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

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Introduction

Over the past three decades, the US judiciary -- especially the Supreme Court – has grown increasingly less receptive to claims by convicted felons as to the conditions of their confinement while in prison. Courts have not articulated a return to the "hands off" policy of the 1950s; yet, it is clear that it has become significantly more difficult for prisoners to prevail in constitutional correctional litigation. Although it did not lead to across-the-board dismissal of all existing consent decrees governing prison conditions, nor has it entirely inhibited the initiation of new institutional reform litigation, the passage and aggressive implementation of the Prison Litigation Reform Act has been a powerful disincentive to such litigation in many areas of prisoners' rights law.[1]

From the perspective of the prisoner, the legal landscape is more hopeful in matters that relate to mental health care and treatment. Here, in spite of a general trend toward more stringent applications of standards of proof and a reluctance to order sweeping, intrusive remedies, some courts have aggressively protected prisoners' rights to be free from "deliberate indifference" to serious medical needs ,[2] and to be free from excessive force on the part of prison officials.[3]

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[1] *Compare e.g.*, Judith Resnik,, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations,*, 86 GEO. L.J. 2589, 2630 (1998) (discussing disincentives to litigation and settlement embedded in the PLRA), to Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Cases*, 81 N.Y.U. L. REV. 550, 626 (2006) ("injunctions [on behalf of plaintiff-prisoners seeking institutional reform]remain a vital part of the system by which we govern our correctional administration").

[2] Estelle v. Gamble, 429 U.S. 97, 104 (1976). Although *Gamble* dealt with health care issues in general, subsequent cases – although not United States Supreme Court cases – focused specifically on questions of mental

A mostly-hidden undercurrent in some prisoners' rights litigation has been the effort on the part of some plaintiffs' lawyers to look to international human rights doctrines as a potential source of rights, an effort that has met with some modest success. This effort has also been given some collateral support by the US Supreme Court in a trilogy of criminal procedure and criminal law cases[4] that has, over vigorous and passionate dissent,[5] endorsed an expansive reading of international law principles in a domestic constitutional law context. It gets support also by the inclination of other courts to turn to international human rights conventions -- even in nations where such conventions have not been ratified – as a kind of "best practices" in the area.[6]

The recent publication and subsequent ratification (though not, as of yet, by the United States) of the UN Convention on the Rights of Persons with Disabilities (CRPD)[7] may add new support to those using international human rights documents as a basis for litigating prisoners'

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health care. See e.g., Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) (discussed *infra* text accompanying notes 45-46); Coleman v. Wilson, 912 F.Supp. 1282 (E.D.Cal. 1995), *appeal dismissed*, 101 F.3d 705 (9th Cir. 1996) (discussed *infra* text accompanying notes 80-81).

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

[4] See Lawrence v. Texas, 539 U.S. 558, (2003) (consensual sodomy); Roper v. Simmons, 543 U.S. 551 (2005) (execution of juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (execution of persons with mental retardation).

[5] See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1931-32 n.1 (2008) (discussing dissents).

[6] *See Roper*, 543 U.S. at 578, discussed *infra* text accompanying nn.114-15.

[7] See http://un.org/disabilities/default.asp?id=259 (CRPD).

rights claims.[8] That Convention calls for "respect for inherent dignity"[9] and "non-discrimination".[10] Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment", [11] ("freedom from exploitation, violence and abuse",[12] a right to protection of the "integrity of the person",[13] "equal recognition before the law,"[14] and, finally, equal "access to justice."[15]

To the best of our knowledge, there has, as of yet, been no scholarly literature on the question of the implications of the CRPD on the state of prisoners' rights law in a US domestic context.[16] In this article, we raise that question, and offer some tentative conclusions.

First, we will offer a short history of developments in this area of the law, and will next briefly consider legal developments as they affect the specific issue of the provision of mental health services in a correctional context. Next, we will briefly outline some of the relevant

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[8] See Astrid Birgden & Michael L. Perlin, *"Tolling for the Luckless, the Abandoned and Forsaked": Community Safety, Therapeutic Jurisprudence and International Human Rights Law As Applied to Prisoners and Detainees*, 13 LEG. & CRIMINOL. PSYCHOLOGY 231 (2008).

[9] CRPD, *supra* note 7, at Article 3(a)

[10] Id. at Article 3(b).

[11] Id. at Article 15,

[12] Id. at Article 16.

[13] Id. at Article 17.

[14] Id. at Article 12,

[15] Id. at Article 13.

[16] On a related question, *see* 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,* -- J. AGGRESSION &VIOL. BEHAV. – (2009) (in press).

international human rights law principles as they have been applied in this context, and then discuss the significance of the new Convention. After that, we will consider the impact that the Convention may have on future developments in this area of the law, and will offer some modest conclusions.

The title of this paper is taken, in part, from Bob Dylan's brilliant song, *Shelter from the Storm,* from the album, **Blood on the Tracks**.[17] In a full-length book about that album, the critics Andy Gill and Kevin Odegard characterize the song as depicting a "mythic image of torment."[18] Individuals in correctional institutions with mental illnesses are often similarly deeply tormented. We hope that the ideas we offer here may, some day, go to alleviate that level of torment.

I. A brief history of correctional law

In this section, we will trace correctional law developments from the "slave of the state" status to the "hands off" doctrine to contemporary constitutional law doctrine.[19]

A. Slave of state

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[17] http://www.bobdylan.com/#/songs/shelter-storm (last accessed, March 26, 2009).

[18] ANDY GILL & KEVIN ODEGARD, A SIMPLE TWIST OF FATE: BOB DYLAN AND THE MAKING OF BLOOD ON THE TRACKS 163 (2004).

[19] *See* MICHAEL L. PERLIN & HENRY A. DLUGACZ, MENTAL HEALTH ISSUES IN JAILS AND PRISONS: CASES AND MATERIALS 13-19 (2007).

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

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

B. Hands Off

Although legal doctrines supporting this laissez-faire approach developed more banal rationales such as separation of powers, federalism, prison security and the ability of courts to comprehend the inner workings of complex institutions[22], the lack of judicial attention to

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[20] 62 Va. (21 Gratt.) 790, 1871 WL 4928 (1871).

[21] *Id.,* 1871 WL at *4.

[22] *See, e.g.,* Michael Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27, 32 (2009).

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

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

C. Rejection of Hands Off Doctrine

1. Early cases

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

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[23] *Banning v. Looney,* 213 F.2d 771 (10th Cir. 1954), *cert. denied,* 348 U.S. 859 (1954).

[24] *Id*. at 771.

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

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

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[25]Newman v Alabama 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part,* 503 F.2d 1320,1323 (5th Cir. 1974); see also, Williams v Vincent, 508 F.2d 541 (2nd cir. 1974).

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

2.. Historical Factors

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

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

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[26] 418 U.S. 539 (1974)

[27] *Id.* At 555-56.

5. The general tenor of the times and the civil rights movement in particular increased the sense on the part of of some inmates that they could effectively and properly be agents of social change. [28]

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

> The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common- law view that "(i)t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." [30]
>
> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain." [31]

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

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[28] See PERLIN & DLUGACZ , *supra* note 19, at 15.

[29] *Gamble,* 429 U.S. at 104 .

[30] *Id*. at 103

[31] *Id*. at 104

[32] See e.g., FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW, §2.2-2.4 2008.

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

II. Legal issues related to the provision of mental health services to persons in correctional institutions

A. Persons in correctional institutions with mental disabilities: some statistics

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

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[33] *Gamble,* 429 U.S. at 104 n. 8 (citing to The Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules for the Treatment of Prisoners, Rules 22-26 (1955)).

[34] *See, e.g*. the work of the Consensus Project of the Council of State Governments,, http://consensusproject.org/, and recent legislation introduced by Senator Jim Webb of Virginia to form a blue ribbon commission on corrections reform, discussed at http://webb.senate.gov/email/criminaljusticereform.html. . For a statistical overview, see Jennifer Boothby, *Contemporary United States Corrections, Mental Health, and Social Policy*, in CORRECTIONS, MENTAL HEALTH, AND SOCIAL POLICY: INTERNATIONAL PERSPECTIVES 41 (Robert Ax & Thomas Fagan eds. 2007).

[35] Pew Center on the States, *One in 31: The Long Reach of American Corrections.* (2009), *available* at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=49398

problem.[36] Jeffrey Metzner reports that both the literature and clinician experience consistently find that 8 to 19 percent of prison inmates have psychiatric disorders that result in significant functional disabilities and another 15 to 20 percent require some psychiatric intervention at some point during incarceration[37]

Millions of people are released each year from our nation's jails and prisons, many of whom require linkages to an already inadequate and overtaxed public mental health system. Jamie Fellner estimates that more than half of jail and prison inmates have mental health problems.[38] Gail Wasserman and her colleagues estimate that, among incarcerated juveniles, the rate rises to as high as 65%.[39] The rate of mental illness among prison inmates is three times higher than that of the general population.[40] We know also that prisoners with mental illness – as a result of their mental illness – are statistically more likely to violate certain prison rules, making it resultantly more likely that they face segregation and thus exacerbation of their

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[36] BUREAU OF JUSTICE STATISTICS, U.S. DEPT'T OF JUSTICE, BULL. No. NCJ 213600, *Mental Health Problems Of Prison And Jail Inmates* (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf

[37] Jeffrey L. Metzner, *Class Action Litigation in Correctional Psychiatry*, 30 J AM. ACAD. PSYCHIATRY & L. 19 (2002)

[38] Jamie Fellner, *A Conundrum for Corrections, A Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill*, 22 WASH. U. J. L. & POL'Y 135, 135 (2006); *see also* William Rich, *The Path of Mentally Ill Offenders*, 36 FORDHAM URBAN L.J. 89, 90-91 (2009) (same).

[39] Larkin McReynolds & Gail Wasserman, *Risk for Disciplinary Infractions Among Incarcerated Male Youths: Influence of Psychiatric Disorder*, 35 CRIM. JUST. & BEHAV. 1174, 1175 (2008), citing Gail Wasserman et al, *The Voice DISC-IV with Incarcerated Male Youth: Prevalence of Disorder*, 41 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 314 (2002).

[40] Lori Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 Val. U. L. Rev. 487, 493 (2002).

mental illness.[41] Such prisoners are "considerably" more likely than non-mentally ill inmates to be victimized by physical or sexual assault while incarcerated,[42] and serve, proportionately, longer terms of imprisonment.[43] In the context of the unprecedented increase in the overall prison population during the past three decades, these factors have combined with the erratic access of persons with mental disabilities to adequate screening and treatment during incarceration, and inconsistent efforts at promoting successful reentry upon release to create a major challenge on the national scale.[44]

B. Earlier legal developments

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

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[41] Eva Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse,* 41 U.C. DAVIS L. REV. 111, 131 (2007); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 142 (2003).

[42] Marschke, *supra* note 40, at 496.

[43] *Id.* at 497.

[44] *See* Rich, *supra* note 38, at 115: ("**Error! Main Document Only.**Failure to prepare inmates for reentry, and failure to provide supervised medication, trained staff and related housing, and social services to paroled inmates almost assures repetition of the cycle of crime and punishment").

[45] 551 F.2d 44 (4th Cir. 1977)

> In the instant case, petitioner seeks psychological diagnosis and treatment. We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.
>
> We therefore hold that Bowring (or any other prison inmate) is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.[46]

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

> First, there must be a systematic program for screening and evaluating inmates in order to identify those who require mental health treatment. (citations omitted). Second, as was underscored in both *Newman* and *Bowring*, treatment must entail more than segregation and close supervision of the inmate patients. Third, treatment requires the participation of trained mental health professionals, who must be employed in sufficient numbers to identify and treat in an individualized manner those treatable inmates suffering from serious mental disorders. (citations omitted) Fourth, accurate, complete, and confidential records of the mental health treatment process must be

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[46] *Id.* at 47.

[47] 503 F.Supp. 1265 (S.D. Tex 1980) *aff'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert denied,*460 U.S. 1042 (1983).

> maintained. Fifth, prescription and administration of behavior-altering medications in dangerous amounts, by dangerous methods, or without appropriate supervision and periodic evaluation, is an unacceptable method of treatment. Sixth, a basic program for the identification, treatment, and supervision of inmates with suicidal tendencies is a necessary component of any mental health treatment program…. [48]

The erosion of the hands-off doctrine was hastened by judicial discovery of disturbing and frightening conditions within prisons by those judges willing to hold evidentiary hearings When this occurred, the deliberate indifference doctrine was aggressively applied and far-ranging remedies to constitutional violations were fashioned. From the late 1960's through the 1970's, by way of example, such cases as *Pugh v. Locke*[49] ordered sweeping reforms to the violent, unsanitary and unconstitutional conditions uncovered in Alabama's prisons. *Pugh* is considered one of the landmark cases in this era of expanded judicial intervention in prisons conditions litigation, in which relatively loose standards of proof regarding causation and remedy had led to long-term oversight of prison condition by multiple federal courts.[50]

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

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[48] Id. at 1339

[49] 406 F.Supp 318, (M.D. Ala., 1976), aff'd, 559 F.2d 283 (5th Cir. 1977).

[50] See Schlanger, *supra* note 1, at 606 ("A paradigm prison case was the Alabama litigation*, Pugh v. Locke. Pugh* was very typical of the first generation of prison cases in that its substantive scope, its method of litigation, and its remedial approach were extremely broad…..") (citations omitted)

during the 1980's and into the 1990's.[51] In *Turner v. Safly,*[52] the Supreme Court permitted the limitation of even fundamental rights as long as such limitation bore a reasonable relationship to a governmental objective. In *Rhodes v Chapman,*[53] the Supreme Court, in a decision reminiscent of the "hands-off" doctrine, emphasized that internal workings of prison security and administration were generally to be left to prison administrators.[54]

Meanwhile, the interplay between the development of the deliberate indifference doctrine in health conditions cases and the development of parallel doctrines in other correctional constitutional law continued. These two strands came together in *Wilson v. Seiter*[55] where the Supreme Court applied the deliberate indifference standard to Eighth Amendment prison litigation *outside* of the healthcare arena; in doing so, it relied on the logic of *Whitley v. Albers*, finding that prisoners are only protected from excessive force that constitutes the "unnecessary and wanton infliction of pain," by corrections personnel.[56] Finally, in 1994, after it had issued a series of opinions moving toward a standard of increased deference to prison administrators, the Supreme Court clarified the meaning (and subjective

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[51] This move was echoed in other institutional litigations outside of the correctional context. See.e.g., Youngberg v. Romeo, 457 U.S. 307 (1982) (articulating "professional judgment standard").

[52] 482 U.S. 78, 89 (1987).

[53] 452 U.S. 337 (1981)

[54] *See id.* at 349 ("But the Constitution does not mandate comfortable prisons, and prisons . . . ., which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court")

[55] 501 U.S. 294 (1991)

[56] **Error! Main Document Only.**Whitley v. Albers, 475 U.S. 312, 319 (1986).

nature) of that standard. Ironically, this happened in a case that dealt with the constitutional right to protection from harm rather than a case concerning medical care. In *Farmer v. Brennan,*[57] the court held:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. [58]
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> *** ****
>
> Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health…."[59]

In declining to adopt a purely objective standard, the Supreme Court held that the requisite state of mind fell somewhere between that of negligence and that of intent to harm.[60] Some subsequent lower and intermediate federal cases however, adopted broad interpretations of this standard. The Ninth Circuit, for example, in *Gibson v County of Washoe,*

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[57] 511 U.S. 825 (1994).

[58] Id. at 837 (declining to adopt an objective standard)

[59] Id. at 843, quoting *Helling v. McKinney,* 509 U.S. 25, 35, (1993)

[60] Id. at 825 ("Deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Thus, it is the equivalent of acting recklessly . However, this does not establish the level of culpability deliberate indifference entails, for the term recklessness is not self-defining, and can take subjective or objective forms.")

Nevada,[61] held that officials' knowledge concerning the prevalence of certain disorders (in this case, manic-depressive disorder) across the correctional population could meet *Farmer's* threshold for "knowledge" or risk. [62] *Madrid v. Gomez*[63] gave additional definition to the post-*Farmer* deliberate indifference standard in the mental health context. The *Madrid* court applied a two-prong test: (1) first, the care must be inadequate as measured by an objective standard as demonstrated by a pattern of negligent conduct of systematic deficiencies ; and (2) the plaintiff must prove that the system was aware of the risk to health which grew out of this inadequacy and acted with disregard of that risk[64].

C. After the PLRA

By 1995 when the Prison Litigation Reform Act[65] (PLRA) was passed -- raising severe barriers to prison reform litigation at all stages -- the Supreme Court had already made matters more difficult for plaintiffs' attorneys. There was a widespread sense that the era of judicial intervention in prison conditions had effectively ended. Indeed, limiting judicial oversight of prisons was a stated goal of the act:

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[61] 290 F.3d 1175 (9th Cir. 2002)

[62] See, Henry Dlugacz & Julie Low, *Key Considerations in Liability Management for the Correctional Psychiatris*t, in CORRECTIONAL PSYCHIATRY: PRACTICE GUIDELINES AND STRATEGIES chapter 3-1 to 3-23 (Ole J. Theinhaus & Melissa Piasecki eds, 2007)

[63] 899 F.Supp. 1146 (N.D. Cal. 1995)

[64] Id. at 1256

[65] Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C.§§ 3626; 28 U.S.C. §§ 1346. 1915, 1915A; 42 U.S.C. §§ 1997-1997 h.)

> The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive mean necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.[66]

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

> Lawyers obtained the first federal court orders governing prison and jail conditions in the 1960s. This and other types of civil rights injunctive practice flourished in the 1970s and early 1980s. But a conventional wisdom has developed that such institutional reform litigation peaked long ago and is now moribund. This Article's longitudinal account of jail and prison court-order litigation establishes that, to the contrary, correctional court-order litigation did not decline in the late 1980s and early 1990s.

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[66] 28 U.S.C. §3626(a) (1) (A) (1997).

[67] See, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY CRIME & JUSTICE FACTS AT A GLANCE: CORRECTIONAL POPULATIONS, *available at* http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (reporting 1.6 million inmates in American jails and prisons in 1995; by 2005, that number had increased by 38 percent, to 2.2 million); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 132 (1997) (reporting prisoner petitions in table C-2A), *available at* http://www.uscourts.gov/judicial_business/c2asep97.pdf.) cited in Statement of Prof. Margo Schlanger. presented to the Subcommittee On Crime, Terrorism, And Homeland Security, Committee On The Judiciary, United States House Of Representatives ("Review Of The Prison Litigation Reform Act: A Decade Of Reform Or An Increase In Prison And Abuses?") (Nov. 8, 2007), Accessible at http://judiciary.house.gov/hearings/pdf/Schlanger071108.pdf (last accessed, April 7, 2009).

[68] See *supra* text accompanying notes 51-64.

> Rather, there was essential continuity from the early 1980s until 1996, when enactment of the Prison Litigation Reform Act (PLRA) reduced both the stock of old court orders and the flow of new court orders. Even today, ten years after passage of the PLRA, the civil rights injunction is more alive in the prison and jail setting than the conventional wisdom recognizes.[69]

The nature of successful cases has indeed changed. Litigation in the "…1980s and 1990s … grew ever more resource-intensive, and addressed increasingly narrow topics with more rigorous proof and causation requirements."[70]. One manifestation of this in the mental disability context may have been a number of successful constitutional litigation challenging the conditions of confinement in SuperMax prisons[71] and their negative effect on mental health[72] Vincent Nathan, a vastly experienced monitor and special master in correctional litigation, has noted that many correctional systems have chosen not to take full advantage of Supreme Court's invitation to reduce services and due process.[73] Nathan has argued that reform efforts have in effect changed the landscape so that fewer than expected states have taken advantage

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[69] Schlanger, note 1, at 550.

[70] *Id.*

[71] While definitions vary, "SuperMax" units are generally high security units or prisons which hold prisoners in very restrictive conditions. They generally have certain features in common including confinement to cells 22- 23 hours per day; very limited contact with other people; limited exercise and showers, limited privileges such as telephone, commissary and visiting; little or no access to work, religious activities, programming; strict escort polices. See, e.g., William Collins, *Supermax prisons and the constitution: Liability Concerns in the Extended Control Unit. U.S. Dep't of Justice, National Institute of Corrections (2004) Available at www.nicic.org/pubs/**2004**/019835.pdf.*

[72] See, e.g., Scarver v. Litscher**,** 434 F.3d 972 (7th Cir.,2006); Austin v. Wilkinson*,* 189 F.Supp.2d 719, (N.D.Ohio, 2002); Jones 'El v. Berg**e,** 164 F.Supp.2d 1096 (W.D.Wis. 2001).

[73] Vincent Nathan, *Have the Court Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 425 (2004).

of *Sandin v. Connor's* [74] holding that a state imposition of disciplinary segregation for a term of less than a year did not require significant due process protections.[75] Likewise, some but not many prison systems have taken advantage of the invitation in *Lewis v. Casey*[76] to eliminate law libraries. Nathan suggests that: " In some important ways, the new and more constructive status quo is resisting efforts at change, just as did its less laudable predecessor."[77]

Significantly, some notable cases have resisted the trend away from judicial intervention. In California, two senior federal judges have maintained long-standing oversight of entire state correctional system's medical and mental health care.[78] In *Plata v. Schwarzenegger*, Judge Henderson ordered the appointment of a receiver to take over the administration of basic functions of California's correctional health care system.[79] In *Coleman v. Schwarzenegger*[80] Judge Karlton has, through appointment of a special master under Federal Rule of Civil Procedure 53, overseen the provision mental health care within that same system. In related proceedings, a three judge panel recently issued a tentative order requiring release of prisoners from California's prisons finding a nexus between overcrowding and the state's

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[74] 515, U.S. 472 (1995)

[75] Nathan, *supra* note 73, at 425 n 19.

[76] 518 U.S. 343 (1996)

[77] Nathan, *supra* note 73, at 425.

[78] Plata v. Schwarzenegger, No. C-01-1351 (N.D. Cal. Oct. 3, 2005) (findings of fact and conclusions of law with regard to appointment of receiver; case involving medical care in California's prison system); Coleman v. Wilson, 912 F.Supp. 1282 (E.D. Cal. 1995) (case involving mental health care within California's prison system.)

[79] *Plata, supra.*

[80] *Coleman, supra.*

inability to provide constitutionally mandated health and mental health care.[81] During this same era of judicial retreat, the Ohio Department of Corrections entered in to a consent decree which brought significant improvements and considerable new resources to bear to the provision of mental health care.[82]

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

1. the degree to which strapped-for-funds correctional systems take more aggressive use of the leeway provided to them by the Supreme Court

2. the extent to which large firms, which have been instrumental in recent successful litigations in this area, maintain their commitment to this area during times of fiscal constraint.

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[81] Plata v. Schwarzenegger**,** --- F.3d ----, 2009 WL 764543 (9th Cir. 2009). The full tentative ruling is available at http://clearinghouse.wustl.edu/detail.php?id=589 (last accessed April 9, 2009).

[82] Dunn v. Voinivich, No. C1-93-0166 (S.D. Ohio July1, 1995) (consent decree).

3. the impact of economic circumstances on the scope of relief granted by trial courts

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

III. International human rights law

A. In general[83]

Human rights are necessary for all individuals; human rights violations occur when persons are treated as objects or as a means to others' ends . [84]Offenders have enforceable human rights.[85] The Vienna Declaration and Programme of Action[86] and the Universal Declaration of Human Rights[87] recognized that inherent dignity and inalienable rights of all individuals is the foundation of freedom, justice, and peace. Through global covenants,

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[83] This section is generally adapted from Birgden & Perlin, *supra* note 16.

[84] Tony Ward & Astrid Birgden, *Human Rights And Clinical Correctional Practice*. 12 AGGRESSION & VIOLENT BEHAV. 628 (2007).

[85] Birden & Perlin, *supra* note 8; Birgden & Perlin, *supra* note 16

[86] http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En

[87] SEE MICHAEL L. PERLIN ET AL, INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: DOCUMENTS SUPPLEMENT 27-33 (2006).

individual rights regarding offenders are safeguarded against cruel, inhuman, or degrading treatment or punishment,[88] prisoners should be treated with humanity and dignity, and provided with reformation and social rehabilitation,[89] individuals are guaranteed the right to the highest attainable standard of physical and mental health,[90] individuals are guaranteed respect for human rights and fundamental freedoms in forensic and correctional systems,[91] and prisoners should be treated in a humane manner and with dignity.[92]

B. As applied to persons with disabilities[93]

1. Historical background

Remarkably, the issue of the human rights of people with disabilities, particularly people with mental disabilities[94], had been ignored for decades by the international agencies vested

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[88] International Covenant on Civil and Political Rights, Article 7 (1966)

[89] International Covenant on Civil and Political Rights, Article 10, (1966)

[90] International Covenant on Economic, Social and Cultural Rights, Article 12, (1966),

[91] Vienna Declaration on Crime and Justice (2001).

[92] United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, 1988. *See generally*, Birgden & Perlin, *supra* note 16.

[93] This section is largely adapted from Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges,* in MENTAL HEALTH AND HUMAN RIGHTS (Michael Dudley ed. 2008) (in press) **.**

[94] There is no single, universally-accepted definition of "mental disabilities." The terminology varies from country to country, jurisdiction to jurisdiction, and even document to document. In this chapter, we use "mental disabilities" to encompass both psychiatric disorders and intellectual disabilities.

with the protection of human rights on a global scale.[95] Early developments in global international human rights law following World War II -- and the various forms of human rights advocacy that emerged in the decades that followed -- failed to focus on mental disability rights. As Dr. Theresa Degener, a noted disability scholar and activist, has observed:

[95] We focus here on this population as the focus of our article is on this population in a correctional law context.

> [D]rafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the equality clauses of any of the three instruments of this Bill, the Universal Declaration of Human Rights (1948) (hereinafter UDHR), the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter ICESCR), mention disability as a protected category.[96]

It was not until the United Nations' declaration of 1981 as the *International Year of Disabled Persons*[97] that there was significant activity on an international level. The United Nations General Assembly subsequently established the *World Programme of Action Concerning Disabled Persons*,[98] and declared 1983 to 1992 to be the *Decade of Disabled Persons*.[99] As part of these efforts, the United Nations Human Rights Commission appointed two special rapporteurs to investigate and report on the human rights of persons with mental disabilities,[100] and in 1991, the General Assembly adopted the *Principles for the Protection of*

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[96]Theresa Degener, *International Disability Law - A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999,* 18 BERKELEY J. INTL. L. 180, 187 (2000).

[97]G.A. Res. 123, U.N. GAOR, 31st Session (1976).

[98]G.A. Res. 52, U.N. GAOR, 37th Session (1982).

[99]G.A. Res. 53, U.N. GAOR, 37th Session (1982).

[100]United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: HUMAN RIGHTS AND DISABILITY, U.N. Doc. E/CN.4/Sub.2/1991/31 (report

Persons with Mental Illness and for the Improvement of Mental Health Care (widely referred to as the "MI Principles").[101] The MI Principles established the most comprehensive international human rights standards for persons with mental disabilities, and their adoption was a critical global step in recognizing mental disability rights issues within the human rights arena.

Degener's writings reflect the change that has taken place in disability rights jurisprudence. In 2000, she stated further that "disability has been reclassified as a human rights issue," and that "law reforms in this area are intended to provide equal opportunities for disabled people and to combat their segregation, institutionalization and exclusion as typical forms of disability-based discrimination."[102]

Yet, historically, mainstream human rights protection systems and advocacy organizations had difficulty acknowledging mental disability rights as part of their mandates.

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by Leandro Despouy), and PRINCIPLES, GUIDELINES, AND GUARANTEES FOR THE PROTECTION OF PERSONS DETAINED ON GROUNDS OF MENTAL ILL-HEALTH OR SUFFERING FROM MENTAL DISORDER, U.N. Doc. E/CN.4/Sub.2/1983/17 (report by Erica-Irene Daes).

It is sobering that these reports were, for all practical purposes, the first major governmental documents ever published discussing these issues. We believe that sanism – manifested here by a refusal to take seriously the issues that affect persons with mental disabilities, especially *institutionalized* persons – is the root cause of this phenomenon. *See* Perlin & Szeli, *supra* note 93; Michael L. Perlin, **Error! Main Document Only.***"Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor Tenbroek, and the Rights of Persons with Mental Disabilities,* 13 TEX. J. ON C.L. & C.R. 413, 417-18 (2008).

[101]G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex at 189, U.N. Doc. A/46/49 (1991). *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) for a detailed discussion of the development of mental disability rights protections within the United Nations human rights system.

[102]Degener, *supra* note 96, at 181.

The human rights issues encountered by persons with mental disabilities may have been perceived as too complex or esoteric. This challenge was sometimes articulated in rather unfortunate ways, such as "We work in human rights, not mental disability rights."[103] 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.[104] But while human rights are - by definition - universally possessed by *all* humans, the formal recognition of the applicability of these rights in contexts specific to vulnerable populations is critical for their enforcement.

To some extent, this new interest in human rights protections for people with disabilities echoes a larger international movement to protect human rights,[105] and appears to

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

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

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

[105]*See* B.G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 HUM. RTS. Q. 155 (1991) (Ramcharan is former Deputy UN High Commissioner for Human Rights).

more precisely follow track C. Raj Kumar's observation that "the judicial protection of human rights and constitutionalization of human rights may be two important objectives by which the rule of law can be preserved and which may govern future human rights work."[106]

2. More recent application of international human rights law doctrines to persons with disabilities [107]

Many obstacles to the enforcement of U.N. human rights conventions have been identified in the decades since the entry into force of the ICCPR and the ICESCR. These include concerns that 1) there is limited enforcement machinery; 2) the existing machinery is understaffed, underfunded, and may not have the authority to compel compliance with -- or to punish violations of – human rights standards; 3) ultimately, human rights enforcement may be viewed as a State function ("the fox guarding the henhouse" syndrome); and 4) the general lack of accountability that results from some of these issues. [108]

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[106] C. Raj Kumar, *Moving Beyond Constitutionalization and Judicial Protection of Human Rights - Building on the Hong Kong Experience of Civil Society Empowerment,* 26 LOY. L.A. INT'L & COMP. L. REV. 281, 282 (2003).

[107] Much of this section is adapted from 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,* -- NO. ILL. U. L. REV. – (2009) (in press). *See also generally*, PERLIN &. DLUGACZ, *supra* note 19, at 977-1049.

[108] See, e.g., *Enforcing Human Rights: The U.N. Machinery*, 30 U.N. CHRON. 93 (Mar. 1993)

Also, note that even with the general human rights instruments, the lack of universal consensus about the rights to be protected creates a considerable sticking point in enforcement.

What has our track record been with regard to such Conventions? To be charitable, it is a mixed bag. Courts in the US have been inconsistent in their enforcement of and adherence to UN Conventions.[109] In *Lareau v. Manson,*[110] a federal district court cited to United Nations Standard Minimum Rules for the Treatment of Prisoners standards in cases involving, the "double bunking" of inmates[111]; but on the other hand, in *Flores v. Southern Peru Copper Corp.,*[112], the Second Circuit found that the United Nations' Convention on the Rights of the Child (CRC) did not convey a private right of action to plaintiffs as a matter of law. In at least one case, however, while noting that the non-ratified Convention was not binding on US courts, the Massachusetts Supreme Judicial Court "read the entire text of the convention … and conclude[d] that the outcome of the proceedings in this case are completely in accord with principles expressed therein."[113]

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[109] See generally, Alvin Bronstein, & Jenni Gainsborough, *Using International Human Rights Law and Standards for U.S. Prison Reform*, 24 PACE. L. FEV. 811 (2004).

[110]507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980), *aff'd in part & rev'd in part*, 651 F. 2d 96 (2d Cir. 1981)

[111] Compare Bott v. DeLand, 922 P. 2d 732 (Utah 1996), *overruled on other grounds* in Spackman ex rel. Spackman v. Bd. Of Educ., 16 P. 3d 2000 (Utah 2000) (Utah's unnecessary abuse standard based upon "internationally accepted standards of humane treatment").

[112]414 F.3d 233, 257, 259 (2d Cir.2003)

[113] Adoption of Peggy, 767 NE 2d 29, 38 (Mass 2002).

Most significantly and most recently, in *Roper v. Simmons,*[114] in the course of striking down the juvenile death penalty, the Supreme Court (per Justice Kennedy) acknowledged that the United States had not ratified the CRC, but added:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.[115]

There is some important literature that suggests that, in other nations, in other contexts, ratification of a UN Convention *has* had a salutary impact on domestic law. Writing about the ratification in the UK of the CRC, Prof. Adrian James has written:

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[114]543 U.S. 551 (2005) . *See also*, State v. Romano, 155 P. 3d 1102, 1114 n. 14 (Hawai'i 2007) (relying, in part, on the UN Convention for the Traffic in Person and the Exploitation of Others, in opinion affirming a prostitution conviction, and citing approvingly Almeida v. Correa, 465 P. 2d 564, 570-71 (Hawai'i 1970) for its citations to a UNESCO document in its resolution of a paternity case).

[115] At 578 .

Soberingly, a recent survey by Professor Jean Koh Peters found that almost three-quarters of children worldwide live in countries where CRC is not observed or where evidence as to observance is inconclusive, despite CRC's widespread ratification. Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968-69 (2006).

> [T]here have been significant changes in the environment within which children's issues are addressed in both private and public law cases in the family courts; in addition, it is also clear that at an organizational level, major strides have been taken in embracing the provisions of the [CRC] and in making children's rights, especially those of participation, meaningful.[116]

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

C. The specific application of international human rights law to correctional law

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[116]Adrian James, , *Children, the UNCRC, and Family Law in England and Wales,* 46 FAM. CT. REV. 53, 61 (2008).

In a recent filing with the US Supreme Court, *amicus* Disability Rights Legal Center of Los Angeles, CA, has relied on a Submission to the Special Rapporteur on the Right to Education of the UN Human Rights Council in support of its arguments on behalf of number of students with disabilities eligible for special education in adult correctional facilities. See Forest Grove School District v. T.A., Docket # 08-305 (2009).

International human rights law and standards specifically address the full range of issues that affect prisoners with mental illness.[117] A "white paper" prepared by the American Friends Service Committee reveals how documents such as the ICCPR, the ICESCR, and the Convention Against Torture all contain significant protections to persons in correctional institutions.[118] In this context, recently, Professor Eva Nilsen has written persuasively that global human rights standards should be relied on as a source of legal protections for persons in correctional settings,[119] arguing that international courts – in their interpretations of such standards – "give a robust interpretation to claims of degrading treatment that violates human dignity."[120] Alvin Bronstein and Jenni Gainsborough similarly argue that "the U.S. *unquestionably* has a moral responsibility to accept as binding [international] human rights standards."[121]

The question is then posed: what impact does the new CRPD have on these arguments?

IV. Convention on the Rights of Persons with Disabilities (CRPD)[122]

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[117] Fellner, *supra* note 38, at 140.

[118] American Friends Service, *Correlation of Prisoners' Issues and Conditions to International Covenants and Treaties: An AFSC Resource Guide* (2003), posted at http://www.massdecarcerate.org/download/CJIssue_treaty_correlation200306.pdf (last accessed, March 26, 2009).

[119] Nilsen, *supra* note 41

[120] *Id.* at 160, and see *id.* at 160-61 nn. .246-50 (citing sources).

[121] Bronstein & Gainsborough, *supra* note 109, at 814 (emphasis added).

[122] This section is adapted from Perlin, *supra* note 108.

I. A. Historical background

Disability rights as a human rights issue has now taken center stage at the United Nations, and the involvement of stakeholders – consumers and users of psychiatric services, sometimes referred to as "survivor groups"[123] has been critical in the most significant historical development in the recognition of the human rights of persons with mental disabilities: the drafting and adoption of a binding international disability rights convention.[124]

In late 2001, the United Nations General Assembly established an Ad Hoc Committee "to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, ..."[125] The Ad Hoc Committee drafted a document over the course of five years and eight sessions, and the new *Convention on the Rights of Persons with Disabilities* [126]was adopted in December 2006 and opened for signature in March 2007.[127] It entered into force - thus becoming legally binding on States parties - on May 3, 2008, thirty days after the 20th ratification.[128] One of the hallmarks of the

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[123] Perlin, *supra* note 7, at 438.

[124] [23] On the singular role of this Convention, see e.g., Frederic Megret, *The Disabilities Convention: Toward a Holistic Concept of rights*, available at http://ssrn.co/abstract=1267726, and Frederic Megret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?* 30 HUM. RIGHTS – (2008) (in press); Michael Ashley Stein & Janet Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities,* 13 TEX. J. CIV LIB. & CIV. RTS. 167 (2008).

[125] G.A. Res. 56/168 (2001).

[126] G.A. Res. A/61/611 (2006).

[127] G.A. Res. A/61/106 (2006).

[128] On the 20th ratification, see http://www.un.org/News/Press/docs/2008/hr4941.doc.htm. *See generally*, Tara Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify,* 14 HUM.

process that led to the publication of the UN Convention was the participation of persons with disabilities and the clarion cry, "Nothing about us, without us."[129] This has led commentators to conclude that the Convention "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[130]

The Disability Convention furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life.[131] As

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RTS. BRIEF 37, 44 (Winter 2007); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights,* 58 HASTINGS L. J. 1203 (2007).

[129] See e.g., Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities,* 8 HUM. RTS. L. REV. 1, 4 n.15 (2008):

> See, for example, Statement by Hon Ruth Dyson, Minister for Disability Issues, New Zealand Mission to the UN, for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disability, 30 March 2007: "Just as the Convention itself is the product of a remarkable partnership between governments and civil society, effective implementation will require a continuation of that partnership." The negotiating slogan 'Nothing about us without us' was adopted by the International Disability Caucus, available at: http://www.un.org/esa/socdev/enable/documents/Stat_Conv/nzam.doc [last accessed 13 November 2007].

[130] *Id.*, n. 17 (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 Rights of Persons with Disabilities, convened by the UN Human Rights Council, 26 March 2007, available at: http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/7444B2E219117CE8C12572AA004C5701?OpenDocument [last accessed 13 November 2007].).

[131] *See e.g.,* for a thoughtful and helpful forerunner article, 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).

referred to above, it calls for "respect for inherent dignity"[132] and "non-discrimination."[133] Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment,"[134] "freedom from exploitation, violence and abuse,"[135] and a right to protection of the "integrity of the person."[136]

D. Impact of CRPD

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

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[132] UN CONVENTION, Article 3(a).

[133] *Id.*, Article 3(b).

[134] *Id.,* Article 15.

[135] *Id.*, Article 16.

[136] *Id.*, Article 17.

[137] Marschke, *supra* note, 40 at 532. *See e.g.,* Farmer v Brennan 511 US 825, 837-38 (1994):

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law

V. Conclusion and potential future developments

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

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reflects such concerns when it imposes tort liability on a purely objective basis. See Prosser and Keeton §§ 2, 34, pp. 6, 213-214; see also Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680; *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

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

The CRPD has not yet been ratified in the United States. Nonetheless, its principles should serve as a model of "best practices," in the same way that the Convention on the Rights of the Child served as such a model in the Massachusetts case discussed earlier,[140] for all future

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[138] See *supra* text accompanying notes 78-82.

[139] See Nathan, *supra* note 73.

[140] Adoption of Peggy, 767 NE 2d 29, 38 (Mass 2002).

inquiries into the rights of prisoners to adequate mental health care and treatment. It is not an exaggeration to say that it provides a potential blueprint for litigators looking for fresh approaches to the seemingly-intractable constellation of legal and behavioral issues faced by prisoners with mental disabilities.

The US Supreme Court – albeit by the most slender of majorities – has made it clear in a series of criminal law and procedure cases that international human rights law is a legitimate source of rights in any determination of appropriate domestic constitutional standards.[141] Although lower courts have, in the past, incorporated UN Standards, Covenants and Conventions in decisions dealing with prisoners rights' issues, the Supreme Court has never, to this date, had the occasion to construe this body of law in a correctional conditions case.

The CRPD is a beacon to those who advocate for persons with disabilities.[142] In his definitive encyclopedia about Bob Dylan's music, Oliver Trager characterizes *Shelter From the Storm* (from which the beginning of the title of this article comes) as concluding that "the

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

[142] Compare Lisa Widawsky, *In My Backyard: How Enabling Hazardous Waste Trade To Developing Nations Can Improve The Basel Convention's Ability To Achieve Environmental Justice,* 38 ENVTL. L. 577, 602 (2008) (discussing how environmental convention is "a beacon of hope for achieving … justice.").

possibility of redemption still exists." [142] We believe that lawyers representing plaintiffs in institutional conditions cases should turn to the Convention as a potential affirmative source of rights on behalf of their clients, and as a strategy for offering "redemption" to this population. In arguing in support of the US's ratification of the Convention, Tara Melish recently wrote that " Ratification will allow us simultaneously to serve as a model for the rest of the world, projecting our commitment to the rights of persons with disabilities outward, while ensuring that we are in fact living up to that projection as a nation and social community of equals at home "[143] This is a development that lawyers representing prison inmates must follow if correctional law is to grow and expand.

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[142] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 554 (2004).

[143] Melish. *supra* note 128, at 47.