



“The ladder of the law has no top and no bottom”: How therapeutic jurisprudence can give life to international human rights[☆]



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ARTICLE INFO

Available online 26 April 2014

Keywords:

Therapeutic jurisprudence
 Mental disability law
 International human rights law
 Right to counsel
 Convention on the Rights of Persons with Disabilities

ABSTRACT

In the past two decades, therapeutic jurisprudence (TJ) has become one of the most important theoretical approaches to the law. But, there has, as of yet, been puzzlingly little written about the relationship between TJ and international human rights law. To be sure, there has been some preliminary and exploratory work on the relationship between TJ and international law in general, but virtually nothing on its relationship to international human rights law in a mental disability law context. This paper seeks to focus on this lack of consideration, to speculate as to why that might be, and to offer some suggestions as to how to infuse some new vitality and vigor into this important area of law and social policy.

In this article, first, I offer a brief explanation of TJ. Next, I discuss, also briefly, the impact (and the potential future greater impact) of the recently-ratified United Nations Convention on the Rights of Persons with Disabilities (CRPD) on this area. Then, I consider the sparse commentary currently available on the intersection between TJ and international law in general, and will speculate as to why this is so sparse. Then, I offer some thoughts as to the TJ/international human rights law connection, looking specifically at three questions that require far more attention from this perspective (access to counsel, the use of state-sanctioned psychiatry as a tool of political oppression, and the potential redemptive power of the CRPD), and describe a research agenda that scholars might turn to in furtherance of the investigation of the relationships between therapeutic jurisprudence, international human rights law and mental disability law. I conclude by calling on scholars, activists, advocates and practitioners to begin to take this connection seriously in their future work.

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1. Introduction

In the past quarter century, therapeutic jurisprudence (TJ) has become one of the most important theoretical approaches to the law. From a few initial law review articles by its founders – David Wexler and Bruce Winick – it has grown to a worldwide movement that has inspired professors, lawyers, mental health professionals, judges, and others, and has been acknowledged as the impetus for the entire mental health court movement. It has created a sea change of thinking about the advocacy model, about the criminal trial process, about the relationship between mental health laws and persons regulated by those laws, and the ways that lawyers think about themselves and their roles.¹

But, there has, as of yet, been puzzlingly little written about the relationship between TJ and international human rights law. To be sure,

there has been some preliminary and exploratory work on the relationship between TJ and international law in general, but virtually nothing on its relationship to international human rights law in a mental disability law context. I have written this paper to bring some attention to this lack of consideration, to speculate as to why that might be, and to offer some suggestions as to how we might be able to infuse some new vitality and vigor into this important area of law and social policy.

The paper will proceed in this manner. First, I will offer a brief explanation of TJ. Next, I will discuss, also briefly, the impact (and the potential future greater impact) of the recently-ratified United Nations Convention on the Rights of Persons with Disabilities (CRPD) on this area. Then, I will consider the sparse commentary currently available on the intersection between TJ and international law in general, and will speculate as to why this is so sparse. Then, I will offer some thoughts as to the TJ/international human rights law connection, looking specifically at three questions that require far more attention from this perspective, and will conclude by calling on scholars, activists, advocates and practitioners to begin to take this connection seriously in their future work.

The paper's title comes from Bob Dylan's brilliant song, *The Lonesome Death of Hattie Carroll*, mostly a true story. Hattie Carroll was a fifty-one-year-old, black hotel worker who died after having been struck with a

[☆] This paper is an expansion of remarks given at the Congress of the International Academy of Law and Mental Health in Amsterdam, Netherlands, July 14, 2013, at a ceremony at which the author was presented the first Bruce Winick Award for his work in therapeutic jurisprudence and international human rights law. The paper is dedicated to Bruce's memory. It will always be a blessing.

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¹ See *infra* text accompanying notes 9–36.

cane at a Baltimore, Maryland charity ball by William Zantzing, a twenty-four-year-old, Maryland tobacco farmer.² Zantzing, already intoxicated, demanded another drink and complained when Carroll said, “Just a minute, sir”.³ Zantzing was originally charged with murder, but that charge was subsequently reduced to manslaughter. He was convicted by a three-judge panel and sentenced to six months in jail.⁴ In his epic work, *Dylan’s Visions of Sin*, Christopher Ricks begins his “Justice” chapter with an essay on Hattie Carroll, characterizing it as a song “that brings home the falsity of the boast ... that ‘the courts are on the level.’”⁵

The line which begins the title of this paper, “the ladder of the law has no top and no bottom,” has been characterized as the “words that are the cornerstone of justification for the justice system in model capitalist democracies,”⁶ and words that reject “the August claim of the judiciary” as utterly “hollow.”⁷ It has been cited many times in different contexts, perhaps most notably by the historian (and not coincidentally, Dylan scholar) Sean Wilentz, in his appearance before the House Judiciary Committee, decrying the Republican efforts to impeach President Clinton, rejecting the argument that such impeachment would vindicate the rule of rule – proving that the ladder of the law had no top and no bottom – as “nonsense, logically and historically.”⁸ For persons with mental disabilities, institutionalized on all continents, these analyses ring true. My hope is that the application of the precepts of therapeutic jurisprudence may make a real and lasting change.

2. Therapeutic jurisprudence⁹

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence.¹⁰ 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 that can have therapeutic or anti-therapeutic

consequences.¹¹ 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.¹² There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: “the law’s use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”¹³ Thus, “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”¹⁴

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives”¹⁵ and focuses on the law’s influence on emotional life and psychological well-being.¹⁶ 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”.¹⁷

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 law and procedure, employment law, gay rights law, and tort law.¹⁸ It is also recognized as one of the major inspirations for the creation of mental health courts.¹⁹ As Professor Ian Freckelton has noted, “it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications”.²⁰ It 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.²¹ In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as “... a sea-

² Adam Bernstein, *William Zantzing; Infamous After Dylan Song ‘Hattie Carroll’*, WASH. POST, Jan. 10, 2009, at B6.

³ *Id.*

⁴ Douglas Martin, *W. D. Zantzing, Subject of Dylan Song, Dies at 69*, N.Y. TIMES, Jan. 9, 2009, at B8.

⁵ CHRISTOPHER RICKS, *Dylan’s Visions of Sin* 221 (2003).

⁶ Pat Stack, *J is for Justice*, SOCIALIST REVIEW (March 2008), accessible at <http://www.socialistreview.org.uk/article.php?articleid=10310>.

⁷ MIKE MARQUESE, *Chimes of Freedom: The Politics of Bob Dylan’s Art* 82 (2003).

⁸ Sean Wilentz, *Impeachment and the Rule of Law* (1999), accessible at http://www.college.columbia.edu/cct_archive/spr99/28a_fr.html.

⁹ This section is generally adapted from Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159 (2013) (Perlin, *Guardians*); 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. MED. & L. 343 (2013), and Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights Implications of Juvenile Punishment Schemes* 46 TEXAS TECH L. REV. 301 (2013) (Perlin, *Yonder*).

¹⁰ See e.g., DAVID B. WEXLER, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990); DAVID B. WEXLER & BRUCE J. WINICK, *Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence* (1996); BRUCE J. WINICK, *Civil Commitment: A Therapeutic Jurisprudence Model* (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TORO L. REV.* 17 (2008) (Wexler, *Two Decades*); 1 MICHAEL L. PERLIN, *Mental Disability Law: Civil and Criminal*, § 2D-3, at 534-41 (2d ed. 1999) Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 *L. & HUM. BEHAV.* 27, 27, 32-33 (1992). The first academic conference on TJ was held at New York Law School in 1993. See Symposium, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 *N.Y.L. SCH. J. HUM. RTS.* 623-926 (1993). For thoughtful criticisms of the therapeutic jurisprudence, see John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, 10 *N.Y.L. SCH. J. HUM. RTS.* 877, 881-82 (1993); Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law*, 20 *N. ENG. J. ON CRIM. & CIV. CONFINEMENT* 301, 317 (1994); Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *PSYCHOL. PUB. POLY & L.* 193 (1995), all responded to in Keri K. Gould & Michael L. Perlin, “Johnny’s in the Basement/Mixing Up His Medicine”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 *SEATTLE U. L. REV.* 339, 35-47 (2000).

¹¹ See Michael L. Perlin, “His Brain Has Been Mismanaged with Great Skill”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 *AKRON L. REV.* 885, 912 (2009); see Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in *DISPUTES AND DILEMMAS IN HEALTH LAW* 91 (Ian Freckelton & Kate Peterson eds., 2006) (for a transnational perspective).

¹² Michael L. Perlin, “You Have Discussed Lepers and Crooks”: *Sanism in Clinical Teaching*, 9 *CLINICAL L. REV.* 683 (2003); Michael L. Perlin, “Everybody Is Making Love/Or Else Expecting Rain”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 *U. WASH. L. REV.* 481 (2008). On how therapeutic jurisprudence “might be a redemptive tool in efforts to combat sanism, as a means of ‘strip [ping] bare the law’s sanist façade,’” see 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, 591 (2008), quoting, in part, MICHAEL L. PERLIN, *The Hidden Prejudice: Mental Disability on Trial* 301 (2000). See also, 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, 599 n. 111 (2005). Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 *T. JEFFERSON L. REV.* 575, 585-86 (2008).

¹³ David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 *BEHAV. SCI. & L.* 17, 21 (1993). See also, e.g., David Wexler, *Applying the Law Therapeutically*, 5 *APPL. & PREVENT. PSYCHOL.* 179 (1996).

¹⁴ Michael L. Perlin, *A Law of Healing*, 68 *U. CIN. L. REV.* 407, 412 (2000); Michael L. Perlin, “Where the Winds Hit Heavy on the Borderline”: *Mental Disability Law, Theory and Practice, Us and Them*, 31 *LOYOLA LA. L. REV.* 775, 782 (1998).

¹⁵ Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 *NOVA L. REV.* 535, 535 (2009).

¹⁶ David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in DANIEL P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* 45 (2006) (Stolle).

¹⁷ 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).

¹⁸ Michael L. Perlin, “Things Have Changed”: *Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 *N.Y.L. SCH. L. REV.* 535, 537 (2002-03).

¹⁹ See e.g., Andrea M. Odegaard, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 *N.D. L. REV.* 225 (2007); Michael L. Perlin, “There Are No Trials Inside the Gates of Eden”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in *COERCIVE CARE: LAW AND POLICY* 193 (Bernadette McSherry & Ian Freckelton, eds. 2013) (Perlin, *Gates of Eden*).

²⁰ Diesfeld & Freckelton, *supra* note 11, at 582.

²¹ Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement*, in STOLLE, *supra* note 16, at 365.

change in ethical thinking about the role of law ... a movement towards a more distinctly relational approach to the practice of law ... which emphasizes psychological wellness over adversarial triumphalism".²² That is, therapeutic jurisprudence supports an ethic of care.²³ Importantly, TJ is now being written about in other languages, ranging from Swedish²⁴ to Dutch²⁵ to French²⁶ to Hebrew²⁷ to Urdu,²⁸ and TJ works are being translated into many other languages as well.²⁹

One of the central principles of therapeutic jurisprudence is a commitment to dignity.³⁰ Therapeutic jurisprudence "values" the dignity of the individual human being.³¹ Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,³² 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 judicial pronouncement 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.³³

The question to be posed in this paper is this: to what extent can international human rights law reach out to therapeutic jurisprudence

to best insure that these principles written about by Professor Ronner – the principles of voluntariness, voice and validation – can be fulfilled?³⁴ Again, it is puzzling that so little has been written about the relationship between TJ and international human rights law, because one would think that international human rights law does – or, at least, *should* – mirror these principles (as well as a fourth "V" principle to be added, that of *visibility*)³⁵, and that this mirroring would have led to a robust literature, to academic programs and to a comprehensive evaluation of how these approaches to the law intersect in a mutually reinforcing way.³⁶ That this has not happened yet is a dilemma we must confront. TJ articulates these principles; international human rights should adopt them.

3. The Convention on the Rights of Persons with Disabilities³⁷

The Convention on the Rights of Persons with Disabilities (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."³⁸ This Convention is the most revolutionary international human rights document ever created that applies to persons with disabilities.³⁹ It furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life,⁴⁰ firmly endorses a social model of disability, and reconceptualizes mental health rights as disability rights – a clear

²² Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001); see also, Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–06 (2006). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

²³ See e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 22; Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

²⁴ See CHRISTIAN DIESEN, TERAPEUTISK JURIDIK (2011).

²⁵ See Alexander F. De Savornin Lohman, *Werkdocument Duurzame Rechtspraak*, English version accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210027.

²⁶ See Martine Herzog Evans, *Révolutionner La Pratique Judiciaire: S'inspirer De L'Inventivité Américaine*, 44 RECUEIL DALLOZ 3016 (2011), English version accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021083.

²⁷ See Hadar Dancig-Rosenberg & Yifat Ferder, *The Other Inside Us: On Culture-Sensitive Cause Lawyering*, 3 TEL-AVIV U. J. L. & SOC'L CHANGE – (2010).

²⁸ See Muhammad Ahmad Munir, *Therapeutic Jurisprudence and Court Responsibilities*, accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261530 (posted May 7, 2013).

²⁹ See Wexler, *Two Decades*, *supra* note 10, at 19.

³⁰ See BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

³¹ Carol L. Zeiner, *Marching Across the Putative Black/White Race Line: A Convergence Of Narratology, History, and Theory*, 33 B.C. J.L. & SOC. JUST. 249, 313 (2013). See also, on the relationship between therapeutic jurisprudence and juvenile commitment hearings, Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So.2d 1206, 1211 (Fla. 2001) ("juveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity and trust").

³² Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). In this context, Professor Ronner quotes Professor Tom Tyler for the proposition that, "that when individuals feel the system has treated them with fairness, respect, and dignity, their behavior improves and they tend to become healthier in their everyday lives." *Id.* at 627–28, citing Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 443–44 (1992). On the importance of "voice," see also, Diesfeld & Freckelton, *supra* note 11, at 588.

³³ 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 (2010).

³⁴ TJ should reach out more consistently to international rights law as well. See e.g., Perlin, *Guardians*, *supra* note 9, at 1186–87; Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMPLE POLITICAL & CIVIL RTS. L. REV. 1, 17 n. 80 (2012); Astrid Birgden & Michael L. Perlin, "Where the Home in the Valley Meets the Damp Dirty Prison": A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings, 14 AGGRESSION & VIOLENT BEHAV. 256 (2009) (Birgden & Perlin, *Home in the Valley*); Astrid Birgden & Michael L. Perlin, "Tolling for the Luckless, the Abandoned and Forsaken": Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231 (2008) (Birgden & Perlin, *Tolling for the Luckless*); Michael L. Perlin & Henry A. Dlugacz, "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 (2009).

³⁵ See MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD (2011).

³⁶ On the other hand, other schools of jurisprudence have focused explicitly on connections to international law. See e.g., Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT'L L. 857 (1996) (feminist theory); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991) (same); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000) (same); Robert Williams, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous People's Survival in the World*, 1990 DUKE L.J. 660 (critical race theory); Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 HUM. RTS. Q. 67 (1996) (gay rights theory).

³⁷ This section is generally adapted from Perlin, *Gates of Eden*, *supra* note 19, and Michael L. Perlin, *Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce Arrigo & Heather Bersot, eds.) (2013) (Perlin, *Dignity*).

³⁸ 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. 17 (2008). See, for example, statements made by the High Commissioner For Human Rights, Louise Arbour, and the permanent representative of New Zealand and chair of the ad-hoc committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a special event on the Convention on the Rights of Persons with Disabilities, convened by the UN Human Rights Council, 26 March 2007, available at: [http://www.un.org.ch/80256EDD006B9C2E/\(Httpnewsbyyear_En\)/7444B2E19117CE8C12572AA004C5701?OpenDocument](http://www.un.org.ch/80256EDD006B9C2E/(Httpnewsbyyear_En)/7444B2E19117CE8C12572AA004C5701?OpenDocument) [August 23, 2011].

³⁹ See generally, Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRACTICE, AND COURAGE 98 (Michael Dudley et al. eds. 2012); PERLIN, *supra* note 35, at 3–21; 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 NO. ILL. U. L. REV. 483 (2009).

⁴⁰ See e.g., Aaron Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181 (2005).

and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.⁴¹ “The Convention 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.”⁴² It provides a framework for insuring that mental health laws “fully recognize the rights of those with mental illness.”⁴³ There is no question that it has “ushered in a new era of disability rights policy.”⁴⁴

It describes disability as a condition arising from “interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations,⁴⁵ and extends existing human rights to take into account the specific rights experiences of persons with disabilities.⁴⁶ It calls for “respect for inherent dignity”⁴⁷ and “non-discrimination.”⁴⁸ Subsequent Articles declare “freedom from torture or cruel, inhuman or degrading treatment or punishment,”⁴⁹ “freedom from exploitation, violence and abuse,”⁵⁰ and a right to protection of the “integrity of the person.”⁵¹

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 with disabilities, but also sets out explicitly the many steps that States must take to create an enabling environment so that persons with disabilities can enjoy authentic equality in society.⁵² One of the most critical issues in seeking to bring life to international human rights law in a mental disability law context is the right to adequate and dedicated counsel. 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”⁵³ 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.⁵⁴

The extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities.⁵⁵ If and only if, there is a mechanism for the appointment of dedicated counsel,⁵⁶ can this dream become a reality.⁵⁷

The ratification of the CRPD marks the most important development ever seen in institutional human rights law for persons with mental disabilities. The CRPD is detailed, comprehensive, integrated and the result of a careful drafting process. 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 of all persons with disabilities, and to promote respect for their inherent dignity.⁵⁸ Whether this will actually *happen* is still far from a settled matter.

4. The relationship between TJ and international law

There have been significant TJ developments in many *other* aspects of international law. Michael King catalogs these,⁵⁹ making reference to, *inter alia*:

- Allan and Allan's study of the therapeutic aspects of South Africa's Truth and Reconciliation Commission,⁶⁰
- Cooper's consideration of the implications of therapeutic jurisprudence for the human right of self-determination in international law,⁶¹
- King and Guthrie's suggestion that the Northern Territory Emergency Response legislation in Australia is anti-therapeutic, hindering the legislation's objective of the well-being of the relevant Northern Territory communities,⁶²
- Olowu's evaluation of TJ as a means of humanizing criminal justice in Africa,⁶³
- Nicholson's examination of the anti-therapeutic effects of child labor laws in South Africa,⁶⁴ and
- Munir's study of therapeutic jurisprudence in relation to juvenile justice in Pakistan.⁶⁵

But there has been little examination of the TJ/IHR overlap, especially as it relates to issues involving persons with mental disabilities.

⁴¹ Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95 (2008). 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 (2011).

⁴² Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L. J. 249, 256 (2009); See also, Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections*. Accessible at <http://ssrn.com/abstract=1563883> (2010).

⁴³ Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW IN CONTEXT 1, 8 (2008).

⁴⁴ Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271, 1295 (2011).

⁴⁵ UN CONVENTION, Art. 1 and Preamble, Para. E.

⁴⁶ Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 514-15 (2008); see PERLIN, *supra* note 35, at 143-58.

⁴⁷ UN CONVENTION, *supra* note 45, Article 3(A).

⁴⁸ *Id.*, Article 3(B).

⁴⁹ *Id.*, Article 15.

⁵⁰ *Id.*, Article 16.

⁵¹ *Id.*, Article 17.

⁵² ON the changes that ratifying states need to make in their domestic involuntary civil commitment laws to comply with Convention mandates, see 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'L PROBS. 393 (2011). See also, István Hoffman & György Könczei, *Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code*, 33 LOY. LA. INT'L & COMP. L. REV. 143 (2010) (on the application of the CRPD to capacity issues); Kathryn D. DeMarco, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on The Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523 (2012) (on the application of the CRPD to solitary confinement in correctional institutions); Perlin, *Guardians*, *supra* note 9 (on the application of the CRPD to guardianship law); Perlin, *Yonder*, *supra* note 9 (on the application of the CRPD to juvenile punishment schemes); Perlin, *Gates of Eden*, *supra* note 19 (on the application of the CRPD to mental health court systems).

⁵³ See Michael L. Perlin, “I Might Need a Good Lawyer, Could Be Your Funeral, My Trial”: *A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education*, 28 WASH. U. J. L. & SOC'L POLY 241 (2008), quoting UN CONVENTION, *supra* note 45, Article 12. “State Parties” refers to those nations that have ratified the CRPD.

⁵⁴ UN CONVENTION, *supra* note 45, Article 13.

⁵⁵ Perlin, *supra* note 53, at 253.

⁵⁶ ON the significance of “cause lawyers” in the development of mental disability law in the United States, see Michael A. Stein, Michael E. Waterstone & David B. Wilkins, *Book Review: Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010).

⁵⁷ 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, 32 (2012) (“without such [dedicated] counsel, it is likely that the CRPD will be no more than a ‘paper victory’ for persons with disabilities in Asian nations”).

⁵⁸ UN CONVENTION, *supra* note 45, Article 1.

⁵⁹ Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1112 (2008).

⁶⁰ Alfred Allan and Marietje M. Allan, *The South African Truth and Reconciliation Commission as a Therapeutic Tool*, 18 BEHAV. SCI. & L. 459 (2000).

⁶¹ James M. Cooper, *State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law*, 17 BEHAV. SCI. & L. 607 (1999).

⁶² Michael S. King & Rob Guthrie, *Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response*, 89 PRECEDENT 39 (2008).

⁶³ Dejo Olowu, *Therapeutic Jurisprudence: Transforming Legal Education and Humanising Criminal Justice in Africa*, 1 DEJURE 95 (2010).

⁶⁴ Caroline M. A. Nicholson, *The Impact of Child Labor Legislation on Child-Headed Households in South Africa*, 30 T. JEFFERSON L. REV. 407 (2008).

⁶⁵ Muhammad Ahmad Munir, *Therapeutic Jurisprudence in Pakistan: Juvenile Delinquency and the Role of the Defense Lawyer*, in *TRANSFORMING LEGAL PROCESSES IN COURT AND BEYOND* 85 (Greg Reinhardt & Andrew Cannon, eds. 2007).

5. The relationship between TJ and international human rights law

There has been some important work done on the relationship of TJ to the application of international human rights principles to prisoners and detainees with a mental illness, much of it a response to the reality that the conditions of prison facilities and forensic facilities around the world are textbook examples of anti-therapeutic conditions.⁶⁶ Astrid Birgden argues forcefully that “applying therapeutic jurisprudence can assist forensic psychologists in actively addressing human rights in general, as well as prisoners and detainees with mental disabilities in particular.”⁶⁷ By way of example, in relation to prisons, Ivan Zinger has argued that the best approach to ensure that the rule of law is upheld is to view corrections as being in the human rights business:

The best argument for observing human rights standards is not merely that they are required by international or domestic law but that they actually work better than any known alternative – for offenders, for correctional staff, and for society at large. Compliance with human rights obligations increases, though it does not guarantee, the odds of releasing a more responsible citizen. In essence, a prison environment respectful of human rights is conducive to positive change, whereas an environment of abuse, disrespect, and discrimination has the opposite effect: Treating prisoners with humanity actually enhances public safety. Moreover, through respecting the human rights of prisoners, society conveys a strong message that everyone, regardless of their circumstance, race, social status, gender, religion, and so on, is to be treated with inherent respect and dignity.⁶⁸

Conditions in forensic facilities across the world shock the conscience, and, in some instances, are so bereft of humanity that they challenge the notion that we are a civilized society.⁶⁹ Society's lack of interest in these conscience-shocking conditions screams out for an in-depth TJ analysis, to demonstrate their destructiveness and their negative impact on the mental health of those unlucky enough to be housed in such facilities.

There have been a handful of considerations of the TJ/IHR overlap in the context of involuntary civil commitment. In an analysis of a British policy allowing for informal detention in a civil commitment context, Prof. Kristy Keywood concludes that both a human rights-based analysis and a TJ-perspective highlight the process “by which vulnerable people are rendered yet more vulnerable” through this mechanism.⁷⁰ But there is still so much more left to be done.

⁶⁶ See e.g., Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503 (2010); Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y. L. SCH. J. HUM. RTS. 777 (1993).

⁶⁷ Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REV. JUR. U.P.R. 43, 59 (2009); see also, Birgden & Perlin, *Home in the Valley*, supra note 34; Birgden & Perlin, *Tolling for the Luckless*, supra note 34; Michael L. Perlin, “With Faces Hidden While the Walls Were Tightening”: *Applying International Human Rights Standards to Forensic Psychology*, 7 U.S.–CHINA LAW REVIEW 1 (2010).

⁶⁸ Ivan Zinger, *Human Rights Compliance and the Role of External Prison Oversight*, 48 CAN. J. OF CRIMINOLOGY & CRIM. JUST. 127, 127 (2006). Similarly, Ida Dickie notes how a TJ emphasis on procedural fairness and respect for autonomy can help all stakeholders in the criminal justice system. Ellen Waldman, *Therapeutic Jurisprudence: Growing Up and Looking Forward*, 30 T. JEFFERSON L. REV. 345, 347 (2008), discussing Ida Dickie, *Ethical Dilemmas, Forensic Psychology, and Therapeutic Jurisprudence*, 30 T. JEFFERSON L. REV. 455 (2008).

⁶⁹ See e.g., Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L & COM. 333, 343, 349 (2007); Perlin, *Dignity*, supra note 37; Michael L. Perlin & Meredith R. Schriver, “You That Hide Behind Walls”: *The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients*, in TORTURE AND ILL-TREATMENT IN HEALTH-CARE SETTINGS: A COMPILATION 195 (Center for Human Rights and Humanitarian Law, American University Washington College of Law ed. 2013).

⁷⁰ Kristy Keywood, *Detaining Mentally Disordered Patients Lacking Capacity: The Arbitrariness Of Informal Detention and the Common Law Doctrine of Necessity*, 13 MED. L. REV. 108, 115 (2005), discussing decision in *R. v. Bournewood Community and Mental Health N.H.S. Trust ex parte L* (Secretary of State for Health and others intervening) A.C. 458, H.L. (1999).

Remarkably little has been written about connection between these two important topics.⁷¹ Again, fittingly, and not surprisingly, the most important piece was by Bruce Winick,⁷² and it grew from another conference at New York Law School in 2002 on the relationship between these two approaches to the law.⁷³ In that piece, Winick looked at the then-recent developments in Hungary and Bulgaria, describing the progress of mental health law from the medical model (with lack of treatment and human rights abuses in institutions) to a legal rights-based model (with improved but vague civil commitment and due process standards) to a therapeutic jurisprudence model (to balance legal and therapeutic needs of civilly committed patients).⁷⁴ He identified the convergence between therapeutic jurisprudence and human rights values in civil commitment procedures such as liberty, due process, the right to treatment and to refuse treatment, and the exercise of decision-making.⁷⁵ In this analysis, he concluded that:

The remedy for the abuses in the mental health system of Hungary and other Eastern European nations is a healthy dose of international human rights law and therapeutic jurisprudence. As that region moves from a medical, to a legal, to a therapeutic jurisprudence model of civil commitment, we can expect to see reforms in mental health law and practice that will both protect individual liberty and promote improved mental health and psychological well-being.⁷⁶

This leaves us with an important question: how can we expand the TJ/IHR overlap?

6. Expanding the TJ/IHR overlap

As should be clear, it is essential that scholars begin to take seriously the relationship between TJ and IHR in this context. To some extent, it is puzzling that there has been so little work done in this area. Perhaps it is because so much of the international human rights scholarship is written at the level of high philosophy.⁷⁷ This leaves, on the surface at least, little room for the theoretical/practical perspectives that TJ encourages/demands. Perhaps it is because TJ's roots are in mental disability law, and, traditional human rights advocates were never particularly interested in mental disability law issues (the rankest form of sanism, to be sure).⁷⁸

Historically, mainstream human rights protection systems and advocacy organizations rarely acknowledged mental disability rights as part of their mandates, and often simply ignored the existence of such rights.⁷⁹ The human rights issues encountered by persons with mental disabilities may have been perceived as too complex or esoteric. This challenge was sometimes articulated in rather

⁷¹ Tony Ward & Astrid Birgden, *Human Rights and Clinical Correctional Practice*, 12 AGGRESSION & VIOLENT BEHAV. 628 (2007); Nicola Ferencz & James McGuire, *Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective*, 37 COURT REV. 48, 51 (Spring 2000); Birgden & Perlin, *Home in the Valley*, supra note 34; Birgden & Perlin, *Tolling for the Luckless*, supra note 34.

⁷² Bruce J. Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y. L. SCH. J. INT'L & COM. L. 537 (2002).

⁷³ Symposium, *International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary*, 21 N.Y. L. SCH. J. INT'L & COM. L. 361 (2002).

⁷⁴ Winick, supra note 72, at 540.

⁷⁵ *Id.* at 544.

⁷⁶ *Id.* at 572.

⁷⁷ See e.g., Amanda Perreau-Saussine, *Immanuel Kant on International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW I (Samantha Besson & John Tasioulas eds., 2010); Joseph Raz, *Human Rights Without Foundations*, in *id.*, at 321; James W. Nickel & David A. Reidy, *Philosophy*, in INTERNATIONAL HUMAN RIGHTS LAW 39, 45 (Daniel Moeckli et al. eds., 2010); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, in THE PHILOSOPHY OF HUMAN RIGHTS 379 (Patrick Hayden ed., 2001).

⁷⁸ “Traditionally, disability has not been regarded as a human rights issue.” Anna Lawson, *Disability, Degradation, and Dignity: The Role of Article 3 of the European Convention on Human Rights*, 56 NO. IRELAND LEGAL Q. 462, 462 (2005), discussed, inter alia, in Perlin, *Dignity*, supra note 37; Perlin, supra note 35, at 3.

⁷⁹ Perlin & Szeli, supra note 39, at 82.

unfortunate ways, such as “We work in human rights, not mental disability rights.” While the oblique suggestion that people with mental disabilities were not “human” was generally unintended, it may well have reflected deep-seated beliefs that they were somehow less human than the broader population whose human rights merited unquestioned protection.⁸⁰

There may be other reasons as well. Participants on the TJ LISTSERV offered these fascinating and provocative responses:

- “People with mental disabilities ... are treated not as rights holders but as objects needing society’s mercy”,⁸¹
- “[There is] an uncritical acceptance by many lawyers of a version of human rights that privileges civil and political rights over social economic and cultural rights”,⁸²
- “The early embracers [of TJ] were practitioners; ... few practitioners invoke international law ... Practitioners did not see utility in the combination”,⁸³
- “[Reasons include] the inherent complexity of mental health problems and solutions, the existing levels of pro-social vs. antisocial responses already habituated in any given culture, our human tendency towards punishment over altruism when fearful and uncertain, [and] the invisible nature of the condition or disease.”⁸⁴

All of these ideas have real merit, and each is worth a follow-up article of its own. But the fact remains that this intersection is still sadly under-considered. Consider three discrete, but overlapping, issues, in this context: access to counsel, the use of state-sanctioned psychiatry as a tool of political oppression, and the potential redemptive power of the CRPD. Together a focus on these three topics will best illuminate why we need to pay more attention to the intersection of these topics.

6.1. Counsel⁸⁵

Consider first the issues related to adequacy of counsel.⁸⁶ As stated flatly by Judge Juan Ramirez and Professor Amy Ronner, “the right to counsel is ... the core of therapeutic jurisprudence.”⁸⁷ If counsel in international human rights cases fails to meet the standards articulated in the CRPD — as well as constitutional minima — it strains credulity to argue that such a practice might comport with TJ principles. TJ is the perfect mechanism “to expose [the law’s] pretextuality”,⁸⁸ this pretextuality is clear in the international human rights context.

Consider now why adequate and dedicated counsel is critical to the favorable resolution of all of these “talking points” of TJ:

- In many nations there is no mental health law at all.⁸⁹ If there is no law at all, the mental health system cannot comport with TJ principles. This should be self-evident, but requires some mention. The *absence* of law must inevitably cause social and cognitive dissonance, and thus detrimental to mental health and anti-therapeutic.⁹⁰

- Beyond this, there can be no question that the institutional conditions in psychiatric institutions worldwide are utterly anti-therapeutic.⁹¹ Conditions in hospitals that colleagues of mine and I have observed (in Nicaragua, Bulgaria, Kyrgyzstan, Serbia and other nations)⁹² glumly and tragically reflect conditions similar to those in *Wyatt v. Stickney*⁹³ and in other “first generation” right to treatment/institutional conditions cases in the United States dating back to the 1970s.⁹⁴ Conditions that advocates observed in Eastern Europe in the early years of this century “... eerily reflected the conditions at Willowbrook State School in New York City when they were exposed to a stunned nation some thirty years ago.”⁹⁵ Not unimportantly, the court’s final order in that case was “overtly premised on therapeutic ends.”⁹⁶
- Also, if there is no objectively fair means of assessing the need for a person to be hospitalized and/or no procedural or substantive standards for determining the need for hospitalization, such a system is anti-therapeutic per se.⁹⁷ By way of example, the literature demonstrates that patients’ negative perceptions of the civil commitment process “can potentially hinder their progress under traditional mental-health therapies and treatment”⁹⁸ In his book-length treatment of the relationship between civil commitment and therapeutic jurisprudence, Prof. Bruce Winick characterized the traditional commitment process as a “phony ritual [, producing] distrust on the part of the patient that undermines the presumed benefits of hospitalization.”⁹⁹ Interestingly, in the same book, Winick argues, based on a TJ model, for the incorporation of international human rights principles into the commitment process, concluding that, in the Eastern European context, such a model “can do much to convert the mental health system ... into a more humane and therapeutic one that can provide help to those suffering from mental illness without in the process harming them.”¹⁰⁰
- Also, the evidence demonstrates how badly the current state of community treatment fails when assessed by the standards of therapeutic jurisprudence.¹⁰¹ It should be evident that a failure to provide community services — especially to individuals that the institution concedes need not be in the hospital and are not benefitting from

⁹¹ See e.g., WHO Policy Brief, *Developing Effective Mental Health Laws in Africa* (2008), available at http://www.who.int/mental_health/policy/development/MHPB7.pdf, at 2:

The laws [of Ghana, Uganda and Zambia] fail to promote the dignity, respect, autonomy and nondiscrimination of people with mental disabilities or to incorporate safeguards against abuses related to involuntary admission and treatment. Critical issues related to free and informed consent are overlooked and essential safeguards to prevent abuse of seclusion and restraints special treatments or clinical and experimental research are lacking.

⁹² See generally, PERLIN, *supra* note 35, at 84–87.

⁹³ 344 F. Supp. 373 (M.D. Ala.) 344 F. Supp. 387 (M.D. Ala. 1972) aff’d sub nom. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); see generally, Perlin, *supra* note 41 (discussing the international human rights implications of *Wyatt*).

⁹⁴ See Michael L. Perlin, et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?* 1 PSYCHOL. PUB. POLY & L. 80, 99 (1995), discussing *New York State Ass’n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y., 1973) (*Willowbrook* case).

⁹⁵ Perlin, *supra* note 69, at 347, quoting, Michael L. Perlin, *Chimes of Freedom: International Human Rights and Institutional Mental Disability Law*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 423, 424–25 (2002).

⁹⁶ Perlin et al., *supra* note 94, at 100.

⁹⁷ See generally WINICK, *supra* note 30; Bruce Winick *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEG. ISS. 37 (1999).

⁹⁸ Joseph Frueh, *The Anders Brief in Appeals from Civil Commitment*, 118 YALE L.J. 272, 308–09 (2008), citing to, inter alia, TOM TYLER & YUEN J. HUO, *TRUST IN THE LAW* (2002).

⁹⁹ WINICK, *supra* note 30, at 6, citing PERLIN, *supra* note 12 at 92–93.

¹⁰⁰ WINICK, *supra* note 30, at 324.

¹⁰¹ Although she does not explicitly refer to therapeutic jurisprudence in her article, Prof. Anna Lawson’s analysis of how adhering to the principle of reasonable accommodation “has the potential to play a powerful role in ensuring that people with psychosocial impairments and conditions are genuinely included in mainstream society and permitted to participate fully in the life of their communities” fits squarely within the best goals and aspirations of TJ scholarship. Anna Lawson, *People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities*, 26 LAW IN CONTEXT 62, 80 (2008).

⁸⁰ See Perlin, *Dignity*, *supra* note 37, at 192.

⁸¹ Email from Prof. Tali Gal, School of Criminology, University of Haifa (April 3, 2013), on file with author.

⁸² Email from Prof. Penelope Weller, Graduate School of Business and Law, RMIT University, Melbourne (April 3, 2013), on file with author.

⁸³ Email from Prof. Kate Diesfeld, School of Public Health and Psychosocial Studies, Faculty of Health and Environmental Sciences, Auckland University of Technology, Auckland, NZ (April 4, 2013), on file with author.

⁸⁴ Email from Robert Ward., Esq., Assistant Public Defender, Charlotte, NC (April 3, 2013), on file with author.

⁸⁵ PERLIN, *supra* note 35, at 159–68.

⁸⁶ MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 123–38 (2013).

⁸⁷ Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. WESTERN L. REV. 103, 119 (2004).

⁸⁸ Perlin, *supra* note 18, at 544.

⁸⁹ PERLIN, *supra* note 35, at 84–87.

⁹⁰ Email from Prof. Bruce Winick, Professor of Law, University of Miami Law School (June 30, 2010) (on file with author).

hospitalization – is anti-therapeutic per se. Explicitly, the concept of TJ demands “greater access to community services.”¹⁰² Consider in this context the significance of the US Supreme Court’s decision in *Olmstead v. L.C.*¹⁰³:

We have known – for decades – that community treatment “works” better, that there is less improper use of antipsychotic medication in community settings, that community patients are less stigmatized, and stand a better chance of authentic reintegration into all aspects of social, economic and personal life.¹⁰⁴

The presence of vigorous and independent counsel also best assures procedural justice. Prof. Christopher Slobogin phrases the key issue this way:

The procedural justice literature has clearly established that a procedure that gives participants a full opportunity to present their version of the facts enhances perceptions of fairness, satisfaction with outcomes, and respect for the process. Conversely, a procedure that does not do so is more likely to create antipathy toward the system among those it has frustrated.¹⁰⁵

No remedy will succeed unless there is a major infusion of therapeutic jurisprudence.

6.2. State sanctioned psychiatry as tool of abuse

The use of state-sanctioned psychiatry to suppress political dissent is well-documented.¹⁰⁶ Such abuse violates dignity and suppresses the voice of those institutionalized.¹⁰⁷ It also delegitimizes the process involved, making that process anti-therapeutic not solely for those institutionalized because of political actions but also for all others whose commitments are based on the same laws.¹⁰⁸ There are multiple reasons why nations such as Russia and China have regularly circumvented procedural safeguards: “to allow for indefinite confinement, and to stigmatize and thus discredit potential political threats.”¹⁰⁹ These nations treat patients in public psychiatric hospitals in ways that utterly fail to meet minimal standards of human decency, and freely perpetuate these actions “because the persons who are institutionalized are stigmatized as a result of their mental illness and are thus discredited as human beings.”¹¹⁰

6.3. The CRPD

The Convention on the Rights of Persons with Disabilities is a document that resonates with TJ values, and “look[s] at law as it actually impacts people’s lives.”¹¹¹ The lynchpin for effective and meaningful CRPD enforcement is the presence of dedicated, advocacy-focused counsel available to represent persons with CRPD complaints or

grievances.¹¹² “The failure to assign adequate counsel bespeaks sanism and pretextuality and a failure to consider the implications of therapeutic jurisprudence.”¹¹³

Again, consider the connection between the CRPD and TJ values.¹¹⁴ There is no question that the CRPD reflects the three principles articulated by Prof. Ronner – voice, validation and voluntariness. Each section of 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.¹¹⁵ I believe that the time is right for scholars to engage in a close and careful reading of the TJ literature, and then apply their findings to questions related to the implementation of this Convention.¹¹⁶

Of course, the CRPD does not exist in a vacuum. In reinforcing their position that therapeutic goals not trump other “important goals,” Winick and Wexler have emphasized that “the due process right to effective counsel is one such goal.”¹¹⁷ Consider the analogous dilemma of the quality of counsel in death penalty cases. Any system offering inadequate counsel would lead to a failure to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, and such a system “fails miserably from a therapeutic jurisprudence perspective.”¹¹⁸ Certainly, nations that provide no counsel for persons facing civil commitment, institutionalized, or seeking release and/or aftercare treatment fail just as miserably. Again consider the conclusion of Judge Ramirez and Professor Ronner: “the right to counsel is also the core of therapeutic jurisprudence.”¹¹⁹ Without such counsel, the entire mental disability law process is nothing more than a “pretextual charade.”¹²⁰ Again, scholars need to carefully consider the TJ implications of this “charade” from an international human rights law perspective.

Finally, consider the plight of individuals with mental disabilities in Asia, currently unable to take their grievances to an inter-regional court or commission. I believe that it is essential that a disability rights tribunal be created for that area so as to give life to international human rights.¹²¹ Given the lack of counsel available, the promise of

¹¹² PERLIN, *supra* note 35, at 159–69.

¹¹³ Michael L. Perlin, “And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got”: The Role and Significance of Counsel in Right to Refuse Treatment Cases, 42 SAN DIEGO L. REV. 735, 750 (2005); see also, Michael L. Perlin & Deborah A. Dorfman, “Is It More Than Dodging Lions and Wastin’ Time”? Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases, 2 PSYCHOLOGY, PUB. POLY & L. 114 (1996).

¹¹⁴ See, *inter alia*, PERLIN, *supra* note 35, at 215; Perlin, *supra* note 41, at 132; Perlin, *supra* note 53, at 252–53; Perlin, *Gates of Eden*, *supra* note 19, and Perlin, *Guardians*, *supra* note 9.

¹¹⁵ See e.g., Perlmutter, *supra* note 12; King, *supra* note 59; Gregory Baker, *Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law – How Exposing Its Presence in the Environmental Justice Movement Can Legitimize the Paradigm And Make the Case For Its Inclusion into All Aspects of Legal Education and the Practice of Law*, 9 FLA. COASTAL L. REV. 215 (2008); Thomas D. Barton, *Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving, An Essay on Harnessing Emotion and Human Connection*, 5 PSYCHOL. PUB. POLY & L. 921 (1999).

¹¹⁶ For a consideration of how the promotion of mediation and alternative conflict resolution through the CRPD can promote therapeutic jurisprudence values, see Carole Petersen, *Inclusive Education and Conflict Resolution: Building a Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific*, 40 HONG KONG L.J. 481 (2010).

¹¹⁷ Bruce Winick & David Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 484 (2002). On how adherence to TJ goals can make counsel more effective in individual cases, see Perlmutter, *supra* note 12.

¹¹⁸ Michael L. Perlin, “The Executioner’s Face Is Always Well-Hidden”: The Role of Counsel and the Courts in Determining Who Dies, 41 N.Y.L. SCH. L. REV. 201, 235 (1996); see generally, PERLIN, *supra* note 86, at 123–38. See also, Karen O. Talley, *Independent Protection and Advocacy: The Role of Counsel in Institutional Settings*, 53 N.Y.L. SCH. L. REV. 55 (2008); Henry A. Dlugacz, *Outpatient Commitment: Some Thoughts on Promoting a Meaningful Dialogue*, 53 N.Y.L. SCH. L. REV. 79 (2008).

¹¹⁹ Ramirez & Ronner, *supra* note 87, at 119.

¹²⁰ Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369, 381 (1994).

¹²¹ See generally, Perlin, *supra* note 57. On why the “Asian values” argument – asserting that human rights are inapplicable to that part of the world – is a form of cultural relativism that “should not and cannot be used as a defense in ignoring human rights,” see *id.* at 16–19; PERLIN, *supra* note 35, at 172–81. See generally, Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291 (2000).

¹⁰² Marsha B. Freeman, *Florida Collaborative Family Law: The Good, the Bad, and the (Hopefully) Getting Better*, 11 FLA. COASTAL L. REV. 237, 255 (2010).

¹⁰³ 527 U.S. 581 (1999).

¹⁰⁴ Michael L. Perlin, “Their Promises of Paradise”: Will *Olmstead v. L.C.* Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?, 37 HOUS. L. REV. 999, 1051 (2000).

¹⁰⁵ Christopher Slobogin, *The Admissibility of Behavioral Science Information in Criminal Trials from Primitivism to Daubert to Voice*, 5 PSYCHOL. PUB. POLY & L. 100, 117 (1999).

¹⁰⁶ See e.g., Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISRAEL L. REV. 69 (2006); PERLIN, *supra* note 35, at 59–80; see generally, Robin Munro, *Judicial Psychiatry in China and its Political Abuses*, 14 COLUM. J. ASIAN L. 1 (2000).

¹⁰⁷ See RONNER, *supra* note 33; Ronner, *supra* note 33.

¹⁰⁸ See generally, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

On procedural justice in the context of mental disability law, see MICHAEL L. PERLIN, *A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW* 79–98 (2013).

¹⁰⁹ Perlin, *supra* note 106, at 96.

¹¹⁰ *Id.* at 96–97.

¹¹¹ Bruce Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

the CRPD may be little more than an empty shell for individuals from this region. Without such a Tribunal, persons with mental disabilities will continue to suffer severe violations of their human rights by the States as there is no other way to feasibly or realistically enforce these rights, nor is there any way for persons with mental disabilities to meaningfully address these violations. The continued suffering of these severe violations is a complete repudiation of the spirit and the substance of therapeutic jurisprudence.

In short, in each of these key areas, the need to examine, understand and expand the relationship between international human rights and therapeutic jurisprudence is essential. It is impossible for us to achieve meaningful ameliorative change in our mental disability law system unless we begin to take this connection seriously and to re-envision the way we regulate the practice of mental disability law (especially, though not exclusively, *institutional* mental disability law) using these tools of legal change. Scholars, activists, advocates and practitioners must begin to take this connection seriously in their future work if we wish to avoid the specter, in the words of an expert witness – himself a Holocaust survivor – in the famous US case of *Pennhurst State School & Hospital v. Halderman*,¹²² of facilities that are akin to “Dachau, without ovens.”¹²³

Consider this brief “research agenda” that scholars might turn to in furtherance of the investigation of the relationships between therapeutic jurisprudence, international human rights law and mental disability law, some of which relate to topics already mentioned, and some of which are new. A focus on each of these ten items would make a major contribution to this investigation:

1. The TJ implications of the impact of the “Asian values” argument¹²⁴ on development of international human rights in Asian nations.
2. The TJ implications of the differences in legal education in civil/common law nations as it relates to development of international human rights lawyers.
3. The TJ implications of promoting adherence to articles of the CRPD.
4. The TJ implications of instituting reform of forensic facilities.
5. The TJ implications of methods of providing counsel to individuals facing civil commitment, or seeking release from hospitals.
6. The TJ implications of extent to which alternative community facilities are provided for persons currently in psychiatric institutions.
7. The TJ implications of perpetuation of the death penalty in the face of international human rights standards calling for its abolition.

8. The TJ implications of the expansion of problem-solving courts (mental health courts in specific).
9. The TJ implications of guardianship practices around the world.
10. The TJ implications of policies that sanction jailing and imprisoning juveniles in adult facilities.

Adoption of this research agenda would make a huge difference in the lives of those who are institutionalized around the world.

7. Conclusion

The first law review article applying international human rights principles to persons with mental illness appeared in 1993, some three years after David Wexler and Bruce Winick began to write about TJ. Winick’s link-up of the two was published in 2002.¹²⁵ These are all very recent developments in the life of the law. In the past 30 years, there has been a robust literature in TJ and a robust literature in international human rights law. But, again, there has still not been an abundance of literature or analysis that spans these boundaries. In recent book chapters and a series of law review articles, I have sought to begin to make this connection.¹²⁶ I seek to expand that connection here.

I hope that this article will inspire others to take this path and to bring together these two emancipatory “pieces” of law and policy. It will enrich us all, as should be the aim of any scholarship. More importantly, such new and innovative scholarship has the potential capacity to change the world.

When Bob Dylan wrote *Hattie Carroll*, he changed the world.¹²⁷ Two years ago, in an article that was part of a symposium on “Bob Dylan and the Law,” I wrote this:

Even if Dylan had only written *Hurricane*¹²⁸ and *The Lonesome Death of Hattie Carroll*, he would have had more of an impact on the way that the American public thinks about the criminal justice system than all the professors of criminal law and procedure (including myself) put together.¹²⁹

I believe this is still so today. My hope is that an infusion of therapeutic jurisprudence and international human rights law into mental disability law will, finally, begin to fix the law’s ladder.

¹²² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (holding that the Developmental Disabilities Bill of Rights Act (42 U.S.C. § 6010) was merely a federal/state grant program and that neither the right to treatment nor the least restrictive alternative sections of the bill of rights was enforceable in private action); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns).

¹²³ LEOPOLD LIPPMAN & L. IGNANCY GOLDBERG, THE RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN 17 (1973), quoted in Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 100 n. 215 (1991).

¹²⁴ See *supra* note 121.

¹²⁵ See Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the “Principles for the Protection of Persons with Mental Illness”*, 16 INT’L J. L. & PSYCHIATRY 257 (1993).

¹²⁶ See e.g., Perlin, *Dignity*, *supra* note 37; Perlin, *Yonder*, *supra* note 9; Perlin, *Guardians*, *supra* note 9; Perlin, *Gates of Eden*, *supra* note 19; PERLIN, *supra* note 35.

¹²⁷ A year after *Hattie Carroll* was written, the great, late folk singer, Phil Ochs said that, with that song, Dylan “leaves the listener stunned with a sense of injustice.” Phil Ochs, *The Art of Bob Dylan’s “Hattie Carroll,”* # 48 BROADSIDE (July 20, 1964), at 2.

¹²⁸ *Hurricane* was a song about Rubin “Hurricane” Carter, a professional boxer accused of a triple murder committed in a Paterson, New Jersey bar. Carter was convicted but was later granted a writ of habeas corpus, the court finding that his conviction was “predicated upon an appeal to racism rather than reason, and concealment rather than disclosure.” Carter v. Rafferty, 621 F. Supp. 533, 534 (D.N.J. 1985). See Michael L. Perlin, *Tangled Up In Law: The Jurisprudence of Bob Dylan*, 38 FORD. URB. L.J. 1395, 1405-07 (2011) (footnotes omitted):

Hurricane is a textbook example of how racism can affect every aspect of the criminal justice system]: racial disparity in [traffic] stops; accuracy of identifications;] one-man “show-up” identifications; suggestive questioning by the police appealing to racial prejudice; conditions of pre-trial confinement; judicial bias; racial bias in jury selection; tainted publicity; and conditions of prison confinement.

¹²⁹ Perlin, *supra* note 128, at 1404.