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“I Might Need a Good Lawyer, Could Be Your Funeral, My Trial”: Global Clinical Legal Education and the Right to Counsel in Civil Commitment Cases

Michael L. Perlin*

INTRODUCTION

If there has been any constant in modern mental disability law in its thirty-five-year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective. We knew this at the dawn of the modern era. We knew it when some courts started taking more seriously some of the other substantive and procedural rights of persons who were the subjects of such hearings. We knew it when so

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1. See generally Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (holding that a statute that fails to provide a person alleged to be mentally ill with adequate procedural safeguards is unconstitutional); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff’d, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (holding that the mentally ill have a constitutional right to adequate treatment in a mental hospital); Michael L. Perlin, “Chimes of Freedom:” International Human Rights and Institutional Mental Disability Law, 21 N.Y.L. SCH. J. INT’L & COMP. L. 423, 423 (2002) (citing Jackson v. Indiana, 406 U.S. 715 (1972) (holding that a statute that effectively condemned defendant to permanent institutionalization deprived him of equal protection and due process under the Fourteenth Amendment)).

2. See, e.g., Elliott Andalman & David L. Chambers, Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal, 45 MISS. L.J. 43, 72 (1974) (speculating that counsel was so inadequate in the sample study that patients’ chances for hospital release were enhanced if no lawyer was present); George E. Dix, Acute Psychiatric Hospitalization of the Mentally Ill in the Metropolis: An Empirical Study, 1968 WASH. U. L.Q. 485, 540 (1968) (noting that only two of 1700 contested cases resulted in patient release).

3. See Leslie Scale, The Realities of Mental Health Advocacy: State ex rel. Memmel v. Mundy, in MENTAL HEALTH ADVOCACY: AN EMERGING FORCE IN CONSUMERS’ RIGHTS 79, 81 (Louis E. Kopolow & Helene Bloom eds., 1977) (stating that the former system of
few states chose to follow the examples of New York,⁴ New Jersey,⁵ and a handful of other jurisdictions that legislatively created regularized, dedicated, specialized legal services offices whose primary job was to provide representation at such hearings.⁶ We knew it when academics and practitioners began to unpack the ethical issues that permeated civil commitment hearings.⁷ We knew it when it became clear that only in those jurisdictions that had dedicated counsel programs was there any coherent body of reported civil commitment case law.⁸ And we knew it when we began to discover—as our attention turned, far too tardily, to international and comparative mental disability law⁹—that, in many nations, there was no mental disability “law,”¹⁰ and that even where there was such law, the promise of counsel was little more than an illusion.¹¹

representation in Milwaukee County operated as a “greedy runway to the county mental health center”).

⁴. See, e.g., N.Y. MENTAL HYG. LAW §§ 47.01–03 (McKinney 1996).

A contrast between the development of case law in Virginia and Minnesota is especially instructive. Notwithstanding the fact that Virginia’s population is approximately 15% greater than Minnesota’s, Virginia had only two published litigated civil cases on questions of mental hospitalization during the decade from 1976 to 1986, while Minnesota had at least 101 such cases in the same period. Significantly, Minnesota has a tradition of providing vigorous counsel to persons with mental disabilities, while Virginia does not.

Id. (footnotes omitted).
¹⁰. That is, there was not even a statute that purported to govern such cases. See, e.g., Michael L. Perlin, International Human Rights Law and Comparative Mental Disability Law: The Universal Factors, 34 SYRACUSE J. INT’L L. & COM. 333, 337 (2007) (“A recent report by
And so it remains today. The quality of counsel assigned to represent individuals who face involuntary civil commitment to psychiatric hospitals is, in most United States jurisdictions, mediocre or worse. Legal challenges to the status quo have been rare. Perhaps startlingly, this reality goes almost unmentioned in the legal literature. Also, those of us who identify with the clinical legal education movement cannot pat ourselves on the back too vigorously; in a recent survey, I identified only ten domestic law schools that offered courses that, broadly, could be called “mental disability law clinics.” In other countries, there are far fewer.

As of the writing of this Article, in only one U.S. jurisdiction—Montana—has a court grasped the scope of the problem. As I will discuss subsequently, this decision has had almost no discernable impact on the state of the law elsewhere, but at least gives us a baseline against which we can assess the enormity of the problem in other jurisdictions.

the World Health Organization (WHO) revealed that 25% of all nations in the world have no mental health law.

11. See id. at 341 (“It is rare for even minimal access to counsel to be statutorily (or judicially) mandated, and, even where counsel is legislatively ordered, it is rarely provided. Moreover, the lack of meaningful judicial review makes the commitment hearing system little more than a meretricious pretext.”).

12. See Perlin, supra note 7, at 43. See also 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, 738 (2005) (“The data suggests that, in many jurisdictions, such counsel is woefully inadequate—disinterested, uninformed, roleless, and often hostile.”).

13. See 1 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2B-11-3, at 88–91 (2d ed. Supp. 2007) (discussing In re Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001) (using an expansive interpretation of adequacy of counsel in civil commitment cases and noting how that decision is “the exception to the usual practice”)).

14. A Westlaw search of “(adequacy effectivness) +3 counsel /s ‘civil commitment,’” reveals no articles other than those written by this author.

15. Perlin, supra note 8, at 712 n.170. These schools are Chicago, Lewis & Clark, New England, New York Law School, Richmond, Texas, Touro, Virginia, William Mitchell, and Yale. Id.

16. See infra Part IV.

17. See infra text accompanying notes 35–59 (discussing K.G.F., 29 P.3d at 485).

18. See In re Detention of T.A. H.-L., 97 P.3d 767, 771–72 (Wash. Ct. App. 2004) (“We do not share the Montana Supreme Court’s dim view of the quality of civil commitment proceedings, or their adversarial nature, in the state of Washington. The Strickland standard appears to be sufficient to protect the right to the effective assistance of counsel for a civil commitment respondent in this state.”).
Yet I am unwilling to be entirely pessimistic. Encouragingly, a variety of interrelated factors may shed some light on this scandal and lead to positive social change in this area: the new, robust case law from the European Court on Human Rights on virtually all aspects of mental disability law; the ratification of the United Nations Convention on the Rights of Persons with Disabilities and the publication of the World Health Organization Resource Book on Mental Health, both of which will eventually attract international attention to this issue; the first burst of professional interest in this issue, as evidenced by programs, workshops, and panels focusing precisely on the extent of this dilemma at the 2007 Congress of the International Academy of Law and Mental Health, and the 2006 conference of the Australia and New Zealand Association of Psychiatry, Psychology, and Law; the focus by mental disability law-specific NGOs (e.g., Mental Disability Rights International; Mental Disability Advocacy Center) on institutional conditions in Central and Eastern Europe and in Central and South America, calling attention to this issue; greater interest globally in what can broadly be called “access to justice” issues; and the emergence of

19. See, e.g., PERLIN ET AL., supra note 9, at 451–789.
25. I discuss this extensively in Perlin, supra note 10.
the Global Alliance for Justice Education as a factor in the promotion of socially relevant legal education.27

So the question is joined: Do we have any reason to feel even a shred of optimism about likely future developments in this area? Are we doomed simply to repeat the dreary experiences of the past thirty-five years, or are there any glimmers of hope that might lead us to expect that, globally, there will be some point in the future when lawyers who represent persons facing civil commitment will no longer be, in Judge David Bazelon’s memorable phrase, “walking violations of the Sixth Amendment”?28 And, finally, what role can clinical programs play in ameliorating this miserable situation?29

In Part I of this Article, I will review developments in the United States, with special focus on the Montana case of In re Mental Health of K.G.F.,30 without doubt the most comprehensive decision on the scope and meaning of the right to counsel in this context from any jurisdiction in the world. In Part II, I will survey an array of other jurisdictions (common law, civil law, and mixed) and consider the range of findings (from nations in which there is no counsel, to perfunctory-at-best counsel, to almost-adequate counsel). In Part III, I will consider other major legal, political, and social developments that might, it is hoped, illuminate these issues. In Part IV, I will examine these issues from the perspective of clinical legal education. In Part V, I will consider the impact of sanism31 and pretextuality32 on these developments. Finally, I will offer some modest conclusions.

29. See Bloch, supra note 27, at 25 (“The global clinical movement may be the best hope for moving the access to justice movement along.”).
30. 29 P.3d 485 (Mont. 2001).
31. Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. See infra Part V.
32. Pretextuality defines the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making. See infra Part V.
My title is drawn from Bob Dylan’s 2001 song, Cry a While.\textsuperscript{33} It is found in these couplets:

Well, you bet on a horse and it ran on the wrong way  
I always said you’d be sorry and today could be the day  
I might need a good lawyer, could be your funeral, my trial  
Well, I cried for you, now it’s your turn, you can cry a while.\textsuperscript{34}

For many persons with mental disabilities, the lack of a good lawyer turns their trial into a (legal) funeral. It is time that this pernicious practice be ended.

I. THE SIGNIFICANCE OF K.G.F.\textsuperscript{35}

As I have already noted, K.G.F. is the most important case ever litigated in this area. K.G.F. was a voluntary patient at a community hospital in Montana whose expressed desire to leave the facility prompted a State petition alleging her need for commitment.\textsuperscript{36} Counsel was appointed, and a commitment hearing was scheduled for the next day.\textsuperscript{37} The State’s expert recommended commitment; patient’s counsel presented the testimony of the plaintiff herself and a mental health professional who recommended that the patient be kept in the hospital a few days so that a community-based treatment plan could be arranged nearer to her home.\textsuperscript{38} The court ordered commitment.\textsuperscript{39} K.G.F.’s appeal was premised, in part, on allegations of ineffective assistance of counsel.\textsuperscript{40}

In a thoughtful and scholarly opinion, the Montana Supreme Court relied on state statutory and constitutional sources to find that “the right to counsel . . . provides an individual subject to an involuntary commitment proceeding the right to effective assistance

\textsuperscript{33} BOB DYLAN, Cry a While, on LOVE AND THEFT (Sony BMG 2001).
\textsuperscript{34} Id. The line in question apparently derives from an older blues song by Sonny Boy Williamson. See ANDREW MUIR, TROUBADOUR: EARLY & LATE SONGS OF BOB DYLAN 284 (2003).
\textsuperscript{35} This section is largely adapted from Perlin, supra note 8, at 691–94.
\textsuperscript{36} In re Mental Health of K.G.F., 29 P.3d 485, 488 (Mont. 2001).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
of counsel. In turn, this right affords the individual with the right to raise the allegation of ineffective assistance of counsel in challenging a commitment order.\textsuperscript{41} In assessing what constitutes “effectiveness,” the court—startlingly, to my mind—eschewed the \textit{Strickland v. Washington} standard\textsuperscript{42} (used to assess effectiveness in criminal cases) as insufficiently protective of the “liberty interests of individuals such as K.G.F., who may or may not have broken any law, but who, upon the expiration of a ninety-day commitment, must indefinitely bear the badge of inferiority of a once ‘involuntarily committed’ person with a proven mental disorder.”\textsuperscript{43} Interestingly, one of the key reasons why \textit{Strickland} was seen as lacking was the court’s conclusion that “reasonable professional assistance”\textsuperscript{44}—the linchpin of the \textit{Strickland} decision—“cannot be presumed in a proceeding that routinely accepts—and even requires—an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation.”\textsuperscript{45}

In assessing the contours of effective assistance of counsel, the court emphasized that it was not limiting its inquiry to courtroom performance; even more important was counsel’s “failure to fully investigate and comprehend a patient’s circumstances prior to an involuntary civil commitment hearing or trial, which may, in turn, lead to critical decision-making between counsel and client as to how best to proceed.”\textsuperscript{46} Such pre-hearing matters, the court continued, “clearly involve effective preparation prior to a hearing or trial.”\textsuperscript{47} The court further emphasized the role of state laws guaranteeing the patient’s “dignity and personal integrity”\textsuperscript{48} and “privacy and dignity”\textsuperscript{49} in its decision: “‘[q]uality counsel provides the most likely

\textsuperscript{41} \textit{Id.} at 491.


\textsuperscript{43} \textit{K.G.F.}, 29 P.3d at 491.

\textsuperscript{44} \textit{See Strickland,} 466 U.S. at 689.

\textsuperscript{45} \textit{K.G.F.}, 29 P.3d at 492 (citing Perlin, \textit{supra} note 7, at 53–54 (“identifying the \textit{Strickland} standard as ‘sterile and perfunctory’ where ‘reasonably effective assistance’ is objectively measured by the ‘prevailing professional norms’”)).

\textsuperscript{46} \textit{K.G.F.}, 29 P.3d at 492.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.} at 493 (quoting \textit{MONT. CODE ANN.} § 53-21-101(1)).

\textsuperscript{49} \textit{K.G.F.}, 29 P.3d at 493 (quoting \textit{MONT. CODE ANN.} § 53-21-142(1)). \textit{See also} \textit{MONT. CONST.} art. II, § 4 (“The dignity of the human being is inviolable.”). \textit{See generally} Michael L.
way—perhaps the only likely way’ to ensure the due process protection of dignity and privacy interests in cases such as the one at bar.”

After similarly elaborating on counsel’s role in the client interview and the need to ensure that the patient understands the scope of the right to remain silent, the court concluded by underscoring counsel’s responsibilities “as an advocate and adversary.” The lawyer must “represent the perspective of the [patient] and . . . serve as a vigorous advocate for the [patient’s] wishes,” engaging in “all aspects of advocacy and vigorously arguing to the best of his or her ability for the ends desired by the client,” and operating on the “presumption that a client wishes to not be involuntarily committed.” Thus, “evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment—in the absence of any evidence of a voluntary and knowing consent by the patient-respondent—will establish the presumption that counsel was ineffective.” In conclusion, the court stated:

[I]t is not only counsel for the patient-respondent, but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings, and must therefore rigorously adhere to the standards expressed herein, as well as those mandated under [state statute].

On one hand, K.G.F. provides an “easily transferable blueprint for courts that want to grapple with adequacy of counsel issues”; on the other, no other state court has adopted its reasoning in the six-plus years since it was decided. As indicated earlier, its rationale was


50. K.G.F., 29 P.3d at 494 (citing Perlin, Fatal Assumption, supra note 7, at 47).
51. Id. at 500.
52. Id. (internal quotations omitted).
53. Id. (internal quotations omitted).
54. Id.
55. Id.
56. Id. at 501.
57. PERLIN & CUCOLO, supra note 13, § 2B-11.3, at 90.
rejected by the Washington Supreme Court in an opinion that concluded, with no supporting empirical or other statistical evidence:

We do not share the Montana Supreme Court’s dim view of the quality of civil commitment proceedings, or their adversarial nature, in the state of Washington. The Strickland standard appears to be sufficient to protect the right to the effective assistance of counsel for a civil commitment respondent in this state.58

Writing about this issue in a domestic context several years ago, I noted:

[G]lobally, counsel’s continuing failure here still appears to be inevitable, given the bar’s abject disregard of both consumer groups (made up predominantly of former recipients, both voluntary and involuntary, of mental disability services) and individuals with mental disabilities, many of whom have written carefully, thoughtfully, and sensitively about these issues.59

The question is joined: If we use K.G.F. as a benchmark, to what percentage of persons subject to involuntary civil commitment is adequate counsel provided? And if this percentage is woefully low, what, if anything can be done about it?

II. A GLOBAL CONSIDERATION

Globally, there is little good news. In many nations, there is no mental health law at all. In others, there is simply no provision for counsel. In others, counsel appears to be present in name only, what is referred to disparagingly in the literature as the “warm body” problem. In only a few instances does counsel appear to be doing a remotely adequate job. Persons with mental disabilities are a paradigmatic example of the individuals—in Frank Bloch’s words—“deprived of basic rights and needs [who] are unable to benefit from relief that might be available through their local legal system and legal regime.”

Again, globally, the picture is dismal. On the African continent, South Africa is apparently the only nation that provides counsel prior to civil commitment. A recent comprehensive analysis of the law in

60. For a particularly pessimistic view of the state of affairs in the former Soviet bloc nations, see Oliver Lewis, Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise, 8 J. MENTAL HEALTH L. 293 (2002).
61. See generally Perlin, supra note 10, at 337–40 (listing multiple examples).
62. Id. at 340–42 (listing examples).
63. See, e.g., Pamela Metzger, Doing Katrina Time, 81 Tul. L. Rev. 1175, 1198 (2007) (“This right to counsel is not satisfied by the mere appearance of a warm body wearing a business suit and holding a copy of the [statute book].”).
65. Bloch, supra note 27, at 8.
66. Mental Health Act of 2002 s. 15 (S. Afr.). A recent comprehensive study of access to justice in Africa does not reveal any other example of the existence of such a right. See ACCESS TO JUSTICE IN AFRICA AND BEYOND: MAKING THE RULE OF LAW A REALITY (Penal Reform
Uganda, in fact, focuses on that legislation’s failure to provide counsel as one of its major “human rights gaps.” 67 Although there is a right to counsel in India, 68 research has revealed no such right in a range of other Asian nations including, inter alia, Afghanistan, China, Indonesia, Pakistan, South Korea, Sri Lanka, Thailand, and Vietnam; similarly, no such right appears to exist in a range of South American nations, including Argentina, Peru, and Venezuela. 69 The only non-U.S.-based evidence I could find in the literature, of a hospital administration urging the extended appointment of counsel in civil commitment cases, is from Israel. 70

This is troubling for many reasons, not the least of which is that, without the availability of such counsel, it has been “virtually impossible” to imagine the existence of the bodies of involuntary civil commitment law, right to treatment law, right to refuse treatment law, or any aspect of forensic mental disability law that are now taken for granted in the United States. 71 Without the presence of

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69. Memorandum from An Truong to Author (Aug. 27, 2007) (on file with author).

70. See Arie Bauer et al., Regional Psychiatric Boards in Israel: Expectations and Realities, 28 INT’L J.L. & PSYCHIATRY 661, 668 (2005) (“[I]t seems advisable that all persons hospitalized compulsorily . . . be legally represented at RPB [Regional Psychiatric Board] hearings, in order to ensure the greatest possible protection for their rights, first and foremost their liberty.”). Bauer works for the Forensic Psychiatry Unit of the Mental Health Services Division of the Israel Ministry of Mental Health. See also Arie Bauer, Trends in Involuntary Psychiatric Hospitalization in Israel 1991–2000, 30 INT’L J.L. & PSYCHIATRY 60, 67 (2007) (speculating that amendment to national mental health law providing for counsel in all RPB proceedings “will bring about a diminution in the number of involuntary hospitalizations”).

71. Perlin, supra note 10, at 341.
counsel, legal reform—in nations with developing economies, at least—“will all too often be a hollow shell.”

III. OTHER MAJOR LEGAL, POLITICAL AND SOCIAL DEVELOPMENTS

There is an important paradox here that needs to be highlighted. At the same time that the non-developments that I have outlined above have taken place, there have been many important and overlapping positive developments, all five of which, when considered together, shine new light on the underlying issues and promise to focus new attention on them in the near future.

First is the first international case law that begins to articulate a broad right to counsel in all cases. Decisions such as Airey v. Ireland\(^7\) and Currie v. Jamaica\(^7\) (both concluding that a litigant’s right to effective access to the courts may sometimes require the state to provide for the assistance of a lawyer) have begun to give litigators the tools through which they can seek to “craft arguments supporting the right to counsel in civil proceedings under international law.”\(^7\) It is essential that advocates bring cases in international courts to articulate this specific right in the specific context of involuntary civil commitment.\(^7\)

Second are the ratification of the United Nations Convention on the Rights of Persons with Disabilities and the publication of the World Health Organization Resource Book on Mental Health, both of which will eventually attract international attention to this issue. The new U.N. convention mandates that “States Parties shall take appropriate measures to provide access by persons with disabilities to

\(^7\) Stephen Golub, *The Importance of Legal Aid in Legal Reform, in Justice in Africa*, supra note 66, at xv, xviii.


\(^7\) Paoletti, supra note 74, at 51.

\(^7\) On the question of the theoretical and constitutional underpinnings of right to counsel in all civil cases, see infra note 77 (citing sources).
the support they may require in exercising their legal capacity.”

Elsewhere, the convention commands:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

The extent to which this Article is honored in signatory nations will have a major impact on the extent to which this entire Convention affects persons with mental disabilities.


For a discussion of the specific potential impact of Article 13, see Waddington, supra note 79. Professor Simon Rice has argued persuasively that legal aid is a human right. See Simon Rice, A Human Right to Legal Aid (Macquarie Univ. Div. of Law, Working Paper No. 2007–
The third development is the first burst of professional interest in this issue, as evidenced by programs, workshops and panels focusing precisely on the extent of this dilemma at the Congress of the International Academy of Law and Mental Health (“IALMH”), and the conference of the Australia and New Zealand Association of Psychiatry, Psychology, and Law (“ANZAPPL”).

It is not insignificant that the first scholarly developments in this area have come in the guise of interdisciplinary conferences that involved lawyers and mental health professionals. The most recent IALMH Congress featured a program on *Advocating Care—The Models and Roles in the Experience of Advocacy*;80 I led a workshop at the 2006 ANZAPPL Congress on *The Provision of Advocacy Services and the Role of Counsel in Cases of Persons with Mental Disabilities*;81 examining the same issues explored in this Article. I believe that, in the coming years, there will be more and more interdisciplinary professional focus on these issues, and that, as a result of that heightened focus, the concerns raised here will be considered far more widely.

Fourth is the focus by mental disability law-specific NGOs (e.g., Mental Disability Rights International; Mental Disability Advocacy Center) on institutional conditions in Central and Eastern Europe and in Central and South America, calling attention to this issue. Recent years have seen the emergence of two important NGOs, one based in Washington, D.C., and one based in Budapest, that have done a heroic job82 of calling the world’s attention to worldwide conditions in psychiatric institutions and to the inhuman and degrading treatment of persons institutionalized by reason of mental disability.83

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14, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1061541. It is still far too early to speculate as to what impact such scholarship will have on the issues addressed in this Article.


82. See Perlin, supra note 10, at 334.

83. For discussions of the work done by MDRI and MDAC, see Perlin, supra note 10, at 337; Gable, supra note 22, at 540; Kanter, supra note 22, at 316; Alex Geisinger & Michael
It is not an exaggeration to say that, together, these two groups have done more than all the “traditional” human rights offices combined to call the world’s attention to these issues. And the lack of counsel available to persons institutionalized because of mental disability is one of those issues emphasized in their reports and other documents.

The fifth development is the emergence of the Global Alliance for Justice Education (“GAJE”) as a factor in the promotion of socially relevant legal education, similarly calling attention to these issues. GAJE is a global alliance of “people committed to achieving justice through education, with a focus on clinical education and other forms of socially relevant legal education,” and on preserving and supporting a social justice focus for clinical legal education around the world, as a means of creating “a valuable tool in developing countries to help promote equal justice for the poor.”


Individuals with mental disabilities—people who are largely “voiceless” and “traditionally isolated from the majoritarian democratic political system”—are frequently marginalized to an even greater extent than are others who fit within the definition of “discrete and insular minorities.”[^90] The emergence of GAJE as an important force in the promotion of social justice should be yet another factor in focusing positive attention on this marginalization and the issues discussed in this Article.[^91]

### IV. THE ROLE OF CLINICS

There are remarkably few clinics at U.S.-based law schools that provide representation in civil commitment cases.[^92] Internationally, the picture is even drearier.[^93] Notwithstanding the significance of representation to the disposition of civil commitment cases,[^94] this is simply an area of representation that has captured neither the imagination nor the attention of clinicians at home or elsewhere.

There is some irony here, for we are beginning to realize the profound impact that law school clinics can have on the entire enterprise of “justice education” throughout the world.[^95] Recent scholarship focuses on the “real life” impact of clinics in this context.


[^92]: See Perlin, *supra* note 8, at 712 n.170 (listing clinics).

[^93]: See infra text accompanying note 104.


[^95]: See, e.g., Barry et al., *supra* note 27, at 200–09 (discussing justice education as “one of the primary goals of legal education”).
in nations as disparate as Japan, the Czech Republic, China, India, and nations with developing economies in Central and South America, and the similar impact of U.S.-based clinics on citizens of nations as disparate as Jamaica, Ghana, and Poland. Clinical education should also, optimally, be able both to make students aware of any pre-existing sanist perspective they “bring to the table,” and to turn such students into more assertive advocates for their clients with mental illness (or perceived mental illness). Yet a recent survey by Professor Roy Stuckey of clinical law teachers with international teaching or consulting experience only appears to reveal one non-U.S.-based professor involved with this enterprise in mental disability law contexts in other nations.

101. For a discussion of these examples, see Teaching International Law—“The Visible College of International Clinicians Making a Real Difference in Law School and in the World, 95 AM. SOC’Y INT’L LEGAL PROC. 188 (2001) (remarks by Diane Edelman).
102. See supra text of note 31; Perlin, supra note 8.
103. Perlin, supra note 8, at 685:

The . . . phenomena [of sanist myths] are especially troubling in the clinical setting, in which students are exposed for the first time to the skills that go to the heart of the lawyering process: interviewing, investigating, counseling and negotiating. All of these are difficult for us (and our students) to learn, but this difficulty is significantly increased when the client is a person with mental disability (or one so perceived). The difficulties can be further exacerbated when the clinical teacher—either overtly or covertly—expresses sanist thoughts or reifies sanist myths.

Id. (emphasis added). Sanism is discussed extensively infra Part V. See also supra note 31.
104. Roy Stuckey, Compilation of Clinical Law Teachers with International Teaching or Consulting Experience, manuscript at 43 (updated June 15, 2005), http://law.sc.edu/clinic/does/
I believe, as I will discuss more extensively below, that this is due, at least in part, to the ravages of sanism, both active and passive. But this revelation is no longer new. I have written in the past how clinical professors are not immune from the same sanist attitudes that infect the rest of society, and it is essential that we remember this as we seek to implement progressive social change in this area.

There is, to be sure, some positive light peeking through the mist. Several colleagues, both in the United States and abroad, have done inspiring work in focusing on the need for clinical programs to involve themselves more comprehensively in human rights education and in preparing their students to focus on global justice issues. On internationalsurvey.pdf (last visited Sept. 16, 2008). Professor Kate Diesfeld has spoken extensively about a mental health and learning disability clinic that she established at the University of Kent at Canterbury in the United Kingdom. See http://www.aut.ac.nz/about/faculties/health_and_environmental_sciences/research_centres_and_institutes/national_centre_for_health_and_social_ethics/consultation_and_public_services.htm (last visited Sept. 29, 2008).

105. See Perlin, supra note 8, at 713:
Several years ago, I gave the keynote presentation at a Society of American Law Teachers (SALT) conference, and presented a paper titled, “Mental Disability, Sanism, Pretextuality, Therapeutic Jurisprudence, and Teaching Law.” SALT regularly provides speaking forums for professors whose primary scholarly (and often personal) interests are the rights of the “discrete and insular minorities” described in footnote 4 of the Caroleone Products case. SALT draws from the ranks of politically progressive law professors, including many who articulate a commitment to social justice as one of the reasons they joined the academy. The organization has been a consistent voice in the fight to insure diversity in the classroom and the curriculum. Each year, at the Association of American Law Professors’ annual conference, there is a SALT meeting, and often (if not always), some political activity “in the streets.” Yet, the response to my talk was strikingly at odds with this commitment to diversity and social justice. In an article subsequently published in the SALT Equalizer, Professor Rogelio Lasso wrote that he found it particularly disturbing that “Sanism” merited a plenary presentation but that the “disgraceful lack of racial diversity of law school faculties” did not.

Id. (citations omitted).

106. See generally Perlin, supra note 8.

the specific issue of mental disability law representation, two law schools in Japan—one with no tradition of any clinical education, and the other with perhaps the strongest tradition of providing such courses—have given me tentative oral commitments that they will create clinical programs to represent individuals in civil commitment hearings. In addition, Nkumba University Law School in Uganda has agreed to create a similar program, contingent on availability of funding. But there is no evidence that these developments will have an immediate effect on the global lack of clinical involvement.

V. THE MEANING AND SIGNIFICANCE OF SANISM AND PRETEXTUALITY

Sanism permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence in involuntary civil commitment law, institutional law, tort law, and all aspects of the criminal process (pretrial, trial, and sentencing). It reflects what civil rights lawyer Florynce Kennedy has characterized as the “pathology of oppression.”

“Pretextuality” is especially poisonous where witnesses, especially expert witnesses, show a “high propensity to purposely distort their testimony in order to achieve desired ends.” This pretextuality infects all participants in the judicial system, breeds
cynicism and disrespect for the law, demeans participants, and reinforces poor-quality lawyering, blasè judging, and, at times, perjurious and corrupt testifying.\footnote{114}

In previous works, I have explored the relationships between sanism and pretextuality in matters involving, inter alia, competency to stand trial,\footnote{115} sexual autonomy,\footnote{116} the right to refuse treatment,\footnote{117} “autonomous decisionmaking,”\footnote{118} and competency to plead guilty or waive counsel.\footnote{119} I have begun to explore it specifically in the context of international human rights law.\footnote{120} But, as I have discussed elsewhere, these factors can be more pernicious as they relate to lawyers’ representation of persons with mental disabilities in court proceedings. Writing about this latter topic four years ago, I alleged:

Sanism permeates the legal representation process both in cases in which mental capacity is a central issue, and those in which such capacity is a collateral question. Sanist lawyers (1) distrust their mentally disabled clients, (2) trivialize their complaints, (3) fail to forge authentic attorney-client relationships with such clients and reject their clients’ potential contributions to case-strategizing, and (4) take less seriously case outcomes that are adverse to their clients.\footnote{121}

\footnotesize
\begin{itemize}
\item \footnote{114. See generally PERLIN, supra note 111.}
\item \footnote{117. See, e.g., Perlin, “And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got,” supra note 12; Perlin & Dorfman, supra note 94.}
\item \footnote{118. E.g., Perlin, supra note 8, at 722.}
\item \footnote{119. E.g., Perlin, supra note 49.}
\item \footnote{121. Perlin, supra note 8, at 695.}
\end{itemize}
Although there is a robust “psychiatric survivor” movement both in the United States and elsewhere, this voice is typically ignored. For at least twenty-five years, formerly hospitalized individuals and their supporters have performed an important role in the reform of the mental health system and in test case litigation. “Yet, there is little evidence that these groups are taken seriously either by lawyers or academics.”


123. But see Perlin, supra note 8, at 700 n.90:


[S]urvivor groups generally have opposed the constitutionality or application of involuntary civil commitment statutes, see, e.g., Project Release v. Prevost, 722 F.2d 960 (2d Cir. 1983), or supported the right of patients to refuse the involuntary administration of psychotropic drugs, see Rennie v. Klein, 653 F.2d 836, 838 (3d Cir. 1981) (Alliance for the Liberation of Mental Patients, amicus curiae), but also have involved themselves in a far broader range of litigation. See, e.g., Colorado v. Connelly, 479 U.S. 157 (1986) (impact of severe mental disability on Miranda waiver; Coalition for the Fundamental Rights and Equality of Ex-patients, amicus). The involvement of such groups in test case litigation—exercising the right of self-determination in an effort to control, to the greatest extent possible, their own destinies, see, e.g., JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED...
In the civil commitment context, any sanism-inspired blunders by lawyers can easily be fatal to the client’s chance of success. If a lawyer rejects the notion that his client may be competent (indeed, if he engages in the not-atypical “ presumption of incompetency” that is all too often de rigeur in these cases), the chances are far slimmer that he will advocate for such a client in the way that lawyers have been instructed—or, at the least, should be instructed—to advocate for their clients. In nations with no tradition of an “expanded due process model,” in cases involving persons subject to commitment to psychiatric institutions or those already institutionalized, a lawyer’s sanism can kill his client’s chance for release or for a judicial order mandating amelioration of conditions of confinement, or access to or freedom from treatment.

CONCLUSION

The legislative and judicial creation of rights—both positive and negative—is illusory unless there is a parallel mandate of counsel that is (1) free and (2) regularized and organized. Without the presence of such counsel, any rights articulated by a court, human rights commission, or legislature become merely “paper victories.”

ALTERNATIVES TO THE MENTAL HEALTH SYSTEM (197[8])—is a major development that cannot be overlooked by participants in subsequent mental disability litigation.

Id.

125. Michael L. Perlin et al., Therapeutic Jurisprudence and Outpatient Commitment Law: Kendra’s Law as Case Study, 9 PSYCHOL. PUB’L & L. 183, 193 (2003) (“In short, the presumption in which courts have regularly engaged—that there is both a de facto and de jure presumption of incompetency to be applied to medication decision making—appears to be based on an empirical fallacy: psychiatric patients are not necessarily more incompetent than nonmentally ill persons to engage in independent medication decision making.”) (citation omitted).


127. See generally PERLIN, supra note 6, at Chapter 2B.

Further, to be authentically effective, counsel needs to be available both for individual cases (in which commitment of the patient is being sought) and in “affirmative” cases (that is, cases consciously thought of as “public interest” or “law reform” cases in which persons with disabilities file suit as plaintiffs seeking variously to have courts articulate procedural or substantive due process rights in the commitment process, or to have courts articulate such rights with regard to conditions of confinement, the latter encompassing both positive rights, e.g., a right to treatment services, and negative rights, e.g., the right to refuse treatment).

An argument certainly can be made that the presence of sanism (which affects lawyers—even those active in the clinical movement and lay persons alike) and the technical complexity of involuntary civil commitment cases (involving, necessarily, expert testimony by mental health professionals and subtle predictions about “future dangerousness”) augment the necessity and importance of adequate representation in such cases. In arguing why the United States should ratify the new UN Convention, Tara Melish focused on the “deeply entrenched attitudes and stereotypes about disability that have rendered many of the most flagrant abuses of the rights of persons with disabilities ‘invisible’ from the mainstream human rights lens.” These stereotypes are the essence of sanism; vigorous, advocacy-focused counsel is needed to answer and rebut them.

I believe that the creation and expansion of legal clinics into mental disability law is an important and necessary step in its evolution. The confluence of developments in international case law, the UN Convention publication, scholarly awareness, and the

129. E.g., Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (holding that a statute that fails to provide a person alleged to be mentally ill with adequate procedural safeguards is unconstitutional).

130. E.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff’d sub. nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (holding that the mentally ill have the constitutional right to adequate treatment in mental hospitals).

131. E.g., Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) (holding that patients with mental illness committed involuntarily retain their constitutional right to refuse antipsychotic drugs).

132. See Perlin, supra note 8.

133. See generally PERLIN, supra note 6, at Ch. 2A.

involvement of GAJE are all necessary steps toward a sensitive, comprehensive body of law. We must all do our part to ensure that defendants facing involuntary commitment have access to competent and adequate representation, in an effort to return to the Dylan lyric with which the Article’s title begins, to make it less likely that a patient’s “trial” is nothing more than, symbolically, his legal “funeral.”