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"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities

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"THE PAIN I RISE ABOVE": HOW INTERNATIONAL HUMAN RIGHTS CAN BEST REALIZE THE NEEDS OF PERSONS WITH TRAUMA-RELATED MENTAL DISABILITIES

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I. INTRODUCTION

Persons with disabilities, especially *mental* disabilities, are disproportionately traumatized by the existence of their disability and their treatment by others, both in community and institutional settings.[1] Although there is a robust literature about this phenomenon in the context of refugee populations, domestic violence victims, returning war veterans (especially as it relates to the question of the prevalence of posttraumatic stress disorder (PTSD),[2] and persons who suffered childhood physical and/or sexual abuse,[3] there is less so in the context of persons who have had a lifetime of chronic mental illnesses,[4] notwithstanding the clear findings that childhood traumatic events are strongly associated with mental, behavioral, and physical health problems in adulthood.[5]

Although a range of behavioral intervention remedies has been suggested,[6] there has been little attention paid to potential legal

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1. *See, e.g.*, Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1274 (1994) [hereinafter *The Protection Racket*]; Debra Benko & Brittany Benowitz, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 HUM. RTS. BRIEF 9, 9–10 (2001).

2. *See, e.g.*, Kenneth E. Miller & Andrew Rasmussen, *War Exposure, Daily Stressors, and Mental Health in Conflict and Post-Conflict Settings: Bridging the Divide Between Trauma-Focused and Psychosocial Frameworks*, 70 SOC. SCI. MED. 7 (2010); Zachary Steel et al., *Association of Torture and Other Potentially Traumatic Events with Mental Health Outcomes Among Populations Exposed to Mass Conflict and Displacement: A Systematic Review and Meta-Analysis*, 302.5 JAMA, no. 5, 537 (2009); Dawne Vogt et al., *Deployment Stressors, Gender, and Mental Health Outcomes Among Gulf War I Veterans*, 18 J. TRAUMATIC STRESS 115 (2005).

3. *See generally, e.g.*, Victoria L. Banyard et al., *The Long-Term Mental Health Consequences of Child Sexual Abuse: An Exploratory Study of the Impact of Multiple Traumas in a Sample of Women*, 14 J. TRAUMATIC STRESS 697 (2001); Allan V. Horwitz et al., *The Impact of Childhood Abuse and Neglect on Adult Mental Health: A Prospective Study*, 42 J. HEALTH & SOC. BEHAV. 184 (2001); Nancy Wu et al., *Childhood Trauma and Health Outcomes in Adults with Comorbid Substance Abuse and Mental Health Disorders*, 35 ADDICTIVE BEHAVIORS 68 (2010).

4. *But see* Michael L. Perlin, *"Your Old Road Is/ Rapidly Agin'": International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities*, 17 WASH. U. GLOB. STUDIES L. REV. (forthcoming 2018) [hereinafter Perlin, *Your Old Road*].

5. R. Jay Turner & Donald A. Lloyd, *Lifetime Traumas and Mental Health: The Significance of Cumulative Adversity*, 36 J. HEALTH & SOC. BEHAV. 360, 361 (1995); *see also* Janet Lord, *Child Rights Trending: Accommodating Children with Disabilities in the Global Human Rights Framework and US Foreign Policy*, 16 WHITTIER J. CHILD & FAM. ADVOC. 1, 16 (2017) [hereinafter Lord, *Child Rights*] ("[persons with mental disabilities] are at higher risk for abuse and violence, which can, in turn, aggravate existing disabilities or create secondary disabilities, such as psychosocial trauma."). *See generally* Cassandra Kisiel et al., *Understanding Strengths in Relation to Complex Trauma and Mental Health Symptoms Within Child Welfare*, 26 J. CHILD & FAM. STUD. 437 (2017) (urging targeted trauma-informed assessments in mental health evaluations).

6. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS:

interventions, even though there has been important recent focus on the need for lawyers to develop and use tools through which they can provide better representation for traumatized clients.[7] This may be compounded by the fact that *going to court* in and of itself may exacerbate the underlying trauma.[8]

There is a high correlation between exposure to trauma and the impact on mental health.[9] For example, people with mental disabilities and people who have been involved in the criminal justice system have a much higher risk of being exposed to trauma and developing PTSD, compared to the general population.[10] Additionally, many people who experience life in institutions—both short term and residential institutions—are often subjected to trauma, simply by virtue of being in the institution, but also are often subjected to forced medication, restraint, and seclusion, all of which are traumatic events that can have long lasting

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ETHICAL AND PRACTICAL DIMENSIONS 9 (2007); *see, e.g.*, Carolyn Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623 (2005); *see also* Renee DeBoard-Lucas et al., 16 *Trauma-Informed, Evidence-Based Recommendations for Advocates Working with Children Exposed to Intimate Partner Violence*, 32 CHILD L. PRAC. 136 (2013).

7. *See generally* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma Informed Lawyering*, 22 CLINICAL L. REV. 359 (2016). Professors Katz and Haldar identify four "hallmarks" of trauma-informed legal practice: "(1) identifying trauma; (2) adjusting the lawyer-client relationship; (3) adapting litigation strategy; and (4) preventing vicarious trauma," *id.* at 363, and conclude that, by focusing on these hallmarks, "clinical law professors can not only enhance the advocacy of their students while in the clinic, but also convey lasting skills which will set their students on the path to being excellent lawyers throughout their careers." *Id.* at 393.

8. Reynaldo Anaya Valencia & Miguel A. Ortiz, *The Persistent Challenge of Gender and Law: View's from One Law School's Student Body*, 3 SCHOLAR 157, 160 n.3 (2001) (discussing how women and minorities injured by discrimination often choose to forego legal remedies, rather than risk the trauma that they expect courtroom exposure to entail); *see also* Alexandra P. West, *Implying Plaintiffs' Waivers of the Psychotherapist-Patient Privilege After* Jaffee v. Redmond, 59 U. PITT. L. REV. 901, 917 (1998) ("In order to keep their childhood traumas private, [victims of childhood abuse] must forego all legal remedies for future emotional injuries caused by others' wrongful acts.").

9. *See, e.g.*, Karen Oehme et al., *Trauma-Informed Co-Parenting: How a Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents' and Children's Best Interests*, 39 U. HAW. L. REV. 37, 46–47 (2016) (discussing how exposure to childhood trauma can have a profound impact on individual development, and lead to serious long-term physical, interpersonal, and mental health problems).

10. *See generally* Jeanne Y. Choe et al., *Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns*, 59 PSYCHIATRIC SERV. 153 (2008); Ashley Goff et al., *Does PTSD Occur in Sentenced Prison Populations? A Systematic Literature Review*, 17 CRIM. BEHAV. & MENTAL HEALTH 152, 153 (2007); Michael G. Maxfield & Cathy S. Widom, *The Cycle of Violence: Revisited 6 Years Later*, 150 ARCH. PEDIATRICS & ADOLESCENT MED. 390, 390 (1996); Kim T. Mueser et al., *Trauma and Posttraumatic Stress Disorder in Severe Mental Illness*, 66 J. CONSULT. CLIN. PSYCHOL. 493, 493 (1998); Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey*, 62 ARCH. GEN. PSYCHIATRY 911, 911 (2005).

impacts on an individual's mental and physical health.[11] It is important to note that, "[e]ven as a practice of last resort, the threat of force can cause distress and undermine recovery."[12]

Significantly, in considering these issues, there has been virtually no attention paid to the impact of international human rights law—specifically, the U.N. Convention on the Rights of Persons with Disabilities (CRPD)—as a means of remediating mental health traumas.[13] The CRPD is a "revolutionary . . . human rights document"[14] that clearly establishes the international human and legal rights of persons with disabilities,[15] and "radically changes the scope of international human rights law as it applies to all persons with disabilities,"[16] characterizing discrimination against any person on the basis of disability as "a violation of the inherent dignity and worth of the human person."[17] Importantly, it

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11. Mehgan Gallagher, *No Means No, Or Does It? A Comparative Study of the Right to Refuse Treatment in a Psychiatric Institution*, 44 INT'L J. LEGAL INFO. 137, 139–41 (2016). It is ironic, of course, that a rationale for forced medication is that it will *improve* the individual's mental health. James B. (Jim) Gottstein, *Involuntary Commitment and Forced Psychiatric Drugging in the Trial Courts: Rights Violations as A Matter of Course*, 25 ALASKA L. REV. 51, 51 (2008). The possibility of increased trauma is virtually never mentioned in the cases allowing for such involuntary medication.

12. Sandy Watson et al., *Care Without Coercion-Mental Health Rights Personal Recovery and Trauma-Informed Care*, 49 AUST. J. SOC. ISSUES 529, 535 (2014).

13. As of March 5, 2018, a WESTLAW search of <"Convention #on the rights #of persons #with disabilities"CRPD/p trauma> revealed only four "hits."

14. Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 485 (2017) [hereinafter Perlin, *God Said*]. This should not be interpreted to mean to imply that this is the *only* international human rights law document of potential relevance. *See, e.g.*, Naomi Weinstein & Michael L. Perlin, *"Who's Pretending to Care for Him?" How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, -- WAKE FOREST J.L. & POL'Y (forthcoming 2018), manuscript at 67 (discussing the applicability of the U.N. Standard Minimum Rules for the Treatment of Prisoners, and the International Covenant on Civil and Political Rights); *see also, e.g.*, Henry A. Dlugacz & Luna Droubi, *The Reach and Limitation of the ADA and its Integration Mandate: Implications for the Successful Reentry of Individuals with Mental Disabilities in a Correctional Population*, 35 BEHAV. SCI. & L. 135, 141–43 (2017).

15. Michael L. Perlin, *Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the U.N. Convention on the Rights of Persons with Disabilities*, 44 GEO. WASH. INT'L L. REV. 1, 2 (2012) [hereinafter Perlin, *Promoting Social Change*].

16. Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1163 (2013) [hereinafter Perlin, *Striking*].

17. Michael L. Perlin & Naomi Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC'L JUST. 1, 4–5 (2014) (citing U.N. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, at 27, U.N. Doc. A/Res/61/106 (Dec. 13, 2006) [hereinafter CRPD]). On how the institutional treatment of juveniles shames and humiliates, and the potential ameliorative impact

abandons the long-prevailing "medical model" of disability and replaces it with a "social model."[18]

In this Article, we will first discuss the meaning of trauma in this context, and then consider the impact of international human rights law on the sorts of trauma that persons with mental disabilities typically experience, and will suggest how this body of law might be used as a tool to potentially remediate some of the conditions in question. We will also look at these issues through the prism of therapeutic jurisprudence, in an effort to determine how we can bring more dignity—and concomitantly, less shame and humiliation—to the population in question, with a special focus on the potential use of problem-solving courts in this context. We will then conclude by offering some thoughts on how to better utilize a human rights approach to ensure that people with trauma-related mental disabilities are treated with dignity and respect.

Our title comes, in part, from Bob Dylan's brilliant song, *Idiot Wind*,[19] and is the latter part of this lyric: "*You'll never know the hurt I suffered nor the pain I rise above.*"[20] We believe that this lyric best describes how persons with trauma-related mental disabilities often feel. No two people experience trauma in the same way, and so no "other" can truly know or understand the pain that someone with a trauma-related injury or disability feels, even if that person has suffered through a similar experience. Oftentimes, this pain is hidden—especially in a society where it is not socially acceptable to publically feel pain or sadness.[21] Although family members, lawyers, medical professionals, and therapists can try to

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of international human rights law on that state of affairs, see Michael L. Perlin & Alison J. Lynch, *"She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles*, 56 FAM. CT. REV. 79 (2018).

18. *See* Michael L. Perlin & Meredith R. Schriver, *"You Might Have Drugs at Your Command": Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees from the Perspectives of International Human Rights and Income Inequality*, 8 ALBANY GOV'T L. REV. 381, 385 (2015). Within the context of its human rights approach, the Disability Convention firmly endorses a social model of disability and re-conceptualizes mental health rights as disability rights—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law. *Id.*

19. In a previous article, drawing on the same song, one of the co-authors (MLP) characterized it as "an angry, coruscating and brilliant polemic that indicted American foreign policy in the post-Vietnam War period." Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1379–80 (1997). There is some irony in that so many of those suffering trauma—in the context of PTSD—are veterans of the wars in Iraq and Afghanistan. *See* Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5*, UTAH L. REV. 881, 912–14 (2015) [hereinafter Perlin, *Criminal Sentencing*].

20. *See* Bob Dylan, Idiot Wind (Columbia 1975), http://bobdylan.com/songs/idiot-wind/.

21. *See, e.g.*, Michael L. Perlin & Deborah A. Dorfman, *"The Sources of This Hidden Pain": Why a Class in Race, Gender, Class and Mental Disability, in* VULNERABLE POPULATIONS & TRANSFORMATIVE LAW TEACHING 313 (Hazel Weiser ed., 2011).

empathize with someone who has suffered through trauma, it is impossible to truly understand the intimacies of the pain and experiences that someone with a trauma-related disability navigates on a daily basis.

II. WHAT IS TRAUMA?

It is necessary to begin with a definition of trauma. The American Psychological Association (APA) defines trauma in this manner:

> [A]n emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea. While these feelings are normal, some people have difficulty moving on with their lives.[22]

According to one study, approximately one third of the population will experience trauma—in one form or another—at some point in their lives.[23] Trauma responses can be short or long-term.[24] Re-experiencing the traumatic event, avoiding stimuli associated with the trauma, and acting or feeling as if the event is reoccurring are all examples of short-term responses to trauma.[25] Examples of long-term responses to trauma include chronic shame and guilt, difficulty trusting others and/or maintaining relationships, and vulnerability to re-victimization.[26] Another symptom is PTSD, recently redefined in DSM-5 as including these factors:

> A. Exposure to actual or threatened death, serious injury, or sexual violence . . . .
> B. Presence of one (or more) . . . intrusion symptoms associated with the traumatic event(s) . . . .
> C. Persistent avoidance of stimuli associated with the traumatic event(s) . . . .
> D. Negative alterations in cognitions and mood associated with the

22. *Trauma*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/topics/trauma/ (last visited Aug 14, 2017).

23. S.D. Solomon & Jonathan Davidson, *Trauma: Prevalence, Impairment, Service Use, and Cost*, 59 J. CLIN. PSYCHOL. (SUPP. 9) 5, 7 (1997).

24. Richard P. Kluft et al., *Treating the Traumatized Patient and Victims of Violence*, 86 NEW DIRECTIONS IN MENTAL HEALTH SERV. 70, 82 (2000) (citing Bessel A. van der Kolk, *The Compulsion to Repeat the Trauma: Re-Enactment, Re-Victimization, and Masochism*, 12 PSYCHIATRIC CLIN. N. AM. 389, 389–90 (1989)).

25. *Id.*

26. *Id.*; *see also* Perlin, *Criminal Sentencing*, *supra* note 19.

traumatic event(s) . . . .
E. Marked alterations in arousal and reactivity associated with the traumatic event(s) . . . .[27]

As a result of PTSD, many people suffer from outbursts of anger, difficulty falling asleep, increased irritability, and hypervigilance.[28]

The psychological effects of trauma can manifest long after the traumatic experience occurred.[29] This is because, for some people, conditioned stimuli can be linked to the traumatic event, which can cause recurrence of fear and anxiety similar to that experienced during the initial traumatic event when re-exposed to a similar environment,[30] and the brain cannot always differentiate between what is real and a memory or reoccurrence.[31]

There is no universal response to or indicator of traumatic events, because the reactions to trauma are, in large part, psychobiologic, and are influenced by a variety of individual and social contexts, which effect how an individual processes trauma.[32] And although trauma is a common human experience, a wide range of factors influence how it is manifested in different individuals including ego strength, personality style, diatheses for mental and physical illness, and cultural background.[33] This Article will focus primarily on trauma-related mental disabilities.[34]

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27. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271–720 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-5]. On the significance of the symptom clusters and the retained inclusion of a "delayed-onset" specifier in DSM-5, see Andrew P. Levin et al., *DSM-5 and Posttraumatic Stress Disorder*, 42 J. AM. ACAD. PSYCHIATRY & L. 146, 150–51 (2014); *see, e.g.*, Matt J. Gray et al., *A Longitudinal Analysis of PTSD Symptom Course: Delayed-Onset PTSD in Somalia Peacekeepers*, 72 J. CONSULTING & CLINICAL PSYCHOL. 909 (2004) (on the significance of delayed-onset PTSD in cases not involving soldiers in combat); *see also* Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745, 746 (2010).

28. *See, e.g.*, Olympia Duhart, *Soldier Suicides and OutCrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 887 (2011); MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14-1.9.1 (3d ed. 2017).

29. *See* CENTER FOR SUBSTANCE ABUSE TREATMENT, UNDERSTANDING THE IMPACT OF TRAUMA IN TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 77 (2014).

30. Dennis Charney, *Psychobiological Mechanisms of Resilience and Vulnerability: Implications for Successful Adaptation to Extreme Stress*, 161 AM. J. PSYCHIATRY 195, 205–06 (2004).

31. Katz & Haldar, *supra* note 7, at 366.

32. Kluft et al., *supra* note 24, at 82; *see generally* ADRIENNE STITH BUTLER ET AL., UNDERSTANDING THE PSYCHOLOGICAL CONSEQUENCES OF TRAUMATIC EVENTS, DISASTERS, AND TERRORISM (2003).

33. Kluft et al., *supra* note 24, at 82.

34. It is necessary to pay particular attention to the current plight of individuals with mental disabilities who are incarcerated—either in jails awaiting trial or in Immigration and Customs Enforcement (ICE) facilities—prior to potential deportation. *See, e.g.*, Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due*

Because of their experiences, individuals who have experienced trauma are often more prone to becoming addicted to substances or to committing criminal offenses.[35] Problem-solving courts—which seek to find individualized alternatives for offenders and increase the likelihood that a person with a mental disability will be diverted out of the criminal justice system[36]—play an important role in protecting the rights of persons with trauma-related mental disabilities, particularly by decreasing the likelihood that "the person with mental disabilities will suffer at the hands of others because of that status."[37]

III. INTERNATIONAL HUMAN RIGHTS LAW AND TRAUMA

A. *Convention on the Rights of Persons with Disabilities (CRPD)*

The CRPD "radically changes the scope of international human rights law as it applies to all persons with disabilities, and in no area is this more significant than in the mental disability law context."[38] It "reconceptualizes mental health rights as disability rights and extends existing human rights to take into account the specific rights experiences

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Process Rights of Mentally Disabled Immigrants, 14 U. PA. J. CONST. L. 511, 511 (2011). For an experience termed "Kafkaesque" by one commentator, see Jennifer L. Aronson, *The Kafkaesque Experience of Immigrants with Mental Disabilities: Navigating the Inexplicable Shoals of Immigration Law*, 6 INTERDISC. J. HUM. RTS. L. 145, 147 (2011). There has been a smattering of litigation alleging mental and physical trauma in such circumstances. *See, e.g.*, Liriano v. ICE/DHS, 827 F. Supp. 2d 264, 264 (S.D.N.Y. 2011). For comparative law considerations, see generally Mauro Giovanni Carta et al., *Human Rights of Asylum Seekers with Psychosocial Disabilities in Europe*, 12 CLIN. PRAC. & EPIDEMIOLOGY IN MENTAL HEALTH 64 (2016); Derrick Silove et al., *No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-Affected Refugees Seeking Asylum in Australia*, 44 TRANSCULTURAL PSYCHIATRY 359 (2007).

35. *See* Jillian M. Cavanaugh, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 468 (2011); van der Kolk, *supra* note 24, at 389; *see generally* A.N. Groth, *Sexual Trauma in the Life Histories of Sex Offenders*, 4 VICTOMOLOGY 6–10 (1979); Theoharis Seghorn et al., *Childhood Sexual Abuse in the Lives of Sexually Aggressive Offenders*, 26 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 262, 265 (1987).

36. Terry Carney et al., *Mental Health Tribunals: "TJ" Implications of Weighing Fairness, Freedom, Protection and Treatment*, 17 JUDICIAL ADMIN. 46, 54 (2007); Risdon Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQ. 6, 18 (2003).

37. Michael L. Perlin, *"Who Will Judge the Many When the Game is Through?": Considering the Profound Differences Between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts*, 41 SEATTLE U. L. REV. (forthcoming 2018), manuscript at 21 [hereinafter Perlin, *Who Will Judge*] (citing Carney et al., *supra* note 36, at 54; Slate, *supra* note 36, at 6).

38. Perlin, *Striking*, *supra* note 16, at 1159.

of persons with disabilities."[39] The CRPD is also the only international convention on the rights of persons with disabilities that is legally binding and enforceable (also known as "hard law").[40] Other international documents, such as the U.N. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care ("MI Principles") and the Declaration on the Rights of Mentally Retarded Persons ("MR Declaration"), are soft law, and thus not legally binding or enforceable.[41]

It is necessary to carefully consider the language of the CRPD—and its potential application to the population in question—both in the context of its proscriptive rights and its prescriptive rights.[42] We believe that the CRPD can be, and should be, a blueprint for advocates representing persons traumatized as a result of their mental disabilities.

At the outset, it is necessary to clarify that the United States has signed, but has not ratified, the CRPD.[43] Under such circumstances, "a state's obligations under it are controlled by the Vienna Convention on the Law of Treaties . . . which requires signatories 'to refrain from acts

39. 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, 139 (2011) (citing Phil Fennell, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95, 107 (2008); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights*?, 30 HUM. RTS. Q. 494, 494 (2008)).

40. "Hard law . . . 'refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.'" Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1160 (2011) (quoting Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2001)).

41. On the significance of soft law in the development of international human rights, see Christian Courtis, *Disability Rights in Latin America and International Cooperation*, 9 S.W. J.L. & TRADE AM. 109 (2002). Soft law "may guide the interpretation, elaboration, or application of hard law; constitute norms that aspire to harden; serve as evidence of hard law; exist in parallel with hard law obligations and act as a fall-back; or serve as a source of relatively hard obligations through acquiescence or estoppel." *See* Jose Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 421 (2003). On how soft law becomes hard law via court decisions, see Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 111 (2008).

42. Perlin & Schriver, *supra* note 18, at 386. Prescriptive rights require certain conduct, whereas proscriptive rights forbid particular behavior. Edward J. Imwinkelried, *Expert Testimony by Ethicists: What Should be the Norm*?, 33 J.L. MED. & ETHICS 198, 200 (2005); *see* Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 920 (1994) (noting the significance of the inclusion of proscriptive and prescriptive rights in human rights treaties in general).

43. *See* Michelle Diament, *Obama Urges Senate to Ratify Disability Treaty*, DISABILITY Scoop (May 18, 2012), https://www.disabilityscoop.com/2012/05/18/obama-urges-senate-treaty/15654/.

which would defeat [the Disability Convention's] object and purpose.'"[44] Domestic courts in New York have cited the CRPD approvingly in cases involving guardianship matters.[45] In one such case, Surrogate Judge Kristin Booth Glen noted that the CRPD was "entitled to 'persuasive weight' in interpreting our own laws and constitutional protections."[46] Thus, we approach this issue from the perspective that the CRPD must be taken seriously in the United States by all domestic courts.[47]

Article 1 of the CRPD outlines the purpose of the Convention, which is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[48] The definition is all-inclusive and includes "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[49] This is particularly important in the context of persons with trauma-related mental disabilities because, as discussed above, such individuals are particularly susceptible to institutionalization and human rights violations, and consequently, to additional trauma simply by virtue of their disability.[50] The CRPD further calls for non-discrimination and "full and effective participation and inclusion in society."[51] This includes people who have experienced trauma-related mental disabilities.

Article 12 declares that persons with disabilities have equal recognition before the law.[52] This is particularly relevant within the

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44. *In re* Mark C.H., 906 N.Y.S.2d 419, 433 (Surr. Ct. 2010) (alteration in original) (citing Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331); *e.g.*, *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Surr. Ct. 2012) (holding that substantive-due-process requirement to adhere to principal of least restrictive alternative applies to guardianships sought for mentally disabled persons); *Mark C.H.*, 906 N.Y.S.2d at 435 (holding that due process requires that the guardianship appointment be subject to a requirement of periodic reporting and review); *see* Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 362–63 (2011).

45. *See* PERLIN & CUCOLO, *supra* note 28, § 2-8, at 2-73 to 2-78.

46. *Dameris L.*, 956 N.Y.S.2d at 855. *See generally* Perlin & Schriver, *supra* note 18, at 386; Perlin, *God Said*, *supra* note 14, at 486 n.57.

47. *See* Perlin, *Striking*, *supra* note 16, at 1160.

48. CRPD, *supra* note 17, art. 1; *see, e.g.*, Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative*?, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 283–84 (2011) ("The CRPD is predicated on the obligation to respect each person's inherent dignity, autonomy, and independence, including the freedom to make one's own choices").

49. CRPD, *supra* note 17, art. 1.

50. *See, e.g.*, Janet E. Lord, *Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT'L & COMP. L. REV. 27, 29 n.30 (2010).

51. CRPD, *supra* note 17, art. 3.

52. *Id.* art. 12.

context of both therapeutic jurisprudence (TJ)—the concept that the law can have therapeutic or anti-therapeutic consequences[53]—and trauma-informed lawyering (both of which will be discussed in detail below) as both of these approaches recognize the importance of authentically including the client in the legal process and recognizing him/her before the law.[54]

Article 13 of the CRPD proclaims that persons with disabilities shall have equal access to justice on an equal basis with others. This includes the provision of accommodations for persons with disabilities "in order to facilitate their effective role as direct and indirect participants . . . in all legal proceeding. . . ."[55] Access to adequate and dedicated counsel is one of the most critical issues in bringing life to international human rights law within a mental disability law context.[56] In many nations, there are no mental health laws at all,[57] effectively meaning those States' legislative bodies have completely failed to address people with mental disabilities, while other countries lack provisions for legal counsel altogether,[58] in that there is no statutory right to legal counsel at an adjudication or civil commitment proceeding. Most other countries have what is referred to as the "warm body" problem, where legal counsel appears to be present in name only.[59] At a very minimum, ensuring people with mental disabilities receive due process provides the appearance of fairness.[60] This is therapeutic because it contributes to the individual's sense of dignity and conveys the sense that he or she is being taken seriously.[61] It is important for persons with disabilities to have the option

53. 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).

54. *See, e.g.*, Bernard 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, 578–79 (2005).

55. CRPD, *supra* note 17, art. 13.

56. *See* Michael Perlin, *International Human Rights Law and Comparative Mental Disability Law: the Universal Factors*, 34 SYRACUSE J. INT'L & COM. L. 333, 342 (2007) [hereinafter Perlin, *International Human Rights Law*]; *see also* Oliver Lewis, *Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights*, 9 EUR. J. HEALTH L. 293, 316 (2002).

57. Perlin, *International Human Rights Law*, *supra* note 56, at 337–40 (listing multiple examples).

58. *Id.* at 340–42.

59. *See, e.g.*, Pamela Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175, 1198 (2007) ("This right to counsel is not satisfied by the mere appearance of a warm body wearing a business suit and holding a copy of the [statute book].").

60. *See, e.g.*, Jeffrey W. Rennecker, *Ex Parte Appellate Procedure in the Patent Office and the Federal Circuit's Respective Standards of Review*, 4 TEX. INTELL. PROP. L.J. 335, 375 (1996) (in another context, "[t]he fundamental standards of due process requiring a fair trial before a fair tribunal logically require the appearance of fairness . . . .").

61. *See* John Ensimger & Thomas Liguori, *The Role of Counsel in the Civil Commitment*

to actively participate in legal proceedings.[62] This can help to ensure that they feel included in the process which can initiate healing.[63] This is particularly true for persons with trauma-related mental disabilities.

Article 14 of the CRPD states that all persons with disabilities shall enjoy the right to liberty and security of person, and that States must ensure that people with disabilities are not deprived of their liberty unlawfully or arbitrarily.[64] The right to liberty is an integral part of all international human rights law and domestic human rights law.[65] U.S. constitutional law has also codified this right in a number of important court cases. In 1975, the U.S. Supreme Court held that states cannot confine a person who is mentally ill "without more."[66] Four years later the Supreme Court ruled that the standard of proof for involuntary civil commitment of a psychiatric patient is clear and convincing evidence.[67] The right to liberty and security of person is especially important within the context of persons with trauma-related mental disabilities because being deprived of one's liberty can trigger memories of past trauma, causing a string of painful emotions and reactions.[68]

Article 15 of the CRPD states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[69] An

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Process; A Theoretical Framework, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 309, 323 (David B. Wexler ed., 1990); *see also* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications For Civil Commitment Hearings*, 46 SMU L. REV. 433, 444 (1992) (discussing the therapeutic value of judicial civil commitment hearings, and emphasizing that individuals benefit from hearings in which they are able to take part, are treated with dignity, and are "fair"); Amy D. Ronner, *Punishment Meted Out for Acquittals: An Anti-therapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472–77 (1999) (discussing how unfair procedures lead to disrespect for the law, disregard for human life, rage and a sense of helplessness).

62. *See generally* Bruce J, Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 41–52 (1999).

63. *See infra* notes 119–22, at 51–52; *see also infra* text accompanying notes 119–22.

64. CRPD, *supra* note 17, art. 14.

65. *See, e.g.*, International Covenant on Civil and Political Rights art. 12, G.A. Res. 2200A (XXI) (Dec. 19, 1966). (It appeared in at least eight international covenants and conventions preceding the CRPD); *see* European Convention on Human Rights art. 5, No. 14 (CETS no. 194); *see* Lucien J. Dhooge, *Lohengrin Revealed: The Implications of* Sosa v. Alvarez-Machain *for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. INT'L & COMP. L. REV. 393, 460–61 (2006).

66. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

67. *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (holding that "the state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").

68. *See* Charney, *supra* note 30 and accompanying text.

69. CRPD, *supra* note 17, art. 15. It is important to underscore that "torture" goes beyond prototypical notions of physical abuse and includes psychological abuse as well. *See generally* THE TRAUMA OF PSYCHOLOGICAL TORTURE (Almerindo E. Ojeda ed., 2008); Hernan Reyes, *The*

important case brought before the European Court of Human Rights (ECtHR) illustrates this right where the Court recognized that poor conditions of confinement can constitute inhuman or degrading treatment. In *Stanev v. Bulgaria,* the Court found that being improperly detained without a court hearing, for seven years in a dilapidated facility lacking adequate food, running water, access to toilets, privacy, or almost any form of meaningful activity amounted to "degrading" treatment.[70] The Court further found that long-term detainment in the facility without a court hearing constituted deprivation of liberty.[71] As with potential deprivations of Article 14, such a deprivation of this right can implicate reliving a traumatic experience; exposing a person to such treatment not only creates a traumatic experience for that individual, but it can also recreate a traumatic experience for an individual with a trauma-related mental disability by triggering memories of past experiences.[72]

According to Article 16 of the CRPD, State Parties are under an obligation to protect persons with disabilities from all forms of exploitation, violence, and abuse.[73] It has been argued that this Article should be read to also promote alternatives to seclusion and restraint,[74] which can lead to increased trauma and cause long-term effects on patients.[75] Further, due to the harms that are associated with seclusion and restraint on individuals generally—but particularly on persons who have previously suffered trauma—such interventions are arguably classified as violations of Article 16 whereas they are forms of exploitation, violence, and abuse.[76] In fact, former Special Rapporteur on the Convention against

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Worst Scars Are in the Mind: Psychological Torture, 86789 INT'L REV. RED CROSS 591 (2007).

70. Stanev v. Bulgaria, App. No. 36760/06, Judgment, ¶¶ 209–210 (Eur. Ct. H.R., 2012), *available at* http://bit.ly/Typ5zW.

71. *Id.*

72. *See* Charney, *supra* note 30, and accompanying text; *see also, e.g.*, Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 484 (2016) (discussing how traumatic events may trigger painful memories or feelings).

73. CRPD, *supra* note 17, art. 16.

74. Bernadette McSherry, *Regulating Seclusion and Restraint in Health Care Settings: The Promise of the Convention on the Rights of Persons with Disabilities*, 53 INT'L J. LAW & PSYCHIATRY 39, 40 (2017).

75. *Id.* at 3 (citing MELB. SOC. EQUITY INST., SECLUSION & RESTRAINT PROJECT: REP., Report Prepared for the Nat'l Mental Health Comm'n (Univ. of Melbourne, 2014)); Stuart A. Kinner et al, *Attitudes Towards Seclusion and Restraint in Mental Health Settings: Findings From a Large, Community-Based Survey of Consumers, Carers and Mental Health Professionals*, EPIDEMIOLOGY & PSYCHIATRIC SERVS. 1–10 (2016) (A study conducted in by the Melbourne Social Equity Institute, University of Melbourne surveying 1451 mental health consumers found that "[b]etween 80 and 90% of participants believed that seclusion and all forms of restraint infringed human rights and that seclusion, physical and mechanical restraint compromised therapeutic trust and would often or always cause trauma or trigger past trauma.").

76. McSherry, *supra* note 74, at 41.

Torture, Manfred Nowak, has noted that seclusion and solitary confinement can constitute torture or ill-treatment.[77] It is important to note that 30% of inmates in solitary confinement suffer from a mental disability.[78]

There is very little scholarship focusing on the application of the CRPD in cases involving trauma.[79] In an article focusing on the CRPD's application to matters involving children and juveniles, Janet Lord has noted that that population is "at higher risk for abuse and violence, which can, in turn, aggravate existing disabilities or create secondary disabilities, such as psychosocial trauma."[80] In a paper considering the ways that persons with albinism are subject to torture in Tanzania, Stacy Larson has invoked the CRPD in seeking to craft remedies for a population "living in fear of attack along with the awareness of how severe an attack can be [that] creates mental trauma . . . amounting to torture."[81] And disability rights activist Tina Minkowitz has argued that the CRPD can and should be used by "users and survivors of psychiatry" as a means of avoiding "nonconsensual interventions [that] have been a source of trauma."[82] But other than these pieces, there has been no legal scholarship at all on this important issue.[83]

While the CRPD is the most recent and inclusive document on the rights of persons with disabilities, prior to the CRPD, there were other international instruments that provided substantive protections for

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77. Interim Report on Torture and other cruel, inhuman or degrading treatment or punishment, transmitted by Note of the Secretary-General, ¶ 56, U.N. Doc. A/63/175, 53 (July 28, 2008).

78. Perlin, *God Said*, *supra* note 14, at 508 (citing Jessica Knowles, *"The Shameful Wall of Exclusion": How Solitary Confinement for Inmates with Mental Illness Violates the Americans with Disabilities Act*, 90 WASH. L. REV. 893, 907 (2015).

79. *See infra* note 124. *But see* Liz Brosnan & Eilionoir Flynn, *Freedom to Negotiate: A Proposal Extricating "Capacity" from "Consent,"* 13 INT'L J.L. IN CONTEXT 58, 68 (2017) (discussing "the role that supported decision-making such as by - trauma-informed, intentional peer support . . . can play in establishing the person's will and preference") (citations omitted).

80. Lord, *Child Rights*, *supra* note 5, at 16 (quoting JANET E. LORD ET AL., HUMAN RIGHTS. YES! ACTION AND ADVOCACY ON THE RIGHTS OF PERSONS WITH DISABILITIES (Nancy Flowers ed., 2d ed. 2012)).

81. Stacy Larson, *Magic, Mutilation, and Murder: A Case for Granting Asylum to Tanzanian Nationals with Albinism*, 2 PACE INT'L L. REV. ONLINE COMPANION 1, 24 (2011).

82. Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and The Right to Be Free From Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT'L L. & COM. 405, 427 (2007). Note also that Minkowitz criticizes the CRPD for not being sufficiently protective of the rights of persons with psychosocial disabilities, especially in the context of the right to refuse treatment. *Id.* at 407; *see* Gallagher, *supra* note 11; Gottstein, *supra* note 11. *See generally* PERLIN & CUCOLO, *supra* note 28, ch. 8.

83. There has been some mention in the behavioral science literature. *See, e.g.*, Watson et al., *supra* note 12; Jeffrey Chan et al., *Applying the CRPD to Safeguard the Rights of People with a Disability in Contact with the Criminal Justice System*, 19 PSYCHIATRY, PSYCHOL & L. 558 (2012).

persons with mental disabilities, including the International Convention on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).[84] It is valuable to assess the impact of some of these documents on the questions we raise in this Article.

B. *International Covenant on Civil and Political Rights (ICCPR)*

The International Covenant on Civil and Political Rights (ICCPR) is an important international human rights treaty that was entered into force in 1976. It is part of the International Bill of Human Rights, and it ensures basic human rights principles of dignity and autonomy, as well as the right to be recognized as a person before the law.[85] Article 7 of the ICCPR ensures protection from torture[86] or other forms of inhuman or degrading treatment and provides that no one shall be subjected to medical or scientific experimentation.[87] Article 14 states that all persons shall have equal rights before the courts.[88] These important provisions help ensure that persons with trauma-related mental disabilities are protected from torture, and other acts that could cause memories of past traumatic events to resurface and when such events do occur, the Covenant ensures that judicial remedies are available.

C. *The Declaration on the Rights of Mentally Retarded Persons (MR Declaration)*

The Declaration on the Rights of Mentally Retarded Persons (the MR Declaration) was adopted by the General Assembly in 1971.[89] It encourages persons with mental disabilities to live with their families and to participate in community life.[90] It further states that if an institution is

84. Karl C. Procaccini, *Constructing the Right "Not to Be Made a Refugee" at the European and Inter-American Courts of Human Rights*, 22 HARV. HUM. RTS. J. 271, 283 nn.65 & 67 (2009). While the ECHR is an important document, we will not discuss it in detail for the purposes of this Article.

85. G.A. Res. 2200A (XX1), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

86. On the question of how treatment of persons with mental disabilities *in healthcare facilities* may sometimes amount to torture under international human-rights law, see Bernadette McSherry & Piers Gooding, *Torture and Ill-Treatment in Health Care Settings: Lessons from the United Nations*, 20 J.L. & MED. 712, 712 (2013). On how "torture" may include psychological abuse, see generally Reyes, *supra* note 69.

87. ICCPR, *supra* note 85, art. 7.

88. U.N. Secretary-General, *Progress of Efforts to Ensure the Full Recognition and Enjoyment of the Human Rights of Persons with Disabilities*, U.N. Doc. A/58/181 (Apr. 25, 2002), *available at* http://www.un.org/disabilities/default.asp?id=148#part4.43-58.

89. G.A. Res. 2856 (XXVI) (Dec. 20, 1971).

90. G.A. Res. 46/119, U.N. GAOR, 46th Sess., Supp. No. 49, at 189, U.N. Doc. A/46/49, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health

necessary, it should be provided in surroundings and other circumstances as close to normal life as possible.[91] It further states that persons with mental disabilities have a right to protection from exploitation, abuse, and degrading treatment. It guarantees protections and allows for legal safeguards for when persons with mental disabilities rights' are not able to be exercised in a meaningful way.[92] These protections are relevant to persons with trauma-related disabilities because they all help to foster an environment where such individuals feel safe and secure, thereby reducing the chances of experiencing reoccurring memories related to past traumatic experiences. An unanswered question is the extent to which criminal procedure decisions that allow for defendants to face and question their accusers[93] can actually, in some cases, negatively affect victims who have experienced trauma by forcing them to relive the painful experience.[94]

D. *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles)*

In 1991 the MI Principles first established due process standards for admission into institutions in international law.[95] This was the first international document that provided basic minimum standards for treatment of people with mental disabilities in institutional and community settings.[96] The MI Principles restrict seclusion and physical

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Care (1991) [hereinafter MI Principles].

91. MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW DOCUMENTS SUPPLEMENT 227–28 (2006).

92. *Id.*

93. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004) (affirming a defendant's right to stand and face accusers, but also affirming the power of victims of domestic violence to exercise control over their own cases, specifically over whether or not to pursue charges).

94. *See, e.g.*, Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of* Crawford v. Washington *on Domestic Violence and Rape Prosecutions*, 37 B.C. J.L. & SOC. JUST. 1, 2 (2017) (charging that *Crawford* "punishes victims.").

95. PERLIN ET AL., *supra* note 91, at 243–53.

96. MI Principles, *supra* note 90. The CRPD addresses civil commitment in articles 14, 15, 17, and 19. CRPD, *supra* note 17. The MI Principles set the standard, but did not become enforceable until the Inter-American Court on Human Rights decided Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L./V/II.95, doc. 7 ¶ 6–27 (1999), thus solidifying the soft law of the Principles into hard law. *See* Perlin, *Promoting Social Change*, *supra* note 15, at 5–6 n.18. The publication of the MI Principles "inspired lawyers, advocates, professors and progressive mental health professionals to begin thinking seriously about the intersection between international human rights law and mental disability law." Michael L. Perlin, *"There Must Be Some Way Out of Here": Why the Convention on the Rights of Persons with Disabilities is Potentially the Best Weapon in the Fight Against Sanism*, 20 PSYCHIATRY, PSYCHOL. & L. 462 (2013) (as discussed in Perlin, *Promoting Social Change*, *supra* note 15, at 5–6 n.17). The MI Principles retain significance today in those nations that have neither signed nor ratified the CRPD. *See* MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL

restraints.[97] This restriction is not absolute, but only allows seclusion or restraint when "it is the only means available to prevent immediate or imminent harm to the patient or others," and it is not allowed to be used for longer than "the period which is strictly necessary for this purpose."[98] Further, a personal representative must be given notice of the physical restraint or seclusion of a patient.[99] The MI Principles were revolutionary in terms of setting the standard for civil commitment for persons with disabilities in international law. The MI Principles also have a specific section for rights in and conditions of mental health facilities.[100]

There were very few procedural protections for persons with trauma related mental disabilities before the MI Principles. The CRPD is less specific than the MI Principles with regard to the right to refuse treatment, however, it has more "teeth" than the MI Principles (which have been severely critiqued in this regard),[101] because the CRPD is a binding international document with enforcement mechanisms.[102]

E. *U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*

CAT, which was adopted in 1984, is another important treaty for the rights of persons with mental disabilities.[103] According to CAT, a practice must be an act or omission of a government authority, cause severe pain, and intent and purpose must be present in order to constitute torture.[104] Even when a practice does not rise to the level of torture, it may still constitute ill-treatment ("cruel, inhuman or degrading treatment or

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DISABILITY LAW: WHEN THE SILENCED ARE HEARD 9–10 n.13 (2011).

97. PERLIN ET AL., *supra* note 91, at 243–53.

98. *Id.*

99. *Id.*

100. MI Principles, *supra* note 90.

101. *See, e.g.*, T.W. Harding, *Human Rights Law in the Field of Mental Health: A Critical Review*, 101 ACTA PSYCHIATRICA SCANDINAVICA 24, 24 (2000) (discussing how the MI Principles are "basically flawed" and specifically referring to the right to refuse treatment).

102. 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). *But see also, e.g.*, Minkowitz, *supra* note 82, at 407 (criticizing the MI Principles for not being sufficiently protective of the rights of persons with psychosocial disabilities, especially regarding the right to refuse treatment); *Harding*, *supra* note 101, at 24.

103. CAT was intended to strengthen existing international law prohibitions on torture. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1 (1988); *see also* Juan Mendez (Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment), para. 78, U.N. Doc. A/66/268, 172 (Aug. 5, 2011); *see also, e.g.*, Selmouni v. France, App. No. 25803/94, 29 Eur. H.R. Rep. 403, 443 (1999) (holding that physical and mental violence committed against applicant while in police custody, which caused severe pain and suffering, was an act of torture in violation of Article 3).

104. G.A. Res. 39/46, Convention Against Torture (Dec. 10, 1984).

punishment") which is prohibited under Article 16.[105] The intent to cause pain requirement does not require specific evidence of the motivations of treating professionals, rather it can be implied. Also, a practice is not excluded from being labeled as torture by stating that its purpose is therapeutic.[106] Thus, certain types of coerced treatment or the use of seclusion and restraints can be considered a CAT violation as well as a violation of the CRPD and other international human rights treaties.[107] Such protections are important for individuals with trauma-related mental disabilities because, as mentioned above, being subjected to any sort of cruel treatment or punishment—or even the *threat* of such treatment—can stir up memories of past trauma for individuals forcing them to relive painful experiences over and over again.[108]

F. *WHO International Classification of Functioning, Disability and Health (ICF)*

Another important international document relevant to the human rights of persons with trauma-related disabilities is the WHO International Classification of Functioning, Disability and Health (ICF). The ICF is the "WHO framework for measuring health and disability at both individual and population levels."[109] It was officially endorsed "as the international standard to describe and measure health and disability" by all the 191 WHO Member States at the Fifty-Fourth World Health Assembly in May 2001.[110]

The ICF has been cited as demonstrating a broader, more modern view of the concepts of "health" and "disability" by acknowledging that every individual is capable of experiencing at least some degree of disability throughout their lifetime, whether it be through a change in health or environment.[111] It acknowledges that "disability is a universal human experience, sometimes permanent, sometimes transient" and that it is not restricted to a small portion of the population.[112]

However, this document looks at disability in more of a traditional

105. Eric Rosenthal & Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19 HUM. RTS. BR. 2, 13 (2012).

106. *See id.*; *see also* ERIC ROSENTHAL & LAURIE AHERN, TORMENT NOT TREATMENT: SERBIA'S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES 47, 49 (2007).

107. Rosenthal & Ahern, *supra* note 105, at 2–3.

108. *See generally* Perlin, *God Said*, *supra* note 14, at 483–86.

109. 78 C.F.R. § 143 (2013).

110. World Health Organization, Classifications: International Classification of Functionality, Disability and Health, http://www.who.int/classifications/icf/en/ (last visited Oct 18, 2017).

111. *Id.*

112. *Id.*

and medical sense. The traditional medical model of disability[113] is not sufficient to examine the needs of trauma-related mental disabilities, because it tends to be exclusionary toward people with disabilities. Instead, it is important to utilize a social model, which looks more at the individual and what he/she can do rather than what he/she cannot do. While we recognize and can appreciate the importance of such a document that provides medical definitions of disability, the authors conclude that the CRPD takes a much more protective and human rights-based approach to persons with disabilities, and therefore prefer its definitions and stance on disability.

All of the above international human rights documents provide important protections for the rights of people with disabilities. However, these other instruments do not have the enforcement mechanisms that the CRPD has.[114] The authors believe that the CRPD is the most comprehensive, all-inclusive, protective, and relevant document for the purposes of this discussion.

IV. THERAPEUTIC JURISPRUDENCE[115]

How can therapeutic jurisprudence be employed in efforts to implement meaningful remedies to help realize the rights of persons with trauma-related mental disabilities? Therapeutic jurisprudence (TJ) recognizes that the law can have therapeutic or anti-therapeutic consequences.[116] It assesses the law's influence on emotional and psychological well-being,[117] and allows us to "look at law as it actually impacts people's lives."[118] According to TJ, the "law should value

113. *See supra* text accompanying note 17.

114. DeMarco, *supra* note 102, at 524.

115. This section is generally adapted from Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014); Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304 (2016); Michael L. Perlin & Naomi Weinstein, *"Said I, 'But You Have No Choice'": Why a Lawyer Must Ethically Honor a Client's Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L., POL'Y & ETHICS J. 73 (2016/2017) [hereinafter Perlin & Weinstein, *No Choice*]; and Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUST. 431 (2017). Further, it distills the work of one of the co-authors (MLP) over the past two decades-plus, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

116. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 32–33 (1992).

117. David B. Wexler, *Therapeutic Jurisprudence*, 20 TOURO L. REV. 353, 355 (2004).

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

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."[119] The ultimate goal of TJ 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."[120]

Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness, and argues:

> 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 pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[121]

Although there has been significant scholarly investigation of the relationship between TJ and international law,[122] there has been virtually

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119. BRUCE J. 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).

120. MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY AND THE LAW: THE LAST FRONTIER 145 (2016). For an important recent paper emphasizing the necessary integral relationship between therapeutic jurisprudence and due process, see Nigel Stobbs, *Therapeutic Jurisprudence and Due Process—Consistent in Principle and Practice*, 26 J. JUD. ADMIN. 1 (2017).

121. 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 also* Amy D. Ronner, *Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to the Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

122. *See, e.g.*, Alfred Allan & Marietjie M. Allan, *The South African Truth and Reconciliation Commission as a Therapeutic Tool*, 18 BEHAV. SCI. & L. 459 (2000); 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); Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1112 (2008); Michael S. King & Rob Guthrie, *Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response*, 89 PRECEDENT 39 (2008); Muhammad Ahmad Munir, *Therapeutic Jurisprudence in Pakistan: Juvenile*

none in the specific context of international human rights law.[123] Self-evidently, TJ is extremely important within the context of international human rights law, and it is essential that the TJ community turns to international human rights law as a future source and potential direction for TJ scholarship.[124] One of the authors (MLP) has called on TJ scholars to immerse themselves in international human rights law and has listed ten areas in which they might focus their research.[125] One such area was an investigation of "[t]he [TJ] implications of instituting reform of forensic facilities."[126] While there is a plethora of scholarship on the relationship between TJ and prisons and other detention facilities,[127] there is still perilously little on the relationship between TJ and international human rights law.[128] As such, this is an area that calls for new investigations and considerations.[129] Professor Astrid Birgden, by way of example, notes how combining TJ and international human rights law "provides for liberty, due process, the right to receive or refuse treatment, and the exercise of informed decision making."[130]

TJ also informs how lawyers should interact with their clients. Lawyers should be particularly aware of their interactions with clients who have experienced trauma, and how their actions may affect these

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Delinquency and the Role of the Defense Lawyer, *in* TRANSFORMING LEGAL PROCESSES IN COURT AND BEYOND 85 (Greg Reinhardt & Andrew Cannon, eds. 2007); Caroline M.A. Nicholson, *The Impact of Child Labor Legislation on Child-Headed Households in South Africa*, 30 T. JEFFERSON L. REV. 407 (2008).

123. *See* Michael L. Perlin, *"The Ladder of the Law Has No Top and No Bottom": How Therapeutic Jurisprudence Can Give Life to International Human Rights*, 37 INT'L J.L. & PSYCHIATRY 535 (2014) [hereinafter Perlin, *The Ladder of the Law*].

124. *Id.*

125. For the only important recent exception, see YA'IR RONEN, RE-UNDERSTANDING THE CHILD'S RIGHT TO IDENTITY: ON BELONGING, RESPONSIVENESS AND HOPE (2016) (examining the identity issue through the prisms of TJ and international human rights law).

126. Perlin, *The Ladder of the Law*, *supra* note 123, at 542.

127. *See, e.g.*, Astrid Birgden & Michael L. Perlin, *'Tolling for the Luckless, the Abandoned and Forsaked': Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 LEGAL & CRIMINOLOGICAL PSYCHOL. 231, 234–35 (2008); 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, 257 (2009); Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777, 777–78 (1993); Ivan Zinger, *Human Rights Compliance and the Role of External Prison Oversight*, 48 CAN. J. CRIMINOLOGY & CRIM. JUST. 127, 127 (2006); Dirk van Zyl Smit, Regulation of Prison Conditions, 39 CRIME & JUST. 503, 557 (2010).

128. On this question, see also Perlin, *Your Old Road*, *supra* note 4.

129. *See generally* Perlin, *God Said*, *supra* note 14, at 514.

130. Astrid Birgden, *Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix*, 42 CRIM. JUST. & BEHAV. 19, 25 (2015).

individuals.[131] These clients may, for example, be withdrawn, have high anxiety, or be suspicious and untrusting.[132] It is important for lawyers to be sensitive to these needs to effectively represent these clients. Further, re-exposure to a past event may trigger feelings of fear and anxiety that were felt during the original event for many people who have experienced past trauma.[133] This is why it is imperative to treat people with trauma-related injuries in accordance with the principles of TJ in order to best avoid bringing up past memories that could trigger such feelings.[134] The principles of TJ are also in line with the CRPD's requirement to treat individuals with disabilities with inherent dignity and respect[135] and to ensure "full and effective participation and inclusion in society" for persons with disabilities.[136]

In recent years, TJ scholars have turned their attention to the potential value of problem-solving courts (mental health courts and others)[137] as a way of "attempt[ing] to get at the root of the individual and social problems that motivate criminal behavior"[138] by "changing the future behavior of litigants and ensuring the future well-being of communities."[139] When such courts operate as they are intended to, they are grounded[140] and rooted[141] in TJ, and they reflect TJ "theory in

131. *See* Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11, 29 (2008) (discussing how alternative dispute resolution might be a solution to some of the problems raised); Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 PHX. L. REV. 1017, 1020 (2013) (discussing how TJ might potentially heal trauma in the case of crime victims); Alison Journey Culyba & William Wesley Patton, *A Legislative Case Study of the Evolution of Polyvictimization Research and Policy Implementation: Mental Health Professionals' Duty to Engage in Public Policy Advocacy*, 8 WM. & MARY POL'Y REV. 1, 5 n.18 (2016) (discussing how TJ can serve to heal trauma "that can arise from legislation and court processes.").

132. Judy I. Eidelson, *Post-Traumatic Stress Disorder: Representing Traumatized Clients*, PHILA. BAR ASSOC. FAM. L. SEC. (Nov. 2013).

133. Charney, *supra* note 30, at 195.

134. *See, e.g.*, Bouvier v. Astrue, 923 F. Supp. 2d 336, 342 (D. R.I. 2013).

135. CRPD, *supra* note 17, art. 1.

136. *Id.* art. 3(c).

137. *See, e.g.*, Michael 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: RIGHTS, LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton, eds., 2013); Michael L. Perlin, *"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1 (2013); Perlin, *Who Will Judge*, *supra* note 37.

138. Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 L. & SOC. INQUIRY 853, 853 (2008).

139. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 125, 126 (2001).

140. James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1542 (2003).

141. Andrew Wasicek, *Mental Illness and Crime: Envisioning a Public Health Strategy and*

practice."[142] We turn now to a short discussion of these courts in an effort to determine whether they might serve as a palliative (or, at least, a partial palliative) for traumatized individuals.

A. *The Role of Problem-Solving Courts in the Implementation of this Remedy*

Problem-solving courts serve two important roles. First, they help get to the root of the problem by understanding and addressing the cause, and second, they aid in preventing recidivism and preventing recurring court involvement.[143] Problem-solving courts take a holistic approach where other courts may just put a "band-aid" on the issue[144] in that they look to alternatives to assist offenders in the long-term rather than perpetuating a revolving door between court and prison. Such alternatives include drug treatment centers or domestic violence counseling instead of incarceration.[145] Problem-solving courts are imperative within the context of caring for the needs of persons with trauma-related mental disabilities because they treat the person as an individual with specialized needs and look for a treatment for the problem rather than simply locking up the accused where he/she will likely not have access to essential services and be exposed to more trauma.[146]

Mental health courts are premised on team approaches.[147] On such

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Reimagining Mental Health Courts, 48 CRIM. L. BULL. 6 (2012); John E. Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 280–81 (2010).

142. Michael Cobden & J. Ron Albers, *Beyond the Squabble: Putting the Tenderloin Community Justice Center in Context*, 7 HASTINGS RACE & POVERTY L. J. 53, 56 (2010); Matthew J. D'Emic, *Mental Health Courts: Bridging Two Worlds*, 31 TOURO L. REV. 369, 376 (2015) (acknowledging that a defendant's appearance in such a court comes at a "painful and crucial point in life.").

143. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055 (2003) [hereinafter Winick, *Therapeutic Jurisprudence*].

144. Michael C. Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 832–34 (2000).

145. Winick, *Therapeutic Jurisprudence*, *supra* note 143, at 1057; *see also* Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence*, *in* PRINCIPLES OF ADDICTION MEDICINE 1519, 1519 (Richard Ries et al. eds., 2009) (discussing the relationship between therapeutic jurisprudence and specialized problem-solving courts, such as drug treatment courts).

146. Greg Berman, *What Is a Traditional Judge Anyway?: Problem-Solving in State Courts*, 84 JUDICATURE 78, 78 (2000); Greg Berman & John Feinblatt, *Problem-Solving Justice: A Quiet Revolution*, 86 JUDICATURE 182 (2003).

147. *See, e.g.*, Arthur J. Lurigio & Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 210 (2009), http://web2.westlaw.com/find/default.wl?mt=208&db=100307&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=0353926850&serialnum=0350386067&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=S&pbc=B931BC9F&referenceposition=210&rs=WLW12.01; Marlee E. Moore & Virginia A. Hiday, *Mental Health Court Outcomes: A Comparison*

teams, justice and treatment agencies provide representatives who screen offenders as to potential risk of violence in the community, help create individualized treatment plans, and supervise participants' performance in treatment.[148] The mental health court judge is a team member,[149] helping to decide questions of treatment needs and safety issues if the defendant is to be released.[150] A case manager and court monitor track the defendant's progress and participation, and submit periodic reports to the court.[151] Participants report to the court periodically for the monitoring of treatment compliance; extra status review hearings are held when needed.[152]

To be effective in this context, "the judge needs to develop enhanced interpersonal skills and awareness of a variety of psychological techniques that can help the judge to persuade the individual to accept treatment and motivate him or her to participate effectively in it."[153]

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of Re-Arrest and Re-Arrest Severity Between Mental Health Court and Traditional Court Participants, 30 LAW & HUM. BEHAV. 659, 660 (2006). On variances in team approaches, see Sheryl Kubiak et al., *Assessing the Role of Legal Actors Across Eight Mental Health Courts*, 17 MICH. ST. U. J. MED. & L. 301, 304 (2013). The material accompanying *infra* notes 148–61 is generally adapted from Perlin, *Who Will Judge*, *supra* note 37, manuscript at 17–22.

148. Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL'Y & L. 107, 125–26 (2003). On the role of jail as a potential sanction in the cases of non-compliant defendants, see Allison Redlich et al., *Patterns and Practice in Mental Health Courts: A National Survey*, 30 LAW & HUM. BEHAV. 347, 355–56 (2006).

149. *See* Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507, 521 (2005).

150. On the often-conflicting roles of case managers in mental health courts, see Ursula Castellano, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484, 490-91 (2011). On the how caseworkers, in other contexts, "transform traditional courtroom justice," see URSULA CASTELLANO, OUTSOURCING JUSTICE: THE ROLE OF NONPROFIT CASEWORKERS IN PRETRIAL RELEASE PROGRAMS 9 (2011).

151. Stefan & Winick, *supra* note 149, at 521.

152. *Id.* at 520–21. For a recent article articulating strategies to optimize criminal justice-treatment collaborations, see J. Steven Lamberti, *Preventing Criminal Recidivism Through Mental Health and Criminal Justice Collaboration*, 67 PSYCHIATRIC SERV. 1206 (2016). On how the adoption of a consumer-participation model in mental health courts can improve mental health court participants' capacity for voluntary participation, see McDaniel M. Kelly, *Rehabilitation Through Empowerment: Adopting the Consumer-Participation Model for Treatment Planning in Mental Health Courts*, 66 CASE W. RES. L. REV. 581, 584 (2015).

153. MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 72 (2013) (citing Winick, *supra* note 148, at 126 (citing Carrie Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002))). On the "collateral institutional authority of the judge" in mental health courts, see Eric J. Miller, *The Therapeutic Effects of Managerial Re-entry Courts*, 30 FED. SENT'G REP. 127, 128 (2008). On the way that judgmental descriptive language can adversely affect the work of such courts in civil cases, see Ian Freckelton, *Distractors and Distressors in Involuntary Status Decision-Making*, 12 PSYCHIATRY, PSYCHOL. & L. 88 (2005).

Optimally, this will best achieve the courts' objectives,[154] by building trust and managing risk.[155] It is essential that the judge is able:

> to convey empathy and respect, to communicate effectively with the individual, to listen to what the individual has to say—thereby fulfilling the individual's need for voice and validation—to earn the individual's trust and confidence, and to engage in motivational interviewing and various other techniques designed to encourage the individual to accept treatment and comply with it.[156]

Judges in such courts must have the capacity to "break free from the statutory shackles that [*sic*] 'transformed them into mid-level bureaucrats.'"[157] It is also far more likely that these judges will be culturally competent, and thus able to "unpack" the testimony of persons subject to civil commitment who do not come from the mainstream culture.[158] These courts provide "nuanced" approaches,[159] and may signal a "fundamental shift" in the criminal justice system.[160]

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154. Urusla Castellano, *The Politics of Benchcraft: The Role of Judges in Mental Health Courts*, 42 LAW & SOC. INQUIRY 398, 416 (2017).

155. Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 PSYCHOL. PUB. POL'Y & L. 587 (2005). On the significance of trust in the context of youth and family courts, see Karni Perlman, *It Takes Two for T.J: Correlation Between Bench and Bar Attitudes Towards Therapeutic Jurisprudence –An Israeli Perspective*, 33 T. JEFFERSON L. REV. 351 (2008).

156. PERLIN, *supra* note 153, at 72. For thoughtful critiques of mental health courts, see E. Leah Johnston, *Theorizing Mental Health Courts*, 89 WASH. L. REV. 519, 521 (2012); E. Leah Johnston & Conor Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685 (2017). On the role of the legislature in insuring the success of such courts, see Sheila Moheb, *Jamming the Revolving Door: Legislative Setbacks for Mental Health Court Systems in Virginia*, 14 RICH. J.L. & PUB. INT. 29 (2010).

157. Castellano, *supra* note 154, at 399 (quoting, in part, Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 84 (2006).

158. *See* Perlin & Weinstein, *No Choice*, *supra* note 115, at 100 ("Cultural competence is a key component in providing effective representation and resolving any ethical dilemmas that may arise in elder law, just as it is in mental disability law"); *see also, e.g.*, Ruby Dhand, *Creating a Cultural Analysis Tool for the Implementation of Ontario's Civil Mental Health Laws*, 45 INT'L J. L. & PSYCHIATRY 25, 32 (2016) (recommending further that "cultural and other intersectional factors [be probed] during the [civil commitment] hearing processes."). *See generally* Michael L. Perlin & Valerie R. McClain, *"Where Souls Are Forgotten": Cultural Competencies, Forensic Evaluations and International Human Rights*, 15 PSYCHOL., PUB. POL'Y & L. 257 (2009); Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564 (2014).

159. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 SETON HALL L. REV. 591, 598 (2006).

160. *Developments in the Law–The Law of Mental Illness: Mental Health Courts and the Trend Toward a Rehabilitative Justice System*, 121 HARV. L. REV. 1168, 1177 (2008).

It is essential to keep in mind that one of the central principles of TJ is a commitment to dignity.[161] Indeed, "the *perception* of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously."[162] Professors Jonathan Simon and Stephen Rosenbaum have embraced therapeutic jurisprudence, focusing specifically on this issue of voice: "When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion."[163] Naomi Weinstein and one of the co-authors (MLP) have recently argued that "attorneys must embrace the principles and tenets of TJ as a means of best ensuring the dignity of their clients and of maximizing the likelihood that voice, validation and voluntariness will be enhanced."[164] We believe that an embrace of the modern mental health court model is the single best way that this dignity can be provided, and that traumatized persons will be treated more fairly.[165] In addition, it is also imperative to ensure that lawyers working with individuals with trauma-related mental disabilities are sensitive to the rights and needs of such individuals by utilizing a trauma-informed approach to lawyering.[166]

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161. *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005). Dignity inquiries permeate the criminal justice system, especially as the concept applies to persons with mental disabilities.

162. 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. POL'Y & L. 80, 114 (1995) (emphasis added).

163. Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 51 (2015).

164. Perlin & Weinstein, *No Choice*, *supra* note 115, at 115.

165. *See* Ginger Lerner-Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 583 (2010) ("Mental health courts, if implemented with competence and extreme care, can save countless lives, prevent undue suffering and trauma, and lead to transformative health outcomes and recovery."). On how culturally-competent problem-solving courts are vehicles to enable trauma-informed practices to improve criminal justice system responses, see Jami Vigil, *Building a Culturally Competent Problem-Solving Court*, 45 COLO. LAW. 51, 53 (Apr. 2016). *See generally* David Yamada, *Dignity, "Rankism," and Hierarchy in the Workplace: Creating a "Dignitarian" Agenda for American Employment Law*, 28 BERKELEY J. EMP. & LAB. L. 305 (2007) (reviewing ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY (2006), and ROBERT W. FULLER, DIGNITY FOR ALL: HOW TO CREATE A WORLD WITHOUT RANKISM (2008)). The authors are grateful to Professor Yamada for introducing us to the work of Professor Fuller.

166. Veterans' courts—another sort of problem solving court—have been criticized *specifically* because they "have no inherent measures in place that are sensitive to or cognizant of combat trauma." Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN. ST. L. REV. 895, 923 (2013).

B. *The Benefits of Trauma-Informed Practice*

Trauma-informed services are designed to respond to the impact that past trauma has on individuals, as well as disclosure of current harm.[167] It recognizes the importance of trust, safety, and respect in relationships between service providers and individuals who have experienced harm.[168]

"Trauma-informed practice recognizes the ways in which trauma impacts systems and individuals."[169] Trauma-informed practice is the idea that the practitioner puts the needs of the trauma-exposed client at the forefront of his/her approach to lawyering.[170] This involves the lawyer adjusting his/her practice approach to better work with a client who has experienced trauma. Put another way, a trauma-informed perspective asks clients "What happened to you?" instead of "What is wrong with you?"[171] It is important for lawyers to recognize that mental health diagnoses, behavioral systems, and involvement in the criminal justice system do not indicate sickness or badness, but are instead manifestations of injury or traumatic experience.[172] Thus, trauma-informed services and programs have a tendency to be more supportive (rather than punitive) so as to best avoid re-traumatizing the client, and vicariously, the person serving the trauma survivor.[173] In fact, "[e]ffective trauma-informed services are services not just designed to treat symptoms or syndromes related to significant sexual, physical, or emotional abuse; they are services where staff are aware of, and sensitive to, doing no further harm

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167. For the application of these principles in a different (but perhaps overlapping) area of law, see Martina E. Vandenberg, *Innovations in the Fight Against Human Trafficking: Listening to Trafficking Survivors, Fighting for Justice*, 60 N.Y.L. SCH. L. REV. 631, 647 (2015–16) ("Attorneys who specialize in human trafficking have a responsibility to train pro bono attorneys on appropriate trauma-informed representation.").

168. Maxine Harris & Roger D. Fallot, *Envisioning a Trauma-Informed Service System: A Vital Paradigm Shift*, 89 NEW DIRECTIONS FOR MENTAL HEALTH SERVS. 3, 20 (2001).

169. Katz & Haldar, *supra* note 7, at 369.

170. *See, e.g.*, Andrea E. Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Specific Persecution*, 11 GEO. IMMIGR. L.J. 167, 167 (1996); *see also* Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 U. FLA. J.L. & PUB. POL'Y 291, 327 (2017).

171. On the essentiality of TJ-involved lawyers engaging in dialogues with their clients about the underlying issues, see Michael L. Perlin, *"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*, 27 U.N.Z. LAW REV. 1135, 1158–59 (2017).

172. SANDRA BLOOM & BRIAN FARRAGHER, RESTORING SANCTUARY: A NEW OPERATING SYSTEM FOR TRAUMA-INFORMED SYSTEMS OF CARE 1, 7–9 (2013).

173. Sandra Bloom, *The Sanctuary Model of Organizational Change for Children's Residential Treatment*, 26 THERAPEUTIC COMMUNITY: INT'L J. FOR THERAPEUTIC AND SUPPORTIVE ORGS. 65, 70–71 (2005).

to survivors."[174] Trauma-informed practice also includes self-care for the lawyer in order to counterbalance the impacts of dealing with clients exposed to trauma.[175]

Clients generally seek legal advice at times when they are particularly vulnerable and emotional.[176] In order to effectively represent their clients, lawyers must often ask for clients to share some of the most intimate and painful details of their lives, and often must ask to expose some of their most closely-held secrets.[177] It is important for lawyers to recognize and understand trauma and its impacts on clients—particularly on clients with mental disabilities—instead of simply being sympathetic to said clients.[178]

The implementation of trauma-informed practice is of particular importance for lawyers because they have traditionally been trained not to get emotionally attached to their clients.[179] However, by utilizing a

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174. Coral Muskett, *Trauma-Informed Care in Inpatient Mental Health Settings: A Review of the Literature*, 23 INT'L J. MENTAL HEALTH NURSING 51, 58 (2014) (citing Ann Jennings, *Models for Developing Trauma-Informed Behavioural Health Services and Trauma-Specific Services* (2004), *available at* http://www.theannainstitute.org/MDT.pdf (last accessed Aug. 13. 2017)); *see also* Lauren G. Adams & Maisley Paxton, *Counseling Children and Youth in Times of Crisis Understanding Child Development and Building Rapport (Part 1)*, 30 CHILD. L. PRAC. 49, 54 (2011) ("Using a trauma-informed approach can reduce client anxiety and its potential impact on the child client. By developing a productive relationship with the child client, you can increase the likelihood of a more positive outcome for the child."). On the need for all involved in the court process to be aware of trauma-informed lawyering practices, see Gene Griffin & Sarah Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD. LEGAL RTS. J. 1, 18 (2014) ("Everyone in juvenile court should become trauma-informed, including the judges, attorneys, probation officers, clinicians, social service staff and administrators").

175. Katz & Haldar, *supra* note 7, at 361.

176. *See, e.g.*, Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL. ED. 43, 47 (1991).

177. Katz & Haldar, *supra* note 7, at 361. Vicarious trauma, otherwise known as "compassion fatigue" or "secondary trauma," refers to the idea that working with trauma-affected individuals can have an impact on counselors, therapists, doctors, and other people who help such individuals. *Id.* at 367–68. Vicarious traumatization refers to the fact that exposure to the graphic or traumatic experiences of their clients can change the way professionals view themselves, others, or the world. *Id.* at 368 (citing Katie Baird & Amanda C. Kracen, *Vicarious Traumatization and Secondary Traumatic Stress: A Research Synthesis*, 19 COUNSELING PSYCHOL. Q. 181 (2006)). For a perspective focusing on juvenile court issues, see Claire Chiamulera, *Secondary Traumatic Stress in Juvenile Court: Are You Affected?*, 35 CHILD L. PRAC. 120, 120 (Aug. 2016).

178. Katz & Haldar, *supra* note 7, at, 361.

179. Lynette Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katherine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 164 (2007); *see, e.g.*, People v. Pangelina, 153 Cal. App. 3d 916, 918 (Cal. Rptr. 1984) ("The lawyer's role is that of an advocate, and most observers agree that this role is best discharged by an objective lawyer unfettered by any emotional attachment to the client . . . ."); *see also* Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 280 (1999) (noting that "traditional legal education [is taught] by means of the Socratic Method, and its emphasis on the Rule of Reason.").

trauma-informed approach to lawyering, attorneys are better able to represent their clients by serving them in a more well-rounded way.[180] This also allows them to help refer clients to outside services including counseling and trauma-informed therapeutic services.[181] Legal professionals must recognize that seeking legal assistance in of itself can be a traumatic experience—and this is particularly true for clients who are forced to relive traumatic events in their interactions with the legal system.[182] Lawyers need to be especially sensitive to the needs and intricacies of working with clients who have experienced trauma—particularly those with mental disabilities—and a trauma-informed approach to lawyering helps to ensure a more client-centered, holistic approach.[183] Trauma-informed lawyering comports with the CRPD's principles of treating people with disabilities with inherent dignity and respect.[184]

V. CONCLUSION

Trauma-related mental disabilities affect the lives of individuals and the entire community in a variety of ways. For some, the impacts of trauma are brief, but for others the effects are permanent. After

180. There is apparently a course offered at Santa Clara Law School, "Trauma, Vicarious Trauma, and Legal Representation of Trauma Victims." *See* Lisa Morgillo, *Do Not Make Their Trauma Your Trauma: Coping with Burnout as a Family Law Attorney*, 53 FAM. CT. REV. 456, 464 (2015). One of the co-authors (MLP) created a course in "Trauma and Mental Disability Law" that was taught regularly at New York Law School from 2009-14. Along with Professor Heather Ellis Cucolo, he will be offering a webinar-based version of that course in the fall 2018 term under the auspices of Consolidated Continuing Education & Professional Training (CONCEPT), see https://www.concept-ce.com/about/.

181. Parker, *supra* note 179, at 163; *see also* ABA POLICY ON TRAUMA-INFORMED ADVOCACY FOR CHILDREN AND YOUTH (2014), *available at* https://www.americanbar.org/content/dam/aba/administrative/child_law/ABA%20Policy%20on%20Trauma-Informed%20Advocacy.authcheckdam.pdf; ELIZA PATTEN & TALIA KRAEMER, PRACTICE RECOMMENDATIONS FOR TRAUMA-INFORMED LEGAL SERVICES (2013). In this context, consider what Professor Susan Brooks calls "relationship-centered lawyering," arguing that there are "three broad areas of competency every effective lawyer needs, regardless of his or her type of practice: (a) understanding theories about the person-in-context, (b) promoting procedural justice, and (c) appreciating interpersonal, cultural, and emotional issues." Susan Brooks, *Teaching Relational Lawyering*, 19 RICH. J.L. & PUB. INT. 401, 402 (2016).

182. Katz & Haldar, *supra* note 7, at 366.

183. *Cf.* Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 979–80 (2016) ("Successful processes require that educational institutions integrate these concepts to develop a coordinated and holistic response that is trauma-informed, fair, impartial, principled, and balanced in its attention to the welfare and safety of students, faculty, staff, and community members.").

184. *See, e.g.*, Salzman, *supra* note 48, at 283–84.

experiencing trauma, many individuals experience a variety of emotions and reactions, responses that can impair their ability to seek and retain employment, to stay out of the criminal justice system, to have relationships, and to otherwise live "normal" lives.[185] This is generally not the fault of the individuals who experienced the trauma, but is a result of the fact that their environments are not adapted to sufficiently fulfill the needs of persons who have experienced trauma-related mental disabilities. Therefore, it is important to utilize a human rights approach to addressing the needs of people with trauma-related mental disabilities.

It is essential for people working with persons with trauma-related mental disabilities to recognize the specific needs of this population.[186] The CRPD provides an excellent framework for a person-centered, inclusive approach to protecting the human rights of persons with disabilities, and more specifically, people with trauma-related mental disabilities. It is important to treat individuals with trauma-related mental disabilities as unique individuals with unique needs and abilities. A one-size-fits-all approach is not sufficient to deal with this population because each person deals with one's own trauma in different ways. It is imperative that "counsel [has] a background in mental health issues and in communicating with individuals who may be in crisis . . . ."[187] Also, "judges and defense counsel in mental health [and other problem-solving] courts should ensure that defendants receive dignity and respect, [and] are given a sense of voice and validation . . . ."[188]

Although it is impossible to truly know the pain felt by people with trauma-related mental disabilities, at the very least lawyers, therapists, and other professionals can ensure people with mental disabilities are treated in a way that is in compliance with the CRPD. We remain hopeful that with the increased attention to the practice of therapeutic jurisprudence, the increased recognition of the importance of problem-

185. For some, of course, the trauma leads directly to involvement in the criminal justice system. *See* Perlin, *Criminal Sentencing*, *supra* note 19, at 916–17.

186. This is mandated in some nations. *See, e.g.*, Amy Raub et al., *Constitutional Rights of Persons with Disabilities: An Analysis of 193 National Constitutions*, 29 HARV. HUM. RTS. J. 203, 224 (2016) (quoting the Constitution of Ecuador: "Persons *with* disabilities *are recognized the following rights: 1. Specialized attention in public and private entities that provide healthcare services for their* specific needs, *which shall include the free provision of medicines, especially for those* persons *that require lifetime treatment.*").

187. Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses*, 11 PSYCHOL. PUB. POL'Y & L. 570, 576 (2005); *see also* M. Carmela Epright, *Coercing Future Freedom: Consent and Capacities for Autonomous Choice*, 38 J.L. MED. & ETHICS 799, 801 (2010) ("Ideally, in mental health courts all courtroom personnel, i.e., judge, prosecutor, defense counsel and other relevant professionals, have experience and training in mental health issues and available community resources.").

188. Stefan & Winick, *supra* note 149, at 516.

solving courts, and the momentum towards utilizing and teaching trauma-informed practice, the needs of persons with trauma-related mental disabilities will be recognized and met in a way that is in accordance with international human rights principles of dignity, respect, and equality.

A recent biography of Bob Dylan presciently describes the song *Idiot Wind*—from which we have drawn part of our title—as "an image of democracy's decay."[189] Our treatment of traumatized persons with mental disabilities—especially those institutionalized because of mental disabilities—has contributed to that "decay."[190] We believe a turn to international human rights law might help alleviate some of the "pain" in question.

189. IAN BELL, TIME OUT OF MIND: THE LIVES OF BOB DYLAN 36 (2015 ed.).

190. For a recent consideration of how our treatment of racial minorities, women and those from other cultures fails to comport with therapeutic jurisprudence standards, see Perlin & Cucolo, *supra* note 115, at 456.