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**“ABANDONED LOVE”: THE IMPACT OF *WYATT V. STICKNEY* ON THE
INTERSECTION BETWEEN INTERNATIONAL HUMAN RIGHTS AND DOMESTIC
MENTAL DISABILITY LAW**

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Introduction

*Wyatt v. Stickney*¹ is the most important institutional rights case litigated in the history of domestic mental disability law.² It spawned “copycat” litigation in multiple federal district courts and state superior courts,³ it led directly to the creation of “Patients’ Bills of Rights” in most states,⁴ it inspired the creation of the Developmental Disabilities Assistance and Bill of Rights Act,⁵ the Mental Health Systems Act Bill of Rights,⁶ and the federally-funded Protection and Advocacy System.⁷ Its direct influence on the development of the right-to-treatment doctrine abated after the Supreme Court’s disinclination, in its 1982 decision in *Youngberg v. Romeo*,⁸ to find that right to be constitutionally mandated, but its historic role as a

¹ *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 305 (5th Cir. 1974)

² See generally, 2 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (2d ed. 1999), §§3A-3.1 to 6, at 24-79.

³ See *id.*, § 3A-3.3, at 57-60.

⁴ Michael L. Perlin, “*Everybody is Making Love /Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. L. REV. 481, 487 (2008).

⁵ Stanley S. Herr, , *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 635 (1989-90).

⁶ Stacey A. Tovino, , *Psychiatric Restraint and Seclusion: Resisting Legislative Solution*, 47 SANTA CLARA L. REV. 511, 542-43 (2007).

⁷ Herr, *supra* note 5, at 635; Dick Thornburgh & Ira Burnim, *Dedication to Frank M. Johnson, Jr.*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 606, 606 (1999).

⁸ 457 U.S. 307 (1982); see generally, 2 PERLIN, *supra* note 2, §§ 3A-9 to 9.9, at 87-108.

beacon and inspiration has never truly faded. It has been cited (at least) an astounding 411 times in domestic law journals.⁹

But little has been written about the influence of *Wyatt* on the intersection between international human rights and mental disability law (an intersection whose importance has grown exponentially since the ratification of the United Nations' Convention on the Rights of Persons with Disabilities [CRPD]).¹⁰ In this article, I begin a preliminary exploration of that influence, concluding:

- Although *Wyatt* has not been cited in foreign cases, respected commentators have articulated its importance.¹¹
- A study of important cases from international regional human rights tribunals reveals its impact – both on holdings and on court reasoning.¹²
- Relevant sections of the CRPD have been based on *Wyatt*'s holdings and the institutional standards mandated by subsequent *Wyatt* orders.¹³

⁹ WESTLAW search of JLR database done January 12, 2011.

¹⁰ <http://www.un.org/disabilities/convention/conventionfull.shtml> (last accessed, January 12, 2011) (sometimes CRPD); Michael L. Perlin, "A Change Is Gonna Come": *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 No. ILL. U. L. REV. 483 (2009).

¹¹ See e.g., Gerard Quinn, *Civil Commitment and the Right to Treatment under the European Convention on Human Rights*, 5 HARV. HUM. RTS. J. 1, 39-40 (1992).

¹² E.g., *Congo v. Ecuador*, Case 11.427, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc.7 revat 475 (1998); *Purohit and Moore v. The Gambia* (2003). Comm. No. 241/2001, 2003 ahrlr 96 (achpr 2003). 1 IHRR 257 (Afr. Comm'n on Human and Peoples' Rights).

¹³ See *infra* Part IV.

- It is not much of a reach to predict that, in another 40 years, *Wyatt's* influence on international human rights law will be seen as profound (or as more profound) than its influence on domestic law.

This paper will proceed in this manner. First, I will discuss the influence of *Wyatt* on domestic mental disability law, both in the context of caselaw and judicial opinions, as well as its sociopolitical influence. Next, I will briefly trace the development of institutional mental disability rights law abroad, from the period prior to the publication of the UN Mental Illness Principles,¹⁴ to the period following publication of that document, to the period following the ratification of the CRPD. I will then show how *Wyatt*, although often in a *sub silentio* manner, has been the guiding force behind those international human rights law developments that mandate positive rights for institutionalized patients, especially in the context of the CRPD. Although *Wyatt* is cited less and less by US courts in the current era,¹⁵ it remains the inspiration for the most profound international human rights advances worldwide.

The first part of the title of this paper, *Abandoned Love*, comes from a lesser-known Bob Dylan song, first released in 1985 on *Biograph*.¹⁶ In this “brilliant

¹⁴ G.A. Res. 119, U.N. GAOR, 46th Sess., 3d Comm., 75th plen. mtg., reprinted in [1991] 45 U.N.Y.B. 620, U.N. Sales No. E.92.I.1 (“MI Principles”).

¹⁵ *Wyatt* was cited by US courts 132 times between 1971 and 1980, 45 times between 1980 and 1990, 35 times between 1990 and 2000, and 5 times since then. WESTLAW search done of ALLCASES database, January 12, 2011.

¹⁶ See <http://www.bobdylan.com/songs/abandoned-love> (last accessed, January 13, 2011).

song,”¹⁷ Dylan sings, “Won’t you let me in your room one time ’fore I finally disappear?,” and , two verses later, “I march in the parade of liberty.” It is a song of “anger” and “relief,” filled with “loss and yearning.”¹⁸ *Wyatt v. Stickney* may appear to have been “abandoned” by the US Supreme Court in its *Youngberg* decision, but, through the vehicle of the CRPD, we allow it to return to our “room” another time (in the guise on international human rights law) as part of the “parade of liberty.”¹⁹ For those of us inspired by *Wyatt* when we litigated in the 1970s,²⁰ the subsequent years have often been filled with “anger” and “loss and yearning.” The ratification of the CRPD, however, gives us a large measure of “relief.”

I. The influence of *Wyatt*

Writing about *Wyatt* some 13 years ago, I suggested that its “ultimate legacy” needed to be considered from four different perspectives: (1) further developments in the litigation itself; (2) *Wyatt’s* ultimate impact on the delivery of mental disability services in Alabama; (3) *Wyatt’s* impact on the development of statutory law elsewhere; and (4) *Wyatt’s* impact on the development of

¹⁷ MICHAEL GRAY, *SONG & DANCE MAN III: THE ART OF BOB DYLAN* 22 n. 7 (2000).

¹⁸ OLIVER TRAGER, *KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA* 1 (2004).

¹⁹ On Dylan’s views on “liberty” and the growth of mental disability law in general, see Michael L. Perlin & John Douard, “*Equality, I Spoke That Word/As If a Wedding Vow*”: *Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y.L. SCH. L. REV. 9, 13-14 (2008-09).

²⁰ See *Doe v. Klein*, No. L-12088-74 P.W. (N.J. Super. Ct. Law Div. June 29, 1977), reported at 1 MENT. DIS. L. REP. 475 (1977) (institutional right to treatment consent order) (I litigated *Doe* when I was director of the NJ Division of Mental Health Advocacy).

constitutional law elsewhere.²¹ As part of that analysis,²² I concluded that *Wyatt* was at least partially responsible for these positive changes in the delivery of mental health services in Alabama:

- a) *Population at Alabama's psychiatric hospitals declined dramatically:*
- b) *Environmental and life safety hazards were eliminated or ameliorated:*
- c) *Staff attitudes toward patients changed:*
- d) *State expenditures increased dramatically:*
- e) *In some areas, staff numbers increased significantly*²³

These outcomes were all measurable and empirically validated. They demonstrated – without fear of contradiction – the “real life” effect *Wyatt* had on the care and treatment of institutionalized persons with mental disabilities in Alabama.

Wyatt's domestic impact outside of Alabama was significant as well, there being “no doubt” of its “massive influence” on the development of state-level Patients Bills of Rights,²⁴ the promulgation of rights-enforcing regulations in nearly three-quarters of all states,²⁵ and a host of federal legislation including Section 504 of the Rehabilitation Act of 1973,²⁶ the Mental Health Systems Act,²⁷ the Protection and

²¹ 2 PERLIN, *supra*, note 2, §3A-3.2, at 45.

²² On subsequent developments in *Wyatt*, see *id.*, § 3A-3.2a, at 45-51, and 2 MICHAEL L. PERLIN & HEATHER E. CUCOLO, . MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (2010 Cum. Supp), § 3A-3.2a, at 4-5.

²³ 2 PERLIN, *supra* note 2, §3A-3.2b, at 51-53.

²⁴ *Id.*, § 3A-3.2c, at 54.

²⁵ Harry Schnibbe, *Changes in State Mental Health Service Systems Since Wyatt*, in WYATT V. STICKNEY : RETROSPECT AND PROSPECT 173, 174 (L. Ralph Jones & Richard R. Parlour, eds. 1981).

²⁶ 29 U.S.C. § 794 (1994).

Advocacy for Mentally Ill Individuals Act ("PAMI Act"),²⁸ and the Developmental Disabilities Assistance and Bill of Rights Act.²⁹ The state laws inspired by *Wyatt* "established baseline civil rights governing the substantive and procedural limitations on the involuntary civil commitment process, the right to treatment, and the right to refuse treatment."³⁰ Beyond that, *Wyatt's* mandate of a right to treatment in the least restrictive alternative is "echoed in the Americans with Disabilities Act,"³¹ as articulated in *Olmstead v. L.C.*³² There is no dispute that *Wyatt* was "the beginning of a revolution" recognizing the rights of institutionalized persons with mental disabilities."³³

And, of course, *Wyatt* had a "dramatic influence on constitutional and case law

²⁷ 42 U.S.C. § 9401 (1980). This Advocacy title was shortlived after being enacted on October 7, 1980. It was repealed effectively on October 1, 1981 by the Reagan Administration's Omnibus Reconciliation Act of 1981. See 2 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (1989), § 8.13 (discussing repeal).

²⁸ 42 U.S.C. § 10801 (1994).

²⁹ 42 U.S.C. § 6061 (1999).

³⁰ 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, 82 (1995)

³¹ Thornburgh & Burnim, *supra* note 7, at 606. See also 2 PERLIN, *supra* note 2, §3A-3.2c, at 56 (*Wyatt* "clearly infuses [*Olmstead*]").

³² 527 U.S. 581 (1999).

³³ Laura Hortas, *Asylum Protection for the Mentally Disabled: How the Evolution of Rights for the Mentally Ill in the United States Created a "Social Group,"* 20 *CONN. J. INT'L L.* 155, 168 (2004), quoting John LAFOND & MARY DURHAM, *BACK TO THE ASYLUM* 96 (1992); see also, Thornburgh & Burnim, *supra* note 7, at 606-07, discussing how *Wyatt* "broke new constitutional ground;" Emily Whitney, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 777, 791 n.100 (2009) (characterizing *Wyatt* as a "revolutionary" decision).

developments in other jurisdictions.”³⁴ Soon after Judge Johnson issued his first order,³⁵ similar litigation was filed in Ohio,³⁶ in Minnesota,³⁷ in Louisiana,³⁸ and elsewhere.³⁹ After these courts began entering “Wyatt-esque” orders,⁴⁰ a “second generation” of cases was filed that included suits that focused more critically on certain of the *Wyatt* standards, and suits that sought relief in areas *beyond* that requested in *Wyatt*.⁴¹

Subsequent cases built on the *Wyatt* base by extending the constitutional right to treatment to include explicitly treatment in the least restrictive alternative.⁴² Although the U.S. Supreme Court eventually failed to constitutionalize some of these holdings in the lead case of *Youngberg v. Romeo*,⁴³ that Court’s resuscitation of this doctrine -- in the civil case of *Olmstead v. L.C.*⁴⁴ and in the forensic case of

³⁴ 2 PERLIN, *supra* note 2, §3A-3.2d, at 56. See also, Cynthia Faye Barnett, *Treatment Rights Of Mentally Ill Nursing Home Residents*, 126 U. PA. L. REV. 578, 588 (1978) (“As dramatic as the changes wrought by *Wyatt* are at the state level, its impact is not limited to Alabama”).

³⁵ *Wyatt*, 325 F. Supp. at 781

³⁶ *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974).

³⁷ *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974)

³⁸ *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976) (applying theory to juvenile facility).

³⁹ Cases are collected in *Philipp v. Carey*, 517 F. Supp. 513, 517–19 (N.D.N.Y. 1981),

⁴⁰ See e.g., *Davis*, 384 F. Supp. at 1197

⁴¹ See cases discussed in 2 PERLIN, *supra* note 2, §§ 3A-5 to 5.5, at 64-77, and in PERLIN & CUCOLO, *supra* note 22, §§ 3A-5 to 5.5, at 6-7.

⁴² See *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980), *vacated*, 457 U.S. 307 (1982); *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1981), *vacated*, 458 U.S. 1101 (1982). See generally 2 PERLIN, *supra* note 2, § 3A-4.

⁴³ 457 U.S. 307 (1982).

⁴⁴ 527 U.S. 581 (1999) (under Title II of the ADA, states are required to provide persons with mental disabilities community-based treatment when such resources are available). On the relationship between *Olmstead* and the least restrictive alternative doctrine, see e.g., Michael L. Perlin, “*Through the Wild Cathedral*

*Sell v. United States*⁴⁵ -- teaches us that *Wyatt's* influence in this area of mental disability law is still vital.⁴⁶

Post-*Youngberg* case law has been mixed;⁴⁷ however, a close reading of these cases reveals that *Wyatt* continues to inform much of the important judicial decisionmaking in this area of the law.⁴⁸ I believe that my conclusion of 13 years ago still stands today:

Evening "": Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities, 13 TEX. J. ON CIV. LIBS. & CIV. RTS. 413, 414 (2008).

⁴⁵ 539 U.S. 166 (2003) (defendant has qualified right to refuse to take antipsychotic drugs prescribed solely to render him competent to stand trial; medication over objection is permissible where court finds treatment medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, necessary significantly to further important governmental trial-related interest). On the relationship between *Sell* and the least restrictive alternative doctrine, see e.g., Michael L. Perlin, "And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got : The Role and Significance of Counsel in Right to Refuse Treatment Cases", 42 SAN DIEGO L. REV. 735, 736 (2005).

⁴⁶ On *Wyatt's* influence on a national level in general, see Tovino, *supra* note 6, at 541-45.

⁴⁷ 2 PERLIN, *supra* note 2, §§ 3A-12 to 3A-12.3, at 111-124.

⁴⁸ See e.g., *Flakes v. Percy*, 511 F. Supp. 1325, 1337-41 (W.D. Wis. 1981); *Mahoney v. Lensink*, 17 Conn. App. 130, 550 A.2d 1088, 1093 (1988), *aff'd in part, rev'd in part*, 213 Conn. 548, 567 A.2d 518 (1990) (citing *Wyatt* and *Youngberg*); for more recent cases, see e.g., *Estate of Komninos v. Bancroft Neurohealth Inc.*, 9 A.3d 1044 (N.J. App. Div. 2010) (citing *Wyatt*); *State ex rel. Matin v. Bloom*, 674 S.E.2d 240 (W.Va. 2009) (citing *Wyatt v. Aderholt*). See Lee W. Badger, Ralph Jones & Richard R. Parlour, *Wyatt v. Stickney: Context and Consequence*, in L.R. Jones & R. Parlour, *supra* note 25, at 211, 218 (*Wyatt*-type suits "have improved patient care in state hospitals [in many states]"; courts now serve as "[benchmark] agents of change"); Stephen J. Ellmann, *Test Cases: Legal Battles and Latent Effects*, in *id.* at 181, 189 ("[*Wyatt*] has built a consensus on the rights of the mentally ill and the mentally retarded"); Edward Kaufman, *The Right to Treatment Suit as an Agent of Change*, 136 AM. J. PSYCHIATRY 1428 (1979).

Although the direct, precedential impact of *Wyatt v. Stickney* would appear to have been dulled somewhat by the U.S. Supreme Court's decision in *Youngberg v. Romeo*, the moral strength of Judge Johnson's vision in *Wyatt* remains powerful to this day. *Wyatt*'s dramatic influence on subsequent case law and legislation bears testament to its weight. As a result of *Wyatt*, concepts such as staffing ratios, individual treatment plans, and environmental standards have been regularly incorporated in the fabric of the law. While the Supreme Court stopped far short of mandating *Wyatt* standards in *Youngberg*, these standards remain the law in many jurisdictions; more importantly, there have been few post-*Youngberg* cutbacks in ``*Wyatt* states".⁴⁹

It is thus no surprise that the eminent forensic psychiatrist Milton Greenblatt has characterized *Wyatt* as "the most significant case in the history of forensic psychiatry,"⁵⁰ and the "foundation of modern psychiatric jurisprudence."⁵¹ In the words of an Alabama probate judge, it treated persons with mental illness "as individuals with basic human rights, as opposed to faceless masses of insanity."⁵²

II. The institutional treatment of persons with mental disabilities in other nations

⁴⁹ 2 PERLIN, *supra* note 2, §3A-6, COMMENT, at 78-79.

⁵⁰ Milton Greenblatt, *Foreward* in Jones & Parlour, *supra* note 25, at ix.

⁵¹ *Id.* at x. See also, 2 PERLIN, *supra* note 2, §3A-3.1, at 24 (*Wyatt* "one of the most influential mental disability law cases ever filed.")

⁵² Reese McKinney, *Involuntary Commitment, A Delicate Balance*, 20 QUINNIPIAC PROB. L.J. 36, 37 (2006).

Wyatt and its progeny revealed persistent and pervasive mistreatment of persons with mental disabilities in the United States. Conditions in psychiatric hospitals in most parts of the world today eerily mimic conditions in United States facilities at the time that *Wyatt* was brought,⁵³ soon after the then-President of the American Psychiatric Association characterized such hospitals as “bankrupt, without remedy.”⁵⁴ A few years after *Wyatt*, when the chairman of the legal action committee of the National Association of Retarded Children (now The ARC) characterized the Pennhurst State School⁵⁵ as “Dachau, without ovens”⁵⁶ there was

⁵³ Bruce Winick, *Therapeutic Jurisprudence And The Treatment Of People With Mental Illness In Eastern Europe: Construing International Human Rights Law*, 21 N.Y..L. SCH. J. INT’L & COMPAR. L. 537 (2002); Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT’L L. & COMMERCE 333, 347 (2007).

The cruelty of conditions at the hospitals that were the focus of the *Wyatt* litigation cannot be overstated. See *Wyatt*, 344 F. Supp. at 393 n. 13:

A few of the atrocious incidents cited at the hearing in this case include the following: (a) a resident was scalded to death by hydrant water; (b) a resident was restrained in a strait jacket for nine years in order to prevent hand and finger sucking; (c) a resident was inappropriately confined in seclusion for a period of years, and (d) a resident died from the insertion by another resident of a running water hose into his rectum. Each of these incidents could have been avoided had adequate staff and facilities been available.

⁵⁴ Harry Solomon, Solomon, *Presidential Address: The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, 7 (1958). Three years later, a witness testified at a Congressional hearing that “[s]ome [state hospital] physicians I interviewed frankly admitted that the animals of nearby piggeries were better housed, fed and treated than many of the patients on their wards.” Constitutional Rights Hearing, 1961, pp. 40-42 (statement of Albert Deutsch), quoted in Perlin et al, *supra* note 30, at 97.

⁵⁵ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (holding that the Developmental Disabilities Bill of Rights Act (42 U.S.C. § 6010) was merely a federal/state grant program and that neither the right to treatment nor the least

never any accusation of exaggeration. Subsequently, lawyers began to “replicate” the US experience in Eastern Europe and other parts of the world to begin the transformation of mental disability law from a medical to a legal model.⁵⁷

There is a remarkable overlap between the body of decisions that define U.S. constitutional mental disability law and the body of international human rights standards that mandate humane treatment of persons with mental disabilities.⁵⁸ The revolution that *Wyatt* began has largely constitutionalized virtually every aspect of the involuntary civil commitment and release process as well as most "pressure points" in the course of institutionalization (the right to treatment, the right to refuse treatment, the right to the least restrictive alternative course of treatment).⁵⁹

These actions followed earlier developments in the United Nations.⁶⁰ Initially, it underscored its commitment to human rights by adopting the Universal Declaration of Human Rights (UDHR) in 1948. As stated in the Preamble, the UDHR sets forth a

restrictive alternative sections of the bill of rights was enforceable in private action); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars federal relief in a right-to-community service case due to federalism concerns). *Pennhurst* was the facility that housed Nicholas Romeo, the plaintiff in the *Youngberg* case. See *Youngberg*, 457 U.S. at 310-12.

⁵⁶ LEOPOLD LIPPMAN & I. IGNANCY GOLDBERG, *THE RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATION FOR EXCEPTIONAL CHILDREN* 17 (1973), quoted in Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 100 n. 215 (1991).

⁵⁷ Winick, *supra* note 53, at 539.

⁵⁸ Perlin, *supra* note 53, at 347.

⁵⁹ Perlin et al, *supra* note 30, at 96-103.

⁶⁰ See MICHAEL L. PERLIN, *INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD*, chapter 3 (2011) (in press).

common standard of achievement for all peoples and nations. Its primary authors drew upon established religious and secular philosophical traditions world-wide in crafting provisions that recognize the inherent, universal, and transcendent nature of human rights.⁶¹ Prof. David Kinley has thus concluded that human rights “are not only compatible with democracy, *they are essential to its functioning and survival*”.⁶² Subsequent declarations followed in the same vein: the declaration of 1981 as the *International Year of Disabled Persons*,⁶³ the establishment by the United Nations General Assembly of the *World Programme of Action Concerning Disabled Persons*,⁶⁴ and the declaration of 1983 to 1992 to be the *Decade of Disabled Persons*.⁶⁵ As part of these efforts, the United Nations Human Rights Commission appointed two special rapporteurs to investigate and report on the human rights of persons with mental disabilities⁶⁶ and in 1991, the General Assembly adopted the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (widely referred to as the "MI

⁶¹ See generally, MICHAEL L. PERLIN ET AL, *INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS* 244-45 (2006).

⁶² David Kinley, *Human Rights Fundamentalisms*, 29 SYDNEY L. REV. 545, 559 (2007) (emphasis added).

⁶³ G.A. Res 31/123, ¶ 1, U.N. Doc. A/RES/31/123 (Dec. 16, 1976).

⁶⁴ G.A. Res. 45/91, U.N. Doc A/RES/45/91 (Dec. 14, 1990).

⁶⁵ G.A. Res. 39/26, U.N. Doc. A/RES/39/26 (Nov. 23, 1984).

⁶⁶ United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights and Disability, U.N. Doc. E/CN.4/Sub.2/1991/31 (report by Leandro Despouy); Principles, Guidelines, and Guarantees for the Protection of Persons Detained on Ground of Mental Ill-Health Suffering from Mental Disorder, U.N. Doc. E/CN.4/Sub.2/1983/17 (report by Erica-Irene Daes).

Principles").⁶⁷ The MI Principles established what at that time was the most comprehensive international human rights standards for persons with mental disabilities, and their adoption was a critical global step in recognizing mental disability rights issues within the human rights arena.⁶⁸

Adoption of the MI Principles was spurred on by the work done by Rosenthal and his colleagues in Central and Eastern Europe.⁶⁹ Then, in 1993, Rosenthal and Leonard Rubenstein wrote *International Human Rights Advocacy under the "Principles for the Protection of Persons with Mental Illness,"*⁷⁰ the first publication of a theoretical article that explored the relationship between international human rights law and mental disability law in the specific context of the MI Principles.⁷¹ This was the first detailed international statement of the rights

⁶⁷ "MI Principles," *supra* note 14.

⁶⁸ On the way that the MI Principles became the "centerpiece of the human rights based approach to mental health care" in Australia, see Neil Rees, *International Human Rights Obligations and Mental Health Tribunals*, 10 *PSYCHIATRY, PSYCHOL. & L.* 33 (2003); see also Terry Carney, *Mental Health in Postmodern Society: Time for New Paradigms?* 10 *PSYCHIATRY, PSYCHOL. & L.* 12 (2003). But see 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, 407 (2007) (criticizing MI Principles for not being sufficiently protective of the rights of persons with psychosocial disabilities, especially in the context of the right to refuse treatment); T.W. Harding, *Human Rights Law in the Field of Mental Health: A Critical Review*, 101 *ACTA PSYCHIATRICA SCANDINAVICA* 24, 24 (2000) (discussing how MI Principles are "basically flawed," also specifically referring to the right to refuse treatment).

⁶⁹ See Tovino, *supra* note 6, 540 nn. 194-95.

⁷⁰ 16 *INT'L J. L. & PSYCHIATRY* 257 (1993).

⁷¹ PERLIN, *supra* note 60, Chapter 1; Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in *MENTAL HEALTH AND HUMAN RIGHTS* (Michael Dudley ed. 2011) (in print); Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the*

of persons with mental illness, and was the first awareness on the part of the United Nations that this most marginalized population was entitled to basic human rights. The MI Principles reflected many of the core rights that had been articulated in the *Wyatt* opinions,⁷² including, specifically, the right to treatment in the least restrictive alternative.⁷³ By adopting these principles, the UN “internationalized” mental disability law rights.⁷⁴

In the post-*Wyatt* years, scholars interpreted other international documents similarly to draw on *Wyatt*'s spirit. While characterizing the European Court's jurisprudence as “still ... undeveloped,” noting that construction of Article 5 of the ECHR has been mixed,⁷⁵ Prof. Lawrence Gostin argued forcefully that a theory

New Convention, in UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: MULTIDISCIPLINARY PERSPECTIVES 241 (Jukka Kumpuvuori & Martin Scheninen, eds. 2010).

⁷² Rosenthal & Rubenstein, *supra* note 70, at 259-61.

⁷³ See MI Principle 9, discussed in Larry Gostin & Lance Gable, *The Human Rights Of Persons With Mental Disabilities: A Global Perspective On The Application Of Human Rights Principles To Mental Health*, 63 MD. L. REV. 20, 38 n. 124 (2004).

⁷⁴ Rosenthal & Rubenstein, *supra* note 70, at 269. See *id*, citing LOUIS HENKIN, THE AGE OF RIGHTS 17 (1990) (internationalization refers to the “politico-legal” process by which rights become accepted by the international community as “a proper subject for ... international law”); See also, Harold H. Koh, *Different But Equal: The Human Rights Of Persons With Intellectual Disabilities*, 63 MD. L. REV. 1,11 (2004), characterizing *Wyatt* as being part of the “transnational legal process.”

⁷⁵

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

European Convention on Human Rights

[http://echr.coe.int/NR/rdonlyres/F49018BA-57B7-4A4B-9E31-](http://echr.coe.int/NR/rdonlyres/F49018BA-57B7-4A4B-9E31-0E0876966E30/0/ECHRTravauxART5DH5610EN1674958.pdf)

[0E0876966E30/0/ECHRTravauxART5DH5610EN1674958.pdf](http://echr.coe.int/NR/rdonlyres/F49018BA-57B7-4A4B-9E31-0E0876966E30/0/ECHRTravauxART5DH5610EN1674958.pdf) (last visited Jan 20, 2011).

supporting a “right to therapeutic conditions [of confinement]” can be articulated under Article 5,⁷⁶ articulating in his reasoning a line of argument that tracks nearly perfectly the quid-pro-quo rationale basis of *Wyatt*:⁷⁷

If a person is to be deprived of liberty, not as punishment for a criminal offense, but because of the need for therapy, then government should have a duty to provide minimally adequate treatment.”⁷⁸

In the same vein, Prof. Gerard Quinn specifically looked to the litigation strategy in *Wyatt* (and its statutory-based predecessor, *Rouse v. Cameron*⁷⁹) to “point the way to success under the [European] Convention [for finding a right to treatment].”⁸⁰

Similarly, Article 12(1) of the ICCPR recognizes the right to the “highest attainable standard of mental health.”⁸¹ Prof. Terry Carney and his colleagues have linked this right to the right to treatment, citing *Wyatt* as “a paradigmatic example

⁷⁶ Lawrence O. Gostin, *Human Rights of Persons with Disabilities*, 23 INT’L J. L. & PSYCHIATRY 125, 153 (2000).

⁷⁷ See *Wyatt*, 503 F.2d at 1312: “Treatment had to be provided as the quid pro quo society had to pay as the price of the extra safety it derived from the denial of individuals’ liberty.”

⁷⁸ Gostin, *supra* note 76, at 154.

⁷⁹ 373 F.2d 451, 455 (D.C. Cir. 1966). See 2 PERLIN, *supra* note 2, §§ 3A-2.2 to 2.3, at 13-20.

⁸⁰ Quinn, *supra* note 11, at 38-39. See also *id.* at 48-49: “Given the overriding concern with autonomy in any regime of rights, the negative right to liberty could require positive rights to care and treatment in therapeutic environments once liberty has been lost under article 5(1)(e).”

⁸¹ The International Covenant on Civil and Political Rights (Dec. 16, 1966), <http://www2.ohchr.org/english/law/ccpr.htm>.

of institutional litigation which led to a marked improvement in treatment standards in line with the court order.”⁸²

Wyatt has also been seen as providing ammunition for broader-based rights under the domestic law of other nations.⁸³ In discussing the need for an overhaul of New Zealand’s mental health law, Prof. John Dawson – in his critique of a draft Bill of Rights – specifically linked *Wyatt*’s right to treatment rationale to the draft Bill’s guarantee of humane conditions for detained persons.⁸⁴ \

It is clear. *Wyatt* – both directly and indirectly – inspired the development of substantive international mental disability law (especially as it related to institutionalized persons), and this inspiration has been known to respected scholars and critics.⁸⁵

III. Mental disability case law in other regions

⁸² Terry Carney, David Tait & Fleur Beaupert, *Pushing The Boundaries: Realising Rights Through Mental Health Tribunal Processes*, 30 SYDNEY L. REV. 329, 344 (2008).

⁸³ See also, Danielle Elyce-Hirsch, *A Defense Of Structural Injunctive Remedies In South African Law*, 9 OR. REV. INT’L L. 1, 60-61 & nn. 127-28 (2007) (on judicial decisionmaking in law reform cases in South Africa, discussing the institutional oversight component of the *Wyatt* cases).

⁸⁴ John Dawson, *Fundamental Rights and the Mentally Disabled*, 6 OTAGO L. REV. 291, 301 (1986).

⁸⁵ See also e.g., Lisa J. LaPlante & Roxana Castellon, *Expanding the Definition of the Right to Mental Health: Attending to Victims of Political Violence and Armed Conflict in Their Communities of Origin*, 2 ESSEX HUM. RTS. REV. 38, 40 (2005) (characterizing the legal basis of the right to mental health as “indisputable”).

The prevailing human rights conventions – all linked to the UDHR⁸⁶ -- create judicial or quasi-judicial institutions that are given the responsibility of interpreting, administering and applying “an entire regime of rules which each of these treaties embodies.”⁸⁷ In this section, I will briefly survey developments in other regions of the world beyond the United States.⁸⁸

A. Europe

In a broad context, Professors Laurence Helfer and Anne-Marie Slaughter have characterized The European Convention on Human Rights (ECHR) as a “remarkable success”⁸⁹ As noted above, Article 5 of the ECHR guarantees the right to liberty and security of the person, subject to limited circumstances in which governments may justifiably deprive persons “of unsound mind” of their liberty, mandating the provision of a “speedy” review of the detention by an independent court or tribunal, and the provision of an enforceable remedy in damages to those who are detained in a manner that contravenes the Convention.⁹⁰

However, this Article is in no way a panacea to prevent all violations of human rights of persons with disabilities; by way of example, in a carefully-nuanced article,

⁸⁶ See *supra* note 60.

⁸⁷ Gabriel M. Wilner, *Reflections On Regional Human Rights Law*. 25 GA. J. INT’L. & COMPAR. L. 407, 408 (1995/1996).

⁸⁸ See generally, PERLIN, *supra* note 60, Chapter 3.

⁸⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*. 107 YALE L.J. 273, 276 (1997).

⁹⁰ For a comprehensive evaluation of all ECHR case law as it applies to persons with mental disabilities, SEE PETER BARTLETT, OLIVER LEWIS & OLIVER THOROLD, *MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007).

Professors Gostin and Gable focus on two important problems that appear to fall outside of the scope of the Convention: confinement of nonprotesting patients and compulsory supervision in the community.⁹¹ The ECHR also – in its prohibition against inhuman and degrading treatment (see Article 3) – sets into place “a mechanism for monitoring the conditions of confinement.”⁹²

Prof. David Hewitt has concluded that the European Court on Human Rights has interpreted the ECHR “very restrictively in psychiatric cases,⁹³ considering specifically cases that characterized the handcuffing of patients as “therapeutically necessary” (*id.*, discussing *Herczegfalvy v. Austria*)⁹⁴, or sanctioned the use of seclusion for “disciplinary” purposes (*id.*, discussing *Dhoest v. Belgium*, 1987).⁹⁵ Notwithstanding this gloomy analysis, Prof. Gerard Quinn has concluded that the due process protections of the “negative right to liberty ... are very robust under the Convention.”⁹⁶ Prof. Bruce Winick bridges the gap between Hewitt and Quinn, by arguing that, even in the absence of case law, many of the ongoing “abusive

⁹¹Gostin & Gable, *supra* note 73, at 59.

⁹² *Id.* at 78. See also, BARTLETT, LEWIS & THOROLD, *supra* note 90, at 112, discussing how Article 10 of the Council of Europe Recommendations regarding the Rights of Persons with Mental Disorder “imports a duty on the part of States to provide a reasonable level of health care to persons with mental disabilities.”

⁹³ David Hewitt, *Do Human Rights Impact on Mental Health Law?* 151 NEW L.J. 1278, 1278 (2001).

⁹⁴ *Herczegfalvy v. Austria*, App. No. 10533/83, 15 Eur. HR. Rep. 437, 438-439 (1993).

⁹⁵ *Dhoest v. Belgium*, 12 Eur. Ct. H.R. 135 (1987).

⁹⁶ Quinn, *supra* note 11, at 48; see also, Timothy W. Harding, *The Application Of The European Convention Of Human Rights To The Field Of Psychiatry*, 12 INT’L J. L. & PSYCHIATRY 245, 260-62 (1989) (listing most important principles established in ECHR cases involving individuals being committed to psychiatric hospitals or Institutionalized in such facilities); see generally, BARTLETT, LEWIS & THOROLD, *supra* note 90.

practices [of commitment, treatment and institutional conditions]” still common in Easter Europe⁹⁷ “can be understood to violate the [ECHR] and other evolving principles of international human rights law”⁹⁸ concluding that the remedy for these abuses is a “healthy dose of international human rights law and therapeutic jurisprudence.”⁹⁹

Several cases decided by the European Court of Human Rights illuminate some of this tension. In *Winterwerp v. Netherlands*,¹⁰⁰ the Court found that in order to detain “persons of unsound mind” in accordance with Article 5 of the European Convention, there must be a finding that the disorder requires confinement and the disorder must be diagnosed using objective medical expertise. The ECHR also found that it is essential for the person concerned to have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. In *Aerts v. Belgium*,¹⁰¹ the Court concluded that the ECHR provided a right to be held in an institution not destructive of the individual’s mental health.¹⁰² Discussing this case, Profs. Gostin and Gable note that it suggests that persons with mental illness “mental illness must be confined in a minimally therapeutic environment.”¹⁰³ In *Herczegfalvy v. Austria*,¹⁰⁴ the ECHR noted that the

⁹⁷ See generally, Winick, *supra* note 53; see also, Perlin, *supra* note 53.

⁹⁸ Winick, *supra* note 53, at 572.

⁹⁹ *Id.*; see PERLIN, *supra* note 60, chapter 9, arguing that Winick’s insights must be taken seriously by scholars and policymakers in this area.

¹⁰⁰ *Winterwerp v. Netherlands*, 2 Eur. Ct. H.R. 387, 403 (1979).

¹⁰¹ *Aerts v Belgium*, App. No. 25357/94, 29 Eur. H.R. Rep 50, (1998).

¹⁰² See BARTLETT, LEWIS & THOROLD, *supra* note 90, at 114.

¹⁰³ Gostin & Gable, *supra* note 73, at 87-88.

¹⁰⁴ *Herczegfalvy v. Austria*, *supra*, at 484.

position of inferiority and powerlessness typical of patients confined to psychiatric hospitals calls for increased vigilance. Although ultimately the ECHR did not find a violation of Article 3 it noted that use of handcuffs and security bed were “worrying,”¹⁰⁵ Prof. Hewitt is especially critical of this decision: After *Herczegfalvy*, he charges, “it is hard to think of a single accepted psychiatric practice that might breach Article 3.”¹⁰⁶

Other cases illustrate other aspects of the ECHR.¹⁰⁷ While Article 5(2)’s provision that everyone who is arrested has to be given the reasons “for his arrest and of any charge against him,” appears to be self-limiting to the criminal setting, it was held in *Van der Leer v. Netherlands*¹⁰⁸ that it applied to all detentions, and was thus breached when a patient was not informed that her stay in a hospital as a voluntary patient had been converted to a detention ordered by a court.¹⁰⁹ The European Court has found that ordering detention in a psychiatric institution without prior medical opinion violates the European Convention, finding that mental disability must be of sufficient seriousness to justify deprivation of liberty,¹¹⁰

¹⁰⁵ *Id.*

¹⁰⁶ Hewitt, *supra* note 93, at 1278

¹⁰⁷ See generally, Mary Donnelly, *From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patients’ Rights*, 26 LAW IN CONTEXT 37 (2008); BARTLETT, LEWIS & THOROLD, *supra* note 90.

¹⁰⁸ *Van der Leer v. Netherlands*, App. No. 11509/85, 12 Eur H. R. Rep. 567, 573-574 (1990).

¹⁰⁹ Kris Gledhill, *Human Rights Instruments And Mental Health Law: The English Experience Of The Incorporation Of The European Convention On Human Rights*, 34 SYR. J. INT’L L. & COMM. 359, 366-67 (2007), discussing *Van Der Leer*.

¹¹⁰ *Varbanov v. Bulgaria*, Eur. Ct. H.R. (2000), App. No. 31365/96, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=801062&po>

and that individuals have a right, under Article 5, to initiate review of detention.¹¹¹ In *E v. Norway*,¹¹² the European Court of Human Rights has found that a delay of eight weeks violates the right to speedy review by a court. And in *Megyeri v. Germany*,¹¹³ the Court found that, for periodic review of commitment to be effective, there may need to be procedural safeguards present; in this case, a breach of the Convention was found where no lawyer was assigned to represent the patient in question. There must also be judicial process involved in determining whether detention, under Article 5, is lawful.¹¹⁴

rtal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.*Varbanov* is discussed extensively in Krassimir Kanev, *State, Human Rights, And Mental Health In Bulgaria*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 435 (2002).

¹¹¹ *Rakevich v. Russia*, app no. 58973/00 (2003) ECHR 558.

¹¹² *E. v. Norway*, App. No. 11701/85, 17 Eur. HR. Rep 30, 57-58 (1994). *E* is discussed in Gostin & Gable, *supra* note 73, at 73-74.

¹¹³ *Megyeri v. Germany*, App no.13770/88, 15 Eur. H. R. Rep. 584, 590-592 (1992). *Megyeri* is discussed in Gledhill *supra* note 109, at 367-68.

¹¹⁴ *X. v. UK*, App. No. 6998/75, 4 Eur. H. R. Rep. 188, 206-207(1982); for a helpful discussion of the *X* case, see Laurence O. Gostin, *Human Rights, Judicial Review, And The Mentally Disordered Offender*, [1982] CRIM. L. REV. 779.

For other cases finding violations of Article 5, see e.g., *Kudla v. Poland*, (2002) 35 E.H.R.R. 11; *Nevmerzhitsky v. Ukraine*, [2005] ECHR 210; *HL v. United Kingdom*, (2005) 40 EHRR 32.. For cases finding violations of Article 3 (the right to not be subjected to torture or inhumane or degrading treatment or punishment), see e.g., *Peers v. Greece*, (2001) 33 E.H.R.R. 51; *Price v. United Kingdom*, (2002) E.H.R.R. 53; *Keenan v. United Kingdom*, (2001) 33 E.H.R.R. 38. For cases finding violations of Article 8 (the right to respect for one's private life and family life in both home and correspondence), see e.g., *Storck v. Germany*, [2005] ECHR 406; *Y.F. v. Turkey*, (2004) 39 E.H.R.R. 34. For a case finding a violation of Article 13 (the right to an effective remedy in the event that one's rights of the Convention have been violated), see *Keenan, supra*. For a discussion of cases finding violations of Article 2 (the right to life and the few exceptions that exist to this right), see BARTLETT, LEWIS & THOROLD, *supra* note 90, at 140-44.

In the most recent litigation, in a potentially enormously-significant procedural decision, the ECHR agreed to hear on the merits the case of a Bulgarian citizen with a psychosocial disability. It found that the plaintiff, who was partially deprived of his legal capacity and placed into the Pastra Social Care Institution without his consent in 2002, and has never been evaluated to determine whether he was capable of living on his own, and who was placed in the guardianship of the institution's director (who thus controls his finances and identity papers and can decide his place of residence), could proceed with his case. In that case, the plaintiff alleges violations of his rights under the European Convention on Human Rights, including his right not to be subject to inhuman and degrading treatment under Article 3, his right to liberty under Article 5, to a fair hearing under Article 6, to respect for home and private life under Article 8, and to an effective remedy under Article 13.¹¹⁵

Notwithstanding this array of cases, Professor Peter Bartlett and his colleagues conclude that the number of cases remains “miniscule, set against the number of people within ECHR territory whose circumstances engage Convention guarantees.”¹¹⁶

B. Other regions of the world¹¹⁷

¹¹⁵ *Stanev v. Bulgaria*, App. No. 36760/06 (2010).

¹¹⁶ BARTLETT, LEWIS & THOROLD, *supra* note 90, at 254.

¹¹⁷ There is no regional human rights tribunal or commission in Asia. See PERLIN, *supra* note 53, chapter 8; see also Michael L. Perlin & Yoshi Ikehara, Promotion Social Change in East Asia: *The Movement To Create A Disability Rights Tribunal*

Several important cases litigated in other parts of the world have had a tremendous impact on the relationship between international human rights law and mental disability law. Not only do these cases serve as an example for other nations to follow in assuring human rights to every person, but they also demonstrate the potential effectiveness of regional tribunals.

1. South America

One such case is *In the Matter of Victor Rosario Congo*,¹¹⁸ involving a 48 year-old Ecuadorian who, as a result of the State's gross negligence and willful acts, died of malnutrition, hydroelectrolitic imbalance, and heart and lung failure. Specifically, Congo was beaten with a club on the scalp by a guard, deprived of any medical treatment, and placed in isolation naked and virtually incommunicado.

The Inter-American Commission on Human Rights (Inter-American Commission) found that the State violated Congo's right to humane treatment under Article 5 of the American Convention on Human Rights (American Convention). The Commission determined that Article 5 of the American Convention must be interpreted in light of the MI Principles:

The Commission considers that in the present case the guarantees established under Article 5 of the American Convention must be interpreted

And The Promise Of International Online, Distance Learning. Paper presented at the inaugural conference of the East Asia Law and Society Association, University of Hong Kong, February, 2010. Accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743741.

¹¹⁸ Congo v. Ecuador, Case 11.427, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc.7 revat 475 (1998).

in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care. These principles were adopted by the United Nations General Assembly as a guide to the interpretation in matters of protection of human rights of persons with mental disabilities, which this body regards as a particularly vulnerable group.¹¹⁹

In a subsequent footnote, the Commission underscored:

The UN Principles for the Protection of Persons with Mental Illness are regarded as the most complete standards for protection of the rights of persons with mental disability at the international level. These Principles serve as a guide to States in the design and/or reform of mental health systems and are of utmost utility in evaluating the practices of existing systems. Mental Health Principle 23 establishes that each State must adopt the legislative, judicial, administrative, educational, and other measures that may be necessary to implement them. These Principles are also standards of assessment that makes international human rights monitoring by NGO's more possible.¹²⁰

Continuing, the Inter-American Commission found that the solitary confinement of Congo constituted inhuman and degrading treatment in violation of

¹¹⁹ *Id.*, paragraph 54.

¹²⁰ *Id.*, n. 8.

Article 5(2) of the American Convention; especially in light of the fact he was left in isolation unable to satisfy his basic needs. Thus, the State violated Congo's right to "be treated with respect for the inherent dignity of the human person."¹²¹ Further, the Commission found that the State is responsible for the physical assault committed by one of its agents and that there is a duty upon the State to ensure the physical, mental and moral integrity of persons suffering from mental illness.¹²²

The Inter-American Commission also found that the State violated Article 4(1) of the American Convention because the State failed to take measures in its power to ensure the right to life of a person who "partly because of his state of health and in part owing to injuries inflicted on him by a State agent, was defenseless, isolated and under its control."¹²³ Finally, the Commission found that, under Article 25(1) of the American Convention, Congo had a right to judicial protection which the State violated since there were no judicial proceedings opened to investigate and establish the responsibilities for the injuries to and death of Congo.¹²⁴ As a result of this case, the Commission recommended that the persons responsible for the violations be punished, that the family of Congo be compensated, that medical and psychiatric care for persons suffering from mental illness be provided, and that specialists be assigned to penitentiary system to identify psychiatric disorders of those confined.

¹²¹ *Id.* para. 59.

¹²² *Id.* para. 62.

¹²³ *Id.* para. 84.

¹²⁴ *Id.*, para. 97.

Finally, in *Ximenes-Lopes v. Brazil*,¹²⁵ a man being held for psychiatric treatment at a private psychiatric clinic/rest home -- operating as part of the Brazilian public health system -- died while hospitalized. Responding to allegations that he was abused and tortured (and that these actions led to his premature death), the Inter-American Court stated that:

[Brazil's duties] to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under the jurisdiction thereof, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in inter-individual relationships.¹²⁶

The Court concluded that Brazil was under a special duty to protect life and personal integrity, notwithstanding the fact that the facility was a private one, finding under the Convention that private entities acting in a state capacity in the provision of health care were under its jurisdiction, where, as in this case, the state failed to adequately regulate and supervise them.¹²⁷ It also required Brazil to establish educational programs for staff working in mental health institutions.¹²⁸

¹²⁵ Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

¹²⁶ *Id.*, para. 85.

¹²⁷ *Id.*, para. 89.

¹²⁸ *Id.*, para. 250. For favorable commentary about the *Ximenes Lopes* case, see e.g., Steven R. Kenner & Javier Vasquez, *A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights*, 40 COLUM. HUM. RTS. L. REV. 595 (2009); Jo Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic, Social and Cultural Rights with Civil and*

Again, there can be little doubt that *Wyatt* – albeit *sub silentio* – served as a major inspiration for these rights-expanding cases.

2. Africa

In *Purohit and Moore v. The Gambia*,¹²⁹ the African Commission on Human and Peoples' Rights (African Commission) found that Gambia violated various provisions of the African Charter on Human and Peoples' Rights (African Charter) in the way persons with mental disabilities were treated in Gambia and by the Lunatic Detention Act of the Gambia (LDA). Although communications are not received by the African Commission until local remedies are exhausted, in this case the Commission found that the existent remedies were not realistic for persons with mental disabilities.

In determining the merits of *Purohit and Moore*, the African Commission found that when States ratify the African Charter they undertake a responsibility to bring its domestic laws and practice in conformity with the African Charter.¹³⁰ Further, the Commission found that Articles 2 and 3 guaranteeing equal protection and anti-discrimination are non-derogable rights. Thus, Gambia violated these rights through the implementation of LDA which detained more people from poor

Political Rights in the Inter-American Human Rights System, 31 HASTINGS INT'L & COMP. L. REV. 1 (2008).

¹²⁹ *Purohit and Moore v. The Gambia* (2003). Comm. No. 241/2001, 2003 ahrlr 96 (achpr 2003). 1 IHRR 257 (Afr. Comm'n on Human and Peoples' Rights).

¹³⁰ *Id.*, para 42.

backgrounds and provided only those charged with capital offenses with legal assistance.¹³¹

The LDA was not in conformity with the African Charter by its classification of persons with mental disabilities as “lunatics” and “idiots.” The African Commission found that these terms dehumanized and took away their inherent right to human dignity in violation of Article 5.¹³² Like the Inter-American Commission, the African Commission turned to the MI Principles in reaching this conclusion. In addition, the African Commission found that the LDA violated Article 6 of the African Charter because the LDA authorized detention on the basis of opinions by general medical practitioners, did not have fixed periods of detention, and did not provide for review or appeal.¹³³ In *Purohit and Moore*, the Commission also found that the right to health is crucial and persons with mental disabilities, as a result of their condition and by virtue of their disabilities, should be accorded special treatment that would enable them to sustain the optimum level of independence in accordance with both the African Charter and MI Principles.¹³⁴

In a recent paper in which I argued for the creation of a Disability Rights Tribunal for Asia and the Pacific,¹³⁵ I relied on the decisions in *Congo* and *Purohit* to support my position:

¹³¹ *Id.*, para 53-54.

¹³² *Id.*, para 59.

¹³³ *Id.*, para 68.

¹³⁴ *Id.*, para 81.

¹³⁵ See *supra* note 116.

[E]xperiences in other regions show that similarly-situated courts and commissions have been powerful forces in mandating the practical implementation . . . of other UN Conventions and treaties... I do not believe there is a single person in the world who believes, by way of example, that the high courts of Ecuador or Gambia would have decided the *Congo* or the *Purohit* cases the way that the interregional bodies did.¹³⁶

I believe that *Wyatt* was an inspiration for both these decisions, and the judicial bodies' conclusions that the State violated Congo's right to "be treated with respect for the inherent dignity of the human person"¹³⁷ and Gambia's actions that took away plaintiffs' "inherent right to human dignity."¹³⁸ But, of course, the universe of such cases is, in the words of Prof. Peter Bartlett and his colleagues (referring to the more-robust jurisprudence of the European Court) "miniscule."¹³⁹ The ratification of the CRPD, however, may change that dramatically.

IV. The CRPD

There is no question that the most important international development to date has been the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD).¹⁴⁰ The "wide scope"¹⁴¹ of the "holistic"¹⁴² CRPD furthers the

¹³⁶ Perlin & Ikehara, *supra* note 117, manuscript at 21.

¹³⁷ *Congo v. Ecuador*, *supra*, para. 59.

¹³⁸ *Purohit and Moore v. The Gambia*, *supra*, para 57.

¹³⁹ BARTLETT, LEWIS & THOROLD, *supra* note 90, at 254. See *supra* note 115.

¹⁴⁰ See PERLIN, *supra* note 60, Chapter 7; Perlin, *supra* note 10; Janet E. Lord & Michael A. Stein, *The Domestic Incorporation Of Human Rights Law And The United*

human rights approach to disability and recognizes the right of people with disabilities to equality in most aspects of life. “The Convention responds to traditional models and situates disability within a social model framework and sketches the full range of human rights that apply to all human beings, all with a particular application to the lives of persons with disabilities.”¹⁴³ It provides a framework for insuring that mental health laws “fully recognize the rights of those with mental illness.”¹⁴⁴ It categorically affirms the social model of disability¹⁴⁵ by describing it as a condition arising from “interaction with various barriers [that] may

Nations Convention On The Rights Of Persons With Disabilities, 83 WASH. L. REV. 449 (2008); Michael A. Stein & Janet E. Lord, *Jacobus Tenbroek, Participatory Justice, and the UN Convention On The Rights Of Persons With Disabilities*, 13 TEX. J. ON C.L. & C.R. 167 (2008). On the relationship between the CRPD and other United Nations’ Conventions and Treaties in this context, see Annegret Kämpf, *The Disabilities Convention and its Consequences for Mental Health Laws in Australia*, 26 LAW IN CONTEXT 10 (2008).

¹⁴¹ Richard Carver, *A New Answer To An Old Question: National Human Rights Institutions And The Domestication Of International Law*. 10 HUM. RTS. L. REV. 1, 26 (2010).

¹⁴² Michael A. Stein, *A Quick Overview Of The United Nations Convention On The Rights Of Persons With Disabilities And Its Implications For Americans With Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679, 679 (2007); Frederic Megret, *The Disabilities Convention: Towards A Holistic Concept Of Rights*, 12 INT’L J. HUM. RTS. 261, 271 (2008).

¹⁴³ Janet E. Lord & Michael A. Stein, *Social Rights And The Relational Value Of The Rights To Participate In Sport, Recreation, And Play*, 27 B.U. INT’L L. J. 249, 256 (2009); see also, Ronald McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections*. Accessible at <http://ssrn.com/abstract=1563883> (2010).

¹⁴⁴ Bernadette McSherry, *International Trends In Mental Health Laws: Introduction*, 26 LAW IN CONTEXT 1, 8 (2008).

¹⁴⁵ See Janet E. Lord, David Suozzi & Allyn L. Taylor, *Lessons From The Experience Of U.N. Convention On The Rights Of Persons With Disabilities: Addressing The Democratic Deficit In Global Health Governance*, 38 J.L. MED. & ETHICS 564, 568 (2010).

hinder their full and effective participation in society on an equal basis with others" instead of inherent limitations,¹⁴⁶ reconceptualizes mental health rights as disability rights,¹⁴⁷ and extends existing human rights to take into account the specific rights experiences of persons with disabilities.¹⁴⁸

In Prof. Gerard Quinn's eloquent phrase, it provides a "moral compass" for positive change,¹⁴⁹ reflecting a "paradigm shift" in the way we think about and treat persons with disabilities.¹⁵⁰, characterizing it as a "beacon for an international consensus on justice and disability."¹⁵¹ Prof. Lisa Waddington says it ushers in a "new era in human rights protection."¹⁵² Prof. Jacqueline Laing says it "brings hope to the vulnerable."¹⁵³ Prof. Penelope Weller argues that it illustrates "profound

¹⁴⁶ CRPD, art. 1 and pmb., para. e.,

¹⁴⁷ Phillip Fennel, *Human Rights, Bioethics, and Mental Disorder*, 27 MED. & L. 95 (2008).

¹⁴⁸ Frederic Megret, *The Disabilities Convention: Human Rights Of Persons With Disabilities Or Disability Rights?* 30 HUM. RTS. Q. 494 (2008).

¹⁴⁹ Gerard Quinn, *The United Nations Convention On The Rights Of Persons With Disabilities: Toward A New International Politics Of Disability*, 15 TEX. J. ON C.L. & C.R. 33, 34 (2009).

¹⁵⁰ *Id.* at 41.

¹⁵¹ *Id.* at 52.

¹⁵² Lisa Waddington, *A New Era In Human Rights Protection In The European Community: The Implications The United Nations' Convention On The Rights Of Persons With Disabilities For The European Community*, accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581. (2007).

¹⁵³ Jacqueline Laing, *Information Technology And Biometric Databases: Eugenics And Other Threats To Disability Rights*. 3 J. LEGAL TECH. RISK MANAGEMENT 9, 22 (2008).

shifts both in the conception of human rights and the implementation of human rights in public policy domains.”¹⁵⁴

The CRPD makes clear that persons with disabilities have the same human rights as all other persons.¹⁵⁵ Multiple sections of the CRPD track the holdings of the *Wyatt* decision and its supplemental standards. Thus, Article 3 calls for “respect for inherent dignity” and “nondiscrimination,”¹⁵⁶ Article 12 “equal recognition before the law,”¹⁵⁷ Article 13 equal “access to justice,”¹⁵⁸ Article 14 “the right to liberty and security of [the] person,”¹⁵⁹ Article 15 “freedom from torture or cruel,

¹⁵⁴ Penelope Weller, *Human Rights and Social Justice: The Convention On The Rights Of Persons With Disabilities and The Quiet Revolution In International Law*. 4 PUBLIC SPACE: J. L. & SOC’L JUSTICE 74, 90 (2009).

¹⁵⁵ See Michael A. Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007).

¹⁵⁶ See *Wyatt*, 344 F. Supp. at 379 (“Patients have a right to privacy and dignity”). On this Article of the CRPD, see Lord, Suozzi & Taylor, *supra* note 145, at 572.

¹⁵⁷ *Id.* (“No person shall be deemed incompetent to manage his affairs, to contract, to hold professional or occupational or vehicle operator’s licenses, to marry and obtain a divorce, to register and vote, or to make a will *solely* by reason of his admission or commitment to the hospital”). On this Article of the CRPD, see Lord, Suozzi & Taylor, *supra* note 144, at 573-74.

¹⁵⁸ *Id.* (“Patients shall have an unrestricted right to visitation with attorneys”). See also *id.* at 378 (“the Court has determined that this case requires the awarding of a reasonable attorneys’ fee to plaintiffs’ counsel”). On this Article of the CRPD, see Terry Carney et al, *Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?* 26 LAW IN CONTEXT 125 (2008).

¹⁵⁹ *Id.*, 325 F. Supp. at 785: “To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.” On this Article of the CRPD, see Rosemary Kayess & Phillip French, *Out Of Darkness Into Light? Introducing The Convention On The Rights Of Persons With Disabilities*, 8 HUM. RTS. L. REV. 1, 21 (2008).

inhuman or degrading treatment or punishment,”¹⁶⁰ Article 16 “freedom from exploitation, violence and abuse,”¹⁶¹ Article 17 a right to protection of the “integrity of the person,”¹⁶² Article 19 the right to community living,¹⁶³ Article 25 the right to health and the non-discriminatory provision of services,¹⁶⁴ and Article 26 the right to rehabilitation.¹⁶⁵

¹⁶⁰ *Id.*, 344 F. Supp. at 380 (“Patients have a right to be free from physical restraint and isolation”). On this Article of the CRPD, see Lord, Suozzi & Taylor, *supra* note 144, at 573.

¹⁶¹ *Id.* at 401 (“The institution shall prohibit mistreatment, neglect or abuse in any form of any resident”) (complementary *Wyatt* decision on behalf of those institutionalized in facilities for persons with mental retardation). On this Article of the CRPD, see Rangita de Silva de Alwis, *Mining The Intersections: Advancing The Rights Of Women And Children With Disabilities Within An Interrelated Web Of Human Rights*, 18 PAC. RIM L. & POL’Y J. 293, 307-08 (2009).

¹⁶² *Id.* at 391 n. 7 (quoting plaintiffs’ expert) (“The conditions I would say are hazardous to psychological integrity, to health, and in some cases even to life”). On this Article of the CRPD, see Kämpf, *supra* note 134; Bernadette McSherry, *Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment*, 26 LAW IN CONTEXT 111 (2008).

¹⁶³ *Id.* at 384 (“Each individualized treatment plan shall contain: *** criteria for release to less restrictive treatment conditions, and criteria for discharge”). On this Article of the CRPD, see Arlene S. Kanter, *The United Nations Convention On The Rights Of Persons With Disabilities And Its Implications For The Rights Of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 564-65 (2009).

¹⁶⁴ *Id.* at 380 (“Patients have a right to receive prompt and adequate medical treatment for any physical ailments”). On this Article of the CRPD, see Penny Weller, *Supported Decision-Making and the Achievement of Non-Discrimination: The Promise and Paradox of the Disabilities Convention*, 26 LAW IN CONTEXT 85 (2008).

¹⁶⁵ *Id.* at 376 (court-appointed Human Rights Committee “shall have review of all research proposals and all rehabilitation programs, to ensure that the dignity and the human rights of patients are preserved”). On this Article of the CRPD, see Kanter, *supra* note 163, at 565 n. 150.

I am not suggesting that the Convention drafters kept a copy of *Wyatt* close at hand during the drafting process. That would be asserting too much. But I believe it is undeniable that the rights first articulated so eloquently by Judge Johnson in *Wyatt* – subsequently restated in modified formats in cases decided by the regional human rights courts and commissions¹⁶⁶ -- are the heart and soul of the UN Convention. It is conceivable, I expect, that the CRPD might have been drafted as it was had *Wyatt* never been decided as it was and had *Wyatt's* progeny not given it additional life in multiple US jurisdictions. But I doubt it.

V. Conclusion

Wyatt exploded into the consciousness of public interest lawyers forty years ago,¹⁶⁷ and that explosion irrevocably changed the course of American institutional conditions law for all time.¹⁶⁸ Although its contemporaneous impact on legal developments in the United States has ebbed in the aftermath of *Youngberg v. Romeo*, its legacy stands. And that legacy informs and inspires the CRPD.

Prof. Quinn, again, sees the Convention as a reflection of the reality that “the American disability rights revolution now belongs to all.”¹⁶⁹ By noting that “the most important potential of the Convention is its potential to transform the process that leads to those laws in the first place,”¹⁷⁰ he engrafts that legacy of *Wyatt* – a

¹⁶⁶ See *supra* Part III.

¹⁶⁷ See Perlin, *supra* note 56, at 100..

¹⁶⁸ See generally, 2 PERLIN, *supra* note 2, Chapter 3.

¹⁶⁹ Quinn, *supra* note 149, at 51.

¹⁷⁰ *Id.* at 47.

case that transformed the entire legal process as it affected persons with mental disabilities who were institutionalized -- on to the Convention itself.¹⁷¹

Interestingly, *Wyatt's* use of international law has been rarely discussed and is mostly forgotten.¹⁷² Judge Johnson specifically noted:

It is interesting to note that the Court's decision with regard to the right of the mentally retarded to habilitation is supported not only by applicable legal authority, but also by a resolution adopted on December 27, 1971, by the General Assembly of the United Nations. That resolution, entitled "Declaration on the Rights of the Mentally Retarded", reads in pertinent part: "... The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential."¹⁷³

¹⁷¹ See BARTLETT, LEWIS & THOROLD, *supra* note 90, at 262:

For too long, persons with disabilities, and people with mental health problems and intellectual disabilities in particular, were left at the margins of human rights discourse. A change has commenced, but only commenced.

¹⁷² But see Koh, *supra* note 74, at 11, n. 58; Gunnar Dybwad, *From FeebleMindedness to Self-Advocacy: A Half Century of Growth and Self-Fulfillment*, June 2, 1994, at 11. (paper presented at the 118th meeting of the American Association on Mental Retardation), accessible at <http://www.mnddc.org/parallels2/pdf/90s/98/98-FFA-HSU.pdf>.

¹⁷³ *Wyatt*, 344 F. Supp. at 390-91 n. 6.

A discussion of the use by domestic courts of international human rights law is beyond the scope of this paper.¹⁷⁴ But the coincidence here is, to say the least, intriguing.

To a great extent, the mental disability law revolution has, until relatively recently, largely been a parochial and domestic one. However, I expect that the ratification of the UN Convention -- building on the European jurisprudence and cases such as *Congo* and *Purohit* -- has the capacity to radically alter this reality.¹⁷⁵ It is not a reach, I do not think, to predict that, forty years from now, we will look back at *Wyatt's international* influence and legacy on being at least as or more profound and paradigm-shattering than its *domestic* influence.

To conclude by returning to the Dylan lyric that begins my title: The "love" shown in the *Wyatt* case for persons institutionalized in facilities akin to concentration camps¹⁷⁶ may have been, to some extent, "abandoned" by US courts. But the CRPD, I hope, will allow such persons, in Dylan's words, to, finally, "march in the parade of liberty."¹⁷⁷

¹⁷⁴ See 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, 270-711(2009) (discussing this question).

¹⁷⁵ See Weller, *supra* note 154, at 75 (on how the Convention reflects a "quiet revolution" in human rights/mental disability law).

¹⁷⁶ See *supra* note 56.

¹⁷⁷ See <http://www.bobdylan.com/songs/abandoned-love> (last accessed, January 13, 2011).