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Articles

DIFFERENT BUT EQUAL: THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES†

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I first met Stan Herr, appropriately enough, on a conference call, about eight years ago, while I was still Director of the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School, Stan's alma mater. The 1995 Special Olympics World Games were about to be held in New Haven, Connecticut, and were scheduled to be the largest sporting event to be held in the world that year. Sitting in my Yale office, I was taken aback to get a call from the White House, where Stan was working for the Clinton administration as an adviser on disability issues. I was told cryptically that a "Mr. Herr" was on the line. My first thought, dusting off my high school German, was that "Mr. Herr," translated into German, was "*Herr Herr*" ("Mr. Mister"). Anyone named "Herr Herr," I thought, had to be a *mensch*.¹ I was

† [Editor's Note: Some portions of this Article are drawn from an earlier work that Professor Harold Koh co-authored. The text accompanying notes 13-85 has been drawn from the Introduction to THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL.

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1. See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1201 (2d ed. 1987) (defining the Yiddish word as "decent, upright, mature, and responsible person").

right. The ebullient voice that came booming over the speakerphone sounded like it came from someone who was at least eight feet tall. When I actually met Stan a few weeks later, I realized that he was only 6' 5." But he struck me then, as he strikes me now, as a giant of a man, who used his special stature to lead, to stand up for others, and to see much farther than lesser persons.

Over the speakerphone, Stan proposed what at first struck me as an absurdly ambitious plan: to convene at Yale Law School in early 1995, in connection with the Special Olympics World Games, an international symposium on the rights of people with mental retardation. Why not bring together at Yale, Stan asked, the leading spokespeople from two of the greatest social movements of the past half-century: the international human rights movement and the disability rights movement? We would talk about disability rights as human rights. We would ask the pressing question "should difference make a difference" in a legal sense? Should human beings with mental disabilities be treated as legally different, simply because they are physically or intellectually different from individuals lucky enough to be born without such disabilities?

At the time, I knew virtually nothing about the disability rights movement, but the answer to that question struck us both as intuitively obvious: the statement in Article I of the Universal Declaration of Human Rights that "[a]ll human beings are born free and equal in dignity and rights,"² contained no footnote that said "except for persons with mental disabilities." In 1971, the U.N. General Assembly had adopted without a dissenting vote a Declaration on the Rights of Mentally Retarded Persons that proclaimed, in seven concise articles, that persons with mental retardation have "the same rights as other human beings," including the right to "a decent standard of living;" normal modes of life, protective services, and legal protection from "abuse and degrading treatment[;]" and "proper legal safeguards."³ Why, we asked each other, had that Declaration never become an international treaty? And wasn't the fortuity of having the Special Olympics in Yale's hometown an opportune moment to give impetus to a new global lawmaking exercise by developing a "Yale Declaration" on the International Human Rights of Persons with Mental Disabilities?

And so, in March 1995, we co-sponsored at Yale Law School a conference on the International Human Rights of Persons with

2. G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., art. I, at 71, U.N. Doc. A/810 (1948).

3. G.A. Res. 2856 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 93, U.N. Doc. A/8429 (1971).

Mental Disabilities.⁴ Like everything with which Stan was involved, it was a little bit different. We heard not just from Americans, but from people all around the world, who hailed not just from developed, but also from developing countries.⁵ We heard from lawyers, academics, doctors, scientists, and, most importantly, from persons with mental retardation, speaking as their own self-advocates.⁶ One of the most eloquent conference spokesmen that day was our good friend Professor Larry Gostin, the Director of the Center for Law and Public Health at Johns Hopkins and Georgetown, who then, as today, spoke about the relationship between human rights and mental health.⁷ As the conference ended, we issued the Yale Declaration, which reaffirmed the universality of human rights and called on all nation-states to bring about without delay the full enforcement of the rights of persons with mental retardation.⁸

I remember all of that, but another memory sticks in my mind. At the dinner that closed the conference, Stan made all of us stand up holding our wine glasses and sing Russian songs, whose words only he knew. I will never forget the sight of Stan—this giant of a man—with his eyes closed, rocking back and forth, booming out a Russian folk song, as if privy to a private melody that the rest of us could not yet hear. But as he sang the tune over and over again, it became familiar. Eventually, we all joined in, following his lead, until we created a harmony more beautiful than any of us could have imagined.

My message today is simple: as it was with Stan's music, so, too, should it be with Stan's work.

4. Sandra Park, *Meeting Addresses Retardation*, YALE DAILY NEWS, Mar. 27, 1995, available at <http://www.yaledailynews.com/article.asp?AID=7679>.

5. See *id.* (explaining that the attendees had traveled from as far away as the Middle East and Europe).

6. One such participant was Mitchell Levitz, whose life story is chronicled in DIFFERENT BUT EQUAL. Mitchell Levitz, *Voices of Self-Advocates*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 453 (Stanley S. Herr et al. eds., 2003) [hereinafter DIFFERENT BUT EQUAL] (discussing the challenges of intellectual disabilities from the perspective of a person with a disability).

7. Professor Gostin's contributions to disability law scholarship are noteworthy. See Adrienne Asch et al., *Respecting Persons with Disabilities and Preventing Disability: Is there a Conflict?*, in DIFFERENT BUT EQUAL, *supra* note 6, at 319 (discussing the challenges involved in promoting disability prevention, while also encouraging the full inclusion of individuals with disabilities; Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20 (2003) (encouraging the use of international law to improve the lives of people with intellectual disabilities).

8. Yale Declaration, in DIFFERENT BUT EQUAL app., *supra* note 6, at 517-25.

When the Yale conference ended, we vowed to publish the volume as a book, called "Different But Equal." The thesis of the book would be captured in its title: *persons with disabilities are different but equal*. However different persons with disabilities may be, they are nevertheless born free and equal in dignity and rights and, hence, are entitled to equality of respect and treatment, even if that equality does not entail identical treatment under all circumstances. The book and the Yale Declaration on which it was based, we decided, could someday be a cornerstone for a binding international convention designed to enshrine the human rights of persons with intellectual disabilities.

That was our plan. But before we could finish the book, fate led us both down unexpected paths. In 1998, I was appointed to serve as Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton administration.⁹ In that job, I encountered advocates for persons with physical and mental disabilities. I visited hospitals, mental institutions, prisons, and jails in which persons were incarcerated simply for being different.¹⁰ And as I traveled the world dealing with human rights crises in such places as Kosovo, East Timor, Colombia, and Sierra Leone, I often thought of Stan, singing his lonely song, waiting for the rest of us to join in.

And so, it was hardly a surprise when just two days after I left the government in January 2001, I heard Stan's voice again on the speakerphone, still booming, announcing with passion that it was time for us to finish our book, and, to make that possible, he had persuaded Larry Gostin to join our enterprise. What I learned only later was that Stan had already discovered the cancer that would take him from us, and that he hoped very much to make this volume the final piece of his legacy.

At the *Stanley S. Herr Memorial Conference on Disability Rights and Social Justice*, Larry Gostin and I were proud to announce the completion of our last journey with Stan Herr, the publication of *The Human Rights of Persons with Intellectual Disabilities: Different but Equal*, by the Oxford University Press, with a Foreword by the just-departed U.N. High Commissioner for Human Rights Mary Robinson.¹¹ Although

9. See United States Institute for Peace, *Promoting Democracy and Human Rights: The Continuing Agenda*, Dec. 13, 2000, available at <http://www.usip.org/events/pre2002/koh.html> (last visited Oct. 7, 2003) (providing audio and video archives of a presentation made by Professor Koh while serving in the Clinton administration).

10. See, e.g., Eric Rosenthal et al., *Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo* (2002), at 15-17, available at <http://www.mdri.org/pdf/KosovoReport.pdf> (last visited Oct. 7, 2003) (discussing the arbitrary detention of individuals with disabilities in Kosovo).

11. Mary Robinson, *Foreword*, in *DIFFERENT BUT EQUAL*, *supra* note 6, at v.

Stan did not live to see its publication, his spirit moves throughout the pages. The book contains three different chapters by him and many of the ideas that motivated our original 1995 conference.¹² And like Stan's last Russian song, through the book runs a melody that none of us could hear, until Stan sang it so many times, we could not help but join the harmony.

The melody is simple and runs something like this: the rights of persons with intellectual disabilities are part and parcel of the international human rights movement.¹³ Since World War II, international human rights have been defined as embracing those universally recognized inalienable rights to whose enjoyment all persons are entitled solely by virtue of being born human.¹⁴ The list of universal rights is specified in the 1948 Universal Declaration of Human Rights,¹⁵ and elaborated in the International Covenants on Civil and Political Rights¹⁶ and on Economic, Social and Cultural Rights,¹⁷ both of which have been almost universally signed and ratified.¹⁸ At the 1993 Vienna Conference on Human Rights, nearly all nations of the world joined in a declaration that called these rights universal, indivisible, and interdependent.¹⁹ These instruments, our book argues in its introduction, require us to frame the concerns of persons with intellectual disabilities not simply as a social problem, but as a human rights imperative.²⁰

12. Stanley S. Herr, *From Wrongs to Rights: International Human Rights and Legal Protection*, in DIFFERENT BUT EQUAL, *supra* note 6, at 115 [hereinafter *From Wrongs to Rights*]; Stanley S. Herr, *The Potential of Disability Non-discrimination*, in DIFFERENT BUT EQUAL, *supra* note 6, at 203 [hereinafter *Disability Non-discrimination Laws*]; Stanley S. Herr., *Self-Determination, Autonomy, and Alternatives for Guardianship*, in DIFFERENT BUT EQUAL, *supra* note 6, at 429 [hereinafter *Alternatives for Guardianship*].

13. Herr, *From Wrongs to Rights*, *supra* note 12, at 115 ("People with intellectual disabilities are an integral focus of a growing international human rights movement.").

14. Harold Hongju Koh & Lawrence O. Gostin, *Introduction: The Human Rights Imperative*, in DIFFERENT BUT EQUAL, *supra* note 6, at 1.

15. G.A. Res. 217 A (III), *supra* note 2.

16. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), available at <http://www.umn.edu/humanrts/instatee/b3ccpr.htm> (last visited Oct. 7, 2003).

17. *Id.* at 49.

18. See *The Two International Covenants on Human Rights*, at http://www.droitshumains.org/uni/Formation/02LesPactes_a.htm (last visited Oct. 29, 2003) (noting that 141 states have ratified the International Covenant on Economic, Social and Cultural Rights, and that 144 states have ratified the International Covenant on Civil and Political Rights).

19. *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661, 1664 (1993) [hereinafter *United Nations World Conference on Human Rights*].

20. Koh & Gostin, *supra* note 14, at 1.

During the last half-century, the promotion of human rights has come to be recognized not simply as an American or Western value, but as a universal value with internationally recognized meaning.²¹ In fact, however, countries with entrenched traditions of socialism and social democracy have more broadly embraced notions of economic, social, and cultural rights than have such market capitalist countries as the United States.²²

For more than half a century, the international human rights movement focused almost entirely on the activities of the able-bodied and the able-minded.²³ But over the last two decades, existing human rights networks have finally broadened their focus beyond the rights of “traditional and visible minorities”—including people of color, ethnic and religious minorities, women, children, and refugees—to the rights of what might be called “invisible, underprotected minorities,” particularly persons afflicted with HIV/AIDS, gays and lesbians, persons with disabilities, and those afflicted with mental illness.²⁴

Discrimination against each of these groups has become a serious and neglected problem that affects large numbers in every society.²⁵ Because each of these groups has traditionally been hidden from mainstream society, each has long been subjected to widespread, unredressed discrimination, which traditionally has been neither well-chronicled nor subjected to sustained public scrutiny or criticism.²⁶

21. See, e.g., *United Nations World Conference on Human Rights*, *supra* note 19 (demonstrating unity of international community in recognizing human rights).

22. Koh & Gostin, *supra* note 14, at 1.

Those in the United States who are wary of economic, social, and cultural rights have generally argued that the guaranteed provision of housing, schooling, health care, and the like would have broad redistributive implications and would place impossible burdens on federal, state, and local governments to provide social services. While these skeptics rarely object to guaranteeing the “freedom from” rights—[e.g.], freedom from genocide, torture, discrimination, arbitrary punishment, and other forms of overt government invasion—they contend that similarly guaranteeing “freedom to” rights—such as rights to housing, education, and health—would create unsustainable burdens on the public fisc. In so asserting, their hesitation has been reinforced in [U.S.] domestic law by judicial decisions by the Burger and Rehnquist Courts, which have drawn the constitutional line between strong protection of civil and political rights and a refusal to recognize constitutional rights to health care and education. This mindset has created a growing schism—both between the United States and developing nations and within the United States—between wealthy and underprivileged groups who see securing economic, social, and cultural rights as a practical precondition to [the] meaningful enjoyment of civil and political rights.

Id. at 1-2.

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.*

From a human rights perspective, the intellectually disabled rank among the world's most vulnerable and at-risk populations, both because they are different and because their disability renders them less able either to assert their rights or to protect themselves against blatant discrimination.²⁷

In dealing with persons with intellectual disabilities, many governments fail to distinguish between two groups with distinctly different problems and needs: those with mental retardation and those with mental illness.²⁸ According to the American Association on Mental Retardation,

Mental retardation refers to substantial limitations in present functioning. It is characterized by [three characteristics: 1] significantly subaverage intellectual functioning, [with an IQ tested below 70] existing concurrently with [2] related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. [And 3,] [m]ental retardation manifests before age 18.²⁹

Mentally ill persons, by contrast, may exhibit very high intelligence, shifting adaptive skills, and may become afflicted (or cured) at any time during their lives.³⁰ As the recent Oscar-winning movie, *A Beautiful Mind*, vividly illustrated, even Nobel Prize-winners can suffer and—with enough support from their loved ones and community—overcome mental illness.³¹

27. *Id.*

28. *Id.*

29. *Id.* at 2-3 (citing AMERICAN ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)). The American Psychiatric Association's definition similarly states: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.* at 42-43.

30. Koh & Gostin, *supra* note 14, at 3.

31. See SYLVIA NASAR, *A BEAUTIFUL MIND* (1994) (recounting the compelling story of the brilliant mathematician John F. Nash, who overcame mental illness and won the Nobel Prize in Economics).

Like the disabled at large, the vast majority of the world's intellectually disabled still live in horrifying conditions.³² As Mary Robinson has noted:

We know that persons with disabilities frequently live in deplorable conditions, and face physical and social barriers, which prevent their integration and full participation in the community. As a result, millions of adults and children throughout the world are segregated, deprived of virtually all their rights, and sometimes lead wretched and marginalised lives.³³

Because of their incapacity to protect or even to understand their own interests, the intellectually disabled are at the greatest risk.³⁴ Mental institutions and psychiatric hospitals worldwide stand in dismal condition, and patients often contend with inhumane and unsanitary living conditions, where they are treated as subhuman prisoners and receive little or no medical care.³⁵

Our book calls on the world to make concrete the principle of "different but equal."³⁶ That task is easier said than done. Making concrete the "different but equal" principle raises challenges for governmental and nongovernmental organizations at both a national and international level.³⁷ National and international organizations share a joint responsibility to ensure that rights proclaimed in international norms and national legislation are translated into genuine and concrete improvements in the lives of persons with intellectual disabilities.³⁸ Human rights workers need to learn how to help intellectually disabled persons speak up for their own rights and how to integrate the language, tools, strategies, and networks of the international human rights movement into their daily struggle for dignity, equality, and justice.³⁹

For human rights advocates, this is a familiar task. In building new global human rights regimes, a pattern has emerged, whereby advocates focus on five priorities: first, on *reconceptualizing the disability*

32. Koh & Gostin, *supra* note 14, at 3.

33. Mary Robinson, "Let the World Know": *Report of a Seminar on Human Rights and Disability*, available at <http://www.un.org/esa/socdev/enable/stockholmnov2000a.htm> (last visited Oct. 29, 2003).

34. Koh & Gostin, *supra* note 14, at 3; *see also* Rosenthal et al., *supra* note 10, at 6-11 (detailing the wretched conditions present in one Kosovo psychiatric institution).

35. Koh & Gostin, *supra* note 14, at 3.

36. *See id.* ("[H]owever different persons with disabilities may be, they are nevertheless born free and equal in dignity and rights.").

37. *Id.*

38. *Id.*

39. *Id.*

question as a human rights issue; second, on *developing knowledge*, third, on *developing transnational issue networks* to address problems; fourth, on *developing legal precedents under domestic law*, or what I have elsewhere called “*norm-internalization*,”⁴⁰ and fifth, on using that reconceptualization, knowledge, and domestic precedent to help *crystallize international standards*.⁴¹

This pattern has emerged in numerous new areas of human rights law, for example, in the campaign for an International Landmines treaty and in the effort to create a global ban on the illicit transfer of small arms.⁴² Such a pattern has also begun to unfold with respect to the intellectually disabled, as advocates have sought first, to reconceptualize disability as a human rights issue, and only secondarily as a medical issue.⁴³ Treating intellectual disability as a human rights issue directly addresses, and seeks to readjust, the power relationships that shape the unequal treatment of the disabled.⁴⁴ As Mary Robinson put it:

The most important tool in tackling inequality is to enable those experiencing it to remedy the power relationship, to take some control. This is a concept of rights that requires that those who are furthest from the cabinet table own the rights that inhere to them by virtue solely of their humanity. Ownership of this kind enables them to describe their condition, then to challenge it, and then to ensure that any decisions taken in the organisation and the ordering of their lives are made “by and with” them, not “about and for” them.⁴⁵

The second step has been the formation of what I have elsewhere called a “transnational human rights network” that has worked to ex-

40. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) (discussing “transnational legal process: the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems”) (emphasis omitted).

41. Koh & Gostin, *supra* note 14, at 4.

42. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 655-63 (1998) (discussing the landmines convention) [hereinafter Koh, *Lecture*]; Harold Hongju Koh, *A World Drowning in Guns*, 71 FORDHAM L. REV. 2333, 2341-49 (2003) (discussing nascent efforts to regulate small arms and light weapons) [hereinafter Koh, *Guns*].

43. See Disabled Persons International, *International Day of Persons with Disabilities*, at http://www.dpi.org/en/resources/press_releases/report.htm (last visited Oct. 7, 2003) (discussing the U.N.’s World Disability Report, in which U.N. High Commissioner for Human Rights, Mary Robinson, notes that “law-makers are beginning to accept that disability is first a human rights issue and, only secondly, a medical matter”).

44. Koh & Gostin, *supra* note 14, at 4.

45. Mary Robinson, *Equality and Rights*, EQUALITY NEWS, Summer 2000, at 5, available at <http://www.equality.ie/pdf/NEWSLETT.PDF> (last visited Oct. 29, 2003).

pose worldwide discrimination against persons with intellectual disabilities.⁴⁶ That global network of human rights nongovernmental organizations (NGOs) now includes such organizations as Inclusion International, Mental Disability Rights International, Rehabilitation, and Sister Witness International (as well as such “general-purpose NGOs” as Human Rights Watch), all of which are dedicated to investigating, publicizing, and calling for action on international disability issues in such countries as Russia, Romania, Latin America, and Kosovo.⁴⁷ In August 2002, for example, one of those NGOs, Mental Rights Disability International, grabbed headlines around the world by releasing a report about psychiatric hospitals in Kosovo.⁴⁸ That report demonstrated that, even under U.N. supervision, women are raped by male patients while staff watch; that mentally retarded patients sit in prolonged enforced idleness in conditions of appalling filth; and that patients are often drugged rather than counseled, threatened with retaliation for charges of abuse, and frequently left without meaningful treatment or instruction.⁴⁹

A third step has been to litigate discrimination issues involving the intellectually disabled under domestic law.⁵⁰ Domestic advocates in Ireland, for example, have made high-profile use of international law in *O'Donoghue v. Minister for Health*,⁵¹ in which the High Court concluded that the government had deprived a child with a disability of a free appropriate education in violation of broad guarantees of a free required education under Ireland's Constitution.⁵² In *Department of Health and Community Services v. J.W.B. (In re Marion)*,⁵³ the High Court of Australia severely restricted a guardian's right to authorize the involuntary sterilization of a person with an intellectual disability.⁵⁴ These issues have also been extensively litigated in the United States, particularly in the well-known *Pennhurst* and *Mills* litigations.⁵⁵ These

46. See Koh, *Lecture, supra* note 42, at 649 (discussing the establishment of transnational issue networks to promote the “internationalization” of norms).

47. Koh & Gostin, *supra* note 14, at 4.

48. See Rosenthal et al., *supra* note 10 (detailing human rights abuses of persons with mental disabilities in Kosovo).

49. See Oliver Burkeman, *UN 'ignored' Abuse at Kosovo Mental Homes*, THE GUARDIAN, Aug. 8, 2002, at 2; Editorial, *Forgotten by the U.N.*, WASH. POST., Aug. 18, 2002, at B6; Edith M. Lederer, *Report of Abuse in Kosovo Clinics*, WASH. POST., Aug. 8, 2002.

50. Koh & Gostin, *supra* note 14, at 4.

51. [1993] 2 I.R. 20 (Ire.).

52. *Id.* at 71.

53. (1992) 175 C.L.R. 218.

54. *Id.* at 252-53.

55. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972) (holding that the school board must provide specialized education to students with mental disabilities); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd*

court cases eventually spurred enactment of the Education for All Handicapped Children Act of 1975⁵⁶ (later called IDEA, the Individuals with Disabilities Education Act),⁵⁷ which effectively allowed the return of some one million children previously excluded from the American public school system due to their perceived mental handicaps.⁵⁸

These lawsuits are examples of what I have elsewhere called “transnational legal process.”⁵⁹ As I have explained elsewhere, I believe that nations obey international law for a variety of reasons: power, self-interest, liberal theories, communitarian theories, and what I call “legal process” theories.⁶⁰ While all of these approaches contribute to compliance with international law, the most overlooked determinant of compliance is what I call “vertical process”: when international law norms are internalized into domestic legal systems through a variety of legal, political, and social channels, and obeyed as domestic law.⁶¹ In the international realm, as in the domestic realm, most compliance with law comes not from coercion, but from *obedience*, or norm-internalization, the process by which domestic legal systems incorporate international rules into domestic law and obey it as domestic law.⁶²

in part, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981) (addressing whether mentally retarded residents of a state hospital are entitled to minimum levels of care, safety, and rehabilitation).

56. Pub. L. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400 et seq.).

57. Pub. L. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. §§ 1400 et seq.).

58. Koh & Gostin, *supra* note 14, at 5. In American case law, the high water mark was *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), which cited the 1971 U.N. Declaration and included reference to international human rights standards in making its decision. *Id.* at 390-91 n.6. In general, U.S. courts have seldom used international human rights law to redress human rights abuses, though now they are increasingly willing to do so. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366-75 (1991) (discussing increased acceptance of international law in recent domestic litigation). In other countries, as one of Professor Herr's chapters chronicles, judges have made strong use of human rights declarations for persons with intellectual disabilities. Herr, *From Wrongs to Rights*, *supra* note 12, at 134.

59. See Koh, *supra* note 40, at 2645-58 (analyzing nations' motivation for compliance with international law).

60. *Id.* at 2645-58; see also Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199-206 (1996) [hereinafter Koh, *Legal Process*] (assessing why nations obey international law); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401 (1999) [hereinafter Koh, *International Human Rights*] (discussing the relationship between enforcement and obedience in international law).

61. Koh, *Lecture*, *supra* note 42, at 535-36.

62. Koh, *Legal Process*, *supra* note 60, at 204.

Under this view, the key to understanding whether nations will obey international law is *transnational legal process*: the process by which public and private actors—namely nation states, corporations, international organizations, and nongovernmental organizations—interact in a variety of fora to make, interpret, enforce, and, ultimately, internalize rules of international law.⁶³ The key elements of this approach are interaction, interpretation, and internalization.⁶⁴ Those seeking to create and embed certain human rights principles into international and domestic law should trigger transnational *interactions*, that generate legal *interpretations*, that can in turn be *internalized* into the domestic law of even resistant nation states.⁶⁵

In my view, “transnational legal process” is not simply an academic explanation of why nations do or do not comply with international law, but, more fundamentally, a bridging exercise between the worlds of international legal theory and practice.⁶⁶ Human rights activists too often agitate without a clear strategy regarding what pressure points they are trying to push or why they are trying to push them.⁶⁷ Scholars by contrast, have ideas, but often lack practical understanding of how to make them useful to either decisionmakers or activists.⁶⁸ My claim is that, by triggering transnational legal process, activists can promote interactions—lawsuits, legislative, and treaty-drafting efforts—that generate legal interpretations that can be internalized into domestic law.⁶⁹ But the movement is not simply one-way.

63. This argument is presented more fully in a forthcoming book, tentatively entitled *WHY NATIONS OBEY: A THEORY OF COMPLIANCE WITH INTERNATIONAL LAW*. The pieces of the argument may be found in Koh, *International Law*, *supra* note 40, at 2645-58; Koh, *Lecture*, *supra* note 42, at 535-36; Koh, *Guns*, *supra* note 42, at 2349-60; Koh, *Legal Process*, *supra* note 60, at 204; Koh, *International Human Rights*, *supra* note 60, at 1401; and Koh, *supra* note 58, at 2358-75.

64. Koh, *Lecture*, *supra* note 42, at 535-36.

65. *See id.* at 641-42 (explaining how, in the context of the Third United Nations Convention on the Law of the Sea, when nations participate in transnational legal interactions, “even resisting nations cannot insulate themselves forever from complying with particular rules of international law”).

66. *See id.* at 655-63 (noting the effectiveness of transnational legal process in working toward the ratification of the Landmines Convention).

67. *See id.* at 657-60 (noting that anti-landmines activists initially focused their efforts on the U.S. government, then the United Nations, and ultimately the “Ottawa Process,” an alternative convention framework).

68. *See* Koh, *International Human Rights*, *supra* note 60, at 1416 (arguing that rather than simply engaging in scholarship on the subject, lawyers have a “duty . . . to try to change the feelings of that body politic to promote greater obedience with international human rights norms”).

69. *See* Koh, *Lecture*, *supra* note 42, at 646-50 (arguing that local and transnational activists can interact with government to produce normative change). As this Article went to press, the Inter-American Human Rights system produced a graphic example of the use of transnational legal process to promote norm-internalization in the area of mental disabili-

Just as activists can promote the domestication of international law (the “trickling down” of international legal standards into the domestic system), they can equally promote the internationalization of norms that have been initially developed and hardened at the domestic level (the “bubbling up” of domestic law).⁷⁰

That is what domestic disability rights activists have tried to achieve as their domestic efforts have spurred nascent efforts to develop and harden an international standard regarding the rights of the mentally disabled.⁷¹ Throughout this fifth stage in the international human rights strategy, international standard setting, the United Nations has played an increasingly proactive role in working for global recognition of human rights of people with intellectual disabilities by launching the International Year of Disabled Persons,⁷² the World Programme of Action and the Decade of Disabled Persons,⁷³ and the World Summit on Social Development.⁷⁴ In 1971, the U.N. General Assembly adopted a Declaration on the Rights of Mentally Retarded Persons.⁷⁵ In 1975, the U.N. endorsed a Declaration on the Rights of Disabled Persons that covers some one-half billion persons who suffer from a mental or physical disability.⁷⁶ In 1993, the General

ties. In December 2003, the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) approved provisional measures to protect 460 people detained in a psychiatric institution in Paraguay. Two human rights nongovernmental organizations, Mental Disability Rights International (MDRI) and the Center for Justice and International Law (CEJIL), had sought the IACHR's intervention to prevent conditions threatening the lives, liberty, and personal security of a 17-year old and an 18-year old boy held along with 458 others in the Neuro-Psychiatric Hospital of Paraguay. The petition was the first ever brought before the IACHR to challenge ongoing abuses against people in a psychiatric facility. The IACHR requested that the Government of Paraguay adopt “all necessary measures” to protect the lives, and physical and mental safety of the 460 people detained in the institution, with special attention to the situation of women and children detainees. For the current state of the case, see the Mental Disability Rights International website at <http://www.MDRI.org>.

70. See Koh, *International Human Rights*, *supra* note 60, at 1414 (describing how the “trickle down” and “bubble-up” phenomena in the context of the Torture Victim Protection Act led to the U.S. ratification of the U.N. Torture Convention).

71. See Robinson, *supra* note 33 (discussing the “joint responsibility of the national and international level” to ensure the implementation of human rights disability standards).

72. G.A. Res. 123, U.N. GAOR, 31st Sess., Supp. No. 39, at 104, U.N. Doc. A/31/395 (1976).

73. *World Programme of Action Concerning Disabled Persons: Report of the Secretary General*, G.A. Res. 52, U.N. GAOR, 37th Sess., U.N. Doc. A/37/351/Add.1 and Corr. 1, annex, § VIII, recommendation I (IV) (1982).

74. The World Summit on Social Development was held in March 1995 and reconvened in June 2000. World Summit for Social Development, at <http://www.un.org/esa/socdev/wssd> (last visited Oct. 29, 2003).

75. G.A. Res. 2856, *supra* note 3, at 93.

76. G.A. Res. 3447, U.N. GAOR, 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1975).

Assembly adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.⁷⁷ This led in 1994 to the appointment of a U.N. Special Rapporteur on Disability, as well as to a recently published study commissioned by the Office of the U.N. High Commissioner for Human Rights to evaluate expressly the effectiveness of existing international mechanisms on the rights of the disabled.⁷⁸

The issue of what should constitute the core elements of this international standard is discussed throughout our book.⁷⁹ The core elements are now commonly recognized to include such rights as *access* to tools for exercising individual agency; *participation* and *inclusion* in critical decisions that affect the disabled person's life and future; and freedom for disabled individuals to exercise proactively their rights, both personally and through agents.⁸⁰ Advocates have also made a powerful case that those with mental retardation should have their own legal authority to make their own decisions about *having and raising children*.⁸¹ For those with mental illness, the *right to treatment* remains a paramount concern.⁸² Many societies continue to regard the mentally ill as outcasts, rather than as patients in need of health care, institutionalizing the curable and driving millions suffering from mental illness from seeking help for fear of long-term detention or social stigmatization.⁸³ Also not to be forgotten are the distinctive needs of individuals whose intellectual disabilities only exacerbate

77. G.A. Res. 48/96, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/96 (1993). Similarly, the U.N. Economic and Social Council in 2001 adopted a resolution to further promote the rights of individuals with disabilities. See U.N. EXCOR, 56th Sess., 43rd plen. mtg., at 23, U.N. Doc E/RES/2000/10 (2000).

78. See United Nations Human Rights resolution 2000/51 of 25 April 2000, Official Records of the Economic and Social Council, Supp. No. 3 and corrigendum (E/2000/23 and Corr.1), chap. II, § A (2000).

79. See Koh & Gostin, *supra* note 14, at 6-20 (providing an overview of the content in DIFFERENT BUT EQUAL).

80. See, e.g., G.A. Res. 2856, *supra* note 3, at 93 (asserting that a disabled person has the right to education and other services to enable him to maximize his potential and the right to a qualified guardian, if needed, to ensure his legal rights).

81. See MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 64-65 (1999) (arguing that persons with retardation should be allowed to decide for themselves whether to have children).

82. This concern persists despite the adoption of the Declaration on the Rights of Mentally Retarded Persons, which declares that "[t]he mentally retarded person has a right to proper medical care and physical therapy." G.A. Res. 2856, *supra* note 3.

83. See, e.g., Rosenthal et al., *supra* note 10, at 6-15 (describing the deplorable conditions).

their existing human rights vulnerabilities, for example, refugees and children who suffer from mental health problems.⁸⁴

The Yale Declaration, announced in March 1995 at the end of the Yale Conference (and reproduced as an Appendix to our volume),⁸⁵ represents perhaps the most progressive effort thus far to enumerate the elements of an authoritative international human rights instrument that could forthrightly address this issue.⁸⁶ Six years later, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, closed with a recommendation to the General Assembly to “consider elaborating a comprehensive and integral international convention to promote and protect the rights and dignity of disabled people, including, especially, provisions that address the discriminatory practices and treatment affecting them.”⁸⁷ In December 2001, the U.N. General Assembly adopted a historic resolution calling for a comprehensive and integral International Convention to promote and protect the rights and dignity of persons with disabilities.⁸⁸ In time, the U.N.

84. In her address to the October 2000 International Consultation on Mental Health of Refugees and Displaced Populations in Conflict and Post-Conflict Situations, High Commissioner Mary Robinson explained:

We also have a better understanding now of the degree to which persons affected by conflict and post-conflict situations are especially vulnerable to mental health problems. Professionals involved in complex emergencies must address the delicate issues arising with regard to mental health. Victims themselves must be able to recognize that the trauma of conflict can cause mental health problems. Both should be able to seek support, without fear of stigmatization.

World Health Organization, *Concluding Statement from the International Consultation on Mental Health of Refugees*, available at http://www.whomsa.org/it/text8/04_statement.html (last visited Oct. 29, 2003).

85. Yale Declaration, *supra* note 8, at 517.

86. The Yale Declaration declares, *inter alia*, that “[a]ll states must immediately begin a process of reforming their laws and public policies to achieve or exceed international standards and begin an inclusive planning process to bring about full enforcement of human rights for people with mental retardation in their own country.” *Id.* at 517-18. The Declaration further recommends that nations utilize the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities as a guide in implementing this process. *Id.* at 518. The Declaration also issues recommendations regarding how nations might increase and prioritize their resources, and encourages the adoption of model service programs that respect the rights of individuals with mental retardation. *Id.* at 521-22.

87. Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Office of the High Commissioner for Human Rights, U.N. Doc. A/Conf.189/12, Chap. I, para. 180 (2001).

88. *Resolution on Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, G.A. Res. 168, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/168 (2001), available at <http://www.un.org/esa/socdev/enable/disA56168e1.htm> (last visited Oct. 29, 2003). The resolution established an ad hoc committee to consider proposals for this convention and invited member states, relevant human rights treaty bodies, intergovernmental and nongovernmental organizations, and other entities to participate. *Id.*

process may well culminate in Stan Herr's dream: a ratifiable treaty barring discrimination against the disabled.⁸⁹

This five-part international human rights strategy—a transnational legal process that moves through the stages of conceptualization, knowledge, networks, domestic change, and international standard setting—was completely familiar to Stan Herr. Indeed, he worked on every element of this strategy, quite literally until the last hours of his life. I know that for a fact, because the last time that Stan and I worked together was not as authors or editors, but as lawyers, when we filed an *amicus curiae* brief at the United States Supreme Court in what became a landmark decision: the Court's June 2002 decision in *Atkins v. Virginia*.⁹⁰ That case reopened for the first time in thirteen years the question raised in *Penry v. Lynaugh*:⁹¹ whether the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution forbids execution of persons with mental retardation.⁹²

Initially, my students, co-counsel, and I were asked to write an international law *amicus* brief in support of the defendant with mental retardation in *McCarver v. North Carolina*.⁹³ But while that case was pending, North Carolina passed a law forbidding execution of persons with mental retardation,⁹⁴ leading the U.S. Supreme Court to dismiss certiorari in the *McCarver* case as improvidently granted.⁹⁵ The Court then granted the certiorari petition of Daryl Atkins, a similarly situated defendant with mental retardation, and permitted all *amici curiae* briefs originally filed in *McCarver* to be refiled in support of the same position in *Atkins*.⁹⁶

As we prepared the brief, my students, co-counsel, and I communicated with nine former U.S. diplomats, who collectively had rendered more than two centuries of service to both Democratic and

89. See generally Herr, *Disability Non-discrimination Laws*, *supra* note 12, at 203-24 (discussing nations' domestic implementation of the international human rights standards on non-discrimination set forth by the U.N.).

90. 536 U.S. 304 (2002). *Atkins* held that the execution of a convict with mental retardation violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 321.

91. 492 U.S. 302 (1989).

92. *Id.* at 307.

93. 532 U.S. 941 (2001) (mem.).

94. N.C. GEN. STAT. §§ 15A-2005 to -2006 (West 2002).

95. *McCarver v. North Carolina*, 533 U.S. 975 (2001) (mem.).

96. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (stating in the reporter's note that the Court granted the motion of the *amici curiae* filers in *McCarver* to have their briefs considered in support of the *Atkins* petitioner).

Republican administrations.⁹⁷ When we spoke with these diplomats, we learned that some of them opposed the administration of the death penalty in all circumstances.⁹⁸ Some opposed it only with regard to people with mental retardation or juveniles.⁹⁹ But all agreed upon three propositions: first, that this practice was inconsistent with international standards of decency;¹⁰⁰ second, that continuing to execute persons with mental retardation would strain our diplomatic relations, increase our diplomatic isolation, and impair U.S. foreign policy interests;¹⁰¹ and third, that these considerations should lead the Court to hold that the practice of executing people with mental retardation had become so “unusual” as to offend our “evolving standards of decency” and hence, the “cruel and unusual punishments” clause of the Eighth and Fourteenth Amendments of the U.S. Constitution.¹⁰² These diplomats authorized us to file an *amicus* brief before the U.S. Supreme Court arguing that the Eighth and Fourteenth Amendments should be read to forbid this practice.¹⁰³

As we began our research, we initially guessed that there were several countries in the world that permitted the execution of persons with mental retardation. But as we studied, we were stunned to learn that the United States was in fact the *only* country in the world that

97. That illustrious group included four ambassadors—Morton Abramowitz, Thomas Pickering, J. Stapleton Roy, and Frank Wisner—who hold the title of Career Ambassador, the highest rank awarded in the United States diplomatic corps. The diplomats included Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis Oakley, Thomas R. Pickering, J. Stapleton Roy, and Frank G. Wisner. For further discussion of the background to the diplomats’ brief in *Atkins*, see Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1119-21 (2002) (providing additional information on the diplomats and the development of arguments used in their *Atkins* brief).

98. Harold Hongju Koh et al., *American Foreign Servicemen’s brief regarding Mental Retardation and the Death Penalty*, available at <http://deathpenaltyinfo.org> (last visited Oct. 29, 2003) [hereinafter Koh et al., *Servicemen’s brief*].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) and *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

103. We reasoned that former diplomats were entitled, as friends of the Court, to advise the Court regarding the likely impact the continuing administration of the death penalty against individuals with mental retardation would have upon our diplomatic relations with foreign governments and upon our standing in the international community. *Id.* The Court had long held that international law standards “may be ascertained by consulting the . . . general usage and practice of nations,” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), “and[] as evidence of these . . . the works of . . . commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

regularly executed persons with mental retardation.¹⁰⁴ Even China, for example, long the world's leader in executions, had banned the execution of persons with mental retardation since imperial times.¹⁰⁵ When we filed our brief, we noted that of the minority of nations in the world that still retain the practice of capital punishment, only two—the United States and Kyrgyzstan—still openly executed people with mental retardation.¹⁰⁶ But soon after we filed, we learned that in 1999, Kyrgyz President Askar Akayev had in fact signed into law a moratorium on executions and announced a plan that would eliminate capital punishment by 2010 in an effort to confirm the nation's "commitment to basic human rights and freedoms."¹⁰⁷ When the *New York Times* reported on our brief, Kyrgyzstan's ambassador to Washington sent a letter to the editor pointedly noting that Kyrgyzstan no longer conducted executions, implying that his country would never be so barbaric as to join the United States in this aberrant practice.¹⁰⁸

Given this unanimity of state practice, our brief argued first, that the U.S. practice of executing persons with mental retardation violated customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."¹⁰⁹ Second, we argued as a matter of constitutional law that a practice so cruel and uncivilized as to be banned by the federal government, a majority of the states of the United States, and by every other country in the world was plainly "unusual," and hence should be barred by a Constitution that forbids "cruel and unusual" punishments.¹¹⁰

In *Atkins*, the Supreme Court finally struck down the practice of executing persons with mental retardation.¹¹¹ In so doing, the Court's majority specifically took note that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹¹² In

104. See Koh et al., *Servicemen's brief*, *supra* note 98 (stating that the "current United States practice of executing people with mental retardation has become manifestly inconsistent with evolving international standards of decency").

105. *Id.* at n.10.

106. *Id.*

107. Douglas Frantz, *World Briefing: Asia: Kyrgyzstan: Death Penalty Moratorium*, N.Y. TIMES, Jan. 17, 2002, at A8.

108. See Baktybek Abdrisaev, Editorial, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14 (declaring that "there is no execution of the mentally ill in Kyrgyzstan").

109. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

110. Koh et al., *Servicemen's brief*, *supra* note 98.

111. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

112. *Id.* at 317 n.21.

dissent, Justice Scalia raged that the practices of the “world community” are “irrelevant” to American constitutional interpretation because they reflect “notions of justice [which] are (thankfully) not always those of our people.”¹¹³ Nonetheless, in the following term, the Court again rejected Justice Scalia’s claim¹¹⁴ in its landmark decision striking down state sodomy laws previously upheld in *Bowers v. Hardwick*¹¹⁵ as a violation of the constitutional right to privacy. The Court held: “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. . . . *The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.*”¹¹⁶ By so saying, our Supreme Court signaled that it may, at long last, be listening to international and foreign views in deciding whether our country’s conduct meets global human rights standards.

These trends would have delighted Stan. In our last phone call, Stan and I talked about our *amicus* brief in *Atkins*, which he happily agreed to sign, his last Supreme Court brief as a human rights advocate. I remember him chuckling about the Kyrgyzstan moratorium on executions. In the months since he died, I have wondered, was it possible that when Stan sang that lonely Russian melody in New Haven in 1995, he was really previewing the “Kyrgyz leitmotif” that we would hear together in the last days of his life?

With the release of our joint volume, and the convening of this memorial conference, Larry Gostin and I and all of Stan’s co-authors hope to spur the accelerating international movement to treat the rights of the intellectually disabled as fundamental human rights. We hope that this conference can be an occasion where every one of us can recommit ourselves to Stan’s dream of building a binding international convention to protect the rights of persons with intellectual disabilities. In time, we hope that our academic, litigation, legislation, and treaty-building work will be remembered as only one of many variations on Stan Herr’s melody. That melody tells us that *a genuine commitment to human rights for all requires that people with intellectually disabilities be treated as different but equal.* That is a very simple melody. But as Stan’s remarkable journey teaches, if we all build on his music, we can follow Stan’s voice and create new harmonies more beautiful than any us could have ever imagined.

113. *Id.* at 347-48 (Scalia, J., dissenting).

114. *See* *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

115. 478 U.S. 186 (1986).

116. *Id.* at 2483(emphasis added).