Introduction: The Lasting Legacies of Institutionalisation

Questioning Law's Roles in the Emancipation of People with Disabilities

CLAIRE SPIVAKOVSKY, LINDA STEELE AND PENELOPE WELLER

F ROM THE 1970s onward, governments in several Western jurisdictions began to close large institutional settings, such as mental asylums and move people with disabilities[1] into the community. This process is what is commonly referred to as 'deinstitutionalisation'. While deinstitutionalisation has been lauded as one of the most significant and positive developments in the history of people with disabilities, questions have been raised about the extent to which it has achieved its aims of enhancing the social and political participation of people with disabilities within the community. Not only does research suggest that, in the 'post-deinstitutionalisation' era, people with disabilities have been left with insufficient social, economic and health care support within the community, including poor access to appropriate housing and voluntary community-based mental health treatment,[2] but some critical scholars have begun to argue that these well-known failures of deinstitutionalisation provide new opportunities for control, confinement and segregation in the post-deinstitutionalisation context. Ben-Moshe, for example, argues that presenting the 'failure' of deinstitutionalisation in terms of unmet individual housing,

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[1] The United Nations Convention on the Rights of Persons with Disabilities (CRPD) defines 'persons with disabilities' as including 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (Article 1). The CRPD moves beyond a purely medical and diagnostic approach to disability, stating in the Preamble that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

[2] M Dear and J Wolch, *Landscapes of Despair: From Deinstitutionalization to Homelessness* (Princeton, Princeton University Press, 1987).

financial and medical needs can be used to justify an eventual and 'inevitable' return to the asylum, with the certainty the asylum provides emerging as the only way to manage people with disabilities.[3] In the meantime, however, we have already moved down the path of relocating people with disabilities to other institutional settings such as group homes, nursing homes and prisons.[4] We have also subjected people with disabilities to other institution-like forms of control and restraint within the community – such as chemical restraints[5] – which can amount to less visible, or 'virtual' forms of institutionalisation. And we have dragged our feet: some people with disabilities have only very recently been released from the large-scale, locked institutional settings that were supposedly 'dismantled' decades ago.[6]

Recently, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) demanded completion of the unfinished business of deinstitutionalisation. Article 19 of the CRPD provides for 'the equal right of all persons with disabilities to live in the community'. The UN Disability Committee has stated that to realise this right:

> States parties must adopt a strategy and a concrete plan of action for deinstitutionalization. It should include the duty to implement structural reforms, to improve accessibility for persons with disabilities within the community and to raise awareness among all persons in society about inclusion of persons with disabilities within the community.
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> Deinstitutionalization also requires a systemic transformation, which includes the closure of institutions and the elimination of institutionalizing regulations as part of a comprehensive strategy, along with the establishment of a range of individualized support services, including individualized plans for transition with budgets and time frames as well as inclusive support services.[7]

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[3] L Ben-Moshe, 'Why Prisons are not "the New Asylums"' (2017) 19(3) *Punishment & Society* 272.

[4] B Harcourt, 'From the Asylum to the Prison: Rethinking the Incarceration Revolution' (2006) 84 *Texas Law Review* 1751. Available at: www.law.uchicago.edu/files/file/harcourt_institutionalization_final.pdf; A Hatch, *Silent Cells: The Secret Drugging of Captive America* (Minneapolis, University of Minnesota Press, 2019); AR Hatch, M Xavier-Brier, B Attell and E Viscarra, 'Soldier, Elder, Prisoner, Ward: Psychotropics in the Era of Transinstitutionalization' in BL Perry (ed), *50 Years After Deinstitutionalization: Mental Illness in Contemporary Communities* (Emerald Publishing, Bingley, 2015); N Spagnuolo, 'Building Back Wards in a "Post" Institutional Era: Hospital Confinement, Group Home Eviction, and Ontario's Treatment of People Labelled with Intellectual Disabilities' (2016) 36(4) *Disability Studies Quarterly*. Available at: www.dsq-sds.org/article/view/5279/4480.

[5] E Fabris, *Tranquil Prisons: Chemical Incarceration Under Community Treatment Orders* (University of Toronto Press, Toronto, 2011); E Fabris and K Aubrecht, 'Chemical Constraint: Experiences of Psychiatric Coercion, Restraint, and Detention as Carceratory Techniques' in L Ben-Moshe, C Chapman and AC Carey (eds), *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York, Palgrave Macmillan, 2014) 185.

[6] Ben-Moshe, 'Why Prisons are not "the New Asylums"' (2017) 272.

[7] UN Committee on the Rights of Persons with Disabilities. *General Comment No 5 (2017) on Living Independently and Being Included in the Community*. CRPD/C/GC/5 paras 57–58. Available at: www.tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en.

Lawson identifies Article 19 as the first time in international human rights law that such a right has been recognised.[8]

More broadly, the CRPD has put a spotlight on the inequality, discrimination, impoverishment and social and political marginalisation of people with disabilities in contemporary society and provided instruments for their redress. The CRPD provides for the protection and fulfilment of people with disabilities' human rights, including self-determination with respect to accommodation and living arrangements (Article 19a), relationships (Article 23) and health care (Article 25) and that – on an equal basis with others – people with disabilities have the right to life (Article 10) and an adequate standard of living (Article 28). The CRPD also provides that people with disabilities should not be subject to restraint or deprivation of liberty on a basis related to their disability (Article 14) and that measures must be taken to prevent all forms of exploitation, violence and abuse experienced by this group both within and outside the home (Article 16). In these ways, the CRPD offers significant promise for changing the current circumstances of people with disabilities in society. It provides tools to challenge institutionalisation itself, as well as inequitable and discriminatory treatment of people with disabilities across a range of fronts.

Yet, questions have been raised about the pace and extent to which the CRPD effects change at a domestic level. Socio-legal scholars point to contemporary laws, policies and practices that continue to limit and sometimes breach the rights of people with disabilities to flourish within the 'deinstitutionalised' community.[9] It is a timely moment, therefore, to reflect on law's role in the lives of people with disabilities and the complex contributions law makes to contemporary policies and practices affecting people with disabilities' participation in the community. In this collection, we and our contributors consider the extent to which contemporary laws, policies and practices in the post-deinstitutionalisation era continue or legitimate historical practices associated with this population's institutionalisation. The collection brings together contributors from across the world and speaks to overarching themes of segregation and inequality, interlocking forms of oppression and rights-based advancements in law, policy and practice. Some necessary foundations for engaging with these themes are offered below.

THE LASTING LEGACIES OF INSTITUTIONALISATION

Institutionalisation has a long history in western jurisdictions. 'Madmen' and 'lunatics' were placed in shrines, monasteries and 'madmen's towers' in the thirteenth century and later in specialised 'hospitals' such as the infamous 'Bedlam'

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[8] A Lawson, 'People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26(2) *Law in Context: A Socio-Legal Journal* 62, 62–63.

[9] In relation to institutionalisation, see R Stanev and S Wildeman, 'Freedom: A Work in Progress' in E Flynn, A Arstein-Kerslake, C de Bhalis and ML Serra (eds), *Global Perspectives on Legal*

hospital in London and the Hotel Dieu in Paris.[10] In the 'great confinement' of the seventeenth century, large hospitals and workhouses provided compulsory 'refuge' to abandoned children, the poor, the indigent, prostitutes, petty thieves, beggars and the 'incurable'.[11] In the nineteenth century 'new', 'humane' asylums emerged to replace the brutality of these 'old' institutional practices and were characterised by figures such as Philippe Pinel as 'casting off the chains'.[12] During these centuries, imperial nations brought institutionalisation to colonies and, along with criminal justice and child welfare institutions, these disability institutions were central to the establishment of colonial authority and colonial nation building and, in turn, to enacting and legitimating Indigenous land dispossession and genocide.[13]

It was not until the second half of the twentieth century that the use of mass institutionalisation as an important tool for managing people with disabilities as a population began to fall out of favour. Multiple factors and conditions contributed to this shift in popularity, notably the emergence of rights-based logics from within the Scandinavian scholarship of the late 1960s and early 1970s. For example, Bank-Mikkelsen[14] and Nirje[15] both promoted the

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Capacity Reform: Our Voices, Our Stories, Routledge, Abingdon & New York, 2018); L Steele, K Swaffer, L Phillipson and R Fleming, 'Questioning Segregation of People Living with Dementia in Australia: An International Human Rights Approach to Care Homes' (2019) *8*(3) *Laws* 18. Available at: www.doi.org/10.3390/laws8030018. In relation to mental health treatment, see F Beaupert, 'Silencing Prote(x)t: Disrupting the Scripts of Mental Health Law' (2018) 41(3) *UNSW Law Journal* 746. Available at: www.unswlawjournal.unsw.edu.au/wp-content/uploads/2018/09/Beaupert.pdf; P Weller, 'Mental Capacity and States of Exception: Revisiting Disability Law with Giorgio Agamben' (2017) 31(3) *Continuum* 400. In relation to sterilisation, see L Steele, 'Court-authorised Sterilisation and Human Rights: Inequality, Discrimination and Violence Against Women and Girls with Disability?' (2016) 39(3) *UNSW Law Journal* 1002. Available at: www.classic.austlii.edu.au/au/journals/UTSLRS/2016/32.html. In relation to criminal justice, see E Baldry, 'Rights of Persons with Disabilities not to be Criminalised' in E Stanley (ed), *Human Rights and Incarceration: Critical Explorations* (Cham, Palgrave Macmillan, 2018) 53; C Spivakovsky, 'From Punishment to Protection: Containing and Controlling the Lives of People with Disabilities in Human Rights' (2014) 16(5) *Punishment & Society* 560, doi: 10.1177/1462474514548805. In relation to aged care, see Steele, Swaffer, Phillipson and Fleming, 'Questioning Segregation' (2019).

[10] R Porter, *The Greatest Benefit to Mankind: A Medical History of Humanity from Antiquity to the Present* (London, Fontana Press, 1992) 127.

[11] M Foucault, *Madness and Civilisation* (London, Tavistock, 1961).

[12] J Crosby, D Harper and P Reavey, *Psychology, Mental Health and Distress* (New York, Palgrave Macmillan, 2013) 30.

[13] S Avery, *Culture is Inclusion: A Narrative of Aboriginal and Torres Strait Islander People with Disability* (First People's Disability Network (Australia), Sydney, 2018); C Chapman, 'Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination' in Ben-Moshe, Chapman and Carey (eds), *Disability Incarcerated* (2014) 25; C Coleborne and D MacKinnon, 'Psychiatry and its Institutions in Australia and New Zealand: An Overview' (2006) 18(4) *International Review of Psychiatry* 371; C Cunneen, E Baldry, D Brown, M Schwartz and A Steel, *Penal Culture and Hyper-incarceration: the Revival of the Prison* (Routledge, Abingdon, 2013).

[14] N Bank-Mikkelsen, 'A Metropolitan Area in Denmark: Copenhagen' in R Kugel and W Wolfensberger (eds), *Changing Patterns in Residential Services for the Mentally Retarded* (Washington DC, President's Committee on Mental Retardation, 1969).

[15] B Nirje, 'The Normalisation Principle and its Human Management Implications' in Kugel and Wolfensberger (eds), *Changing Patterns* (1969).

rights-based principle of 'normalisation', arguing that people with disabilities share the same rights as other citizens and that all citizens are entitled to live a normal life within the community. Indeed, Wolfensberger proposed that it was this rights-based logic which ultimately 'broke the back of the institutional movement'.[16] There were, however, other factors and conditions at play. There was growing disquiet among the general public about the operation of large-scale institutions, especially after a series of exposés documented the human rights abuses taking place within them.[17] The rising costs of institutions, at a time when many countries were experiencing fiscal crises, became politically problematic.[18] There were also broader shifts taking place at that time in the nature of social control and welfare capitalism.[19] In combination, these factors appear to have eroded faith in the practices and processes of institutionalisation and, from the 1970s onwards, a process of deinstitutionalisation began in many countries.

Despite the trend outlined above, versions of institutionalisation persist. Large institutional settings such as mental asylums have – for the most part – closed down, but the legacies of institutionalisation – that is, the logics of segregation, of coercive 'care' and eugenics that underpinned the practice of institutionalisation – continue to be far more difficult to dismantle. This is why it is common within disability studies to speak not of deinstitutionalisation but of *trans*-institutionalisation.[20] Indeed, research from the decade immediately following the onset of deinstitutionalisation of people with disabilities shows that many were moved from mental asylums into smaller institutions like group homes,[21] nursing homes,[22] or the other key form of large-scale institution for population management in society: prisons.[23]

Additionally, even in circumstances where people with disabilities have returned to the community unfettered, many are yet to experience the full promise of 'normalisation' that was made at the time of deinstitutionalisation. Some people with disabilities are still prevented from or limited in their equal and effective participation in the political and public life of their country, for example

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[16] W Wolfensberger, 'A Contribution to the History of Normalization with Primary Emphasis on the Establishment of Normalization in North America between ca. 1967–75' in R Flynn and R Lemay (eds), *A Quarter Century of Normalization and Social Role Valorization Evolution and Impact* (Ottawa, University of Ottawa Press, 1994) 60.

[17] C Chapman, A Carey and L Ben-Mosche, 'Reconsidering Confinement: Interlocking Locations and Logics of Incarceration', in Ben-Moshe, Chapman and Carey (eds), *Disability Incarcerated* (2014).

[18] M Oliver, *The Politics of Disablement* (Basingstoke, Macmillan and St Martin's Press, 1990).

[19] A Scull, *Decarceration: Community Treatment and the Deviant: A Radical View* (New Jersey, Prentice-Hall Inc, 1977).

[20] Oliver, *The Politics of Disablement* (1990).

[21] S Taylor, R Bogdan and J Racino (eds), *Life in the Community: Case Studies of Organizations Supporting People with Disabilities* (Baltimore, Paul Brookes, 1991).

[22] Dear and Wolch, *Landscapes of Despair* (1987); B Hudson, 'Deinstitutionalisation: What Went Wrong?' (1991) 6 *Disability, Handicap and Society* 21.

[23] M Oliver, *The Politics of Disablement* (1990).

by being excluded from voting or participating on juries.[24] Furthermore, the vast majority of people with disabilities living in the community face significant barriers to equal access to work[25] and education[26] (with many having only provisional access to this right through segregated 'special' schools and 'supported' employment). These barriers lead to significantly poorer outcomes for people with disabilities in both these key fields of attainment.[27]

Advocates and scholars have also drawn attention to the lower life expectancy of people with intellectual disabilities and their higher incidences of sexual and other violence (particularly women with intellectual disabilities).[28] Moreover, ongoing settler–colonialism and racism has meant that First Nations disabled people experience significant levels of incarceration, premature death and social deprivation,[29] leading First Nations scholar and advocate Avery to suggest that contemporary practices of exclusion and segregation are more specifically a Western or settler–colonial phenomenon, with First Nations communities having strong cultures of inclusion and acceptance of diversity.[30]

Finally, as critical disability scholars and scholars of ableism remind us, there are also far more subtle ways in which the legacies of institutionalisation and, in particular, its eugenic logics, continue to live on within the deinstitutionalised community. As Robert McRuer aptly puts it, there is a 'system of compulsory able-bodiedness [in society, which] repeatedly demands that people with disabilities embody for others an affirmative answer to the unspoken question, "Yes, but in the end, wouldn't you rather be more like me?"'[31] As such, as Fiona Kumari Campbell explains, 'disabled people have not yet established their entitlement to exist unconditionally as disabled people' and are often expected to welcome all forms of intervention in their everyday lives, even if they are no longer confined behind specific institutional walls.[32]

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[24] UN OHCHR, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*, 21 December 2011, A/HRC/19/36.

[25] See eg OECD, *Sickness, Disability and Work: Breaking the Barriers: A Synthesis of Findings across OECD Countries* (Paris, OECD Publishing, 2010).

[26] See eg UNICEF, *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education* (Geneva, UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States, 2012).

[27] World Health Organization and World Bank, *World Report on Disability* (Paris, UNESCO, 2011).

[28] Disabled Peoples Organisations Australia, *Disability Rights Now 2019: Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019*. Available at: www.dpoa.org.au/rights-of-people-with-disability-routinely-ignored-new-report/.

[29] Avery, *Culture is Inclusion* (2018).

[30] Ibid.

[31] R McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York, New York University Press, 2006) 9.

[32] FK Campbell, 'Stalking Ableism: Using Disability to Expose "Abled" Narcissism' in D Goodley, B Hughes and L Davis (eds), *Disability and Social Theory* (New York, Palgrave, 2012) 215. See also A Kafer, *Feminist, Queer, Crip* (Indiana, Indiana University Press, 2013); E Kim, *Curative Violence:*

Placed together in this way, the various bodies of scholarship suggest that while we have largely moved away from the practice of sending people with disabilities to the specific large-scale institution of the mental asylum for the purposes of segregation and confinement, we have, in reality, taken far fewer steps away from the various logics that underpinned this practice for centuries. The question therefore becomes: What enables the logics and various other legacies of institutionalisation to live on within the deinstitutionalised community? For us, a key but often overlooked, part of the answer to this question can be found by looking to the role of law in relation to the lives of people with disabilities.

LEGITIMATING INSTITUTIONALISATION'S LEGACIES: CONSIDERING LAW'S LONGSTANDING VIOLENCE

Law has always played a significant role in the lives of people with disabilities. While 'lunacy', 'mental hygiene' and 'mental treatment' legislation all worked in the era of institutionalisation to segregate and contain people with disabilities, in the post-deinstitutionalisation era, legislation rebranded 'mental health' and 'disability' has emerged to govern the ways people with disabilities can participate in the community. These modern-day laws are often positioned as 'progressive' in comparison to their predecessors. At face value, post-deinstitutionalisation mental health and disability legislation work to limit the scope of non-consensual coercive interventions through clear legal criteria and legal processes. They also provide rights-based safeguards for people with disabilities receiving government and private services, including complaints commissions and other independent oversight bodies.[33] At the same time, however, this legislation usually contains provisions which limit the rights of people with disabilities in various ways. Indeed, nestled within most modern mental health and disability acts are compulsory treatment and/or involuntary detention orders which run against the very core of what we understand to be the rights of 'liberal individuals': autonomy, liberty and so on. It is the persistent presence of provisions like these, we argue, which enable the logics and various other legacies of institutionalisation to live on within the deinstitutionalised community.

We are not alone in advancing this line of argument. Rather, the premise of this collection is based upon work that has been emerging from various pockets within critical socio-legal, disability and Mad studies scholarship over the past few years. It is based upon the scholarship of Spivakovsky, for example, who explored how modern-day disability group homes assume a coercive quality for

Rehabilitating Disability, Gender, and Sexuality in Modern Korea (Durham, Duke University Press, 2017).

[33] B McSherry and P Weller, *Re-thinking Rights-Based Mental Health Laws* (Oxford, Hart, 2010).

a specific subset of residents through diverse laws including supervised treatment orders, restrictive practice provisions made under the Disability Act (Vic) 2006 and work health and safety laws.[34] Or Fabris, who argues that community treatment orders work to 'detain' people in the community through the use of psycho-pharmaceuticals which act as 'chemical restraints', confining individuals from within their bodies.[35] Or Steele, who argues that a variety of legal orders made pursuant to guardianship, forensic mental health and civil mental health laws enable the heightened carceral (ie, prison-like) control of certain individuals with disability in the 'free' community outside conventional institutional settings; that these controls travel with these disabled individuals through space and time and make otherwise 'free' spaces carceral.[36]

The premise of this collection is also informed by the small collection of work attending to legal epistemologies and ontologies of disability. For example, Beaupert,[37] Spivakovsky[38] and Wildeman's[39] separate works, which allow us to see how contemporary law continues to facilitate the segregation, coercion and control of disabled people post-deinstitutionalisation by maintaining age-old, paternalistic and protectionist legal epistemologies which privilege assumed connections between disability and 'risk' or 'vulnerability'. As scholars such as Steele[40] and Weller[41] have noted, this relationship between legal epistemologies and ontologies of disability is especially apparent in the foundational legal division of (in)capacity which grounds legal authority in many areas of law (eg, criminal law, tort law, contract law) and is premised on psychological understandings of mental capacity. Pursuant to this division, people without mental capacity are seen as incapable of having their choices recognised in law, thus enabling others (eg, judiciary, government officials, family members) to make decisions about their bodies and their lives.

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[34] C Spivakovsky, 'From Punishment to Protection: Containing and Controlling the Lives of People with Disabilities in Human Rights' (2014) 16 *Punishment & Society* 560; C Spivakovsky, 'Making Dangerousness Intelligible in Intellectual Disability' (2014) 23 *Griffith Law Review* 389; C Spivakovsky, 'Governing Freedom Through Risk: Locating the Group Home in the Archipelago of Confinement and Control' (2017) 19 *Punishment & Society* 366.

[35] Fabris, *Tranquil Prisons* (2011); Fabris and Aubrecht, 'Chemical Constraint' in L Ben-Moshe, C Chapman and A Carey (eds), *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York, Palgrave Macmillan, 2014).

[36] L Steele, 'Disabling Forensic Mental Health Detention: The Carcerality of the Disabled Body' (2017) 19 *Punishment & Society* 327; L Steele 'Troubling Law's Indefinite Detention: Disability, the Carceral Body and Institutional Injustice' (2018) *Social & Legal Studies*. Available at: www.doi.org/10.1177/0964663918769478.

[37] Beaupert, 'Silencing Prote(x)t' (2018) 746.

[38] Spivakovsky, 'From Punishment to Protection'; C Spivakovsky, 'Making Dangerousness Intelligible in Intellectual Disability'; C Spivakovsky and K Seear, 'Making the Abject: Problem Solving Courts, Addiction, Mental Illness and Impairment' (2017) 31 *Continuum* 458; L Steele, 'Temporality, Disability and Institutional Violence: Revisiting In Re F' (2017) 26 *Griffith Law Review* 378.

[39] S Wildeman, 'Agonizing Identity in Mental Health Law and Policy (Part II): A Political Taxonomy of Psychiatric Subjectification' (2016) 39(1) *Dalhousie Law Journal* 147.

[40] L Steele, 'Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence' (2014) 23 *Griffith Law Review* 467.

[41] P Weller, 'Mental Capacity and States of Exception: Revisiting Disability Law with Giorgio Agamben' (2017) 31 *Continuum* 400.

The collection is also informed by a crucial and fruitful recent turn in socio-legal scholarship which explores the particular implications of law's role in legacies of institutionalisation in the specific context of Indigenous and racialised populations. This work is premised on the entanglement of disability with ableism as well as settler–colonialism, racism, sexism and other forces of oppression such that understandings of disability are always bound up in dynamics of abjection that sustain white privilege. Scholars such as Chapman[42] and Joseph[43] have proposed that legal and regulatory frameworks of control and intervention which apply on the basis of disability carry on racialised practices of segregation, control and violence, but that these practices are often hidden under the guise of medicalised, individualised notions of disability and through interventions purportedly associated with 'therapy' and 'care'.[44] This scholarship resonates with Avery's exploration of intersectionality and oppression in relation to First Nations people with disabilities,[45] as well as ongoing resistance by First Nations people to settler–colonial legally sanctioned interventions in their bodies, families, communities and Country, including through the very medical and welfare services positioned as empowering in a post-deinstitutionalisation context and support for their self-determination and Indigenous nation building.[46]

Placed together like this, these various emergent pockets of critical socio-legal, disability and Mad studies scholarship and longstanding activism by disability communities sketch out some of the features of modern law and legal practice which enable the logics and various other legacies of institutionalisation to live on within the deinstitutionalised community. Yet this is only one side of the picture. Increasingly, socio-legal scholars, activists and practitioners are turning to the legal instrument of the CRPD as a promising way to remedy these situations.

CONSIDERING THE PROMISE OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The United Nations CRPD brings the possibility of a radical revision in law as it applies to people with disabilities. The CRPD demands that people with disabilities be afforded full and effective participation in all aspects of life and

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[42] C Chapman, 'Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination' in Ben-Moshe, Chapman and Carey (eds), *Disability Incarcerated* (2014).

[43] A Joseph, 'Beyond Intersectionalities of Identity or Interlocking Analyses of Difference: Confluence and the Problematic of "Anti"-Oppression' (2015) 4 *Intersectionalities: A Global Journal of Social Work Analysis, Research, Polity, and Practice* 15; A Joseph, *Deportation and the Confluence of Violence within Forensic Mental Health and Immigration Systems* (Basingstoke, Palgrave-Macmillan, 2015).

[44] See also Steele, 'Troubling Law's Indefinite Detention' (2018); D Wadiwel, 'Disability and Torture: Exception, Epistemology and "Black Sites"' (2017) 31 *Continuum* 388.

[45] Avery, *Culture is Inclusion* (2018).

[46] See, eg, Referendum Council, *Uluru Statement from the Heart* (2017). Available at: www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF.

that they receive recognition before the law on an equal basis with non-disabled people.[47] The CRPD addresses participation in decision-making by asserting the right to legal capacity. This is expressed in the CRPD as the right to 'equal recognition before the law' (Article 12(1)) and the right to enjoy 'legal capacity on an equal basis with others in all aspects of life' (Article 12(2)). Here, legal capacity is defined as 'the ability to hold rights and duties (legal standing) and the ability to exercise those rights and duties (legal agency)'.[48] With these words, the CRPD rejects the nexus between legal and mental capacity. In law, a determination that a person lacks mental capacity triggers the use of alternative mechanisms (such as guardianship or substitute decision-making) to make 'lawful' decisions for that person. Instead, the CRPD requires that the decisions and wishes of people with disabilities are always recognised in law and always given credence.

Importantly, rather than merely asserting the right to make decisions, the CRPD demands that people with disabilities receive support for decision-making (Article 12(3)). Support for decision-making includes the full range of strategies, mechanisms, interactions and relationships that will enable people with disabilities to formulate, express and assert decisions.[49] Tied with the obligation to provide support is the requirement of reasonable accommodation.

> 'Reasonable accommodation' means necessary and appropriate modifications and adjustments not imposing disproportionate or undue burden, when needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[50]

'Reasonable accommodation' requires the differential treatment of people with disabilities in order to allow for their different needs and abilities in mainstream systems.[51] Exactly what is required depends on the needs of the person with respect to, for example, support for decision-making and exercise of legal capacity. Respect for legal capacity and support for decision-making similarly require a radical revision of all decision-making laws, policies and arrangements and universal access to the provision of support mechanisms.

Moreover, in its guidance on Article 19 (discussed above), the UN Disability Committee emphasises the important interrelationship between legal capacity and independent living: individuals should have support in making their choice as to where they live and then support to live in that place.[52] Of course, ending the institutionalisation of specific individuals via supported decision-making

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[47] A Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2006) 34 *Syracuse Journal of International Law and Commerce* 429.

[48] B McSherry, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22.

[49] CRPD Committee, (2014).

[50] CRPD Article 2 – Definitions.

[51] A Lawson, 'Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies' (2012) 16 *The International Journal of Human Rights* 845.

[52] UN Committee on the Rights of Persons with Disabilities, *General Comment No 5* (2017).

needs to be situated in the context of the CRPD's structural implications that institutions should not even exist and thus not even be available as a choice.[53] In a similar vein, the CRPD demands the reform of laws in order to abolish legislation for discriminatory medical interventions. In short, the CRPD provides individual rights to choose and thus resist oppressive and violent interventions in a context of transformation of our legal systems as a whole.

While the promise of the CRPD is apparent, in many ways the full potential of this radical instrument of international human rights law is yet to be realised. Primarily, this discrepancy occurs because, as an international law instrument, the CRPD provides an international standard but, in most countries, it is not directly incorporated into law. While most state parties to the CRPD have developed some response to the treaty, including legal responses, there is little evidence that there is an engagement with the CRPD at the scale and intensity necessary to achieve the goal of full participation. Instead, under-resourced and misplaced service provision continues, prompting new questions about the role and limits of law in dismantling, legitimating or propagating the logics and legacies of institutionalisation. It is the purpose of this collection to engage with these new questions about the role and limits of law and offer new insights.

AIM AND STRUCTURE OF THE COLLECTION

The aim of this edited collection is to consider the extent to which some contemporary laws, policies and practices affecting people with disabilities are moving towards the deinstitutionalisation movement's promised end of enhanced social and political participation in the community, while other laws, policies and practices may instead reinstate, continue or legitimate historical practices associated with this population's institutionalisation. To this end, the collection focuses upon a diverse range of laws, policies and regulatory practices affecting people with disabilities around the world and is divided into three parts.

The chapters in Part One are concerned with exploring the complex legacies of institutionalisation in practice. Each of the first four chapters in this part draw attention to the ways that ostensibly positive moves towards reasonable accommodation, 'empowerment' and reducing the barriers facing people with disabilities in law, policy and practice struggle to entirely free themselves from the legacies and logics of institutionalisation. Chapter 1 by Liz Brosnan and Chapter 2 by Penelope Weller focus on purportedly progressive reforms to mental health laws. Through autoethnography, Brosnan reflects on the tensions and contradictions she observes as a person of lived experience of the civil mental health system who is working alongside lawyers and psychiatrists as

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[53] Steele, Swaffer, Phillipson and Fleming, 'Questioning Segregation' (2019).

a lay member of interdisciplinary decision-making teams of Mental Health Review Tribunals. Weller reflects on the goal of 'recovery' in community and inpatient mental health treatment. In different ways they argue that ostensibly positive moves to empower certain people with disabilities in their relationship with law and policy may still work, at the same time, to reinforce the interests of the state in relation to these populations. Ultimately these laws still reinforce relations of disempowerment and ultimately facilitate continuation of forced treatment.

Chapter 3 by Salvador Cayuela Sánchez and Chapter 4 by Eduardo Díaz Velázquez engage with concerns about complex legacies of institutions in the Spanish context. Cayuela Sánchez focuses on a consideration of the biopolitics of disability during Late-Francoism and the beginning of the Spanish Democratic Transition. Here, Cayuela Sánchez shows how the Franco regime's reforms at the end of the Spanish Civil War (1936–39) included measures aimed at repressive institutional settings, but these were coupled with increased control of people with disabilities through their explicit inclusion in 'disciplinary' institutions (such as education and medicine). Moving further along the timeline in Spain, Díaz Velázquez draws attention to contemporary tensions and contradictions in legislation and public policies relating to education, employment and disability support. A shift to viewing disability through the lens of the social model is undercut by the neoliberal context in which the laws and policies are situated and the lack of attention to socioeconomic inequalities experienced by some people with disabilities. Díaz Velázquez argues these laws and policies perpetuate exclusion, segregation and inequality and ultimately prevent people with disabilities from realising full citizenship.

The final two chapters in this part, by Roxanne Mykitiuk and Sheila Wildeman, focus on anti-discrimination and human rights laws, which are conventionally viewed as progressive legal developments for people with disabilities. Chapter 5 by Roxanne Mykitiuk reflects, through the method of autoethnography, on the embodied consequences for and impacts on people with disabilities of the disjuncture between ostensibly supportive and empowering laws and policies and the problematic practices that they produce. Her chapter focuses on the regime of accommodation and inclusion for a particular subset of Canadian university faculty members with disability: those with episodic disability that are characterised by unpredictable or intermittent, fluctuating periods of impairment and wellness. Access to the positive institution of the university becomes at best fraught or at worst impossible, as academics with episodic disabilities must negotiate neoliberal and ableist performance demands and contend with human resource policies and procedures that are premised on narrow conceptions of disability. In Chapter 6, Wildeman then considers the extent that recent Canadian human rights litigation challenging solitary confinement disrupts broader practices and patterns of control of people with disabilities that occurs through mental health. Wildeman highlights the risks in seeing mental health diagnosis, treatment and detention as humane and therapeutic alternatives

to the mainstream prison system because they are themselves controlling and sustain (and mask) dynamics and forces of oppression such as colonialism, ableism and racism. She instead posits 'anti-carceral' lawyering as an alternative strategy which can potentially disrupt institutionalisation.

In light of the legacies of institutionalisation drawn out in Part One of the collection, Part Two brings attention to the ways these legacies often form complicated alliances with other longstanding practices of oppression and segregation. Indeed, Chapter 7 by Ameil Joseph on anti-immigration discourses in the context of Brexit and Trump's politics and Chapter 8 by Karen Soldatic on contemporary poverty management regimes in Australia draw out the often obscured and historic confluence of and alliances between, ableist, sanist, gendered, classed and racialised logics within law, policy and practice.

Chapters 9 by Isabel Karpin and Karen O'Connell and 10 by Leanne Dowse then consider the role of law and the institutions charged with its enforcement and administration in the legitimation of ableist, sanist, gendered, classed and racialised social norms. In the case of Karpin and O'Connell, this exploration focuses on women with personality disorder who have turned to workers compensation and family law to facilitate or remediate their interactions with the social institutions of work and family. In the case of Dowse, the focus is on people with cognitive disability experiencing corrosive social disadvantage who are subject to systematic and patterned regimes of incapacitation through institutions charged with law's enforcement and administration (ie, the prison).

Part Two concludes with a chapter by Fleur Beaupert and Shelley Bielefeld which analyses the emergence and operation of fixated persons units alongside counter-terrorism initiatives, that is, joint policing–mental health units developed to respond to persons who have allegedly become 'fixated' on public figures or social causes and are presumed to pose a risk of harm to the community. Through this chapter, Beaupert and Bielefeld remind us of the ease with which dissenting responses to political marginalisation and structural injustice by those existing at the interstices of raced, ableist and classed oppression can be both silenced and subverted through law, policy and practice.

In an attempt to find ways and means to move beyond some of the current tensions in law and policy identified in Parts One and Two, the final part of the collection considers the role of the CRPD in the emancipation of people with disabilities from the legacies of institutionalisation. In Chapter 12, Peter Bartlett considers the international debate about strong or weak readings of the CRPD. In Chapter 13, Lucy Series questions and analyses cases of equality, legal capacity and deprivation of liberty in the United Kingdom. Moving beyond Anglo-western perspectives, Chapters 14 and 15 by Melania Moscoso Pérez and R Lucas Platero and Elvira Pértega Andía respectively consider how the introduction of CRPD-based laws intersect with local laws and practices in Spain, causing contradiction and tension for both legal and medical practitioners, care workers and those with disabilities. Finally, in Chapters 16 and 17, Jill Stavert

explicitly considers the value of the CRPD as a basis for mental health and capacity law reform while Dio Ashar Wicaksana points to the critical importance of civil society advocacy in the implementation of CRPD-based laws.

Ultimately, this collection brings forth the possibilities, limits and contradictions in the roles of law and policy in the institutionalisation and deinstitutionalisation of people with disabilities and their alternatives and directs us towards a more nuanced and sustained scholarly and political engagement with these issues.