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Book Review: A NEW ERA FOR MENTAL HEALTH LAW AND POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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The book is thoughtful, comprehensive, balanced, and readable. It is exhaustively researched and left this reader wanting to read even more. Spoiler alert: I am cited multiple times in the work, but, given the breadth and extent of his other sources, I do not think that disqualifies me from doing this review.

The topic of this book is one that is near and dear to me. I have written about it extensively in the past, have presented on related themes on all continents (save Antarctica), and I have worked with advocacy groups around the world seeking to interpret and implement the UN Convention on the Rights of Persons with Disabilities (CRPD), mostly—but not exclusively—in nations with developing economies. It has always been a matter of great embarrassment and shame to me that the United States is not a CRPD ratifier, though I remain hopeful that a differently
constituted Senate might change that at some point in the future. I mention this because some have argued that U.S. citizens should not write or speak about this Convention because of that fact. I disagree, profoundly, and hope that by writing and speaking about it more, decision-makers who may be in a position to aid in the ratification efforts might be reached.

When I first wrote about the CRPD, I was straightforward, characterizing it as “the most revolutionary international human rights document ever created that applies to persons with disabilities,” as it firmly endorsed a social model of disability and reconceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that traditionally was part and parcel of mental disability law. Importantly, Dr. Gooding has a slightly different take on the topic, persuasively arguing that a “human rights” model of disability offers an even “more comprehensive framework for achieving social justice.”

The entire book needs to be read through this lens and, I think, the entire discussion about the CRPD needs to be read through that same lens.

Mental health law is at a crossroads, he says, and I agree. One of the paths at that crossroads is the extent to which the CRPD Committee’s interpretations of the CRPD—that, on one level, would call for the abolition of all mental health law (and all status defenses in the criminal law, including the insanity defense and incompetency status)—will be taken.

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3 Importantly, although the United States has not ratified the CRPD, “a state’s obligations under it are controlled by 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.’” Henry A. Dlugacz & Christopher Wimmer, The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings, 4 St. Louis U. J. Health L. & Pol’y 331, 362-63 (2011) (discussing In re Mark C.H., 906 N.Y.S.2d 419, 433 (N.Y. Sur. Ct. 2010) (finding that guardianship appointments must be subject to requirements of periodic reporting and review)).


5 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).

6 Gooding, at 47.

7 Id. at 254. Elsewhere, he says (and I again agree) that “mental health legislation faces an uncertain future.” Id. at 21.

(or should be taken) seriously by signatory nations. Here, he notes, accurately, that “no government appears willing—at least at this stage—to adhere to the directive” to do so. Another—and a significant portion of the book is devoted to this—involves the unpacking the meaning and significance of “supported decision-making” in the context of the CRPD. Here, Gooding deftly analyzes the differences between traditional “substituted decision-making” (as reflected in the medical model) and the contours of “supported decision-making” (as urged by the CRPD), and he concludes—totally accurately, I believe—that the CRPD’s “articulation of equality, autonomy, human dignity and solidarity … provide a conceptual and practical alternative to existing legal configurations that emphasize ‘substituted decision-making.’” later—again appropriately, I believe—relying on Oliver Lewis’s characterization of the “expressive, educational and proactive” role of the CRPD.

Gooding asks and grapples with some of the hardest questions that policymakers and advocates must face (and that most ignore): “How should the law work when someone is unaware of the harm of her or his actions? What should happen when a person wishes to jump off a building because she believes doing so will save the world?” Further, he notes how the competing aims of mental health law “blur the decision-making process,” and I completely agree with that as well. In addition, he calls attention to what I have previously described as the “pretextuality” of much mental health law decision-making, quoting an important critique of institutional psychiatry’s approach to civil...

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9 See, e.g., Gooding, at 61-68.
10 Id. at 65 (emphasis added). He notes elsewhere, and I agree, that current mental health legislation provides poor protection for people with psychosocial disabilities “in the face of malign public attitudes.” Id. at 97.
11 Id. at 117-217.
12 Id. at 5. Elsewhere, he notes, again accurately, that choice of language matters and that language around mental health law is “greatly contested.” Id. at 35. This insight is one that also must be taken seriously.
14 Id. at 12. See also, id. at 39, his discussion of Bernadette McSherry’s focus—see Mental Health Law: Where to from Here?” 40 MONASH U. L. REV. 175 (2014)—on the challenge that these issues pose.
commitment law: “They [institutional psychiatrists] learn what they have to sign and complete in order to achieve what they have already clinically decided on.” These questions and observations, and other similar ones, give rise to a discussion of when, if ever, coercive responses may be justified, and Gooding examines this dilemma prudently and soberly.

Gooding’s concluding recommendations are thoughtful and sober—like the rest of the book. He calls for the active involvement of persons with disabilities in implementing the CRPD; for a human rights perspective to be integrated into all mental health law, policy, and practice; for the legislative repeal of substituted decision-making processes; and for a shift in resources “from coercion to a wide range of supports in health and social policy and programming.” And perhaps, most important, at every step of the way, “the active involvement of people with psychosocial disabilities and their supporters … will be crucial.”

Two thoughts for Dr. Gooding’s potential future research agenda. I am especially delighted that Dr. Gooding—and here he stands in contrast to many who write about mental disability law from an international human rights law perspective—takes criminal law issues seriously. I hope that in a future work he tackles an issue that has concerned me since the civil commitment abolition debate began in earnest in the early- to mid-1970s. I have always feared that, were commitment to

17 Gooding, at 113, quoting Tom Burns, Mental Illness is Different and Ignoring Its Differences Profits Nobody, Special Issue, J. Mental Health L. 34 (2010).
18 His discussion of the careful analysis by Oliver Lewis and Michael Bach of a draft Northern Ireland Law; see How Northern Ireland Can Avoid Making a Big “Mental Capacity Law” Mistake (April 23, 2014), accessible at www.mdac.info, is particularly insightful; see Gooding, at 173–74.
19 Although the drafting of the CRPD stands alone in the extent to which disability rights organizations were active participants in that drafting process—see Human Rights and Disability Advocacy (Maya Sabatello & Marianne Schulze eds., 2014)—largely absent from that process were forensic patients, perhaps the group most marginalized. See Maya Sabatello, Where Have the Rights of Forensic Patients Gone?, 109 Am. Soc’y Int’l L. Proc. 77, 78 (2015).
20 Gooding, at 47-48; 255-56. This approach is elaborated upon in Theresia Degener & Gerard Quinn, A Survey of International, Comparative and Regional Disability Law Reform, in Disability Rights Law & Policy: International and National Perspectives 5, 14 (Mary Lou Breslin & Silvia Yee eds., 2002).
21 Gooding, at 256.
22 Id. at 275.
be abolished, many of the persons now subject to civil commitment would be arrested for “nuisance crimes” (failing to give a good account of themselves, loitering, etc.) and sent to jails, never a good alternative for a person with a mental disability. The debate rages as to whether deinstitutionalization is the “cause” of criminalization of persons with mental illness, and this must be addressed frontally in any conversation about the possible abolition of commitment laws (or the abolition of forced treatment).

I am also concerned about another issue that somehow does not emerge frequently enough: What sort of legal advocacy is available for persons seeking to enforce the CRPD in domestic or regional courts? This is also mostly beyond the scope of Dr. Gooding’s book, but I think it is critical that, in the future, it be taken seriously by all scholars and activists working on these issues. Several years ago, I wrote this:

There is no question that the key to meaningful CRPD enforcement—and the most critical determining factor of whether the CRPD will actually be as emancipatory as its potential suggests (and as some literature predicts)—is the availability and presence of dedicated and committed counsel to provide representation to the population in question. Without the presence of vigorous, advocacy-focused counsel, the CRPD may turn into little more than a “paper victory” for persons with disabilities and their advocates.

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I am sad that there has been so little attention paid to this topic and am hoping that, in the future, Dr. Gooding takes this on as well. It is a topic that would greatly benefit from his analytic skills and compassion (a pairing all too rare in the literature).\textsuperscript{27}

So, in short, this is an excellent book on an important topic. Dr. Gooding has done us all a favor by devoting his time and energy to it. I hope that it is widely read.

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\textsuperscript{27} Although therapeutic jurisprudence is barely mentioned in the book (and that in citations to articles, see his thoughtful discussion, Gooding, at 75, of Bruce J. Winick, \textit{The Side Effects of Incompetency Labeling and the Implications for Mental Health Law,} 1 Psychol. Pub. Pol'y & L. 6, (1995)), the book resounds with therapeutic jurisprudence (TJ) implications for scholars, practitioners, and activists. I have said elsewhere that “the CRPD is a document that resonates with TJ values”; see Perlin, supra note 5, at 36, and that, in this context, one “of the major aims of TJ is explicitly the empowerment of those whose lives are regulated by the legal system.” \textit{Id.;} see also Michael L. Perlin, “Your Old Road Is/Rapidly Agin’”: \textit{International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities}, 17 Wash. U. Global Studies L. Rev. 79, 106 (2018) (“the application of international human rights law …—specifically, the CRPD—is entirely consonant with TJ values”). I hope that Dr. Gooding’s book is carefully read by TJ scholars and practitioners as well.