INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: THE ROLE OF INSTITUTIONAL PSYCHIATRY IN THE SUPPRESSION OF POLITICAL DISSENT

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For many years, institutional psychiatry was a major tool in the suppression of political dissent. Moreover, it appears painfully clear that, while the worst excesses of the past have mostly disappeared, the problem is not limited to the pages of history. What is more, the revelations of the worst of these abuses (and the concomitant rectification of many of them) may, paradoxically, have created the false illusion that all the major problems attendant to questions of institutional treatment and conditions in these nations have been solved. This is decidedly not so.

Remarkably, the issue of the human rights of persons with mental disabilities had been ignored for decades by the international agencies vested with the protection of human rights on a global scale. Within the legal literature, it appears that the first time disability rights were conceptualized as a human rights issue was as recently as 1993 when, in a groundbreaking article, Eric Rosenthal and Leonard Rubenstein first applied international human rights principles to the institutionalization of people with mental disabilities.

For people with mental disabilities, in particular, the development of human rights protections may be even more significant than for people with other disabilities. Like people with other disabilities, people with mental disabilities face degradation, stigmatization, and discrimination throughout the world today. But unlike people with other disabilities, many people with mental disabilities are routinely confined, against their will, in institutions, and deprived of their freedom, dignity, and basic human rights. People with mental disabilities who are fortunate enough to live outside of institutions often remain imprisoned by the social isolation they experience, often from their own families. They are not included in educational programs, and they face attitudinal barriers to employment because they have not received the education and training needed to obtain employment or because of discrimination based

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on unsubstantiated fears and prejudice. Only recently have disability discrimination laws and policies in the United States and elsewhere focused on changing such attitudes and promoting the integration of people with disabilities into our schools, neighborhoods, and workplaces.

The question remains, however: to what extent has institutional, state-sponsored psychiatry been used as a tool of political suppression, and what are the implications of this pattern and practice? After an Introductory section (Part I), I discuss, in Part II, the first revelations of the dehumanization inflicted on persons with mental disabilities, primarily (but not exclusively) in Soviet Bloc nations. In Part III, I discuss developments after these revelations were publicized. In Part IV, I weigh the extent to which the post-revelation reforms have been effective and meaningful. In Part V, I explain the meanings of sanism and pretextuality, and discuss how they relate to the topic at hand. Then, in Part VI, I raise questions that have not yet been answered, and that, I believe, should help set the research agendas of those thinking about these important issues.

I. *Introduction*

Writing several years ago about the need for enforcement of international human rights protections against political abuse, Professor George Alexander concluded that "psychiatric incarceration may occasion a greater intrusion of the rights of the politically unpopular than mere jailing."[1] He came to this finding by way of his consideration of the "unique role" of state psychiatry "in discrediting opinion and dehumanizing those with whom one disagrees."[2]

This is a powerful charge and is one that might appear puzzling to many readers. Because psychiatric intervention is medical treatment, we assume that it has been undertaken for benevolent purposes. Indeed, in rejecting the appellant's argument that the burden-of-proof in involuntary civil commitment cases should be "beyond a reasonable doubt" (the same standard used in criminal cases in the US), the US Supreme Court made it clear that it saw a significant difference between the loss of liberty in a criminal case, and the loss of liberty in a civil commitment case:

> Even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the

[1] George Alexander, *International Human Rights Protection Against Political Abuses,* 37 Santa Clara L. Rev. 387, 392 (1997).

[2] *Id.*

> patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. It is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. ...It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.[3]

Yet, if we are to consider the well-documented history of the use of state psychiatry in the Soviet bloc and in China, we are forced to confront the reality that, for many years, procedural safeguards such as these were totally absent, and institutional psychiatry was a major tool in the suppression of political dissent.[4] Moreover, it appears painfully clear that, while the worst excesses of the past have *mostly* disappeared,[5] the problem is *not* limited to the pages of history. What is more, the revelations of the worst of these abuses (and the concomitant rectification of many of them) may, paradoxically, have created the false illusion that all the major problems attendant to questions of institutional treatment and conditions in these nations have been solved. This is decidedly not so.[6]

Remarkably, the issue of the human rights of persons with mental disabilities had been ignored for decades by the international agencies vested with the protection of

[3] Addington v. Texas, 441 U.S. 418, 429-430 (1979); *see generally* 1 Michael L. Perlin: Mental Disability Law: Civil and Criminal § 2C-5.1a, at 395-400 (2nd ed. 1998). I critique what I characterize as the "pretextual assumptions" of *Addington* in Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 95-96 (2000) [hereinafter Perlin, THP]. On the meaning of "pretextuality" in this context, *see infra* Part V.

[4] As Richard Bonnie explains:

> Psychiatric incarceration of mentally healthy people is uniformly understood to be a particularly pernicious, form of repression, because it uses the powerful modalities of medicine as tools of punishment, and it compounds a deep affront to human rights with deception and fraud. Doctors who allow themselves to be used in this way (certainly as collaborators, but even as victims of intimidation) betray the trust of society and breach their most basic ethical obligations as professionals.

Richard Bonnie, *Political Abuse of Psychiatry in the Soviet Union and in China: Complexities and Controversies,* 30 J. Amer. Acad. Psychiatry & L. 136, 136 (2002).

[5] But not entirely. *See infra* text accompanying notes 84-90.

[6] Michael Perlin, *International Human Rights and Comparative Mental Disability Law: the Universal Factors,* Syracuse J. Int'l L. & Commerce (in press 2007).

human rights on a global scale.[7] Dr. Theresa Degener, a noted disability scholar and activist, thus observed that "drafters of the International Bill of Human Rights [IHBR] did not include disabled persons as a distinct group vulnerable to human rights violations," and that "none of the equality clauses of any of the three instruments of [the IHBR] mention disability as a protected category."[8]

Degener's writings reflect the change that has taken place in disability rights jurisprudence. In 2000, she stated further that "disability has been reclassified as a human rights issue," and that "law reforms in this area are intended to provide equal opportunities for disabled people and to combat their segregation, institutionalization and exclusion as typical forms of disability-based discrimination."[9]

To some extent, this new interest in human rights protections for people with disabilities tracks a larger international movement to protect human rights,[10] and appears to more precisely track C. Raj Kumar's observation that "the judicial protection of human rights and constitutionalization of human rights may be two important objectives by which the rule of law can be preserved and which may govern future human rights work."[11]

Within the legal literature, it appears that the first time disability rights was conceptualized as a human rights issue was as recently as 1993 when, in a groundbreaking article, Eric Rosenthal and Leonard Rubenstein first applied international human rights principles to the institutionalization of people with mental disabilities.[12] This article was relied on almost immediately by scholars and activists

[7] Text *infra* accompanying notes 8-20 is mostly adapted from MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS ch. 1 (2006).

[8] Theresia Degener, *International Disability Law—A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999,* 18 BERKELEY J. INTL. L. 180, 187 (2000). The three instruments are the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR).

[9] Degener, *supra* note 8, at 181.

[10] *See* B.G. Ramacharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 HUM. RTS. Q. 155 (1991). Ramacharan is former deputy UN high commissioner for human rights.

[11] C. Raj Kumar, *Moving Beyond Constitutionalization and Judicial Protection of Human Rights—Building on the Hong Kong Experience of Civil Society Empowerment,* 26 LOY. L.A. INT'L & COMP. L. REV. 281, 281-282 (2003).

[12] Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy under the Principles for the Protection of Persons with Mental Illness,* 16 INT'L J.L. & PSYCHIATRY 257 (1993).

studying the human rights implications of mental disability laws in Japan[13] and in Uruguay.[14]

For people with mental disabilities, in particular, the development of human rights protections may be even more significant than for people with other disabilities. Like people with other disabilities, people with mental disabilities face degradation, stigmatization, and discrimination throughout the world today.[15] But unlike people with other disabilities, many people with mental disabilities are routinely confined, against their will, in institutions, and deprived of their freedom, dignity, and basic human rights. People with mental disabilities who are fortunate enough to live outside of institutions often remain imprisoned by the social isolation they experience, often from their own families. They are not included in educational programs, and they face attitudinal barriers to employment because they have not received the education and training needed to obtain employment or because of discrimination based on unsubstantiated fears and prejudice. Only recently have disability discrimination laws and policies in the United States and elsewhere focused on changing such attitudes and promoting the integration of people with disabilities into our schools, neighborhoods, and workplaces.[16]

I believe that the omnipresent deprivations of freedom, dignity, and human rights are the product of what I refer to as *sanism* and what I refer to as *pretextuality.* I define

[13] *See* Pamela Schwartz Cohen, *Psychiatric Commitment in Japan: International Concern and Domestic Reform,* 14 UCLA PAC. BASIN L. J. 28, 35 n.48 (1995).

[14] *See* Angelika C. Moncada, *Involuntary Commitment and the Use of Seclusion and Restraint in Uruguay: a Comparison with the United Nations Principles for the Protection of Persons with Mental Illness,* 25 U. MIAMI INTER-AM. L. REV. 589, 591 n.6 (1994).

[15] *See* City of Cleburne v. Cleburne Living Center, 573 U.S. 432, 462 (1985) (Marshall, J., dissenting in part), arguing that "The mentally retarded have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque," and describing a regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.

[16] *See e.g.,* Michael L. Perlin, *"What's Good Is Bad, What's Bad Is Good, You'll Find out When You Reach the Top, You're on the Bottom:" Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind,"?* 35 U. MICH. J. L. REF. 235 (2001-2002)*;* Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More:" Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53 (2000); Michael L. Perlin,*"For the Misdemeanor Outlaw" The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities,* 52 ALABAMA L. REV. 193 (2000); Michael L. Perlin,*"Their Promises of Paradise:" Will Olmstead v. L.C. Resuscitate The Constitutional Least Restrictive Alternative Principle in Mental Disability Law?,* HOUSTON L. REV. 999 (2000) [hereinafter Perlin, *Paradise*]*,* all discussing the Americans with Disabilities Act, *see* 42 U.S.C. §§ 12101 et seq.

sanism as an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry, that infects jurisprudence and lawyering practices, that is largely invisible and largely socially acceptable, that is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of a false "ordinary common sense" and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.[17] And I define *pretextuality* as the ways in which courts accept—either implicitly or explicitly—testimonial dishonesty and engage similarly in dishonest and frequently meretricious decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.[18] I do not believe we can make any sense of the phenomena that are at the heart of this paper without seriously considering the pernicious impact of sanism and pretextuality on all of mental disability law.[19]

It is clear that, within the past decade, there has been an explosion of interest in the area of human rights and mental disability law[20]—by academics, practitioners, advocates, and self-advocates.[21] And, importantly, organizations such as Amnesty International and the Helsinki Committees have finally—if tardily— recognized that violations of persons' mental health rights are violations of human rights.[22]

[17] Perlin, THP, *supra* note 3, at 21-58.

[18] *Id*. at 59-76.

[19] *See, e.g.,* Michael L. Perlin, *She Breaks Just like a Little Girl: Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense,*" 10 Wm. & Mary J. Women & L. 1, 6 n.188 (2003); *see generally infra* Part V.

[20] *See, e.g.,* Michael L. Perlin, *Things Have Changed: Looking at Non-institutional Mental Disability Law Through the Sanism Filter,* 46 N.Y.L. Sch. L. Rev. 535, 539 (2002-2003) discussing the recent "explosion of case law and commentary "in this area of the law; *see also* Arlene S. Kanter, *The Globalization of Disability Rights Law,* 30 Syr. J. Int'l L. & Comm . 241, 268 (2003) noting that in recent years the situation has changed dramatically as "the principle of non-discrimination and equality for people with disabilities has entered center stage in the international arena."

[21] *See generally*, 1-5 Perlin, *supra* note 3; Perlin, THP, *supra* note 3; Michael L. Perlin, Mental Disability Law: Cases and Materials (2nd ed. 2005).

[22] Symposium Transcript, *The Application of International Human Rights Law to Institutional Mental Disability Law* 21*,* N.Y.L. Sch. J. Int'l & Comp. L. 387, 391 (2002) (Comments of Eric Rosenthal):

> I began my research... by examining the human rights studies of non-governmental organizations such as Human Rights Watch and Amnesty International. I also looked at the U.S. Department of State's Country Reports on Human Rights Practices. What I found is shocking: those human rights organizations and human rights reports criticized governments when political dissidents were put in psychiatric facilities, but they did not speak out about the abuses against other people who may or may not have mental disabilities.

The question remains, however: to what extent has institutional, state-sponsored psychiatry been used as a tool of political suppression, and what are the implications of this pattern and practice? Even though the worst excesses of Soviet-sanctioned political suppression came to an end with the dissolution of the Soviet empire, the problem remains a serious one in other nations (most importantly, China). Just as important, the pervasive impact of sanism and pretextuality continue to, globally, contaminate public psychiatric practice. This contamination is particularly corrosive because the dramatic and well-publicized cessation of the Soviet bloc's *political* abuses have lulled us into a false consciousness through which we inaccurately believe that the underlying problems have disappeared. They have not.

This Article will proceed in the following manner. In Part II, I will discuss the first revelations of the "dehumanization" referred to by Professor Alexander. In Part III, I will discuss developments after these revelations were publicized. In Part IV, I will weigh the extent to which the post-revelation reforms have been effective and meaningful. In Part V, I will elaborate upon the meanings of "sanism "and "pretextuality," and discuss how they relate to the topic at hand. Then, in Part VI, I will raise questions that have not yet been answered, and that, I believe, should help set the research agendas of those thinking about these important issues.

II. *The First Revelations*

The history of the use of institutional psychiatry as a political tool was documented by Michel Foucault 40 years ago.[23] Foucault examined the expanded use of the public hospital in France in the 17th century, and concluded that "confinement [was an] answer to an economic crisis...reduction of wages, unemployment, scarcity of coin."[24] By the 18th century, the psychiatric hospital—a place of "doomed and despised idleness"[25]—satisfied "the indissociably economic and moral demand for confinement."[26]

See also, Krasimir Kanev, *State, Human Rights, and Mental Health in Bulgaria,* 21 N.Y.L. Sch. J. Int'l & Comp. L. 435, 435 (2002). Amnesty International first involved itself in this issue in Bulgaria in 2001.

[23] Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason 46-57 (Richard Howard trans. 1965).

[24] *Id.* at 47.

[25] *Id.* at 55.

[26] *Id.*

The first important modern revelations appear in Sidney Bloch and Peter Reddaway's shattering 1985 study, *Psychiatric Terror: How Soviet Psychiatry is Used to Suppress Dissent.*[27] Bloch and Reddaway documented the cases of nearly 500 political dissenters forcibly hospitalized from 1950-1970.[28] This was accomplished, in large part, by the Soviet approach to diagnosis (and its uniquely broad formulation of "schizophrenia," "a critical factor in labeling dissent as 'mental illness.'"[29] Bloch and Reddaway revealed that Soviet forensic psychiatrists diagnosed dissenters as expressing "paranoid reformist delusional ideas" in case reports;[30] the patient's conviction that "the state ... must be changed" was seen as an indicia of mental illness.[31] This tactic served three interrelated ends: It allowed the government to avoid the sorts of procedural safeguards that are normally associated with criminal prosecution.[32] Second, the stigma of a "mentally ill" label effectively discredits the politics of the person being so labeled.[33] Finally, because there were, at that time, no maximum terms to civil commitments,[34] confinement to psychiatric hospitals was indefinite.[35]

Studies such as the one done by Bloch and Reddaway awakened the West to the realities of the ways that psychiatry was being misused in the service of totalitarian political regimes, a misuse that continued until the 1990s. Of course, as Bonnie has noted,"The risks of mistake and abuse are further magnified, of course, in totalitarian societies, where the state has the power and inclination to bend all institutions to its will and, where the counterforces may be weak or nonexistent, depending on the country's pretotalitarian history."[36] Not coincidentally, reports such as this provided activists with the first important evidence that international human rights law was

[27] Sidney Bloch & Peter Reddaway, Psychiatric Terror: How Soviet Psychiatry is Used to Suppress Dissent 280-330 (1977).

[28] Sidney Bloch & Peter Reddaway, Soviet Psychiatric Abuse: The Shadow Over World Psychiatry (1984).

[29] Sidney Bloch & Peter Reddaway, *Psychiatrists and Dissenters in the Soviet Union,* in The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions 132, 147-158 (Eric Stover & Elena O. Nightingale eds., 1985).

[30] *Id.*

[31] *Id.*

[32] *Compare* Addington v. Texas, 441 U.S. 418 (1979).

[33] On how it is socially acceptable to use pejorative labels to describe and single out persons with mental illness, *see* Michael L. Perlin, "*Where the Winds Hit Heavy on the Borderline:" Mental Disability Law, Theory and Practice, Us and Them,* 31 Loyola L.A. L. Rev. 775, 786 (1998).

[34] *Compare* State v. Fields, 390 A. 2d 574 (N.J. 1978) (establishing right to periodic review of commitments at which state bears burden of proof); *see generally,* 1 Perlin, *supra* note 3, § 2C-6.5c, at 456-62.

[35] *See* Alexander, *supra* note 1, at 391.

[36] Bonnie, *supra* note 4, at 140.

potentially an important tool for countries "without democratic and constitutional systems because it may provide the only genuine safeguard against the abuse of persons with mental disabilities—abuse that may be based on political, social, or cultural grounds."[37]

By 1989, changes in the political climate in the Soviet Union led the Soviet government—over the objection of the psychiatric leadership[38]—to allow a delegation of psychiatrists and academics from the United States, representing the U.S. Government, to conduct extensive interviews of suspected victims of abuse and to make unrestricted site visits to hospitals selected by the delegation.[39] Reporting on this issue in 1999, Professors Richard Bonnie (one of the members of the delegation) and Svetlana Polubinskaya explained:

> The investigation by the U.S. delegation provided unequivocal proof that the tools of coercive psychiatry had been used, even in the late 1980s, to hospitalize persons who were not mentally ill and whose only transgression had been the expression of political or religious dissent. Most of the patients interviewed by the delegation had been charged with political crimes such as anti-Soviet agitation and propaganda or defaming the Soviet state. Their offenses involved behavior such as writing and distributing anti-Soviet literature, political organizing, defending the rights of disabled groups and furthering religious ideas.

[37] Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons With Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health,* 63 Md. L. Rev. 20, 21 (2004). *See also* Bonnie, *supra* note 4, at 140. "The Soviet experience was significant because it provided a vivid illustration of the risks associated with unchecked psychiatric power, and the importance of erecting institutional safeguards to minimize these risks in the context of involuntary hospitalization and treatment."

[38] Bloch and Reddaway explain that Soviet psychiatrists who rendered such diagnoses (referred to as "core psychiatrists") received many contingent benefits for cooperating with the authorities:

> The rewards of the good life include access to a variety of privileges and benefits not available to ordinary Soviet citizens. The core psychiatrist is likely to travel abroad, as a tourist or as an attendant at a conference, to have access to stores selling luxury goods at moderate prices, to have a country cottage, and to take vacations at special sanatoria. Their salaries are about three times higher in real terms than those of ordinary psychiatrists.

Bloch & Reddaway, *supra* note 27, at 322.

[39] Richard J. Bonnie & Svetlana V. Polubinskaya, *Unraveling Soviet Psychiatry,* 10 J. Contemp. Leg. Iss. 279, 279 (1999). *See also* Richard Bonnie, *Soviet Psychiatry and Human Rights: Reflections in the Report of the U.S. Delegation,* 18 Law, Med. & Health Care 123 (1990).

> Under applicable laws of Russia and the other former Soviet Republics, a person charged with crime could be subjected to custodial measures of a medical nature if the criminal act was proven and the person was found non-imputable due to mental illness.[40] Non-imputable offenders could be placed in maximum security hospitals (the notorious special hospitals) or in ordinary hospitals depending on their social dangerousness.[41]
>
> The delegation found that no clinical basis existed for the judicial finding of non-imputability in seventeen of these cases. In fact, the delegation found no evidence of mental disorder of any kind in fourteen cases. In all likelihood, these individuals are representative of many hundreds of others who were found non-imputable for crimes of political or religious dissent in the U.S.S.R., mainly between 1970 and 1990.[42]

Glumly, Bonnie and Polubinskaya concluded that this repressive use of psychiatry in Russia was made "inevitable"[43] by the "communist regime's intolerance for dissent, including any form of political or religious deviance, and by the corrosive effects of corruption and intimidation in all spheres of social life."[44] On this point, they indicted "a subset of Soviet psychiatrists[45] [who] knowingly collaborated with the KGB to subject mentally healthy dissidents to psychiatric punishment, in blatant violation of professional ethics and human rights."[46] In this respect, they concluded, "abuse of psychiatry in the Soviet Union had less to do with psychiatry per se than with the repressiveness of the political regime of which the psychiatrists were a part."[47]

[40] *See generally,* Jerry D. Baker, *Nonimputability in Soviet Criminal Law: The Soviet Approach to the Insanity Plea,* 11 Law & Psychol. Rev. 55 (1987).

[41] RSFSR arts. 58-61 (Criminal Code) (1962) reprinted in The Soviet Codes of Law 88-89 (Harold J. Berman & James W. Spindler trans., William B. Simons ed., 1980) Soviet Codes; RSFSR arts. 410-413 (Code of Criminal Procedure 1962) reprinted in Soviet Codes of Law, *id.* at 315-316.

[42] Bonnie & Polubinskaya, *supra* note 39, at 280-282.

[43] *Id.* at 283-284.

[44] *Id.*

[45] These were ones who were associated primarily with Moscow's Serbskii Institute for General and Forensic Psychiatry. *Id.*

[46] *Id.*

[47] *Id.* at 283-84 (most footnotes omitted). *See id.* at 284-285:

> The roots of the problem lie much deeper in the attitudes and training of Soviet psychiatrists, and in the role of psychiatry in Soviet society. Repression of political and religious dissidents was only the most overt symptom of an authoritarian system of psychiatric care in which an expansive and elastic view of mental disorder encompassed all forms of unorthodox thinking, and in which psychiatric diagnosis was essentially an exercise of social power.

Indeed, "psychiatry was a state institution," and "the social prestige of psychiatrists lay almost entirely in their role as agents of social control, and psychiatrists were more closely aligned with the police than with other specialties in medicine."[48]

More recent studies of other Soviet bloc nations revealed similar patterns of behavior. Krassimir Kanev, Bulgaria's leading human rights activist, has noted, "Observations show that in the absence of an accurate definition of 'danger,'[49] Bulgarian psychiatry, as well as the Bulgarian judiciary, combine clinical criteria with the values of society in an astonishing way."[50] A review of civil commitment in Romania reveals a practice that can only be characterized as macabre:

> During the Ceaucescu regime, Article 114 was used in conjunction with Decree Law 12, On the Medical Treatment of Dangerously Mentally Ill Persons, to systematically confine dissidents, on the recommendation of the State Prosecutor or health authorities, as mentally ill persons. Dissent, often expressed through the propagation of anti-state propaganda or illegal departure from the country,[51] was itself viewed as a symptom of severe mental illness.

[48] *Id.* at 287-288.

[49] On the multiple textures of the word "danger" in this context, *see* 1 Perlin, *supra* note 3, § 2A-4.1, at 92-101. To be subject to involuntary civil commitment, one must be seriously mentally ill, and, as a result of that mental illness, a likely danger to self or others. *See id.* § 2A-4.2, at 101-04. On the relationship between involuntary civil commitment and the United Nations' *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles)*, *see* Bruce Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law,* 21 N.Y.L. Sch. J. Int'l & Comp. L. 537, 556-559 (2002); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation,* 21 N.Y.L. Sch. J. Int'l & Comp. L. 469, 527-531 (2002).

[50] Kanev, *supra* note 22, at 439.

[51] Romania Decree Law 12. *See generally* International Association on the Political Use of Psychiatry, Information Bulletin No. 6 (Mar. 1983). Article 166 stated:

> Propaganda of a Fascist nature and propaganda against the socialist state, committed by any means in public, is punished by a sentence of imprisonment from 5 to 15 years and the forfeiture of certain rights. Propaganda or the undertaking of any action with the aim of changing the Socialist system or activities which could result in a threat to the security of the state will be punished by a sentence of imprisonment from 5 to 15 years and the forfeiture of certain rights.

Article 245 provided:

> Entering or leaving the country through illegal crossing of the frontier will be punished by a sentence of imprisonment from 6 months to 3 years. The acquisition of means or

> One psychiatrist in Romania, interviewed for this article, explained why, in his opinion, this had to be true:
>
> > Under Ceaucescu, political opponents could not exist.... In Ceaucescu's time, there was a man who said in the street with a banner, "Down with Ceaucescu." Strictly professionally speaking, it was difficult to believe that this was a real political opinion because it was so obvious that no one would allow him to express himself, so he had to be delusional and couldn't adjust. Real political opposition [sic] were subversive.[52]

Romania's characterization of individuals attempting to flee as mentally ill criminals reflected the former Soviet view that crossing the border is a sign of mental illness, as is distributing religious leaflets.[53] Reliance on such behaviors as the basis for a diagnosis of mental illness is problematic for both the patient and the psychiatrist. As Ochberg and Gunn have explained:

> The psychiatrist has a dilemma. If he accepts society's definition of madness without using his own separate criteria, he becomes a depository for all sorts of problems unrelated to medicine and he risks becoming an agent of society for the enforcement of contemporary mores. On the other hand, if he takes the opposite view to extremes, he ends up by refusing to treat any patient whose only symptoms are behavioral and who does not show organic changes.[54]

This state of affairs is not and was not limited to Russia and the Soviet Bloc. Robin Munro's monumental study of state psychiatry in China paints an equally bleak picture. Munro charged that Chinese state psychiatry engaged in what he characterized as hyper-diagnosis, or "the excessively broad clinical determination of

> instruments of the undertaking of measures from which it unequivocally follows that the offender intends to cross the frontier illegally will also be regarded as an attempt.

Sana Loue, *The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania: A Comparative Analysis,* 23 J. Legal Med. 65 (1996).

[52] *Id.*

[53] *Id*., quoting Thersa C. Smith & Thomas A. Ouszreuk. No Asylum: State Psychiatric Repression in the Former USSR 65 (1996).

[54] Frank M. Ochberg & John Gunn, *The Psychiatrist and the Policeman,* 10 Psych. Annals. 35 (1980).

mental illness,"[55] as reflected in:

> a tendency on the part of forensic psychiatrists to diagnose as severely mentally ill, and therefore legally non-imputable for their alleged offenses, certain types of dissident or nonconformist detainees who were perceived by the police as displaying a puzzling `absence of instinct for self-preservation 'when staging peaceful political protests, expressing officially banned views, pursuing legal complaints against corrupt or repressive officialdom, etc.[56]

Munro characterized another category of politically motivated ethical abuse that found in China as "severe medical neglect," resulting in "numerous mentally ill individuals being sent to prison as political 'counter-revolutionaries' and then denied all medical or psychiatric care for many years in an environment bound only to worsen their mental condition."[57] Here, he charged that China engaged in "the deliberate withholding of such care from political offenders whom the authorities had already clearly diagnosed as being mentally ill."[58]

Munro drew on empirical studies showing that of 222 cases examined in which diagnoses of schizophrenia were made, there were fifty-five cases of a political nature, and forty-eight cases involving "disturbances of social order."[59] From these statistics (comparing them to the cohort of those diagnosed with serious mental illness who had been charged with violent felonies), Munro concluded that "so-called political cases and also those involving disturbance of public order are evidently seen by China's legal-medical authorities as representing no less serious and dangerous a threat to society than cases of murder and injury committed by genuinely psychotic criminal offenders."[60]

[55] Robin Munro, *Judicial Psychiatry in China and Its Political Abuse,* 14 Colum. J. Asian L. 1, 26-27 (2000). As of the time of the writing of this Article, Munro was director of the Hong Kong office of Human Rights Watch; he subsequently was appointed to be senior research fellow at the Centre of Chinese Studies of the University of London.

[56] *Id.* at 26.

[57] *Id.* at 26-27.

[58] *Id.*

[59] *Id.* at 84.

[60] *Id.* at 84-85.

III. *Following the Revelations*

As indicated above, the publicity that accompanied the exposes of conditions in Russian psychiatric hospitals led to teams of investigators visiting Russia to confirm the initial evidence.[61] A 1989 U.S. delegation was followed by review team sent by the World Psychiatric Association in 1991.[62] At the same time, American representatives met with Soviet mental health professionals in the USSR Ministry of Foreign Affairs in an effort to seek cooperative solutions to the underlying problems.[63]

Soon thereafter, Russia adopted a new mental health law,[64] and in the subsequent two years, ten other former-Soviet bloc nations did the same.[65] At the same time, responding to growing concerns of the United Nations Human Rights Commission on the question of the protection of those detained on the grounds of mental illness (concerns spurred in large part by the revelations discussed in this Article),[66] the United

[61] *See* Bonnie, *supra* note 4, at 138: "One of the important purposes of mental health law reform in the 1960s and 1970s was to bring coercive psychiatry within reach of the rule of law."

[62] Bonnie & Polubinskaya, *supra* note 39, at 280.

[63] *Id.*

[64] *Id.* at 292; *see* Richard J. Bonnie, *Law of the Russian Federation on Psychiatric Care and Guarantees of Citizens' Rights in its Provision,* 27 J. Russian & E. European Psychiatry 69 (1994) (reprinting text of law).

[65] Bonnie & Polubinskaya, *supra* note 39, at 292-93.

[66] Moncada, *supra* note 14, at 591 n.5 (1994):

> The U.N. General Assembly acknowledged Human Rights Commission Resolution 10 A XXXIII (of March 11, 1977), requesting the Subcommission on Prevention of Discrimination and Protection of Minorities [hereinafter the Subcommission] study the problem of those detained on the grounds of mental illness with a view towards creating some guidelines for their protection. G.A. Res. 33/53, U.N. GAOR, 33d Sess., U.N. Doc. A/33/475, Dec. 14, 1978. The study by the Subcommission's Special Rapporteur, Erica-Irene A. Daes, revealed that:
>
> > (a) Psychiatry in some States of the international community is often used to subvert the political and legal guarantees of the freedom of the individual and to violate seriously his human and legal rights; (b) In some States, psychiatric hospitalization and treatment is forced on the individual who does not support the existing political régime of the State in which he lives; (c) In other States persons are detained involuntarily and are used as guinea pigs for new scientific experiments; and (d) Many patients in a great number of countries who should be in the proper care of a mental institution because they are a danger to themselves, to others, or to the public, are living freely and without any supervision.
> >
> > Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder,

Nations adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care in 1991[67] (the MI Principles).[68]

These Principles, establishing minimum human rights standards of practice in the mental health field, have been recognized as "the most complete standards for the protection of the rights of persons with mental disability at the international level,"[69] and they have been used by international oversight and enforcement bodies as an authoritative interpretation of the requirements of the ICESCR and the American Convention on Human Rights.[70]

The MI Principles establish standards for treatment and living conditions within psychiatric institutions, and create protections against arbitrary detention in such facilities. The MI Principles recognize that "[e]very person with a mental illness shall have the right to live and work, to the extent possible in the community." They have major implications for the structure of mental health systems since they recognize that "[e]very patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives."[71]

> U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Report prepared by Erica-Irene A. Daes at 28, U.N. Doc. E/CN.4/Sub.2/17/Rev.1 (1983) [hereinafter Daes Report].
> The Daes Report incorporates replies submitted by various governments and non-governmental organizations. ... In this vein, the reply by Amnesty International underlined the abuse of psychiatry for political purposes and present[ed] concrete complaints concerning the treatment of prisoners of conscience and other persons inside psychiatric hospitals in the Soviet Union.

Daes Report, *id*. at 16.

[67] Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 46th Sess., Supp. No. 49, Annex, at 188-92, U.N. Doc. A/46/49 (1991).

[68] On the significance of soft law in the development of international human rights, *see* Christian Courtis, *Disability Rights in Latin America and International Cooperation,* 9 Sw. J.L. & Trade Am. 109 (2002-2003). Soft law may guide the interpretation, elaboration, or application of hard law; constitute norms that aspire to harden; serve as evidence of hard law; exist in parallel with hard law obligations and act as a fall-back; or serve as a source of relatively hard obligations through acquiescence or estoppel. *See* Jose Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences,* 38 Tex. Int'l L.J. 405, 421 (2003).

[69] Victor Rosario Congo v. Ecuador, Case 11.427, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc.7 rev. at 475, para. 111 (1998).

[70] Rosenthal & Sundram, *supra* note 49, at 488.

[71] *Id.* at 489, citing MI Principles 3, 7(1), 8(2), 15,15,18, & 24.

The MI Principles also protect a broad array of rights within institutions, including protections against harm, "including unjustified medication, abuse by other patients, staff, or others…," and require the establishment of monitoring and inspection of facilities to ensure compliance with the Principles. They require treatment "based on an individually prescribed plan," and they require that "[t]he treatment of every patient shall be directed towards preserving and enhancing personal autonomy." The MI Principles establish substantive standards and procedural protections against arbitrary detention in a psychiatric facility.[72]

Although the MI Principles do not speak specifically to the issue of psychiatry-as-a-tool of state oppression, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[73] has been interpreted in that specific context.[74] Article 5(1) of the ECHR lists the circumstances in which governments may justifiably deprive persons of their liberty and includes a provision referring to "persons of unsound mind,"[75] requiring such a finding so as to justify confinement in a

[72] *Id* .citing MI Principles 9(2), 9(4), & 22.

[73] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 1, 1998, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited September 25, 2006).

[74] On the relationship between the MI Principles and the ECHR, *see* Rosenthal & Sundram, *supra* note 49, at 530:

> Jurisprudence from the European Court of Human Rights demonstrates how similar many of the provisions of the MI Principles are to the requirements of convention-based law. In some cases, convention-based rights under the...ICCPR or the European Convention on Human Rights (ECHR) may provide greater protections than do the MI Principles .... The line of cases established under article 5 of the ECHR helps clarify many points not specifically mentioned in the MI Principles.

[75] Article 5— Right to Liberty and Security:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;
> b. the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment (sic) of any obligation prescribed by law;
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

mental hospital, but leaving the term undefined.[76] In one of the leading European civil commitment cases, however, the European Court of Human rights has said specifically this Article would not permit the detention of a person simply because "his views or behaviour deviate from the norms prevailing in a particular society."[77]

In short, the promulgation of the MI principles has the potential to be an important bulwark against the sort of governmental misconduct that is exemplified by the Soviet experience. This does *not* answer the question, however, of whether that potential has been fulfilled.

IV. *Law-in-Action vs. Law-on-the-Books*: *Have the Revelations Led to Meaningful Change?*

The dichotomy between "law on the books" and "law in action," is a gap that has plagued American mental disability law since it began. Cases are decided on the Supreme Court level, yet are not implemented in the states. The United States Supreme Court has articulated sophisticated doctrine, for example, by mandating dangerousness as a prerequisite for an involuntary civil commitment finding, yet trial courts ignore that doctrine. The Supreme Court has issued elaborate guidelines to be used in cases of criminal defendants who will likely never regain their competence

> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

See European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No.5), 213 U.N.T.S 222, signed at Rome, Nov. 4, 1950, entered into force Sept.3, 1953, as amended by Protocol No. 11, entered into force Nov. 1, 1998. Reprinted in, Michael L. Perlin et al., International Human Rights and Comparative Mental Disability Law: Documents Supplement 161 (2006).

[76] *See generally,* Gostin & Gable, *supra* note 37, at 65-66.

[77] Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. Series A (1979) (Cf), at 16; O'Connor v. Donaldson, 422 U.S. 563, 575 (1975):

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

to stand trial, yet, nearly thirty years later, half of the fifty states still ignore these standards.[78]

To what extent does this same gap continue in the nations that are the subject of this paper? Regrettably, conditions in many Eastern European facilities are still so substandard as to violate fundamental international human rights.[79] Consider first a report by Amnesty International condemning conditions in Romanian psychiatric hospitals:

> Many of the people placed in psychiatric wards and hospitals throughout the country apparently do not suffer an acute mental disorder and many do not require psychiatric treatment. Their placement in psychiatric hospitals cannot be justified by the provisions of the Law on Mental Health and they should also be considered as people who have been arbitrarily deprived of their liberty. They had been placed in the hospital on non-medical grounds, apparently solely because they could not be provided with appropriate support and services to assist them and/or their families in the community. Often, because of their disability they are more vulnerable to abuse, which apparently is not taken into consideration by hospital staff as in most places such residents were not segregated from people who have different needs for care.[80]

Similarly, when Amnesty International investigated conditions in Bulgaria, it documented cases of women locked in a cage outside one institution. The cage was full of urine and feces and the women covered in filth. One woman was unclothed on the lower half of her body and many sores were visible on her skin.[81] Other like conditions have been graphically and relentlessly documented throughout all of Eastern

[78] Michael L. Perlin, *Chimes of Freedom: International Human Rights and Institutional Mental Disability Law,* 21 N.Y. L. Sch. J. Int'l & Comp. L. 423, 428-429 (2002), citing Perlin, THP, *supra* note 3, at 59-76; Grant Morris & J. Reid Meloy, O*ut of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants,* 27 U.C. Davis L. Rev. 1 (1993); Perlin, *Paradise*, *supra* note 16, at 1046-1047.

[79] *See* Perlin, *supra* note 6, at 849-859, 859-863, & 873-886.

[80] Amnesty International, Romania, *Memorandum to the Government Concerning Inpatient Psychiatric Treatment* (2004), *available at* http://www.web.amnesty.org/library/print/engeur390032004 (last visited September 25, 2006).

[81] *Amnesty International press release, Bulgaria: Disabled Women Condemned to "Slow Death," AI-index: EUR 15/002/2001.*

Europe;[82] Oliver Lewis's extensive investigations of a cluster of Eastern European nations found, by way of example, persistent and unrelenting violations of Article 5 of the ECHR, noting that in many nations, public psychiatric hospital staff were not even aware of the existence of these international human rights provisions.[83]

Conditions in China's institutions continue to violate international law. Writing soon after Munro's article was published, Dr. Paul Appelbaum, former president of the American Psychiatric Association, concluded that "At least some of the evidence cited by Munro suggests deliberate use by psychiatrists of diagnoses of mental disorders to facilitate the system's efforts to crush challenges to its social and political domination of the populace."[84] Since that time, there has been much written about the treatment of persons adhering to the teachings of Falun Gong:[85]

> After 1999, Falun Gong members continued to protest as some of the more deplorable acts perpetrated against the group came to light and international attention focused on the group's plight. In addition to continuing reports that thousands of Falun Gong were being held in forced labor or "re-education" camps, it was revealed that stalwart Falun Gong members who had protested on numerous occasions were sent to a psychiatric hospital not due to mental illness, but for

[82] Oliver Lewis, *Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise*, 8 J. Mental Health L. 293, 294 (2002).

[83] *Id.; See also* Mental Disability Advocacy Center, *Mental Health Law of the Kyrgyz. Republic and Its Implementation,* § 4.1.1 (2004) report prepared by Dr. Arman Vardanyan, Deborah A. Dorfman, & Craig Awmiller), MDAC Report *available at http://www.eurasiahealth.org/health/resources/81502/* (last visited September 25, 2006). *See also* Perlin, *supra* note 6, at manuscript at 7 n.24:

> On a site visit to a Nicaraguan public hospital in 2003, I observed male patients walking on wards totally naked (with both male and female staff present). Female patients were brought outside the hospital for lunch. They were wearing "doctor's office" type gowns, exposing their breasts and buttocks. Food was passed around in large bowls, and there were no utensils. Each patient had to reach in and scoop out food (some sort of vegetable stew) with her hands.

[84] Paul S. Appelbaum, *Law & Psychiatry: Abuses of Law and Psychiatry in China,* 52 Psychiat. Serv. 1297 (2001).

[85] Falun Gong is a movement that describes itself as emphasizing five sets of yoga-type exercises designed to "cultivate" one's mind, body, and spirit and thereby gain access to one's inner energy. *See* Darryll K. Jones, *The Neglected Role of International Altruistic Investment in the Chinese Transition Economy,* 36 Geo. Wash. Int'l L. Rev. 71, 132 n.232 (2004).

[86] Mark J. Leavy, *Discrediting Human Rights Abuse as an "Act of State": A Case Study on The Repression of the Falun Gong in China and Commentary on International Human Rights Law in*

> "re-education." The practice of imprisoning the more recalcitrant members of the Falun Gong in psychiatric hospitals has come under increased international scrutiny and criticism.[86]

A recent and exhaustive report by Human Rights Watch concludes that psychiatric incarceration is still used for political purposes in China, and that conditions parallel those found in the Soviet Union in the 1970s and 1980s.[87] Note the authors of the report:

> The challenge for the international psychiatric community now is to find ways of exerting its influence to ensure that China's secretive... system and other custodial psychiatric facilities around the country can no longer be used by the security authorities as a long-term dumping ground for political and religious nonconformists who, for one reason or another, they find it awkward or inconvenient to bring to criminal trial.... Advocacy efforts by local and international psychiatric bodies would also greatly assist in encouraging individual Western governments and the European Union to take up the issue, notably by placing the issue of political psychiatric abuse in China on the formal agenda of the various bilateral human-rights dialogue sessions that have become, in recent years, a central and regular feature of Sino-Western relations.[88]

Thus, although the use of psychiatry as a tool of political suppression may no longer be the problem that it was in the 1980's,[89] violations of international human rights laws

U.S Courts, 35 Rutgers L.J. 749, 760-761 (2004); *See also* Christopher Chaney, *The Despotic State Department in Refugee Law: Creating Legal Fictions to Support Falun Gong Asylum Claims,* 6 Asian-Pac. L. & Pol'y J. 4 (2005): "According to the Falun Gong, hundreds of its practitioners have been confined to psychiatric institutions and forced to take medications or undergo electric shock treatment against their will." And *see* Theresa Chu, *Justice Against Crime of Genocide,* paper presented at the International Academy of Law and Mental Health, Paris, July 2005.

[87] *Dangerous Minds: Political Psychiatry in China Today and its Origins in the Mao Era, available at* http://hrw.org/reports/2002/china02 (last visited September 25, 2006).

[88] *Id. See also* a document by Physicians for Human Rights, *Dual Loyalty & Human Rights in Health Professional Practice: Proposed Guidelines and Institutional Mechanisms* reprinted and *available at* http://www. phrusa.org/healthrights/dl.html (last visited September 25, 2006).

[89] *But see supra* text *accompanying* notes 85-87, and *infra* notes 91 (citing to continued abuses in Russia), and 115 (discussing the institutionalization of members of the Falun Gong in China).

continue unabated.[90] Again, according to Richard Bonnie: "Notwithstanding the 1992 mental health legislation, coercive psychiatry remains largely unregulated and shaped by the same tendencies toward hyperdiagnosis and overreliance on institutional care that characterized the communist era."[91]

V. *Sanism and Pretextuality*

We cannot underestimate the extent of our societal blindness to the ongoing violations of international human rights law in the context of the institutional commitment and treatment of persons with mental disabilities. Notwithstanding a robust set of international law principles, standards and doctrines—most based on American constitutional law decisions and statutory reforms of the past three decades[92]—people with mental disabilities live in some of the harshest conditions that exist in any society.[93] As previously noted, these conditions are the product of neglect, lack of legal protection against improper and abusive treatment, and primarily, the social attitudes of sanism and pretextuality.[94]

In the past, I have written regularly about these attitudes in *domestic* contexts so as to "seek to expose their pernicious power, the ways in which [they] infect judicial decisions, legislative enactments, administrative directives, jury behavior, and public attitudes, the ways that these factors undercut any efforts at creating a unified body

[90] *See e.g.,* Winick, *supra* note 49, at 538 (discussing current conditions in facilities in Hungary, and concluding that they are "reminiscent of the state of American mental health facilities thirty-five or more years ago" (and *see also id.*: "many diagnosed as mentally disabled are permanently institutionalized in Hungarian psychiatric facilities, although perhaps 50% of them could live safely in the community with suitable care."). *See generally,* PERLIN, *supra* note 7 at 844-846.

[91] Bonnie, *supra* note 4, at 142. Recent revelations make clear that this is not simply a relic of the past. *See* Peter Finn, *In Russia, Psychiatry Is Again a Tool Against Dissent,* WASHINGTON POST, Sept. 30, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901592_pf.html (last visited September 9, 2006).

[92] *See generally* PERLIN, *supra* note 7, at ch. 2.

[93] *See, e.g.,* MENTAL DISABILITY RIGHTS INTERNATIONAL, HUMAN RIGHTS & MENTAL HEALTH: MEXICO (2000); MENTAL DISABILITY RIGHTS INTERNATIONAL, CHILDREN IN RUSSIA'S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM (1999); MENTAL DISABILITY RIGHTS INTERNATIONAL, HUMAN RIGHTS & MENTAL HEALTH: HUNGARY (1997); MENTAL DISABILITY RIGHTS INTERNATIONAL, HUMAN RIGHTS & MENTAL HEALTH: URUGUAY (1995); ERIC ROSENTHAL ET AL., NOT ON THE AGENDA: HUMAN RIGHTS OF PEOPLE WITH MENTAL DISABILITIES IN KOSOVO (2002).

[94] *See supra* text accompanying notes 17-19.

of mental disability law jurisprudence, and the ways that these factors contaminate scholarly discourse and lawyering practices alike."[95] There is no longer any question in my mind that these same factors infect international mental disability law practice in the same ways that they infect domestic practice.[96]

In a recent manuscript, I concluded that an examination of comparative mental disability law revealed at least five dominant, universal, core factors[97] that reflected "the shame that the worldwide state of mental disability law brings to all of us who work in this field. Each is tainted by the pervasive corruption of sanism that permeates all of mental disability law. Each reflects a blinding pretextuality that contaminates legal practice in this area."[98] This same sanism is, in great part, to blame for the societal disinterest that allows the conditions discussed here to fester.

[95] Michael L. Perlin, "*Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did,* 10 J. Contemp. Legal Issues. 3, 26 (1999). I address these issues extensively in Perlin, THP, *supra* note 3, and in a series of law review articles. *See, e.g.,* Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance,* 19 Bull. Am. Acad. Psychiatry & L. 131 (1991); Michael L. Perlin, *On "Sanism,"* 46 SMU L. Rev.(1992) 373; Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency,* 47 U. Miami L. Rev. 625 (1993); Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law,* 20 N. Eng. J. Crim. & Civ. Confinement 369 (1994); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J.L. & Health 15 (1993-1994); Michael L Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 Notre Dame J. L. Ethics & Pub. Pol' y 239 (1994); Perlin, *supra* note 19; Michael L. Perlin, *There's No Success Like Failure and Failure's No Success at All: Exposing the Pretextuality of Kansas v. Hendricks,* 92 Nw. U. L. Rev 1247 (1998); Perlin, *supra* note 16; Michael L. Perlin, *You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching*, 9 Clinical L. Rev. 683 (2003) [hereinafter Perlin, *Lepers and Crooks*]; Michael L. Perlin, *And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases,* 42 San Diego L. Rev. 735 (2005) [hereinafter Perlin, *Best Friend*].

[96] I discuss this issue extensively in Michael L. Perlin, "The Chimes of Freedom Flashing": Mental Disability and International Human Rights (book manuscript in progress); *see also* Perlin, *supra* note 7, at ch. 6.

[97] (1) Lack of comprehensive legislation to govern the commitment and treatment of persons with mental disabilities, and failure to adhere to legislative mandates; (2) Lack of independent counsel and lack of consistent judicial review mechanisms made available to persons facing commitment and those institutionalized; (3) A failure to provide humane care to institutionalized persons; (4) Lack of coherent and integrated community programs as an alternative to institutional care, and (5) Failure to provide humane services to forensic patients. *See* Perlin, *supra* note 7, at ch. 8.

[98] Perlin, *supra* note 6, at manuscript at 1.

The United Nations has recently published a Convention on the Rights of Persons with Disabilities.[99] that would "give disability rights organizations a specific tool for promoting human rights for persons with disabilities in domestic contexts and to their own government."[100] That Convention would not necessarily be a full palliative for the problems discussed in this paper, but it would certainly be a step in the right direction.

VI. *Unanswered Questions*

In their analysis of the Russian experience, Bonnie and Polubinskaya summed up their findings in this manner:

> At bottom, the human rights problem raised by these prosecutions is the criminalization of dissent; repression of dissent is problematic whether the dissenter is sent to jail or to a psychiatric hospital. However, it would be a mistake to regard the hospitalization of dissidents as only a derivative problem. To hospitalize a dissenter who is not mentally ill on grounds of non-imputability combines repression with moral fraud and magnifies the violation of human rights; it demeans the dissenter's dignity, devalues his or her message and establishes the legal authority for an indeterminate period of what can only be called psychiatric punishment.[101]

What is clear now is that the heroic exposes discussed in this Paper—while having a major impact on the political use of psychiatry in Russia and the Soviet bloc nations—have not solved many of the underlying problems. As Robin Munro's work teaches us,[102] political dissidents and outsiders in China still face punishment in the guise of

[99] http://www.un.org/esa/socdev/enable/rights/ahc8adart.htm (last visited, October 14, 2006). For a thoughtful and comprehensive predecessor article, *see* Aaron Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities,* 41 STAN. J. INT'L L. 181 (2005).

[100] Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform,* in DISABILITY RIGHTS LAW & POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES 3, 18 (Mary Lou Breslin & Silvia Yee eds., 2002).

[101] Bonnie & Polubinskaya, *supra* note 39, at 280-822.

[102] *See supra* text accompanying notes 55-60.

psychiatric hospitalization. And, moreover, the amelioration of conditions in Russia, while certainly more than cosmetic, have done little or nothing to improve the plight of those persons institutionalized for *non*-political reasons in many of the former Soviet bloc nations.[103] I believe that the universality of sanism is, in large part, responsible for this situation. In short, the publicity and attention that focused on the political misuses of state psychiatry resulted in discrete amelioration in one area (the treatment of psychiatric "political prisoners" in Russia). But this amelioration did not extend to: 1) "political prisoners" elsewhere, and, 2) *non*-political residents of state psychiatric facilities in these same nations.

Having said this, I believe that this overview leaves many unanswered questions.

I will briefly address them in the hopes that they will now be added to others' research agendas. First, has the political use of psychiatry is (or has been) limited to nations with a history of totalitarian governments?

It should not surprise anyone that there is also a history of such political use of psychiatry in the United States against important political and cultural figures. Ezra Pound, Alger Hiss, -General Walker and others were removed from public prominence through hospitalization.[104] Were cases like this were sui generis, or are they more typical than might be expected? Notes Professor Alexander on this point: "There are a number of other cases of politically prominent figures who were disposed of behind the bars of institutions but, as in the other forms of alleged madness, the bulk of those disposed of have been relatively powerless."[105] The hands of the authorities in the United States have, historically, been far from clean.

Second, If the excesses described by Profs. Bonnie and Polubinskaya have substantially ceased, do admissions to psychiatric institutions in the former Soviet Union now comport with due process?

A recent case in the Soviet Republic of Karelia suggests that this is far from so.[106] There, a local court found that a patient, one who had spent nearly two months in the

[103] *See e.g.,* Lewis, *supra* note 82, at 293-294, and *see infra* text accompanying notes 106-112.
[104] *See* George Alexander, *Big Mother: The State's Use of Mental Health Experts in Dependency Cases* 24 , Pac. L.J. 1465, 1475 (1993); *see also* Jonas Robitscher, The Powers of Psychiatry, 104-109 (1980).
[105] Alexander, *supra* note 104, at 1475.
[106] *Available at* http://www.mdac.info/news_reports/news_reports.htm (last visited September 25, 2006).

hospital after being coerced to sign a "voluntary" consent form,[107] had been denied her statutory right to appear before the court in person, contrary to local law.[108] A contemporaneous report of the Mental Disability Advocacy Center concluded that "people with mental health problems in Russia endure humiliating and degrading treatment regarding access to and use of toilet facilities in psychiatric institutions, [and that] facilities ... provided to patients suffer such a lack of privacy that patients experience extreme anxiety and humiliation having to endure such conditions."[109] Even more recently, lawyers from the Mental Disability Advocacy Center have appealed to the UN Special Rapporteur on Torture and the UN Working Group on Arbitrary Detention to intervene in the case of Pavel Shtukaturov who, they allege, is being involuntarily detained, denied the right to meet with his attorney and is apparently being punished and intimidated by hospital authorities for applying to the European Court of Human Rights.[110] The earlier problems, plainly, have not been resolved.[111] As Bonnie concludes, "The challenge of mental health reform in Russia and the other former Soviet states is a daunting one."[112]

Third, each year, China becomes more and more important to the world's economy. What impact has that had—and will it have—on the conditions Prof. Munro describes?

As discussed above, it appears that the problems raised in Munro's article are still serious ones.[113] Bonnie, for one, is pessimistic about the likelihood of ameliorative reform, in large part because of what he perceives as Western disinterest: "In the

[107] On the question of whether "voluntary" admissions are, in fact, voluntary, *see* 1 PERLIN, *supra* note 3, § 2C-7.2, at 482-83, discussing Stanley Herr, *Civil Rights, Uncivil Asylums and the Retarded,* 43 U. CIN. L. REV. 679, 722 (1974), (distinction between voluntary and involuntary often "illusory,") and David B. Wexler, *Foreword: Mental Health Law and the Movement Toward Voluntary Treatment,* 62CAL. L. REV. 671, 676 (1974), (distinctions between voluntary and involuntary hospitalization often "murky.").

[108] Article 34 of Law on Psychiatric Care, and Article 304 of The Civil Code of the Russian Federation.

[109] *Available at* http://www.mdac.info/documents/MDAC%20Shadow%20Report%20on%20Estonia% 20for% 20HRC%202003 (last visited September 25, 2006).

[110] Email from Oliver Lewis, legal director, MDAC (February 28, 2006) (on file with Author).

[111] *See also, e.g.,* http://www.mdac.info/documents/PR_RuAppealCourt_20051216_eng.pdf (press release, last visited September 20, 2006) "Russian Appeal Court Declares State's Denial to Provide Services to Children with Disabilities Unlawful;" http://www.mdac.info/documents/PR_SvRussia_ 20050804_eng.pdf (press release last visited September 20, 2006) Russia's guardianship system challenged at the European Court of Human Rights."

[112] Bonnie, *supra* note 4, at 142.

[113] *See supra* text accompanying notes 85-87.

case of China, the international community does not appear to be willing to press the regime on human rights, and therefore the path toward ending political abuse will not be through political liberalization."[114] A recent expose in *the New York Times* tells us that the use of state psychiatry as a tool of political repression continues unabated in China.[115] This is, in short, *not* a problem that has disappeared since Bonnie expressed pessimism on this subject some six years ago.

Fourth, if all nations provided top-flight legal services to persons institutionalized because of mental disability, would these problems disappear?

The development of mental disability law in the United States tracks—inexorably and almost absolutely—the availability of appointed counsel to persons facing commitment to psychiatric institutions, to those being treated in such institutions, and to those seeking release from such institutions.[116] Without the availability of such counsel, it is virtually impossible to imagine the existence of the bodies of involuntary civil commitment law, right to treatment law, right to refuse treatment law, or any aspect of forensic mental disability law that are now taken for granted.[117] Similarly, especially in the area of involuntary civil commitment law, the presence of regular and on-going judicial review has served as a bulwark of protection against arbitrary state action.[118]

Put simply, none of these protections—accessible, free counsel, and regular judicial review——is present in most of the world's mental disability law systems.[119] It is rare

[114] Bonnie, *supra* note 4, at 143. Rather, he sees Chinese psychiatry as the key to amelioration: "Instead, the only available path, in the short term, is through, Chinese psychiatry, using the collegial pressure of international psychiatric and medical organizations." *Id.*

[115] Joseph Kahn, *Sane Chinese Put in Asylum, Doctors Find*, N.Y. Times, March 17, 2006. ("Dutch psychiatrists have determined that a prominent Chinese dissident who spent 13 years in a police-run psychiatric institution in Beijing did not have mental problems that would justify his incarceration, two human rights groups said Thursday.")

[116] *See generally,* 1 Perlin, *supra* note 3, § 2B-1 to §2B-15, at 191-292; *see also, e.g.,* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases,* 16 Law & Hum. Behav. 39 (1992); Perlin, *Lepers and Crooks, supra* note 95; Perlin, *Best Friend, supra* note 95. In this context, *see* especially, *id.* at 738, discussing the "meaningful and complex performance standards for counsel in such cases," set by the Montana Supreme Court in *In re the Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001).

[117] *See, e.g.,* 2 Perlin, *supra* note 3, at ch. 3; Perlin, *supra* note 7, at ch. 2.

[118] *See, e.g.,* 1 Perlin, *supra* note 3§ 2B-12, at 271-73 and *see* MDAC Report, *supra* note 83,4.1.2 §. ii)Lack of Clear Procedures for Judicial Review of Involuntary Civil Commitment Applications) ("reporting on lack of periodic review of commitment findings in Kyrgyz Republic.")

[119] *See* Perlin, *supra* note 7.

for even minimal access to counsel to be statutorily (or judicially) mandated, and, even where counsel *is* legislatively ordered, it is rarely provided. Moreover, the lack of meaningful judicial review makes the commitment hearing system little more than a meretricious pretext. The task, as Professor Bonnie has indicated, is "daunting,"[120] and the absence of these safeguards suggest that promises of authentic reform may, in practice, still be largely illusory.

Fifth, to what extent do these issues "matter" to the political leaders of the nations in question, and to what extent is it likely that the attitudes of such leaders are likely to change?

The revelations of the misuse of state psychiatry in Russia attracted local and world attention in the years soon after the dissolution of the former Soviet Union.[121] The recent issuance of a report by Mental Disability Rights International (MDRI) excoriating Turkey for its "barbaric" widespread use of electroconvulsive or "shock" treatment (ECT) on psychiatric patients——as young as 9 years old—without the accompanying use of anesthesia[122] has come to be an issue in the debate over that nation's application to become a member of the European Union,[123] and that application has apparently given some leverage to those disability rights group that seek to have such practices banned.[124]

[120] Bonnie, *supra* note 4, at 142.

[121] *See* Bonnie & Polubinskaya, *supra* note 39.

[122] Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey (2005), *available at* www.mdri.org/projects/turkey (last visited September 25, 2006).

[123] *See European Union Calls on Turkey to Improve Rights of People with Mental Disabilities,* reprinted at http://www.disabilityworld.org/12-01_06/mdriturkey.shtml (last visited September 25, 2006).

[124] *See* http://www.mdri.org/projects/turkey/MDRI_EU_PressRelease.pdf (last visited September 25, 2006):

> It is extremely important that the EU has raised concerns about the human rights of people with disabilities in Turkey," said Eric Rosenthal, Executive Director of Mental Disability Rights International. "Abuses that take place behind the closed doors of institutions are all too often overlooked by the public and international oversight bodies. By raising these concerns, the EU report ensures that egregious abuses against children and adults with mental disabilities will be taken into account as Turkey applies for EU accession.

See also, Craig Smith, *Abuse of Mentally Ill Is Reported in Turkey*, N.Y. Times, Sept.28, 2005:

> The report, by Mental Disability Rights International, an advocacy group based in Washington, is likely to complicate the EU talks because many European officials are already wary of letting Turkey join the Union and will use any evidence that the country falls short of European standards to argue against its membership. But the authors of the

These examples aside, however, this issue certainly does not appear high on the agenda of the most pressing social issues in the nations discussed in this paper, notwithstanding the fact that many of these practices (if not all) appear to be gross violations of international human rights.[125] The early works by Professor Alexander,[126] the exposes by Munro[127] by Bloch and Reddaway,[128] the research by Bonnie (alone[129] and with Polubinskaya,[130] and later work (still very much ongoing) by MDRI and MDAC[131] have performed a remarkable public service in highlighting these abuses and by carefully demonstrating how these nations in question, consistently and unremittingly, have violated (and continue to violate) international law.

The two topics on which I have focused in this paper—the political use of state psychiatry and the wretched conditions in which "nonpolitical" individuals are held and treated in state psychiatric facilities—cannot be understood as two discrete and unrelated issues. They are connected in very important ways, and it is critical that we understand that connection.

The Russian state (and other Soviet bloc nations) used (and China continues to use) state psychiatry as a means of silencing dissidents for multiple reasons: so as to allow the state to circumvent the (minimal) procedural safeguards that would have to attend a criminal trial; to allow for indefinite confinement, and to stigmatize and thus discredit potential political threats.[132] The very same states treat patients in public psychiatric hospitals in ways that utterly fail to meet minimal standards of human decency, and that violate the MI Principles[133] by means that avoid procedural safeguards (as to fair hearing and periodic review),[134] and freely perpetuate these actions because the persons who are institutionalized are stigmatized as a result of

> report hope that the pressure will bring a quick end to the worst abuses. "We realized Turkey was a great opportunity for using that process to have some influence," said Eric Rosenthal, Mental Disability Rights International's founder...

[125] *See* Perlin, *supra* note 7, at ch. 8.
[126] *See* Alexander, *supra* note 1; Alexander, *supra* note 104.
[127] *See* Munro, *supra* note 55.
[128] *See* Bloch & Reddaway, *supra* note 27; Bloch & Reddaway, *supra* note 28; Bloch & Reddaway, *supra* note 29.
[129] *See* Bonnie, *supra* note 4; Bonnie, *supra* note 39.
[130] *See* Bonnie & Polubinskaya, *supra* note 39.
[131] *See supra* notes 93 & 122 (MDRI), and notes 83, 106, & 118 (MDAC).
[132] *See* Bloch & Reddaway, *supra* note 29, at 152.
[133] *See generally supra* note 74, and *see e.g.,* cases cited in Gostin & Gable, *supra* note 37; Rosenthal & Rubenstein, *supra* note 12, and Rosenthal & Sundra, *supra* note 49, *passim.*
[134] *See supra* note 118.

their mental illness—the inevitable end-product of sanism—and are thus discredited as human beings.[135]

Although these motivations may not be "political" (in the sense that those being mistreated are not necessarily identified as political dissidents or dissenters),[136] the outcome of state action *is* political in that it reflects the state's failure to take seriously the human rights of persons whom it has institutionalized because of mental illness. The recent expose of the unregulated use of ECT in Turkey, (and the impact of that expose on Turkey's aspirations to European Union membership) show us that mistreatment of the non-political remains, at its core, a political act.

Writing in 1993, Eric Rosenthal and Leonard Rubenstein first illuminated how the MI Principles "come from an individualistic, libertarian perspective that emphasizes restrictions on what the state can do to a person with mental illness."[137] A presenter at a conference held at New York Law School on the treatment of persons with mental disabilities referred to this article, and then told the audience, "Without advocates willing to get in the trenches and fight for these ideals, so that they might become a reality for persons with mental disabilities, these treaties and standards remain mere words without action."[138] This is a goal to which all of us who take this area of law and society seriously should aspire.

[135] *See* Falter v. Veterans' Admin., 502 F. Supp. 1178, 1185 (D.N.J. 1980) (central inquiry is "how [persons with mental disabilities] are treated as human beings"), discussed in this context in Perlin, *supra* note 20, at 541 n.49.

[136] Except, of course, in China.

[137] Rosenthal & Rubenstein, *supra* note 12, at 260.

[138] *Symposium: International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary,* 21 N.Y.L. Sch. J. Int'l & Comp. L. 361, 381 (2002) (remarks of Jean Bliss).