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International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent

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

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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:

> The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free... The full force of that idea does not apply to a civil commitment. It may be true that an erroneous

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[1]George Alexander, *International Human Rights Protection Against Political Abuses,* 37 SANTA CLARA L. REV. 387, 392 (1997).

[2]*Id.*

> commitment is sometimes as undesirable as an erroneous conviction...However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, 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, 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

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[3]Addington v. Texas, 441 U.S. 418, 429-30 (1979); *see generally*, 1 MICHAEL L. PERLIN: MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2C-5.1a, at 395-400 (2d 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) (PERLIN, THP). On the meaning of "pretextuality" in this context, *see infra* Part IV.

[4] As Richard Bonnie explains:

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.[5]

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.[6] As Dr. Theresa Degener, a noted disability scholar and activist, has observed:

> [D]rafters of the International Bill of Human Rights did not include disabled persons as a distinct group vulnerable to human rights violations. None of the

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> 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 rightswith 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, ... (2002).

[5]*See generally*, Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Universal Factors*, (manuscript awaiting submission).

[6]Text *infra* accompanying notes 6-18 is mostly adapted from MICHAEL L. PERLIN ET AL, INTERNATIONAL HUMAN RIGHTS AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS, chapter 1 (2006) (in press).

equality clauses of any of the three instruments of this Bill, 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), mention disability as a protected category.[7]

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."[8]

To some extent, this new interest in human rights protections for people with disabilities tracks a larger international movement to protect human rights,[9] 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

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[7]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).

[8]*Id.* at 181.

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

future human rights work."[10]

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.[11] This article was relied on almost immediately by scholars and activists studying the human rights implications of mental disability laws in Japan[12] and in Uruguay.[13]

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

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[10]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, 282 (2003).

[11] 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).

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

[13] *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).

degradation, stigmatization, and discrimination throughout the world today.[14] 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.[15] 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]

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[14]*See* City of Cleburne v. Cleburne Living Center, 573 U.S. 432, 462 (1985)(Marshall, J., dissenting in part), arguing that " [T]he 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."

[15]On the role of "sanism" in this regard, *see infra* Part IV.

[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 (2001-02)*;* 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,

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[17] -- by academics, practitioners, advocates, and self-advocates.[18] 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.[19]

"Their Promises of Paradise ": Will Olmstead v. L.C. Resuscitate The Constitutional Least Restrictive Alternative Principle in Mental Disability Law?, 37 HOUSTON L. REV. 999 (2000) (Perlin, *Paradise)* (all discussing the Americans with Disabilities Act, *see* 42 U.S.C. §§ 12101 et seq.).

[17]*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 (2002-03), 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").

[18]*See generally*, 1-5 PERLIN, *supra* note 4; MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CASES AND MATERIALS (2d ed. 2005).

[19]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.

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

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?

This article will proceed in this manner. In Part I, I will discuss the first revelations of the "dehumanization" referred to by Professor Alexander. In Part II, I will discuss developments after these revelations were publicized. In Part III, I will weigh the extent to which the post-revelation reforms have been effective and meaningful. In Part IV, I will explain the meanings of "sanism" and "pretextuality", and discuss how they relate to the topic at hand. Then, in Part V, 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.

I. The first revelations

The history of the use of institutional psychiatry as a political tool was documented by Michel Foucault 40 years ago.[20] 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."[21] By the 18th century, the psychiatric hospital – a place of "doomed and

itself in Mississippi in Burgundian Paris.

[20] MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 46-57 (Richard Howard trans. 1965).

[21] *Id.* at ....

despised idleness"[22]– satisfied "the indissociably economic and moral demand for confinement."[23]

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.*[24] Bloch and Reddaway documented the cases of nearly 500 political dissenters forcibly hospitalized from 1950-1970.[25] 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."[26] Bloch and Reddaway revealed that Soviet forensic psychiatrists diagnosed dissenters as expressing "paranoid reformist delusional ideas" in case reports;[27] the patient's conviction that "the state … must be changed" was seen as an indicia of mental

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[22]*Id.* at …

[23]*Id.* at …

[24]SIDNEY BLOCH & PETER REDDAWAY, PSYCHIATRIC TERROR: HOW SOVIET PSYCHIATRY IS USED TO SUPPRESS DISSENT 280-330 (1977).

[25]SIDNEY BLOCH AND PETER REDDAWAY, SOVIET PSYCHIATRIC ABUSE: THE SHADOW OVER WORLD PSYCHIATRY (1984).

[26]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, 148-57 (Eric Stover & Elena O. Nightingale eds. 1985).

[27]*Id.* at …

illness.[28] This tactic served three interrelated ends: It allowed the government to avoid the sorts of procedural safeguards that are normally associated with criminal prosecution.[29] Second, the stigma of a "mentally ill" label effectively discredits the politics of the person being so labeled.[30] Finally, because there were, at that time, no maximum terms to civil commitments,[31] confinement to psychiatric hospitals was indefinite.[32]

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,

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[28]*Id.* at...

[29]*Compare Addington, supra.*

[30]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).

[31]*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.

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

depending on the country's pretotalitarian history."[33] Not coincidentally, reports such as this provided activists with the first important evidence that international human rights law was 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."[34]

By 1989, changes in the political climate in the Soviet Union led the Soviet government – over the objection of the psychiatric leadership[35] – to allow a delegation of psychiatrists from the United States, representing the U.S. Government, to conduct extensive interviews of suspected victims of abuse and to make

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[33]Bonnie, *supra* note 4, at ...

[34]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 ...:

> 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.

[35]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 26, at ...

unrestricted site visits to hospitals selected by the delegation.[36] 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.
>
> 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.[37] Non-imputable offenders could be placed in maximum security hospitals (the notorious "special hospitals") or in ordinary

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[36]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).

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

hospitals depending on their social dangerousness. [38] All of the persons interviewed by the delegation had been found non-imputable and confined in special hospitals after criminal proceedings that deviated substantially from the general requirements specified in Soviet law. Typically, the patients reported that they had been arrested, taken to jail, taken to a hospital for forensic examination, and then taken to another hospital under a compulsory treatment order without ever seeing an attorney or appearing in court.

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.

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

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[38] RSFSR arts. 58-61 (Criminal Code) (1962) reprinted in THE SOVIET CODES OF LAW 88-89 (William B. Simons ed., Harold J. Berman & James W. Spindler trans. 1980) (SOVIET CODES) ; RSFSR arts. 410-13 (Code of Criminal Procedure) (1962) reprinted in SOVIET CODES, *supra,* at 315-16.

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.[39]

Glumly, Bonnie and Polubinskaya concluded that this repressive use of psychiatry in Russia was "inevitable."[40] They reasoned:

> The practice of involuntary psychiatric treatment presents an unavoidable risk of mistake and abuse even in a liberal, pluralistic society. This intrinsic risk was greatly magnified in the Soviet Union 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. Psychiatrists were not immune from these pressures. It seems likely that a subset of Soviet psychiatrists, associated primarily with Moscow's Serbskii Institute for General and Forensic Psychiatry, knowingly collaborated with the KGB to subject mentally healthy dissidents to psychiatric punishment, in blatant violation of professional ethics and human rights. In this respect, 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

[39]Bonnie & Polubinskaya, *supra* note 36, at 280-82.

[40]*Id.* at 283.

the psychiatrists were a part.[41]

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."[42]

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,'[43] Bulgarian psychiatry, as well as the Bulgarian judiciary, combine clinical criteria with the values of society in an astonishing way."[44] A review of civil commitment in

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

[42]*Id.* at 288.

[43]On the multiple textures of the word "danger" in this context, *see* 1 PERLIN, *supra* note3, § 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, 556-59 (2002); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation,* 21 N.Y.L. SCH. J. INT'L & COMP. L. 469, 527-31 (2002).

[44]Kanev, *supra* note 19, at 439.

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,[45] was itself viewed as a symptom of severe mental illness. One psychiatrist in Romania, interviewed for this article, explained why, in his opinion, this had to be true:
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> Under Ceaucescu, political opponents could not exist .... In Ceaucescu's

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[45] 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 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. 211, 247 (2002).

> 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.[46]

Romania's characterization of individuals attempting to flee as mentally ill criminals reflected the former Soviet view that "[c]rossing the border is a sign of mental illness, as is distributing religious leaflets."[47] 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.[48]

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[46] *Id.*

[47] *Id., quoting* THERESA C. SMITH & THOMAS A. OLESZCZUK, NO ASYLUM: STATE PSYCHIATRIC REPRESSION IN THE FORMER USSR 65 (1996).

[48] Frank M. Ochberg & John Gunn, *The Psychiatrist and the Policeman,* 10 PSYCH. ANNALS 35 (1980).

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 mental illness,"[49] 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."[50]

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."[51] Here, he charged that China engaged in "the deliberate

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[49]Robin Munro, *Judicial Psychiatry in China and its Political Abuses,* 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.

[50]*Id.* at 26.

[51]*Id.* at 27.

withholding of such care from political offenders whom the authorities had already clearly diagnosed as being mentally ill." [52]

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."[53] 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."[54]

II. 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.[55] A 1989 U.S. delegation was followed by review team sent by the

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[52] *Id.*

[53] *Id.* at 84.

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

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

World Psychiatric Association in 1991.[56] 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.[57]

Soon thereafter, Russia adopted a new mental health law,[58] and in the subsequent two years, ten other former-Soviet bloc nations did the same.[59] 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),[60] the United Nations adopted the Principles for the Protection of Persons with

[56]Bonnie & Polubinskaya, *supra* note 36, at 280.

[57]*Id.*

[58]*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 69-96 (1994) (reprinting text of law).

[59]Bonnie & Polubinskaya, *supra* note 36, at 292-93.

[60]Moncada, *supra* note 13, 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

Mental Illness and for the Improvement of Mental Health Care in 1991[61] (the MI Principles).

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,"[62] and they have been used by international oversight and enforcement bodies as an authoritative interpretation of the requirements of the ICESCR and the American

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> 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, 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, supra, at 16.

[61]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).

[62]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. 54 (1998).

Convention on Human Rights.[63]

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."[64]

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.[65]

Although the MI Principles do not speak specifically to the issue of psychiatry-

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[63]Rosenthal & Sundram, *supra* note 43, at 488.

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

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

as-a-tool-of-state-oppression, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[66] has been interpreted in that specific context.[67] 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,"[68] requiring such a finding so as to justify confinement in a

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[66]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/Convention/WebCovenENG.pdf (ECHR).

[67]On the relationship between the MI Principles and the ECHR, *see* Rosenthal & Sundram, *supra* note 43, 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 ... 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.

[68]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 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

mental hospital, but leaving the term undefined.[69] 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."[70]

III. Law-in-action vs. law-on-the-books

The dichotomy between "law on the books" and "law in action" dichotomy 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

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purpose of bringing him before the competent legal authority;

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 Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, Nov. 4, 1950, effective Sept. 3, 1953, 213 U.N.T.S 222, as amended by Protocol No. 11, ETS No. 155, entered into force Nov. 1, 1998, reprinted in PERLIN, *supra* note 5 (Appendix).

[69]*See generally*, Gostin & Gable, *supra* note 34, at 65-66.

[70]Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) at 16 (1979).*Cf.* 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.").

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 to stand trial, yet, nearly thirty years later, half of the fifty states still ignore these standards.[71]

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.[72] 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.

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[71]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, 428-29 (2002), citing PERLIN, THP, *supra* note 3, at 59-76; Grant Morris & J. Reid Meloy, *Out 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 1046-47.

[72]*See* Perlin, *supra* note 5.

> 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.[73]

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.[74] Other like conditions have been graphically and relentlessly documented throughout all of Eastern Europe;[75] 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

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[73]Amnesty International, Romania, *Memorandum to the Government Concerning Inpatient Psychiatric Treatment* (2004) (http://www.web.amnesty.org/library/print/engeur390032004) .

[74]*Amnesty International press release "Bulgaria: Disabled women condemned to 'slow death'", AI-index: EUR 15/002/2001 .*

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

were not even aware of the existence of these international human rights provisions.[76]

In short, although the use of psychiatry as a tool of political suppression may no longer be the problem that it was in the 1980's,[77] violations of international human rights laws continue unabated.[78] 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."[79]

IV. Sanism and pretextuality

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[76]*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), available online at (www.eurasiahealth.org/resources/mdlDoc/118-e.pdf) (MDAC REPORT) *See also,* Perlin,*supra* note 5, at ....:

> 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.

[77]*But see infra* Part V, discussing psychiatric institutionalization of members of the Fulan Gong in China.

[78]*See e.g.,* Winick, *supra* note 43, 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"); *see generally*, Perlin, *supra* note 5.

[79]Bonnie, *supra* note 4, at ...

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[80] – people with mental disabilities live in some of the harshest conditions that exist in any society.[81] 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.*

I define *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

[80]*See generally*, PERLIN, *supra* note 6, chapter 2.

[81]*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).

the legal process.[82]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).[83]

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 of mental disability law jurisprudence, and the ways that these factors contaminate scholarly discourse and lawyering practices alike."[84] There is no longer

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[82] PERLIN, THP, *supra* note 3, at 21-58.

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

[84] 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. 373 (1992); 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(1993-94); 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 22; Michael L. Perlin, *"There's No*

any question in my mind that these same factors infect international mental disability law practice in the same ways that they infect domestic practice.[85]

V. Unanswered questions

This overview leaves many unanswered questions.

(1) 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

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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, *"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 (2003); Michael L. Perlin, *"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching,* 9 CLINICAL L. REV. 683(2003) (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) (Perlin, *Best Friend*).

[85]I discuss this extensively in MICHAEL L. PERLIN, "THE CHIMES OF FREEDOM FLASHING": MENTAL DISABILITY AND INTERNATIONAL HUMAN RIGHTS (book manuscript in progress).

[86]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 104-09 (1980).