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Entangling Liberty and Equality: Critical Disability Studies, Law and Resisting Psychiatric Detention

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The Charter *claims of persons with disabilities often sit precariously between sections 7 and 15. Psychiatric detention, including that pursuant to provincial mental health legislation, restricts liberty and security of the person based on the enumerated ground of disability. This project imagines opportunities to challenge state interventions that are linked to prohibited grounds of discrimination. It is inspired by Justice L'Heureux-Dubé's "interpretive lens of equality" that understands that all* Charter *rights "strengthen and support each other." The equality principle should wield significant influence on the interpretation of the protections offered by section 7. Such an approach to sections 7 and 15 provides a more suitable response to challenges to psychiatric detention. Otherwise, claimants are forced to compartmentalize their claims into discrete section 7 or 15 claims, which distorts the analysis of their lived experience. Section 7 violations may be experienced more acutely by members of equality-deserving communities where the deprivation of liberty contributes to or maintains systemic disadvantage/ subordination, patterns of exclusion and/or an underclass of those in a deprived position. There is emergent recognition of the value of such an integrative and purposive approach, which reconciles with the United Nations'* Convention on the Rights of Persons with Disabilities' *prohibition of detention based on disability.*

Les revendications des personnes handicapées en vertu de la Charte *se situent souvent de manière précaire entre les articles 7 et 15. La détention psychiatrique, y compris en vertu de la législation provinciale sur la santé mentale, restreint la liberté et la sécurité de la personne sur la base du motif énuméré de la déficience. Cet article imagine des possibilités de contester les interventions de l'État qui sont liées à des motifs de discrimination interdits. Il s'inspire de la « lentille interprétative de l'égalité » de la juge L'Heureux-Dubé, qui comprend que tous les droits de* la Charte *« se renforcent et s'appuient les uns les autres ». Le principe d'égalité devrait exercer une influence significative sur l'interprétation des protections offertes par l'article 7. Une telle approche des articles 7 et 15 fournit une réponse plus appropriée aux contestations de la détention psychiatrique. Dans le cas contraire, les requérants sont contraints de compartimenter leurs demandes en demandes distinctes au titre de l'article 7 ou de l'article 15, ce qui fausse l'analyse de leur expérience vécue. Les violations de l'article 7 peuvent être ressenties de manière plus aiguë par les membres de communautés méritant l'égalité lorsque la privation de liberté maintient un désavantage ou une subordination systémique, des modèles d'exclusion ou une sous-classe de ceux qui sont dans une position défavorisée. La valeur d'une telle approche intégrative et ciblée, qui concilie l'interdiction de la détention fondée sur le handicap énoncée dans la* Convention des Nations unies relative aux droits des personnes handicapées*, est de plus en plus reconnue.*

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Introduction

This paper is about the constitutionality of psychiatric detention. Psychiatric detention restricts the liberty and security of persons on the basis of disability. It presents a particular risk to detainees' life, liberty, and security. Psychiatric detention engages the equality as well as the liberty protections owed to persons with disabilities, as protected by the *Canadian Charter of Rights and Freedoms*.[1]

On their own, neither section 7 nor section 15 have yet provided reliable protection against state infringements on liberty experienced by psychiatric detainees. Scrutiny of the equality claims of persons with disabilities is typically cursory. Courts appear willing to accept welfare-focused justifications that rely on superficial analyses of remedial purposes of deprivation to "protect" vulnerable persons.

This paper, instead, proposes an integrative approach to understanding—and challenging—the discriminatory effects of deprivations of liberty for

1. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

persons in psychiatric detention. Such an approach to section 7 and section 15 would provide a more suitable response to challenges to psychiatric detention.

The *Charter* claims of persons with disabilities often sit precariously between sections 15 and 7 of the *Charter*. This project builds on an earlier paper, "Re-Centering Equality from the Inside: The Interplay Between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention," co-authored by the author, Karen Spector and Mercedes Perez.[2] That paper explores the *Charter*'s application to the claims of persons in psychiatric detention and proposes equality as a principle of fundamental justice and that equal access to justice is a foundational constitutional principle that supports other *Charter* claims. It also relied on emergent scholarship and evidence about social determinants of mental health to support those *Charter* arguments.

This paper imagines opportunities for challenging state infringements of liberty and security of the person that are linked to prohibited grounds of discrimination. Disability detention pursuant to provincial mental health legislation restricts the liberty and security of the person on the basis of the enumerated ground of disability.

This paper takes up the *Charter's* ability and authority to intervene in the structures that maintain disability exclusion. The paper has three parts. The first section ("The context: Psychiatric detention") defines and contextualizes the legal sources of psychiatric detention. The second section ("Constitutional edges: The *Charter*'s response to psychiatric detention") is concerned with the constitutionality of psychiatric detention, drawing on three cases to illustrate judicial resistance to *Charter* challenges to psychiatric detention The third section ("Emergent recognition of need for refinement") proposes an integrative approach to the *Charter's* protections, alive to the relationship between equality and liberty. These fresh opportunities expose the interconnectedness of liberty and equality concerns for psychiatric detainees.

Here, "psychiatric detention" describes the confinement, detainment, or restraint of persons with mental health disabilities in a variety of coercive or carceral settings. Most obviously, it includes non-consensual treatment, compulsory assessment, and forcible hospitalization pursuant to provincial mental health legislation. This paper pays explicit attention to alternate sites of psychiatric detention, such as coerced treatment within

2. C Tess Sheldon, Karen Spector & Mercedes Perez, "Re-Centering Equality: The Interplay Between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention" (2016) 35:2 NJCL 193-234.

the community (i.e. community treatment orders) and mandatory reporting requirements. It does not consider the specific issues raised by psychiatric detention in forensic settings.

Critical Disability Studies ("CDS") requires us to attend to various techniques of "disability incarceration."[3] Though outside the scope of this paper, "psychiatric detention" includes the restrictions that flow from the application of Part XX.1 of the *Criminal Code* (including findings of responsibility and fitness). Also outside the scope of this paper are coercive practices flowing from coercive guardianship practices, adult protection legislation, or chemical constraint, as well as confinement in long-term care, child welfare or other community settings (such as group homes, homes for special care, and shelters.)

I. *The context: Psychiatric detention*

This paper is about claims that raise intersectional grounds, as well as intersecting rights.[4] It aims to avoid approaches that force a complainant to caricature their experience of discrimination. Black, Indigenous, and racialized persons with mental health disabilities experience unique forms of stereotyping and are more likely to receive high doses of medication and be labelled "dangerous offenders" in the criminal legal system.[5] Certain kinds of bodies and brains are constructed as deficient, and the "concept of disability has been used to justify discrimination against other groups by attributing disability to them."[6]

Disability has been "dealt with" through systems of rehabilitation, compensation, and emulation of able-bodied norms. When emulation fails,

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3. Liat Ben-Moshe, Chris Chapman & Allison C Carey, *Disability Incarcerated: Imprisonment and Disability in the United States and Canada* (New York: Palgrave Macmillan, 2014). In the Foreword, Angela Y Davis sets out that "the chapters in this collection do not simply seek to identify points of convergence of race, gender, class, sexuality, and disability within the framework of historically developing modes of incarceration. Rather they also aim to transform entrenched ways of conceptualizing imprisonment. They point out that carceral practices are so deeply embedded in the history of disability that it is effectively impossible to understand incarceration without attending to the confinement of disabled people" (*ibid* at viii).

4. See Kerri Froc, "Will 'Watertight Compartments' Sink Women's *Charter* Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian *Charter* of Rights and Freedoms" in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge, UK: Cambridge University Press, 2012) 132 at 134: "Whether the 'watertight compartments' approach is applied to rights or grounds, it stems from the same fundamental misunderstanding of subordination as unidimensional and monocausal, rather than composed of intertwined and mutually reinforcing systems of oppression, whose effects are obscured by their synergistic operation."

5. Sonia Meerai, Idil Abdillahi & Jennifer Poole, "An Introduction to Anti-Black Sanism" (2016) 5:3 Intersectionalities 18; Kwame McKenzie & Kamaldeep Bhui, "Institutional Racism in Mental Health Care" (2007) 334 BMJ 649.

6. Isabella Kres-Nash, "Racism and Ableism" (10 November 2016), online*: American Association of People with Disabilitie*s <www.aapd.com/racism-and-ableism/> [perma.cc/XZ5P-V7QJ].

there are moves to exclusion and elimination. One of the most effective ways of excluding is to institutionalize. The segregation of persons with disabilities was and continues to be based on "sanist" stereotypes that persons labelled with mental health disabilities are violent or in need of coercive care.[7] Persons with mental health disabilities "have suffered from historical disadvantage"[8] and have "been the subjects of abuse, neglect and discrimination."[9] "Sanism" refers to the social structures responsible for the unique, seemingly intractable forms of discrimination against persons with mental health disabilities.[10]

In these psychiatric institutions, residents were—and continue to be—subject to neglect and abuse.[11] Most of these large congregate living facilities were closed in the 1970s, with residents discharged to the community. Despite the promise of deinstitutionalization, community-based mental health supports and services remain underfunded and over-subscribed.[12] Some community placements are unsafe, lacking adequate oversight and recreating institutional or carceral settings that resemble "present-day versions of the moribund institutions from a century ago."[13]

Without support, many former residents fall into crisis after discharge. The trans-institutionalized "fell through the cracks of the system, cycling sporadic interludes with a variety of public institutions, such as hospitals and nursing homes."[14] They face barriers to accessing community-based services and are detained in inappropriate custodial settings such as long-term care and large group homes. Transplanted populations of disabled people were detained in community placements, including under community treatment orders in Ontario.[15]

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7. See Michael Perlin, "On Sanism" (1992) 46:2 SMU L Rev 373.
8. *R v Swain*, [1991] 1 SCR 933 at 994, 4 OR (3d) 383 [*Swain*]. See also Beverley McLachlin, "Medicine and the Law: The Challenges of Mental Illness" (2010) 33:2 Dal LJ 15 at 31.
9. *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 90 [*Martin*].
10. See Michael L Perlin, "Sanism and the Law" (2013) 15:10 American Medical Assoc J Ethics 878 at 878.
11. See generally Laverne Jacobs, "Examining the Right to Community Living for People with Disabilities in Canada" in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: Lexis Nexis, 2021).
12. See Daniel Yohanna, "Deinstitutionalization of People with Mental Illness: Causes and Consequences" (2013) 15:10 American Medical Assoc J Ethics 886.
13. Megan Linton, "Institutional Legacies of Violence: Neoliberalism and Custodial Care in Ontario" (12 April 2020), online: *Canadian Dimension* <www.canadiandimension.com> [perma.cc/8F3K-K9VT].
14. Ashley Primeau et al, "Deinstitutionalization of the Mentally Ill: Evidence for Transinstitutionalization from Psychiatric Hospitals to Penal Institutions" (2013) 2:2 Comprehensive Psychology 1 at 2. See also Ted Frankel, "Exodus: 40 Years of Deinstitutionalization and the Failed Promise of Community-Based Care" (2003) 12 Dal J Leg Stud 1.
15. See Lucy Series, "Making Sense of Cheshire West" in Claire Spivakovsky, Linda Steele

CDS is a diverse set of interdisciplinary approaches to understanding disability's social, political, and cultural contexts, which informs this paper.[16] It understands disability as part of "universal human variation rather than an aberration."[17] CDS includes the experiences of persons with mental health issues or in distress.[18] CDS emphasizes how the law and legal institutions are lived, and is concerned with the law's role in the emancipatory claims of persons with disabilities.[19] The *Charter*, the United Nations *Convention on the Rights of Persons with Disabilities* ("*CRPD*"), Ontario's *Human Rights Code*, and provincial, territorial and federal human rights statutes explicitly prohibit discrimination on the

& Penelope Weller, eds, *The Legacies of Institutionalisation: Disability, Law and Policy in the 'Deinstitutionalised' Community* (Oxford: Hart, 2020) at 1: "Like many Western countries, the United Kingdom (UK) began its transition into what the socio-legal historian of mental health law, Clive Unsworth, terms the 'post-carceral era' in the mid-twentieth century. This era is characterised by policies and initiatives that seek to transplant populations of disabled people who might previously have been incarcerated in large institutions (long-stay hospitals, 'colonies,' asylums and madhouses) into a mythical space called 'the community.'"

16. See Simi Linton, *Claiming Disability: Knowledge and Identity* (New York: NYU Press, 1998) at 2: "The [CDS] field explores the critical divisions our society makes in creating the normal versus the pathological, the insider versus the outsider, or the competent citizen versus the ward of the state." See also Lennard Davis, "Bending Over Backwards: Disability, Narcissism, and the Law" (2000) 21:1 BJELL 193; Nirmala Erevelles, "Race" in Rachel Adams et al, eds, *Keywords for Disability Studies* (New York: NYU Press, 2015) at 145-148 ; Rosemarie Garland-Thomson, "Feminist Disability Studies" (2005) 30:2 Signs 1557.

17. Michael A Stein, "Disability Human Rights" (2007) 95:1 Cal L Rev 75 at 121: "Adopting a disability human rights model-and then extending it to other groups-repositions disability as a universal and inclusive concept. As human beings, each of us has strengths, weaknesses, abilities, and limitations. A disability human rights framework prioritizes potential over function and recognizes the value of every individual for his or her own end. […] Doing so embraces disability as a universal human variation, rather than as an aberration." See also Law Commission of Ontario, "Framework for the Law as it Affects Persons with Disabilities" (2012) at 71, online (pdf): *LCO* <www.lco-cdo.org/en/content/persons-disabilities> [perma.cc/F2N9-UTJN]: "People exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities; and the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage."

18. See e.g. Peter Beresford & Jasna Russo, "Supporting the Sustainability of Mad Studies and Preventing its Cooption" (2016) 31:2 Disability & Society 270; Richard Devlin & Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-Citizenship" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (UBC Press: Vancouver, 2006) 1 at 5: "This [CDS] literature and social movement have historically been more oriented to challenging dominant conceptions of physical disability than of mental disorder and disability. However, particularly in light of contemporary scientific efforts directed at "unlocking the mysteries of the brain" to produce evidence of biochemical or genetic components of psychiatric disorders (so that they are finally on par with physical disorders) and to identify genetic components of specific forms of mental disability, critical disability theory is increasingly concerned with targeting the problematic assumptions of the biological model in the distinct historical and institutional realms of mental disorder and mental disability…"

19. See e.g. Anna Lawson, "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?" (2020) 47:4 JL & Soc'y 558.

ground of mental disability.[20] There is, however, a wide gap between the law in the books and the law in action, particularly for those with mental health disabilities.[21] The enforcement of even the most carefully crafted legislation has a more profound effect than what is set out in its text.[22]

Every province and territory has legislation that authorizes involuntary detention for people with various forms of mental disability/mental illness. In Ontario, psychiatric detention is governed by the *Mental Health Act* ("*MHA*"), Part XX.1 of the *Criminal Code*, the *Child, Youth and Family Services Act*, and other affiliated legislative regimes.

This paper focuses on detention pursuant to the *MHA*, which establishes a series of escalating forms that permit a person to be transported to a psychiatric facility and to be committed there. The commitment criteria apply where a person has a "mental disorder" that would likely result in serious bodily harm to another person or to themselves. Ontario's *MHA* was expanded in 2000 to include a second set of commitment criteria that apply where a person "is likely to suffer substantial deterioration or serious impairment." In addition, community treatment orders ("CTOs") were introduced to provide for community-based treatment if the person—or their substitute decision-maker—consents to a treatment plan (such as medications and clinical appointments). If a person does not comply, they already meet the criteria to be returned to the hospital and involuntary detention. A detainee can apply to the Consent and Capacity Board ("CCB") after the issuance of each form.

II. *Constitutional edges: The* Charter*'s response to disability detention*

Like other kinds of incarceration, psychiatric detention raises constitutional questions with multiple and interlocking parts. This section relies on three *Charter* cases (*PS v Ontario*, *Thompson v Ontario*, and *G v Ontario*) to chart the limits and possibilities of statutory human rights, civil law, and constitutional law that review psychiatric detention, including non-

20. *Charter*, *supra* note 1; International Convention on the Rights of Persons with Disabilities, 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) [*CRPD*]; *Human Rights Code,* RSO 1990, c H 19. However, a psychiatric detainee who disagrees with the label of disability can seek protections from discrimination based on "perceived disability."

21. See Michael Bay, "Making the Law Match the Reality: Making the Reality Match the Law" (2006) 1:1 J Ethics Mental Health 1 at 4.

22. See Vera Chouinard, "Legal Peripheries: Struggles over disAbled Canadians' places in Law, Society and Space" (2001) 45 Can Geographer 187 at 191: "Disabled Canadians have fought long and hard for entitlement to basic human and citizenship rights, and equal protection of those rights. In doing so, they have helped to map out more formally equal places in society and space; places which in principle guarantee rights of access and inclusion without disadvantagement on the basis of bodily impairment. However, in practice disabled citizens' capacities to exercise legal rights are compromised by their peripheral places within law, society, and space."

consensual treatment. Challenges to legislation that authorizes psychiatric detention have relied on section 7 ("Life, liberty and security of person"), section 12 ("Cruel and unusual treatment or punishment"), and section 15 ("Equality before and under law and equal protection and benefit of law").[23] For example, legislation that creates a different standard of capacity only for those who are involuntarily detained also creates a distinction based on the enumerated ground of disability because it relies on the "stereotype that having a mental disability necessarily means that a person cannot make decisions about their health care treatment."[24]

Outside the *Charter* context, courts have considered the human rights implications of disability detention. For example, the Nova Scotia Court of Appeal in *Disability Rights Coalition v Nova Scotia* found the prolonged detention of persons with disabilities including in psychiatric institutions, as community placements for the individual applicants were delayed because of a lack of funding.[25] *Disability Rights Coalition* did not engage the *Charter*, but instead Nova Scotia's *Human Rights Act*.

The equality protection has special relevance for the *Charter's* review of psychiatric detention. In *Fleming v Reid*, the Ontario Court of Appeal considered the constitutionality of legislation authorizing non-consensual treatment and found that "their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments."[26] The Supreme Court of Canada has also recognized that persons with mental health disabilities have experienced considerable historical disadvantages and stereotypes[27] and that "[t]he mentally ill have historically been the subjects of abuse, neglect and discrimination in our society."[28] In *G v Ontario*, a majority of the Supreme Court of Canada found that "[p]eople with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them."[29]

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23. *Charter*, *supra* note 1 at ss 7, 12, 15(1).
24. Ruby Dhand & Kerri Joffe, "Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the Canadian Charter of Rights and Freedoms" (2020) 4:3 Man LJ 207 at 241.
25. 2021 NSCA 70, leave to appeal to SCC refused, 28618 (14 April 2022) [*Disability Rights Coalition*].
26. [1991] OJ No 1083 at 20, 82 DLR (4th) 298 (ONCA): "Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as person of lesser status or dignity."
27. See *Swain*, *supra* note 8 at 994: "The mentally ill have historically been the subjects of abuse, neglect, and discrimination in our society. The stigma of mental illness can be very damaging."
28. *Martin*, *supra* note 9 at para 90: "This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes."
29. 2020 SCC 38 at para 1 [*G v ON*].

Nevertheless, section 15 continues to have a mixed track record for psychiatric detainees.[30] A reminder of the precarity of disability rights, the ground of "disability" was a last-minute addition to the drafting of section 15.[31] *Eldridge v British Columbia (Attorney General)*, about the availability of sign language interpretation in hospitals, remains section 15's highest watermark.[32]

1. PS v Ontario*, 2014 ONCA 900*

Like Ms. Eldridge, Mr. PS is Deaf.[33] He was detained in a maximum-security psychiatric facility for 19 years, despite a universal agreement that he did not need to be there. Community supports appeared to be unavailable. The CCB found that it did not have the authority to make decisions about transfers or leave or give directions about community services. For many years, staff had relied on written communication, despite knowing that Mr. PS could not read.[34]

The Ontario Court of Appeal concluded that *Eldridge's* requirements about the availability of sign language interpretation mandated "the regular provision of communication through deaf appropriate services." Persuasive to the Court was that detainees such as Mr. PS are "entirely dependent" upon the psychiatric setting.[35]

The Court found that the CCB lacked sufficient authority to manage his reintegration into the community, which impacted his liberty. There must be a mechanism for meaningful review of the conditions of detention for long-term detainees by the CCB. In a section entitled "Interplay of Sections 15 and 7," the Court found that Ontario's accommodation failures

30. See H Archibald Kaiser, "Canadian Mental Health Law: The Slow Process of Redirecting the Ship of State" (2009) 17 Health LJ 139.

31. See M David Lepofsky, "Discussion: The *Charter's* Guarantee of Equality to People with Disabilities - How Well Is It Working?" (1998) 16 Windsor YB Access Just 155 [Lepofsky, "Discussion"].

32. [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]. See also Bruce Porter, "Expectations of Equality" (2006) 33 SCLR (2nd) 23 at 36: "In the area of disability rights, significant advances have been made, with the *Eldridge* decision representing a high watermark, in the recognition of the requirement of positive measures to ensure substantive equality. In that case, a unanimous Court rejected arguments of governments that section 15 'does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action' as a 'thin and impoverished vision of s. 15(1)'".

33. *PS v Ontario*, 2014 ONCA 900 [*PS*].

34. *Ibid* at paras 133-138: The trial judge concluded that *Eldridge's* requirements about the availability of sign language interpretation applied but only for "significant therapeutic interventions." However, the Court of Appeal rejected the trial judge's "erroneous and overly narrow application of *Eldridge*." Even if *Eldridge* does not require round-the-clock interpretation, it does require "effective" communication. Persuasive to the Court was that detainees, such as Mr. PS, are entirely dependent upon the psychiatric setting.

35. *Ibid* at para 143.

interfered with Mr. PS's prospects for community reintegration. That is, the section 15(1) violations increased the gravity of the section 7 violations. Mr. PS's detention continued because of accommodation failures.

PS illustrates promising new space for the application of the equality guarantees to psychiatric detention and "represents the most fulsome elaboration by a Canadian appellate court of the *Eldridge* principles with respect to access to equal public services by deaf persons, and indeed by persons with disabilities generally."[36]

Persistent questions remain, however, about the availability of *Charter* remedies at the CCB.[37] Section 24(1) empowers a court of competent jurisdiction to order individual remedies for conduct breaches.[38] By operation of section 52(1), a court or body empowered to determine questions of law can declare that a law unjustifiably limits the *Charter*.[39] The CCB does not have clear authority to answer *Charter* questions or make section 24 or section 52 orders, even though its daily work is to address questions of liberty and equality.

2. Thompson v Ontario*, 2016 ONCA 676*

In 2016, the Ontario Court of Appeal was asked again to scrutinize the constitutionality of Ontario's *MHA*.[40] Karlene Thompson applied for a declaration that the expanded commitment criteria were overbroad and arbitrary. She also argued that the CTO regime compels compliance with community treatment on a threat of readmission and involuntary detention violated the *Charter*. The *MHA* provisions move directly to coercion before exhausting less intrusive means of care, including voluntary opportunities to access community-based supports. They are forced to relinquish their liberty to gain access to housing, for example.

At the Court of Appeal, interveners built on *PS* to assert the interplay of sections 7 and 15. They argued that the expanded commitment criteria perpetuate sanist presumptions that persons with mental health disabilities are in need of coercive care. There is no other group for whom coercion or detention is used in this "therapeutic" way. They may feel compelled to consent to treatment plans by the promise of limited mental health services and supports upon their discharge. Persons subject to CTOs face these constraints on their choices because of their disability. A person's choice

36. Isabel Grant & Peter Carver, "PS v Ontario: Rethinking the Role of the Charter in Civil Commitment" (2016) 53:3 Osgoode Hall LJ 999.
37. See e.g. *ES v Joannou,* 2017 ONCA 655.
38. *Charter*, *supra* note 1 at s 24(1).
39. *Constitution Act, 1982,* s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11. See also *R v Conway*, 2010 SCC 22.
40. See *Thompson v Ontario (AG)*, 2016 ONCA 676 [*Thompson*].

to consent to a community treatment plan should not obviate a finding of discrimination because choices are, themselves, shaped by systemic inequality. The invocation of choice should not be used to defeat equality claims.[41]

Although it appeared to entertain the idea that CTOs may amount to a form of detention or a deprivation of liberty, the Court of Appeal rejected Ms. Thompson's application and only briefly considered her equality arguments. Critical to the Court's findings were the *MHA's* procedural protections, including review by the CCB.

3. G v Ontario*, 2020 SCC 38*

In *G v Ontario*, the Supreme Court of Canada considered the constitutionality of *Christopher's Law*, which requires that persons convicted of a sex offence, including those found not criminally responsible due to mental disorder (NCRMD), are subject to inclusion on the provincial sex offender registry.[42] While Mr. G had been absolutely discharged by the Ontario Review Board, he faced ongoing restrictions because of his disability. He remained "detained" in its lived sense, as CDS requires us to do.

The Ontario Court of Appeal found that the automatic inclusion of NCRMD accused without an individualized assessment offends section 15(1). The Court of Appeal found no breach of section 7 because the *Christopher's Law* requirements only amount to a "modest intrusion on individual liberty" and do not cause sufficient psychological stress to constitute a deprivation of security of the person.

The Court heard from several interveners that these rules discriminated against NCRMD accused by treating them without regard for their disability. NCRMD accused (even once discharged absolutely, such as Mr. G) are deprived of "exit ramps." Convicted persons who receive an absolute discharge can be removed from the registry, while NCRMD acquittees who receive an absolute discharge could not. The distinction is perpetuated by sanist stereotypes that persons with mental health disabilities will always be dangerous.

As in *PS v Ontario*, Mr. G's disability led to his continued detention. This deprivation of the exit ramp acted as a disincentive to work toward

41. See e.g. *Fraser v Canada*, 2020 SCC 28 at para 86; *Quebec (AG) v A*, 2013 SCC 5 at para 336; Diana Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 209; Sonia Lawrence, "Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15" in Sheila McIntyre & Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis, 2006) at 115.

42. *G v ON*, *supra* note 29.

discharge, impeding his recovery. Mr. G and the interveners argued that Mr. G's section 7 claims must be considered in the context of equality.[43] As an intervener, the Canadian Civil Liberties Association ("CCLA") relied on Justice L'Heureux-Dubé findings in *GJ* to assert that "section 7 must be interpreted through the lens of section 15." The CCLA asked the Court to find that the Court of Appeal erred in its section 7 analysis by finding that the deprivation was in accordance with substantive equality, a principle of fundamental justice.[44]

In oral argument, the bench heartily interjected about the risks of creating a "hybrid right" and of "putting sections 7 and 15 together in a pot." Justice Rowe asked counsel if they were asking the Court to create a new *Charter* right called "7–15 or 15–7." In response, counsel for Mr. G asserted that "a person with a mental disorder cannot take off their disorder like a winter coat…."

Justice Karakastanis, for the majority of the Court, had "no difficulty" concluding that the denial of exit ramps for those who are absolutely discharged when NCRMD is discriminatory.[45] Relying on *Eldridge*, she rejected the argument that the government's intention not to stereotype is relevant to the equality analysis.[46] Without using the term "ableism" or "sanism," she relied on sources from CDS to illustrate stigmatizing, prejudicial notions that persons with mental health disabilities "are inherently and perpetually dangerous."[47] These paragraphs are striking for their reliance on social science and historical context and will support future *Charter* claimants with disabilities.

Disappointingly, the Supreme Court did not address the interplay argument. Similar arguments may arise in challenges to the constitutionality

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43. *Ontario (AG) v G*, 2020 SCC 38 (Factum of the Respondent, Mr. G at para 65), <www.scc-csc.ca/WebDocuments-DocumentsWeb/38585/FM020_Respondent_G.pdf> [perma.cc/WG48-YMFH]: "Mr. G argued that "[S]tate-imposed intrusions that may appear to be modest to someone without a mental health condition can become significant, debilitating, traumatizing, and ultimately destabilizing for someone with a mental condition. Similarly, registry requirements that may be accepted as justifiable by a convicted non-mentally disordered sex offender may be perceived as confusing, unjust, and even punitive by a person with a major mental disorder who was too ill at the time of the index offence to appreciate the nature of their actions."

44. *Ontario (AG) v G*, 2020 SCC 38 (Factum of the Intervener, Canadian Civil Liberties Association at para 25) <www.scc-csc.ca/WebDocuments-DocumentsWeb/38585/FM040_Intervener_Canadian-Civil-Liberties-Association.PDF> [perma.cc/5VMR-RA68]: "CCLA submits that a purposive reading of the *Charter* requires that s. 7 claims be considered in light of the equality guarantee in s. 15, particularly where the claim is being advanced on behalf of a member of a marginalized group. … Indeed, there is support in the case law and academic commentary for the proposition that substantive equality is itself a principle of fundamental justice."

45. *G v ON*, *supra* note 29 at para 60.

46. *Ibid* at para 46.

47. *Ibid* at para 62.

of BC's *MHA*. *Council of Canadians with Disabilities v BC* was recently heard by the Supreme Court on the question of standing. The underlying claim challenges the constitutionality of provisions of BC's *MHA* that deem involuntarily detained persons incapable of refusing treatment. The applicants argue that these provisions violate both section 7—because they subject involuntarily detained persons to forced treatment without any assessment of their capacity—and section 15—because they discriminate by reinforcing harmful stereotypes that equate mental illness with incapacity. If the matter is heard on its merits, the interplay of sections 7 and 15 may be relevant.

III. *Emergent recognition of the need for refinement*

Judicial resistance to the *Charter* challenges of psychiatric detainees is typically persistent. *PS v Ontario* and *G v Ontario*, however, establish the possibility of a renewed analytical approach to the constitutionality of psychiatric detention. The renewed method proposed here recognizes the interconnectedness of sections 7 and 15. Such an approach aligns with emergent understandings of the value of a unified approach to claims about freedom from government interference and the right to governmental action. It also reconciles with the *CRPD*'s prohibition of detention based on disability. It proposes that the equality principle should influence the interpretation of section 7, including as a principle of fundamental justice.

This section outlines three opportunities to challenge state deprivations of liberty that create disabling circumstances or conditions, contribute to systemic disability exclusion and subordination, or maintain an underclass of persons with disabilities. These three opportunities are inspired by Justice L'Heureux-Dubé "interpretive lens of equality," which holds that the "section 15(1) guarantee is the broadest of all guarantees, applying to and supporting all other *Charter* rights."[48] Such a combined approach more accurately reflects the claimant's circumstances of the person while recognizing "the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."[49] Without a deeper integration, psychiatric detainees are forced

48. *New Brunswick (Minister of Health and Community Services) v G(J))*, [1999] 3 SCR 46 at 115, 177 DLR (4th) 124 [*G(J)*]: Justice L'Heureux-Dubé found, for a minority of concurring judges that "[t]he rights in s7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society." See also Froc, *supra* note 4 at 133: "[I]n multiple rights cases, the focus of the court is on separating elements of a claimant's experience into one (dominantly defined) right or another rather than viewing it as claimants do—as a singular experience of rights violation that arises from complex circumstance of subordination."

49. Shaun O'Brien, Nadia Lambek & Amanda Dale, "Accounting for Deprivation: The Intersection

to compartmentalize and distort their claims into discrete section 7 or 15 claims. An analysis of marginalization drawn from section 15 jurisprudence can assist a claimant to substantiate a deprivation pursuant to section 7.

Outside of the context of psychiatric detention, critical legal scholars have written about an emergent willingness to understand equality and liberty as interconnected or compounding. O'Brien, Lambek, & Dale ground their understanding of "deprivation" and "interference" in the lived experience and "particular ways in which people who are vulnerable can experience legislation and government action."[50] Discriminatory legislation found to be arbitrary and overbroad under section 7 may be better understood as a violation of section 15, according to Rudin. To do otherwise "ducks the equality issue."[51] Lepofsky points to *Carter v Canada* and *R v Swain* as other examples of cases in which the Supreme Court decided on section 7 but failed to consider the equality implications for persons with disabilities.[52] Froc highlights the failure of approaches that understand sections 7 and 15 as "watertight compartments" and offers alternative understandings that "integrate section 7 into 15."[53]

1. *Emboldened approach to "positive" rights and the social determinants of mental health*

The *Charter's* scrutiny of psychiatric detention has failed to consider its active and passive deprivations. Psychiatric detention is, no doubt, a carceral technique, analogous to other forms of detention. Psychiatric

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of Sections 7 and 15 of the *Charter* in the Context of Marginalized Groups" (2016) 35:2 NJCL 153 at 174.

50. *Ibid*.

51. Jonathan Rudin, "Tell It Like It Is: An Argument for the Use of Section 15 over Section 7 to Challenge Discriminatory Criminal Legislation" (2017) 64:3/4 Crim LQ 317.

52. David Lepofsky, "Carter v Canada (Attorney General), The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee" (2016) 76 SCLR 89 at 91 [Lepofsky, "*Carter*"]: "What does it look like when the Supreme Court stares right at a case that 'screams' disability equality, but treats it as something different, using a different *Charter* provision, enacted for different purposes, with an analytical framework that can disregard disability equality's aims and tools? *Carter* is, first and foremost, a disability equality case. The *Carter* claimants were people with serious disabilities. That was what brought them to court. The claimants wanted to be able to end their lives at the time of their individual choosing. Their claim was to a right of access to disability accommodation. (At trial, Smith J. also provided compelling reasons why the legislation violated *Charter* section 15's disability equality guarantee.)." For more detail about the section 15 arguments against assisted suicide, see Maneesha Deckha, "A Missed Opportunity: Affirming the Section 15 Equality Argument against Physician-Assisted Death" (2016) 10:1 McGill JL & Health 69.

53. See Froc, *supra* note 4 at 133: "One would assume therefore that the more severe, complex, and intractable the oppression suffered, the kind that often manifests in a "cluster" of rights violations—the more likely it is that it will receive judicial recognition. However, the poor track record of women's multiple rights claims at the Supreme Court, claims that arise through a combination of an equality rights violation under Section 15 of the *Charter* coupled with another civil liberty violation, belies this assumption."

detention is, also, a result of upstream failures to provide *equal* access to the social determinants of mental health, which constitute the living and working circumstances that shape mental health. A robust understanding of substantive equality requires attention to systemic barriers to those supports we need to live well.

While Mr. PS and Mr. G were successful without such an integrative approach, a comprehensive understanding of psychiatric detention requires attention to its complex nature. Unequal access to the social determinants of mental health results in the deprivation of liberty. To confront psychiatric detention, clarity about its true character is required.

Courts have, historically, been reluctant to interpret the *Charter's* protections as requiring positive obligations, such as access to humane working conditions, supportive housing, and income assistance.[54] Section 7 has been restricted to protection against "negative" deprivations, requiring the state to refrain from engaging in activities that infringe on constitutionally protected rights. The fate of positive section 7 rights "is currently dangling by weak threads."[55]

As a result of the failure to characterize a deprivation of material well-being as a deprivation of liberty, the *Charter* has not yet been an "effective human rights framework for addressing poverty and homelessness."[56] The formulaic distinction between positive and negative rights has hampered the *Charter's* development and is often used to dismiss economic rights claims.[57] The "dying negative rights paradigm that must be rejected" as an impoverished vision of the *Charter's* obligations.[58]

The Supreme Court has rejected such a rigid, positive/negative dichotomy, finding the distinction unhelpful.[59] *Irwin Toy* left open the question of whether section 7 "could operate to protect economic rights

54. See Martha Jackman, "Charter Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279 at 283.

55. Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the *Charter*" (2020) 25 Appeal 43 at 57: "It seems that without a change to the section 7 test, true access to such rights may not be possible… The court's understanding of equality issues may be progressing, but without an embedded equality analysis it seems unlikely that the move will be made toward recognizing positive section 7 rights."

56. Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework" (1 November 2012), online (pdf): *Social Rights Advocacy Centre Working Paper* <ssrn.com/abstract=2319185> [perma.cc/7SS6-JMXN].

57. See e.g. Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the Charter: A Comment On Gosselin V. Québec" (2003) 20 SCLR 65.

58. See Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend" (1998) 9:3 Const Forum Const 71.

59. See e.g. *Ontario (AG) v Fraser,* 2011 SCC 20 at para 69; *Haig v Canada*, [1993] 2 SCR 995 at 1039, 105 DLR (4th).

fundamental to human…survival."[60] In *Gosselin*, Justice Arbour found that many *Charter* rights have positive dimensions.[61] In *Eldridge*, the Supreme Court found that the state can be obliged to act if, where it provides a benefit, it has not done so in a non-discriminatory manner.[62] In *Toronto v Ontario*, the Supreme Court rejected what it determined to be a positive rights claim.[63] Justice Abella dissented, finding no reason "to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes."[64] For her, all rights have positive dimensions because they exist within, and are enforced by, a positive state apparatus.[65]

An equality-infused reading of section 7 does not foreclose (and may require) a positive dimension to the right to the social determinants of health. It appreciates that material deprivations, including a lack of resources or services, force people into conditions that make them vulnerable to additional deprivations. Equity-deserving communities require equal *Charter*-protected access to the resources they "need to survive with dignity."[66]

For disability activists, there was an expectation that section 15 would give rise to a more positive conception of equality.[67] The explicit recognition of a "positive right" to non-coercive disability supports aligns with substantive conceptions of disability justice. People with mental health disabilities face persistent social and economic barriers that interfere with their full participation in their communities. They are more likely to experience poverty, have lower levels of education and income, and "are less likely to live in adequate, affordable housing compared to people with other disabilities and people without disabilities."[68]

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60. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003-1004, 58 DLR (4th) 577 [*Irwin Toy*].
61. *Gosselin v Québec (AG)*, 2002 SCC 84 [*Gosselin*].
62. *Eldridge*, s*upra* note 32 at para 73.
63. *Toronto (City) v Ontario (AG)*, 2021 SCC 43 at para 35 [*Toronto v Ontario*].
64. *Ibid*. See *ibid* at para 155, Abella J, dissenting: "Dividing the rights 'baby' in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection."
65. *Ibid* at para 153.
66. Flader, *supra* note 55 at 59: "An embedded equality analysis could open the minds of judges who would not ordinarily consider the intersectional systemic barriers that certain claimants face when attempting to acquire their *Charter* protected rights."
67. See Lepofsky, "Discussion,", *supra* note 31 at 161; Mary Ann McColl, Rebecca Bond & David Shannon, "People with Disabilities & the Charter: Disability Rights at the Supreme Court of Canada under the Charter of Rights and Freedoms" (2016) 5:1 Can J Disability Studies 183.
68. Ontario Human Rights Commission, *By the Numbers: A Statistical Profile of People with Mental Health and Addiction Disabilities in Ontario* (Toronto: OHRC, 2015), online: <www.ohrc.on.ca/en/numbers-statistical-profile-people-mental-health-and-addiction-disabilities-ontario> [perma.cc/6BKT-9Q9S]; Ontario Human Rights Commission, *Policy on Preventing Discrimination Based*

The right to equality requires action by the state, rather than engaging a right to be left alone. CDS challenges the traditional understanding of autonomy as requiring self-sufficiency. Fineman's theory of vulnerability theory embraces a more substantive vision of equality.[69] Feminist reconceptualizions of autonomy consider the multiple relationships that constitute an individual's autonomy.[70] Applying relational autonomy approaches to mental health jurisprudence, Sheila Wildeman proposes that the "…attainment of the requisite reflective abilities is not, and cannot be, a solo endeavor but rather, requires social supports."[71]

The social determinants of mental health are the upstream socioeconomic factors that promote the conditions in which people can be well. Rather than improving entitlements to mental health services, the most effective interventions get at the root causes of health inequities. However, the typical mental health statute is silent on positive entitlements to the social determinants of mental health.[72] Instead, mental health statutes codify standards for using coercion to compel examinations and to detain.

State failures to promote and protect the social determinants of mental health impugn its sections 7 and 15 obligations. The most powerful social determinants of health are also prohibited grounds of discrimination. Government inaction in relation to the determinants of health perpetuates exclusion and disadvantage on prohibited grounds of discrimination.

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on Mental Health Disabilities and Addictions (Toronto: OHRC, 2014) at 26ff, online (pdf): <www3.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf > [perma.cc/5S86-PQV4].

69. Martha A Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 Yale JL & Feminism 1 at 12: "The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity. [...] On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe." See also Ani B Satz, "Disability, Vulnerability, and the Limits of Antidiscrimination" (2008) 83 Wash L Rev 513 at 513: "Interpreting Martha Fineman's theory of vulnerability and applying it for the first time within disability legal studies, I argue that vulnerability to disability and the vulnerabilities disabled individuals experience more acutely than those without disability are both universal and constant."

70. See Susan Sherwin, "A Relational Approach to Autonomy in Health Care" in Susan Sherwin, ed, *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998) 19 at 44: "A relational approach to autonomy allows us to maintain a central place for autonomy within bioethics, but it requires an interpretation that is both deeper and more complicated than the traditional conception acknowledges—one that sets standards that involve political as well as personal criteria of adequacy."

71. Sheila Wildeman, "Insight Revisited: Relationality and Psychiatric Treatment Decision-Making Capacity" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 255 at 269.

72. See Kaiser, *supra* note 30 at 139.

Although Mr. PS did not assert a positive right, the Court of Appeal found that the *Charter* required the CCB to have adequate power to oversee the availability of the upstream supports and services that Mr. PS needed to live in the community. Failure to deliver upstream resources, such as the social determinants of mental health, lead to the application of more coercive forms of state interference, including psychiatric detention. Nevertheless, disability supports and services have been first on the chopping block, including during COVID-19. The privatization and deregulation of disability services expose persons with disabilities to the risk of psychiatric detention. The state may turn to laws that restrict personal liberty as a substitute for providing those supports upstream.[73]

Housing is a key social determinant of mental health.[74] The applicants in *Tanudaja v Canada* asserted a constitutional right to housing. Canada and Ontario brought motions to strike the application because "there is no positive obligation raised by the *Charter*…to provide for affordable, adequate, accessible housing."[75] The Dream Team, a group of psychiatric consumers and survivors who advocate for supportive housing, sought to intervene in the motion at the Superior Court and were granted leave to intervene in the appeal of that motion as part of a group.[76] They argued that the lack of adequate and accessible housing creates further isolation.[77] The Court of Appeal released a divided ruling, with the majority noting that the extent to which positive obligations may be imposed on the government was undecided.[78] In her dissent, Feldman JA found that it was too early to decide whether the circumstances of the case would be sufficiently exceptional to consider the granting of socioeconomic rights.

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73. See Wendy Mariner, George Annas & Leonard Glantz, "Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law" (2005) 95:4 American J Public Health 581 at 588: "In an era of increasingly limited state funds, there is a danger that legislatures will turn to laws that restrict personal liberty as a substitute for providing the resources necessary for positive public health programs that actually prevent disease and improve health."

74. See *Disability Rights Coalition*, *supra* note 25. Though not a *Charter* case, *Disability Rights Coalition* raised the equality protections against disability detention as guaranteed by provincial human rights legislation.

75. *Tanudjaja v Canada (AG)*, 2014 ONCA 852 at para 17.

76. Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2014) 24 JL & Soc Pol'y 10.

77. *Tanudjaja v Canada (AG)*, 2014 ONCA 852 (Factum of the Intervener ARCH Disability Law Centre, The Dream Team, Canadian HIV Legal Network and HALCO) at paras 27-28: "Lack of supports and adequate and accessible housing can often worsen and amplify the effects of a person's disability."

78. *Ibid* at para 37: "Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v Quebec*."

The failure to *equally* fund humane community-based alternatives drives the *detention* of people with disabilities. Barriers to accessing voluntary mental health services may give rise to the inappropriate use of coercion, such as CTOs or other kinds of psychiatric detention. In *Shortt (Re),* the Ontario Court of Appeal found an NCR accused's long-term psychiatric detention unconstitutional[79]. Despite a determination by the Ontario Review Board of his eligibility to live in a community residential setting, he remained in the hospital due to a "lack of public funding; long waiting lists, or inadequate attendant care."[80] The Court of Appeal unanimously ordered Ontario to provide him with appropriate community housing in a timely fashion. In *JH v Alberta* (2020), Mr. JH was detained despite the fact that he did not have a "mental disorder."[81] Mr. JH did not raise equality arguments, though they were raised by the intervener, who argued that this continued detention was a result of the unavailability of culturally safe services.[82] As in *PS v Ontario*, Mr. JH's detention continued because of accommodation failures and "insufficient community supports."[83] In *Re Williams*, the Ontario Court of Appeal granted a conditional discharge to a person who had been detained in a psychiatric hospital, given the unavailability of alternative living arrangements due to COVID-related policies.

Courts have, at times, failed to rigorously scrutinize the defence of limited resources used by government, with particular consequence for the liberty interests of equity-deserving communities.[84] Sanism drives speculative presumptions that it would be too costly to invest in the upstream community supports necessary to avoid psychiatric detention. Mental health supports and services are not funded at a level commensurate with other community supports.[85] As a result of over-reliance on coercive care, people often find they cannot access voluntary mental health supports

79. *Shortt (Re)*, 2020 ONCA 64.
80. *Ibid* at para 55.
81. *JH v Alberta (Minister of Justice and Solicitor General)*, 2020 ABCA 317.
82. *JH v Alberta Health Services*, 2019 ABQB 540 at para 225. See also *ibid* at para 311: His treating physician said that he would discharge JH 'if community supports were in place.'
83. Lorian Hardcastle, "Is Alberta's *Mental Health Act* Sufficiently Protecting Patients?" (18 September 2017) at 6, online (blog): *University of Calgary Faculty of Law Blog* <ablawg.ca/wp-content/uploads/2017/09/Blog_LH_Mental_Health.pdf> [perma.cc/Q7G7-6WRN].
84. See *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at 41, 181 DLR (4th) 385: "…one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment."
85. See Canadian Mental Health Association, "Mental Health in the Balance: Ending the Health Care Disparity in Canada" (September 2018) at 4, online (pdf): <cmha.ca/wp-content/uploads/2021/07/CMHA-Parity-Paper-Full-Report-EN.pdf > [perma.cc/94HG-28NX]: "The historical underfunding of mental health has been most pronounced in community-based mental health services."

services when they need them. Their mental health may worsen until they are involuntarily detained, which is often a negative and traumatizing experience that may discourage them from accessing future services.[86]

Welfare-focused justifications of psychiatric detention rely on superficial analyses of the remedial purposes of deprivation to "protect" psychiatric detainees.[87] In *AH v Fraser Valley Health Authority*, the Supreme Court of British Columbia found unconstitutional the long-term involuntary detention of an Indigenous woman pursuant to British Columbia's *Adult Guardianship Act*. The Act's "non-specific catch-all language" permitted her detention for her "protection."[88] The Court found that she was detained instead of being provided necessary supports and services. As an Indigenous woman with disabilities, AH was marked as "in need" of coercive care.

CDS highlights the role of law in the regulation of capacity, distinguished from dominant understandings of capacity as an objective, individual attribute.[89] Individualized approaches also distort violence as care. "Care" is used as a pretext for institutional control, and the institution masquerades as a provider of care. Violent expressions of care are justified for disabled persons' own good.

2. *The* Convention on the Rights of Persons with Disabilities *and the prohibition of disability detention*

An integrative approach to the *Charter's* equality and liberty protections reconciles with the *CRPD*'s prohibition of detention based on disability. The *CRPD* marked a "paradigm shift" from thinking about disability as a matter of social welfare to a matter of human rights.[90] The *CRPD* requires state parties to take positive measures, including protecting and promoting social determinants of mental health.[91] It "brings positive state obligations

86. See Community Legal Assistance Society "Operating in Darkness: BC's *Mental Health Act* Detention System" (29 November 2017), online: *CLAS* <clasbc.net/operating-in-darkness-bcs-mental-health-act-detention-system/> [perma.cc/C95P-H7WN].

87. See Canadian Psychiatric Association, "Community Treatment Orders and Other Forms of Mandatory Outpatient Treatment" (2019), online (pdf): *CPA* <www.cpa-apc.org/wp-content/uploads/Mandatory-Outpatient-Treatment-CTO-2018-web-EN.pdf> [perma.cc/T6C5-UFKP].

88. *AH v Fraser Health Authority*, 2019 BCSC 227 at para 117. See also Dhand et al, "Litigating in the Time of Coronavirus: Mental Health Tribunals' Response to COVID-19" (2020) 37:1 Windsor YB Access Just 132 at 134.

89. See Geoffrey Reaume, "Understanding Critical Disability Studies" (2014) 186:16 CMAJ 1248 at 1249: "Critical disability studies view disability as both a lived reality in which the experiences of people with disabilities are central to interpreting their place in the world, and as a social and political definition based on societal power relations."

90. See Lucy Series, "The Development of Disability Rights Under International Law: From Charity to Human Rights" (2015) 30:10 Disability & Society 1590.

91. See United Nations Human Rights Office of the High Commissioner, "End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities Ms. Catalina

to the fore" and "affirms the fundamental interrelationship of civil and political with economic, social, and cultural rights."[92]

CDS requires investigation into the social meaning of disability. The *CRPD*'s preamble sets out that disability "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation."[93] The social model of disability proposes that factors external to a person's actual limitations determine that person's abilities.[94] Critics of the social model of disability, including CDS scholars, argue that it fails to integrate an appreciation of actual impairment.[95] Others, including the World Health Organization, prefer a hybrid biopsychosocial model of disability.[96]

While the principle of autonomy pervades the *CRPD*, it does not authorize or prohibit compulsory intervention. It requires, however, that an intervention cannot be applied because of disability.[97] That is, disability

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Devandas-Aguilar, on her visit to Canada" (12 April 2019) at 18, online: *OHCHR* <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24481&LangID=E> [perma.cc/7Y2S-GWZD]: "I urge the federal, provincial, and territorial governments to adopt concrete action plans to prevent the re-institutionalization of persons with disabilities and to ensure the provision of community-based services, including adequate housing. The provision of support to persons with disabilities is not only a human rights obligation of Canada, but also an essential condition to ensure that no one is left behind in the implementation of the 2030 Agenda for Sustainable Development." See also Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights" (2006) University of Oxford Working Paper No 38.

92. Sheila Wildeman, "Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities" (2013) 41:1 JL Med & Ethics 48 at 55.

93. *CRPD*, *supra* note 20 at "Preamble."

94. See e.g. Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (New York: Bloomsbury, 2007); Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993); Michael Olive, *Understanding Disability: From Theory to Practice* (Basingstoke: Macmillan, 1996); Ena Chadha, "The Social Phenomenon of Handicapping" in Elizabeth A Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 209. The Supreme Court of Canada adopted the social model of disability in *Quebec v Boisbriand (City)*. See *Quebec v Boisbriand (City)*, 2000 SCC 27 at para 77: "By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a 'handicap'. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes."

95. See e.g. Tom Shakespeare & Nicholas Watson, "Defending the Social Model" (1997) 12:2 Disability & Society 293; Tom Shakespeare, "Critiquing the Social Model" in *Disability Rights and Wrongs* (New York: Routledge, 2006) 29; Tom Shakespeare & Nicholas Watson, "The Social Model of Disability: An Outdated Ideology?" (2001) 2 Research Soc Science & Disability 9.

96. See World Health Organization & World Bank, *World Report on Disability 2011* (Geneva: WHO, 2011) at 4. Disablement is "a dynamic interaction between health conditions and contextual factors, both personal and environmental" (*ibid* at 4).

97. See e.g. Michael L Perlin, "There Must Be Some Way out of Here: Why the Convention on the Rights of Persons with Disabilities Is Potentially the Best Weapon in the Fight against Sanism" (2013) 20:3 Psychiatry, Psychology & Law 462; Michael L Perlin, "'A Change Is Gonna Come': The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the

cannot be used as a factor in determining whether detention or compulsion may be imposed. The *CRPD* requires detention to be delinked from disability, even if there are other reasons for their detention. Article 14 ("Liberty and Security of the Person") provides that state parties shall ensure that persons with disabilities are not arbitrarily deprived of their liberty, that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

The *CRPD* was argued in *Thompson v Ontario*, though those arguments were left unaddressed by the Court of Appeal.[98] In Ontario, the *MHA* creates a separate legal regime that specifically relies on a person's disability as a basis for involuntary detention and treatment. The *MHA* permits the deprivation of liberty on the ground of disability (as indicated by even the name of the legislation). Mental disability is "virtually the only disease category under which a diagnosis alone, rather than commission of a crime, may result in confinement, a massive curtailment of liberty."[99]

The *CRPD* was also raised by the applicants in a constitutional challenge to psychiatric detention provisions of BC's *MHA*.[100] International human rights obligations are a relevant and persuasive factor in *Charter* interpretation.[101] Their content is an important indicator of the meaning of the full benefit of the *Charter's* protection.[102] The *CRPD* may strengthen or support *Charter* claims of persons in psychiatric detention.[103]

Additional *CRPD* protections from torture and cruel, inhuman, or degrading treatment or punishment are relevant to the claims of psychiatric detainees. The *CRPD* must be "read hand-in-glove"[104] with the *Convention*

Domestic Practice of Constitutional Mental Disability Law" (2009) 29:3 N Ill UL Rev 483.

98. See *Thompson v Ontario (AG)*, 2016 ONCA 676 (Factum of the intervener ARCH Disability Law Centre).

99. Deborah Agus, "Mental Health and the Law" in William Eaton, ed, *Public Mental Health* (Oxford: Oxford University Press, 2012) 351 at 363.

100. See Community Legal Assistance Society, "Case Updates—Deemed Consent Law under the Mental Health Act" (January 2022), online: *CLAS* <clasbc.net/our-work/cases/deemed-consent-law-under-the-mental-health-act/> [perma.cc/34PY-GFW5].

101. See e.g. *Baker v Canada (Ministry of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70, 174 DLR (4th) 193.

102. See e.g, *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at paras 23, 59 DLR (4th) 416; *United States of America v Burns*, 2001 SCC 7 at para 79-80.

103. See CT Sheldon & Karen R Spector, "Law as a Site of Mad Resistance: User and Refuser Perspectives in Legal Challenges to Psychiatric Detention" (2019) 10 J Ethics Mental Health 1.

104. Michael L Perlin & Meredith Schriver, "'You That Hide Behind Walls': The Relationship Between the Convention on the Rights of Persons with Disabilities and the Convention Against Torture and the Treatment of Institutionalized Forensic Patients" in *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington: American University Washington College of Law, 2014) 195 at 195: "The *CRPD* and the CAT must be read 'hand-in-glove' because together, these documents should make it more likely that attention will be

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").[105] The CAT has supported calls for an absolute ban on restraint, solitary confinement, and the non-consensual administration of electroshock, psychosurgery, and neuroleptics.[106] The CAT protections may support additional *Charter* claims based on section 12 ("Treatment or punishment") in psychiatric settings.[107]

3. *Equality as a principle of fundamental justice*

Section 7 has not yet been a reliable protection against state infringements on liberty experienced by psychiatric detainees. For disabled claimants, section 15 also "certainly leaves much to be desired and marks a retreat from the early promise of substantive equality."[108] A more nuanced approach is required, particularly where the deprivation maintains or contributes to systemic disadvantage/subordination, a pattern of exclusion, or an underclass of those in a deprived position.

Mr. G asked the Court to consider his section 7 claim in light of the equality guarantee. The equality principle should influence the interpretation of the deprivation because, as Peter Hogg notes, "equality analyses have never been solely restricted to section 15 litigation,"[109] and there is "plenty of room for the equality value in this mansion."[110] In *GJ*, Justice L'Heureux-Dubé found that the section 7 analysis must "take into account the principles and purposes of the equality guarantee...."[111]

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paid to the conditions of confinement of forensic populations."

105. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (entered into force 26 June 1987).

106. See *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, HRC, 22nd Session, UN Doc A/HCR/22/53 (2013) 1 at 1: "By illustrating some of these abusive practices in health-care settings, the report sheds light on often undetected forms of abusive practices that occur under the auspices of health-care policies and emphasizes how certain treatments run afoul of the prohibition on torture and ill-treatment."

107. *Charter*, *supra* note 1 at s 12: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." For commentary on serious allegations of torture, see generally the Ontario Superior Court of Justice in *Barker v Barker*, 2020 ONSC 3746, where the Court found two psychiatrists had committed assault and battery as a result of experimental treatment of patients at a maximum-security psychiatric facility

108. Ravi Malhotra, "Has the Charter Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century" (2012) 58 SCLR 273 at 283: "While section 15 has undoubtedly had a troubled history, I believe that a cautiously optimistic approach is warranted on the facts in the case of disability rights." See also Isabel Grant, "Mental Health Law and the Courts" (1991) 29:4 Osgoode Hall LJ 747 at 764: "While most of the early *Charter* challenges were procedural in nature and brought under sections 7, 9, and 10 of the *Charter*, section 15 is increasingly being used as the basis of *Charter* challenges. Section 15 has been addressed in six non-criminal cases in the mental health law context. In only one of the cases was the section 15 argument successful."

109. Peter Hogg, "The Brilliant Career of Section 7 of the *Charter"*(2012) 58 SCLR 195 at 198.

110. Peter Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR 113 at 117, 126.

111. *G(J)*, *supra* note 48 at para 115.

Case law may support the characterization of equality as a principle of fundamental justice.[112] Justice Wilson found in dissent in *R v Morgentaler* that "a deprivation of the section 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice."[113] For the Ontario Court of Appeal in *R v Bedford* , Justice MacPherson found that sex workers' vulnerability "exacerbates the security of the person infringement caused by the communicating provision."[114] A similar point was argued at trial, but not decided upon, in *Carter v Canada*.[115] In *Inglis v British Columbia*, the BC Supreme Court required the reinstatement of a mother-baby program at a correctional center, adopting an approach to section 7 that was "informed by the principles and purposes of the equality guarantee to ensure the law responds in an appropriate way to the needs and circumstances of these disadvantaged individuals."[116]

Arguments for the identification of substantive equality as a foundational constitutional principle have received mixed treatment.[117] Others take an opposing position, resisting the temptation to turn "every case into a *Charter* case," since that undermines the important role of direct *Charter* review.[118] However, the Supreme Court appears to have

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112. See e.g. the Supreme Court's decision in *R v Boudreault*, 2018 SCC 58 at para 68, where the SCC held that the impact on liberty of mandatory victim surcharges was grossly disproportionate for those "marginalized individuals" who were more likely to offend and be required to pay these surcharges.

113. *R v Morgentaler*, [1988] 1 SCR 30 at 175, 44 DLR (4th) 385.

114. *Canada (AG) v Bedford*, 2012 ONCA 186 at paras 358-356: "…persons engaged in prostitution are overwhelmingly women. Many are aboriginal women. Some are members of lesbian and gay communities. Some are addicted to drugs and/or alcohol, both of which are forms of disability. Since gender, race, sexual orientation, and disability are all enumerated or analogous grounds under s. 15 of the *Charter*, the s. 7 analysis must take into account that prostitutes often hail from these very groups."

115. *Carter v Canada (AG)*, 2012 BCSC 886. The Carter decision was deeply divisive to the communities of persons with disabilities. It is included here as an example of the interplay of overlapping *Charter* protections, rather than as a comment about the substance of the appeal. In March 2023, amendments to the Criminal Code will extend assisted suicide to persons whose sole underlying condition is mental illness. For more detail about CDS, as well as "deep divisions" about Carter, see Jen Rinaldi, "Safeguarding Against Abuse" (21 June 2016), online: *Briarpatch* <www.briarpatchmagazine.com/articles/view/safeguarding-against-abuse> [perma.cc/4NXH-Z5XJ]; Ravi Malhotra, "The Politics of Death-Making/Assisted Suicide: A Castoriadan Reading" in Kelly Fritsch, Jeffrey Monaghan & Emily van der Meulen, eds, *Disability Injustice: Confronting Criminalization in Canada* (Vancouver: UBC Press, 2022) 259.

116. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at para 377.

117. See Patricia Hughes, "Recognizing Substantive Equality as a Fundamental Constitutional Principle" (1999) 22:2 Dal LJ 5 at 33; Margot Younge, "The Other Section 7" (2013) 62 SCLR (2nd) 3. See also *Hills v Canada (Attorney General)* [1988] 1 SCR 513 at 93, 48 DLR (4th) 193, where Justice L'Heureux-Dubé found that "the values embodied in the *Charter* must be given preference over an interpretation that would run contrary to them."

118. See Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR 361 at 367: "…the meaning of *Charter* values, while rhetorically powerful, is

foreclosed such arguments, recently finding that unwritten constitutional principles cannot serve as bases for invalidating legislation.[119]

Others resist the broadening of section 7 because it "would take away the need for section 15."[120] Doing so would amount to a "backdoor" equality requirement in section 7.[121] For example, during the oral argument for *G v Ontario*, Justice Abella queried whether Mr. G was asking section 7 "to do some more work under section 15." Section 15 rights are qualitatively different from those protected by section 7, and broadening section 7 may let Courts "off the hook" from continuing to develop section 15.[122]

Conclusion

The *Charter* has not yet been a reliable foundation on which to challenge psychiatric detention. Kaiser reflects on the disappointments of the post-*Charter* era to protect against the "easy erosion" of rights.[123] Patton points to failures to implement *Charter* values in the day-to-day operation of psychiatric settings.[124] Courts have, generally, failed to recognize the relevance and necessity of equality arguments in the psychiatric context. Establishing a section 15 claim is typically more difficult for claimants who instead rely on section 7. As a result, they are forced to compartmentalize their claims, thereby distorting the analysis of their lived experience.

Relying on CDS, this paper considers the *Charter's* possibilities to reveal the injustice of psychiatric detention. To do so, it focuses on the

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substantively unclear."

119. *Toronto v Ontario*, *supra* note 63 at para 63: "Unwritten constitutional principles cannot serve as bases for invalidating legislation."

120. Flader, *supra* note 55 at 59.

121. See Lepofsky, "*Carter*," *supra* note 52 at 106: "The *Charter's* equality rights guarantee, if properly construed, has the potential to fully and effectively address equality claims. If the section 15 test were considered deficient, the proper solution would be to fix that test, rather than smuggling a second constitutional equality rights guarantee into section 7's principles of fundamental justice."

122. See Jennifer Koshan, "Redressing the Harms of Government Inaction: A Section 7 versus Section 15 Showdown" (2013) 22:1 Const Forum Const 31 at 41: "To the extent *Charter* claims have had more recent success under section 7 than section 15, one might speculate that the courts see some harms (e.g. those relating to physical health and safety) as more significant and worthy of *Charter* protection than others (e.g. those relating to stereotyping, prejudice and broader forms of disadvantage). In those cases where the two kinds of harm overlap, claimants may be well advised to focus on section 7 arguments…. More fundamentally, we must not lose sight of the obvious fact that section 15 protects against harms that are also constitutionally recognized and are of a qualitatively different nature than those protected by section 7."

123. Kaiser, *supra* note 30 at 152: "The *Charter* may still be strategically useable on occasion as a safeguard of individual rights in the courtroom or perhaps to instigate broader advocacy efforts in less legalistic settings."

124. Lora Patton, "These Regulations Aren't Just Here to Annoy You: The Myth of Statutory Safeguards, Patient Rights and *Charter* Values in Ontario's Mental Health System" (2008) 25 Windsor Rev Legal Soc Issues 9 at 29: "Despite the significant protections outlined in the MHA, those protections are often neglected or intentionally avoided in the day-to-day operation of hospitals."

"rights" of psychiatric detainees as well as how "rights" are expressed. CDS attends to the social and political meaning of the constitutionality of detention. By also concentrating on its structural and ideological influences, this paper aims to get at the contexts and underpinnings of psychiatric detention, towards meaningful change.

Piecemeal law reform and incrementalist *Charter* challenges risk making psychiatric detention more "therapeutic," obscuring ongoing violence under the guise of benevolent concern.[125] Challenges to some statutory provisions may inadvertently legitimatize other provisions. For example, after the Court of Appeal's decision in *JH*, Alberta amended its *MHA*, including the definition of "mental disorder."[126] At best, such reforms remain band-aid solutions, failing to address systemic barriers to voluntary, culturally safe, and accessible community resources.[127] A fundamental shift must characterize the availability of those supports as a right and not merely a benefit. Psychiatric detainees are the subjects of rights, and they are rights-holders, owed the structural support they need to flourish.

COVID-19 is an ideal crucible in which to explore the meaning, persistence, and apparent intractability of institutional violence and systemic discrimination against persons with mental health disabilities. The pandemic has confirmed the urgency of the need to depopulate unsafe congregate settings, including disability institutions, and ensure the provision of support in the community towards collective flourishing. Others have written persuasively about the urgent need to reduce the

125. Though not about psychiatric detention, see Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: UT Press, 2015).
126. Lorian Hardcastle, "Mixed reaction as Alberta moves to revamp mental health laws" (16 June 2020), online (blog): *The Lawyers Daily* <law360.ca> [perma.cc/C38W-HB9B].
127. *Ibid*.

number of persons detained in prisons[128] and immigration detention.[129] The institutional and custodial sites that continue to detain persons with disabilities, including psychiatric consumers or survivors, have become infectious hotspots.[130] Given the risk of transmission in congregate living environments, institutionalization is itself a public health concern and is "the problem—not people's frailty."[131]

Restrictions to personal liberty as a substitute for adequate prevention, including the inappropriate deployment of mental health legislation, raise equality and liberty considerations. Predictably, COVID-19 has been used as a pretext to roll back on rights for psychiatric detainees.[132] Ireland and the United Kingdom expanded legislative criteria to make it easier than ever to detain a person on a temporary basis and for longer during COVID-19.[133] CDS scholars have explored the amplification of coercive interventions (including through the operation of guardianship laws) against disabled people during COVID-19.[134] The CCB has used evidence

128. See Nova Scotia Advocate, "Open letter on the urgency of reducing incarceration during COVID-19 pandemic" (16 March 2020), online: *The Nova Scotia Advocate* <www.nsadvocate.org/2020/03/16/open-letter-on-the-urgency-of-reducing-incarceration-during-covid-19-pandemic> [perma.cc/7AKA-FRH2]; Martha Paynter, "Why some Canadian prisoners should be released during the coronavirus pandemic" (17 March 2020), online (blog): *The Conversation* <theconversation.com/why-some-canadian-prisoners-should-be-released-during-the-coronavirus-pandemic-133661> [perma.cc/3VZJ-SSCL]; Adelina Iftene, "COVID-19 In Canadian Prisons: Policies, Practices and Concerns" in Colleen M Flood et al, eds, *Vulnerable: The Law, Politics and Ethics of COVID-19* (Ottawa: University of Ottawa Press, 2020) 367; Justin Piché, Kevin Walby & Abby Deshman, "COVID's uneven spread in the federal penitentiary system has one solution" (3 February 2021), online (blog): *Policy Options* <policyoptions.irpp.org/magazines/february-2021/covids-uneven-spread-in-the-federal-penitentiary-system-has-one-solution/> [perma.cc/TY9F-4ZSL]: "If the Government of Canada takes steps to contain COVID, not people, the number of individuals at heightened risk of COVID-19 transmission inside Canada's federal penitentiaries can be significantly reduced. So, too, can the number of prisoners subjected to prolonged exposure to inhumane and arguably unconstitutional segregation-like conditions imposed in the name of coronavirus prevention."

129. See Hanna Gros & Samer Muscati, "Canada's immigration detainees at higher risk in pandemic," *Ottawa Citizen* (23 March 2020), online: <ottawacitizen.com/opinion/columnists/gros-and-muscati-canadas-immigration-detainees-at-risk-in-pandemic/> [perma.cc/EE35-65NS].

130. See C Tess Sheldon, Karen Spector & Sheila Wildeman, "Viruses feed on exclusion: Psychiatric detention and the need for preventative deinstitutionalization" (12 April 2020), online (blog): *Ricochet* <www.ricochet.media> [perma.cc/9YT5-DXBQ].

131. Seniors for Social Action Ontario, "Get Them Out! Keep Them Out!" (18 September 2021), online (pdf): *Seniors for Social Action Ontario* <d5bb3c6f-31a3-47ef-a85b-5c06ab03f844.filesusr.com/ugd/c73539_f15405246c7242768bb382843e16fe88.pdf> [perma.cc/Q935-48E8].

132. See Brendan Kelly," Emergency Mental Health Legislation in Response to the Covid-19 (Coronavirus) Pandemic in Ireland: Urgency, Necessity and Proportionality" (2020) 70 Intl JL & Psychiatry 101564.

133. See Anne-Maree Farrell & Patrick Hann, "Mental Health and Capacity Laws in Northern Ireland and the COVID-19 Pandemic: Examining powers, Procedures and Protections under Emergency Legislation" (2020) 71 Intl JL & Psychiatry 101602; Harvey Rees et al, "Use of the Coronavirus Act 2020 for de facto Psychiatric Detention Report" (2020) 24:3 Progress Neurology & Psychiatry 6.

134. See e.g. Claire Spivakovsky & Linda Steele, "Disability Law in a Pandemic: The Temporal Folds of Medico-legal Violence" (2021) 31:2 Soc & Leg Studies 175.

of a person's reluctance or inability to follow COVID-19 precautions to justify their continued detention.[135] This deployment of the *MHA* was a downstream solution and a poor substitute for adequate prevention, such as accessible and affordable housing.[136]

Resistance to such an integrated approach may result from presumptions that equality and liberty are "watertight compartments" or even incompatible with one another.[137] Mental health law is characterized by attempts to strike a balance between, on the one hand, respect for the right to self-determination and, on the other hand, protection from unwanted harm. These liberty and welfare interests are often—and unfortunately—pitted against each other. Instead, public mental health law illustrates the mutually supportive relationship between equality (through its attention to health disparities, vulnerability, and marginalization) and liberty (through its attention to health outcomes and the use of coercion).[138] That is, liberty and equality reinforce each other and have common grounding.[139]

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135. See Dhand et al, *supra* note 88 at 134. See also Jennifer A Chandler et al, "Weighing Public Health and Mental Health Responses to Non-Compliance with Public Health Directives in the Context of Mental Illness" in Colleen M Flood et al, *supra* note 28, 433 at 442: "Under current interpretations of Ontario's mental health legislation, it appears that the failure, due to mental illness, of an uninfected person to follow public health advice would only rarely be sufficient on its own to satisfy the criteria for involuntary hospitalization. However, from the public health perspective, the failure to follow preventive measures or to self-isolate where infection is known or suspected poses risks that justify enforceable restrictions on the liberties of the general population."

136. *NH (Re)*, 2020 CarswellOnt 7012, 2020 CanLII 34747 (ON Consent & Capacity Board): "The panel thought that not following precautions for Covid-19 was a significant risk for NH and was likely to cause serious physical impairment of NH if she were not in hospital. The panel thought that there could be consequences because of this behaviour to NH and possibly to others. The risk was greater as NH lived in the shelter system. See also *BD (Re)*, 2020 CarswellOnt 6318, 2020 CanLII 32317 (ON Consent & Capacity Board); *JM (Re)*, 2020 CanLII 34250 (ON Consent & Capacity Board); *TM (Re)*, 2020 CarsellOnt 6317, 2020 CanLII 32318 (ON Consent & Capacity Board).

137. See Nico Vorster, "Liberty and Equality: A Critical Response to the Debate Between James P Sterba and Jan Narveson" (2012) 31:2 South African J Philosophy 433; Danielle Allen, "Liberty, equality aren't mutually exclusive," *Washington Post* (17 October 2014), online: <www.washingtonpost.com/opinions/liberty-equality-arent-mutually-exclusive/2014/10/17/d9df36ba-55fb-11e4-809b-8cc0a295c773_story.html> [perma.cc/Z2PH-NRQ6].

138. See C Tess Sheldon, "Public Mental Health Law" in Tracey Bailey, C Tess Sheldon & Jacob Shelley, eds, *Public Health Law and Policy in Canada*, 4th ed (Markham: Lexis Nexis Canada, 2020).

139. Vorster, *supra* note 137.