hope, make this truly the “dawn of a new era.”\footnote{Perlin, A Change is Gonna Come, supra note 25, at 498.} And maybe then, also, finally, in Dylan’s words, the “voices in the night”\footnote{Million Miles, Bob Dylan (1997), http://www.bobdylan.com/songs/million-miles [http://perma.cc/Z7RS-DS9K].} will, for once, be heard.