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See This Empty Cage Now Corrode: The International Human Rights and Comparative Law Implications of Sexually Violent Predator Laws

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“SEE THIS EMPTY CAGE NOW CORRODE”: THE INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE LAW IMPLICATIONS OF SEXUALLY VIOLENT PREDATOR LAWS

Michael L. Perlin* and Heather Ellis Cucolo**

Our sexually violent predator (SVP) laws are a miserable failure. We suggest a turn to international human rights law (IHR) as a source of rights for this population, and consider this matter from the perspective of comparative law. Many nations have enacted laws that both mirror and contradict early developments in United States jurisprudence, but there, challenges to community containment and preventive detention laws have been more successful when based upon IHR law. Also, registry notification is generally far more limited, and details are usually confined solely to police agencies. We must consider laws and court decisions from other nations when implementing US law reform in this area.

In Part I, we consider the implications of IHR law, and assess how realistic it is that such law be embraced by domestic jurisdictions in dealing with relevant cases. We also consider the human rights issues and violations that have resulted from domestic enactment of International Megan’s Law. In Part II, we apply comparative law in an effort to determine how other nations have struggled with

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some of the basic issues that have been focused on by domestic jurisdictions since the Supreme Court's decision in Kansas v. Hendricks (1997). In Part III, we assess the application of therapeutic jurisprudence (TJ) to the legal and human rights issues discussed prior, in an effort to determine whether other nations have more successfully implemented TJ principles to combat some of the seemingly-intractable problems raised in SVP cases. We conclude by offering suggestions for US-based policymakers.

Keywords: *sex offenders, SVPA, international human rights law, comparative law, therapeutic jurisprudence*

INTRODUCTION

The co-authors of this paper have spent decades studying and writing extensively about the full range of topics related to this population. Additionally, they have represented persons alleged to be sexually violent predators,¹ have taught courses in sexual offenders law, and have presented domestically and internationally on this topic to audiences of lawyers, judges, mental health professionals, criminologists, and criminal justice professionals. Throughout these endeavors, we have critiqued—vigorously—a full range of legal issues related to this area of law and policy,² including, but not limited to:

1. When MLP was a rookie Public Defender in Trenton, NJ, in the early 1970s, he regularly visited the Menlo Park Diagnostic Center where some of his clients—those who had been found, in the phrase used then, to be “repetitive and compulsive” sex offenders—were housed. *See, e.g.*, N.J. STAT. ANN. § 2A:164–63 (West 2018), *repealed by* N.J. STAT. ANN. § 2C:98–92 (West 1979). When HEC was a rookie Public Defender in Newark, NJ, in the late 2000s, she regularly visited the Special Treatment Unit (STU), attached to the state prison in Avenel, NJ, where some of her clients—classified as sexually violent predators—were housed. *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, SHAMING THE CONSTITUTION: THE DETRIMENTAL RESULTS OF SEXUAL VIOLENT PREDATOR LEGISLATION (2017) (the picture on the book's front cover was taken by HEC and shows the barbed wire outside of the STU at Avenel). *See also* Melissa Wangenheim, “To Catch a Predator,” *Are We Casting Our Nets Too Far?: Constitutional Concerns Regarding the Civil Commitment of Sex Offenders*, 62 RUTGERS L. REV. 559, 559–83 (2010) (examining the characteristics of individuals labeled sexually violent predators and describing admissions at New Jersey's Special Treatment Units).

2. *See generally* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, ch. 5 (3d ed., 2019 update).

- The constitutionality of sexually violent predator act (SVPA) commitments,³
- Recidivism statistics and presumptions about recidivism rates,⁴
- Media distortions, and the media's impact on judicial decisionmaking⁵
- The role of and access to counsel in SVPA proceedings,⁶ and the quality of counsel in such cases,⁷
- The relationship between therapeutic jurisprudence and this entire area of law and policy,⁸
- Post-adjudication commitment,⁹
- Registration and notification statutes,¹⁰
- Residency restrictions,¹¹
- Access of the public to data,¹² and
- The Supreme Court's misuse of statistics.¹³

3. See Michael L. Perlin, "There's No Success like Failure / and Failure's No Success at All": *Exposing the Pretextuality of Kansas v. Hendricks*, 92 NW. U. L. REV. 1247 (1998) [hereinafter Perlin, *No Success Like Failure*]; Michael L. Perlin, "Mixed-Up Confusion": *Kansas v. Hendricks, Sexually Violent Predator Laws, and Empty Promises*, 2 HEALTH L.J. 3 (Fall 1997).

4. Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMPLE POLITICAL & CIVIL RTS. L. REV. 1 (2012) [hereinafter Cucolo & Perlin, *Therapeutic Jurisprudence*]; Heather Ellis Cucolo & Michael L. Perlin, "The Strings in the Books Ain't Pulled and Persuaded": *How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 CASE W. RES. L. REV. 637, 638 (2019) [hereinafter Cucolo & Perlin, *Strings*].

5. Heather Ellis Cucolo & Michael L. Perlin, "They're Planting Stories in the Press": *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185 (2013).

6. Heather Ellis Cucolo & Michael L. Perlin, "Far from the Turbulent Space": *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J. L. & SOC. CHANGE 125 (2015).

7. 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 FLA. J. L. & PUB. POL'Y 291 (2017).

8. Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4; Cucolo & Perlin, *supra* note 7; Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *A TJ Approach to Mental Disability Rights Research: On Sexual Autonomy and Sexual Offending*, in *THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE* 129 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019).

9. PERLIN & CUCOLO, *supra* note 1, at 117–24.

10. *Id.* at 125–36.

11. *Id.* at 160–73; Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 22.

12. PERLIN & CUCOLO, *supra* note 1, at 130.

13. Cucolo & Perlin, *Strings*, *supra* note 4.

We can safely say that, when read together, this body of work appears to be fairly nihilistic, and that seems to be an accurate assessment of this corpus of law, given the caselaw and statutes with which we are faced.¹⁴

In this article, we are presenting another approach to the questions we face (and that, as a society, we have miserably failed to solve): a turn to *international human rights law* as a source of rights for the population in question, and a consideration of the matter from the perspective of *comparative law*.¹⁵ To briefly summarize, many nations have enacted laws that both mirror and contradict early developments in United States civil commitment jurisprudence.¹⁶ In these nations, though, challenges to community containment and preventive detention laws have been more successful when based upon international human rights law.¹⁷ Also, registry notification is generally far more limited, and details are usually confined solely to police agencies.¹⁸ We believe that the implications of the laws and court decisions from other nations are necessary to consider when implementing US law reform in this area, and require far more attention than they have received from US scholars and legislators.

This paper will proceed in the following manner. In Part I, we will consider the implications of *international human rights law* for cases involving the populations in question, and then assess how realistic it is that such law be embraced by domestic jurisdictions in dealing with relevant cases. Here, we will look most closely at developments in Australia (where there is the most comprehensive scholarship and case law) in an effort to determine its potential applicability to the full range of domestic SVP issues. We will also consider the human rights issues and violations that have resulted from the domestic enactment of International Megan's Law. In Part II, we will apply *comparative law* (focusing primarily on developments in Germany),

14. See e.g., *id.* at 667 ("Courts around the country continue to remain stagnant, clinging to misinformation and refusing to depart from prejudicial viewpoints that are pretextual and based on irrational fears"); Cucolo & Perlin, *supra* note 7, at 327, discussing "the ways that shame and humiliation have contaminated the SVPA process"; Cucolo & Perlin, *supra* note 5, at 246, "[o]ur sex offenders policies were born in 'towering rage' and they have resulted in a state of affairs in which their 'corrupt ways had finally made [us] blind', quoting, in part, the song *Idiot Wind* by Bob Dylan.

15. We have considered these topics before in other contexts, in PERLIN & CUCOLO, *supra* note 2, §§ 5-8 to 5-8.5, at 5-365 to 5-383, and in PERLIN & CUCOLO, *supra* note 1, at 142-59.

16. See *infra* text accompanying notes 145-244.

17. See *infra* text accompanying notes 22-76.

18. See *infra* text accompanying notes 189-90.

in an effort to determine how other nations have struggled with some of the basic issues that have been focused on by domestic jurisdictions, for the twenty-plus years since the Supreme Court's decision in *Kansas v. Hendricks*.¹⁹ In Part III, we will assess the application of *therapeutic jurisprudence* (TJ) to the legal and human rights issues discussed prior, in an effort to determine whether other nations have more successfully implemented TJ principles to combat some of the seemingly intractable problems raised in SVPA cases. In Part IV, we offer some conclusions and some suggestions for US-based policymakers in this contentious area of law and social policy.

The title of this article begins with a quote from Bob Dylan's brilliant song, *Visions of Johanna*, listed as one of Dylan's ten greatest songs by *Rolling Stone* magazine.²⁰ Certainly, the critic Tony Attwood may be right when he argues that the song reflects "the emptiness of existence,"²¹ but we chose the lyric in question for its aspirational character: that the "cages" in which this population is incarcerated *will*, someday, become "empty" and "corrode." To further mix our musical metaphors, we believe that a consideration of international and comparative law may be a necessary start on, to quote The Beatles this time, "the long and winding road."

I. INTERNATIONAL HUMAN RIGHTS LAW

A. The CRPD

The international human rights that are relevant to this population and the questions we raise should be divided into two categories: (1) those that flow from the United Nations' Convention on the Rights of Persons with Mental Disabilities (CRPD),²² and (2) those from all other sources.

19. 521 U.S. 346 (1997). See *infra* text accompanying notes 45–48. See generally *supra* note 3.

20. See *10 Greatest Bob Dylan Songs*, ROLLING STONE (Aug. 29, 2019, 12:20 AM ET), <https://www.rollingstone.com/music/music-lists/10-greatest-bob-dylan-songs-152077/visions-of-johanna-157900/>.

21. Tony Attwood, *Untold Dylan: Visions of Johanna: The Meaning of the Music, the Lyrics and the Rewrites*, accessible at <https://bob-dylan.org.uk/archives/7> (updated April 2018).

22. G.A. Res. 61/106, at 27, U.N. Doc. A/Res/61/106 (Dec. 13, 2006) [hereinafter CRPD]. See generally Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 98 (Michael Dudley et al. eds., 2012).

First consideration is how the CRPD “radically changes the scope of international human rights law as it applies to all persons with disabilities. In no area is this more significant than in the area of mental disability law.”²³ It is seen as having “finally empowered the ‘world’s largest minority’ to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.”²⁴

Understood as the “most revolutionary international human rights document ever created that applies to persons with disabilities,” it furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in almost every aspect of life.²⁵ By re-conceptualizing mental health rights as disability rights and extending existing human rights to encompass persons with disabilities,²⁶ it firmly endorses a social model of disability—a clear and direct repudiation of the medical model that traditionally was part-and-parcel of mental disability law.²⁷

“The Convention responds to traditional models, 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.”²⁸ It provides a framework for ensuring that mental health laws “fully recognize the rights of those with mental

23. 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).

24. Michael L. Perlin, “*Your Old Road Is Rapidly Agin*”: *International Human Rights Standards and Their Impact on Forensic Psychologists, the Practice of Forensic Psychology, and the Conditions of Institutionalization of Persons with Mental Disabilities*, 17 WASH. U. GLOBAL STUDIES L. REV. 79, 91 (2018).

25. *Id.*

26. Meghan Gallagher & Michael L. Perlin, “*The Pain I Rise Above*”: *How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 FLA. J. INT’L L. 271, 279 (2018).

27. See generally Michael L. Perlin, “*Abandoned Love*”: *The Impact of Wyatt v. Stickney on the Intersection between International Human Rights and Domestic Mental Disability Law*, 35 LAW & PSYCHOL. REV. 121, 138–41 (2011).

28. 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). In affirming the social model of disability, it is described as a condition arising from “interaction with various barriers [that] may hinder [the individual’s] full and effective participation in society on an equal basis with others” instead of inherent limitations. See CRPD, *supra* note 22, Art. 1; see also, e.g., Perlin, *supra* note 23, at 1174.

illness.”²⁹ There is no question that it has “ushered in a new era of disability rights policy.”³⁰ As one of the authors (MLP) and another colleague have previously written, the “CRPD can be, and should be, a blueprint for advocates representing persons traumatized as a result of their mental disabilities.”³¹

Significantly, although former President Obama did sign the CRPD, the Senate has not ratified it.³² One of the documented reasons for refusing to ratify the CRPD was that it, allegedly, had significant overlap with the Americans with Disabilities Act (ADA).³³ Although both bodies of legislation deal with disability discrimination, the Convention defines “disability” in a more positive, inclusive manner and addresses the problems individuals with disabilities encounter in society in a more holistic manner.³⁴ The Convention more widely considers past discrimination and its impact on current situations and environments.³⁵

Notwithstanding the fact that the Senate declined to ratify the Convention for lack of a super-majority of votes,³⁶ the fact that President Obama did sign the Convention triggered the application of the Vienna Convention of

29. Bernadette McSherry, *International Trends in Mental Health Laws: Introduction*, 26 LAW CONTEXT: A SOCIO-LEGAL J. 1, 8 (2008).

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

31. Gallagher & Perlin, *supra* note 26, at 278–79.

32. The text of the Convention, reports of the negotiating sessions leading to its completion, lists of the myriad non-governmental organizations participating in the sessions, and lists of the countries that have signed and ratified the Convention are available at CRPD, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 8 May 2020).

33. 42 U.S.C. § 12101. See e.g. Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301, 302 (2019) (“the best reason why the United States should ratify the CRPD is to realize the promise of the ADA”).

34. See CRPD, *supra* note 22, Art. 4. See also *Guiding Principles of the Convention*, at <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/guiding-principles-of-the-convention.html> (accessed 8 May 2020).

35. *Id.*

36. 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, 387 n. 34 (2015), citing *The Convention on the Rights of Persons with Disabilities*, U.S. Int'l Council on Disabilities, <https://ncd.gov/policy/crpd> (accessed 14 May 2020).

the Law of Treaties, "which requires signatories 'to refrain from acts which would defeat the Disability Convention's object and purpose.'"³⁷

Thus, multiple domestic cases have cited the CRPD as authority,³⁸ and there can be no question that it must be read as still having "weight and influence over domestic policy."³⁹ 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."⁴⁰

This leads to an important question: are all sex offenders covered by the CRPD? To answer this, we must consider two opposing views. First, because of the overlap with the ADA, it is important to consider how that domestic body of legislation considers the sex offender population. Under the ADA, an individual is considered to have a "disability" if he or she has a physical or mental impairment, has a record of such an impairment, or is regarded as having such an impairment that substantially limits one or more major life activities.⁴¹

Certain disorders are categorically exempt from protection. They include: transvestism, transsexualism, pedophilia, exhibitionism, gender identity disorders not resulting from physical impairments, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from current illegal use of drugs, and other sexual behavior disorders.⁴² In addition, individuals with disabilities may be precluded from being "qualified" based on their criminal history and subsequent labeling as

37. Vienna Convention on the Law of Treaties, Art. 18, May 23, 1969, 1155 U.N.T.S. 331, as discussed in 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).

38. See e.g., *In re Mark C.H.*, 906 N.Y.S.2d 419, 433 (Sur. Ct. 2010), as discussed in this context in Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 167–69 (2012); and Perlin, *supra* note 23, at 1177–78. See also, *Matter of Michelle M.*, 41 N.Y.S.3d 719, 2016 N.Y. Misc. LEXIS 2719, at *8–*9 (July 22, 2016) (Sur. Ct. 2016); and *In re Zhuo*, 42 N.Y.S.3d 530 (Sur. Ct. 2016), discussed in this context in PERLIN & CUCOLO, *supra* note 2, §§ 2-8, at 2-87 to 2-89.

39. See Perlin & Schriver, *supra* note 36, at 387.

40. *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 855 (Sur. Ct. 2012).

41. 42 U.S.C. § 12211.

42. *Id.* Although the text of the ADA remains the same, on May 18, 2017, the United States District Court for the Eastern District of Pennsylvania held that gender dysphoria—a new diagnosis (see DIAGNOSTIC AND STATISTICAL MANUAL 5 (2013)) that describes the clinically significant distress that some transgender people experience—is *not* excluded by the ADA. See *Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 (E.D. Pa. May 18, 2017).

a “sex offender.”⁴³ Thus, if the CRPD sets the parameters of disability similar to the ADA, sex offenders would likely be excluded from coverage under the Convention.⁴⁴ But the second analysis takes into account the decision in *Hendricks* and, in particular, the Supreme Court’s characterization of pedophilia (*Hendricks*’ diagnosis) as a “mental abnormality.”⁴⁵

There, the Court stated:

Contrary to *Hendricks*’ assertion, the term “mental illness” is devoid of any talismanic significance. Not only do “psychiatrists disagree widely and frequently on what constitutes mental illness,” but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement.⁴⁶

Pedophilia, the Court reasoned, was classified by “the psychiatric profession” as a “serious mental disorder”; this disorder—marked by a lack of volitional control, coupled with predictions of future dangerousness—“adequately distinguishes *Hendricks* from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”⁴⁷ *Hendricks*’s diagnosis as a pedophile, which qualifies as a “mental abnormality” under the Act, thus “plainly suffice[d]” for due process purposes.⁴⁸ Therefore, if the Convention were to consider the vast, undefined range of mental disabilities that result from a either legal interpretation or psychiatric diagnosis, then potentially, sex offenders would be covered.

Assuming that this population *is* covered, what is the significance of this Convention for what are we considering in this paper? 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

43. Amanda Johnson, *Challenging Criminal Records in Hiring under the Americans with Disabilities Act*, 48 COLUM. HUM. RTS. L. REV. 211 (2016–17).

44. *But see* Michael L. Perlin & Naomi M. 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, 50 (2014) (how shaming and humiliating of sex offenders contravenes the CRPD).

45. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

46. *Id.* at 357.

47. *Id.* at 360.

48. *Id.*

respect for their inherent dignity."⁴⁹ 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."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.⁵²

Article 12 declares that persons with disabilities have equal recognition before the law,⁵³ Article 13 proclaims that persons with disabilities shall have equal access to justice on an equal basis with others,⁵⁴ and Article 14 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.⁵⁵ The ratification

49. See CRPD, *supra* note 22, 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").

50. See CRPD, *supra* note 22, Art. 1.

51. *Id.*, Art. 3.

52. On the connection between international human rights and such disabilities, see Gallagher & Perlin, *supra* note 26.

53. See CRPD, *supra* note 22, Art. 12.

54. *Id.*, Art. 13. 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. . . ." *Id.* On how 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, see Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L & COM. L. 333, 342 (2007); Cucolo & Perlin, *supra* note 6; Cucolo & Perlin, *supra* note 7.

55. See CRPD, *supra* note 22, Art. 14. On Article 14 generally, see Michael L. Perlin & Eva Szeli, *Article 14: Liberty and Security of the Person*, in COMMENTARY ON UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 402 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

The official commentary to Article 14 states that under the CRPD, detention is "unlawful" when it "is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment." See Christopher Slobogin, *Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment, and Competency Law*, 40 LAW & PSYCHOL. REV. 297, 298 (2016), discussing U.N. Secretary-General and High Commissioner for Human Rights, Human Rights Council, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on*

of the Convention illustrates “profound shifts both in the conception of human rights and the implementation of human rights in public policy domains.”⁵⁶

Other sections of the CRPD make clear that persons with disabilities have the same human rights as all other persons, and importantly, many track—either consciously or unconsciously—the holdings of the decisions in *Wyatt v. Stickney*⁵⁷ and its supplemental standards. Thus, other articles call for “[r]espect for inherent dignity” and “nondiscrimination”;⁵⁸ “[f]reedom from torture or cruel, inhuman or degrading treatment or punishment”;⁵⁹ “[f]reedom from exploitation, violence and abuse”;⁶⁰ a right to protection of the “integrity of the person”;⁶¹ the right to community living;⁶² the right to health and the non-discriminatory provision of services;⁶³ and the right to rehabilitation.⁶⁴

It is vital to keep in mind that these provisions apply not just to persons in the *civil* mental health system, but also to those in the *forensic* system (those charged with or convicted of crime),⁶⁵ as well as, per the quoted

Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities, ¶ 48, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009); and Slobogin, *supra*, at 313 n. 108, quoting Patrick Keyzer, *The International Human Rights Parameters for the Preventive Detention of Serious Sex Offenders*, in DANGEROUS PEOPLE: POLICY, PREDICTION AND PRACTICE 25, 29–30 (Bernadette McSherry & Patrick Keyzer eds., 2011) (noting holdings by international tribunals prohibiting as “arbitrary” and in violation of international covenants detention that is more invasive than necessary to achieve the state’s ends).

56. Penelope Weller, *Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law*, 4 PUB. SPACE: J. L. & SOC. JUST. 74, 90 (2009).

57. *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff’d in part, rev’d in part*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff’d in part, rev’d in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See generally Perlin, *supra* note 27, at 139; 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)).

58. See CRPD, *supra* note 22, Art. 3.

59. *Id.*, Art. 15.

60. *Id.*, Art. 16.

61. *Id.*, Art. 17.

62. *Id.*, Art. 19.

63. *Id.*, Art. 25.

64. *Id.*, Art. 26. See generally Gallagher & Perlin, *supra* note 26.

65. It is also important always to keep in mind that there is a significant *blurring* between the civil and forensic/criminal mental disability law systems, and that that blurring increases

portion of the *Hendricks* opinion, sex offenders.⁶⁶ In short, when seeking to navigate any aspect of the criminal justice system, this navigation must be done with an eye toward the international human rights system as well.⁶⁷ As one of the authors (HEC) has written (with Dr. Astrid Birgden):

Human rights and freedoms are granted to all individuals (including sex offenders) and human rights law provides fundamental protections without qualification or exception. Offenders are both rights-violators and rights-holders. Therefore, while the State is obliged to protect the community from sex offenders by preventing and deterring crime, it is also obliged to respect their human rights, protect them against violations, and promote a human rights framework.⁶⁸

B. Other International Law Documents

There is an array of other international law protections that should be available to persons who are enmeshed in the SVPA system. These include the following:

- Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home

with time. See e.g., Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, “*On Desolation Row*”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, 24 TEX. J. ON CIV. LIBS. & CIV. RTS. 59 (2018), discussing four areas of “negative blurring”—the proliferation of assisted outpatient treatment (AOT) statutes, the expansion of sexually violent predator acts, the sanctioning in some jurisdictions of the imprisonment of insanity acquittees in prison facilities, and the provision of no meaningful continuity of care, resulting in large numbers of persons continually “shuttling” between jails (or prisons) and mental hospital—and one area of “positive” blurring, the proliferation of mental health courts. On this topic, see generally 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. 937 (2018).

66. See Perlin & Weinstein, *supra* note 44, at 50 (explaining why the CRPD should apply to sex offenders).

67. Michael L. Perlin & Meghan Gallagher, “*Temptation’s Page Flies out the Door*”: *Navigating Complex Systems of Disability and the Law from a Therapeutic Jurisprudence Perspective*, 25 BUFFALO HUM. RTS. L. REV. 1, 18 (2018–19).

68. See, e.g., Astrid Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 295, 307–08 (2011) (arguing in favor of the treatment of sex offenders with respect and dignity).

or correspondence, nor to unlawful attacks on his honor and reputation.”⁶⁹

- Articles 7, 9, and 14 of the ICCPR, which ensure protection from torture,⁷⁰ provide that all persons shall have equal rights before the courts,⁷¹ and that no one shall be “subjected to arbitrary arrest or detention” or “deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁷²
- In addition, multiple articles of the Universal Declaration of Human Rights speak to the issues with which we are concerned.⁷³ These articles, variously, guarantee “equal protection against any discrimination,”⁷⁴ freedom from “arbitrary arrest, detention or exile,”⁷⁵ and freedom from “arbitrary interference with [one’s] privacy, family, home or correspondence.”⁷⁶

There are some provisos to be taken into account. The Supreme Court has ruled, in *Sosa v. Alvarez-Machain*,⁷⁷ that the ICCPR is not self-executing and does not confer a private cause of action (that would allow individuals to sue in federal court on the basis of this Covenant). On the other hand, as the United States *has* ratified this Covenant and, by that ratification, “accepts the obligation to protect, respect, and fulfill [the] rights [enumerated in the Covenant],”⁷⁸ rights that establish international legal obligations are binding on the executive and legislative branches of government.⁷⁹ Also, such “non-self-executing” declarations

69. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, (Mar. 23, 1976) [hereinafter ICCPR], as discussed in this context in Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 22.

70. ICCPR, *supra* note 69, Art. 7.

71. *Id.*, Art. 14.

72. *Id.*, Art. 9.

73. UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217 (II) A, U.N. DOC. A/RES/217(III) (Dec. 10, 1948).

74. *Id.*, Art. 7.

75. *Id.*, Art. 9.

76. *Id.*, Art. 12.

77. 542 U.S. 692, 735 (2004).

78. Vanessa Soderberg, *More than Receptacles: The International Human Rights Analysis of Criminalizing Pregnancy in the United States*, 31 BERKELEY J. GENDER L. & JUST. 299, 315 (2016).

79. Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT’L L. & POL’Y 58, 63 (2002).

arguably do not preclude *defendants* from invoking treaty rights defensively.⁸⁰

Consider now how these treaties, covenants, and conventions have been interpreted in another nation, Australia.⁸¹

Interestingly, there has been extensive academic literature in Australia about the issue of international human rights violations of offenders,⁸² as opposed to the paucity of such literature in the United States.⁸³ Professor Patrick Keyzer, by way of example, has argued that legislation in New South Wales—laws that are very similar to most of the current SVP laws in the United States—inflicts arbitrary detention and double punishment contrary to Articles 9 and 14 of the International Covenant on Civil and Political Rights.⁸⁴

In the United States, two major sorts of legislative enactments designed to confine and restrict offenders are civil commitment laws, and registration and notification laws. Both of these legal sanctions necessitate the use of expert testimony during court proceedings.⁸⁵ Thus, it is imperative that

80. See *United States v. Duarte-Acero*, 132 F. Supp.2d 1036, 1040 (S.D. Fla. 2001) (holding that the prohibition against private causes of action does not apply when raising "ICCPR claims defensively").

81. See generally PERLIN & CUCOLO, *supra* note 1, at 142–50; PERLIN & CUCOLO, *supra* note 2, §§ 5–8 to 5–8.1.1, 5–65 to 5–373.

82. See e.g., Patrick Keyzer & Bernadette M. McSherry, *The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface*, 2 INT'L J. CRIMINOLOGY & SOC. 296 (2013); BERNADETTE M. MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* (2009); Patrick Keyzer, *The "Preventive Detention" of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions*, 16 PSYCHOL., PSYCHIATRY & L. 262 (2009).

83. But see Eric Janus, *Preventive Detention of Sex Offenders: The American Experience versus International Human Rights Norms*, 31 BEHAV. SCI. & L. 328 (2013); Birgden & Cucolo, *supra* note 68.

84. See Keyzer, *supra* note 82, rebuking the Australian Attorney General for criticizing an Australian sex offender detainee for seeking an international human rights remedy through the United Nations Human Rights Committee ("A person—particularly a person who is presently susceptible to the coercive power of the state—ought not be vilified because he has taken legal action").

85. In the few cases that have considered the question, such testimony has regularly passed the standard for the admission of expert testimony established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587–89 (1993) (scientific evidence is admissible if it is valid and reliable). See Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 735–40 (2011).

these experts also be required to abide by human rights principles. As discussed below, Australia has made some significant strides in that effort while the United States continues to lag behind.

As in the United States, Australian jurisdictions enacted preventive detention legislation in response to a series of high-profile events.⁸⁶ But, unlike the United States, Australia has adopted a particular set of ethical rules for psychologists. The revised Australian Psychological Society Code of Ethics is based on the Universal Declaration of Ethical Principles for Psychologists.⁸⁷ The Universal Declaration provides a moral framework of universally acceptable ethical principles based on shared human values across cultures.⁸⁸ The application of its moral framework assists psychologists to respond ethically by developing codes of ethics and reviewing current codes.⁸⁹ The Universal Declaration's moral principles are based

86. See e.g., *United States v. Fox*, 286 F.Supp.3d 1219, 1221 (D. Kan. 2018):

In response to several high profile and horrific incidents committed by individuals previously convicted of sex crimes, Congress passed SORNA [Sex Offender Registration and Notification Act] to create a comprehensive national registry for sex offenders. 34 U.S.C. § 20901 (“In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress . . . establishes a comprehensive national system for the registration of [sex] offenders. . .”).

The Victorian *Community Protection Act 1990* (Vic) s. 8, was passed specifically to detain Garry David, who had been convicted of two counts of attempted murder in 1980 and had a long history of threatening behavior. See David Wood, *A One-Man Dangerous Offenders Statute—The Community Protection Act 1990* (Vic), 17 MELBOURNE UNIVERSITY L. REV. 497, 497 (1990).

87. The Universal Declaration was adopted by the International Union of Psychological Science; see <https://www.iupsys.net/about/governance/universal-declaration-of-ethical-principles-for-psychologists.html>. See also APS CODE OF ETHICS, <https://www.psychology.org.au/About-Us/What-we-do/ethics-and-practice-standards/APS-Code-of-Ethics>.

88. There has been, to our minds, astonishingly little written in the United States about this Declaration. 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, 262 (2009); Nora Sveaass, *Destroying Minds: Psychological Pain and the Crime of Torture*, 11 N.Y. CITY L. REV. 303, 306 (2008); and Ida Dickie, *Ethical Dilemmas, Forensic Psychology, and Therapeutic Jurisprudence*, 30 T. JEFFERSON L. REV. 455, 457–58 (2008).

89. Janel Gauthier, Jean Pettifor & Andrea Ferrero, *The Universal Declaration of Ethical Principles for Psychologists: A Culture-Sensitive Model for Creating and Reviewing a Code of Ethics*, 20 ETHICS & BEHAV. (SPECIAL ISSUE ON INTERNATIONAL DIMENSIONS OF PSYCHOLOGICAL ETHICS) 174–96, 179 (2010), DOI: 10.1080/10508421003798885.

on shared human values of peace, freedom, responsibility, justice, humanity, and morality. Whereas historically, psychologists have focused on the individual-clinical, psychological approach to offender rehabilitation, the Universal Declaration considers broader social contexts: individuals, families, groups, and communities.⁹⁰ Four principles are enumerated in the Universal Declaration reinforcing that psychologists are to balance offender rights and community rights:⁹¹

1. Principle I: Respect for Dignity—Treatment must integrate with environmental contexts and social supports;
2. Principle II: Competent Caring for Well-Being—Above all else, psychologists should do no harm;
3. Principle III: Integrity of Psychologists—Advance scientific knowledge and to maintain community confidence in the discipline of psychology; and
4. Principle IV: Professional and Scientific Responsibilities to the Community—Knowledge about human behavior and development of social structures and policies that benefit all individuals.⁹²

Another distinction between the United States and Australia is the application of criminal punishment. Prison sentences in Australia are generally harsher than in the United States, but offenders in Australian states traditionally do not forfeit their human rights upon the commission of a crime.⁹³

Australia has aggressively pursued rehabilitation and community monitoring.⁹⁴ Similar to the United States is Australia's procedure of registration

90. See Birgden & Cucolo, *supra* note 68, at 298–99.

91. See Astrid Birgden & Michael L. Perlin, "Where the Home in the Valley Meets the Damp Dirty Prison": A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings, 14 *AGGRESSION & VIOL. BEHAV.* 256 (2009) (proposing a detailed "checklist" against each principle for forensic psychologists delivering services in correctional settings).

92. Birgden & Cucolo, *supra* note 68, at 299.

93. Jasmin Moran, *The Public Safety (Public Protection Orders) Bill 2012: Is Post-Sentence Detention of Sex Offenders Consistent with Human Rights?*, 45 *VICT. U. WELLINGTON L. REV.* 133, 159 (2014) (compared to the US and Australian models, New Zealand law "strikes an appropriate balance between the competing interests at stake—public protection and human rights").

94. Graham Hazlitt et al., *Sentencing Offenders Convicted of Child Sexual Assaults*, *JUD. COMM'N N.S.W.* 4 (1994).

and notification.⁹⁵ The Australian National Child Offender Register allows for the registration of persons convicted of sex offenses and other serious offenses against children, and each jurisdiction can determine which offenses require registration and for how long.⁹⁶

As in the United States,⁹⁷ Australia witnessed a “growing community concern about the release of convicted sex offenders, not only because of the abhorrent nature of these offences, but because of the lack of evidence that some offenders have been rehabilitated, after refusing to participate in sexual offender treatment programs.”⁹⁸ Early enactments providing for preventive detention were applied to offenders on a very limited basis, and at least one act was held to be unconstitutional by the Australian High Court.⁹⁹ In 2003, Queensland enacted the Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill (DPSOA),¹⁰⁰ which authorized the province Supreme Court to order post-sentence imprisonment of persons serving sentences for serious sexual offences.¹⁰¹

95. There is some important empirical evidence that such laws actually *increase* the rate of recidivism. See e.g., J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161 (2011); Stephanie Nk. Robbins, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 208 (2010).

96. See Australian National Child Offender Register (ANCOR), CrimTrac, http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html; Child Sex Offenders Registration Act, 2006, § 44 (Austl.); Media Release, *Senator the Hon. Christopher Ellison, National Register Launched to Track Child Sex Offenders* (Sept. 1, 2004), http://www.crimtrac.gov.au/documents/pr_ellison_20040901.pdf.

97. Cucolo & Perlin, *supra* note 5.

98. Patrick Keyzer & Sam Blay, *Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication*, 7 MELB. J. INT'L L. 407, 412 (2006). See also Mary Stathopoulos, *Measuring Sexual Offender Recidivism*, Austl. Inst. Fam. Stud. ACSSA Aware No. 25, at 1–3 (2010) (government study reported sexual recidivism rates ranging from “two percent in some samples to as high as sixteen percent in others.”).

99. See *Kable v. DPP (NSW)* (1996) 189 CLR 51 (finding the NSW Act constitutionally invalid); see also Hon. Kevin Lindgren, *Kable's Case and the Rule of Law* (May 7, 2014), <https://www.ruleoflaw.org.au/kables-case-and-the-rule-of-law/>.

100. Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld), 1 [hereinafter DPSOA]. On the haste with which the Queensland law was written (and the subsequent human rights dilemmas), see MCSHERRY & KEYSER, *supra* note 82, at 102–03.

101. DPSOA, *supra* note 100. Section 5 of the DPSOA provides that the application be made during the last six months of the prisoner's period of imprisonment (§ 5(2)(c)). The

The constitutional challenges to the validity of the DPSOA progressed through the Australian courts, and the DPSOA was continuously held to be constitutionally valid,¹⁰² partly on the basis that the proceedings were civil in nature.¹⁰³ The most important Australian case challenging the DPSOA came from Robert Fardon, a prisoner at the Wolston Correctional Centre in suburban Brisbane.¹⁰⁴ Fardon argued that the DPSOA constituted double punishment in that it punished a person for his or her prior offenses and was thus an additional term of imprisonment without any new crime committed.¹⁰⁵ In *Fardon v. Attorney-General (Qld)*, the court majority upheld post-sentence commitment of offenders who were perceived to be dangerous.¹⁰⁶ In the course of their opinions, the six justices in the majority¹⁰⁷ made points very similar to those found in *Kansas v. Hendricks*¹⁰⁸ as to the "non-punitive" nature of the Act. Despite the potential implications of preventive detention for double jeopardy, only two of the seven judges addressed the issue:

Court may order that the prisoner undergo examinations "by 2 psychiatrists named by the court who are to prepare independent reports" (§ 8(2)(a)); or, if the court is satisfied that the application may not be finally decided until after the prisoner's release day, order "that the prisoner be detained in custody for the period stated in the order" (§ 8(2)(b)). A sexual offense is defined as "an offence of a sexual nature against children or involving violence whether committed in Queensland or outside Queensland." *Id.*

102. *Attorney-General (Qld) v. Fardon* [2003] QCA 416 (Unreported) (de Jersey CJ., McMurdo P., & Williams JA., 23 September 2003) [80] (McMurdo P.) (the High Court of Australia dismissed the appeal).

103. *Attorney-General (Qld) v. Fardon* [2003] QSC 200 (Unreported, Muir J, 9 July 2003). See also Keyzer & Bly, *supra* note 98, at 414. For a detailed analysis of the progression of the case, see Patrick Keyzer, Stephen Southwood & Cathy Pereira, *Pre-Emptive Imprisonment for Dangerousness in Queensland under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues*, 11 PSYCHIATRY, PSYCHOL. & L. 24 (2004). For a consideration of all Australian state sex offender laws, see James Vess et al., *A Comparative Analysis of Australian Sex Offender Legislation for Sex Offender Registries*, 44 AUST. & NZ J. CRIMINOLOGY 404 (2011).

104. *Fardon v. Attorney-General (Qld)* (2004) 210 ALR 50 [hereinafter *Fardon* (2004)] (Gleeson CJ.; McHugh, Gummow, Hayne, Callinan & Heydon JJ.; Kirby J. dissenting).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Hendricks*, 521 U.S. at 369 ("We . . . hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive").

It is accepted that the common law value expressed by the term “double jeopardy” applies not only to determination of guilt or innocence, but also to the quantification of punishment. However, the making of a continuing detention order with effect after expiry of the term for which the appellant was sentenced in 1989 did not punish him twice, or increase his punishment for the offences of which he had been convicted.¹⁰⁹

Alternatively, the dissenting justice called the post-sentence detention under the statute “double punishment” both because the disposition took place in a prison and because treatment “takes a distant second place (if any place at all) to the true purpose of the legislation, which is to provide for ‘the continued detention in custody . . . of a particular class of prisoner.’”¹¹⁰ Since the DPSOA was validated by the High Court, Queensland and the federal government of Australia have not made any appreciable changes to the statute in question.¹¹¹

The High Court’s decision in *Fardon* did not render the DPSOA valid under international law,¹¹² and in 2007, Fardon and an individual detained under the New South Wales equivalent legislation¹¹³ submitted communications to the United Nations Human Rights Committee (UNHRC)¹¹⁴ under the Optional Protocol to the ICCPR. The UNHRC disagreed with the Australian High Court, finding that such detention was

109. *Fardon* (2004), *supra* note 104, at 72 (Gummow J) (citations omitted). The other judge to address the double punishment issue found that “the [DPSOA] ultimately deprives people such as the appellant of personal liberty, a most fundamental human right, on a prediction of dangerousness, based largely on the opinions of psychiatrists which can only be, at best, an educated or informed ‘guess.’” *Id.* at 82 (Kirby J., dissenting).

110. *Id.* (Kirby J., dissenting).

111. See Keyzer & Blay, *supra* note 98, at 423–24.

112. *Id.* at 417. (Instead, this issue will ultimately be determined by the UNHRC). For a searing critique of *Fardon*, see Patrick Keyzer, Cathy Pereira & Stephen Southwood, *Pre-emptive Imprisonment for Dangerousness in Queensland under the Dangerous Prisoners (Sexual Offenders) Act 2003: The Constitutional Issues*, II PSYCHIATRY, PSYCHOL. & L. 244, 251 (2004) (“in our opinion, the uncertainty and oppressiveness of this imprisonment regime amount to a significant undermining of our criminal justice system”).

113. Not coincidentally, the three Australian states that have opted to employ preventive detention have not implemented any statutory protection of human rights. Similar legislation has been passed in New South Wales (CRIMES (SERIOUS SEX OFFENDERS) ACT 2006 (NSW)), VICTORIA (SERIOUS SEX OFFENDERS (DETENTION AND SUPERVISION) ACT, 2006 (WA)).

114. *Fardon v. Australia*, CCPR/C/98/D/1629/2007, UNHRC, 10 May 2010, <https://www.refworld.org/cases, HRC,4c19e97b2.html> [hereinafter *Fardon* Communication].

essentially criminal in nature and required proof of a criminal offense rather than a suspicion of future criminality.¹¹⁵

The UNHRC concluded that under Article 9, Paragraph 1 of the Covenant,¹¹⁶ such detention was "not permissible in the absence of [another] conviction for which imprisonment is a sentence prescribed by law."¹¹⁷ Accordingly, the statute as applied in *Fardon v. Attorney-General (Qld)* amounted to an ex post facto law, violating Article 15 of the Covenant that proscribes any penalty heavier than the one that existed at the time of the original sentence.¹¹⁸ Despite the human-rights-based opinion of the UNHRC, it is not binding on Australia, although the UNHRC can request that any party to the International Covenant provide a response as to how it plans to give effect to the Committee's view.¹¹⁹

Professors Bernadette McSherry and Patrick Keyzer have concluded that the Queensland law "challenges long established and widely accepted human rights principles."¹²⁰ Human Rights Watch has found that "these laws [preventive detention] cause great harm to the people subject to them . . . proponents of these laws are not able to point to convincing evidence of public safety gains from them,"¹²¹ and that the United States "is the only country in the world that has such a panoply of measures governing the lives of former sex offenders."¹²² The hope is that the various jurisdictions throughout Australia heed the advice of human watch groups and remain far below the extraordinarily low bar that has been set by the United States.

C. The Significance of the International Megan's Law

What impact does the enactment of International Megan's Law (IML)¹²³ have on what we are discussing in this article? In 2008, following the

115. *Tillman v. Australia* No. 1635 (2007).

116. *Id.*

117. *Fardon* Communication, *supra* note 114, ¶ 7.4(1).

118. *Id.* ¶ 7.4(2); ICCPR, Art. 15.

119. *See generally* Keyzer & Blay, *supra* note 98.

120. MCSHERRY & KEYZER, *supra* note 82, at 37.

121. *See No Easy Answers: Sex Offender Laws in the U.S.*, 19(4)G HUMAN RTS. WATCH 1-142, 3 (Sept. 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us>.

122. *Id.* at 10.

123. On the impact of New Jersey's Megan's Law on the development of domestic sex offender laws in other states, *see* PERLIN & CUCOLO, *supra* note 2, § 5-2.3.3, at 5-53 to 5-55. On the International Megan's Law, *see id.*, § 5-8.3, at 5-377 to 5-379.

national state-by-state implementation of sexual notification and registration laws, the first version of an IML was introduced in US Congress.¹²⁴ Seven years later, that legislation passed both the US House of Representatives and the Senate, including an amendment to include a passport identifier for sex offenders.¹²⁵ President Obama ultimately signed the bill into law on February 8, 2016.¹²⁶

Prior to the enactment of IML, “a sex offender who provide[d] notice of travel to one country [would] appear on a flight manifest as traveling to that country, but might then travel from that first destination country to a different destination without detection by U.S. authorities.”¹²⁷ The new law was therefore designed to put foreign countries on notice when registered sex offenders traveled internationally.¹²⁸

IML mandated that the US State Department mark convicted sexual offenders’ passports with a “unique identifier.”¹²⁹ According to IML, a “sex offender” is “an individual required to register under the sex offender registration program of any jurisdiction or included in the National Sex Offender Registry (NSOR), on the basis of an offense against a minor.”¹³⁰ In addition, a “unique identifier” is “any visual designation affixed to a conspicuous location on the passport indicating that the individual is a covered sex offender.”¹³¹ Furthermore, the Departments of Justice and Homeland Security¹³² are required to notify foreign entities when sex

124. Jonathan D. Salant, *Obama Signs International Megan’s Law*, NJ.COM (Feb. 8, 2016), http://www.nj.com/politics/index.ssf/2016/02/obama_signs_international_megans_law.html.

125. *Id.* See also Jennifer Kamorowski, Heather Ellis Cucolo & Allison D. Redlich, *International Megan’s Law: It’s Not About What Works, It’s About What Sells*, WINTER NEWSLETTER (Am. Psychol. Law Soc’y, Washington D.C., Feb. 2017), https://ap-wildapricot.org/resources/Documents/APLS_Winter_2017.pdf.

126. Salant, *supra* note 124. The Act’s full name is “The International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act.”

127. *Doe v. Kerry*, No. 16-CV-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016).

128. Salant, *supra* note 124.

129. *Id.*

130. H.R. 515, 114th Cong. (2016).

131. *Id.*

132. Homeland Security, through the establishment of an “Angel Watch Center” within the Child Exploitation Investigations Unit of US Immigration and Customs Enforcement (ICE), is charged with determining whether individuals who travel

offenders are traveling abroad to their respective countries.¹³³ The law's ostensible goal is to reduce the danger of child sex tourism.¹³⁴

The State Department has announced that it would start revoking the passports of registered child sex offenders, and will compel them to apply for a new passport that bears a "unique identifier" to alert authorities of their status.¹³⁵ Additionally, any registered child sex offender who currently does not have a passport, and applies for one for the first time, will only be issued a passport that contains the identifier, which states: "The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to [US law]."¹³⁶

The misconceptions of the "high risk of sex offense recidivism and the myth of 'stranger danger' have engendered most—if not all—of the laws regarding sex offenders in the United States"¹³⁷ served as the rationale—albeit flawed rationale—for the passage of the IML. There is no evidence to suggest that these laws are effective in reducing the risk to those they aim to protect.¹³⁸

In addition to increasing the stigma of being identified as a sex offender,¹³⁹ coupled with the false reality that sex offenders are predominantly the ones

internationally are on the NSOR or whether they meet the criteria for inclusion on the NSOR. Salant, *supra* note 124.

133. *Id.*

134. US Representative Chris Smith, *International Megan's Law: One Year Later* (Feb. 8, 2017), <https://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=400124>. "Child sex tourism is the sexual exploitation of children by a person . . . who travel[s] from their . . . home country in order to have sexual contact with children." ECPAT INTERNATIONAL, COMBATING CHILD SEX TOURISM: QUESTIONS & ANSWERS (2008), www.ecpat.org/wp-content/uploads/legacy/cst_fa_q_eng.pdf.

135. *Child Sex Offenders to be Identified on US Passports*, NEW YORK POST (Nov. 3, 2017), <http://nypost.com/2017/11/03/child-sex-offenders-to-be-identified-on-us-passports>.

136. *Id.* The specific section of the U.S. Code, where IML is codified, is 22 U.S.C. § 212b ("Unique Passport Identifiers for Covered Sex Offenders"). *Passports and International Megan's Law*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFAIRS (Oct. 30, 2017), <https://travel.state.gov/content/passports/en/news/passports-international-megans-law.html>.

137. Kamorowski, Cucolo & Redlich, *supra* note 125, at 7.

138. *Id.*

139. Under IML, a sex offender is defined as "an individual required to register under the sex offender registration program of any jurisdiction or included in the National Sex Offender Registry, on the basis of an offense against a minor." 22 USCA § 212b (c). This, of course, may include teenagers consensual "sexting" pictures to their boyfriend/girlfriend, those who are involved in what are characterized as "Romeo and Juliet" relationships and many other offenses not involving sexual violence. See Steve James, *Romeo and Juliet Were*

who engage in child sex tourism,¹⁴⁰ placing a unique identifier on a sex offender's passport also raises serious issues as to the constitutionality of IML.¹⁴¹ A wide array of compelling constitutional arguments can be made against the implementation of International Megan's Law, including alleged violations of the First Amendment (as covered individuals must publicly communicate their status as registered sex offenders on their passports),¹⁴² and the equal protection and due process aspect of the Fifth Amendment (as covered individuals are deprived of the right to be free from arbitrary, oppressive, and unreasonable state action in a way that conveys no rational relationship to the government's goal of safeguarding the public).¹⁴³ It is thus no surprise that activists have argued that the IML is at odds with various articles of the United Nations' Universal Declaration of Human Rights.¹⁴⁴

Sex Offenders: An Analysis of the Age of Consent and a Call for Reform, 78 U. MO.-KAN. CITY L. REV. 241 (2009); see also Birgden & Cucolo, *supra* note 68, at 300 (consensual sex between teenagers was included in the 660,000 registered sex offenders as of 2008).

140. See e.g., Kamorowski, Cucolo & Redlich, *supra* note 125, at 9 (As of 2012, ICE had arrested 8,000 "child predators" nationwide, yet only 99 (just over 1%) of those arrests were made under the traveling child sex offender provisions of the 2003 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act (Department of Homeland Security, 2012). In addition, in a 2010 Department of Justice report to Congress, "The National Strategy for Child Exploitation Prevention and Interdiction," the National Drug Intelligence Center interviewed over a hundred prosecutors, investigators, and other experts in the field, over half of whom reported that their agency had not investigated or prosecuted any sex tourism cases, and 25% of whom said they encountered sex tourism cases very infrequently). See also Christopher King, *Sex Offender Registration and Notification Laws at Home and Abroad: Is an International Megan's Law Good Policy?*, 15 N.Y. CITY L. REV. 117, 136 (2011) (only a "tiny proportion" of registered sex offenders engage in child sex tourism abroad).

141. The only case to date on the federal level brought by litigants to challenge the implementation of International Megan's Law has been *Doe v. Kerry*, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016). There, the "plaintiffs challenge[d] the 'passport identifier' provisions and 'notification' provisions of the IML." *Id.* at *5. Although the Court ultimately granted a motion to dismiss plaintiffs' suit, the opportunity for other litigants to bring forth legitimate constitutional arguments, in federal court, abounds.

142. *Id.* at *16. See also Complaint at 20, *Doe*, No. WL 5339804, 16-CV-0654-PJH (N.D. Cal. Sept. 23, 2016).

143. *Id.* See also Complaint at 21, *Doe*, No. WL 5339804, 16-CV-0654-PJH (N.D. Cal. Sept. 23, 2016).

144. See eAdvocate, *International Megan's Law EXPOSED! Now, Hear the Truth About HR 5138*, CONG., COURTS & SEX OFFENDERS (July 31, 2010). The Articles are discussed *supra* at text accompanying notes 73-76.

II. COMPARATIVE LAW

Other nations have considered additional substantive issues related to sex offender law, including, e.g., issues that relate to female sexual offenders,¹⁴⁵ how crimes are classified as to sexual nature,¹⁴⁶ prosecution for crimes committed overseas,¹⁴⁷ extradition,¹⁴⁸ and statutes of limitations for sexual offenses.¹⁴⁹

145. See Catrien Bijleveld, *Sex Offenders and Sex Offending*, 35 CRIME & JUST. 319, 351 (2007) (discussing sex offenses committed by females in the Netherlands); *Female Sex Offenders*, Center for Sex Offender Management (Mar. 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf).

146. See Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121 (2007); Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993); Ngaire Naffine, *Windows on the Legal Mind: The Evocation of Rape in Legal Writings*, 18 MELBOURNE U.L. REV. 741, 757–58 (1992) (under domestic law, the victim's nonconsent is usually considered to be the "nub" of crimes of sexual violence); Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 645–46 (2001) (consent becomes the dividing line between legal sexual contact and punishable sexual violence).

147. See *State v. Sumulikowski*, 110 A. 3d 856 (N.J. 2015) (New Jersey authorities cannot prosecute two high-school chaperones accused of having sex with three high-school students on a school trip to Germany: "There must be territorial jurisdiction in New Jersey for the state to prosecute a crime here"; "The state has the power to prosecute crimes that occur within its borders but may not bring charges for offenses committed entirely in another state or country."); *People v. Kennedy*, 817 N.Y.S.2d 614 (Ct. App. 2006) (member of US Navy who was convicted of a sex offense by the Navy was not required to register in New York because he was not required to register with the Navy as a sex offender).

148. See generally Janus, *supra* note 83, at 536–38, discussing *Sullivan v. Government of the United States*, (2012), EWHC (Admin.), 1680 [36] (Eng.), characterizing the Minnesota SVP scheme as a "flagrant violation" of the European Convention on Human Rights. For press stories about the *Sullivan* case, see e.g. Maricella Miranda, *UK Court Blocks Egan Sex-Crimes Suspect's Extradition*, PIONEER PRESS (June 28, 2012), http://www.twincities.com/ci_20961564/ukcourt-blocks-minnesotalsexcrimes-suspects-extradition; Ian Evans, *Britain Denies Extradition of Minnesota Sex Suspect*, STAR TRIB. (June 28, 2012), <http://www.startribune.com/local/south/160704485.html> (London court refused to extradite, finding that commitment to Minnesota's sex offender program would be "flagrant denial" of the suspect's human rights).

149. See Sam Kim, *South Korea Toughens Laws Against Sex Crimes*, ASSOCIATED PRESS, October 28, 2011. For example, South Korea's parliament has enacted a law that eliminates the statute of limitations for sex crimes against children under 13 and disabled women, and increases the maximum penalty to life in prison; has scrapped a law that barred the prosecution of a child sex offender unless the victim made the complaint himself or herself; and has legalized chemical castration and the collection of DNA samples from sex criminals. See

We consider these developments to weigh their potential impact on the state of SVP laws in the United States.¹⁵⁰

Although many other nations have had to contend with confining and monitoring sexual offenders, most have been hesitant to follow the United States' creation of SVP civil commitment statutes. Alternatively, preventive detention has been accomplished by providing indeterminate periods of incarceration as an option at criminal sentencing,¹⁵¹ or by community supervision.¹⁵²

Germany is the only country in the European Union to allow for preventive detention as a proposed solution to reduce sexual crimes.¹⁵³ German criminal law has historically respected the principle against applying laws

also Misael Carlos Sanchez, *Our Moral Obligation: The Message Massachusetts Can Send to Sexual and Physical Child Abusers*, 26 B.U. PUB. INT. L.J. 115, 141–42 (2017) (as of 2017, Israel, New Zealand, Portugal, Argentina, and England had in place voluntary chemical castration for sex offenders in lieu of prison sentences).

150. The Supreme Court has been sharply split on whether to consider law from other nations. By way of example, in *Roper v. Simmons*, 543 U.S. 551 (2005), holding that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments, the Court specifically “recognized the relevance of the views of the international community” (*id.* at 575). Justice Scalia dissented vigorously, replying, “More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand” (*id.* at 624). See generally A. Mark Weisburd, *Roper and the Use of International Sources*, 45 VA. J. INT’L L. 789 (2005). On the significance of the Court’s reliance on comparative law in the death penalty context, see Michael L. Perlin, “Yonder Stands Your Orphan with His Gun”: *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEXAS TECH L. REV. 301, 303–04 (2013).

151. A prime example is *Sicherungsverwahrung* in Germany, which is defined as confinement based on security concerns and which may be imposed at sentencing on select offenders who are found to constitute a high risk of recidivism. See Tatjana Hörnle, *Penal Law and Sexuality: Recent Reforms in German Criminal Law*, 3 BUFF. CRIM. L. REV. 639, 674–82 (2000).

152. See Overview 1959–2013, ECHR, Council of Europe (2014) (e.g., preventive supervision in Europe; Council of Europe, 2014), at http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 16 (2014).

153. Compare *Kable*, *supra* note 99 (preventive detention schemes may infringe and certainly will create the danger of infringement of basic human rights). See generally Daphne Grathwohl, *German Court Rules Preventive Detention Unconstitutional*, DW (May 4, 2011), <https://p.dw.com/p/p8JJa> (Germany’s Federal Constitutional Court in Karlsruhe struck down the rules governing “supplementary preventive custody” as unconstitutional and violating the basic right to freedom by not differentiating itself from normal imprisonment).

retroactively, and has declared that indefinite imprisonment sentences are impermissible.¹⁵⁴ Yet, in response to highly publicized crimes in the mid-1990s, "the legislature sought to react emphatically to the social threat and disturbance caused by new forms of criminality,"¹⁵⁵ and legislation was enacted to increase criminal penalties and alter the requirements for the incapacitation of sexual offenders.¹⁵⁶

In 2001, the German Chancellor openly advocated to "[l]ock [sex offenders] up—and throw away the key."¹⁵⁷ Public sentiment and legislative support have encouraged German criminal courts to incapacitate habitual offenders who are at risk of committing serious crimes likely to have a severe impact on victims.¹⁵⁸ Such detention is not deemed to amount to punishment, but rather, is seen as "a security measure which does not constitute a moral verdict on the wrongfulness of the act—the major element of criminal punishment—but solely predicts dangerousness and assesses the need to protect society."¹⁵⁹

Just as judicial pressure and expert bias are found in American courts,¹⁶⁰ so do they exist in German courts. German judges are hesitant to risk ruling

154. See GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 148, 152 (2006).

155. GERMAN PENAL CODE, *as amended as of December 19, 2001*, 32 AMERICAN SERIES OF FOREIGN PENAL CODES xxxvi (Stephen Thaman trans., 2002). Article 66b, § 1 allows preventive detention retrospectively if, (1) it occurs prior to the end of a term of imprisonment for a range of crimes including "sexual self-determination," or (2) evidence comes to light concerning offenses listed in Article 66 § 3, which indicates that the convicted person presents a significant danger to the general public, and is very liable to commit serious offenses by which victims would be seriously harmed.

156. SIXTH LAW ON REFORM OF THE CRIMINAL LAW AND LAW TO FIGHT AGAINST SEXUAL CRIMES AND OTHER DANGEROUS CRIMES (1998) (Germany) (ten-year maximum for preventive detention abolished; retroactive application permissible).

157. Walter Albrecht & Dietmar Henning, *German Chancellor's Outburst against Sexual Offenders: "Lock Them Up—And Throw Away the Key,"* WORLD SOCIALIST WEB SITE (Aug. 1, 2001), <https://www.wsws.org/en/articles/2001/08/schr-ao1.html>.

158. See Frieder Dünkel & Dirk van Zyl Smit, *Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court*, 5 GERMAN L.J. 619 (2004) ("Preventive detention is, together with life imprisonment, the harshest sanction in German criminal law.").

159. Albrecht & Henning, *supra* note 157; see also Dünkel & van Zyl Smit, *supra* note 158, at 625 (citing same principle regarding detention of mentally ill people).

160. See e.g., Michael L. Perlin, *Pretexes and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993); see also 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 &

against experts appointed to testify in preventive detention cases,¹⁶¹ and experts often believe that their appointment is premised on the fact that dangerousness exists and it is their role to find it.¹⁶² Prediction of dangerousness for preventive detention does not require the finding of a mental abnormality, and experts often heavily rely on an offender's prior record.¹⁶³

Criticisms of the German approach parallel many of the criticisms of US sex offender laws¹⁶⁴—that measures enacted are based only on the offender's past and are not equipped to prevent serious crime.¹⁶⁵ Also similar is the concern that “[r]esearch on risks and risk assessment had no influence in guiding the response to sex offenders. The political and judicial language reveals itself as mere risk rhetoric that camouflages a decision-making process that pays lip-service to risk assessment but does not accept risks.”¹⁶⁶ Scholars have also noted that there is a duty to protect human dignity by

JUSTICE 431 (2017), discussing the “significance of the interrelationships between social biases and ‘scientific’ judgment, as reflected in expert testimony in cases related to all the sub-areas of mental disability law,” *id.* at 432.

161. See Dünkel & van Zyl Smit, *supra* note 158, at 633–37.

162. Nora V. Demleitner, *Abusing State Power or Controlling Risk? Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621, 1650–52 (2003).

163. Meaghan Kelly, *Lock Them Up—and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT’L L. 551, 567–68 (2008) (no finding of mental abnormality is required, appointed experts often interpret their appointment as a mandate to find dangerousness, and an offender's prior record is too heavily relied upon when the offender is older and past his criminal prime). See also *White v. State*, 649 S.E.2d 172 (S.C. Ct. App. 2007) (evidence of a sex offender's prior criminal sexual offenses not resulting in convictions may be sufficiently relevant to be admissible at a hearing to determine whether probable cause exists to commit a sex offender as a sexually violent predator).

164. See Tatjana Hörnle, *A Clash of Penal Cultures?*, 9 BUFF. CRIM. L. REV. 329, 335 (2005) (book review) (“Shifting sensibilities and moral panics are by no means exclusively American phenomena, and they do to a certain degree influence criminal policy in Germany.”).

165. See Dünkel & van Zyl Smit, *supra* note 158, at 619–20 (the “measure for improvement and security” dates back to the Nazi era's 1933 law against habitual criminals).

166. Albrecht & Henning, *supra* note 157 (emphasis added). See Dünkel & van Zyl Smit, *supra* note 158, at 635–36 (“the overall recidivism rates of . . . sexual offenders are particularly low”). See also Martin Rettenberger & Reinhard Eher, *Actuarial Assessment of Sex Offender Recidivism Risk: A Validation of the German Version of the Static-99*, 1 SEXUAL OFFENDER TREATMENT (No. 3, 2006) (recent Austria study supported improvement in risk assessment of sex offenders through use of the Static-99 in German speaking countries, but further validation necessary).

having a statutory maximum period of preventive detention.¹⁶⁷ In 2010, the Violent Offenders (Custodial Therapy) Act transferred jurisdiction over dangerous offenders who require post-sentence incapacitation from the criminal courts to the civil courts.¹⁶⁸

The European Court of Human Rights (ECHR) ruled against Germany's preventive detention of a sexual offender and unanimously held that there had been a violation of Article 5, Section 1 (right to liberty and security) of the European Convention on Human Rights.¹⁶⁹ Then, in 2011, the German high court declared all post-sentence incapacitation orders of the German Code unconstitutional, as dispositions under those orders were not sufficiently therapeutic, and thus distinct from prison conditions.¹⁷⁰

In anticipation of this judgment, the German Federal legislature enacted a Retrospective Preventive Detention Act.¹⁷¹ Under this Act, retrospective

167. See Dünkel & van Zyl Smit, *supra* note 158, at 622. Other less restrictive options such as treatment and supervision in the community have been proposed; "Instead of simply locking people away one could also have extended the strict supervision in the community," *id.* at 633, 637. See also *Justice Minister Rejects Outing Sex Offenders as Post-Jail Regime Still Unclear*, THE LOCAL (July 20, 2011), <http://www.thelocal.de/20110720/36407> ("The Constitutional Court ruled in May that the practice of keeping dangerous criminals in prison after their original sentences are served could not be continued, backing a previous ruling from the European Court of Human Rights.").

168. MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL PROCEDURE 235 (2012).

169. In 2011, the ECHR returned to the issues raised in its earlier jurisprudence regarding preventive detention (*Sicherungsverwahrung*) under German criminal law. See e.g., *supra* note 155. In *M. v. Germany*, European Court of Human Rights, Application No. 19359/04 (2010), the ECHR addressed the legality of indeterminate criminal dispositions based in whole or part on assessments of risk. The Court held that the German Criminal Law's *retroactive* extension of confinement in preventive detention failed to meet the requirement of lawful detention "after conviction" under Art. 5 § 1 (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and violates the prohibition of retroactivity (Art. 7 § 1 of the Convention). Also, in *Haidn v. Germany*, 5th Section, App. no. 6587/04 (2011), the ECHR extended its judgement by finding that *retrospective* preventive detention does not meet the requirements of Art. 5 § 1 (a) of the Convention either, and that detention under a corresponding law therefore as well violates the prisoner's right of liberty and freedom.

170. BVerfG, Docket No. 2BvR 2365/09 (May 4, 2011) (directing the legislature to reform the law; accordingly, by May 2013, it held that only those who pose an extreme likelihood of committing serious violent and sexual offenses and who suffer from a serious mental disorder may be confined).

171. After the decision of *M. v. Germany*, *supra* note 169, European Court of Human Rights, Application No. 19359/04 (2010) and in expectance of the ECHR's actual judgement, the German Federal Legislature promulgated a new Act: *Gesetz zur Neuordnung des*

preventive detention can no longer be ordered in cases of prisoners convicted before 2011. However, preventive detention may still apply to prisoners convicted before that date, and to prisoners transferred from a psychiatric hospital who are no longer mentally ill but continue to pose a danger to the public. Because both alternatives of continued detention violate the judgments of the ECHR, it is unknown whether courts will continue to abide by the legislature's decree.¹⁷² It was significant to the ECHR that Germany had failed to implement a "robust treatment regime."¹⁷³ This analysis stands in stark contrast to American decisions in which continued, indeterminate sexual offender commitment is sanctioned in spite of an abject lack of treatment provided.¹⁷⁴

Although preventive detention as it exists in the United States has been scarcely replicated, many countries have looked to US laws to determine how to effectively institute community supervisions and address their own sex offender and recidivism concerns once a person returns to the community.¹⁷⁵ On this issue, we will consider the laws in other nations in Europe, the European Union, Hong Kong, South Africa, and Canada.¹⁷⁶

Rechts der Sicherungsverwahrung und zu begleitenden Regelungen of 22 December 2010, Bundesgesetzblatt, Jahrgang 2010, Teil I, Nr. 68, at 2300.

172. The case of H.W. v. Germany, App. No. 17167/11, ¶ 3 (Eur. Ct. H.R. 2013), accessible at <http://hudoc.echr.coe.int/fre?i=001-126364>, concerned the review by the German courts of an offender's placement in preventive detention, which had been ordered by the sentencing court together with his conviction for sexual offences more than twelve years previously. The court held in particular that H.W.'s preventive detention after the expiration of the time limit for a judicial review of the measure had been arbitrary, and that the German courts should have obtained a fresh assessment of Mr. W.'s dangerousness by a medical expert. See Mark Hamburger, H.W. v. Germany, 14 CHI.-KENT J. INT'L & COMP. L. I (2014).

173. Janus, *supra* note 83, at 536.

174. See *Hendricks*, discussed *supra* in text accompanying notes 45–48, and Perlin, *No Success Like Failure*, *supra* note 3, at 1264 (discussing lack of treatment offered to Hendricks, a point conceded by the Supreme Court in its opinion).

175. Jill Levenson, *Community Protection from Sexual Violence: Intended and Unintended Outcomes of American Policies*, in INTERNATIONAL PERSPECTIVES ON THE ASSESSMENT AND TREATMENT OF SEXUAL OFFENDERS: THEORY, PRACTICE AND RESEARCH 591 (Reinhard Eher et al. eds., 2011) (United States has the most aggressive community protection policies in the world; no known residence restrictions exist outside of the US).

176. For a comparative analysis of the United States, Canada, and Australia, see Cynthia Calkins Mercado, *Preventive Detention of Sex Offenders: A Common Law Perspective*, 2 PENSAMIENTO PSICOLÓGICO 7 (2014). For a comparative analysis of the United States, the

A. Europe¹⁷⁷

Just as American states have struggled with the constitutionality of community containment,¹⁷⁸ countries in the European Union (EU) differ on the scope of sex offender registration laws.¹⁷⁹ A resolution adopted by the Parliamentary Assembly of the Council of Europe recommended against the introduction of a Europe-wide sex offender register and instead called on members to take effective national measures to prevent sexual offenses.¹⁸⁰

Many other countries around the world have developed their own systems of registration and notification.¹⁸¹ Some jurisdictions, such as the United Kingdom (UK), debated the decision to follow the United States model.¹⁸² At first, the UK refused to adopt legislation modeled after Megan's Law for various reasons, including "a lack of statistical evidence

United Kingdom, and Australia, see Mark Kielsgard, *Myth-Driven State Policy: An International Perspective on Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247 (2014).

177. See generally PERLIN & CUCOLO, *supra* note 2, § 5-8.1, at 5-346 to 5-351.

178. See *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom. Snyder v. John Does #£1-5*, 138 S. Ct. 55 (2017) (the Sixth Circuit found the retroactive application of the Michigan Sex Offenders Registration Act (SORA) to be punitive and therefore unconstitutional).

179. Eric Janus, Shawn Alexander & Leah Graff, M. v. Germany: *The European Court of Human Rights Takes a Critical Look at Preventive Detention*, 29 ARIZ. J. INT'L & COMPAR. L. 605 (2012). On the Canadian experience, see Julie Blais & James Bonta, *Tracking and Managing High Risk Offenders*, 39 LAW & HUM. BEHAV. 253 (2015).

180. Eur. Parl. Ass'n, *Reinforcing Measures Against Sex Offenders*, Resolution 1733 (2010), available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17868&>. The resolution was adopted by the Standing Committee, acting on behalf of the Assembly, on May 21, 2010.

181. As of 2014, the following countries have laws governing sex offender registration and notification systems at the national and/or provincial level: Argentina, Australia, Bermuda, Canada, France, Germany, Ireland (Republic of), Jamaica, Jersey, Kenya, Maldives, Malta, Pitcairn Islands, South Africa, South Korea, Taiwan, Trinidad & Tobago, United Kingdom, and the United States.

The following countries have considered or are considering sex offender registration and notification laws, but such laws have not yet passed: Austria, Bahamas, Fiji, Finland, Hong Kong, Israel, Malaysia, New Zealand, Switzerland, United Arab Emirates, and Zimbabwe.

182. Interesting is that the practice of registration (of offenders generally) originated in Europe rather than the United States. See Wayne A. Logan, *Prospects for the International Migration of U.S. Sex Offender Registration and Community Notification Laws*, 34 INT'L J.L. & PSYCHIATRY 233 (2011).

that notification affects recidivism, the reluctance of pedophiles to register for fear of harassment, an increased likelihood that offenders will kill their victims to avoid conviction, a possibility of violence against offenders and suicide of registrants, and the possibility of driving sex offenders underground.”¹⁸³ Nonetheless, the UK enacted its own registration and notification system under The United Kingdom Sex Offenders Act of 1997.¹⁸⁴ This act allowed for the police to be notified of offenders entering the community but focused on protecting sex offenders’ rights of free movement, privacy, and rehabilitation.¹⁸⁵ The UK has adopted the European Convention on Human Rights and thus upholds a mandated right to privacy.¹⁸⁶ The UK’s approach is unique, and is based on the “premise that criminal law should not breach the divide between public and private realms or seek to invade a person’s private sexual life beyond what is necessary to protect the public.”¹⁸⁷

183. Nicole J. Smith, *Protecting the Children of the World: A Proposal for Tracking Convicted Sex Offenders Internationally*, 13 SAN DIEGO INT’L L.J. 623, 631 (2012).

184. SEX OFFENDERS ACT, 1997, c. 51 (U.K.). Killer “Grinned as He Took Sarah Payne”, TELEGRAPH, Nov. 15, 2001, www.telegraph.co.uk/news/uknews/1362446/Killer-grinned-as-he-took-Sarah-Payne.html (attention to sex offender registration laws bloomed in 2000, when eight-year-old Sarah Payne disappeared while playing in a cornfield in England).

185. In contrast to US laws, the 1997 Act only required that notifications about registered offenders be provided to professionals and practitioners, rather than the public at large. See e.g. Smith, *supra* note 183, at 632.

On similarities and convergences between the US and UK laws, see Kate Blacker & Lisa Griffin, *Megan’s Law and Sarah’s Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom*, 46 CRIM. LAW BULL. 987 (2010); MEPS ‘Want EU Sex Offender List’, BBC NEWS (Aug. 22, 2007, 23:37 GMT), http://news.bbc.co.uk/2/hi/uk_news/6958807.stm.

186. Art. 12 Universal Declaration of Human Rights; Art. 17 International Covenant on Civil and Political Rights; Art. 8 European Convention on Human Rights; Art. F(2), Treaty on EU, EU Data Protection Directive. Parliament approved two Acts with expansive implications for the right of privacy: The Data Protection Act (Data Protection Act, 1998, c. 29 (Eng.)), and the Human Rights Act (Human Rights Act, 1998, c. 42 (Eng.)). See e.g. David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. INFO. TECH. & PRIVACY L. 1, 105 (1999) (first establishment in Great Britain of enforceable right to privacy). See DAVID BANISAR ET AL., PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND INTERNATIONAL DEVELOPMENTS 27, 375 (2002).

187. Autumn Long, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 145, 155 (2009); TERRY THOMAS, SEX CRIME: SEX OFFENDING AND SOCIETY I, II (2000).

The United Kingdom Sex Offenders Act of 1997 was further amended with the passage of the Sexual Offences Act of 2003 that led to the creation of the Violent and Sex Offender Register (ViSOR).¹⁸⁸ Under ViSOR, detailed sex offender information is shared among the prison system, probation system, and police departments, but is not available to the public at large.¹⁸⁹

The UK Sex Offenders Act was held to be “in accordance with the law” by the ECHR.¹⁹⁰ Article 8 of the ECHR protects the right to private life, emphasizing that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹⁹¹ The ECHR found no evidence to suggest that the Act caused public humiliation or attack.¹⁹² The Court further couched the requirement to provide information to police as an “interference with private life” and necessary to “pursue legitimate aims, namely the prevention of crime and the protection of the rights and freedoms of others.”¹⁹³ In a 2010 decision, the UK Supreme Court unanimously ruled that lifelong notification requirements for sex offenders are not a breach of Article 8 of the European Convention on Human Rights.¹⁹⁴

188. SEXUAL OFFENCES ACT, 2003, c. 42 (U.K.). The 2003 Act offered more specific definitions of sexual offenses, defining rape as: “(i) A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.” *Id.* at § 1.

189. HOME OFFICE, REVIEW OF THE PROTECTION OF CHILDREN FROM SEX OFFENDERS, 2007, at 7, 12 (U.K.) (if disclosure to the public is approved and does occur, the authorities must make and keep records about why the reasons were appropriate).

190. Levenson, *supra* note 175, at 591 (most European countries view registration as violation of the European Convention of Human Rights and seem unlikely to implement such policies).

191. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, Art. 8, 213 U.N.T.S. 221, Europe T.S. No. 2889. ECHR rights are guaranteed in the European Union. *See* CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION OF FEB. 7, 1992, Art. 6(2), 2002 O.J. (C 325) 12.

192. *See* Levenson, *supra* note 175, at 591 (lifelong registration was deemed incompatible with Article 8 of the European Convention of Human Rights, but some offenders considered most dangerous are required to register indefinitely).

193. *See* Adamson v. United Kingdom, App. No. 42293/98, 28 Eur. H.R. Rep. CD209 (1999) (although also resulting in retrospective consequences, the Act did not violate Article 7(i) because the measure was not a penalty, *id.* at Pi).

194. R (On the Application of F (By his Litigation Friend F)) and Thompson (FC) v. Secretary of State for the Home Department, [2010] UKSC 17, 65 (24,000 former offenders were potentially affected by this decision).

B. Hong Kong

Hong Kong is a common law state that combines its own laws with precedent from the United Kingdom; however, it has not followed any of the UK's recent enactments involving sex offender monitoring.¹⁹⁵ Although the prevalence of sex crimes in Hong Kong has been studied, the suggested underreporting based upon Asian/Chinese cultural differences has made it difficult to accurately assess the extent of the issue.¹⁹⁶ Unsurprisingly, it has been suggested that one of the reasons that the numbers are so low is because indecent (sexual) assault victims fail to report the incident due to the "shame" and "embarrassment" it would cause them and their families.¹⁹⁷

The impetus for establishing a Sex Offender Registry in Hong Kong arose from the increasing number of sexual assaults by persons regarded as having authority or responsibility for children, including people such as teachers, tutors, and care-givers.¹⁹⁸ The call for the register was first raised in *HKSAR v. Thomas Lang* by the Deputy District Judge.¹⁹⁹ The case dealt with the production and possession of child pornography and indecent assault, and the judge commented that Hong Kong did not have any measures which prevented sexual offences against children.²⁰⁰ The judge

195. Mark D. Kielsgard & Jack Burke, *Post-Incarceration Supervision of Pedophile Offenders: An International Comparative Study*, 51 CRIM. L. BULL. Art. 1, Part D (#1, 2015).

196. *Id.* Hong Kong enjoys a reputation of being one of the safest cities in the world. This is evident from surveys conducted by the United Nations and the government of Hong Kong. The *Seventh United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems* (UN Survey 2000) reported that in 2000, the overall recorded crime rate in Hong Kong was 1,185.7 per 100,000 persons, lower than Singapore (1,202.6), Japan (1,924.0), South Korea (3,262.6), Italy (3,822.8), France (6,403.8), Canada (8,040.6), and England and Wales (9,766.7). See UN-HABITAT, ENHANCING URBAN SAFETY AND SECURITY: GLOBAL REPORT ON HUMAN SETTLEMENTS 2007, 304–12 (Nairobi: United Nations Human Settlements Programme, 2007), <https://www.citiesalliance.org/resources/knowledge/cities-alliance-knowledge/enhancing-urban-safety-and-security-global-report> (summarizing several case studies related to crime and violence in the city).

197. Catherine So-kum Tang, *Childhood Experience of Sexual Abuse Among Hong Kong Chinese College Students*, 26 CHILD ABUSE AND NEGLECT 1, 23 (2002) (discussing extensive pressure within Chinese families to protect the family from shame).

198. Cynthia Wong, *Teacher Jailed 6 Years for Having Sex with Pupil*, SOUTH CHINA MORNING POST (Sept. 13, 2008). See also, *Woman Teacher Jailed for Molesting Girl Student*, THE STANDARD (Oct. 21, 2010).

199. *HKSAR v. Thomas Lang*, DCCC 1051/2006 (unreported).

200. *Id.* at 41.

pointed to the UK as an example, specifically, the mandatory requirement under what was then the UK’s Sex Offences Act, for sex offenders to notify the police of their names and whereabouts.²⁰¹ In *HKSAR v. Kam Wing Yin*, a deep concern over the absence of a formal register was highlighted due to the ability of the defendant in that case to return to his business as a piano teacher and continue to work closely with children after his discharge.²⁰² Without such a register, parents without the knowledge of the defendants’ past convictions might be exposing their children to the risk of sexual abuse.

Despite the studies reporting low recidivism rates amongst sex offenders, in July 2008, the Law Reform Commission (LRC) proposed a registry amidst judicial comments and rising public pressure. In February 2010, the LRC published the *Sexual Offences Records Check for Child-Related Work: Interim Proposals*, which introduced the sex offender registration scheme.²⁰³ The purpose of the scheme is two-fold: first, it aims to prevent previous sexual offenders from working with children or mentally incapacitated persons (MIPs); and second, it aims to help reduce the risk of sexual abuse to children or MIPs and give them better protection while considering the need for the rehabilitation of offenders.²⁰⁴ Organizations or enterprises that regularly interact with children voluntarily seek assistance from the Hong Kong Police Force to provide necessary information when hiring new employees.²⁰⁵ The Hong Kong Police are bound by the Sexual Record Check Scheme Conviction Protocol (SRCSCP)²⁰⁶ when conducting investigations and supplying criminal history information. Unlike the UK, the SRCSCP is a non-statutory, voluntary arrangement that is purely administrative and not available for public access.²⁰⁷ However, despite widening the categories of persons that can be checked under the SRCSCP,

201. See SEXUAL OFFENCES ACT, *supra* note 188.

202. *HKSAR v. Kam Wing Yin*, [2006] HKCA 288.

203. THE LAW REFORM COMMISSION OF HONG KONG, REPORT: SEXUAL OFFENCES RECORDS CHECKS FOR CHILD-RELATED OFFENCES: INTERIM PROPOSALS (Feb. 2010), at ¶¶I.24–I.25, http://www.hkreform.gov.hk/en/docs/rsexoff_e.pdf [hereinafter LRC HONG KONG: REPORT].

204. Rebecca Ong, Sandy Sabapathy & Wing Hong Chu, *Mind the Gap: Hong Kong’s Sexual Conviction Record Scheme*, 10 ASIAN J. COMPAR. L. 295, 300 (2015).

205. *Id.*

206. SEXUAL RECORD CHECK SCHEME CONVICTION PROTOCOL [hereinafter SRCSCP], (2011) Ch. 1, §§ 1.1-1.8(H.K.).

207. LRC HONG KONG: REPORT, *supra* note 203.

its effectiveness has been questioned, as it—being administrative in nature—does not compel employers to carry out such checks.²⁰⁸

Hong Kong's registration model is solely for the purpose of investigating potential job applicants, when the specific job requires the individual to interact with children.²⁰⁹ The registration scheme in its current form is severely limited in its scope and protections, and is a "far cry from the comprehensive provisions provided under conventional sex offender registration laws in other major economies like the US, the UK, and Australia."²¹⁰

C. South Africa²¹¹

All African countries have ratified the relevant international and regional human rights treaties in order to protect children from sexual violence and to provide redress when it occurs.²¹² Taking it a step further, South Africa considered the possibility of a pedophile registry in 1997,²¹³ but did not create any legislation securing that possibility. In early 2000, South Africa considered a proposal to establish an electronic sex-offender list,²¹⁴ but declined to act further after studies from the United States and the United Kingdom concluded that registries do little to prevent sex crimes against children.²¹⁵ In 2005, the parliament succeeded in passing the Children's

208. Ong, Sabapathy & Chu, *supra* note 204, at 301.

209. SRCSCP, *supra* note 206, Ch. 4.

210. Ong, Sabapathy & Chu, *supra* note 204, at 302.

211. See generally, PERLIN & CUCOLO, *supra* note 2, § 5-8.2, at 5-355 to 5-356.

212. See e.g., S. AFR. CONST. 1996, § 21(d) (providing that "every child has the right . . . to be protected from maltreatment, neglect, abuse, or exploitation"); Sexual Offences Act (No. 3 of 2003), §§ 8–14 (Lesotho) (making various forms of child sex abuse, as well as the failure to report it, criminal offences).

213. Lynne Altenroxel, *Experts Divided over Possible Paedophile List*, IOL (Aug. 1, 2000), <https://www.iol.co.za/news/south-africa/experts-divided-over-possible-paedophile-list-45655>.

214. Douglas Carew, *Government Moves to List Sex Offenders*, IOL (Jan. 13, 2001), <https://www.iol.co.za/news/south-africa/government-moves-to-list-sex-offenders-56850>.

215. Dianne Smith, *Sex-Offenders List Dies before It's Born*, IOL (Feb. 23, 2001), <https://www.iol.co.za/news/south-africa/sex-offenders-list-dies-before-its-born-58777> (citing excessive cost and ineffectiveness). Political pressure sparked further attempts, but a South Africa Law Commission Discussion Paper cautioned against sex offenders registries because of their tendency to "generate a false sense of security," advising that "[t]here is no substitute for other essential recruitment and good practice procedures in selecting people to work with children such as taking up references." SA LAW COMMISSION DISCUSSION PAPER 102,

Act and establishing a National Child Protection Register (CPR).²¹⁶ With a similar goal as Hong Kong, the register recorded instances of abuse or neglect of specific children and contained "a record of persons who are unsuitable to work with children."²¹⁷ Yet unlike Hong Kong, the South African government failed to successfully implement the Act and was criticized by citizens and victim advocates.²¹⁸ In 2007, the South African Parliament added a provision for a national sex offender registry to expand the CPR.²¹⁹ This provision specifically allotted for the protection of mentally disabled persons from sexual crimes.²²⁰ The ultimate goal was to provide a national framework to address the specific modes of sexual violence most common to this area of the world—rape and incest.²²¹

The scope of South Africa's sex offender registry, although modeled on the systems of other nations, is much narrower than that of the United States.²²² It maintains records of any person convicted of a sexual offense against a child or a mentally disabled person,²²³ and allows "employers, licensing authorities, and authorities dealing with fostering, kinship care-giving, temporary safe care-giving, adoption, and curatorship the ability to apply for a prescribed certificate stating whether or not the particulars of

SEXUAL OFFENSES: PROCESS AND PROCEDURE I.I.I pg. I (Dec. 2001) (S. Afr.) § 42.7.1.3, at 752.

216. Children's Act 38 of 2005 § III, cl.2 (S. Afr.).

217. *Id.* § 118.

218. Graeme Hosken, *Thousands of Abused Children Still in Danger*, IOL (Jan. 31, 2006), as cited in PERLIN & CUCOLO, *supra* note 2, § 5-4.2, at 5-375 n.1691; see Clayton Barnes, *Sex Offender Registry Set To Flop—Expert*, IOL (Aug. 11, 2007), <https://www.iol.co.za/news/south-africa/sex-offenders-register-set-to-flop-expert-365854>, (South Africa lacks many of the social resources that the United States uses for monitoring its registry).

219. N.J. Badat & K. Ajam, *Call for Sexual Predators List*, IOL (Aug. 18, 2007), <http://www.iol.co.za/news/south-africa/call-for-sexual-predators-list-1.366844>.

220. *Id.*

221. Kristina Scurry Baehr, *Mandatory Mimmums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa*, 20 YALE J.L. & FEMINISM 213, 218 n.26 (2008). South Africa had the highest rate of reported rape per capita of all the participating member states in 2001–02. U.N. OFFICE ON DRUGS & CRIME, EIGHTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS COVERING THE PERIOD 2001–2002, at 41 (2005), <http://www.unodc.org/pdf/crime/eighthsurvey/8sv.pdf>; SA Law Commission, *Issue Paper 10 Sexual Offences against Children*, § 3.5.1 (S. Afr.) (May 1997).

222. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, §§ 40–53.

223. *Id.* § 43(a)(i).

a potential employee or applicant are contained in the registry.”²²⁴ Scholars who have studied the specific demographics have suggested that “economic development programs, access to alcohol and substance abuse treatment, education reform, and media campaigns”²²⁵ might be most effective at reducing sexual violence in South Africa.

D. Canada²²⁶

In 2004, the Canadian Parliament passed the Sex Offender Information Registration Act (SOIRA).²²⁷ Canada’s Registry is not available to the public but requires that sex offender information be contained in a national database “to help police services investigate crimes of a sexual nature.”²²⁸ SOIRA has been cited as ineffective in aiding police investigations²²⁹ and

224. Shelby A. Boxenbaum, *South Africa’s Sex Offender Registry: A Legislative, Public Policy and Constitutional Overview*, 14 GONZ. J. INT’L L. 1 (2010–11).

225. Baehr, *supra* note 221.

226. See generally PERLIN & CUCOLO, *supra* note 2, § 5-8.2 at 5-356.

227. SEX OFFENDER INFORMATION REGISTRATION ACT, 2004 S.C., c. 10, <http://canlii.ca/t/5390m>. In *R. v. Lyons*, 2 S.C.R. 309 (1987), the Canadian Supreme Court held that indeterminate sentences (based on dangerousness) in lieu of a normal sentence do not violate the Canadian charter provision prohibiting cruel and unusual punishment unless the sentence becomes “grossly disproportionate.” In *R. v. L.M.*, 2 S.C.R. 163 (2008), the Court sanctioned a ten-year term of community supervision appended to the end of a sentence under a “long-term offender” statute, on the ground the supervision was not punishment.

228. *Id.* § 2(i). SOIRA acknowledges “the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community,” and thus does not provide the Canadian public with access to the registry. *Id.* § 2(2)(c). On Canada’s Dangerous Offender Legislation in general, see Jessica Morak, *Resident Evil: A Reformation of U.S. Civil Confinement Law*, 22 CARDOZO J. INT’L & COMP. L. 665, 688–90 (2014); Julie Blais, *Preventative Detention Decisions: Reliance on Expert Assessments and Evidence of Partisan Allegiance within the Canadian Context*, 33 BEHAV. SCI. & L. 74 (2015). On the impact of actuarial risk assessment evaluations in Canada in cases involving mentally disordered offenders, see N. Zoe Hilton & Janet L. Simmons, *The Influence of Actuarial Risk Assessment in Clinical Judgments and Tribunal Decisions about Mentally Disordered Offenders in Maximum Security*, 25 L. & HUM. BEHAV. 393 (2001). For a therapeutic jurisprudence-based investigation of sexual offenders in Canada, see Jason E. Peebles, *Therapeutic Jurisprudence and the Sentencing of Sexual Offenders in Canada*, 43 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 275 (1999).

229. Michael Friscolanti, *Canada’s Sex Offender Registry a National Embarrassment*, MACLEAN’S (Jan. 14, 2008), <https://www.thecanadianencyclopedia.ca/en/article/canadas-sex-offender-registry-a-national-embarrassment> (more than three years after its enactment, the national registry had failed to aid police in solving a single crime).

characterized as just a "public relations tool" since around 5 percent of the people listed on the registry are "missing."²³⁰ The registry's shortcomings have been blamed on its inability to electronically track offenders in and out of the prison system.²³¹

A case brought before the Ontario Court of Appeals argued that registering as a sex offender "generates stigma, and that the stigma arises not from the conviction but from the subsequent labeling."²³² The Ontario Court of Appeals echoed the rationale of the US Supreme Court,²³³ and struck down the constitutional challenge to its sex offender registry laws. The Ontario court noted that the registry was not made public, and any "stigma flows more from the conviction for the underlying sex offense than from registration and the requirement to report."²³⁴ The court found that "the Act's primary purpose is to protect the community and enhance public safety," and it "is not aimed at stiffening the criminal law or creating a new criminal offense or imposing punitive consequences."²³⁵ Thus, "neither the requirement to register and report under the Act nor any stigma attaching to the registration constitute punishment."²³⁶ Although the government conceded the deprivation of petitioner's liberty interest,²³⁷

230. The biggest challenge facing both the American and Canadian registries is missing or non-compliant sex offenders. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, PUBL'N NO. I-2009-001, REVIEW OF THE DEPARTMENT OF JUSTICE'S IMPLEMENTATION OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (2008).

231. Friscolanti, *supra* note 229 (the registry's computer program does not record a sex offender's next reporting date, and Canada's Correction Service refuses to report to registry officials when sex offenders are being released from prison).

232. *R. v. Dyck*, (2008) 90 O.R. 3d 409 ¶ 74 (Can. Ont. C.A.) (Dyck maintained that his constitutional rights were violated under Section 12 of the *Charter of Rights and Freedoms*, stating that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." *Id.* at 411).

233. *Smith v. Doe*, 538 U.S. 84, 98 (2003) ("[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.").

234. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (UK) § 12.

235. *Id.*

236. *Id.* ¶ 59.

237. *See Dyck*, *supra* note 232. *Dyck* also raised a challenge under Section 7 of the *Charter of Rights and Freedoms*, which states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (UK) § 7.

it argued that he must show that the legislative measures are “so extreme that they are *per se* disproportionate to any legitimate government interest.”²³⁸

Just like other countries’ defense of the necessity of sex offender registration, the Court found that “the [Canadian] Legislature acted rationally pursuant to the legitimate state interest of community protection.”²³⁹ The restrictions placed upon an offender’s liberty were “modest when compared to the important state interest sought to be achieved by the legislation.”²⁴⁰ The argument that risk assessments were not incorporated and thus the Act was overbroad,²⁴¹ was rejected. The Court held that the legislation was not “constitutionally flawed in terms of the scope of persons that are captured by its provisions,”²⁴² and that “the choice of the Legislature to include all persons convicted of designated sex offenses in the Registry was logical, rational, and not grossly disproportionate to the state objective.”²⁴³ The reporting requirements, thus, were relatively minimal in terms of their intrusion and effect on the privacy and liberty of the offender and “not contrary to the principles of fundamental justice.”²⁴⁴ This conclusion was justified by the same distorted accounts of high levels of recidivism among sexual offenders that other nations have used.²⁴⁵

E. Conclusion

Our consideration of international and comparative law suggests that the United States ignores most of the relevant international human rights laws and conventions.²⁴⁶ Despite the enactment and subsequent court

238. *Dyck*, 90 O.R. 3d 409, at ¶ 95 (Can. Ont. C.A.) (quoting *Suresh v. Canada* (Minister of Citizenship & Immigration (2002), 208 D.L.R. 4th 1 (Can.)).

239. *Id.*

240. *Id.* ¶ 104.

241. *Id.* ¶ 92.

242. *Id.* ¶ 122.

243. *Id.* ¶ 125.

244. *Id.* ¶ 93.

245. Cucolo & Perlin, *Strings*, *supra* note 4, at 650–51, discussing the Supreme Court’s misuse of statistical data in the lead case of *McKune v. Lile*, 536 U.S. 24 (2002), also discussed extensively in Ira Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

246. Other than articles dealing with the narrow issue of castration, the only scholarship that we have found by US-based law scholars are Janus, *supra* note 83, and Birgden & Cucolo, *supra* note 68. There is, as previously noted, plentiful scholarship from other nations; see e.g. McSHERRY & KEYZER, *supra* note 82; Keyzer & McSherry, *supra* note 82.

acceptance of certain preventive detention and registration protocols, the other nations that we have considered in this paper tended to strongly consider international human rights standards before enacting legislation. Additionally, unlike the US, those nations generally accept the oversight and precedent of international human rights committees to guide their opinions on sex offenders and legal determinations.²⁴⁷

III. THERAPEUTIC JURISPRUDENCE²⁴⁸

Therapeutic jurisprudence (TJ) recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.²⁴⁹ It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.²⁵⁰ Professor David Wexler clearly identifies how the inherent tension in this inquiry must be resolved: "the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."²⁵¹ As one of the authors (MLP) has written elsewhere,

247. See generally Logan, *supra* note 182. Karne Newburn, *The Prospect of an International Sex Offender Registry: Why an International System Modeled after United States Sex Offender Laws Is Not an Effective Solution to Stop Child Sexual Abuse*, 28 WIS. INT'L L.J. 547, 582 (2011) ("The EU offers a more comprehensive, well thought-out solution to stop child sex abuse"). A Lexis search yielded over 125 cases using the "frightening and high" language in determining the outcome of sex offender cases—cases that continue to be decided to the present day. *Belleau v. Wall*, 811 F.3d 929, 934 (7th Cir. 2016) (The Supreme Court in *Smith v. Doe* 538 U.S. 84, 103 (2003), remarked on "the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high. . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.'"). *But see* *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied*, 138 S. Ct. 55 (2017) (rejecting the "frightening and high" mantra).

248. Much of this section is adapted from Michael L. Perlin, "I've Got My Mind Made Up": *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 93–95 (2018).

249. 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).

250. 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, 751 (2005).

251. David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

“An inquiry into therapeutic outcomes does *not* mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”²⁵²

Therapeutic jurisprudence “look[s] at law as it actually impacts people’s lives,”²⁵³ and TJ supports “an ethic of care.”²⁵⁴ It attempts to bring about healing and wellness,²⁵⁵ and to value psychological health.²⁵⁶ It “look[s] at law as it actually impacts people’s lives,”²⁵⁷ and assesses its influence on emotional life and psychological well-being.²⁵⁸ One governing TJ principle is that the “law should . . . strive to avoid imposing anti-therapeutic consequences whenever possible.”²⁵⁹

One of the central principles of TJ is a commitment to dignity.²⁶⁰ Professor Amy Ronner describes the “three Vs”²⁶¹ as:

- voice: litigants must have a sense of voice or a chance to tell their story to a decisionmaker;²⁶²
- validation: the decision maker needs to take seriously the litigant’s story; and

252. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000).

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

254. Perlin, *supra* note 248, at 94 (quoting, in part, Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

255. Perlin, *supra* note 248, at 94 (citing Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION & THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003)).

256. *Id.*

257. Winick, *supra* note 253, at 535.

258. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis Stolle, David B. Wexler & Bruce J. Winick eds., 2006).

259. Winick, *supra* note 255, at 26.

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

261. See e.g., Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

262. On the importance of “voice,” see Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

- voluntariness: in general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.²⁶³

There has been some minimal consideration of the relationship between TJ and the sex offender process.²⁶⁴ The co-authors have considered it in the context of adequacy of counsel issues,²⁶⁵ the shaming of participants in the SVPA process,²⁶⁶ the role of the media in shaping sex offender policies,²⁶⁷ the lack of preparation for release and family reintegration,²⁶⁸ and the courts' misuse of statistics in deciding sex offender cases.²⁶⁹ Professor Astrid Birgden has argued persuasively that TJ provides the best framework to ensure protection of both sex offenders and the community.²⁷⁰ Also, one of the authors has written about how the application of international human rights law—specifically, the CRPD—is entirely consonant with TJ values.²⁷¹

Little has been written, however, about the relationship between TJ and sex offender law in an international human rights context.²⁷² In an article

263. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002).

264. See e.g., John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 377 (1999); Katie Granlund, *Does Societal Input Lead to Successful Sex Offender Legislation?*, 29 LAW & PSYCHOL. REV. 197 (2005); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998).

265. See e.g., Cucolo & Perlin, *supra* note 6, at 166–68; Cucolo & Perlin, *supra* note 7, at 322–24.

266. See *id.* at 322.

267. See Cucolo & Perlin, *supra* note 5, at 243–45.

268. See Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 40–42.

269. See Cucolo & Perlin, *Strings*, *supra* note 4, at 665–67.

270. See Perlin, Dorfman & Weinstein, *supra* note 65, at 107–08, citing Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 351 (2004).

271. Perlin, *supra* note 24, at 106; 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). See also Astrid Birgden & Michael L. Perlin, "Tolling for the Luckless, the Abandoned and Forsaked": *Community Safety, Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees*, 13 LEG. & CRIMINOLOGICAL PSYCHOLOGY 231 (2008); Michael L. Perlin, "Yonder Stands Your Orphan with His Gun": *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEXAS TECH L. REV. 301 (2013).

272. *But see* Astrid Birgden, *Maximizing Desistance: Adding Therapeutic Jurisprudence and Human Rights to the Mix*, 42 CRIM. JUST. & BEHAV. 19, 26 (2005) (discussing desistance

with another co-author, MLP has suggested that the use of sex offender registries both “directly contravene the guiding principles of therapeutic jurisprudence . . . and potentially violate international human rights law principles as well.”²⁷³

Dignity is demanded not only by American constitutional norms, it is required also by international human rights law.²⁷⁴ We believe that a combination of the principles of therapeutic jurisprudence and application of international human rights (focusing on the right to dignity) reveal a potential blueprint for the future. Dr. Birgden has argued that TJ can be used to support the principle of desistance—a gradual or emergent process through which people cease and refrain from persistent offending in a human rights framework²⁷⁵—in an international human rights setting, in the specific context of the treatment of sexual offenders.²⁷⁶

Our domestic laws—and the laws of many other nations²⁷⁷—flaunt international human rights law.²⁷⁸ We willfully blind ourselves to the reality that offenders—all offenders, including those deemed to be sexually violent predators—have enforceable human rights and have a right to expect humane treatment from correctional staff and institutions.²⁷⁹ It is crystal clear that offenders, who maintain enforceable human rights, do not receive expected humane treatment from the corrections system, neither institutions nor practitioners.²⁸⁰ When it comes to this particular population, *every* relevant United Nations convention and covenant is violated

and therapeutic jurisprudence in an international human rights setting). “Desistance” is a gradual or emergent process, cast in a human rights framework, through which people cease and refrain from persistent offending.

273. Perlin & Weinstein, *supra* note 44, at 2.

274. Perlin, *supra* note 23, at 1174–76, discussing dignity requirements in the U.N. Convention on the Rights of Persons with Disabilities.

275. SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* (2001).

276. See Birgden, *supra* note 272, at 31; see also Svenja Göbbels, Gwenda M. Willis & Tony Ward, *Current Re-Entry Practices in Sex Offender Treatment Programmes: Desistance Facilitating or Hindering?*, 20 J. SEXUAL AGGRESSION 354 (2014).

277. See PERLIN & CUCOLO, *supra* note 2, §§ 5-8 to 5-8.5, at 5-365 to 5-383.

278. *Id.*

279. Birgden & Perlin, *supra* note 271; Tony Ward & Astrid Birgden, *Human Rights and Clinical Correctional Practice*, 12 AGGRESSION & VIOLENT BEHAV. 628 (2007).

280. Birgden & Cucolo, *supra* note 68, at 298.

with impunity, locally and in many other nations in the world.²⁸¹ As we noted earlier, domestic jurisdictions could learn from those other nations that actually consider the depth and complexity of the underlying issues, prior to enacting legislative solutions that, while popular with the voters and much of the media,²⁸² actually make matters worse (both by the continuous flagrant violations of an offender's civil liberties and human rights, and by creating laws that have been shown to, in fact, make the world a *less safe* place for all of us.)²⁸³

If there is any shred of hope in this concededly dismal recounting, it exists within the construct of therapeutic jurisprudence. And although our path to redemption lies within a "long and winding road," we believe it is the only way to restore dignity to this population.

The sex offender process is riddled with shame. There is no question that current laws—both in the US and, to varying degrees, elsewhere—can "provoke feelings of hopelessness, and unworthiness, and can cause both lack of dignity and feelings of being 'less than human' among sex offenders."²⁸⁴ As the authors have noted previously, "Nothing so clearly violates 'the dignity of persons as treatment that demeans or humiliates them' as shaming."²⁸⁵

Some efforts in other nations are less objectionable than domestic laws. As noted above, in the United Kingdom, Hong Kong, South Africa, and in Canada, the public does not have untrammelled access to the sex offender registry.²⁸⁶ Compare this with local practice mandating public websites with the following data:

281. See e.g., Rachel Van Cleave, *The Role of U.S. Federal Courts in Extradition Matters: The Rule of Non-Inquiry, Preventive Detention, and Comparative Legal Analysis*, 13 TEMP. INT'L & COMP. L.J. 27, 32 n. 25(1999) ("indefinite detention violate several international treaties").

282. Cucolo & Perlin, *supra* note 5.

283. *Id.* See generally, Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4.

284. Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 30, quoting, in part, Fred Cohen, *From the Editor: Sex Offender Registration Laws: Constitutional and Policy Issues*, 31 CRIM. L. BULL. 151, 153 (1995).

285. Cucolo & Perlin, *supra* note 7, at 309, quoting, in part, R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 549 (2006); see also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 850 (1983)).

286. See *supra* text accompanying notes 189, 204, 222–24 & 228.

- The name of the sex offender, including any aliases.
- The address of each residence at which the sex offender resides or will reside and, if the sex offender does not have any (present or expected) residence address, other information about where the sex offender has his or her home or habitually lives. If current information of this type is not available because the sex offender is in violation of the requirement to register or is unable to be located, the website must so note.
- The name and address of any place where the sex offender is an employee or will be an employee and, if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works.
- The name and address of any place where the sex offender is a student or will be a student.
- The license plate number and a description of any vehicle owned or operated by the sex offender.
- A physical description of the sex offender.
- The sex offense for which the sex offender is registered and any other criminal offense for which the sex offender has been convicted.
- A current photograph of the sex offender.²⁸⁷

By any TJ measure of analysis, the domestic version fails miserably. It is also clear that, in most other nations discussed in this paper, the issues have been taken more seriously than in the US, and that has happened in ways more consonant with the spirit of therapeutic jurisprudence.

CONCLUSION

Last year, in an article about the US Supreme Court's misuse of statistics, the authors concluded, "Clearly evidenced in numerous decisions, courts around the country continue to remain stagnant, clinging to misinformation and refusing to depart from prejudicial viewpoints that are pretextual and based on irrational fears."²⁸⁸ Three years ago, we noted how the

287. Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 20, quoting 73 FED. REG. 38030, 38059 (July 2, 2008) (explaining registration requirements in 42 U.S.C. § 16914 & 16918); U.S. Att'y Gen., *The National Guidelines for Sex Offender Registration and Notification-Final Guidelines* 36 (2008), available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

288. Cucolo & Perlin, *Strings*, *supra* note 4, at 667.

"marginalization" of this population consistently "causes shame, humiliation and lack of dignity for these individuals."²⁸⁹ Earlier, we pointed out that "alternative solutions [to our current SVP laws] that might actually have an impact on sex offending are too complex, too multi-textured, and too time-consuming to be considered by the general public and by legislatures."²⁹⁰

There have been very few successful initiatives in the US in recent years that remediate any of these issues that we have been discussing since the *Hendricks* case was decided. We believe that it is only by taking seriously both international human rights laws²⁹¹ and comparative law²⁹² that we can "best [assure] that [therapeutic jurisprudence] will be an important and integral part of the decision-making process" in such cases.²⁹³

One analysis of the "cage now corrode" line that gives this paper a portion of its title suggests that it signifies "things return[ing] to their proper place."²⁹⁴ Another suggests that, in this song, the "self we construct is a kind of empty cage."²⁹⁵ It is certainly a song about "nightmares and hallucinations."²⁹⁶ We know that we have created an empty shell of ineffective legislation that has, in its effect, remained dormant and has deteriorated the human rights and dignity of persons who have committed the targeted designated crimes. We know that our current SVP laws are *not* in their "proper [legal] place." We know that the lives of those caught up in the SVPA system exist in "an empty cage," and that the current system is nothing short of a "nightmare." We hope that these suggestions will, if taken seriously, at least partially ameliorate that situation.

289. Cucolo & Perlin, *supra* note 7, at 328.

290. Cucolo & Perlin, *supra* note 5, at 246

291. See *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 855 (Sur. Ct. 2012), arguing that the CRPD was "entitled to 'persuasive weight' in interpreting our own laws and constitutional protections," discussed *supra* text accompanying note 139.

292. See *Roper v. Simmons*, 543 U.S. 551 (2005), discussed at *supra* note 150.

293. Cucolo & Perlin, *Therapeutic Jurisprudence*, *supra* note 4, at 41.

294. BRENT WOOD, *THE TRAGIC ODES OF JERRY GARCIA AND THE GRATEFUL DEAD: MYSTERY DANCES IN THE MAGIC THEATER* (2020).

295. TAIGEN DAN LEIGHTON, *ZEN QUESTIONS: ZAZEN, DOGEN, AND THE SPIRIT OF CREATIVE INQUIRY 200* (2011).

296. Naomi M. Weinstein & Michael L. Perlin, "Who's Pretending to Care for Him?" *How the Endless Jail-to-Hospital-to-Street-Repeat Cycle Deprives Persons with Mental Disabilities the Right to Continuity of Care*, 8 WAKE FOREST J.L. & POL'Y 455, 459 (2018), citing ROBERT SHELTON, *NO DIRECTION HOME: THE LIFE AND MUSIC OF BOB DYLAN* 213 (1997).

