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

Piers Gooding (Cambridge University Press, 2018, pp. 294, ISBN-13: 978-1107140745 Hardback)

Reviewed by Michael L. Perlin Esq. 

What a pleasure it was to read Piers Gooding's new book, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*.¹ 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.²

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

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¹ Cites to this work will be in the "GOODING, at xx" format.

² The book is so well researched and referenced that it would probably be difficult to find *any* reviewer whose works are not mentioned.

constituted Senate might change that at some point in the future.³ 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,”⁴ 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.⁵ 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.”⁶ 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,⁷ 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)⁸—will be taken

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)).

⁴ See Michael L. Perlin & Éva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in *MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE* 80, 85 (Michael Dudley et al., eds. 2008); Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the New Convention*, in *UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: MULTIDISCIPLINARY PERSPECTIVES* 241 (Jukka Kumpuvuori & Martin Scheninen, eds. 2010); Michael L. Perlin, “A Change Is Gonna Come:” *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 484 (2009).

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.

⁸ For my earlier critique of that position, see Michael L. Perlin, “*God Said to Abraham/Kill Me a Son*”: *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477 (2017).

(or should be taken) seriously by signatory nations.⁹ Here, he notes, accurately, that “no government appears willing—at least at this stage—to adhere to the directive” to do so.¹⁰ 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.¹¹ 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,’”¹² later—again appropriately, I believe—relying on Oliver Lewis’s characterization of the “expressive, educational and proactive” role of the CRPD.”¹³

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?”¹⁴ Further, he notes how the competing aims of mental health law “blur the decision-making process,”¹⁵ 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,¹⁶ quoting an important critique of institutional psychiatry’s approach to civil

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.

¹³ *Id.* at 68, citing Oliver Lewis, *The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities*, in *RETHINKING RIGHTS-BASED MENTAL HEALTH LAWS* 97 (Bernadette McSherry & Penelope Weller eds., 2010).

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.

¹⁵ GOODING, at 103. In an in-press article, I focus specifically on multiple aspects of this “blur.” See Michael L. Perlin, Deborah A. Dorfman, & Naomi M. Weinstein, “On Desolation Row”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, *TEX. J. ON CIV. LIBS. & CIV. RTS.* (2018) (forthcoming), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3110985.

¹⁶ See, e.g., Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance*, 19 *BULL. AM. ACAD. PSYCHIATRY & L.* 131 (1991); Michael L. Perlin, “Half-Wracked Prejudice Leaped Forth”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 *J. CONTEMP. LEG. ISS.* 3 (1999).

commitment law: “They [institutional psychiatrists] learn what they have to sign and complete in order to achieve *what they have already clinically decided* on.”¹⁷ 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.¹⁸

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 CRPD¹⁹; for a human rights perspective to be integrated into all mental health law, policy, and practice; for the legislative repeal of substituted decision-making processes²⁰; and for a shift in resources “from coercion to a wide range of supports in health and social policy and programming.”²¹ And perhaps, most important, at every step of the way, “the active involvement of people with psychosocial disabilities and their supporters ... will be crucial.”²² I could not agree more.

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.²³ 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).

Importantly, the activism surrounding the drafting of the CRPD also inspired a number of new disability rights organizations and alliances in regions of the world where such groups had not previously been that active. See Carole J. Petersen, *The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific*, 35 U. HAW. L. REV. 821, 832 (2013).

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.

²³ See also, e.g., Piers Gooding & Tova Bennet, *The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinkmanship or Evidence It Won’t Work?* 21 NEW CRIM. L. REV. 141 (2018).

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.²⁴ The debate rages as to whether deinstitutionalization is the “cause” of criminalization of persons with mental illness,²⁵ 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.²⁶

²⁴ I discuss this in parallel situations in, *inter alia*, Michael L. Perlin & Alison J. Lynch, “*Had to be Held Down by Big Police*”: A Therapeutic Jurisprudence Perspective on Interactions between Police and Persons with Mental Disabilities, 43 *FORDHAM URBAN L.J.* 685 (2016); Michael L. Perlin & Alison J. Lynch, “*To Wander Off in Shame*”: Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their Treatment of Persons with Mental Disabilities, in *SYSTEMIC HUMILIATION IN AMERICA: FINDING DIGNITY WITHIN SYSTEMS OF DEGRADATION* 175 (Daniel Rothbart ed. 2018); Naomi M. Weinstein & Michael L. Perlin, “*Who’s Pretending to Care for Him?*” *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, 8 *WAKE FOREST J. L. & POL’Y* 455, 456-57 (2018).

²⁵ I do not believe that it is; see Michael L. Perlin, “*Wisdom Is Thrown into Jail*”: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness, 17 *MICH. ST. U. J.L. & MED.* 343, 349-53 (2013), relying on, *inter alia*, Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 *L. & HUM. BEHAV.* 110 (2011), and John Junginger et al., *Effects of Serious Mental Illness and Substance Abuse on Criminal Offenses*, 57 *PSYCHIATRIC SERVS.* 879 (2006), but this causal connection is clearly in the public favor.

²⁶ Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law, 117 *PENN ST. L. REV.* 1159, 1179-80 (2013). Gooding does note my argument that comprehensive mental health legislation can ensure that individuals “can access independent counsel and judicial review mechanisms.” GOODING, at 85, citing Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 *SYRACUSE J. INT’L L. & COMMERCE* 333, 343 (2007).

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).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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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, *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.” *Id.*; see also Michael L. Perlin, “Your Old Road Is/Rapidly Agin’”: *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.